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Cover Page Footnote

Leon Meltzer Professor of Law, University of Pennsylvania Law School. Many thanks to Larry Alexander, Anita Allen, Bill Ewald, Claire Finkelstein, Michael Green, Ken Himma, Leo Katz, Richard McAdams, Linda McClain, Stephen Morse, Stephen Perry, Scott Shapiro, Matthew Smith, Abby Wright, Ben Zipursky, and the participants in the February 2006 Fordham Symposium The Internal Point of View in Law and Ethics for their comments. All errors are my own.

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CONSTITUTIONAL FIDELITY, THE RULE OF RECOGNITION, AND THE COMMUNITARIAN TURN IN CONTEMPORARY POSITIVISM

*Matthew D. Adler**

INTRODUCTION

H.L.A. Hart famously distinguishes between the "internal" and "external" points of view.[1] The "internal point of view" is a mental state that at least some participants in any legal system must possess for that system to exist. It is the mental state of "accepting" a rule, and the connection to the existence of legal systems is as follows. A legal system exists only if the system's rule of recognition, stating its ultimate criteria of legal validity, is accepted by the persons who count as officials within that system—only if those persons adopt the internal point of view towards the rule of recognition. The "external point of view" is an ambiguous term, sometimes meaning the mental state of a legal theorist describing a legal system, sometimes that of a participant who may comply with the legal system's rules because of the threat of sanction but does not accept those rules. The "external point of view," in this latter sense, is the attitude of Oliver Wendell Holmes's "bad man."[2]

Hart's account of law prioritizes the internal point of view over the Holmesian "bad man's" point of view. The first is essential to a legal system, the second inessential—because it is impossible to have a legal system in which all participants take the perspective of Holmes' "bad man" towards the rule of recognition and other rules of that system, but possible (if not necessary) for all the participants in a legal system to take the internal point of view towards its rule of recognition and other rules.[3] This

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1. *See* H.L.A. Hart, The Concept of Law 88-91 (2d ed. 1994).

2. On the difference between the external and internal points of view, see Stephen R. Perry, *Holmes versus Hart: The Bad Man in Legal Theory*, *in The Path of the Law* and Its Influence: The Legacy of Oliver Wendell Holmes, Jr. 158, 161-68 (Steven J. Burton ed., 2000); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 Fordham L. Rev. 1157, 1158-1161 (2006).

3. *See* Hart, *supra* note 1, at 110-17.

prioritization, which marks an important difference between Hart's account and "realist" accounts, has been much discussed.[4]

This essay will focus on a feature of Hart's account that is less well known, at least among nonspecialists: not the contrast between the internal point of view and that of the Holmesian bad man, but the contrast between different kinds of internal perspectives. Let me distinguish between two different attitudes that an official might have towards the rule of recognition: unconditional acceptance, such that she not only accepts the rule but would accept it even if other officials were to accept a different rule; and conditional acceptance, such that she accepts the rule but wouldn't accept it if other officials were to accept a different rule. More precisely, unconditional acceptance as I have just described it is "group insensitive" (GI) acceptance. The official's acceptance of the rule might not be wholly unconditional—she might be disposed to abandon the rule under some conditions, for example a revelation from God or a popular uprising—but the shift of other officials' support to a different rule would not be sufficient to prompt her to abandon it. Further—the point of this additional proviso will become clear later on—let us say that the official's acceptance of the rule is uncompromising. Were other officials to waver in their attachment to the rule of recognition, she would feel no obligation to accommodate or compromise with them. In short, *an official's GI-acceptance of a rule, such as the rule of recognition, means an uncompromising acceptance that survives peer defection to alternative rules.* "Group sensitive" (GS) acceptance can be defined by contrast: an official GS-accepts a rule if she accepts it but does not GI-accept it.

A remarkable feature of modern, Hartian positivism is that it not only prioritizes the internal point of view over that of the Holmesian bad man, but also prioritizes the group-sensitive variant of the internal point of view (GS-acceptance) over the group-insensitive variant (GI-acceptance). Officials must be committed to the rule of recognition, but they cannot be *too* committed. A society in which officials GI-accepted some secondary rule stating ultimate criteria of validity would not be a full-fledged legal system, for Hart and leading contemporary positivists, any more than a society in which officials complied with but did not accept the rule of recognition. Hart's preferred version of the internal point of view sits midway in a spectrum of degrees of commitment to rules, comprising *neither* Holmesian nonacceptance *nor* a full-blooded commitment.

To put the point another way, officials must accept the rule of recognition, but they must also be committed to each other. What exactly that means is a matter of some dispute among contemporary positivists. There are different possible variants of GS-acceptance. But, at a minimum, GS-acceptance is not GI-acceptance. The basic point of consensus in this

4. *See, e.g.*, Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 81-83 (2001); Scott J. Shapiro, *The Bad Man and the Internal Point of View*, *in The Path of the Law* and Its Influence, *supra* note 2, at 197, 208-09.

contemporary, group-sensitive school of positivism is that the official who GI-accepts the rule is *too* committed to it, and insufficiently sensitive to the views of others in the community of officials.

Hart's embrace of a conditional, group-sensitive, official attitude towards the rule of recognition as the hallmark of a full-fledged legal system emerges, not in the original version of *The Concept of Law* (1961), but in the Postscript (1994).[5] The original version built on Hart's general analysis of social rules.[6] What Hart termed a social rule is quite close to what many modern economists and other theorists would call a "social norm."[7] In effect, according to the original version of *The Concept of Law*, the rule of recognition is a social norm among officials.[8]

This view does not require that the officials GS-accept the rule of recognition. A practice whereby officials GI-accept some rule of conduct *will* be a social norm, if in addition each official approves of every other official's conformity to the rule, this is commonly known, and each official desires every other official's approval.[9]

But the Postscript, responding to Dworkin's criticisms of the original *Concept of Law*, shifts from the social-norm construal of the rule of recognition to the view that the rule of recognition is a *convention*. Hart writes in the Postscript that "[r]ules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance," and characterizes the rule of recognition as a "conventional social rule[]."[10] It is not clear whether Hart in the Postscript means to say that the rule of recognition satisfies the strict conditions of a social convention elaborated by David Lewis in his influential book, *Convention*,[11] or that the rule is a convention in some weaker sense. Gerald Postema has argued that the rule of recognition is something like a Lewis-convention,[12] as has Andrei Marmor,[13] and Jules

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5. *See* Hart, *supra* note 1, at 238-76.

6. *See id.* at 55-58.

7. *See* sources cited *infra* note 44.

8. This statement is not fully accurate, because neither Hart nor other positivists should be understood as suggesting that the rule of recognition is just a social practice (be it a social norm, a shared cooperative activity (SCA), a Lewis-convention, or some other kind of social practice). Rather, rules of recognition are abstract, propositional entities; it is the embodiment of a particular such entity, R, in a practice in some society which makes R the rule of recognition for that society. *See* Benjamin C. Zipursky, *The Model of Social Facts*, *in* Hart's Postscript: Essays on the Postscript to *The Concept of Law* 219, 227-34 (Jules Coleman ed., 2001) [hereinafter Hart's Postscript]. This distinction—between rules of recognition themselves, and their embodiment in practices—is not crucial for my purposes. I am interested, rather, in the different ways in which a rule of recognition might be embodied in a practice. In particular, is the propositional entity accepted conditionally or unconditionally by the participants? I will therefore speak in compressed fashion of a rule of recognition just being a social norm, SCA, Lewis-convention, or some other practice.

9. *See infra* text accompanying notes 45-46.

