Introduction

I.1 The Puzzle of Authority

Philosophy of law has long been in a state of deadlock, unable to make progress in solving the puzzle of law's authority – that law is both a matter of right and might. This book seeks to break the deadlock.[1] It does so by going back to the work of HLA Hart, who in 1958 set solving that puzzle as the main task for legal theory in 'Positivism and the Separation of Law and Morals' with his lapidary claim: 'Law surely is more than the gunman situation writ large'.[2] I argue that the task can be accomplished through exploiting the rich resources in Hart's own legal theory. But I do so in a way closed to him by the idea he claimed was central to his tradition in his 1958 manifesto for legal positivism: his Separation Thesis that there is no necessary connection between law and morality.

The thought that we should abandon the Separation Thesis will not seem like news to Hart's successors, who have taken to claiming that legal positivism is not committed to this thesis, even that Hart himself never upheld it.[3] But, as I will explain, the claim that Hart never advanced the thesis is wrong and the connection my arguments display is far stronger than any of his successors acknowledge. The resources I muster from Hart's legal theory show that one cannot elaborate a theory of law's authority without elaborating a theory of its legitimate authority, where legitimacy is actual legitimacy. Law's authority is a matter both of what legal subjects in fact accept and what they have reason to accept.

[1] In *What Makes Law: An Introduction to Legal Philosophy* (Cambridge: Cambridge University Press, 2014), Liam Murphy suggests that the deadlock cannot be broken and that we should move on in practical ways.
[2] HLA Hart, 'Positivism and the Separation of Law and Morals', in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, at 59.
[3] For example, Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 23 *New York University Law Review* 1035.

Law's authority does not, then, as Hart's most influential successor Joseph Raz has argued, amount to a claim to rule legitimately which must be made even when the law on behalf of which its officials make the claim is utterly immoral and even when the officials are completely insincere.[4] Rather, as Hart always suggested, the central task of philosophy of law is to understand the authority law *has*, not the authority it merely *claims*. Moreover, law's authority cannot be explained as de facto authority – what it has a matter of fact – but which may not amount to legitimate or de jure authority, despite the reliance by both Hart and his successors on that distinction.

As I argue, the idea that there could be an illegitimate legal authority is a contradiction in terms: an unauthoritative authority. What makes law authoritative is that the officials who speak in its name can answer satisfactorily the legal subject's question 'But, how can that be law for me?' The legal order of what I will refer to as the 'modern legal state', in Hart's words the 'distinctive structure of a municipal legal system',[5] affords to its officials resources which enable them to answer that question and so to maintain their order as a legal order. A legal order is therefore one in which the law has de jure authority.

My main thesis is that the legal subject's question should be at the centre of philosophical inquiry into law. But on my argument the legal subject and the modern legal state are two sides of the same coin. I do not attempt to buttress the claim that as a matter of history the conceptions emerge together, although I believe this to be the case. However, I try to show that if philosophy of law is to progress beyond deadlock, it must both make its conceptions of state and subject explicit and appreciate the tight, indeed unbreakable, relationship between the two.

In my account, a theory of law's authority has three elements. First, it explains authority as compliance with fundamental principles of legality – the right-giving basis of legal order. Second, it gives to officials a role in interpreting enacted law in the light of such principles. It thus offers a theory of the role of official interpretation of the law in maintaining legal order. Given the first and second elements, the principles make up a grammar of legality in that enacted laws which are not interpretable in the light of the principles have a dubious claim to authority. If enough dubious laws are enacted, the order begins to shift from one of legal right

[4] Joseph Raz, 'Authority, Law, and Morality', in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 194.
[5] HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, 2nd ed.), 17.

to one of unmediated coercive power. Thus, to be legal, to count as valid law, law must be interpretable in a way which respects the fundamental principles. Third, the way in which these two elements combine in a single legal theory requires invoking what I call a 'constitutionalist idea'. This is the idea of an ongoing practice which constitutes legitimate authority of the sort early modern political theorists set out in versions of the social contract. These theorists substituted for the divine right of the monarch a secular basis for the authority of the modern legal state, one produced by the voluntary interaction of the very individuals who are subject to that authority.

