1   A Hegelian Model of Legal Concept Determination

The Normative Fine Structure of the Judges' Chain Novel

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I. INDETERMINATENESS AND RATIONAL AUTHORITY

The specter of skepticism haunts the philosophy of law. (Or at least, there is a neighborhood of that bustling city demarcated by a dominating concern with that potentially destructive apparition.) The engagement of early modern philosophy with skepticism traced out an arc, from the *epistemological* skepticism from which Descartes recoiled to the more radical *semantic* skepticism that Kant was concerned to forestall. Where Descartes's inquiry into the conditions of the possibility of empirical knowledge could take for granted the subject's grasp of ideas that at least *purported* to represent how the objective world actually is, Kant dug deeper to investigate what is required to make intelligible the *contentfulness* of concepts in any sense that includes their objective representational purport. The sort of skepticism in the philosophy of law that I am concerned with here is also a specifically *semantic* skepticism. While there are legitimate epistemological questions about the practices and procedures by which various participants seek to know what the law is, the issues I am addressing are a matter rather of the intelligibility of the *determinate contentfulness* of the concepts that articulate laws. It is a mark of the distinctiveness of the realm of law that any semantic skeptical threat to the intelligibility of legal concepts as determinately contentful carries with it a collateral threat to the ontological status of legal statuses such as obligations and rights, which are instituted by laws.

    The reason the rather abstract issue of semantic skepticism about the determinateness of legal concepts matters is that the rational authority of legal judgments and legal argumentation derives from the capacity of laws articulated by those concepts to serve as *reasons* justifying those judgments. The significance of the *semantics* of legal concepts lies in the normative *pragmatic* difference it makes. The content of concepts affects what one is committed and entitled to by applying those concepts in judgment and argumentation. Some kinds of semantic indeterminateness of legal concepts would undercut the rational credentials of legal arguments and the normative authority of legal

judgments. It is essential to the normative bindingness of applications of legal concepts to particular cases that those applications can be *rationally* licensed by laws articulated by those concepts. Insofar as legal concepts are (whether for global, systematic reasons or local, contingent ones) semantically indeterminate in a way that precludes their functioning appropriately in *justifications* of legal decisions, one would be obliged to adopt a form of legal realism about those decisions that is indistinguishable from legal nihilism. For the idea that there is a difference between exercising normative authority by appeal to law and simply exercising power in its name depends on the possibility of distinguishing applications of the law that are rationally justifiable in virtue of the meanings of the concepts that articulate the law and those that are not. The question I address here is whether and how legal concepts might be understood as contentful in a way that supports such assessments of what legal principles formulated in terms of such concepts rationally permit and require.[1]

So one way of approaching the question of what sort of semantic skepticism must be avoided so as not to fall into legal nihilism about the rationality of legal argumentation and judgment concerning the application of legal concepts is to ask: what sort of determinateness of content is required for legal concepts to support assessments of what applications are and what are not *rationally justified* by principles expressed by the use of those concepts? One natural answer appeals to sharpness of the boundaries distinguishing what falls under the concepts and what does not. Here the operative ideal might be that cases specified in non-legal vocabulary (or in legal vocabulary that is in some sense at a different level from that being applied) should unambiguously determine the correct applicability of various legal concepts. Sharpness of boundaries is indeed a relevant issue, but I think we can see that if it is the rational justifiability of legal judgments and (so) the rational authority of legal norms (including those explicit in the form of laws or principles) that is potentially threatened by semantic indeterminateness, then we should look upstream of the issue of the definiteness of extension of legal concepts. What matters in the first instance is rather the definiteness of *inference*: of what considerations are *reasons* for and against judgments employing legal concepts.

Legal reasoning—like most medical or financial reasoning, and indeed, like almost all reasoning outside of mathematics and fundamental physics—is seldom formally, logically valid reasoning. The goodness of the inferences it relies on is rather *material* goodness. That is, the goodness of the reasoning essentially depends on the contents of the non-logical concepts it involves. Such reasoning can nonetheless be dispositive (and in that way like logical deduction). The inference from A is to the East of B, so B is to the West of A is a material inference, since it essentially depends on the contents of the non-logical concepts *East* and *West*. But it is dispositive nonetheless. But most legal reasoning—like most medical or financial reasoning—is probative rather than dispositive. This need not mean that it has the right shape to be properly understood in terms of the *weights* of various evidential considerations. Rather it means that almost all the reasons considered are *defeasible*. The fact that *p* might provide very good reason for the conclusion

that *q*. It need not follow that if in addition *r* is true, then *p&r* provides a good reason to conclude that *q*. In the medical case, the patient's high fever is, by itself, a good reason to suspect bacterial infection. Add the information that the patient was just administered the anesthetic halothane and the conclusion no longer follows. However if in addition the patient has a high white blood-cell count, the presence of infection again becomes likely—unless the patient is leukemic. And so on. This defeasibility means that material inferences, including the inferences that articulate legal concepts, unlike logical ones, are in general *non-monotonic*: a good inference can be turned into a bad one by adding further premises.

It is just here that semantic indeterminateness threatens the rational authority of legal reasoning and (so) judgment. The sort of indeterminateness of legal concepts that would pose such a threat is indeterminateness concerning which inferences to legal conclusions (conclusions making essential use of legal concepts) are materially good or bad ones, and which additional considerations would either defeat them or reinstate those inferences. (Although talk of sharpness of boundaries of legal concepts can capture some of this concern, the home of such extensional talk is monotonic, indefeasible reasoning, and it is not particularly helpful in the non-monotonic realm of non-formal reasoning.) Insofar as it is not settled by the contents of legal concepts what would count as reasons for and against judgments articulated by the use of those concepts, and what additional premises would infirm or support those inferences, that indeterminateness will rob legal judgments in the vicinity of the sort of normative authority that can only derive from applications of legal concepts being subject to appropriately constrained assessments of the goodness of *reasons* for or against them. The semantic indeterminateness that would matter most, then, would be that concerning the complex network of non-monotonic inferential and incompatibility relations that articulates the contents of legal concepts.

