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INCOMMENSURABILITY, PRACTICES AND POINTS OF VIEW: REVITALIZING H.L.A. HART’S PRACTICE THEORY OF RULES

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Abstract

The standard reading of H.L.A. Hart’s practice theory of rules is that it failed to provide a sufficient normative basis for a theory of law. That standard reading rests upon a significant misunderstanding: that Hart has an exclusionary reason approach to law. Instead, Hart understands law to be a social practice, one capable of generating valid norms that not only block the operation of moral norms, but which are wholesale incommensurable with them.

Wholesale incommensurability entails that law, as a form of social practice, constitutes a discrete normative system in which the truth-conditions of legal propositions are distinct from the truth-conditions of moral propositions: put differently, normative terms such as right, duty, obligation, permission, and so on, have a different meaning in law as in morality, because made true by different facts.

The upshot is that Hart takes a distinctively strong view of judicial power: judges can expressly reject morality in the course of their decision-making. The power possessed judicial authority rests on no more, but no less, than a set of social conventions, and judges get the power to decide cases based on those conventions alone. The practice of law enables the judge to change and determine the scope of these conventions, as well as to impose them on others. And the judge may use the practice of law to pursue her own agendas: her underlying moral, political, or personal motivations are irrelevant to the validity of law or of her individual decisions from the legal point of view.
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I. INTRODUCTION

Legal positivism is a theory about the existence, validity, and efficacy of a distinct practical point of view: the legal point of view. Positivism advances a number of theses about the legal point of view. Perhaps the


2 See, e.g., Kenneth Einar Himma, Inclusive Legal Positivism in OXFORD HANDBOOK
most famous is the separation thesis: that the existence of law does not depend upon some merit-based test.\(^3\) The existence of law is a matter of social, rather than moral, fact.\(^4\) A second claim might be labeled the practical difference thesis: that the legal point of view makes a practical difference when reasoning about how one ought to act.\(^5\)

One way of expressing the relevant practical difference identified by the legal point of view is related to the separation thesis: where the law and morality conflict, the legal point of view replaces a moral or all-things-considered evaluation of how to act on a given occasion. From the legal point of view, some reasons should not, or cannot, count in determining what to do. Another way to express this thought is to suggest that the legal and moral points of view are intransitive.\(^6\) A moral claim that, all-things-considered, one ought to do some particular act does not override, nor is it overridden by, the legal one. We could call this a “crossroads” experience:\(^7\)
the judge knows what, morally, she ought to do but nonetheless recognizes that, legally, she ought to act on a different set of reasons.

For a point of view actually to exist or be effective in a given society, some individuals must accept and use it as generating authoritative norms of conduct. In turn, any adequate account of acceptance depends upon which version of intransitivity is used to explain how practical points of view can exist as separate from morality. I shall suggest that the versions of legal positivism advanced by H.L.A. Hart and Joseph Raz each relies on a different form of intransitivity to explain the existence of a point of view. Hart suggests that points of view are incommensurable with morality; Raz suggests that they act to exclude the direct operation of moral reasons in certain circumstances. These methodological and substantive divergences in turn produce different accounts of the nature and scope of adjudication: both the judicial obligation to obey the law and judicial authority under law.

Both Hart and Raz agree that a judge’s attitude to the normative status of the law has adjudicative implications. Raz believes that a judge cannot demand that the parties conform to legal norms without claiming to endorse the law as morally justified. Hart believed that legal officials can accept the norms of a legal system as valid and imposing legally enforceable obligations upon the parties without having to provide some further set of moral reasons to establish the underlying legitimacy of the legal system.

Hart’s view that the legal point of view and morality generate distinctive types of obligation stem from his account of the law as an abstract social practice. I shall argue that Hart’s social-practice approach uses a membership norm (a rule of recognition) to define what counts as a valid utterance from the point of view. Practice-based points of view are

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Because of Philanthropic Concerns 13 (3d ed., James W. Ellington, trans., 1993) (suggesting that when reasons of prudence and morality conflict, “the will stands, as it were, at a crossroads between its a priori principle [moral duty], which is formal, and its a posteriori incentive [happiness], which is material”).

8 I use the term “points of view” in a slightly different sense to that in which Hart often uses it. For example, Hart famously speaks of there being two “points of view” necessary to understanding the law, the “internal point of view” and the “external point of view.” See Hart, supra note 1, at 89. I prefer to call these ways of understanding the law “perspectives,” and reserve the use of the language of points of view for something like what Hans Kelsen calls a “normative order.” See Hans Kelsen, General Theory of Law and State 374 (Special ed., Anders Wedberg trans., 1990), (discussing the legal and moral points of view). See also R.A. Samek, The Legal Point of View 35-51, 73-81 (1974) (discussing the legal point of view in relation to a system of norms).

identified by criteria, contained in the rule of recognition, that determine what (and who) counts as speaking on behalf of the point of view identified by the practice. Making the existence of a rule of recognition depend solely upon public or “sociological” facts about group practices or conventions undermines the view that someone must believe that the point of view is morally justified (or legitimate) for it to be in force.

More controversially, I shall argue that Hart, at least in his major early works such as the Separation of Law and Morality and the Concept of Law, advances a radical separation between legal and moral obligations. Hart, I claim, not only splits the legal and moral domains into separate and normatively distinct points of view, Hart treats these points of view as incommensurable with each other. I shall suggest that Hart understands the incommensurability of legal and moral points of view in a categorical or “wholesale” manner reminiscent of Hans Kelsen’s distinction between legal and moral normative orders.

A number of important consequences follow from these two positions (that the law and morality form different points of view, and that these points of view are incommensurable with each other). A primarily adjudicative consequence is that Hart’s version of accepting a point of view is consistent with the claim that a judge may personally believe and publicly state that the law is immoral, and so assert her authority under law for prudential or self-interested reasons (or even no reason at all). His theory of law is thus agnostic as to the personal motivations of legal officials: judges need not be directly motivated to act by the legal norms they enforce. Moreover the judge need not believe that individual laws or the legal system as a whole imposes moral obligations upon the parties to respect her decisions. Accordingly, law may be systematically de-centered from a judge’s calculation of how to act. Legal norms could operate only to constrain or justify her independently motivated action.

The more far-reaching consequence, however, stems from the incommensurability claim. If law and morality are incommensurable points of view, then, when acting from the legal point of view, a judge may rationally choose — or may be rationally required — to ignore or reject moral reasons. On the incommensurability picture, a judge’s legalistic decision to ignore morality is not rationally criticizable from the legal point of view, precisely because when moral and legal reasons conflict, morality has no purchase over the law. Worse, a judge who attempts to give legal

10 Scott Shapiro has taken a conflicting position. See Scott J. Shapiro, Law, Morality, and the Guidance Of Conduct, 6 LEGAL THEORY 127, 149, 173 (2000).
terms some moral sense makes a semantic error: she ends up talking gibberish. Thus, it might seem that we can have no moral grounds upon which to criticize the law.

I shall claim that things are not so bad as the moral groundlessness position suggests. Most importantly, on many occasions the same rule or the same action may be evaluated from the moral and the legal point of view. That we may mean different things in asserting that there is a moral obligation or a legal obligation does not block moral critiques of the legal rule, decision, or action. Furthermore, this version of the relation between law and morality is the one that Hart quite clearly endorses in his *Separation of Law and Morality* (and perhaps less obviously in the *Concept of Law*); a view that he takes to clarify both the nature of law and the importance of critical morality.

I take some comfort, in making the wholesale incommensurability claim, from Hart’s endorsement of John Austin’s assertion that “those who said that if human laws conflicted with the fundamental principles of morality then they cease to be laws, as talking “stark nonsense.”” I take Hart to claim that conflating legal and moral concepts of obligation and validity risks conceptual incoherence. The better critique, Hart believes, acknowledges the strong separation of legal and moral concepts. Separating law from morality has, Hart thinks, an important moral consequence: “If … we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention.”

The wholesale incommensurability claim certainly requires a radical re-reading of Hart’s early work. However, it enables a more cogent understanding of both the nature of the moral critique of law that Hart contemplates, as well as clarifying the relation between his understanding of the role of “descriptive” sociology and the separation thesis itself.

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14 Hart, *supra* note 1, at 82-84.

15 Hart, *supra* note 3, at 617.

16 *Id.* at 620.
In Section II, I shall explore the nature of a point of view, and address one way, inspired by the work of Hans Kelsen, in which we could regard the legal point of view as categorically incommensurable with morality (I call this wholesale incommensurability). In Section III, I shall demonstrate that Hart’s practice theory of norms, along with his discussion of the relevant normative attitudes necessary for norms to generate obligations, is strengthened by the incommensurabilist account. In Section III, I shall address some familiar objections to the practice theory, and show that, from an incommensurabilist perspective, those critiques have less force than has been traditionally thought. Finally, in Section IV, I shall elucidate the radical nature of an incommensurabilist reading of Hart for legal positivism, law and morality.

II. POINTS OF VIEW: INCOMMENSURABLE OR EXCLUSIONARY

A variety of legal theorists, among them Hans Kelsen,17 H.L.A. Hart,18 and Joseph Raz,19 claim there is a distinctively legal point of view that can conflict with morality. For example, in Practical Reason and Norms, Raz notes that we often confront “conduct which is right on the merits but wrong in disregarding [some institutional source of reasons for actions].” A police officer may be morally right, for example, to refuse to use effective but occasionally dangerous choke-holds to subdue violent detainees.20 That reason may, however, conflict with authoritative departmental orders upon which the officer’s colleagues, including his partner, rely in dangerous situations. It seems plausible to recognize that the institutional order can continue to operate as a valid reason for action despite this conflict and is not simply trumped by the moral reason. Accepting that there is a genuine conflict here, however, requires us to recognize that the institutional standard for justifying the action cannot be what is right all-things-considered.21 Rather, “[t]he peculiarity of the situation[... is that we are aware that the action can be assessed in two ways which lead to contradictory results.”22

17 See, e.g., Kelsen, supra note 8 at 374.
18 See, e.g., Hart, supra note 3; HART, supra note 1.
19 See, e.g., RAZ, supra note 4, at 137-59 (discussing individual and legal points of view); Joseph Raz, On the Moral Point of View in JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 247, 247-272 (1999).
20 See e.g., City of Los Angeles v. Lyons, (dangerous chokeholds used to subdue resulted in deaths and were predominantly used to subdue minority detainees).
21 This sort of crossroads case “can hardly be interpreted as ordinary first-order conflicts.” RAZ, supra note 4, at 43
22 Id. at 43.
One way of characterizing decisions from a point of view is that they replace an all-things-considered evaluation of the appropriate action by suggesting that some reasons should not, or cannot, count in determining what to do. The claim is that there are points of view that cover the same subject matter as morality but stake out a different position from which to assess the propriety of a course of action. When these positions conflict with first-order moral reasons, they provide a ground for rejecting or ignoring those reasons for action. We could call this a “crossroads” experience: we know what, morally, we ought to do but nonetheless feel or believe that there are reasons for ignoring the balance of reasons.

The crossroads experience marks out a familiar form of conflict arising in law and in life. To take a Razian example, Jeremy the soldier is ordered by a superior to appropriate a civilian’s van. All things considered, Jeremy thinks he should disobey the order; from the military point of view, however, he thinks he should obey the order. “He is faced with conduct which is right on the merits but wrong in disregarding the [military] reason. His reaction is characteristic. He is torn between conflicting feelings.” A somewhat different example is Sartre’s famous statement of a dilemma facing a student who has to decide whether to stay at home and care for his sick mother, or leave home to join the army to fight against the Nazi occupation of France. The student’s “wavering,” like Jeremy’s conflicted feelings, expresses a crossroads experience.

Points of view illuminate the crossroads experience produced by conflicts among competing reasons for action. Two influential theories, which I label exclusionist and incommensurabilist, explain just how points of view operate to block the application of directly moral considerations when deciding how to act. Both positions entail that different points of view are intransitive. The conflicting values or points of view may not be measured on a single scale and so balancing is impossible. For the exclusionist, there are multiple, hierarchical, orders of reason (first- and second-order reasons). For the incommensurabilist, there are multiple, qualitatively different, orders or reason, where “reason has no judgment to

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23 See id. at 41-43 (discussing the case of a soldier trying to balance conflicting reasons for action).
24 Id. at 43.
26 Id.
27 For a discussion of intransitivity, see JOSEPH RAZ, MORALITY OF FREEDOM 322, 325-326 (1988).
make concerning their relative value.”

Accordingly, the incommensurabilist position takes a pluralist, rather than unitary, approach to practical reasoning. Points of view are incommensurable if the competing actions are assessed using radically different schemes of valuing. Incommensurability rejects all-things-considered evaluations because there is no one strongest reason for action, nor could there be. There is no way to “weigh” or “balance” or “rank” (by “strength” or “importance”) or otherwise commensurate the various competing reasons and identify one of them as decisive (or “conclusive”). An agent cannot to rationally choose which one “overrides,” or “outweighs” the other relevant competing reasons.