10. Hart, *supra* note 1, at 255-56.

11. *See* David K. Lewis, Convention: A Philosophical Study (1969).

12. *See* Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. Legal Stud. 165 (1982).

Coleman once held that view.[14] More recently, Coleman has argued that the rule of recognition is conventional in a weaker sense: It is embedded in a shared cooperative activity (SCA) among officials.[15] Other positivists, notably Scott Shapiro and Christopher Kutz, have also defended an SCA-based view of the rule of recognition.[16] As I will argue below, both the view that the rule of recognition is a Lewis-convention, and the view that the rule of recognition emerges from an official SCA, rules out a legal system grounded on officials' GI-acceptance of some ultimate secondary rule: one in which officials are committed, first and foremost, to that rule, and only derivatively (if at all) to each other.[17]

In an interesting way, then, contemporary positivism has taken a kind of communitarian turn. This is interesting in its own right, but I am mainly interested in the tension between the group-sensitive positivism of the later Hart and prominent contemporary positivists, and U.S. constitutional theory. Professed fidelity to the text of the 1787 Constitution is commonplace among U.S. citizens and officials. Other forms of constitutional fidelity, such as fidelity to discrete legal propositions—for example, the proposition that slavery is unconstitutional, or that the Constitution guarantees a right of abortion—can also be observed. A striking implication of group-sensitive positivism is that a society of committed textualists—where each official uncompromisingly accepts the text of the 1787 Constitution, together with some interpretive method, as fundamental law, regardless of whether other officials accept a different text or method—would not be a full-fledged legal system. What about a society of officials who GI-accept some discrete proposition of constitutional law? In this society, some or even most of the fundamental law may be conventional, but the discrete proposition is not: Each official uncompromisingly accepts the proposition and would continue to accept it even if every other official denied it. It is not clear what group-sensitive positivists would say about this case; but, plausibly, their grounds for asserting that a society of committed textualists is not a full-fledged legal system would imply that a society of officials who GI-accept any proposition of constitutional law also is not.

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13. *See* Andrei Marmor, *Legal Conventionalism*, *in* Hart's Postscript, *supra* note 8, at 193, 193.

14. *See* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* Hart's Postscript, *supra* note 8, at 93, 114-21; Coleman, *supra* note 4, at 94 n.29, 97.

15. *See* Coleman, *supra* note 4, at 94-100.

16. *See* Christopher Kutz, *The Judicial Community*, 11 Phil. Issues 442 (2001); Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 Legal Theory 387 (2002).

17. My criticism of the Lewis-convention and SCA-based accounts of the rule of recognition focuses on the implication of these views that, in a genuine legal system, officials must GS- rather than GI-accept the rule of recognition. In a valuable, recent, unpublished paper, Matthew Smith offers other criticisms of these accounts. *See* Matthew Noah Smith, The Greatest Unity Alongside the Greatest Extension: How Legal Institutions Are Social Practices (Mar. 10, 2006) (unpublished manuscript, on file with the Fordham Law Review).

Part I of the essay explores the tension between constitutional fidelity and the two most prominent variants of group-sensitive positivism: the view that the rule of recognition is a Lewis-convention, and the view that the rule of recognition is embedded in an SCA. It argues for the intelligibility of committed textualism and shows why both the Lewis-convention and the SCA-based accounts of law would be forced to deny that a society of committed textualists is a full-fledged legal system. Is this a *reductio* of group-sensitive positivism? Perhaps not; but, at a minimum, denying that an attitude of straightforward fidelity to a constitutional text could serve as the constitutive mental state for a legal system is quite counterintuitive and should lead us to reexamine why positivists have found group-sensitivity attractive. Part II reviews this terrain, tentatively concluding that positivists' arguments for rejecting Hart's original account of the rule of recognition as a social norm may not be ultimately persuasive. The catholic conception of the internal point of view set forth by the original *Concept of Law*—a conception which encompasses both GI- and GS-acceptance and is therefore consistent with textualism and other kinds of constitutional fidelity—should perhaps not have been replaced with the narrower, group-sensitive conception offered by the Postscript.

I. CONTEMPORARY POSITIVISM AND THE PROBLEM OF CONSTITUTIONAL FIDELITY

Hart famously characterizes the rule of recognition as a practice among officials, as do many modern positivists. In other work, I have challenged this official-centric conception of the rule of recognition, offering instead a relativistic view which contemplates that multiple groups within the same territory, citizens as well as officials, might accept different rules of recognition and thereby give rise to different full-fledged legal systems.[18] For purposes of this essay, however, I will shelve the relativistic view and adopt the Hartian picture which sees the practices of a single group within each territory, officials, as creating the unique legal system governing that territory. Concretely, only one existing legal system has primary jurisdiction in the United States, and it is the social norms, or Lewis-conventions, or SCAs, of U.S. officials as a whole (not U.S. citizens) that provide the foundations for that legal system.

I shelve relativism here, not because I have become convinced by the traditional, official-centric, nonrelativistic view of law, but because the problem of group-sensitive versus group-insensitive variants of the internal point of view is *orthogonal* to the questions whether law is relative or nonrelative and whether law is a practice of officials or rather of citizens. Whatever the group or groups whose practices create law, one needs to ask whether fundamental propositions of law must be accepted by each group member conditionally on the others doing so, or may be accepted by each

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18. *See* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 Nw. U. L. Rev. 719 (2006).

member independent of the others. Because most positivists continue to hold a nonrelativistic and official-centric view of law, I will try to show why—within that framework—a group-sensitive characterization of the internal point of view is problematic. But these arguments carry over to relativistic views, or for that matter to nonrelativistic views that are citizen- rather than official-centric.

I also bracket three other contested questions about the internal point of view. First, is the internal point of view—the mental state of accepting a rule, such as the rule of recognition—a belief state or some noncognitive state?[19] Second, does the internal point of view necessarily involve a moral belief, a moral commitment, or some other moral attitude? Is it necessarily the case (for example) that individuals who accept the rule of recognition believe that general compliance with the rule is morally good or required?[20] Third, what are the semantics of "internal" legal statements, those made by individuals who possess the internal point of view? Do these statements express beliefs? Do they imply or presuppose beliefs without expressing them? Do they express noncognitive states?[21]

These three related questions, although undeniably important for any jurisprudent working within the Hartian tradition, are—once more—orthogonal to the problem of group-sensitivity, and I take no position here on the answers to these questions. Regardless of whether "acceptance" of the rule of recognition is a belief or some noncognitive state, one can distinguish between GS-acceptance and GI-acceptance.[22] Similarly, regardless of the precise semantics of internal legal statements, and the connection between the internal point of view and moral attitudes, one can draw that distinction. Although a number of my examples below involve officials who accept the Constitution on moral grounds, the examples are not meant to suggest that acceptance of the rule of recognition is necessarily a moral attitude.[23]

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19. *See* Coleman, *supra* note 4, at 88-89; Shapiro, *supra* note 2, at 1169-70. *See generally* Kevin Toh, *Hart's Expressivism and his Benthamite Project*, 11 Legal Theory 75 (2005).

20. *See* Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, *in* Hart's Postscript, *supra* note 8, at 271; Richard Holton, *Positivism and the Internal Point of View*, 17 L. & Phil. 597 (1998); Shapiro, *supra* note 2, at 1161-62.

21. *See* Shapiro, *supra* note 2, at 1168-70; Toh, *supra* note 19.