Why might one think that legal concepts and principles are semantically indeterminate in this sense? One line of thought that has been influential over the last half century or so is Wittgenstein's argument that, as I would put the point, norms explicit in the form of statable rules and principles are intelligible as underwriting determinate assessments of the correctness or incorrectness of various applications and inferences only against a background of implicit practical norms. Rules are not self-applying, and they do not explicitly *say* what follows from them or is incompatible with them. Consequences can be extracted from them only in the context of practices of distinguishing correct from incorrect inferences from those principles serving as premises. For any particular such inferential connection, or course, there might be another explicit rule that told us it was correct to draw that conclusion from the original principle. But the lesson of Lewis Carroll's fable "Achilles and the Tortoise" is that it does not make sense to think of *all* the inferences as codified in explicit principles. The regress of explicit interpretations must bottom out in something that is *not* an interpretation (in Wittgenstein's sense of substituting one formulation of a rule for another). One

cannot dispense with constellations of practices that implicitly treat some applications of concepts as correct and others as incorrect. Norms explicit in the form of rules or principles necessarily float on a supporting sea of norms implicit in practice. Call this the "regress of interpretations" point.

In the case of legal reasoning, it means at a minimum that statute law can be considered semantically determinate in the sense we are focusing on only with the help of a context of case law. Although it helps to be reminded by Wittgenstein of the ubiquity of this semantic phenomenon, legal practitioners hardly needed to be reminded of it in the case of legal concepts. No one with any actual experience with the law thinks you can figure out what it is by reading the statutes. Too many of the terms occurring there are applied according to standards that can only be gleaned from case law—and the rest appeal to terms whose home is elsewhere in the law, but whose standards of application also must be understood in connection with the relevant case law. In the Uniform Commercial Code in the U.S., for instance, some crucial terms (e.g., "commercial reasonableness") are left wholly undefined, some (e.g., "unconscionable contractual condition") are undefined, but implicitly appeal to the body of contract and common law more generally, while others (e.g., "buyer in ordinary course of business") are explicitly defined but the definitions evidently have such an "open texture" that one would be foolish indeed to assume one could settle how they would apply to many possible cases without consulting the case-law record of actual applications.

The upshot of these considerations is that the place to investigate the nature of the semantic determinateness of legal concepts is common law rather than statute law. For although one's first impression might be that things should be clearer where there are explicit legislated statutes to appeal to, in fact understanding the contents of the legal concepts appealed to in those statutes depends on norms that are implicit in the practice of the environment of case law in which they actually function. It is accordingly to that practical context that we must look to assess the nature and extent of the semantic determinateness of legal concepts, as it bears on our understanding of the rational authority of legal reasoning, and hence legal judgments. Common law is case law all the way down, so it provides a particularly useful test-bench.

II. INSTITUTION AND APPLICATION OF CONCEPTUAL NORMS

Why should the fact that legal norms explicit in the form of rules and principles depend on conceptual norms implicit in practices threaten the determinateness of those norms? Here is a story that depends on two principal arguments concerning the relation between practices of *instituting* conceptual norms and practices of *applying* them in judgment and reasoning. According to one model, these are distinct, sequential phases in a process requiring both. First, one fixes the contents or meanings of one's concepts,

and then one looks to see which applications of them are correct, given those meanings. The early modern tradition was structured around a version of this model: ideas just came with their contents (so the first stage was just presupposed), and it was up to the mind to apply them to find out what is true. As the heyday of ideas gave way to the heyday of words, the first stage could be thought of in terms of associating ideas with words. Inspired by artificial languages, Carnap promulgated such a two-phase model. Defining a *language* is associating meanings with expressions. Then, and only then, the language is available to formulate a *theory*, by finding out which expressions are made true by the world, given their meanings.

Quine objects to applying to *natural* languages this model appropriate to *artificial* languages. There is only one thing we do with natural languages: use them to reason and make claims. Doing that is *applying* meaningful expressions to the non-linguistic world. But it must also be intelligible as *instituting* the association of meanings with expressions. If we give up the "Myth of the Museum" idea of a realm of *naturally* or *intrinsically* meaningful items, we must conclude that all there is to make our expressions meaningful is the use we make of them in reasoning and judging. In place of the two-phase model, he proposes a unified model of language use, in which institution and application of what I have called "conceptual norms" (not, of course, Quine's preferred way of talking) are *aspects* of discursive practice, rather than *phases* of it. On his conception there is no way to assign responsibility for various aspects of our practice to the meanings we deploy rather than the facts we confront, and no principled distinction between change of meaning and change of belief. What Carnap thinks of as language (meaning) and what he thinks of as theory (the application of meaning in inference and assertion) necessarily develop hand in hand. What is real is just the reasoning and judging that are the use of language, and there is no prospect of somehow factoring out the contributions each aspect makes to that practice. One cannot make sense of the notion of instituting conceptual norms apart from the notion of applying them, and vice versa. *Institution* and *application* are reciprocally dependent conceptions, and reciprocally dependent processes. This is the first of the two arguments about the relations between the institution and the application of conceptual norms that I referred to above.

Replacing the two-phase model with the holistic two-aspect picture has consequences for how we think of the determinateness of the conceptual norms that are at once both instituted and applied in discursive practice. The second argument accordingly begins where the first leaves off. It raises doubts about the determinateness of conceptual norms that are instituted by any course of actual applications of concepts, even when supplemented by dispositions to apply them. It argues that the use of concepts must underdetermine their contents. This argument depends on what has come to be known as ˢthe rule following considerations,ˢ in the wake of what Kripke made of Wittgenstein's treatment in the *Philosophical Investigations*.[2] As I

would boil down this complex constellation of considerations, the argument that matters in the present context can be thought of as having five steps.