Hans Kelsen is perhaps the most prominent legal incommensurabilist. He describes the legal point of view in terms strikingly similar Sartre (whose student example is a celebrated moral example of incommensurability). Kelsen insists that the different normative orders of morality and law are categorically incommensurable. He considers the example of a law compelling all citizens to undertake military service which conflicts with a moral obligation to do something else (for example, the duty to tend to a sick mother).

\[\text{\textit{Id.}, at 324. See also id., at 334 ("Incomparability . . . marks the inability of reason to guide our action.").} \]
\[\text{\textit{Thomas Nagel, The Fragmentation of Value}, in \textit{THOMAS NAGEL, MORTAL QUESTIONS} 128 (1979).} \]
\[\text{\textit{Coleman recognizes the problems with such an assertion. See Jules L. Coleman, \textit{The Practice of Corrective Justice}, 37 ARIZ. L. REV. 15, 15 n.3 (1995) ("To say that what I ought to do depends on the reasons that apply to me is not to say that the justification of everything I do is settled by reason and reason alone. There are many choices I am justified in making for which I cannot offer conclusory reasons. Still, reasons figure prominently in determining what I ought to do.").} \]
\[\text{\textit{JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS}, 115 (1980). See also \textit{JOHN FINNIS, FUNDAMENTALS OF ETHICS}, 87-88 (1983).} \]
\[\text{\textit{See BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY, 97 (1993).} \]
\[\text{\textit{See RAZ, supra note 4, AT 27-28.}} \]
\[\text{\textit{See RAZ, supra note 4 at 26-27; RAZ, supra note 4, at 75.}} \]
\[\text{\textit{See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L. J. 943, 946 (1987).} \]
\[\text{\textit{See KELSEN, supra note 8.}} \]
obligations as falling under different normative orders, each consisting of an interlocking and mutually supporting system or norms structured by a different “chain of validity.” \(^{39}\) Each normative order has a separate “basic norm” that serves to both identify it as a separate point of view and generates its binding force. \(^{40}\)

Kelsen thinks that:

> [f]rom the point of view of positive law as a system of valid norms, morality does not exist as such; or, in other words, morality does not count at all as a system of valid norm if positive law is considered such a system. In the same way … law does not appear at all as a system of valid norms if we base our normative considerations on morality. From this point of view, there exists a duty to refuse military service, no contrary duty. Neither the jurist nor the moralist asserts that both normative systems are valid. The jurist ignores morality as a system of valid norms, just as the moralist ignores the positive law as such a system. Neither from the one nor from the other point of view do the there exist two duties simultaneously which contradict each other. And there is no third point of view. \(^{41}\)

For Kelsen, the different points of view, moral and legal, constitute categorically distinct normative orders. He explains the crossroads effect by insisting that the legal and moral points of view are incommensurable. Conflict between legal and moral points of view places an agent like Sartre’s student “under the influence of two ideas which push him in opposite directions,” \(^{42}\) producing a “collision of duties,” \(^{43}\) that endow him with “both a legal and a moral personality.” \(^{44}\) Psychologically, the agent is


\(^{40}\) Id., at 100-102.

\(^{41}\) Id.

\(^{42}\) Id., at 375.

\(^{43}\) Id., at 408.

\(^{44}\) Id., at 377. There are a variety of problems with Kelsen’s view that I shall sidestep here, most particularly his attempt to dissolve the conflict between legal and moral points of view by claiming that they do not logically conflict. See, e.g., id., at 375; see also Hart, supra note 1, at 293 n.4 (rejecting this aspect of Kelsen’s theory). But Kelsen and Hart share a view that moral norms are in some way posited. For Kelsen’s views, see Kelsen, PTL at 62. See also Raz, supra note 4, at 130-131 (discussing Kelsen’s account of moral norms). For Hart’s view, see Hart, supra note 1, at 85-93 and infra n.____.
split in two, forced to assess the same act — refusing to engage in military service — from two different points of view, established by two different normative orders.

The Kelsenian account of incommensurability presented here is potentially quite radical. By characterizing the legal and moral points of view as different normative systems, I suggest that Kelsen attempts to establish a wholesale description of incommensurability, where one point of view (e.g., the legal) as a whole conflicts with another point of view (e.g., the moral). The more common, retail, description of incommensurability simply asserts that discrete reasons or values may be, for one reason or another, incommensurable with each other.45

For example, in his book *Natural Law and Natural Right*,46 John Finnis advances a retail version of Sartre’s student’s dilemma as requiring a choice between sociability, on the one hand, and benevolence, on the other, where these conflicting values are incommensurable.47 According to Finnis, there is a clash of values such that sociability and benevolence cannot be weighed against each other and the student must simply pick which value he wishes to honor. Finnis’ description of the student’s dilemma is retail because, unlike Kelsen, he does not suggest that the values conflict in virtue of their membership in some distinctive normative order, or some particular system of norms. Instead the values are directly incommensurable.

Kelsen aside, discussions of the legal point of view have generally overlooked the possibility that the distinction between law and morality is generated by their wholesale incommensurability. That is perhaps because the wholesale incommensurability position is fraught with difficulties. For example, we could try to provide a wholesale incommensurabilist account of Jeremy’s predicament as a clash between competing normative orders. In that case, we could deny that there is some unitary scale of assessment that would permit Jeremy to weigh the reasons for and against taking the van. Instead, the incommensurabilist would have to argue, upholding personal property as against ensuring military security refer distinctive normative systems, and these systems “talk past” each other.

Luckily, however, the varieties of crossroads experiences are not

45 RAZ, *supra* note 27, at 349.
47 *Id.* at 175-176 (distinguishing “interdependencies” that exist among family members, on the one hand, and “members of a sound political community, on the other”); see also *id.*, at 141-149 (discussing different forms of familial and political community).
exhausted by incommensurability. Indeed, it seems odd to suggest that Jeremy faces a conflict among incommensurable values talking past each other. Rather, these values could perhaps readily be ranked were Jeremy not precluded from doing so under orders from his superior officer.\textsuperscript{48} It is the fact that Jeremy is not \textit{authorized} to rank, not the fact that Jeremy is unable to rank, that produces the crossroads experience here. Here, the crossroads experience derives from the way in which the officer’s order operates to render the options intransitive. Joseph Raz has identified the hierarchical ordering of authority-based reasons — what he calls exclusion or pre-emption through second-order reasons for action\textsuperscript{49} — as an alternative ground of intransitivity, one that also accounts for the crossroads experience.

Raz’s innovation here is to demonstrate how exclusion operates both to explain the crossroads experience and provide an incommensurability-independent manner by which to reject unitary conceptions of morality.\textsuperscript{50} His claim is that the hierarchical structure of the conflict of reasons precludes an all-things-considered evaluation. Some hierarchically superior reason operates to block all the first order reasons from operating, at least from a particular point of view. From the point of view of the police department, for example, an officer ought only to consider reasons within the scope of departmental policy (including those reasons not conflicting with departmental policy). The officer has two obligations imposed upon her by both morality and the department. These obligations may be commensurable, all things considered but (if Raz is right about this sort of crossroads experience) of a different order, and so intransitive.\textsuperscript{51}

The exclusionist argues that the department’s ability to legislate policy for its officials generates a separate point of view from which to evaluate what the officer ought to do. Exclusion provides an account of how this process works: there are two orders of reasons, first order reasons, such as “when faced with violent detainees, use a chokehold to subdue them,” that requires the officer to use the chokehold in certain dangerous circumstances, and second order reasons, such as “If I am to follow departmental policy, the department demands that I ignore reasons that conflict with its properly-enacted first-order reasons,” that exclude conflicting first-order reasons from operating. Of course, there must also be

\textsuperscript{48} Raz, \textit{supra} note 6, at 41-43.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
some reason for thinking that the department has the power to command its officers to ignore conflicting non-departmental reasons.\textsuperscript{52}

I have already suggested that most modern legal theorists who accept the point-of-view argument do not consider the incommensurabilist option. Perhaps one reason might be that incommensurability renders obscure why anyone from a legal point of view should care about moral critiques of the law. In other words, the wholesale incommensurabilist faces an additional problem not encountered by the exclusionist. When legal and moral obligations conflict there cannot be a single, all-things-considered judgment about what one ought to do. That is because incommensurabilists reject the claim that there is a univocal and ultimate criterion by which to commensurate the legal and moral meanings of obligation. Picking the legal action (“action\textsubscript{l}”) is best relative to \textit{legal} criteria for rightness or goodness; picking the moral action (“action\textsubscript{m}”) is best relative to \textit{moral} rightness or goodness, and picking the prudential action (“action\textsubscript{p}”) is best relative to \textit{prudential} rightness or goodness.\textsuperscript{53} If these are truly intransitive, however, then there could be no reason for picking action\textsubscript{l} over action\textsubscript{m} or action\textsubscript{p} because one couldn’t compare them from the perspective of some more ultimate criterion. They are intransitive. At that kind of crossroads, there is no tie-breaking reason to ground choice among the different options.\textsuperscript{54}

\textsuperscript{52} This problem — of legitimacy or the right to legislate — is one that arises for the exclusionist in a manner that it does not for the incommensurabilist. I shall suggest that, for the incommensurabilist, so long as the legal system has a legal right to legislate, then its legislation is valid whatever morality or prudence might counsel. For the exclusionist, there is no similarly hard distinction between legal and moral senses of right, legitimacy, and obligation. Thus the legal right to impose obligations (legal validity) at bottom rests upon moral legitimacy. I shall discuss this necessary connection between law and morality, infra ___, and text accompanying notes ___.

\textsuperscript{53} Using indexicals to indicate the different normative domains governing action\textsubscript{l}, action\textsubscript{m}, and action\textsubscript{p} is deliberately meant to be reminiscent of contextualist approaches to knowledge. \textit{See, e.g.,} Stewart Cohen, \textit{Knowledge and Context}, 83 J. PHIL. 574-583 (1986); Stewart Cohen, \textit{Contextualism, Skepticism, and The Structure of Reasons}, PHIL. PERSPECTIVES 13: EPISTEMOLOGY 57-89 (1999). As we shall see, the idea is that the semantic content of the different statements, I ought to do act\textsubscript{l}, act\textsubscript{m}, or act\textsubscript{p} is different, as is their truth values depending upon there is a legal, moral, or prudential reason for action.

\textsuperscript{54} This type of choice is often presented as choice for no reason. I would suggest that there are reasons for each of the available choices, there is just no decisive or tie-breaking reason for choosing among them. \textit{See, e.g.,} John Gardner, \textit{Law as a Leap of Faith}, FAITH IN LAW 19, 19-32 (P. Oliver, S. Douglas-Scott & V. Tadros, eds., 2000) (“Within each point of view there are reasons, but there are no further independent reasons to take one or the other point of view. It is a non-rational although (and thus?) courageous leap which brings a person to one or the other, and from the one to the other. Neither position is absolute except in its own relative eyes, and neither therefore answers absolutely to the
I shall use “incommensurabilist” as short-hand for someone who takes the wholesale position on the incommensurability of points of view.\textsuperscript{55} I shall claim that Hart seemed to adopt something like the wholesale approach (one I have so far suggested is associated with Hans Kelsen) in both his \textit{Separation of Law and Morals},\textsuperscript{56} and the \textit{Concept of Law}.\textsuperscript{57} Even if the claim that Hart was a wholesale incommensurabilist is ultimately unpersuasive, nonetheless wholesale incommensurability provides a useful stalking horse for developing some features of legal-positivist arguments, and in particular the nature of (legal or moral) obligation, and Hart’s (early) version the separation thesis:\textsuperscript{58} that legally valid norms need not be morally binding.\textsuperscript{59}

I shall advance the claim that H.L.A. Hart embraced something like wholesale incommensurability to explain the difference between legal and moral obligation. Hart’s central early example of the separation of law and morals, and one to which I will return, is the case of the Nazi informant. The facts are simple:

In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. …[W]hat he had said was apparently in violation of statutes making it illegal to make

\textsuperscript{55} The position I attribute to the incommensurabilists is one or other version of the wholesale account of incommensurability.

\textsuperscript{56} See Hart, \textit{supra} note 3, at 620. Hart does not think our values can “fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.” Hart, \textit{supra} note 3, at 620. He rather seems to think that the values form separate, incommensurable, systems. In other words, Hart adopts one of the wholesale positions. His discussion in the \textit{Separation of Law and Morals} is most consistent with the second, point-of-view version of wholesale incommensurability.

\textsuperscript{57} Hart appears to have been strongly influenced, during the time he wrote \textit{Separation of Law and Morals} and \textit{Concept of Law} by the ordinary language philosophy championed in Oxford by his friend John Langshaw Austin. See Nicola Lacey, \textit{A Life of H.L.A. Hart: The Nightmare and the Noble Dream}, 133-136, 142-146 (2004).

\textsuperscript{58} In later life, Hart may well have moderated this “extreme aspect of [his] legal theory particularly over rigid [sic] separation theory.” Lacey, \textit{supra} note 57, at 348 (quoting from Hart’s notebook). My claim is that, at least through the concept of law, the separation theory was very rigid indeed.

\textsuperscript{59} H.L.A. Hart, \textit{Essays in Jurisprudence and Philosophy}, 69 (1983) (suggesting that normative may mean only subject to some form of criticism, rather than morally binding).
statements detrimental to the government of the Third Reich or to impair by any means the military defense of the German people.\textsuperscript{60}

As a result of her actions, her husband was condemned to death but transported to the Russian front.

An important feature of the case, one that Hart emphasizes, is that the wife had no legal duty to report the husband. Her decision to inform was not, as in the usual examples of conflicts between law and morality, the product of warring obligations in which the legal trumped the moral or vice versa. Instead, the informant could have done nothing and so completely avoided the moral issue: instead she chose to adopt the legal point of view and act as permitted under law in denouncing her husband. Hart agrees that what she did was an “outrageously immoral act”:\textsuperscript{61} in effect, she used the law as a means to kill her husband. I shall suggest, however, that Hart thinks that her choice is not subject to criticism from the legal point of view ― her act was not illegal or unlawful at the time she denounced her husband. The legal point of view can block certain moral critiques on the merits.

I shall press Hart’s separation of the legal and moral points of view in the following terms: I shall argue, first, that Hart regards the legal and moral points of view as different social practices and, second, that he treats them as wholesale incommensurable. I fully recognize that the wholesale incommensurability half of this claim is quite radical, both as an interpretation of Hart and as a moral position. The radical nature of this position is brought out by its consequences for a moral critique the informant’s use of the denunciatory power granted under law.

