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THE FORGOTTEN FOUNDATIONS OF HART AND SACKS

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Law as it *is* is a continuous process of *becoming*. If morality has a place in the “becoming,” it has a place in the “is.”¹

The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process²

INTRODUCTION

IF there is such a thing as “mainstream” legal scholarship today, it could plausibly be characterized as holding the following views about legal institutions and practice: that legal doctrine is sufficiently determinate for adjudication to be “rational,” but that in hard cases courts inevitably perform a policymaking role; that legal institutions like courts, agencies, and legislatures possess different informational and structural advantages for decision making so that questions about who makes a decision are often as important as the substance of the underlying decision; and that traditional rule of law values, including predictability and procedural fairness, are important, though not overriding, values to which

¹ Henry M. Hart, Jr., *Holmes’ Positivism—An Addendum*, 64 Harv. L. Rev. 929, 930 (1951).

² William James, *Pragmatism: A New Name For Some Old Ways of Thinking* 201 (1907).

courts ought to afford some measure of protection. Of course, scholars divide over the degree and relative importance of these claims—over how indeterminate doctrine is in some domain, or how important fairness or predictability is in another, or even over what is required to count as “rational”—but such debate takes place within the context of shared assumptions about the general nature and purpose of legal decision making.

In some form, these assumptions may be as old as law itself. But as an explicit set of methodological premises, they are of relatively recent origin and can be traced back to the postwar movement in legal thought known as “Legal Process Theory.” That term is often used to refer generally to the work of legal scholars in the 1950s and early 1960s, whose scholarship often focused on procedural and jurisdictional questions, but the name also derives from the title of the period’s most famous and ambitious attempt to articulate something like a process-based theory of law, the set of teaching materials known as *The Legal Process*.³ The editors of those materials, Professors Henry Hart and Albert Sacks of Harvard Law School, never published their teaching materials during their lifetimes, but mimeographed versions of them were widely circulated among law professors at other law schools in the late 1950s and 1960s and so formed the centerpiece of the legal education of generations of lawyers, judges, and legal scholars.⁴

Given how influential the Legal Process materials have been for modern public-law scholarship, one might think that we would have a clear understanding of their intellectual foundations.⁵ But we do not. Most historical accounts describe Process Theory as a “response” of some sort to the Realists’ critique of orthodox legal thought in the 1930s, often

³ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁴ The course was taught at Harvard from 1957 to 1979 except for the 1976–77 school year. William N. Eskridge, Jr. & Philip P. Frickey, An Historical and Critical Introduction to *The Legal Process*, in Hart & Sacks, *supra* note 3, at li, xcix n.212. Eighteen other schools had adopted the materials for classroom use by 1963. *Id.* at ciii.

⁵ By “foundations,” I mean nothing more sophisticated than the way in which their theory of law fit within deeper views about the nature of knowledge and the world. I certainly do *not* mean to imply that Hart and Sacks were offering a “foundationalist” theory of knowledge according to which all beliefs are justified ultimately by reference to some set of foundational beliefs. See, e.g., René Descartes, *A Discourse on Method: Meditations on the First Philosophy*; *Principles of Philosophy* 75–78 (John Veitch trans., Everyman 1994) (1637). Indeed, as I will argue, Hart and Sacks’s epistemology was *anti*-foundationalist in that sense.

concluding that Hart and Sacks “absorbed” or “tamed” or “domesticated” Legal Realism by accepting its basic claims (for example, that adjudication entails judicial policymaking) while denying its most radical implications (for example, that adjudication is irrational).⁶ But such broad claims alone are not particularly illuminating. What precisely did Hart and Sacks accept from the Realist critique? What did they reject? And on what grounds did they think they could accept some parts while rejecting others? In short, what was the philosophical basis of their reconstruction of legal practice and scholarship?

The most popular answer to this last question has been to deny the premise implicitly assumed, namely that Hart and Sacks were much concerned at all with philosophically justifying their claims about law and legal institutions. This view sees Hart and Sacks as representative of a generation of intellectuals and social scientists who were skeptical about value claims but optimistic about scientific or factual knowledge. Hart and Sacks thus sought to avoid staking out any “substantive” moral or political philosophical views, hoping instead to transcend the controversial debates about value raised by Legal Realists by insisting that legal procedures—of legislatures, courts, and administrative agencies—could be used to resolve such disputes in a “neutral” manner.⁷

⁶ Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 254 (1992) (observing that Legal Process theorists sought to “absorb and temper the insights of Legal Realism after the triumph of the New Deal”); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* 35 (1995) (“Process theorists attempted to tame legal realist insights about the political nature of judicial activity by showing how judicial discretion might be limited by a rationalistic aesthetic defined by a peculiar understanding of the institution of judging.”); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *Vand. L. Rev.* 953, 970 (1994) (explaining that postwar legal scholars “substantially absorbed the anti-formalist claims of Legal Realism”); Gary Peller, *Neutral Principles in the 1950’s*, 21 *U. Mich. J.L. Reform* 561, 589 (1988) (explaining that postwar legal theorists “made legal realism acceptable by editing out its most radical implications, by domesticating the realist critique to the realm of substance”).

⁷ Bruce A. Ackerman, *Law and the Modern Mind* by Jerome Frank, *Daedalus*, Winter 1974, at 123 (“Abandoning in large measure its effort to justify decisions by reference to a substantive legal tradition rooted in a comprehensive vision of a good society, legal [process] scholarship concerned itself with the ways in which the structure of the existing legal process of dispute resolution limited the extent to which each decision-maker could properly impose his own *particular* social ideals upon the world around him.”); see also Laura Kalman, *The Strange Career of Legal Liberalism* 36 (1996) (explaining that Process theorists attempted “to separate law from politics, process from substance, fact from values”); Peller, *supra* note 6, at 590 (observing that for Legal Process theorists “in the realm of procedure, neutral, value-free reasoning was possible”). But see Fallon, *supra* note 6, at 973 n.85 (denying that Process theorists like Hart or Wechsler considered complete value-neutrality “to be either

This story, which we might call the “standard story,” was initially offered as a *critique* of the Legal Process approach. Scholars associated with the Critical Legal Studies movement sought to show that the intent and result of the Process-theory approach was to suppress ideological conflict and that such suppression was both impossible and illegitimate, as evidenced by the civil rights movement, Vietnam War, and general social upheaval of the late 1960s. To them, such events proved that Hart and Sacks’s apparent belief that the “rule of law” could be defended without taking a position on the legitimacy of the current social structure it protected was at best naïve and at worst reactionary.⁸

The odd thing about this story is that, though delivered as part of an effort to undermine the foundations of mainstream legal scholarship, it has been endorsed by those working within the mainstream, Legal Process paradigm.⁹ Most such scholars simply ignore the foundational issues entirely. But even some of those who do devote attention to the issue accept large chunks of the standard story. Specifically, they concede that there was not much in the way of a normative justification for Hart and Sacks’s approach to analyzing legal institutions.¹⁰ This version of the standard story sees Hart and Sacks as quintessential *lawyers*, who

necessary or possible”); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum. L. Rev. 982, 991 (1978) (arguing that Wechsler recognized that “judges must often make difficult choices among values and [did] not suggest that the judge can somehow be neutral among those values”).

⁸ See, e.g., Horwitz, *supra* note 6, at 271–72; Minda, *supra* note 6, at 42; Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law: A Progressive Critique* 18, 30 (David Kairys ed., 1982); Peller, *supra* note 6, at 566.

⁹ The main exceptions to this generalization are Neil Duxbury, *Patterns of American Jurisprudence* 2 (1995), and Eskridge & Frickey, *supra* note 4, at cviii–cxiii. In Section II.C, *infra*, I explain why the efforts of Duxbury, Eskridge, and Frickey at revision did not go far enough.

¹⁰ Anthony J. Sebok, *Legal Positivism in American Jurisprudence* 176 (1998) (arguing that Hart and Sacks’s belief in pluralist democratic theory enabled them to exclude from the field of jurisprudence the problem of explaining whether or not law was consistent with profound injustice); Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan. L. Rev. 2113, 2125 (2003) (noting that, even if some criticisms of Process Theory were put aside, “the Legal Process approach would fail because it would still tell us nothing about the values of the system, the rights it seeks to enforce through one institution or another”); Fallon, *supra* note 6, at 970–71 (observing that Hart and Sacks were part of a generation who “had accepted the worldly view that substantive moral and political philosophy were woolly, bankrupt disciplines” and so are properly criticized for ignoring the relevance of those disciplines in considering questions of “substantive justice”).

were neither particularly interested in, nor capable of, engaging in philosophical debates about the nature of morality, law, or human knowledge.

The endurance of the standard story is perplexing because, though not wholly implausible, it contradicts much of what the editors explicitly stated. To be sure, neither Hart nor Sacks were philosophers. And those parts of the teaching materials where the editors make explicit their methodological and jurisprudential assumptions are neither very clearly written nor free of inconsistency. They reveal, however, that the editors were struggling with how best to understand the normative demands the law places on lawyers, judges, and scholars in a modern, secular world.¹¹

In undertaking that project, Hart and Sacks were putting their own stamp on a long tradition of American jurisprudence that has conceptualized legal reasoning as both theoretical and practical, and the truths derived from it as both empirical and normative.¹² More specifically, they were operating within the “sociological” strain of that tradition, which understood legal change as the result of an organic development guided by social purposes.¹³ Hart and Sacks’s particular contribution to this tradition, contrary to what the standard story suggests, was to *emphasize*, rather than *downplay*, the role values play not only in legal analysis and decision making, but in *all* forms of social-scientific inquiry. In other words, Hart and Sacks responded to the Realists’ skeptical threat by reaffirming law’s scientific credentials, but they did so less by showing how legal methods of analysis were “objective” or “neutral,” as the standard story has long held, than by redefining what it meant for a discipline to be “scientific” in the first place.

In so doing, Hart and Sacks were taking sides in a larger debate going on at the time across a variety of disciplines about the role of values in scientific and social-scientific inquiry. They were part of a generation of intellectuals who began to raise questions about the foundation and

¹¹ In philosophical circles, the difficulty of understanding the existence of value in the natural world (as well as other nonphysical phenomena, such as mental states and probabilities) is sometimes called the “placement problem.” See David Macarthur & Huw Price, Pragmatism, Quasi-Realism, and the Global Challenge, *in* *New Pragmatists* 91, 93–94 (Cheryl Misak ed., 2007).

¹² For a discussion of a nineteenth-century version of such an effort, see Charles L. Barzun, Note, Common Sense and Legal Science, 90 Va. L. Rev. 1051, 1052–56 (2004).

¹³ For discussions of the connections between Process Theory and sociological jurisprudence, see Duxbury, *supra* note 9, at 212–23; Eskridge & Frickey, *supra* note 4, at lviii; *The Canon of American Legal Thought* 243–45 (David Kennedy & William W. Fisher III eds., 2006).

scope of scientific knowledge and about the possibility and *desirability* of separating the investigation of facts from that of values. Hart and Sacks were thus groping, however awkwardly at times, to define law as an academic discipline with methods that could properly be understood as *scientific*, comparable to those employed by economists, psychologists, or sociologists. In short, Hart and Sacks sought to justify their characterization of law as a “craft” on the ground that *all* knowledge, including that derived from the social and even natural sciences, was, in a sense, *craft* knowledge—that is, knowledge of how to *do something*.

These are controversial claims about the nature of knowledge. They were then, and they remain so today. So if they were intended to serve as the epistemological foundation for the interpretive and institutional methods of legal analysis elaborated in *The Legal Process*, as I claim they were, that fact alone prompts at least two questions: Given that those methods continue to dominate mainstream legal scholarship, does that mean that much of today’s scholarship depends on comparable assumptions about the nature of human knowledge? And if not, why not? The guiding assumptions of this Article are that these questions are important and that we can gain insight into the answers to them by looking at the intellectual efforts of those who first articulated the methodological principles now largely taken for granted.¹⁴ The point is *not* that we should look to Hart and Sacks as an authority on these questions, so that we should revise our own views to fit our revised understanding of theirs; rather, the suggestion is that we improve our understanding of our own situation by looking more closely at the intellectual influences that helped create it.

My argument proceeds in three parts. Part I shows the stakes involved in debates about the Legal Process teaching materials, first by showing their pervasive influence on modern scholarship and then by pointing out the uses to which historical interpretations of them have been put. It traces the source of the view that Hart and Sacks ignored philosophical and jurisprudential commitments and shows how that idea has continued

¹⁴ See Peller, *supra* note 6, at 571–72 (noting that “[t]he premises of process theory became the background assumptions for a whole generation of scholars” and that “the process approach continues to form the background assumptions for most centrist legal scholars who take the institutional focus of process theory as their starting point”). I hardly mean to suggest that such methodological principles have always been taken for granted. Critical Legal Scholars (such as Peller) certainly did not do so. See, e.g., *id.* at 622 (observing that the assumptions of process theory can no longer be taken for granted and have left scholars in a culture of “disintegration”).

to hold a grip on scholars, including those who are otherwise sympathetic to the Legal Process agenda.

Part II constitutes the bulk of my interpretive argument. I show how Hart and Sacks advanced positions on the nature of morality, of law, and of legal knowledge, respectively. Drawing particularly on the first chapter of the teaching materials, I argue that the positions they adopted reflect an underlying tension between, on the one hand, their desire to make their account consistent with a naturalistic understanding of the world and, on the other, their desire to defend and articulate the moral and political values on which they believed legal practice depended. I suggest that what explains the tension throughout is Hart's pragmatist philosophical assumptions according to which the mind in part constructs social reality.¹⁵

In Part III, I offer what I take to be the historical and contemporary consequences of my interpretation of *The Legal Process*. I claim, in short, that my reading of it not only explains how Hart and Sacks took themselves to be responding to the skeptical threat of Legal Realism, but also shows that they belong to a generation of postwar intellectuals who challenged, in different ways and in different disciplines, a rigid separation of fact and value in intellectual inquiry. I then show how contemporary philosophers and scholars in the tradition to which Hart and Sacks belong have taken a different approach to dealing with the problem they faced—an approach that evades, rather than faces head on, that problem.

I. THE RISE AND FALL (AND RISE) OF HART AND SACKS

Debates about the Hart and Sacks teaching materials are debates about mainstream legal scholarship. That is because the approach to analyzing legal institutions and decision making articulated in them was a core feature of the dominant mode of American legal thought after the Second World War and remains so today in large areas of public law. Despite being attacked in the 1970s and 1980s by law and economics scholars (from the right) and by Critical Legal Scholars (from the left), the Legal Process approach has endured intact, albeit with modifica-

¹⁵ It is widely recognized that Hart was the driving intellectual force behind the Legal Process teaching materials. See Eskridge & Frickey, *supra* note 4, at lxxvii–lxxxv. His other writing also reveals the extent to which he was responsible for the jurisprudential and methodological speculations in the materials. See, e.g., Michael J. Henry, Hart Converses on Law and Justice, *Harv. Law Rec.* 7–8 (February 28, 1963) (describing in detail the content of Hart's Holmes Lecture).

tions. Ironically, though, the historical account of Process Theory, leveled by Critical Legal Scholars in order to undermine and delegitimize it, has also endured intact along with it. That fact alone makes worth telling the story, familiar to many, of how the Hart and Sacks materials have weathered intellectual storms over the last half century.

A. Process Theory and The Legal Process

The Legal Process was certainly not the only work of what became known as “Process Theory,” but it has been the most influential. Two factors likely explain its influence. First, it articulates, more explicitly than any other work of its day, the core methodological assumptions of Process Theory and the reasons for making them. Second, and perhaps more important, it served as the centerpiece of the law school curriculum for generations of lawyers, judges, and legal scholars over a period of three decades.¹⁶

The term “Process Theory” describes a school of legal thought marked by several interrelated themes. These include: a recognition that courts often ‘make’ law rather than ‘find’ it; the observation that courts have a significant, but limited, role to play within a legal system that includes other important decision-making institutions such as legislatures and administrative agencies; and finally, an insistence that despite the indeterminacy of some legal materials, adjudication can be rational insofar as those materials—whether case law, statutes, or the Constitution—are applied in a principled manner and interpreted by reference to their purpose.¹⁷

Of the many works of legal scholarship voicing these themes in the postwar period, a few have endured as Legal Process classics. These include, in addition to the Hart and Sacks materials, Herbert Wechsler’s article, *Toward Neutral Principles of Constitutional Law*,¹⁸ Hart and Wechsler’s casebook on Federal Courts,¹⁹ Lon Fuller’s paper *The Forms and Limits of Adjudication*,²⁰ Fuller’s response to H. L. A. Hart’s

¹⁶ Eskridge & Frickey, *supra* note 4, at li.

¹⁷ *Id.* at liii.

¹⁸ 73 Harv. L. Rev. 1 (1959).

¹⁹ Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (1953).

²⁰ Lon Fuller, *The Forms and Limits of Adjudication* (Henry Hart Papers, Box 35, Folder 8) (on file with the Harvard Law School Library).

Holmes lecture,²¹ Alexander Bickel and Harry Wellington's article, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*,²² and Bickel's later book, *The Least Dangerous Branch*.²³ Of these, however, only the Hart and Sacks teaching materials devote substantial attention to the goal of grounding all of these themes on a set of jurisprudential claims about the nature of law and legal knowledge.²⁴

The full title of Hart and Sacks's teaching materials is *The Legal Process: Basic Problems in the Making and Application of Law*. The subtitle accurately describes the contents of the book, which consists of over fifty "problems," each of which contains some combination of cases, statutes, other background materials, and discussions of those materials. After the opening chapter, devoted to "The Nature and Function of Law," each successive chapter focuses on a particular set of legal institutions, beginning with "private ordering," then taking up common law decision making, legislation, and executive decision making in succession. It concludes with a long chapter on the judicial interpretation of statutes, a topic on which its influence has been particularly pronounced.²⁵

So part of the reason the Hart and Sacks materials have in many ways come to stand for an entire school of legal thought is because their scope was broader, and their ambitions greater, than most of the other works of that period, even the influential ones. But the more important source of

²¹ Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958).