The first is the reminder that what the dual aspect picture tells us must be instituted in the course of applying concepts in reasoning and judgment is *norms* for the *assessment* of such applications as *correct* or *mistaken*. The idea of *conceptual content* is the idea of something that has an essentially *normative* significance. The contents of the concepts applied must be capable of supporting *justifications* of some applications, and must be the right sort of thing to be appealed to as *reasons* in rational assessments of the correctness of those applications, according to the norms articulated by those contents. A central criterion of adequacy of accounts of the relation between the fixing of conceptual contents and the practice of applying those contents in reasoning and judgment (a criterion of adequacy that is as pressing for two-phase models as for dual-aspect ones) is that the contents must be understood as providing norms for rational assessment of the correctness of applications of the concepts whose contents they are. It must be possible to make sense of a thinker as both i) applying a particular concept (rather than another, perhaps closely related one) and ii) doing so *incorrectly*, in the sense that in the situation in which the concept is applied, the content of the concept does not provide an adequate *reason* for applying it. Call this the "normativity of conceptual content" point. Notice that it will follow that a crucial dimension along which the *determinateness* of conceptual contents can be assessed is the determinateness of the norms for assessment of the correctness of applications that they induce. In fact this point was implicit in the argument of the previous section. For it asserts the connection between conceptual content and conceptual norms (for assessment of the rational correctness and justifiability of reasoning and judging) that is presupposed by the idea that a kind of semantic skepticism provides reasons for legal nihilism.

The second of the five steps in the argument is the observation that the normativity of conceptual content point raises what is at least a *prima facie* problem for the idea that it is the process or practice of applying concepts that determines their contents. This is that such an enterprise seems doomed to commit what in reflections on ethical norms is called the "naturalistic fallacy." For acknowledgment of the normative significance of conceptual contents means that understanding such contents to be conferred by the process of applying concepts requires a transition from 'is' to 'ought'. Somehow, what practitioners *actually* do—accepting some arguments and judgments articulated by a given constellation of concepts, and rejecting others—must be intelligible as settling what those practitioners *ought* to do—which such applications would be *correct*, in the sense of rationally justifiable by appeal to the contents of those concepts (in the context of the facts), and which not. At this second step, as I am construing the argument, one simply points to a feature of the challenge faced by dual-aspect approaches. A theory must be offered of how norms can be instituted by practices of applying concepts.

At the third step, an argument is offered that the challenge to accounts of the determination of conceptual content by application of concepts that

is raised by acknowledging the essentially normative significance of conceptual content for assessment of the correctness of such application cannot be met. It turns on the observation that any actual course of prior applications of a concept can comprise at most a finite number of occasions on which practitioners actually apply or withhold application of the concept. Yet those applications are being asked to settle the correctness of a potentially infinite set of further, novel applications. The trouble is that there will always be many different ways of extending the prior practice to those future potential cases, many different ways of "going on in the same way," to use Wittgenstein's phrase. (This is the point at which Kripke and Wittgenstein introduce as an analogy the fact that finite sequences of numbers can be diagnosed as exhibiting an infinite number of regularities, each of which would countenance a different continuation of the sequence.) Any finite number of cases are similar to one another in an infinite number of respects (and dissimilar to one another in an infinite number of respects). What is it about the actual cases that should be understood as *privileging* some of those respects of similarity, as those that should be projected to govern assessments of novel cases? *Privileging* is itself a normative notion. It seems that the finite number of actual applications provides no resources for underwriting this normative discrimination among their actual shared features of some uniquely endorsed. We can call this the "gerrymandering point."

The final two steps in the five-step argument point to fatal flaws afflicting two general ways one might seek to respond to the argument that culminates in the gerrymandering point. Each runs afoul of considerations already put in place earlier in the argument. The first considers the possibility of privileging some projectable respects of similarity of actual applications (hence some ways of "going on in the same way") by explicitly *saying* which are to be projected. This possibility might be thought to be particularly promising in the special case of legal concepts, since judges often accompany their decisions as to whether legal concepts do or do not apply to particular sets of facts presented by actual cases with explicit *rationales*. These are statements of rules or principles that they are treating as projectable features of prior precedent. The trouble with this line of thought is that in the context of worries about the intelligibility of actual applications instituting determinate conceptual norms it collides with the regress of interpretations point. For that point was that what one explicitly *says*, rules or principles one endorses, can be understood as laying down determinate normative constraints only in virtue of a background of implicit practical abilities to distinguish correct from incorrect applications of the concepts used to state the rule or principle. What is at issue is just how the latter can be understood as working. So a response along these lines would be circular.

The final step in the argument addresses a different approach. Since appeal to actual applications is too weak (failing to satisfy the criterion of adequacy of determining norms), and appeal to rules is too strong (helping itself to explanatory resources that are ruled out of bounds by the parameters of the problem), this strategy looks to something intermediate in

strength: *dispositions* to apply the concepts in question. On the one hand, they reach beyond actual past applications, governing merely virtual, possible future applications as well. On the other hand, they too are implicit in practical know-how, not appealing to explicit knowing-that of the kind expressed in conceptually articulated principles and rules. The trouble with such a dispositional approach is that it fails to satisfy the normativity of content criterion of adequacy. We would need a dispositional understanding that supports assessments of correctness, and makes intelligible the notion of a *mistake*. But dispositions (like actual applications) just are what they are. They do not err. No one can fail to respond as they are disposed to respond. On a dispositional account, as Wittgenstein says, "[W]hatever seems right to me is right." And that means that the notion of what is right goes missing. Here one might respond that one *could* make sense of the notion of an error on a dispositional account, if in some case one was disposed to respond in a way that was *irregular* with respect to one's past dispositions—if one's dispositions had *changed*. Apart from the difficulty of individuating dispositions, such a response just puts us back into the regularism view, whose difficulties were addressed at the second stage. For any way one is disposed to respond continues *some* regularity that can be discerned in earlier dispositions.

In sum, *regularist* positions, which invoke matter-of-factual regularities or dispositions, fail to institute genuinely constraining *norms*. *Regulist* positions, which invoke explicit rules or principles, something that can be *said* as opposed to just *done*, end up being circular through failure to appreciate the regress of interpretations point about how normative knowing that depends on normative knowing how.

Of course, all this is vastly controversial. Every step in the complex argument I have just sketched can be denied, from the need to supplant a two-stage sequential model with a two-aspect holistic one through the criticisms of regulist and regularist ways of trying to make the latter strategy work. And a chain of argumentation is only as strong as its weakest link. So if one is suspicious of any of these moves, one might feel entitled to be unworried by the sort of semantic skepticism they justify, and so unthreatened by the sort of legal nihilism it entails. Even those who find themselves in this fortunate position, however, should be made at least slightly uneasy by the reflection that finding holes in the complex skeptical line of argumentation falls far short of making available a positive account of the institution-by-application of conceptual norms.

