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The Limits Of Legal Realism

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The Limits Of Legal Realism,
by Anthony D'Amato*, 87 Yale Law Journal 468-513 (1978)

Abstract: This article will address some criticisms of legal realism, primarily those of H.L.A. Hart, that have been unanswered in the literature and have appeared to discredit the realist approach to law. The article will also articulate what I believe to be more difficult problems with legal realism.

Tags: Legal realism, positivism, judicial decisions, H.L.A. Hart

[pg468]** Holmes launched the highly successful American school of legal realism with his remark that "law" consists of "prophecies of what the courts will do in fact." [FN1] Later writers amended this proposition to include all officials, since decisions by judges constitute only a fraction of authoritative decisionmaking. [FN2] In its heyday, realism stimulated many proposals for legal reform and social change; [FN3] it also alerted students of the law to the effectiveness of arguments appealing to values, even if such arguments were not to be found in the decisions of appellate courts or in other "materials" traditionally used in law schools. The liberating perspective on legal processes offered by realism can still excite students of law. This article, however, will not restate the tenets of legal realism or reevaluate it from traditional perspectives. [FN4] Rather, it will address some recent criticisms of legal realism, primarily those of H.L.A. Hart, that have been unanswered in the literature and have appeared to discredit the realist approach to law. The article will also articulate what I believe to be more difficult problems with legal realism. Thus I shall attempt first to give realism its due by extending it to the "limits of its logic." I shall then explore whether that extension can carry us to a full understanding of "law" or whether other limiting considerations intervene before that point can be reached.

I. A Realist's World View

A. "Rules" and "Reasons"

1. *What the Puzzled Man Wants to Know*

The first step is to sketch a thoroughly "realistic" portrait of a legal system. Start with a person, call him K, who lives in any country in the [pg469] world. As he looks around, he notices that the public order is maintained by people who either wear official uniforms or who proclaim themselves, in some manner that the public recognizes and accepts, as agents of the state. These agents often have a license to carry firearms, and all of the agents constitute the firearms-licensing authority. Some wear robes and sit as "judges"; some wear civilian clothes and sit behind desks in government buildings. As a group they control various institutions that have the power to investigate facts, to confiscate property, to question, arrest, incarcerate, and (in certain cases) execute citizens, and to engage in other forceful acts without fear of punishment from any higher or stronger group within the same territory. These agents of the state may be called officials or hirelings or co-conspirators. Since they control the physical power of the state, K naturally would like to know how to conduct his affairs so that the officials will not oppose, and perhaps will even cooperate with, his plans.

These state officials are characteristically present in any modern nation. They may have just

ascended to power through revolution, or they may have been peacefully in control for a long time. Whatever their origins, most state officials will display a fair amount of consistency in their behavior toward the rest of the citizens. This consistency arises out of the need to maximize power and control. If officials were to behave erratically and arbitrarily, citizens would not know how to act without incurring official opposition; the result would be chaos. A traffic signal will effectively control traffic if it is green for half a minute, then turns red, and regularly turns green again. But a light that turns from one color to the other every second will simply mix up the traffic patterns. In addition, if officials hourly were to issue new commands that changed whether the driver should stop on the green signal or on the red, chaos would be compounded. Consistency is a price officials pay for power. [FN5]

[pg470] Consistency of official behavior, however, is not necessarily achieved by official adherence to a given set of rules. The officials of a state (for example, right after a revolution) might behave consistently but at the same time at great variance with the promulgated rules of law (for example, the rules of the old regime that they have not revised or repealed). There might even be an Alice-in-Wonderland state where the officials proclaim one set of rules but act consistently in opposition to those rules. In observing a nation over time, K would be interested in articulating those "rules" that seem to account for the way officials behave. Most familiar legal systems, of course, exhibit a high correlation between official behavior and the "rules" promulgated by that system. Indeed, our hypothetical observer might note that if official behavior correlated with the promulgated and articulated rules, then the power of the officials would be enhanced: what would be the point of acting consistently but promulgating irrelevant rules? Such rules would only confuse the citizenry and make it more difficult to control them.

Suppose that the puzzled observer decides that these officials are indeed acting consistently over time. Moreover, he concludes that the officials' actions correlate to a collection of "rules," some more or less clear (for example, sections of the Internal Revenue Code), and some obscure (for example, the constitutional law of obscenity). K wants to act in such a way that there is as small a chance as possible that he will be put in jail, fined a large amount of money, or subjected to the harassment of a trial. He would also like to increase the scope of his activity, so long as he can predict that the state officials will support such endeavors. For example, if K chooses to enter into a contract, he may create a private legal regime that the state, with all its power, will enforce against the contracting parties. For each contemplated course of action, the puzzled man wants to know what the officials will probably do and how costly his proposed course of action will be. If he [pg471] presents his factual alternatives to a lawyer, he wants the lawyer to advise him as to the probable reaction of state officials. He does not necessarily want the lawyer to cite to him one of the promulgated "rules" of the system, unless the rule itself happens to be highly correlated with consistent official behavior. Without such a correlation, K would rightly be indifferent to the "fact" that such a rule might, in popular terminology, be called a rule of "law." He is not interested in "law" as it might be so-called by the public or by the legal profession; he is only interested in what officials acting consistently will do to him.

If in fact there is a high correlation between what is called law and the generalizations that describe consistent official behavior, then of course K might accept a given "rule" as a shorthand description of probable official behavior. But K would be misled if a lawyer were to tell him what the "law" is when the lawyer knows that the "law" thus articulated—be it a "rule" passed by

the legislature or one found in a judicial opinion or in the "Restatement of the Law"—will be ignored by all officials. K is only interested in the "law" if it is a good generalization of consistent official behavior and thus may serve as a good prediction of future official action. For him, that anything else might be termed "law" is, at best, of mild interest, and, at worst, confusing.

If K is only interested in the "law" when it correlates with official behavior, he similarly will only be interested in the reason behind a rule if that too helps predict what officials will do. At best such a reason is an aid to K's memory of what his lawyer predicted the official will do or a useful generalization at a higher level of abstraction than the lawyer's prediction. For example, suppose a lawyer tells K that if he wants equitable relief from a court he should not come into court with "unclean hands," because equitable relief historically was a matter of the King's conscience. Such a generalization states a reason behind many actions of courts of equity and helps a citizen conduct his affairs so as to maximize the likelihood of gaining equitable relief. Because he now is aware of the "unclean hands" doctrine, the client might not feel the need to telephone his lawyer before taking a step that would slightly change the facts of the situation since, as to such trivial issues, the client may act as his own lawyer.

On the other hand, a little learning might be a dangerous thing. The client may assume that he now understands how a court of equity will act and thus commit a blunder that his lawyer, whose understanding far exceeds simplistic notions such as "unclean hands," could have averted. Thus K should accept the "unclean hands" generalization as a tool for remembering his lawyer's advice; he may even apply that [pg472] advice to trivial changes in the facts that crop up after his meeting with the lawyer. But K should not regard "unclean hands" as the "law," because of the vast amount of interpretation needed to apply the doctrine to any particular case. [FN6]

To summarize: K wants to know how to regulate his affairs so as not to be punished, and perhaps to be aided, by the agents of the group in the state that controls coercive power. If these agents act consistently through time, K will conclude that he is living in a legal system where a person may adjust his behavior so that it is "lawful" (that is, so that officials do not punish him). K wants to know *right now* what he should do so that officials will not punish him *in the future*. Hence, he must predict official behavior. A present prediction of official behavior is itself enough to deter the puzzled man from taking some actions or to encourage him to undertake others. Thus as it impinges upon K's behavior, the "law" is a prediction of official reaction in the future to various alternatives that he may choose in the present. K is not interested in "rules" per se or in "reasons behind rules"; these are helpful to him only insofar as they correlate with official behavior. But even if the correlation is strong, K is still primarily concerned with what officials will do, not with officially established rules or the reasons for such rules. He will cheerfully leave to his lawyer the tasks of interpreting the rules and the reasons behind them and of forming a prediction of what courts and other officials will do. Official behavior, not "rules" that may diverge from such behavior, will affect the voluntary behavior of the puzzled man. The closeness of fit between rules and official behavior is something the puzzled man leaves to the various legal actors and institutions. [FN7]

2. Hart's Critique

Labeling the realist's view of rules as a variety of "rule-scepticism," Hart has analogized the legal system to a game with an official scorer whose rulings are final. [FN8] He claims that it would be "absurd" to classify statements of the score made by players during the game—the [pg473] advice given by lawyers to their clients—as predictions of the official scorer's rulings. For Hart, the players are simply applying the rules of the game when they cite an interim score, and they would rightfully claim that the official scorer was "wrong" if the latter failed to count a basket or a goal or a home run in the official score. Similarly, without denying that the Supreme Court is the ultimate legal authority in the United States, one can say that the Court has decided a case incorrectly. Although an effort will be made at the end of this article to recapture a part of the meaningfulness of saying that an official's decision is "wrong," my argument here is that Hart has erred in two significant ways in his analogy between a legal system and a game.

First, in some games it *would* make sense for the players to keep score by predicting the scorer's rulings. In boxing or diving, for example, knowledge of who the official scorers are and what they look for in awarding "points" is certainly more helpful than knowledge of abstract scoring rules. Indeed, the latter—such as the "rule" that a diver deserves more points if he hits the water with a minimal splash or the "rule" that a single knockdown in a round wins that round for a fighter—are generalizations from the scoring by referees in many diving competitions and boxing matches. Yet future referees might not give similar weight to such "rules," and the generalization would have to be modified. Analogously, if K finds himself in a strange country, he might be better off if he regards the officials as rule creators (like boxing referees or diving judges) and not as expounders of established rules (like umpires in baseball or chess).

Second, suppose a legal system has developed with many rules, so that an observer such as Hart might view courts as the mere applicers of such rules. In that system, there is a surface plausibility to Hart's claim that if official aberrations from the rules are frequent or if the official scorers repudiate the scoring rule, then the game has changed. It is no longer cricket or baseball but "scorer's discretion." [FN9] But when would a legal system become "judge's discretion"? How would we know? Is a legal system not constantly being revised as judges or officials decide cases and fashion new rules? A critique of the Supreme Court's recent procedural decisions would suggest, in Hart's terms, that the Court is playing "scorer's discretion":

Perhaps most distressing of all is the clear disinclination shown in the *Thermtron* case, as in earlier decisions respecting final judgments and tax injunctions, to obey congressional mandates with [pg474] which the Justices disagree—an attitude irreconcilable with the basic precepts of a democratic government.

... [T]he willingness of Justices to engage in such practices in order to assure that a few more routine diversity cases are heard, or when, as in the grand-jury and doctor-standing cases, perfectly acceptable alternative arguments would have led to the same result, suggests that disrespect for Congress's authority and disregard for candor in opinion writing are deeply ingrained indeed. [FN10]

Yet the Supreme Court's prestige remains extraordinarily high. [FN11] A losing litigant in a case in which the Court unjustifiably ignored a statute would not be consoled if his attorney, citing Hart, castigated the Court for acting unlawfully or for inventing a new game. Rather, the litigant would wonder why the lawyer had not simply predicted what the Justices would do and then advised the client to settle the case. Least of all would the litigant be consoled by an observation, following Hart, that the Supreme Court is no longer a "court" and that the game may no longer properly be called "law."

B. *Who Are the "Officials"?*

Under the realist sketch so far, K is interested in predictions of what officials will do because the officials control the physical power of the state. He does not necessarily want to predict whether they will approve of his actions in a moral sense, for they are neither his parents nor the elders of his church, to mention two categories of persons whose moral approval he might seek. But how does he know who the officials are? Must he have some prior notion of "law" to be able to identify the officials? Hart has indicated that this matter of identification is a decisive failing of the predictive view of law: " 'Surely law cannot just mean what officials do or courts will do, since it takes a law to make an official or a court'." [FN12] Hart's concept of law posits the existence of a "rule of recognition" that serves to identify officials, [pg475] courts, the jurisdiction of courts, and the general system for the creation, modification, and extinction of rules of law that directly affect the conduct of the average person's life. [FN13] Without rules of recognition, Hart asserts, "[t]here would be nothing to distinguish the decision of a private person from that of a court." [FN14] In short, Hart claims that there is a minimal necessity for a certain kind of "rule" in any legal system: the rule or rules establishing courts, legislatures, officials and their successors, and the jurisdictional competence or authority of the officials. This sort of rule, Hart says, is not explicable in terms of a prediction of what officials will do.

To meet this criticism, it must be maintained that K needs no notion of "rule" or "law" to identify an official of a legal system or to specify the jurisdictional competence of various officials.

Imagine that K decides to visit Machovia, an independent nation. Before K sets off, his lawyer mentions to him that the Machovian constitution has an interesting provision that only males may be judges in Machovian courts. After arriving in that country, the puzzled man, through his negligence, causes harm to a citizen. K then finds himself facing a female judge in a Machovian court. Should he at this point decide to ignore what the judge says on the theory that (a) the woman cannot possibly be a judge in Machovia since it takes a rule of law to make a judge, and (b) there cannot be any rule of law consistent with the constitution that would make this woman a "judge"? Let us assume that the trial is recessed before the puzzled man makes any irreversible blunder and that during the recess he inquires as to the credentials of the apparent judge. He is told that, indeed, the constitution prohibits female judges; moreover, the constitutional rule has not been amended, and it supersedes any contrary law established by any legislature or any court. Strangely, this particular judge seems to be fully accepted by her peers, the clerks, the attorneys, and other persons connected with the judicial proceedings.

