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Cover Page Footnote

John J. O'Brien Professor of Law and Professor of Philosophy, University of Pennsylvania Law School. I received very helpful comments on earlier drafts of this essay from Joseph Raz and Scott Shapiro; participants at the Conference The Internal Point of View in Law and Ethics, held at the Fordham University School of Law; participants at a Legal Theory Workshop held at the Faculty of Law, McGill University; and participants in an ad hoc faculty workshop held at the University of Pennsylvania Law School.

HART ON SOCIAL RULES AND THE FOUNDATIONS OF LAW: LIBERATING THE INTERNAL POINT OF VIEW

*Stephen Perry**

INTRODUCTION

The internal point of view is a crucial element in H.L.A. Hart's theory of law. Hart first introduces the notion by pointing out that, within a social group which has rules of conduct, "it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct."¹ Those who are concerned with the rules in the latter way have, Hart tells us, adopted the internal point of view towards the rules. Hart thus defines the internal point of view in a very specific manner, by reference to the notion of "accepting and using a rule." Furthermore, as Hart's more general discussion in *The Concept of Law* makes clear, he has in mind quite specific and closely related conceptions both of what a rule is and of what it means to accept and use a rule.

A rule is, according to Hart, a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform. To use the rule is to conform one's own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group. The existence of such "social" rules, as Hart calls them, thus consists of these very facts of acceptance and use. Since the internal point of view is just the perspective of those who accept the rule, it follows that, as a conceptual matter, a social rule does not even exist unless a sufficiently large number of people within the requisite group adopt the internal point of view with respect to some regular pattern of behavior.

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1. H.L.A. Hart, *The Concept of Law* 89 (2d ed. 1994).

A social rule in Hart's sense lies, according to Hart, at the foundation of every legal system. The rule of recognition, as he calls this fundamental rule, is a complex social practice of the kind just described which holds among those persons in a society whom we would intuitively recognize as its officials. The normative character of the rule of recognition, like all Hartian social rules, is duty- or obligation-imposing. More particularly, it imposes a duty on officials to apply other rules which can, in accordance with criteria set out by the rule of recognition, be identified as valid law. The existence of a rule of recognition is, according to Hart, a necessary condition of the existence of a legal system. Since the rule of recognition, like other social rules, cannot exist unless a sufficiently large number of people in the requisite group adopt the internal point of view, and since, for Hart, the requisite group is a society's officials, it follows that a legal system cannot exist unless most—if not all—of its officials adopt the internal point of view. By the same token, a legal system can, according to Hart, exist even if no one other than its officials adopts the internal point of view.

The internal point of view serves two particularly important and related roles in Hart's theory of law. The first is, as just discussed, to specify one of the constitutive elements of the complex social practice that comprises a legal system, and, more particularly, to specify that element which permits us to say that law is not just a social practice, but a normative social practice. The second role is to explain the normative dimension of the meaning of such statements as "It is the law of Pennsylvania that everyone has an obligation to do X."² John Austin and Jeremy Bentham had maintained that law could be explained as a general habit of obedience, and that the concept of obligation could be reduced to the nonnormative concepts of threat and sanction. Hart argues very persuasively, and to the satisfaction of virtually all of his successors in jurisprudence, that neither of these reductive analyses has any hope of success, precisely because they omit the normative dimension of, respectively, the practice of law and the concept of obligation. In each case, the remedy that Hart proposes to cure the defect is the internal point of view. Habits and rules both involve regular patterns of behavior, but rules also involve, and are partly constituted by, a characteristic normative attitude: Those who accept the rule regard the pattern of behavior as a common and binding standard of conduct. The internal point of view also figures in Hart's analysis of the meaning of legal statements. Although the point has not been widely appreciated until recently, the account Hart offers of the meaning of such statements as "It is the law of Pennsylvania that everyone has an obligation to do X" is in part a non-cognitivist one. The normative aspect of the

2. Scott Shapiro suggests that the internal point of view serves four distinct roles in Hart's theory of law, of which these are but two. The others are to specify a particular kind of motivation that the law can provide and to offer an account of the intelligibility of legal practice. Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *Fordham L. Rev.* 1157 (2006).

meaning of this statement has, on Hart's view, nothing to do with whether or not the residents of Pennsylvania do, in fact, have an obligation to do X, but consists, rather, in the expressed *endorsement* of the view that everyone in Pennsylvania is obligated to do X.³ The meaning of the normative dimension of such statements is given, in other words, by the fact that those who assert this statement express their acceptance of the internal point of view towards the law of Pennsylvania.

Although Hart rejects Austin's reductive analyses of law and obligation, he shares the naturalistic and empiricist commitments that led Austin to be suspicious of normativity. In this essay I argue that Hart's own theory of law does not fully escape the difficulties of the Austinian theory that he so successfully criticizes because in the end, he, like Austin, does not take normativity sufficiently seriously. Since the internal point of view is nothing more than an attitude that a standard is binding, Hart is not offering an account of the normativity of law that looks to its (potential) reason-givingness. I argue that Hart's non-cognitivist account of the meaning of legal statements, based as it is on the idea that the proper explanation of the normativity of law looks to the expressed endorsement of a standard of conduct rather than to the law's potential to create reasons for action of a specifically legal kind, prevents him from offering an analysis of power-conferring rules that fully corresponds to his analysis of duty-imposing rules. The upshot is that Hart cannot offer a proper theoretical account of that aspect of the phenomenon of law which he himself took to be most important, namely, the claim by legal officials to have the authority or power to change the normative situation of those who are subject to law. That law makes this claim is indeed one of the most fundamental attributes of both the concept and practice of law. The internal point of view, properly understood, is the perspective both of the authorities who make this claim and of the subjects of law who accept it. To accept the legitimacy of the law's claim to authority is to *believe* that the law has such authority, and not simply to adopt an attitude of endorsement towards the law's requirements. The internal point of view must be freed, in other words, both from its conceptual role as a constitutive element of a certain kind of norm and from its semantic role in a non-cognitivist account of the meaning of legal statements. Once we adopt a properly liberated, cognitivist understanding of the internal point of view, then we are no longer committed, as Hart was, to conceiving of law as a socially practiced norm of a certain kind, a constitutive element of which is a widely shared attitude of endorsement. While it *might* be the case that accepting the authority of law involves the acceptance of a norm—presumably, a power-conferring rather than a duty-imposing norm—it is by no means obvious

3. To the best of my knowledge, the non-cognitivist aspect of Hart's understanding of the meaning of normative statements was first noticed by Raz. See Joseph Raz, *H.L.A. Hart (1907-1992)*, 5 *Utilitas* 145, 147-49 (1993) [hereinafter Raz, *H.L.A. Hart (1907-1992)*]; Joseph Raz, *The Purity of the Pure Theory*, 138 *Revue Internationale de Philosophie* 441, 447-48, 454 (1981) [hereinafter Raz, *The Purity of the Pure Theory*].

that this is so, and to show that it is so requires more in the way of argument than Hart provides. Adopting a cognitivist understanding of the internal point of view, and of the meaning of normative statements generally, also leads naturally to the recognition that the meaning of normative expressions is, contrary to Hart's own view of the matter, the same in both moral and legal contexts. Legal normativity is moral normativity, and the law's claim to authority is a moral claim.

I. NORMS

It will be helpful to begin our discussion of the internal point of view with the general notion of a norm. I will stipulatively define a norm as a standard of conduct or purported standard of conduct that (1) is of a type which has existence conditions that refer in some fairly direct way to facts about human behavior, attitudes, or beliefs, or to some combination of such facts, and that (2) does in fact exist because the appropriate existence conditions have been met. The intuitive idea is that a norm is a standard of conduct or purported standard of conduct which is also a social artifact of a certain kind, because its existence consists of, or at least depends directly on, certain forms of human behavior. A norm can thus only exist if it is practiced, accepted, believed in, endorsed, prescribed, recognized, or otherwise "engaged with," to use a useful term of John Gardner's, by human beings.⁴

For present purposes, I will label the existence conditions which a norm must meet as "social" conditions. A better general term might be "behavioral," since there can be individual as well as group norms. But in the context of law it is safe to assume that the existence conditions of any norm will always refer to the behavior, attitudes, or beliefs of groups of persons, even if they also sometimes refer to the behavior and attitudes of individuals (such as the absolute monarch Rex, who figures in a well-known example discussed by Hart). Hartian social rules are clearly norms, but the notion has been defined sufficiently broadly so as to encompass most other positivist accounts of the foundations of a legal system which can be described in a very broad sense as conventionalist.⁵ These include Jules Coleman's and Gerald Postema's early idea that the rule of recognition is a coordination convention in the narrow sense defined by David Lewis,⁶ and Scott Shapiro's more recent suggestion that the

4. John Gardner, *Legal Positivism: 5 ½ Myths*, 46 *Am. J. Juris.* 199, 200 (2001).

5. See the helpful general discussions of conventionalism in law in Jules L. Coleman, *The Practice of Principle* 74-102 (2001); Leslie Green, *The Authority of the State* 89-121 (1988); John Finnis, *Natural Law and Natural Rights* 134-60 (1980); Andrei Marmor, *Legal Conventionalism*, in *Hart's Postscript: Essays on the Postscript to The Concept of Law* 193 (Jules L. Coleman ed., 2001).

6. Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. Legal Stud.* 139 (1982); Gerald Postema, *Coordination and Convention at the Foundations of Law*, 11 *J. Legal Stud.* 165 (1982). On Lewis-style conventions, see David K. Lewis, *Convention: A Philosophical Study* (1969).

fundamental social practice underlying law is an instance of Michael Bratman's notion of Shared Cooperative Activity.⁷ It is important to notice, however, that most of these "conventionalist" accounts of law's foundations are meant to show how appropriately characterized conventionalist norms can, under certain conditions, be reason-giving or even obligation-imposing. As was noted in the Introduction, Hart's account of social rules does not appear to have any such aim, since his understanding of the normativity of law looks to the expressed *endorsement* of a standard of conduct as guiding or binding, rather than to an explanation of how standards of conduct actually are or might be binding for some person or group of persons.

The claim that the content of law can be completely captured by a set of norms is characteristic of many modern versions of legal positivism, and the question of how properly to formulate the existence conditions of legal norms is a subject of lively and ongoing debate among positivists. This debate builds upon, and is not easily separated from, the more general debate about the nature of norms that takes place within the philosophy of practical reason. But not all contemporary legal philosophers accept the claim that the normative content of law can be completely captured by a set of norms, in the sense of "norm" that I have defined. In order to avoid a possible source of confusion here, it is worth drawing explicit attention to the fact that the meaning of the term "normative" differs in an important way from the meaning of the term "norm," even though the two are obviously closely related. The term "normative" refers in a general and rather diffuse way to the full range of reasons for action that people can have, and thus includes within its scope moral and prudential reasons as well as reasons that derive from norms as I defined them earlier.⁸ A norm, however, has social or behavioral existence conditions. A norm cannot exist unless somebody thinks that it has some effect on someone's reasons for action, although by the same token it can exist even if it does not, in fact, affect anyone's reason for action at all. This is because a norm is simply a certain kind of artifact, the existence of which depends on certain facts about human behavior, attitudes, or beliefs. The fact that such norms

7. Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 *Legal Theory* 387 (2002); Scott J. Shapiro, *Legal Activity as Massively Shared Agency* (unpublished manuscript, on file with the author); see also Coleman, *supra* note 5, at 95-102. On Bratman's notion of Shared Cooperative Activity, see, e.g., Michael E. Bratman, *Shared Cooperative Activity*, 101 *Phil. Rev.* 327 (1992).

8. The sense of the term "normative" discussed in the text refers to the general notion of reason-givingness and is therefore applicable to all reasons for action, whether they derive from norms or not. But there is also another, overlapping sense of the term, which is concerned with the nature of norms as such. In this second sense, the term does not necessarily involve the idea of reason-givingness, since the point of some norms is not to guide conduct but rather to provide standards of evaluation. The norms of theory evaluation in science are of this kind, for example. I thank Scott Shapiro for reminding me of this point.

are regarded as reason-affecting does not mean that they are, in fact, reason-affecting.