III. RECIPROCAL RECOGNITION MODEL OF
THE SOCIAL INSTITUTION OF NORMS

I began by characterizing a theoretical worry in the philosophy of law about the rational justifiability of legal reasoning and judgment that is rooted in a distinctive kind of semantic skepticism. I have further rehearsed a line of

argument in the philosophy of language supporting that kind of semantic skepticism. That argument is familiar in its overall shape, even though the particular ways I have formulated the subsidiary points and assembled them into a whole are at least as contentious as the validity of the constituent claims themselves. It starts from an appreciation of the normative significance the contents of *any* concept must have for the justification and assessment of the correctness of the use of that concept. This argument is not restricted to legal or, more generally, normative concepts—though of course it applies to them as well. There is another argument, however, that is skeptical specifically about the contents of normative concepts—and so legal ones.

Though it is abroad in many versions, Gilbert Harman's development of it is, characteristically, particularly clear and forceful.[3] It concerns the relation between norms and normative attitudes. To avoid possible confusion, I will talk about normative *statuses*, such as being responsible or committed, having authority or being entitled, and normative attitudes of practically *taking* or *treating* someone (whether implicitly or explicitly) as having such a status. Put in these terms (and abstracting away from his focus on specifically *moral* normativity), Harman claims that there is a crucial distinction between the way normative concepts are related to the normative attitudes one expresses in applying those concepts, and the way ordinary empirical concepts are related to the attitudes one expresses in applying them. In the latter case, for concepts such as *mass* and *cat*, the best explanation for our attitudes towards mass and cats is that there really are such things as mass and cats. In the case of normative attitudes, the best explanation for our attitudes—for taking or treating people as committed or entitled—need appeal only to other normative attitudes. We need not postulate the existence of normative statuses of commitment and entitlement that are being acknowledged in adopting our normative attitudes. All we need to countenance is normative attitudes, not normative statuses. It is normative attitudes all the way down. Harman's argument depends on his specific methodological commitment to the claim that as theorists, we should only undertake ontological commitments to what figures in our best explanations of the use of our concepts. But more relaxed versions of this argument are available, which depend only on claiming that we can fully understand the etiology of normative attitudes by appealing only to other normative attitudes—as one might think one could explain someone's belief in God by appeal only to other people's (say, parents' and teachers') belief in God. At this level of generality, a form of this argument lies at the core of legal realism's belief in the explanatory sufficiency of contingent facts—caricatured as epitomized by "what the judge had for breakfast"—to explain assessments of legal reasoning and decision-making.

In the rest of this essay, I present a way of thinking about the determinate contentfulness of concepts that is a constructive alternative both to this Harmanian skepticism about the applicability of normative concepts in particular, rooted in a reductionism that sees only normative attitudes and no

real normative statuses for them to be attitudes towards, and to the skeptical attitude about the determinate contentfulness of concepts generally that is argued for on the basis of difficulties understanding the normative practical significance of applying those concepts. The alternative model I will elaborate is due to Hegel. This is perhaps a surprising place to look for enlightenment on these issues, since, so far as I am aware, Hegel has not been brought to bear on the broader issues in the philosophy of language, nor is this the place where his name comes up in the philosophy of law. Nonetheless, Hegel's account of the institution of genuine normative statuses by normative attitudes that have the right social, reciprocal recognitive structure is a constructive answer to Harmanian skepticism about normativity in general. It is also the basis for a response to the specifically *conceptual* normativity addressed in the previous section. That story will be told in section IV. The final section of this essay puts in place the third part of Hegel's constructive story, as it bears on the issues we have identified.

Hegel introduces a model that is at once a non-reductive way of bridging the 'is'/'ought' gap that the rhetoric of the "naturalistic fallacy" threatens to open up and a response to Harmanian skepticism about the reality of norms. It is a structure whereby genuine normative *statuses* are instituted by a suitable constellation of actual normative *attitudes*. This is the structure of reciprocal authority and responsibility that he talks about under the rubric of "mutual recognition." The normative status with which Hegel introduces this idea is that of being a *self*—in the normative sense of a subject of normative statuses, one who can undertake responsibilities and exercise authority. The fundamental normative attitude he calls "recognition" [*Anerkennung*]. Recognizing someone is taking or treating that person in practice as a normative subject, able to undertake responsibilities and exercise authority— paradigmatically by making judgments and acting intentionally.

The basic idea is that normative statuses are *social* statuses. This is Hegel's version of the Enlightenment thought that normative statuses such as responsibility and authority are products of human activity. The world did not come with such normative statuses in it. It required us practically to take or treat each other *as* responsible and authoritative for us to *be* responsible and authoritative. The way Hegel develops his social approach to normativity is this. It is necessary and sufficient to be a normative subject that one is recognized as such by those one recognizes as such. When recognitive attitudes are in this way reciprocal, they institute a genuine normative status: selfhood. To be a self is to be taken to be one by those one takes to be selves. Recognizing others is attributing to them a certain kind of authority: the authority *constitutively* to recognize others. If they exercise that authority by recognizing the original recognizer, that recognizer is thereby socially constituted as a normative self. Being able to *be* responsible (a normative status) depends on others *holding* one responsible (a normative attitude). Whose attitudes matter for someone's status depend on whom *that* person recognizes.