K, being prudent, follows the appropriate trial procedure, taking an [pg476] exception to the credentials of the judge, and upon losing the case instructs his lawyer to challenge the validity of the trial on appeal. To his surprise, the appellate court of last resort dismisses the issue of the credentials of the female judge. Now, for the purpose of this mental experiment, we may assume several quasi-rational explanations given by the appellate court for its decision: the court may hold that litigants have no standing to contest the credentials of any judge; that the constitutional prohibition against females is rarely honored any more in light of the feminist movement sweeping Machovia; or that in Machovia occasional inconsistency is the spice of life. Taken

singly or together, these explanations would negate any inference that a constitutional "rule" is operating to define who is an "official." [FN15] If after the decision our puzzled man obtains no relief from the legislature, the newspapers, or his own country's consulate, he has indeed lost his case in Machovia. Clearly, the female judge has power over him, since her findings are accepted by the other officials of the state and translated into a coercive penalty. The "law" does not make the judge nor define her jurisdiction, but instead the judge becomes an official of the system through the acquiescence of other officials. Technically, the other officials of Machovia may be called imposters; perhaps none of them holds valid credentials under the laws and constitution of the state. Nevertheless, if they control the physical power of the state, they are by virtue of that fact "officials," and any "law" that says otherwise is a meaningless scrap of paper.

K will surely not be comforted if his lawyer tells him the result in his case was "illegal" because all the officials of Machovia are not legal officials. Similarly, he will not be comforted to know that the trial judge who sentenced him is a "usurper" sitting on the bench in [pg477] defiance of the constitution, when the officials of Machovia ignore this "usurpation." These explanations might spring from a notion of "law" in the mind of K's lawyer, but they are not a description of the reality of what officials do in Machovia. Our puzzled man would be better served by a lawyer's prediction that the female trial judge is in fact a judge, despite any "rule" to the contrary. Such a prediction, to K, is more "law" than a citation of the quaint constitutional "rule" barring female judges.

Not everyone who calls himself an official is an official. But if people acting in concert take over the preponderance of physical power of a territory and then call themselves "officials," a prudent puzzled man in that territory would be well advised to believe them. Later on the officials may issue rules that help the citizenry recognize who the officials are. The articulation of such rules of recognition, however, is not necessary, even though it may increase the officials' power. Moreover, officials can issue false or misleading rules of recognition, such as the constitutional provision barring female judges in Machovia. Thus, although a rule of recognition might be useful to K to the extent that it correlates well with the empirical facts of the legal system, one first must know the reality of official behavior before one can determine the extent to which any proffered rule coincides with that reality. But if the empirical facts are known, what further need is there to measure correlation? In the clash between legal realism and Hart's rule of recognition, the latter turns out to be an unnecessary postulate.

II. A Limited Need for "Law" within Realism

A. *The Law Must Antedate the Official's Decision*

By focusing on what officials do, K may be led to believe that there is no law until the officials act. A prediction that officials will act in a certain way would thus seem to be no higher in status than a prediction by a meteorologist that tomorrow's weather will be stormy. Regardless of the accuracy of the meteorologist's forecast, his prediction has no effect whatsoever on whether storms will arise tomorrow. Richard Taylor, whose theory of legal realism appears extreme, would say that lawyers and weathermen have the same status in this sense. A critical examination of Taylor's thesis, however, suggests that a lawyer's prediction can be incorporated into the meaning of "law."

Professor Taylor has argued that there is no such thing as law until an official makes a decision; prior to that decision, any statement of [pg478] the "law" is mere speculation. [FN16] Taylor discusses an example of a negligence claim for an injury to a fetus when the case law in the relevant jurisdiction held that an unborn child is not a person and thus has no cause of action. The trial judge in this case held that there was no cause of action and the appellate division sustained the ruling. The mother bringing the action on behalf of the child took the case to the highest state court, which overruled the precedents and allowed the child's claim on the basis of what seemed right and just to a majority of the judges. [FN17] "[S]uddenly," Taylor writes, the defendant became legally obligated to pay "not because of any enacted legislation, for none existed, and not because of any common law, for the common law was entirely on his side, but simply and solely because this was declared to be his obligation [by the court of last resort]." [FN18]

One maybe tempted to say that "law" does not exist until articulated in a concrete official decision, but surely any client would be unhappy with such a theory. K's lawyer would have to tell him that, in any case involving him, there is no law until a decision is reached; thus K must wait and see what the law will turn out to be. The puzzled man would be unable to order his affairs so as to reduce the possibility of official interference.

Such a theory runs contrary to the ordinary meaning of "law" as a useful mechanism for shaping, channeling, modifying, or controlling behavior in society. Hart is obviously right in saying that law has an "internal aspect"— that law cannot be described solely from the standpoint of an external observer who notices certain regularities in social behavior (such as cars stopping at red lights). Law also must be described as something that is internalized by citizens so that they make conscious decisions to comply with rules (for example, they stop at a red light in order to avoid sanctions that the officials might mete out). [FN19] [pg479] Law, therefore, must be something that "exists" prior to the citizen's act. The law must occur to the citizen before he decides among alternative courses of action. [FN20] When the traffic light turns red, he decides to stop his car instead of driving through the intersection. The light has given him a signal that he allows to influence his behavior. He need not wait until he is convicted for going through a red light before he can know what the law is; such a notion of law would almost entirely deprive law of its ability to shape social behavior and would for that reason be unrealistic.

If Taylor's approach ignores the effect of law on individual behavior prior to official decision, must the other extreme, represented by Hart, prevail in its contention that law is a set of rules? As has already been discussed, there is no necessary correlation between rules and official behavior, even though a high degree of correlation in fact enables people to be better predictors of the expected actions of officials. [FN21] Taylor's critique of the "rules" approach is especially instructive here. Taylor notes that "there do exist in certain volumes certain statements" that may be

quite correctly called statutes, ordinances, or laws. But such printing does not, by itself, constitute laws in the sense we are considering, for it no more compels or obliges a man to do or refrain from doing than does the printing in the daily newspaper or the handbills of the Jehovah's Witnesses.... They are, as Gray quite rightly maintained, sources of laws, and not laws themselves. [FN22]

[pg480] As an example, he cites an ordinance in Syracuse, New York, that one may not fly a kite in any public street or square without first obtaining permission from the Common Council.

[FN23] Taylor adds that this law is never enforced and its existence is unknown to all but a few police officers and judges. Putting aside Taylor's solution for this problem (which, as discussed, consists of not labeling something as law until it is enforced by an official's decision), Taylor may be right that some element must link the rule on the books to the citizen who is to obey the law. The rule must be particularized so that an individual knows that he is supposed to be affected by it. The realist thesis suggests that the particularization is done by the predictor.

[FN24]

The predictor need not be a lawyer, though K might be well advised to seek the services of a lawyer. A predictor might be a newscaster, K's friend, or perhaps K himself. The predictor is someone who gives advice to a person who wants to know what the law is. He particularizes the rules so that they can be seen to apply to the person seeking advice.

Thus suppose K wants to fly a kite on a city street in Syracuse. He consults a lawyer as to what he should do. A good lawyer who takes his job seriously would not simply look up the ordinance and advise K not to fly a kite. The ordinance may have been repealed recently, but the fact of repeal may not appear in the current collection of ordinances. The lawyer might find a recent decision that invalidated a similar ordinance in another city in New York on the grounds that the ordinance was an unjustified interference with the right of privacy under the state constitution. In the latter example, the lawyer would have to predict whether a court would find that such reasoning applied to the Syracuse ordinance (it might not if Syracuse is a more populated city where the ordinance seems more reasonable). The lawyer might also note, as did Taylor, that this particular ordinance has never been enforced. He might therefore counsel that there is hardly any chance that an official would penalize a kite-flyer (in other words, that the ordinance establishes very little, if any, "law"). Finally, the lawyer might point out to K that even if there is absolutely no enforcement of the kite ordinance, he could be taking a financial risk by flying a kite on a city street. Suppose the kite were to come down and block a driver's windshield, thus causing the driver to run over a pedestrian. [pg481] A "technical" violation of the anti-kite ordinance might count very heavily against K in a subsequent negligence action.

The lawyer's advice is basically: "You want to fly a kite on the city street. If the kite hurts somebody or causes an accident, you may be penalized in a subsequent lawsuit. In addition, there happens to be a Syracuse ordinance against flying a kite without the permission of the Common Council. This ordinance itself does not mean that officials will stop you from flying the kite or penalize you for doing so, because the ordinance has rarely been enforced and there is no present reason to predict enforcement against you solely on the basis of the ordinance. On the other hand, if a policeman tells you to stop flying the kite, I'd advise you to comply with his command because the ordinance, after all, is still on the books."

The contention here is that the lawyer's prediction is "law" to K, for K has asked the question "what is the law with respect to my contemplated action of flying a kite on the streets of Syracuse?" The lawyer's prediction of official reaction under alternative factual situations operates as law because it shapes K's future conduct. Moreover, the law has been personalized or

particularized; it is not merely a rule in a book, but it has been brought home to K by the lawyer acting as an intermediary. [FN25]

Taylor's case of injury to a fetus can also be analyzed in terms of what an attorney might have predicted. Suppose a landlord asks his attorney whether he should insure against injuries to fetuses. Taylor maintains that prior to the result reached in the court of last resort, the lawyer "could predict, justifiably and with confidence, that no such action as this [action by a fetus] would be sustained." [FN26] But when the final court reaches its decision, the landlord is confronted with the unexpected obligation to pay. The final decision abruptly changed the law.

But Taylor's approach is unpersuasive. His hypothetical attorney who predicted "justifiably and with confidence" that there was no liability to a fetus is like a novice meteorologist who predicts sunny weather because it has been sunny for nine days in a row. A more experienced meteorologist might see that the barometer was falling and a cold front was moving in, which would signify a possible change in the weather. Similarly, a more experienced attorney might find signs of [pg482] dissatisfaction with the common law rule in law journals and in cases in other jurisdictions. Armed with the knowledge that a court of last resort might well overrule an old precedent, the lawyer might have predicted, for example, a sixty-five percent chance that the common law result would be overruled.

It might be argued on behalf of Taylor, however, that his hypothetical attorney's prediction still constituted "law" to the landlord even though it turned out to be an incorrect prediction of what the court of last resort would hold. By the same token, an inaccurate prediction of weather is still a weather forecast even though it turns out to be wrong. Although this article will contend that a prediction in terms of probability of a future unique event can be neither "right" nor "wrong," [FN27] for present purposes legal realism must include the possibility, or even likelihood, that at any given time there are varying predictions of future official behavior that K might receive from different attorneys. Hence there are different "laws" that may operate on K. Indeed, no theory of law could realistically exclude the possibility that different interpreters may come up with different views as to the content of law. All predictions are "law" to K in the sense that they influence his conduct, and only a monolithic, a priori notion of "law" would make this result seem strange. But part of the purpose of legal realism is to point out that even though people can be wrong in predicting the actions of other people (officials), that prediction will operate as law until the officials act in the particular case at hand. The next section will argue, however, that the legal system does not function as randomly as these remarks suggest. Lawyers can be much more accurate than Taylor's hypothetical attorney, especially since the legal system operates in some sense as a self-validating mechanism for lawyers' predictions. [FN28]

Despite its failure to view law as a present constraint on behavior, Taylor's position points out an important objection to the positivist view of law as a system of rules. Hart has great difficulty with the concept of an overruling of precedent; he tries to give considerable latitude to the process of "distinguishing" prior cases, but finds it difficult to recognize the possibility of an out-and-out overruling. [FN29] Indeed, he makes the far-fetched claim that the rules laid down in precedents "are as determinate as any statutory rule. They can now only be altered by statute...." [FN30] Hart notwithstanding, judges can and sometimes do [pg483] overrule established precedents, and in doing so may attest to a view of the legal system that places

considerably less importance on "rules" than does Hart. [FN31]

B. *Subjective Probability: Of Meteorologists and Lawyers*

Professor Taylor's thesis equates the position of a lawyer predicting an official's action to that of a forecaster of natural phenomena. A meteorologist's prediction has no influence on tomorrow's weather, though of course it could influence our preparations for tomorrow's weather. Similarly, in the fetus example, Taylor would say that the lawyer was simply wrong in his prediction of the court's decision. The court's ruling took the parties by surprise, like an unexpected tornado. [FN32]

In order to examine Taylor's analogy, the nature of a prediction of a single event must be considered. The conceptual difficulties in such a prediction are, in fact, immense and have given rise to a considerable mathematical literature. [FN33] The problems can be described briefly in ordinary language terms.

[pg484] Suppose that a meteorologist forecasts an eighty percent chance of rain tomorrow. What does this mean? Is there any way that the meteorologist could be wrong? Assume that tomorrow comes and in fact there is rain. Does that make the forecast right? Or should the meteorologist have predicted a 100% chance of rain? Or assume that tomorrow comes and there is no rain. Does that make the meteorologist wrong? We might say, on seeing a clear day, that the meteorologist misled us; but then, after all, there was a twenty percent chance of clear skies. Faced with this puzzle—that a prediction expressed in terms of probability cannot be invalidated by the event that actually occurs—some mathematicians have refused to accept the notion that "probability" can apply to the prediction of a single discrete event. [FN34] Yet such forecasts are familiar and have intuitive meaning. Thus other mathematicians have labeled the prediction of single events "subjective probability" [FN35] and suggest that such a prediction measures the predictor's degree of confidence that the predicted event will occur.

