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The Underlying Value of MacCormick's Post-Positivism

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In a quartet of books, Neil MacCormick develops in great detail his institutional theory of law.[1] According to this theory, law is an institutional normative order. As we shall see, save for one key difference, MacCormick's institutional theory of a legal system closely parallels Hart's positivist theory. Though his theory of a legal system looks very much like Hart's positivist theory, he concludes that a central positivist tenet is false. He argues that, *contra* positivism, moral considerations are necessarily determinants of a legal system's laws; for, on his account, radically unjust norms necessarily are not law.[2] Thus, MacCormick's theory presents us with a surprising juxtaposition—in his words, a post-positivist synthesis of positivism and natural law theory.

In this essay, I examine whether it is possible to reach a natural law conclusion on the basis of what is traditionally taken to be a positivist foundation. I argue that MacCormick's and Julie Dickson's attempts (on MacCormick's behalf) to do this are not promising. However, I also argue that MacCormick's theory of law has resources for a more promising approach to this argument, and I attempt to mine these resources. This essay proceeds in a number of steps.

First, I outline MacCormick's institutional theory of a legal system and explain how it closely parallels the Hartian theory. I also emphasise the key difference between MacCormick's and the Hartian approach. Namely, for MacCormick, the ideas underlying a legal system are important elements of the system.

In section II, I consider and reject Julie Dickson's attempt (endorsed by MacCormick) to explain how MacCormick's post-positivist thesis (radically unjust norms necessarily cannot be law) flows from his theory of law. As we shall see, the argument she offers (and which MacCormick endorses) relies on an inadequately supported essentialist thesis about the fundamental nature of law.

In section III, I propose an alternative non-essentialist argument for MacCormick's post-positivist thesis. As we shall see, this argument rests on MacCormick's conception of the underlying idea of a legal system and on a clarification of the oft-conflated distinction between a theory of a legal system and a theory of legal content. In short, I argue that though MacCormick and the Hartian propose very similar theories of a legal

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1 This quartet comprises *Practical Reason in Law and Morality* (2008); *Institutions of Law: An Essay in Legal Theory* (2007); *Rhetoric and the Rule of Law* (2005); and *Questioning Sovereignty* (1999)—all published by Oxford University Press.

2 *Institutions*, 273.

system, their theories of how to determine the content (the particular laws) of such legal systems may differ. Further, I develop a theory of legal content that is inspired by MacCormick and that supports his post-positivist conclusion.

I. MACCORMICK'S INSTITUTIONAL THEORY OF LAW

MacCormick's view that law is an institutional normative order closely parallels the Hartian idea that a legal system is a union of primary and secondary rules. In what follows, I describe the main similarities between these two theories, as well as their key difference. MacCormick's notion of an informal order and the Hartian notion of social rule lie at the centre of these authors' respective theories of law. These notions are very similar; however, MacCormick's informal normative order includes an element that Hart's social rule lacks, which, as we shall see, constitutes the key difference between the two theories of law.

A. Social Rules and Informal Normative Orders

A Hartian social rule is a pattern of conduct that a relevant group participates in from the internal point of view.[3] To participate in a pattern of conduct from the internal point of view is to treat that pattern as a standard of behaviour that one and other members of one's group ought to follow. Hallmarks of this form of participation in a pattern of conduct are that the members generally conform to the pattern, they criticise others for deviating from the pattern, and they take deviation from such pattern to be a ground that justifies such criticism.

MacCormick's informal normative order is a species of normative order. According to him, a normative order is activity organised around a common normative opinion. This common normative opinion is a general sense among the relevant population that there are particular patterns of behaviour that everyone ought to follow.

> It is a 'normative order' because, or to the extent that, one can account for it by reference to the fact that actors are guiding what they do by reference to an opinion concerning what they and others ought to do. … The result is a kind of common action by mutually aware participants. Each one acts on the understanding (or the assumption, not necessarily particularly articulate) that each of the others is oriented towards more or less the same opinion concerning what everyone ought to do.[4]

MacCormick's preferred example of this kind of an order is the practice of queuing. On his account, this practice comprises a shared normative opinion that certain patterns of line-forming ought to be followed and behaviour conforming to this opinion.

MacCormick distinguishes between formal and informal normative orders. In an informal normative order, the shared normative opinion that a normative order relies upon may be vague in a number of ways. First, no one need have a fully articulated idea of the content of the required pattern of behaviour. Second, to the extent that the relevant group's members do articulate this content, there can be quite a bit of disagreement. In other words, the normative order only requires a threshold degree of

3 See HLA Hart, *The Concept of Law* (Oxford University Press, 2nd edn 1994) 55–58 for his seminal discussion of social rules.