As this summary suggests, reciprocal recognition as the condition of normative attitudes instituting normative statuses invokes quite a distinctive constellation of authority and responsibility. One way to see that is to think about a less global normative status: being a good chess player. The reciprocal recognition model counsels us to look at the status instituted when someone is recognized a good chess player by those he recognizes as good chess players. The candidate has full authority over his own attitudes, hence over whom he recognizes as good chess players. But in adopting such an attitude, in recognizing some actual collection of chess players as good ones, in the sense in which he aspires to be a good one, the candidate cedes to them a corresponding authority: authority to constitute him as a good chess player in that sense by recognizing him, or not. The candidate can make this recognition easy to earn. If he recognizes just anyone who can play a legal game as a good chess player, it will not be hard to be recognized in turn as meeting that standard. But then he is only constituted as having the normative status of a good chess player in this very weak sense. If instead he recognizes only formidable club players, or only masters, it will be correspondingly difficult to achieve their reciprocal recognition. On the other hand, if he succeeds in doing so, he is constituted as a good chess player in a much more demanding sense, and achieves a much more valuable normative status. One cannot constitute oneself as a good chess player without the cooperation of those one recognizes as having that status. (Compare: being a good writer, or a good philosopher.)[4]

On this account, it is up to each agent whether to undertake a commitment or claim an entitlement. But what the status that is instituted determinately *is* is up to those one has made oneself responsible to by recognizing them in this regard. The determinate content of the commitment undertaken is not in the same sense up to the one who undertakes it. For authority to determine its content has been ceded to those the agent has recognized as entitled to hold her responsible. Thus it is up to me whether, for a consideration, I agree to return the property to its original owner. It is *not* then up to me whether what I have done counts as complete performance of my duties under the contract. Although normative statuses of this kind are instituted by (reciprocal recognitive) attitudes, the social division of labor between the mutually recognized and recognizing parties ensures that it is not the case that "whatever seems right, is right." The status is not determined by the attitudes of any one party. In the next section, we will see how this fact bears on our understanding of the determinate contentfulness of the normative statuses that are socially instituted by mutual recognition.

The recognitive model is a broadly naturalistic one, at least in the sense that the advent of this kind of norms in a natural world is not mysterious. This account of what normative statuses are exhibits them as products of matter-of-factual normative attitudes that have the right social structure. In one sense, such an understanding of normative statuses is congenial to the Harman line of thought. For in one sense, it is "attitudes all the way

down." Understanding normative attitudes is sufficient to understand normative statuses. But on the recognitive account, we do not need to deny that in addition to normative attitudes, there are the normative statuses they institute. There is something normative attitudes are attitudes *towards*. For Harman, officially the question is whether the "best explanation" of our normative attitudes countenances the statuses that (when reciprocal recognition is achieved) they institute. Unless it is further filled in, the very general concept of *best explanation* will not decide this issue. This is a point we will return to.

IV. HISTORICAL VERSION OF THE RECOGNITIVE STRUCTURE OF RECIPROCAL AUTHORITY AND RESPONSIBILITY

Hegel also has a constructive response to Kripkensteinean worries about the intelligibility of the idea that *determinate* conceptual norms can be determined by applications of concepts. I introduced this issue as the product of two ideas: the normative character of conceptual content, and the transition from a two-stage story, according to which conceptual norms are first instituted, and then in a separate, subsequent stage applied, to a two-aspect story, according to which the process or practice of using concepts must be intelligible as at once instituting and applying conceptual norms. The difficulty Kripke's Wittgenstein raises is that it seems that the actual use of concepts radically underdetermines the norms that articulate their content.

Kant was the first to appreciate the normative character of concepts, the first to understand them as *rules* for judging and acting. This appreciation was one facet of his reconstrual of judgments and intentional actions as distinguished from non-discursive acts in the first instance by their status as things the agent is in a distinctive way *responsible* for, as expressions of *commitments*, as exercises of *authority*. (In the twentieth century, we had to relearn this lesson about the normativity of intentionality, principally from Wittgenstein and Sellars.) In a way that along this dimension parallels the progression from Carnap's two-stage to Quine's two-aspect account of the institution and application of conceptual norms, Hegel seeks to replace Kant's two-stage model with a more pragmatic, holistic, two-aspect model. (I am not going to argue for that controversial historical claim here, mentioning it only because appreciating that something along those lines at least *might* be true should make it less surprising that Hegel has something to teach us on this score.)

The key to Hegel's constructive response to the challenge of understanding how and in what sense the practice of actually applying concepts can at the same time be the practice that institutes determinate norms for doing so is that his account is not only *social* but *historical*. His fundamental reciprocal recognition model of the constellation of authority and responsibility by which normative attitudes institute genuine normative statuses

has a *diachronic* species, in which the recognitive community that institutes conceptual norms takes the distinctive form of a *tradition*. Besides the social reciprocal recognition account, Hegel's account of determinateness crucially depends upon the historical dimension of concept use.[5] It is this fact that makes his account of concept-use generally of particular significance when applied to the understanding of the process of determination of *legal* concepts.

Ronald Dworkin famously suggested modeling the development of laws and the legal concepts that articulate them to the writing of a "chain novel."[6] Each judge inherits a more or less settled textual corpus comprising earlier applications and interpretations of some set of concepts and principles, and is obliged to extend it. Here is how Dworkin puts what he sees as common to the task of the judge and of the author of the chain novel *in medias res*:

> Your assignment is to make of the text the best it can be, and you will therefore choose the interpretation you believe makes the work more significant or otherwise better.[7]

It is clear that this model is getting at something important about case law (and about common law, which is case law all the way down). In the 25 years since its original promulgation, I think we have also come to see some of its drawbacks. For one thing, it is not clear how helpful it is to understand the fixed end of the analogy with the development of law in terms of a chain *novel*. The dimensions along which it is appropriate to assess literary works and legal traditions are too disparate and divergent. More significantly with respect to our concerns, such formulations as the one just cited are hard to argue with precisely because of their extreme generality. *Many* senses of "better" will be irrelevant to assessing judicial interpretations. The model gets a grip only insofar as one can say something systematic about what determines the relative importance of the others. It is those judgments that carry whatever practical force the model brings to bear. The model itself provides no more than a portmanteau formulation; it sketches only the *form* of an account. Fill in the relevant respects of assessment of "better" extensions of legal traditions and their respective weights, or more generally interactions (in the non-monotonic inferential structure being developed) and one would have an actual account. In this respect, Dworkin's "law as integrity" formula for this sort of practical reasoning is like Harman's "inference to best explanation" formula for theoretical reason. Important points are being made, but what is offered is hardly a *theory*—it is more like a set of reminders of questions to ask.