When the weather bureau predicts an eighty percent chance of rain tomorrow (note that "rain" is not a single discrete event but "rain tomorrow" is), its prediction reflects its degree of confidence that rain will occur. If tomorrow is sunny, then the weather bureau will feel slightly less confident the next time its instruments show similar readings. They will likely think, "the last time roughly similar conditions prevailed we predicted an eighty percent chance of rain, but in fact the next day was sunny; so this time let's predict a seventy-five percent chance of rain." Thus the predicted events become factors affecting the predictor's degree of confidence for future predictions. Suppose the next few seventy-five percent predictions of rain are followed by rainy weather; then the weather bureau might revise its prediction upward to eighty percent. After much experience, the prediction can be "refined" in this manner. But no matter how refined it is, on any given day a prediction of eighty percent rain for tomorrow is still only a measure of the degree of confidence of the predictor and cannot be invalidated by the fact that the next day the weather is sunny.

If a lawyer wants to be as accurate as possible when giving advice to a client, he will similarly express his confidence in numerical terms. He may say, "there is an eighty percent chance that if you go ahead and make this movie, the officials in this state will rule that it is

obscene." He cannot advise the puzzled filmmaker that the movie is or is not obscenity, and any recitation of "rules" about obscenity certainly [pg485] will seem extremely vague to the filmmaker. The lawyer might advise the filmmaker to change this scene or that scene and thus reduce the likelihood that the movie will be confiscated. But if the client wants to proceed with the script as written, the best advice the lawyer can give him as to what the "law" actually is would be in terms of probabilities.

If the movie is made and the state officials rule that it is not obscene, the client has no better grounds for calling the lawyer's prediction "wrong" than a citizen has for blaming the weather bureau when fair weather prevails despite a prediction of rain. Like the weather forecast, a prediction that there is an eighty percent chance that a movie will be confiscated as obscenity operates as a present deterrent to the filmmaker. Such a high risk of confiscation might well prevent him from making the movie at all. Thus "law" as a prediction of official behavior can modify the client's behavior. This, within the theory of legal realism, is what "law" means and how it actually works.

Other rules, more specific than those applicable to obscenity, can illustrate the variable nature of predictions and the resulting effects upon behavior. Consider the clear rule of a highway speed limit of fifty miles per hour. A lawyer might well predict that there is a 99.9% likelihood that a specified sanction will be applied by relevant officials if the puzzled man drives at eighty miles per hour. [FN36] But now suppose that the puzzled man asks what the law is regarding his driving at a speed of fifty-two miles per hour. On an unreflective level, a speed of fifty-two miles per hour clearly exceeds the speed limit of fifty miles per hour and violates the rule. But the predictive theory of law does not ask us to look to verbal analyses of rules; a lawyer instead should predict what officials will do, for that is the "law" that the client is interested in. A lawyer might start out by saying, "I've never heard of anyone being stopped for driving at fifty-two miles per hour. I think that's close enough to the speed limit that there's only, say, a five percent chance that a policeman might stop you. Or maybe only one percent." But suppose the client replies: "I want to know more than your prediction of whether a policeman will stop me. I want to know, in addition, what will happen *if* he stops me. If he gives me a traffic ticket for driving at fifty-two miles per hour, will that stand up in court? Or will the judge find me not guilty if I admit to driving at fifty-two miles per hour?"

These questions confront the lawyer with a more intricate analytical problem. Would a judge recognize the prevailing police practice of not stopping drivers who drive only two miles per hour above [pg486] the speed limit and thus hold that the driver is not guilty of a traffic offense? What would the judge himself think about this question? The lawyer may imagine that the judge will take a variety of factors into account. First, if the judge "rewrites the rule" so that the real speed limit is fifty-two, then will he simply encourage those who now drive at fifty-two miles per hour to add two more miles per hour to the margin of acceptable excess speed? Would this encourage future drivers to keep adding increments of two miles per hour to the officially sanctioned limit? On the other hand, will the judge think that his decision might not be noticed by anyone, given the fact that he is a traffic court magistrate and his opinions, if there are any, are not published? [FN37] Second, should the judge discourage policemen from arresting drivers who exceed the speed limit by so small a margin? While a policeman is arresting the puzzled man for driving at fifty-two miles per hour, a "real" speeder may go by undetected. Moreover,

how can the judge be sure that the arresting officer's speedometer or radar equipment has been adjusted so finely as to detect a precise speed of fifty-two? Is it not possible that the driver was actually driving at fifty miles per hour? Even if the driver admits to fifty-two, the driver's own speedometer might be inaccurate. On the other hand, if the driver does admit to fifty-two, would it not encourage disrespect for the law if he is not punished? [FN38] Finally, the judge must note the possibility of the equivalent of "plea bargaining" in the traffic arrest situation. A person who is driving, say, sixty miles per hour in a fifty miles per hour zone might get arrested, and the policeman might say, "I clocked you at sixty but I'll write the ticket at fifty-two; you'll get fined, but the judge won't throw the book at you." The judge knows that policemen might do this in order to minimize the amount of protest on the scene by the arrested driver. If so, the judge would be upsetting normal expectations, perhaps of both the driver and the policeman, if he dismissed the case.

The lawyer must integrate all of these musings to predict judicial behavior. The various arguments would have different weights at different speeds above fifty. The lawyer might predict a twenty percent [pg487] chance of conviction if the ticket says fifty-two miles per hour, going on up to a ninety-nine percent chance if it says eighty miles per hour or more. These variable predictions to driver K may constitute the "law" much more so than does the "rule" of a fifty miles per hour limit. For the present, the prediction may be thought of as self-validating in that it fulfills the idea of law as a mechanism that affects human behavior. What the officials actually do later is a fact, not the law itself. What they do comes too late for K; he is interested in predicting what they may do. [FN39]

Yet this self-validation of a prediction does not serve to distinguish a prediction about official behavior from a prediction about the weather. K may rely equally upon both in planning his daily activities. Thus there must be another aspect about the legal prediction that makes the subsequent official action dependent upon it in some sense. A closer look at the mechanism underlying the lawyer's prediction is needed.

Reduced to its fundamental level, the attorney's prediction of official behavior is an expression of his degree of confidence that past official behavior will continue to be consistent with respect to the set of facts brought to the official by K. In nearly all legal systems nearly all of the time, this degree of confidence can be quite high because, as discussed, officials' power is maximized by consistency in the administration and interpretation of standards for civilian behavior. [FN40] But a more critical issue arises: the interpretation of what is "consistent." K's contemplated course of conduct, for which he is seeking legal advice, is necessarily unique. K's course will not be exactly the same as action undertaken by any other person in the past; for one thing, the actor (K) is a different personality, and his actions will occur at a different time and in at least a slightly different environment.

The attorney advising K must sort out those aspects of K's contemplated action that are of legal relevance so that they can be assessed in light of preexisting law. Obviously this last sentence contains a formula that involves question-begging terms. What is "legal"? What is "relevant"? Such terms cannot be defined within legal realism. Nevertheless, an attorney may work well with them without knowing their definition, like the character in the Moliere farce who discovers that he has been speaking prose all his life. It is a matter, for the attorney, [pg488]

of "feel." [FN41] He senses those aspects of K's contemplated action that will strike officials as legally relevant, and he omits those aspects that seem to have no bearing on the case. (The latter aspects, in fact, are by far the most numerous, since they include everything else in the universe.) Having noted the legally relevant features of K's contemplated action, the attorney measures those aspects against past behavior patterns of officials confronted with similar fact situations. Finally, the attorney informs K that if he does such-and-such the official reaction will probably be thus-and-so.

From a macroscopic view of the legal system, each day there are thousands of attorneys advising clients like K on how to act without incurring official wrath. And millions of people, acting as their own attorneys, also conform their conduct to predicted official reactions—drivers who stop at red lights, businesspersons who write down their entertainment expenses, people who refrain from hitting other people who annoy them, people who do not trespass upon the property of others. Those instances of conduct that actually come before an official for decision are only a slight fraction of all conduct. A policeman stops a driver for speeding, a judge hears a case of assault and battery, an income tax return is audited—these are the tip of the iceberg of legal transactions within a society. Hence the legal system, viewed as a whole, runs on private decisions based on the expectation of predictable official behavior.

Since most individual actions occur without official intrusion of any sort, and since officials know that the smooth functioning of the legal system depends on popular expectations of consistent official behavior, [FN42] the officials will tend to make decisions in a manner that reinforces previous expectations. The decisionmaking official, in short, will generally strive to fulfill the expectations of the party or parties who are under the official's power. The speed-limit hypothetical suggests what would happen to the power of officials if they did not fulfill those expectations consistently. If police began arresting drivers for speeding who were driving below the speed limit, drivers would probably begin ignoring the speed limit and many would exceed it. Why comply with the rule if you can be arrested for complying? If judges began deviating randomly from the rules of criminal law, it is likely that more people would commit crimes. Officials would soon [pg489] find themselves treated as an arbitrary "risk" within the system, with their pronouncements and commands ignored and their power to control public behavior greatly eroded. [FN43]

A link can thus be established between the official's decision and the previous prediction of that decision, a link not present in the prediction of natural phenomena such as the weather. To maximize his power, the official will want to fulfill, as much as possible, the expectations of the parties. The link is even stronger when an attorney represents one of the parties. The attorney "senses" the legally relevant aspects of K's contemplated action. Out of raw fact he constructs guidelines for his client based upon "legal" factors, that is, those factors that the attorney predicts will be noticed and acted upon by officials. If the client's behavior is later challenged in court, the attorney knows that a judge, reviewing K's actions, will hear arguments by the attorney that characterize K's behavior. The judge does not necessarily have to delve into the facts himself; he can rely on stipulations, jury findings, or the presentations of the attorneys. Since the judge is aware of the role played by K's attorney and knows that attorneys in the aggregate have a vast influence over human behavior, he might well consider attorneys to be "officials" who, like judges, play a part in the maintenance of social order. Although the state will not per se enforce

with its physical power the attorney's advice to his client, the attorney's advice will nevertheless exert a substantial influence on the client's behavior. The judge will thus perceive the attorney as an important link in the maximization of official power. It follows that the judge will make a special attempt to reinforce the attorney's prediction of the judge's own decision. To put the matter differently, a judge or other decisionmaker might feel less constrained to reinforce an ordinary citizen's expectation of the law (the citizen after all could have made a mistake) than to fulfill the prediction of an attorney who specializes in reading the judge's opinions and predicting his future behavior. Therefore, unlike the weather forecasting situation, what the attorney predicted to K will itself become a factor in the official's own determination of what judgment to hand down in K's case.

This point tends to go unnoticed in the analysis of legal systems, and yet, upon reflection, it seems supported by the actions of judges and other decisionmakers. Provisions against *ex post facto* laws [FN44] mean [pg490] that judges should not base their decisions on norms or rules that arise after completion of the actions that form the basis of the lawsuit. But translated into the terms of legal realism, that is another way of saying that the judges should reinforce the attorneys' predictions, so long as the judges desire to maximize official power and systemic stability. [FN45]

Naturally, a judge cannot always reinforce an attorney's prediction, because sometimes the attorney is simply wrong. He may have misread the previous decisional patterns or failed to anticipate a change in the law (as in the previously discussed fetus example), or he may simply have been careless. Hence the judge has to teach the attorney a lesson (which he proceeds to do by taking it out on the client), and if the attorney is taught many such lessons, he will likely suffer a decline in his practice. Yet even though a judge cannot totally reinforce both attorneys in a contested case, it is striking how often judges try to reinforce some expectations of both attorneys. Judges will encourage the parties to settle the case short of litigation or even after trial. In the federal courts, roughly nine out of ten docketed cases are settled. [FN46] Additionally, judges try to "give" each side "something"; [FN47] rulings on motions, on admissibility of evidence, and so forth, often seem to be parcelled out to make each side relatively happy. Finally, the ultimate result is often a compromise; in a close case the winning side may find its damages halved, or it may win on a doctrinal point but actually lose in terms of requested relief. [FN48] Of course, these tendencies are [pg491] heightened when cases are decided by arbitrators instead of judges, an increasingly common phenomenon in this country. [FN49]

In sum, if for legal realism the "law" is a prediction of what officials will do, then officials will want to fulfill those predictions. The fulfillment of those predictions, in turn, reinforces the realist's concept of "law." Indeed, under such an analysis, the previously discussed fetus example can be viewed as the fulfillment, by the judge, of those expectations of sensible lawyers (unlike the hypothetical attorney invented by Professor Taylor) with respect to the newly emerging rights of fetuses. The concept of legislation is easily incorporated into this summation of legal realism. Attorneys expect that legislation will change the reaction of officials in the future. The promulgation of new legislation changes social behavior by informing lawyers that new decisional patterns will replace the old ones. Even drastic legislative changes may be accommodated so long as they enunciate decisional patterns that operate prospectively, whereas official decisionmaking with respect to past conduct is most effective and acceptable to the

public when it fulfills prior predictions and expectations. [FN50]

[pg492] C. *Basis for an Attorney's "Feel" for What Is Legally Relevant*

If legal realism focuses on the prediction of official behavior, the basis for the attorney's prediction must be investigated. The attorney must look at a raw fact situation (or contemplated fact situation) and sort out the "legally relevant" facts. Although "legal relevance" cannot be defined precisely within legal realism, it is a useful shorthand expression for the lawyer's process of generalization from fact situations. Yet, how does the lawyer acquire such a "feel" for this sort of useful induction? Can the acquisition of such a "feel" be described without tautology?

