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GOVERNANCE STRUCTURES, LEGAL SYSTEMS, AND THE CONCEPT OF LAW

LEWIS A. KORNHAUSER*

INTRODUCTION

Two positions dominate the debates over the concept of law. One position, advocated primarily by legal positivists, contends that the elaboration of the concept of law constitutes an exercise in "self-understanding"[1] that requires the analyst to excavate the understanding of law implicit in the habits, behaviors, and actions of those within the practice. I shall call this the *conceptual* conception of law. The other position, by contrast, contends that we should *choose* the concept of law that best serves our political aims.[2] I shall call this the *interpretive* conception of law. No one in the current debate advocates a social-scientific concept of law that best promotes our systematic understanding of the emergence and maintenance of social structures.

This Article begins the articulation of a social-scientific concept of a *governance structure*; legal systems are simply a class of governance structure. As the idea of a governance structure is inspired by some arguments in H.L.A. Hart's *The Concept of Law*,[3] this Article may be understood as a continuation of his (abandoned) project of a "descriptive sociology" of law. Moreover, though the Article neither offers an exegesis of Hart's argument

* Alfred B. Engelberg Professor of Law, New York University.I have benefited from conversations on this topic with Ronald Dworkin and Liam Murphy. I also benefited from comments by participants at the Special Workshop on Law and Economics and Legal Scholarship, 21st IVR World Congress, Lund, Sweden (August 12–18, 2003), and the NYU Colloquium on Law, Philosophy, and Social Theory. Kevin Davis, John Ferejohn, Barry Friedman, Nicola Lacey, Brian Leiter, and Frank Upham commented on an earlier draft. Ronald Dworkin and Thomas Nagel gave extensive comments on an earlier draft. The financial support of the Filomen d'Agostino and Max E. Greenberg Research Fund of the NYU School of Law is gratefully acknowledged.

1. *See* JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY pt.3 (2001); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS ch.10 (1994) [hereinafter RAZ, ETHICS IN THE PUBLIC DOMAIN].

2. Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. (forthcoming 2004); Liam Murphy, *The Political Question of the Concept of Law*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* (Jules Coleman ed., 2001) 371, 372–73 [hereinafter HART'S POSTSCRIPT ESSAYS]; Stephen R. Perry, *Hart's Methodological Positivism*, *in* HART'S POSTSCRIPT ESSAYS, *supra*, at 311, 311–13.

3. H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994).

nor provides a conception of law that directly competes with legal positivism, natural law, or Dworkinian interpretivism, it does suggest a different interpretation of the traditional debates over the concept of law.

The grounds on which we should choose among these differing conceptions of law are not clear. Indeed, it is not obvious that we *must* choose among these different conceptions. As each responds to a different question, the conceptions to which the answers give rise are not obviously competitive.[4] Nonetheless, I shall argue that a social-scientific approach to governance structures sheds light on both the conceptual and the interpretive projects.

Understanding the structures of governance has obvious social-scientific interest and significance. We have strong intuitions, backed by some evidence,[5] that the institutions of governance influence the level and rate of economic development in a society. A clear understanding of which structures promoted development and the conditions which gave rise to and sustained these structures would both deepen our understanding of important social processes and permit us better to reform institutions in societies plagued by poverty and its associated ills.

Section I of this Article returns to Hart's fable in chapter 5, section 3 of *The Concept of Law* about the emergence of law; the idea of a governance structure expands on the insight offered by this fable. Hart's "descriptive sociology," however, went awry because it misunderstood and underestimated the role of institutions in governance. Section II begins the task of defining the concept of a governance structure, the central features of which are "institutions." The concept of an institution is itself elusive; here I distinguish among three, often conflated, aspects of institutions: institutional structures, realized institutions, and functioning institutions. Section II then offers a crude taxonomy of governance structures. Section II concludes with an extensive discussion of incentive structures as a type of institutional structure. Section III reflects on the implications of this view of governance structures for the controversy over the concept of law. I argue for two, nonexclusive reinterpretations of that debate. The first treats law as a term of commendation or evaluative criterion of governance struc-

4. In the current debate, the proponents of the interpretive conceptions argue that the conceptual approach must fail because the concept of law is too contested to yield an unequivocal concept of law. Resolution of this contest requires that we resolve the ambiguities on the basis of moral concerns.

5. KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960–1995 (1999); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999); Injae Lee, Essays on Legal System and Economic Performance (2003) (unpublished Ph.D. dissertation, New York University) (on file with University of Michigan).

tures. From this perspective, different positions in the debate over the concept of law elaborate differently the structure of this evaluative criterion and its relation to other criteria such as justice. On this account, legal systems are those governance structures that satisfy the evaluative criterion called law. The second reinterpretation views the debate as an empirical one over the best way to structure certain institutions within a governance structure. This approach is similar to the methodological position advocated by Dworkin, Murphy, and Perry that the determination of our concept of law is a substantive question in political theory, not a clarification of the concept we already hold.[6]

I. LAW AS AN INSTRUMENT OF GOVERNANCE: HART ON THE EMERGENCE OF LAW

Early in *The Concept of Law*, Hart recounts a fable concerning the emergence of law in society. His fable begins with the description of a simple society embedded in a benign, stable environment. This fable introduces and motivates the importance of three types of secondary rules that Hart argues characterize the legal system.[7] From this fable Hart extracts the germ of a concept of a legal system.[8] He argues that law emerges to resolve the problems of identification, adaptation, and enforcement that beset non-simple societies.

Hart does not consider in detail the characteristics of a society that make it "simple" nor consider the variety of problems of governance that even a simple society may face. We may infer however that, for Hart, law facilitates the governance of societies that are more complex in the sense of more populous or more heterogeneous, or that inhabit more complex environments.

The characteristics and conditions of a "simple" society merit some elaboration: it is small and closely knit; it inhabits a static or, at worst, slowly changing world that is largely insulated from large, external shocks. It is not at war, even sporadically. It does not periodically suffer flood or famine, pestilence or plague. Small, closely knit societies are not only small but also homogeneous both ethnically and linguistically; and they are

6. Dworkin, *supra* note 2; Murphy, *supra* note 2, at 372–73; Perry, *supra* note 2, at 311–13.

7. Hart motivates the idea and types of secondary rules in chapter 4 and then discusses the concept more fully in chapter 5. He explicitly mentions a "simple society" towards the end of chapter 4, section 1. HART, *supra* note 3, at 60. He then develops the analogy more fully in chapter 5, section 3. *Id.* at 91–99.

8. Several authors have recently revisited and reinterpreted this fable along lines consistent with the exposition that follows. *See* Leslie Green, The Concept of Law *Revisited*, 94 MICH. L. REV. 1687 (1996); Jeremy Waldron, *All We Like Sheep*, 12 CAN. J. L. & JURISPRUDENCE 169 (1999).

characterized by little social and economic differentiation. A simple society may thus easily monitor the behavior of its members; each individual is generally under the gaze of others as everyone generally engages in the same daily tasks. In short, a simple society is easy to govern with a minimum of formal organization. Governance in simple societies requires only the general, common acceptance of a set of primary obligations to govern the ordinary conflicts that will arise in the course of social life.[9] Law emerges, on Hart's account, only when these idyllic conditions have disappeared; law emerges as an instrument of governance of societies that are large and no longer closely knit or that face an external environment that changes too rapidly for social custom to adapt to these changes.