4 *Institutions*, 16.

overlap of normative opinion. Third, no one is tasked with providing and enforcing a particular articulation of the content of the pattern of behaviour that all should follow.[5] As we shall see in more detail below, institutional normative orders eliminate much (but not all) of the vagueness endemic to informal normative orders.

So far, MacCormick's notion of an informal normative order looks very much like Hart's notion of a social rule. However, MacCormick includes an element that is not found in Hart's parallel account. In the context of a discussion of the informal normative order of queuing, MacCormick states:

> Assuming, then, that a practice of queuing is viable in a given context despite the absence of any explicit agreement on its meaning or its governing norm(s), it seems reasonable to suggest that there must be some quite deep community of underlying ideas, or some common guiding idea that makes the practice intelligible.[6]

MacCormick's idea seems to be that an informal normative order can only be viable within a group insofar as the group's members share a sense of the underlying idea of the order.[7] However, just as an informal normative order requires only overlapping rather than perfect agreement about the content of the patterns of behaviour that constitute the order, such an order only requires overlapping opinion about the underlying value of the order.[8]

In sum, MacCormick usefully distinguishes two elements of a normative order. First, an order comprises a cluster of behaviour patterns followed from the internal point of view (in Hart's terms) or from a commonly shared normative opinion (in MacCormick's terms). Second, and this is the feature that Hart's account of a social rule ignores, the participants act from an underlying sense of the value of the order. To take MacCormick's favoured examples, the participants in a practice of queuing follow and enforce a particular pattern of behaviour—say, first-come-first-served service—and they do so out of a sense of the value of following and enforcing such a pattern—say, the egalitarian notion that 'the provision of a service or opportunity that has to be taken up one-at-a-time should be done on the basis of a sequence that is universalistic rather than discriminatory on the ground of special personal or social characteristics'.[9]

As described above, the underlying idea of an informal normative order is a commonly shared opinion that the participants in the order have about the underlying value of the complex of patterns of behaviour that constitute the order. We can see the importance of including this notion in the account of a normative order most clearly when we query the content of an order's requirements. Consider again MacCormick's queuing practice. The pattern of behaviour that constitutes this practice is one-at-a-time, first-come-first-served provision of the relevant service. The participants in the practice treat this pattern as a rule that all ought to follow. Now, imagine that the practice participants encounter a late arrival to the queue who has some painful disability that makes waiting in the queue extremely difficult. Let us assume that the convergent pattern of behaviour that makes up the practice has been strictly one-at-a-time, first-come-first-served, but also that no such disabled persons have heretofore participated in the practice. What does the queuing practice require in the present case?

5 *Ibid*, 17–18.
6 *Ibid*, 17.
7 See also *ibid*, 18.
8 *Ibid*, 17–18.
9 *Ibid*, 17.

To determine an order's requirements, the Hartian does not look to the order's underlying idea. Rather, she focuses on the pattern of behaviour that the participants take as a standard to be followed. In the present case, we assume that the standard the participants have in mind is first-come-first-served. The Hartian might say one of two things about this case. She might say that because first-come-first-served is the standard that the participants in the order have in mind, the order requires the severely disabled person to wait. Alternatively, she might say that the order is indeterminate in this case, for the norm the participants have in mind does not encompass this particular fact pattern.[10]

MacCormick's account of an informal order includes the notion of a generally shared opinion about the underlying value of the practice. The requirements of the order are guided and sustained by this underlying value. Hence, depending on what this idea is with respect to the queuing practice, it might lead us to different conclusions about the requirements of the practice. For example, the underlying value of the practice might entail both the egalitarian notion that all should have equal access to a service and the further idea that this access must be more than mere formal access. If we stipulate further that our disabled person would have only formal but not actual access to the relevant service should she be required to wait in line, then we would likely conclude that the practice's underlying value requires that the disabled person be allowed to skip the queue.

In sum, focusing only on the commonly shared opinion of an order's constitutive patterns of behaviour may lead one to different conclusions about the order's requirements than would attending to both the commonly shared opinion about the order's constitutive patterns of behaviour and its underlying idea. Thus, MacCormick's pattern-plus approach to characterising an informal normative order differs from the Hartian pattern-only approach to characterising a social rule in an important way.

B. Institutional Normative Orders and Unions of Primary and Secondary Rules

MacCormick and the Hartian legal theorists make similar use of their parallel notions of informal normative orders and social rules in their respective theories of law. According to the Hartian, a complex of social rules determines the laws of a legal system. Similarly, an informal normative order determines the laws of MacCormick's legal system.