²² 71 Harv. L. Rev. 1 (1957).

²³ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

²⁴ See Peller, *supra* note 6, at 591 ("While other process writers might have developed the analysis of particular institutions with greater sophistication, the *Legal Process* text was by far the most ambitious attempt to describe American law comprehensively . . ."). The only possible exception to this generalization, at least with respect to the jurisprudential foundations of legal analysis, is the work of Lon Fuller. But in some ways Fuller is the exception that proves the rule, for one of my main arguments is that Fuller deeply influenced Hart and Sacks, particularly in philosophical and jurisprudential matters.

²⁵ See, e.g., Guido Calabresi, A Common Law for the Age of Statutes 87 (1982) ("In a deep sense we are all followers of Henry Hart and know the moves almost by instinct."); T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 26–28 (1988) ("Hart and Sacks, of course, produced the most sustained intentionalist argument, and for years they have dominated the interpretive scene."); John F. Manning, What Divides Textualists and Purposivists?, 106 Colum. L. Rev. 70, 86 (2006) (using Hart and Sacks's theory of statutory interpretation as the representative of a "purposivist" interpretive approach in part on the ground that "their materials have come to represent the canonical statement of purposivism").

their influence is the fact that, though not published until 1994, they were used as the basis for a second-year course at Harvard Law School, and soon at many other schools as well, from the late 1950s into the 1980s.²⁶ By the time he started teaching the course, Henry Hart was already a towering figure at what was regarded as the country's leading institution of legal education.²⁷ His influence in his own time was great, as evidenced by the many citations to the Legal Process materials in the opinions of both the Warren and Burger Courts.²⁸ Equally important, though, was the fact that the materials formed the lens through which tens of thousands of future lawyers at Harvard and other schools, including many who became judges and legal scholars, first encountered the central problems of public law.²⁹

B. The Critical Attack: Legal Process and "Liberal Legalism"

It is thus perhaps not surprising that the Hart and Sacks materials became a chief target of what came to be known as the Critical Legal Studies ("CLS") movement in the 1970s and 1980s. During the same time, Process theorists were also attacked by scholars associated with the emerging law and economics movement for, among other things, having a naïve view of the motivations of governmental actors.³⁰ But I focus on the CLS critique here because part of their critique of Hart and Sacks was a historical one.

To summarize a complex and multifarious legal movement rather crudely, CLS scholars sought to question (if not outright deny) the legitimacy of the existing social structure in the United States and the legal institutions that maintained it. In particular, they attacked what they sometimes referred to as "liberal legalism," by which they meant to describe the set of political and legal views that ascribe considerable value to the "rule of law" and to the individual liberty it is designed to pro-

²⁶ Eskridge & Frickey, *supra* note 4, at cxiii.

²⁷ Telephone Interview with Lloyd L. Weinreb, Dane Professor of Law, Harvard Law School (July 28, 2011) (recalling that Hart was in "a different stratosphere" from other Harvard Law Professors at the time, even prominent ones like Lon Fuller).

²⁸ Eskridge & Frickey, *supra* note 4, at civ.

²⁹ *Id.* at cxiii.

³⁰ William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 *Mich. L. Rev.* 707, 742–43 (1991); Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1398–99 (1996).

tect.³¹ CLS scholars argued that the rule of law was both impossible in practice and, in any event, undesirable in theory. It was impossible because legal doctrine contained within it contradictory principles and purposes that rendered judges effectively unconstrained.³² And it was undesirable because the yearning for rules was associated with an excessively individualistic ideology that sought to distinguish artificially between “public” and “private” realms of life.³³ In short, they sought to show that the distinction between law and politics was illusory.³⁴

The targets of CLS critiques in the 1970s and 1980s were often legal theorists of their own generation, but Hart and Sacks came under harsh scrutiny as well.³⁵ Not only had their ideas influenced the younger generation of scholars, but their own brand of legal liberalism seemed particularly retrograde in light of the subsequent Warren Court revolution. Although the Legal Process materials themselves did not discuss constitutional law, Herbert Wechsler’s famous critique of the Court in *Brown* for its failure to base its decision on “neutral principles” seemed to embody all that was wrong with the methodological approach articulated in those materials.³⁶ In their common valorization of “process” values (for example, the Court’s legitimacy as an institution) over “substantive” ones (for example, racial justice), Hart, Sacks, Wechsler, and others

³¹ See, e.g., Robert W. Gordon, *New Developments in Legal Theory*, in *The Politics of Law: A Progressive Critique*, supra note 8, at 281, 282 (observing that, despite many differences among critical legal scholars, there existed among them “some common features to our common disenchantment with liberal legalism”); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wis. L. Rev.* 1062, 1071 (1974) (describing and criticizing the basic model of liberal legalism, which conceptualized the state as “a process by which individuals, principally through their membership in relatively permanent voluntary groups, formulate rules for mutual self-governance”); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1685 (1976) (criticizing a mode of legal thought that “favors the use of clearly defined, highly administrable, general rules” and which is associated with an ideology of individualism).

³² See, e.g., J. M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 *UMKC L. Rev.* 392, 409–15 (1987); Mensch, supra note 8, at 33.

³³ Kennedy, supra note 31, at 1754; Mensch, supra note 8, at 28–29.

³⁴ See, e.g., Horwitz, supra note 6, at 271–72; Kennedy, supra note 31, at 1762.

³⁵ Scholars in their own generation include Ronald Dworkin, Owen Fiss, and Guido Calabresi. For critiques of each, respectively, see Balkin, supra note 32; Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 392–96 (1982); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 *Stan. L. Rev.* 213 (1983).

³⁶ See, e.g., Peller, supra note 6, at 621 (noting that Wechsler’s article “exposed the politically conservative underbelly, as well as the intellectual contradictions,” of the Legal Process approach).

were seen to have failed to understand or appreciate the Court's more aggressive role in trying to achieve progress towards social justice.³⁷ Instead, their theory was perceived to be based on little more than "empty proceduralism."³⁸

Buttressing this critique was a historical account that purported to explain how Process theorists like Hart and Sacks ended up with such "empty proceduralism." As early as the 1970s, scholars began historicizing Hart and Sacks by interpreting their theory of law as one that both reflected, and depended on, the period of postwar social consensus in which ideological disagreement was at a minimum.³⁹ But it was not until the late 1980s that a comprehensive and critical analysis of the intellectual roots of the Hart and Sacks materials was offered.

In an influential article, Professor Gary Peller argued that the approach of Hart, Sacks, and Wechsler grew out of the combination of both a deep ethical skepticism and a desire to legitimize the rule of law.⁴⁰ Drawing upon Edward Purcell's important book, *The Crisis of Democratic Theory*, Peller argued that Hart and Sacks were part of a generation of scholars and social scientists who, in the wake of Nazism and Fascism, sought to broker a sort of compromise between a scientifically oriented modernism that was skeptical of values and a traditionalism that sought to justify democratic institutions on philosophical foundations.⁴¹ These intellectuals, influenced by John Dewey's "relativist" theory of democracy, drew a distinction between facts and values and argued that democracy ought to be understood as premised on an underlying skepticism about values.⁴² While recognizing that all inquiry was necessarily "framed" by values, they denied that values themselves could be reasoned about, insisting instead that one could only reason "instrumentally" about the best means to achieve already given ends.⁴³ Thus, what democracy called for was not *philosophical* justification but *empirical* inquiry into the sociological conditions necessary to sustain it.

³⁷ G. Edward White, *Patterns of American Legal Thought* 158–59 (1978).

³⁸ Eskridge & Peller, *supra* note 30, at 742.

³⁹ White, *supra* note 37, at 155–56.

⁴⁰ Peller, *supra* note 6, at 572–73.

⁴¹ *Id.* at 572 n.14, 579–80 (citing Edward Purcell, *The Crisis in Democratic Theory: Scientific Naturalism and the Problem of Value* (1973)). Peller draws on Purcell most extensively in Peller, *supra* note 6, at 572–86.

⁴² Peller, *supra* note 6, at 583–84.

⁴³ *Id.* at 583 n.27.

Peller argued that in the legal domain, Hart and Sacks sought to forge a similar compromise by drawing a distinction between procedure and substance analogous to the one Dewey had drawn between facts and values.⁴⁴ On his view, Hart and Sacks conceded the realist critique that questions of substantive law were ultimately matters of value, preference, and politics, but they nevertheless insisted that in the domain of procedure, it was still possible to offer “neutral” analyses of procedural and jurisdictional questions.⁴⁵ But since Hart and Sacks were wrong in thinking that such procedural issues could be treated without reference to controversial values, Peller concluded, they and others ended up portraying as neutral and objective what in fact were the social assumptions of a particular group of white, male, affluent law professors.⁴⁶

Other scholars, drawing on the work of Peller and Purcell, came to similar conclusions.⁴⁷ According to these scholars, Hart and Sacks had sought to avoid the need to make controversial value judgments by drawing a distinction between substance and procedure. And in their effort to separate procedure from substance, and fact from value, Hart and Sacks made the same mistake earlier generations of liberal legal scholars had made in thinking that they could separate law from politics.⁴⁸

⁴⁴ *Id.* at 589 (“[J]ust as the fact/value distinction served as a territorial truce line in the more general intellectual conflict, so Hart and Sacks were sure that the process/substance distinction was the geographic foundation for a pluralist tolerance of both the traditionalist and realist visions of law.”).

⁴⁵ *Id.* at 570.

⁴⁶ *Id.* at 620.

⁴⁷ See, e.g., Horwitz, *supra* note 6, at 247, 250, 253–55 (drawing on Purcell’s and Peller’s work in arguing that “[a]mong the most significant contributions [to postwar legal thought] were efforts to elaborate a process-oriented theory of democracy free of any substantive commitments to particular values such as equality”); Kalman, *supra* note 7 (drawing on Peller’s work and arguing that that Process theorists attempted “to separate law from politics, process from substance, fact from values”); Minda, *supra* note 6 (drawing on Peller’s work and arguing that “Hart and Sacks offered a sophisticated analysis of institutions and procedures for enabling judges to engage in a form of legal policy-making that was supposed to avoid the evils of subjective value decisions”).

⁴⁸ See, e.g., Horwitz, *supra* note 6, at 272 (“Until we are able to transcend the American fixation with sharply separating law from politics, we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices.”).

C. The New Legal Process (But the Same Old Story)

As it turned out, though, Legal Process made a comeback. Or perhaps it never went away. By the 1990s, many of Hart and Sacks's students had become influential judges and legal scholars.⁴⁹ Five of the six Supreme Court Justices appointed to the Court between 1986 and 1994, for instance, were alumni of the course.⁵⁰ Meanwhile, in spite of (or perhaps because of) the CLS critique, those former students who had entered the legal academy continued to develop theories of adjudication,⁵¹ constitutional interpretation,⁵² and statutory interpretation,⁵³ based on the core Legal Process-like assumptions of principled decision making, purposivist interpretation, and procedural fairness. Although sometimes these scholars would emphasize the ways in which they were moving beyond the original Legal Process assumptions, or would distinguish their approach from that of Hart and Sacks,⁵⁴ the resemblances were sufficiently strong for commentators to observe the blossoming of a "New Legal Process" school.⁵⁵

⁴⁹ Eskridge & Frickey, *supra* note 4, at cxxv. Former students include Richard Posner, Owen Fiss, Frank Michelman, David L. Shapiro, G. Edward White, and many others. *Id.* at cxxxiv (listing Fiss and Michelman as alumni of the course); *id.* at cxxxiv n.357 (noting that Posner and Shapiro took Legal Process at Harvard); E-mail from G. Edward White, Professor, University of Virginia School of Law, to author (Oct. 9, 2011) (on file with author) (listing G. Edward White as an alumnus of the course).

⁵⁰ Eskridge & Frickey, *supra* note 4, at cxxv. Those Justices are Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, and David Souter. Clarence Thomas is the sole exception. See Adam Liptak, A Well-Traveled Path from Ivy League to Supreme Court, *N.Y. Times*, Sept. 7, 2010, at A17.

⁵¹ See, e.g., Ronald Dworkin, *Taking Rights Seriously*, at xii (1977).

⁵² See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 4–5 (1980).

⁵³ See, e.g., Calabresi, *supra* note 25, at 4–7.

⁵⁴ Dworkin, *supra* note 51, at 4–5 (characterizing Hart and Sacks as part of a generation of scholars who "tried to settle questions about the legal process instrumentally, by asking which solutions best advanced [social] goals," and thus tended to ignore "issues of moral principle"); Eskridge & Frickey, *supra* note 4, at cxxviii (characterizing their own generation of scholars as "more likely to view law as a hermeneutical, cultural, or political enterprise than as a neutral policy science").

⁵⁵ Eskridge & Frickey, *supra* note 4, at cxxv (observing that *The Legal Process* "made a postmortem comeback in legal scholarship"); Eskridge & Peller, *supra* note 30, at 790–91 (identifying the emergence of a "New Public Law" scholarship or a "New Legal Process," which they interpret as part of a larger cultural turn towards political moderation); Rubin, *supra* note 30, at 1437–38 (observing, and endorsing, the emergence of legal scholarship that shares with the Legal Process school a conviction that studying law is fundamentally about analyzing institutions); Weisberg, *supra* note 35, at 216 (characterizing Calabresi as one of many scholars who were working within the Legal Process tradition).

It seems safe to say that the “New Legal Process” remains dominant today in most areas of public law. Although constitutional law scholars no longer tend to find persuasive an entirely process-based approach to constitutional law,⁵⁶ the core methods that Hart and Sacks sought to articulate in their teaching materials continue to shape the terms of debates in administrative law,⁵⁷ federal courts,⁵⁸ criminal law,⁵⁹ and, most explicitly, statutory interpretation.⁶⁰ Moreover, broader theories of law and adjudication in the administrative state continue to draw on Hart and Sacks. A review of Justice Breyer’s recent book, *Active Liberty*, for instance, observed that its central argument was “all but lifted off the pages of Henry Hart and Albert Sacks’s landmark law school textbook, *The Legal Process*, which Justice Breyer studied as a law student at Harvard Law School in the early 1960s.”⁶¹

Oddly, though, the renewed interest in the methodologies articulated in *The Legal Process* has not led to a reconsideration of its intellectual foundations. Given that the standard story was offered as a critique of mainstream legal scholarship, one might suspect that it does not tell the whole story. Yet even those sympathetic to the use of Legal Process methods in other areas of law have accepted the bulk of the standard story about Hart and Sacks, concluding that either the editors were not concerned with questions of normative justification or simply thought they need not provide one. Richard Fallon, for instance, a leading federal

⁵⁶ See, e.g., Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1064 (1980) (criticizing Process Theory as applied to constitutional law generally and Ely’s *Democracy and Distrust* more specifically).

⁵⁷ See Eskridge & Frickey, *supra* note 4, at cxxxii (discussing Hart and Sacks’s influence on administrative law scholarship, including the work of Stephen Breyer, Richard Stewart, and Jerry Mashaw); see also Eskridge & Peller, *supra* note 30, at 727 n.51 (listing various administrative law and civil procedure casebooks that reflect the “institutional process perspective” of Hart and Sacks).

⁵⁸ See Fallon, *supra* note 6, at 954–56 (observing that most federal courts scholarship still takes place within the “paradigm” of the Hart and Wechsler approach, the assumptions of which were more explicitly articulated in the Hart and Sacks teaching materials).

⁵⁹ See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 *Va. L. Rev.* 189, 189 (1985) (analyzing and criticizing interpretive doctrines of criminal law in light of their assumptions about the relative institutional competencies of courts and legislatures).

⁶⁰ See sources collected at *supra* note 25.

⁶¹ Ken I. Kersch, *Justice Breyer’s Maudarin Liberty*, 73 *U. Chi. L. Rev.* 759, 767–68 (2006). Professor Michael Dorf has also characterized his call for “experimentalist judging” and a renewed focus on how to design institutions to reduce indeterminacy as an effort inspired by the Legal Process tradition of Hart and Sacks. Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. Rev.* 875, 920–35 (2003).

courts scholar who defends the Hart and Sacks paradigm, notes that Hart and Sacks were part of a generation which “had accepted the worldly view that substantive moral and political philosophy were woolly, bankrupt disciplines” and so are properly criticized for ignoring the relevance of those disciplines in considering questions of “substantive justice.”⁶² And Judge Guido Calabresi endorses the criticism of *The Legal Process* and argues that it “was a disingenuous and misguided attempt to return legal scholarship to its pre-Legal Realism autonomous status,” which insisted that one could make judgments of institutional competency independent of values.⁶³

However, things are beginning to change. In their introduction to the 1994 published version of *The Legal Process*, Professors Eskridge and Frickey offer a wonderfully detailed account of the development of the materials and their ultimate influence. Eskridge and Frickey dispel some myths about Hart and Sacks, such as that they opposed *Brown*,⁶⁴ and give a fuller description of the intellectual influences on them, noting in particular the similarities between Hart’s views and those of their colleague at Harvard, Lon Fuller.⁶⁵ At the same time, Neil Duxbury has shown the ways in which the Process Theory of Hart and Sacks and Fuller expressed a purposive, rationalist tradition of jurisprudence that was in many respects continuous with the thought of such earlier legal theorists as Roscoe Pound, John Chipman Gray, and Benjamin Cardozo, who were associated with the movement known as “sociological jurisprudence.”⁶⁶ Both accounts observe that, like Fuller, Hart and Sacks in

⁶² Fallon, supra note 6, at 970–71.