It is also worth pointing out that while people sometimes refer in a rather loose way to moral norms, morality cannot, in general, be regarded as consisting of norms in the sense defined earlier, unless one accepts a rather implausible understanding of the nature of morality.⁹ Obviously, morality has normative content, in the sense that there are distinctive moral reasons for action that take the form of obligations, rights, permissions, etc. As a general matter, however, these reasons for action do not have behavioral existence conditions in the way that norms do. For example, all of us are under the moral obligation not to enslave other human beings, but we do not have this obligation, or at least we do not exclusively have it, by virtue of a Hartian social rule or by virtue of any other kind of norm. The obligation exists even in societies which have institutionalized forms of slavery and in which people do not regard slavery as involving a wrong. People in such societies thus have a moral obligation that they not only regularly violate, but that they do not even know they have.

Finally, to avoid one other possible source of confusion, the term “norm” as I am employing it here can encompass both rules in the preemptory or mandatory sense that Joseph Raz has captured quite precisely in his notion of an exclusionary reason,¹⁰ and also principles in the sense of standards that, as Ronald Dworkin described them in an early article, have a dimension of weight but are nonetheless not dispositive of what should be done on a particular occasion.¹¹ If this is what is meant by a principle, then some principles are norms, but some are not. In exactly the same way, some exclusionary reasons are norms, but some are not. To be a norm, the standard in question must both have and meet social existence conditions. If it does not, then it is not a norm.

Hart ordinarily used the term “rule” rather than the term “norm.” A rule, as I shall use the term, is a norm which is general at least in the sense that it has application to more than one case, and which is also usually general in the sense of applying to more than one person. A policeman’s order which is issued on a particular occasion to a particular motorist to pull over to the side of the road is a norm, but it is not a rule. Since the distinction between norms and rules is not one that has any particular significance in the theoretical debates that I will be discussing in this essay, I will use the terms “rule” and “norm” more or less interchangeably.

It is not, I think, in any way controversial to state that much of the content of what I will call “regular” law, meaning law that has more or less direct application to persons and which can be roughly characterized as non-foundational in nature, consists of norms. The laws passed by a legislature are norms, for example, as are the standards of conduct that

9. Cf. Joseph Raz, *Incorporation by Law*, 10 *Legal Theory* 1, 3 (2004).

10. See, e.g., Joseph Raz, *Practical Reason and Norms* 35-48 (1975).

11. Ronald Dworkin, *Taking Rights Seriously* 22-28 (1978).

emerge from the application of the doctrine of precedent. It is controversial whether the *entire* content of regular law consists of norms—for example, part of its content might be drawn directly from morality—and it is also controversial whether at least some legal norms might have moral as well as social existence conditions. These are not, however, controversies that bear on the questions I will be discussing in this essay, and for present purposes we can set them aside. My interest, rather, is with the theoretical nature of the *foundational* arrangements of law.

II. SOCIAL RULES AND THE INTERNAL POINT OF VIEW

Hart first introduces his particular conception of a social rule, and with it the idea of the internal point of view, in the course of discussing his now-famous example of the absolute monarch Rex. Rex, Hart tells us, “controls his people by general orders backed by threats requiring them to do various things which they would not otherwise do, and to abstain from doing things which they would otherwise do.”¹² Each member of the general population has a habit of obeying Rex’s orders, and since everyone obeys him we can speak of a convergent habit. So far, however, contrary to the views of Austin and Bentham, we do not have a situation that can properly be characterized as law, even though the situation has, in Hart’s words, “some of the important marks of a society governed by law,” including a certain unity which might even entitle us to call it a state.¹³ But we nonetheless do not yet have *law* because there is nothing in the situation as thus far described which would entitle us to say that Rex has the *right* to rule, and thus a fortiori there is nothing which would permit us to say that Rex’s right to rule is immediately passed to a successor, for example his son, when Rex dies. Hart argues very persuasively that the idea of habitual obedience cannot, by itself, “account for the continuity to be observed in every normal legal system, when one legislator succeeds another.”¹⁴ If we are to be able to speak of a right to succeed, Hart says,

there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed.¹⁵

In other words, once we can describe the situation by reference to a certain kind of *rule*, then certain new concepts come into play, such as “title,” “right to succeed,” and, most importantly, “right to make law,” which

12. Hart, *supra* note 1, at 52.

13. *Id.* at 53.

14. *Id.* at 54.

15. *Id.* at 55.

entitle us to describe the situation as involving at least a rudimentary legal system.¹⁶

Hart's critique of Austin shows beyond a shadow of a doubt that law cannot be reduced to the simple elements of habit and obedience. But Hart's own theory of law brings with it certain difficulties of its own, and I shall argue that these difficulties flow, in part, from Hart's inability to make a completely clean break with the Austinian approach. As a preliminary matter, let me first draw attention to two aspects of the Rex example which seem to require a fuller explanatory account than can be found in Hart's initial discussion of the example. The first is that Hart moves immediately from the impossibility of accounting for law by reference solely to the elements of habit and obedience to the conclusion that this deficiency can only be remedied by bringing in the concept of a *rule*, where by a "rule" he means, as his subsequent discussion in *The Concept of Law* soon makes clear, a very particular kind of norm, as that term was defined in the preceding section. The second point is that, in the Rex example, the kind of rule that would seem to be required to make sense of the notion of a right to rule, if indeed we need the notion of a rule here at all, would most naturally be thought to be a power-conferring rule. The appropriate rule, in other words, would appear to be one that confers on Rex a power which Rex can exercise so as to change the normative situation of others, and, in particular, to subject them to obligations. This is surely the most straightforward way to make sense of the point, heavily emphasized by Hart, that Rex has a *right* to rule. In fact, however, the kind of rule that Hart goes on to describe, and that he says we require in order to have sufficiently adequate conceptual resources to capture the phenomenon of law in its full social complexity, is not a power-conferring rule at all, but rather a duty-imposing rule. This creates something of a puzzle, to which I shall return later. First, however, let me summarize the concept of a social rule as Hart describes it.

Hart's analysis of a social rule is meant to make more precise the familiar idea of a rule or norm which is based on custom. According to Hart's analysis, a social rule exists for a group of persons when a certain pattern of behavior within the group is general, deviations from the pattern give rise to criticism, criticism of such deviations is regarded as justified, and, finally,

16. It is perhaps worth pointing out a certain oddity about the Rex example. A rule of recognition is supposed to be a social rule that holds among officials and officials only, but since in the example there is only one official, namely Rex, that could not be true here. Rex's right to rule clearly does not derive from a personal rule which he has unilaterally adopted, or which in some other way derives from his attitudes and behavior alone. It is clear from Hart's description of the example that the behavior and attitudes of members of the general population, and not just the behavior and attitudes of Rex, count among the existence conditions of the rule which confers on Rex the right to rule. In Part III, *infra*, I discuss the question of why Hart might have been led to make the somewhat implausible claims that (1) it is only the behavior and attitudes of officials that are to be taken into consideration in determining whether or not a rule of recognition exists, and (2) that a legal system can exist even if no one in the relevant society besides officials adopts the internal point of view. *Id.* at 116-17.

there is associated with the pattern a so-called "internal aspect."¹⁷ The internal aspect involves a "reflective critical attitude" toward the relevant pattern of behavior, which means that it is regarded by members of the group as a common standard of conduct to which they all have reason to conform. The fact that the pattern of behavior is regarded as a standard is also taken to legitimize criticism of deviations from the pattern and to justify the use of a wide range of normative language: You ought (or ought not) to do such and such a thing; doing such and such is wrong. As this general characterization of social rules makes clear, a social rule is a kind of norm in the sense of that term that was defined in Part I, and the various elements of a social rule that Hart describes—a general pattern of behavior, an internal aspect in the form of a reflective critical attitude, and so on—establish the existence conditions for this particular class of norm. Hart goes on to say that in the case of a rule for which "the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great," the rule is regarded as giving rise to an *obligation*.¹⁸ The internal point of view is the point of view of those in the group, consisting of at least a majority, who accept that the rule is binding upon all members of the group in the manner suggested by the rule's internal aspect.¹⁹ At one point, Hart describes the relationship between the internal point of view and the internal aspect of rules in the following way: To mention the fact that members of the group regard the relevant pattern of behavior as both a standard of conduct and as giving rise to an obligation is, he says, "to refer to the internal aspect of rules seen from their internal point of view."²⁰

Hart's analysis of the concept of law employs this notion of a social rule in the following way: The core element of law is, Hart argues, the "rule of recognition," which is a fundamental social rule that is accepted as binding by a subgroup of persons within the larger society whom Hart designates as "officials."²¹ The rule of recognition exists, like all Hartian social rules, as a certain kind of complex social practice, which in the case of the rule of recognition is a practice that holds not among all the members of the relevant society, but only among its officials.²² The rule of recognition serves two different but related roles. First, it specifies criteria which identify which other rules are to count as valid laws of the relevant legal system. Second, it imposes on certain officials, including in particular judges, an obligation to apply and enforce those valid laws. It bears emphasizing that the rule of recognition is, like all Hartian social rules which are accompanied by a particularly insistent demand for conformity,

17. *See id.* at 55-57.

18. *Id.* at 86.

19. *Id.* at 91-92.

20. *Id.* at 90.

21. *Id.* at 94-95, 100-10.

22. *Id.* at 110.

duty-imposing in its normative character.²³ Judges and other officials hold the internal point of view toward the rule of recognition and hence regard it as “a public, common standard of correct judicial decision.”²⁴ Other members of the society may or may not share the internal point of view, although it is a general requirement for the existence of a legal system that there be at least a minimal level of general compliance with the system’s rules.²⁵ Some citizens comply because they themselves hold the internal point of view toward the rule of recognition (and, by extension, toward the rules it identifies as valid), but others only pay attention to the rules and comply with them to the extent that they have to, “because they judge that unpleasant consequences are likely to follow violation.”²⁶ Hart maintains that such persons have adopted the “external point of view” towards the rules of their society, and continues,

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons’ behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment.²⁷

In a number of earlier articles, I criticized Hart for privileging the internal point of view over one version of the external point of view in a way that, I argued, he was not entitled to do.²⁸ Scott Shapiro argued in response to that criticism that I had mischaracterized Hart’s understanding of the internal point of view: Shapiro observed that Hart did not regard the internal point of view simply as the perspective of a legal insider, but meant it to refer, rather, to “the perspective of an insider who accepts the law’s legitimacy.”²⁹ We must be careful not to be misled by this formulation, since, as Shapiro is careful to note, Hart did not think that adopting the internal point of view entails that one accepts the moral legitimacy of law; Hart was quite explicit in his view that one can adopt the internal point of view for many different

23. Hart writes that the statement that someone is under a duty or obligation always implies the existence of a rule, but that the converse does not hold. For example, rules of etiquette are taken to be reason-giving but not obligation-imposing. *Id.* at 85-86. This is a complication which for present purposes we can ignore, however, since Hart makes clear that social rules in the legal context are always taken to be obligation-imposing.

24. *Id.* at 116.

25. *Id.* at 112-17.

26. *Id.* at 90.

27. *Id.* at 90-91.

28. Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *The Path of Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* 158 (Steven J. Burton ed., 2000) [hereinafter Perry, *Holmes Versus Hart*]; Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *Law and Interpretation* 97 (Andrei Marmor ed., 1995) [hereinafter Perry, *Interpretation and Methodology in Legal Theory*].

29. Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *The Path of the Law and Its Influence*, *supra* note 28, at 197, 200. Shapiro reiterates this point in Shapiro, *supra* note 2, at 1159.

reasons, including reasons of self-interest or a mere wish to conform.³⁰ As regards Shapiro's charge that I mischaracterized Hart's position, it is certainly true that I took Hart to understand the internal point of view to be the normative perspective of a legal insider. Shapiro is also correct to point out that Hart himself limited the appropriate perspective to that of an insider who accepts that the law gives rise to common binding standards for everyone in the relevant society. The main point I was concerned to establish, however, was that Hart's defense of his own theory of law does not exclude the possibility of theoretically privileging another kind of normative perspective that an insider might hold, and which could be regarded as a competitor to the internal point of view in Hart's sense. This is the perspective of Oliver Wendell Holmes's famous bad man, who only complies with the law out of reasons of self-interest.³¹ This suggestion was not intended to show that a Holmesian theory of law is in fact a plausible or ultimately defensible view, but only, as I say, to point to what still seems to me to be a gap in Hart's own argument.³² Whether or not I am right in thinking that such a gap exists, I accept Hart's basic point that no plausible theory of law can do without the internal point of view in *something* like the sense he had in mind. But it is theoretically preferable, I will argue, to free

30. Hart, *supra* note 1, at 203.

31. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459-61 (1897).