On Hart's account, the governance structure of the idyllic society[10] may fail in three distinct ways when ideal conditions disappear. First, the content and scope of the primary rules may be questioned; the governance structure of the idyllic society has no means for resolving these disputes. Second, the governance structure of the idyllic society cannot deal effectively with dramatic, rapid changes in the conditions facing the society. A primary rule that allocates food or other resources appropriately when food or other resources are relatively abundant may not provide an acceptable allocation when food or other resources are scarce. Third, the governance structure of the idyllic society may not be adequate to enforce its primary rules in larger, less closely knit, and homogeneous societies. In larger societies, violations of the primary rules may be more difficult to detect; moreover, it may prove more difficult to impose sanctions once violations have been detected.[11] Similarly, as social differentiation increases within a society, it becomes more difficult for one group to monitor the behavior of other groups.[12]

9. "It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules." HART, *supra* note 3, at 92.

10. I should emphasize that Hart does not use the term "governance structure" nor try to characterize simple or complex societies. This description of Hart thus projects his rhetorical device and theoretical perspective into mine.

11. Hart makes a somewhat different argument concerning the inefficiency of the governance structure of the idyllic society. He argues merely that, in larger societies, whether some action constitutes a violation will always arise and be unresolvable in the absence of an authoritative mechanism for determination of whether a violation occurred. HART, *supra* note 3, at 93–94. Hart's point is surely valid but it also ignores the more substantial difficulties of enforcement—detection and the coordination of sanction—that are mentioned in the text.

12. It is unclear whether Hart argues only that law is a sufficient governance structure to manage these problems or whether he argues that law is necessary to resolve these problems. To the extent that Hart defines law as the union of primary and secondary rules that resolve these three problems, his argument implies that law is necessary.

Each of these failings of governance, Hart argues, can be cured by the addition of a set of secondary rules to the primary rules that create the obligations. One set of secondary rules, which Hart calls rules of recognition, identifies the valid legal rules within the society. The second set of secondary rules, which Hart calls rules of change, provides a mechanism for changing primary rules to meet changing conditions. I shall call these rules "rules of adaptation," as they permit the social group to adapt to changes in its environment. The third set of secondary rules, which Hart calls rules of adjudication, facilitates the enforcement of primary rules. I shall call these rules "rules of enforcement," because, in modern, municipal legal systems, they include not only the rules governing adjudication (or the resolution of disputes concerning the occurrence of a rule violation), but also rules concerning the policing and monitoring of conduct for compliance and of punishing violations of primary rules. Of these three sets of secondary rules, Hart identifies the rules of recognition as central and foundational for law.[13]

Law, on Hart's analysis, then, consists of the union of primary rules of obligation and secondary rules that resolve the problems of adaptation, recognition, and adjudication. This characterization of law clearly renders it distinct from morality as nothing insures that the secondary rules that resolve these three problems do so in a just manner. Nonetheless, Hart has acknowledged that law will generally satisfy two distinct, but minimal, moral criteria, one procedural and one substantive. The procedural criterion, which I shall call *legality*, refers more or less to the "internal morality of the law" that Lon Fuller emphasized.[14] Most of these elements apply to the structure of the institutions that announce legal rules rather than to the primary rules themselves. Hart describes the substantive criterion as the *minimal moral content of law*; it applies primarily to the set of primary rules.

Hart offers this fable as a rhetorical device rather than as an analytic strategy. The fable serves to introduce the idea of a secondary rule and to

13. Hart's classification of secondary rules might be expanded better to reflect the institutional differentiation of tasks mentioned in the text. The rules of enforcement themselves might be subdivided into monitoring or policing rules and sanctioning rules. In addition, Hart's discussion of the rule of recognition focuses on the law-applying aspect of adjudication rather than its fact-finding aspect.

Hart's distinction between primary and secondary rules has long been considered problematic. Hart's invocation of secondary rules as the basis of law is an attempt to assimilate the institutional aspect of law to its normative one.

14. LON L. FULLER, THE MORALITY OF LAW (2d ed. 1969). According to Fuller, rules must be clear, stable, public, prospective, noncontradictory, and individuals must have the capacity to comply with them. *Id.* at 38–39. In addition, the administration of the rules must conform to the rules as publicly announced. *Id.* at 39.

indicate the significance of this type of rule. Though Hart characterizes law as the union of primary and secondary rules within a society, his subsequent discussion concentrates on a single type of secondary rule, the rule of recognition. This emphasis transforms the argument from one concerning governance structures to one concerning the extent to which the content of the legal order—the set of primary and secondary rules—is autonomous.

In the next Section, I return to the concept of governance structures. After providing a crude definition, I suggest a taxonomy of governance structures.

II. GOVERNANCE STRUCTURES

The analysis of governance structures begins with the basic idea of a social group situated in a social and physical environment. A governance structure is part of the organizational structure of the social group. A social group may organize itself in many different ways; conversely, many social groups may adopt the same structure of governance. Consequently, a characterization of a social group must not include organizational features of the society; rather it refers to features of the population: the number of persons in the group, its demographic characteristics such as its gender and age composition (or fertility rate, mortality rate, etc.), and perhaps cultural features such as the number of language groups within the larger population that are not predominantly the result of its social organization.[15]

State government encompasses more than a governance structure. Governments after all provide various goods and services. Some jurisdictions provide some or all of the following (but not necessarily exclusively): education, waste removal, and the provision of clean water.[16] The government may also announce and maintain standards for the measurement of length, area, volume, and time; government may also collect statistics about the society[17] or provide other information such as maps and meteorological

15. Many of these features of a population are not wholly independent of the governance structure. Fertility and mortality rates are not independent of social policy; similarly, linguistic diversity may be a consequence of social policy. A group may institute measures that tend to suppress or to support the continued existence of various language groups. Nevertheless, at any given point in time, the fertility rate, the mortality rate, and the distribution of native languages of the population are apt to be important characteristics of a social group that constrain the set of governance structures that are feasible for the social group in the future.

16. In addition, governments often gather statistics about the social group. That is, they determine the gross national product (GNP), the unemployment rate, the inflation rate, maps, censuses, and other statistical indicators. These indicators may have a large influence on the functioning of the society and of the governance structure but they are not parts of the governance structure per se.

17. For example, the United States collects and publishes extensive information concerning the economy, particularly the labor market.

information. These standards, statistics, and services are not part of the governance structure though they may play a significant role in the economic and social life of the society.

As suggested in Section I, a governance structure may perform one or more of four functions: (1) adaptation to changing circumstances and interests of the population; call this function *legislation* or *rule creation*; (2) detection of noncompliance with extant rules; (3) the application of extant rules to the assessment of conduct; call this function *adjudication* (and note that it includes at least two activities—the determination of what happened and the application of the extant rule to the given facts); or (4) sanctioning.[18] As we shall see, in a society, a single institution may perform multiple functions; similarly, multiple institutions may perform the identical function. The administrative apparatus of the federal government of the United States illustrates both these phenomena. There are many administrative agencies of the federal government and each administrative agency performs all of these functions for a restricted domain of behaviors or activities.