⁶³ Calabresi, supra note 10, at 2124; see also Sebok, supra note 10, at 175–76 (in offering a sympathetic jurisprudential analysis of the Legal Process, explaining its editors’ relative unconcern with questions of justice by attributing to them the view that the existence of just institutions was a matter of sociological fact with which they need not deal). Sebok, Calabresi, and Fallon all draw on Peller’s account of the Legal Process materials. See Sebok, supra note 10, at 152 n.162; Calabresi, supra note 10, at 2124 n.48; Fallon, supra note 6, at 957 n.12, 964 n.45, 966 n.58, 970 nn.76, 79.

⁶⁴ Eskridge & Frickey, supra note 4, at cix (observing that “in the classroom Hart endorsed *Brown* and explicitly disagreed with Wechsler’s analysis”).

⁶⁵ Id. at lxxxiii (noting that Fuller and Hart acknowledged intellectual debts to each other and observing that the work of both men “converged on similar themes”).

⁶⁶ Duxbury, supra note 9, at 212–27.

some ways sought to reject a strong is/ought dichotomy when it came to interpreting law.⁶⁷

These accounts are on the right track, but they do not pursue the implications of their insights and so leave us with more questions than answers. First, if Hart and Sacks were part of the same rationalist tradition as the sociological jurists, how did their methods amount to a “response” to Legal Realism, given that the sociological jurists were one of the primary targets of the Realist attack?⁶⁸ Second, if part of the answer lies in Hart and Sacks’s denial that one could clearly separate questions of value from questions of fact, does that controversial philosophical claim remain an implicit assumption of mainstream legal scholarship today? If not, why not?

The only way we can begin answering these questions is to look at the teaching materials themselves. Although one would hardly know it from reading most of the scholarship on them, the teaching materials take quite explicit and controversial stands on a variety of philosophical questions.

II. THE PHILOSOPHICAL FOUNDATIONS OF *THE LEGAL PROCESS*

What really troubles me is not so much the question of the nature of law, but the question of knowledge about it. How do we connect the law and what we know about law with the way things are in the world?⁶⁹

Hart opened his 1963 Holmes Lectures at Harvard Law School with the question above, which he put in the mouth of a fictitious law student with whom he proceeded to conduct a Socratic dialogue. Hart’s lectures, which he called, “Conversations on Law and Justice,” were unprecedented in that Hart was the first (and last) currently teaching Harvard Law Professor to be asked to deliver Harvard’s most prestigious lecture series.⁷⁰ In those lectures, Hart set forth, with some slight modifications, the ideas and arguments found in the first chapter of *The Legal Process*,

⁶⁷ Id. at 228 (observing that for Fuller “[f]acts cannot be divorced from values”); id. at 233 (noting the deep influence of Fuller and Hart on each other’s work); Eskridge & Frickey, *supra* note 4, at lxxxv.

⁶⁸ Duxbury’s answer to this is that Process Theory did not amount to a “response” at all. Duxbury, *supra* note 9, at 205. I discuss and criticize this view in Part III.

⁶⁹ Henry, *supra* note 15, at 7.

⁷⁰ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 55–56 (1982).

entitled “The Nature and Function of Law.” That Hart used such a high-profile platform to reflect on questions of the nature of knowledge, justice, and law ought to immediately raise doubts about the conventional wisdom that Hart was unconcerned with such philosophical issues.

In fact, in that opening chapter Hart and Sacks advanced philosophical positions on the nature of morality, of law, and of knowledge, and the task of this Part is to consider each of those positions in turn. In each of them, we can see a recurring tension between the conflicting demands of fact and value. That is, we can see the editors struggling with how best to understand and justify values within a naturalistic account of the world. That tension does not get resolved until we look at their discussion of their own methodological assumptions. There we can see that their effort to reconcile fact and value has its roots in a pragmatist epistemology and metaphysics associated with William James. Whether their sought-after reconciliation is persuasive as a philosophical matter is an open question, but understanding what Hart and Sacks were trying to do at least helps us to better situate them historically and to compare their approach to more recent efforts to answer the same questions. Those tasks I take up in Part III.⁷¹

A. The Nature of Morality

The teaching materials advance, albeit in a somewhat clunky way, a naturalistic, non-skeptical moral theory that is consequentialist in structure. To see how the editors derive this theory requires first looking at the anthropological story with which they begin the teaching materials and the lessons they draw from it. We will then trace their core moral maxim, that the purpose of society is to “maximize the total satisfactions

⁷¹ A word about methodology. The argument presented in this Part is an exercise in intellectual history that is both philosophical and historical. It is “philosophical” in the sense that my purpose is to understand some of the philosophical claims made in the materials, either explicitly or implicitly. And this purpose requires that I make some effort to render coherent their analysis of a given topic even if not all of their statements on it seem superficially consistent. But it is “historical” in the sense that my goal is also to characterize accurately what I think the editors of the teaching materials—particularly Henry Hart—were actually trying to say. It is not, in other words, a mere “rational reconstruction” of the text. The assumption that allows me to pursue both purposes without contradiction is that the editors had philosophical views on the subjects discussed, even if they were not always fully articulate in their own minds. Such an assumption is not uncontroversial, and may be false, but I can see no way of assessing its plausibility aside from evaluating the interpretation I offer based on it.

of valid human wants,” to its likely original source.⁷² Doing so takes us to the legal philosophy of Roscoe Pound and the moral philosophy of William James. If the interpretation here offered is sound, it demonstrates why the view that Hart and Sacks meant to offer a purely “instrumental” or conventionally utilitarian moral theory is mistaken.⁷³

1. The Basic Conditions of Human Existence

The first section of the teaching materials is entitled “The Basic Conditions of Human Existence.”⁷⁴ There the editors explain that one such basic condition is that human beings have needs and desires. Such desires or “wants,” as the editors call them, vary widely, from the basic necessities of life to more subtle ones, such as a desire to “achieve some sense of oneness with the universe.”⁷⁵ Whereas the more basic wants are relatively fixed, the more subtle ones are capable of change and development through both “external suggestion” and “internal reflection.”⁷⁶ Whatever the content of those wants is, however, human life is “an unceasing process of fixing upon those on which time and effort are to be expended, and trying to satisfy them.”⁷⁷

Because satisfying those wants frequently requires the work of, or support from, others, human beings are inescapably dependent on one another.⁷⁸ One consequence of such interdependence is that people choose to live together in groups. And once a group is formed, it gives rise to a set of common interests of its members. These common interests exist regardless of whether the members recognize them. For at the very least, insofar as they seek to enjoy the benefits of cooperation, they

⁷² Hart & Sacks, *supra* note 3, at 104 (describing as a “great desideratum” the effort “to maximize the total satisfactions of valid human wants”).

⁷³ Eskridge & Frickey, *supra* note 4, at cx (“[T]o the extent Hart and Sacks aspired to ‘worldly’ understandings, it was a means-oriented instrumentalism which offered few insights about social justice.”); Kennedy, *supra* note 31 (quoting the teaching materials while denying that conflict in private law can be “reduced to disagreement about how to apply some neutral calculus that will ‘maximize the total satisfactions of valid human wants’”); cf. Sebok, *supra* note 10, at 134 (“Law, for Hart and Sacks, was wholly instrumental; it was about achieving society’s purposes—whether for good or for evil.”).

⁷⁴ Hart & Sacks, *supra* note 3, at 1.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

must necessarily share interests in maintaining the conditions that make such group life possible.⁷⁹

Given that human beings have wants and that each person's wants are, *prima facie*, as valid as every other person's, the fundamental purpose of society is, to the extent possible, to "maximize the total satisfactions of valid human wants."⁸⁰ Furthermore, the fact of human interdependence means that maximizing many of these satisfactions will require increasing each individual's skills and abilities (and hence capacity to satisfy others' wants). Therefore, a corollary purpose of society is that of "establishing, maintaining and perfecting the conditions necessary . . . for community life to perform its role in the complete development of man."⁸¹ As we will see, for Hart and Sacks, these purposes provide criteria for evaluating virtually all social institutions, including legal ones. But for now the point is to consider these fundamental social purposes as foundations of social, and thus moral, life.

2. Maximizing the Satisfactions of Valid Human Wants

In the account just described, Hart and Sacks seem to infer from the factual premise that these are the "basic facts" of human existence the normative conclusion that the purpose of society is to "maximize the total satisfactions of valid human wants." The editors' failure to acknowledge how controversial such an inference is, much less explain what might justify it, has contributed to the impression that they embraced a narrow form of utilitarianism that has an impoverished conception of the good.⁸²

But the impression is inaccurate. Although consequentialist in structure, Hart and Sacks's moral theory requires making qualitative discriminations among the possible human ends to be maximized. That it does

⁷⁹ Id. at 2–3.

⁸⁰ See id. at 104.

⁸¹ Id. at 102 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in *Government Under Law: Essays Prepared for Discussion at a Conference on the Occasion of the Two Hundredth Anniversary of the Birth of John Marshall* 47, 52 (1955)).

⁸² See Kennedy, *supra* note 31, at 1685, 1764–66; see also Eskridge & Frickey, *supra* note 4, at cxxii ("Both law and economics and *The Legal Process* start with the desire of human society to maximize the collective satisfaction of its members and acknowledge that legal rules can contribute to this goal."); id. at cxxxiv (observing that later scholars go "beyond Hart and Sacks" insofar as they "understand social interdependence in non-utilitarian terms: The community is bonded together by values and traditions, not just convenience and efficiency").

so the editors demonstrate in two ways. First, in modifying “human wants” with the predicate “valid,” they explicitly recognize that all human desires are not created equal for the purposes of ethical evaluation.⁸³ Second, and more important, they say that the “social problem” is that of “establishing, maintaining and perfecting the conditions necessary . . . for community life to perform its role in the complete development of man.”⁸⁴ These words, quoting as they do a Catholic priest, are a far cry from the economist’s utilitarian calculus and instead seem to call for some kind of substantive evaluation of what “development” entails. The editors go on to explain that in maximizing satisfactions of human wants, attention must be paid to the “compulsive force” of an awareness of the “individual worth of every human being.”⁸⁵ In short, the development of “human abilities” is the “ultimate goal both of social and of individual life.”⁸⁶

Still, the claim that one can derive values from facts, though one with a long pedigree,⁸⁷ remains a controversial meta-ethical position and so requires some argument about the nature of value in order to justify it. Hart and Sacks do not provide one, but their odd phrase about “maximizing the total satisfactions of valid human wants” may provide a clue as to where to find one. The editors fail to note the source of that phrase, but it seems likely that Hart took it from Roscoe Pound, who was still a colleague of his at Harvard. In various places, Pound had described the “end of law” as that of “achieving a maximum satisfaction of men’s wants or claims or desires to have things and do things.”⁸⁸ And Pound would frequently cite as inspiration for this idea William James’s observation that history was “the story of men’s struggles from generation to generation to find the more and more inclusive order.”⁸⁹ In the same essay from which that line is quoted, James wrote that “the guiding princi-

⁸³ Hart & Sacks, *supra* note 3, at 104. Throughout, I use the terms “moral” and “ethical” interchangeably. I mean to draw no significant distinction between them.

⁸⁴ *Id.* at 102 (quoting Snee, *supra* note 81).

⁸⁵ *Id.* at 106.

⁸⁶ *Id.*

⁸⁷ It is a tradition that arguably includes both classical utilitarians like Bentham and Mill, as well as modern-day naturalistic moral theorists like Peter Railton. See Peter Railton, *Facts, Values, and Norms: Essays toward a Morality of Consequence* 5 (2003).

⁸⁸ Roscoe Pound, *The Revival of Natural Law*, 17 *Notre Dame Law* 287, 368 (1942); see also Roscoe Pound, *Justice According to Law* 30–31 (1951).

⁸⁹ William James, *The Moral Philosopher and the Moral Life*, in *The Will to Believe: And Other Essays in Popular Philosophy* 184, 205 (Longmans, Green & Co. 1937) (1897).

ple for ethical philosophy” must be “simply to satisfy at all times *as many demands as we can*.”⁹⁰

3. William James, Henry Hart, and the Satisfaction of Demands

Now it is of course speculative to assume that Hart adopted James’s moral theory since we do not know whether Hart even read the essay which Pound had quoted. Nevertheless, the similarities between James’s argument in that essay, and arguments Hart made in *The Legal Process* and his other writings, are sufficiently striking to suggest some possible influence, even if indirect. At the very least, the comparison suggests a way to ground Hart’s argument.

James argued, in short, that experience was the sole test for ethical truth. There was no good or bad in the “nature of things,” but that fact did not imply ethical skepticism. Indeed, James refused to accept such skepticism as a real possibility.⁹¹ He thus began by observing that all human beings have feelings, desires, and hence “demands” upon the world and others. His controversial move was then to say that the mere existence of such demands generated moral obligations by others to respect them.⁹² For James, morality only existed insofar as there were sentient beings who had demands, whether physical or emotional. But once such beings came into existence, so did morality.

Two crucial points qualify and clarify this seemingly counter-intuitive claim. First, a person’s demands included not just subjective physical needs or satisfactions, but his or her “ideals” as well.⁹³ So it seems clear that James was not endorsing a “desire-satisfaction” brand of consequentialism.⁹⁴ Second, the obligations that a person’s demand generated could be defeated if, but only if, another person had a conflicting demand.⁹⁵

⁹⁰ Id.

⁹¹ Id. at 192–93, 199.

⁹² Id. at 195, 201.

⁹³ Id. at 193 (“If one ideal judgment be objectively better than another, that betterness must be made flesh by being lodged concretely in some one’s actual perception.”).

⁹⁴ Wesley Cooper, *William James’s Moral Theory*, 32 *J. Moral Educ.* 411, 411 (2003) (interpreting James as offering a “consequentialism of ideals,” as distinguished from a consequentialism of preference satisfaction).

⁹⁵ Compare James, *supra* note 89, at 195 (arguing that the only ground for not satisfying a demand is “the exhibition of another creature who should make a demand that ran the other way”), with Hart & Sacks, *supra* note 3, at 104 (“Judgment upon the validity of any one per-

The few times he devoted attention to the topic, Henry Hart expressed quite similar views. Like James, Hart did not ground ethics on a metaphysical foundation, but also like James, he denied that that position implied ethical skepticism.⁹⁶ Instead, as we have seen, he conceived of ethics in broadly consequentialist terms as the “satisfaction” of demands or wants. Hart seemed to go beyond James in specifying that the development of individual abilities was one of the essential goods to be maximized.⁹⁷ More important, though, both James and Hart made clear that their brand of consequentialism entailed some qualitative evaluation of the ends sought. James spoke of “ideals,” whereas Hart spoke of “ends,” but implicit in both was a rejection of the idea that in adjudicating among competing demands, one could not evaluate qualitatively the wants whose satisfaction was being demanded.

In short, the comparison to James goes some way to dispelling the notion that the teaching materials were based on a narrow form of utilitarianism. If one looks past their use of awkward phrases like “maximizing the total satisfactions of valid human wants,” one can see that they were offering a consequentialist moral theory based on naturalistic meta-ethical premises that sought to include within it qualitative judgments about the human virtues and capacities most worth maximizing. Such an ambition is hardly quixotic and in fact has been pursued more recently by such eminent moral philosophers as Amartya Sen and Philip Pettit.⁹⁸

But neither James nor Hart should be let off the hook too easily. For unlike the philosophers just mentioned, neither of them specified with any concreteness what those qualitative ends to be maximized were or, more importantly, how one should go about discriminating among them. Without such criteria for qualitative evaluation, their common approach might seem hardly worth calling a normative ethical theory at all.

Interestingly, both James and Hart addressed this criticism in the same way. Neither man met the objection head-on; instead, each re-framed it as an issue that could only be resolved by the ethical choice an individual makes. James put it this way:

son’s wants depends, in part, on the extent to which their satisfaction will interfere with or further the satisfaction of other people’s wants.”)

⁹⁶ Henry, *supra* note 15, at 7 (quoting Hart as lamenting that the “reluctance to make personal commitments on rational grounds upon questions of value is a disease of our time”).

⁹⁷ See Hart & Sacks, *supra* note 3, at 103–04.

⁹⁸ Amartya Sen, *On Ethics and Economics* 7–11 (1987); Philip Pettit, *Consequentialism and Respect for Persons*, 100 *Ethics* 116, 116–18 (1989).

[I]t is simply our total character and personal genius that are on trial; and if we invoke any so-called philosophy, our choice and use of that also are but revelations of our personal aptitude or incapacity for moral life. From this unsparing practical ordeal no professor's lectures and no array of books can save us.⁹⁹

Meanwhile, Hart, in the context of elaborating his suggestion that the purpose of law was to enable man "to realize his potentialities as a human being," explained, in somewhat Jamesian language, that "[w]hat is crucial in this process is the enlargement of each individual's capacity for effectual and responsible decision. For it is only through personal, self-reliant participation, by trial and error, in the problems of existence, both personal and social, that the capacity to participate effectively can grow."¹⁰⁰ For James, the idea seems to have been that over time, as individuals were faced with dilemmas requiring action of one sort or another, the ethical truth would come out. "The course of history," James explained, "is nothing but the story of men's struggles from generation to generation to find the more and more inclusive order."¹⁰¹

As will become clear below, Hart, following Pound before him, understood the purpose of law to be that of guiding an historical process quite similar to the one James described. Something like that is the "process" of the "legal process." But we can already see the dilemma that has emerged from Hart's moral theory: The purpose of society is to maximize the satisfactions of valid human wants, but how do we know which wants are "valid"? Put another way, if it is only through "effectual and responsible" decision making that people can learn to apply that maxim appropriately, how do we know a "responsible" decision when we see one?

