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THE FOUNDATIONS OF § 1983 JURISPRUDENCE: A LOOK FROM *THE CONCEPT OF LAW*

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ABSTRACT

This article uses the theories of H.L.A. Hart to provide an interpretive framework for a vital civil rights statute, 42 U.S.C. § 1983. Any interpretation of § 1983 requires some sense of the fundamental nature of law and the ability to identify legal rules. Specifically, this article examines the "under color of" language of § 1983 and the statute's application to municipalities. It is possible that these areas remain partially in flux or undeveloped because the Court lacks an interpretation of the statute that accounts for how rules can confer power, create artificial persons, delegate the ability to act with the power of the state, and cause others to believe that actions are occurring under state sanction.

Hart's inclusive legal positivism can provide a comprehensive approach to identifying legal rules, and thus, also provides a way to interpret laws that call for identification of other laws. Additionally, Hart's concept of the internal point of view provides a way to interpret the "under color of" language of § 1983 that better differentiates that language from state action. Thus, Hart's *The Concept of Law* is a perfect launching point for the application of the philosophy of law to problems of identification such as those found in §1983 jurisprudence. By way of introduction, the first several sections of this article present the history behind Hart's theories and a basic overview of Hart. The later sections of the article discuss the Supreme Court's rulings on "under color of" and municipal liability and possible explanations and expansions on those rulings through inclusive legal positivism.

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I. INTRODUCTION

Section 1983 jurisprudence is famously convoluted. The statute itself, the foundation for a tort for violations of federal rights, reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

Much like the Constitution itself, this statute is broad, sweeping, and not entirely transparent, despite its use of general and commonly understood words. In the slow progression of § 1983 jurisprudence, the Supreme Court has been cautious in its expansions of the various doctrines used in its interpretation. This article is an attempt to reinterpret and clarify two doctrines based in the wording of the statute by looking to the philosophy of law, specifically H.L.A. Hart's

1. 42 U.S.C. § 1983 (2006).

account in *The Concept of Law*.[2] There, Hart sets out a way to identify law as such, and to distinguish legal rules from moral or cultural rules. The resulting theory distinguishes two general types of legal rules, and sets out a theory of how citizens and officials relate to the law and take it as creating obligations.

Purely as a historical matter, Oxford University Press first published *The Concept of Law* in 1961,[3] the same year that the Supreme Court decided *Monroe v. Pape*.[4] As a result, Hart's theory was practically unavailable to the Supreme Court at the time, and other jurisprudential theories lacked the nuances that might have provided a base on which to rest § 1983. Even without this contemporaneousness, it is unlikely the Court would have related Hart's work to concrete problems of statutory interpretation. As noted in a prominent review of *The Concept of Law*, "[It] is a book of its time. The book's language, examples, and method rest in England and, more specifically, Oxford of the fifties."[5] The examples and theory are largely about British law, the Queen, and Parliament. In a very few cases, the United States is used as an example; however, these examples are not nuanced examinations, but rather macro-pictures used to illustrate general points. Thus, it is perfectly understandable that the Court would not yet have examined their method and reasoning in light of Hart's theory, even if it were in the regular practice of citing legal philosophy.

Any interpretation of § 1983 requires some sense of the fundamental nature of law. The tests in the area examined in this article, the "under color of" language of § 1983, and the statute's application to municipalities, remain partially in flux or undeveloped, possibly because the Court lacks an interpretation of the statute that accounts for how rules can confer power, create artificial persons, delegate the ability to act with the power of the state, and cause others to believe that actions are occurring under state sanction. Use of Hart's theory may provide a foundation for the inner workings of § 1983 by more effectively identifying and defining "law." This use may thus provide a path forward into the gray areas that remain in the doctrines discussed in this article. As the later parts of this article show, it may not be possi-

2. H.L.A. HART, THE CONCEPT OF LAW (Peter Cane et al. eds., 2d ed. 1994) (1961).

3. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

4. *See* Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* was the advent of modern § 1983 jurisprudence, as it reinterpreted the statute to apply to actions that were not specifically authorized by state law. *See id.*

5. Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1688 (1996) (book review).

ble to avoid at least some degree of the uncertainty that has been characteristic of the Court's analysis up to now; however, this fact does not decrease the value that Hart's theory has in clarifying and systematizing § 1983 jurisprudence.

Part II of this article provides some background on the development of Hart's ideas in *The Concept of Law*. Part III then explains Hart's theory, incorporating some recent elaboration. As I do not purport to prove that Hart's original conception of his theory is more correct, or a better explanation for § 1983, than any of the criticisms of or elaborations on his theory, I do not include significant discussion of those theories here. This article is not a critique of the definition of law, nor is it a thorough examination of the Supreme Court's reasoning in light of multiple theories. This article may merely be a shot across the bow of the Court's method and reasoning, one suggestion of a way to systematically move forward with this statute.

Over all, Part IV of this article explains the current state of § 1983 jurisprudence on these issues and compares it to applicable aspects of Hart's theory. When laying the foundations for modern use of § 1983 in *Monroe v. Pape*,[6] Justice Douglas based his definition of "under color of" on legislative history and previous cases. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[7] Part IV-A discusses this "under color of" language. Justice Brennan, in *Monell v. Department of Social Services*,[8] stated that "municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by §1,"[9] but that "a municipality cannot be held liable *solely* because it employs a tortfeasor."[10] Part IV-B ventures into the expansion of the term "person" to include municipalities and the cases in which individual action can be taken to be action for the larger unit. This article will not, however, venture into the morass of the Eleventh Amendment and the concept of States as persons. Grounding the concept of state sovereign immunity in a theoretical framework is a much larger, and completely separate, project. Later expansions of this work could well include examinations of the state action doctrine in Fourteenth Amendment jurisprudence, absolute and qualified immunities

6. *Monroe*, 365 U.S. 167.

7. *Id.* (quoting United States v. Classic, 313 U.S. 299 (1941)).

8. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

9. *Id.* at 685–86.

10. *Id.* at 691.

under § 1983 and *Bivens* actions, and sovereign immunity, as well as any other doctrine that requires an identification of law.

In the end, while Hart's theory provides some theoretical framework for § 1983, it does not provide a final answer to every definitional or interpretive problem. However, in both areas examined here, clarification on the concept of law provides some clarification and systemization of the doctrines that require an identification of the law. Clarification of how citizens and officials act within and react to the law provides a way to move forward with an interpretation of the language, aims, and results of this immensely important but troublesome statute.

II. *THE CONCEPT OF LAW* AS A RESPONSE TO EARLIER THEORIES

In order to understand Hart's theory, it is important to place it in context within the greater philosophy of law dialectic. Previous theories fell largely into two camps: the early legal positivists and the natural law theorists. Each of these theories is an attempt to answer the question, "What is law?" Parts A and B below will give a general account of early natural law theory and early positivism, respectively. These Parts show the nature of the philosophy of law debate that spawned Hart's inclusive legal positivism. Hart's work, as described in Part C and Part III below, introduces the concept of inclusive legal positivism as a response to and elaboration on these earlier theories.

A. Natural Law Theory: A Brief Historical Account

Natural law theory describes law as mirroring or merely being a reference to morality.[11] From Aristotle on, natural law theory has held a strong place in Western culture.[12] Blackstone summarized the doctrine as:

> This law of nature being coeval with mankind and dictated by God himself is of course superior in obligation to any other. It is binding over the whole globe, in all countries at all times. No human laws are of any validity if contrary to this, and such of them as are valid

11. Hart's statement of the basic premise of natural law theory is "that between law and morality there is a connection which is in some sense necessary." HART, *supra* note 2, at 155.

12. Natural law theorists in the history of Western philosophy have included Aristotle in the classical era, Aquinas in the Medieval era, all the way through Dworkin and some contemporary thinkers. *See* John Finnis, *Natural Law Theories*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edwin N. Zalta et al. eds., 2007), http://plato.stanford.edu/entries/natural-law-theories/.

> derive their force and all their authority, mediately or immediately, from this original.[13]

Another, more general statement of the basic principle guiding natural law theory is that "Unjust laws are not laws."[14] In many cases, natural law theory purports to simultaneously answer the questions "What is law?" and "What laws should we have?"

The rise of the natural sciences in Western culture brought about one of the major problems for natural law theory: conflict with the naturalistic worldview. The naturalistic worldview purports to limit its ideas about the world to what can be observed and tested. [15] When we say that there is some "law," can we point to the thing that we are calling law? Under natural law theory, it is difficult to point to law in a secular way. It makes a certain amount of sense, if one is going to be positing the existence of something, to base that existence on some identifiable properties in the world.

Another significant problem with natural law theory is that it has a hard time accounting for the clearly non-moral aspects of the law.[16] For example, the decision of whether one will drive on the left or right side of the road is not a moral one. The content of this purely administrative aspect does not seem to be just or unjust, moral or immoral. This example leads to a critique of any one-to-one link between law and morality: "there exists at least one conceivable rule of recognition (and therefore possible legal system) that does not specify as a moral principle among the truth conditions for any proposition of law."[17] These objections to natural law theory lead directly to the development of legal positivism.

B. Positive Law Theory Before Hart

"Positivism denies what natural law theory asserts, namely, a necessary connection between law and morality."[18] John Austin popu-

13. J.L. Mackie, *The Third Theory of Law*, *in* PHILOSOPHY AND PUBLIC AFFAIRS (1977), *reprinted in* PHILOSOPHY OF LAW 167, 167 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) (quoting JULIUS STONE, THE PROVIDENCE AND FUNCTION OF LAW 227 (1946)).

14. "Lex iniusta non est lex." *See* HART, *supra* note 2, at 156.

