

H.L.A Hart

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Recommended Citation

Mark V. Tushnet, *H.L.A Hart*, 68 Cornell L. Rev. 257 (1983)
Available at: <http://scholarship.law.cornell.edu/clr/vol68/iss2/8>

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BOOK REVIEWS

H.L.A. HART. *Neil MacCormick*. Stanford: Stanford University Press, 1981. Pp. 184. \$18.50 (cloth).

It is fitting that this first book in a series "devoted to eminent jurists and legal thinkers" should examine the work of Herbert Hart, whose contributions to legal philosophy revitalized the subject and inspired many others to investigate the moral problems as well as the analytical puzzles generated by law. Neil MacCormick's study sensibly concentrates on Hart's work in analytical jurisprudence, especially *The Concept of Law*, for that is the focal point of Hart's most systematic theories. Since its publication in 1961, *The Concept of Law* has been a benchmark for legal philosophy, a foundation for further progress in the field.

MacCormick presents Hart's legal theory thoroughly and fairly. He discusses Hart's philosophical orientation, traces connections between Hart's theory of law and his moral views, and integrates what might seem disparate aspects of Hart's work.

MacCormick is a sympathetic interpreter and critic. He identifies difficulties and oversimplifications and proposes reasonable refinements, but endorses both Hart's general approach and the main lines of his theories. Because of the continuing importance of MacCormick's subject, this review emphasizes some questions about central themes within Hart's work that MacCormick overlooks. These include the adequacy of Hart's analysis of law as "the union of primary and secondary rules," his theory of legal obligation, and his conception of morality.

I

THE NATURE OF LAW

Classical positivism—the theory developed by Bentham and Austin—conceives of law in terms of coercive relations between those who make its rules and those subjected to them. This "imperative theory" construes the elements of a body of law as "orders backed by threats."¹ Such rules belong to law only when they can be traced to the political "sovereign" of a community—a person or group of persons whose coercive commands are generally observed by the members of the community and who are not similarly subordinate to anyone else.

Hart derives the outlines of a much more complex and promising analysis from a persuasive critique of classical positivism. While the imperative theory offers an initially plausible model for legal restrictions, it obscures those elements of law that facilitate changes in legal relations.

¹ H.L.A. HART, *THE CONCEPT OF LAW* 16, 19 (1961).

Law contains not only "primary" or "obligation-imposing" rules, but also contains "secondary" rules, including those that confer legal powers and make possible legal arrangements by private individuals.² Secondary rules underlie official positions and are also presupposed by the identification of laws within a system, providing the basis for authoritative rule-change and rule-application.³ Additionally, the notion of a primary rule and the obligations that it imposes cannot be understood on the model of orders backed by threats. Rules and obligations involve complex social practices and internalized standards for behavior.⁴

In place of the imperative theory, Hart characterizes law as "the union of primary and secondary rules" along the following lines:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.⁵

MacCormick accepts this general framework, and much of his book is devoted to developing it further. He, for example, clarifies Hart's sometimes obscure notion of the "internal point of view" that is essential to the existence of social rules.⁶ He distinguishes and refines Hart's notions of "secondary" and "power-conferring" rules.⁷ He explains how Hart exaggerates the role of rules as distinct from other, often more fundamental, normative standards,⁸ and how Hart overextends the concept of obligation.⁹ He relates Hart's analysis of law to his theories of punishment and the minimal content of natural law.¹⁰ He examines Hart's theory of adjudication, including his views about the "open texture" of legal rules and judicial "discretion."¹¹

The last topic mentioned is one to which MacCormick has made a substantial contribution,¹² and it has become a focal point of controversy within legal philosophy. The subject, however, is complex, and MacCormick's treatment of it does not do justice either to his own views or to those of Ronald Dworkin,¹³ Hart's most prominent critic. I shall

² *See id.* at 26-48.

³ *See id.* at 49-114.

⁴ *See id.* at 54-58, 79-88.

⁵ *Id.* at 113.

⁶ N. MACCORMICK, H.L.A. HART 30-44 (1981).

⁷ *See id.* at 103-6, 76-85.

⁸ *See id.* at 50-54.

⁹ *See id.* at 58-61.

¹⁰ *See id.* at 135-37.

¹¹ *See id.* at 121-33.

¹² *See generally* N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

¹³ *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

concentrate here on problems that have received less attention in the literature and that should trouble anyone sympathetic to Hart's basic concerns.

Hart's conception of law is puzzling for more than one reason. According to his theory, what counts as law depends on what officials accept as the fundamental tests for law; but the authority of officials to make such determinations rests in turn upon laws that create and regulate official positions—laws whose existence ultimately depends on their satisfaction of whatever criteria the officials accept. This is circular. Officials decide what rules exist, including the rules by virtue of which they have official status. How is this possible?

MacCormick is sensitive to the apparent paradox, and his interesting discussion of related problems¹⁴ suggests how it might be dispelled. Hart's theory describes the structure of legal institutions once they have been established, but it does not pretend to explain how such a complex social arrangement comes about. Hart does not claim, for example, that the historical processes that result in full-blown legal systems are themselves regulated by law. To this we may add that those who aspire to occupy official positions cannot secure them just by mutual agreement, for they cannot wish law into existence. Rather, a legal system requires more than the complex internal structure described by Hart; it does not exist unless the behavioral guidelines laid down by law are generally complied with by the members of a community.

Hart's theory is puzzling for other reasons as well. He gives us reason to believe that his statement of minimal "necessary and sufficient" conditions for the existence of a legal system may be misleading. First, he claims that we cannot assume that all the instances of a general term like "law" share common characteristics. Like the standard examples of games and Hart's own example of rules, legal systems might be related not by sharing essential properties but rather by "family resemblances."¹⁵ Hart further suggests that the concepts of law and a legal system are, like other concepts he discusses, "open textured" and somewhat vague; while some things are clearly law and others clearly not, still other things may lie within the "penumbra" of such concepts, retaining some of the salient characteristics of law but lacking others or possessing unusual properties.¹⁶ Hart suggests, for example, that legal systems need not systematically enforce primary rules.¹⁷ Hart does seem to hold, however, that he has identified the defining features of clear, central cases of law. Along with his use of the expression "necessary and sufficient conditions," he implies that law can be distinguished from

¹⁴ See N. MACCORMICK, *supra* note 6, at 110-20.

¹⁵ See H.L.A. HART, *supra* note 1, at 15-16, 79.

¹⁶ See *id.* at 79, 96, 119-32.

¹⁷ See *id.* at 95.

other social phenomena by reference to "the union of primary and secondary rules."

Allowing for some looseness in the concept of law, we may ask whether Hart's analysis achieves this end. The most sympathetic appraisal of Hart's theory should generate the following query. Let us suppose that whenever there is a clear case of a legal system there must be a union of primary and secondary rules as described. Does this enable us to distinguish law from other things? If not, then even if Hart's theory states conditions that are "necessary" for the existence of a legal system, it fails to supply conditions that are "sufficient." Those conditions might be satisfied and we might still fail to have law. Alternatively, Hart's analysis might fail to distinguish law from social arrangements that coexist with it but that are not law, and perhaps also are not borderline cases. That seems to be the case.

To test Hart's theory, we must consider his analysis abstractly. We must ask whether there are or can be forms of social organization that are not legal systems but have the following properties: they contain rules of behavior whose existence depends on criteria supplied by other rules, as well as rules creating and regulating positions, which confer competence to change, apply, and identify rules within the organization, where the rules are generally complied with by those to whom they apply. Once we pose the question this way, we see that such a structure is not peculiar to legal systems, but is characteristic of many social organizations, ranging from private clubs to religious institutions.

This problem cannot be evaded by resolving to apply the term "law" to all those institutions that share such a structure with legal systems. For that either begs the question or acknowledges the failure of the theoretical undertaking to distinguish law from other things. The problem is not easily solved. The obvious way of trying to rectify Hart's analysis is to identify further distinguishing characteristics of legal systems. Yet reflection on possible ways of supplementing Hart's analysis will show that the task is not easily accomplished, if it can be done at all.

Despite Hart's skepticism on this matter, one might try, for example, to distinguish law by reference to coercive sanctions. But coercive sanctions can be and have been employed systematically outside the law in other institutions, with and without legal permission. In view of this fact, the proposal might take the familiar form of holding that law (or its counterpart, the political state) enjoys a "monopoly" on the use of force. But in the present context this must be interpreted as the notion that law *claims* the exclusive or ultimate *right* to regulate the use of force within a population, and nothing prevents other organizations from claiming such a right for themselves.

In other words, when considering possible differences between law and other social organizations, we must be careful to understand them

in analogous terms. If we approach the matter by conceiving of, for instance, the scope, relative authority, or "legitimacy" of the law *through the eyes of the law*, then when considering other social organizations, we must likewise think of the scope, relative authority, or "legitimacy" of the rules of those other institutions *from their respective standpoints*. Just as those to whom the legal rules apply are determined by the law itself, those to whom the rules of another institution apply are determined by the rules of that institution. While law may be accorded ultimate authority when one adopts the standpoint of the law, the rules of another institution (such as a church) may likewise be credited with ultimate authority when one adopts the standpoint of that institution.

These comments suggest the contours of a large, unexplored difficulty for Hart's theory. His analysis is profoundly incomplete unless it distinguishes law from other forms of social organization. If this problem cannot be solved by supplementing Hart's analysis, it may signify that Hart's approach has reached a dead end and that law requires theoretical analysis of a different type.

