

## **HARD CASES AND LEGAL VALIDITY: HART'S INSIGHT**

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### **ABSTRACT:**

I argue that the internal normative structure of law that Hart places at the centre of this theory are often overlooked in contemporary debates about legal theory, and particularly the debate about hard cases. I argue that this idea is important for explaining law's distinctive moral significance, namely, its ability to coordinate among people as independent actors, entitle to set and pursue their ends for themselves. I argue that this approach to law marks a departure from many positivist approaches, and, crucially, that it can solve the problem of hard cases, when properly understood.

### *0. Introduction*

The question of the role of morality in law has dominated analytic jurisprudence for the past half a century. Positivists ask how, if the existence of a legal system, and which legal system exists are matters of social fact, one can explain the prevalence of morality in law. Non-positivists wonder, if law is necessarily moral, then what role do social facts play? They thus dispute their moral and legal significance.

One central focus of this debate is the argument from *hard cases*.<sup>1</sup> Hard cases are cases where the posited law points to a clear outcome, but the question of what the law requires remains open. Consider *Riggs v. Palmer*, the pivotal case at issue.<sup>2</sup> *Riggs* is a case in which a grandson, Elmer Palmer, murdered his grandfather in order to expedite his inheritance. Elmer was clearly named as a beneficiary in the will, the will was validly enacted, and there was no posited law overriding the Statute of Wills, the governing statute at the time, or prohibiting murderers from inheriting. Nonetheless, the majority held it is the “universal law administered in all civilized countries”<sup>3</sup> that no one should profit from his own wrong, and for this reason denied Elmer the inheritance.

This case poses a challenge for positivists because it appears that the Court relied on a rule that had no posited source in rendering its decision. Even so, the judges argued that they were deciding what the law *is*, rather than what it ought to be. This calls the two fundamental positivist tenets regarding the social nature of law into question. It challenges the sources theses, the principle that social sources are necessary for legal validity, because it appears that the principle that no one should profit from his own wrong is an unposited legally valid rule. This also challenges the separation thesis, since the mere fact that the posited law pointed to a given outcome did not settle the question

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<sup>1</sup> Ronald Dworkin *Taking Rights Seriously*, (Harvard University Press: Cambridge, MA). Cf. esp. “The Model of Rules,” ch. 2.

<sup>2</sup> 115 NY 506, 22 NE 188 (1889). [Hereinafter *Riggs*.] Dworkin raised a number of cases in this discussion to illustrate his point, but *Riggs* is the one that has most gripped theorists’ imagination and dominated subsequent discussions of the problem. This is probably because it is most plausibly characterized as a judgment of what the law *is* rather than an alteration of the law based on what it ought to be. See ch. 2 generally for Dworkin’s famous attack on legal positivism from the problem of hard cases.

<sup>3</sup> *id.* at 511f; 190.

of what the law required; the majority still looked to morality in order to decide the issue. The intuitive plausibility of *Riggs* suggests that a complete theory of law must be capable of explaining the legal validity of these further considerations as well.

The parties to this debate take *Riggs* to illustrate the possibility of legally binding moral considerations that are not anticipated by posited ones. They thus take the challenge posed by *Riggs* to lie in the possibility of explaining the legal force of these considerations, given that the existence of a legal system is a matter of social fact. This throws the debate about the nature of law into sharp relief. Legal positivists respond by acknowledging the role of morality in law, though insisting that its presence is in turn a matter of social fact. Dworkin and his followers argue that law is an aspect of morality, one that is dependent on contingent facts about the system.

I take a different tack. Lost in this dispute is one of Hart's central contributions to legal philosophy, namely centrality of law's internal normative structure to a theory of law. Beyond remedying the structural deficiencies with Austin's view, Hart sought to explain the fundamental effect of law on the normative landscape of a community. In arguing for the importance of secondary and power-conferring rules in a theory of law, Hart remarks,

if such rules of this distinctive kind did not exist we should lack some of the most familiar concepts of social life, since these logically presuppose the existence of such rules. Just as there could be no crimes or offences and so no murders or thefts if there were no criminal laws of the mandatory kind which do resemble orders backed by threats, so there could be no buying, selling, gifts, wills, or

marriages if there were no power conferring rules; for these latter things, like the orders of courts and the enactments of law-making bodies, just consist in the valid exercise of legal powers.<sup>4</sup>

Hart is here alluding to a central aspect of law. Among the various non-legal advantages or disadvantages that might result from the establishment of a legal system, law also introduces new, distinctively *legal* ways that people might relate to one another. These might be related to underlying moral considerations that bear on people's relations, but they are not reduced to them, and they are not wholly explained in terms of underlying, non-legal concepts. So, e.g., just as the rules of a game make possible new ways to move, score, win, lose, take a turn, etc. according to its rules, so too does the introduction of a system of legal rules to a community make it possible for people to buy property, sell it, own, steal from, get married, commit a crime, and bear other relations towards one another. These are distinctive in that they expand ways that people can relate to each other, enriching the normative possibilities of a community, and they are capable of authorizing the state to uphold them. Unlike games, however, and clubs, universities, and other social institutions, the establishment of law is fundamental to the normative structure of a community. Hart underscores its importance:

the introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel. Not only was

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<sup>4</sup> *Concept of Law*, 32.

it an important step; but it is one which, as we shall argue in Chapter IV, may fairly be considered as the step from the pre-legal into the legal world.<sup>5</sup>

The introduction of secondary power-conferring rules and the legal powers and institutions that they establish is one of the central organizing factors of modern society. The establishment of a system of law is a fundamental a societal shift, as important and innovative, Hart contends, as the invention of the wheel.

I will elaborate on this idea and argue for its moral significance. I will argue that law, so understood, coordinates the actions of people conceived as independent rational actors, capable of setting and pursuing their ends for themselves. In essence, it takes its subjects to be “choosing beings,” as Hart remarks in his discussion of the role of excuses in law, or as a community of “choosing beings,” capable of exercising their power of choice independently, but whose ends and actions can conflict with one another.<sup>6</sup> This is morally valuable because, as I shall argue, it both makes possible a range of normative relations that people can bear towards one another and secures these with the power of the state, while at the same time guaranteeing that the state will secure just these relations, leaving all other interactions free from the threat of state interference. This does not mean that law is necessarily just, or that the posited law must satisfy some moral

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<sup>5</sup> *Concept of Law*, 41f.

<sup>6</sup> As will become clear, this isn't the exact picture of law that I defend, but like Hart, I think it is part of the idea of law as the union of primary and secondary rules that it takes its subjects to be rational actors capable of setting their own ends. See H.L.A. Hart, “Legal Responsibility and Excuses,” *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford University Press, Oxford UK 1968) defending a “mercantile view” of law, on which people should consider “law not as a system of stimuli but as what might be termed a choosing system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.” 44

criteria in order to be valid; positivists wholeheartedly deny both theses. But, I suggest, when the law is just, the enriched normative relations that law makes possible are *morally* valuable, because, among other things, they allow people to interact as independent actors.

I will argue that this important aspect of law follows from Hart's conception of law as the union of primary and secondary rules, united by an ultimate rule of recognition. Together, these explain the idea of law as a system of rules, and, resultingly, the notion of a rule as a valid standard of the system. Specifically, Hart's conception of law can explain law as a binding system of rules, issued by an authorized source and backed by a public sword. As Hart painstakingly argues against Austin, a theory of law that ignores these crucial notions fails to explain law. Discussions of the normative significance of legal positivism thus ought to attend to this crucial distinction between Hart and Austin.