22. If acceptance is a belief state, then GI-accepting a rule means believing that one should comply with the rule even if peers shift to some other rule, *ceteris paribus*; believing that one has no obligation to compromise with peers who do deviate; and being disposed to persist in these beliefs even if peers do deviate. GS-accepting the rule means believing that one should comply with the rule but not GI-accepting it. If acceptance is, say, a noncognitive Gibbardian acceptance of a rule, then GI-accepting it means an unconditional Gibbardian acceptance which would not waver merely because of peer defections to alternative rules, while GS-acceptance is a Gibbardian acceptance that is not GI-acceptance. On Gibbardian acceptance, see Coleman, *supra* note 4, at 88-89; Allan Gibbard, Wise Choices, Apt Feelings: A Theory of Normative Judgment 71-75 (1990).

23. I assume no one disputes that the internal point of view is *possibly* linked to a moral attitude—that it is possible for an official to accept the rule of recognition because of his moral beliefs or views.

Imagine, then, that each U.S. official accepts the text of the 1787 U.S. Constitution, together with some methodology M for interpreting that text, as the single nonderivative criterion of U.S. law. In other words, each official accepts that any candidate rule of U.S. law is valid if and only if it can be derived from the text of the 1787 Constitution using M. This methodology M might be some version of originalism, but it need not be. For example, it might be a non-originalist textualism which applies current linguistic conventions to the text rather than the linguistic conventions extant at the Framing. Group-sensitive positivism is in tension with all variants of textualism, including but not limited to originalism.

In addition, assume that each official accepts the *same* interpretive methodology. In actuality, of course, no such consensus currently exists—witness raging debates about originalism—and probably never has. This absence of methodological consensus generates a familiar, Dworkinian puzzle for the positivist account of U.S. law. The Dworkinian asks, How can the debates about interpretive methodology have a legally correct answer (as the participants believe or at least assert), absent agreement about what the methodology is?[24] How can the positivist explain the fact that propositions about fundamental legal matters, such as interpretive methodology, can be both contested and true? This problem of legal-truth-despite-disagreement, although surely a very important one for the positivist, is distinct from the problem of group-sensitivity I want to raise. To avoid conflating the two problems, I will assume (contrary to actual U.S. practice) that officials agree on foundational matters: on the status of the Constitution's text as the sole ultimate source of U.S. law, on the identity of that text, *and* on the legally correct method for interpreting it. Textualism, plus the identification of the 1787 Constitution as the foundational text, plus the identification of an interpretive methodology, collectively comprise a candidate rule of recognition. Let us call this candidate rule of recognition F*.

Assume, finally, that each official GI-accepts F*. That is, (1) each official accepts F*; (2) the defection of other officials to any alternative F′ would not be a sufficient reason[25] for the official herself to abandon F*; (3)

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24. *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 654-58 (1987); Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. Soc'y 149 (2003); Zipursky, *supra* note 8, at 247-53.

25. As I elaborate below, this second condition has both a justificatory and counterfactual aspect. (Thanks to Michael Green for pressing me to clarify this point.) In the actual world, where each official accepts F*, each official believes and says that the defection of other officials to any alternative F′ would not be a sufficient reason for her to abandon F*; and, were other officials to deviate to any alternative F′, the official (without further changes from the actual world) would not shift to F′. This latter counterfactual aspect is difficult to specify exactly. The truth conditions for counterfactuals are notoriously elusive. Suffice it to say that, if an official accepts F* as part of a Lewis-convention, then there is some alternative F′ about which the following counterfactual is true: Were other officials to accept F′ rather than F*, then, without more, the official herself would accept F′.

each official is not prepared to compromise or negotiate with the other officials about whether to accept F*.

Is this a possible social situation? Is it possible for all U.S. officials to have an attitude of GI-acceptance towards some fundamental legal criterion F*? I don't see why not. To begin, GI-acceptance of ultimate legal standards is surely an intelligible and possible attitude in the domain of religious law. Consider the individual who believes in the existence of a single supreme deity, and in the status of some text as the revelation of that deity, and would therefore continue to (attempt to) comply with the text even if his fellow believers renounced it—even if they converged around a different text. Acceptance of the Bible, the Koran, or other religious texts need not, of course, take this strongly "protestant" form. But neither should the concept of a system of religious law be defined to exclude the case of a community of believers each of whom GI-accepts the same text as the word of God and who largely converge in their beliefs about the requirements of the text, which are effective in the community.

Does the shift from religious to secular law render GI-acceptance of some supreme text, such as the U.S. Constitution, impossible? I don't see why. It seems to me that GI-acceptance of F* is an intelligible attitude and, a fortiori, a possible attitude. There are at least two colorable grounds for GI-accepting F*. One is an epistemic theory which says that the process of framing the 1787 Constitution had great epistemic credentials, in evidencing the rules for setting up a government that are morally best for us to follow (for example, because the Framers were men of uncommon wisdom, or because the intensive process of drafting and public discussion which led to the 1787 Constitution was an excellent route to moral truth). The second is a higher-democratic theory, which sees the output of "constitutional moments"—decision making that involves the citizenry as a whole and that meets certain further *desiderata*, for example, being sufficiently deliberative—as morally binding.[26]

Note that neither epistemic nor higher-democratic attachment to F* is wholly unconditional attachment. Imagine that the official is attached to F* because she believes the Framers to have been individuals of uncommon moral wisdom. However, were the official to believe that another text, rejecting the 1787 Constitution, had been drafted by individuals with even greater moral wisdom, she would lose her attachment to the 1787 Constitution and would accept the competing text. Similarly, the higher-

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My definition of GI-acceptance stipulates that *this* counterfactual aspect of Lewis-conventions (whatever precisely it involves) is *not* true of the official who GI-accepts F*.

26. The higher-democratic theory can, but need not, countenance informal constitutional amendments as Bruce Ackerman does—constitutional propositions that function as amendments but are not embodied in a canonical text. Ackerman himself notes that formal referenda may be an improvement on (what he takes to be) the current practice of informal amendments. *See* Bruce Ackerman, 1 We the People: Foundations 54-55 (1991). Because my focus in this essay is GI-textualism, I am imagining here a simple kind of higher-democratic theory which says that the text of the 1787 Constitution remains in force until a constitutional moment supplements it, or wholly replaces it, with a different text.

democrat would reject the 1787 Constitution if the citizenry, after mass deliberation, did. Crucially, however, neither epistemic nor higher-democratic acceptance of F* entails group-sensitive attachment. The official who accepts F* on epistemic grounds, because of the Framers' wisdom, is open to the possibility of yet wiser individuals; but if she doesn't believe that her fellow officials are those individuals, the defection of those officials from F* to F′ will not be sufficient reason for her to shift to F′ as well. Similarly, the higher-democratic official will only shift to a different rule if a constitutional moment occurs. A mere change in the commitments of his fellow officials, without a change in citizen commitments following large-scale debate and discussion, is not (by his lights) a constitutional moment. It is just a coup.

I would not for a moment deny that GS-acceptance of F* is also an intelligible and possible attitude. The official might hold a "settlement" theory of U.S. constitutional law, which says that the moral justification for written constitutions is, in substantial part, to coordinate expectations and reduce uncertainty.[27] Therefore, there is a plurality of texts that she would accept as ultimate law were other officials to do so—perhaps any text whatsoever or (more plausibly) any text that she takes to be above some moral threshold. My argument is not *against* the possibility of this sort of attitude towards the Constitution, which amounts to a kind of GS-acceptance, but *for* the possibility of GI-acceptance.