Social theory seeks to describe and to explain the organizational forms that a social group adopts. The descriptive task requires taxonomies of social groups, of social and physical environments, and of organizational forms; the explanatory task requires a theory that explains which social groups will adopt which organizational forms under which environmental conditions. In this Article, I restrict the discussion in two ways: First, I concentrate on governance structures—structures that regulate the conduct of the members of the social group and determine the political organization of that group. Social organization includes economic and other structures as well.[19] Second, I sketch an incomplete taxonomy of governance structures but provide no theory to explain them.

A. Characterizing Governance Structures

I will identify governance structures with a set of institutional structures within a society that address one or more of the four problems of adaptation, detection, application, and sanction that are the central elements of governance. An institutional structure is a decision-making protocol that

18. The text is formulated in terms of sanctions and non-compliance rather than in terms of incentives and eligibility. Many government programs disburse benefits to individuals; these programs obviously engage in rule creation and rule application. "Detection" here includes the determination of eligibility while sanctioning is the conferral of a benefit.

19. The distinctions here are unclear and require further development elsewhere.

specifies procedures relevant to the resolution of one or more of the problems of adaptation, detection, application, and sanction.[20]

On some accounts, institutional structures are rules but, in this Article, I reserve the term "rules" for a standard towards which agents have the relevant "internal" attitude, as Hart puts it. We may thus divide institutional structures into at least two types: incentive structures that rely solely on rewards and penalties to influence behavior and structures of rules that guide behavior, depending on how the proper functioning of the institution is imagined.[21]

Institutional structures are abstract entities, not concrete ones. It is important to distinguish three ideas: an *institutional structure*, a *realized institution*, and a *functioning institution*. As already noted, an institutional structure is simply a procedural protocol; a realized institution is an institutional structure inhabited by particular individuals. A functioning institution is a realized institution situated (and operating) in a specified social and physical environment.[22] Discussions frequently confuse these three ideas; the term "institution" often applies to each of them. Confusion arises most easily when one adopts a "snapshot" or "static" perspective on society; a "design" or "dynamic" perspective highlights the distinction because when we design institutions, questions concerning the character of the public officials who will occupy the institutions and the conditions under which they act are paramount.

20. The rule of recognition provides one way to resolve problems of application. I argue later that, for several reasons, a governance structure might not have a rule of recognition. For instance, the governance structure might operate through incentives rather than rules.

21. The distinction among an institutional structure, a realized institution, and a functioning institution indicates that rules in Hart's sense are insufficient to characterize the latter two entities. At best, then, rules might characterize institutional structures but it is at least an open empirical question whether an institutional structure might rely solely on incentives—rewards and punishments—to implement the protocol that defines the structure.

Regardless of these questions, it is not clear that Hart's much criticized distinction between secondary and primary rules identifies the set of rules that constitute institutional structures.

22. The game-theoretic distinction between a game and a game form may illuminate the tripartite distinction in the text. A game is a set of players, each defined by a preference and a strategy set, and a game tree. The set of players may include a fictitious player, nature, that chooses the state of the world and provides signals concerning that state to the players. A game form is a game that leaves the preferences of each player unspecified. A play of a game is the unfolding of the game as played by identified players and includes the realizations of the chance moves.

We might identify an institutional structure with a game form as neither specifies the preferences of the population that inhabits the institution (or the social group in which it functions) or the game. A realized institution would then correspond to a game and a functioning institution would correspond to a *play* of the game.

Institutional structures, however, are generally less well defined than game forms as institutional structures must function in a complex world. The timing of the invocation of parliamentary procedures, for instance, is not specified by that institutional structure.

To illustrate these distinctions, consider a simple legislative body with a simple institutional structure: the legislature consists of some fixed number of representatives that are elected at-large from the social group as a whole. It acts by majority rule with its agenda governed by Robert's Rules of Order. This institutional structure is widespread; departmental faculties often govern themselves in this way, as do many municipalities. The realized legislative institution thus obviously varies with the set of members of the body, and the issues discussed and voted upon by a functioning institution will depend on the social and physical environment in which the social group and its legislature find themselves. A group facing severe resource constraints will consider different issues than one that has few resource constraints.

Institutional structures may thus be transplanted from one social group to another; or, indeed, from one social domain to another within a given social group. The possibility of transplantation suggests two analogies that may clarify the idea of an institutional structure. First, the transfer of technology from one firm to another or, more strongly, from one country to another, is a complex, uncertain enterprise. Extensive time and effort, and often additional capital investment, are needed to transfer a functioning technology from one location to another.[23] These difficulties arise despite the obvious, concrete nature of most technologies. They arise in part because of differences in the training of the personnel who implement the technology and because of small differences in the environment in which the technology operates.[24] Even when the workforce in the new location is as highly educated and skilled as the workforce in the original location, the original workforce has acquired significant knowledge and experience in the operation of the technology through learning-by-doing.[25]

Second, the replication of an experiment by another laboratory or the successful use in a new laboratory of an experimental technique developed

23. For example, in RICARDO HAUSMANN & DANI RODRIK, ECONOMIC DEVELOPMENT AS SELF-DISCOVERY 28–29, 30 (Nat'l Bureau of Econ. Research, Working Paper No. 8952, 2002), *available at* http://www.nber.org/papers/w8952, Hausmann and Rodrik point to the diffusion of technology for making textiles that originated in Britain. The Indian textile industry imported the British technology but, in India, productivity per worker never exceeded one-tenth the productivity of British workers. They also recount part of the history of the transfer of steelmaking technology to Japan at the end of the nineteenth century. Plants made exactly to British (or German) specifications failed to work successfully in Japan; the adoption of the technology required significant adaptation.

24. Individuals who transfer programs from one computer to another often confront similar problems.

25. Thus, one might speak of a technology, realized technology, and a functioning technology analogously to the institutional trichotomy.

in another laboratory presents similar difficulties. Labs often have difficulty using the techniques of other laboratories.[26]

The distinctions among institutional structures, realized institutions, and functioning institutions are important for several reasons. First, discussions of institutions often shift among these different meanings. Clarity requires keeping the ideas separate as assessment proceeds differently in each case. Second, different jurisprudential conceptions of law apparently understand the domain of the concept differently. Dworkin's interpretive theory, for example, regards law as a feature of functioning institutions because the identification of law requires reference to the past political history of the jurisdiction; it thus refers to the functioning institutions of the society. The domain of legal positivist conceptions, however, is less clear. In principle they aim at a *general* theory of law, one that describes law in many different societies. One might develop a general characterization of law either over the domain of functioning institutions or over the domain of institutional structures. A general characterization over the domain of functioning institutions, however, would identify law in terms of some performance property of functioning institutions. Natural law theories, for example, identify legal systems in terms of the justice of the functioning institutions. I discuss this program of characterization at greater length in Section III.A below.

Legal positivists, by contrast, seek to separate the evaluation of law from its characterization. A characterization over the domain of functioning institutions thus will likely prove unappealing to them. Characterizing law over the domain of institutional structures, on the other hand, furthers the ambition of separating law and evaluation as the consequentialist evaluation of institutional structures is complex. One must assess each possible functioning institution in light of its likely realization. Moreover, a characterization of law that refers to the domain of institutional structures will characterize law in terms of its central, social features. This program fits well with the description of Hart's enterprise as one of "descriptive sociology." Finally, Hart's own characterization of law as the union of primary and secondary rules seems to identify law with institutional structures—as secondary rules constitute the institutional structures that resolve the three problems faced by complex societies.[27]

26. For examples, see GERALD L. GEISON, THE PRIVATE SCIENCE OF LOUIS PASTEUR (1995) (discussing the difficulties of transferring the techniques for preparing rabies vaccine from one laboratory to another).