Interpretability is key. Laws which are not interpretable in light of fundamental principles of legality lose their claim to authority because they do not bear the marks of having been enacted with legal right. They are 'illegal laws', laws which lack the quality of legality. Conversely, when laws are interpretable in this way, legal officials will be able to justify to the legal subject their exercise of authority. They will be able to answer adequately the question 'But, how can that be law for me?' For legality mediates the conversion of public policy into the enacted law applied by officials to legal subjects. This process of mediation, whereby political judgments are converted into legal content, brings the fundamental principles to bear on the determination of the law which the officials apply. In this way, the officials maintain the constitutionalist idea through a dynamic process of juridical production.

All three elements are to be found in Hart, though in a distorted form which can be corrected only by setting them in the long arc of legality – an arc which stretches from Thomas Hobbes in the seventeenth century to the other major legal positivist thinker of the twentieth century, Hans Kelsen.[6] Hobbes's and Kelsen's contributions to my argument are not, however, through an account of their place in a chronological history of ideas. Rather, it is through the way their theories help to provide a more satisfactory theory of legal authority than if we suppose that the main protagonists are confined, on the one hand, to Hart followed by Raz in the legal positivist camp, and on the other, to Lon Fuller and Ronald

[6] Why Hobbes, that is, why not Rousseau, Kant or any other classic philosopher of law and politics? The answer is that Hobbes is *the* theorist of the modern legal state, as I hope to demonstrate in this book. I will set out my reasons for not opting for a Kantian legal theory in Appendix II.

Dworkin in the natural law camp with their distinct attempts to show a necessary connection between law and morality.[7]

In making this argument, I seek to vindicate the insight in a passing remark in Michael Oakeshott's essay on the rule of law that there is a 'vision of a state in terms of the rule of law' which 'hovers over the reflections of many so-called "positivist" modern jurists'.[8] In this essay, Oakeshott set out an account which owes most to Hobbes, though he acknowledged that its roots can be found in other early modern as well as modern theorists. Kelsen is the positivist jurist he had in mind.[9]

Oakeshott's insight is profound. While Hobbes and Kelsen are not often linked[10] and Kelsen hardly mentioned Hobbes let alone acknowledged any debt to him, they both chose to explain the law of the modern legal state as a matter of both rightful authority and coercive power. Since they understood that to explain law as a matter of authority is to explain it as de jure authority, they focused on the way in which legality plays a crucial role in transforming political might into legal right.

Here and throughout it is important to bear in mind that the right in issue here is not right at large but (in accordance with the first element sketched above) *jus* or legal right, the idea of right intrinsic to legal authority. The whole of this book is an exercise in unpacking this idea, which is also the idea which animates terms like the 'rule of law' and 'legality'. Such terms are the closest English comes to conveying the connotations of *jus* and its equivalents – *Recht*, *droit*, *diritto* – as well as the other words which European languages (except for Polish) have for expressing the distinction between law in the sense of made or enacted law and law in the sense of legal right. It is the right or authority implicit in the kind of political rule which establishes in enacted or positive law its judgments about how the subjects of rule should act. In so doing, lawmakers accept that the content of their judgments will be determined

[7] An omission from my cast list, and thus for the most part from this book, is the natural lawyer John Finnis and his major work *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980). I explain why in Appendix III.

[8] Michael Oakeshott, 'The Rule of Law', in Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999) 129, at 175.

[9] See my 'Dreaming the Rule of Law', in Dyzenhaus and Thomas Poole, eds, *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge: Cambridge University Press, 2015) 234.

[10] Though see Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Chicago: Chicago University Press, 1993, Daniela Gobetti, trans.) and Bobbio and Danilo Zolo, 'Hans Kelsen, the Theory of Law and the International Legal System: A Talk' (1998) 9 *European Journal of International Law* 355, at 358–9.

in accordance with the discipline which the requirements of legality – of government under law – imposes.

The right-giving basis of legal order resides in its fundamental principles of legality. In Hobbes, these are his laws of nature the 'Science' of which he said is 'the true and onely Moral Philosophy',[11] and of which Oakeshott observed that they amount to 'no more than an analytic break-down of the intrinsic character of law, ... the *jus* inherent in genuine law'.[12] In his much neglected chapter 26 'Of Civill Lawes' in *Leviathan* (1651), Hobbes made clear that legal officials, in maintaining these laws, a task which includes the activity of judges in interpreting enacted law, do the job of preserving the social contract by which subjects have agreed with each other to regard the law – the commands of their sovereign – as binding on them.