B. The Nature of Law

To answer that question requires taking up Hart and Sacks's theory of law. Most philosophers of law ignore Hart and Sacks entirely, treating

⁹⁹ James, *supra* note 89, at 214–15.

¹⁰⁰ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 409–10 (1958); see also Henry M. Hart, Jr. & John T. McNaughton, *Evidence and Inference in the Law*, *Daedalus*, Fall 1958, at 40, 64 (arguing that the best environment for developing human abilities is one that "provides the maximum opportunity and encourages the maximum growth of individual capacity to make effectual and responsible decisions concerning the direction of human and social life").

¹⁰¹ James, *supra* note 89.

them, either explicitly or implicitly, as not engaged in a jurisprudential project.¹⁰² Those who have tried to put Hart and Sacks into today's jurisprudential categories have characterized *The Legal Process* as expressing a "positivist" theory of law.¹⁰³ To see the teaching materials as endorsing a positivist theory of law is not in itself implausible, but it is deeply misleading. To understand why requires first looking at how the teaching materials explain the existence of law in the first place.

1. Substantive and Constitutive Arrangements

Let us return to the basic conditions of human existence. As we have seen, the editors argue that these basic conditions, discussed above, entailed certain fundamental purposes of society, for example, "maximizing the total satisfactions of valid human wants." Those conditions and those purposes explain why we have law, for to achieve those social purposes requires at least two things. First, it requires a common set of "understandings or arrangements" specifying the terms on which community life will be conducted. That is, the members of society must know what kind of conduct will be tolerated, what will be required, and what will be prohibited if the cooperation necessary for satisfying wants is to continue peaceably. But since these "substantive understandings"

¹⁰² Scott Shapiro, *Legality* 6 (2011) (observing that "[t]he Legal Process School led by the lawyers Henry Hart and Albert Sacks was an extremely influential approach to the American legal system that analyzed the law through an organizational lens," but that "[l]egal philosophy has nevertheless remained more or less unaffected by the kind of organizational analysis that has become such a prominent and productive feature" of disciplines such as psychology, sociology, and economics).

¹⁰³ Eskridge & Frickey, *supra* note 4, at lxxxv (observing that Hart made a "twist" on Fuller's insistence upon the inseparability of fact and value, "but a twist which spun away from Fuller's natural law view that law should adapt to society and its morals, and toward a new kind of positivism"); see also Sebok, *supra* note 10, at 168 ("Despite the almost wholesale insertion of Fuller's theory of adjudication into the theory of reasoned elaboration, the theory of law in *The Legal Process* is closer to H. L. A. Hart than Fuller."); Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 *Ariz. L. Rev.* 413, 470 (1987) ("Hart and Sacks did not themselves advocate anything like a natural law theory. Their manuscript is largely free of this sort of jurisprudential speculation, and what can be gleaned from their views about the nature of law suggests a positivistic orientation instead."). But see Fallon, *supra* note 6, at 965 & n.50 (identifying "the anti-positivist principle" as one of the core methodological assumptions of Hart and Sacks); Brian Leiter, *Positivism, Formalism, Realism*, 99 *Colum. L. Rev.* 1138, 1155–58 (1999) (reviewing Professor Sebok's book and criticizing the suggestion that Hart and Sacks were positivists and suggesting instead that they seem to have endorsed something like a natural law theory akin to that of Lon Fuller).

will always be somewhat abstract and thus “indeterminate in many respects,” they are insufficient on their own to maintain community life.¹⁰⁴

The second condition necessary for group life is therefore another set of arrangements, which performs three functions: (1) to clarify what the substantive arrangements require in particular instances; (2) to determine when one of the substantive arrangements has been violated; and (3) to make a change to the existing set of substantive arrangements.¹⁰⁵ These “constitutive” or “procedural” arrangements establish institutional procedures for settling questions of conflict or uncertainty about the substantive understandings. They are “obviously more fundamental” than the substantive arrangements because they are both the *source* of those substantive arrangements and the *means* by which the substantive arrangements are put to work in setting the terms of cooperation among individuals.¹⁰⁶

These “arrangements,” both substantive and constitutive, are made up of general directives, which we typically call “laws” and which together make up a legal system.¹⁰⁷ Since these arrangements exist to serve society’s fundamental purposes, they impose moral obligations on individuals living within society. Specifically, each individual in society has a duty to comply with “decisions which are the *duly arrived at* result of *duly established* procedures . . . unless and until they are *duly changed*.”¹⁰⁸ This principle, which Hart and Sacks insist is the “the central idea of law,” they call the “principle of institutional settlement.”¹⁰⁹

Does this amount to a “positivist” theory of law? The answer depends on what one means by that term.

2. (Anti-Positivist) Purposivism

According to one way of defining legal positivism, the positivist holds that all law is capable of being identified without reference to evaluative or moral argument. Sometimes referred to as the “sources

¹⁰⁴ Hart & Sacks, *supra* note 3, at 3.

¹⁰⁵ *Id.* These functions are strikingly similar to those served by H. L. A. Hart’s rules of recognition, adjudication, and change. See H. L. A. Hart, *The Concept of Law* 92–96 (2d ed. 1994). The similarities between the two Harts are discussed below. See *infra* Subsection II.B.3.

¹⁰⁶ Hart & Sacks, *supra* note 3, at 3–4.

¹⁰⁷ *Id.* at 113–14.

¹⁰⁸ *Id.* at 4 (emphasis added).

¹⁰⁹ *Id.*

thesis,” this describes the view held by so-called “exclusive” or “hard” positivists.¹¹⁰ This view does not deny that judges do, or ought to, rely on moral or other non-legal considerations in rendering decisions, particularly in hard cases. It merely insists that when judges do so, they are creating new law, not identifying law that already exists. Only traditional legal sources—for example, constitutions, statutes, and cases—determine the content of the law.¹¹¹

Hart and Sacks seemed to reject the sources thesis. They explicitly criticized the view that “ethics is a body of thought to be distinguished sharply from law,” on the ground that “law is concerned essentially with the pursuit of purposes, and purposes have continually to be evaluated.”¹¹² More important, Hart and Sacks’s theory of adjudication seems to require that judges engage in moral evaluation when determining the law. According to the editors, whenever a court is faced with general language requiring application to particular facts, the court must give that language concrete meaning. This is a process Hart and Sacks famously call “reasoned elaboration.”¹¹³ The judge’s task is to “elaborate” the directive in a way that both remains faithful to past decisions and elaborates the directive in “the way which best serves the principles and policies it expresses.”¹¹⁴ When there is not a clear rule applicable, this will require making reference to the “more basic principles and policies of law”—that is, the underlying purposes of the law.¹¹⁵ Since ultimately the purpose of the law is to maximize the satisfactions of valid human wants and to establish and maintain “the conditions necessary for community life to perform its role in the complete development of man,” that means that courts must look to moral principles in interpreting the

¹¹⁰ See Joseph Raz, *Authority, Law and Morality*, 68 *The Monist* 295, 295–96 (1985).

¹¹¹ *Id.* at 318 (observing that applying law is only one of the functions of courts and that “another additional function the courts have is to supervise the working of the law and revise it interstitially when the need arises”).

¹¹² Hart & Sacks, *supra* note 3, at 108–09. The sentence quoted in the text is admittedly ambiguous. The editors could be simply saying that positive law needs to be evaluated and reformed in light of moral principles. That view would be consistent with the sources thesis.

¹¹³ *Id.* at 145–52.

¹¹⁴ *Id.* at 147; cf. Ronald Dworkin, *Law’s Empire* 66 (1986) (advancing a theory of interpretation that requires the interpreter to craft an interpretation that both “fit[s]” and justifies past practice).

¹¹⁵ Hart & Sacks, *supra* note 3, at 147.

law. In short, in determining what the law *is*, courts must determine what the law *ought to be*.¹¹⁶

In their call for judges to look to the “policies” and “principles” of the law in this way, Hart and Sacks seemed to foreshadow the work of Ronald Dworkin, the most well-known modern anti-positivist philosopher of law. The similarities between the two theories have not gone unnoticed by scholars.¹¹⁷

3. *The (Positivist?) Principle of Institutional Settlement*

There is, however, a competing doctrine in the Legal Process materials. This is the “principle of institutional settlement,” which Hart and Sacks call the “central idea of law.”¹¹⁸ This principle seems to command citizens and officials alike to recognize and follow “decisions which are the *duly arrived at* result of *duly established* procedures . . . unless and until they are *duly changed*.”¹¹⁹ Professor Sebok has cited this principle as his basis for interpreting the theory of law in the teaching materials as a “positivist” one, but it is important to see why that characterization, though plausible in some ways, threatens to mislead more than it clarifies.¹²⁰

As we have seen, the principle of institutional settlement is a moral principle that follows from the fact that in order to maximize the satisfaction of valid human wants, all members of a community have a common interest in having a means of resolving conflicts and settling the terms on which group life will proceed. That is because, irrespective of the content of those terms, having them settled and known to members of the community allows those members to plan their own conduct

¹¹⁶ Even these claims about adjudication could be consistent with exclusive positivism if interpreted as claims about how courts ought to *make* law, but in other places Hart made clear that he thought such reasoned elaboration was necessary to *identify* the law. See Hart, *supra* note 1, at 936 n.21 (noting that the problem of determining when a law is settled “inescapably involves ethical questions”); Henry M. Hart, Jr., Notes on Some Essentials of a Working Theory of Law 36 (Henry Hart Papers, Box 17, Folder 1) (on file with the Harvard Law School Library) [hereinafter Hart, Notes on Some Essentials].

¹¹⁷ See Eskridge & Frickey, *supra* note 4, at cxxxi (comparing Hart and Sacks to Dworkin); Leiter, *supra* note 103, at 1157 (same); Wellman, *supra* note 103, at 415–16 (comparing Dworkin’s theory of law and adjudication to that of Hart and Sacks).

¹¹⁸ Hart & Sacks, *supra* note 3, at 4.

¹¹⁹ *Id.* (emphasis added).

¹²⁰ Sebok, *supra* note 10, at 130 (citing the principle of institutional settlement as evidence that Hart and Sacks “recognized that there is no necessary connection between law and morality and therefore embraced a central tenet of legal positivism”).

and cooperate with one another accordingly. But such cooperation and planning can only take place if people comply with the terms agreed upon. Hence the demand that people comply with “duly arrived at results” of “duly established procedures.”

Insofar as Hart and Sacks consider it both a necessary and sufficient condition of a directive or decision’s legal validity that it have been issued by such “duly established procedures,” as they seem to,¹²¹ their characterization of law appears to be “positivist” in one sense of that term. Specifically, for them what determines whether a directive is “legal” is merely a *social fact*, namely whether it has passed through the appropriate procedures, such as securing a majority of votes of a legislative body, not whether it satisfies some kind of moral demand.¹²² There thus seems to be a tension between, on the one hand, Hart and Sacks’s purposivist approach to adjudication and, on the other, the conception of law that seems implied by the principle of institutional settlement.

One way to resolve this tension would be to acknowledge that these “duly established procedures” (or “constitutive arrangements”) exist as a matter of social fact, but to insist that those procedures themselves call upon judges to interpret legal materials by reference to social purposes or moral principles.¹²³ But this approach fails to address the core tension between (a) Hart and Sacks’s insistence that courts interpret directives in a way that best fulfills their underlying substantive purposes and (b) their suggestion that the chief purpose of law is to provide clear and settled terms for social living. For in hard cases, there is often a conflict between a particular law’s purpose and the purpose law, as such, serves in settling matters.

That tension, it seems to me, goes unresolved in the teaching materials.¹²⁴ But for our purposes, the important thing to see is that it is a tension between *values*. That is, to the extent their conception of law is

¹²¹ That Hart and Sacks do so is suggested by the structure of their overall argument and by the fact that, as stated in the text, they refer to the principle of institutional settlement as the “central idea of law.” Hart & Sacks, *supra* note 3, at 4, 113.

¹²² *Id.* at 4–5. This is sometimes referred to as the “social fact thesis.” See Kenneth Einar Himma, Inclusive Legal Positivism, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 125, 126 (Jules Coleman & Scott Shapiro eds., 2002).

¹²³ The jurisprudential view described in the text has been dubbed “inclusive” or “soft” positivism. See Hart, *supra* note 105, at 250 (describing it as “soft positivism”); Himma, *supra* note 122, at 125 (describing this thesis as “inclusive legal positivism”). Professor Sebok interprets Hart and Sacks in this way. Sebok, *supra* note 10, at 132–33.

¹²⁴ Professors Eskridge and Peller seem to agree, though they frame the tension as one between purposivism and formalism. Eskridge & Peller, *supra* note 30, at 724–25.

more “positivist” than Ronald Dworkin’s, it is so because Hart and Sacks placed greater weight on the “legality” values—that is, on the benefits for social life of the predictability that comes with settled rules—than he does. And that is why the label “positivist” is misleading. For H. L. A. Hart and subsequent legal positivists have tended to deny that positivism, as a theory about the nature of law, in any way depends on a normative argument about the *benefits* of keeping law and morals separate. Thus, for instance, although H. L. A. Hart observed that the development of “secondary rules” (analogous to Henry Hart’s “constitutive rules”) remedies various “defects” that arise from the uncertain, disputed, and static quality of substantive norms in pre-legal societies, he and other positivists have insisted that his analysis of the concept of law in no way depends on such benefits.¹²⁵ Hart and Sacks, though, make explicit that they distinguish between legal and moral norms for *ethical* reasons: “When the principle of institutional settlement is plainly applicable, we say that the law ‘is’ thus and so, and brush aside further discussion of what it ‘ought’ to be. Yet the ‘is’ is not really an ‘is’ but a special kind of ‘ought’”¹²⁶ Similarly, they say later that the distinction between “settled” law and “law-that-is-not-but-ought-to-be” is “not in a just sense a distinction between law and morals. It is a distinction rather between one aspect of morals in relation to law and another.”¹²⁷

But understanding Hart and Sacks as, at most, “normative” or “ethical” positivists also shows how the tension earlier identified has not disappeared; it has only been relocated.¹²⁸ Now the tension between fact and value we keep seeing pop up emerges again at the methodological

¹²⁵ See Hart, *supra* note 105, at 248–50 (denying that Ronald Dworkin’s description of positivism as an “interpretive” theory of law grounded on moral arguments of the sort mentioned in the text describes his own theory and observing that his own discussion of the capacity of secondary rules to remedy defects does not reflect the purpose of law but instead only “a particular moral merit which law has”); Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 *Oxford J. Legal Stud.* 683, 693 (2006) (“[Hart’s] claim is not that the development of secondary rules makes the law a better institution, morally more legitimate, so to speak. Hart simply claims that the development of secondary rules enables the law to better serve its functions; it makes it more efficient, *qua* law.”). I leave aside the question of whether these two defenses of the alleged moral neutrality of Hart’s analysis are consistent with each other.

¹²⁶ Hart & Sacks, *supra* note 3, at 5.

¹²⁷ *Id.* at 109.

¹²⁸ Jeremy Waldron has described his own position, which is similar in many ways to that of Hart and Sacks, as a form of “normative positivism.” See Jeremy Waldron, *Normative (or Ethical) Positivism*, in *Hart’s Postscript: Essays on the Postscript to The Concept of Law* 410, 411 (Jules Coleman ed., 2001).

level. Their analysis seems to be both descriptive about what the nature of law *is*, while at the same time prescriptive about what the nature of law *ought to be*. But how can one endorse a concept as a normative matter without having some sense of what that concept is prior to the endorsement?¹²⁹ Is it coherent or useful to analyze the institution or the concept of law by reference to ethical criteria? As it turns out, such methodological questions are, these days, some of the most hotly debated ones among philosophers of law.¹³⁰ What matters for our purposes, though, is that for Hart, too, they seemed to be the more fundamental questions.¹³¹ So it is to these questions we now turn.

C. *The Nature of Legal Knowledge*

One of the more pervasive and pernicious misconceptions about the Legal Process materials is that the theory there offered was understood by the editors to be “neutral” with respect to controversial underlying values.¹³² Like the labels “instrumentalist” and “positivist,” it reflects the assumption that Hart and Sacks limited the domain of rational discourse to include only “instrumental rationality,” which describes the process of finding the most efficient means to reach an already chosen end. But a closer look at the methodological assumptions the editors explicitly articulate reveals the hollowness of that criticism. More important, once

¹²⁹ See *id.* at 419 (discussing this objection to normative positivism).

¹³⁰ For arguments denying that such neutrality is possible or desirable, see Ronald Dworkin, *Justice in Robes* 140–86 (2006); Gerald A. Postema, *Bentham and the Common Law Tradition* 328–35 (1986); Stephen Perry, *Interpretation and Methodology in Legal Theory*, in *Law and Interpretation: Essays in Legal Philosophy* 97, 123 (Andrei Marmor ed., 1995); Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 *Am. J. Juris.* 139, 153–57 (2007); Waldron, *supra* note 128. For defenses of the neutralistic ambitions of analytical jurisprudence, see Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 179–217 (2001); Hart, *supra* note 105, at 239–44; Marmor, *supra* note 125, at 700; Scott Shapiro, *The Bad Man and the Internal Point of View*, in *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes* 197, 199–200 (Steven J. Burton ed., 2000).

