

## ESSAYS

### CAN THERE BE A DEMOCRATIC JURISPRUDENCE?

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#### I. AGAINST GENERAL JURISPRUDENCE

There are lots of books written about football, by which I mean the game played in American high schools and colleges and organized at a professional level by the NFL.<sup>1</sup> (Sometimes it is called “gridiron,” and foreigners call it “American football.”) There are also lots of books written about football, by which I mean the game Americans call “soccer,” played all over the world by teams like Manchester United and Dynamo Kiev.<sup>2</sup> There are lots of books, too, written about football, which was what we used to call Rugby Union in New Zealand when I was growing up.<sup>3</sup> And no doubt there are many books written about football and also books written about football (in the senses in which “football” is used colloquially to refer to Rugby League and Australian Rules, respectively).<sup>4</sup> These books are tremendously interesting, especially to the devotees of the respective codes. Rugby fans, soccer fans, and American football fans want to read about their favorite teams, about their premier competitions, and about the rules, tactics, coaching techniques, and philosophies of these various games.<sup>5</sup>

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<sup>1</sup> My favorite title is HOLLY ROBINSON PEETE ET AL., *GET YOUR OWN DAMN BEER, I’M WATCHING THE GAME! A WOMAN’S GUIDE TO LOVING PRO FOOTBALL* (2005).

<sup>2</sup> *See, e.g.*, MATTHEW TAYLOR, *THE ASSOCIATION GAME: A HISTORY OF BRITISH FOOTBALL* (2007).

<sup>3</sup> *See, e.g.*, ALAN BLACK, *HOW TO COACH RUGBY FOOTBALL* (1991).

<sup>4</sup> *See, e.g.*, ANDREW MCLEOD & TREVOR D. JAQUES, *AUSTRALIAN FOOTBALL: STEPS TO SUCCESS* (2005); GRAHAM MORRIS, *WIGAN RUGBY LEAGUE FOOTBALL CLUB* (2001).

<sup>5</sup> For the different uses of the word “football” and their connections, see the excellent article *Football (word)*, Wikipedia, [http://en.wikipedia.org/wiki/Football\\_\(word\)](http://en.wikipedia.org/wiki/Football_(word)) (last visited Sept. 30, 2008).

There are very few books written about football *as such*—that is, football as something which American football, soccer, rugby union, rugby league, and Australian Rules have in common. There are some history books that trace the development of the various codes; and those are interesting.<sup>6</sup> But I do not think many people would be interested in anything general on the rules and philosophy of football as such. It is not impossible that there could be such books and the task of writing them is not incoherent: “football” is not a homonym as between the various codes mentioned in the previous paragraph.

Something interesting could certainly be written about football in general, for the various football codes grew out of a common game and they do all have some things in common: they are competitions between two teams of ten or more players; the object of the game involves moving the ball by hand, foot, or both toward an objective at the far end of a roughly rectangular field about a hundred yards long; the two teams are attempting to move the ball in opposite directions; one team begins with possession of the ball; possession can be taken from one team by members of the other team or by the operation of the game’s rules; members of a given team try to pass the ball from one to another, while members of the other team try to intercept these passes; and so on. We could construct a general theory of football as such, devoted to the identification and abstract characterization of these common features, and in that general theory of football we might say things like, “The forward pass, though very familiar to Americans, is not a necessary feature of football as such,” or we might say, “All football involves the concept of possession of the ball” (and then face up to the difficulties of showing how this is true even of soccer). We might undertake a general study of the abstract concept of *offside*, to determine what there is in common between the amazingly technical rules of offside in rugby and in soccer, for example. But the interest of such an enterprise would be staggeringly limited compared to studies of the theory and practice of rugby union or rugby league or soccer or American football. That is what people are really interested in, and quite properly so. The general theory of football would look like the most esoteric and scholastic curiosity by contrast.

Might something similar be said about general jurisprudence, the study of law *as such*? There are lots of books and articles written on Roman law, common law, canon law, Islamic law, the *lex mercatoria*, civil law, the body of

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<sup>6</sup> See, e.g., MICHAEL MACCAMBRIDGE, *AMERICA’S GAME* (2004); HUW RICHARDS, *A GAME FOR HOOLIGANS: THE HISTORY OF RUGBY UNION* (2007).

law associated with classic *laissez faire*, the *Rechtsstaat*, the law of the modern administrative state, international law, and so on. But we have also nurtured the enterprise of producing books and articles on law *as such*, attempting to define what systems like these all have in common. Just as our imagined writers about the general theory of football would have to produce vague and abstract propositions like, “All football involves rules governing the enterprise of trying to move a ball from one end of a field to the other, against the opposition of a team trying to move it in the other direction,” so writers in general jurisprudence produce vague and abstract propositions like, “All law involves the governance of primary rules by secondary rules.”

The production and discussion of bodies of theory involving abstract propositions of this kind have become specialties in our law schools. These abstractions are supposed to be helpful, though it has to be said that interest in them is increasingly confined to the small community of scholars who produce them (and the hapless students they are able to lure into their seminars). Other legal scholars, these days, have only a passing interest in and the most cursory knowledge of these theories. It would probably be unfair to say that legal scholars who do not make a specialty of general jurisprudence have the sort of attitude toward it that we would expect sports writers to have toward the general theory of football that we imagined. But it would not be completely wrong. Somehow those of us who do general jurisprudence have managed to create the impression that this is something that other legal scholars *ought* to be interested in, and those other legal scholars probably have a vague background qualm to that effect as they go about their own less-abstract business, cheerfully ignoring what H.L.A. Hart thought about Hans Kelsen or what the exclusive positivists say to the inclusive positivists. But that vague qualm about jurisprudential illiteracy is quickly offset by a widespread, if tacit sense that what goes on in general jurisprudence is largely an inbred word game, of little interest to those who are really interested in law.<sup>7</sup>

And in some moods, I can see the point of these denunciations. Though I have no doubt that the study of questions like, “What is law?”; “What is a legal system?”; and “What is the difference between talk of legal obligation and talk of moral obligation?” is of inestimable benefit to mankind, the answers do sometimes seem a little desiccated, and the concept of law that emerges from all this industry seems rather thin or stripped-down in a way that satisfies the

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<sup>7</sup> See, e.g., Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1678 (2002) [hereinafter Dworkin, *Thirty Years On*] (critiquing legal positivism).

analyst's taste for conceptual austerity but serves very few of the other interests that people have in thinking seriously about the law. Instead of parading so proudly the naked, shivering concept of law as such that we have captured in our analysis, stripped of all its local color and clothing, I sometimes wonder whether it might not be better to devote the same level of analytic talent to some more substantial legal questions.

This sounds like a call for what is sometimes called "special jurisprudence" instead of general jurisprudence. There are actually two senses of special jurisprudence that may be contrasted with the very abstract inquiry we have been considering. One sense of special jurisprudence involves the study of particular areas of law rather than law as such: the jurisprudence of tort law or criminal law or contracts.<sup>8</sup> The other sense of special jurisprudence (sometimes called "particular jurisprudence") involves the study of particular legal systems or types of legal systems, rather than law as such: the jurisprudence of Roman law or the jurisprudence of the common law or the jurisprudence of modern American law.<sup>9</sup>

It might be thought that both special and particular jurisprudence presuppose general jurisprudence. We need to understand what law is as such before we study tort law, and we need to understand what law is as such before we study common law. Certainly this is how things will seem from the perspective of general jurisprudence; there would be little point in engaging in general jurisprudence if we did not think of it as this sort of preliminary inquiry. But from the point of view of special or particular jurisprudence, that is not usually the order of analytic priorities. Those who participate in special jurisprudence do not begin with a general account of law as such and then conjoin it with the particular subject matter of torts or crime or whatever. Rather, they try first to get a sense of what law *in that area* is like, and if anything they use *that*—plus their sense of what law is like in other areas—to build up their account of law as such (rather than the other way around). In particular jurisprudence, when we study the nature of law in, say, common law systems (in contrast to civilian systems), we do not first introduce the abstract concept "law" and then begin distinguishing types of law from one another, as species of the same (independently understood) genus. We compare common

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<sup>8</sup> For an interesting discussion of special jurisprudence with regard to criminal law, see MICHAEL MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* 3–23 (1997).

<sup>9</sup> For the contrast between "general jurisprudence" and "particular jurisprudence," see JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW*, Lecture XI (Robert Campbell ed., John Murray 1913) (1832) [hereinafter AUSTIN, *LECTURES ON JURISPRUDENCE*].

law and civil law initially as two different packages, and we begin slowly to figure out what sort of analysis might be necessary by following up the contrasts that interest us. No doubt abstraction of some sort is always involved, but the analytic categories that are presently prominent in general jurisprudence may or may not prove useful in undertaking this sort of comparison.<sup>10</sup>

## II. DEMOCRATIC JURISPRUDENCE

In this Essay, I want to consider “democratic jurisprudence.” Democratic jurisprudence might be distinguished from general jurisprudence in one or both of the ways I have mentioned. It might be special jurisprudence; that is, democratic jurisprudence might suggest a body of legal theory dealing with topics like elections, campaign finance, redistricting, the franchise, and so on.<sup>11</sup> Or democratic jurisprudence might be a kind of particular jurisprudence; it might be a theory of law as it presents itself in democracies, in contrast to law as it presents itself in monarchies, dictatorships, and so on.<sup>12</sup> The account that I shall develop will be mainly the second of these.

As you can probably tell from my remarks at the end of Part I, I do not propose to pursue this inquiry by asking first what law is and then, as it were, adding the ingredient of democracy, as though democratic jurisprudence were general jurisprudence with democratic theory nailed on as an afterthought. Nor shall I proceed by asking first what law is (an inquiry about genus) and then asking what the distinguishing features are of law in a democracy (an inquiry about species). I am interested in some distinctive features of law in a democracy. But instead of a straight genus/species analysis, I will show how some of the elements and theorems that are emphasized in the general analytic study of law come to life in democratic jurisprudence. I will argue that we can see the point of them in that context, whereas they seem rather mysterious abstractions in the context of the most general jurisprudential inquiry.

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<sup>10</sup> See also Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 311, 316–17 (Jules Coleman ed., 2001) (discussing the “local” origins of general jurisprudence).

<sup>11</sup> See, e.g., SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (rev. 2d ed. 2002).

<sup>12</sup> That is, it might be like Montesquieu's chapter, “On Republican Government and on Laws Relative to Democracy” in the section “On Laws Deriving Directly from the Nature of the Government” in *The Spirit of Laws*. See MONTESQUIEU, *THE SPIRIT OF LAWS* 10–20 (Anne M. Cohler et al. eds., 2002) (1794).