Under the wholesale incommensurability analysis, the immorality of the informant’s legally generated denunciatory power is simply irrelevant from the legal point of view.\textsuperscript{62} The wholesale incommensurability entails that, once the agent chooses to act under law, certain types of criticism are blocked. In particular, Hart suggests that we cannot move from recognizing a law as immoral to rejecting it as legally invalid. Legal validity is completely independent of the moral merits. Thus, instead of denying that the informant acted according to law because the agent acted immorally, Hart endorses an approach that accepts that laws can be immoral on their

\textsuperscript{60} Hart, supra note 3, at 618-19.

\textsuperscript{61} Hart, supra note 3, at 619.

\textsuperscript{62} From the moral point of view, the law’s legal validity is similarly irrelevant.
face and urges jurists — philosophers, judges, and legislators — to face the unpleasant results with “candor.”

If the fact that the law is grotesquely immoral does not affect its validity, then the fact that the informant chose to act immorally, rather than being (legally) compelled to so act, is irrelevant to assessing the legal validity of her act. Hart does not say is that the agent acted morally: Hart does, however, reject the claim that the immorality of her actions is legally significant. From the legal point of view, she cannot have acted unlawfully by doing what the law permitted her to do. Accordingly, our legal choices are stark: to acquit or to retrospectively amend the law to render her acts unlawful. Neither of these acts is morally palatable. Hart’s recommendation is to grasp the nettle in full consciousness of its unpleasantness, not remove the sting by engaging in some “insincer[e]” denial that the original act was legally valid.

Despite Hart’s later endorsement of aspects of the exclusionist position, and repeated scholarly assessment of Hart in exclusionist terms, I believe wholesale incommensurability usefully illuminates some features of Hart’s otherwise mystifying contention that quite ordinary normative terms have different meanings in law and morality. Hart maintained that view throughout his life. In one of his last published interviews, he reiterated that:

I have always held [the view] … that the concept of legal obligation is morally neutral, and that legal and moral obligations are conceptually distinct … The point of a theory of legal obligation (and indeed of descriptive jurisprudence in general) is to provide an illuminating form of description of a specific type of

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63 Hart emphasizes the virtue of candor twice: see Hart, supra note 3, at 619 & 620.
64 Hart supra note 3, at 620.
65 Hart, supra note 3, at 619-620.
66 HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY, 154-56 (1982).
67 See, e.g., RAZ supra note 4, at 158-59..
68 Hart, supra note 3, at 178-79, 202-12, HART, supra note 66, at 146, 158. Hart reiterated this belief even when appropriating certain aspects of the exclusionist approach. One could easily hold the belief that the sense of obligation are incommensurable and that the law operates as an exclusionary reason to preclude legal and moral evaluation. This belt-and-braces approach depends, however, on being able to accept the incommensurabilist claim that “obligation” has different senses in law and morality. Most exclusionists reject this equivocal approach to obligation.
social institution which will bring out clearly certain salient features of the institution.69

III. THE CONCEPT OF A PRACTICE: J.L. AUSTIN, RAWLS, HART

The claim that Hart, like Kelsen, believes that a point of view constitutes an integrated system of norms depends upon Hart’s description of normative systems or what I shall call a point of view,70 as generated by social practices, and Hart thinks that that different social practices, including morality, etiquette, and law,71 are identified by the different conventions or procedures for bringing the practice into existence and identifying which norms are members of the practice. Furthermore, social practices constitute distinctive points of view from which agents can perform various normative activities such as explaining, justifying, and guiding conduct.72 Accordingly, to understand both the legal point of view and the Hartian spin on Kelsenian wholesale incommensurability, we must first understand how social practices generate distinctive normative points of view.

The concept of a practice in Hart’s theory is not terribly well understood, yet practices are pivotal for understanding the distinctive legal, moral, and prudential points of view.73 Hart, I will argue, develops his practice theory of rules in the context of a conversation about rule-following that is heavily influenced by his Oxford colleague, J.L. Austin,74 a conversation that is, in turn, taken up and developed by John Rawls’ early work on rules.75 In fact, Rawls’ discussion of rules and practices provides perhaps the clearest

69 LACEY, supra note 57 at 354 (quoting Hart’s interview with the Spanish journal Doxa).

70 Hart identifies two points of view, the internal and external. These do not track the concept of a point of view as I describe it; rather they describe two perspectives from which to evaluate a point of view. See HART, supra note 1 at 89.

71 See id.

72 Id. at 89-90.

73 The three primary points of view Hart identifies in the Concept of Law. I should remind the reader that I am using “point of view” in a different sense than that which Hart employed.

74 See LACEY, supra note 57.

75 As Rawls puts it: “That punishment and promising are practices is beyond question. In the case of promising this is shown by the fact that the form of words ‘I promise’ is a performative utterance which presupposes the stage-setting of the practice and the proprieties defined by it. Saying the words ‘I promise’ will only be promising given the existence of the practice.” John Rawls, Two Concepts of Rules, 64(1) PHILOSOPHICAL REV. 3, 30 (1955) [hereinafter Rawls Concepts]. Rawls also refers approvingly to Austin’s work on performatives in Justice as Fairness. See John Rawls, Justice as Fairness, 67(2) PHILOSOPHICAL REV. 164, 180 n.14 (1958) [hereinafter Rawls Fairness].
exposition of the practice theory, and so serves as a useful introduction to Hart’s. Both Rawls and Hart use the concept of a practice to elaborate the manner in which practices generate distinctive obligations separate from the all-things-considered perspective of ordinary morality. Rawls, however, provides a somewhat more detailed exposition of the structure of a practice, one that Hart’s account of the internal point of view fills with a substantial discussion of how rules bind.

J.L. Austin, Rawls and Hart are each engaged in a critique of radical empiricism, though individually aiming at separate targets. Their common methodological approach rejects or minimizes worries about the practical efficacy of norms. Instead of some sociological investigation to determine whether and how agents act upon specific norms as lived or enforced or verified, Austin, Rawls and Hart each seeks to demonstrate that the existence of a social practice (linguistic, normative, legal) depends, in large part, upon conventions or rules establishing the legitimacy or validity of a determinate set of “roles, moves,” and so on, within a given social practice. Furthermore, practice norms can exist even when under- or un-enforced: that is, when no-one currently uses some norm or no sanction follows from breaking some rule of the practice. As Hart puts it, “there is no necessary connexion between the validity of any

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76 Some care is warranted here. Rawls target is specifically the utilitarian or consequentialist injunction to act so as to produce some good state of affairs. See Rawls Concepts, supra note 75, at 18-29. Hart sees to separate the legal point of view from the moral point of view, without distinction among different moral theories. HART, supra note 1; Hart supra note 3. Nonetheless, both Rawls and Hart are, to an extent, keen to distinguish their account of rule-generated obligation from a utilitarian perspective, with Hart targeting utilitarianism most specifically in his attack on John Austin’s command theory. HART, supra note 1; Hart supra note 3.

77 Rawls Concepts, supra note 75; Rawls, Fairness, supra note 75.

78 HART, supra note 1, at 108-116.

79 See, e.g., J.L. Austin, Sense and Sensibilia 120-21 (1964) (attacking A.J. Ayer’s verificationist theory of the meaning of a statement), Rawls Concepts, supra note 75, at 22 (attacking utilitarian theories of certain types of rules), and HART, supra note 1, at 82-84 (rejecting John Austin’s command theory of law).


81 See Austin Utterances, supra note 57, at 235-240; Rawls Concepts, supra note 75, at 24-26; HART, supra note 1, at 108.

82 Austin Utterances, supra note 57, at 240.

83 Hart, supra note 1, at 103.

84 Rawls Concepts, supra note 75, at 25.
particular rule and its efficacy."  

My suggestion that Hart, in particular, rejects the methodology of sociological empiricism may render problematic his familiar claim that, in the *Concept of Law*, he was engaged in a work of "descriptive sociology." While many have found that claim to be confused or confusing, distinguishing among two types of practice theory, empirical and conceptual, shall make clear both Hart’s commitment to the latter, as well as what he takes to be the method and role of descriptive sociology in his conceptual account of law.

I shall argue that Hart’s practice theory promotes a conceptual approach to normativity that is nonetheless interested in the ways in which social activity can generate particular obligations. Furthermore, Hart (like Rawls), treats social practices much in the way that J.L. Austin, the ordinary language philosopher, understands the practices of naming, betting, marrying, and so on. Indeed, we may take naming as paradigmatic of the classificatory activity that Hart repeatedly identifies as central to law. However, before I turn to Hart’s practice theory, I shall introduce a general description of the relation between social practice and normativity as developed by both J.L. Austin and John Rawls.

A. J.L. Austin, Performative Utterances, and Social Practice

J.L. Austin practiced a form of constructivist, conceptual analysis directed towards determining the manner in which social conventions may be used to alter our normative commitments. His goal was to show how we can construct independent sets of social practices, like naming or promising or marrying, using just language structured by social rules. The Rawlsian and Hartian versions of this practice theory make an additional claim: that at least some of these social practices carve out distinctive normative points of view, with their own offices, roles, undertakings, and so on.

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85 Hart, supra note 1, at 103.
87 Hart, supra note 1, at v.
88 See, e.g., Tamanaha, supra note 80 at 91-128 (discussing practice thesis and responses to it).
89 Hart, supra note 1, at 126-28 (discussing the meaning of the term “vehicle”).
90 Austin *Utterances*, supra note 57, at 240.
To understand how linguistic conventions can generate a social practice, consider (to choose one of J.L. Austin's examples) the act of naming, that is, of predicating that for some object $F$ it will have the name $a$. Austin’s example is that of naming a ship the *Queen Elizabeth*, though it might as well be naming a child, or a corporation, and so on. What matters, for present purposes, is that each of these naming activities require various offices and contexts through which to undertake the act of naming and ensure that is properly performed, or, as Austin puts it, there must be some “legitimate and agreed procedure [as well as] … getting yourself appointed to do the naming.” Furthermore, Austin thinks that these procedures and “appointments” (or, as Rawls might call them, “offices”) are established and fixed using social rules or conventions.

The act of naming (along with other social practices, such as marrying, betting, promising, and so on) thus appears to Austin as a form of legislation. Individuals get the power to legislate, first because social groups formulate (or agree upon) and accept the various social conventions that lead to action, and second, because the individual then gets him or herself appointed to some office empowered use the various practices or social institutions (the terms are interchangeable) that Austin identifies.

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91 *Id.*

92 We might think that naming is a social practice or an overlapping set of social practices that, though not identical, share distinctive “family resemblances.” On family resemblance, see Wittgenstein PI.

93 Austin *Utterances*, supra note 57, at 240. Austin explicitly characterizes the process I call naming as “christening.” Austin *Utterances*, supra note 57, at 235. Christening would exclude the naming of a corporation, but not of a child. However, my goal is to distinguish certain naming activities, such as christenings or corporate naming practices, that require explicit and official offices, from those that do not, such as giving or taking a nickname. There may be a means of analyzing informal acts of naming consistent with the Austinian formulation, see STANLEY CAVELL, THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY XX (1979); that need not concern us here.

94 Austin *Utterances*, supra note 57, at 237. Hart echoes this formulation in his article on Analytic Jurisprudence. H.L.A. Hart, Analytic Jurisprudence, 105 U. PA. L. REV. 953, 962 (1957) (“when used by persons duly qualified in the appropriate circumstances, words have certain legal effects.”). Austin *Utterances*, supra note 57, at 237. Hart echoes this formulation in his article on Analytic Jurisprudence (“when used by persons duly qualified in the appropriate circumstances, words have certain legal effects.”) Hart supra, note 96.

95 Rawls *Concepts*, supra note 75, at 25.

96 As Austin put it: a “convention … must exist and be accepted [a]nd … the circumstances must be appropriate for its invocation.” Austin *Utterances*, supra note 57, at 237. Hart echoes this formulation in his article on Analytic Jurisprudence. H.L.A. Hart, Analytic Jurisprudence, 105 U. PA. L. REV. 953, 962 (1957) (“when used by persons duly qualified in the appropriate circumstances, words have certain legal effects.”). Austin *Utterances*, supra note 57, at 237. Hart echoes this formulation in his article on Analytic Jurisprudence (“when used by persons duly qualified in the appropriate circumstances, words have certain legal effects.”) Hart supra, note 96.

97 Austin *Utterances*, supra note 57, at 237. (“convention … must exist and be accepted”). Compare Hart, supra note 3, at 603 (“what is missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules.”). Compare, with HART, supra note 1, at 116-17.
(naming, marrying, and so on).

Legislative authority may be uncontroversial in the context of naming (where we predicate of a particular person or object that it shall be called A) because naming might seem to be an act of legislating, rather than discovering the person or object's “real” name. However, the power to legislate may be more controversial in the case of marrying, and so on. Indeed, Austin may believe that a social group's power to legislate through performative utterances extends to every act of predication; or at least to creating certain practices or activities that are “legitimate” because “agreed upon.” Here, we might think, Austin either has a deeply constructivist notion of legitimacy, or has a non-moral notion of legitimacy as simply following rules, or both (one that is better expressed using the Hart's term, “validity”).

Put differently, Austin’s linguistic conventionalism is potentially deeply radical. We can render this though more perspicuous by identifying weaker and stronger versions of his speech act theory. The weak version is limited to the normative domain: Austin, in *Performative Utterances* or *How To Do Things with Words* merely provides an account of ways in which language generates and modifies norms through various linguistic conventions. The stronger (and more radical) version is also ontological: that Austin endorses a form of constructivism, one that claims that various groups are able to authorize certain social practices, through their social, conventional, linguistic activity, that allow properly constituted officials to legislate what we may or may not predicate of any object. The group, through its linguistic activities, is the truth-maker: it determines which activities are valid according to the social practice.