It might be objected that a body of officials would never truly GI-accept F*. In a society where F* is in fact accepted by officials, those officials might *purport* to GI-accept F*; they might each *say* that their acceptance of the fundamental rule is not conditioned on general acceptance; but some of these officials would in fact shift to a different rule were other officials to do so. In response to this concern, let me emphasize that I am simply making a *possibility* claim here. I am not claiming that GI-acceptance is an attitude that officials frequently or typically have towards constitutional texts, or that a society in which all officials GI-accept an ultimate legal criterion has ever actually existed. My assertion, rather, is that a society in which all U.S. officials GI-accept F* is a *possible* society. It might be unlikely that an official who professes GI-acceptance of F* would, in fact, stick to that commitment in the teeth of peer defection; it might be unlikelier still that a whole society of officials would genuinely GI-accept F*; but I do not see why such a society is impossible, psychologically or otherwise.

A different objection to my possibility claim is that the content of U.S. law, as any official sees it, is necessarily sensitive to what other officials do. Imagine that other officials refuse to allow selection of a new Congress and President, as mandated by Articles I and II plus the Twelfth, Seventeenth,

27. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1371-72 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 906-11 (1996).

and Twentieth Amendments to the Constitution, and instead cooperate in selecting a different set of bodies to govern the territory of the United States. Once that happens, the hold-out official who GI-accepts F* will not recognize any new federal legislation (which, according to F*, must be promulgated by Congress and the President). Were other officials to remain faithful to F*, then the hold-out official would recognize new federal legislation. But this example simply shows that no official will intelligibly GI-accept an entire system of U.S. law—including propositions about statutory law, regulatory law, and the common law. Officials must have a hand in shaping these sorts of subordinate law (what else do they do?), and it is therefore crazy for any official to accept a particular body of statutory, regulatory, and common law independent of what other officials do. My interest is not in the crazy posture of GI-acceptance of U.S. law as a whole, but rather in the not-so-crazy posture of GI-acceptance of a rule F* setting forth the ultimate validity criterion for U.S. law—namely, the text of the Constitution plus some interpretive methodology.

Let us now turn to the group-sensitive strain of contemporary positivism. A variety of accounts of the rule of recognition offered by contemporary positivists have the upshot that a society in which U.S. officials GI-accepted F* would not be a full-fledged legal system. Consider first the view, adumbrated by Hart in the Postscript, and once held by Jules Coleman,[28] that the rule of recognition is a Lewis-convention. David Lewis defines a convention as follows:

> A regularity *R* in the behavior of members of a population *P* when they are agents in a recurrent situation *S* is a *convention* if and only if it is true that, and it is common knowledge in *P* that, in almost any instance of *S* among members of *P*,
>
> (1) almost everyone conforms to *R*;
>
> (2) almost everyone expects almost everyone else to conform to *R*;
>
> (3) almost everyone has approximately the same preferences regarding all possible combinations of actions;
>
> (4) almost everyone prefers that any one more conform to *R*, on condition that almost everyone conform to *R*;
>
> (5) almost everyone would prefer that any one more conform to *R'*, on condition that almost everyone conform to *R'*,
>
> where *R'* is some possible regularity in the behavior of members of *P* in *S*, such that almost no one in almost any instance of *S* among members of *P* could conform both to *R'* and to *R*.[29]

28. *See supra* note 14.
29. Lewis, *supra* note 11, at 78.

The crucial feature of Lewis's definition, for my purposes, is that conventions necessarily have *alternatives*. Compliance with R is conventional only if there is some alternative, incompatible rule, R′, that almost every agent would prefer to comply with if every other agent did. Therefore, in any society in which all (or even a substantial number of) officials GI-accept F*, F* is not a Lewis-convention. If F* is a Lewis-convention, then there is some alternative F′ such that the sheer fact of general official acceptance of F′, without more, would prompt almost every official to accept F′ instead of F*. But, if all or even many officials GI-accept F*, it follows immediately from the definition of GI-acceptance that there is no such rule F′ to which all or most would shift just in virtue of a general official shift to F′. More concretely: If every official accepts the 1787 Constitution plus an interpretive method on epistemic grounds, because of the wisdom of the Framers, or on higher-democratic grounds, because of its origin in a suitable constitutional moment, then there is no alternative text and/or method that any official would accept merely because all other officials do.

The prominent positivists who have argued that the rule of recognition is something like a Lewis-convention include not merely Coleman, but also Andrei Marmor and Gerald Postema.[30] Marmor modifies Lewis's model in important respects, but retains the feature that, for my purposes, is crucial: the existence of at least one alternative rule to which almost every participant would have sufficient reason to shift if every other participant did. Marmor says quite explicitly that the rule of recognition R in any legal system is a conventional rule and that any conventional rule is "arbitrary."

> Given that *A* is the main reason[] for members of a population, *P*, for following a rule, [*R*], in circumstances *C*, *R* is an arbitrary rule if and only if: there is at least one other rule, *R′*, so that if most members of *P* were complying with *R′* in circumstances *C*, then for all members of *P*, *A* would be a sufficient reason to follow *R′* instead of *R*. The rules *R* and *R′* are such that it is normally impossible to comply with them concomitantly in circumstances *C*.[31]

Postema is less explicit about this point. He wants to "allow for the possibility that the arguments supporting conformity to a convention, though giving significant . . . reasons, may be overridden by stronger arguments or reasons in some cases."[32] If by "some" Postema means "some, but not all," then on this view there must be at least one alternative to any convention—in which case GI-acceptance and Postema-conventionality are inconsistent. On the other hand, if Postema is willing to count as a convention a rule R which is followed by a group and which each member would on balance prefer conforming to, even if all other members defected to some alternative R′, for all possible such alternatives, then

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30. *See* Marmor, *supra* note 13; Postema, *supra* note 12.
31. Marmor, *supra* note 13, at 203.
32. Postema, *supra* note 12, at 177-78.

Postema-conventionality and GI-acceptance are consistent—but this would seem to be a distortion of the term "convention."

In short, genuine conventionality in Lewis's sense, or in any other sense that entails some alternative to the existing rule of recognition which virtually every official would accept if every other official did, is inconsistent with a widespread attitude of fidelity to the text of the Constitution plus an interpretive method that survives general defection to every other text and/or method. Scott Shapiro, indeed, uses the very example of attachment to the U.S. Constitution to explain why the Lewis-convention account of the rule of recognition is problematic. Shapiro writes,

> My guess is that many [Americans] would believe that they had a moral obligation to heed a text that had been ratified by the representatives of the people of the United States [a kind of higher-democratic view], regardless of what everyone else did. Many officials would probably also share such an attitude. If most officials suddenly abandoned the United States Constitution, this would not lead all others to similar action. Some would resign in protest, while others would continue applying the rules validly enacted under the United States Constitution. To be sure, if the French Constitution had been ratified instead, these judges would prefer following the French, instead of the United States, Constitution. But since the United States Constitution was ratified, they prefer to follow it and it alone.[33]

Shapiro, along with Coleman and Kutz,[34] has argued that the proper model of the official practice giving rise to law is the model of shared cooperative activity (SCA), rather than of a Lewis-convention.[35] The construct of SCA derives from the work of the philosopher Michael Bratman, who offers it as an account of certain collective and highly interactive activities like painting a house together or building a bridge together. Roughly speaking, an SCA exists where the participants have a

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33. Shapiro, *supra* note 16, at 393.

34. *See* Kutz, *supra* note 16.