The idea that law governs people capable of setting and pursuing ends for themselves makes law specially vulnerable to hard cases like *Riggs*, or so I shall argue. This is because it is always possible for rational actors to act so as to subvert law's aims, as Elmer did in *Riggs*. Dworkin is thus right to hold that the problem of hard cases is inescapable for positivists. However, I argue, those very features of law that make it vulnerable to hard cases also gives it the resources to resolve them. When the law confers a system of rights, it also reserves the authority to uphold them, and the decision in *Riggs* is just an attempt by the law to reassert its authority over one who usurped its power for illegitimate ends. Nothing more than appeal to law's systematic nature, as an

authoritative system of rules coordinating the activities of independent actors, is needed to resolve this case. Most importantly, no further appeal to morality is necessary. My solution thus remains a positivist one.

### *I. Riggs v. Palmer*

*Riggs* is a civil case brought by Francis Palmer's two daughters, Mrs. Riggs and Mrs. Preston against his grandson, Elmer Palmer, after Elmer was charged and found guilty of murdering his grandfather in order to expedite his inheritance. The plaintiffs argued that notwithstanding the validity of the will, and the clear language, clearly bequeathing to Elmer the remainder of the estate, it is an affront to law and to common sense that it should allow the property to devolve to the murderer in such a circumstance. Elmer was clearly set to inherit under the Statute of Wills that governed the case at the time, and there were no contravening posited laws overriding the Statute. Nonetheless, the Court split in its judgment, with the majority siding against Elmer. It is true, the majority argued, that under the posited law, Elmer stood to receive his grandfather's inheritance. The judges also conceded that this was the law governing the matter, and that there were no further posited considerations that bore on the issue. However, this alone did not settle the question. Instead, they argued, it was a "fundamental maxim of the common law"<sup>7</sup> that is grounded in the "universal law administered in all civilized countries"<sup>8</sup> that no one should be permitted to profit from his own wrong, and that this principle superseded Elmer's entitlement to inherit under the governing statute. In other words, they argued,

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<sup>7</sup> *Riggs* at 511; 190, as per Earl, J.

<sup>8</sup> *id.* at 511f; 190.

despite its lack of recognized pedigree, and despite the fact that the posited law points to the opposite conclusion, the principle governing the issue in this case is that no man should profit from his own wrong, and that it is legally binding because of its appropriateness to the circumstances.

The controversy that the Court encountered in rendering a judgment in *Riggs* did not arise from gaps in the law, or because the law on the matter was unclear. There were no omissions or mistakes in language in the governing statute. Nor was *Riggs* a borderline case where the court had to decide where to draw the line on an issue. The facts in *Riggs* clearly fell under the statute, and the wording of the statute was clear on the matter: the will was a valid one, and Elmer was designated as the beneficiary. The judges also all agreed about what happened; the facts of the case were not in dispute. In all these respects, *Riggs* was an easy case. Rather, the difficulty that the Court encountered in *Riggs* was that the posited law did not, on its own, settle the question of what the law on the matter was. Even though they agreed on the facts of the case and what the posited law dictated, the presiding judges continued to dispute what the law required. And, in rendering its decision, the majority in *Riggs* relied on a further, unposited consideration, namely, the principle that no man should profit from his own wrong. Most importantly, the majority insisted that even though this principle was binding in virtue of its merits, not its sources, the decision remained a judgment about what the law *was*, and not what it ought to be. The challenge posed by *Riggs* is to explain the possibility of legally valid considerations that are binding in virtue of their merits, not their sources.

*Riggs* poses a challenge for positivism because it suggests the possibility of legally binding considerations that are valid by virtue of their moral merits, not their sources.

As mentioned in the introduction, positivists counter that the legal validity of considerations binding by virtue of their merits is itself a matter of social fact.<sup>9</sup> Anti-positivists deny that the ultimate test for legal validity can be a social one.<sup>10</sup> None examine the normative significance of a system of rules like the one Hart proposes, and the important normative difference between Hart's idea of law as the union of primary and secondary rules, united by an ultimate rule of recognition, and Austin's command theory of law. Hart, however, objected that Austin's theory lacked this key feature of law, and thus amounted to a "gunman scenario writ large." My claim is that this important advance in understanding the posited law has independent normative significance. It can help to structure a morally important aspect of social life. For this reason, I argue, it can explain law's vulnerability to hard cases like *Riggs*, that are decided on the basis of unposited merit-based principles, but remain a question of law. But, I argue, it can also explain how law, conceived as a system of primary and secondary rules united by a rule of recognition, can resolve them. No further appeal to morality is necessary.

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<sup>9</sup> See, e.g., Hart's Postscript in *The Concept of Law*, p.238; Joseph Raz, "Legal Principles and the Limits of Law," 81 *Yale Law Review* 823 (1972); David Lyons, "Principles, Positivism, and Legal Theory," 87 *Yale Law Journal* 415 (1977), 423-24; Coleman, Jules, "Negative and Positive Positivism," 11 *Journal of Legal Studies* 139 (1982); Waluchow, W.J., *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); Scott J. Shapiro, *Legality* (Harvard University Press: Cambridge MA, 2011).

<sup>10</sup> Dworkin, *Taking Rights Seriously, Law's Empire* (Cambridge: Harvard University Press, 1986); Mark Greenberg, "How Facts Make Law I and II," in Scott Hershovitz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford University Press, 2006).

## *II. The Distinctive Features of Law*

Austin took the problem of legal validity, or the problem of explaining binding force of law, to be the central task for a theory of law. The difficulty lies in reconciling law's social nature with its imperative force. If law binds people categorically, independently of their wishes and inclinations, how can it be a matter of social fact? How is it distinct from morality? On the other hand, if it consists in nothing more than things people say and do, what explains its binding force? In what more can it consist such that its force is not merely a matter of people's practices, and their wishes and inclinations to comply with them? In short, Austin sought to provide a theory identifying the distinctive features of law, and distinguishing law from a society held together by "mutual intercourse" alone. He concluded that law consists in the commands of a sovereign who is habitually obeyed but obeys no one in return, back by a threat of sanction for non-compliance.

Hart inherited this problem from Austin, and, like Austin, took this to be the defining problem for a theory of law. As we know, Hart rejected Austin's command theory of law as reducing law to a "gunman scenario writ large." The "root cause" of Austin's failure is that the basic components of his theory – commands,<sup>11</sup> threats, and habits of obedience – "do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law."<sup>12</sup> An account of legal validity, and the nature of law which it seeks to explain, cannot explain law

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<sup>11</sup> Note that Hart rejected Austin's use of the term "command," and replaced it with the notion of "orders," since even commands imply an element of authority to issue them. *Concept of Law*, 19.

<sup>12</sup> *Concept of Law*, 80.

“properly so-called,” and distinguish a society governed by the rule of law from one held together by “mutual intercourse” alone without appeal to this basic notion. The notion of a rule, and its place within a system of rules, is necessary to explain the basic legal concepts that are familiar to law.

Hart thus famously conceives of law as a system of primary and secondary rules united by an ultimate rule of recognition. In this, rather than orders, threats, and habits of obedience, lies the “key to the science of jurisprudence.” This advance remedies the defects with Austin’s theory, including its inability to explain power-conferring rules, the distinction between acting in a public or private capacity, the persistence of laws and succession of legislative authority, the existence of constitutional democracies, and so on.

More importantly, Hart’s conception of law explains the internal normative structure of law, and the various ways in which the distinctive normative notions that law introduces – legal rights, obligations, permissions, authority – bear on one another. Hart explains how legal rules can serve as reasons for legal conclusions, and how they can authorize the decisions and actions that people take under them. A theory of law that cannot explain these amount to nothing more than the “gunman scenario writ large.”