Our ability to create social practices depends upon following a

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98 For an alternative view, consider, e.g., Plato’s discussion in the *Cratylus*. See Plato, *Cratylus in COMPLETE WORKS* 101, 105-06 (John Madison Cooper & D. S. Hutchinson, eds., 1997) (the function of naming is to individuate).

99 Hence the claim, made by some people or some religions, that same-sex couples cannot marry. Here, they may mean that, even if the state should recognize such a union, it will not *really* count as such (not morally, or not in the eyes of god, or so on).

100 Austin *Utterances*, supra note 57, at 240.

101 Legitimacy meaning law governed, rather than justified.

102 See, e.g., HART, supra note 1 at 100 (old).

103 How radical may be brought out by suggesting that, for Austin, the social group exerts the same power to engage in naming and predicing as Hobbes’ Sovereign. See THOMAS HOBBES, THE LEVIATHAN 120 (1966) (1651).

104 And not just normative. If predication is the central example, then social conventions allow us to determine what we predicate of any object.
The consequences of legislative failure — the variety of ways Austin describes things going wrong — is not that the legislator is sanctioned for the various infelicities Austin identifies, but that the proposed practice-based act is void (or perhaps voidable): the name is inapplicable, the marriage never happened, the bet was never placed. If the foregoing is correct, we might expect Austin to elaborate the ways in which social conventions generate or modify the normative (and perhaps ontological) status of various objects. Austin does, indeed, do so, but by demonstrating how things go wrong, that is, how we can fail to properly engage the social conventions in our practice-based activities.

The sorts of infelicities that Austin identifies as associated with performative utterances, the various misfires, insincerities, and so on, all stem from some failure to abide by rules or conventions constitutive of the practice. Sometimes, when things go awry, the agent does not act according to the rules or conventions of the practice, and so her actions fail to count as a move in the practice (christening, betting, marrying). On other occasions, the agent fails to establish the practice-based authority to engage in the relevant moves. Other examples show how agents fail to participate in or invoke the practice as governing a particular act. These more or less legislative failures to abide by the correct procedure establishing the practice are failures in the constitutive activity.

Austin uses the example of naming a ship the Queen Elizabeth. Just before the relevant official is to christen the ship by pulling the lever that breaks the bottle, some unofficial interloper, whom Austin dubs the “low type,” intervenes and pulls the lever while pronouncing the normally operative words: “I now pronounce this ship the Generalissimo Stalin.” Austin contends that, even though the low type has followed the correct procedure, nonetheless he lacks the necessary authority, and the purported

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105 Austin Utterances, supra note 57, at 240.
106 So, in Austin’s rule-following sense of “legitimate,” the failure to abide by the rules renders the purported acts illegitimate; perhaps more congenially, the failure renders the act invalid and so void in some way.
107 Here, we might regard Austin as speaking of “legitimate” acts, Austin Utterances, supra note 57, at 240, in the etymologically accurate sense of law-governed or rule-governed acts. Such acts need not be justified by reference to some moral or other normative authority. They must simply follow the agreed-upon or accepted rules or conventions established by a particular social group. Id. at 240.
108 Compare, with Hart, supra note 3, at 603 (“nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures.”).
109 Austin Utterances, supra note 57, at 239-240.
The act of naming is void: the ship has not been named at all.

The idea that the failure to abide by practice norms renders actions void, rather than sanctionable, undermines a variety of empirical approaches to the various practices (naming, promising, punishing) under discussion and focuses instead on their conceptual underpinnings. The goal of J.L. Ausin’s conceptual analysis, one that we shall see is taken up by both Rawls and Hart, is to identify the necessary elements of, or criteria for, each practice contained in the socially accepted conventions constitutive of that practice. Here, the notion of the necessary is, conceptually, an important one, for without these elements the practice does not exist, and if the agent does not satisfy the criteria for engaging in the practice (making a move in the practice, e.g., placing a bet) the practice-based activity is void. Put differently, the rules governing moves within the practice are categorical because their normativity (their force as norms) is not responsive to the manner in which they are enforced or taken up by the social group.

Another feature of the practice is that undertaking practice-based activity can generate binding norms. Austin’s infamous sense of humor often erupts through the understatement of those obligations engendered through engaging in a practice, as when, for example, he describes the exchange of wedding vows as “indulging” a marriage. Such norms gain their status as structuring the moves within a practice through the interlocking network of rules and conventions constitutive of the practice that establish its offices, rights, and duties.

A further feature of social practices, one that is not developed by Austin but which is taken up by both Rawls and Hart, is that practices, to the extent they create specific offices, moves, excuses, and so on, are discrete normative entities, such that practice-based activity is not answerable to evaluation all-things-considered but must be only from in those terms provided by the practice. The practice constitutes a discrete normative point of view. It is these two aspects of practice theory — bindingness and discrete points of view — that Rawls illuminatingly analyzes.

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110 That is, they are constitutive of the practice.
111 Rawls Concepts, supra note 75, 22-25 (discussing notion of a practice as blocking consequentialist calculations).
112 “In saying ‘I do,’ I am not reporting on a marriage, I am indulging in it.” AUSTIN HOW TO, supra note 57, at 6. This humor may serve to defuse the previously noted radical consequences of appointing the individual group to the position of sovereign authority able to predicate various statuses — normative or ontological — of various objects.
B. Rawls’ Practice Theory

Rawls elaborates the concept of a practice in two early articles: *Two Concepts of Rules* \(^{113}\) and *Justice as Fairness*. \(^{114}\) His description of a practice as a social institution, however, makes its way, with only minor changes, into his major work, the *Theory of Justice*. \(^{115}\) Practices are thus centrally important to Rawlsian theory: it is vital to understand what Rawls means by a practice.

For Rawls, the concept of a practice is:

>a sort of technical term meaning any form of activity

specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments.\(^{116}\)

His definition of a practice is reminiscent of Austinian conventions: practices or institutions are systems of rules that constitute certain types of normative activity (the examples he gives are punishing\(^ {117}\) and promising\(^ {118}\)). Practice rules thus “defin[e] offices, moves, and offenses.” Put differently, when discussing an act in terms of a practice rule, we could not even “describe [the act] as that sort of action,”\(^ {119}\) Rawls suggests, without constitutive practice rules. Practice rules thus provide the

\(^{113}\) Rawls *Concepts*, *supra* note 75, 3 n.1 provides the “technical” definition of a practice that is repeated pretty much verbatim in his early article, *Justice as Fairness*, Rawls *Fairness*, *supra* note 75, at 164 n.2 and *Theory of Justice*. JOHN RAWLS, *THEORY OF JUSTICE*, 55 (1971) [hereinafter RAWLS THEORY].

\(^{114}\) Rawls *Fairness*, *supra* note 75, at 164 n.2 (“I use the word “practice” throughout as a sort of technical term meaning any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure. As examples one may think of games and rituals, trials and parliaments, markets and systems of property.”).

\(^{115}\) See RAWLS THEORY, *supra* note 113, at 55, in which Rawls describes the concept of a social institution in almost identical terms to his earlier descriptions of a social practice: as “a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defenses and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property.”

\(^{116}\) Rawls *Concepts*, *supra* note 75, at 3 n.1

\(^{117}\) Id. at 4-13.

\(^{118}\) Id. at 13-18.

\(^{119}\) Id. at 25.
normative “stage-setting”\textsuperscript{120} against which we understand our acts as a particular sort of practice-determined act: they provide a system of norms that determine the range of normative rights, duties, permissions, exceptions, exemptions and so on that are authorized by the practice.

In \textit{Two Concepts of Rules}, Rawls’ central thesis is that act-utilitarianism can justify adopting or rejecting particular practices wholecloth, but (once adopted) must defer to practice-based reasons to evaluate practice-based acts. Thus, we might think that the social institutions of promising or punishment are good or bad, all things considered, perhaps because they maximize social welfare. These utilitarian considerations operate from a point of view external to the practice. They justify whether or not to create, continue, use, and so on, the practice (punishment or promising). However, we cannot evaluate particular practice-dependent acts of promising or of punishment from the point of view of the practice in terms of maximizing social welfare: the existence of the practice blocks such considerations. We can only evaluate individual promises or acts of punishment in terms provided for by the practice itself.

1. Blocking and Binding

Rawls’ central objection to summary rules is that they fail to explain at least one common understanding of obligation or obligatoriness that can be elaborated using practice rules. Under the summary view, rules can be defeated whenever some more pressing interest conflicts with the rule. Commonly, however, we treat some rule-governed social activities, e.g., promising and punishing, as categorical, and critique deviations from them. A summary-rules approach would render practices such as promising conditional and defeasible whenever ignoring the rule is costless.

Rawls' gives the example of a deathbed promise: a father asks his son to promise that, for example, the son will attend university. If no-one witnesses the promise, and the promisor has died, then the costs of ignoring

\textsuperscript{120} \textit{Id.} at 22, 25 (“In the case of actions specified by practices it is logically impossible to perform them outside the stage-setting provided by those practices”); \textit{supra}, at 27 (“it is only against the stage-setting of the practice that one’s particular action is described as it is.”); \textit{supra}, at 30 (“That punishment and promising are practices is beyond question. In the case of promising this is shown by the fact that the form of words “I promise” is a performative utterance which presupposes the stage-setting of the practice and the proprieties defined by it.”); \textit{supra}, at 31 (the practice of punishment depends upon “ such things as the normal rights of a citizen, rules of law, due process of law, trials and courts of law, statutes, etc., none of which can exist outside the elaborate stage-setting of a legal system.”)
the promise are negligible. However, Rawls argues, even if “the practice is justified on utilitarian grounds, [it is a mistake to think that] the promisor must have complete liberty to use utilitarian arguments to decide whether or not to keep his promise.”121 Rather, the practice excludes consideration of utilitarian reasons “and it is a purpose of the practice to do this.”122 The promise remains binding, from the point of view of the practice, whatever the merits of acting as he has promised.

Rawls thus distinguishes practice rules from summary rules, the latter of which are rules of thumb, providing a generalized (or summary) statement about those acts that produce the best outcome in oft-repeated circumstances.123 Like all rules of thumb, however, summary rules are defeasible or revisable on any particular occasion that an agent’s welfare or (from a utilitarian point of view) social welfare conflicts with and outweighs the state of affairs recommended by the rule. Summary rules thus depend upon, and so collate or predict, what we have reason to do all things considered (because it maximizes social welfare).

Rawls’ argument in Two Concepts of Rules further suggest that the sort of maximizing calculus or strategic rationality common to rational choice theory cannot generate the sort of binding rules necessary if we are to have the practice of promising (that is, to be able to promise at all).124 The justification of individual acts is logically prior to and conceptually independent of the rules that summarize them.125 This order of logical priority renders summary rules indeterminate and defeasible: they may be reconsidered by any agent, in any case, at any time.

Practice rules reverse the order of logical priority. For example, the institution of promising works by binding us to some course of action independent of our (or society’s) underlying interests. Indeed, it is characteristic of promising that, from the practice-based office (or point of view) we may regard ourselves as bound to keep the promise, even though from the utilitarian point of view we may regard ourselves as bound to break it.126

121 Id. at 16.
122 Id. at 16.
123 Id. at 22.
125 Rawls Concepts, supra note 75, at 23.
126 Since rules of thumb are defeasible whenever the interests of society (or perhaps a rationally egoistic agent) recommends some action in conflict with the rule, such a conflict could not exist without practice rules to block their operation. Accordingly, rules of thumb
Practice rules thus constitute the various practice-based acts (such as the act of promising) as a particular sort of act, and so must preexist the act itself. Because the practice determines the consequences of engaging in various sorts of act — what Rawls calls the “roles, moves, penalties, defenses, and so on, and which gives the activity its structure” — then from the point of view of a practice, the justification of rules is dependent upon, and logically prior to, the justification of acts. Accordingly, since promising is a social practice, then a promise is not just uttering words and doing some future act. Rather, the ways we understand the utterances involved in and normative consequences of promising are determined by the rules constituting the agents as promisor and promisee within the social practice or promising.

Consider, for example, a different sort of social practice: playing chess. Practice rules do not simply summarize or predict the movements of various pieces of wood: they define the pieces as pawns, bishops, rooks, and so on, and determine their rank (their relative value), the manner in which they move, how they take the other pieces, and so forth. A move in chess thus does not pre-exist the (practice-) rules of chess, but is constituted by them.

Practice rules institute a completely different sort of authority to decide on propriety of following rules. Agents follow practice-rules from the perspective of a specific office with various rights or duties, reasons or permissions, and so on, attached. The practice itself identifies the normative relations between the various “rules of a practice as defining offices, moves, and offenses” and so on. For Rawls, practice rules are authoritative in determining the normative consequences of compliance with, or violation of, the rules of the practice. For example, he considers that it is the practice rules that provide a determinate range of “defenses” (requests to vary the obligations incurred under the practice such as excuses, exemptions, mitigations, penalties, etc.). Such requests arise from within, and operate according to the normative structure established through the practice. They are not to be judged as correct or not using “some higher ethical principle.”