The social contract is usually understood as a once and for all act in the state of nature with civil society its product. But the continued existence of such a society depends on the maintenance of the civil laws which provide the framework for the subjects' interaction with both one another and the state in an ongoing dynamic process. Put differently, a civil society must be fully governed by law – both enacted law and fundamental principles of legality – for the 'mutuall Relation between Protection and Obedience'[13] to obtain. To the extent it is not so governed, the social contract becomes ever more friable. To the extent that it is so governed, the social contract is renewed.

The social contract and the protection–obedience relationship are thus the two major components of the constitutionalist idea. Indeed, in early modern political thought, they were conceived as two closely connected though distinguishable ideas, both of which were required to make up a complete contract: the *Gesellschaftsvertrag* or contract of the whole of the society to be ruled by one sovereign and the *Herrschaftsvertrag* which, as Ernest Barker put it, 'in the sense of government, is based on a contract between ruler and subjects'.[14] Barker noted correctly that with Hobbes, once the political community is formed, there is no further contract

[11] Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1996, Richard Tuck, ed.), 110.
[12] Oakeshott, 'The Rule of Law', 173.
[13] Hobbes, *Leviathan*, 491.
[14] Ernest Barker, 'The Theory of the Social Contract in Locke, Rousseau and Hume', in Barker, *Essays on Government* (Oxford: Clarendon Press, 1960, 2nd ed.) 86, at 90. Emphasis removed.

between the 'sovereign Leviathan' and the community so that the state is subject to 'none of the limits of a contract of government'.[15]

But, as I show, the role of officials in maintaining the order of civil law makes possible the mutual relationship of protection and obedience and that relationship does the work of a contract of government. Hence, Barker was wrong to suppose that Hobbes's sovereign is unlimited,[16] though, as I argue at various points, the issue is more that the sovereign is legally constituted, and as such may not as sovereign violate fundamental principles of legality. For the present, I want to note that in general presence matters more than name. So long as there is present in a legal theory, first, an idea of what legitimates the legal order – what gives it the quality of legality which distinguishes it from the gunman writ large – and, second, a sense of how that idea achieves traction in the relationship between ruler and subject, one is trafficking in a constitutionalist idea, the functional equivalent of a complete social contract.[17]

Of the thinkers on whom I focus, Hobbes and Kelsen understood this best and so offered, as I show, the most satisfactory accounts of how the three elements of a theory of law's authority combine. But these elements became inevitable as soon as Hart made the puzzle of legal authority the main task for legal theory. For since 1958 there is general agreement that law cannot be reduced to the coercion attached to the commands of a legally unlimited sovereign, as Hart's predecessors Jeremy Bentham and John Austin had argued. Rather, law has to be understood both as a matter of authority and of the fundamental rules or norms which both constitute such authority and condition its exercise through official interpretation.

There is also general agreement that, as Hart argued in his 1961 classic *The Concept of Law*, an understanding of law as authoritative requires adopting the 'internal point of view' of those subject to the law who accept it as such. They follow its injunctions not because they fear punishment – the claim Hart rejected in Bentham's and Austin's 'command theory' of law – but because they regard it as the right thing to do. '[T]he coercive power of law presupposes its accepted authority';[18] and

[15] Ibid, 92.
[16] Though see ibid, note 1 at 92 for Barker's perceptive qualifications to this claim which I set out in Chapter 2.
[17] For an analysis of the persistence of the social contract idea, even in thinkers who purported to reject it such as Hume and Bentham, see JW Gough, *The Social Contract: A Critical Study of Its Development* (Oxford: Clarendon Press, 1957, 2nd ed.).
[18] Hart, *The Concept of Law*, 203.