The Hartian describes the complex of social rules that determine the laws of a legal system as secondary rules.[11] For the Hartian, there are three basic kinds of secondary rule: rules of recognition, adjudication, and change. A rule of recognition establishes what rules are valid rules of the legal system. A rule of change establishes the procedures by which the rules of the legal system can be changed. A rule of adjudication empowers certain bodies to police and apply the rules of the system to decide cases.

Primary rules are the rules regulated by the rules of recognition, adjudication and change. For the most part, primary rules are not secondary rules of recognition, change or adjudication. For example, typical primary rules include rules specifying crimes, torts, property relations, and various legal facilities, such as those for contract, marriage, wills,

10 Though at first blush this seems a plausible thing for the Hartian to say, her basis for saying this is not clear. Without the notion of an underlying idea, it is hard to see how the facts of this case fall outside the first-come first-served norm.

11 See Hart (n 3) 94–99 for a discussion of primary and secondary rules.

and so on. However, some secondary rules are also primary rules.[12] That is, some secondary rules might be recognised, changed or adjudicated in accordance with yet other rules of recognition, adjudication or change.

In sum, to say that a set of ultimate secondary rules exists within a legal system is to say that its legal officials take the internal point of view with respect to the following patterns of behaviour: (1) recognising particular kinds of norms as norms of the legal system, (2) treating certain bodies as having the power to modify the legal system's norms, and (3) treating certain bodies as having the power to apply the legal system's norms to decide cases. Moreover, on the Hartian account, a legal system is a union of secondary rules and the primary rules that they regulate.

MacCormick describes a legal system as an institutional normative order. The two elements of this order parallel Hart's union of primary and secondary rules. The first element parallels the Hartian idea of a primary rule. MacCormick refers to this element as a rule.

> We have arrived at the idea of a rule, that is, an explicitly articulate norm (no longer a purely implicit one). The case here is one in which the explicit articulation is made by a person who has a position of authority. This can be either authority to decide how to apply first-tier norms, both implicit and explicit, or authority to lay down explicit norms that clarify or vary what was previously implicit and therefore also vague.[13]

Here, MacCormick contrasts the norms of an informal normative order with the rules of an institutional normative order. Whereas the norm that governs the informal social order need not be fully articulated by any participant in the order, by contrast, in a formal normative order, there is a practice of authorising some body to articulate more precisely the rules that govern the group. This practice is the second element of MacCormick's theory of law. This authorising practice is an informal normative order.[14] The participants in this order take themselves to be required to treat certain bodies as having the authority to vary, clarify and apply norms that govern a subject population. Let us call this practice a rule-defining informal normative order.

Note that MacCormick's institutional normative order looks much like Hart's union of primary rules and secondary rules.[15] According to Hart, a legal system entails the existence of a complex of social rules (comprising rules of recognition, change and adjudication) amongst legal officials that specify and apply the norms, the laws, that

12 I refer to the account of primary and secondary rules that I give here as Hartian rather than as Hart's because this account modifies Hart's distinction between primary and secondary rules. Hart characterises primary rules as strictly duty-imposing and secondary rules as strictly power-conferring (Hart (n 3) 81). However, this seems false: for example, rules relating to marriage or business partnerships are in large part power-conferring, yet they are paradigms of primary rules. Moreover, some secondary rules are duty-imposing. For example, the rule of recognition imposes a duty on judges to apply certain rules to decide cases. Also, though Hart seems to suggest that primary and secondary rules are mutually exclusive kinds of rules, it seems that some rules are both primary and secondary in the sense that they regulate some rules (so, they are secondary), yet they are regulated by other rules (so, they are also primary).

13 *Institutions*, 24–25.

14 '[I]t is of great importance to attend to the difference between informal or conventional norms on the one hand, and on the other hand the explicit or implicit rules that may be introduced and established, or developed and recognized, by persons holding some position of authority. In this regard, avoidance of an infinite regress requires us to suppose that, ultimately, some authority-conferring norms must be conventional rather than institutional' (*Institutions*, 31).

15 MacCormick might object to how closely I draw this parallel. He argues that 'the elegant simplicity of Hart's rule of recognition theory disqualifies it as a satisfactory account of law in all constitutional states' (*Institutions*, 56–57). On his view, Hart's view is unsatisfactory because it is incomplete. MacCormick's idea

govern a subject population. Similarly, MacCormick holds that a legal system entails the existence of an informal normative order that requires its participants to treat certain bodies as having the authority to vary, clarify and apply the rules, the laws, that govern a subject population.