32. My argument began with the observation that Hart had conflated two senses of the expression "external point of view." In one sense in which he uses the term, the external point of view is the perspective of an observer of the relevant social practice who is engaged in a process of theoretical reasoning and who describes the practice from, so to speak, the outside. But Hart also uses the expression to refer to the perspective of someone like Holmes's bad man, who pays attention to the law only for the self-interested reason that he wishes to avoid being subjected to sanctions. The bad man is clearly a participant in the practice, not an observer, and he is engaging in a process of practical rather than theoretical reasoning. I then pointed out that, because the bad man is an insider and a practical reasoner, his perspective might be thought of as a second kind of internal point of view which is in competition with Hart's own understanding of that notion. Finally, I suggested that Hart had not given us sufficient reason for privileging one insider's perspective over the other. I did not mean to suggest that a Holmesian theory of law could dispense completely with the internal point of view in Hart's sense, since the notion of a rule, or of some similar normative notion, would undoubtedly be required to make sense of the practices of officials. See Perry, *Holmes Versus Hart*, *supra* note 28, at 196 n.69. But Hart himself allows for the possibility that *no one* besides officials might adopt the internal point of view in his sense, Hart, *supra* note 1, at 117, and that is precisely what a Holmesian legal system would look like. What I did not make clear in these earlier articles is that Hart's analysis of social rules leaves him no choice but to say that a legal system could exist even if no one other than officials accepts the legitimacy of law. I discuss the reasons for this in Part IV, *infra*. At the time that I wrote those earlier articles, I also did not appreciate that Hart in fact held a non-cognitivist theory of the meaning of legal statements. As Scott Shapiro has pointed out to me, it is not at all clear why one could not offer a non-cognitivist analysis of legal statements understood as Holmesian threats which would explain their normativity in expressivist terms along lines very similar to Hart's own account. I discuss the non-cognitivist dimension of Hart's analysis of legal statements in Part III, *infra*. For an interesting discussion of what a Holmesian (or Hobbesian) theory of law might look like, see Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 Fordham L. Rev. 1211 (2006).

the internal point of view from the conceptual link to a fundamental norm which takes the form of a Hartian social rule.

To show this, it will be helpful to begin with a discussion of Hart's famous distinction between the two types of rules which he calls primary and secondary. It is, Hart maintained, in the combination of these two types of rules that the key to the science of jurisprudence can be found.³³ Secondary rules are meant, very roughly, to be the foundational rules of a legal system, whereas primary rules make up what I loosely referred to earlier as the system's "regular" laws. When Hart first introduces the distinction, he suggests that what distinguishes the two types of rules is a difference in their normative character: Secondary rules are said to be power-conferring, whereas primary rules are meant to be duty-imposing.³⁴ This way of characterizing the distinction cannot be correct, however.³⁵ Although my concern in this essay is primarily with secondary rules, let me first make clear why primary rules cannot be regarded as exclusively duty-imposing in nature. It is evident from Hart's general discussion of primary rules that he understands them to be norms that can be identified as valid laws in accordance with the criteria of validity which are specified by the relevant legal system's rule of recognition. Primary rules are simply valid rules of the system, and as such they can certainly impose obligations, but they can also create powers, rights, privileges, immunities, liabilities, and so on. Hart says that the notion of validity brings with it a new way in which rules can exist, since a valid rule, unlike a social rule, can exist even if it is habitually ignored.³⁶ There is, for example, a valid law against jaywalking

33. Hart, *supra* note 1, at 81.

34. *Id.*

35. It has often been remarked that Hart draws this important distinction in a number of different and ultimately inconsistent ways. See, e.g., Neil MacCormick, H.L.A. Hart 103-06 (1981); Joseph Raz, *The Authority of Law* 177-79 (1979); P.M.S. Hacker, *Hart's Philosophy of Law, in Law, Morality, and Society: Essays in Honour of H.L.A. Hart* 1, 19-21 (P.M.S. Hacker and Joseph Raz eds., 1977); Stephen R. Perry, *Hart's Methodological Positivism, in Hart's Postscript, supra* note 5, at 311 n.4. Besides the attempt to differentiate the two types of rules on the basis of their supposed character as duty-imposing in the one case and power-conferring in the other, the other main way that Hart tries to draw the distinction characterizes secondary rules as "on a different level from the primary rules, for they are all about such rules." Hart, *supra* note 1, at 94, 97. Probably the best way to make sense of this claim that secondary rules are on a different level from primary rules is simply to take it as asserting that secondary rules play a constitutive or foundational role in legal systems. The terminological picture is further complicated by the fact that Hart sometimes uses the term "primary rule" to mean not the valid rules of a legal system, but rather the customary rules of primitive or pre-legal societies. *Id.* at 91-92. This is a particularly confusing usage because customary rules are, of course, the very class of norm that Hart's notion of a social rule is meant to capture.

36. Hart, *supra* note 1, at 103, 109-10. Note that it does not follow from the fact that a valid law is habitually ignored that it is not a norm in the sense I defined in Part I, since a valid law still has social existence conditions which refer, for example, to the fact that it was enacted by some legislative body. Hart states that once we have a rule of recognition which specifies criteria of validity, the statement that a rule exists "may now be an internal statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity.'" *Id.* at 110. But the possibility of

in New York City, and this is true despite the fact that virtually everyone jaywalks there. The notion of validity, in other words, marks out a set of existence conditions for a distinct class of norms which differ from social rules in at least two respects: Their normative character is not restricted to imposing duties, and their existence does not require that they actually be observed.

Just as primary rules turn out not to be exclusively duty-imposing in character, neither are secondary rules exclusively power-conferring. Hart discusses three specific kinds of secondary rules in *The Concept of Law*. One of these is the rule of recognition, and the other two Hart calls rules of change and rules of adjudication.³⁷ Rules of the latter two kinds are clearly power-conferring in nature. A rule of change “empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules,”³⁸ whereas a rule of adjudication “empower[s] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.”³⁹ In other words, a rule of change confers powers to legislate, whereas rules of adjudication create the various powers to apply the law and, more generally, to settle disputes, which we associate with courts. The rule of recognition, however, is, as we have already seen, not power-conferring but duty-imposing: It specifies whatever features a rule must possess in order to count as one of the legal system’s regular laws—to count, in Hart’s terminology, as a valid primary rule of the system—and it imposes on officials a duty to apply and enforce the rules which are thus identified as valid. As Hart’s discussion of the relationship among these three types of rules proceeds, it becomes increasingly clear that he regards the rule of recognition as the theoretically dominant type of rule among the three, and indeed rules of change and rules of adjudication pretty quickly drop out of the picture altogether. The only secondary rule that remains standing, so to speak, is the rule of recognition, which Hart repeatedly refers to as the *ultimate* rule of a legal system.⁴⁰ Thus when Hart says that law is a combination of primary and secondary rules, one could be forgiven for thinking that what he means in the end is that law is a combination of a duty-imposing rule of recognition on the one hand, and the various rules that are identified by the rule of recognition as valid, on the other hand. Thus, despite the fact that at one point Hart explicitly characterizes secondary rules as power-conferring by their very nature, the view he

such “internal” statements of existence does not preclude the possibility of “external” statements which assert that a given valid rule of a legal system exists because it meets certain social existence conditions, for example, that the legislature of the society in question has performed certain actions which, according to the society’s relevant (and practiced) rules of change and recognition, amount to the enactment of the rule as a law for that society.

37. *Id.* at 91-99.

38. *Id.* at 95.

39. *Id.* at 96.

40. *Id.* at 105-10.

eventually appears to settle on is that the most fundamental element in the foundational arrangements of a legal system is a rule that is duty-imposing.

As I remarked earlier, there is a puzzle here. Hart tells us that if we are to understand the regime of Rex, the absolute monarch, as involving law, then there must exist in his society a general social practice more complex than any that can be described in terms of habit and obedience. Assuming for the moment that Hart is right to treat the relevant social practice as one involving norms, in the sense of "norm" that was defined in Part I, why should the most fundamental norm be duty-imposing rather than power-conferring in nature? The issue here concerns the relationship between the rule of recognition and the type of secondary rule that Hart calls a rule of change. A rule of change is, as we saw a moment ago, a rule that confers on some person or body the power to legislate, which (again assuming that we should be looking to rules or norms at all) is presumably exactly the kind of rule that must exist if Rex can properly be said to have a right to rule. Recall that the rule of recognition imposes on certain officials, and in particular on judges, the duty to apply and enforce a system's primary rules. But judges cannot apply the primary rules unless there are some primary rules to be applied. It is possible that, in a borderline case of a legal system, all the primary rules identified as valid by the rule of recognition might consist of preexisting customary rules that hold among the population at large or among some segment of the population;⁴¹ the rules of the old law merchant, for example, were of this kind. But we do not have a central case of a legal system until there exists some person or body which is capable of enacting new rules, which means, in Hartian terms, that the system contains at least one rule of change.⁴² The puzzling aspect of Hart's characterization of the theoretical foundations of law is that, while he provides a very detailed theoretical account of the nature of the rule of recognition, in the form of his general analysis of the existence conditions of social rules, he offers no corresponding theoretical account of the nature of the fundamental power-conferring rules that he calls rules of change. This is particularly puzzling given his statement earlier in *The Concept of Law* that "the

41. Cf. MacCormick, *supra* note 35, at 111-18. As an incidental point, it is interesting to observe that general customary practices of this kind, which are recognized as valid law by the rule of recognition, play a kind of dual role in Hart's theory, because they are at the same time not only valid laws of the relevant legal system, but also social rules in Hart's sense; the law merchant, for example, consisted of social rules among that class of citizens who regularly engaged with one another in certain kinds of commercial transactions.

42. MacCormick helpfully describes an imagined historical process in which a customary duty on the part of certain persons to apply existing customary rules—where the social rule giving rise to such a duty would amount, in effect, to a primitive rule of recognition—might gradually give way to a more complex social practice such that, at a certain point, "it becomes appropriate for the hermeneutic theorist to describe the position in terms of separate power-conferring secondary rules." *Id.* at 116. MacCormick points out that such a power-conferring rule might at first be limited to a power to modify existing customary rules—making it, in a quite literal and restricted sense, nothing more than a rule of *change*—but that it could evolve over time into a rule conferring a more general and unfettered power to legislate. *Id.* at 115-18.

introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel."⁴³

Hart tells us that there will be a very close connection between rules of change and rules of recognition, "for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation."⁴⁴ But this observation is not sufficient by itself to resolve the puzzle, unless we conceive of power-conferring rules as mere "fragments" of the antecedent clause of a rule of recognition which is itself conceived as a conditional directive imposing obligations of enforcement on officials. But the suggestion that power-conferring rules might in this way be conceived as "fragments of laws" is nothing more than the basic Kelsenian understanding of law which Hart forcefully and persuasively rejects at an earlier point in *The Concept of Law*.⁴⁵ In rejecting the Kelsenian approach, Hart adverts to what he calls "the variety of laws,"⁴⁶ by which he means the apparently irreducible normative diversity that we find among the kinds of rules that figure both in regular law and in the foundational arrangements of legal systems.⁴⁷ But Hart's insistence on the variety of laws makes it all the more puzzling that he did not formulate explicit existence conditions for power-conferring rules along the same lines as he did for the duty-imposing norms that he calls social rules, or at least that he did not offer *some* explicit theoretical account of the fundamental power to make law. There would thus appear to be a significant omission at this point in Hart's theory. There is admittedly a certain elegant sparseness to Hart's theory as he presents it in *The Concept of Law*, since he argues that an instance of the very same kind of duty-imposing social rule which, in pre-legal societies, one finds in the form of separate freestanding customs,⁴⁸ also lies at the foundations of every legal system: A rule of recognition is, in essence, just the same kind of duty-imposing customary norm, except that it exists among a particular subgroup within law-possessing societies whom we would intuitively identify as officials, and more particularly, as judges. However, elegance and theoretical sparseness are not virtues if they obscure further complexity in the phenomena, and at the very least the theoretical picture as presented so far is incomplete.

Hart tells us that the addition of secondary rules to a social system extends what can be said and done from the internal point of view, and that

43. Hart, *supra* note 1, at 41-42.

44. *Id.* at 96.

45. *Id.* at 33-42.