15. *See generally* Brian Leiter, *Naturalism in Legal Philosophy*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 12, http://plato.stanford.edu/entries/lawphil-naturalism/ (explaining current naturalistic theory).

16. *Cf., e.g.*, *Natural Law Theories*, *supra* note 12, § 1.5 (explaining how some natural law theorists deal with this problem).

17. *See* Jules Coleman, *Negative and Positive Positivism*, *in* PHILOSOPHY OF LAW, *supra* note 13, at 95, 96.

18. *Id.* Modern positivists now draw the distinction differently, largely due to Hart's influence. *See* Leslie Green, *Legal Positivism* § 4.2, STANFORD ENCYCLOPEDIA OF

larized the positivism movement, which attempts to separate moral rules and "positive law." This separation is important to ground the study of law in the naturalistic worldview. In order to understand law in the world, one must be able to find the thing to which "law" refers. The early positivists found their laws in commands given by a sovereign.[19] Hart describes these theories as basing law on commands by a sort of gunman writ large.[20]

These theories generally map well onto criminal law but have trouble explaining aspects of law such as those laws delegating power, whether it is the power to create contracts or the power of legislatures and administrative agencies to make laws. This is a general problem with seeing laws as orders backed by threats. Additionally, all laws cannot be purely vertical relationships between sovereign and subject.[21] "[S]uch a conception of law cannot explain the variety of forms of law, nor how sovereigns can be bound by their own rules, nor how law survives the death of the commander."[22] Early positivism's troubles dealing with the content of laws, their range of application, and their mode of origin provide Hart with the ammunition with which he replaces that more-simplistic model.[23]

C. Hart's Responses

Both natural law theory and early positivism contained substantial problems in their definitions of law. Natural law theory had problems with multiplicity of systems, while positive law theory had problems with complexity of systems. Hart's theory responds to each.

In response to early positivism, Hart disposes of the need to root sovereignty in a single body to allow for orders to be coming from the sovereign,[24] though he still retains the positivist naturalistic worldview in his description of legal systems. In response to natural law theory, Hart admits that there are definite connections between

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PHILOSOPHY (Edwin N. Zalta et al. eds., 2003), http://plato.stanford.edu/entries/legal-positivism/.

19. Green, *supra* note 5, at 1693 (citing THOMAS HOBBES, LEVIATHAN 311–35 (C.B. Macpherson ed., 1968); JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., 1970); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfred E. Rumble ed., 1995)).

20. HART, *supra* note 2, at 22-24.

21. *Id.* ch. IV, at 50.

22. Green, *supra* note 5, at 1693 (citing HART, *supra* note 2, at 26–78).

23. HART, *supra* note 2, at 27.

24. *Id.* chs. IV, VI, VII.

law and morality.[25] However, these connections are not "necessary," as defined by most natural law theories.[26] He points out six forms of connection between law and morality: officials' use of morality in decision making and in exercise of power; the influence of morality on law; in use of morality in the interpretation of law; use of morality in the criticism of law; law's relation to justice; and the use of moral language in assessing legal validity.[27] A separation of the concepts of law and morality "enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them."[28]

Hart's responses to early positivism and natural law theory end up with his advent of the idea that is now developed as inclusive legal positivism. The theory is based on two constraints: adoption of a naturalistic worldview; and consistency and accuracy within the theory as to the perspectives of citizens and the officials participating in the legal system.[29] One can find legal validity in the world, and within a legal system officials and citizens may regard law as valid and having motivating force.

According to Hart, law is a historical phenomenon and a social construction: It depends on what has been said and done previously, and it does not exist absent human action and specific developments in human society.[30] He specifically roots his arguments in the fact that societies can exist with rules that do not amount to law – instead these societies rely on "custom."[31] The rules in these simple societies, however, are "static, inefficient, and fraught with uncertainty."[32] In order to account for change in rules, for rules that are non-moral, and for rules that do not seem to follow the "gunman writ large" model, Hart created a more complex picture of what law is. Part III below explains the specifics of that theory in greater detail.

It should be noted that any legal analysis using Hart's theory must in some sense be an identification analysis. As it is a theory of

25. *Id.* at 193–200.

26. *See id.* at 202.

27. *Id.* at 202–10.

28. *Id.* at 211.

29. Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L. REV. 393, 394–96 (2007).

30. Green, *supra* note 5, at 1689–92; HART, *supra* note 2, at 91–94.

31. HART, *supra* note 2, at 91–94. Hart rejects the term "custom" because "it often implies that the customary rules are very old and supported with less social pressure than other rules." *Id.* at 91. The rules in such a society would "resemble our own rules of etiquette." *Id.* at 92.

32. Green, *supra* note 5, at 1698; *see* HART, *supra* note 2, at 92–94.

the law, use of Hart's theory would not be effective in a situation where the goal was to supply definitions for terms other than terms entwined in the definition of law. As it is not a natural law theory or a theory of justice, Hart's theory as an analytical tool would also not be effective in a normative realm – an analysis attempting to answer the question of what the law on a given subject should be. Rather, Hart's theory provides immense assistance any time the analysis requires a determination of what law is and what properties it has. As discussed in Part IV below, § 1983 analysis requires identification of various state rules and determination of the status of various actions that might have the appearance of law. As such, § 1983 may be uniquely suited to a Hartian framework.[33]

III. Secondary Rules and the Structure of Society

Hart combines two types of rules to create his account of the nature of law: primary rules and secondary rules.[34] Primary rules are similar to the early positivists' accounts of "the gunman writ large." They are rules that directly impose duties upon individuals via threat of sanctions.[35] The most basic example of a set of primary rules is criminal law: orders by the sovereign to refrain from certain actions create obligations to so refrain. However, Hart's notion of primary rules does not necessarily require a sovereign in the sense meant by the early positivists.[36]

Secondary rules are generally power-conferring, rather than duty-imposing.[37] Secondary rules "provide that human beings may by doing or saying certain things introduce new rules of the primary type."[38] The aspects of and types of these rules are discussed below in Part A.

Under Hart's conception, primary and secondary rules do not merely provide guidelines for officials or judges.[39] Common persons

33. One other area of the law that might be particularly well suited to this sort of analysis might be the state action doctrine of constitutional law. While some of this doctrine is touched on below, this article does not go into this doctrine in a detailed or thorough way.

34. Hart, *supra* note 2, at 80–81.

35. *See id.*

36. *See id.*

37. *Id.* at 81. Some critiques of Hart's distinction have centered on the duty-imposing nature of some secondary rules, and the non-power-conferring nature of others. *See* K.-K. Lee, *Hart's Primary and Secondary Rules*, 77 Mind 561 (1968); Jonathan Cohen, *Critical Notice*, 71 Mind 395 (1962).

38. Hart, *supra* note 2, at 81.

39. *Id.* at 90–91.

take these rules as providing reasons to conform their behavior accordingly, as well as grounds for others to criticize and make claims on them.[40] Hart calls this the "internal point of view."[41] This internal standpoint does not merely provide answers to the questions, "What should I do?" and "What does the law in a particular jurisdiction proscribe?"[42] It provides common persons with the ability to make claims against others for deviation, and when taken up, it makes individual citizens think that others may make claims for deviation against them.[43] Under this model, the law is not merely descriptive, nor is it merely a tool for officials to mete out punishment and reward: In some sense it provides internal psychological reasons for compliance and enforcement.[44] The importance of and specific aspects of the internal point of view are discussed below in Part B.

A. Secondary Rules

The secondary rules Hart describes in *The Concept of Law* consist of three types: rules of recognition, rules of legislation/change, and rules of adjudication.[45] These types of rules, while not exhausting the possible types of secondary rules, are the ones Hart posits as separating law from morality and other types of rule systems. These three types of rules respond to the troubles inherent in simpler societies that might lack law: uncertainty, lack of change, and inefficiency.[46] Rules of recognition enable identification of other legal rules.[47] Rules of legislation enable enactment of and modification of primary and secondary rules.[48] Rules of adjudication enable settlement of disputes and the application of general rules to specific cases.[49] All of these types of rules are vital to our idea of law as a system of rules and to the functioning of legal systems. Because of the specific focus of this article, the sections below only explain rules of legislation and rules of recognition.

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40. *Id.* at 82–91.

41. *Id.* at 89.

42. These questions are described as first and third personal questions. Kar, *supra* note 29, at 425–26.

43. Kar, *supra* note 29, at 427–28; *see* HART, *supra* note 2, at 86–91.

44. *See* HART, *supra* note 2, at 90 ("[T]he violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.").

45. *See generally* HART, *supra* note 2.

46. *Id.* at 91–94.

47. *Id.* at 94, 100.

48. *Id.* at 95.

49. *Id.* at 96–98.

1. Rules of Legislation

Rules of legislation[50] provide the rules by which new rules are introduced or old rules are eliminated.[51] They "may be very simple or very complex; the powers conferred may be unrestricted or limited in various ways; and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation."[52]

Hart explains two separate types of rule-making acts, typified by what we call legislation and precedent.[53] Both are types of use of the rule of legislation, however, each creates rules of differing sort of generality. Legislation creates a rule with maximal use of general language, whereas precedent uses minimal general language.[54] The lines between these two extremes, in practice, however, are blurred: There is a sliding scale of types of rule creation between legislation and precedent, with few real examples lying perfectly at one extreme. The distinction is additionally blurred since both types of rule creation create uncertainties as to what situations in which the rule applies and how exactly the rule is to be carried out.[55]

Hart thus ascribes to the law an "open texture" – no matter which method of creating law is used, the law will at some point be unclear as to the extent of its application.[56] Because of the open texture of law, the necessary indeterminacy of human use of language, and the non-finite number of facts and features of the world, Hart also warns against attempts to forestall ambiguity.[57] "When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in a way that satisfies us."[58] This seems to be a direct endorsement of judicial use of moral and other policy arguments.[59]

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50. Hart uses instead the term "rules of change." *Id.* at 95.