It is unfortunate that MacCormick fails to consider problems of this magnitude. He does not seem seriously to entertain the possibility that Hart's theory might be deficient, other than in matters of detail.

II

LEGAL OBLIGATION

One of the central concepts in both law and morals is obligation, and Hart devotes considerable attention to it. This is partly because, as MacCormick notes,¹⁸ Hart in *The Concept of Law* employs the notion in a wide, generic sense: Hart treats *all* legal and moral requirements as "obligations."

In place of obligation, MacCormick suggests that the generic notion involved in appraising conduct is that of a "requirement"—a standard of minimally acceptable behavior—and its breach, wrongdoing.¹⁹ This is plausible. For present purposes, however, the distinctions traced by MacCormick can be ignored. They have no effect on the problems now to be discussed.

Despite his reservations about Hart's theory, MacCormick claims that Hart's most important contribution to legal philosophy is his application to it of the "hermeneutic approach,"²⁰ which enables Hart to recognize that appraisals of conduct imply beliefs that are naturally expressed in normative language. This amounts to the rejection of crude "behavioristic" interpretations of moral and legal judgments, which do not merely refer to patterns of "external" behavior or, for that matter, to

¹⁸ See N. MACCORMICK, *supra* note 6, at 58-59 (also noting that Hart draws relevant distinctions in other works).

¹⁹ See *id.* at 61-65.

²⁰ *Id.* at 29.

the threat of sanctions. Hart holds that judgments of obligation imply beliefs about relevant standards of conduct, reasons for action, and justified criticisms of contrary behavior. MacCormick rightly emphasizes this virtue of Hart's approach. But he appears insensitive to some very serious difficulties within Hart's theories of obligation.

According to Hart, all obligations (or, in other words, all moral and legal requirements) presuppose and exist by virtue of social rules.²¹ Hart explains the existence of a social rule in terms of the widespread internalization within a community of a corresponding standard for behavior.²² The social rules imposing obligations are those backed by considerable social pressure.²³ Hart treats rules imposing moral obligations as a species of this genus, and Hart's discussion of the differences between moral and legal obligation²⁴ implies that legal obligations are likewise a species of the genus obligation and therefore that legal primary rules are a species of obligation-imposing social rules, so defined. But Hart's theory of law and his frequent references to legal obligations, legal primary rules, and legal obligation-imposing rules imply something different: that legal obligations are imposed by rules that exist by virtue of their satisfying a system's criteria of validity, its tests for law. Such rules need not reflect prevailing standards within the community at large, and Hart does not claim that they do. For such rules to exist, most officials must accept or internalize some criteria of legal validity. But this does not mean that officials endorse a valid rule's standard as such. It means only that they are committed to regarding it as having legal standing.

The upshot is that Hart's views about legal obligation are inconsistent. Legal obligation is treated as a *species* of obligation, and thus as the creature of social rules, whose existence depends on general acceptance, the widespread internalization within a community of a standard for behavior. But it is also treated as if it were *sui generis*, the consequence of rules that must be valid and that need not reflect a generally accepted standard.

This sort of inconsistency can of course be exorcized from Hart's theories by a theoretical revision. One might decide that legal "obligations" are not always genuine obligations, in which case one would cut their ties to social rules. Or one could decide that legal requirements are genuine obligations, and thus are on a par with moral obligations, in which case one would revise the theory of social rules and obligations accordingly.

Instead of pursuing these possibilities further, I suggest that the

²¹ See H.L.A. HART, *supra* note 1, at 83.

²² See *id.* at 54-57.

²³ See *id.* at 84-86.

²⁴ See *id.* at 163-76.

confusion within Hart's theory is no accident, but reflects a deeper tension in his views. His discussion of the "reflective critical attitude"²⁵ involved in judgments of obligation implies (correctly, I believe) that they are relevant to the appraisal of behavior. To believe that someone is under an obligation to act in a certain manner is to believe that contrary behavior is *wrong* and may *justifiably* be criticized. This requires a qualification that Hart would no doubt accept. Because obligations are not always absolute, can conflict with other obligations (or other considerations relevant to the appraisal of behavior), and might therefore be overridden, to believe that someone is under an obligation is to believe that contrary behavior is wrong *unless* it can be justified because the obligation is overridden. We can abbreviate this by saying (as philosophers often do) that behavior contrary to an obligation is "prima facie" wrong—so long as we remember that "prima facie" wrong does not mean "merely appears to be wrong," but rather that there is a relevant standard for behavior that merits respect, although it may not be absolute.

If beliefs concerning obligations can be *true*, this implies that contrary behavior *is* (prima facie) *wrong*—that is, such behavior is wrong unless violation of the standard can be justified. Hart's treatment of obligation sensibly implies that beliefs about obligations can be true, for he believes that obligations exist. Hart is not a radical skeptic about the appraisal of behavior.

Treating legal requirements as obligations, then, implies that they *automatically* merit such respect, that contrary behavior is (prima facie) wrong. But why should we assume this? Legal restrictions are burdensome and themselves require justification. It is reasonable to suppose that some legal restrictions cannot be justified. Even if we assume that legal restrictions that cannot be justified on their own merits deserve some measure of respect when they are part of generally decent legal systems, we cannot assume that systems of law are decent. A given system, like a given rule, might or might not merit respect. This depends upon whether it satisfies standards that are relevant to its evaluation.

Hart does not assume that legal systems automatically satisfy the relevant conditions, and his positivism (specifically his views about "the separation of law and morals," or, in other words, the moral fallibility of law) does not permit such an assumption. Hart acknowledges that law can be outrageously unjust and can become an oppressive instrument in the hands of a dominant group.²⁶ This implies that an entire legal system may be so morally corrupt as not to merit any respect. In that case (which we cannot rule out *a priori*), there would be no general presumption that one should obey the law, and legal requirements could not

²⁵ *Id.* at 55.

²⁶ *See id.* at 114, 196-98.

amount to genuine obligations. These legal requirements would not amount to standards for behavior that merit respect, the violation of which would be (*prima facie*) wrong.

This may help to explain why Hart leaves room within his theory for a class of "legal obligations" that are *sui generis*. If one wishes to apply a term like "obligation" (or any other term with similar implications for the appraisal of behavior) *automatically* to legal requirements, as it is customary to do, then one must think of them as merely *legal* "obligations," which cannot be assumed to have the normal implications of obligations for the evaluation of behavior.

Why then does Hart not settle for this part of his theory of legal requirements? Why does he simultaneously treat them as genuine obligations, on a par with moral obligations? Part of the explanation has to do with Hart's attitude toward law. Another part has to do with Hart's conception of morality. Hart says, for example, in a typical passage on the subject, "that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."²⁷ This implies that one may be justified in disobeying the law, but, more significantly, it also implies that law automatically merits respect. Legal requirements do not settle questions of conduct, but they are assumed always to be relevant, even without considering whether they satisfy any relevant standards. This assumes that legal standards are on a par with genuine obligations, a breach of which is (*prima facie*) wrong.

MacCormick echoes Hart: "Law is indeed morally relevant. But it is never, and should never be deemed, morally conclusive."²⁸ Such a statement does not seem to go far enough, for it assumes that law automatically merits some measure of respect, regardless of its substantive content and its possible use as an instrument of injustice, inhumanity, and even genocide. So it is no wonder that MacCormick should fail to notice these tensions within Hart's theory. Both take the same fundamental attitude toward law. This feature of Hart's and MacCormick's views seems to represent more than a failure of analysis. It manifests too reverential an attitude toward law, one that fails to square with their endorsement of "the separation of law and morals."

III THE NATURE OF MORALITY

Hart and MacCormick not only exaggerate the moral significance of legal requirements, but also their views about morality make it seem as if legal and moral requirements are on a par.

²⁷ *Id.* at 206.

²⁸ N. MACCORMICK, *supra* note 6, at 160; *see also id.* at 27.

If we assume that obligations are relevant to the appraisal of behavior in the way described, then we can ignore Hart's distinction between obligation in general and moral obligation, for it has no bearing on the problems to be discussed. Similarly, the distinction between moral obligation and the more general idea of a moral requirement, which MacCormick emphasizes, will be irrelevant here, and the discussion is simpler if we ignore it.

As previously noted, Hart holds that a belief about an obligation implies beliefs about reasons for action and the justified criticism of behavior. If judgments of obligation were equivalent in content to a set of such beliefs, then someone would be under an obligation just when the latter set of beliefs was true—that is, when criticism of behavior contrary to a standard that merits respect is justified.

But Hart also maintains that obligations are the products of social rules. And he holds that such rules exist only when the corresponding standard for behavior is widely accepted within a community. This implies that someone is under an obligation to act in a certain way whenever enough people accept the notion that there is such an obligation—in other words, in believing basic moral standards makes them so, provided that enough people happen to agree.

The result is an implausible conception of moral requirements. In Hart's view, for example, if most members of a community believe that a wife is obligated to defer to the wishes of her husband, then, regardless of the merits of their belief, she is under that obligation and her contrary behavior is wrong. But neither our concept of obligation nor our ordinary moral judgments are tied so tightly to a social consensus, which we recognize might be mistaken. It makes perfectly good sense for someone to hold that she is not under an obligation, although others generally believe that she is, or for her to hold that she is under an obligation, even though others generally disagree. Not only does it make good sense, but she may be right. Whether she is right depends upon the substantive reasons for or against her judgment. While prevailing moral attitudes should be taken into account—for example, to avoid unnecessary offenses—those attitudes do not determine what reasons there are.