My suggestion is that the diachronic, historical species of Hegel's generic reciprocal recognition model of the institution of normative statuses by normative attitudes specifies a substantive structure of authority and responsibility that fills in the normative fine structure gestured at but not supplied by Dworkin's chain novel metaphor. Hegel's account as I understand it is

aimed at discursive practice and the development of determinate conceptual contents generally. It becomes particularly pointed and significant when applied to the explicit, self-conscious, institutionalized context in which legal concepts develop.

We might start with the observation that we want to say both that judges are responsible *for* the law, and that judges are responsible *to* the law. Hegel's account of the reciprocal recognitive structure of the process by which legal concepts and principles are determined provides a way of understanding these symmetric claims according to which we can be entitled to both. The sense in which judges are responsible for case and (so) common law is what lies behind calling it "judge-made law." There is nothing to such law that is not the cumulative result of judicial decisions to apply or not to apply the concepts (e.g., "strict liability") in particular cases. In selecting the prior cases she treats as precedential, and the features of the facts she takes as salient in making the decision and providing a rationale for it, the judge both further determines (in the sense of sharpening) the content of the legal concepts involved, and provides precedents and rationales to which future judges are at least potentially responsible. In this way the deciding judge exercises authority over both the content of the legal concepts being applied and, thereby, over the decisions of future judges.

That description shows that there is also a sense in which any deciding judge is responsible *to* the content of the concept whose applicability is being assessed, which she inherits from the tradition. For she is bound by the authority of the prior judges, whose decisions are available to provide precedents, considerations, and rationales. For the justification of a judge's decision can appeal only to the authority of prior decisions, and so to the conceptual content those decisions have conferred on or discovered in the legal term in question. The current judge is responsible to the conceptual content that articulates a legal norm, *by* being responsible to the *attitudes* of previous judges, as reflected in their actual decisions. *Stare decesis*, the authority of precedent, is a matter of how actual normative attitudes determine subsequent normative statuses.

In offering a rationale, a justification for a decision, the judge presents what is in effect a rational reconstruction of the tradition that makes it visible as authoritative insofar as, so presented, the tradition at once *determines* the conceptual content one is adjudicating the application of and *reveals* what that content is, and so how the current question of applicability ought to be decided. It is a *reconstruction* because some prior decisions are treated practically as irrelevant, non-precedential, or incorrect. It is a *rational* reconstruction insofar as there is a standing obligation that the prior applications that are embraced by a rationale as precedential and salient must fit together with the new commitment that is the decision being made. The rationale is an account delineating the boundaries of the authority of the conceptual content associated with a legal term, determined by the attitudes of the prior judges' precedential decisions and rationales, to which the current judge is

responsible, in the sense that that content sets the standards for normative assessments of the correctness of that judge's decision.

This sort of practice or process of sequential rational integration of new commitments into a constellation of prior commitments institutes normative statuses of authority and responsibility according to the model of reciprocal recognition. Each deciding judge recognizes the authority of past decisions (and so of the contents they both acknowledge and help institute) over the assessment of the correctness of the decision being made. That judge also exercises authority over future judges, who are constrained by that judge's decisions, insofar as they are precedential. But the currently deciding judge is also responsible to (and held responsible by) future judges, who can (by their practical attitudes) either take the current decision (and rationale) to be correct and precedential, or not. For the current judge actually to exercise the authority the decision implicitly petitions for recognition of, it must be recognized by future judges. And if that precedential authority *is* recognized by the later judges, then it is real (a normative status has been instituted by those attitudes), according to the model of reciprocal recognition. Both in acknowledging and in claiming the authority of precedent, the judge is implicitly acknowledging the authority also of future judges, who administer that authority. For they assess whether the new commitment has been appropriately integrated with prior commitments, and decide on that basis whether to acknowledge it as authoritative, as normatively constraining future commitments in that they must be integrated with it. So each judge is recognized (implicitly) as authoritative both by prior judges (the ones whose decisions are being assessed as precedential or not) and (explicitly) by future judges (the ones who assess the current decision as authoritative, that is precedential, or not). And each judge recognizes the authority both of prior judges (to whose precedential decisions the judge is responsible) and of future judges (on whose assessments of the extent to which the present judge has fulfilled his responsibility to the decisions of prior judges the present judge's authority depends). Because the future stands to the present as the present does to the past, and there is no final authority, every judge is symmetrically recognized and recognizing.

V. UNDERSTANDING THE DETERMINATENESS OF CONCEPTUAL NORMS: FROM *VERSTAND* TO *VERNUNFT*

In making a decision, a judge undertakes a commitment. The model of reciprocal recognition explains how that attitude, together with the attitudes of others, institutes normative statuses of authority and responsibility intelligible as commitment. What we now need to see is how the fact that the sequences of successive rational integration of new commitments with previous ones exhibits this historical structure of reciprocal recognition makes sense *also* of a dimension of symmetric authority over and responsibility

to *determinate conceptual contents* for *both* specific recognitive attitudes of attributing and acknowledging commitments *and* the normative statuses those attitudes institute. One of Hegel's key ideas, as I read him, is that in order to understand how the historical process of *applying* determinately contentful concepts to undertake discursive commitments (taking responsibility for those commitments by rationally integrating them with others one has already undertaken) can also be the process of *determining* the contents of those concepts, we need a new notion of *determinateness*.

What we might call "*Fregean* determinateness" is a matter of sharp, complete boundaries. For Frege, each concept must be determinate in the sense that it must be semantically settled for every object, definitively and in advance of applying the concept epistemically, whether the object does or does not fall under the concept. No objects either both do and do not, or neither do nor do not, fall under it. I'll talk about this representational dimension of conceptual content in the next section. The dimension of conceptual content that is made intelligible in the first instance by the synthetic activity of rational integration, we have seen, is articulated by relations of material inferential consequence and incompatibility relations. What corresponds to Fregean determinateness for conceptual contents specified in terms of these relations is that for every potential material inference in which any judgment that results from applying the concept figures as a premise or conclusion, it is definitively settled semantically whether or not it is a good inference, and similarly for the relations of material incompatibility that hold between those judgments and any others. Here the sharp, complete boundaries that must be semantically settled definitively are those around the sets of materially good inferences and materially incompatible sets of sentences.