### III. DEMOCRACY

There are many rival definitions of “democracy.” Some theorists are convinced that it is wrong to confine democracy to voting and majoritarian procedures. They call that a narrow procedural definition and they clamor for a more expansive definition that connotes not just majority rule but also substantive protection for human rights.<sup>13</sup> I am not going to take that line. I do not want this to be just another argument about the affinity between legality and the substantive rights that these more expansive theorists associate with democracy. I do not just want to say, cheaply, that democracy is ultimately about individual rights; and law is too; therefore law is intrinsically democratic. I want a more robustly democratic jurisprudence than that.

For me, democracy includes the idea that rulers are chosen by the people whom they rule, the people determine the basis under which they are governed, and the people choose the goals of public policy, the principles of their association, and the broad content of their laws. The people do all this by acting, voting, and deliberating as equals, through elections and through their relations with representatives. The reference to the discipline of equality—acting, voting, and deliberating as equals—is crucial. People disagree and they need formal procedures to come to decisions from the baseline of those disagreements. And when I talk of decisions made among the people, I mean to refer to rather formal aspects of those decisions—formal in the sense of procedures disciplined at all times by the principle of political equality and by an awareness that lapses into informality often connote the lazy privileging of some voices over others.<sup>14</sup> These are the aspects of democratic systems that interest me. But, as I said, what engages my attention in the present Essay is not the legal mechanics of those processes (electoral law, etc.), but the way in which the very idea of such processes informs all the law and the spirit of law generally in such a system.

One other point about methodology. Recently, legal philosophers have been debating whether jurisprudence is essentially normative or whether it

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<sup>13</sup> See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* ch. 1 (1996) [hereinafter DWORKIN, *FREEDOM’S LAW*] (arguing for a more expansive definition of democracy).

<sup>14</sup> See CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 75–122 (1989); JEREMY WALDRON, *LAW AND DISAGREEMENT* 69–146 (1999) [hereinafter WALDRON, *LAW AND DISAGREEMENT*].

can—indeed, whether it must, in the first instance—be purely descriptive.<sup>15</sup> When we try to answer the questions that are posed in jurisprudence, should we think of ourselves as attempting to account for the *value* or *importance* of certain institutions and practices? Or should we confine ourselves to simply *identifying* the relevant institutions and practices, describing them in a general way that illuminates their main features but leaving it as a task for political philosophers to argue about the merits and demerits of this entity we have described?

The battle lines are familiar. Ronald Dworkin and John Finnis, however different their respective approaches are to jurisprudence, both believe that it is impossible to sort intelligently among the practices, texts, and institutions that have some claim to be regarded as “law” or “legal” without some sense of why law should be thought to be important.<sup>16</sup> H.L.A. Hart, by contrast, said that his jurisprudence aimed to give nothing more than “an explanatory and clarifying account of law.”<sup>17</sup> He characterized his account as descriptive, saying, “it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law,”<sup>18</sup> and recently Jules Coleman has seconded this characterization of legal theory.<sup>19</sup> The whole issue is a bit of a swamp, and I really do not want to wade into it in this Essay. I have said elsewhere that I think the purely descriptive approach is mistaken.<sup>20</sup> The kind of democratic jurisprudence that I have in mind explores the connections and the consilience between the *value* of democracy and the concept of law. So a democratic jurisprudence is bound to be a value-laden jurisprudence, and in my view none the worse for that.

For the most part, the methodological argument has been about whether there *can* be a purely descriptive jurisprudence uninvested with evaluative content. Those who believe that there can be such a jurisprudence have not

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<sup>15</sup> See, e.g., GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 332 (Clarendon Press 1986).

<sup>16</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 45–113 (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*]; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3–22 (1980).

<sup>17</sup> H.L.A. HART, *THE CONCEPT OF LAW* 239 (2d ed. 1994).

<sup>18</sup> *Id.* at 240.

<sup>19</sup> JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 179–218 (2001).

<sup>20</sup> Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra* note 10, at 411. Asking whether one can give a non-evaluative account of the concept of law is, of course, a special instance of the broader question of value-neutrality in the social sciences. Jeremy Waldron, *Legal and Political Philosophy*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 352 (Jules Coleman & Scott Shapiro eds., 2002).

wanted to deny that there can also be a normative jurisprudence. Thus, in the postscript to the second edition of *The Concept of Law*, Hart writes that he is willing to concede that evaluative theories like those of Dworkin or Finnis are “of great interest and importance as contributions to an evaluative justificatory jurisprudence.”<sup>21</sup> His comments are purely defensive: he just does not want a descriptive or a conceptual jurisprudence to be precluded out of hand. Hart does say—slightly less defensively—that his sort of jurisprudence offers “an important *preliminary* to any useful moral criticism of law,”<sup>22</sup> just as Jules Coleman wants to insist—first things first, as it were—that “jurisprudence does not *begin* by trying to determine which features of law are important or interesting.”<sup>23</sup> Even though it may go on to be evaluative (and democratic and whatever you like), it has to begin by giving a plausible non-evaluative account of what law essentially is.

I can imagine that view being made to look plausible in the case of the sort of ultra-abstract general jurisprudence discussed at the beginning of this Essay (though even there I have my doubts). Be that as it may, it is quite implausible for the sort of particular jurisprudence—democratic jurisprudence—envisaged in this Essay. As I said earlier, particular jurisprudence of this kind does not really require the abstraction of general jurisprudence as a preface. It proceeds on its own concerns, and it is pretty clear that those concerns include democratic values.

#### IV. POSITIVISM AND DEMOCRACY

Ronald Dworkin has observed that legal positivism used to be associated with democratic values—in the work of Jeremy Bentham, for example, or in American Progressive jurisprudence in the first part of the twentieth century.<sup>24</sup> Dworkin thinks that this connection has been lost—partly because he associates democracy with a jurisprudence of rights enforced by the judiciary (and positivists, in his view, have never been strong on that) and partly because he thinks that analytic legal philosophers have turned against *any* sort of political connection in their capacity as guardians of positivism’s death rattle.<sup>25</sup>

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<sup>21</sup> HART, *supra* note 17, at 241.

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW*, *supra* note 10, at 108 (emphasis added).

<sup>24</sup> Dworkin, *Thirty Years On*, *supra* note 7, at 1677.

<sup>25</sup> Dworkin writes:

I have more faith in positivist jurisprudence than Dworkin does, and in what follows, I shall use that body of theory as a starting point in my exploration of the prospects for a democratic jurisprudence. I do not mean to suggest that there can be no democratic jurisprudence except a positivist one. Nor do I mean to suggest that democracy is positivism's destiny. The most I will claim is that democratic jurisprudence provides an interesting interpretation of some features of contemporary legal positivism that look a little odd standing on their own.

Positivist jurisprudence has several distinctive features. (a) One distinctive feature is its preoccupation with the institutional *sources* of norms—where putative laws come from, who made them—as key to whether a given norm gets recognized as law. This preoccupation may or may not need explanation.<sup>26</sup> But if it does, I believe it is quite easy to explain from a democratic perspective. (b) A second distinctive feature is the emphasis of modern positivists on the *recognition* of norms as law, as itself a rule-governed activity: this is embodied in Hart's notion of rule of recognition. (c) The third feature we should consider is *the separability of law and morality*—whether a given norm is law does not turn on its moral quality. I shall say less about this, and it will be less important for my overall argument. Again, the separability of law and morality may not need explanation or the explanation may simply be that the positivist has formed a conception of law which does not

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The political influence of legal positivism has sharply declined in the last several decades, however, and it is no longer an important force either in legal practice or in legal education. Government has become too complex to suit positivism's austerity. The thesis that a community's law consists only of the explicit commands of legislative bodies seems natural and convenient when explicit legislative codes can purport to supply all the law that a community needs. When technological change and commercial innovation outdistance the supply of positive law, however—as they increasingly did in the years following the Second World War—judges and other legal officials must turn to more general principles of strategy and fairness to adapt and develop law in response. It then seems artificial and pointless to deny that these principles, too, figure in determining what law requires. Following the war, moreover, the idea steadily gained in popularity and in constitutional practice that the moral rights people have against lawmaking institutions have legal force . . . . Once again, it seemed increasingly pointless to declare that these moral constraints on government were not themselves part of the community's law. The political appeal of positivism correspondingly drained away. It was associated no longer with democratic progress, but with conservative majoritarianism . . . .

*Id.* at 1677–78.

<sup>26</sup> For the purely conceptual jurist, maybe it is enough that some mode of content-independent recognition be possible to constitute a distinct order of norms. See Andrei Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 20, at 106–07.

incorporate moral criteria in order to accommodate (what commonsense recognizes as) the fact that some actually existing systems of law make wicked or unjust demands. But I shall show that the partisan of democracy can also give the separability thesis an interesting spin.

In two other regards, the democratic jurisprudence that I shall develop parts company with familiar forms of positivism. (d) Modern positivists pay insufficient attention to the *public* character of law—to the fact that law presents itself not just as a set of commands by the powerful and not just as a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public, norms that ordinary people can in some sense appropriate as their own, *qua* members of the public. I shall argue that this elusive idea, in various tantalizing forms, is a key feature of the democratic conception of law. (e) The fifth feature that I will pursue is the *generality* of law. We tend to confine the term “law” to general norms rather than particular commands; indeed, in many contexts, including many philosophical contexts, we associate the very form of law—*lawlikeness*—with universalization. Although this is something that positivist theorists take cognizance of and make vague gestures to explain, generality is not a feature of law that is highlighted in their jurisprudence. On the other hand, generality is a key feature of legality in most accounts of the rule of law. Now, it is unusual to associate this feature of the rule of law with democracy; on most understandings, democracy has more to do with how the laws are made than with the impersonality and generality of their application. I believe, however, that the association of generality with laws’ having a certain provenance is important for democratic jurisprudence. And I shall argue that when one puts feature (e) together with a democratic account of features (a) and (b), and when one adds to that the difficult-to-state condition about publicness that I listed as condition (d), what emerges is an extremely interesting and philosophically quite challenging *democratic* conception of law.

## V. DEMOCRACY AND SOURCE-BASED JURISPRUDENCE

Let’s begin with (a), the point about sources. Legal positivists present conceptions of law that are dominated by issues about provenance—where law comes from, how and by whom it is made. A norm’s being law is understood in terms of its *sources*; it is understood in terms of the persons, institutions, and procedures that generate the norms that are to count as law.