The obvious starting point for such a description is a "realistic" look at the training that the lawyer receives in school. [FN51] First, regardless of how many or how few "rules" are taught in law schools, what is really taught is an ability to predict how judges will deal with fact situations. For example, law students or their professors will frequently ask whether a given judicial opinion is "correct," and the inquiry into this question usually is accompanied by much argumentation and citation of rules, reasons, and principles. When the debate is over, what really counts is the court's holding. Then another case is studied and perhaps the same questions arise. But again what counts is the holding and whether the holding is consistent with the court's position in the first case. If the cases are not consistent, can one be "distinguished"? After a while, there is a subtle shift of content with respect to the word "correct" as applied to a judicial opinion. A professor might ask whether a holding is "wrong" and the student's answer would consist not of an appeal to principles or rules or logic, but of a comparison of the holding in question to previous holdings learned by the student. In short, the student begins to learn not "logic" but "judicial logic"—the kinds of arguments that judges have found to be "valid," "correct," "reasonable," and so forth. These terms (plus the terms "right," "wrong," "correct," "persuasive," and their cognates) begin to assume a meaning within the context of judicial decisions. The student begins to learn to "think like a lawyer." He or she then gains the ability to predict what judges will do. Having thrown overboard any extra-legal [pg493] notions of rightness or absolute logic or reasonableness, the student's mind becomes filled with a contextual approach to these concepts. For instance, many students coming to law school might assume that there is a duty to warn a stranger who may be about to have a serious accident. A few weeks' exposure to a torts course convinces the rather intimidated student that such a view is quite "incorrect" in the newly found and eminently useful sense of that word.

Law students also learn something about the judges' outlook on life. Judges tend to be conservative; they tend (in the United States) to be property oriented; they tend to adhere to precedent; they tend to define their own jurisdiction narrowly. [FN52] But in addition, judges will on occasion create new "law" by reaching a decision based not on rules but on an intuitive reaction that justice requires such a result. Law students learn this by studying a disproportionate number of innovative cases—for example, the case that first established strict liability for hazardous enterprises or the case that first held that evidence illegally seized by the police could not be used in a subsequent criminal trial. The student learns the lesson that judges can reach deeply into societal notions of fairness and justice despite what the "rules" on the books might say. Any future predictive activity by the student- turned-lawyer must take into account this element of judicial departure from rules.

Law school training is a socialization process involving many aspects of legal prediction. A law school graduate should have a "feel" for the way courts behave. [FN53] When a client asks a product of the law schools "what is the law?" the answer he elicits is a product of the legal education in all its dimensions. The lawyer does not simply respond by citing a "rule" to the client, but rather begins to interpret the client's actual fact situation in light of everything the lawyer knows and can predict about future official reaction to that fact situation. And the accuracy of his prediction is enhanced because the official most likely has also gone through the same educational process, thus learning what kinds of decisions are expected of him.

D. Different Predictions Based on the Same Facts

What are the implications for legal realism when two lawyers in the same jurisdiction, who have been through the same law school, react [pg494] differently to the same set of facts? Can legal realism account for this kind of difference in the "law"? Suppose that attorneys A and B are asked to estimate whether a movie based on a given script would be declared obscene in a particular jurisdiction. Lawyer A responds that the movie in question has an eighty percent chance of being declared obscene; then lawyer B advises the producer that the movie only has a fifty percent chance of being declared obscene. What is the "law" for the puzzled producer?

Most people only seek the advice of one lawyer or do not seek legal advice at all. The "law" for them is what the lawyer says or what they decide for themselves acting as their own attorneys. If the puzzled producer consults only lawyer A, he might conclude that the risks of confiscation are too high to proceed with the film. If the producer makes such a decision, then the "law" of obscenity, brought home by attorney A, deterred production. But the story changes if the producer consults lawyer B and gets a different estimate of legality. The producer may well proceed with the film if the chance of confiscation is only fifty percent, because the anticipated profit is enough to make such a risk worthwhile. But he will not produce the movie if the risk of confiscation is eighty percent. Can both A and B be right?

Under the approach to legal realism taken in this article, both A and B can be right; the "law" is indeed different depending upon which lawyer gives the advice. The relevant differences between the advice of A and of B will be due to their experience, the amount of time they are willing and able to devote to the case, their intelligence, and their skill. Lawyer B, for example, might be a specialist in obscenity law, an experienced practitioner, and an enthusiastic worker; he may have a block of time he can devote to this case, and he may have good ideas for defending an obscenity case. Confident of his own abilities, lawyer B may predict that, with himself as counsel for the film, there is an even chance that it will not be declared obscene. In contrast, lawyer A may not be a specialist in this particular area and might be preoccupied with other matters. His estimate may well be accurate—that with himself as counsel there is only a twenty percent chance of getting the film past the officials.

Sometimes expertise involves more than determined advocacy or enthusiasm. Suppose a precedent exactly on point with a client's issue is known to one attorney but not to another. The lawyer who happens to know about the precedent might make a very different prediction of the client's chances of winning than will the attorney who is ignorant of the precedent, particularly if

the precedent itself is an unusual legal result within its area.

[pg495] The buried precedent possibility is a good illustration of the difficulty of conceptualizing law as a set of rules rather than as a prediction of official behavior. The "set of rules" in force depends on variable knowledge as to the contents of law books. Lawyerly omniscience cannot be assumed; one attorney may know more than another, and this increased knowledge might make a decisive difference. The most that can be said is that if both lawyers knew of the buried precedent, they would presumably agree as to its impact on a court faced with a similar issue. But if all lawyers are unequal in their knowledge, as they are unequal in ability, the "law" seems to vary according to which lawyer our puzzled producer consults.

A client will eventually consult a lawyer in whom he has confidence and will accept that lawyer's estimate of the legal situation. Thus movie producer M asks attorney A about the script and gets a reply of "eighty percent likelihood of declaration of obscenity"; the producer then abandons the script. Next, movie producer N picks up the same script and asks attorney B, and B replies "fifty percent." N makes the movie, which is or is not confiscated by state officials. Depending on the final outcome, N is or is not rewarded for his risk, and M is or is not happy that he forfeited his option on the script. The indeterminacy of both the legal prediction and the enforcement of obscenity rules in this example is largely due to the confusion surrounding those rules. If society were not relatively happy with this variable outcome, behavioral patterns of officials regarding pornography would be standardized so that there would be less variance in the predictions of attorneys and in the enforcement of obscenity policy regarding individual scripts. [FN54]

III. Self-Prediction: Of Biases and Bribes

Predicting a judge's action may be a useful way of looking at law from K's perspective, but what can a legal realist tell the judge? If the judge wants to know what the law is so that he may reach a proper decision, there must be more to offer him than the empty formula: "the law is whatever your honor decides to do." Can the formula be fleshed out with the idea of prediction, so that it reads "the law is whatever your Honor predictably would decide to do"? Hart has [pg496] written that "courts regard legal rules not as predictions, but as standards to be followed in decision." [FN55] Hart reserves the idea of predicting official behavior to statements of law by private individuals or their advisers. To be sure, judges do not make predictive statements in their opinions as to what future judges might hold; rather, they write in terms of rules and principles. But that does not mean that judges cannot regard legal rules as predictions. [FN56] Despite the apparent general acceptance of Hart's criticism of legal realism on this point, and the surface circularity of the judge using the notion of prediction, it can be argued that legal realism logically accommodates the notion that judges can regard the "law" as predictions by attorneys of future judicial behavior.

A. *A Primitive Legal System*

Let us begin with a mythical state ruled by Rex, the sole lawmaker and judge. Two citizens have a dispute and bring their case before him. Rex informs counsel that he intends to apply "the law" to this dispute and asks them to refresh his memory as to what the law is. The plaintiff's

attorney replies: "My client has been trying to adhere to the law, which as your Excellency knows is whatever your Excellency proclaims it to be. Before my client undertook his action, he consulted me as to the law governing his intended action. My answer consisted of a prediction of your Excellency's decision if the case were litigated before you." Rex nods his head in agreement.

The attorney continues: "It follows that your Excellency ought to decide in a manner that fulfills the prediction. In other words, I am asking your Excellency to put yourself in the position of my client two months ago when he had to make his decision and to see what the law was at that time. In order to see what the law was, you will have to make a prediction of what your own decision would be two months later. Whatever that prediction would have been, I am now asking you to decide the case so as to make the prediction come true."

Surely there is nothing circular in the request that the decisionmaker make such a retrospective prediction even though that same decisionmaker now must render the final judgment. I am not barred today from predicting that I will leave my office at 5 p.m. tomorrow; friends familiar with my habits could make such a prediction, and so can I. [pg497] And if I wanted to be a creature of habit, I could even make the prediction come true. There is nothing incoherent in the idea of predicting one's own behavior. Similarly, there is nothing incoherent in Rex's retrospective prediction of a decision he is called upon to make in the present. If he "knows his own mind" and is not an especially forgetful monarch, he will likely make a more accurate prediction than others might make. At the very least, he is not precluded logically from making a prediction.

Now the attorney is asking Rex to fulfill the retrospective prediction, and Rex need not follow this advice. But recall that Rex himself wanted to know what the law is. The attorney's reply is an appropriate answer to this inquiry. The "law" is the decision that was predictable two months ago, and if Rex wishes to keep the idea of law alive he would be well advised to fulfill the prediction. If Rex deviates from the predictable result, he will confuse his subjects, who will find it more difficult to plan their lives so as to minimize friction with the authorities. In short, the attorney is asking Rex to behave consistently, with the understanding that consistent official behavior maximizes official power within a stable society.

Assume that Rex responds: "All right, I will decide this case according to what a correct prediction of my decision would have been two months ago. What would such a prediction have been?" Suppose the plaintiff's attorney argues that his own prediction two months ago was based on a statute enacted by Rex the previous year. Moreover, of all the statutes ever enacted by Rex, the plaintiff's attorney continues, this particular statute comes closest to governing the facts of the particular case.

The defendant's attorney states that her prediction to her client, which was quite different from that of the first attorney to his client, was based on a decision by Rex in an analogous case. That case was decided after passage of the statute cited by opposing counsel, but before the facts underlying the present case occurred.

The choices open to Rex are numerous; they depend upon the precise facts, statutes, and

precedents involved. He could rule that the cited statute applies and that the defendant's precedent is not "on all fours" with the present case; he could find that the cited case in fact overruled the statute; or he could find that although the case overruled the statute, the case was a bad one, and he is now overruling the case and reinstating the statute. Since the statute points one way and the case the other, Rex cannot treat previous rules as "standards" for reaching decisions in Hart's sense. He might treat prior rules as [pg498] standards if he likes those particular rules; he might ignore them if, in light of the facts of the present case, the rules seem inadequate or wrong (recall the overruling of the "fetus" precedent). He might apply a principle instead of a statutory or decisional rule, on the grounds that justice so requires. The only strategic constraint upon him that remains constant in this case is that his decision should have been predictable two months ago. An attorney at that time might have had reason to know, for example, that the old statute was shaky and that the recent precedent would probably be upheld by Rex. Of course the entire system will not break down if Rex instead enforces a rule or standard or idea that arose after the facts of the present case took place. But too many such decisions would unravel the fabric of law in his society, since people cannot conform their conduct to rules that change unpredictably after people have made their decisions.

Rex has another possible course of action that would probably seem intolerable. "My enacted statutes are very complex," he might reason, "and I require my subjects to know the statutory mandates or to find out from lawyers what the statutes hold. These statutes form a good basis for predicting what I may decide, but other factors also form a good basis for predictions. There are principles of justice to which I adhere and which I have made known that I favor. There is my well-known penchant for adherence to precedent; I like my own prior cases even more than I like my own statutes, and when they conflict I tend to apply my case results. If citizens must consider all these things to discover what the law is, then I feel they should also seek out my own philosophy about people and things. For example, the parties to this case should have observed that I dislike people with red hair, because my dislike certainly pre-dates the facts in the present case. Since the plaintiff in this case has red hair, I hereby announce my decision for the defendant."