Hegel associates the demand for conceptual contents that are definite in this sense with the early modern tradition that culminates in Kant. It is the central element in the metaconceptual framework Hegel calls 'Verstand'. He proposes to replace this static way of thinking about the determinateness of *relations* that articulate conceptual contents with a dynamic account of the *process* of determin*ing* those contents, which he calls 'Vernunft'. Roughly, he thinks that *Verstand* is what you get if you assume that those applying concepts always already have available the contents that would result from *completing* the process of determining those contents by sequential rational integration exhibiting the historical structure of reciprocal recognitive authority and responsibility. He is very much aware of the *openness* of the use of expressions that is the practice at once of applying concepts in judgment and determining the content of the concepts those locutions express. This is the sense in which prior use does *not* close off future possibilities of development by settling in advance a unique correct answer to the question of whether a particular concept applies in a new set of circumstances. The new circumstances will always resemble any prior, settled case in an infinite number of respects, and differ from it in an infinite number of respects. There is genuine room for choice on the part of the current judge or judger,

depending on which prior commitments are taken as precedential and which respects of similarity and difference are emphasized. After all, in the absence of any prior governing statute or definition, all there is to the content of the concept in question is what has been put into it by the applications of it that have actually been endorsed or rejected. Prior uses do not determine the correctness of all possible future applications of a concept "like rails laid out to infinity," as Wittgenstein would later put the point.

So is Hegel's idea that we can take conceptual contents that turn out to be *in*determinate in the Kant-Frege sense—because no amount of prior use settles once and for all and in principle which of all possible future uses are correct—and just *call* them 'determinate', in his new sense? He does in the end want to do that, but not in the immediate, stipulative, ultimately irresponsible way that would have, as Russell says, "all the advantages of theft over honest toil." Instead, he takes on the hard work needed to entitle himself to a move of this shape. For, first, he wants us to step back and ask a more basic question: what *kind of fact* is it that prior uses constrain, but do not settle, in the Kant-Frege sense, how would be correct to go on? His answer is that what is correct is a matter of a normative status, of what one is and isn't committed or entitled to, responsible for, and what would authorize such commitments. On his account, that kind of fact is a social-recognitive fact—one, further, that is instituted by a process with the distinctive *historical* version of the structure of reciprocal recognition. Second, he uses that structure to fill in the details of a new notion of determinateness, in which the Kantian *Verstand* conception takes its place as merely one recognitive moment in a larger whole.

For that to happen, the Kantian account of rational integration of new commitments into a synthetic unity with prior commitments must also be recontextualized as merely one aspect of a more general rational integrative-synthetic activity. For the original account appeals to fixed, definite relations of material inferential consequence and incompatibility, construed as given, settled, and determinate according to the *Verstand* framework. What Hegel adds is a *retrospective* notion of *rationally reconstructing* the process that led to the commitments currently being integrated (not just the new one, but all the prior ones that are taken as precedential for it, too). This is a kind of genealogical justification or vindication of those commitments, showing why previous judgments were correct in the light of still earlier ones—and in a different sense, also in the light of subsequent ones. Hegel calls this process "Erinnerung," or *recollection*.

A good example of it is the sort of Whiggish, triumphalist, rationally reconstructed history of their disciplines to be found in old-fashioned science and mathematics textbooks. Such a story supplements an account of what we now know with an account of how we found it out. What from the point of view of our current commitments appear retrospectively as having been wrong turns, dead ends, superseded theories, and degenerating research programs are ignored—however promising they seemed at the time, however

good the reasons for that were, and however much effort was devoted to them. What is picked out and presented instead is a trajectory of cumulative, unbroken progress—of discoveries that have stood the test of time. It is a story about how we found out what the real boundaries of our current concepts are, hence how they ought properly to be applied, by finding out what really follows from what and what is really incompatible with what. Hegel thinks that our activity of telling stories like this is reason's march through history. It is the way we retrospectively *make* our applications of concepts (have been) *rational*, in the sense of responsive to discursive norms, by finding a way concretely to *take* them to be rational, in that sense. For in rationally reconstructing the tradition concept users retrospectively discern conceptual norms that are determinately contentful in the Kantian *Verstand* sense, as having been in play all along, with different aspects of their boundaries (relations of material consequence and incompatibility) discovered by correct (precedential) applications at various critical junctures.

The new notion of *determinateness* Hegel proposes is an essentially *temporally perspectival* one. Looked at *retro*spectively, the process of *determining* conceptual contents (and of course at the same time the correct applications of them) by applying them appears as a theoretical, epistemic task. One is "determining" the conceptual contents in the sense of *finding out* which are the right ones, what norms really govern the process (and so should be used to assess the correctness of applications of the concepts in question), that is, finding out what really follows from what and what is really incompatible with what. A *recollective reconstruction* of the tradition culminating in the current set of conceptual commitments-and-contents shows, from the point of view of that set of commitments-and-concepts, taken as correct, how we gradually, step by step, came to acknowledge (in our attitudes) the norms (normative statuses such as commitments) that all along implicitly governed our practices—for instance, what we were really, whether we knew it or not, committed to about the melting point of a piece of metal when we applied the concept *copper* to it. From this point of view, the contents of our concepts have always been perfectly determinate in the Kant-Frege *Verstand* sense, though we didn't always know what they were.

Looked at *pro*spectively, the process of *determining* conceptual concepts by applying them appears as a practical, constructive semantic task. By applying concepts to novel particulars one is "determining" the conceptual contents in the sense of *making it* the case that some applications are correct, by *taking it* to be the case that they are. One is drawing new, more definite boundaries, where many possibilities existed before. By investing one's authority in an application as being correct, one authorizes those who apply the concept to future cases to do so also. If they in turn recognize one in this specific respect, by acknowledging that authority, then a more determinate norm has been socially instituted. From this point of view, conceptual norms are never fully determinate in the Kant-Frege *Verstand* sense, since there is always room for further determination. The conceptual norms are not

completely indeterminate either, since a lot of actual applications have been endorsed as correct by potentially precedent-setting judgments. All the determinateness the content has is the product of that activity.