35. Shapiro's SCA-based account of a legal system is presented in *Law, Plans, and Practical Reason. See* Shapiro, *supra* note 16. In a recent unpublished paper, which Shapiro has graciously provided me, he has substantially modified this account and moved some distance from the SCA model. *See* Scott J. Shapiro, Legal Practice and Massively Shared Agency (unpublished manuscript, on file with the Fordham Law Review). Among other things, Shapiro in the more recent paper suggests that an official might be alienated from other officials and lack an intention to work together with those other officials in the activity of creating and maintaining criteria of legal validity. Instead, the official might simply intend to do her part in a plan created by those who designed the legal system (for example, the Framers). Shapiro's alienated official, who intends to follow the basic plan for the legal system and has no commitment to cooperate with other officials except insofar as required by that basic plan, seems not too dissimilar from my official who GI-accepts a rule of recognition. If so, my criticisms of the SCA-based account of a legal system presented by Shapiro in *Law, Plans and Practical Reason* would not apply to the newer view. This is not an issue I will further pursue here. It is important to understand why SCA-based views of the rule of recognition are problematic, and to advance that point I will focus in this essay on the account that Shapiro provides in *Law, Plans, and Practical Reason.*

"commitment to the joint activity," are "mutually responsive," and are "committed to mutual support." More precisely, the intentions constitutive of SCA are as follows:

> [O]ur *J*-ing is a SCA [in the 2-party case] only if
>
> (1)(a)(i) I intend that we *J*.
>
> (1)(a)(ii) I intend that we *J* in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i).
>
> (1)(b)(i) You intend that we *J*.
>
> (1)(b)(ii) You intend that we *J* in accordance with and because of meshing subplans of (1)(a)(i) and (1)(b)(i).
>
> (1)(c) The intentions in (1)(a) and in (1)(b) are not coerced by the other participant.
>
> (1)(d) The intentions in (1)(a) and (1)(b) are minimally cooperatively stable.
>
> (2) It is common knowledge between us that (1).[36]

Let us focus on the "meshing subplan" condition of SCA. As Bratman's definition states, and as his writings underscore, actors are sufficiently cooperative to be part of an SCA only if they intend that their particular conceptions of how the joint activity should proceed—their subplans—be meshed or harmonized.

> [S]uppose that you and I each intend that we paint the house together, our subplans happen so far to mesh, but neither of us is committed to maintaining this mesh. Suppose our subplans happen to agree on red. We may still ask how I would be disposed to act if you were unexpectedly to announce a preference for blue. In the absence of a commitment to mesh I would tend to be willing to bypass (rather than seek a mesh with) your subplans, so long as we still thereby paint the house together. For example, I might try to pour red paint into your paint can when you are not looking. And this would signal the absence of a cooperative attitude characteristic of SCA. If, in contrast, I intended not merely that we paint together, but that we do so in accordance with meshing subplans, then I would need instead to track this more complex goal. I would normally do this by working with you to achieve such a mesh.[37]

The meshing subplan condition is also central to Shapiro's SCA-based model of a legal system—the best developed such model in the literature. Shapiro suggests that a legal system is a proto-SCA in which officials

36. Michael E. Bratman, *Shared Cooperative Activity*, *in* Faces of Intention: Selected Essays on Intention and Agency 93, 105 (1999).

37. *Id.* at 99.

intend to create and maintain a unified system of rules and intend to "mesh" their particular conceptions of the content of that system, where these diverge.[38] Each official intends to resolve any disagreement with other officials about what the rules are through negotiation, deliberation, or a resort to authority. "[L]egal officials are committed not only to appealing to a common set of rules but also to resolving their disagreements about the membership of such set or the application of any of its members."[39]

I have defined GI-acceptance to preclude an intention to mesh. If someone GI-accepts a rule, then she accepts it *uncompromisingly*: She has no intention of harmonizing her view with those who accept an incompatible rule. I am not sure whether this aspect of GI-acceptance is genuinely separate from the other elements or just follows from them. If I would end up conforming to R in preference to any other rule to which other officials might defect, and I know that, is it possible for me to have a genuine intention to mesh my plan to conform to R with others' conflicting plans that might arise? Maybe so, maybe not.

In any event, uncompromising acceptance of F*—the text of the Constitution plus an interpretive method—is a perfectly intelligible attitude. Official O is convinced that the Framers were men of uncommon wisdom, moral authorities. O is also convinced that many of her fellow officials are neither people of uncommon wisdom, nor second-order authorities about the wisdom of the Framers. Because O is convinced that the Framers were men of uncommon wisdom, she accepts the 1787 Constitution plus an interpretive method (presumably some variant of originalism). And she has no intention of budging from that position, at least not in response to disagreement from other officials. Were O convinced that the disagreeing official was an uncommonly wise man or woman, or a second-order authority, O would budge; but O has no general intention to compromise with her fellow officials about the status of F* as a fundamental legal axiom. Shapiro cashes intention-to-mesh, in the context of a legal system, as the officials' commitment to resolve disagreements with each other about what the legal rules are; but O has no such commitment in any substantial sense with respect to F* itself (she expects that disagreements will arise, but expects and intends to continue to accept F*, and may not even feel any need to make other concessions to, or explain herself to, disagreeing officials). A similar story of uncompromising acceptance of some F* on higher-democratic grounds could easily be sketched.

It might be argued that any official who accepts F*, and intelligibly so, must be strategically rational. She must take account of the beliefs, preferences, and actions of other officials, including whatever preferences they may have for alternative rules. But it seems that officials can be

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38. I say "proto-SCA" because Shapiro drops the commitment-to-mutual-support condition of SCAs. *See* Shapiro, *supra* note 16, at 426-32. *See generally* Adler, *supra* note 18, at 752-65 (discussing Shapiro's account and its application to the United States).

39. Shapiro, *supra* note 16, at 427.

intelligible without being strategically rational—witness the whole "attitudinal" school of political science scholarship about judging, which denies that judges are strategically rational[40]—and, more fundamentally, a Bratmanian intention to "mesh" must be more than strategic rationality. That *must* be the lesson of Bratman's house painting example. So imagine an official who prefers that she and others conform to the text of the 1787 Constitution, on epistemic or higher-democratic grounds, and who will act to implement the text—taking into consideration the possible actions of those who want to thwart implementation and know that she wants to implement it. That strategic awareness, alone, cannot mean that the official satisfies the intention-to-mesh condition for SCAs—any more than the fact that I will be careful to keep in mind your preference for a blue house in pursuit of my preference for a red house, pouring red paint into your can only when you are not paying attention to the color, means that I intend to cooperate with you in painting the house.

Shapiro suggests that a commitment to mesh with other officials follows from a commitment to develop a system of legal rules, since legal systems have authority structures (for example, supreme courts) for resolving official disagreement.[41] If the claim is that, by virtue of my commitment to F*, I am necessarily committed to deferring to the decision of the Supreme Court or some other legal body about the legal status of F* itself, that cannot be right. I GI-accept F*; I recognize as legal bodies only those bodies validated as such by F*; I would reject as legally void any decision rejecting F* itself. *That* set of attitudes must be coherent; the official attached to the 1787 Constitution on epistemic or higher-democratic grounds is surely not committed to accepting a Supreme Court decision to the effect that some text other than the 1787 Constitution is our higher law.