It is important to examine exactly what is unacceptable in Rex's reasoning, for such an examination may throw light upon hidden assumptions about the nature of law. First, is our discomfort about the red-hair decision based on the feeling that hair color must always be "irrelevant" to a legal dispute? Surely any legal system might have a rule that red-haired plaintiffs always lose; such a rule is no more inconceivable than legalized racial discrimination. [FN57] Thus a second question arises: whether the difficulty with the red-hair decision lies in the manner in which the red-hair distinction was introduced by Rex. One [pg499] might argue, following classical positivist thinkers, that Rex is only "sovereign" when he enacts rules in a formal manner and that his other activities are merely private. Hart presents a more moderate version of this position—that a legal system becomes "mature" only when there is a "rule of recognition" specifying how the lawmaker may validly enact rules. [FN58] But these theories exclude wide areas of law that are not the result of consciously enacted rules. Dworkin argues, for example, that Hart's view excludes the possibility of customary law. [FN59] More generally, even the addition of such areas as customary law does not account for all possibilities, for there remains a judge's conception of "justice," which may not have been articulated, or even conscious, before the judge is presented with a fact situation calling for a decision. Rex is,

therefore, on fairly good footing when he says that his dislike of redheads is like some other conception of justice that may have been extant in his legal system. In the case before him, Rex is finally able to articulate this conception by announcing that the reason for his decision is the red hair of the plaintiff. Such a procedure cannot be characterized as contrary to the normal meaning of the term "law" without also saying that a judge is acting extralegally whenever he decides a case according to "justice" (or according to "principle" or customary law, for that matter). This is indeed a basic difficulty with Hart's concept of law, and it is not saved by Hart's implication that all the standards any legal system needs are to be found in "rules" of law. [FN60] For clearly there are cases where the rules are rejected in favor of other principles or because justice so requires. [FN61]

Perhaps, then, a third objection to the ruler's reasoning involves the lack of notice to the public regarding Rex's antipathy toward red-haired litigants. Rex said that the public "should have observed that I dislike people with red hair," but there is no indication that attorneys, even if they had noticed Rex's behavior in this regard, would have concluded that Rex's antipathy would extend to parties in lawsuits. So if Rex's antipathy toward red hair is part of the "law," its relevance to judicial decisionmaking was concealed from the public. Does the lack of notice destroy the red-hair policy as "law"?

The positivists, who seem to be the strictest interpreters of what constitutes "law," offer a surprising answer. Hart dedicates his work [pg500] to the goal of helping the public to identify and separate rules of law from social rules lacking legal validity and power. [FN62] But, strangely, Hart would regard a rule of law as valid even if the public is not generally aware of the rule. [FN63] Promulgation, according to Hart, is not necessary to establish the validity of a rule of law, although it is certainly desirable from the standpoint of the lawmaker who wants to influence public behavior. Fuller's natural law philosophy, on the other hand, rejects a rule as a rule of law unless it is promulgated. [FN64] It is less clear whether Fuller would insist upon depriving a secret rule of the name "law," or whether he is simply arguing that no one ought feel a sense of obligation toward a secret law. Perhaps a realistic view of Rex's situation would be that so long as the public regards him as the authoritative law giver and law decider, his decision against red-haired plaintiffs is just as authoritative as a decision granting or denying rights to a fetus.

Rex's own authority may be partially undermined, however, when he makes decisions, such as this one, for which experienced attorneys had no inkling that red hair would make the critical difference. Assuming that Rex wants to maintain his authority, he would be well advised not to make many such unpredictable decisions. The public's perception of Rex's authority in the system is not settled once and for all by a "rule of recognition" as the positivists would claim. [FN65] Public attitudes reflect an ongoing process of evaluation of all of Rex's actions, including his decision in the red-hair case. Rex will pay a price for venting his personal bias in the red-hair case—a slight chipping away of his authority as the "official" in his state. This sort of calculus might ultimately appeal to Rex as a decisive reason not to surprise the parties by deciding their case according to a previously unpredictable standard such as the color of hair. [FN66]

[pg501] B. *Pervasive Bias in a Complex Legal System*

Turning from Rex's simple sovereignty to a complex legal system with many official decisionmakers, suppose that all the judges in all the courts share a certain bias. Since the "law" is a prediction of what officials will do, is knowledge of that bias just as essential to an attorney explicating the law as is knowledge of statutes or recent judicial decisions? The American legal system's concern for private property is an example of such a shared bias. An observer from a communist country might find it strange that trespass to property falls under a "strict liability" rule, but harms to persons under a "negligence" rule. He would find our legal system thoroughly imbued with, and dedicated to the preservation of, private property. If such an outside observer wants to know how to plan his affairs within the United States, he had better take into account the judicial bias toward property rights. Similarly, Americans traveling in a communist country might be misled by enacted legislation and judicial decisions. A pervasive bias against private property rights would surely color the interpretation and application of such laws. Of course, if other legal systems are never considered, the bias in favor of private property in this legal system may never be noticed—just as a fish may be aware of the details of its environment but is unaware that it is swimming in water. Legal realism points out that the shared biases of judges are real factors in their decisionmaking and that it should be part of legal training to identify those shared biases.

Bribery serves as an interesting vehicle for studying the problems of biases. At one extreme, widespread bribery might be indistinguishable from pervasive bias. A Marxist might claim, for instance, that the high salaries paid to judges in the United States constitute "bribes" that make the judges decide in favor of the preservation of the private [pg502] property system. At the other extreme, we might consider the curious Burmese magistrate created by George Orwell who, after requiring that both plaintiff and defendant pay him a bribe, goes on to decide the case "reasonably." [FN67] Since a refusal to pay the bribe would result in losing the case, a lawyer could advise a client that the "law" requires the bribe to be paid. In this situation the "bribe" is part of the cost of getting justice, and only a narrow, unrealistic view of "law" would term bribery illegal.

Suppose a student wants to travel in a foreign country known to have "corrupt" officials who enforce the law to the letter but then release an arrested person if he pays off the arresting officer and his superior. A sensible attorney would advise the student always to carry money for such a purpose. Otherwise, if the student violates even a minor rule or ordinance he might end up in jail awaiting trial for a year or two. The student might object to the advice and protest that he would not pay a "bribe" under any circumstances. But if all officials in that country accept bribes or acquiesce in bribe taking, then such payments are not clearly "bribes." More realistically, they are simply part of the official sanctions for being suspected of violating rules.

To refuse to pay the bribe is to refuse to acknowledge the peculiar legal system in that foreign country, and such refusal may be extremely costly. Indeed, from the viewpoint of the officials in the foreign country, the initial violation (for example, drunken behavior in public) may be "worth" only a ten dollar penalty, but the ten dollars must be collected as a "bribe." The refusal to pay the bribe, however, would be highly irritating to the officials, and such refusal (not the initial drunken behavior) might merit a two-year jail term. Can it be said that the officials in this situation are acting illegally? It is far more realistic for a lawyer to advise a client in light of the expected behavior of the officials of that country and not according to artificial concepts we

might have about the propriety of bribes. [FN68]

C. Individual Bias or Bribery

The cases considered are examples of systemic bias or bribes, not of individual aberrant bribes demanded only by a particular official or of bias only on the part of a particular judge. Even the Burmese magistrate effectively represents a class of officials since he is the [pg503] only official in the territory and there was no appeal possible from his rulings.

American legal realists have been more interested in individual bribery or bias than in the systemic or pervasive varieties. But is the individual bias of a judge "law" in the same sense that pervasive bias is? In the extreme case posed by the realist, is Judge Jones's breakfast as important to the lawyer as relevant cases or statutes, particularly if there is reason to believe that the state of the judge's digestion is highly correlated with the disposition he makes of various types of cases? Reference here might usefully be made to the situation posited by John Dickinson in 1931 of a police magistrate who has consistently decided cases in accordance with the wishes of a particular politician in the same town. [FN69] Is knowledge of the magistrate's decisional pattern part of the "law"?

It might be contended that in predicting the outcome of a case before the particular magistrate, a lawyer could give his client better advice if he knew the preferences of the politician, whose wishes the magistrate follows. Would it cheapen the concept of "law," and perhaps eventually legitimize improper political influence over judges, to teach law students to look for such influence instead of devoting their studies to cases and statutes? A reply might be that law students will learn about political realities in practice anyway and that reform of the law is facilitated by formally drawing attention to bias or corruption.

There is, in addition to a possible cheapening effect on law, a more fundamental objection to viewing individual bias as part of the "law." Suppose that a defendant is brought before the magistrate, the relevant ordinance is favorable to the defendant's position, but the wishes of the politician, to whom the magistrate defers, are unfavorable to the defendant. Both the prosecuting attorney and the defense attorney can cite the ordinance and argue about whether or not it applies to the case. But in court the wishes of the politician do not stand on the same footing as the statute. The prosecutor cannot cite the expressed wishes of the politician in open court as a reason for the magistrate's decision. Conversely, if the defense attorney has evidence of the politician's wishes, he might present that material in court to dare the magistrate to comply with those wishes and thereby be exposed to possible impeachment or legal action for abuse of legal process.

It is important to note that these potential sanctions against the magistrate can apply only when there are other officials in the system [pg504] (that is, this is not a situation in which Rex is the sole magistrate and sovereign) and those other officials do not share the magistrate's bias. But these conditions have been assumed in the example. If the case presented a problem of shared bias, then the other officials in the system—other judges, the state legislature, executive officials who might bring an impeachment action—would find nothing objectionable in the magistrate's position. When the magistrate's individual bias deviates from theirs, however, he may be viewed

as a potential drain on their power who might better be removed from the bench or punished in some way. Since officials want to ensure that policies are enforced uniformly by all the officials, individual bias or bribery represents a threat to their power. Individual bias or bribery introduces into the legal system a tension between individual aberration and systemic policy. This tension underlies the prosecutor's reluctance to mention the politician's wishes in open court and the defense attorney's inclination to cite the magistrate's previous compliance with political influence. Because of the possibility of reversal or impeachment, knowledge of the bribe or bias does not have the same predictive value as knowledge of relevant cases or statutes. Uncertainty over which preference will prevail—the individual or the collective—introduces an unwelcome element of indeterminacy in individual bias situations.

Complex legal systems have developed elaborate mechanisms to ward off precisely the threat to systemic stability that is raised by corruption of individual officials. Not only is bribery of judges a crime in practically every legal system, but the more developed legal systems have sophisticated tests for conflicts of interest. [FN70] The life tenure of federal judges in this country, for example, is designed in part to avoid potential conflicts of interest. But perhaps the most important, and least noticed, attempt to avoid individual bias in complex legal systems is what might be labeled the interchangeability and rotation of decisionmakers. Judges arrange their court calendars among themselves, so the parties are normally unable to pick, or even predict, which judge will hear a case. Sometimes judges are brought in from other circuits; sometimes judges will excuse themselves and other judges will take over a case; in some jurisdictions judges rotate on a regular basis. [FN71] [pg505] This interchangeability reduces the advantages of studying the idiosyncracies of particular judges when predicting how the courts will treat a given fact situation. So long as all judges do not share the same bias, a legal realist might be rudely surprised if a case he has prepared with one judge in mind winds up in court before a different judge. Since individual bias in complex legal systems is so much less reliable a basis for prediction of official action than are cases or statutes, knowledge of such bias, to answer Dickinson's question, is not part of the "law."

This analysis can be applied to the question posed by Hart at the outset of Part III: can the idea of law as a prediction of official behavior apply to a judge's own sense of what the law is? The concept of interchangeability of judges in complex legal systems suggests that an individual judge is in fact playing the role of a judge rather than "being himself" in any given case. [FN72] When Judge Jones takes the bench in his black robes, he knows that he is being asked to decide a case *as a judge would*, not as he himself might decide as a parent or a friend or an adviser. In order for him to determine what the law is, he must ask himself what an experienced and knowledgeable attorney would have predicted to the parties when the facts of the case arose. In making this retrospective prediction, Judge Jones should not consider what he personally would decide except insofar as his decision would be interchangeable with that of any other judge. [FN73] When Judge Jones assesses what an experienced attorney would have predicted that any judge would decide, then the appropriate decision is clear. He should fulfill that prediction in the decision he reaches. By doing so, he maximizes the power of all officials in a stable legal system or, at the very least, encourages the other officials to continue to include *him* as one of *them*.

[pg506] IV. A Limiting Case for Legal Realism

This article has attempted to show both that the substantial criticisms leveled against legal realism by Hart can be met and that consideration of his criticisms can provide some additional insight into the nature of law and legal systems. But it is necessary to continue the analysis by considering a case that poses serious difficulties for legal realism, a case that has fascinated modern jurisprudence: the situation that Fuller labeled the "problem of the grudge informer." [FN74] First, it will be argued that the issues presented by that case are not satisfactorily resolved by Hart. Second, a possibly better solution based on legal realism will be suggested. Finally, it will be argued that even this solution falls short because realism neglects what might be called the "normative dimension" of law.

A. *The "Grudge Informer" Case*

1. Hart's Solution

In Nazi Germany, some persons procured the imprisonment or execution of acquaintances for offenses against the regime. When the new Federal Republic was established after World War II, the informers were prosecuted for such crimes as murder, false imprisonment, or the unlawful deprivation of another's liberty; the informers' defense was that their actions were completely legal. The actual cases are difficult to interpret (and indeed have frequently been misinterpreted by commentators); [FN75] as a result, Hart asks that the problem be considered purely as a hypothetical. [FN76] Building loosely on the facts of actual cases, suppose that a wife, wanting to get rid of her husband so that she can move in with her lover, reveals to the authorities that her husband has been secretly listening to short-wave radio broadcasts from enemy countries. The state seizes and executes her husband. Imagine further that at his hearing or trial the husband argues that his wife's motives were purely personal, not patriotic, but the judge holds that under the statutes and prior decisions she performed a patriotic act irrespective of her motives. After the war, the new regime in Germany prosecutes the wife for murder.