Hart's conception of morality is not thoroughly conventional. He acknowledges that morality involves more than just social rules and other shared values, such as ideals. He embraces a distinction between "positive" (or conventional) and "critical" morality, in which the latter refers to principles used in appraising law and social rules.²⁹

This might lead one to assume that Hart qualifies the authority that he accords to social rules when they violate minimal standards of

²⁹ See H.L.A. HART, *supra* note 1, at 178-79. The distinction is so named in H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 17-20 (1963).

critical morality, so that indefensible rules generate no genuine obligations and do not automatically merit respect. But Hart never clearly integrates these two aspects of his theory of morality in that way. He never suggests that social rules that are morally indefensible are deprived of their moral authority, and his theory of obligation implies the contrary. Hart treats law and morals in exactly parallel ways.

It is perhaps understandable that Hart plays down the relevance of critical principles to the appraisal of behavior, for he never clearly embraces the idea that some critical principles might be sound and their contraries unsound. Although his *use* of critical principles suggests such a position, his theoretical discussions appear noncommittal on the subject. This brings us, finally, to a doctrine that both Hart and MacCormick embrace, the so-called separation of law and morals.³⁰ In one form or another, this doctrine is central to legal positivism.

Although he does not explicitly endorse this formulation, Hart has given contemporary positivism a standard gloss on the separation doctrine: "there is no necessary connexion between law and morals, or law as it is and law as it ought to be."³¹ MacCormick plausibly interprets this to mean that there is no "necessary *conceptual* link between the legal and the moral."³²

But these formulations are unsatisfactory. They clash with Hart's important claim that "there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it were utterly neutral, without any necessary contact with moral principles."³³ Hart argues that the idea of a general rule, which is part of the concept of law, "connotes the principle of treating like cases alike," and specifically suggests "justice in the administration of the law."³⁴ Hart maintains the standard view that justice in the administration of the law requires adherence to the law, however unjust its rules might be. This helps to explain why Hart regards law as meriting respect.

Hart's reasoning is invalid and his conclusions unsound.³⁵ More to the point, Hart's argument conflicts with the separation doctrine as he presents it and as MacCormick interprets it. If Hart is not inconsistent, we need to understand the doctrine differently.

Positivists hold that law is a matter of social fact. This leads some positivists who are also moral skeptics to reason in the following manner.

³⁰ See generally Lyons, *Moral Aspects of Legal Theory*, 7 MIDWEST STUDIES IN PHILOSOPHY 223 (1982).

³¹ H.L.A. HART, *supra* note 1, at 253; see also Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (defending positivism's separation of law and morals).

³² N. MACCORMICK, *supra* note 6, at 24 (emphasis in original).

³³ Hart, *supra* note 31, at 624.

³⁴ *Id.* at 623-24; see also H.L.A. HART, *supra* note 1, at 155-57 (expanding on the theme that treating like cases alike is part of justice in the administration of law).

³⁵ See Lyons, *On Formal Justice*, 58 CORNELL L. REV. 833 (1973).

Law is a matter of social fact, but morality is simply a reflection of our arbitrary attitudes. There are legal facts and legal states of affairs, but there are no moral facts or moral states of affairs. Essentially, what law is cannot be determined by morality.

But this does not express the separation doctrine that most legal positivists embraced. As Hart rightly notes, the classical positivists, Bentham and Austin, were by no means moral skeptics.³⁶ Nor does Hart ally himself with radical skepticism about morality. Legal positivists generally take morality seriously. They regard it as important to understand what law *is* so that we can evaluate law in terms of what it *ought* (or ought not) to be. The separation doctrine thus addresses the relations between law and what Hart calls "critical" morality, and it assumes that moral criticism of the law is possible and important. As MacCormick observes, Hart's endorsement of the separation doctrine stems from his moral concerns.³⁷

It is tempting to understand the separation doctrine that most positivists endorse as the axiom that law is subject to moral appraisal and does not necessarily satisfy the standards by which it may properly be judged. This is a doctrine that radical skeptics about morality cannot embrace. They can make no sense of the idea that there are moral standards by which law may *properly* be judged, because they regard moral standards as fundamentally arbitrary.

It is unclear whether Hart can consistently endorse the separation doctrine in such a form, for it is unclear whether he believes, along with the classical positivists, that certain critical principles applicable to law are sound and their contraries unsound. Hart takes no stand on such questions. His beliefs about moral rights and obligations, however, do not seem consistent with the spirit of the doctrine in the form just suggested. From his view, rights and obligations are determined by whatever moral rules happen to prevail within a community, even if those rules can not survive criticism. This suggests that the only moral standards that Hart is prepared to regard as valid bases of moral appraisal might be fundamentally arbitrary.

MacCormick's own views about morality are relevant here. He is clearly more skeptical about morality: "Honest and reasonable people can and do differ even upon ultimate matters of principle, each having reasons which seem to him or her good for the view to which he or she adheres."³⁸ MacCormick believes that such reasons "are not in their nature conclusive, nor equally convincing to everyone."³⁹ From this he infers that when there is such a disagreement, no moral position can be

36 See H.L.A. HART, *supra* note 1, at 253.

37 See N. MACCORMICK, *supra* note 6, at 24-25.

38 N. MACCORMICK, *supra* note 12, at 5.

39 *Id.*

uniquely correct. If there can be a right answer to a moral question, it must be because there is agreement on the relevant values. As noted earlier, MacCormick, like Hart, places great stock in moral consensus.

But, because there can be irreconcilable differences about matters of fact, and because the reasons that can be given for judgments about matters of fact are likewise "not in their nature conclusive, nor equally convincing to everyone," one might expect MacCormick to be skeptical about ordinary facts too. He suggests, however, that judgments of value, including moral judgments, are inherently "subjective" in ways that judgments of facts are not.⁴⁰ Facts do not depend on what we think, but the values that things have depend fundamentally on how we happen to evaluate them. Thus, factual questions can have right answers that are independent of what we think, but right answers to evaluative questions exist only when people happen to agree.

This conception of morality does not square with the version of the separation doctrine that we have been considering. That version suggests that the justice or injustice, morality or immorality, of laws and legal systems is a matter of fact that is not merely a function of moral agreement. MacCormick can regard the morality or immorality of law as a matter of fact, but only on the understanding that law does not necessarily satisfy the standards that people happen to share.

Therefore MacCormick, and perhaps Hart, understand the separation doctrine somewhat differently. They hold that law is subject to moral appraisal and does not necessarily satisfy the standards by which it may *happen* to be judged. The trouble is that Hart and others defend the separation doctrine in part by treating cases of unjust law as if the injustice were *not* a function of moral agreement, but a matter of fact determined by how people fare under such arrangements. This seems to be misleading. It would have been helpful, therefore, if MacCormick had addressed the issue more fully and clarified the positivistic doctrine of "the separation of law and morals."

Hart's legal theory seems motivated by two distinct assumptions. First, law is a matter of complex social fact that requires careful and subtle analysis. Second, law is subject to moral appraisal. Because law and morals share a normative vocabulary, therefore, the analysis of moral as well as legal ideas and their differentiation is a fundamental task of legal philosophy. Hart's work and MacCormick's study of it combine to show that this task still lies before us.

*David Lyons**

⁴⁰ See *id.* at 105-6.

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THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS. *Herbert Kaufman*. Washington, D.C.: Brookings. 1981. Pp. 220. \$22.95 (cloth).

STALKING THE WASHINGTON BUREAUCRAT

Washington, D.C. is not only our national capitol; it is our national curiosity. Each year tourists by the thousands flock to the city to study the monuments and museums of the nation's capital. Not least among the objects of curiosity is the federal government and the people who run it. Journalists prowl the halls of government for news; lawyers and lobbyists stalk the same halls seeking a "fair advantage"¹ for their clients; and academics prospect for new insights for yet another article or book on government. In the face of such relentless searching, one might imagine that nothing of significance could have escaped observation.

Such is the richness and variety of the subject, however, that something always seems to be left unstudied, or at least unappreciated. Herbert Kaufman's *The Administrative Behavior of Federal Bureau Chiefs* examines one such area. Although the bureaus and bureaucrats in general have been studied ad nauseam, Kaufman notes that the activities of federal bureau chiefs have not been extensively studied or fully appreciated. Hence this book.

I

Kaufman does not attempt to survey all federal bureau chiefs. He limits his survey to a sample of chiefs in six bureaus: the Animal and Plant Health Inspection Service (Department of Agriculture); the Customs Service (Department of the Treasury); the Food and Drug Administration (Department of Health and Human Services); the Forest Service (Department of Agriculture); the Internal Revenue Service (Department of the Treasury); and the Social Security Administration (Department of Health and Human Services). It is a disparate, not to say odd, assortment, representing a wide range of different functions and organizational characteristics. Whether it is fairly representative of "the bureaucracy" is another matter, on which I reserve comment until later. Suffice it for now to note simply that the intellectual—as distinct from mechanical—basis for the particular selection is not explained.