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127 Id. at 3 n.1
128 Id. at 26.
129 Id. at 25.
130 Id. at 27.
2. Practices as Points of View

Practices perform an additional justificatory function: they block the operation of a certain type of moral calculation or practical rationality (utilitarian rules of thumb) from counting under — or from the point of view of — the practice. Rawls identifies two different types of justification: (1) the justification of the practice itself (i.e., the question: is this practice good; is it better, on the whole, to have this practice rather than not to have it?); and (2) the justification of acts constituted by (or, in Rawls' terms, "falling under") a practice (i.e., the question: is this act permitted by the practice; has this person violated a rule of the practice?) Each refers to a different normative system of justification (utilitarian and practice-based), which Rawls describes in terms of different types of rules (summary and practice). Each type of rule provides a different basis for practical action grounded in either social welfare (summary rules) or an obligation to follow the rules of the practice (practice rules).

The ability of a practice (such as promising or punishment) to block external rules or reasons results in the practice operating as a distinctive normative point of view separate from, at the least, utilitarian calculations of welfare maximization. Practices, then, explain one way in which social rules can generate a point of view. They generate practice-defined offices from which to assess various acts, justifications, excuses, and so on, as in accordance or in conflict with the practice. In so doing, practices institute a completely different sort of authority to decide on the propriety of following rules from the external, legislative office. An agent obeys (or disobeys) the rules while occupying a specific, practice-defined office; that is, from a point of view internal to the practice. Other, external or non-practice-based offices are precluded (from the point of view of the practice) from counting in the agent’s calculation of how to act.

3. Practices and Normative Plurality

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131 Id. at 6. (will it “have the consequence, in the long , of furthering the interest of society?”).
132 Rawls Concepts, supra note 75, at 28
133 Rawls is obscure on this point, and that obscurity is telling. It marks the difference between all practices availing themselves of a general point of view opposed to utilitarianism or morality and each practice providing a particular point of view opposed, not only to utilitarian rules of thumb, but other, practice-based notions of morality. It is this latter position that I take Hart to endorse.
135 Id. at 15, 16.
Rawls’ contrast between practice and other reasons need not depend upon the distinctive, calculating and maximizing, features of utilitarianism. Instead, the ability of a practice to provide an independent point of view applies more broadly to block any welfare-maximizing calculation. Furthermore, practices need not be justified on moral grounds at all. A social group may choose to create a practice for morally neutral reasons. Games, such as chess or cricket or baseball, provide examples of such practices. The point of a practice is to generate a merit-independent obligation, one that can block consequentialist evaluations, and so introduces a distinctive point of view. Accordingly, practices appear to introduce a different type of reason, one that expresses an obligation to support the rule and which kicks in on the basis of occupying a particular type of office. Rather than looking forward to evaluate the state of affairs produced by the rule, the type of reasoning demanded by a practice looks backward, to ask what it is that the rule requires.

As we have seen, in Two Concepts of Rules he emphasizes consequentialist reasons for decision, which identify particular acts as justified to the extent that they contribute to the best outcome by maximizing welfare. Summary rules (rules of thumb) are simply summaries of the underlying consequentialist reasons justifying action in this sort of case, and so are logically dependent upon the existence of those reasons. On the contrary, practice-dependent reasons do not exist independently of a practice: they exist only if a (particular) practice also exists.

To engage in a utilitarian or more broadly moral critique of the practice is, according to Rawls, to shift from an internal to an external point of view. Such a shift, Rawls thinks, renders incoherent external critiques of practice-based acts. The practice itself defines the meanings of the various practice-defined acts, as well as, perhaps, the normative terms of criticism or approbation to be used in assessing action. A different way of expressing this thought is to acknowledge that practices set the truth-conditions of practice-dependent normative statements. Accordingly, not only can we use a practice to create certain acts, such as the act of promising, we also legislate the normative structure of a practice, its offices, moves, and so on. Doing so creates the truth conditions of statements of the form, “I engage in act $\Phi$ by doing x, y, and z”; or “agent $X$ ought to do $\Phi$.” The description of

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136 Finnis might say that play is a moral good. But we may think of some games being developed for morally bad reasons, or absentmindedly and for no reason.  
137 He says “absurd” Rawls Concepts, supra note 75, at 9, 29; or “logically precluded.” Id. at 30.
act \( \Phi \), or the proposition that an agent \( X \) ought to do act \( \Phi \), has a different meaning (different semantics or truth conditions), and may have a different truth-value, dependent upon the point of view from which the act is described or the proposition asserted, internal or external to the practice.

To give a more concrete example, consider once more the question of punishment in the context of Nazi law. From the point of view of the practice, punishing the dissident was a justified move of the practice: the appropriate official followed the practice-rules in adjudicating the case and condemning the dissident to death. However, the question, “was punishment legally justified?” is different from the question, “was punishment morally justified?” Put differently, the proposition, officer \( O \) has a duty to punish offender \( D \), is ambiguous. It could mean: \( O \) has a practice-based duty (a legal duty, albeit one created by Nazi law) to punish \( D \), which is a true proposition. Or it could mean: \( O \) has a moral (utilitarian or other) duty to punish \( D \), which is false. More strikingly, however, the proposition, \( O \) has a moral (utilitarian or other) duty \textit{not} to punish \( D \), is also false, which suggests that the attempt to formulate the question of punishment in moral terms is incoherent.\(^{138}\) Indeed, the charge of incoherence is precisely one Rawls levels against utilitarian attempts to address practice-based questions of how to act.\(^{139}\)

Rawls’ external question is the one faced by the Nazi informant: all things considered (or, to maximize social welfare) ought I to use the practice of punishment at all to deal with my husband? Here, the practice has nothing to say: the only relevant considerations are moral considerations. Accordingly, from the point of view of the practice, the proposition that the informant \( I \) ought to inform on \( D \), is neither true nor false; however, from a moral point of view, the proposition that \( I \) ought to inform on \( D \) is not true.

Put differently, since the semantics of a proposition depend upon its truth-conditions, the statement “I engage in act \( \Phi \) by doing \( x \), \( y \), and \( z \),” has different truth conditions, and so means something different, in each of the social practices \( P_1 \), \( P_2 \), \( P_3 \), …, \( P_n \). Accordingly, Rawls’ concept of a social practice appears to entail, not only the two different normative points of view of utilitarianism and of a social practice, but also a plurality of practice-based points of view. These different statements from a point of view.

\(^{138}\) This is a standard feature of the semantics of classical logic. \textit{See} Stephen Read, \textit{Thinking About Logic: An Introduction to the Philosophy of Logic} 219 (1995) (discussing law of excluded middle).

\(^{139}\) Rawls \textit{Concepts, supra} note 75, at 29-30.
view have different truth-conditions established by $P_1$, $P_2$, $P_3$, …, $P_n$.

A different question, and one which Rawls does not address, is whether the same thing follows for the normative aspect of statements of the form, “$X$ ought to do $\Phi$,” as for practice-based descriptions of acts. Does the “ought” have a practice-relative semantics? Or instead, are there simply two types of “ought” operating here, one associated with summary rules, one associated with practice rules.

For example, Ronald Dworkin has suggested that similar-sounding terms with different truth-conditions may be “conceptually incommensurable.” Conceptual incommensurability entails that, for any two concepts, “there is no way of comparing the two.” His example of conceptual incommensurability to ask: “Which is more clear, an argument by Descartes or the Greek sky?” Since there is, $a$ $priori$, no way to compare the two concepts of clarity, the comparison is senseless or meaningless.

On this view, practices do generate different normative standards on a practice-by-practice basis, such that the “ought” in $P_1$ is conceptually incommensurable with the “oughts” in $P_2$, $P_3$, …, $P_n$. We might think that semantic plurality is a major problem: after all, if “ought” means something different across practices $P_1$, $P_2$, $P_3$, …, $P_n$, then how could we determine which sense of “ought” is to govern if the proposition that $X$ ought to do $\Phi$ is true for $P_1$ and not-true for $P_2$? This sort of radical incommensurability has the potential to engender at the least deep confusion over what it is an agent means when she asserts that she has a duty to $\Phi$, where the problem is not what it means to $\Phi$, but what is the nature of her “duty”: which duty is it: duty$_1$, duty$_2$, duty$_3$, …, duty$_n$ correlated with a practice, $P_1$, $P_2$, $P_3$, …, $P_n$?

Things are not as bad as they seem. First of all, the number of practices generating normative schemes may in fact be quite limited. Second, even if a large number of duties are practice dependent, our understanding of duties may just be fine-grained. Third, different truth-conditions do not imply different truth values: since (on the classical picture, at least), there are only two truth-values, true and not-true, the practice-relative statement that “$X$ ought to $\Phi$,” will have the same truth value no matter that it is made

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141 Id.

142 Id.

143 READ supra note 138 at 219.
from the perspective of P₁, P₂, P₃, …, Pₙ.

Accordingly, it may be possible to provide an explanation of semantic and normative plurality in terms of the truth conditions of practice-based norm statements, even though we may have overlap in terms of their truth value. Semantically different statements may generate the same truth value, such that though “ought” means something different in P₁, P₂, P₃, …, Pₙ, nonetheless, the proposition that X ought to do Φ can be true for some subset of the relevant practices, or for all of them.

For example, it may be true that, from a utilitarian and from a practice-based point of view, I ought to keep a particular promise. However, the “ought” means different things here: the utilitarian claim is that on this occasion keeping doing what I have undertaken to do would be right because maximizing utility; the promise-based claim is that keeping my promise is obligatory, having given my word. Having legislated a promise, I am under a practice-based duty to act as promised unless there is some practice-based defense that would allow me to avoid so doing.

Rawls early work, in Two Concepts of Rules, Justice as Fairness, but also in his Theory of Justice might be understood as seeking to establish some common type of response or position from which to respond to the plurality of social practices in terms of fairness and justice. On each occasion, Rawls seeks to establish some means of evaluating the worth of creating or maintaining the practice as socially valuable. This externalist position from which to evaluate worth of all practices, whether utilitarian or political, defuses the threat of incommensurability.

A different, but related, approach has been proposed by Phillip Pettit, who argued that we may distinguish between consequentialism and non-consequentialism in terms of an agent’s responses to these ways of valuing. Consequentialism requires that agents promote values; non-consequentialism requires that agents, in addition, honor them. Promotion requires that an agent increase the amount of value in the world by choosing that act which is most likely to do so. Honoring values requires “bearing witness” to or “exemplifying” a particular value and comes in two forms: one that denies that values can be given some sort of

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144 Rawls Fairness, supra note 75, at XX; RWALS THEORY, supra note 113, at XX.
145 See, e.g., Phillip Pettit, Consequentialism, in CONSEQUENTIALISM, 95, 96 (Stephen Darwall, ed., 2006).
146 Id., at 96.
147 Id., at 97.
weighting such that action produces more or less of the value in the
world;\textsuperscript{148} and one that, while it may admit that there can be more or less of a
value in the world, advances value by refusing acts that might injure the
value.\textsuperscript{149} Thus, even though the truth conditions of practice-based “oughts”
may vary across the different practices, $P_1$, $P_2$, $P_3$, …, $P_n$, Pettit’s promotion
and honoring distinction suggests there is a unitary way of responding to all
these different “oughts,” which is to honor them.

4. Are All Categorical Norms Practice-Dependent?

Another central question not resolved (or even addressed) by Rawls is
whether directly normative rules are necessarily practice dependent. That
is, absent a practice, are all rules simply summaries of the underlying
reasons for action, whether those reasons are consequentialist or non-
consequentialist moral reasons for decision?

The practice thesis depends upon differentiating reasons that are
practice-dependent from those that are practice-independent. For Rawls,
practice-independent reasons are not associated with any practice.
However, Rawls does not indicate whether his distinction between
summary rules and practice rules splits the (normative) world into only two
types of rules, practice-independent and practice-dependent. Are there
other types of rules.

To extend Rawls’ claim beyond the sort of welfare-maximizing decision
emblematic of act-consequentialism, the following two theses would have
to be true:

(1) any moral decision all-things-considered is revisable.

Here, the claim would be that all first-order moral evaluations are
defeasible dependent upon circumstances; accordingly, any rule that
summarizes first-order moral evaluations is always defeasible \textit{because}
dependent upon the circumstances of the individual case.

(2) The only way to block a rule’s dependency on the underlying
first-order reasons is through the existence of a practice.

On this view, it is the existence of a practice that generates a point of
view independent of the underlying reasons for action. That is, the practice

\textsuperscript{148} Id., at 99.
\textsuperscript{149} As Pettit puts it, “the important thing … is to keep your hands clean.” Id., at 99.
is the sole way in which to generate second-order norms that block the operation of primary norms.

As to (1): the claim that all-things-considered judgments are defeasible, or revisable because based upon first-order reasons, seems entirely plausible. For example, Joseph Raz has proposed the following thought-experiment. Suppose a judge may decide a case all things considered, rather than on the basis of some norm from the legal point of view. Here, there is no rule guiding the judge, summary or otherwise. She simply judges all things considered in every case that appears before her. Her prime function is to render judgement between parties rather than apply systematized standards of behavior. Accordingly, the same offender could appear before her charged with the same offense at time T₁ and T₂, but if the balance of reasons has changed from T₁ to T₂ the judge would be justified, all things considered, in treating the offender differently. Second, a judge may have a defeasible duty to apply the rules of the system; that is, the judge may have the discretion to ignore those rules she does not want to apply, only enforcing those which she agrees are right or best, all things considered. Here the judge treats the system’s rules as summary, but is willing to compromise this function when she judges that, all things considered, a better decision than that which could be reached by applying the (summary) rules is available, e.g., one which in the circumstances is more just, efficacious, etc. This envisages the adjudication process as containing the discretion to overrule or change the law at will. Neither sort of discretion is compatible with the claim that a judge is duty-bound to follow the law even when it conflicts with what, morally, we ought to do all-things-considered.