27. This characterization of law as an institutional structure ignores Hart's requirement that some key group of officials accept the rule of recognition as valid. This requirement apparently places law

B. *Economic Analysis of Law and the Concept of an Institution*

An economist characterizes institutions as structures of incentives not as a set of rules. Hart's analysis of obligation suggests a distinction between rules and incentives based on the different attitudes that individuals adopt towards incentives and rules. On Hart's account, individuals regard rules as *standards* of behavior; nonconformity to a rule subjects the agent to criticism for that nonconformity. Incentives, by contrast, are not standards of behavior. An agent may appropriately choose not to "conform" to the incentive—*i.e.*, to take the action that is rewarded or avoid the action that is punished—if nonconformity is, all things considered, the best action for the agent.

Can institutions be structured solely on the basis of incentive structures? We might understand this question as either an empirical or conceptual one. Empirically, the question seems open. Many economic institutions seem to consist solely, or at least, predominantly of incentive structures.

In this Section, I digress slightly from the main argument to suggest that in fact rules are not necessary to the constitution of institutions. My argument proceeds largely by example; I consider the concept of law embedded in a strand of economic analysis of law and show that rules play no role in it.

1. Economic Analysis of Law

When economic analysis of law first entered the legal academy thirty years ago, its advocates and its critics understood it as a comprehensive theory of law that was characterized by a normative claim that legal rules ought to maximize social welfare.[28] That characterization persists though it provides neither a comprehensive theory of law nor an accurate description of the diverse enterprise of economic analysis of law. The description is not accurate because, though many contributions of economic analysis of law refer to welfarist evaluative criteria, the best interpretation of these contributions is not a directly normative one. Rather, most contributions focus on a different, nonnormative question: What behavior will a given legal rule induce?[29] The description is not a comprehensive theory of law because it

within the domain of realized institutions but not functioning institutions. Below, I will suggest that the criterion of "acceptance" might be reinterpreted as a requirement of the institutional structure.

28. I ignore controversy over the exact nature of the normative claim attributed to economic analysis of law. For details, see Lewis A. Kornhauser, *Wealth Maximization*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 679 (Peter Newman ed., 1998).

29. So, for example, most of the economic analysis of accident law primarily considers the question of how much care individuals will take under varying rules of law and varying conditions of judi-

does not address most of the central questions of a philosophy of law: What criteria identify a rule as a valid legal rule? What is the relation between law and morality?[30]

For purposes of this Article it is useful to distinguish two schools of economic analysis of law from among the many diverse projects that comprise the general endeavor: the *policy analysis* school that seeks to predict the consequences of legal rules and institutions on the behavior of private individuals and the *political economy* school that seeks to explain both the consequences and the causes of legal rules and institutions.

Policy analysis makes standard economic assumptions about the preferences of private individuals but assumes that public officials act conscientiously to meet their legal obligations. Political economy extends the assumption of self-interested behavior from private individuals to public officials. These two schools of economic analysis of law bear significantly different relations to the debate over the concept of law.

The practice of policy analysis is consistent with any of the contending concepts of law. Analyses of the effects of legal rules on individual behavior assume that the legal rule has already been identified. They prescind from the controversy over the concept of law. Given any legal rule, the policy analyst can study its consequences.

Political economy, by contrast, offers a distinctive perspective on the concept of law that, given the prior discussion, may be described in two different, though related ways. Political economy articulates a realist account of law that identifies law not with the norms announced in authoritative legal texts—constitutions, statutes, administrative regulations, and judicial opinions—but with the actions of public officials. This account emphasizes the institutional aspect of law. The second description of the political economy approach to law regards it as a governance structure that relies solely on incentives to direct the behavior of public officials and private individuals alike. In this Section, I set out this view.

Political economy assumes that every individual, private citizen, and public official acts self-interestedly. Self-interested action has various in-

cial ability to monitor and determine the actions of the individuals. Of course, many of these economic analyses identify which rules yield efficient behaviors. They may even assert that a given rule ought to be adopted because it induces efficient behaviors. The behavioral predictions, not these normative observations and policy prescriptions, however, constitute the primary contribution of economic analysis of law to the understanding of legal phenomena.

30. The normative claim thus does not identify criteria for validity of a legal rule. It says that legal rules ought to maximize social welfare not that a rule is a legal rule if it maximizes social welfare. Even this latter statement is inadequate as a concept of law. Many of the various rules that might govern some class of events or transactions may maximize social welfare; not all them can be law as they would impose inconsistent obligations.

terpretations. Most broadly, the analyst assumes that each agent has well-defined preferences over some domain and that, from the available options, she chooses the one she most prefers; *i.e.*, she maximizes. This broad interpretation places no restriction on the domain over which the agent has preferences. A more restrictive interpretation of self-interested action assumes that private individuals and public officials have preferences over the same domain. The core project of political economy, however, restricts the domain of preference more dramatically to the domain standardly assumed in economics: the allocation of goods and services to the agent.[31]

2. Legal Institutions in Political Economy

Consider standard legal institutions from the perspective of political economy. The institutional structures underlying these functioning institutions are completely defined by the incentive structures in which the agents act. These incentive structures presumably include wages, security, prospects of advancement, and changes in status.

We may more easily understand some institutional structures of government as incentive structures than others. Public officials within the executive branch, for example, pursue careers in the same fashion as individuals in the private sector. Indeed in some instances a public position may advance an individual's career prospects outside the public sector. Similarly, we might understand legislators as promoting their self-interest; their interest in policies that do not directly affect their economic circumstances derive from their interest in reelection. A similar strategy might explain the policy preferences of judges who face reelection.

Explanation in terms of self-interest of the behavior of judges with life tenure presents the most difficulty. In these instances, analysts often attribute to these judges preferences directly over policies though it is difficult to see in what sense such preferences over policy are self-interested in the narrow sense. Such preferences are not narrowly self-interested in at least two respects. First, narrowly self-interested preferences would, at the least, be over a broader domain, one that included not only policy prevailing in a given state, but also the economic condition of the judge narrowly understood—her wages, prestige, workload, etc. One might defend the restriction of the domain to policies on the grounds that judicial decisions do not generally affect the economic condition of the judge. Indeed, judicial ethics generally require that the judge recuse herself from decisions that have a

31. This assumption precludes other-regarding preferences but it does not preclude preference for status goods. Some accounts would permit the agent to have preferences that included a concern for her reputation or her status in the community.

direct impact on her personal, economic circumstances. Second, the concern for policy, at least for federal judges with life tenure, stands outside the set of concerns that normally fall within a narrow interpretation of the concept of self-interest.