Hart is careful, however, to limit his account to just the internal normative structure of law; law, he warns, can be put to good or wicked ends, so an account of its normative

structure implies nothing about its moral value.<sup>13</sup> I take issue with this stance, and argue that the distinctive normative structure of law does have independent moral significance. My view remains a thoroughgoingly positivist one, though, in that I appeal to nothing more than law as a system of primary and secondary rules united by an ultimate rule of recognition in order to explain its significance. No further question of the legal validity of unposited moral considerations arises.

To the extent that positivists address the moral value of law, they tend to think of law as a means that can be used to promote good or wicked ends.<sup>14</sup> This is true; however, this characterization of law misses the point. Compare law to, e.g., friendship. Like with law, there is a distinction between the reasons people have internal to a friendship to be good friends, and further non-friendship based reasons people have pursuant to the ends friendship can promote. People can have non-friendship-based reasons to make new friends, be good friends and keep the ones they have, friendships improve people's quality of life and worlds with more friendships are better than those with fewer. However, it mischaracterizes friendship to say that its moral significance lies in the extent to which it furthers these ends. Consider Scanlon's remarks on friendship.

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<sup>13</sup> Hart retreats somewhat from this strong positivist stance with his admission about the "minimum moral value" of law in its requirement that like cases be treated alike, though even for Hart the moral value of this feature is dubious. I will prescind from this controversial aspect of Hart's theory and the difficulties this remark has raised for his theory. My focus is on the moral significance of law as Hart conceives it, but not in its ability to treat like cases alike.

<sup>14</sup> Indeed Andrei Marmor takes this to be a "core commitment" (and the least controversial one) that all positivists share. "Legal Positivism: Still Descriptive and Morally Neutral," *Oxford J Legal Studies* (Winter 2006) 26 (4): 683-704. See especially John Gardner, "On the Supposed Formality of the Rule of Law," in *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press: Oxford UK, 2012), ch.8, emphasizing this idea in connection with legal positivism.

A person who values friendship will take herself to have reasons, first and foremost, to do those things that are involved in being a good friend: to be loyal, to be concerned with her friends' interests, to try to stay in touch, to spend time with her friends, and so on.<sup>15</sup>

To value friendship consists, in the first instance, to place moral value on one's reasons to be a good friend. It is true that, Scanlon notes (citing Moore) "the pleasures of human intercourse" [is] "one of the most valuable things we know or can imagine."<sup>16</sup> Friendship can improve people's lives in many ways. But to take these ends to be what is morally important or significant about friendship misses what is important about friendship and its core moral value, namely the moral importance of being a good friend. It is the values that are internal to friendship and the reasons that these give rise to that are what is morally most important about friendship. So too, I suggest, with law. It's true that law can promote a variety of ends in a community, good or wicked. But to take these to be what is morally significant about law ignores its internal moral value and misses what is morally important about law, namely the rights, authorities, permissions, and so on that it confers. The comparison between law and friendship is fraught and I cannot do it justice in this brief discussion. But I believe the structural similarity in the respect I have outlined is important and instructive.<sup>17</sup>

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<sup>15</sup> Thomas Scanlon, *What We Owe to Each Other*, (Belknap Press of Harvard University Press: Cambridge, MA, 1998), 88. Scanlon is making a general point about the role of value in moral theory here. I am not endorsing this general view; I aim only to draw on his discussion of the value of friendship.

<sup>16</sup> G. E. Moore, *Principia Ethica*, (Cambridge University Press, Cambridge, UK, 1903) p. 187, cited in Scanlon, *What We Owe to Each Other*, 88 (footnote omitted).

<sup>17</sup> See John Gardner, "Nearly Natural Law," *52 American Journal of Jurisprudence*, (2007) 1 for a helpful discussion relating law and friendship.

Positivists often emphasize law's ability to promote stability, predictability, security, etc. within a community and its ability to coordinate people's activities. This cannot be all that law does however. This is because it leaves the distinctive features of law that distinguish it from all other social rules and institutions unexplained. Coordination, stability, predictability, etc. require that people have *some* common and public set of rules or considerations, of which they are all aware, and to which they can all appeal when planning their affairs requires them to take into consideration the activities of others. But this is not all that law provides. As Hart takes pains to show, law not only gives people an indication of how those around them will behave; it gives people a legal *right* to have others behave this way, and imposes a legal *obligation* on others to so behave. Second, in order to confer these rights and obligations on people, law must also be issued from an *authorized source*; otherwise, it consists in the arbitrary exercise of power. Finally, not all harms count as legal sanctions. Instead, law backs these rights and obligations with a *public* sword; it entitles each person to call upon the power of the state in order to protect her rights against others and to enforce people's obligations against one another. These features constitute the distinctive marks of law. An explanation of what law provides that leaves these features out fails to explain law, as opposed to instituting just any set of standards or incentives for coordinating people's behaviour with one another. In order to understand how law governs people's behaviour then, a theory of law must explain these key features that make a system of social rules a legal system.

Hart's solution to the difficulties that Austin encountered was to conceive of law as the union of primary and secondary rules united by an ultimate rule of recognition. They are necessary for explaining the distinctive features of law. They explain power-conferring legal rules allowing people to get married, make wills, contracts, legislate, etc. They are also necessary for explaining the notion of legal obligation, the subjection of officials to legal rules, the distinction between acting in a public or private capacity, the persistence of laws and succession of legislative authority, the existence of constitutional democracies, etc. Most importantly, Hart's conception of law as the union of primary and secondary rules united by a rule of recognition explain how these various authorities and duties fit together as a *system*, structured by the posited rules, and organized as a coherent whole. Hart's conception of law explains how legal rules can serve as reasons for legal conclusions, and how they can authorize the decisions and actions that people take under them. As such, they effect to the important normative relations that people can bear under law, like owning and exchanging property, punishing a crime, being under a legal obligation (or having a legal right) and the other examples that Hart listed in the quotation in in the introduction. As Hart makes clear, a theory of law that cannot explain these has failed to fully explain law. These key features of law are what distinguish law "properly so-called," from the gunman scenario, or a society held together by "mutual intercourse" alone.

### *III. Law as the Union of Primary and Secondary Rules*

This distinctive normative structure of law makes it possible for people to coordinate their actions as independent actors, capable of setting and pursuing ends for themselves, and entitled to independent action, separate from the ends and pursuits of all others. In short, it allows people to interact as strangers, making possible many of the interactions that are familiar aspects of social life. It does so by introducing a range of normative relations that people can bear to one another, facilitating interactions among members of a community, that, though perhaps possible without law, are not readily available, and they are not as secure as they are when they are enshrined in the law of a community, and backed by the power of the state. This does not mean that law is necessarily good or that the posited law always lives up to this ideal. It is always possible that the posited law is wicked or that it fails to enact these important normative notions. But, where there is good law, it gives effect to this important aspect of morality. This, I suggest, what is distinctively morally important about law.

When people are governed by a legal system, they are subject to a set of rules conferring a coordinated set of rights and duties on them. Specifically, when people are governed a legal system, they are subject to a set of rules securing for each person a range of action over which she is entitled to be free from interference by those around her, but limiting this range of action to that which is consistent with others' entitlement to the same; people thus also incur a set of obligations to respect the rights of all other subjects of the system.

The law secures these rights and obligations with the threat of force. When someone has a right at law, she is entitled to call upon the power of the state to protect it from encroachment by others, and when she is under an obligation, she is subject to the threat of state coercion for its violation.

This does not mean that the state will protect people's interests from all sources of interference, nor is it a promise to provide people with the conditions for achieving their aims, come what may. It is always possible that, say, despite their best efforts, people fail to achieve the ends they set for themselves: I might do all that I can do but my efforts might be thwarted by natural forces, or, say, someone else gets there first, and so on. These are all unhappy results, but they are not violations of my legal rights. The entitlement to be free from interference is also not a promise that people will in fact refrain from interfering with one another's rights. Rights and duties are rational constraints; it is up to the actor to decide whether or not to comply. By backing legal rights and obligations with the power of the state, however, law gives public warning that violations of these rights and duties are taken at the risk of state coercion, and that the state might force the wrongdoer to redress her wrong.