Kaufman's methodology is simplicity itself. He observed the chiefs in their workday environment over approximately a year, sitting in their

¹ Several years ago, as a newly appointed FCC Commissioner, I was advised by Senator Warren Magnuson, then Chairman of the Senate Commerce Committee: "You will be besieged by lawyers, lobbyists and others. Give them their due; all they ask of their government is a fair advantage." No other statement so succinctly expresses the spirit with which modern Americans petition their government.

offices as they went about their routines, attending most of their meetings, interviewing them about out-of-town trips, interviewing others with whom they came into contact, and reviewing various documents related to their activities. The product of this effort is not, as Kaufman surely would agree, a scientific report. It is in fact only slightly more than a collection of impressions, systematic after a fashion but not always purposefully focused.

Kaufman's report on his observations can be divided into roughly two parts. The first part describes what Kaufman's bureau chiefs did, while the second explains why what they did made relatively little difference to the performance of the agency. In the first part, Kaufman classifies bureau-chief activities into four general categories:² (1) decisionmaking, (2) processing information, (3) representing the bureau to external constituents, and (4) motivating bureau personnel. His report on these activities does not give much information about the individual agencies or their activities. Although it is not too much to assume that the average reader will have some general notion of the substantive business of the agencies, Kaufman's lack of detail does not rest on this assumption, but apparently on the premise that the particulars of an agency's functions are essentially irrelevant to an appreciation of their behavior or, at least, to an understanding of the contribution of their chiefs. Overall, Kaufman presents only a very general summary of his observations of *all* of the bureaus, with occasional references to an individual bureau chief's activity to illustrate his points about bureau chiefs as a group.

In Kaufman's judgment, the first bureau chief activity, decisionmaking, is relatively insignificant. To those who think of the chief as the embodiment of the agency—the "boss"—this finding may appear counterintuitive. The relative insignificance of this function partly results from Kaufman's definition of decisionmaking as a discrete, authoritative choice among alternatives.³ So defined, "decisions" are hard to locate in any bureaucratic organization, for most decisions are the culmination of a series of choices made at various levels of the bureaucracy. Thus, what finally appears as an *agency* decision is the product of an almost invisible process involving group interaction. The bureau chief's contribution to that process more often involves one of subtle influence on, or not so subtle direction of, subordinate staff, rather than a selection among discrete choices.⁴

² See H. KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 17-90 (1981).

³ See *id.* at 18-19. The definition thus excludes preparation for, and deliberation over, alternatives. With these exclusions the wonder is not that decisionmaking accounted for little of the chiefs' time, but that it accounted for any measurable time at all.

⁴ Kaufman notes that the bureau chiefs were instrumental in starting the processes that lead to decisions:

In contrast to the limited attention given to making "decisions," the bureau chiefs that Kaufman observed were constantly engaged in receiving and reviewing information (fifty-five to sixty percent of their time).⁵ Both the purposes ("scanning for potential embarrassment," "preparing for decisions," and "appraising performance")⁶ and the methods ("conferring," "reading," "direct observation")⁷ of information-gathering and evaluating are described in very general terms that can be applied to all six bureau chiefs or, for that matter, to almost anyone. As a consequence, we learn little of the particular problems or issues confronted by individual bureau chiefs and how they responded to them.

In terms of time consumed, the next most important activity for the six bureau chiefs was the conduct of external relationships, an activity that Kaufman estimated consumed as much as thirty percent of the bureau chiefs' time.⁸ Not surprisingly, Congress and its staff preempted a large share of this time. Others who were favored by the chiefs' attention included organized clientele groups, the media, other department officials, and last and not least, the general public. Kaufman's description is once again very general, failing to offer any particular detail about ex-

They often started the process, and their interventions, even when brief, influenced its course. And they frequently brought deliberations and disputes to an end by announcing their judgment; such exercises of authority were their distinctive contribution to the process. So their role in it was important. Nevertheless, the process, once launched for a given issue, ran more or less autonomously to the point of resolution; subordinates did most of what was necessary to bring it to that point.

Id. at 19. One of the disadvantages of focusing on the role of the bureau chief is that the "autonomous" forces that take place in the bowels of the bureau are not explained. Without more information about how the bureau operates, it is hard to appreciate the role of the chief.

⁵ *See id.* at 45. *See generally id.* at 24-45 (discussing the reception and review of information).

⁶ *Id.* at 26-33.

⁷ *Id.* at 33-44. The majority of this time was consumed by oral communications, primarily through meeting with staff and others or conversing on the telephone. Kaufman does not speculate on how this particular time allocation might affect the quality and the quantity of information received. It would be my hunch, based in part on personal experience, that the emphasis on oral communications—particularly by telephone—places a rather heavy burden of reliance on what is often impressionistic, or at least unsystematic, information. If this is true, the question of why bureaucrats devote so much time to inefficient techniques of information-gathering naturally arises. Kaufman seems to imply that the schedule of his chiefs left little time for reading materials other than the largely *pro forma* scanning of documents requiring signature. But this suggestion merely describes the observed reality; it does not explain it.

Bureau chiefs are not powerless to organize their schedules to suit their perceived needs. The fact that more time is not devoted to sustained and careful reading might reflect a bureaucratic habit of trying to appear to be always in motion. A person who retires to his office for two hours to study reports will not be perceived to be as busy as one who devotes the same time to telephone calls and meetings. It may also reflect the bureaucrat's conscious decision not to delve deeply into a subject but rather to spend just enough time to keep the flow of information ("throughput" in computerese) moving through the agency.

⁸ *See id.* at 78. *See generally id.* at 45-78.

ternal relationships, such as what particular groups were influential and what particular committees were most active.

Finally, the bureau chiefs spent from ten to twenty percent of their time performing what, for want of a better shorthand, I would call the "cheerleading function"—attempting to motivate staff, increase their sense of institutional identity, reassure them, exhort them, and so on.⁹ The process included such obvious techniques as giving speeches, presenting awards, and direct consultation with subordinates. As with the other functions, Kaufman's treatment is very general.

The outcome of all this bureaucratic activity is not easy to describe. Indeed, Kaufman even finds it difficult to discern the contribution made by bureau chiefs, apart from their setting a general "tone" for their organizations,¹⁰ adding to the prestige of the bureau, and affecting the timing and sequence of certain functions. After noting particular achievements of a couple of the bureaus during the period of the study, Kaufman cautions against attributing these achievements to the bureau chiefs themselves. This is consistent with a theme running throughout the book: that bureaucratic decisionmaking is a function of numerous interactive processes in which the different contributions of various actors, both inside and outside of the agency, are indistinct. Indeed, to say that the individuals' contributions are indistinct understates his point; Kaufman appears to subscribe to the notion that organizations possess an organic personality in which the individual actors have no important independent identity. A flavor of this notion is captured in the following passage:

In a sense, then, an internal dynamics seems to be at work in the federal administrative system. That is, at any given time, its state engenders behavior on the part of the people in and associated with it that moves it almost irresistibly toward another state—not inevitably, perhaps, but with a high degree of probability. The inner logic apparently driving the system is, I admit, expressed through the actions, and through the wills and values, of the participants. At the same time, the actions of the participants are determined to a large degree by what they can and cannot do in their organizational context, and even their wills and values are shaped by the organizational situation in which they are immersed. The two sets of factors together help propel and steer the system. Consequently, organizations and the organizational trends and tendencies described here are not simply artifacts of the people who compose and nominally conduct them. They are governed also by their own organizational imperatives.

. . . .

The idea that organizations are not simply implements of human

⁹ *Id.* at 78. See generally *id.* at 78-86.

¹⁰ See *id.* at 139.

intentions is consistent also with homeostatic and cybernetic models of organization behavior. If organizations are self-regulating mechanisms that tend to maintain a steady state by suppressing disturbing factors, every proponent of change—which is to say every complainer about the prevailing state of affairs—would encounter formidable resistance that few could overcome. Not even those inside the organizations could redirect things easily or extensively. That is exactly what this study found.¹¹

II

Evaluating this book is extremely difficult because its pretensions are very modest, and one hesitates to criticize it for not doing what was not attempted. Still, one may ask whether what was attempted was worthwhile. My conclusion is that it probably was not. When one compares Kaufman's present study to his study of Forest Service officials¹²—a classic in the genre of "sociological" observations of administrative behavior—the present work is particularly disappointing. It lacks the specific focus and the detail that made *The Forest Ranger* both interesting and instructive. The present book offers no detail about the specific bureaus, their distinctive problems, or their unique missions. The implicit premise of Kaufman's study is that, insofar as it is pertinent to the behavior of the bureau chiefs, the agencies are basically the same. Given not only the widely varying missions and histories of these different bureaus, but also the disparate external environments in which each operates, that premise seems questionable. At the very least, it is a premise that requires fuller articulation and justification, and this in turn demands a more detailed explanation of the specific tasks that these bureaus undertake and the specific problems that confront the bureau chiefs. Instead, Kaufman supplies at most a handful of illustrations about a particular problem in one of the agencies studied.

The present study also fails to offer any new theoretical insights about bureaucracy and bureaucratic behavior. The very definition of Kaufman's undertaking is problematic for reasons suggested earlier. His definition of the relevant universe to be studied is an altogether confused one, and his definition of a bureau is unsatisfactory. Admittedly, as he observes at the outset, no standard definition of a bureau exists.¹³ The term is used indiscriminately to label offices and agencies of different size, mission, and organizational structure. For example, the term is used in the lexicon of federal establishments to cover organizations as diverse as the Bureau of the Census (within the Department of Com-

¹¹ *Id.* at 193-95.

¹² See generally H. KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960).