So are the contents of empirical concepts *determinate*, in the Kant-Frege *Verstand* sense, as the retrospective epistemic perspective has it, or *in*determinate in that sense, as the prospective semantic perspective has it? Hegel thinks that if the only metaconceptual expressive tool one has available to describe the situation is that static, non-perspectival *Verstand* conception of determinateness, the answer would have to be: "both"—or, just as correctly: "neither." That those two answers do not make any sense within the metaconceptual framework of *Verstand* just shows the expressive impoverishment and inadequacy of that framework. What we should say is that concepts have contents that are both determinate and further determinable, in the sense provided by the dynamic, temporally perspectival framework of *Vernunft*. Do we *make* our concepts, or do we *find* them? Are we authoritative over them, or responsible to them? Hegel's answer is: "both." For both aspects are equally essential to the functioning of concepts in the ever-evolving constellation of concepts-and-commitments he calls "the Concept." Authority and responsibility are co-ordinate and reciprocal, according to the mutual recognition model of normativity that is Hegel's successor-concept to Kant's autonomy model. And when such a structure of reciprocal recognitive attitudes takes the special form of a historical-developmental process, the contents of those attitudes and the statuses they institute can be considered from both prospective and retrospective temporal recognitive perspectives. Those perspectives are two sides of one coin. Hegel's *Vernunft* metaconception of *determinateness* is articulated by the complementary contributions of these two different aspects of one unitary process. That it is a *rational* unity, at each stage and across stages, is secured by the fact that new commitments are undertaken by a process of rational integration in the new, broader sense that includes justifying those commitments by recollective rational reconstruction of the tradition that produced them.

Each judge's acknowledgement of the authority of her predecessors consists in justifying her decision by a rationale that retrospectively discerns an expressively progressive trajectory through past precedential decisions. Hegel characterizes this enterprise as "giving contingency the form of necessity." 'Necessity' for him, as for Kant, means "according to a rule." The judge *finds* a rule in the motley she inherits, and petitions her successors for acknowledgment of the correctness of that finding. The key to making the transition from thinking of the contents of concepts in terms of the metaconcepts of *Verstand* to those of the metaconcepts of *Vernunft* is to see that *all* the content of the concepts comes from the contingencies that are embraced at each stage in their development. The actual decisions concerning when to apply and when not to apply the concept are all there is to settle its content. But that contingency must be given the form of a norm, with the rational authority to serve as a reason justifying some future applications

and not others. Telling the retrospective rationalizing story that discerns a norm is the form of reason's march through history. Traditions are lived forwards, but understood backwards. The posture of discursive traditions going forward is shaped by backward-facing understandings. The intricate interplay of assertions of authority and acknowledgements of responsibility displaying the structure of reciprocal recognition is the process by which contingent normative attitudes (decisions) institute genuine, determinately contentful norms. Semantic skepticism, and attendant nihilism about the rational normative authority of legal reasoning, results from misunderstanding the nature of determinate conceptual contentfulness—from adopting the standpoint of *Verstand* rather than that of *Vernunft*.

The shape of the debate within jurisprudential theory about how to understand the determinateness of legal norms and hence the rational authority of legal reasoning offers a striking expression of the unhelpfulness of thinking about conceptual contents according to the *Verstand* model. According to one view, the law is what some judge takes it to be. A statement of what is legal (a normative status) is a matter-of-factual *prediction* about what a judge would decide (the judge's normative attitude). Extreme forms of legal realism in addition insist that what the judge says is typically determined by non-legal reasons or causes. Legal decisions are brought about causally by such factors as "what the judge had for breakfast," as the slogan has it (and more realistically, by his training, culture-circle, and reading). On the other side, more in keeping with the phenomenology of responsible jurisprudence, is a view according to which the judge's job is not to *make* the law, but to *find out* what it already is (whether that is understood to be a matter of what norm the statutes or the precedents really institute, or of what natural law dictates, or any other conception). On the Hegelian view, both of these are literally "one-sided" (mis)conceptions. The former sees only the judge's authority, but not his responsibility, and the latter sees only his responsibility, but not his authority. What is needed is an account that does justice to both, to their essential interrelations with one another, and to the way the process of which both are aspects determines conceptual contents. Hegel's new notion of determinateness, made possible by the intricate diachronic reciprocal recognition model of the relations of authority and responsibility in an evolving tradition of legal construction, is offered as a response to just these criteria of adequacy.

NOTES

1. Although I have not couched it in their (contested) terms, this is obviously a version of one central issue among those that divide Dworkin and Fish in their celebrated, extended debate. Though I have carefully formulated the issue in terms of rationality rather than objectivity, the extensive bibliography Brian Leiter supplies in his *Objectivity in Law and Morals* (Cambridge UP, 2001) encompasses many discussions of cognate issues, testifying to their perceived significance.

2. In S. Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP, 1982). I put the term in scare quotes because I consider it misleading in the extreme. The issue as I understand it is not about norms explicit in the form of rules, but norms implicit in practices, and it is about assessments of correctness, not following norms. I have discussed my reservations about Kripkenstein's setting of the problem elsewhere, and address the general issue in Chapter 1 of *Making It Explicit* (Harvard UP, 1994).
3. In G. Harman, *The Nature of Morality: An Introduction to Ethics* (Oxford UP, 1977).
4. The claim need not be that *all* normative statuses have this reciprocal recognition structure. Being a U.S. ambassador is a status instituted by recognition in one respect by the U.S. president, and in another by the U.S. Senate, and those statuses are themselves instituted by individuals being recognized in yet other respects by the citizens. The claim is that these more specific kinds of normative institution are only intelligible against a background provided by the most fundamental kind of discursive normativity, which *is* essentially, and not just accidentally, a matter of *reciprocal* recognition.
5. I offer more details of how I see Hegel's understanding of conceptual content as developing out of Kant's in the first three chapters of *Reason in Philosophy: Animating Ideas* (Harvard UP, 2009), from which some of the material below is adapted.
6. R. Dworkin, *Law's Empire* (Harvard UP, 1986), 228 ff.
7. *Ibid.*, 233.