As to (2): a binary distinction between summary and practice rules seems implausible. Practice rules, remember, are necessary to constitute some set of social conventions that generate more or less public and determinate offices, moves, excuses, and so on. Hence Rawls expresses some doubts about the extent to which the binary division of rules is “exhaustive,” and in particular the extent to which moral rules can be

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150 Joseph Raz has described this sort of legal system as a ‘system[ ] of absolute discretion.” RAZ, supra note 6, at 137-140.
151 RAZ, supra note 6, at 137-140.
152 At least as understood by Rawls. He thinks practices are limited: they have offices and so on that make them more “official” than the ordinary, run of the mill situation.
153 Rawls Concepts, supra note 75, at 29. But in the next paragraph he suggests that a philosophical task is to determine which of the two approaches to rules, summary and practice, applies in a given instance, fueling the suspicion that he does endorse some binary separation of the rules into summary and practice.
characterized as practice rules. Some rules, for example moral rules, may be mandatory in nature, and so not defeasible all things considered, even absent some practice. Put differently, second-order norms blocking the operation of first-order reasoning all-things-considered need not entail the presence of a practice, and so claim (2), above, does not hold.

Here, we might consider Raz's distinction between what he calls the deliberative and executive stages of rule-application. In the deliberative stage “the relative merit of alternative courses of action is assessed. In the…executive stage such assessment is excluded.” This can be compared to a decision to act: a decision is an intention to act which is formed on the basis of some deliberation and is a reason for action for the agent who decides. But in deciding the agent brings her readiness to continue deliberation to an end: “To make a decision is to put an end to deliberation.” This is to suggest that a decision is not only a first-order reason to perform the act stipulated by the decision, but also a second-order reason to exclude further deliberation on the balance of (first-order) reasons: a decision is a pre-emptive or what Raz elsewhere calls an exclusionary or protected reason for action. This second-order reason is not simply a stronger first-order reason, that is, an exclusionary reason is not a first-order reason which overrides conflicting first-order reasons. It is a second-order reason because it is a reason to refrain form acting for a reason, that reason being the fact that a decision has been made. Once made, the decision operates to exclude consideration of first-order reasons for action or first-order reasons against action, and replaces them.

C. Hart on the Legal Point of View

Hart’s account of the law as a distinctive social practice, and so as a discrete point of view, is remarkably similar in structure and style to J.L. Austin’s discussion of performative utterances (and important aspects of Rawls’ practice theory). Each understands social practices as created by groups empowered to legislate conventions for classifying objects as

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154 Id. at 32 n.27
155 Raz, supra note 39, at 213.
156 Raz, supra note 6, at 67.
157 Id. at 65-9; for more on the analogy between exclusionary reasons and decisions to act, see Joseph Raz, Reasons For Action, Decisions and Norms, in PRACTICAL REASONING, (Joseph Raz ed., 1978).
158 See id. at 25-8.
159 ‘A second-order reason is any reason to act for a reason or to refrain from acting for a reason. An exclusionary reason is a second-order reason to refrain for acting for some reason’. Id. at 39.
160 Hart’s notion of a power has been extensively critiqued; however, most critics
falling under general rules. Each insists that the rules constitutive of the practice are logically prior to those acts constituted by the practice. Each insists that the practice generates offices, and actions undertaken from the point of view of that office may be analyzed in terms of the practice as satisfactory (in Austin’s terms, “happy”) or void (in Austin’s terms, “misfires,” “insincerities,” and so on). Finally, the practice-based propriety of any act (what Austin calls its “legitimacy,” and Hart its “validity”) is independent of its efficacy, or as I have already noted that Hart puts it, “there is no necessary connexion between the validity of any particular rule and its efficacy.”

Validity is the central concept here: it identifies an agent as using a norm from the point of view of a social practice, that is, as demanded by the practice’s constitutive rules or conventions. And Hart expressly treats validity as a categorical and a priori, rather than as hypothetical and a posteriori. An action generates reasons or obligations by virtue of following the appropriate practice rules, whether or not the change in (normative or ontological) status accomplished through the practice is itself acted upon. Having promised to give Jill a penny the next time he sees her, Jack remains under a practice-generated duty to pay Jill even if Jill studiously avoids Jack or forgets to demand payment. Having imposed a criminal punishment on John, the state remains entitled to punish even though some natural disaster intervenes or the state suspends the sentence.

1. Validity, Rules of Recognition, and the Internal Point of View

So far, Austin and Rawls have presented a view of social practices as

understand Hart as referring to normative powers. My approach, in emphasizing predication, understands Hart as referring to ontological power. This, admittedly marginal, view might explain Hart’s view that all second-order rules are power-conferring. In an ontological sense, he is correct. If predication is the central worry here, Hart’s constructivism suggests a profound ontological power. To the extent that the rules are also normative, then they may be re-characterized as mandatory, permissive, and so on.

161 Or, in Austinian terms, for predicating properties of objects, such as that they have a name, are married, entitle an agent to be paid a sum of money (in the case of a bet), and so on.

162 Austin Utterances, supra note 57, at 240

163 Id.

164 Id. Austin uses legitimacy, as I have noted at note XXX, in a morally neutral sense.

165 HART, supra note 1, at 103.

166 Id.

167 Again, it is worth emphasizing that validity is not legitimacy: validity has none of the moral baggage associated with the latter concept. Put differently, validity is morally inert.
governed using the shared social conventions of the group. These practice rules form an integrated normative system or point of view that generates specific, practice-based reasons, obligations, rights, excuses, exceptions, and so on. Hart improves upon the Austinian and Rawlsian description of practices suggesting that the criteria for identifying which norms or offices, and so on, belong to a practice may be codified under some “rule of recognition.” For a legal system, the rule of recognition operates to identify which rules are members of the relevant legal system for those agents authorized to occupy a practice-defined office, that is, which rules constitute “a binding common standard of behavior [for] those whose official power qua ‘legal power’ is dependent ultimately upon that very rule.” That is, the rule of recognition identifies the properly constituted, valid norms of the practice.

In the *Concept of Law*, Hart thinks that claims about membership and validity presuppose a particular attitude on the part of the speaker. Validity claims constitute what Hart calls “internal statements … expressing the [attitude] of those who accept the rule of recognition.” What the speaker accepts is that the rule of recognition establishes the shared criteria that are (indeed, must be) used to determine what utterances and norms count as belonging to the point of view. Thus, any statement asserting that a point of view is valid, or otherwise communicating acceptance, suggests that some group of individuals recognize the point of view as existing and efficacious.

Hart initially introduces the concept of acceptance in conjunction with the internal perspective (Hart calls it the internal point of view). Acceptance makes its first appearance in his more general discussion of rule-following:

> [w]hen a social group has certain 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

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169 Id., at 22.

170 *Hart, supra* note 1, at 108.

171 Hart suggests that it is a feature of “this rule of recognition, in terms of which [the speaker] assesses the validity of a particular statute, [that it] is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system.” *Id.*

172 See *id.* at 116;
uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’\textsuperscript{173}

In the \textit{Concept of Law}, acceptance explains the manner in which rules, or a particular point of view (constituted in part by a community’s “social practice”),\textsuperscript{174} gains normative force. The mere fact that a community shares patterns of behavior does not tell us much about whether the regularity is normative or adventitious.\textsuperscript{175} Conduct may conform to a rule because the participants purposely act as the rule directs or because of unthinking habit, or coincidence. Since people may follow norms (or not) for a variety of reasons we need some explanation detailing \textit{why} individuals follow the rules to distinguish those whose behavior is habitual or accidental from those whose is conduct deliberate and reflective.\textsuperscript{176}

Hart insists that rule-guided conduct can only be explained on the condition that the rule-follower treats the rule as a norm.\textsuperscript{177} As Hart puts it, acceptance is a “distinctive normative attitude … consist[ing] in the standing disposition of individuals to take [the relevant] patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure.”\textsuperscript{178} He argues that normative concepts such as obligation and right depend upon the internal perspective of a participant; the “critical reflective attitude”\textsuperscript{179} adopted by an agent when she engages in the standard normative activities of explaining, justifying, and guiding conduct from the relevant point of view.\textsuperscript{180}

Hart contrasts the internal perspective with the “extreme external point of view”\textsuperscript{181} that records or describes the agent’s regularly repeated acts

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 89.
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} On norm-governed and norm-guided behavior, \textit{see} Scott J. Shapiro, \textit{On Hart's Way Out}, in Essays on the Postscript to The Concept of Law 149, 153 (Jules Coleman, ed. 2001) (“‘Norm-governed’ behavior is behavior that is subject to the regulation of an actual norm, whether or not the behavior conforms to the norm. … ‘Norm-guided’ behavior … is behavior that conforms to a norm for the reason that the norm regulates the action in question.”).
\item \textsuperscript{176} \textit{See} ROGER A. SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT 66 (1992).
\item \textsuperscript{177} MACCORMICK, \textit{supra} note 168, at 30-31.
\item \textsuperscript{178} HART, \textit{supra} note 1, at 255.
\item \textsuperscript{179} \textit{Id.} at 57.
\item \textsuperscript{180} \textit{Id.} at 89-90.
\item \textsuperscript{181} \textit{Id.} at 89.
\end{itemize}
without seeking to understand, from the participant’s perspective, why the participant acts as she does.\textsuperscript{182} External statements simply describe or predict the participant’s conduct in terms of regularities of behavior.\textsuperscript{183} The extreme externalist perspective is liable to miss important features of a social practice, at least from the participants’ point of view.\textsuperscript{184}

The rule of recognition thus has adjudicative consequences: if a legal system is to impose obligations upon its subjects, the officials must “accept” the rule of recognition, as well as the norms derived from it, as valid.\textsuperscript{185} Hart’s jurisprudence attempts to describe just what this attitude entails.

2. Descriptive Sociology, Validity and Efficacy

Brian Tamanaha has described this extreme externalist, sociological point of view as emphasizing norms as lived or as enforced by law. The first, norms as lived, is captured by the notion of a habit of obedience;\textsuperscript{186} the second, norms as enforced, is captured by the requirement of some legal sanction for violating the norm.\textsuperscript{187} Tamanaha’s description of the sociological is, however, strikingly different to Hart’s understanding of the role of “descriptive sociology” in the Concept of Law. If we think of the logical and temporal priority of practices and practice rules, then first comes the conventions (and agreements in judgments among groups as to the existence and nature of the conventions) that create generate the practice,\textsuperscript{188} in other words, the existence of the practice is prior to its validity and efficacy. Next in order of logical and temporal priority come the practice

\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Note that valid here does not mean legitimate, i.e., morally binding.
\textsuperscript{185} Id.
\textsuperscript{186} See TAMANAH, supra note 80, at 93. (“The central insight … was that law can be found in the regularized conduct or actual patterns of behavior in a community, association, or society.”). Under this view, law is “the actually followed body of rules which govern the behavior of members of the group.” TAMANAH, supra note 80, at 94.
\textsuperscript{187} “Legal norms are only those norms that, when violated, are enforce by publicly administered sanctions.” Id. at 97. Here, sociology focuses on the behavior of the officials administering legal norms.
\textsuperscript{188} Expressed in formal logic: where P is the proposition that a practice exists (such as promising) and A the proposition that a is an act constituted by the practice’s rules (in the case of promising, A is the proposition that “a is a promise,” then while A→P (that is, “A only if P” is true, or, if one prefers, (P/A), it is not the case that P only if A, or ~(A→P).
rules themselves: those rules that determine what constitutes a valid role, move, or excuse under the practice. Third and finally in logical and temporal priority is the practice as lived or enforced, in other words, its efficacy.

Tamanaha identifies sociology as concerned with the back end question of efficacy; Hart, on the contrary, considers descriptive sociology as concerned with the front-end question of the existence of a practice. Nonetheless, Hart thinks that existence questions are sociological questions because they depend upon brute social facts: that the social agreements and conventions generative of a practice exist (whether or not the practice is lived or enforced by a given group).

Here it is worth revisiting the conceptual versus empirical distinction I introduced earlier. The point for Austin, Rawls, and Hart is that the group has legislated or predicated a concept: names and naming (or christening); marriage and marrying; and so on. The nature and contours of the concept is defined by the practice created by the group. Because the concept is generated by human activity (the social conventions of a particular group) it is susceptible to a particular type of “sociological” analysis. However, that “sociology” is not empirical, concerned with the back-end question of the group’s lived experience. It is conceptual, concerned with the front-end question of the sorts of concepts available to the group to formulate and organize that experience.

Accordingly, we can take our first pass at Hart’s understanding of his legal theory as a species of “descriptive sociology.” As with Rawls, Hart establishes practice rules are logically prior to the activities engendered by the practice. For there to be valid practice-based norms, the practice must first exist. The central relation, for Hart, is the conceptual one between existence and validity: for an agent to act in accordance with the offices and rules of the practice (for there to be a legally valid act) there must already exist some practice constituting a set of offices and rules as offices and rules of the practice. Adopting the internal point of view simply means accepting the rules of the practice as valid.

The legislative and adjudicative acts of practice-based officials derive from the power devolved upon them by social rules or conventions that generate practices, and the concomitant power to use those practices to alter

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189 As we shall see, in Section XXX, infra, Hart believes that legal obligations exist in virtue of brute sociological facts alone: they need and have no further moral grounding.

190 HART, supra note 1 at v.
an agent’s normative status (to engage in a promise or indulge a marriage or impose a punishment) or predicate certain statuses or qualities of other individuals (that a ship is named the Queen Elizabeth, that this is a vehicle and that is not,\(^\text{191}\) that this general law applies to this person rather than that). Such legislative and adjudicative acts are answerable to what the relevant group does, what practice-generating rules or conventions it has established. Accordingly, Hart’s understanding of a particularly descriptive sociology is directed towards describing those constitutive conventions conferring a set of powers upon those agents who use a practice to create, modify, or specify the roles and moves under some practice. These conventions emphasize the morally neutral aspect of practice.