Political economy aims to explain the functioning of political and legal institutions in terms of the self-interest, narrowly defined, of individuals.[32] On this account, law would emerge within the structure or equilibrium of an extremely complex game. We would identify the secondary rules of the legal system implicitly from the equilibrium behavior of individuals. That is, in the equilibrium of this game, official behavior would largely conform to the demands of the "secondary rules" of the legal system. They would do so because, in this equilibrium, nonconformity would be worse for them than conformity. The rules, however, would not explain or guide the behavior of the officials.

Oddly, it may be easier to understand how "mere" incentives might sustain a "legal" equilibrium in a complex society than in a simple society. A complex society exhibits a high degree of division of labor among its members. It is also often highly anonymous. Each individual is engaged in a limited set of activities that contribute to the functioning of the entire society. In these circumstances, no individual can unilaterally act to change the basic structures of society. Restructuring society requires the coordinated actions of large numbers of individuals; the anonymity and division of labor within the current society renders this coordination difficult and unlikely. Consequently, each individual finds it in her interest to continue doing the actions that sustain the equilibrium even when, in that equilibrium, many individuals are unsatisfied.

A simple example may illustrate the power of equilibrium reasoning of this type. Consider a stylized version of the caste system.[33] The caste system restricts an individual's set of social interactions to a restricted class of individuals. So, for instance, some class of individuals is permitted to trade only with some small subset of other individuals. Indeed, the caste structure requires that, for each individual, certain transactions are restricted to a narrow set of individuals. This pattern of restricted trade can be

32. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY (1985); and more recently, from a different perspective, KAUSHIK BASU, PRELUDE TO POLITICAL ECONOMY: A STUDY OF THE SOCIAL AND POLITICAL FOUNDATIONS OF ECONOMICS (2000). Brennan has more recently abandoned this project for one that admits a broader set of motivations. *See* GEOFFREY BRENNAN & ALAN HAMLIN, DEMOCRATIC DEVICES AND DESIRES (2000).

33. This example is based on the model of George Akerlof, *The Economics of Caste and of the Rat Race and Other Woeful Tales*, 90 Q. J. ECON. 599 (1976), and George A. Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 Q. J. ECON. 749 (1980).

sustained in equilibrium if the sanction for violating the trade restrictions is sufficiently high. Let the sanction be ostracism; if an individual X attempts a restricted transaction with an impermissible individual, then no one trades with X. Notice that this enforcement rule ensures no one trades outside the caste structure. The benefit to X for a single, illicit transaction is very small even if the benefits of many such transactions would be very high. The costs to X of engaging in a single "illegal" transaction, by contrast, are very high; X is completely excluded from the social system. If X could convince a sufficiently large number of individuals to violate the caste structure, they all might be better off—indeed everyone in society might be better off without the social restrictions imposed by the caste structure—but the costs of organizing such systematic violation may be high. One might understand such systematic violation as secession from the larger society. Everyone who violated the caste rules will be prohibited from dealing with other nonostracized members of the society but the ostracized could deal with each other. If the ostracized community is sufficiently large and diverse, everyone there would benefit but the caste structure itself raises the cost of organizing a mass defection from its rules. Any revolutionary must convince others with whom she is not generally permitted to deal.

Complex games of this nature will generally have multiple equilibria. The sketch of the model of the caste structure illustrates this. By hypothesis, everyone would be better off without the caste structure but no one can unilaterally induce society to shift from the equilibrium behavior that sustains the caste structure to an equilibrium without restrictions on individual transactions (*i.e.*, to a "free trade" equilibrium). Similarly, when we consider a complex society, we can imagine many different ways in which it might be organized. Some of these will have "law" and others perhaps will not. On this account, we identify "law" with some features of the equilibrium of the game.[34]

This project of the reduction of law to incentives faces a number of difficulties but it is important to see that Hart's objections to Austin's command theory of law do not succeed against it. Hart offered four objections to Austin's theory:[35] (1) laws, unlike orders, apply to the issuer; (2) some laws confer powers rather than impose duties; (3) some laws do not, like orders, arise from explicit prescription; and (4) sovereignty does not

34. On the other hand one might want to identify "law" with some feature of the social structure that determines which equilibrium actually prevails. This understanding of law would place it outside the formal structure of the game and would in fact give it some explanatory power.

35. HART, *supra* note 3, at 79.

explain the continuity of a legal system. Each of these features of law fits easily within the game-theoretic structure sketched above.

Hart's first objection that laws, unlike orders, apply to the issuer, will not undermine the view of law as a structure of incentives when the institutional structure of promulgation and enforcement of law is sufficiently articulated. If a single person promulgates, applies, and enforces the legal rules then it is not clear that the promulgator faces appropriate incentives to adhere to the rules that she promulgates. In a more complex structure, however, in which the institution that promulgates rules differs from the institution that enforces rules, one can easily see how the individuals who promulgate rules will face incentives from the enforcing institution to adhere to the rules they issue. Similarly, if the enforcement institution is sufficiently differentiated, one set of enforcement officials will provide incentives for a second set to adhere to the rules.

Similarly, the fact that some laws confer powers rather than impose duties presents no problem for an incentive account of law. An incentive structure can insure that only those individuals upon whom a power has been conferred can successfully use that power and insure that once exercised, it is obeyed.

Hart's third objection might be interpreted in two distinct ways. He might mean that some laws are customary rather than promulgated. Or he might mean that customary rules cannot be adequately enforced. The fable concerning caste structures outlined above responds to the enforcement objection. The source of the caste structure is irrelevant to the structure of incentives that insure that compliance is an equilibrium of the system. Moreover, the simple caste model suggests that the equilibrium will not depend on the source of law—legislation or customary prescription—but on the ability of the enforcement structure to recognize the rule and its violation. So if customary prescription is sufficiently demarcated, an incentive structure of law will successfully enforce it.

Finally, overlapping generation models of social security[36] and of political structure[37] illustrate how rules can persist across generations of

36. *See* John Geanakoplos, *Overlapping Generations Model of General Equilibrium*, *in* 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 767 (John Eatwell et al. eds., 1987); Paul A. Samuelson, *An Exact Consumption-Loan Model of Interest With or Without the Social Contrivance of Money*, 66 J. POL. ECON. 467 (1958).

37. *See* DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC BACKWARDNESS IN POLITICAL PERSPECTIVE (Nat'l Bureau of Econ. Research, Working Paper No. 8831, 2002), *available at* http://www.nber.org/papers/w8831.

agents. In these models, agents have the appropriate incentives to maintain behaviors across generations because of their mutual expectations.[38]

On the other hand, one might argue that political economy does not provide an adequate account of central *legal* concepts such as authority, jurisdiction, and validity. Political economy reduces these concepts to incentive structures. More significantly, it is not clear that, from the political economy perspective, law is a system of rules.

C. *A Taxonomy of Governance Structures*

From Hart's analysis, one might extract both a simple theory and a crude taxonomy of governance structures into two classes. His fable distinguished simple societies with only primary rules of conduct (and no differentiated governance structure) and more complex societies that had "law," *i.e.*, secondary rules of identification, adaptation, and enforcement.[39] This distinction divides societies into two mutually exclusive, but not exhaustive, types. Call a governance structure that has only primary rules of conduct and no differentiated institutional structures, a *simple governance structure*. The "descriptive sociological" theory implicit in Hart's argument then apparently claims that simple governance structures only emerge in homogeneous social groups that inhabit stable (and perhaps sufficiently rich) environments.[40] Hart moreover identifies law with a subset of governance structures, those that have both primary rules of conduct and three types of secondary rules.[41] His definition and taxonomy pay no attention to the governance regime.[42]

The argument in Sections II.A and II.B suggests a more complex taxonomy of governance structures that refers to two features of the governance structure: the degree of institutional differentiation in the governance structure and the motivational psychology underlying the institutional design.