¹³¹ Henry, *supra* note 15, at 7 (“What really troubles me is not so much the question of the nature of law, but the question of knowledge about it.”).

¹³² See sources cited *supra* note 7; see also Calabresi, *supra* note 10, at 2123 (explaining that, according to Hart and Sacks, legal scholars could identify institutional competencies and thus “help select who should be the definers and determiners of the values that would guide the legal system” and that they “would do so, neutrally, based on institutional capacity”); Peller, *supra* note 6, at 590 (“[T]he traditionalist identification of law with value-free neutral principles was reflected in the conviction that, in the realm of procedure, neutral, value-free reasoning was possible.”).

we inquire a little more deeply into the philosophical basis for such methodological doctrines, we can begin to see more clearly what exactly Hart and Sacks meant by the legal “process.”

1. “Prudential” Social Science

To understand how Hart and Sacks conceptualized legal inquiry we must begin again with their account of the foundations of social life. For it turns out that, according to the editors, the basic conditions of human existence not only have consequences for social institutions like law, but also for the *study* of such institutions. Specifically, the fact that society itself has fundamental purposes means that social science—or what the editors sometimes call the “science of society”—is necessarily a “prudential” science that requires making decisions based on value judgments.¹³³ In fact, in a section entitled “The Question of the Nature of Knowledge About Institutional Decisions,” the editors stress this point so often that it is surprising how rarely scholars mention it. Consider, for example:

These materials proceed upon the conviction that the science of society is essentially a judgmental, or prudential, science demanding modes of inquiry and reflection which are sharply at variance with the

¹³³ Hart & Sacks, *supra* note 3, at 107. Professor Peller acknowledges that Hart and Sacks conceived of legal reasoning as “prudential” in this way, but he insists that Hart and Sacks only endorsed this value-laden style of legal reasoning for judges insofar as they were acting “interstitially,” that is, insofar as they were interpreting statutes or making common law decisions that could be overruled by legislative action and were thus acting as “deputy legislatures.” Peller, *supra* note 6, at 592, 596–97. On his view, when it came to constitutional decision making, Hart and Sacks agreed with Wechsler that judges must abstain from making any value judgments. *Id.* at 595, 602–03. In my view, Peller is right that Hart and Sacks’s analysis is consistent with Wechsler’s, but he overstates both the degree to which Hart and Sacks conceptualized common law decision making as mere policymaking, see, e.g., Hart & Sacks, *supra* note 3, at 452–53 (discussing the case of *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902), and doubting whether there were sufficiently clear standards to justify the court in vindicating a common law “right to privacy”), and the degree to which Wechsler denied the role of values in constitutional cases, see Wechsler, *supra* note 18, at 16 (“Is there not, in short, a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, *in respect of values* that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts?” (emphasis added)). Peller correctly observes that for Hart and Sacks, the fundamental question was often the question of “who decides,” Peller, *supra* note 6, at 570, but for the reasons stated in the text I do not find his further claim that Hart and Sacks thought such decisions could be made “neutrally” to be well supported by the text of the teaching materials or Hart’s other work.

procedures conventionally thought to be appropriate in the natural sciences.

. . . [T]he materials reject the teaching of a vast body of literature which has accumulated during the last half century seeking to equate the methods of the various social sciences, and in particular of law, with the methods of the natural sciences

. . . .

. . . The science [of society] must depend heavily upon ethical and hence disputable considerations.¹³⁴

Social science must be “prudential,” according to the editors, for two reasons. The first, which we might call the *ethical justification*, is that the goal of social-scientific inquiry is to study social institutions in order to improve them and to make them better serve the purposes they exist to serve. Therefore, insofar as social scientists offer solutions to problems and hence make judgments about what *ought to be done*, they must necessarily base those judgments on values.¹³⁵ This is true whether the institutions studied are markets, legislation, courts, or even language itself.

But social-scientific inquiry requires making value judgments for a second, subtler and deeper, reason. We might call this the *epistemic justification*. Here the claim is that although the purpose of society is to maximize the satisfactions of “valid human wants,” what those wants are, and whether they are valid, always remain open, contested questions.¹³⁶ Similarly, what conditions of community life are necessary to aid “the complete development of man”¹³⁷ is similarly an open question of continuing controversy. That means that the social scientist is tasked with not only identifying the best *means* for achieving the ends of society but also with making judgments about what those very broad purposes of society require in any given situation; that is, what the concrete *ends* of society ought to be.¹³⁸ So, on the one hand, in order to under-

¹³⁴ Hart & Sacks, *supra* note 3, at 107, 110. Nor are those the only considerations. See, e.g., *id.* at 110 (“[T]he conclusions of the science [of society] must depend ultimately upon *judgment*—upon judgment informed by experience and by all the objective data that can feasibly be assembled, but upon judgment nevertheless.”).

¹³⁵ *Id.* at 108.

¹³⁶ *Id.* at 104.

¹³⁷ *Id.* at 102.

¹³⁸ *Id.* at 111.

stand a social institution, the social scientist must interpret its procedures and practices in light of the ends she takes them to be pursuing.¹³⁹ On the other hand, in seeking to improve those practices and procedures, she must stand ready to reevaluate the institution's particular goals in light of what is possible, given the patterns of human thought and behavior already entrenched in those institutional practices.¹⁴⁰ In other words, consideration of values improves the social scientist's understanding of facts, and consideration of facts improves her understanding of values. "[W]hat is involved," the editors explain, "is a process of interaction between social ends and social means."¹⁴¹

This discussion ought to dispel decisively the notion, so central to the standard story, that Hart and Sacks were purporting to offer a "neutral" analysis of legal institutions. Rather, the editors conceive the nature of inquiry into social institutions to be such that even to describe them entails a kind of normative evaluation on the part of the social scientist.

This explanation, though, may give lie to the caricature at a high cost, for neither the ethical nor the epistemic justifications provide self-evidently plausible models for social science. The ethical justification, which asserts that the social scientist's task is to solve society's problems, seems to impose dogmatically an agenda of social reform on disciplines which, given their status as "sciences," ought to be in the business of discovering the truth, not merely curing social ills. But even if that were a legitimate purpose to impose on a social-scientific discipline, the epistemic justification for characterizing social science as "prudential" hardly follows. Instead, social progress would seem to be facilitated by first getting one's goals clear and then using empirical methods to discern the causal relationships the discovery of which will allow us to achieve those goals most effectively.¹⁴²

¹³⁹ Id. at 108, 111 ("[H]ow can the observer of decisions understand the actions of the decisionmaker unless he takes account of the choices [among the possible purposes to be pursued] and tries to appraise their soundness?").

¹⁴⁰ Id. at 111 ("The social scientist . . . never writes on a clean slate. He has to reckon with the choices previously made in that society and with the social conditions and institutions that they have brought about.").

¹⁴¹ Id.

¹⁴² Cf. Ernest Nagel, *Fact, Value, and Human Purpose*, 4 *Nat. L. F.* 26, 33 (1959) (arguing that the utility of descriptive accounts of social phenomena "seems to me obvious, if we are at all concerned with diagnosing a social complex, with the objective of changing what is actual in the direction of a better approximation to some ideal").

What could have justified this approach in the minds of Hart and Sacks?

2. Lon Fuller, William James, and Philosophical Pragmatism

The answer, once again, requires tracing their ideas back to their sources. In this case, that takes us first to the work of Lon Fuller, and then back again to the pragmatist philosophy of William James.¹⁴³ As it turns out, the same set of views about the nature of mind and reality ground both the ethical and epistemic justifications.

a. The Ethical Justification

Let us begin with the ethical justification. In their discussion of the “prudential” nature of social science, Hart and Sacks cite Lon Fuller’s work twice, in one case quoting him directly on the importance of interpreting human behavior in purposive terms.¹⁴⁴ Fuller devoted much more attention than did Hart or Sacks to methodological questions in jurisprudence specifically and in social science more generally. He argued in various places that one could not offer purely descriptive accounts of law, because law was a purposive activity.¹⁴⁵ The reason for that controversial methodological view lay in Fuller’s pragmatist metaphysical views, in particular those of William James, whose work deeply influenced Fuller.¹⁴⁶

¹⁴³ Scholars have documented the intellectual and personal connections between Fuller and Hart. See, e.g., Duxbury, *supra* note 9, at 232–33 (noting that “[i]t is in Fuller’s writings that we can see a distinct ‘process’ perspective on law beginning to gel” and further observing that “Fuller’s voice can be heard throughout the *Legal Process* materials”); Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* 235 (2000) (noting that the meeting of Hart and Fuller in 1939 when Fuller arrived at Harvard “struck an intellectual spark” and that the two shared the view that “identifying law with government behavior and removing moral elements from legal analysis were philosophically inadequate and practically dangerous”); Eskridge & Frickey, *supra* note 4, at lxxxiii.

¹⁴⁴ Hart & Sacks, *supra* note 3, at 107 (quoting Lon Fuller, *Freedom—A Suggested Analysis*, 68 *Harv. L. Rev.* 1305, 1307 (1955) [hereinafter Fuller, *Freedom*]); *id.* at 111 (citing Lon Fuller, *American Legal Philosophy at Mid-Century, A Review of Edwin W. Patterson’s Jurisprudence, Men and Ideas*, 6 *J. Legal Educ.* 457 (1954) [hereinafter Fuller, *Legal Philosophy*]).

¹⁴⁵ See, e.g., Lon L. Fuller, *The Law in Quest of Itself* 2–3 (1940) [hereinafter Fuller, *Quest*]; Fuller, *Freedom*, *supra* note 144, at 1306–07; Lon Fuller, *Human Purpose and Natural Law*, 3 *Nat. L. F.* 68, 69 (1958) [hereinafter Fuller, *Human Purpose*]; Fuller, *Legal Philosophy*, *supra* note 144, at 468–73.

¹⁴⁶ Kenneth I. Winston, *The Is/Ought Redux: The Pragmatist Context of Lon Fuller’s Conception of Law*, 8 *Oxford J. Legal Stud.* 329, 345 (1988).

In a series of essays, James sought to offer, among other things, “pragmatist” theories of mind, belief, reality, and truth, all of which were attempts to reconcile in their respective domains the dominant traditions of philosophical thought, rationalism and empiricism.¹⁴⁷ They did so by simultaneously insisting upon experience as the ultimate test of the truth for philosophical doctrines (empiricism), while at the same time recognizing that metaphysical and ethical beliefs can and do affect our lives in concrete ways and so can in that sense be “validated” by experience (rationalism). What we believe, and what we take to be “true” about the world, depended and, on James’s view, *ought to* depend, on what we are seeking or hoping to achieve.¹⁴⁸ Our metaphysical conclusions about what there is in the world, therefore, reflect our practical interests and purposes.

The obvious objection to this view is that it seems to suggest that one can simply will things to be true or that one ought to believe whatever makes one happy. To this objection, James responded there was indeed a brute reality that “coerced” our minds to believe or not believe certain things.¹⁴⁹ But the point was that such a reality was entirely unconceptualized; it was the “perpetual flux” of experience, which impressed itself upon us. Within the broad constraints of that “flux,” there was considerable leeway as to what to believe, and what to hold to be true, and there it was perfectly appropriate to let one’s purposes and values shape one’s beliefs. Thus, for instance, if holding a certain belief could have a causal bearing on whether or not some desired thing might come to be, then that was sufficient justification for believing it. Such seemed to be the case, James observed, in the domain of social life, where one’s attitudes about others could often be self-fulfilling.¹⁵⁰

Professor Kenneth Winston has shown, in part by drawing on Fuller’s private papers, the way in which Fuller’s thought was deeply influenced by James’s work. Like James, Fuller believed that the human mind in part constructed its own reality by creating conceptual order out of raw, unconceptualized experience.¹⁵¹ And because our *intellectual* efforts—

¹⁴⁷ James, *supra* note 2, at 33 (“I offer the oddly-named thing pragmatism as a philosophy that can satisfy both kinds of demand. It can remain religious like the rationalisms, but at the same time, like the empiricisms, it can preserve the richest intimacy with facts.”).

¹⁴⁸ *Id.* at 213; William James, *The Will to Believe*, in *The Will to Believe: And Other Essays in Popular Philosophy*, *supra* note 89, at 1, 10.

¹⁴⁹ James, *supra* note 2, at 211.

¹⁵⁰ James, *supra* note 148, at 23.

¹⁵¹ Winston, *supra* note 146.

that is, what we learn and what we believe to be true—were in part driven by our practical purposes, for Fuller, the conceptual schemes we develop from such efforts were properly subject to *ethical* criteria. Furthermore, as James had, Fuller emphasized the ways in which ideas could have self-fulfilling consequences. “One of the factors shaping the law,” he explained, “is the intellectual perception of it, so that the proper view almost inevitably changes the thing viewed; the articulation of the rule changes the rule.”¹⁵²

One can see this view at work in Fuller’s self-described “pragmatic” conception of jurisprudence according to which philosophical controversies were properly adjudicated by asking, “[w]ould the adoption of the one view or the other affect the way which the judge, the lawyer, the law teacher, or the law student, spends his working day?”¹⁵³ For him, the aim of jurisprudence was to “give a profitable and satisfying direction to the application of human energies in the law.”¹⁵⁴ So he criticized the Realists for assuming without warrant not only that it was *possible* to separate rigorously *what is* from *what ought to be*, but also that such a separation “is something so obviously desirable that it is not necessary to justify the expenditure of human energy needed to achieve it.”¹⁵⁵

Henry Hart made a strikingly similar critique of Oliver Wendell Holmes. Hart attacked Holmes’s famous “bad man” argument not on the ground that Holmes was conceptually confused or that he gave a factually inaccurate account of legal practice.¹⁵⁶ Instead, just as Fuller encouraged, Hart looked to the bad consequences of taking Holmes’s line of inquiry: “Why that helps, unless to make us more effective counsellors [sic] of evil, I have never understood Is a lawyer serving either his client or his profession well if he predicates his advice simply on the likelihood of the client’s being caught, and on what would happen if he were?”¹⁵⁷ Hart’s arguments were directed not at Holmes’s reasoning, but

¹⁵² Id. at 339 (quoting Fuller’s private papers).

¹⁵³ Fuller, *Quest*, supra note 145, at 2–3.

¹⁵⁴ Id. at 2.

¹⁵⁵ Id. at 60–61. It is for this reason, no doubt, that the bulk of the arguments Fuller made against positivism in his famous reply to H. L. A. Hart’s 1957 Holmes Lecture were about the bad consequences that were likely to follow if people believed in legal positivism. Most famously and controversially, Fuller argued that the prevailing positivist views of the legal profession in Germany during Hitler’s rise to power were “helpful to the Nazis.” Fuller, supra note 21, at 659.

¹⁵⁶ Hart, supra note 1, at 932.

¹⁵⁷ Id.

instead at the harmful effects which he thought the widespread adoption of Holmes's conclusions would cause.

We now see the basis for the ethical justification for prudential social science. What at first seemed an unmotivated and dogmatic premise for scientific inquiry now seems more plausible. For if the pursuit of *all knowledge* is purposive and driven by practical interests in some way, then the question is not *whether* one pursues "the truth," but rather *which truths* one decides to pursue.¹⁵⁸ The answer Hart and Sacks offer is that we ought to pursue those truths the discovery of which are most likely to be socially beneficial.¹⁵⁹ And since law itself is something that can be changed by one's perception of it, that will often mean interpreting existing practices in the best possible light.¹⁶⁰

b. The Epistemic Justification

But the ethical justification is insufficient on its own to justify the "prudential" social-scientific method Hart and Sacks endorse in which ends and means "interact." That is because, as already noted, one could plausibly argue that even if our goal is social reform, the best way to achieve such reforms is to first get clear about ends, and then figure out the most efficient means to get there.

Again, looking to Fuller provides some insight. The editors cite an article of Fuller's for the proposition that social science involves "a process of interaction between social ends and social means."¹⁶¹ In that article, Fuller first articulated a method of social analysis, which he called "eunomics," that came to dominate his intellectual agenda for some time.¹⁶² As hinted in the name itself, eunomics combined empirical and

¹⁵⁸ Cf. James, *supra* note 2, at 231 ("We can not then take a step forward in our actual thinking. When shall I acknowledge this truth and when that? Shall the acknowledgment be loud?—or silent? If sometimes loud, sometimes silent, which *now*? When may a truth go into cold-storage in the encyclopedia? and when shall it come out for battle?").

¹⁵⁹ See Hart & Sacks, *supra* note 3, at 110 (asking rhetorically whether the presence of inescapable value judgments means that social science "is unworthy of the name of science—that it is not an organizable body of knowledge, capable of helping man to improve his condition on the face of the globe? The answer here ventured is no.").

¹⁶⁰ *Id.* at 147 (explaining that officials ought to interpret vague directives "in the way which best harmonizes with more basic principles and policies of law").

¹⁶¹ *Id.* at 111. I thank Kenneth Winston for emphasizing to me the importance of Fuller's eunomics project for understanding his work.