¹³ See H. KAUFMAN, *supra* note 2, at 5-6.

merce), the Bureau of Foods (within the Food and Drug Administration, which is in turn within the Department of Health and Human Services), the Federal Bureau of Investigation (within the Department of Justice), and the Bureau of Ships (within the Department of the Navy, which is part of the Department of Defense). On the other hand, as Kaufman's report indicates, many "bureaus" are not labeled as such. Plainly one cannot even rely on official labels to define the relevant universe.

The lack of a standard definition makes it important for Kaufman to provide a clear definition of what he purports to study. Kaufman chooses four criteria for defining the relevant universe of bureaus to be studied:

First, they had to be departmental subdivisions closest to the secretaries that were not headed by assistant secretaries or other ranks of secretary. Second, they had to be line rather than staff agencies. Third, they had to be functional, not territorial, subdivisions of the departments Fourth, at least 10 percent of their total membership had to be serving in field stations outside the headquarters city.¹⁴

From this universe of defined "bureaus," Kaufman selected six. The selection is designed to offer a sampling that differed in age, size, budget, and mission.¹⁵ Unfortunately, Kaufman never tells us why this arbitrary definition of "bureau" is a relevant universe to study. What is the significance of his four criteria? For example, why does he choose only departmental subdivisions, as opposed to independent agencies? That is, in what respect does an FDA bureau chief function differently from, say, the head of the Federal Trade Commission? The significance of the distinction between "line" and "staff" agencies is also unclear. Acknowledging the distinction in terms of classic public administration classification does not give us a clue as to why it is important in terms of bureaucratic sociology. And why do we care about the degree of personnel dispersion in the agency? Except insofar as it may be a clumsy surrogate for size, the relevance of this criterion is neither explained nor self-evident. In sum, Kaufman neglects to answer the crucial question: what will a study of these particular organizations (or their chiefs) tell us about organizations generally, or about government bureaus in general?

The absence of an enunciated rationale for the selection of bureaus to be studied highlights a more fundamental shortcoming of the entire study: the absence of a clear conceptual theory of bureaucracies and how they operate. As noted earlier, Kaufman seems to subscribe to a model of organizational behavior that views bureaucratic actions as a function of environmental and structural constraints, not individual utility functions. But the model is never presented in a manner that would test its usefulness in explaining bureaucratic behavior. After all,

¹⁴ *Id.* at 7.

¹⁵ *See id.*

anything can be described as the product of "the system" if "the system" is defined in sufficient generality.

I do not dispute Kaufman's general thesis that bureaucrats' behavior is shaped by the "organizational situation in which they are immersed."¹⁶ But Kaufman strains the point with his references to "organizational imperatives" and "homeostatic and cybernetic models of organization behavior,"¹⁷ phrases that almost seem to invoke Germanic romantic philosophy in its reification of the collective spirit.¹⁸

This emphasis on the organic character of bureaucracy typifies a sociological perspective that is strikingly different from that of economists and like-minded political scientists who focus first on the individual, deriving their theories of institutional behavior from observations of individual motivations.¹⁹ In contrast, Kaufman's primary focus is on the institutional entity and its collective characteristics; the individual and his preferences are of little or no importance in explaining the system.

Some merit probably inheres in both the sociological and the economic approach. For me, however, the individualistic perspective is far more helpful in understanding the underlying causes and effects of organizational activity, as opposed to describing its superficial appearance. The mere fact that organizational activity does not follow the interests or desires of any one individual or group does not imply that it is endowed with an autonomous will, independent of any human purposes. It may be, as psychologists tell us, that groups sometimes behave in ways quite alien to the desires of any of their constituent individuals. Mobs are a classic example. But surely agencies cannot be equated with mobs. Moreover, if we examine their activities carefully, we are certain to see visible traces of human motivations. The individuals and their interests are not the captives of the "organizational imperative" so much as they are an integral part of it. To understand the situation, we need to look more closely at the interests that interact to produce bureaucratic activity. Unfortunately, Kaufman not only fails to explore the interaction of individual interests in his study, but he also neglects to explore the work of bureaucratic theorists who have done so. The works of such leading modern analysts as Downs,²⁰ Tullock,²¹ and Niskanen,²² for example,

¹⁶ *Id.* at 194.

¹⁷ *Id.* at 194-95.

¹⁸ *Cf.* THE POLITICAL THOUGHT OF THE GERMAN ROMANTICS, 1793-1815 (H. Reiss ed. 1955) (passages from Fichte, Novalis, Muller, Schliermacher, and Savigny).

¹⁹ See P. ARANSON, AMERICAN GOVERNMENT: STRATEGY AND CHOICE 20-21 (1981), for a vigorous defense of the individualist perspective and a criticism of the "organic fallacy." On the difference between "sociological" and "economic" perspectives on political activity, see B. BERRY, SOCIOLOGISTS, ECONOMISTS & DEMOCRACY ch. 8 (1978).

²⁰ A. DOWNS, INSIDE BUREAUCRACY (1967).

²¹ G. TULLOCK, THE POLITICS OF BUREAUCRACY (1965).

²² W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

are not mentioned.

Apart from exploring general theories of bureaucratic behavior, Kaufman might have undertaken many other useful inquiries that would have related his empirical observations to more general observations about organizational behavior in particular situations. For example, Kaufman tells us that processing information is the most time consuming and, he implies, the most important activity of the bureau chiefs. In itself, this is not a very startling or important finding. What one wants to know is how the chiefs process information, for what purposes, and with what kinds of difficulties. Yet Kaufman provides no details sufficient to evaluate the purposes or the processes of information gathering and evaluation. He also makes no effort to relate these inquiries to general models of bureaucratic behavior.

One example of the inadequacy of Kaufman's analysis is his discussion of the purposes behind information processing. Kaufman notes that "scanning for potential embarrassment" is a major objective of bureau chiefs in seeking information. His observation seems to invite further speculation on how this objective influences bureaucratic decisions. It does not come as a surprise that bureaucrats, like most persons, are sensitive to possible embarrassment. Nor is it to be regretted that they are, for such sensitivity can be an important element in making bureaucrats socially responsible. On the other hand, too great a sensitivity may induce a degree of risk aversion that is harmful to the public interest. There has been speculation that just such risk aversion underlies some regulatory attitudes. The FDA's alleged conservatism in licensing new drugs is a commonly cited example.²³ That the FDA is one of the bureaus Kaufman studies makes all the more noticeable his failure to probe into the relationship between the type of information bureau chiefs seek and the decisions that they make.

As to processes, it is now fairly conventional learning that information is subject to distortion in rough proportion to the number of filters

²³ See P. ARANSON, *supra* note 19, at 472-74. This particular criticism is not that agencies are risk-averse with regard to all errors, but merely concerning those that are detectable. The criticism is a logical extension of the argument that bureaus and bureaucrats seek to maximize bureau outputs that are monitorable and measurable. See Lindsay, *A Theory of Government Enterprise*, 84 J. POL. ECON. 1073 (1976). A difficulty with this argument, and its extension, is that of identifying who precisely are the monitors. In the case of the FDA, for example, the argument assumes that the error-costs of preventing or delaying the marketing of a safe and effective drug (a so-called false negative or type II error) are less detectable than those of permitting the marketing of an unsafe or ineffective drug ("a false positive" or "type I" errors). But detectable by whom? The general public might detect the type II error less readily than the type I error, but industry might detect it more readily. The question then becomes whose reaction is more crucial to the agency. This, in turn, may depend on Congress's responsiveness to the different perceptions of industry and the public. Notice that the assumption that the FDA is averse to errors detectable by the public conflicts with the claim of some observers that the FDA is closely responsive to the drug industry. See R. NOLL, *REFORMING REGULATIONS* 52-53 (1971).

through which it must pass en route to the ultimate decisionmaker.²⁴ At each level of the bureau, we can expect not only some unintended loss of relevant information, but also some staff manipulation that will cause the information to appear in a light most favorable to the interests of the staff members involved. Kaufman's study might have offered an excellent opportunity to explore empirically the intricacies of such distortion, its significance for decisionmaking, and the methods that bureau chiefs employ to correct it. Although Kaufman recognizes the distortion problem in general terms, he made little effort, if any, to investigate it. His "findings" on this point are a few summary generalizations to the effect that the problem of staff distortion was "not very great in practice."²⁵ His observations are too general to be instructive about the nature of the problem or its supposed correction. One would welcome some detail for illustrative purposes at least. For example, I would like some information about the nature of the different perceptions within the bureau's staff, and how these differences relate to their respective functions.²⁶ We could also be told a great deal more about how the bureau's external relations correct staff distortion, and what kinds of new distortions these relations introduce.

External relations suggest another important area of bureaucratic activity that Kaufman touches on but does not critically analyze. One of the bureau chiefs' most important activities is dealing with external constituents—most notably, Congress and representatives of organized clientele groups. Apart from telling us that this is an important activity, however, Kaufman does not give us a very sharp picture of the nature of these relationships or their effect on bureaucratic behavior and agency performance. Consider, for example, his report on congressional relations. We are told that both appropriations and legislative subcommittees conducted "searching inquiries,"²⁷ but we are given almost no information about what they searched for, what they received, and with what effect.

Here again the absence of a reference to general theories of political

²⁴ See, e.g., A. DOWNS, *supra* note 20, at ch. 10.

²⁵ H. KAUFMAN, *supra* note 2, at 38.