At most, Shapiro can plausibly suggest that, if I am an official committed to F* as the ultimate criterion of legal validity, then I am committed to meshing with other officials about *the application of F**. I am committed, for example, to harmonizing my view that some putative piece of federal legislation is a genuine statute, with the conflicting view of other officials that it fails the validity conditions to be a statute. But this line of thought is not successful either. The text of the 1787 Constitution and Supreme Court practice make clear that accepting F* hardly commits one to accepting a Supreme Court with authority to resolve all issues regarding U.S. law. The text of Article III gives Congress authority to limit the Court's jurisdiction; and standing doctrines, the political question doctrine, and the "underenforcement" structure built into much of constitutional and subconstitutional law mean that there are a host of federal legal issues that (an official might plausibly believe) the Supreme Court lacks legal

40. *See* Lee Epstein & Jack Knight, The Choices Justices Make, at xii-xiii (1998).
41. *See* Shapiro, *supra* note 16, at 426-28.

authority to resolve.[42] For instance, a President might undertake some military action despite Congress's refusal to authorize the action; the Supreme Court might decline to decide the legality of the action, as a "political question;" the President might have no intention to bargain or compromise with the members of Congress who believe the action to be unconstitutional absent Congressional authorization; instead, he might intend to persist in the action, and to stick to his view that the military action is legal, for as long as both are politically feasible.

The point, more abstractly, is that the existence and jurisdiction of a supreme legal body to resolve questions about the application of F* are themselves determined by F*, the ultimate criterion of legal validity. The official who GI-accepts F* might understand it to create no supreme body to resolve a certain domain of questions about the application of F*, and might intend to act strategically to implement his own legal understandings within that domain.

Let me stress that I'm *not* offering a solipsistic picture of a legal system. It may be possible to imagine a legal system in which there is only one official, but that is *not* what I am imagining here. Rather, I am imagining that each official understands F* to create an institutional structure—a "Congress," "Supreme Court," "President," and so on—with institutional roles and attendant powers, duties, etc., both for himself and for others. That institutional structure, as each official understands it, will require him to cooperate, in various ways, with the other officials. But this sort of cooperativeness is *derivative*; it is simply the cooperativeness that each official takes to be required by his office within the institutional structure that he sees F* as creating. The official is not cooperative with respect to the basic text and interpretive method that (in his mind) gives rise to the structure. His cooperativeness flows from F*—and about the status of F* itself he is quite stubborn. Further, whether or not the official intends to mesh with other officials about various other matters is contingent on his understanding of the institutional structure that he takes F* to create—on the powers, duties, etc. of his and other offices. He may understand the structure to license or even require that he not intend to mesh with the other officials on certain matters.

In sum, the posture of GI-accepting F* (a rule stating that the text of the Constitution plus some interpretive method is supreme law) seems a

42. *See* Adler, *supra* note 18, at 760-61; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978). Underenforcement of constitutional law, for example in the "rational basis" branches of equal protection and substantive due process doctrines, is familiar to constitutional lawyers. The Supreme Court might apply the equal protection rational basis test and uphold a statute, but this decision would not resolve the dispute between an official who contends that the statute violates the Equal Protection Clause (which the Court has failed to fully enforce) and one who claims that the statute satisfies the Clause. A sub-constitutional underenforcement structure, somewhat analogous to rational basis review, is created by the *Chevron* doctrine of judicial deference to the executive branch on questions of statutory interpretation. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

coherent expression of constitutional fidelity, be it on epistemic, higher-democratic, or other grounds. Unfortunately, a society of officials who GI-accept F* is not a full-fledged legal system, according to the group-sensitive models of a legal system advanced by leading contemporary positivists. No official would accept any alternative ultimate criterion of legal validity just by virtue of the fact that other officials do. This means that their practice is not a Lewis-convention. And because the officials' acceptance of F* is uncompromising, each official has every intention not to budge from F* if other officials defect from it, and may not even generally intend to mesh her conception of how F* should be applied with the conflicting conceptions of other officials on this score. This means that their practice is not an SCA.

Of course, the fact that a society of GI-textualists is not a full-fledged legal system does not necessarily undercut group-sensitive accounts of law, such as the Lewis-convention or SCA models. It might, instead, be taken as an insight into the legal flaws of constitutional fidelity. The implications of the conflict between group-sensitivity and constitutional fidelity remain to be seen.

First, however, we should ask whether forms of constitutional fidelity other than GI-textualism are also in tension with group-sensitivity. GI-acceptance of the text plus an interpretive method means that the official GI-accepts *every legal proposition that he regards as ultimate.* There may be legal rules that he now accepts but would reject, were other officials to reject them, but these are all subordinate rules, which he regards as legally valid because he believes they can be derived from the ultimate rules.

Presumably, any society in which officials GI-accept the totality of the ultimate rule of recognition is not a full-fledged legal system under the Lewis-convention or SCA model—whether that ultimate rule is textualist, nontextualist, or a hybrid of a supreme text plus nontextual sources. What about more discrete forms of constitutional fidelity? Imagine that officials GI-accept, as an ultimate legal proposition, the proposition that slavery is illegal. But each official will also accept whichever, of a plurality of foundational texts, other officials accept. Here, there remains a conflict with the SCA and Lewis-convention models, although it is less stark. Officials have no intention of meshing with other officials about the illegality of slavery, but are (or may be) prepared to compromise with each other on all other matters, including ultimate ones. The total rule of recognition *is* a convention: officials currently accept text T plus the proposition that slavery is illegal, but would accept text T′ plus that proposition if other officials did. On the other hand, the reason that officials have for accepting the stipulated proposition is not conventional; official practice is no part of the grounds for their acceptance of *that* aspect of the total rule of recognition.

II. WHY NOT VIEW THE RULE OF RECOGNITION AS A SOCIAL NORM RATHER THAN A LEWIS-CONVENTION OR AN SCA?

Hart, in the original version of *The Concept of Law*, characterizes the rule of recognition as a social rule among officials. A social rule, in turn, is characterized as follows:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.[43]

Hart's analysis of social rules, here, is quite close to a leading contemporary analysis of "social norms": the "esteem"-based analysis offered by Philip Pettit, Richard McAdams, and others,[44] which sees a social norm as a behavioral standard deviations from which everyone in a group disapproves, and where the prospect of losing the approval of group members both functions as an intrinsic sanction for breaching the norm and explains why group members enforce the standard in more active ways (through spoken disapproval or tangible sanctions). As Pettit puts it,

> A regularity, R, in the behavior of members of a population, P, when they are agents in a recurrent situation, S, is a [social] norm if and only if it is true that, and it is a matter of common belief that, in any instance of S among members of P,
>
> 1. nearly everyone conforms to R;
>
> 2. nearly everyone approves of nearly anyone else's conforming and disapproves of nearly anyone else's deviating; and
>
> 3. the fact that nearly everyone approves and disapproves on this pattern helps to ensure that nearly everyone conforms.[45]

Crucially, the social-norm construal of the rule of recognition is perfectly *consistent* with committed textualism, or with other forms of constitutional fidelity. The practice of a group of officials who GI-accept F* (the text of the Constitution plus some interpretive method) as the ultimate criterion of

43. Hart, *supra* note 1, at 57.

44. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997); Philip Pettit, Virtus Normativa: *Rational Choice Perspectives*, 100 Ethics 725 (1990); Richard H. McAdams & Eric B. Rasmusen, *Norms in Law and Economics* 7-8 (Mar. 29, 2005) (unpublished manuscript, on file with the Fordham Law Review).

45. Pettit, *supra* note 44, at 751 (emphasis omitted). Pettit, here, does not build the desire for approval into the definition of a social norm. It is possible for condition three to be satisfied through mechanisms that do not involve a desire on the part of group members for each other's approval. But Pettit's discussion points to that desire as a standard mechanism by which condition three is satisfied. *See id.* at 738-50.

legal validity for the United States could be a social norm. More precisely, on Pettit's definition, their practice would be a social norm if other-regarding, esteem-seeking, and common-knowledge elements were added to the fact of collective GI-acceptance: if each official approved not only her conformity but every other official's conformity with F* (which presumably would follow naturally from the official's acceptance of F* for herself); if each official desired every other official's approval; and if all this were common knowledge.