First, the governance regime may exhibit greater or lesser institutional differentiation. One can imagine, for instance, an institutional structure that

38. For a theoretical model, see ANDREW SCHOTTER, THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS ch.4 (1981).

39. By "no differentiated institutional structure" I mean only that the monitoring of conduct, the enforcement of sanctions, and the change of rules all occur in a decentralized fashion.

40. Hart's taxonomy is obviously incomplete. It ignores governance structures that have secondary rules but not secondary rules of all three types.

41. Hart's taxonomy is incomplete because it ignores the possibility of governance structures that include primary rules and one or two of the sets of secondary rules that he discusses.

42. Perhaps, more accurately, Hart is unconcerned with the institutional structures that resolve the three problems he identifies.

resolves all three problems of recognition, adaptation, and enforcement through a single, simple protocol; it designates a single person to exercise the relevant power and authority. More plausibly, we may easily imagine a governance structure that unites legislative and adjudicative functions but had a differentiated institution for the monitoring of behavior.[43]

Existing municipal legal systems, of course, are generally much more institutionally differentiated. They have complex legislative structures, largely distinct and complex adjudicatory structures, complex and distinct executive structures for monitoring behavior, and equally complex structures—sheriffs and prisons, for example—for the imposition of sanctions for violation of the laws. Indeed, when we examine a modern municipal legal system even casually, we notice a plethora of legislative, executive, and adjudicatory institutions. At the federal level in the United States, for example, numerous federal agencies make legal rules and resolve disputes. These administrative agencies bear different, often complex relationships to the executive and to the courts of general jurisdiction. Administrative agencies, for example, may be either "executive" or "independent"; these agencies differ in the degree of control that the current president can exercise over the decisions of the agency. Similarly, the oversight by a central, general judiciary also varies across administrative agencies. At the extreme, independent end, in the United States, we observe the Federal Reserve Board which determines the monetary policy of the United States. Its decisions concerning monetary policy are not reviewable in the courts and the President exercises very little direct control over the decisions of the Board; its members are appointed for terms that exceed the President's own term.[44] On the other end sit such agencies as the Environmental Protection Agency whose administrator serves at the pleasure of the President and whose decisions are subject to review in the federal courts.[45]

The interrelation of even the broadly defined institutions of executive, legislature, and executive is also complex. Legal scholars generally regard legislative institutions as the core legal institution that monitors and governs the operation of the other institutions. This relation among institutions is not obviously either a conceptual or empirical regularity among governance structures. In at least some instances, the executive has an equal or more dominant role in the control of governance. In the United States, for example, the executive generally determines the legislative agenda and it

43. For example, in Massachusetts Bay, the General Court was both a legislature and the colony's highest court of appeal.

44. Moreover, Congress can exercise little oversight as the Board's operations are self-funding.

45. And over which Congress may exercise substantial oversight.

also has a substantial influence over the content of any legislative proposal.[46] In any case, one can certainly imagine governance structures in which the legislature is not the dominant legal institution.[47]

In principle, we would like both to explain and to evaluate the degree of institutional differentiation that we observe. Is increased institutional differentiation a consequence of increased complexity of the society? Or is increased differentiation a necessary precondition for the emergence of more complex societies? Do larger populations require more differentiated structures? Do more differentiated structures provide "better" governance either in the sense of greater conformity to primary rules or greater justice of those rules?

Second, the system of governance may operate through differing psychological processes. As already noticed, the political economy school of economic analysis of law relies only on incentive structures to explain legal phenomena. One might say that political economy reduces legal behaviors in general and the legal behavior of public officials in particular to self-interested behavior, narrowly understood. On this account, the institutions of governance rely solely on self-interest. Most jurisprudential accounts of law and legal behavior, by contrast, assume that at least some private individuals and all key public officials act conscientiously; they treat their legal obligations as authoritative directives that they must and do follow because they are authoritative not because of the incentives for compliance or sanctions for noncompliance.[48] On the jurisprudential account, institutions of governance rely on conscientious responses to authoritative rules. Most actual governance structures, of course, rely on some mixture of incentives and rules to motivate and guide the behavior of officials. The different patterns of reliance among governance structures might provide a useful taxonomic tool.

On what grounds ought we identify some subset of governance structures as law? That is, how ought we determine the concept of a legal sys-

46. The United States example is complex for several reasons. First, the approval of the executive is often necessary for the enactment of legislation; so the executive and legislative functions are not completely distinct. Second, the relative power of Congress and the President has shifted over time.

Another, perhaps starker, example of non-legislative primacy would be the role of the sheriff in counties in the South of the United States in the first half of the twentieth century.

47. The governance structures of the former Soviet Union or the current People's Republic of China might provide other stark examples; in these societies, the Communist Party was the controlling institution.

48. Two comments are appropriate here. First, these two motivations are not exhaustive. One might consider institutional structures that rely on altruistic motivations, for example. Second, the two processes noted here—incentives and conscientious rule following—parallel the earlier distinction between institutions structured by rules and institutions structured by incentives.

tem? What criteria ought we use to identify the criterion? We might proceed in at least two ways. The first way apparently corresponds with the approach generally adopted in the current debate over the concept of law. It would consider examples of governance structures with differing degrees of institutional differentiation or different motivational structures and try to determine which of these conform to our naive intuitions about law and legal systems. This approach is at odds with the development of a social-scientific concept of law.

Alternatively, the concept of a governance structure developed here suggests a social-scientific enterprise; the identification of some governance structures as legal systems should, on this account, be guided by scientific criteria of simplicity and perspicacity. On this approach, we should develop a social theory that seeks first to explain what governance structures will emerge and persist in a given social group under specified circumstances and second to evaluate these governance structures. Several different approaches to the definition of a legal system might then be used. One set would define a legal system solely on the basis of its explanatory power. The explanatory theory will likely identify many governance structures as feasible for given social groups in specified environments. A legal system would then be defined as a member of a class of governance structures that facilitated exposition of the theory. So, for example, we might identify as legal systems the governance structures that were feasible for some subset of social groups, presumably groups that were sufficiently large and heterogeneous. Or we might identify as legal systems the governance structures that were feasible or emerged under specified environmental conditions; for example in societies subject to frequent, substantial shocks.

A different definitional approach would rely on the causal effects of governance structures in its definition of a legal system. The social theory might, for example, identify some class of governance structures as likely to sustain "stable" social groups in given environments; perhaps some subset of these might be identified as legal systems. Alternatively, the evaluative enterprise would thus articulate some normative criterion and the explanatory theory would identify the conditions under which some given set of governance structures in specified social groups satisfied the evaluative criterion. I shall elaborate on this approach in Section III.

Note that legal positivism denies that we ought to identify law and legal systems in terms of some evaluative criterion. Understood as a contribution to "descriptive sociology," then, positivism would define legal systems as some set of governance structures that emerged under certain

conditions—*i.e.*, as a consequence rather than a cause. Unfortunately, this characterization does not comport well with the identification of law solely in terms of the order of the governance structure.