Given that Hartian social rules and MacCormick's informal normative order play parallel roles in these respective theories of law, it should not be surprising that important differences between these parallel notions lead to important differences in these theories of law. As we have seen, social rules and informal normative orders differ in an important respect. On the Hartian account, the underlying idea of a social rule plays no role as an ultimate determinant of the order's requirements, whereas on MacCormick's account, such an underlying idea is an ultimate determinant of the order's requirements. Assuming that the underlying idea of the rule-defining informal normative order functions similarly (an assumption we will question below), then the ultimate determinant of what is and is not the law in MacCormick's legal system is the underlying idea of the legal system's rule-defining informal normative order. Because the Hartian does not attribute a similar role to the underlying idea of the complex of law-defining social rules (the secondary rules), the Hartian may disagree with MacCormick about what is and is not law in a particular legal system. As we shall see below, this feature of MacCormick's analysis of a legal system is key to the defence of his post-positivist conclusion that radically unjust norms cannot be law. Before turning to this defence, let us first consider the defence that Julie Dickson marshals on MacCormick's behalf and that MacCormick endorses.

II. MACCORMICK'S POST-POSITIVISM

'What is law?' is an ambiguous question. In one sense, it asks 'What is a legal system?'. In another, it queries the content of a legal system: What norms are the norms of the legal system? These questions are connected; for the answer to the former has implications for the answer to the latter. In the opening pages of *Institutions of Law*, MacCormick answers the first of these two questions in the way we have described above: law qua legal system is an institutional normative order, an order comprising rules (the laws) and an informal normative order that determines the rules of the order. This answer suggests a general answer to our second question about the content of a legal system: The laws of a legal system are those rules selected by the system's rule-defining informal normative order.

In the later pages of *Institutions of Law*, MacCormick places a surprising further constraint on what sorts of norms can be law:

> [I]f what is done cannot be accounted for under any possible conception of justice that could reasonably be adopted or advocated by a reasonable person willing to subject his or her beliefs to discursive scrutiny, then what is thus done by way of rules and practices of governance would not properly count as law.[16]

seems to be that the legal system of many law-states must be understood in terms of a complex of rules of recognition, adjudication and change that, in turn, are unified by a commitment to a constitutional norm that requires allegiance to this complex. If this is a difference between the Hartian's and MacCormick's views, it seems to be a difference in complexity rather than fundamentals. As far as I can see, this added complexity does not affect my argument here.

16 *Institutions*, 273.

This addition to his account of the content of law sets MacCormick at odds with the core legal positivist tenet that moral considerations are not ultimate determinants of what is and is not law.[17] Rather, MacCormick asserts that, necessarily, a rule specified by the relevant authoritative practices is not law unless it meets the moral minima of justice that he specifies. Aware of this apostasy, MacCormick refers to his theory as post-positivism.[18]

A question that MacCormick must answer asks why a norm specified by the system's rule-defining informal normative order doesn't count as law irrespective of whether it is radically unjust. MacCormick's argument for this additional moral constraint on what may count as law is not perfectly clear. However, Julie Dickson has offered a clarification of this argument:

> It is clear that radically unjust law does not succeed in realising a conception of justice. But is it MacCormick's view that it is impossible for those creating and administering such law even to make a claim to justice, and, as making such a claim is part of the nature of law, thus radically unjust law cannot properly be accounted as law?[19]

MacCormick answers Dickson's question here in the affirmative,[20] thus accepting Dickson's clarification of the argument for his post-positivist thesis. This argument has three basic parts:

(1) It is impossible for those creating and administering a radically unjust law even to make a claim to justice.

(2) Making a claim to justice is part of the nature of law.

(3) Therefore radically unjust law cannot be properly accounted as law.

Though Dickson's clarification of MacCormick's argument is initially plausible and admirably clear and concise, it should be rejected. The key problem lies with the argument's second premise, which holds that making a claim to justice is part of the nature of law, where the term 'law' seems to refer to a legal system.[21] Let us call this premise the essentialist premise.

The strategy behind this argument is to defend a conclusion about the substantive content of a legal system on the basis of premises about the fundamental nature of legal systems. For a number of reasons, MacCormick should not employ this strategy in support of the post-positivist thesis.

First, he should reject the essentialist premise and the argument that rests upon it because they conflict with his initial characterisation of a legal system. Throughout the quartet of books setting out his institutional theory of law, MacCormick describes a legal system as an institutional normative order, an order comprising rules and a rule-specifying informal normative order. MacCormick explicitly states that such a definition

17 See eg Matthew H Kramer, *In Defense of Legal Positivism* (Oxford University Press 2003) for this characterisation of legal positivism.

18 *Institutions*, 279.

19 Julie Dickson, 'Is Bad Law Still Law? Is Bad Law Really Law?' in Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (Ashgate, 2009) 178.