I follow Hart in supposing that the kind of acceptance at stake is not reducible to hypothetical acceptance, an idea of what would be accepted if only individuals were rational or reasonable. It is, or at least is also and mainly, actual or factual acceptance.[19]

Hart always resisted the idea that such acceptance is tantamount to moral endorsement. As Raz put it in an homage to his teacher, Hart remained 'the heir and torchbearer' of Bentham's and Austin's positivism, a 'great tradition in the philosophy of law which is realist and unromantic in outlook'. That tradition, Raz continued, 'regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious'. '[C]entral', then, to Hart's 'whole outlook' is 'the rejection of the moralizing myths which accumulated around the law', so that he shares the 'Benthamite sense of the excessive veneration in which the law is held in common law countries, and its deleterious moral consequences'. Raz also mentioned that Hart's 'fear' was 'evident . . . that in recent years legal theory has lurched back in that direction'.[20]

It is only at this point that real disagreement between contemporary legal positivists and natural lawyers begins, though it is not about whether law is a matter of social fact. Like Hart's claim that law is a matter of authority as well as coercion, there is general agreement that law is a matter also of facts, including facts about coercion. Disagreement arises because of the claim made in the 'lurch' that if law is to be understood as a matter of authority, that requires finding a moral basis for the authority of law. It is this disagreement which leaves legal theory caught, as it were, between might and right.

The lurcher was, of course, Dworkin, Hart's successor in the Chair of Jurisprudence in Oxford. Raz's description captures well a sense among Oxford philosophers of law that Dworkin's own version of 'moralizing myth' amounted to an awkward though short-lived distraction. However, Hart had worked hard behind the scenes and somewhat illicitly to ensure Dworkin's succession to his chair, a fact of more than biographical interest.[21] While Hart had been so impressed by Dworkin's performance

[19] In Chapter 3, I argue that acceptance is a mix of both, in which actual acceptance dominates.
[20] Raz, 'Authority, Law, and Morality', 194.
[21] Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), 291–3. Lacey reports at 186 that Hart was already troubled by Dworkin's criticisms at the time Dworkin was an undergraduate law student in Oxford.

as an undergraduate law student in Oxford that it is alleged he stole Dworkin's Jurisprudence paper from the examination office as a souvenir, much more important must have been Hart's perception of the importance to philosophy of law of the sweeping challenge to legal positivism in two of Dworkin's first published papers, 'Model of Rules I' and 'Model of Rules II'.[22] There Dworkin argued that judges who follow his 'interpretive theory' of law will in any 'hard case' – a case in which there is reasonable disagreement about what the law requires – do their duty by disinterring the principles which justify the law in fact relevant to the legal question and selecting the answer which shows the law in its best moral light. In his view, this argument undermined three main positivist theses.

First, he had shown that law is more than a matter of facts. It is also a matter of the principles implicit in the law which rise to the surface in hard cases. It followed, second, that one could reject the positivist claim that when judges must resort to principles, the judges are by definition not deciding according to law because they are exercising discretion – an act of legislation. In other words, since law is both a matter of fact and principles, in hard cases judges will find that the law does not run out and so they do not have to legislate an answer. The principles will supply the legal reasons which permit judges to reason that their decisions are fully justified by the law. Finally, to show the law in its best light is to show it in its best moral light. Since Dworkin took the most basic of such principles to be the liberal principle that individuals should be treated with equal concern and respect, he argued that law's connection with moral values is neither contingent nor precarious. He thus rejected the Separation Thesis which Hart took as the hallmark of the positivist tradition. In sum, Dworkin's challenge to legal positivism was that the authority of law is de jure since it is based on the liberal moral principles implicit in the law of any legal order.[23]

In mounting this challenge, Dworkin accepted Hart's argument that law is to be understood as a matter of authority and from the internal point of view. Indeed, since judges generally present their judgments as

[22] In Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1981, 3rd impression) 14 and 46.