²⁶ We can realistically suppose that a bureaucrat's perceptions, like those of "ordinary" people, are influenced by his role within the agency and his external constituency. Thus, we should not be surprised if the bureau responsible for overseeing the activities of one industry should perceive a problem in that industry differently from how another bureau not having such responsibility would perceive it. This phenomenon is not necessarily confined to bureau staffs associated with different industries. Staffs with different professional orientations will betray characteristically different biases. For an excellent illustration, see B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* 79-86 (1981). One would expect the effect of these biases to be enhanced to the extent of conflicts between staff over jurisdictional prerogatives—what Downs calls "policy space." A. DOWNS, *supra* note 20, at 212. Kaufman's book gives no attention to these particular sources of information distortion and conflict or to how the chiefs attempted to correct them.

²⁷ H. KAUFMAN, *supra* note 2, at 27.

behavior is regrettable. The interrelationship of Congress and the bureaucracy has been the subject of considerable theorizing as well as empirical observation.²⁸ Kaufman's study could have provided an excellent occasion for comparing observations on this relationship. For example, one school of thought perceives the relationship between congressmen and bureaucrats as a competitive struggle for control of public policy.²⁹ Another sees the relationship as an essentially symbiotic one in which bureaucrats supply congressmen with various political benefits in return for bureaucratic perquisites.³⁰ It would be interesting to know whether Kaufman's observations could corroborate or contradict these theories. Unfortunately, if he obtained any information relevant to such speculations, he does not report it.

Kaufman's treatment of the bureau's relationships with interest groups represents another lost opportunity. The book contains no evaluation of the nature of these relationships. We are given an illustrative list of organized groups with whom some of the bureau chiefs dealt. The list for the head of the Forest Service includes: "professional foresters . . . wood-producing and wood-using industries and workers in those industries, developers of mineral and gas and oil resources, grazing interests, wildlife biologists and enthusiasts . . . recreation consumers . . ."³¹ What are we to make of such a list? Surely Kaufman does not want us to believe that these groups are all equally influential on matters of forest-management policy or that their relationships with the agency in general or the chief in particular are the same. It is disappointing that

²⁸ See, e.g., M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977); L. FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

²⁹ By one account, the bureaucrats have usually come out ahead by seizing legislative initiative or at least expanding legislative delegations beyond the limits that Congress demarcated. See, e.g., Wiltse, *The Representative Function of Bureaucracy*, 35 AM. POL. SCI. REV. 510, 515 (1941). Needless to say, this view is a popular ingredient of congressional rhetoric on the subject. The evidence is, however, ambiguous at best: some observers find evidence of congressional dominance. See, e.g., Weingast & Moran, *The Myth of Runaway Bureaucracy—The Case of the FTC*, 6 REG. 33 (1982). Kaufman obviously subscribes to the congressional-dominance view, see H. KAUFMAN, *supra* note 2, at 164-66, but he offers no specific evidence in support of this view other than the fact that congressional committees are very active in oversight hearings and related inquiries. See *id.* at 48-54. Effort, however, does not equal effect—indeed, it is possible that the effort that Kaufman sees is more for show than effect. The real efforts are likely to be the product of more subtle techniques of influence than are evidenced by formal congressional oversight hearings.

The ambiguity of the evidence as to who comes out ahead is due in part to the fact that the "struggle" between bureaucratic and congressional protagonists often turns out to be theatrical rather than real, a pretense that masks the positive-sum character of the game.

³⁰ See, e.g., M. FIORINA, *supra* note 28; Weingast, *Regulations, Reregulation and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147 (1981).

³¹ H. KAUFMAN, *supra* note 2, at 70.

Kaufman does not provide more information about the nature of these relationships based on his personal observations.

One of the timeless criticisms of agencies is that they are captured by private interest groups whose affairs they are supposed to oversee.³² The sharp edge of this criticism has been dulled by indiscriminate use; no careful student of administrative behavior today would embrace this cliché without significant qualifications as to its applicability.³³ Still, the claim has enough substance to warrant some inquiry by Kaufman into its possible relevance to selected bureau chiefs. Is the Forest Service and, by implication, its Chief, the "captive" of the timber industry as Justice Douglas once asserted?³⁴ Among his multiple constituents, to whom does Smokey the Bear listen most attentively? Given the conflicts among competing interest groups, how is the Chief likely to respond to different signals? Is there a strategy for playing these interest groups off against each other?

I make the foregoing criticisms with some reluctance, mindful of the point made earlier that one should not criticize an author for failing to achieve what he did not attempt. In particular, my comments about the absence of any new theoretical insights may be somewhat misdirected because Kaufman evidently did not set out to develop or test any theory of bureaucratic behavior. Still, the fact that Kaufman makes no attempt to relate his study to other studies of bureaucracy in order to derive some general lessons about bureaucratic behavior at least raises a question as to the purpose of his undertaking. Because Kaufman does not purport to tell us anything about the substantive work of the six bureaus, we must judge his work on what it informs us about concerning bureaucracies and bureaucrats or, at least, bureau chiefs.

On that score I would conclude that the book's contribution to our understanding is very modest. Reduced to its most elemental terms, the upshot of the book seems to be that bureau chiefs are very busy folks, they do a lot of paper shuffling and talking, and sometimes they contribute to the overall "tone" of an agency, but beyond that they do not play a particularly critical role in the overall bureaucratic scheme of things. Armed with this information, we presumably will be very careful about attributing any great importance to bureau chiefs in the future. Assum-

³² The assertion is most often made of regulatory agencies, *see, e.g.*, R. NOLL, *supra* note 23, at 99-100, but it is not limited to them, *see* P. ARANSON, *supra* note 19, at 485-86.

³³ *See, e.g.*, P. ARANSON, *supra* note 19; J. WILSON, *THE POLITICS OF REGULATION* 372-75 (1980). Among the more important qualifications is the fact that the capture thesis naively implies a process by which legislative programs, passed in the "public interest," are corrupted when the agencies that administer them are taken over by narrow interest groups (industry in particular). In reality, however, the "takeover" all too often occurs in the legislative process itself, in which event the assumption of a legislative "public interest" objective is problematical. *See* Aranson, Gellhorn & Robinson, *supra* note 28; Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

³⁴ *Sierra Club v. Morton*, 405 U.S. 727, 748 (1972) (Douglas, J., dissenting).

ing that Kaufman's conclusion is true—and within the framework of this book it is very difficult to tell whether it is or not—such information is not altogether useless. But those who are truly curious about the folkways of Washington bureaucrats should search elsewhere to satisfy their curiosity.

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MARXISM AS METAPHOR

A Marxist analysis of law claims that a reasonably systematic relation exists between the law and the relations of production, with the latter more or less determining the former. Such an analysis faces three linked difficulties, which I will call the problem of mechanism, the problem of law as constitutive, and the problem of reification.

The problem of mechanism is the one that most non-Marxists latch onto most easily. They say that a Marxist analysis must claim that in a capitalist society law serves the interests of the ruling class. Yet we all know that judges are formally independent of class pressures, that they only occasionally say that they are acting to promote class interests, and that their social ties to the ruling class are loose enough to make it implausible that the judges are instruments of the ruling class. If all this is so, the non-Marxist asks, how then does the coincidence between law and ruling class interests come about?

The problem of law as constitutive mainly arises within the Marxist camp. In its simplest version, the problem arises because class relations are defined in terms of which class owns the means of production, and, yet, ownership is a legal category that takes on its meaning only because of its relation to all other available legal categories. Law thus seems to define or constitute class relations, in which case it is circular to say that the relations of production somewhat determine the law. How then is a Marxist analysis of law possible?

The problem of reification is the peculiar American contribution to the discussion, because of the strong influence of legal realism on American thought about law.¹ One might say, using the scientific terminology to which some Marxists are attracted, that we must specify carefully the dependent variable—"law"—in the analysis. Most Marxists seem to want to say that a rule of law—the fellow-servant rule is a classic example—serves class interests. Yet the legal realists taught us that there never was a "fellow-servant rule" that could be a dependent variable to be explained in terms of its links to the economic base. There were and always are rules and counterrules, rules with exceptions of such scope as to threaten the rule itself, rules whose force can be eliminated by drawing creatively on analogies to apparently unrelated areas of law, and so on. Statutes too have to be interpreted and fit into a whole legal uni-

¹ Similar effects on general discussions have been caused by American political science. For a summary of contemporary Marxist theories of the state that demonstrates that influence, see B. JESSOP, *THE CAPITALIST STATE* (1982).

verse, and cannot be understood as a series of words whose meaning is fixed at the time of enactment. What then can a Marxist analysis try to analyze?

Hugh Collins's superb book, *Marxism and Law*, is a sympathetic explication of what a sensible Marxist analysis might be. It confronts directly the problems of mechanism and of law as constitutive, and gives answers that seem satisfactory on Collins's level of discussion although the answers weaken the claim that Marxists have a special way of analyzing the law. Collins repeatedly notices the problem of reification but does not offer an answer. Indeed, he seems to view reification as inherent in the Marxist program² and criticizes efforts to avoid reification as inconsistent with Marxism.³ He may be correct, in the sense that avoiding reification may, but only may, deprive the analysis of any specifically Marxist content.