51. *Id.*

52. *Id.* at 96.

53. *Id.* at 124.

54. *Id.* at 124.

55. *Id.* at 126 ("[T]here is a limit, inherent in the nature of language, to the guidance which general language can provide.").

56. *Id.* at 128.

57. *Id.* at 128.

58. *Id.* at 129.

59. These policy arguments are specifically for use when the rule is unclear and when "[i]n doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to meaning, for the purposes of this rule, of a general word." *Id.* at 129.

It is up to the legal system in question, however, to decide to what degree it will exercise choice in the interpretation of rules, the "application of general rules to particular cases,"[60] and the amount of flexibility available to settle new problems or change interpretations.[61] In the United States, these issues are all dealt with through *stare decisis* and various cannons of construction. These descriptions of how particular situations are related to the general rules, however, are properly discussed as a part of the rules of adjudication of a legal system.

2. Rules of Recognition

Rules of recognition are the rules by which persons examining the law of a jurisdiction may determine what the law is.[62] Rules of recognition are found in any theory of law.[63] For example, natural law theory has a rule of recognition that refers directly to morality: One can recognize laws by recognizing morality. The major difference with Hart's rules of recognition is that they are not dependent on moral or normative content.

For Hart, rules of recognition can contain many different criteria. "[T]hese include reference to an authoritative text; to legislative

60. *Id.* at 129.

61. *Id.* at 130.

62. Jules Coleman put it well when he wrote: "Every theory about the nature or essence of law purports to provide a standard . . . for determining which of a community's norms constitute its law. . . . Legal positivism of the sort associated with H.L.A. Hart maintains that, in every community where law exists, there exists a standard that determines which of the community's norms are legal ones." Coleman, *supra* note 17, at 95. Other commentators have said that "Hart describes the rule of recognition as a conventional judicial rule that identifies certain things as sources of law." Green, *supra* note 5, at 1706. The discussion here, however, will treat rules of recognition not as purely judicial. Under common understandings of the strengths of Hart's theory, Hart's own words, and the motivations behind legal positivism, Hart's theory also provides an account for the fact that citizens often use the rule of recognition to have some sort of notice of the law. *See* HART, *supra* note 2, at 100 ("Whenever . . . a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation."); Coleman, *supra* note 17, at 97 ("Law is knowable and ascertainable; so that, while a person may not know the range of his moral obligations, he is aware of (or can find out) what the law expects of him."). If the rule of recognition were *only* used by judges or experts (attorneys), then Hart's theory would fall under the same weaknesses that plague theories that support the idea that "The law is what judges will do in a certain case," *e.g.* RONALD DWORKIN, LAW'S EMPIRE 1 (1986), but rather would be under the formulation of "The law is what judges and attorneys will recognize as the law in a certain case." Hart's clarification comes with his discussion of the internal point of view and how judges make internal statements that do not amount to predictions of the actions of judges. *See* HART, *supra* note 2, at 105.

63. Coleman, *supra* note 17, at 95.

enactment; to customary practice; to general declarations of specified persons; or to past judicial decisions in particular cases."[64] The common thread in many of these examples, especially those familiar to the rules of recognition in the United States, is that they are generalizations of the process of creating or changing rules. Thus, an important aspect of rules of recognition is that they are interwoven with rules of legislation:[65] One can often recognize a law based on the method in which it was enacted and was put into the form in which we expect laws to appear. Note also that in modern legal systems, there is usually more than one way to make law and more than one source of law. This necessarily makes the rule of recognition more complex.[66]

No matter how complex the picture looks, distinctions between the sources of law and specification of their relations to one another, particularly in a Federalist system, are important. When there are multiple sources of law, normally there are also criteria for ranking the sources in case of possible conflict.[67] All law is not, at base, legislation or constitutional law: There is a difference between "*subordination*" and "*derivation*."[68] While all State law may be subordinate to the Constitution due to the Fourteenth Amendment, this does not mean that all State law is in any way derived from the Constitution – quite the opposite, in fact.

Additionally, there need not be a lack of conflict about the content under the rules of recognition: "[T]here is the possibility of conflict between [the] authoritative applications of the rule and the general understanding of what the rule plainly requires according to its terms."[69] This means that when officials state their position on or interpretation of rules, this can still be seen as law even if their positions clearly differ from the commonly understood terms of the rule.

However, it is not necessarily the case that rules of recognition are purely based on "pedigree."[70] There is a conflict in Hart's writing

64. HART, *supra* note 2, at 100.

65. "Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation." *Id.* at 96.

66. *See id.* at 101.

67. *Id.* at 101.

68. *Id.* at 101.

69. *Id.* at 102.

70. Hart's Postscript to *The Concept of Law* responds to Dworkin's critique of the concept of rules of recognition: "[they] may go beyond the mode of creation or adoption of rules and include among [their] criteria both matters of fact not properly thought of as pedigree . . . and matters not of fact but of moral value." Green, *supra* note 5, at 1705; *see* HART, *supra* note 2, at 250.

on this point. In his Postscript to *The Concept of Law*, Hart writes, "[I]n some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional constraints."[71] However, this concept, supposedly drawn from an earlier paper, seems to have originally been an explanation of the distinction "between the presence of an enforceable duty not to legislate in a certain way – arguably inconsistent with supreme authority [and thus Austin's view] – and the absence of a legal power to legislate in a certain way."[72] Thus, even in the United States a law may be considered a law even if it is considered invalid under constitutional constraints.

B. The Internal Point of View

The internal point of view largely separates Hart's positivism from others.[73] The internal point of view is generally stated as that standpoint a person takes up when they accept rules as creating obligations for themselves: "'a critical reflective attitude to certain patterns of behavior as a common standard,' which gives rise not only to guides . . . for action but also to grounds for criticizing deviations."[74] Hart illustrates the difference between two statements: "[i]t is the law that . . ." versus "[i]n England they recognize as law whatever the Queen enacts."[75] For Hart, taking the internal point of view and making internal statements about the law imply acceptance of "validity" of the law, and with it an obligation, in that the law seems to pass the tests provided in the rule of recognition of the system.[76] This can be seen as a sort of "expressivism," in that statements that something is the law are not only statements of fact about the world, but also expressions of the attitude of accepting an obligation.[77]

The important implication of this attitude toward the law for this article is that citizens see what they perceive as the law as in some

71. HART, *supra* note 2, at 247.

72. Green, *supra* note 5, at 1705.

73. The following description of the internal point of view will be largely from Hart's own work. Recent work by Robin Kar combining elaborations on Hart and discussions of use of moral language has created a more nuanced account of the internal point of view. *See* Kar, *supra* note 29. This discussion will necessarily be more simplistic than Kar's account due to the limited scope of this article.

74. Kar, *supra* note 29, at 407 (citing HART, *supra* note 2, at 57).

75. HART, *supra* note 2, at 102.

76. *Id.* at 103.

77. *Id.* at 82–91; Kar, *supra* note 29, at 396–97.

sense obligatory. The extent and character of this obligation is debatable,[78] but no matter what, under any version of inclusive legal positivism, the perception of a law gives citizens a reason for acting in accordance with it. Often a reason for compliance involves the notion that other citizens or the government might validly be able to make claims for deviations or noncompliance. The fact that law gives individuals reasons[79] for action separates law from other types of rules or convergences in behavior.[80]

IV. SECTION 1983: COLOR OF LAW AND MUNICIPALITIES AS PERSONS

Section 1983 contains several basic elements: 1) a person; 2) acting "under color of" state law; 3) depriving another of "rights, privileges, or immunities secured by the Constitution and laws."[81] The statute was enacted as part of the Ku Klux Klan Act of April 20, 1871.[82] The purpose of the act is stated in its title: "An Act to enforce the Provisions of the Fourteenth Amendment of the Constitution of the United States, and for other Purposes."[83] As a part of the basic structure of government in the United States, the Constitution – "the supreme law of the land" – creates the initial secondary rules for the federal government, some of which also limit the power of state governments.[84] The federal structure of the American system allows concurrent "laws" on the federal level and the state level. The states may then also confer power, so that smaller political units, namely municipal corporations, may enact "laws."

In general, a quick check is in order to ensure that the constitutional structure of United States law does not run afoul of Hart's theory. For a law to be valid in the United States, it must also be constitutional.[85] Additionally, because of the Supremacy Clause, in order for a state law to be valid, it must not conflict with valid federal law.[86] Federal law could normally be considered part of any rule of recogni-

78. *See* Kar, *supra* note 29, at 408–11, 419–23.

79. And some would specify the "right kind" of reasons. *E.g.*, Kar, *supra* note 29 at 398, 406, 432.

80. *See* HART, *supra* note 2, 85–86, 94.

81. *See* 42 U.S.C. § 1983 (2007).

82. *See Monroe*, 365 U.S. at 171.

83. *Id.* at 171 (citing 17 Stat. 13).

84. *See* U.S. CONST. arts. I–V, amend. 14.

85. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void.").

86. ERWIN CHEMERINSKY ET AL., CONSTITUTIONAL LAW 303 (2001).

tion in any state. As discussed above, Hart specifically accounts for the supremacy of one source of law among many in his theory,[87] so the Supremacy Clause generally does not conflict with the idea of rules of recognition.