We know this is true of the old-fashioned legal positivism of Bentham and Austin,<sup>27</sup> which follows Thomas Hobbes in using the notion of *sovereignty* to define the concept *law*.<sup>28</sup> On this account, law is a species of command; but the way to distinguish commands that are laws from other kinds of commands is to focus on the issue of their source. Who made them? Who issued the command? Can the command be traced back to a certain sort of powerful institution? The designation of a set of norms as law has to do with the answers to these questions, and the word “sovereign” sums up the kind of answer we are looking for to certify a command as law. Other questions, posed by an older tradition in jurisprudence—What is the content of the command? Is it just? Is it reasonable?<sup>29</sup>—are brushed aside in this imperious preoccupation with provenance. And forms of law whose source is unclear or indeterminate are made problematic on that ground alone.<sup>30</sup>

In 1961, Hart’s book *The Concept of Law* effected a considerable revision of old-fashioned positivist ideas,<sup>31</sup> and since its publication positivists do not talk so much about law as emanating from a sovereign. But the preoccupation with sources remains. The key to a legal system is now the social existence of a secondary rule or rules of recognition, which, in Hart’s formulation, “specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”<sup>32</sup> True, the idea of a rule of recognition does not necessarily commit one to the view that the source of a norm is crucial to its legal status. A group of people could share a practice of identifying rules as applying to them or to be applied by them simply in virtue of some feature of their form or content. But Hart and his followers believe that rules of

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<sup>27</sup> See AUSTIN, LECTURES ON JURISPRUDENCE, *supra* note 9; JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995) (1832) [hereinafter AUSTIN, THE PROVINCE OF JURISPRUDENCE]; JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., 1970) [hereinafter BENTHAM, OF LAWS].

<sup>28</sup> THOMAS HOBBS, LEVIATHAN 183–84 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

<sup>29</sup> Cf. THOMAS AQUINAS, SUMMA THEOLOGICA 458–91 (Fathers of the English Dominican Province trans., Christian Classics 1948) (1273) (questioning the status of law); AUGUSTINE, CITY OF GOD 139 (Henry Scowcroft Bettenson ed. & trans., Penguin Books 2003) (420) (discussing the content of the commands of kings and tyrants); CICERO, *De Legibus*, in ON THE COMMONWEALTH AND ON THE LAWS 105 (James E.G. Zetzel ed., 1999) (questioning the content of all laws and asking whether they are reasonable and just).

<sup>30</sup> See the chapter entitled “No Customary Law Complete” in BENTHAM, OF LAWS, *supra* note 27, at 184.

<sup>31</sup> HART, *supra* note 17, at 50–56 (criticizing traditional sovereignty theory and introducing the idea of secondary rules).

<sup>32</sup> *Id.* at 94.

recognition identify rules as law mainly by their institutional pedigree—i.e., the mode of their enactment or where and how they were first laid down.<sup>33</sup>

There is somewhat less clarity about *why* sources are emphasized so much. To designate a set of commands or norms as law is to make crucial the question, “Who issued them?” But why? What does it mean to put this issue of where the norms came from front and center? In other normative domains, provenance is not a crucial feature. No one asks this about the rules of etiquette, and there are older notions of law, too, that finesse the question of sources: think of Antigone saying of the burial customs for which she risks death, “their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth.”<sup>34</sup> The question I am posing can be asked as a question about officials: Why do those who operate a legal system regard sources of norms as so important? Or it can be asked as a question about legal theory: Why do *we* (jurisprudes) regard the issue of source as so important? Or the two questions can be put together. The officials who operate a legal system are interested in all sorts of things, including sources. Why is it appropriate for us in our abstract characterization of a legal system to give greater prominence to the fact that officials obsess about sources than to other obsessions—about justice, effectiveness, longevity, etc.—that officials may also have? Or why do we give greater prominence in our theories of law to those officials who obsess about sources than to others who obsess about other things?

I suspect some positivists focus on sources or give theoretical prominence to officials’ preoccupation with sources because it seems to them the only alternative to a substance-based natural law approach. (Sometimes the idea of sources is more or less defined that way.<sup>35</sup>) Likewise, it is said that the sources thesis is indispensable if we are to take seriously the possibility that law might have the authority it appears to claim.<sup>36</sup> But actually all that is important for *that* is that norms should not be identified as law in a way that requires us to

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<sup>33</sup> Modern positivists disagree about whether the criteria are solely matters of pedigree or whether they may also include criteria of morality and justice. Still, even among those who think that a rule of recognition might include criteria of morality and justice, few countenance the possibility that moral criteria might do this work all by themselves without any reference to sources.

<sup>34</sup> SOPHOCLES, *ANTIGONE*, ll. 454–57 (Robert Whitelaw trans., Oxford 1906) (442 BCE).

<sup>35</sup> The sources of a law, on Raz’s account, are all the social facts relevant to its identification, interpretation, and application, i.e., more or less everything except moral criteria. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 47–48 (1979) [hereinafter RAZ, *ESSAYS ON LAW*].

<sup>36</sup> See JOSEPH RAZ, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 220 (1994).

reason about their subject matter, since authoritative norms are supposed to preempt our own reasoning about how best to deal with the issues they address. For the authority thesis, it is important that the relevant norms can be distinguished as law *in some other way* (and we might as well call that “some other way” their *source*).

There are other, more affirmative explanations. Maybe by focusing on sources in the sense of institutional provenance, we are highlighting crucial information about efficacy. For example, we may be particularly interested in the connection between the institutional sources of law and the state. The greater the distance between these two, the less interesting is the class of norms identified in this way as law—certainly these norms are less interesting to the proverbial “bad man.”<sup>37</sup> But if the institutions regarded as sources of law *are* integrated into the powerful institutional system we call the state, then that makes them highly salient: disobedience becomes dangerous; the calculations of other people in this regard also begin to become things that one can count on, and so on. The connection is not complete, however. That a state will enforce edicts that have some department of its own apparatus as their source may be predictable; but that the state will not also enforce other norms is less clear. Having this sort of source may be necessary but not sufficient for figuring what the state will do, and there may be other aspects of a norm, including something about its content, that might trigger state enforcement of it.<sup>38</sup>

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<sup>37</sup> Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (arguing that even a bad man has an incentive to follow the law once it is established and made known to him to avoid punishment, even if the same bad man would not necessarily have an incentive to follow morality as such).

<sup>38</sup> A connection between source and state might be developed more fully in a Hobbesian way. Thomas Hobbes believed that nothing but a single, determinate human authority—or nothing but a unified institution with a determinate decision-procedure—could guarantee the terms of social peace. According to Hobbes, people who desire peace have reason to submit to the edicts of such an authority, if there is one, irrespective of their content (at least up to a point). Hobbes observes that this is a reason for adopting a posture of respect for law as such only if law is identifiable in a way that connects it with the determinate unity of the sort of political institution he is calling for. So the *source* of the putative law is all-important for Hobbes. That is why he says we need a source-oriented rule of recognition:

Nor is it enough the Law be written and published; but also that there be manifest signs, that it proceedeth from the will of the Sovereign. For private men, when they have or think they have force enough to secure their unjust designs, and convoy them safely to their ambitious ends, may publish for Lawes what they please without, or against the Legislative Authority. There is therefore requisite, not only a Declaration of the law, but also sufficient signes of the Author, and Authority.

HOBBS, *supra* note 28, at 189. Such signs, Hobbes says, will depend on accessible criteria of validity, such as “publique Registers, publique Counsels, publique Ministers, and publique Seals.” *Id.* On this account, the rule

Efficacy is one systemic element that may depend on sources. But a specifically democratic jurisprudence will also emphasize the importance of source-based criteria for political legitimacy. When there is a question about enforcing a given norm, a democrat will want to ask hard questions about its origin: where and by whom was the decision made that *this* should be one of the norms enforced in this society? If it was controversial, then how was that controversy resolved? Who exactly participated in the decision, and on what terms and through what processes did they participate? You may say that *anyone* interested in political accountability (not just a democrat) will want to press these questions.<sup>39</sup> But a democrat will press them because he has very strong views about how decisions like these should be made. He believes that in principle *everyone* who stands to be governed by a given norm if it is adopted has the right to participate on equal terms in determining whether it should be adopted. He believes that every society should set up political institutions that embody this principle and should seek to reform or subordinate decision-making institutions that operate on any other basis. I will not attempt

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and apparatus of legal recognition is oriented to a compelling and substantive political end—viz., the end of ensuring that when someone faces what purports to be a legal demand, he knows that that demand really *is* playing the role which Hobbesian legal validity aspires to play so far as the diminution of conflict is concerned. A person can know that only if he has some guarantee that the demand can be traced to a sovereign authority. Source-based criteria of validity, and the rules which recognize them, attempt to furnish that guarantee.

<sup>39</sup> The accountability explication of the sources thesis goes as follows: Norms distinguished by source are norms whose originators can be identified and thus held responsible for them. The prospect of changing a norm, too, becomes more manageable when we know its source: we know who to look to for change. These two propositions afforded part of the basis for Bentham's excoriation of the norms of common law. BENTHAM, *OF LAWS*, *supra* note 27, at 18–30. Bentham did not deny that these norms were effective, but one of the (many) reasons he was inclined to say that they were not really *law* was because they were not associated with any clear lines of accountability. Hence Bentham's affection for explicit enactment as a mark of law. Enactment events make it clear when law is being changed and how responsibility for change (or the lack of change) should be assigned. In the case of common law, by contrast, there is often confusion—sometimes deliberately contrived confusion—as to whether legal change is really taking place at all, let alone who is responsible for it. Similar ideas can be found among the American Legal Realists, in some of their moods. One characteristic of Realist jurisprudence is the determination not to be fooled by claims about who made the laws or how they were made, and in particular not to be fooled by the proposition that certain apparently novel legal conclusions have simply been inferred deductively from norms whose legitimacy is already established. The Realists observed that contemporary defenders of judicial lawmaking hoped that people would not ask too many hard questions about the appropriateness of these decisions being made by judges; the defenders of judicial lawmaking hoped that these questions could be finessed by vague assurances about logic or interpretation. For their part, the Realists were determined not to be bamboozled any longer, and in their constructive moments they called for a new conception of law which would make both the grounds and the sources of law transparent. *Cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822–28 (1935) (discussing the new conception of law whereby meaningless questions and meaningless concepts are done away with so that the grounds and sources of law might become more transparent).

in this Essay to develop any theory of what those institutions should be like. We are familiar with the main variations: representative legislatures with regular elections, occasional arrangements for plebiscites, and so on. Democrats no doubt will disagree among themselves in regard to these and other alternatives. These disagreements will be part and parcel of the intense interest that they take in the source of norms, as such. Each party to these democratic disagreements will be looking to promote the idea of our distinguishing and privileging a set of norms in virtue of their origination in institutions and procedures of a certain kind, and he will be looking to establish social institutions that come as close as politically possible to the democratic option that he favors. This is a considerable contrast with the Hobbesian view. In the Hobbesian view, what matters is that there be a determinate and unified sovereign.<sup>40</sup> It is much less important who or what the sovereign is—whether it is a king or a junta or an assembly. For the democrat, however, *who gets to be the sovereign* is exactly the issue. So for the democrat, the basis for distinguishing those norms that are entitled to the status of law from those that are not can never be wholly conventional.<sup>41</sup>

Someone may say that there is a difference between the following two propositions: (1) democratic values are the reason why democracies look to the sources they do (as opposed to some other sources) to identify the norms that are to be enforced in that society as law, and (2) democratic values are the reason why democracies look to sources *as such* to distinguish law from non-law. Someone might say that (1) is plausible but (2) is not. But the difference between (1) and (2) might be quite narrow. I have said that democrats have reason to be interested in the very “Who?” question—the question of sources—that the positivist makes central. But I would go further. I believe that in the modern world, it is democrats *above all* who are interested in legitimacy in this sense of “Who?” We sometimes miss this. Because

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<sup>40</sup> HOBBS, *supra* note 28, at 121–28.