III. THE RELATION BETWEEN THE CONCEPT OF LAW AND GOVERNANCE STRUCTURES

The concept of a governance structure seems quite distant from the jurisprudential debate over the concept of law. Though abstract, a governance structure constitutes the map or plan of a functioning institution. The inquiries it suggests most probably fall within the realm of sociology rather than within the realm of jurisprudence. Specifically, the concept of law that concerns the philosophers of law emphasizes the *legal order*, the set of prohibitions, requirements, and permissions that prevail in a society rather than the institutions of the *legal regime*[49] that promulgate, enforce, and maintain the legal order. Phrased differently, the philosophical debate over the concept of law treats the legal order as a largely autonomous set of norms rather than as an artifact of functioning institutions of the governance structure.

We thus require an interpretation of the jurisprudential debate over the concept of law in terms that close this gap between the institutional focus of governance structures and the normative focus of the jurisprudential debate. The introduction offered two characterizations of the jurisprudential debate: a substantive one between legal positivists and natural lawyers and a methodological debate between conceptual analysts and interpretivists.

Four interpretations of these debates suggest themselves. First, we might understand the different substantive positions in the jurisprudential debate as offering distinct taxonomies of the set of possible governance structures. Each of these identifies a set of governance structures that include adjudicatory institutions that treat the identification of law as a largely autonomous enterprise; decisions are reached on the basis of direct application of norms; the identification of the applicable norms follows from the appropriate process of reasoning about other "legal norms." The taxonomies differ on the characterization of criteria of validity that constitute "law." Exclusive, or hard, positivists classify only those governance

49. For a discussion of the distinction between the legal order and the legal regime, see Lewis A. Kornhauser, *Interest, Commitment, and Obligation: How Law Influences Behavior* 208, 210–12, *in* JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant G. Garth & Austin Sarat eds., 1998); Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 748–55 (1998); Lewis A. Kornhauser, *Three Roles for a Theory of Behavior in a Theory of Law*, 31 RECHTSTHEORIE 197, 210–21 (2000).

structures that identify norms on purely social grounds as law. Dworkinian interpretivists identify as law those governance structures that identify norms as law on the basis of a morally infused reflection on institutional practice.[50] It is difficult to see, however, how this taxonomy will facilitate explanation of the types of governance structures that emerge in particular societies under specified conditions.[51]

Second, we might interpret the current philosophic debate as a professional, legal debate. The question of the grounds of law is an important one for professional lawyers and judges who participate in the resolution of disputes. The governance structures in which these professionals work require that decisions rest on specified grounds. The question of the grounds of law will be of particular importance in governance structures that differentiate the norm-creating function from the dispute resolution function in distinct institutional structures. It seems unlikely, however, that there would be some conceptual truths about the grounds of resolution in all possible governance structures[52] or in all governance structures with the appropriate degree of institutional differentiation. At the very least, we would need a clearer understanding of the possible institutional structures in order to answer this question. Absent this, the question becomes a narrow inquiry into the grounds of law within a specific governance structure rather than a broad claim about governance structures in general.

The last two interpretations of the philosophic debate require more extensive treatment. On the third account, the current debate seeks to elaborate the content of "law" as a term of commendation applied to governance structures. On the fourth account, the current debate reflects controversy over the best way to design all or part of a governance structure. I discuss these two interpretations in turn.

A. Law as a Term of Commendation

As suggested at the end of Section II, we might define a legal system as the set of governance structures that satisfies some condition or exhibits some property. In particular, we might identify legal systems as the set of

50. This characterization in the text does not address inclusive, or soft, positivism that characterizes both hard positivist and Dworkinian interpretivist "law" as law.

51. On this interpretation, critics of legal positivism offer a different taxonomy of governance structures with legal systems consisting of those governance structures, the orders of which satisfy the criteria of the grounds of law promoted by the critics.

52. For instance, a governance structure might simply identify the individual whose judgment resolves the dispute without specifying the grounds on which such judgment must rest. Such a governance structure might function well though it blatantly violates minimal, normative conceptions of "legality."

governance structures that exhibit, at least under some circumstances or within some social groups, a desirable or valuable property. This approach views law as a term of commendation.

An analogy to economics may clarify the claim. In economic theory, "efficiency" is a term of commendation. The theory identifies a set of institutions of production and exchange that, under specified conditions, yield efficient allocations of resources.[53] Similarly, the theory of governance structures deploys a normative criterion called law or legality against which it measures governance structures. A well-elaborated theory would identify the set of governance structures that, under given circumstances and within specified social groups, had the property of law.

Obviously the theory of governance structures is not as well articulated as the theory of institutions of production and exchange. Moreover, the evaluative criterion of efficiency is precisely specified[54] while the criterion of legality is not. Parts of the philosophic debate over the concept of law, I contend, are best understood as competing elaborations of an evaluative criterion of governance structures.

Dworkin's philosophy of law provides the strongest support for this perspective. Dworkin argues that the concept of law reflects the existence of the political virtue of integrity. Indeed we should understand integrity as Dworkin's elaboration of the virtue of legality. Integrity on Dworkin's account is distinct from justice and may at times conflict with it.[55] For Dworkin, then, we evaluate governance structures against multiple criteria. For him, understanding the relation among these evaluative criteria and the nature and implication of all-things-considered judgments about governance structures should thus become a central inquiry for philosophers of law. When the criteria applied to governance structures conflict, what ought public officials do? What ought private citizens do? For the social scientist, however, the central questions raised by "law as integrity" differ. Dworkin identifies as legal systems those governance structures that exhibit integrity but he provides little guidance for the identification of necessary or sufficient conditions under which we would expect to observe governance structures that exhibit integrity. From a social science perspective, we should seek the equivalent of the first theorem of welfare economics: Un-

53. So the first theorem of welfare economics says that, when preferences and production sets are convex, competitive institutions yield efficient allocations. GERARD DEBREU, THEORY OF VALUE: AN AXIOMATIC ANALYSIS OF ECONOMIC EQUILIBRIUM 94–95 (1959). The theory provides a precise specification of "competitive" institutions.

54. At least, economists systematically deploy a formally defined concept of Pareto efficiency.

55. This feature simply extends the analogy to economics. Efficiency is not equivalent to justice so that many efficient allocations may be unjust.

der what conditions and in what social groups will governance structures exhibit integrity?

Dworkin's discussion of the value of integrity is entirely separable from his theory of adjudication. As I argue below, his theory of adjudication can be understood as an empirical claim about the set of governance structures that will satisfy integrity. It is, for instance, at least possible that a society will best achieve integrity if the officials in its adjudicatory institutions follow a more formalistic protocol of decision making that restricts the set of considerations on which they base their judgments. Integrity is the criterion against which we measure the performance of the governance structure, not the grounds for decision of (some subset of) public officials acting within that governance structure.

Moreover, it seems improbable that the satisfaction of integrity depends solely on the structure and content of the legal order as Dworkin's theory of adjudication might suggest. After all, the value of given legal rules and principles will vary with the social group to which they apply and with the circumstances in which the social group finds itself. A judgment that a specified governance structure satisfies integrity is thus likely to require more than an examination of the coherence of the legislative and judicial decisions of a polity. Judgments about the quality and value of a governance structure will depend importantly on the functioning of the realized institutions that create, identify, and enforce the operative norms of the society at a given time.