At first blush, however, this may seem to be a violation of the naturalistic-worldview constraints on rules of recognition. This article does not purport to analyze whether the Supreme Court's constitutional analysis refers to natural law principles or moral judgments and whether that poses a real problem for Hart.[88] True, in § 1983 analysis, one is examining whether there has been a constitutional violation. This may seem to either be or require a normative analysis. However, for the purposes of § 1983, the Constitution or federal law could say anything: all that matters is whether it was violated.

Hart's theory, with its nuanced conception of the nature of legal rules, may be able to provide a way to move forward in interpreting this statute. Phrasing choices of interpretation in terms of Hart's theory may help to clarify the doctrines involved. Over all, one might be able to see § 1983 as a primary rule creating an obligation to follow one part of the secondary rules of United States law: When acting, officials must act without depriving citizens of federal rights. On the other hand, § 1983 could be a primary rule prohibiting use of the guise of secondary rules to cause specific types of harm: Federal rights, when deprived by a person whom citizens recognize as having the backing of the law, are protected by this statute. Clearly, though, the statute is a primary rule that refers to secondary rules. To what secondary rules does it refer and to what extent? To whom does it apply and how? The following sections analyze these questions. Fundamentally, Hart's theory assists in these analyses whenever there is a problem involving the identification of law – whether objectively or subjectively – or action by an individual within the law. Hart's theory does not, however, supply standards for the initial content of the primary rule of § 1983, the definitional aspects of persons, citizens, rights, or liability.

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87. *See* HART, *supra* note 2, at 106 ("But even systems like that of the United States in which there is no such legally unlimited legislature may perfectly well contain an ultimate rule of recognition which provides a set of criteria of validity, one of which is supreme.").

88. Hart responds to arguments such as this one: "In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or morality; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or substantive moral values. . . . No 'positivist' could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals." HART, *supra* note 2, at 204.

A. *"Under Color of" Law*

For liability to attach, § 1983 requires the action that violates constitutional rights to be "under the color of any statute, ordinance, regulation, custom, or usage, of any state or territory."[89] The meaning of this phrase is not clear on its face: "under color of" is not a phrase that provides explicit standards on which it should be judged. Thus, certain interpretive choices must be made to supply meaning to the statute. The sections below lay out the progression of the interpretation of this phrase and then demonstrate how Hart's theory can provide a systematic way to move forward into scenarios that have not yet been before the Supreme Court.

1. The Cases

In the seminal § 1983 case, *Monroe v. Pape*,[90] the question was presented whether § 1983 gave "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[91] The City of Chicago and the thirteen policemen who broke into Monroe's home and mistreated him[92] argued that "under color of" law "excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did."[93] Essentially, because the policemen violated the Constitution and broke Illinois law, their actions could not be "law" and therefore could not violate either the Constitution or § 1983: the statute did not cover rogue acts.[94] The Court was not convinced.[95]

In part, a previous holding in *Home Telephone & Telegraph Co. v. Los Angeles*[96] is necessary to understand *Monroe*. In *Home Telephone*, the Court ruled that what is deemed state action is broader than action authorized by the state.[97] There, as in *Monroe*, the action taken – a Los Angeles City ordinance fixing utility rates[98] – would have been a violation of the state constitution as well as the federal

89. 42 U.S.C. § 1983 (2007).
90. *Monroe*, 365 U.S. 167.
91. *Id.* at 172.
92. *Id.* at 169.
93. *Id.* at 172.
94. *Id.*
95. *See id.* at 183–87.
96. Home Tel. & Tel. Co. v. L.A., 227 U.S. 278 (1913).
97. *See id.* at 283–84, 287–96.
98. *See id.* at 280–281.

constitution.[99] The city argued that because the ordinance violated the state constitution, federal relief was not available. That is, until the highest court of the state made a determination that state law authorized the ordinance, the ordinance could not have been state action in violation of the constitution.[100] The Court rejected the city's argument, holding that the Fourteenth Amendment extends to "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[101]

To carry the holding of *Home Telephone* forward to apply to § 1983 as well, Justice Douglas turned to legislative history: "There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section has three main aims."[102] Taking the aims he found in the debates, Justice Douglas wrote:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[103]

This holding that § 1983 applies to validly passed laws as well as invalid laws and actions by state actors implicates the interpretation under Hart's theory of the statute as a primary rule to prohibit use of the guise of secondary rules to cause specific types of harm. The City of Chicago and the police officers in *Monroe* would have had the statute apply only to valid state primary rules or actions, so that "under color of any" law would mean "under a properly enacted and valid" law. This would have produced the absurd result that an action could be "law" without being "under color of" law. The Court rejected this narrowing interpretation, so that under *Monroe* it does not matter whether the action taken actually is a valid action.[104]

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99. *See id.* at 280.

100. *See id.* at 281–82.

101. *Monroe*, 365 U.S. at 172; *see Home Telephone*, 227 U.S. at 288 ("That is to say, a state officer cannot on one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time, for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong.").

102. *Monroe*, 365 U.S. at 173. "*First*, it might, of course, override certain kinds of state laws. . . . *Second*, it provided a remedy where state law was inadequate. . . . [T]*hird* . . . was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173–74.

103. *Id.* at 180.

104. *Id.* at 172–87.

However, the holding in *Monroe* does not provide a generally-applicable standard by which to decide whether an action is "under color of" law. The police officers were municipal officials, and under the state action doctrine in *Home Telephone*, they would be state actors. The question remains whether a private party may at any point be considered acting "under color of" law, and if so, whether the "under color of" standard is the same as the state action doctrine as it extends to private parties. This continuing question leaves open the interpretation that § 1983 could merely be a primary rule creating an obligation to follow one part of the secondary rules of United States law.

The Court began to answer these questions in *Lugar v. Edmondson Oil Co.*[105] There, Edmondson Oil Company (Edmondson) made use of a Virginia statute allowing for attachment of debtor property via an *ex parte* proceeding.[106] Thirty-four days later, a state court ruled that Edmondson could not prove the allegations in its complaint and released the attachment on Lugar's property.[107] Lugar then sued Edmondson under several theories, one of which was a § 1983 claim for the deprivation of his property without due process of law.[108]

Because the claim was a due process claim, the question of whether the Fourteenth Amendment was violated had to be answered as well as whether that violation was "under color of" law.[109] Citing *Flagg Brothers, Inc. v. Brooks*,[110] the Court clearly stated that a violation of the Fourteenth Amendment's Due Process Clause can only be accomplished by a state actor.[111] It noted that in other cases – as it did in *Lugar* – it also avoided the question of whether and to what extent "under color of" varied from state action, even in non-due-process contexts.[112] The Court did cite *United States v. Price*[113] for the proposition that "'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."[114] The Court backed off from this proposition in footnote eighteen, however:

105. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).
106. *See id.* at 924–25.
107. *See id.* at 925.
108. *See id.* at 925.
109. *Id.* at 930.
110. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).
111. *Lugar*, 457 U.S. at 930.
112. *See id.* at 930–32, 935 n.18.
113. 383 U.S. 787, 794 n.7 (1966).
114. *Lugar*, 457 U.S. at 928 (quoting *Price*, 383 U.S. at 794 n.7).

> First, although we hold that conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action. . . . Second, although we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment, § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state-action requirement.[115]

Developments – or lack thereof – on this distinction will be discussed later in this Part. The distinction itself, however, brings the Court closer to one interpretation of § 1983: that it prohibits certain harms done under the guise of state action, rather than solidifying state action as a requirement of the statute.

Because of the due process context, the *Lugar* Court stated that "[i]f the challenged conduct . . . constitutes state action . . . , then that conduct was also action under color of state law and will support a suit under § 1983."[116] To qualify as state action, the conduct that causes the deprivation of a federal right must "be fairly attributable to the State."[117] The two prong test to determine "fair attribution" is:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[118]

These two prongs "collapse into each other" when the claim is made against "a party whose official character is such as to lend the weight of the State to his decisions," as occurred in *Monroe*.[119] They diverge when the claim is "against a party without such *apparent authority*, *i.e.*, against a private party."[120]

The first prong – the action requirement – essentially equates to the proposition that in order for an act to be state action, the must be some related government decision or authorization. The second

115. *Id.* at 935 n.18.
116. *Id.* at 935.
117. *Id.* at 937.
118. *Id.* at 937.
119. *Id.* (citing *Monroe*, 365 U.S. at 172 (1961)).
120. *Id.* (emphasis added).

prong – the actor requirement – equates to the proposition that the party must in some way be linked to the state. The Court did not describe, however, a consistent method of determining when the actor requirement is satisfied, other than to say that "something more" is needed.[121] To define "something more," several different tests have been used in different contexts, including a public function test, a state compulsion test, a nexus test, and a joint action test.[122] In *Lugar*, the test was met because a statute authorized the attachment procedure and Edmondson worked with state authorities (the joint action test) to deprive Lugar of his property.[123]

American Manufacturers Mutual Insurance Co. v. Sullivan[124] reiterated the test from *Lugar*, while emphasizing that "§ 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'"[125] There, private insurers acted in accordance with a workers' compensation procedure that allowed for withholding of benefits during a review period.[126] The suit alleged that use of the statutory review system constituted action "under color of law" and that the withholding of benefits "deprived them of property in violation of due process."[127] While the action requirement was met in *Sullivan* – the insurers acted with knowledge of and pursuant to the State statute – the question remained whether the actor requirement was met.[128]

Where a regulated industry is involved, there must be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[129] This depends on whether "the State has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to

121. *Id.* at 939.

122. *Id.* (citing Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978)).

123. *Id.* at 940–42.

124. Am. Mfrs. Mut. Ins. Co. v Sullivan, 526 U.S. 40 (1999).

125. *Id.* at 50 (citing Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)).