¹⁶² Fuller, *Legal Philosophy*, *supra* note 144, at 473–81.

ethical inquiry or, as Fuller put it, the study of means and ends.¹⁶³ He sought to study the “means” or “forms” of social institutions in order that doing so would shed light on the range of permissible ends such institutions could serve. So, for instance, in his paper, excerpted in the Hart and Sacks materials, “Forms and Limits of Adjudication,” Fuller argued that the “form” of adjudication as a means of dispute resolution necessarily implied that the parties disagreed about the relevance of some existing criterion or principle already applicable to the case.¹⁶⁴ This analysis suggested that adjudication was inappropriate where no such principles or “shared purposes” by reference to which courts could reason could be found.¹⁶⁵ The analysis begins with a sense of the purpose or function of adjudication, then observes its practices at work as a descriptive matter, and then generates normative conclusions based on those observations—in this case, that courts should not handle certain matters.¹⁶⁶

Fuller’s point was not just that it was difficult or even impossible to separate questions of ends from means, but that it was affirmatively better to conceptualize ends in light of the means available. Again, the reason lay in the practical nature of the intellect. Since our minds developed ideas and concepts to deal with actual problems, they were not particularly adept at contemplating ends or values in the abstract. Thus, being forced to conceive of goals in light of certain limits could actually improve the ends we set. “It is easier to define a perfect omelet,” Fuller observed, “than it is to describe the most delectable dish imaginable.”¹⁶⁷ As he put it elsewhere: “In all areas, from the most trivial to the most exalted, the mind is compelled to sharpen its judgment by narrowing its range.”¹⁶⁸ The idea is akin to Holmes’s suggestion that it was a “merit of the common law that it decides the case first and determines the princi-

¹⁶³ Id. at 478. The Greek prefix “eu” means “good” or “well” (for example, eucalyptus, euphoria, and the Greek word eudemonia). 5 *The Oxford English Dictionary* 430 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1998). “Nomic” also comes from Greek, meaning “law-like.” 10 id. at 471.

¹⁶⁴ Fuller, *supra* note 20, at 10.

¹⁶⁵ Id. at 16.

¹⁶⁶ Fuller gives the example of wage setting as an activity improperly handled by adjudication. Id. at 19.

¹⁶⁷ Lon L. Fuller, *Means and Ends*, in *The Principles of Social Order* 61, 65 (Kenneth I. Winston ed., 2001).

¹⁶⁸ Id.

ple afterwards.”¹⁶⁹ Giving attention to the problem at hand sharpens and focuses, as an *epistemic matter*, our more abstract speculations.

Hart had views similar to Fuller’s about the epistemic benefits of practical problem solving. “[K]nowledge,” Hart wrote in a private letter, “consists, not in doctrine, not in propositional statements stored away in the brain; but in the capacity to solve problems as they are actually presented in life.”¹⁷⁰ This statement could be interpreted as expressing the attitude of the hardheaded lawyer who dismisses philosophical speculation as irrelevant to the practical business of life, but that would be a mistake. Consider what Hart said of one of his mentors, Louis Brandeis, in a letter to Judge Charles Wyzanski, who had characterized Brandeis as suspicious of knowledge derived from “unmoored speculation.”¹⁷¹ Hart took a quite different view:

I think that Brandeis very consciously used basic premises arrived at by abstract thinking as a framework within which to search, by the empirical method, for concretely workable solutions. The approach as a whole was profoundly philosophical rather than “practical.” And the soundness of the practical results achieved[,] Brandeis would have regarded I think, and rightly so, as confirming the validity of the philosophical hypotheses.¹⁷²

What Hart said of Brandeis, I suggest, could also be said accurately of himself. Throughout his writings, one can see Hart struggling to come up with a “workable jurisprudence,” that is, a quite general view of law that nevertheless was useful in solving actual problems.¹⁷³

¹⁶⁹ Oliver Wendell Holmes, Codes, and the Arrangement of the Law, 5 Am. L. Rev. 1, 1 (1870). But see Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883, 894 (2006) (arguing that judges may be prone to cognitive errors when making policy decisions based on a set of concrete facts before them).

¹⁷⁰ Eskridge & Frickey, *supra* note 4, at lxxvi (quoting Letter from Henry M. Hart, Jr. to John H. Williams, Dean, Graduate School of Public Administration, Harvard University (Oct. 15, 1941) (Felix Frankfurter Papers, Box 185, Folder 14) (on file with the Harvard Law School Library)).

¹⁷¹ Letter from Henry M. Hart, Jr. to Hon. Charles E. Wyzanski, Jr., District Judge, District Court of the United States (Mar. 22, 1954) (Henry Hart Papers, Box 7, Folder 2) (on file with the Harvard Law School Library).

¹⁷² *Id.*

¹⁷³ See, e.g., Hart & Sacks, *supra* note 3, at cxxxvii (“These materials are concerned with the study of law as an ongoing, functioning, purposive process Their objective is a better understanding of law generally rather than any particular field of law.”); Henry Hart, Legislation Notes (June 11, 1947) (Henry Hart Papers, Box 15, Folder 5) (on file with the Harvard Law School Library) [hereinafter Hart, Legislation Notes] (describing his course on

3. *The Process in The Legal Process*

Not surprisingly, the test of such a “workable jurisprudence” lay in how well it applied to the day-to-day work of lawyers. And that is precisely where the editors saw the process of “means-end interaction” at work most clearly. The lawyer as “arrangement-framer” was primarily in the business of getting clear on the “objective to be sought” and then on what forms (that is, what legal instruments) would facilitate achieving that objective.¹⁷⁴ But inevitably, such forms put constraints on the original objective, thereby requiring that it be modified in light of existing hurdles and limitations. Meantime, the lawyer as “arrangement-applier” (that is, as judge) must interpret existing means—whether contracts, corporate charters, statutes, or constitutions—in light of their apparent purposes.¹⁷⁵

Finally, in their own capacity as legal scholars and teachers, Hart and Sacks had roles analogous to each of the two just mentioned. As scholars, their task was to analyze legal institutions but to do so in a way that would be socially beneficial. Insofar as their own analyses could affect the attitudes and behavior of the actors within those institutions, that task required interpreting those behaviors in a way that would stimulate and encourage the appropriate kind of action.¹⁷⁶

For example, the editors’ analysis of the comparative competencies of legislatures and courts—the methodological approach for which they are perhaps most famous—reflects precisely this approach. There they wholly adopt Fuller’s analysis of the “forms and limits” of adjudication, according to which the very idea of adjudication entails that the rules and principles by reference to which the parties’ dispute will be resolved already exist.¹⁷⁷ That assumption forces judges to apply already-existent rules and, when those are not clear, to look for the “rational implications” of the underlying purposes and principles of social order.¹⁷⁸ Hart and Sacks well recognize that determining when such principles are suf-

the first day as one in “Practical, or Working Jurisprudence”); Hart, Notes on Some Essentials, supra note 116, at 35 (explaining that a “satisfactory working theory [of law] must take a position somewhere in between” natural law and positivism).

¹⁷⁴ Hart & Sacks, supra note 3, at 175–76.

¹⁷⁵ Id. at 178.

¹⁷⁶ Cf. Hart, Notes on Some Essentials, supra note 116, at 31 (“[S]ince the conclusions of the legal scientist cannot be concealed from the judges . . . they will affect their decisions, if they are worth anything at all.”).

¹⁷⁷ Hart & Sacks, supra note 3, at 640–47; see Fuller, supra note 20, at 10.

¹⁷⁸ Hart & Sacks, supra note 3, at 647.

ficiently determinate to guide a court's decision, and when they must instead be left to legislative resolution, is "[o]ne of the grand problems of society."¹⁷⁹ But the point is that their justification for relying on the distinction lies in the attitude it encourages in the relevant institutional actors—in this case the adjudicator's confidence that he or she can find and apply the "law."¹⁸⁰

At the same time, as law teachers, they had the goal of maintaining and improving the social practice of law by shaping the habits and values of future lawyers, judges, and legislators.¹⁸¹ The "instrument" employed was a set of problems and materials designed to show the students how to reason from ends to means and back to ends.¹⁸²

That, of course, is *The Legal Process*. But we can now see more clearly what the "process" in the work's title means. It refers to the process of "interaction of means and end," of fact and value, of ethics and science, by which a society fulfills its purposes. In this way, "process" is more akin to *growth* or *development*. "Law is a doing of something," the editors explain, "a purposive activity, a continuous striving to solve the basic problems of social living."¹⁸³ As we have seen, this "activity" has both conservative and progressive elements. It recognizes the prima facie validity of the existing division of resources, capable of change only through "duly established" procedures.¹⁸⁴ But at the same time it de-

¹⁷⁹ Id. at 112.

¹⁸⁰ Id. at 149–50 (observing that to call what judges do "discretion" obscures "what seems to be the vital point—namely, the effort, and the importance of the effort, of each individual deciding officer to reach what *he* thinks is *the* right answer").

¹⁸¹ Cf. id. at 157 ("The fostering of such traditions, to the extent that they can be consciously fostered, should be of concern to every civilized government. For they help not only to prevent the abuse of public responsibility and the degradation of public service, but to stimulate the kinds of affirmative performances which the traditional ideals demand.").

¹⁸² See, e.g., id. at 10 (instructing students before a set of cases to "[o]bserve how the prior settlements bearing upon the matter in controversy shape the questions to be decided, in the sense of making clear what is fairly open to difference of opinion and what is not" and to "[t]hink about the significance of the principle of institutional settlement as one of the ingredients of justice in the ultimate disposition of the specific controversy"); id. at 63 ("Was justice at length done in the *Gillarde* case? What are the relevant criteria of justice?"); id. at 206 (asking students, in a hypothetical lease-negotiation context, whether they would try to extract the highest rent possible and to "extract in other respects the maximum concessions," or whether, instead, they would approach the issue "with the thought that the parties were in some sense co-adventurers, and that their opposing interests in the matter of rent and some other items needed to be adjusted in light of their common interest in the success of [the lessee's] enterprise").

¹⁸³ Id. at 148.

¹⁸⁴ Id. at 4.

mands that we always interpret the uncertain or open-ended elements of those divisions and procedures in light of improving society overall. The key point is that for the editors, “process” was more than simply *procedure*—it was about a way of understanding and thinking about the law and social life more generally. Albert Sacks made this point when describing the approach of his coauthor:

Since he conceived of law as a process of doing, he drew no distinction between understanding law and developing law. To understand law was to develop it. To develop law intelligently was to understand it. The law scholar and the law doer were one.¹⁸⁵

None of this is to say, however, that Hart and Sacks succeeded in resolving the tension between fact and value that we have seen throughout. True, the pragmatist understanding of the mind, in which it acts upon the world for purposes, explains their legal methodology for the reasons described above, but it does not necessarily *justify*, as an ethical matter, the results achieved by applying those methods. To do so, one might argue, one would need some ultimate criterion of value by reference to which everything else is judged. Put another way, how do we know whether the “process” of societal change is healthy, rather than pathological? It is for this reason that Fuller at times seems to have felt compelled to ground his views on a faith in a human purpose or *telos*, in the spirit of the natural law tradition.¹⁸⁶

Hart did not seem to go down that route. But nor does it appear he ever really resolved the tension for himself.¹⁸⁷ The closest he came was to place his faith ultimately in human responsibility and in the act of human choice itself. In the Holmes lecture with which this Part began, Hart lamented the “reluctance to make personal commitments on rational

¹⁸⁵ Albert M. Sacks, Henry Hart, 82 Harv. L. Rev. 1593, 1593 (1969).

¹⁸⁶ Fuller, Legal Philosophy, *supra* note 144, at 472 (“The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature, and it is to this nature that natural law looks in seeking a standard for passing ethical judgments.”).

¹⁸⁷ Hart made some conflicting statements on this issue. Compare, e.g., Hart, Legislation Notes, *supra* note 173 (defining law as “the process of social ordering . . . by action [or inaction] of the agencies of government . . . with a view to promoting ends *accepted as valid in the society*” (emphasis added)), with Memorandum from Henry Hart to Ernest Brown (Feb. 24, 1959) (Henry Hart Papers, Box 35, Folder 10) (on file with the Harvard Law School Library) (suggesting that there are “principles of social order which are independent of the appetites and wills of the contending groups” and are “discoverable by experience and reflection”).

grounds upon questions of value” among “the intellectuals of our time.”¹⁸⁸ But how is one to know if one’s “personal commitments” are indeed made on “rational grounds”? Hart conceded that he had not found a satisfying answer to that question, telling his audience in his final lecture that he was unable to solve the problem he set out to solve.¹⁸⁹ So instead he suggested resolving the tension between law and justice by a kind of collective act of decision:

Suppose we were to decide . . . that the commitments in the Constitution mean that every American is entitled, within the limits of what is possible under the limiting conditions of social and human existence, to an equal opportunity to develop and to exercise his capacities as a responsible human being who is also a responsible social being¹⁹⁰

In other words, Hart resorted to simply stipulating a value premise for the purpose of further theorizing, rather than discovering such a premise through legal reasoning.¹⁹¹ Having failed to achieve what he set out to accomplish, Hart sat down to a hushed crowd.¹⁹²

III. HISTORICAL AND PHILOSOPHICAL CONSEQUENCES

I have tried to show why the common characterizations of *The Legal Process* as offering an “instrumental,” or “positivist,” or “neutral” theory of law are all misleading and in some ways downright false. Once you look closely at the moral, jurisprudential, and epistemological assumptions on which Hart and Sacks constructed their theory, you can see that theirs was an effort to understand and justify the normative demands of the law in the modern, secular world. They did so not by separating fact and value,¹⁹³ or reducing the latter to the former,¹⁹⁴ but by trying to un-

¹⁸⁸ Henry, *supra* note 15, at 7.

¹⁸⁹ *Id.* at 8.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (“If we accept this basic value postulate . . . it then becomes possible to solve subsidiary problems of the means of reaching this end through reason.”).

¹⁹² Bobbitt, *supra* note 70, at 57. His inability to solve this problem may be why Hart never felt sufficiently satisfied with the teaching materials to publish them. Apparently, the editors rewrote the first chapter more often than any other. Eskridge & Frickey, *supra* note 4, at xc.

¹⁹³ See Peller, *supra* note 6, at 590.

¹⁹⁴ See Purcell, *supra* note 41, at 256–62 (explaining that for many intellectuals of the postwar period, existent American values became the only standard for ethical criticism); Sebok, *supra* note 10 (drawing on Purcell’s book and arguing that Hart and Sacks, unlike Fuller, did not worry about the justice of American legal institutions because they thought it a matter of sociology, not jurisprudence).

derstand how our judgments about facts affected, and ought to affect, our judgments of value, and vice versa.

If this account is right, it improves upon our historical understanding of the Legal Process materials in at least two respects. First, it better explains why Hart and Sacks took themselves to be responding to the threat that they perceived Legal Realism posed. They did so by expanding upon and elaborating themes only latent in the earlier sociological jurisprudence. Second, it shows how Hart and Sacks can be seen as part of a broader intellectual movement that questioned the possibility and utility of bringing the methods of natural science to the study of human behavior.

Perhaps more importantly, the account shows more clearly the way in which mainstream public-law scholarship today has both remained faithful to, but also reinterpreted, the methodological doctrines elaborated in the teaching materials. Whether that reinterpretation is ultimately a persuasive one is beyond the scope of this Article, but below I hope at least to show how it has been achieved and why I suspect Hart and Sacks would not have found it satisfying.

A. Hart and Sacks in History

The account just offered better explains how Hart and Sacks sought to respond to the Legal Realists' skeptical challenge because it reveals the philosophical justification for that response. Scholars have recognized that Hart and Sacks "absorbed" or "tamed" Realism, but they do not typically explain why Hart and Sacks thought they could accept some of Realism's insights but ignore its skeptical implications.¹⁹⁵ Observing the thematic continuity between Process Theory and the earlier movement of sociological jurisprudence is illuminating, but does not resolve the matter.¹⁹⁶ The reason is that it was precisely the failure of sociological jurists like Roscoe Pound and Benjamin Cardozo to distinguish clearly between their factual and normative claims that the Realists attacked.¹⁹⁷

¹⁹⁵ See sources cited *supra* note 6.

¹⁹⁶ See Duxbury, *supra* note 9, at 212–23; *The Canon of American Legal Thought*, *supra* note 13, at 243–45; Eskridge & Frickey, *supra* note 4, at lii–lxxiv.

¹⁹⁷ See, e.g., Felix S. Cohen, *Ethical Systems and Legal Ideas* 4–5 (1933) (citing Pound and arguing that "those who define law in terms of actually prevailing social demands or interests make frequent use of the undisclosed principle that these demands ought to be satisfied"); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 *Colum. L. Rev.* 431,

So the question is, if Hart and Sacks were merely picking up on themes already present in sociological jurisprudence, in what way did their efforts constitute a “response” to Realism?

1. Responding to Realism

One possible answer is that it was not really a response at all. Instead, on this account, Hart and Sacks were merely reaffirming the view that legal decision making was “rational” on the ground that judges were constrained by the purposes rules were meant to serve.¹⁹⁸ The problem with this answer is that the editors make clear in the first chapter of their teaching materials that they mean to be attacking the assumptions of Legal Realism, specifically citing a number of the more well known works associated with the movement.¹⁹⁹ So whether or not Hart and Sacks’s arguments against the Realists were successful, they at least took themselves to be making some kind of response to the Realists’ skeptical challenge. On what basis?

The account offered in Part II provides the answer. Hart and Sacks responded to the Realists by denying the underlying epistemological assumptions on which the Realist critique had relied. They denied, in other words, that law could be profitably studied by separating factual from normative questions in the way the Realists had encouraged legal scholars to do. Hart and Sacks thus went deeper and broader than the sociological jurists had gone; they had to deny not just that a judge could identify the law without making “judgments of value,” but that one could even *study* the law or any other social institution without doing so. They sought to vindicate legal scholarship, in other words, not on the ground that their claims were neutral or uncontroversial, but—to the contrary—on the ground that all “scientific” inquiry into human society

434–38 (1930) (criticizing Roscoe Pound for talking of the “ends” of law in a way that obscured the distinction between “is” and “ought”).