<sup>41</sup> True, even a democrat does not want to be in the business of identifying as laws norms that other people do not identify as laws. He does value coordination to a certain extent. But the coordination he values has strong elements of what Dworkin has referred to, in his critique of legal conventionalism, as “a consensus of independent conviction.” DWORKIN, *LAW’S EMPIRE*, *supra* note 16, at 136. For the democrat, the specification of the sources of law must be seen, at the very least, as a solution to something like a *partial conflict coordination game*, in which people have independent reasons for preferring one outcome to another, but are willing to submit to some coordinative outcome besides the one they favor to avoid the specter of complete non-coordination. The Hobbesian premium that a democrat puts on coordination as such may lead him to accept (what is in his view) a flawed or quite heavily compromised form of democratic decision making as a normative source of law. (I think that Dworkin wrongly ignores intermediate possibilities of this kind in his attack on conventionalism in *id.* at 114–50, and in Dworkin, *Thirty Years On*, *supra* note 7, at 1658.)

democracy presents itself as one theory of political legitimacy among others, we assume that the democrat's preoccupation with democratic legitimacy is matched by the aristocrat's preoccupation with aristocratic legitimacy, and the monarchist's with monarchical legitimacy, and so on; we think they are all interested in "Who?" In fact, that is largely not so. Maybe there are one or two legitimist monarchists left in the world, for whom it makes all the difference that the right individual, anointed and descended in the right way from the right ancestors, enacted the norms that claim the status of law. But these days that is a rare and loony view. Most non-democratic theories of political legitimacy are actually alternatives to the view that the literal "Who?" of politics actually matters. For example, the modern equivalent of monarchy is just something like the Hobbesian idea of single-minded coordination or determinate order, and the modern equivalent of aristocracy is just the idea of personal qualities and expertise that offer some prospect of our getting the best laws: the best men are favored just because they will enact the best laws, and if there were ways of getting better laws (other than using the best men) we would choose those instead.

For democrats, on the other hand, the "Who?" of legitimacy, the issue of sources, is simply *insurmountable*. They may acknowledge that democratic provenance is not sufficient, but they will insist that it is indispensable. In judging the appropriateness of recognizing and enforcing a norm, the democrat cannot get past the issue of who made it. Indeed, democrats are especially sensitive to this issue of sources, because they know that those whose enfranchisement they want to secure—"the common people"—are those who have historically been excluded from any participation in the processes by which norms for their society are chosen. It is not a matter of securing the privileged position of those who have traditionally been our rulers anyway; on the contrary, there is a standing tendency for the common people to be excluded either explicitly or by various subterfuges. Or, if they are included, there is a standing tendency to dilute or compromise the principle of political equality that is supposed to govern the terms on which the common people participate alongside more familiar lawmakers. An interest in sources, then, is not just a hobby for democrats; it is a matter of principle, in regard to which they think experience shows that special vigilance is necessary.

So far I have emphasized "sources" in an institutional sense: what institution produces the laws, and how is its membership determined? But a democratic theory will place emphasis also on formal features of the procedures that are used in lawmaking, again for the sake of political equality,

which is sensitive to the possibility that a system may be inclusive without being politically egalitarian. Another way of putting this is to say that it matters, for the democrat, not only that laws come from the right source, but that they come from the right source in the right way. (Both ideas, I am sure, are included under the positivist's notion of source.) Preoccupation with the procedural aspect of the sources thesis explains the resistance of some defenders of democracy to the practice (common in the United States) of citing legislative history as an aid to interpretation.<sup>42</sup> A crude conception of democratic authority might lead one to say that if authority is accorded to a legislative assembly, it should be accorded also to the intentions, hopes, and expectations of its members (or a majority of its members) as well as to the texts of the statutes that the assembly actually enacts. But a more sophisticated democratic theory, concerned about the constraints of political equality embodied in the formal aspects of legislative procedure, will be more sympathetic to textualism. For only the text has been enacted according to the procedures whose job it is to safeguard political equality. To pick and choose snippets from debate, from sponsors' statements, or from committee reports, and accord interpretive authority to them, is to act as though the procedural rules (which are referred to when we say, for example, that the text has been voted on but the various interventions in legislative debate have not been) did not matter or were "mere formalities."<sup>43</sup> And the democrat will never concede that.

## VI. DEMOCRACY AND THE RULE OF RECOGNITION

We turn now to *(b)*, the point about recognition. A legal system is democratic because of who produces the laws and the way they are produced. But does its being democratic also have anything to do with the way norms are recognized as law? I do not mean now the source-based criteria that are used to recognize them, but the business or activity of recognition. In modern jurisprudence, the recognition of law is conceived as a matter for judges: the rules of recognition are rules judges use to identify the law. Is this something a democratic jurisprudence might address? Putting it that way sounds as though I am looking for the theory-of-adjudication part of a democratic jurisprudence.

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<sup>42</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–25 (1997) (discussing resistance toward citing legislative history).

<sup>43</sup> I have pursued this argument about the importance of procedure in Jeremy Waldron, *Legislating with Integrity*, 72 *FORDHAM L. REV.* 373, 376–77 (2003) [hereinafter Waldron, *Legislating with Integrity*]; see also JEREMY WALDRON, *LAW OF DISAGREEMENT* 69–87, 119–46 (1999).

But actually that is not what I want to address. I want to raise a democratic query about the assumption implicit in the modern approach to rules of recognition—the assumption that the recognition of norms as law is best understood as a *practice among officials*.

In the old ideology of English law, it used to be said that the common law originated in the customs of the people of England.<sup>44</sup> According to this mythology, English law was like the demotic law celebrated on the Continent by theorists like Savigny, who spoke about the “organic connection of law with the being and character of the people.”<sup>45</sup> It was a body of customary law so implicitly the possession of the people as to be in effect their “second nature,” something as intimately bound up with who they were and the minutiae of their social relations as their language was or their culture.<sup>46</sup> On this account, there would be no particular difficulty with recognition. In Bentham’s words:

[H]ow a custom . . . is to be known, is a question, which upon the supposition that it is the custom of the people in general, . . . seems neither very natural nor very material. How is it to be known? meaning by the people? Why, they know it, by the supposition; they even practice it, it is their custom. “How are the people to know what it is they do themselves?” God knows, unless they know already.<sup>47</sup>

Of course it was all a myth, and Bentham did more than anyone else in the history of English jurisprudence to ensure its replacement with a more accurate and somewhat less comforting account of the common law as the (arbitrary and recondite) customs of the English judiciary.<sup>48</sup>

But he did not leave the matter there—as though it were enough to offer a more accurate descriptive jurisprudence than (say) Blackstone had offered.<sup>49</sup> Bentham was interested in whether there could be modes of transparency for

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<sup>44</sup> Blackstone argued that “it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*74.

<sup>45</sup> FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 27 (Legal Classics Library 1986) (1814).

<sup>46</sup> See DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION chs. X–XIII (1990) (expanding on idea of customary law as second nature).

<sup>47</sup> JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 192 (J.H. Burns & H.L.A. Hart eds., 1977).

<sup>48</sup> See Jeremy Waldron, *Custom Redeemed by Statute*, in 51 CURRENT LEGAL PROBLEMS 93 (Michael Freeman ed., 1998).

<sup>49</sup> See POSTEMA, *supra* note 15, at 332.

modern legal systems that might, in a *non*-mythic way, do the work that the Blackstonian ideology of popular custom purported to do—viz., by presenting law as something which could be recognized and identified by the people (and not just the officials) whose law it was. He believed legislation, or better still, the establishment of legislative codes, could reasonably aspire to this sort of transparency. Legislation is a practice whereby laws are made or changed deliberately by formal processes dedicated explicitly to that task.<sup>50</sup> Unlike the processes of judge-made law, there is no confusion about what is going on. The legislature presents itself publicly as a place for lawmaking. Lawmaking is its official *raison d'être*, and when we evaluate the structure and processes of legislatures and the basis on which their membership is determined with a view to their legitimacy, we do so precisely with this function in mind. Courts, by contrast, present themselves publicly and acquire their legitimacy among the public generally as though lawmaking by them were out of the question. And when they do in fact engage in lawmaking they do so, as John Austin said, *obliquely*: the judge's "direct and proper purpose is not the establishment of the [new] rule, but the decision of the specific case. He legislates as properly judging, and not as properly legislating."<sup>51</sup> This makes it much harder for people to keep track of the law that results.<sup>52</sup>

Jurisprudence has always been dogged by populist suspicion of lawyers and legalism and by a demand that the law of the land should be easily known and understood by ordinary folk.<sup>53</sup> The more complex and technical law is, the more plausible the reproach that it is an alien imposition on the people by those

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<sup>50</sup> See Waldron, *Legislating with Integrity*, *supra* note 43, at 379.

<sup>51</sup> AUSTIN, LECTURES ON JURISPRUDENCE, *supra* note 9, at 266–67, 315.

<sup>52</sup> What is at stake here is the liberal principle of publicity—the idea that the legitimacy of our institutions should not depend upon any widespread public misapprehension about the way they operate. See JOHN RAWLS, A THEORY OF JUSTICE 115 (1971) (discussing the connection between a just society and the natural duty to act); see also JOHN RAWLS, POLITICAL LIBERALISM 66–68 (1993) (describing the three levels of the publicity condition). People's acceptance of and their willingness to comply with newly made law should not depend on a false belief that the law is not newly made at all but simply newly interpreted. But legitimacy is not the only issue. Transparency also conveys the idea that law in some sense *belongs* to the members of the public. It is *their* law, not something to be imposed on them by a ruling clique, better able than the people are to determine how the law should change.