Note also that the social-norm account of the rule of recognition is consistent, not just with GI-acceptance, but with GS-acceptance as well. In particular, Lewis-conventions can be norms.[46] A Lewis-convention whereby each official accepts the text of the 1787 Constitution as ultimate U.S. law because of its settlement function, and would accept the French Constitution instead as ultimate U.S. law if every other official did so, would also be a social norm as per Pettit, *if* each official (with common knowledge) cared about every other official's approval and therefore had that additional reason to comply with the U.S. Constitution.

Why, then, do important contemporary positivists reject the social-norm construal of the rule of recognition, in favor of Lewis-conventions or SCAs? Specifications of "law," like specifications of any concept, can be tested by imagining hypothetical cases. The fact that a hypothetical society of GI-textualists would not satisfy the Lewis-convention or SCA-based specification of "law" is a strike against those specifications, because that hypothetical society simply embodies in a pure form an attitude of fidelity to the text that many officials and citizens in the United States profess. My claim, again, is not that a society in which officials GI-accept F* is likely or actual. Rather, the claim is that this attitude is intelligible; that a society of this sort is possible; and that, because fidelity to the text of the Constitution is frequently proclaimed by actual U.S. officials and citizens to be a legal virtue and requirement, it is quite counterintuitive that a possible society in which every official embodied that putative virtue in a strong form would not be a full-fledged legal system.

Here is a different way to put the point.[47] It is extremely unlikely that every current U.S. official GI-accepts the text of the Constitution, but more likely that some do. On the Lewis-convention and SCA models of a legal system, a society in which some officials GI-accept the rule of recognition while others GS-accept it is, presumably, not a full-fledged legal system. It deviates, to some degree, from the paradigm of a society in which every official GS-accepts the rule of recognition. This means that we cannot know whether the United States is currently a full-fledged legal system without investigating the mental states of officials—without determining the proportion of officials who GI- rather than GS-accept the rule of recognition for the United States. But this is counterintuitive. Intuitively,

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46. *See id.* at 732-34.

47. I am indebted to Ken Himma for suggesting this formulation.

we know that the United States is a paradigmatic legal system even without knowing how committed its officials are to its rule of recognition.

In short, the group-sensitive specifications of "law," as per the Lewis-convention and SCA models, produce counterintuitive implications when confronted with the possibility of constitutional fidelity: the implication that a hypothetical society of GI-textualists would not be a full-fledged legal system; and the implication that we need to investigate the psychology of U.S. officials to determine the degree to which the United States is currently a full-fledged legal system. A specification of "law" with these counterintuitive implications might still, on balance, be persuasive. But there would have to be substantial, countervailing considerations in favor of that specification—particularly since another available account, the social-norm based account, has no trouble seeing the society of GI-textualists as a full-fledged legal system.

What, then, are the considerations in favor of the view that the rule of recognition is a Lewis-convention, SCA, or some other practice that precludes GI-acceptance, rather than a social norm? And how substantial are they? This brings us to deep jurisprudential questions that I cannot treat in detail here, and that, in any event, would surely be better answered by others. The point of this essay is simply to help motivate fuller discussion of the deep questions, not to answer them. What follows is a very quick and superficial treatment.

Hart himself shifts to the Postscript's view of the rule of recognition as a convention in response to a criticism offered by Ronald Dworkin, in his article *The Model of Rules II*, that Hart's original definition of a social rule fails to distinguish between two cases: the former in which people accept and conform to the same rule, but do not take the fact of general acceptance and conformity as a grounds for accepting the rule; and the latter in which people do take the fact of general acceptance and conformity as a grounds for accepting the rule. Only in the latter case, Dworkin says, would it make sense for group members to appeal to the *social* rule in justifying conformity.[48] Or as Coleman puts the point,

> [W]hen judges adopt the practice of applying the rule of recognition, the actions and intentions of the other judges are reasons for each; it is as though they are going for a walk together, rather than simply walking alongside one another. It is this feature of the normativity of the rule of recognition that is left unexplained by the internal point of view. For it is not just that different judges decide individually and separately to evaluate conduct in the light of standards that satisfy certain criteria . . . ; [rather], the fact that some judges apply criteria of legality is a reason for others to do so.[49]

The thought, then, is something like this: (1) Participants in legal practice characteristically cite the illegality of some behavior as a reason to

48. *See* Ronald Dworkin, Taking Rights Seriously 53-54 (1977).
49. Coleman, *supra* note 4, at 91-92.

refrain from performing it. (2) In the case where a rule takes the form of a social norm among officials, officials will not characteristically take the very existence of that social practice as a reason to accept the rule, and therefore will not characteristically appeal to that social practice in arguing for conformity. (3) However, in the case where a rule takes the form of a Lewis-convention or SCA among officials, officials will characteristically take the very existence of that social practice as a reason to accept the rule, and therefore will characteristically appeal to that practice in arguing for conformity.

How persuasive is this argument? Consider, first, the question whether the very existence of these various types of social practice generates a "reason" to conform to them, with "reason" defined inclusively to include any sort of preference-satisfaction or prudential reason as well as moral or non-prudential reasons. The very existence of a Lewis-convention necessarily generates a reason in this inclusive sense (preference-satisfaction) for each participant. But the same is true for participants in social norms. A social norm exists, according to Pettit, only if everyone approves conformity and the fact of collective approval is a reason for everyone to conform[50] (paradigmatically, because each disprefers the loss of everyone else's esteem).

Consider, next, "reasons" defined more narrowly to exclude preference-satisfaction per se or other prudential reasons. Consider, in particular, whether Lewis-conventions or SCAs generate *moral* reasons or appeals more readily than social norms. To save space, I will not separately consider the possibility that law generates, or is seen by participants in legal practice to generate, reasons which are neither prudential nor moral. I conjecture, without attempting to demonstrate, that my comparison of Lewis-conventions and SCAs with social norms via-à-vis moral reasons carries over to the case of non-prudential, nonmoral reasons (such as may exist).

In thinking about the status of different social practices (Lewis-conventions, SCAs, and social norms) vis-à-vis moral reasons, it is crucial to distinguish four claims: (1) The practice necessarily generates moral reasons; (2) the practice is capable of generating moral reasons; (3) participants in the practice will necessarily believe it to generate moral reasons; and (4) participants in the practice will possibly believe it to generate moral reasons. As for the first, surely no positivist would want to claim that Lewis-conventions or SCAs among officials *necessarily* generate moral reasons for those officials. That would amount to a natural law view. And, in any event, it is clearly false. Nazi officials could prefer implementing one abhorrent Nazi constitution if other Nazi officials do, and

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50. Actually, Pettit does not quite say this. Condition three is weaker. *See* Pettit, *supra* note 44, at 730-31. However, Pettit admits that he is offering a very inclusive definition of social norm. *See id.* at 729. Condition three can be tightened to demand that the facts about collective approval and disapproval help to ensure conformity by giving everyone a reason to conform.

a different abhorrent Nazi constitution if other Nazi officials do—thus instantiating a Lewis-convention that each official lacks any moral reason to conform to. Similarly, the Nazi official who is part of an SCA, whereby he intends to work together with other officials to oppress the Jews, to mesh his oppressive subplans with other Nazis, and so on, has no actual moral reason whatsoever to continue cooperating with them or to implement whatever plans the group arrives at.