Natural law may be understood similarly to the understanding of Dworkin's account of integrity. It identifies the evaluative criterion of law with justice. As it identifies law and justice, natural law theory postulates a simple structure of evaluative concepts of governance structures. This simple structure perhaps explains both its attractions and demerits.

Natural law theory, like Dworkin's, does not provide a theory of which governance structures within specific social groups and under given circumstances will in fact be just and hence law. It remains true, however, that the evaluative judgment will not depend solely on facts about the content of the norms that constitute the order of governance. Rules may prove unjust within one institutional environment at one time but just within a different institutional environment at another time.

Legal positivism, by contrast, seems at odds with this characterization of the debate. One of its central tenets, in fact, asserts that questions of moral evaluation of governance structures should be strictly separated from

questions of the content of the order of the governance structure.[56] Of course, we might understand this claim simply as a claim that the value of legality is distinct from moral value generally and justice in particular; Hart's discussion of the minimum moral content of law and of a few general formal constraints on law—a concept of minimal legality—might be understood as a brief gesture at articulating the value of legality. On this understanding, however, positivism might be consistent with Dworkin's approach.[57] Recently, such scholars, notably Leslie Green[58] and Jeremy Waldron,[59] have argued that Hart's concept of law offers both benefits and risks in governance to complex societies. This argument complements these minimal ideals of legality by emphasizing the extent to which legality differs from justice.

B. The Grounds of Law and the Problem of Design of Governance Structures

The debate over the grounds of law has sparked a second, methodological debate concerning the philosophy of law. This second debate concerns the criteria by which we ought to resolve the first debate. Do we determine the role of morality in determining the grounds of law by elaborating our concept of law? Or do we make this determination on the basis of political theory by choosing the concept that produces the better practice?[60] This second resolution of the methodological debate points to a plausible, fourth interpretation of the traditional debate over the concept of law. The identification of the grounds of law—more accurately, the grounds of the order of a governance structure—may be understood as an element in the construction of a governance structure. Different grounds of law specify different institutions of adjudication or administration. We may array adjudicatory and executive institutions along a spectrum that runs

56. On the other hand, this understanding of the debate makes some sense of the Hart–Fuller controversy. Fuller identified a number of criteria against which to measure the order of a governance structure. Hart denied that satisfaction of these criteria implied that the order was just. Fuller's project thus appears to be a precursor to Dworkin's; each elaborates the nature of the commendation of law to a governance structure. Each asserts that the structure of evaluation of governance structures is complex. Justice is not the only virtue that a governance structure may exhibit.

57. The debate within positivism between exclusive and inclusive positivism suggests a different interpretation of it. Perhaps positivists identify those governance structures that claim authority as legal systems. Of course, the determination of whether a legal system (or any governance structure) has authority or not will depend on features of the realized institution and not simply on features of the order associated with the governance structure.

58. Green, *supra* note 8.

59. Waldron, *supra* note 8.

60. Green, *supra* note 8, and Murphy, *supra* note 2, argue that positivism will yield the best practice, while Dworkin adopts the competing view.

from a formalism governed by rules distinct from morality to particularistic judgments based on all-things-considered judgments of what to do. Institutions that differ along this dimension will differ greatly in the quality of governance and social life generally. On this account we should understand the debate over the grounds of law as a debate over the appropriate design of the institutions of governance. We might ask several questions: Which design offers the most just society? Or which design best satisfies whatever distinct legal value—such as integrity—that we have identified?

This interpretation is consistent with claims that Dworkin's theory of law is simply a theory of adjudication.[61] These critics of Dworkin argue that his theory is only an account of how judges ought to decide cases. Of course, the protocol that judges use to resolve controversies would be an important element of a governance structure; we may easily imagine adjudicatory institutions that follow different protocols for the resolution of disputes.[62] Moreover, we may believe that a governance structure that excluded morality from its ground of law would be more just than one that included it. Hart, in effect, took this position in his debate with Fuller. Murphy advances a similar claim in his interpretation of the current jurisprudential debate between positivists and Dworkin as a question of political morality.[63] He acknowledges, however, that resolution of the debate requires resolution of an empirical, not a conceptual, question.

CONCLUSION

This Article began the elaboration of a concept of a governance structure of a social group. Some such concept is implicit in many efforts to improve the economies and economic well being of many poor countries. A similar concept is implicitly or explicitly evoked in current efforts to transform the centrally planned economies of central and eastern Europe into market-based economies. Finally, such a concept will promote the social scientific understanding of general social processes.

Logically, a concept of governance structure and the concept of law, as discussed and debated within the philosophic and legal academies, are independent. I have argued, however, that the concepts of a governance structure and of law can be mutually enlightening. The philosophic debate over the concept of law serves as a fertile source of hypotheses about the

61. *See* W. J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994).

62. Indeed, common law judges appear to follow a different protocol than civil law judges and the difference in protocols is reflected in the different structure and content of the opinions issued by these judges.

63. Murphy, *supra* note 2, at 373, 383–84.

role of governance structures in society. I have further argued that legal systems are best understood as a species of the more general concept of a governance structure of a social group. Controversy over the concept of law should then be understood as controversy concerning the property or properties that distinguish legal systems from other types of governance structures.

The jurisprudential debate may also help articulate the normative criteria that we should use to evaluate different structures of governance. I have suggested that, from this perspective, philosophers of law must elaborate the structure of a distinct political virtue that we call law. Once this structure is clarified, we may begin to identify the governance structures that manifest legal virtues. Our social-scientific understanding of how societies order themselves will then be intertwined with our evaluative concept of law and different conceptions of legality.

Many philosophers of law differentiate sharply between their enterprise of the explication of a concept of law (or of a legal order) and the development of a social-scientific concept or understanding of law.[64] According to Raz and Perry, the technical and the conceptual theories of law differ in part because the philosophic theory is inherently *internal* while the technical theory may be *external*, though not necessarily external.[65] An internal theory uses the concepts available to participants in the practice that the theory explains; an external theory, by contrast, uses whatever concepts best explain the practice in question whether the participants have or do not have those concepts. The philosopher seeks to promote the understanding that participants have of their practice rather than to explain it in some scientific sense.

Theorists, however, are not aliens who have no contact or communication with the participants in the practice. Participants are not insulated from the theorizing of scientists outside the practice. Even "external" accounts of a practice may alter or transform that practice as participants adopt (or adapt) the "external" concepts developed to explicate the theory.[66] Should social science successfully elaborate a concept of governance structure that sheds light on legality, then our concept of law will change.

64. Both Raz and Dworkin, for example, agree on this point. Dworkin, in personal correspondence to me, has stated that his arguments do not bear on the development of a technical social scientific concept. *See* RAZ, *supra* note 1, at 237. Perry, in *Hart's Methodological Positivism*, *supra* note 2, at 346, contends that a social scientific methodology cannot answer the questions that Hart posed.

65. RAZ, *supra* note 1, at 237; Perry, *supra* note 2, at 346.

66. Arguably economic analysis of law has had this effect on legal practice.