<sup>53</sup> I have in mind, for example, the complaint voiced in an address to Oliver Cromwell by one of the leaders of the English Levelers, Jerrard Winstanley, who complained that

in many Courts . . . the Will of a Judge & Lawyer rules above the letter of the Law . . . [s]o that we see, though other men be under a sharp Law, yet many of the great Lawyers are not, but still do act their will . . . as I have heard some belonging to the Law say, What cannot we do?

Jerrard Winstanley, *The Law of Freedom in a Platform*, in THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 378, 380 (Daniel R. Coquillette ed., 1999) (1652).

who care only for their exploitation and submission. Certainly there seems to be something particularly offensive to democratic jurisprudence in systematic opacity or mystification. Though the demand for widespread knowledge of legal detail may be unrealistic,<sup>54</sup> I reckon it is part of the democratic aspiration for law that, at the very least, the manner in which law is created, recognized, changed, and applied will be well-understood not just among the class of those who exercise political power, but among all the people. A democratic jurisprudence will be committed to the prevalence among the people of a fair, accurate, and non-ideologically distorted understanding of how the rules and institutions at the heart of the legal system operate.<sup>55</sup>

I have long been intrigued by the fact that it is no part of the modern positivist understanding of law that any of this should be so. (It seems to have died with Bentham.) According to the canonical account of Hart, a society can have a legal system even though the attitude to the rules on the part of most people in the society is one of sullen acquiescence and even though few ordinary people have any accurate idea of how laws are made and recognized.<sup>56</sup> For a legal system to exist on Hart's account, all that is necessary is that the rules recognized as legal be generally complied with (out of fear or whatever other motive), regardless of whether people understand them as legal or understand what it means for them to be legal.<sup>57</sup> Of course a legal system must have secondary rules (like rules of recognition) which exist as social practices; but on Hart's account, their existence need not involve more than a tiny subset of the society, persons who, by virtue of participating in these practices, count as the society's officials—its judges, legislators, senior bureaucrats, etc. “[W]hat is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity.”<sup>58</sup> But official practice is not the same as community practice: “[A] great proportion of ordinary citizens—perhaps a majority—

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<sup>54</sup> Cf. 2 MAX WEBER, *ECONOMY AND SOCIETY* 895 (Guenther Roth & Claus Wittich eds., 1968) (commenting on legal technicality by stating that “[w]hatever form law and legal practice may come to assume under the impact of these various influences, it will be inevitable that, as a result of technical and economic developments, the legal ignorance of the layman will increase”).

<sup>55</sup> This is particularly important in constitutional law, where it is all too easy for people to be mystified by official ambivalence about the role played by judges in making and changing the law and to be unsure about where exactly the opportunities for detailed constitutional change arise and how (and by whom) they are being exercised. I am grateful to Frank Michelman for emphasizing to me the importance of this point so far as democratic jurisprudence is concerned, particularly in the context of the United States.

<sup>56</sup> HART, *supra* note 17, at 114.

<sup>57</sup> *Id.* at 116–17.

<sup>58</sup> *Id.* at 115.

[will] have no general conception of the legal structure or of its criteria of validity.”<sup>59</sup>

Only a few of us have paid much attention to this aspect of Hart’s presentation.<sup>60</sup> Maybe at the abstract level of a very general jurisprudence Hart is right to emphasize this possibility—that a legal system may exist in a society even though most members of the society are alienated from its workings in this way. But if he is right about this, he is right not because analytic jurisprudence should stand aloof from these matters, disparaging demands for transparency on the ground of their analytic irrelevance, but because in this regard a positivist conception gives us precisely the information we need in order to be aware of certain dangers associated with law as such. So, for example, Hart says, of “an extreme case” in which “only officials . . . accept and use the system’s criteria of legal validity,” that “[t]he society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse.”<sup>61</sup> But when he adds that this is not a reason “for thinking that it could not exist or for denying it the title of a legal system,”<sup>62</sup> Hart is not just reiterating the separability thesis. He is putting us on warning with what he calls the following “sobering truth”:

[T]he step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not.<sup>63</sup>

Those few who make and can recognize enacted law may use that capacity and that specialist knowledge for their own benefit, to the detriment of the rest who find they know less and less about the detailed basis on which their society is

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<sup>59</sup> *Id.* at 114. Perhaps it is unlikely that the legal culture will be confined exclusively to the corps of ruling officials. In most cases, their relations with the general populace will be mediated by the emergence of a profession of specialist law detectors (attorneys) who know the marks of law, i.e., those who know how to tell which rules have been deliberately given social authority and which have not. And some of this knowledge will be diffused beyond the profession in more or less amateurish ways.

<sup>60</sup> See, e.g., Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1693 (1996); Perry, *supra* note 10, at 333; Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURIS. 169, 180 (1999).

<sup>61</sup> HART, *supra* note 17, at 117.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 202.

organized. The specialization of normative authority—implicit in the idea of secondary rules—may thus exacerbate whatever exploitation and hierarchy exist in a given society apart from its legalization. And it may well make possible certain forms of oppression that were simply unthinkable without it. Considering what positive law actually is, its existence raises a real and serious prospect that it will be used to facilitate injustice and to confuse and mystify many of those who are subject to that injustice and who have no choice but to live their lives under its auspices.<sup>64</sup>

No doubt any jurist interested in justice will want to be mindful of this possibility. But those interested in democracy will have a direct interest also in this opacity itself—that is, in the sheep-like ignorance of the nature of the law that one is ruled by. A democratic jurisprudence will hold that, whether this sort of phenomenon is theoretically possible as a matter of general jurisprudence, and whether it is inevitable under the conditions of modernity—it is incompatible with the sort of presence that law has in a democracy. Democracy is not just about the electoral accountability of those who make the law. It is about the law itself and its being regarded as in some strong sense the property of those who are ruled by it; democratic law is the people's law and as such its democratic character is undermined by their ignorance or mystification as to the conditions of its manufacture.

As I have said, these concerns are likely to be felt particularly acutely with regard to the category of judge-made law. No jurisprudence can afford to neglect this category; I am convinced by Joseph Raz's argument that an understanding of the workings of "primary norm-applying organs" is indispensable to an analysis of institutionalized systems of norms (such as legal systems).<sup>65</sup> But recognition by a legal theory of the analytic centrality of the activity of courts is quite compatible with the theory's evaluating lawmaking by such institutions as deviant and undesirable—not only on account of the evaluative inadequacy of courts as sources of law, so far as democratic legitimacy is concerned, but also on account of the pervasive

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<sup>64</sup> The passages I have just quoted represent one of Hart's occasional forays into normative theory, presenting a general theory of law as, in part, a theory of what we have to hope for and fear from law as it is properly understood. It is a mistake to think that all normative jurisprudence must extol or idealize law. Warnings and worries are part of normative jurisprudence when one's theories and concepts are organized so as to highlight them.

<sup>65</sup> See RAZ, *ESSAYS ON LAW*, *supra* note 35, at 105–11; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 132–41 (2d ed. 1990) [hereinafter RAZ, *PRACTICAL REASON*].

confusions and misapprehensions that are likely to be associated in the public mind with the idea that courts make law as well as apply it.

## VII. DEMOCRACY AND THE SEPARABILITY OF LAW AND MORALITY

Let me say something now about the third distinctive feature of positivism: (c) the separability of law and morality. Positivists tell us that we cannot assume in advance that law will have any particular content or that its content will have any particular moral quality. They tell us to prepare ourselves to find out that some things which are properly identified as law are wrong, wicked, or unjust, and that therefore we must not try to use our sense of justice or our sense of moral right or wrong as a guide to legal validity. In this regard legal positivism is opposed to the natural law tradition which has long toyed with the proposition, "*Lex iniusta non est lex*"—"An unjust 'law' . . . is no law."<sup>66</sup> The positivist response is summed up in John Austin's aphorism, "The existence of law is one thing; its merit or demerit is another,"<sup>67</sup> and in Hart's insistence that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."<sup>68</sup>

Why do positivists care so much about this thesis? It is hard to answer without moving from conceptual to evaluative jurisprudence. Practitioners of conceptual jurisprudence may say that the separability thesis just happens to be true; it is a fact about our usage of terms or our understanding of how legal systems work that is simply worth emphasizing in light of the standing temptation to overlook it.<sup>69</sup> Others say that it promotes analytic virtues of disciplinary tidiness; or they say with Hart that the separation is practically, and perhaps even morally, important in keeping alive the sense that what the government requires of us is to be evaluated in the last resort on moral grounds that are not already implicated in the terms in which its requirements are presented to us.<sup>70</sup> Raz thinks it is obvious that the deliverances of an authority must be able to be recognized without reference to the reasons (e.g., moral reasons) that the authority serves, if the authority is to contribute to practical

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<sup>66</sup> AUGUSTINE, *THE FREE CHOICE OF THE WILL* 81 (Robert P. Russell trans., 1968) (426); see also AQUINAS, *supra* note 29, at 70–75; FINNIS, *supra* note 16, at 363–66 (discussing subtler versions of the same concept).

<sup>67</sup> AUSTIN, *THE PROVINCE OF JURISPRUDENCE*, *supra* note 27, at 157.

<sup>68</sup> HART, *supra* note 17, at 185–86.

<sup>69</sup> Cf. RAZ, *PRACTICAL REASON*, *supra* note 65, at 164–65 (discussing three weaknesses inherent in this analytical approach).

<sup>70</sup> HART, *supra* note 17, at 210.

reasoning in the way that authorities can, and he thinks law does claim such an authority.<sup>71</sup> If one were to develop an evaluative jurisprudence on the footing that the establishment and operation of such authority were of vital importance in human affairs—as Hobbes did<sup>72</sup>—then one would be insisting in effect on the moral importance of the separation of law and morality. We need something to play the role of law among us whose contents can be identified without recourse to moral judgment because moral judgment divides us and drives us into conflict, whereas what we need most is unity, peace, and coordination.

How does the separability thesis look as an element of a democratic jurisprudence? It is not hard to explain the discomfort of a democratic jurisprudence with any content-based criterion which refuses to recognize as law what a democratic legislature has enacted on the ground that it conflicts with what is taken to be justice. We democrats are likely to insist *as part of our allegiance to democracy* that any content-based prejudices must be pushed aside in order to allow the people to choose freely for their law whatever norms they think appropriate.