20 Neil MacCormick, 'Reply: Concluding for Institutionalism' in Del Mar and Bankowski, *ibid*, 199.

21 Note that this argument contains an ambiguity. In the second premise, the term 'law' seems to refer to a legal system, whereas in the conclusion it refers to an individual law. Thus, this argument threatens to commit a fallacy of equivocation or a fallacy of division. I set these worries aside here.

implies that there are many forms of law. He mentions churches, religions, charitable organisations, sporting associations, confederations like the European Union, and treaty-based inter-state entities as examples of distinct institutional normative orders.[22] As applied to this expansive theory of law, the essentialist premise strains credulity. It is implausible that a claim to justice is implicit in institutional normative orders of each of these forms; for in many such orders justice is irrelevant. Consider MacCormick's examples of churches and international sporting organisations. One might imagine a church unconcerned with matters of justice, but rather solely focused on picking out the correct doctrine and forms of organisation devoted to promoting and maintaining a particular religious doctrine. Similarly, we might imagine a sports organisation unconcerned with matters of justice, but rather focused on developing and maintaining rules that make for a good play of the relevant game. In sum, if, as our examples suggest, some institutional normative orders do not make claims to justice, then a claim to justice must not be part of the nature of institutional normative orders.

MacCormick must either reject the essentialist premise about the nature of law or limit the ecumenical reach of his theory of law. To my mind, MacCormick should not without very good reason limit his ecumenical account of a legal system because in its ecumenical form it, like Hart's parallel account, is a useful and illuminating concept; for it picks out a recurring response to a variety of social problems and challenges that stem from the uncertain, static and ineffective features of informal social orders.[23]

Perhaps MacCormick would recognise that a claim to justice is not part of the nature of law broadly conceived as an institutional normative order; for MacCormick on occasion limits his essentialist claim to the context of a law-state.[24] This suggests a modification to the essentialist thesis we have been considering. On this reading, the essentialist thesis holds that a claim to justice is part of the nature of the law of a law-state but does not hold that such a claim is part of the nature of law generally.

So modified, the essentialist does not necessarily support the post-positivist thesis that MacCormick advocates. To see this, consider what we could say about a radically unjust enactment of a law-state given the modified essentialist premise that radically unjust norms cannot be law of a law-state. We might say that the enactment is law, but, by virtue of its enactment, the legal system that enacted it has failed to live up to the ideal of a law-state; for upon enacting a radically unjust law the legal system fails to meet the requisite elements of a law-state but does not fail to be an institutional normative order. However, I take it that this is not the conclusion MacCormick is defending; rather, as suggested above, his claim is that the radically unjust norm is not law in these contexts.

In sum, we have two reasons to reject Dickson's clarification of MacCormick's argument for his post-positivist thesis. The first is that the argument Dickson proposes relies on an essentialist premise that conflicts with MacCormick's ecumenical theory of law. Second, if modified so that it does not conflict with MacCormick's wide-ranging theory of law, this premise fails to support MacCormick's post-positivist thesis. A further reason to reject Dickson's essentialist argument is that we should be suspicious of

22 *Institutions*, 2.

23 See Hart (n 3) 94–99, and *Institutions*, 24.

24 '[A] certain pretension to justice, that is, a purported aspiration to be achieving justice … is necessarily evinced in the very act of law-making in the context of a law-state' (*Institutions*, 276). By law-state, MacCormick seems to mean a state whose laws more or less meet the Fullerian criteria of the inner morality of law, including publicity, generality, constancy, consistency, clarity, and congruency. See eg MacCormick, *Questioning Sovereignty* (n 1) 44–48.

essentialist premises. An essentialist premise asserts that some feature is a necessary part or property of a kind. In the present case, the assertion is that a claim to justice is a necessary part of the law. It is incumbent on anyone offering such a premise to explain what must be the case for some feature to be a necessary part of a kind and what counts as evidence for such essentialist claims.[25] Moreover, it requires marshaling this evidence with respect to the feature and kind in question. Neither MacCormick nor Dickson has undertaken these tasks.

III. AN ALTERNATIVE ARGUMENT FOR THE POST-POSITIVIST THESIS

An alternative strategy for defending MacCormick's post-positivist thesis relies on MacCormick's conception of an underlying idea of an informal normative order. On MacCormick's account (as we have seen), the underlying idea of such an order is important because it is the ultimate determinant of the order's requirements. Accordingly, the underlying idea of the informal normative order that defines an institutional normative order's (a legal system's) laws is the ultimate determinant of the system's laws. This suggests a strategy for arguing for MacCormick's post-positivist thesis that the laws of a law-state cannot be radically unjust. Namely, the underlying idea of a law-state's rule-defining informal normative order requires that only reasonably just norms be treated as law. Note that on this account, not all legal systems' rule-defining informal normative orders refuse to recognise radically unjust norms as law. Only some do—those whose informal normative orders comprise underlying ideas that require the participants in the order not to recognise such norms as law.