At the same time, the state is limited to protecting *just* those interests secured by legal rights and duties; people can engage in all other activities free from the threat of state coercion. People are of course subject many other obligations to one another, the violation of which can result in many other sanctions. People, e.g., make promises to one another, are members of families, form friendships, and so on, all of which subject people

to obligations and threaten people with various forms of sanction for their violation. But, the law limits the exercise of *state* coercion to upholding just those that are prescribed by law; there are no further types of behaviour that the state is justified in coercing.

I suggest that law can provide the security it does because, as Hart shows, it consists in the union of primary duty-imposing rules and secondary power-conferring rules, and it is founded in an ultimate rule of recognition.<sup>18</sup> This is because such a system of rules enables law to issue rules conferring a set of legal rights and duties on the people living under it. This set of rules is fixed, public and coordinated. We can see this if we consider the various elements of Hart's theory, and the distinctive features of law that I am emphasizing.

Primary rules are action-guiding rules. They tell people what, according to the law, they can and cannot do. Power-conferring rules are rules setting out the conditions under which people can create, amend, or extinguish primary rules. Intuitively speaking, power-conferring rules are rules establishing legal institutions, like legislatures, courts, judges, police, etc. Legal systems must include such rules in order to render intelligible the idea that, under some circumstances, members of a community act and speak in an official law-creating, applying, and enforcing capacity, separate from acting on their personal desires and judgments.

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<sup>18</sup> Hart, *The Concept of Law*, ch. V.

Power-conferring rules also include rules setting out the conditions for making a valid will or contract, and other ways that private parties can alter their legal status with respect to each other. These rules are a kind of power-conferring rules because people are acting like private legislators when they change their legal status in accordance with these rules. But, there remains a significant difference between the actions that private parties take pursuant to these rules and the actions of officials; private parties do not act in an official capacity when they, say, make a will, get married, incorporate, and so on. Moreover, the powers they have to change their legal status consist in just those that the law confers on them; the law prevents people from unilaterally changing their legal status with respect to each other. Indeed, as we shall see, this is the central idea that the notion of a secondary rule explains.

Finally, law is founded in an ultimate rule of recognition setting out the authoritative criteria for validity for all the subordinate rules of the system. This rule imposes a hierarchical order on all the subordinate rules of the system, thereby establishing a means of resolving conflicts between them, should they arise. The rule of recognition thus unites all the various rules of the system into a systemic and coherent whole, and the various judgments and actions the officers of the system into that of a single public authority capable of speaking in a unified voice.

Such a system of rules enables law to issue rules conferring a set of legal rights and duties on the people living under it. This set of rules is fixed, public and coordinated.

First, to say that these rules are fixed is not to say that these rules are unchanging or unchangeable. On the contrary, as Hart points out in his criticism of John Austin, one of the distinctive features of a legal system is that it provides the procedures for creating, amending, and extinguishing its own rules.<sup>19</sup> The rules conferring rights and duties are fixed in the sense that they are determined by facts that are independent of the whims and activities of private actors. This is because these rules are those that are enacted pursuant to the recognized procedures of the system, and it is just to the extent that a rule is enacted in accordance with these procedures that it confers a legal right or duty; no other rights or duties, no matter how weighty, morally good, or widely practiced, are enforced by law. To say that law provides people with a fixed set of rules then is to say that it provides them with a set of rules that are fixed at any given time by facts that are independent of people's private behaviour and attitudes in this respect.

Secondly, by making legal validity depend on conformity with specified procedures, the existence of power-conferring rules makes people's legal rights and duties public. This is because on this conception of law, whether or not a given rule is a rule of the system depends the actions and judgments of public officials; they are issued by public officials, acting in their public capacities, in accordance with public procedures. In this respect, people's legal rights and duties depend on facts that are available to all subjects of the system, and the continued existence of these rights and duties, or their extinction, remains

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<sup>19</sup> *The Concept of Law*, ch. III.

a matter of public fact; they may not be changed or be extinguished in secret.<sup>20</sup> These rules are not always easily discernable, nor is there always a clear answer to what the law requires in any given case. As we well know, legal systems can be indefinitely complex and people often need significant expertise in order to determine what the law requires in a given case. But, legal rights and duties are public in that the facts that make it true that a given person is under a legal right or duty are available to the public at large, and, that these are the relevant facts for determining people's rights and duties under the system is also a publicly available fact.

Finally, power-conferring rules also make it possible for law to issue a coordinated set of rules conferring a coherent set of rights and duties. Law confers a coordinated set of rules insofar as its rules work together to promote, rather than impede action. So, for example, where the law grants a right, it also imposes corresponding obligations to respect it; the law does not permit and prohibit the same action; it does not require people to engage in conflicting actions, or do and refrain from engaging in the same action, or otherwise require practical impossibilities. This does not mean that conflicts are impossible, or that they do not arise between the various rights and duties conferred by the system. In a system that is sufficiently complex, and that is created and maintained by many individuals, conflicts between rules are not unlikely. But, power-conferring rules allow law to resolve conflicts when they do arise by including rules for ordering the subordinate rules of the system and deciding conflicts. Where there is no such explicit rule for settling a conflict, the law will direct people to an authoritative official whose judgment on the

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<sup>20</sup> Absent a defect of law, that is.

matter settles the question. The important point here is that where conflicts between rules do arise, their resolution is also a question for the legal system; the system does not leave conflicts to be resolved by the subjects themselves. This is so just by virtue of the fact that the power-conferring rules return questions arising from the issuing, application, and enforcement of its rules to the system.

#### *IV. Independence*

This makes possible the complex kinds of interactions between people that people typically associate with life under a legal system, and think are absent in pre-legal societies.

Where there is no law, whether or not people's interactions go well or badly for them depends on the particular characteristics of those around them. People might be kind and generous towards one another, and they might respect the interests of those around them, but they might not, and whether or not they do depends on their particular whims and inclinations on the matter. This is not to say that people are subject to the *mere* whims and inclinations of those around them where they have no law. Absent a system of fixed legal rules, people may well develop practices of, say, respecting one another's holdings and engage in trades or exchanges of them; they might refrain from injuring one another, and inflict harm on those who do injure people, and so on. These practices can help to force some people to treat those around them well, even when they are not so inclined. But, whether or not such practices are in place, and which practices people adopt remains a function of the particular characteristics of the members of the community, as does their

continued existence. It is thus just to the extent that the members of a community are inclined to adopt and enforce such practices that they are in place. As a result, where there is no fixed set of rules for settling such conflicts, there is *nothing further* than people's whims and choices to which people can appeal. That is, there is no further standard to which they can hold one another, other than that which is set by the particular choices of particular people in order to settle such conflicts and redress wrongs when they occur.

This makes people's relations with one another doubly insecure. On the one hand, people are independent actors, capable of choosing their ends and pursuits for themselves, independently of ends and pursuits of others. Although they might take their ends and pursuits of those around them into consideration when deciding what to do, they need not. As a result, when people interact with one another, they are vulnerable to the risk that others might act against their interests and injure them. On the other hand, where there is no fixed, public, and coordinated set of rules for governing people's activities with respect to one another, people are vulnerable to the possibility of suffering *any* injury at the hands of another; there is no limit to the ways in which people might harm one another. As a result, people are wholly vulnerable to the whims and inclinations of those around them.