For some modern political philosophers, that is a heretical position: they say instead that their allegiance to democracy (their theory of democratic legitimacy) has limits, which are defined by the essentials of their favorite theory of justice or theory of human rights.<sup>73</sup> Their idea is that democratic decision making can be tolerated only when the people do not get it too far wrong, or only when the people's decisions are not too egregiously offensive to the political philosopher's independently established sense of justice and rights. This type of natural law view is worth reflecting on from a democratic perspective. In the history of legal thought, natural law theory has often represented the posture of those who approached democratic legislation with the lofty disdain of an aristocrat, confident in his possession of an aristocratic sense of justice. Consider, for example, Cicero's version of natural law theory in *De Legibus*:

The most stupid thing . . . is to consider all things just which have been ratified by a people's institutions or laws. . . . [I]f justice is obedience to the written laws and institutions of a people, and if . . . justice were determined by popular vote or by the decrees of princes

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<sup>71</sup> See RAZ, *supra* note 36, at 202–04, 214–15.

<sup>72</sup> See HOBBS, *supra* note 28, at 128–29 (arguing any form of government and law is better than the alternative).

<sup>73</sup> See, e.g., DWORKIN, FREEDOM'S LAW, *supra* note 13, at 16.

or the decisions of judges, then it would be just to commit highway robbery or adultery or to forge wills if such things were approved by the popular vote. . . . But in fact we can divide good laws from bad by no other standard than that of Nature. . . . For nature has given us shared conceptions and has so established them in our minds that honorable things are classed with virtue, disgraceful ones with vice. To think that these things are a matter of opinion, not fixed in nature, is the mark of a madman. . . . This has, I know, been the opinion of the wisest men: that law was not thought up by human minds; that it is not some piece of legislation by popular assemblies; but it is something eternal which rules the entire universe through the wisdom of its commands and prohibitions.<sup>74</sup>

The formulations are a little confused by modern standards, and they do not exactly correspond to natural law formulations: Cicero is arguing *both* that what is enacted is not necessarily just *and* that true law consists of something eternal (like justice) built into the fabric of the universe. But he is using particularly the second of these formulations to cast doubt on the proposition that what popular assemblies enact is entitled to be called law simply by virtue of its enactment. The natural lawyer's misgivings about positive law are often, in this spirit, misgivings about *democratic* law.

Now, it seems to me that rather than cringing under this reproach, the democratic positivist should embrace it. The people may well have views about what is appropriate to put in the laws which are unfamiliar and disconcerting to the sense of justice of those who have traditionally opposed democratic rule. Maybe this does not take us directly from the democratic position to the separability thesis. For we might say that what is going on here amounts to a disagreement about justice between the democratic majority and the aristocrats; so the democratic majority will not necessarily accept the proposition that what they have enacted is unjust; and because they do not have to accept that proposition, they do not have to claim that law is valid even if it is unjust. But I think it is unwise for the democrat to take that particular line. For one thing, the views of democratic legislators about the appropriate subject matter for law may strain against the edges of the concept *justice* or the concept *morality*, and not only against familiar conceptions of it.<sup>75</sup>

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<sup>74</sup> CICERO, *supra* note 29, at 120–21, 132.

<sup>75</sup> See J.R. LUCAS, ON JUSTICE 185 (1980) (arguing that Rawls's theory, whatever it was, was not really a theory of *justice*); BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 174 (1985) (critiquing morality as a "peculiar institution").

There is also a second reason why the democrat will not want to say that he has his own version of “*Lex iniusta non est lex.*”<sup>76</sup> Democrats, more than most other political theorists, are sensitive to the realities of moral disagreement. They expect there to be disagreement about justice in an ordinary polity under normal conditions; they believe these disagreements should be resolved politically by fair procedures of voting; but they have no reason to say that anyone is required to change his *opinion* about justice simply because he was defeated in a fair vote. Accordingly, the democrat will accept that any given law may be regarded as unjust—or as embodying a mistake or misapprehension about justice—by a substantial percentage of those to whom it applies.<sup>77</sup> If he believes nevertheless that the losers are required to accept the outcome of a fair vote (despite their views about justice), he will want to separate the proposition that a given norm was adopted in the right way from the proposition that it was the right norm to adopt. And this will be something like a democratic version of the separability thesis.<sup>78</sup>

### VIII. DEMOCRACY AND THE PUBLIC CHARACTER OF LAW

Now I want to turn to what I described earlier as (*d*) the *public* character of law—the way law presents itself as a body of rules dealing with matters that are appropriately matters of public concern and dealing with them in a way that can stand in the name of public.

These are vague formulations, and I am not sure that I can do very much to make them more precise. What I mean to refer to are the following two characteristics that a set of norms might have. They might function not merely as commands issued by the powerful or as rules recognized by participants in a socially effective practice, but also (i) as norms that purport to stand in the name of the whole society, and (ii) as norms that address matters of concern to the society as such, not just matters of personal or sectional concern to the individuals who happen to be involved in formulating them. Characteristic (i) is partly a matter of source: a norm stands in the name of its issuer, and I guess that if its issuer is an assembly comprising the whole community or comprising people who think of themselves as representatives of the whole community, it

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<sup>76</sup> See *supra* notes 66–68 and accompanying text.

<sup>77</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 14, at 7.

<sup>78</sup> Of course the positivist’s separability thesis is usually more radical than this: a positivist may say that something’s being valid law is not only (1) no indication of its substantive justice, but also (2) no indication of the moral legitimacy of the procedures of its enactment. A democratic jurisprudence may not countenance the separability of legal validity from (2), for reasons explained previously. See *supra* Part IV.

may have a tone or a mood appropriate to its standing as something deliberately wrought *by* the public. But I do not want to suggest that this is a feature peculiar to law in a democracy. The tone appropriate to *res publicae*—public affairs as such—might equally characterize the commands of a king or the norms recognized by an oligarchy acting and thinking of itself as guardian of the public good. Here I do want to head in the direction of general jurisprudence. I think characteristic (i) may plausibly be regarded as essential to the characterization of a set of norms as *law*, distinguishing them in their character and perhaps in their intentionality from private exercises of power or from a set of commands issued for the advantage of a particular person or group, which make no pretense to stand in the name of, let alone for the sake of or in the interest of, the whole community. Characteristic (ii) is important to this aspect as well, in part because the issues that law addresses are conceived as issues for the whole community such that addressing them takes on this particular tone. And recognizing norms as law is in part a matter of recognizing that they combine these two characteristics.<sup>79</sup>

Following Augustine, jurists used to ask: What is the difference between a system of laws and a set of commands issued by a band of robbers?<sup>80</sup> One answer might be that the robbers' commands are patently not issued for the public good, but simply for the robber band's advantage. Now this seems to commit us to a denial of the separability thesis, and as we have seen the democratic jurist does not necessarily want to deny the separability thesis: he wants there to be a way in which people who disagree about the public good can nevertheless recognize the same things as law. Thus, the response to Augustine's question has tended to revolve around differences in efficacy or perhaps systematicity: the order constituted by the power of the robbers would not last long enough or be complicated enough to require the use of the concept *law*, in all its complexity.<sup>81</sup> But there might be an intermediate

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<sup>79</sup> There is a hint of this self-presentation in *The Concept of Law*. See HART, *supra* note 17, at 94 (saying that the point of a source-based recognition criterion is that it can be taken "as a conclusive affirmative indication that [a suggested rule] is a *rule of the group*" (emphasis added)). The status of *being a rule of the group*—as opposed to simply being a norm that has been issued by someone or other and is effective among the members of the group—is an idea that needs more analysis than Hart or subsequent positivists have given it; but it is a minimal trace of what I am getting at here under the heading of publicness.

<sup>80</sup> Cf. AUGUSTINE, ON THE CITY OF GOD AGAINST THE PAGANS 147 (R.W. Dyson ed., 1998) (426) (suggesting that the difference is merely one of size and impunity).

<sup>81</sup> Cf. HANS Kelsen, PURE THEORY OF LAW 47 (Max Knight trans., 1989) ("[W]hy is the coercive order that constitutes the community of the robber gang . . . not interpreted as a legal order? . . . [B]ecause no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no

position. Instead of saying that nothing is law unless it promotes the public good, we might want to say that nothing is law unless it *purports* to promote the public good, i.e., unless it presents itself as oriented in that direction.<sup>82</sup> Some positivists have tended to neglect this aspirational aspect.<sup>83</sup>

There is an interesting analogy between the neglect of this aspiration to publicness in positivist theory and a well-known deficiency in Max Weber's definition of the state. In tones reminiscent of the separability thesis, Weber insisted that the state cannot be defined in terms of its appropriate ends:

There is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to those associations which are designated as political ones: today the state, or historically, those associations which have been the predecessors of the modern state. Ultimately, one can define the modern state sociologically only in terms of the specific *means* peculiar to it . . . .<sup>84</sup>

Weber went on to give his famous definition of the state as “a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”<sup>85</sup> Similarly, the legal positivists, knowing that there is no criterion of justice or the public good that every legal system has followed and no criterion that has not at some time been flouted by some law, have insisted on a structural definition of law.<sup>86</sup> But both Weber

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such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed.”).

<sup>82</sup> Cf. Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 759–88 (2001) (exploring a similar suggestion about the relation between law and justice).

<sup>83</sup> One positivist who does not neglect this is Raz. See RAZ, *supra* note 36, at 212 (arguing that law necessarily presents itself as authoritative). It may not *be* authoritative—that is, it may not actually satisfy what Raz calls the “normal justification thesis” for authority—but it presents itself in that light. *Id.* at 214. Jurisprudential discussion of this has focused mainly on the preemption aspect of Raz's conception of authority: for a legal norm to even begin to present itself as authoritative, there must be a way of determining what it requires without engaging in first-order reasoning about the practical issue it addresses, and Raz thinks this furnishes the basis of an argument against Dworkin's theory. But we might look also at what Raz calls “the service conception of authority,” too. *Id.* at 212–14. In order to begin making a credible claim to authority, a legal norm must present itself to its addressees as though it were based on reasons that would apply to them anyway, rather than as though it were based on new reasons introduced into the picture by the power or sectional interests of the norm-issuer. In this sense, legal norms may be said to have something like the *publicness* self-presentation that I am talking about in this section, according to Raz's account.

<sup>84</sup> Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–78 (H.H. Gerth & C. Wright Mills eds., 1970).

<sup>85</sup> *Id.* at 78.