46. *Id.* at 26-49.

47. *See id.* at 41 ("[P]ower-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?").

48. *Id.* at 91-92.

this extension brings with it "a whole set of new concepts [which] demand a reference to the internal point of view for their analysis."⁴⁹ These concepts include, he goes on to say, "the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public."⁵⁰ But since the internal point of view is characterized by reference to a type of rule whose normative character is limited to the imposition of duties, how is the analysis which yields these other normative concepts supposed to proceed? We have already rejected the Kelsenian possibility that duty-conferring rules are "mere fragments" of the rule of recognition itself, which would seem to suggest that rules of change are, as Hart's general description of them in any event suggests, distinct rules in their own right. But what form do these distinct rules take? Perhaps it might be suggested that they are themselves valid rules, which are identified as such by the criteria of validity specified by the rule of recognition. It is, after all, common enough in modern legal systems that at least some lawmaking powers derive from primary rules, in the sense of "primary rule" which means simply a valid law. Think, for example, of regulatory agencies which are created by ordinary legislation and given delegated rulemaking powers. Perhaps rules of change are not, after all, secondary rules in the same fundamental sense as the rule of recognition, but are, rather, simply very important primary rules, meaning rules which the rule of recognition identifies as valid.

Suppose, for example, that we wish to account for the rule of change that confers lawmaking powers on a distinct legislature, meaning a lawmaking body distinct from the courts themselves. For ease of expression, let me call this rule of change the legislative rule. Suppose further that there is a rule of recognition in the society in question which holds among those officials whom we would intuitively recognize as the society's judges, and that this rule of recognition identifies three possible sources of law: first, enactments of the legislature which meet certain requirements of form and procedure; second, certain precedents of the courts themselves; and third, various forms of custom which exist within the society as a whole or within some segment of the society. If the legislative rule is a valid law, the source of its validity cannot, on pain of circularity, be one of the legislature's own legislative acts. Since precedent is a source of law in this legal system it follows that courts have certain lawmaking powers, so it is at least conceivable that the validity of the legislative rule could be traced to a lawmaking act on the part of the courts. But this does not help us very much, theoretically speaking, since the source of the courts' own lawmaking powers is presumably itself a rule of change, and it is the general theoretical status of such rules that we are trying to explain. Explaining one rule of change by reference to another is not helpful if we do not have a theoretical account of rules of change in general. So let us set this possibility aside for the time being.

49. *Id.* at 98.

50. *Id.* at 98-99.

This leaves custom as a potential source of validity for the legislative rule. This is a more promising possibility, since, just as the law merchant, consisting of customary practices among merchants, can be identified by the rule of recognition as a source of valid law, why cannot the customary practices of *another group of officials*, namely those officials whom we would intuitively identify as members of the legislature, similarly be a source of valid law? This suggestion seems fine so far as it goes, but it runs up against the difficulty that, as Neil MacCormick observes, “acts which constitute custom [in the sense of the law merchant] are not power-exercising acts,” so that “[e]ither the acts ‘add up to’ legal custom or they do not.”⁵¹ But this point alone does not show that the suggestion is not along the right lines, since just as there can be duty-imposing customary rules, such as those which constitute the law merchant and the rule of recognition itself, perhaps there can also be *power-conferring* customary rules.

At this point, three observations are in order. First, and most obviously, the suggestion that rules of change are a distinct kind of customary rule, namely those customary rules which are power-conferring in nature, will not take us very far unless we provide a theoretical account of such rules, along the lines of the account Hart provides of customary duty-imposing rules. This is, however, just another way of stating that there is an omission at this point in Hart’s theory; pointing to the mere possibility of power-conferring customary rules does not, by itself, suffice to rectify the omission. Second, once we have concluded that the legislative rule consists of the customary practices of a group of officials besides judges, it is not clear that there is much to be gained by referring to the rule as one that the rule of recognition identifies as *valid*. Certainly any new rules that are *enacted* by the legislature in accordance with the legislative rule will be identified as valid, and for that reason, there will be, as Hart observes, a close connection between the legislative rule and the rule of recognition: “[W]here the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the [enacted] rules. . . .”⁵² But it is not clear what is to be gained by referring to the legislative rule itself as a valid rule, since by hypothesis it is a customary rule like the rule of recognition, and as such it must exist as a certain kind of complex social practice among officials, albeit a different group of officials from those whose practice constitutes the rule of recognition.⁵³ Probably the better

51. MacCormick, *supra* note 35, at 115. MacCormick does not refer specifically to the example of the law merchant, but this is clearly the kind of customary practice that he has in mind.

52. Hart, *supra* note 1, at 96.

53. The following remarks by MacCormick seem apposite in this regard:

[I]f in a constitutional state one criterion of recognition of rules binding on judges is that they be rules validly enacted by the legislature, the “validity” of a legislative act does not depend on the rule of recognition itself directly. Legislation is validly enacted if it satisfies the constitutional provision (a Hartian rule of change) governing the legislature’s power. As such, it yields a valid or binding ground of

theoretical characterization of the situation is precisely the one that Hart initially offers, namely, that we have two distinct kinds of secondary rule, where "secondary rule" is understood to refer to a norm which is both customary in nature and part of the foundational arrangements of a legal system.⁵⁴ The third observation concerns precedent as a distinct source of law. If rules of change are to be explained as a distinct kind of customary rule, namely a power-conferring customary rule, and if certain acts of the courts can themselves give rise to law, then the social practices of the courts must involve two separate customary rules, one of which is duty-imposing—the rule of recognition—and one of which is power-conferring—the rule of change that underlies the doctrine of precedent. The two rules will be closely related in the sense that the rule of recognition will refer to the doctrine of precedent as a source of law, but they will nonetheless be distinct rules. There is, however, nothing problematic about the idea that more than one customary rule can coexist among the same group of persons.

Perhaps the point of the preceding discussion can be restated in the following way. Once we have rejected the Kelsenian possibility that all laws are, at bottom, directions to officials to apply sanctions, we require at least two different kinds of fundamental rules within a legal system as conceived by Hart. First, we require a rule of recognition, which identifies other rules as valid laws and imposes on certain officials, and in particular on judges, the duty to apply and enforce such valid laws. We also require, however, at least one fundamental instance of the kind of power-conferring rule which Hart calls a rule of change. This must be a distinct rule because even if power-conferring rules could all be reduced to duty-imposing rules—a possibility that will be considered but rejected in the following part—the rule of change as thus conceived would impose duties on a different group of persons from the rule of recognition. Whereas the rule of recognition imposes duties on judges, a rule of change gives some person or body—let us suppose, for ease of convenience, that it is a legislature—the power to impose duties on a much broader group of persons, including in

judicial decision. This in turn implies a judicial duty to apply the constitutional provision. It does not follow that the rule of recognition makes the constitution "valid" in any other sense.

MacCormick, *supra* note 35, at 115.

54. Hart of course also refers to a third kind of power-conferring secondary rule, namely rules of adjudication. MacCormick offers a plausible historical reconstruction of how a customary social rule imposing upon certain specified individuals (for example, village elders) a duty to settle disputes might, as a distinct judiciary emerged, evolve into a customary power-conferring rule of adjudication, which in turn would be subject, as a true and unfettered rule of change evolved, to modification by statute. "The 'rules of adjudication' became validly enacted new rules, created by exercise of parliament's power of change. Judges and other senior lawyers and officials were committed to accepting each change as valid because conformable to the developed criteria of recognition accepted by them from the internal point of view." *Id.* at 119. It is thus possible that rules of adjudication are not, after all, secondary rules as defined in the text, but are, rather, simply valid primary rules of the relevant legal system.

particular all the subjects of the relevant legal system. Furthermore, since for Hart fundamental rules can only exist as customary social practices, presumably at least this one particular rule of change must likewise consist of a customary practice. If the fundamental rule of change confers power on a legislature then it would be natural to conceive of the rule as, at least as a first approximation, a power-conferring rule which exists as a customary practice among that group of persons whom we intuitively think of as legislators.⁵⁵ If this is correct then Hart's paradigmatic example of a rule of recognition, namely, "What the Queen in Parliament enacts is law,"⁵⁶ is in fact best conceived as a complex statement of two different rules: The first, which could be rephrased as something like "The Queen in Parliament has the power to enact valid law for all the Queen's subjects," is a rule of change. The second, which could be rephrased along the lines of "The courts have the duty to apply valid law, including in particular whatever laws are enacted by the Queen in Parliament," is a rule of recognition. Normatively and conceptually these are distinct rules, and this would be so even if the most fundamental rule of change was a customary rule that held not among legislators but rather among the judges themselves. As was noted in the preceding paragraph, there is no reason why two distinct customary rules cannot coexist among one and the same group. Even if judges and legislators were the same persons, their role as judges would be governed by one kind of rule, whereas their role as legislators would be governed by quite another kind of rule.

III. RECTIFYING THE OMISSION: TWO POSSIBLE STRATEGIES

We can summarize the discussion of the preceding part as follows. Hart says that law is the union of primary and secondary rules. Primary rules are just the regular laws of the legal system; they are rules which possess the property of legal validity. Secondary rules are the fundamental or foundational rules of a legal system. They do not possess the property of validity, but exist only as complex social practices among officials. Hart points to three specific types of social rules, namely rules of recognition, rules of change, and rules of adjudication. Rules of recognition are duty-imposing, whereas rules of change and rules of adjudication are power-

55. Notice that this description would be a first approximation only because sophisticated legal systems regulate their own character and content and so can, by the enactment of valid laws or the adoption of appropriate constitutional changes, modify in various ways the makeup of the legislature, its rules of procedure, etc. But the same point of course also holds true of the rules governing, say, the jurisdiction and procedures of the courts, even though the rule of recognition only exists, for Hart, as a customary practice among judges. Perhaps the most appropriate characterization of the situation in both cases is to say that fundamental customary practices can change over time, and sometimes such changes have legal sources. But just as it is true for changes in the rule of recognition that, as Hart says, "all that succeeds is success," Hart, *supra* note 1, at 153, presumably a parallel point also holds of changes in the fundamental power-conferring rule that is constituted by the customary practices of legislators.

56. *Id.* at 107.

conferring. The rule of recognition is said to be a special case of a social rule. Hart analyzes the notion of a social rule in some detail, by specifying a set of existence conditions for such rules. Since social rules are, in their nature, duty-imposing,⁵⁷ Hart's analysis of a social rule is a general account of how duty-imposing rules can exist simply as social practices. It is an account, in other words, of one kind of duty-imposing norm, in the sense of the term "norm" that was defined in Part I. More specifically, it is an account of duty-imposing customary norms. The omission in Hart's theory of law to which I have drawn attention is his failure to offer an explicit analysis of the fundamental power-conferring rules which would correspond to his analysis of the rule of recognition. I have suggested that for Hart such rules are, like social rules, customary in nature. What is required, then, is an account of how customary rules can be power-conferring and not just duty-imposing.

There would appear to be two possible strategies that one might adopt to rectify this omission. The first strategy, which would involve treating power-conferring rules as a type of customary norm completely distinct from duty-imposing rules, would require the specification of a separate set of existence conditions for such rules which would nonetheless be of the same general kind as those which Hart describes for duty-imposing rules. The second strategy would, by contrast, show how power-conferring customary rules can be reduced to duty-imposing customary rules. If the second strategy could be carried out successfully, then all three types of secondary rules which Hart discusses could be shown to be Hartian social rules, meaning duty-imposing customary rules. I will discuss these two possible strategies in turn.