Hart's position is that although the Nazi laws were morally iniquitous, [pg507] they were nevertheless valid laws and cannot later be declared invalid. Thus Hart would either let the informer go unpunished or face up to the moral dilemma implicit in the situation and pass a retrospective law to cover the case. "Odious as retrospective criminal legislation and punishment may be," he writes, "to have pursued it openly in this case would at least have had the merits of candour." [FN77]

The very faithfulness of Hart's position to the philosophy of legal positivism calls positivism into question. Releasing the informer does not accord with the results reached in the grudge informer cases in the German Federal Republic. [FN78] Even as a hypothetical problem, it is surely understandable that a new regime would believe the wife's action to be the procurement of murder and hence would want to punish her. If positivism does not provide a theory to achieve that end, it would appear to be irrelevant, or at least unrealistic. Additionally, by advocating the passage of a retroactive criminal law, Hart acknowledges the inadequacy of letting the informer go unpunished. Certainly such a retroactive solution is even worse; it is a "Nazi"-type approach to the problem. To be sure, positivism may have no theoretical problem with retroactive statutes. [FN79] Such statutes, validly enacted by the present regime, can make an action illegal now even though it was not illegal when it occurred. Yet this indicates that something is fundamentally

wrong with positivism. Why should Hart's theory that a valid retroactive statute is "law" prevail when it could just as well be argued that retroactivity destroys the lawfulness of a statute? Indeed, a retroactive statute can hardly be internalized by the populace—Hart's "internal aspect" of law—since it is enacted after the event to which it refers. Hence, under Hart's own theory that all rules must have an internal aspect, [FN80] retroactivity would make a statute "invalid." Finally, if Hart is ultimately claiming that we ought to accept positivism, the moral repugnance of a retroactive statute must raise doubts about the theory that recommends it. [FN81]

[pg508] Whatever the answers to these questions, it is clear that Hart has not provided a satisfactory answer to the "grudge informer" problem. Can legal realism, as outlined in this essay, fare any better?

2. *A Solution within Legal Realism*

Imagine that the wife in the grudge informer case consults with her attorney before telling the authorities that her husband has been listening to foreign short-wave radio broadcasts. The attorney, a realist, may predict with utmost confidence that the Nazi officials will punish or execute the husband and that the wife will go scot-free. The discussion might follow this course:

Attorney: The statutes and practices regarding informing on subversives are valid statutes and all officials predictably will adhere to them.

Client: But are there any German officials who might not act in the way you predict?

Attorney: The only German officials who might find you guilty of a crime would be those who might come into power if the entire Nazi regime were deposed.

Client: What are the chances of that happening?

Attorney: In your lifetime, perhaps, there is a slight chance. After all, political changes of a fundamental nature are always possible. The possibilities might even increase if the Versailles powers were to take military action against Germany.

Under this scenario, the wife has some non-zero likelihood of punishment under a future regime, and a thorough attorney might alert her to the possibility. Especially in life-and-death matters, even remote risks ought to be taken into account. The wife could not be completely sure that she would get away scot-free, because if law is a prediction of what officials will do in the future, there is a chance, albeit slight, that a new set of officials might take power and that they might react quite differently from the present set of officials. Thus if the new Federal Republic of Germany in 1948 indicted the wife, legal realism would permit the court, reconstructing the advice that an experienced attorney might have given her, to conclude that in finding her guilty it is fulfilling a prediction that might have been made at the time that the events occurred.

3. *Evaluation of the Realist Solution*

The realist solution just proffered has the important merit of presenting a theory of law that could lead to the wife's eventual conviction and that was at least theoretically available to her at the time [pg509] she decided to turn in her husband. In contrast, Hart's retroactive criminal statute admits on its face that she had no notice of the statute and her conduct could in no way have been influenced by it. This analysis of the grudge informer case shows that legal realism is ultimately independent of the actions of particular officials. Part of this independence can be

seen in the concept of the interchangeability of officials. An additional aspect is that new sets of officials might take over and their likely actions must be taken into account. The actions of such new officials had real-life consequences to the actual grudge informers prosecuted after the demise of the Third Reich. [FN82] A person during Hitler's regime would thus have been better served by a legal-realist attorney than by a positivist; the latter could only have assured his client that it was completely legal to be a grudge informer, whereas the legal realist, in calculating the probabilities of what future officials might do, might have alerted the client to the possibility of sanctions if a new set of officials should take control.

These aspects of legal realism offer some important planks in the construction of a full-blown theory of law. But as far as the particular solution to the grudge informer problem is concerned, legal realism proves too much. If an entire new set of officials can be imagined in any given legal system, then all conduct is potentially questionable. Is buying a house in the United States slightly illegal to a legal realist aware of the remote possibility that a communist regime might take over the country and prosecute the home buyer as a bourgeois capitalist? Surely the Nazi regime must have seemed very stable in the 1930s (although at least one important grudge informer case stemmed from events occurring in 1944, when there were numerous signs that the days of the Hitler regime were numbered). [FN83] For legal realists, the legality of any conduct can be questioned on the basis of imaginable future sets of officials. The theory hence fails to resolve the "grudge informer" case.

B. Toward a New Theory of Law

The "grudge informer" cases may appear to present an intractable problem, a problem that is so specialized that it can safely be ignored. But to ignore these cases is to act like the physicists in the nineteenth century who overlooked odd experimental results that, years later, led to wholly new scientific paradigms. [FN84] Closer attention to the grudge [pg510] informer problem suggests that a theory of law must be developed that is not dependent on officials or even on regimes. Hart showed his awareness of this need by modifying the Austinian notion of a particular determinate sovereign; [FN85] he argued that a rule of recognition is needed to determine who the sovereign is and how he validly enacts laws. [FN86] The rule of recognition is not dependent on particular sovereigns, though it does appear in Hart's formulation to be dependent upon regimes. [FN87]

Hart's positivism and the theory of legal realism sketched in this essay thus share a failing: they are ultimately tied to the idea of "law" as emanating from particular human beings. For Austin, law was the command of a determinate sovereign. For Hart, law is the emanation of a regime that has physical power within a territory and is accepted by the people. Legal realism is tied to the prediction of actions of people who are either in power or who may come into power in a given territory. Yet the "grudge informer" case, as we have seen, cannot be resolved satisfactorily under positivism and can only be accommodated by legal realism at the cost of introducing vast uncertainties.

An alternative to these theories might begin by using those planks of legal realism previously described: "law" has to operate in the present and not retroactively, and new officials may arise and negate the enactments of present officials. But how can one distinguish between informing

on an unwanted spouse and purchasing a home in the United States? The answer must be found in moral, not legal, philosophy. Unless they are infused with basic normative concepts, present legal theories cannot resolve such issues. [FN88] In the grudge informer case, it is not far-fetched to imagine that a future regime would see the wife's actions as amounting to murder. Indeed, the wife may have had, or should have had, problems with her conscience, and the German officials who sentenced her husband may have had internal misgivings about their roles in the case. But we would have to distort our moral [pg511] theories to the breaking point to imagine that a future communist regime would prosecute people for having engaged in capitalist transactions. To be sure, a future regime might invent any "excuse" to punish people, but they could hardly claim that the present population of the United States has any significant choice other than participation in a capitalist economy. In some basic sense the grudge informer "deserves" to be punished even though she was neither punished nor punishable under the Nazi regime.

There is no need to postulate an entire new regime to reach these results. Suppose a person commits a crime in the expectation that the politician in Dickinson's example will instruct the police magistrate to throw the case out of court. What if, right after the crime, the magistrate dies or is taken ill, and a magistrate not subject to the politician's wishes appears on the bench? The person who committed the crime obviously took his chances that the case would be "fixed" for him, and he lost. In other words, he knew that his actions violated the statute and hence that he was subject to some probability that a magistrate might convict him for it. A simple change in one official, rather than a change in an entire legal regime, reaches a result analogous to the grudge informer cases. Or consider the student who is counseled to take bribe money with him on his vacation to a foreign country. Suppose he is arrested there for a minor crime and he attempts to bribe the arresting officer. Unknown to the student, however, the country, feeling the effects of adverse publicity about bribes, has just instituted a "crackdown" against bribes. The student may suddenly find himself facing a long prison sentence for attempted bribery. The counsel of legal realism did not serve him well enough, because it was not qualified by an assessment of the possibility of a moral backlash against bribery. Finally, in the limiting case, suppose Dickinson's police magistrate simply decides overnight to cast off the shackles of political corruption and to greet the new day with a fresh resolve to apply the law fairly. For the criminal defendant who had relied upon the political influence system to be acquitted, the magistrate's change of mind is the equivalent of a change of regimes.

The preceding arguments may be reduced to the proposition that the more "moral" a citizen's action is, the more likely it will be upheld by some official in the future, regardless of whether the present regime survives. Conversely, immoral actions, such as those of the grudge informers, bear a greater risk of eventual sanction. Of course, the problem of defining "moral" remains. But an exploration of morality extends beyond both positivism and legal realism.

Yet the assessment by future officials of what is moral or immoral is [pg512] still crucial (as well as, of course, their interpretations of statutes and precedents). The analysis still begins with predicting future official behavior and determining what the law is. Nevertheless, a final liberating step suggests itself. The very definition of who is an official (and whether the official thus located is entitled to continue to be regarded as an official) may be dependent upon a congruence between morality and official actions or decisions. This may be tested by an

extremely unlikely hypothetical. Suppose Parliament enacts a statute, in furtherance of the goal of social discipline, that requires parents to use brutal force against their children and deprives children of any rights no matter how much pain is inflicted on them. Under Hart's theory, the law is perfectly valid. Perhaps the citizens would resist, but their resistance would be illegal. However, if the illegal resistance results in a successful revolution, then a new rule of recognition takes force, the law is repealed, and prior officials are punished. Order reigns again. Everything depends upon the citizens' seizing power, but they must do so under the theory that their actions are illegal until and unless they are successful. Legal realism fares little better. Citizens opposed to Parliament's law might be advised that if they are eventually successful they will replace all the officials in the system, and thus the chance of that happening must be taken into account in predictions of what the present law is. The present law, therefore, is only in part represented by Parliament's statute. If a greater than fifty percent chance exists that the revolution will be successful, then a citizen knows that on balance he is safer in ignoring the statute than obeying it. Of course, legal realism in this context might have a bandwagon effect: as more people are convinced that the statute is not "law," the revolution might be increasingly likely to succeed.

But if instead we have a theory to the effect that the morality of the statute is seen as defining who are the officials, the enactment of the hypothetical statute would undermine the authority of Parliament and the officialness of all persons currently known as officials. At first the public would say that the law is "immoral" and the officials were "wrong" in passing it. Such use of the word "wrong" seems more basic and intuitive than the notion of legal realism that legal validity is solely a prediction of what officials might do. Second, if parliamentary officials persisted in adhering to the statute, popular antipathy might go beyond moral outrage to political support of anti-Parliament spokesmen who may be on their way to becoming a new set of authorities in a new legal regime.

The disintegration of public acceptance of the parliamentary officials' authority would be accompanied by a public conviction that [pg513] the statute itself is "unlawful": with no written constitution restraining Parliament, an unwritten charter could be postulated for the occasion and held to be infringed by the statute. Clearly Parliament would make a tremendous strategic mistake in enacting so unpopular a statute, and the realization of this supports our intuitive feeling that the hypothetical example is extremely far-fetched. But the example does suggest that in a clash between the legitimacy of officials and the legitimacy of one of their statutory commands, Hart errs in supposing that the formal validity of the statute will compel the public to recognize its status as "law" and the status of the enacting officials as authoritative. Rather, the substantive iniquity of the statute could be so great as to dissolve in the public's mind the legitimacy of the statutes and of the leaders' claim to be "officials." What is true of an individual enactment may be true as a summation of the moral basis for all actual statutes. The public's perception of what is right may indeed limit the authoritativeness of "official" action.

Even in ordinary language terms the words "official" and "authority" suggest something more than naked power. They suggest a normative dimension, an entitlement to officiate. The aggregate of these statutory or decision-based moral entitlements may be equivalent in function and purpose to Hart's rule of recognition. Unlike Hart's conception, however, the new theory would suggest a necessary relation between law and morality. [FN89] It would insist that

popular acceptance of the legitimacy of officials' entitlement to make authoritative decisions is grounded on morality and not on a purely legal construct such as Hart's rule of recognition. For Hart's position ultimately requires the tautological dependence of the "legitimacy" of official actions upon "law." Finally, in its broadest signification, a new theory might directly reverse the "might makes right" world view of both positivism and legal realism.

FOOTNOTES

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**Numbers in the format pg468 etc. refer to the pagination of the original article.

[FN1]. Holmes, *The Path of the Law*, 10 HARV.L.REV. 457, 461 (1897), reprinted in COLLECTED LEGAL PAPERS 167 (1921).

[FN2]. *See, e.g.*, K. LLEWELLYN, JURISPRUDENCE 29-30 (1962) ("central as are the judges' actions in disputed cases, there is a vast body of other officials whose actions are of no less importance; quantitatively their actions are of vastly greater importance").

[FN3]. *See* G. GILMORE, THE AGES OF AMERICAN LAW 90-91 (1977).

[FN4]. For an overview of legal realism, *see* W. RUMBLE, AMERICAN LEGAL REALISM (1968); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). For a brief critique, *see* L. FULLER, THE LAW IN QUEST OF ITSELF 51-65 (1940).