126. *Id.* at 44–47.

127. *Id.* at 47–48.

128. *Id.* at 50 ("In this case, while it may fairly be said that private insurers act 'with the knowledge of and pursuant to' the state statute, thus satisfying the first requirement, respondents still must satisfy the second, whether the allegedly unconstitutional conduct is fairly attributable to the State.").

129. *Id.* at 52.

be that of the State."[130] The private insurers in *Sullivan* were deemed to have been acting according to their own judgments, authorized by the State but not required, and without reference to standards established by the State.[131] The Court rejected the idea that authorization or encouragement by a state could create the "sufficiently close nexus" required:[132] This would make any private use of state created legal remedy or structure a state action.[133]

Additionally, there may be circumstances where a state delegates to private parties a "traditionally exclusive government function."[134] For example, in *West v. Atkins*,[135] medical care to inmates delegated to private parties was deemed state action because "the State was constitutionally obligated to provide medical treatment to injured inmates."[136] The Court in *Sullivan* distinguished *West* by stating that nothing in the Pennsylvania constitution or laws "obligate[d] the State to provide either medical treatment or workers' compensation benefits to injured workers."[137] The Court thus relied on the idea that insurance is not a "traditional" state function, as before the workers' compensation statutes, insurance of the type in question was purely a private enterprise, as was the determination by an insurer that a claim was one for which it was liable.[138]

Thus, the private insurers, under two separate tests, were not "state actors": Their action was "not fairly attributable to the State" and therefore, "an essential element" of § 1983 was not satisfied.[139] The Supreme Court did not address the question whether the standard of "under color of" law was fundamentally different from that of state action.[140] The Court merely stated the reach of "under color of" did not extend to "merely private conduct" "*[l]ike* the state action requirement

130. *Id.* (internal quotation marks omitted). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Id.*

131. *Id.*

132. *Id.* at 52–53.

133. *Id.* (citing Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) ("Private use of state-sanctioned remedies or procedures does not rise to the level of state action.")).

134. *Id.* at 55 (discussing and distinguishing West v. Atkins, 487 U.S. 42 (1988)).

135. *West*, 487 U.S. 42.

136. *Sullivan*, 526 U.S. at 55 (citing *West*, 487 U.S. at 54–56).

137. *Id.* at 55–56.

138. *Id.* at 56–57.

139. *Id.* at 58.

140. *See id.* at 49–50.

of the Fourteenth Amendment."[141] There was no further analysis of whether the "merely private conduct" for each was fundamentally the same, or, despite having one similar limitation, the standards could encompass different conduct. There was no development upon the distinctions in *Lugar*'s footnote eighteen, though possibly because *Sullivan* was also a due process case.

To avoid the entanglement with due process, a clarification of the aspects of "under color of" would have to arise under a case where the right being deprived is a statutory right, rather than a constitutional one.[142] A rare Supreme Court § 1983 case against a private party, *Gonzaga University v. Doe*, again specifically avoids this question,[143] continuing the cautious approach in the court's other examinations of this statute. Other cases in the statutory right area are against public actors or public officials: the State of Maine,[144] a New York sewage authority,[145] a state hospital,[146] a Virginia housing authority,[147] public educators,[148] the City of Los Angeles,[149] and the

141. *Id.* at 50 (emphasis added). The Court cited *Blum*, 457 U.S. at 1002, for the fact that the Fourteenth Amendment does not cover mere private conduct. *Sullivan*, 526 U.S. at 50.

142. An interesting aside concerning actions under § 1983 to enforce statutory rights is that certain readings of the statute could cause major interpretive problems. Justice Powell's dissent in Maine v. Thiboutot, 448 U.S. 1, 11 (1980) (Powell, J., dissenting), exemplifies this problem. There, Justice Powell says that the "and laws" portion of § 1983 was added only in 1874 when Congress reorganized the U.S. Code and split the previous statute into a substantive one (modern § 1983) and two jurisdiction statutes (modern 28 U.S.C. § 1343). *Id.* at 15–16. This was not, however, supposed to make any substantive change. *Id.* at 14–15. In Justice Powell's view, "the legislative history unmistakably shows that the variations in phrasing introduced in the 1984 revision were inadvertent." *Id.* at 16. Thus, statutory rights should possibly not be part of the statute at all, excepting perhaps equal protection statutes. *See id.* at 11–34. The problem this might raise is that exclusion of "and laws" would then make it so that under current interpretation of rights under the Constitution, the "under color of" language would become superfluous: all § 1983 actions would require state action—excepting Thirteenth Amendment claims—thus making "under color of" law actually mean "under law." The state action doctrine makes it so that the actor has the countenance, and thus responsibilities of, the law. It says nothing about color and everything about actuality, at least under the sorts of interpretations under cases like *Home Telephone*. In considering whether to accept Justice Powell's characterization of history, this change in the statute and the countenance given to the rest of the words therein should be taken into account. A full discussion of this particular nuance, however, is outside of the scope of this article.

143. Gonzaga Univ. v. Doe, 536 U.S. 273, 277 n.1 (2002).

144. *Thiboutot*, 448 U.S. 1.

145. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

146. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

147. Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987).

148. Smith v. Robinson, 468 U.S. 992 (1984).

149. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986).

Director of the Nebraska Department of Motor Vehicles.[150] There remains an open question whether the differences noted in *Lugar* will actually be expounded upon in a later case. It would seem that "under color of" law, differing from "law," would cover more conduct than what is considered state law under the Fourteenth Amendment. This distinction becomes important when discussing this doctrine in light of Hart's theory in *The Concept of Law*.

2. The Theory

This section, in applying Hart's theory to the interpretation of the "under color of" language in § 1983, examines several questions. First is which of the two interpretations of the statute the cases above and the theory suggest – the guise interpretation, or the primary obligation to follow secondary rules interpretation. Second, within that question, there remains question of how to move forward, if at all, with a standard for suits against private parties under § 1983.

The language of § 1983 itself suggests positivist theory: "under color of" law. Legal theory attempting to answer the question, "What is law?" is immediately implicated. For law to have a 'color' would appear to suggest, at first blush, that it must have naturalistic, observable properties. While one should not place too much weight on this metaphorical reading, it does suggest a meaning for the phrase as a whole. "Under color of" suggests that certain actions can appear to have the authority of law, while at the same time, those same actions may not *actually* be law. Because the phrase does not merely say "under law," it suggests that the statute applies to more than actions which are consistent with the law. Hart's theory is implicated all the more because of the way that he describes secondary rules. Rules of recognition are what allow both experts and citizens to have access to knowledge about what is and is not a law. In different contexts, these might be different, accounting for the multiple types of law mentioned in the statute: "any statute, ordinance, regulation, custom, or usage."[151] Compliance with the basic ideas of positive law theory and secondary rules suggests that other parts of Hart's theory might correspond with deeper analysis of the statute.

The next question becomes whether the Supreme Court's analysis in *Home Telephone* and *Monroe* correlates with the concept of the rule of recognition. The rule that a municipal ordinance is a law, even if the state's highest court has not ruled on the ordinance's validity,

150. Dennis v. Higgins, 498 U.S. 439 (1991).

151. 42 U.S.C. § 1983 (2007).

would seem to coincide with the idea that certain actions – here municipal actions – create recognizable law that is seen from the internal standpoint as valid. A rule of recognition, with an ordinance like in *Home Telephone*,[152] would refer to the rule of legislation and the ordinance books. While, as stated above, United States rules of recognition ultimately refer to the Constitution, reference to the open texture idea – that law is unclear as to its extent and applications, especially when stated in general terms – shows that it is more than possible for persons in the internal standpoint, as well as those making the laws, to take the ordinance in question to be law despite the validity defect of its unconstitutionality. Another interpretation might also be that the rule of recognition in the United States does not require final adjudication by a court upon the permissibility of every rule in order for the rule to be valid law. The very limitations on advisory opinions that are central to, at least federal, courts[153] show that this is the case.

A similar analysis applies to the rogue officer scenario, as in *Monroe*. A person looking at the situation can see that the officers used their status as law-makers in some sense to act. It was their ability to use the rule of recognition to their advantage that allowed those officers to perform the acts that they did. The aspects of the rule of recognition absent from their actions were only the constitutional ones. In this way it appears that these cases support an interpretation that §1983 covers situations where the actions taken would be within the applicable rule of recognition but for the violation or deprivation of a federal right.

Section 1983 does not say merely "law," but rather says, "under color of."[154] In cases like *Monroe*, it is clear that the actor and action involved would have the aspects that would lead an observer to conclude that, even if the action was not "law," it had the properties that would lead one to believe it was law. The action involved has the "color" of law, metaphorically. In the language of *Lugar*, police officers clearly have "apparent authority." The harder question, covered by both *Lugar* and *Sullivan* and conspicuously absent in the statutory context, is whether – and when – action by private parties can be either state action or action "under the color of" law. The question also remains whether these standards should differ under Hart's theory and the statute.

152. *See* Home Tel. & Tel. Co. v. L.A., 227 U.S. 278, 280 (1913) ("The appellant . . . sued the city and certain of its officials to prevent the putting into effect of a city ordinance establishing telephone rates . . . .").

153. *See* Hayburn's Case, 2 Dall. 409 (1792).

154. 42 U.S.C. § 1983.

There is nothing in the statute itself that suggests that "under color of" is limited to only state actors. As footnote eighteen in *Lugar* indicates, it is the requirements for constitutional right deprivation that create the state actor requirement.[155] State action is not a requirement of the "under color of" element. Thus, in the statutory context, it may be possible for "merely private actors" to be liable under § 1983, so long as their actions have the aspects that would make it appear to an observer that those actions carried the force of law.