¹⁹⁸ Professor Duxbury takes this view. Duxbury, *supra* note 9, at 205 (denying that “‘process’ jurisprudence emerged as a post-war response to legal realism” on the ground that “the process-oriented approach to the study of law parallels if not precedes legal realism itself”); see also Leiter, *supra* note 103, at 1155 (“Legal Process amounts to little more than a denial of Realism’s contrary claims . . . [It] merely reaffirms what the Realists had argued against twenty years earlier.”).

¹⁹⁹ Hart & Sacks, *supra* note 3, at 108 (citing and quoting Felix Cohen, *Ethical Systems and Legal Ideals* 12 (1933)).

depended on controversial value judgments.²⁰⁰ So rather than showing how law could be like the other, more traditionally empirical, social sciences, they argued that the other social sciences, were, or ought to be, more like law—that is, more straightforwardly evaluative in orientation.

2. *Postwar Doubts about the Fact-Value Dichotomy*

Nor would such a claim have seemed far-fetched at the time. As it turns out, intellectual developments in a variety of fields taking place at around the same time that Hart and Sacks were working on their teaching materials lent plausibility to such a claim. In philosophy, the natural sciences, and the social sciences, scholars were beginning to question the possibility and profitability of rigidly separating questions of fact from questions of value.

Across the Harvard Yard from Hart and Fuller, such philosophers as W. V. Quine and Morton White were attacking the assumptions of logical positivism, the philosophy of science on which some of the Realist claims had been based.²⁰¹ Most famously, in 1951, Quine published “Two Dogmas of Empiricism,” in which he showed that the so-called “analytic-synthetic distinction”—one of the “dogmas”—could not be consistently maintained.²⁰² His argument was a fairly technical one,²⁰³

²⁰⁰ The editors note in a footnote that there are “stirrings of doubt even among the natural scientists” that science can rid itself entirely of the notion of purpose. *Id.* at 107 n.3. They almost certainly had in mind the work of Michael Polanyi. See *infra* notes 220–23 and accompanying text. Peller suggests that one option available to postwar intellectuals was to apply the insights of realism to itself and show the inherently value-laden nature of even scientific inquiry. Peller, *supra* note 6, at 581. Peller describes this as a road not taken, but my argument has been that that is precisely what Hart and Sacks argued.

²⁰¹ W. V. Quine, *Two Dogmas of Empiricism*, 60 *Phil. Rev.* 20, 20 (1951); Morton G. White, *The Analytic and the Synthetic: An Untenable Dualism*, in *John Dewey: Philosopher of Science and Freedom* 316, 316–30 (Sydney Hook ed., 1950). Some, but not all, Realist claims. See Charles L. Barzun, *Jerome Frank and the Modern Mind*, 58 *Buff. L. Rev.* 1127, 1172 (2010) (arguing that Frank’s critique of law was based in part on a rejection of a strong fact-value dichotomy).

²⁰² Quine, *supra* note 201. The other dogma was “reductionism,” that is, the idea that all meaningful statements could be reduced to statements (either true or false) about immediate experience. *Id.* at 36. Quine’s attack on both dogmas was grounded on a skepticism about the concept of “meaning.”

²⁰³ Essentially, Quine sought to show that the concept of analyticity, to be properly grasped, required reference to the notion of synonymy but that the concept of synonymy was just as obscure as that of analyticity. Take the supposedly analytic statement that “a bachelor is an unmarried male.” Quine said that to maintain the analytic-synthetic distinction one needed some way of explaining the sense in which the word bachelor is “synonymous” with “unmarried male,” but no such explanation is available. One is tempted to say that it is be-

but its upshot was that logical positivism's aspiration to be free of any "metaphysics" and to construct a rigorous science purely from observations of fact was far more difficult than had been imagined.²⁰⁴ And although Quine took his critique to show that the acceptance of scientific theories (and the concepts whose existence they "posit") ultimately depended on such practical criteria as their ability to predict future events and manage the "flux of experience,"²⁰⁵ his colleague Morton White interpreted Quine's critique as showing that metaphysical questions inescapably involved ethical questions.²⁰⁶

Meantime, in the natural sciences, both Michael Polanyi and, a few years later, Thomas Kuhn, argued that scientific progress in practice depended on far more than observations and experiments.²⁰⁷ Polanyi argued, for instance, that multiple scientific theories were often consistent with the same underlying data, so that observations alone could not guide theory choice.²⁰⁸ Indeed, the notion of observation itself rested on the false assumption that it was possible to have "primary sensations" of the world untainted by any previous interpretation.²⁰⁹ Kuhn echoed similar themes.²¹⁰ Both he and Polanyi emphasized the way in which scientific practice depended on values, though Polanyi stressed its depend-

cause the bachelor is "necessarily" an unmarried man, but, again, the notion of "necessity" is precisely the concept that requires explanation.

²⁰⁴ Quine, *supra* note 201.

²⁰⁵ *Id.* at 41.

²⁰⁶ Morton White, *Toward Reunion in Philosophy* 20 (1956) ("Once logicians and epistemologists begin to speak about justifying conceptual frameworks by reference to considerations of expediency, as some do, and once others begin to counter by appealing to intuition or conscience, as they do, we can see that we are entering a subject which might well profit from the two thousand years or so of moral philosophy in which very similar questions have been discussed.").

²⁰⁷ Thomas Kuhn, *The Structure of Scientific Revolutions* 4–6 (2d ed. 1970); Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy*, at vii (1958); Michael Polanyi, *The Logic of Liberty* 21–26 (1951) [hereinafter Polanyi, *Logic*]. The first edition of Kuhn's work was published in 1962.

²⁰⁸ Polanyi, *Logic*, *supra* note 207, at 18–19, 22; cf. W. V. Quine, *On Empirically Equivalent Systems of the World*, 9 *Erkenntnis* 313, 313 (1975) (making a similar point).

²⁰⁹ Polanyi, *Logic*, *supra* note 207, at 22. Polanyi cited William James's *Principles of Psychology* in support of this point, providing support for Professor Winston's suggestion that Fuller was influenced by William James. *Id.* at 22 n.6, 23 n.7; see Winston, *supra* note 146, at 349 n.59 (quoting Lon Fuller, *Legal Fictions*, at xii (1967)) (noting Fuller's interest in Polanyi and quoting Fuller's description of him as "a pragmatist in the very best sense").

²¹⁰ See, e.g., Kuhn, *supra* note 207, at 39 (explaining that in order for certain experimental results to be interpreted as measurements of electron wave length "they had to be related to a theory that predicted the wave-like behavior of matter in motion").

ence on moral values, whereas Kuhn focused on aesthetic ones.²¹¹ Both theorists also stressed the way in which scientific practice was a *social* practice, so that progress depended on the methods, habits, and norms of the community of scientists.²¹²

Finally, in the social sciences, scholars with ambitions as different as Ludwig Wittgenstein and Leo Strauss were calling into question the possibility of understanding human behavior through the methods of natural science.²¹³ In 1958, the philosopher Peter Winch applied Wittgenstein's philosophical insights about the nature of language to the social sciences in order to show that one could not understand social relations or actions without understanding the meaning of words used by the social actors themselves. Nor could one understand the meaning of words without understanding the social relations and actions in which they were put to use.²¹⁴ Our language and our social relations were thus "two different sides of the same coin."²¹⁵ Meanwhile, the political theorist Leo Strauss argued against the possibility or desirability of constructing a value-free social science. Since "social science is meant to be of practical value," Strauss argued, "the end and the means belong together."²¹⁶ And given that man aimed to satisfy his "wants," this meant that a proper social science must take on the task of evaluating those "wants."²¹⁷

In Professor Purcell's account of the postwar intellectual climate in the United States, on which so many scholars have based their interpretations of *The Legal Process*, the figures above play virtually no role.²¹⁸ The main approach to solving the "problem of value" that Purcell traces is the effort, allegedly popular among political scientists at the time, to

²¹¹ Id. at 155–56; Polanyi, *Logic*, supra note 207, at 36–38. Whether such criteria as "simplicity" are purely aesthetic or have genuine epistemic value is a continuing source of debate among philosophers of science. See Elliott Sober, *Simplicity*, in *A Companion to the Philosophy of Science* 433, 433–41 (W.H. Newton-Smith ed., 2000).

²¹² Kuhn, supra note 207, at 166 ("In its normal state, then, a scientific community is an immensely efficient instrument for solving the problems or puzzles that its paradigms define."); Polanyi, *Logic*, supra note 207, at 31.

²¹³ Ludwig Wittgenstein, *Philosophical Investigations* § 242 (1953); Leo Strauss, *Natural Right and History* 38–40, 78–80 (1950).

²¹⁴ Peter Winch, *The Idea of a Social Science* 24–39 (1958).

²¹⁵ Id. at 123.

²¹⁶ Strauss, supra note 213, at 41.

²¹⁷ Id. at 126–27.

²¹⁸ Strauss and Kuhn are the only ones mentioned in this context at all, and they are characterized as cutting against the grain of the predominant scientific naturalism, albeit in different ways. See Purcell, supra note 41, at 237, 267–68.

convert moral questions into empirical questions about social life.²¹⁹ But one can see from the brief summary above that scholars in a variety of disciplines, each in their own ways, for their own particular purposes, were calling into doubt not only the possibility, but also the *desirability* of separating the investigation of questions of fact from those of value (or meaning, in Winch's case).

Nor were these developments remote from the particular legal academic world of Hart and Sacks. As we have already seen, at this time Hart and Sacks's colleague at Harvard, Lon Fuller, was passionately, if not always lucidly, arguing that even descriptions of human behavior required making evaluative judgments. In so doing, he drew on the work of Quine, White, Wittgenstein, Polanyi, and eventually even Kuhn, in support of his long-held view that science and epistemology had within them an "element of responsible decision," as he once put it.²²⁰

Moreover, archival evidence makes clear that these ideas were being discussed at Harvard Law School at the time. Fuller frequently corresponded with Polanyi and encouraged him to read Hart's work, suggesting that it vindicated some of Polanyi's ideas in the legal context.²²¹ At the same time, we know that Hart read Polanyi's *Logic of Liberty*, as evidenced by the fact that Hart and Sacks refer to it in their teaching materials.²²² Meanwhile, both Hart and Fuller were active participants in a "Legal Philosophy Discussion" group, of which Morton White was also a member.²²³ Fuller invited Polanyi to present a paper to that group,

²¹⁹ Id. at 261.

²²⁰ Fuller, *supra* note 209 (noting that the work of Polanyi and Kuhn supported his philosophical and epistemological views); Lon Fuller, A Rejoinder to Professor Nagel, 3 Nat. L. F. 83, 93 (1958) [hereinafter Fuller, Rejoinder] (citing White and Polanyi and using the phrase quoted in the text); Fuller, Human Purpose, *supra* note 145, at 71 (quoting Wittgenstein); Letter from Lon L. Fuller to Willard Quine, Professor (Oct. 8, 1953) (Lon Fuller Papers, Box 6, Folder 14) (on file with the Harvard Law School Library) (praising Quine's attack on logical positivism but criticizing it for its failure to take seriously the importance of purpose in explaining human action).

²²¹ Letter from Lon L. Fuller to Michael Polanyi, Professor (Jan. 9, 1959) (Lon Fuller Papers, Box 6, Folder 11) (on file with the Harvard Law School Library) [hereinafter Fuller, Letter to Polanyi]. Polanyi agreed with Fuller's assessment. Letter from Michael Polanyi to Lon Fuller (Jan. 21, 1959) (Lon Fuller Papers, Box 6, Folder 11) (on file with the Harvard Law School Library).

²²² Fuller, Letter to Polanyi, *supra* note 221. The editors mention Polanyi in the teaching materials when discussing Fuller's theory of adjudication. Hart & Sacks, *supra* note 3, at 647.

²²³ Memo on Law School Discussion Group (date unknown, probably 1957) (Henry Hart Papers, Box 35, Folder 7) (on file with the Harvard Law School library).

though it is not clear if Polanyi ever did so.²²⁴ But during the 1957–58 term, H. L. A. Hart did participate in that group, and H. L. A. Hart's debt to Wittgenstein and Winch has been well-documented.²²⁵

Hart and Sacks were thus engaged in a debate not merely within the legal academy, but rather in a much larger and longstanding debate taking place in and among a variety of disciplines—one which gained salience after the war—about the nature and methods of the human sciences generally.²²⁶ Put another way, just as the Realists had attacked traditional legal thought by looking to the methods of the empirical social sciences, so, too, did Hart and Sacks respond to the Realists on the same methodological level—by directly challenging those methods and the philosophical assumptions on which they depended. In so doing, they were defending not just the rule of law or democratic institutions, but the value of the interpretive and “judgmatical” methods of traditional legal reasoning as a valid form of human knowledge.

3. *Situating Hart and Sacks*

The suggestion that Hart and Sacks were part of the same intellectual movement as Kuhn and Wittgenstein may appear far-fetched to some. But it should not. The interpretation of the teaching materials offered in Part II, read in light of these contemporaneous intellectual developments—some of which we know Hart was aware of—shows why the teaching materials may plausibly be seen as a product of the same intellectual trends that ultimately led to “post-positivist” philosophy of science and the so-called “linguistic turn” in a variety of disciplines.

Hart and Sacks, after all, were part of a generation which had witnessed some of the worst atrocities committed against mankind—or at

²²⁴ The theme for discussion that year was “interpretation.” Fuller encouraged Polanyi to attend on the ground that, though the group had “little acquaintance with philosophy in any technical sense,” they were nevertheless “deeply interested in the problems of the kind dealt with” in Polanyi's recent books. Fuller, Letter to Polanyi, *supra* note 221.

²²⁵ On H. L. A. Hart's participation in the Legal Philosophy Discussion Group, see Nicola Lacey, *A Life of H. L. A. Hart: The Nightmare and the Noble Dream* 188 (2004). Hart told John Finnis that he adopted the idea of the internal point of view from Winch. See *id.* at 230. As for Wittgenstein, Lacey recounts that Hart told one of his students that, upon reading Wittgenstein's *Blue Book*, he felt “as if the scales fell from my eyes.” *Id.* at 140. She also states that Hart referred to Wittgenstein's *Philosophical Investigations* as “our bible.” *Id.*

²²⁶ On the other side of this debate were those in the newly formed (or at least newly labeled) “behavioral sciences,” who sought to study human behavior on the model of the natural sciences, in the tradition of psychological behaviorism. See Roger Smith, *The Norton History of the Human Sciences* 802–03 (1997).

least on the largest scale—that the world had ever seen. If anything could persuade intellectuals of the need for affirming both the existence, and *practical importance*, of moral values in all domains of intellectual inquiry, it was seeing the rise of Nazism and Fascism and their subsequent defeat by the Allied Powers. No surprise, then, that a central question raised in the most famous debate of the era about the nature of law—that between H. L. A. Hart and Fuller—related to how one should understand the official directives of the Third Reich.²²⁷ Tellingly, both Hart and Fuller framed their arguments in terms of the beneficial ethical consequences of taking one view of Nazi “law” or the other.

For some reason, despite Henry Hart’s close affiliation with Fuller, and his explicit denunciations of positivism in the materials and elsewhere, scholars have traditionally interpreted the Legal Process materials as almost entirely unconnected to such debates. They see Hart and Sacks as largely excluding such considerations of value from the sphere of institutional analysis, relegating it to a question of social fact, appropriate for the sociologist or political scientist.²²⁸ Under this view, Hart and Sacks took for themselves the purely technical task of devising a framework of procedures that could adjudicate among conflicting claims of value without taking any controversial positions on values.²²⁹

Hart and Sacks are themselves partly to blame for this misinterpretation. Although Hart often stressed the inescapability of ethical questions, he also emphasized how much progress could be made without considering the ultimate ends of rules and practices.²³⁰ And Sacks was apparently more practically focused than Hart in the classroom, so that when he taught the class, he often did not assign the first chapter, instructing his students to consider it as background reading.²³¹ At the same time, as

²²⁷ Fuller, *supra* note 21, at 632–33; H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 615–21 (1958).

²²⁸ See, e.g., Sebok, *supra* note 10.

²²⁹ See, e.g., *id.* at 133 (“[T]he principle of institutional settlement was not defended by Hart and Sacks on the basis that it would necessarily produce just results. It was defended on the basis that it would help the majority produce the results that the majority would prefer. It was a test of technical competence.”).

²³⁰ Hart, Legislation Notes, *supra* note 173.

²³¹ Professor G. E. White reports that he does not recall Sacks assigning the first chapter and that there were “no discussions of abstract issues in the class.” Email from G. Edward White, Professor, University of Virginia School of Law, to author (Oct. 9, 2011) (on file with author). Professor Andy Kaufman, who knew both men, described Sacks as more practically oriented than Hart. Telephone Interview with Andrew L. Kaufman, Vice-Dean, Harvard Law School (Aug. 31, 2011).

noted in Part I, to many law students in the 1960s and 1970s, the Legal Process approach seemed remote and out of touch with the pressing social and political events of the day.²³² To them, Hart and Sacks's concern for the rule of law and for dutifully following procedures seemed tacitly to assume that American constitutional democracy was in a healthy condition when in fact much injustice and oppression—most conspicuously, of course, *racial* oppression—were being tolerated under its name. It is not entirely surprising, then, that to many students *The Legal Process* seemed to wrongly take for granted a set of common social values.