The external or sociological perspective shared by John Austin and the sort of sociologists Tamanaha identifies thus misses important features of, for example, the process of legislation. A central insight of Hart’s is that legislation depends upon the existence and validity of practice norms. Validity further entails that the legislator, who occupies a practice-based office, understands her actions as legislator from the internal point of view of the practice, and so as subject to practice-generated rules that govern the process of legislation. From John Austin’s external perspective, the legislator is precisely that individual or institution not subject to law because not subject to sanctions and habitually obeying no-one. In somewhat simplified terms, if law is identified with both a habit of obedience and the imposition of sanctions, and legislators are “uncommanded commanders” who do not habitually obey laws (instead, they make them), then the legislator’s legislative acts are not law-governed.\(^\text{192}\) The absence of either habit or sanction preclude the claim that the legislator is regulated by laws.

The practice theory makes clear that the notion of an uncommanded commander presents a mistaken view of legislation.\(^\text{193}\) To change the normative status of individuals (or, as J.L. Austin suggests, to predicate names of objects, and so on), a social group must establish\(^\text{194}\) some set of

\(^{191}\) See id. at 126.

\(^{192}\) “There was a time when authoritativeness was apt to be analyzed in terms of sovereign power, and sovereignty itself assumed to be a matter of relatively plain political fact. The sovereign was the individual or assembly habitually obeyed by the multitude, but not habitually obeying any other. More sophisticated versions gave a legal analysis of sovereignty, but still traced all authority ultimately to sovereign will.” Neil MacCormick, The Concept of Law and the Concept of Law, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 163, 178 (Robert P George, ed., 1996).

\(^{193}\) See, in particular, Hart’s critique of Austin. HART, supra note 3 at 603 (discussing “uncommanded commander”).

\(^{194}\) More accurately, agree upon; more accurately yet, agree in judgment over the
conventions or practice rules by which to accomplish these activities. Engaging in the practice-dependent activity requires occupying the relevant office and acting according to the appropriate practice rules or conventions. This process is, broadly, legislative; while it includes making a promise, imposing a punishment, naming a ship, and undertaking a marriage, it also includes enacting a law.

Here, the concept of legislation is broader than the manner contemplated by Rawls in *Two Concepts of Rules*. In that work, Rawls thinks the utilitarian or summary mode of justification and practice-based mode each correspond to different office. An agent employing utilitarian justifications occupies a legislative office empowered to create, criticize, and change the practice, on the grounds that it promotes social welfare. The agent deciding whether to keep a promise or enforce a punishment occupies an “adjudicative” office, occupied by an agent who holds an office defined by the practice. Each office describes a different point of view from which to evaluate actions defined by the practice.

However, the legislative office is ambiguous as between three types of consideration: first, whether to create the practice at all, that is, whether having the practice is a good or bad thing; second, whether to use the practice to engage in an act of legislation, that is, whether it is best, on this occasion, to make a promise or to put the machinery of punishment into action; and third, whether to categorize a particular activity as falling under the practice. Under the first type of legislative consideration a legislator might consider whether it is better, on the whole, to have the institution of punishment at all. Under the second type of consideration, a prosecutor (or police officer) might determine whether or not to prosecute an individual based on utilitarian grounds: it would be a worse state of affairs, on the whole, to use the practice of punishment to deal with, e.g., a first-time offender charged with minor drug possession. I shall assume both types of consideration, to constitute and engage a practice, are broadly legislative. But I have also been using the notion of the legislative in a third way, internal to a practice, in which an agent uses the practice to legislate, that is to predicate that a particular act can be categorized in practice terms or that an object has a practice-based status, and so on. I have been at pains to suggest that this type of predicative activity is not simply adjudicative nor a matter of finding or stating, but a matter of doing something, and so distinct from what Rawls calls (utilitarian) legislation or (practice-based) adjudication or rule application.

The practice-theory of legislation, and in particular the concept of

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195 Though not in the sense Rawls coins to describe the “legislative office.” *See* Rawls *Concepts*, supra note 75, at 6.
196 *Id.* at 7.
198 *See, e.g.*, *id.*
199 *See, generally, AUSTIN HOW TO*, supra note 57.
validity breaks the link between law and sanction, just as practice rules reverse the priority between laws as lived200 and rules that constitute, change, and adjudicate practice-based activities. Put differently, validity is categorical and a priori not prudential and a posteriori: it is not verified or falsified by investigation into whether the rules are lived or enforced.

On the one hand, as we have seen, a legislative failure properly to engage the practice rules does not result in a sanction, it simply renders the practice dependent act void (or voidable). The bet has not been placed, the ship has not been named, the marriage not “indulged,” the law not passed. Accordingly, as Hart notes, a legislator is controlled by rules:201 the absence of a sanction is immaterial. If a legislator wants to get a law passed, just as if a low type wishes to get a ship named, she must occupy the proper office and abide by the proper rules: her legislative act must be valid, according to the rules of the practice.

However, the absence of a sanction can also explain why a legislator (unlike a judge) is under no obligation to act: while she may have (legal or other) reasons for action, her failure to act would not subject her to criticism in terms of the practice. A Rawlsian might suggest that there are non-practice-based grounds for criticism: utility, fairness, justice. Accordingly, from the external point of view of utilitarianism, the failure to enact the law or make the promise may be good, bad, or indifferent. However, from a perspective internal to the practice, the fact of legislation is not criticizable in these terms, but only in terms of its validity, that is, whether the activity followed the rules of the practice.

Of course, failures to abide by a promise or act as specified by the law may subject the norm-subjects of a practice to some practice-based sanction. Determining the rights, responsibilities, moves, and roles established by the practice itself requires appropriate officials authorized by the rules of the practice to engage in acts of classification which would describe the relevant acts or agents in terms of categories or concepts established by the practice.

If, however, an agent to accomplish those acts that are valid under the practice, the practice must be efficacious. Some agent must use the practice to govern their conduct. Efficacy is, however, unnecessary for validity and for the internal point of view. For various reasons, an agent engaged in activity covered by a social practice may fail to achieve her intended effect:

200 Which are simply rules of thumb or summary rules generalizing from and logically dependent upon the underlying activities of the agents.
201 HART, supra note 1 at 116.
the process may “misfire”: some purported acts may be invalid, where, for example, an agent does not occupy a legally sanctioned office when attempting to engage in a legally created practice (someone without legal title attempts to transfer some property), or when a practice-based office-holder fails to use a recognized practice to bring about some practice-dependent act (for example, when someone tries to dissolve a marriage by saying “you’re divorced!”). Others may be valid but inefficacious: as when a judicial officer renders judgment, but no executive officer enforces it. As J.L. Austin emphasized, however, failures need not render the activity sanctionable; and as Hart stresses, the failure either to bring about a result in the world or to be sanctioned for such failure does not indicate the absence of valid normative activity, including the creation of obligations using the practice.

IV. INCOMMENSURABLE POINTS OF VIEW

It is now time to tie the first two sections together. The first section argued that wholesale incommensurability could be generated by a discrete normative order acting to block the operation of normative evaluations external to that normative order. The second section argued that J.L. Austin, Rawls, and Hart embraced a practice theory of norms that establishes social practices as distinctive and discrete normative orders. My final claim, consistent with but not entailed by the first two, is that Hart conceived (or is best understood as conceiving) of at least three points of view, moral, legal, and prudential, as wholesale incommensurable.

My claim here is quite radical and conflicts with the dominant reading of Hart’s early work adopting an exclusionist understanding of the relation between moral and legal norms, one in which moral norms underwrite the legitimacy of the legal. The payoff from the incommensurability approach will be to bolster certain core features of the Hartian approach to normativity and law.

This radical reading is not without precedent: it has antecedents in Dworkin’s assertion that the version of the separation thesis put forward by Hart is both strong and ontological. In Taking Rights Seriously, Dworkin argued that Hart “promis[ed] an ontological separation of law from

202 Austin Utterances, supra note 57, at 240.
The radical reading claims that Hart is best understood as an incommensurabilist as to moral and legal obligations. The obligations are generated by different processes and offices (legal obligations, for instance, is more amenable to alteration and specification of our duties, law consisting in the union of primary and secondary rules, the latter of which include rules of change and adjudication that are absent from morality), and identified by (though not dependent for their existence upon) the different forms of social critique and enforcement appropriate to each (punishment, among other things, in the case of law; shame- or guilt-inducing criticism in the case of morality).

A. Legal and Moral Practices

In the Concept of Law, Hart establishes that we may differentiate legal and moral norms based upon the sorts of practice they generate. Hart’s emphasis on rules and practices seeks to account for the different practices or points of view as structures of norms in which similar concepts (such as obligation) operate differently. To the extent that the different concepts of legal and moral obligation, for example, do not point in the same direction but instead mark a crossroads.

One feature of the Hartian account worth emphasizing at this point is its constructivism. Hart’s discussion of acceptance attempts to explain the existence and efficacy of any point of view, and in particular the legal point of view, in terms of the attitudes taken by people towards the social practices constitutive of the point of view. For Hart, what transforms utterances or practices from normatively inert into normatively active is the standing disposition of participants to treat the rules as generating social practices which provide a set of practice-based reasons, rights, duties, excuses, exemptions, and so on. Accepting the point of view of a social practice thus transforms a range of social conduct from mindless acts into normative activity.

Normative activity remains, however, practice-dependent, and so the

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204 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 348–49 (1994).
205 See id. at 86-87.
206 See id. at 84-88.
207 See id. at 86-87. (For an argument that Hart implicitly assumes law and morality are dependent upon their different modes of enforcement, see P.M.S. Hacker, Sanction Theories of Duty in OXFORD ESSAYS IN JURISPRUDENCE 131-171 (A.W.B. Simpson ed., 1973 (arguing that Hart’s theory of law necessarily includes sanctions within it).
208 See Hart, supra note 3, at 69
209 HART, supra note 1, at 255.
practice constitutes the meaning of a normative statement from a point of view: that is, its truth-conditions are also practice-dependent. Hart appears to endorse this type of position with respect to the incommensurability of the legal and moral points of view in both the *Separation of Law and Morals* and the *Concept of Law*. For example, in the *Separation of Law and Morals*, Hart states that our values cannot “fit into a single system, [such] that no one of them has to be sacrificed or compromised to accommodate another.”

Normative statements abstracted from a point of view are, on this view, ambiguous. Statements of the form, “If the agent wants to act appropriately, then she ought to do act \( \Phi \),” prevaricate between, for example, legal and moral standards of appropriateness. Accordingly, the semantics used to evaluate what the agent ought to do will depend upon whether the “ought” is used in its legal or moral sense.

My claim is that Hart is best understood as adopting an account of law in which legal norms are categorically different from moral norms because incommensurable with them (rather than pre-empted or excluded by them). The incommensurability understanding of Hart views his concept of a social practice as a quasi-sociological attempt to explain the concept of a group (those individuals for whom the norms are obligatory), and of legislation and predication, rather than to characterize normativity as produced by social pressure justifying or necessitating obedience to the norms. Accordingly, social pressure does not do the work in Hart's account that it does for Austin or other sanction theories of norms, and so it does not do the work that Hart's critics assume it does. This has a variety of interesting consequences for his concept of law.

1. **Primary and Secondary Rules**

    Hart, in the *Separation of Law and Morals* and the *Concept of Law* regards morality as a social practice the norms of which may be identified by a rule of recognition. That is, Hart takes a descriptive and sociological approach not only to identifying the valid norms of a legal system, but also the norms of morality too. Accordingly, it might be helpful to distinguish between three different points of view: the legal, the moral, and the prudential. In so doing, we will gain a deeper insight into his infamous

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210 See, e.g., Hart, supra note 3, at 620.
211 Honoré, supra 197
212 See, e.g., HANS KELSEN, PURE THEORY OF LAW 62 (2d. ed., Max Knight, tr., 1967)
description of “primitive” legal systems, the nature of descriptive sociology, and the role played by the “minimum content of natural law” in the practice of law.

Hart identifies two categories of rules essential for any social practice (understood as an integrated normative system): primary rules which are rules of the form “X has an obligation to Φ” or “X has an obligation to ~Φ”; and secondary rules which are rules about primary rules (their existence, how to apply them, and so on). Primary rules are the rules of conduct predicated by the group: they explain what behavior is mandatory, permitted or empowered by the group or its practices, and so (among other things) what are the practice-based obligations or duties (or rights or powers, and so on). In the law, the sort of conduct that primary rules are directed at include rules of obligation imposing “restrictions on the free use of violence, theft, & deception” and other basic forms of anti-social conduct.

Primary rules, the first-order norms of a group or practice, are insufficient of themselves to explain the existence of the law, or indeed any sort of practice. The problem with primary norms is that they are ossified and so fail to account for the dynamic nature of a modern legal system, where norms are generated, altered, terminated, and so on at the will of the appropriate legislative authority (which may include the courts). Paying attention to the primary rules can only explain “the basic concepts of obligation and duty.” Though these concepts are at the core of a legal system, or at least its criminal laws, primary rules alone do not help to identify discrete legal systems or distinguish the concept of law from that of morality.