A. The Underlying Idea of a Law-State

MacCormick makes a number of observations about the rule-defining practices of the law-state that suggest that it entails an underlying idea that requires its participants to reject radically unjust norms as law. Consider the following passage:

> For this reason, a certain pretension to justice, that is, a purported aspiration to be achieving justice is necessarily evinced in the very act of law-making in the context of a law-state. For here legislative deliberation is carried on in public and open to critical considerations by journalists, commentators, and, not least important, all citizens and especially those who are politically active. Law-making acts are acts which implicitly purport to advance some aspect of the common good consistently with the constraints of a reasonable conception of justice, or to advance some aspect of such a conception as itself a component element of the common good.[26]

[25] Julie Dickson, following Joseph Raz, holds that a goal of theorising about law is to identify the essential features of a legal system. 'In short, analytical jurisprudence is concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is. A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law.' Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001) 17. See her notes for relevant citations to Raz registering this same idea. Though this is a common methodological approach in jurisprudence, there are many questions about it that have not been adequately answered: What exactly does it mean to impute a fundamental nature to law? Does law have a nature? How might the theorist ascertain this nature? See Brian Leiter, *Naturalizing Jurisprudence* (Oxford University Press, 2007) particularly chs 4 and 6, for arguments that law has no essential nature.

[26] See *Institutions*, 276–77.

A number of points concerning this passage bear noting. First, MacCormick here holds that law-states characteristically comprise decision-making processes oriented toward realising justice and the common good. These processes include public fora, such as the press and other forms of public discourse, and institutionalised fora, such as legislatures, agencies and courts. Second, a key feature of these decision-making processes is that they subject deliberation about society's rules to public scrutiny and participation. A third element is implicit in this discussion: the decisions determining the law-state's laws are made in the context of disagreement about the requirements of justice and the common good. In sum, the law-state confronts the problem of determining rules that conduce to the common good in a way that meets the requirements of justice; however, it also confronts the problem of determining such rules in an appropriate way given that there is widespread disagreement about the requirements of the common good and justice.

In light of the foregoing, we can see how MacCormick might argue that the underlying idea of the law-state's rule-defining informal normative order requires that its members select only reasonably just norms as law. He could plausibly argue that though widespread disagreement about the common good and justice makes it impossible to select rules that everyone agrees serves these values, it is possible and incumbent to select rules that are reasonably just, meaning that such rules satisfy some reasonable conception of justice. To do this, the law-state requires that the laws be selected and enforced via decision-making processes subject to the right form of public scrutiny and participation. In sum, the underlying idea of the informal normative order at the heart of the law-state is to select certain decision-making bodies as authorised to make, modify and enforce the laws for the purpose of ensuring that the law-state's rules are reasonably just.

If the underlying value of the informal order that selects the laws of the law-state is to pick and apply reasonably just laws, this practice would defeat its own point were it to select and apply radically unjust law (a law that is not just under any reasonable conception of justice) as law. On the assumption that the order does not require its participants to act in ways that undermine the order's underlying value, the order would not require its participants to recognise or enforce a radically unjust norm as law. Thus, the laws of a law-state are in no case radically unjust.

B. A Complication: Description or Interpretation?

We can see, then, the outlines of a non-essentialist argument for the claim that the laws of the law-state are in no case radically unjust. However, there is a further complication to address. To see this complication, we must distinguish between descriptivist and interpretive conceptions of the underlying idea of an informal normative order.

In section I, I rehearsed MacCormick's original discussion of the underlying idea of an informal normative order. Recall that his favoured example in this discussion was the queuing practice. In this discussion, MacCormick seemed to be thinking of the queuing practice's underlying idea in terms of the descriptivist conception of this idea. That is, MacCormick sought to describe the commonly shared opinion of the queuing practice's underlying value. By contrast, the interpretive conception refers to the correct or best account (rather than the commonly shared opinion) of the order's underlying value. It instructs the participant to specify the requirements of the practice in terms of what she

takes to be a correct or the best[27] (rather than merely commonly perceived) value of the practice. I call this an interpretive conception of the underlying idea because ascertaining this value requires developing and specifying one's own understanding of the value of the order.