<sup>86</sup> See, e.g., HART, *supra* note 17, 91–99 (defining law purely in terms of the union of primary and secondary rules and the institutions structured by secondary rules).

and the positivists neglect the possibility that it is a distinctive feature of the state and law, respectively, to *present themselves as concerned with public purposes*, regardless of whether we judge that concern genuine or whether we agree with a given conception of public purposes. Merely monopolizing force is not enough to capture the distinctive character of the modern state, and modern sociologists who follow Weber accept this: the state must be understood as an entity permeated by an orientation or at least a purported orientation to the public good.<sup>87</sup> Well, similarly—I want to say—the mere recognition of a class of efficacious norms is not enough to distinguish the practices at the heart of law. The whole orientation of those practices needs to be understood as well—not, I hasten to add, as a backdoor way of distinguishing legal systems we like from systems we condemn, but simply to do justice to what appears to be an essential aspect of the self-presentation of legal systems, distinguishing them from systems of rule that do not present themselves in this way at all.

As I said, I do not think this understanding is peculiar to democratic jurisprudence, although I doubt whether an explicitly democratic jurisprudence will be as inclined to neglect it as mainstream positivist theories have been. Laws as such represent public solutions to public problems, public ways of addressing public issues. Is there much more, though, that we can say about this publicness aspect? People disagree about what the public good consists of—not just about what will serve it, but what it fundamentally is. Some see it in welfarist terms, as a function of the well-being of all the individuals in the society, and they may be inclined to associate their welfarism quite closely with the concept of law.<sup>88</sup> Others might see it in a more collectivist or communitarian light: law deals with the communal interest as such, not just with aggregated interests of individuals.<sup>89</sup> Since democrats will participate in these disagreements as much as anyone, there seems little point in associating democratic jurisprudence with any particular conception of the public good, beyond saying that a democrat's conception is likely to put a particular emphasis on inclusiveness so far as the definition of the public good is concerned.

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<sup>87</sup> See THE STATE 2 (John A. Hall & G. John Ikenberry eds., 1989).

<sup>88</sup> See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (arguing the overall well-being of individuals in society should be the basis and justification of legal rules).

<sup>89</sup> See, e.g., MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996) (arguing law should be based on a civic republicanism).

What is the relation between this element of publicness and the controversy in jurisprudence, in the first half of the twentieth century, about the distinction between public and private law? Does the insistence on publicness amount to a suggestion that law should stay away from—or deal in an especially solicitous manner with—private property and the market economy? I am inclined to think that at some level, a democratic jurisprudence will follow Hans Kelsen's lead in resisting any fundamental differentiation of this kind.<sup>90</sup> Kelsen's reasons are analytic. But a democratic jurist might resist the distinction also because he believes that the polity must take responsibility for *the whole* of the law that it administers and be ready to subject *any of it* to critical evaluation at the hands of the people through the medium of the political process. A democratic polity must *own* the law, in the sense of taking responsibility for its being as it is. It should not accept that large parts of the law are to be left untouched by the judgment or the conscience or the explicit deliberations and votes of the people on the ground that legal doctrine in those domains can be left free to develop under its own steam, as it were.

On the other hand, it would be a mistake to think that the idea of publicness that I am exploring in this Part is alien to the subject matter of private law, even as that is traditionally understood. Consider the law of contracts, for example. Although this branch of private law respects private settlements, nevertheless it represents what is to be done *in the name of the public* in regard to settlements between private parties. Thus, even in this area, law must be informed—perhaps constrained, perhaps motivated—by a sense of what is appropriate and inappropriate for the public to do in regard to contracts, as opposed to what might be done simply by someone who happened to have the power to intervene in this area in various ways.

#### IX. DEMOCRACY AND LAW'S GENERALITY

The final aspect of law that I want to explore in this Essay is connected with the publicness aspect, but needs to be dealt with separately. I want to consider (*e*) the significance of laws' *generality*, i.e., the significance of laws' being in the first instance general norms, not just particular commands—"All people in circumstances *C* are to do *X*" rather than just "*Waldron* is to do *X*."

Jurists vary widely in the significance they accord to this. John Austin, after distinguishing between commands that specify particular actions and

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<sup>90</sup> KELSEN, *supra* note 81, at 281.

commands that are issued to particular individuals, classifies the former as law—“where it obliges generally to acts or forbearances of a class, a command is a law or a rule”<sup>91</sup>—but not the latter. No doubt there are pragmatic reasons for proceeding generally on both fronts—“To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless”<sup>92</sup>—but that is no reason for denying that commands addressed to particular people can sometimes have the character of law. Hart did little to revise Austin in this regard. Like Austin, he noted the impracticality of using nothing but particular commands: “no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.”<sup>93</sup> And he announced that therefore particularized orders are exceptional and ancillary relative to the concept of law as he is expounding it.<sup>94</sup> When, later in his book, Hart observed that law therefore has something formal in common with justice inasmuch as both proceed according to rules and both embody the formal idea of “treating like cases alike,”<sup>95</sup> there was very little he could say about this since the generality of law was not presented in his jurisprudence as anything more than a common association of the term, which Hart, for whatever reason, had decided casually to incorporate into rather than exclude from his conceptual account.

Joseph Raz (following Kelsen) has observed that law cannot possibly work with nothing but general norms; though, “[t]o the layman . . . the law is essentially a set of open, general . . . laws. . . . It is humanly inconceivable that law can consist only of general rules and it is very undesirable that it should.”<sup>96</sup> Courts must have the power to make particular orders and get them obeyed. What we want in the name of legality or the rule of law is not that there should be no particular orders but that each particular order should be subject to general norms and, where possible, derived in a way that has a general norm as its major premise.<sup>97</sup> Particular norms that are not so derived, Raz says, “are mostly used by government agencies to introduce flexibility into the law,” but

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<sup>91</sup> AUSTIN, *THE PROVINCE OF JURISPRUDENCE*, *supra* note 27, at 13.

<sup>92</sup> *Id.* at 28–29.

<sup>93</sup> *Id.* at 21; *see id.* at 8, 21–23.

<sup>94</sup> *See id.* at 21–22.

<sup>95</sup> *Id.* at 157–67.

<sup>96</sup> RAZ, *ESSAYS ON LAW*, *supra* note 35, at 213; *see also* HANS KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 38 (Anders Wedberg trans., 1961) [hereinafter *KELSEN, GENERAL THEORY*].

<sup>97</sup> RAZ, *ESSAYS ON LAW*, *supra* note 35, at 215. Hence, Raz’s third principle of the rule of law: “(3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.” *Id.*

“they make it difficult for people to plan ahead on the basis of their knowledge of the law.”<sup>98</sup>

The element of predictability is certainly one of the things appealed to when jurists play up, rather than play down, the connection between law and generality. F.A. Hayek had predictability in mind when he defined law as “a ‘once-and-for-all’ command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time.”<sup>99</sup> But predictability by no means exhausts Hayek’s account of the importance of generality. Generality is important also, he argued, for the element of impersonality and for the guarantee that in living under law we are not subject to another’s particular will (crucial in Hayek’s conception of freedom).<sup>100</sup> One might also stress the element of rationality: generalization across acts and across persons is a token that the law is being imposed for reasons (and that those reasons are being followed where they lead), rather than arbitrarily or on a whim.<sup>101</sup>

The tradition of rule-of-law jurisprudence has also pursued a line of argument about the generality of law as a prophylactic against tyranny, inasmuch as the legislator will be subject to the laws he makes along with everyone else. “If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such exception follows from another general rule), . . . little that anybody may reasonably wish to do is likely to be prohibited.”<sup>102</sup> It is no doubt an incomplete line of argument: fanatics may be willing to impose oppressive measures on themselves as well as others, and law makers may be so different in the conditions of their life that they may not experience their own oppressive lawmaking as others do.<sup>103</sup> The latter objection sometimes elicits a particularly democratic response: our laws should

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<sup>98</sup> *Id.* at 216.

<sup>99</sup> F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 131 (Routledge Classics 2006) (1960); *see also id.* at 125, 134 (discussing the specific argument about the importance for freedom of predictability).

<sup>100</sup> *Id.* at 134; *see also id.* at 118 (discussing a corresponding account of freedom).

<sup>101</sup> We are of course familiar with cases where a given law—even a general one—is under- or over-inclusive relative to the reasons that motivate it. *See* Andrei Marmor, *The Rule of Law and Its Limits*, 23 *L. & PHIL.* 1, 9–15 (2004). But this impression needs to be mitigated by a sense that substantive reasons interact with reasons having to do with administrability in the generalizations that legal texts exhibit. Both types of reason need to be taken into account before an over-inclusive or under-inclusive rule is dismissed as arbitrary.

<sup>102</sup> HAYEK, *supra* note 99, at 136.

<sup>103</sup> *See id.* (mitigating the former point slightly); *see also* Federal Farmer, *Will the House of Representatives Be Genuinely Representative?*, in *THE ANTIFEDERALIST PAPERS*, no. 57, pt. III, at 165–69 (Morton Borden ed., 1965) (giving a version of the latter point).

be made by an assembly comprising representatives, who (being only part-time politicians) have lives which are just like those of their constituents. John Locke's argument is typical. Having experienced tyranny, Locke says:

[T]he people . . . could never be safe, nor at rest . . . till the legislature was so placed in collective bodies of men, call them senate, parliament, or what you please, by which means every single person became subject equally, with other the meanest men, to those laws, which he himself, as part of the legislative, had established; nor could any one, by his own authority, avoid the force of the law, when once made, nor by any pretence of superiority plead exemption, thereby to license his own, or the miscarriages of any of his dependents.<sup>104</sup>

If the legislature is not representative in this sense, then generality cannot serve this function: other devices to avoid oppression will have to be found and, if generality is still regarded as an important feature of law, other accounts of its importance will have to be dredged up.<sup>105</sup>

Even in a representative context, a democrat is unlikely to say that generality is a proof against injustice. Democrats are sensitive to the existence of good faith disagreement about justice, and they recognize that a substantial percentage of those who make laws (and those to whom they are applied) in a democratic polity will inevitably regard them as unjust. Still, there are other reasons why democrats will be concerned with generality, and the one I particularly want to consider goes as follows.

In the modern world, democracies are legally as well as politically *single-status* communities.<sup>106</sup> Democracies have mostly abandoned the idea that people fall into different statuses—commoners and nobles; serfs and freemen; paupers and property owners; married women and patriarchs; and so on—so far as the laws applying to them are concerned. Patches of status remain here and there—for example, the legal status of children; the legal status of aliens; the special status of prisoners and (in some jurisdictions) convicted felons who are no longer prisoners; and the special status of members of the armed forces. But most differences in the application of legal rules are not the result of status,

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<sup>104</sup> JOHN LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* 329–30 (Peter Laslett ed., 1988) (1690).

<sup>105</sup> I do not mean to imply that there no other plausible accounts. As already mentioned, generality may be treated as a token of rationality. Or it might express a conception of reciprocity and mutuality of benefits and burdens, valued in itself or for the reasons Dworkin associates with integrity. DWORKIN, *LAW'S EMPIRE*, *supra* note 16, at 186–90; see Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1557–58 (1996) (discussing how it might be important also for other moral reasons having to do with systematicity).