Before directly addressing the question of whether Hart could avail himself of the first strategy, it will be helpful if we first recall the general nature of Hart's project in *The Concept of Law*. Hart is, in the first instance, concerned to show that the sanction- and prediction-based theories of law and of legal obligation that had been advanced by Bentham, Austin, and the Scandinavian realists are untenable. It is important to bear in mind that those theories were reductivist in character, and that the central concept with which they began, and which they were trying reductively to eliminate, was that of an obligation. Normative concepts were to be replaced by concepts that were consistent with an empiricist epistemology and a naturalistic view of the world. But the early positivists had no use for the idea of authority or normative power as an organizing concept of law; it was too closely bound up with the natural law views to which they were reacting, and in any event it was far too mysterious and elusive a notion to lend itself very readily to direct reductivist analysis.⁵⁸ Obligation, though,

57. This is a slight oversimplification. See *supra* note 23.

58. Bentham not only argued that all laws are reducible to commands, but he also explicitly argued that all power-conferring laws are reducible to conditional commands of various kinds. This latter aspect of Bentham's reductivist program is discussed by Hart in H.L.A. Hart, *Essays on Bentham* 194-219 (1982).

was a concept they could work with, since it seemed easily replaceable by the notion of an order or command, which in turn seemed straightforwardly analyzed by reference to such nonnormative concepts as prediction, threats, or sanctions.⁵⁹ Hart argues persuasively that such reductions cannot be successful, and that the concept of obligation could not, after all, be dispensed with as readily as his predecessors imagined. He points out, for example, that if an obligation was simply a prediction that failure to perform the required act will be met with hostile reaction, then it would be a contradiction, which it obviously is not, to say that one has an obligation but that one has, for whatever reason, completely avoided the possibility of being subjected to such a reaction.⁶⁰

Despite Hart's rejection of his predecessors' sanction- and prediction-based theories of law, he nonetheless shared their commitment to naturalism and empiricism. As Raz has pointed out, these commitments lead him to analyze normative statements as having both a cognitivist and a non-cognitivist dimension. Thus, the meaning of a legal statement made from the internal point of view—for example, "It is the law of Pennsylvania that everyone has an obligation to do X"—involves, according to Raz's account of Hart's semantics, a kind of hybrid, "stating how things are under the law, while endorsing or expressing an endorsement of the law at the same time."⁶¹ On this view, all internal legal statements have truth conditions which derive from the general social practice that constitutes the rule of recognition. There is thus an ascertainable fact of the matter as to whether or not Pennsylvania has a law to the effect that everyone has an obligation to do X, and we can ascertain what the facts are by looking, for example, to the past activities of Pennsylvania's legislature. However, the meaning of the *normative* aspect of an internal legal statement has nothing to do with whether the residents of Pennsylvania do or do not, in fact, have

59. See, e.g., John Austin, *The Province of Jurisprudence Determined* 24-25 (Wilfrid E. Rumble ed., 1995).

60. Hart, *supra* note 1, at 84.

61. Joseph Raz, *Two Views of the Nature of Law: A Partial Comparison*, 4 *Legal Theory* 249, 253 (1998); see also Raz, *H.L.A. Hart (1907-1992)*, *supra* note 3, at 147-49; Raz, *The Purity of the Pure Theory*, *supra* note 3, at 447-48, 454. Hart explicitly states that he accepts a non-cognitivist analysis of legal statements in Hart, *supra* note 58, at 158-60. Kevin Toh makes a careful and detailed case for the view that Hart is a norm-expressivist, meaning that he adopts an expressivist semantic strategy in combination with non-cognitivism to explain the meaning of statements containing normative terms. Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 *Legal Theory* 75 (2005). Scott Shapiro appears to offer a similar view of Hart's semantics in Shapiro, *supra* note 2, at 1168-70. As I understand them, both Toh and Shapiro differ from Raz in that they regard Hart's analysis of the meaning of internal legal statements as fully non-cognitivist, and not, as Raz would have it, as a hybrid view containing both cognitivist and non-cognitivist components. Nothing turns on this difference for present purposes. Raz, however, does not appear to regard Hart's non-cognitivism as a form of norm-expressivism, suggesting instead that it grows out of J.L. Austin's theory of performative utterances which can have various kinds of illocutionary force. See, e.g., Raz, *H.L.A. Hart (1907-1992)*, *supra* note 3, at 149. Austin's most complete statement of his theory of performative utterances is to be found in J.L. Austin, *How To Do Things with Words* (1962).

an obligation to do X. It consists, rather, in the expressed endorsement of the relevant standard of conduct as obligatory for all those who fall within the standard's scope.⁶² This endorsement is expressed through the adoption of the internal point of view, which consists not of a belief that the law gives rise to obligations, but rather of an attitude of accepting the law as obligatory.⁶³ Attitudes, unlike beliefs, cannot be true or false. Thus, although Hart is not, strictly speaking, a reductivist about legal normativity since he is not trying to reduce normative concepts to nonnormative concepts as his positivist predecessors were, there is nonetheless a certain affinity between his view and theirs, because his non-cognitivist explanation of normativity does not involve an account of how law might actually or potentially give rise to true obligations.

Hart's commitments to naturalism and empiricism thus lead him, as the similar commitments of Austin, Bentham, and the Scandinavian realists had earlier led them, to explain the normativity of law in a way which does not depend on the possibility that law does or might systematically give rise to actual changes in anybody's obligations.⁶⁴ But such an approach to normativity has theoretical consequences, one of which is to increase the difficulty of pursuing the first possible strategy that was mentioned earlier for rectifying the omission in Hart's theory. The omission, it will be recalled, is Hart's failure to provide an explicit analysis of a legal system's most fundamental power-conferring rules, and the suggested strategy is to offer an account of the existence conditions of such rules that would parallel Hart's analysis of duty-imposing rules. If one thinks that normativity is appropriately explained by reference to a certain kind of attitude, then the general contours of the account that one will be inclined to offer of the existence conditions of duty-imposing customary rules seem intuitive enough. One will point, as Hart does, to the fact that under certain circumstances everyone in a group tends to behave the same way, and one will also point, as Hart does, to the fact that this regular pattern of behavior is accompanied by a "critical reflective attitude" which disposes persons to endorse the pattern as a binding standard of conduct, to criticize behavior that deviates from the pattern, and so on. But how would one go about offering a parallel analysis of the existence conditions of a power-conferring customary norm? Given that Hart's non-cognitivism has its

62. This would appear to be Hart's view about the meaning not only of internal statements of validity such as "It is the law of Pennsylvania that everyone has an obligation to do X," but also of internal statements to the effect that the rule of recognition itself is obligatory for officials. Cf. Toh, *supra* note 61, at 90-91.

63. As was pointed out in the Introduction, the internal point of view serves a dual role in Hart's theory of law. It both specifies one of the constitutive elements of a social rule, and it helps to explain the normative dimension of the meaning of internal legal statements.

64. The earlier positivists would allow that law can, qua law, give rise to changes in a person's normative situation, since laws are orders backed by threats and threats can give rise to prudential reasons for action. Hart, by contrast, would appear to be committed to the view that law, qua law, does not give rise to any reasons that can be characterized as specifically legal in nature.

origins in J.L. Austin's theory of performatives,⁶⁵ one might begin by pointing to the fact that just as promisors make certain kinds of utterances with the intention of effecting a certain kind of change in the world, namely, a change in their own normative situation such that they come under an obligation which they did not previously have, so too do legislators make utterances—or, more generally, perform certain kinds of acts, which for present purposes we can call “legislative” acts—with the intention of changing the normative situation of some or all of the subjects of the relevant legal system. We can think of a lawmaking act as an assertion made under certain formalized circumstances that is meant to have illocutionary force; more specifically, it is an assertion that is uttered precisely with the intention of changing the normative situation of others. Perhaps one might then characterize the power-conferring rule itself as the general practice, on the part of appropriately designated persons or some appropriately designated body of persons acting collectively, of engaging in such legislative acts with the intention of changing the normative situation of other persons.

The difficulty to which this sketch of an account of customary power-conferring rules would seem to give rise, however, concerns the fact that if we are to take seriously the idea of a customary power-conferring *rule*, presumably the general social practice of engaging in legislative acts must itself have some meaning or significance for those persons, namely legislators, whose conduct is supposed to be guided by the rule. There must, in other words, be some analogue, in the case of power-conferring rules, of the internal aspect of a duty-imposing social rule. In the case of the latter kind of rule, the internal aspect consists, it will be recalled, of an attitude of endorsing the relevant pattern of conduct as obligatory, a willingness to criticize those who deviate from it, and so on. Presumably the analogue of the internal aspect of a duty-imposing rule is, in the case of a power-conferring rule, not just an intention to change the normative situation of others by performing a certain act, but an intention to change the normative situation of others by means of an act which invokes the very rule in question.⁶⁶ This means, however, that the person performing the act must have some concept of the power-conferring rule, so as to be able to invoke it when engaging in the relevant illocutionary act. Notice that in the case of duty-imposing customary rules, it is *not* strictly necessary, at least in the case of categorical rules, that those whose general behavior and attitudes comprise the rule must have a concept of the rule; it would appear to be sufficient to meet the existence conditions of such a rule that members of

65. See *supra* note 61. Hart explicitly characterizes lawmaking acts in terms of Austinian performatives in Hart, *supra* note 58, at 260.

66. Cf. MacCormick, *supra* note 35, at 73 (“The key point . . . is that all the acts which are acts of exercising the so-called power are acts which necessarily and intrinsically *invoke* the rule in some way.”). MacCormick takes this to be a truth which *any* account of normative powers must acknowledge, but this is not so; it is possible to offer accounts of normative powers which are not rule- or practice-based.

the relevant group generally conform their behavior to the relevant pattern of conduct, adopt the attitude that the pattern of conduct is a required or obligatory standard, are disposed to criticize departures from the pattern, and so on.⁶⁷ As Hart writes,

The use of *unstated* rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby *manifest their own acceptance of them* as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that . . .'.⁶⁸

In the case of a power-conferring rule, however, legislators would presumably have to be able to state the rule in order to invoke it; they would have to be able, in other words, to treat it as an internal legal statement. The statement of the rule would presumably take something like the following conditional form: "If appropriately designated legislators utter

67. Perhaps it might be suggested that Hart's analysis of internal legal statements of obligation similarly appears to require that those who make such statements must have a concept of the underlying rule, since he often describes the attitudinal aspect of internal statements in such terms as "endorse as binding" or "regard as obligatory." The suggestion would be, in effect, that one cannot endorse a pattern of conduct as obligatory unless one possesses the concept of obligation, and, for Hart at least, one cannot possess the concept of obligation unless one possesses the concept of a rule. If this suggestion is correct, then Hart's account of categorical duty-imposing social rules would be subject to a difficulty similar to that which I argue in the text arises for power-conferring rules. One possible response that might be made on Hart's behalf is that his non-cognitivism is limited to legal statements and does not apply to moral statements. If that is so, then he could with complete propriety maintain that the attitudinal aspect of *legal* statements can express an endorsement that utilizes the *moral* concept of obligatoriness. Moreover, he could allow for the possibility that legal statements can express moral endorsement and still consistently maintain, as in fact he does, that the meaning of normative terms is different in moral and legal discourse. See Hart, *supra* note 58, at 146-47. He could maintain this latter view because the meaning of legal statements would be explained in non-cognitivist terms and by reference to the existence of rules of a certain kind, whereas his account of the meaning of moral statements would presumably be a cognitivist one, and hence would treat such statements as capable of being true or false. If, however, Hart was motivated to be a non-cognitivist about legal statements at least partly by his commitments to naturalism and empiricism, then it is difficult to see why he would not be a non-cognitivist about *all* normative statements, including moral statements. In that case, Hart's use of such terms as "regard as obligatory" to describe the attitudinal aspect of normative statements would presumably have to be understood as shorthand for expressions of (nonmoral) approval of a pattern of conduct, or something along those lines. In any event, since Hart is quite clear that one can adopt the internal point of view for nonmoral reasons, Hart, *supra* note 1, at 203, it follows that he does not regard the non-cognitivist dimension of legal statements as necessarily involving moral endorsement. There are, moreover, some textual indications that Hart did in fact originally intend his analysis of social rules, and hence his non-cognitivism, to apply to moral as well as to legal statements of obligation, as, for example, when he writes that the statement that someone has an obligation (including, presumably, a moral obligation) implies the existence of a rule. *Id.* at 85. However, in the Postscript to the second edition of *The Concept of Law*, Hart states that he no longer regards his "practice theory of rules" as a sound explanation of morality, "either individual or social." *Id.* at 256.

68. Hart, *supra* note 1, at 102 (emphasis added).

such and such words under such and such circumstances, then the residents of Pennsylvania come under an obligation to do X.”