One way of mitigating against these risks is to physically insulate oneself from the activities of others, making the risk of harm by one's neighbours physically impossible, or unlikely. People might thus, e.g., build fortresses around their homes, or impose other

physical barriers between themselves and those around them. This is a useful strategy, and it is especially important for protecting things that are not fungible, like one's person. So, for example, people, have reason to drive defensively even when they have the right of way because the available remedies for accidents are poor compensation for the potential injuries that one might suffer.

Another way to mitigate against the risk of injury at the hands of another is to provide people with an avenue of recovery should an injury occur. The availability of recourse for recovery does not necessarily make the possibility of injury less likely (though it may help, since it increases the cost of engaging in risky activities). But it can reduce the harm that people suffer when an injury does occur by displacing some of the resulting costs of the injury. The availability of recourse can thus relieve people of the responsibility for bearing the full burden of the loss. It is thus another way of making people's interactions with one another more secure, even though it does not (necessarily) reduce the risk of injury directly.

Where there is no law, people are vulnerable to both kinds of risk. They are vulnerable to the possibility people take no heed of the needs and interests of those around them into account, and they are vulnerable to the risk that any of their aims or pursuits might be thwarted by the activities of another. To be sure, people might adopt alternative means for relieving each other of these risks and making their interactions with each other more secure. As we saw above, people might, say, physically insulate themselves from the activities of others, or institute practices of, say, respecting one another's interests, and,

say, forcing people to compensate one another for what is owed. As we have seen, however, whether or not they do engage in such practices depends on the whims and inclinations of the members of a given community, making people once again vulnerable to the particular characteristics of those around them.

Law, of course, does not relieve people from the physical risk of suffering a harm at the hands of another. Law does not consist in a set of physical constraints, that physically prevent people from harming one another, and this is what would be needed in order to protect people from the possibility of harm in this way. Rather, as we have seen, it gives people *reason* to act or refrain from acting in certain ways. It does so by consisting in a system of rules prescribing the legal rights and duties that its subjects can invoke the power of the state to claim against one another, coupled with the assurance that these are the only claims that the state will enforce against its subjects; there are no further complaints that subjects can call upon the state to enforce against one another beyond those prescribed by law. It thus remains possible for people to harm one another in violations of the rights and obligations that the law imposes on them, even when they are subject to a legal system.

But the distinctive features of law described above – namely, that it is fixed by facts that are independent of any person or group’s personal characteristics, that these facts are publicly available to all the subjects of the system, and that they form a unified system, directing questions of conflict or indeterminacy back to the system to be resolved – relieve people of the risk that people might refuse or fail to take the needs and interests of

those around them into account, and that there is no limit to harms to which they are vulnerable. It does so by providing people with a further set of standards that, first, do not depend on the whims and inclinations of any particular person or group, and whose continued existence is independent of what anyone thinks of these rules, or whether or not people comply with them. Second, people can determine according to these standards, for any given action, whether or not it is subject to the threat of state coercion, and they are entitled to hold those around them to this standard as well. And, third, these standards set out the conditions of state coercion conclusively, so that where questions as to the rules' requirements do arise, as in cases of conflict or indeterminacy, they are not left to be settled by the subjects themselves. Although, as mentioned above, the existence of such a set of rules does not make violation impossible, it assures people that they can seek recourse when they do occur, and that these are the only claims that people can call upon the power of the state to enforce against one another, thereby relieving people of some of the risks they face when interacting with other actors.

The availability of such a set of rules makes it possible for people to interact with strangers, or with one another as strangers, without facing the insecurity described above. It does so because it guarantees all subject to a legal system that they can seek recovery if they are injured by another party to an interaction, but that they are responsible for no more than the cost of the harm in the case of an injury. So, for example, it is of course possible that, even without a legal system in place, people can designate routes for travel, that they develop conventions coordinating their travel, and that these conventions are

steady and well-established, so that people can safely get from one place to another. But, it is the existence of a fixed system of rules securing people's right of way on the green light but not the red; at the crosswalk but not in the middle of the road; designating the roads for drivers but not, say, lawns or sidewalks, and so on, and rules denying people the authority to unilaterally change these rules, that makes possible the complex systems of traffic that we currently have. Similarly, even without a legal system, people may, say, trade goods with one another, establish a marketplace, institute mechanisms for holding one another to the bargains they strike, and so on. But, it is only with such a set of rules in place that people can, e.g., book a flight on the internet, or make a trade on the stock market. These are all risky activities, in the sense that they involve non-trivial stakes, and people stand to lose a lot in the case of injury. They are also risky in that they require the coordination of many people who often know nothing about one another, and who frequently bear no other relation to one another beyond their mutual involvement in these interactions. The existence of a legal system renders people's activities in these cases more secure by affording people a system of rights relieving them of the risk of bearing the full burden of these losses, and simultaneously guaranteeing that they can be held responsible for no more than the cost of these losses.

The problem is not merely people's wickedness or uncertainty (or disagreement) about the rules of morality, though it is certainly made worse by these. Even if people are perfectly good and scrupulous in their dealings with one another, though, they still need an authoritative system of rules for fixing the boundaries of people's rights in order to pursue their ends as independent persons in the manner described above.

Morality can, for example, tell people that it is wrong to help themselves to the belongings of others, that they ought to return objects lent to them, that they ought to compensate people when they destroy their belongings, and so on. But, fulfilling one's moral obligation requires respecting the *actual* object of the right, even when this is something different from what one might intuitively expect. Morality alone cannot deliver this. Morality cannot say, e.g., when one person writes another's page, that it is the paper that persists, even when the text is a piece of poetry, and even when it is written in gold, but when a person paints on a canvas, the canvas is destroyed and a new object – the painting – is created.<sup>21</sup> So far as morality is concerned, either option is permissible, and the choice between them is arbitrary. It thus cannot direct the parties in these cases to, say, return the paper with the text on it to its owner, but to compensate the owner of the canvas for the destruction of her property. And this is what it is needed in order for people to satisfy their moral obligations.

So too for the other rules that law provides for reconciling people's independent activities. In order for people to, e.g., drive safely in the presence of other drivers trying to do the same, they need authoritative rules specifying what counts as a road and who has right of way, no matter how careful or considerate they are; in order for people to limit their liability in their dealings with others, they need rules specifying the conditions under which they can incorporate, no matter how scrupulous they are. Morality might dictate that people should honour their agreements, that each citizen deserves a vote, that the guilty deserve a fair punishment, etc. But it cannot determine when a contract has

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<sup>21</sup> See Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 134 for a discussion of these cases.

been concluded or what are its terms; it cannot determine who counts as a citizen, fix the procedures for submitting a vote or the procedures governing a fair trial and authorizing the state to impose a sanction, and so on. This is so even when people are perfectly good and in perfect agreement on morality's dictates. Satisfaction of moral obligations when engaged in these practices likewise requires the existence of a fixed and public answer to these questions.

This problem is a deep one. Rendering people's disparate aims and the actions they take in their pursuit consistent with one another does not require reconciling every action that a person can take with the pursuits of every other actor in the world. So holding would make action virtually impossible. This is because virtually every time someone acts, she limits the range of action of all other actors. If people had to take every action that every person might choose into account every time she acted, they could almost never act. Law releases people from this general obligation, on the condition that they respect others' power to act as well. But, it provides people with only a limited range of actions over which their choices are sovereign, and puts them under a corresponding obligation towards only a limited range of people, and morality cannot supply the boundaries for fixing this range of actions, or of persons towards whom people are under reciprocal obligations. As a result, although interacting on terms of independence is morally permissible, and although morality can provide people with general guidelines for governing such interactions, it cannot specify the determinate particulars for fixing the boundaries in which they can occur. It thus cannot supply people with determinate rules for rendering their independent actions consistent with one another.