<sup>106</sup> See HART, *supra* note 17, at 21 (giving the barest hint of a suggestion that this is true of all modern legal systems).

but rather the result of contingent differences in circumstances or differences in what people have contracted for. We sometimes speak, following Henry Maine, of a transition from “status to contract.”<sup>107</sup> But as Hayek points out, this is less informative than another contrast: “The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all . . . .”<sup>108</sup>

Now, a democracy is a political community which does not recognize status differences so far as political authority is concerned. The basic idea is that all citizens participate on equal terms in the fundamental business of governance. With one or two exceptions, we do not divide the citizenry into distinct classes so far as their political power or their political competence is concerned (in the way that they are divided in a system with a property franchise or in a mixed aristocratic system). We treat people as one another’s equals in voting and so on. It is conceivable, I suppose, that this political equality and what I have been calling equality of legal status could come apart; certainly we know that political equality is compatible with great inequalities of wealth and conditions of life. But I know of no widespread instances of political equality and single legal status coming apart. Also, it is striking that, in the past, significant differences of legal status have almost always been correlated with differences of political power (and this remains the case with most of the residual status differences I mentioned, like those between children and adults or resident aliens and citizens). I suspect this correlation is significant, and it may be an example of what I referred to earlier, at the beginning of the Essay, as something associated in the first instance with the rule of law being significant also from a democratic point of view. Certainly if we were to give up the Diceyan principle of “legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts,”<sup>109</sup> it would be harder to explain why *all* the citizens should be involved or represented in the making of *all* the laws. (An analogy would be the existence of separate juries—a jury of one’s peers—for the trial of nobles, etc.) Certainly the argument that what one is (equally) bound by, one should have

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<sup>107</sup> HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 170 (John Murray 1861).

<sup>108</sup> HAYEK, *supra* note 99, at 135.

<sup>109</sup> ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (Adamant Media Corp. 2005) (1897) (explicating what Dicey regarded as the second principle of the rule of law: “[E]very man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”).

an (equal) voice in, is one of the oldest and most powerful arguments for the extension of the franchise.<sup>110</sup>

## X. ROUSSEAUIAN JURISPRUDENCE

I sometimes worry that what I have produced here is not so much a democratic jurisprudence as a set of (more or less random) democratic reflections on various aspects of law and legal theory. Even if that is so, I hope these reflections are interesting and help us see features of law that other jurists have emphasized or neglected in a new and provocative light. I am not really sure what makes something into a theory, as opposed to a set of somewhat connected reflections put forward at a fairly abstract level. In general jurisprudence of the sort that I mentioned at the beginning of the Essay, the enterprise is supposed to be held together by a determination to chart the contours of a single concept—*law*—and to identify a set of conceptual truths about law which can be distinguished from other things that happen to be true of some law or even all law, but do not rise to that conceptual status. Personally, I would not want to put too much stock in that distinction. But the task of worrying about how general jurisprudence stands in relation to twentieth century critiques of the analytic–synthetic distinction, for example, is not for me; it is for those who rely on this way of defining the tasks of jurisprudence. Certainly in *particular* jurisprudence, of the sort that I identified in Part II, I doubt that any distinction along these lines can be sustained. Ordinary legal discourse does not supply a concept of *democratic law* which we can walk up to and analyze. It is in large part an artificial or constructed concept and what you have been seeing here is some of the construction work, rather than the charting of the conceptual contours of something already given.

I want to end this Essay, however, by citing one body of theory that has attempted to package a number of the elements that I have been discussing in (what purports to be) a single conception of law. What I have in mind is the jurisprudence of Jean-Jacques Rousseau. Now Rousseau is not often read as a legal theorist.<sup>111</sup> Political theorists write about his theory of participation and

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<sup>110</sup> See, e.g., *At the General Council of the Army, Putney, 29 October 1647*, in THE ENGLISH LEVELLERS 102–11 (Andrew Sharp ed., 1998) (presenting the passionate argument of Colonel Rainborough).

<sup>111</sup> But see DWORKIN, *LAW'S EMPIRE*, *supra* note 16, at 189; JÜRGEN HABERMAS, *BETWEEN FACT AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 110, 138 (William Rehg trans., 1996).

his attempt to reconcile liberty and equality, but they rarely focus specifically on his claim that he had developed a strikingly new and powerful conception of law in *The Social Contract*.

Rousseau believed there was something special about a mode of governance that involved the application of general rules enacted by a general will.<sup>112</sup> He thought there was something striking about exactly the match-up that I discussed at the end of the previous Part between the generality of laws in their application and the generality of the authorship and enactment of laws<sup>113</sup>:

[W]hen the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever. Here the matter concerning which a rule is made is as general as the will which makes it. And *this* is the kind of act which I call a law. . . . [L]aw unites universality of will with universality of the field of legislation.<sup>114</sup>

Commentators on Rousseau seldom pause to consider the definitional claim made in this passage;<sup>115</sup> they press on instead to discuss what Rousseau makes of law, so understood, and the quite implausible theorems he puts forward to the effect that living under law, so defined, one is never subject to oppression or to the effect that the general will that makes the law is always just.<sup>116</sup> For reasons I have tried to explain, a modern democrat may want to be wary of such claims; yet the conception of law presented in the passage just might nevertheless engage his attention. Also, the democrat might not want to turn his back altogether on the peculiarities of Rousseau's doctrine of "the general will."<sup>117</sup> He will remember that Rousseau distinguished between "the general will" and "the will of all," and that one mark of the difference between them was supposed to be that a decision of the whole people becomes an instance of

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<sup>112</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 69–73 (Maurice Cranston trans., Penguin Books 1968) (1762).

<sup>113</sup> Whether inspired by Rousseau or not, Hans Kelsen made a similar connection. KELSEN, *GENERAL THEORY*, *supra* note 96, at 312 ("Democracy demands the utmost conformity between the general will as expressed in the legal order and the will of the individuals subject to the order; this is why the legal order is created by the very individuals who are bound by it according to the principle of majority.").

<sup>114</sup> ROUSSEAU, *supra* note 112, at 81–82.

<sup>115</sup> An honorable exception is TIMOTHY O'HAGAN, *ROUSSEAU* ch. V (1999).

<sup>116</sup> See George Kateb, *Aspects of Rousseau's Political Thought*, 76 *POL. SCI. Q.* 519, 520 (1961) (arguing that justice is at the center of Rousseau's concerns).

<sup>117</sup> ROUSSEAU, *supra* note 112, at 39.

the general will only when each citizen participating in legislation asks himself the right sort of question—not “What is in it for me?” but “What is appropriate for all of us?”<sup>118</sup> The democrat might associate this with the publicness condition I discussed earlier in Part VIII. To be sure, he will have little patience with Rousseau’s suggestion that the latter question—“What is appropriate for all of us?”—admits of just one answer, so that “[w]hen . . . the opinion contrary to my own prevails, this proves only that I have made a mistake, and that what I believed to be the general will was not so.”<sup>119</sup> But that will not lead the democrat to give up on the idea that it is essential to the making of law that the formulation of general norms and the issuing of general commands be approached by the members of a democratic polity in a public spirit.<sup>120</sup>

In *The Concept of Law*, Hart made fun of the idea that Austinian sovereignty could be redeemed by identifying the electorate as the sovereign, and this might be seen as an implicit critique of Rousseau’s conception (because Rousseau is certainly also committed to such an identification).<sup>121</sup> Hart wrote:

The description of the sovereign as “the person or persons to whom the bulk of the society are in the habit of obedience” had . . . an almost literal application to the simplest form of society, in which Rex was an absolute monarch. . . . But the present identification of the sovereign with the electorate of a democratic state has no plausibility whatsoever, unless we give to the key words “habit of obedience” and “person or persons” a meaning which is quite different from that which they had when applied to the simple case . . . .<sup>122</sup>

Anyone committed to this view, said Hart, seems to be committed to the proposition that “the ‘bulk’ of the society habitually obey themselves.”<sup>123</sup> However, as Hart goes on to acknowledge, there is in fact nothing absurd about this: one can be bound by something one has laid down oneself (as in the case of a vow or a promise), and one can be bound as an individual by what one has

<sup>118</sup> *Id.* at 37.

<sup>119</sup> *Id.*

<sup>120</sup> There are places in *The Social Contract* where Rousseau seems to interpret the publicness condition as indicating that public affairs should occupy more of a person’s time than private affairs. See, e.g., *id.* at 140. There is no reason why the democrat should accept this.

<sup>121</sup> *Id.* at 62–64.

<sup>122</sup> HART, *supra* note 17, at 75.

<sup>123</sup> *Id.*

done as part of an assembly (which theorists of sovereignty always acknowledged).<sup>124</sup> Certainly the idea of self-imposed laws has been of great significance in moral philosophy, particularly in Kantian theories of moral autonomy,<sup>125</sup> and it would be silly to dismiss it out of hand on the basis of syntactical objections.

I do not want to deny that Rousseauian political philosophy is treacherous territory. I have already indicated various claims by Rousseau that a democratic jurist may want to reject, and there will be others too. The rejection of representation, the consequent insistence on the small size of political units, and the mythic figure of the lawgiver probably all fall into this category.<sup>126</sup> (No doubt Rousseau-purists will be appalled by this). I guess I just find the bare bones of Rousseau's legal theory interesting for the way it combines into a single package the elements of democratic provenance, publicness, and generality that I have emphasized. And I do find challenging his suggestion that only when these three things come together in this way are we entitled to speak, strictly, of law. As I said in Part II, I have learned to steer clear of any dogmatic thesis in general jurisprudence along these lines. But the Rousseauian precedent confirms what we might suspect—that a coherent democratic jurisprudence will be tempted from time to time to make speculative moves in this direction if only to emphasize the centrality and importance of the claims about law that are made in this tradition, and to gesture at some sort of challenge to the thesis of his brother jurists that law, being a very general concept, is compatible with almost any form of rule.

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<sup>124</sup> See AUSTIN, *THE PROVINCE OF JURISPRUDENCE*, *supra* note 27, at 219 (making this argument); see also HART, *supra* note 17, at 76 (acknowledging something like these points).

<sup>125</sup> IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 51, 58 (Mary Gregor ed., 1997).

<sup>126</sup> See ROUSSEAU, *supra* note 112, at 140–43 (discussing representation); *id.* at 90–93 (discussing small size); *id.* at 84–88 (discussing the lawgiver). I myself believe that the lawgiver symbolizes the impact of international experience in the making of laws in a given society; it mitigates the nativism of Rousseau's account. But that is another story.