With this distinction in mind, we can make the following observation: it is very unlikely that selecting reasonably just laws is the underlying idea qua description of the law-state's rule-defining informal normative order; for it is unlikely that such is the commonly shared opinion of the participants in this order given the complexity and size of law-states and the concomitant diversity of opinion among its participants. Rather, the participants in this order most likely subscribe to myriad understandings of this idea. Moreover, many of the participants likely follow the patterns of behaviour that make up the order with little or no thought about the order's underlying idea.[28]

The interpretive conception of an underlying idea does not require such an unlikely consensus. Rather, it claims that the underlying idea of an order is the correct or best account of the order's value. We can take MacCormick's discussion of the law-state in this spirit. Though this premise requires further defence, it is initially plausible that selecting reasonably just laws is the best or correct account of the value of a law-state's rule-defining order.

From what I have argued so far, there is no reason to think that the underlying idea qua interpretation of the rule-defining normative order has any bearing on what the laws of a legal system are; for I have only argued above that the underlying idea of such an order qua description determines the requirements of the order and hence what the laws of the relevant legal system are. Thus, a key step in the present defence of MacCormick's post-positivism is to argue that the underlying idea qua interpretation similarly determines the requirements of the relevant normative order. I cannot fully defend this argument here, but I can offer a partial defence. To see this idea, consider an informal normative queuing order that differs slightly from the one described in section one above.

We might imagine that, descriptively speaking, the underlying idea of the queuing order is to give each participant in the order equal access to the relevant good or service. Unlike the relatively sophisticated community described above, this community does not distinguish between formal and actual access to a good. Thus, the underlying idea of the order is ambiguous between a commitment to equal formal access and equal actual access. Thus, it is indeterminate whether the order, descriptively speaking, requires that severely disabled persons seeking this service be allowed to skip the queue; for a commitment to equal formal access would entail no such requirement, whereas a commitment to equal actual access (arguably) would.

Imagine a participant who recognises that the general opinion about the order's underlying idea is equal access, generally understood, but who also holds that the best

27 My defence of the interpretive approach to an order's underlying idea and more generally my defence of MacCormick's post-positivism may rest on understanding 'best or correct value' in terms of a number of objectivist or quasi-objectivist metaethical views, such as non-naturalistic realism, naturalistic realism, and constructivism. I think they are compatible with cognitive non-descriptivism and various forms of expressivism too, but I cannot defend this claim here.

28 Cf Hart (n 3) 203: '[I]t is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude, or the mere wish to do as others do.'

or correct account of the underlying idea is actual equal access. What should she say about the requirements of the order? A natural thing for her to say in this case is that though the underlying idea of the order has not yet been fully worked out in the group's consensus and, hence, the requirements of the order have not been fully appreciated by the group, the underlying idea of the order is to promote actual equal access and that accordingly the order requires that the disabled person be allowed to skip the queue. This point generalises. A participant navigating the order should treat the correct or best account of its underlying idea as the star guiding her to the order's requirements rather than the common opinion of this idea. Moreover, a concomitant of taking this interpretive perspective is to assert that those who disagree with one's understanding of the order's underlying idea and its attendant requirements are mistaken. Note that when making this assertion, one would not be arguing about the prevailing opinion of the practices underlying idea and requirement; one does not take the descriptive perspective. Rather, one takes and defends a position with respect to the order's underlying idea and requirements.

In sum, my point here has not been to argue that the interpretive perspective is always the correct perspective to take with respect to an order's requirements. Rather, it has been to suggest that when navigating an order as a participant, such a perspective is appropriate and the descriptive perspective is not. The present defence of post-positivism applies this point to rule-defining informal normative orders; for persons participating in the rule-defining informative normative order, and hence determining what is and is not law in the legal system, the interpretive perspective is appropriate (and the descriptive perspective is not). From this perspective, the laws are those norms that conform to the best or correct account of the underlying value of the rule-defining informal normative order.

IV. CONCLUSION

At this point, it will be useful to summarise the non-essentialist argument that I have advanced in defence of MacCormick's post-positivist thesis that the laws of the law-state are in no case radically unjust. This argument has two basic parts. First, it holds that the underlying idea, interpretively speaking, of the law-state is to select laws that are reasonably just. Defending this premise requires describing in detail this informal normative order and explaining why the best interpretation of the value of such an order is to select only reasonably just norms as law. Second, this argument holds that the interpretive conception of the law-state's underlying idea is the ultimate determinant of the requirements of the law-state's rule-defining informal normative order, and hence, of what is and is not law in the law-state. Above, I have mounted a partial defence of each of these elements of the non-essentialist argument. Allow me to conclude with three observations about this argument.