Perhaps the argument for the Lewis-convention or SCA construal of the rule of recognition is this: that Lewis-conventions or SCAs are *capable of generating* moral reasons for officials to conform. As Ken Himma puts it, "[T]he notion of an SCA might contribute to an explanation of how a social practice can give rise to obligations . . . . [SCA] involves a joint *commitment* on the part of participants . . . . [I]n so far as such commitments induce reliance and a justified set of expectations (whether explicitly or not), they can give rise to obligations."[51] A similar reliance-based story can be told about Lewis-conventions: Once a Lewis-convention is in place, everyone typically expects continued conformity, and (under the right conditions, including the condition that the convention is not too odious) these expectations will be reasonable and participants will have a moral reason not to disappoint the expectations.

But exactly the same reliance-based story can be told for social norms. If a social norm is in place, everyone in the group will typically expect that everyone else will conform, and (if the norm is not too odious) will reasonably rely upon everyone else's conformity, creating a reliance-based moral reason for everyone to conform to the norm.

In short, the necessity claim is too strong, and the possibility claim too weak, to explain why Lewis-conventions or SCAs are a better model of the rule of recognition than social norms. For none of these three practices is it necessarily the case that the very fact of the practice is a moral reason for participants to conform to it; for all three of the practices it is possibly the case that the very fact of the practice is a moral reason for participants to conform to it. Consider, then, the third candidate distinction—namely, that participants in Lewis-conventions or SCAs necessarily believe that the very fact of the practice is a moral reason for participants to conform, while participants in social norms do not necessarily believe that.

Let us restrict our attention to cases where participants' basic motivation for participating is moral. Concretely, compare three cases: (1) Officials believe they are in a moral "coordination game" with multiple coordination equilibria, such that each believes he has moral reason to conform to F* as the ultimate rule for U.S. law if every other official conforms, and believes he has moral reason to conform to F′ if every other official follows F′ (*a morally motivated Lewis-convention*); (2) officials believe they are morally obliged to work together to craft criteria of legal validity for the United

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51. Kenneth Einar Himma, *Inclusive Legal Positivism, in* The Oxford Handbook of Jurisprudence and Philosophy of Law 125, 134 (Jules Coleman & Scott Shapiro eds., 2002).

States and to mesh their subplans (*a morally motivated SCA*); and (3) officials believe that F* is the morally correct ultimate rule for U.S. law, disapprove of deviations from F*, and care about each other's disapproval (*a morally motivated social norm*).

In the Lewis-convention case, participants do necessarily believe that the very fact of the practice is a moral reason for them to conform. This is also true of the SCA case—although not for the reason sometimes suggested.[52] It is *not* true that, if I believe I have moral reason to join an SCA with you, I necessarily believe that I have moral reason not to unilaterally withdraw. (Isn't it possible for me to believe that some substantive moral consideration is best advanced by my cooperating with you, but also to believe that, once that substantive consideration disappears, the sheer fact of our past cooperation and your reasonable expectation that I will continue cooperating gives me no moral reason to do so?) Rather, a morally motivated SCA necessarily generates beliefs about the moral relevance of the SCA itself in the following sense: If I believe that I have moral reason to enter into an SCA with you to develop legal rules for some society, then I must believe that—if a consensus about some criterion of legal validity emerges in our SCA—the genesis of that criterion in our SCA gives me moral reason to accept it. By contrast—and here is the difference between social norms and SCAs or Lewis-conventions—officials who believe that F* is the morally correct ultimate rule for U.S. law, and whose practices amount to a social norm, do not necessarily believe that the very existence of that social norm is a moral reason to conform to F*.

Finally, the fourth candidate distinction fails: Participants in all three sorts of practices are capable of believing that the practice generates reliance interests that they have a moral reason not to disappoint.

The following table summarizes the results of this admittedly very brief analysis.

	Practice itself *necessarily* creates moral reasons	Practice itself *possibly* creates moral reasons	Practice itself *necessarily believed by participants* to create moral reasons	Practice itself *possibly believed by participants* to create moral reasons
Morally motivated Lewis-convention	No	Yes	Yes	Yes
Morally motivated SCA	No	Yes	Yes	Yes
Morally motivated social norm	No	Yes	No	Yes

52. *Cf.* Coleman, *supra* note 4, at 84-98.

The analysis suggests that a Lewis-convention or SCA model of the rule of recognition *is* better than a social norm model in accounting for the fact that officials not only converge in characterizing deviation from the rule as wrong, but also point to their practice itself as part of the reason that deviation from the rule is wrong. Let us call this the "reflexivity" of legal practice. If the rule of recognition is a Lewis-convention, which officials accept on moral grounds, then officials necessarily believe the very fact of collective acceptance to be a moral reason for accepting the rule. If officials believe they have moral reason to form an SCA to craft criteria of legal validity, then they necessarily believe that the very fact of their consensus on some criterion of legal validity—if such consensus emerges after efforts to mesh—is a moral reason to accept that criterion. Analogous points could be made about non-prudential, nonmoral reasons (if such exist or are believed to exist).

Social norms do not necessarily generate reflexive beliefs in this sort of way. On the other hand, it is certainly possible for social norms to generate moral reasons (or non-prudential, nonmoral reasons, if such exist), and to generate reflexive beliefs. Thus, a social norm model of the rule of recognition is weakly consistent with reflexivity. This feature of the model, together with its ability to count committed textualism or other forms of GI-acceptance as suitable attitudes for a full-fledged legal system, might plausibly incline a positivist jurisprudent to think that—all things considered—it is the best model of the social practice undergirding law.

CONCLUSION

Whatever one concludes about the choice between different models of the rule of recognition, it should be recognized that there is a tension between two features of legal practice, at least in the United States and presumably in some other candidate legal systems. One is *fidelity*; the other is *reflexivity*. Many U.S. officials and citizens profess fidelity to the text of the 1787 Constitution. The mental state of GI-acceptance is a particularly pure form of fidelity. Many U.S. officials and citizens also think the 1787 Constitution is legally binding, not merely morally binding or binding in some other nonlegal sense. What makes the 1787 Constitution legally binding—plausibly—is that many in the United States not only accept the 1787 Constitution but also take the very fact of collective acceptance as a reason for accepting it (reflexivity). Note that if many in the United States simply accepted the 1787 Constitution, without taking the fact of collective acceptance as partial grounds for its bindingness, then the characterization of the Constitution as "law" would be puzzling. What, other than reflexivity, distinguishes between a precept that is simply part of a society's generally accepted morality, and a precept that is part of its law?

But what seems to emerge from this essay is the following: It is impossible for any model of the rule of recognition to fully accommodate both fidelity and reflexivity. A given model either (1) will have the counterintuitive consequence that a particularly strong form of fidelity to

the 1787 Constitution, on the part of some or all U.S. officials, undercuts the status of the United States as a full-fledged legal system (the Lewis-convention model, the SCA model); or (2) will be able to count the United States as a full-fledged legal system even if all officials GI-accept the Constitution, but will have some trouble explaining why officials and citizens say that the U.S. Constitution is binding *because it is law*, as opposed to simply saying that it is binding (the social-norm model).

Because the social-norm model does not preclude reflexivity, I am tentatively inclined to find it more attractive. The very existence of a social norm among U.S. officials who GI-accept the text of the Constitution and an interpretive method *could* genuinely create a moral reason for those officials to comply with that norm, and *could* be believed by the officials to be a moral reason to comply with the norm, although it need not generate such reasons or beliefs. Hart, worried about the reflexivity of law, moved from the social norm-based view of the rule of recognition to the group-sensitive view articulated in the Postscript. But worries about the possibility of constitutional fidelity should perhaps move us back to Hart's starting point. The communitarian turn in contemporary positivism may, on balance, have been an unfortunate one.

Notes & Observations