[23] In *Law's Empire* (London: Fontana, 1986), Dworkin developed this argument in setting out an account of what he called 'associative obligation', the obligations of a community constituted by law. See 195–202. I develop a similar idea here through what I term a 'jural community'.

fully determined by law, he maintained that the adoption of the internal point of view as the lens for legal theory supported his position. But because Dworkin never denied that 'the existence and content of the law' is in part 'a matter of social fact' he made, so legal positivists suggested, his claim about law's connection with morality hostage to facts about the law established by the lawmakers of a particular society. To the extent that lawmakers were determined to use the law as an instrument of an oppressive, discriminatory and deeply illiberal ideology, the part of the law reflective of that ideology would expand and eventually make impossible any judicial attempt to show the law in a moral light. Any judicial interpretation, to use Dworkin's terminology, would have to 'fit' so large an amount of relevant law which as a matter of fact exhibited explicitly immoral content that the best 'justification' of the law would be one which promoted that content.[24] As Raz put this point in the essay which opened with his homage to Hart, Dworkin's claim that judges should decide hard cases in 'accordance with the prevailing spirit behind the bulk of the law' would have required a 'South African judge to use his power to extend apartheid'.[25]

Dworkin always tried to avoid confronting this criticism, and in his last word on it said that, while 'the puzzle of evil law' has had a 'prominent place in seminars on legal theory', it is of 'almost no practical importance' because philosophers of law agree that judges should refuse to apply such law, even if they disagree about the reasons they may rely on in doing so.[26] He never, though, found a satisfactory way to respond to the criticism, one in which Hart joined with what Dworkin once called 'uncharacteristic vehemence'.[27]

We will see that such vehement moments in Hart's responses to his foils in his otherwise temperate approach are revealing. As was the case with Hart's tone in dismissing others of his time who argued for a necessary connection between law and morality – Radbruch and Fuller[28] – vehemence on his part showed that their positions touched a crucial nerve in his theory. Indeed, he confessed in his last collection of

[24] See Ronald Dworkin, 'Hard Cases', in Dworkin, *Taking Rights Seriously* 81.
[25] Raz, 'Authority, Law, and Morality', 209.
[26] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011), 410.
[27] Ronald Dworkin, 'A Reply by Ronald Dworkin', in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 247, at 257.
[28] Hart, 'Positivism and the Separation of Law and Morals', 72–5. In fairness, Hart's remarks about Fuller were more temperate but still disparaging – for example, Hart, 'Lon L Fuller: *The Morality of Law*', in Hart, *Essays in Jurisprudence and Philosophy* 343,

essays that a legal theory is implausible which tries to explain law as a matter of authority when it does not resort to some basis in morality for the claim of right implicit in a claim to authority. This confession comes in the course of not only Hart's last and also intemperate attack on Dworkin but also in an expression of concern about Raz's own injection through his idea of the legitimacy claimed by law of a 'moral component' into a positivist theory of law's authority.[29]

Hart was not much troubled by Raz's idea that officials must at least pretend to believe, however insincerely, that the laws they enforce are legitimate because he thought that the idea lacks any moral content and so fails to threaten the Separation Thesis. But his rejection of both Dworkin's claim that there is a basis in moral principles for law's authority and Raz's moral component left him with a position which he acknowledged in his *Essays on Bentham* might seem 'paradoxical or even a sign of confusion' to 'many' because it entails that 'judicial statements of the subject's legal duties need have nothing to do with the subject's reasons for action'.[30] Nevertheless, he asserted that legal theory could make do with the idea of the 'rule of recognition', the most fundamental rule of a modern legal state. The rule specifies the ultimate criteria of validity for all the other rules of a legal order and, through the practice of the officials who in fact accept it, constitutes legal authority.[31]

These *Essays on Bentham* are Hart's most important sequel to 'Positivism and the Separation of Law and Morals' and *The Concept of Law*. They make clear Hart's enduring debt to Bentham for having 'brought into political and legal theory a new and uncompromisingly positivist train of thought'. Hart acknowledged that the roots of Bentham's and his own theories of authority lie in Hobbes's account of law as the command of a sovereign. As he noted, Bentham shared with Hobbes the thought that both the 'legislative power' and 'political society . . . itself' are 'human artefacts', in Hobbes's view, the product of a social contract between those who find themselves subject to that power, the members of that political society. But as Hart also noted, Hume's 'criticism of the theory of the social contract' had had the effect,

at 363, perhaps because, as I indicate later, Hart considered Fuller's main insights to be easily absorbed into his legal theory.

[29] HLA Hart, E*ssays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 147–61.

[30] Ibid, 262–8, at 267.

[31] Hart, *The Concept of Law*, 94–9.