Still, we have already seen why this interpretation fails to jibe with much of what Hart and Sacks actually wrote in their teaching materials. Instead, they recognized that the core premises of their purposivist approach—that the purpose of society was to maximize social benefits while taking account of the worth of individual human beings—entailed commitments to particular values.

What is so odd about the standard story as a matter of intellectual history, however, is that if the problem for postwar intellectuals was how to understand human value in light of both the teachings of modern science but also the horrors of the Holocaust, the legal tradition arguably offered more obviously relevant intellectual resources than did the social sciences. Or at least it offered more resources than did those social sciences for which fidelity to “empirical” methods was a core disciplinary assumption.

The law, after all, had faced epistemological crises before—and would do so again—and yet it always managed to recover.²³³ In Hart and Sacks's time, as in others, it did so on the ultimate *pragmatic* ground: A judge faced with a conflict between two parties and a set of ambiguous legal materials (and facts) has to resolve the matter one way or the other.²³⁴ Not deciding is simply not an option. And that means, as Hart once put it, “[y]ou have got to start thinking.”²³⁵ Something like this pragmatic need to make judgments of value likely explains why William James would often use legal examples to illustrate his pragmatist theory of be-

²³² Eskridge & Peller, *supra* note 30, at 738.

²³³ Cf. Jack M. Balkin & Sanford Levinson, Essay, Law and the Humanities: An Uneasy Relationship, 18 *Yale J.L. & Human.* 155, 173 (2006) (making a similar point, though one framed as law's “resistance to colonization” by other disciplines).

²³⁴ See Hart & Sacks, *supra* note 3, at 178 (“The professional lawyer is essentially a problem solver, dealing with concrete and immediate problems which somehow or other must be solved.”).

²³⁵ Hart, Notes on Some Essentials, *supra* note 116, at 30.

lief and truth.²³⁶ It is unsurprising, then, that Lon Fuller argued on similar grounds that law was the ultimate “decisional science” and so could teach something to other social sciences,²³⁷ or that Hart and Sacks repeatedly defended law’s relevance to, and significance for, other social sciences and disciplines.²³⁸

B. Hart and Sacks Today

All of this leaves unanswered one final question suggested at the outset: how is it that the analytical and interpretive methods developed in the Hart and Sacks materials continue to be so influential while their underlying philosophical rationale remains largely ignored and misunderstood? The answer, I think, is that scholars have held onto the basic Legal Process paradigm through a process of cooption and evasion.²³⁹ That is, they have coopted some of the philosophical justifications for relying on interpretive legal methods, but they have largely evaded the deeper skeptical threat to which Hart and Sacks felt themselves compelled to respond.

1. Cooption

Some of the scholars most associated with the Legal Process tradition, even those who embrace Hart and Sacks as intellectual influences, nonetheless draw a relatively bright distinction between their own approach and that of Hart and Sacks. Professors Eskridge and Frickey characterize their own generation as one that is “more likely to view law as a hermeneutical, cultural, or political enterprise than as a neutral policy sci-

²³⁶ See, e.g., James, *supra* note 148, at 20 (“Law courts, indeed, have to decide on the best evidence attainable for the moment, because a judge’s duty is to make law as well as to ascertain it.”); James, *supra* note 2, at 240–41 (discussing how common law judges, though they talk of eternal principles, in fact make law).

²³⁷ Fuller, *Rejoinder*, *supra* note 220; see also Arthur S. Miller & Ronald Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 665–70 (1960) (citing Strauss, Polanyi, and others in support of their contention that knowledge is “primarily *decisional* in nature,” by which they meant that even descriptive claims entailed making value judgments). Ironically, Miller and Howell were using these ideas to criticize Hart and Sacks. *Id.* at 672.

²³⁸ Hart & Sacks, *supra* note 3, at 113, 177–78, 206.

²³⁹ Eskridge & Peller make a similar point, but in reference to *Critical Legal Studies*. Eskridge & Peller, *supra* note 30, at 789 (observing that the New Legal Process managed to “absorb” postmodern critiques in a way similar to the way the original Legal Process “absorbed” Realist critiques).

ence.”²⁴⁰ And Ronald Dworkin recognizes the “brillian[ce]” of the Hart and Sacks materials, but characterizes their theory of law as “instrumental” and thus overly concerned with “fact or strategy.”²⁴¹ Dworkin offers in its place an “interpretive” theory of law in which substantive judgments of policy are front and center.²⁴²

But under the reading just offered, the contrast these scholars seek to draw with their predecessors is somewhat overblown. Hart and Sacks would talk of legal reasoning being “an interaction of means and ends,” rather than being “hermeneutic,” and they described law as a “process,” rather than a “culture” or “tradition.” But their point was the essentially similar one of insisting upon the need to interpret *what is* in light of *what ought to be*, and vice versa. And while this has long been recognized as Hart and Sacks’s view of the judge’s task when interpreting statutes or case law, as we saw in Part II, those methodological doctrines were merely corollaries of their much broader view of the nature of social-scientific inquiry. It is worth observing, in this regard, that Hans-George Gadamer—whom Eskridge and Frickey, and Dworkin, look to in support of their own interpretive approach—wrote *Truth and Method* in 1960 and can thus be seen as part of the same generation of intellectuals who rejected the application of scientific methods to certain areas of human concern.²⁴³

In short, my claim is that while the words used by today’s scholars differ somewhat from Hart and Sacks’s terminology, the essential premises are the same. According to both, determining the meaning of a statute or the competency of a particular institution to handle a matter inevitably requires making controversial judgments of value, but doing so does not render the process irrational because all rational inquiry, at least to some extent, requires such judgments.²⁴⁴ Furthermore, the values used to make those judgments can be gleaned from the practices, policies, and

²⁴⁰ Eskridge & Frickey, *supra* note 4, at cxxviii.

²⁴¹ Dworkin, *supra* note 51, at 6–7.

²⁴² Dworkin, *supra* note 114, at 45–87.

²⁴³ Hans-George Gadamer, *Truth and Method* (1960); see also Sophia Rosenfeld, *Common Sense: A Political History* 245–47 (2011) (discussing Gadamer as one of several postwar theorists who relied on a notion of “common sense” as a ground for making moral judgments). For Dworkin’s reliance on Gadamer, see Dworkin, *supra* note 114, at 55, 62. For Eskridge and Frickey’s, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *Stan. L. Rev.* 321, 323, 343, 345–46, 351–52, 360, 363, 380–81 (1990).

²⁴⁴ Cf. Eskridge & Frickey, *supra* note 243, at 323 (citing Gadamer, James, and Rorty, among others, in support of their approach to interpreting statutes).

principles inherent in the institutions themselves. Finally, in both cases, the values generally endorsed are broadly liberal, democratic ones.

2. *Evasion*

Today's mainstream legal scholarship, however, largely evades the deepest question motivating Hart's speculations in the teaching materials, namely how ultimately to understand the liberal, democratic values he discerned in American legal practice in a modern, secular world. Hart felt compelled to answer that question, even if he was never able to do so to his satisfaction. Today, the question is largely avoided, and one of the primary intellectual strategies of avoidance is the oft-drawn distinction between "internal" and "external" accounts of legal practice.

The internal-external distinction has far older roots, but its modern jurisprudential formulation can be traced to a distinction H. L. A. Hart drew in *The Concept of Law*.²⁴⁵ Among Hart's arguments against the "rule-scepticism" of the Legal Realists was his claim that the Realist "predictive" theory of rules failed to explain satisfactorily what Hart called the "internal aspect" of rules.²⁴⁶ By this term he meant to describe the attitude of those who take rules as reasons for action and as normative criteria for evaluating conduct.²⁴⁷ The internal point of view plays a significant role in Hart's theory of law because it explains how the ultimate criteria of legal validity (the "rule of recognition") can both (a) serve as a normative guide for officials (that is, a reason for them to enforce the directives promulgated according to the rule's procedures), but also (b) remain a mere social fact from the perspective of those outside the system.²⁴⁸ The capacity of Hart's theory to take account of this normative dimension of rules is partly why Hart's theory is considered a theoretical advance over Austin's command theory.²⁴⁹

²⁴⁵ The distinction has its roots in the German concept of "verstehen," associated with Wilhelm Dilthey and Max Weber. See Wilhelm Dilthey, *Introduction to the Human Sciences: An Attempt to Lay a Foundation for the Study of Society and History* 23–24 (Ramon J. Betanzos trans., 1988). See generally Max Weber, *The Nature of Social Action*, in *Weber: Selections on Translation* 7 (W.G. Runciman ed., E. Matthews trans., 1978).

²⁴⁶ Hart, *supra* note 105, at 86 ("[T]he internal aspect of rules is something to which we must again refer before we can dispose finally of the claims of the predictive theory.").

²⁴⁷ *Id.* at 134.

²⁴⁸ *Id.* at 55–60.

²⁴⁹ See John Austin, *The Province of Jurisprudence Determined* (David Campbell & Philip Thomas eds., Dartmouth Publ'g Co. 1998) (1832); see also Dan Priel, *Towards Classical Legal Positivism* 27–28 (Osgoode CLPE Research Paper No. 20/2011), available at

Now what Hart intended the “internal” and “external” points of view precisely to describe is the source of much jurisprudential debate.²⁵⁰ But the details of that exegetical issue matter less than the basic approach, which involves interpreting the apparent conflict between fact and value as simply two different perspectives of the same phenomenon. For the strategy is a common one and has been used to explain and justify normative legal scholarship. Professors Vermeule and Goldsmith, for instance, defend “doctrinal, normative, and interpretive” legal scholarship against the attacks leveled against it by a pair of political scientists by arguing that such scholarship takes an “internal” point of view.²⁵¹ What the political scientists fail to appreciate, according to Goldsmith and Vermeule, is that the empirical methods of political science are not necessarily helpful for, or even relevant to, the rhetorical purposes such “internal” scholarship intends to serve.²⁵²

It is possible, and not wholly implausible, to interpret the Legal Process materials as providing an “internal” account of law. Professor Schauer has explicitly interpreted the work of Lon Fuller that way and, if anything, Hart and Sacks’s greater doctrinal focus seems even more susceptible to such an interpretation.²⁵³ Similarly, Professor Fallon defends the Legal Process paradigm for Federal Courts scholarship on the ground that it offers “one view of the cathedral” and has yet to be replaced by another paradigm.²⁵⁴ Others, too, have interpreted the Legal Process materials as fitting comfortably within H. L. A. Hart’s jurisprudential framework.²⁵⁵

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886517 (observing that contemporary jurisprudence is said to have improved upon Austin “by emphasizing the fact that law is often taken by people to provide them with reasons for actions, a fact that command theories fail to take into account”).

²⁵⁰ Compare Shapiro, *supra* note 130, at 197–99, with Steven R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *The Path of Law and its Influence: The Legacy of Oliver Wendell Holmes*, *supra* note 130, at 158, 161, 190–91. (debating whether Hart understood Holmes’s “bad man,” who cares about the law only for the purposes of avoiding punishment, to be adopting an “external” point of view with respect to the legal system).

²⁵¹ Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 *U. Chi. L. Rev.* 153, 153–54 (2002); see also Robert Post, *Legal Scholarship and the Practice of Law*, 63 *U. Colo. L. Rev.* 615, 617–24 (1992) (making use of a similar internal-external distinction in analyzing the legal academy).

²⁵² Goldsmith & Vermeule, *supra* note 251.

²⁵³ Frederick Schauer, *Fuller’s Internal Point of View*, 13 *Law & Phil.* 285, 302 (1994).

²⁵⁴ Fallon, *supra* note 6, at 972.

²⁵⁵ See, e.g., Sebok, *supra* note 10, at 170; Dorf, *supra* note 61, at 922.

This way of treating the Legal Process materials, and the internal-external distinction more generally, has something to be said for it. It captures a deep intuition, at least to modern sensibilities, about what is required for understanding a social institution or practice. Furthermore, it is a methodological approach that gained momentum during those same postwar debates in the human sciences of which I have argued Hart, Sacks, Fuller, and H. L. A. Hart were all a part. And since then, it has served as a kind of intellectual truce between social scientists and “humanists” of one stripe or another and thus nicely facilitates an academic division of labor, both generally in universities and, more specifically, within law schools.²⁵⁶ On one side are those who care about things like “meaning,” “value,” and, more recently, “narrative.” On the other are those who care about “data,” “facts,” and “science.”

But it is not hard to see how this approach encourages us to dodge pressing philosophical and practical questions. To pick a few more or less at random: Given that courts are places where parties construct competing “narratives” of past events, is such storytelling ethically illuminating and thus something to be encouraged or is it a source of fallacious reasoning and thus something to be discouraged?²⁵⁷ Are commonsense intuitions about blame and responsibility on which judgments of criminal guilt and civil liability are based the result of genuine moral insight, or do they represent merely emotional reactions explicable only by reference to our evolutionary past?²⁵⁸ Should we take seriously a

²⁵⁶ Cf. Priel, *supra* note 249, at 30 (“The response adopted by Hart and some of his contemporaries was to turn philosophy into a subject concerned with questions that science could not possibly touch.”).

²⁵⁷ Compare *Old Chief v. United States*, 519 U.S. 172, 187 (1997) (excluding evidence of the defendant’s past conviction but observing in dicta that the concept of relevance should be interpreted broadly in part because “[t]his persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them”), with Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 *U. Chi. L. Rev.* 511, 538 (2004) (noting that new evidence about a party’s previous bad conduct appeared to affect subjects’ confidence in their judgments about irrelevant issues, such as whether an Internet website was analogous to a newspaper for the purposes of free speech doctrine).

²⁵⁸ Compare Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 *Monist* 204 (1976) (discussing the now-famous “trolley problems” as an effort to capture and refine moral intuitions), with Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *Science* 2105, 2106–07 (2001) (using fMRI brain scans to observe that individuals considering hypothetical “personal” moral dilemmas produced more activity in emotion-related areas of the brain, including the posterior cingu-

judge's reasoning as an explanation for her decision, or are such reasons mere rationalization or, worse, a form of false consciousness?²⁵⁹ In short, the question the distinction discourages asking is whether, or under what circumstances, the "internal" point of view—that is, the "doctrinal, normative, and interpretive" form of analysis and argument in Anglo-American legal culture—is *justified*, as an ethical and epistemic matter.²⁶⁰

And that, it seems to me, is just what Hart and Sacks were trying to do. In the wake of the Holocaust, that question for them must have seemed to be one of pressing practical importance. So I doubt Hart and Sacks would have accepted passively the idea that they were merely articulating the "internal" point of view of American legal practice. After all, they were trying to *create* that point of view, or at least *maintain* and *improve* it by defending its assumptions and cultivating it in their students. Tellingly, the "perspective" of the various problems in the teaching materials is that of the lawyer, legislator, or judge faced with a question of what to do under conditions of epistemic and ethical uncertainty. The perspective conjured up is not that of someone either "inside" or "outside" of any particular set of norms, but rather that of a person faced with a difficult decision, the responsibility for which cannot be avoided. And when the editors suggest that the actor take a set of values or purposes as given premises for further analysis, they do so for a reason—a reason which itself must be justified.²⁶¹

I suspect, then, that Hart and Sacks, and Fuller too, would have found the suggestion that they were articulating such an "internal" perspective

late cortex, the medial prefrontal cortex, and the amygdala than they did when facing "impersonal" dilemmas).

²⁵⁹ Compare Dworkin, *supra* note 114, at 64 (arguing that a social scientist seeking to interpret a social practice must "use the methods his subjects use in forming their own opinions about what [that practice] really requires" and must "join the practice he proposes to understand"), with Balkin, *supra* note 32, at 432 (suggesting that Critical Legal Scholars could learn from Dworkin because his "internal account of law" provides insight into the profoundly ideological nature of judging).

²⁶⁰ Cf. Waldron, *supra* note 128, at 424 ("[T]he trouble with Hart's descriptive theorist's grasp of the internal point of view is that it is inserted into jurisprudence at the wrong point to do justice to the concerns of the normative positivist."); Priel, *supra* note 249 (calling for the abandonment of the internal point of view as a central focus of jurisprudential inquiry partly on the ground that it entails supplanting the philosophically deeper questions about human nature and knowledge with relatively superficial questions about sociology).

²⁶¹ See, e.g., Hart & Sacks, *supra* note 3, at 10 (asking students to consider, while reading a set of legal materials, the principle of institutional settlement as "one of the ingredients of justice").

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to be true, but only in a trivial sense. It would be like telling an architect designing a house (to use an analogy for law which both Hart and Fuller invoked) that she is taking an “internal point of view” with respect to the structural and aesthetic principles on which her designs are based. Sure. But if she did not think those principles were the *right* ones, she would not have become an architect.

CONCLUSION

For too long it has been taken for granted that the Hart and Sacks teaching materials—and the methods of legal interpretation and institutional analysis they implanted in generations of lawyers, judges, and legal scholars—stood on their own ground, without any philosophical footing. To some, this independence from philosophical commitments has been a curse; to others, it has been a blessing. But in either case, it is wrong. If one looks carefully at the teaching materials, one can see that the authors defend, sometimes implicitly and sometimes explicitly, theories of morality, law, and knowledge. And their theoretical speculation in each of those areas is guided by a pragmatist worldview according to which the mind in part constructs social reality. Once we see this philosophical backdrop to the teaching materials, we can better understand not only how Hart and Sacks sought to respond to the skeptical threat posed by Legal Realism, but also the way in which subsequent scholars have sometimes avoided, rather than faced head on, the practical and philosophical dilemmas with which the editors of the teaching materials struggled.