The difficulty that arises here is a variation on the so-called Frege-Geach problem, which in its general form concerns the fact that normative predicates are used in various contexts where they are not actually being asserted, whereas the basic non-cognitivist analysis of the meaning of normative expressions applies to their use in assertions.⁶⁹ The problem in the present case is not so much with the antecedent clause of the conditional statement of the legislative rule as it is with the consequent clause. Presumably legislators do not think of the rule as one which states that if they perform the appropriate legislative acts, then the residents of Pennsylvania will thereby be caused to do X, to endorse the doing of X as a required standard of conduct, etc. They think of the rule, rather, as one that states that if they perform the relevant legislative acts, the residents of Pennsylvania will come under an obligation to do X. Similarly, when legislators actually invoke the rule with a view to exercising the relevant power, the mental state that accompanies this action is not appropriately described as a practical attitude like endorsement, but rather as an intention to place someone else under an obligation. Furthermore, such an attitude is presumably normally accompanied by a belief that there is some fact of the matter about what the other person's current normative status is, as well as a belief that one's action has succeeded (or not) in changing that status. The difficulty, in other words, is that the statement and use of power-conferring rules are much less amenable to a non-cognitivist semantic analysis than is the case for categorical duty-imposing rules. I of course do not mean to suggest that there are no responses to such difficulties that could be offered on behalf of Hart, and the literature on non-cognitivism and norm-expressivism offers many technical resources that might be drawn on for these purposes.⁷⁰ My main concern, rather, is simply to point out that the non-cognitivist aspect of Hart's views gives rise to more serious difficulties for his theory of law than perhaps has been appreciated in the past.

69. See P.T. Geach, *Ascriptivism*, 69 *Phil. Rev.* 221 (1960); P.T. Geach, *Assertion*, 74 *Phil. Rev.* 449 (1965). Both articles are reprinted in P.T. Geach, *Logic Matters* (1972). Interestingly, one of Geach's primary targets in the first of these articles was an early article of Hart's, in which Hart offers an ascriptivist analysis of attributions of action and responsibility. H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *Proc. Aristotelian Soc'y* 171 (1949). As Kevin Toh points out, Hart states in the preface to *Punishment and Responsibility* that Geach's criticism of the latter article is justified, and that he no longer considers its main contentions to be defensible. Toh, *supra* note 61, at 102 (discussing H.L.A. Hart, *Punishment and Responsibility* (1968)). Toh goes on to express the view that "the apparent inconsistency between Hart's disowning of his ascriptivism and . . . his adherence to expressivism can[not] be eliminated." *Id.*

70. For proposed solutions to the Frege-Geach problem, see, e.g., Simon Blackburn, *Spreading the Word* 181-223 (1984); Allan Gibbard, *Wise Choices, Apt Feelings* 83-102 (1990); Simon Blackburn, *Attitudes and Contents*, 98 *Ethics* 501 (1988). As Toh points out, the viability of these proposals remains controversial. Toh, *supra* note 61, at 102.

There is, however, as I previously indicated, another possible strategy that might be available in order to rectify the omission from the theory of *The Concept of Law* that I have been discussing. Instead of offering an analysis of power-conferring rules considered as a distinct type of customary rule in their own right, the alternative strategy would attempt to reduce all power-conferring rules to duty-imposing rules. Hart does, in fact, propose at least a partial reductive analysis along these lines in the following passage from his later work *Essays on Bentham*:

[T]he general recognition in a society of [a] commander's words as peremptory reasons for action is equivalent to the existence of a social rule. Regarded in one way as providing a general guide and standard of evaluation for the conduct of the commander's subjects, this rule might be formulated as the rule that the commander is to be obeyed and so would appear as a rule imposing obligations on the subject. Regarded in another way as conferring authority on the commander and providing him with a guide to the scope or manner of exercise it would be formulated as the rule that the commander may by issuing commands create obligations for his subjects and would be regarded as a rule conferring legal powers upon him.⁷¹

Hart here makes the suggestion that a certain kind of duty-imposing social rule is, in effect, equivalent to a power-conferring rule. In the example, the relevant rule is not simply a practice of officials (or of a sole "commander" like Rex), but is rather a society-wide practice of treating the commander's word as binding. Members of the larger society regard themselves, in effect, as bound by the practice in a conditional rather than a categorical way; the content of the duty is conditioned on the say-so of the commander, who for that reason can be regarded as doing something that is functionally or perhaps even logically equivalent to exercising a power when he tells his subjects to do this or to do that.

Ingenious as this suggestion is, it is not clear to what extent it can rectify the omission in the argument in *The Concept of Law* that we have been discussing. There are two reasons for this. The first concerns various difficulties that arise when we inquire how the members of the relevant group conceptualize their own normative practices. Notice, to begin, that Hart is clearly correct when he claims that there can be duty-imposing social rules in his sense which are conditional in nature. Notice further, though, that the type of event which triggers the conditional rule need not be the command of a commander, but could be almost anything: If the harvest is good, we must have a harvest festival; if we triumph in battle, we must have a great victory celebration and ritually kill all our prisoners. In the latter case, for example, there will be a Hartian social rule if, on the occasion of triumphing in battle, the members of the group generally hold a great victory celebration, adopt the internal point of view towards the

71. Hart, *supra* note 58, at 258. I thank Scott Shapiro for drawing this passage to my attention.

practice of holding such a celebration, criticize one another for not taking part in the ritual killing of prisoners, and so on. Hart is also correct that there could be a general conditional social rule which makes obligatory conduct dependent on the intentional say-so of a commander. If whenever Rex tells his people to do X, they in fact generally do X, endorse the doing of X, criticize one another for not doing X, and so on, then it seems unproblematic to say that we have a Hartian social rule which is both conditional and general, and in which Rex's commands are, in Hart's phrase, "content-independent,"⁷² meaning that members of the group treat a practice as obligatory simply on the say-so of Rex, regardless of what the content of his say-so is. If Rex says do X, they do X. If Rex says do not do X, they do not do X.

If the members of the group simply have a general conditional *practice* of the kind just discussed, then, as I say, there would appear to be no problem in saying that the practice is a certain kind of Hartian social rule. Matters are not quite so straightforward, however, if we ask how they conceptualize this practice to themselves. Perhaps they have no conceptualization of the practice, but simply do what Rex tells them to do whenever he tells them to do something, and in the process adopt the internal point of view towards whatever it is that Rex has told them to do, criticize one another for failing to do this thing, and so on. It is perfectly conceivable that there could exist such a complex Hartian social rule without the participants having a concept of their own practice. As Hart observes, perhaps the rule is not explicitly stated, but is simply manifested by its use.⁷³ But if members of the group do have such a concept, what is its content? Do they say to themselves, we have a practice such that when Rex tells us to do X, we generally do X, we regard X as required behavior, we criticize one another for not doing X, and so on? This seems highly unlikely. Presumably, if they think of themselves as having a rule, they think that if Rex tells them to do X, they have an obligation to do X. In other words, because the formulation of the rule as an internal statement must be conditional in form, any attempt to understand its meaning in non-cognitivist terms will run into Frege-Geach difficulties of the kind discussed earlier.

As I indicated, the Frege-Geach problem may not arise for members of the relevant group if they do not have a concept of their own practice. Notice, though, that even if the problem does not arise for Rex's subjects, it may nonetheless arise for Rex himself. If Rex thinks of himself as issuing commands, or as otherwise engaging in lawmaking activity, then presumably he thinks of himself as engaging in action that will actually obligate his subjects and not simply cause them all to do X, to endorse X as required behavior, and so on. Possibly this is not a significant problem if we are dealing with a society-wide social rule, because so long as everyone

72. *Id.* at 259.

73. Hart, *supra* note 1, at 102.

does what Rex says and does so with the requisite attitude, perhaps we can simply ignore Rex's conceptualization of the situation. If, however, we are not dealing with a society-wide social rule, but with one that holds only among legislators,⁷⁴ then the difficulty reappears in a more acute form. Unless the relevant social rule is understood as a Kelsenian direction to judges to apply sanctions under various circumstances—and as we have seen, Hart forcefully rejects this possibility—then presumably legislators *must* think of themselves as being guided by a rule such that, if they act in certain ways, their subjects will come under an obligation to do such and such. In that case, however, the practice of legislators among themselves cannot be regarded as a social rule in Hart's sense and nothing more. They must formulate the rule to themselves in the form of an internal legal statement, and in performing lawmaking actions which invoke the rule they must do so—and must conceive of themselves as doing so—with the specific intention of imposing obligations on others (or changing their normative situation in some other way). In fact, from this point of view, it is not clear what has been gained by reformulating the power-conferring rule as a rule which conditionally imposes duties. Under either formulation, legislators must presumably think of themselves as engaging in acts which are undertaken with the intention of changing someone's normative situation, and not simply as engaging in acts which have the effect of triggering the antecedent clause of a conditional rule. But to engage in an act with the intention of changing someone's normative situation is simply to engage in an act with the intention of exercising a normative power. The supposed reduction of a power-conferring rule to a duty-imposing rule thus cannot, it would seem, completely eliminate the concept of a power.

The difficulty with Hart's proposed reduction of power-conferring rules to duty-imposing rules that was just considered has its source in his non-cognitivist semantic theory for internal legal statements. There is also another potential difficulty, however, which arises independently of Hart's non-cognitivism. Hart's proposed reduction of a power-conferring rule to a conditional duty-imposing rule is very similar to a suggestion made by Raz to the effect that a special kind of obligation-imposing norm, which Raz calls an "obedience norm," might also be regarded as power-conferring. Such norms, Raz suggests, "requir[e] that their norm subjects obey the power-holder if and when he exercises his power."⁷⁵ Raz goes on to point out, however, that if the power in question is a power to change the subjects' normative situation in ways other than imposing obligations on

74. It will be recalled that in Part II I concluded that rules of change are best understood as customary rules that hold among legislators. In the displayed passage from *Essays on Bentham*, Hart describes a simple rule of change that takes the form of a conditional duty-imposing customary rule, in which the custom holds for the society at large. But in a more sophisticated society, in which not everyone adopts the internal point of view, the custom will have to be limited to officials; for the reasons that I discussed in Part II, the relevant officials for these purposes are not judges, but rather legislators.

75. Raz, *supra* note 10, at 105. A similar suggestion has also been made by MacCormick. See MacCormick, *supra* note 35, at 76-77.

them, then the norm conferring the power cannot be understood as an obedience norm:

But if we have an option with regard to the logical form of norms conferring power to issue mandatory norms, we have no such option where the power includes power to issue permissive norms or power-conferring norms. In these cases the [power-conferring] norm can only be represented as having the [following] form . . . : the norm subject has power, by performing the norm act when the conditions of application apply, to effect a certain normative change.⁷⁶

The power to make law which is claimed by the officials of a legal system is, however, clearly a general power to change the normative situation of the law's subjects in almost any conceivable way. The law not only claims the power to impose obligations on its subjects, but it also claims the power to confer powers on them, give them rights, grant them permissions, and so on. If Raz's observation in this passage is correct, then there would appear to be no way to generalize Hart's proposed reductive analysis of rules conferring powers to obligate which would make the analysis applicable to power-imposing rules of whatever kind.⁷⁷

Perhaps solutions to these difficulties can be found, and the fundamental power-conferring rules of a legal system can be reduced to duty-imposing Hartian social rules. But it is important to realize that the main impetus for treating this reductivist project as theoretically worthwhile would be that one accepted Hart's semantic non-cognitivism. This is because the type of norm and the type of normative statement that are most amenable to a non-cognitivist analysis are, respectively, duty-imposing norms and statements

76. Raz, *supra* note 10, at 105-06.

77. Raz defends the very plausible view that a person has a power to effect a normative change if there is sufficient reason for regarding an intentional action on his or her part as effecting such a change, and if the justification for so regarding the action is that it is desirable to enable persons to make such normative changes by means of such acts. *See, e.g.,* Raz, *supra* note 35, at 18. Raz has suggested to me in a private communication that it is plausible to think that any normative change is a conditional or unconditional change in the circumstances under which there is a duty, so that one could, for example, explain a power to confer a power in the following way: "If by doing B, Y is using a power to create a duty on X to do A because there is a rule to the effect that if Y does B, then X has a duty to do A, then Z has the power to give Y the power to impose a duty on X if there is a rule which says that if Z does C, then if Y does B, then X has a duty to do A." It does not follow, however, from the fact that every normative change can be explained as a change in the circumstances under which there is a duty, that every power-conferring norm is logically equivalent to a duty-imposing norm. It is this latter result that Raz denies in the cited passage from *Practical Reason and Norms*, and that Hart requires if the strategy of reducing all power-conferring rules to duty-imposing rules is to be successful. It is also worth pointing out in this regard that Raz has elsewhere very plausibly argued that the ascription of rights has a dynamic character, in the sense that a right is not necessarily merely the ground of an existing duty, but may with changing circumstances generate new duties in the future. *See* Joseph Raz, *The Morality of Freedom* 185-86 (1986) [hereinafter Raz, *The Morality of Freedom*]. If that is correct, however, then the legal creation of a right may not be strictly explicable as, and therefore reducible to, a change in the circumstances under which persons have duties. We could not, for example, replace a description of a normative situation which makes reference to rights with a description that makes reference only to existing duties.