The point is not that these distinctive relations can only have bearing in the context of a legal system giving them effect. Murder and theft are wrong whether or not they are recognized as crimes under law, though the idea of them as public wrongs and the state's authority to punish them are likely best understood as legal notions. People could also still exchange their belongings, uphold their agreements, become families, make collective decisions, etc. without law. Legal norms are not like the rules of a game in this respect. Castling, trumping, hitting a home run, and so on have no sense beyond their specification by the rules of the game. Law is not like this. Although some important legal concepts are perhaps wholly a matter of legal artifice (perhaps, e.g. corporations), many can be grasped independently of law. Criminal wrongs (so-called *mala in se* crimes), casting a vote, making a sale, becoming a family, and many other familiar legal notions can have bearing in a community even without being fully specified by law. Law can give effect to these important notions, however, and authorize some of the decisions and actions that people take pursuant to the normative bearing that these have in ordinary social life. And, when the system in place is a just one, law can help to realize the important role that these normative relations play in a well-ordered community.

The moral significance of these internal legal concepts is intrinsic to their place within a legal system. It cannot be wholly explained in terms independent non-legal moral considerations or the beneficial results that they tend to produce. Advantages like stability and security, etc. that law produces are important, and communities can have

many reasons for establishing the rule of law. But taking these to be the main, or the only moral advantage of law distorts the internal normative structure that is central to a complete understanding of law, and drains Hart's advances over Austin of their important insight. Whether a wrongdoer owes compensation, whether a contract should be upheld, whether a ruling quashed, etc. are determined through the operation of law and the normative concepts in play here are products of the system. The decision to establish or not establish a legal system, and which rules it contains can be made with reference to the non-legal ends that law serves. But, as Hart emphatically argues, law has a distinctive internal normative structure making possible a range of important normative relations that people might bear towards one another. My point is that these can also have moral significance in their own right, and this arises by virtue of their place in the system.

When a legal system is a just one, the law thus gives effect to an important aspect of morality. But law can coordinate the actions of people as independent actors even when the rules are unjust. The mere fact that they are fixed, public, and coordinated that makes such interactions possible; all that is needed for securing people's interactions with one another is a fixed, public warning about the state's use of force, and the assurance that these conditions will persist until further public notice. Of course, where the rules of the system are not good ones – where, say, they do not accord their subjects equal status, where they deny people rights that are morally valuable, etc. – subjects will likewise be incapable of lawfully engaging in free or just interactions with one another, or, at least, their ability to do so will be significantly curtailed. But, their mere ability to interact with

one another as independent actors – i.e., their mere ability to set and pursue their ends for themselves and to refrain from interfering with the attempts of others – will remain intact, even where the system fails to set out moral or good conditions for interaction.

Law thus makes it possible for people to interact with one another even though they are vulnerable to one another's power of choice by establishing authoritative rules fixing the boundaries of people's rights with respect to each other, and by establishing fixed procedures for determining the creation, amendment and extinction of these rules. This makes it impossible for any particular person or group unilaterally to change these rules governing the state's use of its power on a private desire or whim. Instead, it is only under certain circumstances – namely, when officials, acting in their official capacity, change these rules in accordance with set procedures – that one can effect a change in these rules. This makes the kind of complex interactions that we typically associate with life under law possible because it allows people to interact with one another – e.g., to drive on a highway, to make a trade on the stock market, etc. – on terms of independence, or without any concern for the particular ends and pursuits of those around them. My final claim is that the fact that law can authoritatively coordinate the actions of free actors makes law vulnerable to hard cases like *Riggs*. However, law's ability to so coordinate people's actions also explains how it can decide such cases. Consider again the difficulty posed by *Riggs*.

#### *IV. Riggs Revisited*

The Court in *Riggs* held that even though Elmer was clearly set to inherit under the will, and even though there was no countervailing posited law prohibiting murderers from inheriting, it is fundamental principle of law that no one should profit from his own wrong. For this reason, it denied Elmer the inheritance. Moreover, the Court held that this principle governed the case even though it had no posited source.

*Riggs* is not a hard case in the sense that it requires judges to apply a wicked or unsavoury law, nor is it hard in the sense that it arises from defects, moral or otherwise, in the formulation or application of legal rules; the Court in *Riggs* was not charged with applying unjust or wicked laws. Nor further is it hard in the sense that the relevant rules are hard to apply, or that it is unclear whether it falls under the rules in question. In all these respects, *Riggs* is an easy or clear case: the rules governing the disposition of property are just ones; the will clearly named Elmer as a beneficiary; it was clearly valid; it clearly fell under the Statute of Wills; and there was no posited law prohibiting murderers from inheriting, or otherwise vitiating the Statute. The difficulty that *Riggs* raises, then, does not lie in the application of the particular rules themselves.

Dworkin suggests that the difficulty with *Riggs* arises from the immorality of permitting Elmer to benefit from his wicked act, and the possibility that the law is implicated in such a wrong. Further commentators have adopted this analysis as well. All have supposed that the law's appeal to the principle that no man should profit from his own wrong constitutes an appeal to a moral principle in an attempt to prevent the law from furthering Elmer's immoral ends. The law on the matter is not so straightforward, however.

First, the principle upon which the Court in *Riggs* relied – that no man should profit from his own wrong – is too broad as stated. The law certainly sometimes permits people to profit from the fact that they have committed a wrong, even if they are not profiting from the wrong directly. So, for example, although many states have laws prohibiting criminals from profiting from the publication of the details of their crimes (so-called “Son of Sam” laws), not all states do, and whether or not so profiting is legally prohibited depends upon whether such a law has been enacted, rather than on a conceptual feature of law. Adverse possession and breach of contract are two other obvious examples of instances in which the law permits people to profit from their wrongs. The law thus need not prohibit all attempts to profit from one’s wrong.

More importantly, however, modern legal systems typically prohibit the imposition of a penalty beyond that provided by the criminal law for the commission of a crime.<sup>22</sup> In general, they do not divest a person of her civil rights or her property because of a lack of desert, or dirty hands. This is so even when allowing a person the benefit of her property or civil rights is morally repugnant. So, for example, the administrators of a retirement fund cannot deny a retired police officer his pension on the grounds that he has been

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<sup>22</sup> Article III of the U.S. Constitution states that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted,” U.S. Const. art. III, § 3, cl. 2. This clause has been liberally construed and has been read to prevent all official attempts to impose further punishment for crimes committed. See *United States v. Brown*, 381 U.S. 437 (1965), 442. See also *Cummings v. Missouri*, 71 US 4 Wall. 277 277 (1867), holding that the deprivation of any right can count as a punishment if it is imposed as such. Similarly, article I of the U.S. Constitution prohibits federal and state Congresses from passing *ex post facto* laws and bills of attainder. Art. I, §§ 4, 9 and 10, respectively.

convicted of drug trafficking.<sup>23</sup> The mere fact that the officer is morally undeserving of this benefit cannot serve as the reason for denying it to him. In general, considerations of moral desert or lack of desert do not form the basis of a decision about who benefits at law. This is certainly true of the American legal system at the time that *Riggs* was decided. The Court's denial of Elmer's claim thus cannot be explained by mere appeal to his lack of *moral* entitlement to the inheritance.

Instead, the problem in *Riggs* is that the defendant committed a legal wrong *so as to gain from someone else's legal power*. Elmer's act did not just consist in the prohibited act of murder, though it was also murder. Instead, he killed his grandfather *in order to* prevent him from changing his will and disinheriting him. In other words, Elmer sought to benefit from a power that the law confers on his grandfather, namely, his power to dispose of his property as he sees fit, and he did so through legally prohibited means.