[FN5]. To be sure, a regime that behaves erratically may hold its population in check through fear, as in Stalinist Russia or Nazi Germany. But it is possible to discern two areas of state activity in this regard. The first includes what might be called "political behavior," and the very inconsistency of official behavior in this sphere would generate quite consistent messages to the public, such as "never criticize the government" or "never argue with the Gestapo." The result is, of course, extreme order and apathy. Thus it might be argued that a reign of terror in a totalitarian state is inconsistent official behavior that will maximize official authority. A corollary result might also be a severe constraint on the state's ability to control specific behavior, because the citizens will simply avoid that sphere of activity subject to erratic official action. The second area of state activity—involving nonpolitical questions such as tort law or family law—can remain relatively free of the erratic behavior of the political sphere in such a situation.

The discussion of "power" in this essay refers to the second area. The first area is more properly described as officials' "freedom" than "power," for it refers to the situation where officials can do whatever they want because the public has withdrawn out of fear of erratic and unpredictable official sanctions. It is the second area in which real "power" consists—the power to control the behavior of the public. For the officials to accomplish this kind of control, they must behave with enough consistency so that the public will know what is expected and so that the public will not simply withdraw from all activity in the area. For example, if traffic lights

were to flash erratically, if the meaning of "green" were changed to "red" without warning several times an hour, and if penalties for infraction were extremely severe, the result would be that no one would drive a car. The system would have failed completely to control traffic; the officials would have no "power" over traffic patterns. *See Fuller, Irrigation and Tyranny*, 17 STAN.L.REV. 1021, 1027-28 (1965) (discussing "power" as it is used here). Such a system, though in accordance with some of the strictures of legal realism as to proper official behavior, would clearly be subject to moral objections. *See pp. 509-13 infra*.

[FN6]. Instead K might view "unclean hands" as a contribution to his ability to predict slight deviations of official behavior from the general prediction made by K's attorney. Of course, the more K investigates the history of equitable relief, the nature of courts, etc., the more he is on his way to becoming his own attorney.

[FN7]. Recent writings on the complexity of "rules" and how they are related to less tangible notions such as "policy" or "structure" or "nature of a court" may be read as an implicit criticism of the entire "rules" approach in the study of legal systems. *See, e.g., D'Amato, Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L.REV. 1129 (1975); Dworkin, *The Model of Rules*, 35 U.CHI.L.REV. 14 (1967); Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968).

[FN8]. H.L.A. HART, THE CONCEPT OF LAW 138-43 (1961).

[FN9]. *Id.* at 139.

[FN10]. Currie, The Supreme Court and Federal Jurisdiction: 1975 Term, 1976 SUP.CT.REV. 183. Currie adds to his indictment:

Nor is the problem confined to a few of the Justices. The unfortunate opinions noted in the preceding paragraphs were written by six different Justices. The Justice who protested loudly against distortion of the appeal statute in *Thermtron* [*Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)] left out the damaging legislative history in *Moe* [*Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976)]; the Justice who called attention to the abuse of precedent in *Francis* [*Francis v. Henderson*, 425 U.S. 536 (1976)] abused it himself in *Franks* [*Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976)]. The three who wrote none of these opinions joined several of them.

Id. at 218-19.

[FN11]. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV.L.REV. 1, 1-2 (1975).

[FN12]. H.L.A. HART, *supra* note 8, at 2.

[FN13]. *Id.* at 97-107. The rule of recognition is a "secondary" rule of law in Hart's system, the only rule whose pedigree does not trace to another rule of law but is instead rooted in social acceptance. All the other rules of law in the system (the "primary" rules) derive their validity from the rule of recognition. Rules that are not "valid" in this sense are simply not rules of law (*e.g.*, rules of etiquette). A rule of recognition may be as complex as a constitution or as simple as the rule "whatever the King enacts is law." *See id.* at 97-114. I have elsewhere attempted a critique of Hart's concept of the rule of recognition. *See D'Amato, The Neo-Positivist Concept of International Law*, 59 AM.J. INT'L L. 321, 322-23 (1965).

[FN14]. H.L.A. HART, *supra* note 8, at 133. This accords with Hart's central purpose: to differentiate legal rules from other social rules. Is this distinction realistic? Compare Fuller, *Human Interaction and the Law*, 14 AM.J.JURIS. 1 (1969).

[FN15]. Hart might respond that the concept of an "official" cannot be unpacked without resort to a rule that is implicit in the entire fact situation described in the text. *See* H.L.A. HART, *supra* note 8, at 121-32, 144-50. Hart indeed speaks ambiguously of two different concepts of a "rule"—a rule that may be explicitly formulated in words and a rule that is inferred from action. *See* Lucas, *The Phenomenon Of Law*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 85-86 (P. Hacker & J. Raz eds. 1977). Thus a rejoinder to Hart might show that the reasons given by the Machovian court in the text render it impossible to formulate any particular rule. More precisely, assume that Hart derives rule X from facts A, B, and C. At the moment of derivation, rule X may account for those facts. But then is rule X to be frozen, so that a new fact that occurs the next day, fact D, would be violative of rule X and hence "illegal"? Or would the new fact D yield a new rule, rule Y, that modifies X? It would appear that the notion of an implicit rule, which is so important in Hart's derivation of the "rule of recognition" from given social facts, *see* note 13 *supra*, cannot easily accommodate post-rule facts that either modify the rule or are illegal in light of the rule. The same problem confronts traditionalist notions of customary law. *See* A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 7-9, 52-56 (1971).

[FN16]. Taylor, *Law and Morality*, 43 N.Y.U.L.REV. 611, 620-23 (1968).

[FN17]. *Id.* at 624-25 & n. 16 (citing *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951)).

[FN18]. *Id.* at 625.

The Illinois Supreme Court recently ruled that a child not conceived at the time negligent acts were committed against its mother has a cause of action for its resulting injuries. *Renslow v. Mennonite Hospital*, 46 U.S.L.W. 2116, 2116 (Ill., Aug. 30, 1977). The majority opinion acknowledged that the ruling was against the precedents, but found a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother. The hospital's negligence consisted of transfusing RH-positive blood into the future mother, who had RH-negative blood. The mother, who was 13 years old at the time of the transfusion, suffered no direct ill effects, but the child born 11 years later suffered extensive injuries from hemolytic disease.

[FN19]. H.L.A. HART, *supra* note 8, at 87-88. Hart says that the internal aspect of rules is more than a mere matter of "feelings," *id.* at 56, and that the notion of "obligation" to obey rules is something more than the gunman situation—"A orders B to hand over his money and threatens to shoot him if he does not comply"—"writ large," *id.* at 80. But are these statements consistent with Hart's overall theory that once the officials are identified according to the rule of recognition, they may enact even immoral legislation that the citizenry would internalize and feel a sense of obligation to follow? Hart insists that evil laws are still valid laws. *Id.* at 198. But then what is the difference between the gunman situation writ large and the state? Hart attempts to overcome this difficulty through an ordinary language approach to the concept of "obligation." *Id.* at 79-88. As one writer has persuasively noted, however, this argument is at direct variance

with the rest of Hart's book. *See* Hill, *Legal Validity and Legal Obligation*, 80 YALE L.J. 47, 58-67 (1970). In brief, Hart seems to want to have his argument both ways: that the morality of a rule is no test for its validity, but that the sense of obligation that people have in obeying the sovereign is founded to some extent on notions of rightness. Yet Hart steadfastly avoids contaminating his rule of recognition with any moral content and denies that the morality of laws might serve as a test of the legitimacy of the sovereign.

[FN20]. This statement, of course, assumes that the citizen is capable of free choice. The external point of view, on the other hand, is causally deterministic. Legal realism seems squarely grounded in the possibility of choice and in the free will of the subjects of law; determinism would not only deny meaning to "law" in this sense but also to all ethical choice. *See generally* R. HARE, *FREEDOM AND REASON* (1963); C. VON WRIGHT, *EXPLANATION AND UNDERSTANDING* 160-67 (1971).

[FN21]. *See* p. 469 *supra*.

[FN22]. Taylor, *supra* note 16, at 621-22 (discussing J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 152-97 (2d ed. 1921)) (footnote omitted).

[FN23]. *Id.* at 622.

[FN24]. A more general treatment of the factor of individualizing a norm is H. KELSEN, *The Idea of Natural Law*, in *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 27, 41-43 (O. Weinberger ed. 1973). Kelsen's treatment is criticized in Paulson, *Book Review*, 42 U.CHI.L.REV. 768. 781-82 (1975).

[FN25]. K could perform this intermediary function if he found the ordinance on the books, researched relevant cases, studied the operation of courts and policemen, and thus determined how the ordinance might apply to himself.

[FN26]. Taylor, *supra* note 16, at 625.

[FN27]. *See* pp. 483-85 *infra*.

[FN28]. *See* pp. 486-91 *infra*.

[FN29]. H.L.A. HART, *supra* note 8, at 131-32.

[FN30]. *Id.* at 132. What would happen if a judge overruled an established precedent under Hart's thesis? Hart presumably could not say that the judge is thus engaged in "legislation," since his positivism recognizes the notion of judicial legislation as a proper form of legal activity only in the "penumbral" aspect of rules (such as when a situation is not clearly covered by the most relevant rules), but not in the "core." *Id.* at 125-27. *See* D'Amato, *Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence*, 14 W.ONT.L.REV. 171, 185-88 (1975). For a judge to overrule the "core" of a prior precedent would, under Hart's theory, necessitate labeling such overruling "invalid." Yet the rule of

recognition requires that there be no invalid rules. Hence we must conclude that the judge is not really a judge or that the overruling is inexplicably ultra vires Hart's theory.

[FN31]. Still trying to preserve the "model of rules," Dworkin argues that if we give effect to policies and principles we may find that in a hard case what looks like a decision contrary to a preexisting rule may be made consistent by a wider view of "rule." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22- 31, 71-80 (1977) (sharp analytical difference between "rule" and "principle"). But would not his thesis, to the extent that he wants to keep it within positivism's "model of rules," be better served by a theory that does not distinguish sharply between rules, policies, and principles? One such theory is presented in Hughes, *supra* note 7. Dworkin's modification of positivism appears to be premised upon an initial determination of whether a given case is a "hard case" or not. Dworkin, *Hard Cases*, 88 HARV.L.REV. 1057 (1975). Suppose that when Taylor's fetus case arises all prior cases have ruled that the fetus has no personal injury rights, and there are no contrary principles or policies articulated in any judicial decision. How would we know that this was a "hard case" where a settled rule of law might be challenged by an appeal to justice? Rather, it would seem to be an easy case until, suddenly, the unexpected decision overrules prior cases, thereby showing that it was a hard case after all. In adhering to the rule model, Dworkin may have succeeded only in substituting a different kind of test—whether a case is a "hard case" or not—that raises as many problems as it solves.

[FN32]. Some thoroughgoing realists might add to Taylor's thesis as follows: the lawyer should have studied other factors, such as what the judge had for breakfast the morning he decided the case or perhaps whether the judge's wife ever had an aborted pregnancy.

[FN33]. For an early work, see S. POISSON, *RECHERCHES SUR LA PROBABILITE DES JUGEMENTS EN MATIERE CRIMINELLE ET EN MATIERE CIVILE, PRECEDES DES REGLES GENERALE DU CALCUL DES PROBABILITES* (1837). For other examples and references, see note 35 *infra*. See also G. BOOLE, *AN INVESTIGATION OF THE LAWS OF THOUGHT* 244 (1854).

[FN34]. For a full discussion, see T. FINE, *THEORIES OF PROBABILITY* 238-50 (1973).

[FN35]. See, e.g., L. SAVAGE, *THE FOUNDATIONS OF STATISTICS* 30 (1940); Anscombe & Aumann, *A Definition of Subjective Probability*, 34 *ANNALS MATH. STATISTICS* 199 (1963).

[FN36]. This assumes that the driver has no privilege or officially tolerated excuse.

[FN37]. Of course, from the realist perspective an unwritten opinion is still the official's action against the speeding driver. But the issue is the lawyer's thought processes in attempting to predict what the judge in the specific case will do. A factor entering into that prediction is whether the judge will view his own decision as having a deterrent effect. If the decision will in fact go unpublished or unnoticed, the judge might well feel less constrained to adhere to enacted rules.

[FN38]. Alternatively, respect for the law might be encouraged if the driver perceives that the officials are not so irrational as to enforce the speed limit rule within a deviation of two miles per hour.

[FN39]. Even if K seeks a declaratory judgment before taking any action, he still may want to predict what that judgment would be since it will likely influence official behavior. The statement in text includes such judgments in the category of what officials do.

[FN40]. *See* p. 469 *supra*.

[FN41]. The attorney indeed may not be able to cite "rules" or explicit reasons to justify his particular predictions; the case may simply resemble other situations he vaguely remembers from the past. Experience has been called the best teacher.

[FN42]. *See* L. FULLER, *THE MORALITY OF LAW* 81-91 (rev. ed. 1969).

[FN43]. Conversely, people might refrain from acting altogether, in which case the officials' power would also be reduced. *See* note 5 *supra*.

[FN44]. *E.g.*, U.S. CONST. art. I, § 9.

[FN45]. If the judge wants to maximize his personal power, he might well decide to contradict the lawyers' predictions. But in maximizing his own power he reduces that of all the other officials in the system. Hence we might expect a variety of sanctions on judges to make sure that they do not deviate in this fashion, including reversal by an appellate court, critical comments by fellow judges, and outright removal from the bench by the other judges. An important contribution by the legal realist school is the emphasis on the psychology of judges. People who become judges are likely to have the caution, conservatism, and disdain for individual power maximization that would support the thesis proposed here. Additionally, a judge may perceive himself as a member of a college of judges against whom are arrayed litigants and lawyers; in response to that perception, the judge might want, above all, to keep the system stable by eschewing erratic personal behavior or the feeling of power that might come from upsetting expectations in a given case. He may perceive his own place in society and that of his brethren on the bench as dependent upon reducing to a minimum the frustration of such expectations.