that someone has a duty or obligation. Furthermore, to the extent that technical solutions to the difficulties can be found, analogues of those solutions may be available to a defender of the Kelsenian view that all laws are, at bottom, directives imposing obligations on officials to apply sanctions. Hart's response to the Kelsenian thesis that power-conferring rules are best understood as "fragments" of such directives appears, after all, principally to rely on the general claim that power-conferring rules are simply distinct in their normative character from duty-imposing rules.⁷⁸ In *Essays on Bentham*, in the course of a discussion of Bentham's proposed reduction of all legal powers to conditional commands, Hart rejects Bentham's specific proposal, but nonetheless explicitly considers the possibility that all power-conferring laws might be reduced to duty-imposing rules. Although he leaves open the technical question, Hart nonetheless forcefully reiterates his view that power-conferring laws "guide those exercising such powers in ways strikingly different from the way in which rules imposing duties guide behavior," adding that "power-conferring rules are distinct in their normative function from duty-imposing rules" and that "[t]o represent them as fragments of duty-imposing rules is to obscure their distinct normative character."⁷⁹

Even if technical solutions turn out to be available to the Frege-Geach problem and to the difficulties that face any proposed reduction of power-conferring rules to duty-imposing rules, we surely do much better if we take the law's normative claims at face value and adopt a cognitivist theory of the meaning of legal statements. Not only will we then be in a much better position to appreciate Hart's insight that the introduction into society of rules conferring legislative and adjudicative powers "is a step forward as important . . . as the invention of the wheel,"⁸⁰ but we will also be in a position to develop a much richer variety of jurisprudential theories. If we take seriously the law's claim to have the systematic capacity to change our normative situation, then we can ask such questions as whether or not the law ever does possess such a capacity, and what the justification for its possessing such a capacity might be. Although Hart's critique of the sanction- and prediction-based theories of his positivist predecessors was an essential move for the advancement of jurisprudence, his own theory of law is severely limited, in ways that have not always been appreciated by his successors, by its commitment to a non-cognitivist understanding of normativity.

IV. THE CONCEPT OF AUTHORITY AND THE INTERNAL POINT OF VIEW

One of the most fundamental attributes of both the concept and the practice of law, and an essential feature of law's nature, is that through its officials and its characteristic institutions law claims legitimate authority for

78. Hart, *supra* note 1, at 41.

79. Hart, *supra* note 58, at 219.

80. Hart, *supra* note 1, at 42.

itself, meaning that it claims for itself a legitimate power to change the normative situation of its subjects. For purposes of simplicity, let me refer to the entity making this claim of authority as a lawmaker. The most important way in which a lawmaker might change the normative situation of its subjects is to impose obligations on them, but this is not, of course, the only way. The lawmaker, if it does indeed possess legitimate authority, might also change the normative situation of its subjects by conferring rights, powers, or permissions on them, by subjecting them to liabilities, by granting them immunities, and so on. A lawmaker claiming legitimate authority would in fact possess such authority only if every purported exercise of its authority did, in fact, change the normative situation of its subjects in just the way that it purported to do. Thus, for example, if it had attempted to impose a duty, it would have succeeded in imposing a duty, if it had attempted to create a right, it would have succeeded in creating a right, and so on. It is sometimes said that legitimate authority is necessarily correlated with an obligation on the part of the lawmaker's subjects to obey its directives,⁸¹ but this is not quite accurate. The true normative correlate of a power is a liability to have one's normative situation changed. The properly generalized version of the idea of a general obligation to obey is thus something like a statement to the effect that the law has the general normative force that it purports to have.⁸²

The internal point of view, properly understood, is the perspective of both those who make and those who accept the legitimacy of the law's claim to authority. Once we discard Hart's implausible semantic analysis of normative statements, then we are free to acknowledge that those who accept the legitimacy of law have not simply adopted a certain normative attitude, but rather hold a certain *belief*, which could be either true or false, about the legitimacy of law. Furthermore, once we move away from Hart's own semantic analysis, then we are no longer under theoretical pressure to demonstrate that the most fundamental elements of a legal system must be duty-imposing norms. One result of Hart's claim that every legal system rests on a duty-imposing rule of recognition is that many of his positivist successors have been almost obsessively concerned with analyzing the true nature of the rule of recognition, and with showing how it can, in fact, give officials obligations if we understand it as, say, a Lewis-style convention which solves a coordination problem, or as an instance of Michael Bratman's notion of shared cooperative activity.⁸³ But interesting and important as these analyses are, they often simply sidestep the question of whether and how the practices of officials might, by means of acts intended to be deliberate exercises of a normative power, give rise to obligations (or to other changes in normative status) on the part of citizens generally.

81. Raz, *The Morality of Freedom*, *supra* note 77, at 23.

82. For further discussion, see Stephen Perry, *Law and Obligation*, 50 *Am. J. Juris.* 263, 266-76 (2005).

83. See *supra* notes 5-7 and accompanying text.

The contemporary legal theorists who have been most concerned with analyzing law's claim to authority, and with determining whether and to what extent that claim can be vindicated, are John Finnis and Joseph Raz.⁸⁴ An approach to jurisprudence which focuses on such questions represents, in a sense, a return to a natural law sensibility, since these were among the philosophical questions about law that were treated by that tradition as central. Finnis's work is, of course, very much within the natural law tradition, and, while Raz is often described as a positivist and has at times applied that label to himself, he is in certain respects as much an inheritor of the natural law tradition as he is of the positivist one.⁸⁵ This is particularly true with respect to his views on the normativity of law, which I will discuss in a moment.

To treat the idea that the law claims legitimate authority for itself as a fundamental attribute of law, and perhaps the most fundamental attribute, suggests a number of more specific avenues of jurisprudential inquiry. First, there is a fairly narrow conceptual inquiry which addresses the question of who must make the claim to authority, and who must accept it, in order to help justify such conclusions as that a legal system exists in such and such a place.⁸⁶ Raz is engaging in such an inquiry when, for example, he defines a de facto authority as an entity that "either claims to be [a] legitimate [authority] or is believed to be so, and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognized by many of its subjects."⁸⁷ Our ordinary concepts of law and of a legal system do not make it a necessary condition of the existence of a legal system that political regimes in fact possess legitimate authority, but they do require that such regimes at least be de facto authorities in Raz's sense. It is important to emphasize the point made earlier that both claiming to be a legitimate authority and accepting the legitimacy of an authority involve *believing* either that one possesses legitimate authority or that one is subject to such authority.⁸⁸ Thus, to adopt the internal point of view in the sense I defined earlier is likewise to believe something; it is to believe that a de facto authority's claim to be legitimate is justified. This is very different from Hart's understanding of the internal point of view as simply a certain kind of attitude.

Notice that because, for Hart, the existence on a shared and widespread basis of the internal point of view in the attitudinal sense is one of the constitutive elements of the rule of recognition, Hart was forced to restrict the group whose practice is said to comprise the rule to persons who could,

84. See, e.g., Finnis, *supra* note 5, at 1-22, 231-59; Raz, *supra* note 35, at 1-33; Joseph Raz, Ethics in the Public Domain 194-221 (1994) [hereinafter Raz, Ethics in the Public Domain]; Raz, The Morality of Freedom, *supra* note 77, at 23-105.

85. See, e.g., Raz, *supra* note 35, at 143-45, 157-59.

86. For an interesting discussion of this question in the context of American law, see Matthew P. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 Nw. U. L. Rev. 719 (2006).

87. Raz, Ethics in the Public Domain, *supra* note 84, at 195.

88. See Raz, The Morality of Freedom, *supra* note 77, at 65.

in fact, be generally expected to have adopted the internal point of view. This is presumably why Hart says that, so far as the existence of the rule of recognition is concerned, it is sufficient that officials, and officials only, have for the most part accepted it in his sense. If the relevant group were extended to citizens generally, then because many citizens may have adopted the external rather than the internal point of view, Hart would face the embarrassment of having to treat states that most people would unhesitatingly regard as having legal systems as not, in fact, having them; such states would not have a rule of recognition, and hence would not have law.⁸⁹ On the other hand, again because the internal point of view in the attitudinal sense is partly constitutive of the rule of recognition, Hart must then make what some might well regard as the equally embarrassing admission that, so long as a given regime is efficacious in the sense that most people generally comply with its directives, it is still a legal system even if *no one* other than its officials adopts the internal point of view.⁹⁰ That Hart's theory is caught between these two sources of potential embarrassment is the upshot of his view that the normativity of law can be explained by pointing to the existence of a certain shared attitude, and that such a shared attitude is a constitutive element of the foundational norm of a legal system. The cognitivist understanding of the internal point of view, which treats it as a belief in the legitimacy of a *de facto* authority's claim to legitimacy, does not face these embarrassments. No doubt it is a truth about our concept of law that the agents of a political regime which claims legitimate authority for itself—in other words, its officials—must for the most part believe that the claim is justified if the regime can be said to have a legal system. But it may well also be a truth about the concept that at least some of the subjects of the regime must also hold this belief.⁹¹ How many is a sufficient number? There is no precise answer to this question. But because the internal point of view in the broader sense does not, or at least does not necessarily, conceptually tie the existence of a legal system to the existence of a fundamental norm which is partly constituted by a shared

89. Hart says that, in pre-legal, customary societies, "it is plain that [those who reject the rules] cannot be more than a minority." Hart, *supra* note 1, at 92. It is not entirely clear whether he regards this as an explicit elaboration of the existence conditions of a social rule, so that if only a minority adopted the internal point of view the rule could not be said to exist, or whether he is limiting himself to the sociological observation that a customary society in which only a minority held the internal point of view would not endure for very long. Either way, it is clear that there must be some minimum number of persons who hold the internal point of view before a social rule can even be said to exist among a group, and one would expect this number to consist of *at least* a bare majority.

90. *Id.* at 117.

91. Raz, following Hans Kelsen, has made the very important point that it is possible to engage in the normative discourse of the law without actually accepting the law's moral authority, since it is possible to engage in such discourse by adopting a hypothetical or detached perspective. One can thus speak as though the law has moral authority while not actually accepting that it does, or while withholding belief on whether or not it does. *See, e.g.,* Raz, *supra* note 35, at 137-43.

attitude of endorsement, this is nothing but a minor conceptual indeterminacy which has no larger theoretical implications.⁹²

A second avenue of jurisprudential inquiry that is opened up by taking the law's claim to authority—and hence a cognitivist understanding of the internal point of view—as one's theoretical starting point concerns the nature of law's normativity. Hart took the foundational arrangements of law to consist of at least one norm, in the sense of norm that I defined in Part I as a standard of conduct or purported standard of conduct which exists simply as a certain kind of social artifact. Since Hart's analysis of normativity was non-cognitivist in nature, he held the view, as we have seen, that all there was to be said about the normativity of law resides in the fact that those who adopt the internal point of view endorse its standards as obligatory; there is nothing more to be said about whether law, *as law*, gives rise to reasons for action.⁹³ Of course there might be prudential reasons to follow the law, or, if a particular legal system can be assessed from the external point of view to have moral value, there might be moral reasons, but that is a different matter.⁹⁴ If, however, one adopts a fully cognitivist understanding of internal legal statements such as "It is the law of Pennsylvania that X," then one will understand them as asserting that a certain normative state of affairs obtains, rather than as expressing an endorsement of a certain kind. This does not preclude the possibility of understanding the foundations of law as consisting of conventionalist norms of some kind, but one will presumably try to do so, as Hart did not, in a way

92. Other theories that take the foundational arrangements of law to consist of norms might well confront problems similar to those I have said face Hart's theory. But such problems should generally not arise for theories that view the normativity of law in moral terms.

93. Both Toh and Shapiro make this point, and observe that many legal theorists have criticized Hart either for assuming that social rules are inherently reason-giving, or for failing to give an account of how they could be reason-giving. Shapiro, *supra* note 2, at 1166-67; Toh, *supra* note 61, at 77. I have in the past been guilty of this sin myself. See Perry, *Holmes Versus Hart*, *supra* note 28; Perry, *Interpretation and Methodology*, *supra* note 28. Once, however, one realizes that Hart was really a non-cognitivist, such criticisms are immediately seen to be beside the point.