I

THE PROBLEM OF MECHANISM

After an introductory chapter explaining why Marxists reject "legal fetishism"—the view that the law is "an essential component of social order"⁴—and seek an image of reality undistorted by that view, Collins discusses the fundamental Marxist argument that law is "essentially superstructural, dependent for [its] form and content upon determining forces emanating from the economic basis of society."⁵ He rejects the theory, which he calls class instrumentalism, that law directly reflects the interests of the ruling class. While such a theory may have something to say about the laws regulating the relations of production, it is totally implausible as an explanation of such things as the details of family law.⁶ According to Collins, class instrumentalism fails on three grounds: it is "often . . . impossible" to link a legal rule to "any aspect of the relations of production"; some laws are "deliberate attempt[s] to change . . . minor aspect[s] of the relations of production" and therefore cannot reflect them; and, most important, there is no "account of how conscious action is determined by the material basis."⁷

This last ground is the problem of mechanism. One mechanism is conscious awareness of class interests. The law would reflect the interests of the ruling class if lawmakers knew their class interests and enacted them into law. Collins agrees that, just as class instrumentalism may account for some aspects of the law, conscious choice may be the

² See, e.g., H. COLLINS, *MARXISM AND LAW* 75-76, 84 (1982).

³ See, e.g., *id.* at 99-100, 109.

⁴ *Id.* at 10.

⁵ *Id.* at 22.

⁶ *Id.* at 23-25.

⁷ *Id.* at 25.

mechanism linking law and class interests in some cases. He argues, however, that lawmakers may not always, perhaps never, know what constitutes the long-term interests of the ruling class.⁸ An alternative theory, which allows subjective perceptions to diverge from objective class interests, leaves law as “a loose collection of rules produced by the fluctuating forces of diverse political groups” within the ruling class, whose diversity rests not on differences in interests but only on differences in perception.⁹ Collins concludes that conscious awareness is a logically unsatisfactory answer to the problem of mechanism: “[E]ither there has to be an account of how motivations inevitably coincide with a person’s objective class position, or it has to be explained how the social class . . . comes to share a common perception of interests.”¹⁰

This gap of logic is filled by a theory of ideology, which not only strengthens the “conscious awareness” answer, but provides an alternative answer to the problem of mechanism. For Collins, ideology is formed by a process of socialization in which people acquire a “set of signs and categories” with which they “interpret the world.”¹¹ Ideology is the way that people make sense of their experiences, and the means by which experiences that are painful and unsettling become natural. The pain of alienation is transmitted into the resigned or joyous acceptance of “the naturalness of an individualistic market economy.”¹² Law plays an important ideological role because it is “encountered frequently in daily life” and “provides a comprehensive interpretation and evaluation of social relationships and events which is in tune with the main themes in the dominant ideology.”¹³

Collins is of course aware that “in tune with” is a long way from “is determined by.” The difficulty is that the dominant ideology is so open that almost anything can be “in tune with” it. Collins argues that Marxists can respond to the openness of ideology in one of two ways. They can “limit the[ir] claims . . . to manageable proportions” and argue that they will explain only “the broad outlines of social evolution.”¹⁴ This solution, Collins correctly states, is “unpalatable” to many Marxists because it means that their theory will have nothing to say about the class struggles that they see “all around them.”¹⁵

The alternative is to emphasize the “plasticity and omnipresence of the dominant ideology.”¹⁶ Through this emphasis Marxists are able to

⁸ *See id.* at 31.

⁹ *Id.* at 31-32.

¹⁰ *Id.* at 32.

¹¹ *Id.* at 38-39.

¹² *Id.* at 42.

¹³ *Id.* at 50.

¹⁴ *Id.* at 56.

¹⁵ *Id.* at 57.

¹⁶ *Id.*

make some sense of the experience of analysts of law—that things happen, decisions are made, laws are enacted which seem to be the product of guild interests on the part of lawyers or which seem to have little connection to the relations of production. The vehicle in Marxist theory for this sense is the concept of relative autonomy.¹⁷ Collins struggles hard to make sense of this concept as a tool of Marxist analysis, concluding that in its best form, “relative autonomy” means that “the dominant ideology produces . . . the underlying categories and values of the legal system, but through a logical process judges articulate the precise implications of these forms.”¹⁸ Yet, Collins points out, this formulation threatens “any illuminating materialist explanation of the content of law.”¹⁹ If judges have an autonomous power to manipulate underlying categories, what prevents them from doing so in ways that “[alter] the basic principles through legal reasoning”?²⁰ Collins summarizes:

If [Marxists] stick to a purely instrumental explanation of legal reasoning, . . . then the whole enterprise of ensuring coherence and consistency in legal reasoning has to be dismissed as false consciousness, perpetuated by lawyers who are concerned to mystify their desire to support the interests of the ruling class. On the other hand, an acceptance of the autonomy thesis poses a threat to the whole theory of historical materialism.²¹

Marxists, it would seem, have a choice between presenting a false picture of reality or being un-Marxist.

Collins suggests that, once again, ideology offers the way out. The apparent autonomy of legal reasoning is an ideology that makes sense of the experience of openness and flexibility within the legal system: “Lawyers are concerned with coherence and consistency because they are attempting to resolve conflicting interpretations of the dominant ideology,”²² which is itself open and flexible. But now Collins closes the trap. Because of the plasticity of the dominant ideology, “it is possible to eliminate any counter-examples without difficulty.”²³ On a Popperian view of science, which I take it many Marxists hold, this makes the Marxist analysis of law unscientific. Collins concludes that instrumentalism must be rejected because it is “unfaithful to the Marxist explanation of ideologies,”²⁴ but that an ideological explanation that emphasizes “the plasticity of the dominant ideology”²⁵ must also fail

¹⁷ *Id.* at 61-74.

¹⁸ *Id.* at 68.

¹⁹ *Id.* at 69.

²⁰ *Id.* at 68.

²¹ *Id.* at 70.

²² *Id.* at 73.

²³ *Id.* at 75.

²⁴ *Id.*

²⁵ *Id.* at 76.

because it cannot connect the relations of production to the content of law.

Notice, however, that Collins appears to require that a Marxist analysis of law provide an explanation of the content of the law. As I have suggested, Collins discusses plastic ideologies because he wants to avoid the "unpalatable" limitation of Marxist analysis to broad historical developments. Similarly, he concludes his discussion of ideology by acknowledging that this criticism loses force if we are willing to limit the scope of the theory and thereby leave "large gaps in the account of laws."²⁶ I will argue below that such a limitation is necessary, not to preserve the distinctively Marxist elements of the analysis, but to make it minimally coherent. The problem of reification is another version of the question of scope to which Collins attends. Solving it may rescue the Marxist project, although perhaps at a cost unacceptable to many Marxists.

II

THE PROBLEM OF LAW AS CONSTITUTIVE

How can one simultaneously believe all of the following propositions to be true: (1) The base determines (in some strong or weak sense) the superstructure; (2) law is an element of the superstructure; (3) the base consists of the relations of production; and (4) relations of production are defined in terms of ownership of the means of production? Legal terms seem to constitute the base, but that is what supposedly determines them.

Collins's chapter on this issue²⁷ focuses as it must on G. A. Cohen's masterly contribution.²⁸ Cohen argues that we must define "relations of production" in terms of physical power over the means of production. This may not work, Cohen concedes, when a mode of production has matured and physical power has acquired normative value by its recognition in law. But "in a period of transformation,"²⁹ we can see how physical power and legally recognized ownership do not coincide. Collins objects, cogently I believe, that somehow during such periods power and ownership have to be brought into harmony.³⁰ Drawing on his earlier analysis, Collins argues that ideology provides the mechanism by which this harmonization occurs.³¹ But if that is so, Cohen can no longer hinge his solution to the problem of law as constitutive to "periods of transformation." Ideologies are groups of ideas that take a long

²⁶ *Id.*

²⁷ *See generally id.* 77-93.

²⁸ G. COHEN, *KARL MARX' THEORY OF HISTORY* (1978).

²⁹ H. COLLINS, *supra* note 2, at 82.

³⁰ *See id.* at 84.

³¹ *See id.* at 84-85.

time to develop and acquire normative and persuasive content through sustained struggle between those favored by existing ideologies and those seeking to institute new ones:

A dominant ideology with the potential to shape a social formation could only arise from settled social practices where norms of behaviour had established a degree of regularity of behaviour within which persistent conceptions of the world could emerge. This ideology could not arise from the kind of transitory power relations by which Cohen characterizes the material base.³²

This analysis of Cohen's thesis seems correct to me. Collins proceeds to offer a different solution to the problem, a solution that resembles the legal anthropologists' notion of law as a double institutionalization of regularities in behavior into social norms and then into enforceable rules.³³ Collins argues that as a mode of production develops (in the womb of an earlier one, Marx might have said), segments of the community (nascent class fragments, Poulantzas might have said)³⁴ interact in patterned ways that rest on their relations to the means of production. Because people need ways of thinking that make sense of their lives, they begin to treat these patterns as norms. When the new mode of production replaces the old, these norms are converted into legal rules.³⁵ Thus the legal rules come to constitute the base by a process of social development and class struggle, through the struggle for ideological domination in the preceding period.

The argument works neatly up to this point. When it is combined with Collins's earlier arguments about the plasticity of a dominant ideology, however, it devastates his effort to make sense of a Marxist analysis of law that does not have "large gaps in the account of laws." To demonstrate this, I must depart from the close tracking that I have given of Collins's arguments and jump to his final chapter.