First, the foregoing conclusion is not consistent with inclusive legal positivism, though one might be tempted to think that it is. A key positivist tenet holds that moral considerations are in no case the ultimate determinants of law in a legal system. The hard positivist subscribes to the narrower tenet that moral considerations are in no case determinants of a legal system's laws. By contrast, the inclusive positivist allows that moral considerations may determine a legal system's laws; however, she holds that such

considerations may in no case be ultimate determinants. According to inclusive positivism, moral considerations may determine what is law in a legal system only if there is a practice among the relevant actors of employing moral considerations to determine what law is. Thus, the practice (and not moral considerations) is the ultimate determinant of law in the system; for if legal officials did not employ moral considerations to determine the law as a matter of practice, such considerations would not be relevant to the determination of law in the legal system.

Is the present argument consistent with a form of inclusive positivism? One might think that it is. The present argument holds that the underlying idea of the law-state's rule-defining informal normative order requires its participants to refuse to select radically unjust norms as law. This suggests that if the rule-defining informal normative order were different, the underlying idea of the order might very well be different. It would appear, then, that the moral constraint against selecting radically unjust norms as law is not an ultimate determinant of the legal system's content; rather, this moral consideration's status as a determinant of the legal system's content is ultimately determined by a prior social fact—a particular rule-defining normative order. Despite all this, the present argument is not consistent with inclusive legal positivism. According to this argument, what is and is not law in the legal system turns on the best or correct account of the value of the legal system's rule-defining informal normative order. Moral considerations are key determinants of the best or correct account of this underlying value. Thus, moral considerations do play a foundational role in determining the underlying idea of the legal system's rule-defining normative order, and, hence, in determining the content of the legal system's laws. As such, they play a foundational law-determining role that inclusive legal positivism does not countenance.

Second, though the present argument rejects a key positivist tenet, it is also markedly different from extant natural law theories. A key feature of Finnis's natural law theory and Dworkin's interpretivist legal theory is that they conflate theories of legal systems and legal content much in the way that Dickson and MacCormick do in support of MacCormick's post-positivist thesis. Finnis and Dworkin argue that legal systems have essential features that have implications for the substantive content of the laws of such systems. On Finnis's view, the law's essential function is to provide authoritative directives that facilitate the realisation of the common good in a just manner. Thus, on Finnis's view, no norm counts as an instance of the focal meaning of law unless it is an authoritative directive that realises this essential function.[29] Similarly, Dworkin holds that the law's essential function is to justify state coercion. Moreover, he holds that given this essential function, we must interpret its laws in a way that casts them in the best light with respect to this function.[30] As we have seen, the present argument does not take this essentialist approach.

A further difference between the present argument and natural law and Dworkinian theory has to do with method. Dworkinian interpretivism and natural law theory hold that moral considerations are determinants of the correct theory of law qua legal system. One way to put this is that one of the criteria for a correct theory of law is that the theory describe a morally praiseworthy object. Many positivists, including Hart, reject this

29 See John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) ch 10. See also Dickson (n 19) for a helpful discussion of Finnis's approach.

30 See Ronald Dworkin, *Law's Empire* (Fontana Press, 1986) ch 2. See also Dickson (n 25) 98–102 for a valuable discussion of this aspect of Dworkin's theory.

approach.[31] Rather, these theorists take a descriptivist approach to law. As Hart puts it, they seek to provide a kind of descriptive explanation of legal phenomena that describes the phenomena in a way that does not rely on moral evaluation.[32] On the present account, a legal system is a union of rules and an informal normative order that selects these rules. This account is very similar to Hart's idea that law is a union of primary and secondary rules. Thus, it should come as no surprise that the present account is compatible with the positivist's methodological approach to theorising about law qua legal system. Rather, we can defend the present account of a legal system on the same kinds of grounds as those that the Hartian employs. Namely, the account describes an important recurrent form of social organisation, and it is largely consistent with the informed person's intuitions about legal system.[33] Contra natural law theory, moral considerations play no role in this approach to theorising about the law. This brings me to the third and final observation about the present argument.

The present argument's theory of a legal system does not mark its difference with positivism. On the contrary, it relies on a positivist account of a legal system. As we have seen, the present account differs from positivism with respect to its theory of how to determine the content of a legal system. Contra positivism, the present account holds that the participant in a legal system's rule-determining normative order should identify the legal system's laws in accordance with the best or correct account of the normative order's underlying idea. Thus, from such a participant's perspective, moral considerations are relevant to determining the content of a legal system. In sum, the present argument is not fully positivist for it rejects the key positivist tenet about how to determine legal content, and it is not fully natural law for it rejects the natural law methodological approach to theorising about legal systems. Thus, it is neither natural law nor positivism; it is post-positivism.

31 See Dickson (n 25) chs 1–4 for a discussion and rejection of this methodological approach characteristic of natural law.

32 See Hart (n 3) 240. 'My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law …'

33 *Ibid.*