94. *Cf.* Hart, *supra* note 1, at 107-08.

There are, indeed, many questions which we can raise about this ultimate rule [i.e., the rule of recognition]. . . . We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer the same kind of question about it as those which we answered about other rules with its aid. . . . [W]hen we move from the statement that a particular enactment is valid, to the [external] statement that the rule of recognition . . . is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value.

Id. Given that Hart understands legal normativity in partially non-cognitivist terms, it is difficult to see why he would understand moral normativity any differently. See *supra* note 69. Be that as it may, Hart clearly thinks that morality provides a distinct source of evaluative judgments that can be brought to bear, as an external matter, upon law.

that shows these norms to be at least potentially reason-giving.⁹⁵ This is, I take it, the project of Scott Shapiro and Jules Coleman in trying to extend Michael Bratman's notion of shared cooperative activity to enterprises in which, like law, some persons make claims of authority over others.⁹⁶

If one takes the approach of grounding the foundations of law on Bratman-like norms or on cooperative conventions of some other kind, then one might well be led to treat the normativity of law as nonmoral in nature, and indeed Coleman in particular explicitly agrees with Hart that the meaning of normative expressions is different in moral and legal contexts.⁹⁷ The obvious analogy is with other cooperative enterprises which contain structures of authority, for example the National Hockey League, which promulgates and occasionally modifies the rules for the conduct of the professional sport of hockey. There is clearly a species of normativity involved here, but equally clearly it is not moral normativity. But this is not, of course, the only kind of authoritative association among persons to which law can be analogized. Consider, for example, the authority which parents have, or which they at least claim or are said to have, over their children. Given that this association is, at least from the child's perspective, nonconsensual, and given that the exercise of parental authority can affect the life of a child in very significant ways, it is difficult to conceive of such authority, if it exists, as anything other than moral in nature. Although so far as I am aware he does not offer the analogy of the family, Joseph Raz has pointed to the similarly nonconsensual nature of the law, and to the significant ways in which the law affects people's lives, to argue, to my mind completely persuasively, that the normativity of law is moral normativity, and that the law's claim of legitimate authority is a moral claim.⁹⁸

Notice that, if one conceives of the law's claim to authority as a moral claim, then one is not committed, or at least one is not committed by that fact alone, to conceiving of the foundations of law as essentially consisting of norms, in the sense of a norm as a convention or some other kind of

95. I am here using the term "conventionalist" in a deliberately broad fashion. See *supra* note 5. In the Postscript to the second edition of *The Concept of Law*, Hart modifies his view of social rules in general, and of the rule of recognition in particular, so as to apply only to "conventional social practices." Social practices are defined as conventional "if the general conformity of a group to them is part of the reasons which its individual members have for acceptance." Hart, *supra* note 1, at 255. However, since Hart does not appear to be at all concerned with the ways in which the conventionality of a rule might further affect the reasons for action of those who accept the rule, this change in his view appears to be completely unmotivated.

96. Coleman, *supra* note 5, at 74-102; Shapiro, *supra* note 2.

97. Coleman states that "[l]aw necessarily claims a normative power to create genuine rights and obligations," but denies that the rights and obligations which are the subject of this claim must be moral rights and obligations. Coleman, *supra* note 5, at 143-44. On Hart's view of the relationship between legal and moral normativity, see *supra* note 69.

98. For a recent statement of Raz's view, see Raz, *supra* note 9, at 6. For a more detailed defense, see J. Raz, *Hart on Moral Rights and Legal Duties*, 4 O.J.L.S. 123, 129-31 (1984).

social artifact. It would seem odd, for example, to think of parental authority as grounded in such a norm. Modern legal systems are of course exceptionally complex normative structures, and their constitutional arrangements are no doubt largely comprised of norms in much the same way as I suggested earlier is true of their regular law. But the basic claim of moral authority must rest on a moral principle, not a norm, or at the very least it must assume that such a moral principle exists.⁹⁹ Moreover, the basic claim of moral authority can be made even in the case of a very simple constitutional arrangement which, much as in the case of the family, it would be implausible to think consisted of norms. This would seem to be true, for example, of Rex, the absolute monarch. If Rex claims moral authority over his subjects, and if he legislates for them on the basis of that claimed authority, then, on the view of law I am considering, there is no reason to think that we do not have a simple example of a legal system. The laws which Rex promulgates are norms because they have social existence conditions relating to actions taken by Rex. And while Rex's moral power to make law might be conditioned on certain facts obtaining, for example, that his subjects generally comply with his laws, there is, in the absence of further argument, no reason why we need to think of this power, supposing Rex's claim to authority were in fact a justified one, as anything other than a pure moral power whose existence neither consists in nor derives from a norm.

A third avenue of inquiry concerns the substantive issues that arise when we consider whether the law's claim to authority can ever in fact be justified. If one conceives of the normativity of law as moral normativity, then discussion will turn to first-order questions in moral and political philosophy. If one thinks instead that legal normativity is nonmoral in nature, then discussion might turn to other branches of practical philosophy, or perhaps to issues in the theory of rationality. For those theorists who conceive of legal normativity in moral terms and who believe that law's claim to legitimate authority is at least sometimes or to some extent capable of being vindicated, the task becomes one of adducing a moral principle which shows how this could be true. The traditional natural law view, a powerful contemporary version of which has been defended by John Finnis, makes the moral claim that, as Finnis puts it, "the sheer fact that virtually everyone *will* acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e., is justified in exercising) authority in that community."¹⁰⁰ Joseph Raz defends the view that the moral authority of law, where it exists, rests on the fact that the subjects of the law will better

99. The distinction I am drawing here between the possibility that law might be grounded in a moral principle and the possibility that it might be grounded in a constitutive norm is similar but not identical to the distinction Dworkin once drew between the possibility that law might be grounded in "concurrent morality" and the possibility that it might be grounded in "conventional morality." Dworkin, *supra* note 11, at 53.

100. Finnis, *supra* note 5, at 250.

comply with the reasons for action that apply to them if they obey the law than if they act on their own judgment.¹⁰¹ Ronald Dworkin, although he does not explicitly speak of law as claiming legitimate authority, nonetheless makes it a central tenet of his theory of law that the state possesses moral legitimacy, and its citizens have a corresponding general moral obligation to obey the law, if its legal and political system considered as a whole possesses a special moral virtue, which Dworkin calls integrity.¹⁰²

The distinction between positivist and anti-positivist theories of law can be drawn in a number of different ways, and, depending on how one draws it, a given theory or theorist can sometimes be classified one way and sometimes the other. Probably the most important way of drawing a positivist/anti-positivist distinction concerns whether there is a necessary relationship of any kind between morality and the normative content of law, but I have not touched on that set of questions in this essay.¹⁰³ Another common way of drawing such a distinction, however, looks to whether the normativity of law is conceived in moral or nonmoral terms. From that perspective, Hart and Coleman are both positivists, whereas both Dworkin and Raz fall on the anti-positivist side of the line. Finnis's view on this issue is rather complicated, since he believes that the law's "schema of practical reasoning" can be read in either a "restricted, legal sense" or in an "unrestricted, moral sense."¹⁰⁴ Yet a third way of drawing a positivist/anti-positivist distinction looks to whether or not the theorist thinks that there are conditions which are sufficiently easily satisfied so as to give rise to a general moral obligation to obey the law in legal systems that either exist or that one could easily imagine as existing.¹⁰⁵ From this perspective, both

101. Raz, *Ethics in the Public Domain*, *supra* note 84, at 194-204. I discuss both Raz's and Finnis's views on the authority of law in Perry, *supra* note 82.

102. Ronald Dworkin, *Law's Empire* 176-224 (1986). I have elsewhere suggested that Dworkin's argument tying the legitimacy of law to integrity should be understood as based on the claim that when a legal system possesses the virtue of integrity, the relationship between the political community and its individual members is thereby rendered intrinsically valuable. See Stephen Perry, *Associative Obligations and the Obligation to Obey the Law*, in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* 183, 198-205 (Scott Hershovitz ed., 2006).

103. Elsewhere I have discussed the proper framing of these questions, and offered a preliminary discussion of how one might go about showing that there is a necessary connection between morality and the normative content of law. See Perry, *supra* note 102, at 183-89.

104. Finnis, *supra* note 5, at 319. Because of this aspect of his views, Finnis does not, in fact, think that law claims moral authority, but only that it claims legal authority. See Perry, *supra* note 82, at 289 n.46.

105. As I noted earlier, the properly generalized version of a general obligation to obey is something like the idea that the law has general normative force. For a theorist who thinks that the law claims moral legitimacy, the conclusion that there is a general obligation to obey—more generally, that the law has general moral force—is just a correlate of the conclusion that the law's claim to moral authority is, in fact, a justified one. But even a theorist who thinks that the normativity of law is nonmoral in nature might conceivably also think that the law possesses, either necessarily or under certain fairly easily satisfiable conditions, a moral property which gives rise to a general moral obligation to obey the law.

Dworkin and Finnis are anti-positivists, whereas Hart, Raz, and Coleman are positivists. Although Raz thinks that it is, in principle, conceivable that every single subject of the law might on every single occasion to which the law applies do better in complying with right reason by obeying the law than by acting on his own judgment, this is so unlikely in practice that we can safely conclude that no legal system ever has the complete authority it claims for itself, and hence that it is never the case that there exists a general obligation to obey the law.¹⁰⁶

A fourth and final avenue of inquiry concerns various further conceptual and methodological issues that arise when one takes the idea that law claims legitimate authority for itself as one's jurisprudential starting point. Raz has argued, for example, that since the law claims to have authority, it must be capable of having it. The law and legal institutions are central to our particular concept of authority, and while officials can sometimes be conceptually confused, they could not, according to Raz, be so confused that the claim to authority was not, at least in principle, capable of being met.¹⁰⁷ Raz's argument that the law must be capable of having the authority that it claims for itself may or may not be correct, but surely if the law was not, in principle, capable of possessing such authority, something would have gone seriously amiss with our concepts of law and authority alike. Furthermore, if it is in the nature of law that legal systems *are* capable, at least in principle, of systematically obligating their subjects, then that is a moral property which law *necessarily* possesses. Finally, the argument required to establish that the law does or does not necessarily possess a moral property of the kind just described cannot help but be moral in character, and to that limited extent, at least, the methodology of jurisprudence requires that we engage in substantive first-order moral argument.¹⁰⁸

Consider, by way of analogy, the case of promises. Just as lawmakers engage in actions which are intended to place other persons under obligations, so too do promisors engage in actions which are intended to place themselves under obligations. One important set of philosophical questions about both the concept and the practice of promising asks whether or not promises ever are, in fact, morally binding, and, if they are, what principle or set of principles accounts for this fact. Once we know what these principles are, we can then ask further questions about their scope: Perhaps only promises made under certain conditions, or promises whose content is constrained in certain ways, can be binding in nature. Whatever the answer to these various questions about promising might be, the important point to note for present purposes is that we can only go about

106. Raz, *Ethics in the Public Domain*, *supra* note 84, at 325-38.

107. *Id.* at 201.

108. Raz denies that this is true of his own "service" conception of authority. *See id.* at 219. I believe that he is wrong on this point, although I cannot discuss the matter here. I have criticized certain aspects of the service conception in Perry, *supra* note 82, at 276-84, 290-91.

answering them by engaging in first-order moral argument, and the same point holds when we ask analogous questions about the concept and practice of law.

It should, however, be noted, as a final cautionary observation, that different jurisprudential questions may have to be answered by resort to different methodological approaches. The fact that certain questions about the nature of law can only be answered by engaging in substantive moral argument does not entail that there are not other, perhaps equally important, jurisprudential questions which can only be answered in an essentially descriptive manner. Methodological issues in jurisprudence are much more complex and varied than is often assumed by commentators to be the case, and there may thus be no simple or univocal answer to the question of whether jurisprudence requires a methodology that can comprehensively be characterized as “descriptive” on the one hand, or as necessarily and comprehensively implicating a broad range of substantive moral questions on the other hand. These are obviously very difficult issues, and I can do no more than draw attention to them here. Their further exploration must await another occasion.

Notes & Observations