This interpretation of "under color of" corresponds more closely with the interpretation that the statute is a primary rule that refers to secondary rules in prohibiting certain harms done under the guise of secondary rules. The reason the other interpretation, the statute as a primary rule that requires officials to follow certain secondary rules when they act, does not work within the statute is, simply put, that the statute is not written that way. Even beyond the "under color of" language, the statute speaks of not depriving *rights*, rather than following certain rules. It is relatively clear that it is not meant to create liability for just any unconstitutional state action.

Having concluded here that the best interpretation of § 1983 is as a primary rule that creates liability for depriving rights in the guise of secondary rules, we must then determine the standards for determining "guise." The question becomes from what perspective "under color of" will be examined, from what perspective "apparent authority" must be apparent. Logically, one may either examine it from a judicial, post-hoc perspective or from a citizen's in-the-moment perspective.

The distinction between these two perspectives is best explained through comparison of two examples. For the first example, imagine a citizen is the victim of a good con artist. The con artist is equipped with all of the indicia of a police officer: badge, equipment, uniform, car, radio, etc. This con artist manages to deprive the citizen, in the course of the intricate con, of a federal statutory right, or perhaps a constitutional right without a state-actor requirement.[156]

The citizen is tricked. Perhaps she voluntarily permits the conman to enter her home. Consent eliminates any normal tort claims the citizen might have.[157] One might say that there is a certain additional

155. *Lugar*, 457 U.S. at 935 n.18.

156. The right to travel, for example, can be violated by private parties. It is not unlikely that such a right might be violated in such a situation as my hypothetical.

157. *Cf.* Bumper v. N.C., 391 U.S. 543, 548 (1968); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971). An exception to this proposition might be the common law tort of fraud, however.

harm visited when an action is made by the state or when an action violates constitutional rights.[158] Over all, the citizen is harmed in a unique way when that harm comes under the guise of a state actor, even if that actor is not actually related in any way to the state.

The citizen will see this con-man as acting under color of law from the in-the-moment perspective. Even if taken from a reasonable person perspective rather than a subjective one, the con-man appears to be acting with the authority of the state. However, from a post-hoc perspective, a judge might look at the situation differently. In retrospect, a judge may be able to look at the actual events and surrounding circumstances to determine that there were not the required indicia of law for the con-man to be acting under color of law – the uniform and equipment did not come from the right sources; there was no law giving any amount of authority to the con-man, so that the apparent authority doctrine would not support finding authority there. There was not actually *any* law involved, other than the fact that *other* situations like it had laws involved. This makes it so that from the post-hoc perspective the con-man would likely not be acting "under color of" law. This example shows that under the post-hoc standard the general interpretive framework of § 1983 as enjoining a special type of harm is not possible.

For the second example, imagine a situation not entirely unlike *Lugar* – a corporation which happens to have extensive contacts with the state and which acts under a statutory scheme deprives a citizen of a statutory right. The citizen in the moment may have no idea that the corporation is so entwined with the state as to give its action the authority and corresponding restrictions of the state. Yet, still, the corporation manages to harm the citizen by depriving some statutory right.

Under this second example, the citizen has neither an in-the-moment experience of the color of law, nor any in-the-moment experience of apparent state authority. In a post-hoc judicial setting, however, a judge may well, as they often now do under the state action doctrine, find that the corporation's actions have enough of the indicia of actual law to qualify as having the color of law.[159] The "fairly attributable" language in *Lugar* and especially *Sullivan* suggest a post-hoc analysis for the state action doctrine.[160]

158. *See Bivens*, 403 U.S. at 394–95; *id.* at 408–09 (Harlan, J. concurring) ("the type of harm which officials can inflict when they invade protected zones of an individual's life are different form the types of harm private citizens inflict on one another").

159. *See, e.g.*,.*Sullivan*, 526 U.S. at 50; *Lugar*, 457 U.S. at 941–42.

160. *See, e.g.*, *Sullivan*, 526 U.S. at 50; *Lugar*, 457 U.S. at 937.

This example shows that under the in-the-moment standard, situations that currently fall under the imprimatur of § 1983 might not. This "might," however, could be considered unlikely to arise. Under the Court's state action doctrine tests, most of the actions that would be taken as state action are so in part because the citizens involved recognize the actions taken as state action. The tests discussed in *Lugar* and *Sullivan* – the traditional governmental functions test, the nexus test, and the joint action test[161] – show this. Under the traditional functions test, an in-the-moment citizen would likely assume that the government is performing the function that has traditionally been exclusive to it. Under the nexus test, when the private actor has a sufficiently close nexus with the government, that nexus is likely considered sufficiently close because the private action is such that it could be easily confused with state action. Under the joint action test, the state and the private party are acting in concert, and therefore a citizen in the moment would likely identify the private actor as a state actor. The problem with the in-the-moment standard is that it has the *possibility* of foreclosing liability for actions that fall under these categories. Under each test, it would be possible for a "state action" to be not "under color of" law, the same incongruity that made the City of Chicago's arguments incorrect in *Monroe v. Pape*.[162] In this way an in-the-moment standard may not be acceptable to the Court because, when applied to constitutional cases, it might not come to the same results.

These two examples show that under the in-the-moment perspective standard, § 1983 would essentially enjoin certain types of harm subjectively experienced by a citizen, while under the post-hoc perspective, § 1983 would essentially enjoin deprivation of certain rights only if there is enough actual legal support for the legal process to pick out some state authority. Both viewpoints have problems. The post-hoc perspective moves toward eliminating definitional difference between "law" and "under color of law;" the in-the-moment perspective could create situations where the Court's current state action methodology would find "law" where "color of law" is not present. It is unclear, based on the statute itself or the theory, which of these two standards is more appropriate. Thus, it may be the Court must perform a policy analysis to determine which to apply, or find form some variety of compromise. The very fact that eventually Hart's theory gives out in the clarification of this law in part is supported by Hart's theory: The open

161. *See Sullivan*, 526 U.S. at 57; *Lugar*, 457 U.S. at 939.

162. *See* discussion *supra* in text accompanying note 114.

texture of the law makes it so that eventually courts have to engage in some moral or policy examination.[163]

Possible compromises might, however, be able to encompass both of these standards. For example, a totality of the circumstances test using each standard as a factor would fully take into account the fact that both perspectives exist and that there are multiple vantages from which to view the "color of" law. In the end, a compromise test could incorporate the theoretical and practical strengths of both tests, effectively providing a test that aligns with the decisions already rendered by the Court and with the various ways in which the internal point of view and rules of recognition work for both citizens and officials. This compromise position could in fact be suggested by one of the constraints on inclusive legal positivism: the internal accuracy constraint. Hart's theory accounts for the internal points of view of both citizens and officials, and therefore an identification of the law that accounts for both points of view would be more closely aligned with Hart's nuanced view of the nature of law.

B. Municipalities as Persons and the Actions Attributable to Them

Section 1983 also requires that a "person" deprive the plaintiff of rights.[164] This raises two major questions: whether "person" definitionally includes municipalities, and how to distinguish action of individual officials from action of the municipality.

1. The Cases

In the beginning of § 1983 jurisprudence, *Monroe v. Pape*[165] held that the City of Chicago was not a "person" within the meaning of § 1983.[166] In *Monroe*, the officers involved were held personally liable, but the city that employed them was not liable at all. The Court based its reasoning largely on the legislative history of § 1983, specifically an amendment to the Act that did not pass: the Sherman Amendment.[167] The Sherman Amendment would have extended liability to municipalities for the acts of private parties who rioted and by their acts destroyed property or injured people.[168] The Court interpreted com-

163. *See* HART, *supra* note 2, at 128.

164. 42 U.S.C. § 1983 (2006).

165. *Monroe*, 365 U.S. 187; *see supra* Part IV.A.

166. *Monroe*, 365 U.S. at 187.

167. *See id.* at 188.

168. *See id.* at 187–88 nn.38, 41; Cong. Globe, 42d Cong., 1st Sess. 663, 749 (1871).

ments made by certain Representatives[169] regarding the unconstitutionality of the Sherman Amendment to mean that the House believed that any liability extended to municipalities under the Civil Rights Act would have been unconstitutional.[170]

Sixteen years later, *Monell v. Department of Social Services*[171] overruled this part of *Monroe*.[172] In *Monell*, the New York City Department of Social Services had an official policy compelling pregnant employees to take unpaid leaves of absence before they would have been required for medical reasons.[173] After reexamining the historical record, the Court reinterpreted the statements relied on in *Monroe* to refer to the obligation to keep the peace, rather than equating "obligation" with "civil liability."[174] Because of this distinction, the debates on the Sherman Amendment were taken to be inapplicable to the interpretation of § 1 of the Civil Rights Bill, now § 1983.[175]

The Court continued on to explain, "An examination of the debate on § 1 and application of appropriate rules of construction show unequivocally that § 1 was intended to cover legal as well as natural persons."[176] Municipalities could "through their official acts . . . , equally with natural persons, create the harms intended to be remedied by § 1, and, further, since Congress intended § 1 to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § 1."[177] This absolute language ignores Justice Douglas's concern in *Monroe* and later cases about the financial ruin of municipalities,[178] which provided the public policy counterpoint to the "harm" argument presented in this quote. While the arguments are convincing that for most other constitutional and statutory purposes, "person" applies to corporations and natural

169. "[T]he House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." Statement of Rep. Poland, Cong. Globe, 42d Cong., 1st Sess. at 804.

170. *Monroe*, 365 U.S. at 191 ("The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them.").

171. *Monell*, 436 U.S. 658.

172. *Id.* at 663.

173. *Id.* at 660–61.