In that chapter, Collins "turn[s] . . . from theory to practice"³⁶ and asks how a Marxist might use law in the class struggle. "The radical's predicament"³⁷ is that the tactical use of law for short-term ends may validate the ideal with law within bourgeois society, enhance the ideological underpinnings of class rule, and thus impede rather than promote revolutionary change in the long run.³⁸ This occurs because the capitalist mode of production supports, and requires, only a neutral

³² *Id.* at 85.

³³ *See, e.g.,* Bohannan, *The Differing Realms of the Law*, in *LAW AND WARFARE* 45-50 (P. Bohannan ed. 1967).

³⁴ *See* N. POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* 77-84 (1973).

³⁵ H. COLLINS, *supra* note 2, at 88-89.

³⁶ *Id.* at 124.

³⁷ *Id.*

³⁸ *Id.* at 126-27.

state to protect property and enforce contracts.³⁹ According to Collins, “[w]hat is needed is a programme for the demystification of the neutrality of the liberal political order, and its replacement by an appreciation of the class structure of government.”⁴⁰ Such a program must be pragmatic, sometimes using law to “heighte[n] . . . class-consciousness” by securing laws that “increase the opportunities for a working-class movement to gain cohesion,”⁴¹ sometimes foregoing apparent reforms as insufficiently demystifying.

I have my doubts about the efficacy of a tactical use of law, which the ruling class may readily describe as a cynical manipulation of the uncohesive working class, thereby preventing an increase in cohesion. But suppose that we treat Collins’s statements not as a political program for Marxists, but as the basis for analyzing the specific content of law in capitalist society. Given that class struggle for Marxists is endemic although not always self-conscious, and given a relatively open ideology of the sort that Collins describes, the laws as they are at any moment must be seen as the product of the class struggle at that moment. Reforms are extracted from unwilling segments of the ruling class by pressure from the working class, enhanced by those leading segments of the bourgeoisie that understand how reform may preserve capitalism. Conversely, repressive laws are imposed by the ruling class on a working class too weak to resist.⁴² Now consider Collins’s solution to the problem of law as constitutive: Regularities of behavior are also negotiated through the class struggle, the particular social norms that embody those regularities ratify the outcome of the class struggle, and the laws that come to constitute the base institutionalize the success of the ruling class. In sum, Collins says that Marxists may escape the circularity of law as constitutive only by developing an empty analytic theory that states no more than that particular laws are explained by the state of the class struggle. Marxists, therefore, must relinquish the project of developing a reasonably comprehensive Marxist analysis of law.

III

THE PROBLEM OF REIFICATION

I have argued that in dealing with the first two problems of mechanism and law as constitutive, Collins leaves Marxism with a serious problem concerning the proper scope of its analysis of law. He argues that a reasonably comprehensive theory will be empty insofar as it emphasizes the plasticity of ideology and, I have suggested, thus argues in

³⁹ *Id.* at 131.

⁴⁰ *Id.* at 141.

⁴¹ *Id.* at 142.

⁴² Presumably almost all of this occurs through the operations of the ideological mechanism that Collins has identified.

effect that Marxism has an empty theory of how the base is constituted by law. It may be possible, however, to have a Marxist analysis of law that makes less comprehensive claims than Collins requires of the analysis that he elucidates.

In a chapter entitled "The Prognosis for Law,"⁴³ Collins touches on this possibility of a more limited Marxist analysis. His discussion is shaped by the utopian vision of a communist society in which the state, and presumably the law as well, will have withered away. I must confess that when the issue is phrased in that way, it strikes me that the ensuing discussion is likely to be highly idealist and unilluminating, although it must be noted that the "wrong" answer cost Evgeny Pashukanis, the leading Soviet philosopher of the law in the 1920s, his life during the terror of the 1930s. Pashukanis developed the "commodity-exchange theory" of law.⁴⁴ According to this theory, Marx discovered how the fetishism of commodities worked by presenting to everyone in bourgeois society the image of commodities stripped of the labor (power) that produces them. Commodity fetishism lets us treat as fungible all the diverse products of diverse human labor by reducing them to a common unit of labor power. But commodities cannot be exchanged in the market without some human participation, making it necessary to supplement the economic relationship among commodities with a legal relationship among people. This legal relationship corresponds to, and in some versions is derived from, the reduction of diverse human labor to a uniform unit of labor power. For in the legal sphere, law reduces all the diverse relations of social life to relations among legally indistinguishable individuals. Thus, what links law to the material base is the parallel between the way commodities present themselves to us and the way that we conceive of our relations to each other.⁴⁵ In the currently fashionable terminology, the commodity-exchange theory of law would have Marxism explain the form of law but not its content.

The commodity-exchange theory avoids one version of the problem of reification. In my discussion so far, I have been careful to talk of law in a relatively undifferentiated way. The problem of reification arises when one tries to analyze specific rules or doctrines and link them to the material base, which is the comprehensive project that Collins attributes to Marxism. The difficulty is that, as the realists taught us, there are no specific rules or doctrines. There are results in particular cases, which the judges rationalize by invoking or creating a rule. But there are always alternative rules that could have been invoked to yield a different result, and alternative rationalizations of the same result that invoke still

⁴³ H. COLLINS, *supra* note 2, at 94-123.

⁴⁴ *Id.* at 108-11.

⁴⁵ For a presentation of the commodity-exchange theory as applied to the state as a whole, see B. JESSOP, *supra* note 1, at 78-141.

other rules. One does not have to believe as I do that this indeterminacy is total to understand that indeterminacy of any significant degree will doom the comprehensive project. Not only will it be clear that the result could have been different, so that the link between the rule invoked and the material base will be entirely adventitious, but the rule itself could have been different, so that the link that is supposed to explain things would have to be reconstructed entirely ad hoc.

Collins criticizes Pashukanis for trying "to explain all legal rules as reflections of commodity exchange."⁴⁶ The realist argument shows that such an effort cannot succeed. The commodity-exchange theory, however, need not involve that effort.⁴⁷ Instead, it could try to explain only the general form of legal relationships in bourgeois society. Another version of the problem of reification, however, then arises. As Collins states the matter: "Bourgeois legal systems are described as sets of general, abstract rules of universal application. . . . I doubt whether . . . this is a fair description of many parts of modern legal systems . . ." ⁴⁸ He notes that in many fields, especially those involving the regulatory-state characteristic of contemporary capitalism, "the overwhelming characteristic of the regulations seems to be their attention to minute detail rather than abstract principle."⁴⁹

One could discount this observation, as Claus Offe does, by treating the detail of regulatory laws as a contradiction within later-developed capitalist laws, which has been generated in turn by the contradictions of capitalism.⁵⁰ A realist would say, however, that generality and abstraction are themselves always masks for minutely particularized decisions. The stated rules, when seen as the realist insists that they must be seen in the precise contexts in which they are applied, are what philosophers might call definite descriptions. This, however, makes the commodity-exchange theory all the more interesting, because it attempts to explain why the appeal to generality and abstraction is so potent that legal decisionmakers always try to use it, are embarrassed when they are forced to particularize, see minutely detailed regulations as a threat to the rule of law, and reject the realist argument fairly violently. Collins criticizes the theory, but only insofar as it tries to be comprehensive.

Collins has shown that the only candidate for a viable Marxist the-

⁴⁶ See H. COLLINS, *supra* note 2, at 109.

⁴⁷ I know too little about Pashukanis to say whether Collins is right about him. His work, *Law and Marxism*, suggests to me that Collins has overstated the extent to which Pashukanis was committed to a comprehensive theory. See E. PASHUKANIS, *LAW AND MARXISM* (P. Beirne & R. Sharlet eds. 1981).

⁴⁸ H. COLLINS, *supra* note 2, at 99-100.

⁴⁹ *Id.* at 100.

⁵⁰ See, e.g., Offe & Ronge, *Theses on the Theory of the State*, 6 *NEW GERMAN CRITIQUE* 137 (1975); Offe, *Structural Problems of the Capitalist State*, 1 *GERMAN POLITICAL STUDIES* 31 (K. Von Beyme ed. 1974).

ory is one that deals with the form and not the content of the law. The commodity-exchange theory is the leading, perhaps the only, contender of that sort. Collins, however, has not shown that, like the other theories, it will not work.

CONCLUSION

A Marxist theory of the legal form may be impossible. One might construct a theoretical entity labeled "the legal form," but that entity never appears in any real bourgeois society. Instead, as Collins's example of regulatory law indicates, all real societies are not pure versions of a mode of production and what it may entail, but social formations in which elements of various modes of production coexist. To analyze societies using abstract categories may be possible, but only because one makes some obviously problematic epistemological assumptions. Contemporary Marxists are in general committed to those assumptions.⁵¹ Every instinct I have tells me that they are wrong, but I am not qualified to reject those assumptions out of hand.

Yet even if the epistemological assumptions are wrong, and even if a Marxist analysis of law of the sort that I have discussed is impossible, something still remains to be said. In one sense Marxism is the only remaining secular view that is committed to fighting domination wherever it occurs. Considered in that light, the debate over the withering away of law takes on a new aspect. Law may be taken as a metaphor for all those facets of our social relationships that seem to us necessary for us to get along in the world and that also seem somehow imposed on us. Marxism is then a metaphor for a world of radical contingency, in which we know that social regularities are constructed by our own actions, have no life of their own, and may be challenged and reconstructed whenever and however we want. In that world, however, what do we do about the Charles Mansons and David Rockefellers?

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⁵¹ B. JESSOP, *supra* note 1, makes this commitment clear, and Jessop himself is committed to these assumptions.

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