By so doing, Elmer tried to usurp his grandfather's legal right for his own gain; he tried to help himself to his grandfather's right to name the beneficiaries of his estate in order to secure his claim on the estate. But, when the law confers a power on people to dispose of their property as they see fit upon their death, it confers this power *just* on those people. No one else has the legal power to decide how they will divest their property. Of course, people might ask for advice from their family or, say, their lawyers on how to best

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<sup>23</sup> *Board of Trustees of Police Pension and Retirement System of Oklahoma Board of Trustees of Police Pension and Retirement System of Oklahoma City v. Weed* 719 P.2d 1276, holding that the Police Pension and Retirement Board's attempt to divest an otherwise meritorious officer of his earned pension on the grounds of his criminal conviction violates the prohibition on corruption of blood and forfeitures of estates.

dispose of their estate. But, the ultimate decision, at law, remains theirs; no one else's decision can have the legal effect of naming a beneficiary under a person's will. By murdering his grandfather so as to benefit under the will, Elmer attempted to subvert this power.

It is thus true that the will named Elmer as the beneficiary, that it was validly enacted, and that there was no countervailing posited law preventing murderers from inheriting in New York State at that time. But, the Court asked, "what law, human or divine, will allow him [Elmer] to take the estate and enjoy the fruits of his crime?" It continued,

If he had met the testator and taken his property by force, he would have no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of the state, and an offense against public policy.<sup>24</sup>

In other words, by murdering his grandfather in order to prevent him from changing his will, Elmer negated his claim to inherit under it just as he would have lost his claim to title had he taken the property by force, or had he fraudulently induced his grandfather to will it to him.

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<sup>24</sup> As per Earl, J., writing for the majority in *Riggs*, 512f, 190.

The posited law's vulnerability to the possibility that its subjects unilaterally act so as to subvert the power it confers is an unavoidable feature of its structure. As a system of rules that imposes a coordinated scheme of rights and duties on people backed by the threat of state force, the law takes its subjects to be rational actors, capable of exercising their reason independently so as to result in action, but whose actions can come into conflict. By imposing such a scheme of rights and duties, the law seeks to give people reason to render their actions consistent with each other. But, by so doing, the law merely gives people reason to so act; it leaves the ultimate choice of action with the actor. It is thus always open to people to act in violation of the law.

This coordinated set of rules thus *legally* prohibits acting so as to subvert this scheme; it provides its subjects with legal reason to comply with its dictates and uphold rather than undermine this scheme. However, as rational actors, it is always open to legal subjects to attempt to subvert the law; there is no conceptual impossibility in their doing so. It is thus always possible for actors under this scheme to help themselves to its guarantees in order to seek a legally prohibited advantage; i.e., it is always open to the subjects of this scheme, as free actors, to seek to benefit from the law's protection of, for example, someone else's right to dispose of his property as he chooses, through legally prohibited means.

No combination of posited rules can prevent actors from choosing to act in this way, no matter how complete or carefully crafted. This is because no system of rules can make it impossible for subjects to abuse or subvert its guarantees. In addition to the possibility

that they violate of its rules, people can also abuse the law's guarantees by attempting to usurp its authority and attempting to claim for themselves powers that it reserves for other subjects, or for its officials.

Such a system of rules is vulnerable to the possibility that its subjects act this way regardless of who it designates as a subject, and which actions it permits or prohibits.

This is because it is the mere fact that it seeks to govern the actions of free actors through the imposition of a fixed set of permissions and prohibitions that it leaves open the possibility that a legal actor, whoever it is, will commit a prohibited act, whatever it is, so as to gain from a legal permission. This is so even if the law denies status to, say, women or African-Americans, or, say, confers it to households or ships,<sup>25</sup> and even when it prohibits good acts and permits wicked ones. The law's appeal to the prohibition against profiting from one's own wrong only appears to be an appeal to a moral principle in *Riggs* because the law in this case was just.

Dworkin is thus correct to say that the positive law's inherent structure renders it vulnerable to cases like *Riggs*. But its inherent structure also provides it with the resources to resolve such cases. The law secures for the testator the exclusive right to name the beneficiaries of his estate by reserving to itself the power to determine its rules.

As we know, legal rules can only be changed in accordance with fixed legal procedures

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<sup>25</sup> The household is taken to be the primary legal actor under Roman law, and under U.S. Admiralty law, ships can be taken to be legal actors for the sake of proceedings *in rem*. See, Barry Nichols, *An Introduction to Roman Law*, cited in fn. 9, above, for a discussion of the Roman law of persons, and e.g., *The Ville de St. Nazaire*, 124 F. 1008 (D. Or. 1903), for the discussion of the U.S. doctrine of proceedings *in rem*.

since only such actions can have legal effect. It is not open to a private party unilaterally to change the rules of the system. This includes the rules conferring the power on a testator to decide who is to inherit his property when he dies. Elmer's actions constitute such a unilateral attempt. Recall the facts of *Riggs*. In this case, Elmer had warning that his grandfather might attempt to change his will and disinherit him. Elmer murdered his grandfather in order to pre-empt this possibility and guarantee his inheritance. Elmer's murder of his grandfather thus constitutes an attempt to usurp the power that the law reserves to itself to set the rules for deciding who gets to dispose of someone's property when he dies. The law can prevent such attempts just by virtue of the fact that, in setting out the conditions under which its rules are created, amended or extinguished, it makes these conditions exhaustive. Private, unilateral attempts to change the rules of the system are legally void. It is for this reason that it must hold Elmer's attempts to be void as well, and deny his claim to the estate.<sup>26</sup>

Cases like *Riggs* are easily multiplied. Consider another example. The law can also prohibit keeping the profits from the sale of timber that was wrongfully taken from

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<sup>26</sup> One might object that by conceiving of the murder of a person in order to stop him from changing his will as a prohibited means of benefiting under the will, but, say, not the tempting or seducing of another in order to achieve this result, I am implicitly relying on a moral judgment about what does or does not count as a prohibited means of effecting a legal outcome, thereby illegitimately reintroducing a moral element to law. This misunderstands the point, however. The reason why the law does not award the estate to those who murder their benefactors in order to inherit, but does allow seducers and temptresses to inherit is not because it is wrong to murder someone in order to prevent him from changing his will (though it is wrong). Rather, it is because the murderer is adopting legally prohibited means in order to benefit from someone else's legal power, just as if he had taken the property by force or fraud. I thank Mark Greenberg and A. J. Julius for pressing me on this point.

another's land and then improved.<sup>27</sup> This is so even if the defendants have a greater *moral* claim to the timber than do its owners. In *Wooden-Ware*, timber was taken by Aboriginals off land owned by the federal government, but reserved for them. Arguably, the defendants in this case are morally entitled to the benefits of the land, even if they do not have title at law. The law, however, upheld the rights of the lawful owner as against the defendants. It did so because it prohibits such unilateral attempts to subvert its rules, even if they are morally justified.

Similarly, the law can also prohibit keeping the profits from the sale of a book in which the author intentionally commits libel for the sake of selling more books<sup>28</sup> or from improvements made on coal that is taken from another's mine,<sup>29</sup> and so on. As above, in such cases the law is preventing itself from being used as an instrument to subvert its own aims. It is true that the benefits sought by the defendants in these cases are ones that the system in question protected: in these cases, the system in question protected the profits gained from otherwise lawful sales, and those accrued through improvements one makes to one's property. But, in these cases, the defendants committed a legal wrong *so as to* benefit from these protections: Cassell & Co. helped themselves to Captain Broome's reputation *in order to sell more books*; the defendants in the coal cases helped themselves to others' coal *in order to gain from its resale*, and so on. As in *Riggs*, their acts constitute unilateral attempts to usurp powers that the law confers on others, namely, the

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<sup>27</sup> *Wooden-Ware Co. v. U.S.* 106 US 432, 1 S. Ct. 398 (1882).