[FN46]. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *MANAGEMENT STATISTICS FOR UNITED STATES COURTS* 415 (1974).

[FN47]. In a recent empirical study of attitudes of state trial judges, one jurist offered the following expression of concern that parties to a lawsuit receive some satisfaction in court: "There will always be dissatisfied litigants, but when a substantial majority of litigants are dissatisfied by the treatment they have received at the hands of a particular judge, such situation is a fair indication that such judge is not performing his duties properly." Jackson, *Salient Interactions: The State Trial Judge and the Legal Profession*, 1 JUST. SYS. J., Sept. 1975, at 24, 25.

[FN48]. A recent case affords a striking example. Judge McGarr in Chicago held that the Hunt family illegally exceeded speculative limits on soybean futures contracts, but at the same time denied the motions for relief filed by the plaintiff Commodity Futures Trading Commission.

These motions included an injunction barring similar illegal trading in the future, a motion that would have forced the Hunts to liquidate their soybean positions, and a motion that would have made them disgorge all illegal profits. The judge himself described his decision as "incongruous," although spokesmen for both sides expressed satisfaction with the decision. Wall St.J., Sept. 29, 1977, at 15, col. 2.

[FN49]. "The past fifty years have seen arbitration growth spurred by legislation, a friendly judiciary, an overburdened court system, cost-conscious business executives and, perhaps, the realization that viable alternatives to litigation are possible in many commercial transactions." Aksen, *Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements*, 28 BUS.LAW. 595, 595 (1973) (footnotes omitted). See Emerson, *History of Arbitration Practice and Law*, 19 CLEV.ST.L.REV. 155, 160-63 (1970); N.Y. Times, Dec. 11, 1977, at 51, col. 1.

[FN50]. A prediction of future judicial behavior might underlie a claim for present judicial relief in some situations. In *Brown v. Multnomah County Dist. Court*, No. SC 25407 (Ore.Sup.Ct. Oct. 12, 1977), a state statute "decriminalized" the first offense of driving under the influence of intoxicants (DUII). It imposed only a \$1,000 fine and removed criminal trial safeguards such as proof of guilt beyond a reasonable doubt. Judge Linde, writing for the majority, held that the statute retained sufficient characteristics of a criminal charge to require compliance with constitutional guarantees. He rejected, however, the defendant's claim that first-offense DUII must be tried as a criminal prosecution because the statute makes such prosecution an element in the second offense, which is a crime. Judge Linde reasoned that this use of the first offense in the second can properly be challenged only in the later prosecution. *Id.* at 17 n. 15. But one might argue that Judge Linde himself could not predict with any degree of certainty how a future court might view the argument. If the future court were to hold that the first noncriminal offense could not be an element in the second because the first trial was not conducted on the basis of proof beyond a reasonable doubt, there never could be a "second" offense for DUII. On the other hand, the future court might avoid this anomalous result by holding simply that only the judgment of the trial court in the first offense need be proved beyond a reasonable doubt (i.e., that the judgment was in fact rendered to this named defendant). But such a holding would effectively hold irrelevant a material element of the prosecution for a "second" offense, namely, whether the "first" offense was established beyond a reasonable doubt. Since Judge Linde could not predict how a future court might decide the issue of relevance, this unpredictability militates in favor of granting standing to the present appellant to contest the future use to which the first-offense conviction should be put.

[FN51]. It is of great significance that in many legal systems lawyers, judges, and legislators receive similar training. See, e.g., McDonald & Turner, *Lawyers and Legislatures*, 18 CLEV.ST.L.REV. 541, 541 (1969) (from 1929 to 1937 "well over half of the members of the Senate and House" were lawyers). To be sure, some decisionmakers in these systems are not lawyers, but even they indirectly receive some legal education through repeated exposure to lawyers' arguments.

[FN52]. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962) (discussing "passive virtues" of courts in restricting their jurisdiction); K. LLEWELLYN, *THE COMMON LAW*

TRADITION 219-22 (1960) (discussing "appellate judicial restraint which is at the same time a matter of appellate judicial wisdom").

[FN53]. Law students with no "feel" at all probably would be weeded out well before graduation or might fail the bar exam after graduation.

[FN54]. When society deems it necessary to be crystal clear about certain things, it invents rules and signals that result in greater clarity. A traffic signal removes what otherwise would be "driver's discretion" and replaces it with a green light that always means go and a red light that always means stop. Later, society may reintroduce a certain amount of discretion if it feels that the rules could be too rigid—for example, a yellow light is added to the red and the green.

[FN55]. H.L.A. HART, *supra* note 8, at 143.

[FN56]. Hart argues that predictions of what a court will do "rest ultimately on an appreciation of the non-predictive aspect of rules, and of the internal point of view of the rules as standards accepted by those to whom the predictions relate." *Id.*

[FN57]. There is, of course, a moral dimension to our discomfort over the red-hair decision, a facet ignored by prevailing legal theories. *See* pp. 509-13 *infra*.

[FN58]. H.L.A. HART, *supra* note 8, at 89-96. *See* note 13 *supra*.

[FN59]. Dworkin, *supra* note 7, at 43-44.

[FN60]. Even when rules have an "open texture" in Hart's system, the core of the rule still provides a standard (even if only a standard for determining the boundaries of the penumbral area within which judicial "legislation" is permissible). *See* H.L.A. HART, *supra* note 8, at 123; D'Amato, *supra* note 30, at 185-88.

[FN61]. *See* D'Amato, *supra* note 7; Dworkin, *supra* note 7, at 35-40.

[FN62]. H.L.A. HART, *supra* note 8, at 8-10.

[FN63]. Hart claims that "laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby." *Id.* at 22. Hart is arguing that laws may be complete as laws even if there is no promulgation. That the laws themselves must at least be available for inspection so that citizens might look them up is not a necessary part of his argument. It is consistent with Hart's theory that some people might discover what the laws are when they are arrested or otherwise punished for violating the secret laws.

[FN64]. L. FULLER, *supra* note 42, at 49-51.

[FN65]. Hart, of course, recognizes that the rule of recognition can change, but he is committed by his concept of postivism to minimize or ignore the possibility that changes in the rule of recognition can be dependent upon the substantive laws that are created, modified, or destroyed

by officials acting under the rule of recognition. If Hart were to accept that possibility, his notion of the rule of recognition as a separate and determinate set of legal- constitutional rules would be undermined, and he would move towards a more holistic view of law-authority relationships closer to, though not necessarily coincident with, the theories put forth by Fuller.

[FN66]. A further strategic dimension is worth noting. Even a decision that was unpredictable can have a stabilizing influence if it is accepted by the public as a fair and just result. For example, the first decision giving rights to a fetus may be a surprise, but if it is perceived by the public as more fair than the common law rule there will be a gain in popular satisfaction with official decisionmakers that may offset concern over the element of surprise in the judgment. Of course, from the officials' perspective a preferred strategy would be to overturn the common law rule by statute. Legislative action would improve the fairness of the law without upsetting the expectations of parties who relied on the old common law rule before the statute was enacted. The gains from prospective legislation are so great that statutes and codes are the primary source of rules in today's advanced legal systems.

In contrast to the fetus example, the red-hair case might well not be perceived by the public as a "fair" result. Thus Rex's decision would not only upset prior expectations, but would lack the redeeming feature of public approbation. Although Rex's decision in the red-hair case would be just as authoritative as his decision in a rights-for-fetuses case, his authority suffers more in the former. This distinction suggests a normative dimension to legal analysis. *See pp. 509-13 infra.*

[FN67]. G. ORWELL, *BURMESE DAYS* 2 (1934).

[FN68]. The attorney's prediction must also take into account the possibility of a crackdown against bribery based on moral considerations. *See p. 511 supra.*

[FN69]. Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U.PA.L.REV. 833, 837 (1931).

[FN70]. *Cf.* N.Y. Times, Oct. 16, 1977, § 4, at 6, col. 1 (increasing scrutiny of judicial conflicts of interest).

[FN71]. *See, e.g.*, MICH.SUP.CT.ADMIN.R. 926.1 ("Civil and criminal actions must be assigned [to judges] by lot when they are commenced. Each judge of a judicial circuit must be given, as nearly as possible, an equal number of actions from each of the following classifications: automobile negligence, domestic relations and other general civil.")

In contrast, it would be absurd to say that a legislator is interchangeable with any other legislator; this may point to the greatest conceptual difference between legislation and adjudication. *But cf.* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV.L.REV. 1281 (1976) (suggesting that judges should and often do act more like legislators in complex public law litigation).

[FN72]. Role-playing was acknowledged by antislavery judges who enforced laws like the Fugitive Slave Act prior to the Civil War. As "jurists" they felt compelled to apply the standard of morality prescribed by law, but as "citizens" they viewed the injustice and immorality of

slavery as evil. R. COVER, JUSTICE ACCUSED 119-25 (1975).

[FN73]. Although it is argued above that there is nothing inconsistent about Rex's retrospective prediction when Rex is not asked to play the role of a sovereign but can simply play himself, in the more normal situation of a complex legal system the idea of playing the role of judge introduces a general and quite predictable element in the situation.

[FN74]. L. FULLER, *supra* note 42, at 245-53.

[FN75]. Compare 64 HARV.L.REV. 1005 (1951) with Pappe, *On the Validity of Judicial Decisions In The Nazi Era*, 23 MOD.L.REV. 260 (1960). For discussion of related cases, see W. FRIEDMANN, LEGAL THEORY 351-54 (5th ed. 1967); Bodenheimer, *Significant Developments in German Legal Philosophy since 1945*, 3 AM.J.COMP.L. 379, 389-90 (1954).

[FN76]. H.L.A. HART, *supra* note 8, at 254-55.

[FN77]. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV.L.REV. 593, 619 (1958).

[FN78]. See W. FRIEDMANN, *supra* note 75, at 353; Hart, *supra* note 77, at 619.

[FN79]. Austin's version of positivism might arguably rule out retroactive statutes. See Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHIL. & PUB. AFF. 132, 152-57 (1975).

[FN80]. H.L.A. HART, *supra* note 8, at 55-56. Since any rule can be changed by the legislature in Hart's scheme, one wonders whether the "internal aspect" could change as abruptly. The hypothetical parliamentary statute discussed below, see pp. 512-13 *infra*, raises interesting issues as to Hart's "internal aspect." Would the public immediately "internalize" it just because it was a valid statute?

[FN81]. Although Fuller criticizes Hart's position along these lines, he finally agrees with Hart that a retroactive criminal statute is the best course of action; the result seems quite damaging to Fuller's own position. See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV.L.REV. 630, 661 (1958).

[FN82]. See W. FRIEDMANN, *supra* note 75, at 352-53; Pappe, *supra* note 75, at 264-65.

[FN83]. See Hart, *supra* note 77, at 618.

[FN84]. For example, physicists ignored the null result of the Michelson-Morley experiment for eighteen years; Einstein then took it seriously and in 1905 published his special theory of relativity, which completely transformed the Newtonian view of the universe. See generally T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52-65 (2d ed. 1970).

[FN85]. Austin insisted that the sovereign was a determinate person or group of persons. See J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 198-214 (2d ed. 1861). The insistence

upon defining an actual person or persons in any legal system as the "sovereign" led to some results which seem to throw doubt upon the entire theory. For example, Austin found that the "sovereign" in the United States consisted of those persons who elect a majority of state legislators in three-fourths of the states, because these persons have the power to amend the Constitution under Article V. *Id.* at 222-23.

[FN86]. H.L.A. HART, *supra* note 8, at 97-107.

[FN87]. *Id.* at 114-18 (examining impact on legal systems of interruptions in political control).

[FN88]. Dworkin has recently argued that "jurisprudential issues are at their core issues of moral principle, not legal fact or strategy." R. DWORKIN, *supra* note 31, at 7.

[FN89]. *See* P. VINOCRADOFF, *COMMON SENSE IN LAW* 13 (3d ed. 1959). The idea of a connection between law and morality has been argued most forcefully in the writings of Professor Fuller. (Of course, before the positivism of Bentham and Austin the theory of "natural law," which posited a necessary relation between law and morality, was the prevailing theory.) But the terrain for a normative theory of law remains largely uncharted. Fuller's attempt to find a sort of procedural natural law in his idea of the "internal morality of law," L. FULLER, *supra* note 42, at 41-44, has been subjected to a trenchant criticism by Professor Hart. *See* Hart, *Book Review*, 78 *HARV.L.REV.* 1281, 1284 (1965). Nevertheless, Fuller's idea of purpose—a formally teleological concept of law as opposed to an existential concept, *see* C. Taylor, *The Explanation Of Behavior* (1964)—seems to have survived Hart's criticisms. Not only does it point to a richer analysis of legal systems, *see* D'Amato, *supra* note 30, at 188-92, but it also seems to capture, in a preliminary way, the only possible reconciliation of modern legal theory with the is/ought fusion that underlies the natural law tradition. *See* L. FULLER, *supra* note 42, at 145-51.