174. *Id.* at 665, 669–83.

175. *Id.* at 683.

176. *Id.* at 683.

177. *Id.* at 685–86.

178. *Id.* at 664 n.9.

persons alike,[179] the overall reasoning of the Court still does not rest on anything stronger than a balance of public policies.

The question remained, however, what the standard for holding municipalities liable would be. The Courts in *Monroe* and *Monell* agreed that *respondeat superior* would be an inappropriate method by which to impose liability on municipalities whose employees act tortiously.[180] The *Monell* standard, stated broadly, was when the act alleged in the suit "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"[181] as well as when such act is according to "governmental 'custom.'"[182] Another statement of the standard was, "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."[183] This standard is based in part on the "shall subject, *or shall cause to be subjected*" language in § 1983.[184] The municipality must in some way "cause" the deprivation of a right, which must be enacted specifically though an individual official.[185]

Over all, the discussion in *Monell* answered many questions, but left open how to recognize when a municipality has a policy or custom such that the act of an individual official can be attributed to the larger unit. *Pembaur v. City of Cincinnati*[186] began to answer how the Court would go about recognizing municipal policy or custom when presented with the actions of municipal officials. In *Pembaur*, the act was the forceful entry into Pembaur's office building to serve arrest warrants for two of Pembaur's employees.[187] The reason this unconstitutional entry was able to be linked to the City was that the sheriffs called the County Prosecutor for advice and were instructed to "go in and get them."[188] Never before, however, had the prosecutors or the sheriffs been confronted with a situation where they had to forcefully enter, and never before had the City expressed any official position on

179. *See id.* at 687.
180. *See id.* at 663 n.7.
181. *Id.* at 690
182. *Id.* at 691.
183. *Id.* at 694.
184. 42 U.S.C. § 1983 (2006).
185. *Monell*, 436 U.S. at 692.
186. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).
187. *See id.* at 472.
188. *Id.* at 473; *id.* at 492 (Powell, J., dissenting).

such entries.[189] The question then became whether the act and the order from the prosecutors could be deemed "official policy" in order to be a basis for liability under *Monell*.[190]

The Court held that the order from the prosecutors did create a policy, even though it was an isolated incident.[191] The rule used to determine this was the contentious part of *Pembaur*. Justice Brennan's plurality opinion presented one possible rule, while Justice Powell's dissent offered another. Justice Brennan's test is based on state law: whether the decision-maker has the discretion and authority to make final policy on the topic at hand,[192] or stated differently, where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[193] For Justice Brennan, this test was satisfied in *Pembaur* because an Ohio statute authorized sheriffs to consult prosecutors on ambiguities, and that the "County Prosecutor could establish county policy."[194]

Justice Powell characterized the majority's test as "focus[ing] almost exclusively on the status of the decisionmaker."[195] This relied on state law, and ignored any possible federal test for what constitutes "making policy."[196] Justice Powell's proposed test instead focused on two factors: "(i) the nature of the decision reached or the action taken, and (ii) the process by which the decision was reached or the action was taken."[197] This test carried with it a judgment about what 'official policy' is: "Focusing on the nature of the decision distinguishes between policies and mere ad hoc decisions. Such a focus also reflects the fact that most policies embody a rule of general applicability."[198] Even after proposing a test based on rules of general applicability, Justice Powell continued to mention the situation in *Owen v. City of Independence*, where a process was followed by the proper authorities to enact a rule that was *not* generally applicable.[199] Over all, Justice Powell

189. *Id.* at 474.

190. *See id.* at 477–84.

191. *See id.* at 476–77.

192. *See id.* at 481–83.

193. *Id.* at 483–84.

194. *Id.* at 484.

195. *Id.* at 498 (Powell, J., dissenting).

196. *Id.*

197. *Id.* at 499.

198. *Id.*

199. *Id.* at 500 (citing Owen v. City of Independence, 445 U.S. 622 (1980)). In *Owen* the city council denied the sheriff a name-clearing hearing after disparaging him at a council meeting. This action in itself involved in no way a general rule, but rather was a finite,

focused on a narrow interpretation of the idea of a municipal policy, and would have established some type of uniform process requirement for the establishment of policy.[200]

This battle arose again in *City of St. Louis v. Praprotnik*.[201] The act in question in *Praprotik* was the transfer of a city architect to dead-end jobs and his eventual termination.[202] In rendering the decision, Justice O'Connor attempted to clarify the *Pembaur* rule;[203] Justice Brennan, concurring in the judgment, fought against the new definition of municipal action proposed by the plurality.[204] Both agreed that the city was not liable, but they did not agree upon how that conclusion was reached. There was no disagreement that the identification of the policy-making rule was a question of state law.[205] What followed from this distinction is where the dispute arose.

Justice O'Connor went further with the statement that the identification of authority was a question of state law, saying also that it "is not a question of federal law, and it is not a question of fact in the usual sense."[206] In determining the persons responsible for the termination and whether it was city policy, Justice O'Connor placed great weight on the state statutes involved and the aspects of city governance at the highest levels, specifically identifying who the policymakers should have been.[207] Because neither the Mayor and Aldermen nor the body established to review employment decisions established a policy, Justice O'Connor did not find a policy.

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individual act by the council. Overall, as will be discussed below, Justice Powell's dissent in *Pembaur* ignores that "mere ad hoc decisions" can be law as equally as general rules.

200. *See Pembaur*, 475 U.S. at 492–502 (Powell, J., dissenting).

201. City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).

202. *See id.* at 114–16.

203. *See id.* at 123 (O'Connor, J., plurality opinion). Justice O'Connor restated the *Pembaur* test: "First, . . . municipalities may be held liable under § 1983 only for acts which the municipality itself is actually responsible, 'that is, acts which the municipality itself has officially sanctioned or ordered.' Second, only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability. Third, whether a particular official has 'final policymaking authority' is a question of *state law*. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Id.* (citations omitted) (quoting *Pembaur*, 475 U.S. at 480, 482–83 & n.12).

204. *Id.* at 132 (Brennan, J., concurring).

205. *Id.* at 124 (O'Connor, J., plurality opinion).

206. *Id.*

207. *See id.* at 124–32; *see, e.g., id.* at 128 ("The Mayor and Aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees.").

Justice Brennan,[208] because he did not support determining municipal liability in a "formulaic and unrealistic fashion," saw state statutory law as the "appropriate starting point" to determine the "actual power structure" in a municipality.[209] He noted, "We in no way slight the dignity of municipalities by recognizing that in not a few of them real and apparent authority may diverge, and that in still others state statutory law will simply fail to disclose where authority ultimately rests."[210] This admission that when he wrote the words "state law" in *Pembaur* he did not mean exclusively statutory law is an important clarification that the plurality opinion by Justice O'Connor glosses over. While these two opinions do not offer significant changes to *Pembaur*, they show that there are still clarifications possible in the concepts and definitions used when analyzing municipal liability.

These tests offered by the Court in the § 1983 context are not the only possible tests, however. In a completely different context in *Gebser v. Lago Vista Independent School District*,[211] the Court instead used an "actual notice" standard to determine the liability of a school district for sexual harassment by an employee teacher.[212] Rather than using a statutorily based remedy, the Court implied a right of action from Title IX of the Education Amendments of 1972.[213] The lower courts in *Gebser* reasoned that the statute "was enacted to counter *policies* of discrimination . . . in federally funded education programs," and that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district."[214] The Supreme Court agreed, stating the scheme under the statute, which removes federal funding from schools with discriminatory policies "is predicated upon notice to an 'appropriate person' and an opportunity to rectify any violation."[215]

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208. Justice Brennan, who authored the *Pembaur* decision similarly reiterated the *Pembaur* holding: "[It is] appropriate to hold municipalities liable for isolated constitutional injury inflicted by an executive final municipal policymaker, even though the decision giving rise to the injury is not intended to govern future situations . . . as long as the contested decision is made in an area over which the official . . . *could* establish a final policy capable of governing future municipal conduct . . . ." *Id.* at 140 (Brennan, J., concurring).

209. *Id.* at 143, 145.

210. *Id.* at 143.

211. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

212. *Id.* at 278–79, 285, 290.

213. *Id.* at 280–84 (citing 20 U.S.C. § 1681 et seq.).

214. *Id.* at 279 (quoting District Court, Western District of Texas).

215. *Id.* at 290.

Gebser could, however, supply alternative reasoning for a municipal liability standard under § 1983: A municipality would be liable if the appropriate people knew about the deprivation of rights and did not stop it. This standard is unlikely to be applied, and unlikely to work within the statute, however. First, it would create liability in same way the Sherman Amendment[216] would have, the same way that the Court in both *Monroe* and *Monell* determined would be an unconstitutional use of Congressional power. It would require a municipality to act affirmatively any time it discovered unconstitutional action by an official, and thereby essentially impose a cost on the municipality merely through its amount of knowledge. Second, the *Gebser* standard does not account for causation language in the statute – that liability flows only from depriving a citizen of *or causing* the deprivation of rights, obligations, or privileges under the Constitution and law of the United States.[217] This reason to reject this standard is more in line with a Hartian recognition of how rule-making and action within the ambit of power-conferring rules work.

Yet, even a knowledge standard might be justifiable under the language of the statute because of the presence of the classification as law of a state "custom."[218] Knowledge of a practice that deprives citizens of their rights without corrective action could be seen as a tacit acceptance of that practice. In this way, the *Gebser* standard might be appropriate, but only for certain categories of "law" listed in § 1983. As will be shown below, Hart's theory provides a framework to incorporate this other use of the *Gebser* standard into a more generally applicable one.