<sup>28</sup> *Cassell & Co. Ltd. v. Broome* [1972] AC 1027; [1972] 1 All E. 801.

<sup>29</sup> *Martin v. Porter*, 5 Mee. & W. 351; *Morgan v. Powell*, 3 Ad. & ENS. 278; *Wood v. Morewood*, 3 id. 440; *Hilton v. Woods*, Law Rep. 4 Eq. 432; *Jegon v. Vivian*, Law Rep. 6 Ch. App. 742, all cited in *Wooden-Ware*.

power to control one's reputation and to seek profit from the sale of one's property. And, as above, the defendants in these cases committed these wrongs so as to benefit from the law's protections. The denial of their claims, however, is not an *ad hoc* attempt to ignore the posited law when it points to an outcome too unsavoury to uphold, or to insert morality to curtail unwanted consequences of the posited law. Nor are these cases examples of the seamless connection between law and morality. They are not an open door for the inclusion of all moral considerations in legal reasoning, as Dworkin suggests. Instead, they are instances of the law's attempt to reassert itself as an institution that delimits the range within which people are authorized to act in the face of the legally authorized powers of other agents to act. These limitations on the exercise of legal rights do not need to be posited in order to be law. Instead, they follow just from the systematic nature of law, and the fact that this precludes the unilateral attempt to change its rules.

Indeed, we can even generate another principle like the one applied in *Riggs* using this same line reasoning. In addition to preventing people from committing a prohibited act so as to benefit from another's exercise of his right, a legal system can also prevent people from exercising their legal rights so as to benefit from another's commission of a legal wrong.<sup>30</sup> So, for example, I cannot refuse to contract with one person unless he breaks his contract with another.<sup>31</sup> This is so even though the system gives me the freedom to contract, including the freedom to refuse to contract, and even though, typically, legal systems relieve people of responsibility for the wrongs of others. These prohibitions do

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<sup>30</sup> See O. W. Holmes, "Privilege, Malice, and Intent," 8 *Harvard Law Review* 1, 1-14, (1894) for raising this point in this connection.

<sup>31</sup> Holmes, "Privilege, Malice and Intent," 12, fn. 1. Holmes cites *Temperton v. Russell* (1893) 1 Q.B.D. 715 in support of this point.

not require explicit enactment in order to be legally binding. Nor do they indicate the existence of unposited moral considerations in law. Instead, they follow just from the fact that a legal system systematically coordinates the rights of each with the rights of others, but it protects nothing more than people's entitlement to one another's rightful actions.<sup>32</sup>

My suggestion, then, is that the unposited moral considerations that Dworkin thinks are missing from the positivist account but that remain legally binding are just those that arise from the fact that law consists in a system of rules that confers a coordinated scheme of rights and duties on people capable of setting and pursuing ends for themselves. Doing so requires that it deny legal effect to unilateral attempts to change its rules. Hard cases arise under such a system because law governs free actors, who are capable of attempting to subvert law's structure, whatever it is. The law has the resources to resolve them because it maintains ultimate authority to determine its rules: unilateral action only has legal effect when the law confers a power. No further appeal to morality is necessary.

Dworkin is thus correct to suggest that the law is inescapably vulnerable to the possibility of the type of hard cases described above, and that, when confronted with them, the law has the resources to resolve them even when their solution cannot be traced to a posited source. A complete theory of legal validity must therefore explain law's ability to handle

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<sup>32</sup> Note that my claim is just that law *can* license these decisions by appeal to the posited law alone, not that it *must*. Legislatures can enact rules expressly prohibiting such judgments, and courts can decide otherwise. My claim, however, is sufficient to defend positivism against Dworkin's attack, since all that is needed for this is to show that the posited law is capable of deciding hard cases like *Riggs*; not that they must be decided this way. I thank Seana Shiffrin for raising this point in this connection.

these cases. But, Dworkin is wrong to think that law's vulnerability to such cases poses a threat to positivism. Explaining law's ability to issue a coordinated set of rules is precisely what Hart set out to do in conceiving of law as the union of primary and secondary rules unified by an ultimate rule of recognition. And, I suggest, we need appeal to nothing further in order to explain law's ability to resolve hard cases. In particular, no further explanation of the legal validity of moral considerations is needed.

#### *V. Conclusion*

My solution to the problem of hard cases like *Riggs* and my account of legal positivism thus emphasizes the central role that the internal normative structure of law plays in an account of law, and its independent moral significance. This might seem like a far cry from the received view of legal positivism, which takes the central task for a theory of law to provide a descriptive of what the law is, and to leave questions of its moral value to moral theory.

Notwithstanding the importance I place on law's moral significance, the account of law I propose remains a positivist one. I take law to consist only in a system of primary and secondary posited rules united by an ultimate rule of recognition, and I rely only on the advances that Hart makes over Austin's theory in explaining law's moral significance.

This perhaps makes my position a normative positivist one,<sup>33</sup> though perhaps not,<sup>34</sup> and in any event it is not a defence of positivism based on the non-legal moral benefits of law to a community.<sup>35</sup>

Crucially, the posited rules retain normative priority on my account. The heart of the anti-positivist challenge lies in questioning the priority of the posited law over moral considerations in determining questions of law. Dworkin and his followers take the posited law to have force just to the extent that it is backed by the relevant moral considerations.<sup>36</sup> Like all positivists, I deny this, and, following Hart, I take the independent legal force of the posited law to be central to a theory of law. My point is that this important aspect of law, that Hart made clear and that Austin mischaracterized, is morally significant, and that this is sufficient to resolve the problem of hard cases.

I have thus proposed a resolution to the problem of hard cases by examining the nature of legal validity. I have argued that the very features of Hart's account that resolve the puzzle raised by legal validity, namely, the difficulty of reconciling law's social nature with the fact that it binds people independently of their inclinations, and whether or not

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<sup>33</sup> See Jeremy Waldron, 'Normative (or Ethical) Positivism', in Coleman (ed.), *Hart's Postscript* (Oxford University Press: Oxford, UK 2001); Stephen R. Perry "Hart's Methodological Positivism," 4 *Legal Theory*, (1988), 427-467; Tom Campbell, *The Legal Theory of Ethical Positivism*, (Aldershot: Dartmouth, MA, 1996); MacCormick, Neil (1985); "A Moralistic Case for A-moralistic Law," 20 *Valparaiso Law Review* 1.

<sup>34</sup> Marmor, "Legal Positivism: Still Descriptive and Morally Neutral."

<sup>35</sup> John Gardner, "Legal Positivism, 5 ½ Myths," 46 *American Journal of Jurisprudence* 199.

<sup>36</sup> Mark Greenberg similarly takes moral considerations to have priority over posited ones in determining the content of law, but for different reasons. See references, fn.10.

they want to be bound, solves the problem of hard cases as well. It does so because the existence of secondary rules establishes the public institutions and voice from which law is issued and enforced, but it also limits all law-creating and enforcing acts to just those that are issued by such public officers; as we have seen, no further private acts can be legally efficacious in this way. It is for this reason that Elmer's unilateral attempt to usurp his grandfather's power to divest of his property as he sees fit is void at law.

This solution differs from other positivists' resolutions by denying that hard cases raise a problem of how morality enters law. It also avoids the difficulties Dworkin encounters by arguing that all of morality is already in law. It resolves the problem of hard cases by appealing to nothing more than systematic features of law, and, as I have argued, the problem of hard cases, and *Riggs* in particular is best understood as raising questions about these features. As a result, no appeal to unposited moral considerations is necessary. Instead, I argue that the distinctive features of law that distinguish it from all other rules and considerations that people are subject to and that explain its internal normative structure and systematicity at the same time explain its moral significance, and this is all that is needed in order to explain, and resolve, *Riggs*.