2. The Theory

The two questions in this section are first whether Hart's theory provides independent support for the application of the term "person" to municipalities and second, if municipalities are persons, what standard applies to determine when a municipality is acting for purposes of § 1983. The first question is essentially a definitional problem. The definition of "person" in the statute is determined either by the terms of the statute itself or by the rules of recognition in the jurisdiction enacting the statute, namely the federal government. Thus, however

216. *See supra* notes 185–205 and accompanying text.

217. Notice the standard under *Gebser*, 524 U.S. at 290, is not the same as causation, which is the statutory standard under § 1983. *Compare id.*, *with* 42 U.S.C. § 1983 (2007).

218. 42 U.S.C. § 1983 (2006).

the Supreme Court determines "person" applies would be valid within Hart's theory.

As a sub-question, one might ask if the definition of person were subject to determination based on how each state created municipalities. If so, the question would then be how the state creates entities, and therefore be a question of identification rather than definition. Luckily, these are already incorporated in the question the Supreme Court asks in determining personhood of artificial entities, even if they are not determinative of the definition of person itself. The Supreme Court in some sense identifies municipalities based on how they are created by each state. A body may be an arm of the state and thereby not a person, or may be a municipal corporation and a person, depending on the specifics of the power conferring rules that create the particular entity. Because Hart's theory accounts for nuance in the delegation of authority,[219] these relationships do not pose a problem for Hart, even if his theory does not specifically provide a standard by which to determine the status of a body as a person.

The second question, what standard to apply once it is determined that municipalities are persons, is more clearly a question of identification of law. Rather than being a definitional problem, this is a problem of identification of municipal action when it occurs. Identification of municipal action is necessary to determine whether the action itself falls under the language of § 1983 – whether the municipality deprived or caused the deprivation of a right, privilege, or immunity.

While the distinction between municipal action and individual action under Hart's positivism makes use of the concept of rules of recognition in a similar way to the "under color of" law discussion above, the reasoning differs significantly, and with it the result. Municipalities are artificial entities, and as such, cannot act in the same way that we would understand an individual to act. Therefore, we must first understand how municipalities act and when individual actions by officials become the actions of the larger entity.

As with any artificial entity, action by the entity must be through individual actors. We distinguish between actions within the entity and actions outside of the entity easily. Distinctions become more difficult when, as with action by municipal officials, persons properly labeled as within the entity act. This is where the rule of legislation and rule of recognition becomes important. Hart's theory, unlike previous theories, provides a basis for identification of power-conferring rules as law. Those power-conferring rules delegate the au-

219. *See* discussion of rules of legislation *supra* Part III.A.1.

thority to create new rules so long as it is done in a certain way. For example, a county ordinance may delegate authority to act on behalf of the county to a commissioner, but only if he acts according to certain procedures. Additionally, the commissioner might have *de facto* power to act in some situations because that power has been delegated to him. However, the commissioner will not be creating county rules that are seen as law when eating cereal for breakfast. Thus, we know via the rule of legislation in a particular municipality and for a particular type of rule, whether it be legislation or precedent of some variety.

Unlike with "under color of," this is not an analysis where examination of appearances is necessary. This is almost necessarily a post-hoc, objective examination under the rule of recognition and rule of legislation applicable to the municipality in question and the specific actors and actions involved. Thus, there is no need for the citizen's perspective to be taken into account here. Any examination from the in-the-moment perspective discussed above would not take into account the language of the statute – the question here is not whether there was the "color of" municipal action, but rather is whether the municipality caused the deprivation in question, whether the deprivation is "fairly attributable" to it.

This is also not a *respondeat superior* type of claim,[220] though to a cynic it may appear so in certain situations where the municipal official involved makes all rules in the form of precedent and without accompanying statements that make the content of the rule clear. The difference is that under the local law that governs the official's action, a judge will be able to identify, via the applicable rule of recognition, whether the pertinent rules of legislation were followed.

This reasoning seems to be more like Justice Brennan's plurality opinion in *Pembaur*[221] and concurrence in *Praprotnik*,[222] and less like Justice Powell's dissent in *Pembaur*,[223] the plurality decision in *Praprotnik*,[224] or the alternative standard from *Gebser*.[225] Justice Brennan comes as close as the Supreme Court has to using the principles in *The Concept of Law*. In *Pembaur,* Justice Brennan turned to

220. Strict vicarious liability of an organization for the acts of an officer or employee, which the doctrine of *respondeat superior* tends to exemplify, by definition does not contain an element of fault on the part of the superior or organization. *Cf.* BLACK'S LAW DICTIONARY (8th ed. 2004), definition of strict liability; BLACK'S LAW DICTIONARY (8th ed. 2004), definition of *respondeat superior*.

221. *Pembaur*, 475 U.S. at 471–85 (Brennan, J., plurality opinion).

222. *Praprotnik*, 485 U.S. at 132–47 (Brennan, J., concurring).

223. *Pembaur*, 475 U.S. at 492–502 (Powell, J., dissenting).

224. *Praprotnik*, 485 U.S. at 114–32 (O'Connor, J., plurality opinion).

225. *Gebser*, 524 U.S. 274; *see supra* text accompanying notes 231–35.

state law to find the rule of legislation and rule of recognition applicable to the situation, and he then determined whether those rules were actually followed. It just so happens that in *Pembaur*, the rule of legislation created a precedent-type rule, rather than a legislation-type rule. In *Praprotnik*, he steps slightly closer when he recognizes that the state and local law involved may be *de facto* law – rules followed in practice rather than those statements most easily discernable from the outside in the form that other communities might make rules. Justice Brennan's recognition that the rule of recognition in certain communities may differ to the point that the Supreme Court's reliance on statutes and formally adopted measures may be misplaced lies squarely within the principles present in Hart's theory.

Justice Powell's dissent in *Pembaur* attempts to identify municipal action with a sort of "one size fits all" federal standard, naming all laws as rules of general applicability.[226] This does not fit with the nuanced idea of law that Hart develops, specifically with the idea that creation of primary rules and official action can occur in a wide variety of ways – the spectrum between legislation and precedent. Another interpretation of Justice Powell's proposed test, since he relies on *Owen v. City of Independence* is that municipal action must merely be in a form easily recognizable by the Court as via official processes; however, this again ignores the variety of ways in which a municipality might act. Over all, use of a general federal standard for identifying what rules of legislation are present and used in a municipality ignores the nuance in the identification of law – Justice Powell's test would ignore the variety in rules of legislation, too heavily depending on a removed-perspective rule of recognition.

The plurality opinion in *Praprotnik* takes a similar tack to Justice Powell, though under the guise of identification of state law. The plurality test, because of its focus *only* on state statutes and the municipal charter, ignores the various ways that rules can be created. Just as under *Home Telephone* state or municipal laws that violate the constitution are still considered laws enacted by the state, so a municipality may create rules that run contrary to the state's or its own explicitly stated standards.[227] In terms of Hart's theory, the plurality test again ignores the variety in rules of legislation, too heavily depending on a removed-perspective rule of recognition. Between these three tests, it is clear that Justice Brennan's test captures more

226. *See supra* notes 215–20 and accompanying text.

227. *Cf. Home Telephone*, 227 U.S. at 283–84.

of the nuance inherent in law, and the same nuance that Hart points out in his descriptions of secondary rules.

As mentioned in the previous section, the *Gebser* standard does not work for every category of law listed in § 1983.[228] As such it could be rejected outright, except for the fact that in the context at least of municipal "custom," it continues to be informative and possibly useful. Another advantage of Justice Brennan's test and the interpretation of the statute in light of Hart's theory is that they can be considered to incorporate the *Gebser* standard in certain contexts, whereas the other tests do not supply any way to incorporate different methods of identifying customs systematically.

V. CONCLUSION

The theoretical outline here may provide a way to move forward with § 1983. Decisions under and interpretations of § 1983 require an understanding of the nature of law, how law is made in different communities and contexts, and how citizens understand the law. Hart's legal positivism effectively lays out the nature of law, and in doing so, can provide a foundation for future decisions. The Court's current methodology lacks the fundamental theoretical underpinnings that might provide a clarification for § 1983 doctrines. While selection of a theoretical underpinning may open the door to arguments over natural law against positive law, the debate in analytical jurisprudence after Hart still contains the fundamental aspects related above. Few of the nuances to Hart's theory are necessary for it to provide an effective foundation here.

As seen in the discussions above, Hart's conception of the internal point of view and secondary rules can help to provide a way to move forward with the definition of "under color of," specifically in the context of private actors who deprive citizens of statutory rights or privileges. While the theory does not give a final determination of a test, it provides different possible standards, and possibly a compromise test that incorporates both a way to move forward and a validation of past decisions.

Additionally, Hart's nuanced look at the different ways of creating law and recognizing law can help to provide a coherent test for determining when a municipality is acting or causing action. While Hart's theory does not provide a method for determining the threshold question – whether municipalities are persons – it does provide a sys-

228. *See supra* notes 231–39 and accompanying text.

tematic, though necessarily complex and gestalt, way to identify municipal law.

Unfortunately, as Hart pointed out in *The Concept of Law* and as seen in this article, public policy arguments will necessarily arise within the open texture of the law.[229] The question becomes how and when those arguments arise. The balance between two competing public policies – enforcement of rights and limitations on societal costs of liability – is shifting ground, able to change and turn with the Court's feelings toward the institution of tort law in general. A foundation in history, as seen in the switch from *Monroe* to *Monell*, can be just as shaky: given enough history, one can find statements to support most any proposition. Just as with speech act theory and the First Amendment and other similar foundational projects in the law, this project may supply a *more* stable, even if necessarily fluctuating, base for § 1983.

229. *See supra* text accompanying note 56.