Indeed, for Hart, a system of primary rules alone would pose a particular challenge for his account of law. Hart, like J.L. Austin, adopts a predominantly constructivist theory of law and, more generally, norms generated by social practices. The whole point of constructivism is to be able to create, change, and terminate norms at will. Accordingly, a system of primary rules is insufficient to explain the nature of law. Under a system containing primary rules alone, there can be no means of creating norms and “no procedure for settling … doubt [as to what the rules are], either by reference to an authoritative text or to an official whose declarations on this

213 HART, supra note 1, at 91-92.
214 See HART, supra note 1, at 92-93.
215 See RAZ, supra note 4, 163-180.
216 Id. at 98.
Accordingly, Hart suggests that a system of governance through primary rules could only be successfully employed by small groups with a “common sentiment and belief and placed in a stable environment.”218 If the group has only primary rules, ones that are recognized as imposing duties or obligations, then (given the nature of obligation) nearly everyone must accept the rules from the internal point of view. Lacking some set of adjudicative officials, the process for enacting and enforcing primary rules is relatively limited and rigid.219 Accordingly, a group possessing only primary rules could not use those rules alone to produce social cohesion or provide standards for the recalcitrant to follow unless all members of society adopted the internal point of view.

Hart infamously provides a relatively sketchy origin myth describing a society governed through primary rules.220 While he does claim that there are “primitive” societies like this,221 the society he imagines is expressly abstracted from them, and so might best be regarded as his version of a pre-governamental “state of nature” thought experiment.222 Hart believes that in such a society there is at best some set of happenstantially overlapping social customs producing mandatory norms setting out what sort of behavior the group accepts (that is, takes an internal attitude towards), and so the conduct the group approves or criticizes.223

2. Morality and Primitivism

Hart’s description of primitive societies is vital, I believe, to understanding his view of, not only law, but also morality. In a primitive society lacking legal norms, with the law’s practice-based offices able to create and change norms and adjudicate disputes, “the bulk of society [must] … generally share, accept, or regard as binding the ultimate rule of recognition.”224 As I have suggested, Hart appears to have been strongly influenced, during the time he wrote *Separation of Law and Morals* and

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217 *Id.* at 92.
218 *Id.*
219 *Id.*.
220 *Id.* 91-92. Many people take the origins myth to be an example of his descriptive sociology: as perhaps the only example of sociology in the whole *Concept of Law*. Such a view, I am arguing, is deeply mistaken.
221 *Id.* at 91.
222 Compare, with Hobbes, *supra* note 103, at __.
223 *Id.* at 90-93
224 *Id.* at 114.
Concept of Law by J.L. Austin. As I have discussed at length, to successfully generate an obligation, legal or moral, a person must be entitled to occupy the proper office and employ the correct procedure. These offices and procedures are posited rather than discovered: created by humans and used by humans rather than part of the moral fabric of the universe.\(^{225}\)

Hart’s account of morality in Concept of Law is strikingly similar to Austin’s; however the proper office is occupied by a “social group” or “the community at large,”\(^{226}\) and the procedures for enacting them include social custom,\(^{227}\) established through the group’s expression of a “common sentiment and belief and placed in a stable environment.”\(^{228}\) His discussion of the social rules of “primitive communities,”\(^{229}\) has attracted criticism for its cultural snobbery and anthropological crudity, but it is better understood as a feature of his employment, in Concept of Law, of an Austinian ordinary language approach. That approach commits Hart to identifying some social offices and procedures for enacting morality. Hart famously identifies law as the union of primary rules of obligation and secondary rules of recognition, change, and adjudication.\(^{230}\) Morality equips a social group with only primary rules and a rule of recognition: in such a “primitive” system (primitive in the sense of lacking secondary rules of change and adjudication), the process for enacting and enforcing primary rules is relatively limited.

Hart’s sketchy origin myth should thus be understood as a thought experiment to explain the ways moral obligations can arise.\(^{231}\) The notion of a primitive system does dual duty: while it is often read as a description of an underdeveloped or backward legal system, it also provides an implicit critique of natural law, or indeed any system that conflates legal and moral obligations.

Hart, then, conceives of morality in terms of a primitive practice: morality is just a set of rules, generated by a group, and identified as members of the set of moral norms through a rule of recognition. As with other practices, the appropriate offices, moves and defenses are set by the

\(^{225}\) Cite to Korsgaard?
\(^{226}\) HART, supra note 1, at 169, 86.
\(^{227}\) Id. at 86.
\(^{228}\) Id. at 92.
\(^{229}\) Id.
\(^{230}\) See id. at 91-99.
\(^{231}\) See id. at 91-92.
practice, that is, are posited by the customs of the groups. Accordingly, moral rules are distinguished in part by their stringency: they are important and have far reaching consequences if breached. If social custom is the positive procedure for generating moral rules, then there is “no means, in such a society, of deliberately adapting the rules to changing circumstances.” Moral rules are static and immune from change through legislative fiat. Finally, the group uses moral rules “as the basis of claims, demands, admissions criticism, or punishment.” — and, we might add, praise or encouragement, explanation and teaching — in a manner distinct from their legal use. Moral rules, in virtue of their voluntary character, are maintained, enforced, and adjudicated through appeals to conscience and a widely shared consensus as to the desirability of a particular rule.

3. Law as the Union of Primary and Secondary Rules

If systems of primary rules (whether moral or “primitive”) are too rigid to count as under our “municipal” concept of as a legal system, because lacking procedures for legislation and adjudication, then these problem are solved by the J.L. Austinian concept of performative utterances. The group can simply provide a second-order or secondary set of rules to recognize and change the group’s primary rules, and adjudicate disputes arising under them. Rules of recognition, change and adjudication are simply the standard rules of a social practice.

Secondary rules are rules that are in a certain sense about primary rules: they are the rules of recognition, adjudication, and change that Hart identifies as necessary to identify those norms that are members of a particular practice or legal system (recognition); to engage in the predicatory power of creating, altering, or extinguishing the primary rules (change); or by providing a structure of norms or “moves” by which permit a practice-based official to praise or critique conduct that conforms with or deviates from the practice-rules.

\[\text{See id. at 73-75.}\]
\[\text{See id. at 92.}\]
\[\text{See id. at 175-78.}\]
\[\text{See id. at 90.}\]
\[\text{See id. at 178-80.}\]
\[\text{Id., at 94.}\]
\[\text{Id. at 94-98.}\]
Rules of recognition, change and adjudication mark the law as a social practice distinct from morality. First of all, the rule of recognition systematizes and unifies the rules under one regime of rules. Using the system’s rule of recognition, we can tell which rules are rules of law, and which are not (i.e., which are legal and which are moral); and moreover, which rules are rules of *that system* as opposed to another. Next, rules of change distinguish law from morality in another way: we normally do not think we can legislate morality just by coming together and agreeing to change it; we do think we can change law in this way. Finally, adjudication establishes both a process and set of officials authorized to determine what rules are members; whether change has been properly accomplished; and whether the primary rules have been complied with.

The claim that law — at least as we understand it in a modern municipal system — is best understood as the union of primary and secondary rules, provides a strongly generalizable, if not universalizable, test to distinguish law from morality. Morality is a set of obligations that lacks secondary rules, and so omits the full features of a social practice. To this extent, Hart adopts a position much like Rawls. At best, morality possesses a rule of recognition: in which case it looks much more like the system of primary obligations that Hart criticizes as "primitive." On this view, Hart has provided a simple and elegant means to distinguish law from morality: the concept of law, as a social practice, requires secondary rules of recognition, adjudication, and change. The concept of morality lacks such secondary rules, certainly the rules of adjudication and change that add dynamism to the practice.

Of course, the presence of secondary rules is insufficient to distinguish law from many other social practices. Further features of the concept of law can be found in the manner Hart distinguishes between legal and moral obligations in terms of the style of criticism that is appropriate in each domain. Practices empower authorized individuals — group members — to

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239 Hart claims that “recognition, change, and adjudication … [are] the heart of a legal system.” *Id.* at 94. He claims that “all three [kinds of secondary rules] together are enough to convert the regime of primary rules into what is indisputably a legal system.” *Id.*

240 TAMANAHA, *supra* note 80, at XXX. The problem is that it excludes — again expressly so — “primitive” legal systems as borderline cases of “our” concept. We shall return to the critique that Hart’s constructivism can only provide “our” concept of law, rather than the concept of law. It is not a charge that Hart would, I think, seek to refute in the style pressed by Tamanaha. But as “our” concept it is fully generalizable.

241 See Rawls *Concepts*, *supra* 75, at ___.

242 HART, *supra* note 1, at 91-92.
criticize non-conforming conduct or praise conforming conduct in terms provided by the practice. Law and morality can be differentiated by the separate terms they use to call out non-conforming behavior.\textsuperscript{243} For example, the proper use of moral terms of criticism "depend[s] heavily on the operation of feelings of shame, remorse, and guilt."\textsuperscript{244} Law, however, employs "physical sanctions"\textsuperscript{245} that are wielded, in the case of civil law, by "a private individual"\textsuperscript{246} and in the case of criminal law "by the group of their official representatives."\textsuperscript{247}

For Hart, then, morality entails generalized social solidarity over the relevant norms: it shares with law the feature of a rule of recognition, but it lacks the sort of offices that distinguish legally authorized agents from the bulk of society. Hart’s position is that the appropriate type of criticism is different because structured by different practice rules. In a modern legal system, however, legal and moral become sufficiently separate that only in pathological legal systems is the moral subsumed into the legal.\textsuperscript{248}

Accordingly, law and morality form two different systems for imposing holding individuals accountable for their actions. Morality lacks any formally-established office — we are all authoritative when it comes to morality. Law is more formal: it creates a set of rules, procedures, and officials that we can identify as authorized to enforce the rules. Because law and morality form different systems of norms, the moral sense of obligation is in part defined by the sorts of criticism appropriate upon violation of moral norms, and these are very different from the legal terms of criticism. Accordingly, the truth-conditions and the truth-value of the statement, "X ought to Φ, and if X does not Φ, some official, O ought to confine X," vary depending upon whether the “ought” is a moral “ought” or a legal “ought.”

4. The Prudential Point of View

It should now be obvious that prudential reasons for action cannot consistently be reduced to either moral or legal reasons, as Hart defines them. The characteristic prudential agent is the individual held hostage by gunman’s demand for “your money or your life,” and who calculates what

\textsuperscript{243} Id. at 86.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 87.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 117.
to do based upon the predicted outcomes of giving up the money or refusing to do so.

A similarly prosaic, but much more ancient example is given by Plato at the beginning of his Republic. A249 Socrates and Glaucon, having spent the day attending a festival and watching a parade in the local port of Pireaus, set out to return to Athens. They are accosted by Polemarchus, Adeiamantus and some of his friends: Polemarchus, pointing to his superior force of numbers, commands Socrates to stay with him. Socrates asks whether Polemarchus could be persuaded to let him leave, but Polemarchus responds that he will not listen to Socrates’ reasons. A250

Polemarchus recognizes that one way in which he can make his preferences stick is by making those preference effective: forcing them upon Socrates and Glaucon. Polemarchus might thus appear as an avuncular version of what Hart’s “the gunman,” A251 in effect commanding “stay, or else.” A252 His ability to command rests upon his capacity to enforce his will through some form of sanction. Threats to use force generate prudential reasons to act: they ensure that the commander’s interests overlap with those of the person commanded. Overlapping interests do not, however, produce the sort of reason that would bind another independently of some sanction. Socrates’ reason for staying would not be the same as Polemarchus’s reason for having him stay, but rather Socrates own prudential interest in avoiding physical harm. A253 And while Socrates has a prudential reason to stay, he also has reasons (so he believes) to escape, and these reasons may trump prudence. Furthermore, should Socrates escape, Polemarchus’ command is not a reason for Glaucon to criticize Socrates: rather, Glaucon may have reason to celebrate his companion’s flight.

A more modern version of Polemarchus is Oliver Wendell Holmes’ Bad Man. A254 Holmes’ famously introduced the Bad Man as a legal version

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249 The example is taken from PLATO, REPUBLIC I.327a-328b (G.M.A. Grube, trans., 1992).
250 The refusal to entertain reasons contrary to one’s point of view is, intriguingly, a feature of both Ronald Dworkin’s account of law. See, e.g., Ronald Dworkin, Law’s Empire 239 (1993).
251 Hart, supra note 3; at XXX, HART, supra note 1, at XXX.
252 For example, Ripstein argues that “Hobbes’s tone sometimes suggests that he would hold that an armed robber is legitimate in extorting money insofar as it is rational for his victim to yield to his demands.” Arthur Ripstein, Foundationalism in Political Theory, 16 PHIL. & PUB. AFFS. 115, 116 (1987).
253 The outcome — Socrates staying — need not indicate his preference.
of the prudential egoist, “a … man, who cares only for the material consequences which … knowledge [of the law] enables him to predict.”

Hart’s bad man is thus a strategic social agent, who operates much like a gambler looking at the past “form” of a race-horse or greyhound to predict future outcomes. The Bad Man regards the law primarily as a repository of judicial choices or preferences that he can use to forecast judicial behavior. He can use these predictions to achieve his own personal aims in conformity with the law without attracting legal sanction.

Both Polemarchus and Holmes emphasize efficacy, that is, the sorts of states of affairs characteristic of consequentialist accounts of practical action. Thus, the prudence that is the gunman’s posture (and that of Polemarchus or Holmes) is simply a version of Rawls’ summary rules: usually, if an agent wishes to avoid injury, she should accede to the demands of a superior force, particularly if the threat of force involves some significant personal injury (whether physical or an injury to long-term liberty, influence with the powerful, and so on). In this manner, prudential “oughts” are conceptually different from legal ones in the same way as summary rules are conceptually different from practice-based ones.

Furthermore, prudence lacks the sort of stringent reasons present in law and morality. As Hart is a pains to argue, prudence, whilst it may have “oughts” lacks obligations. At best, the gunman example indicates, prudence generates only what might be termed “obligements” and benefits: reasons based upon calculations over how much harm another may be able to impose upon the agent so obliged or how much good the other may be able to do the agent. These considerations suggest a radically different set of calculations than the moral or legal moves generated by the normative concepts of rights, duties, and so on distinctive to the moral and legal spheres.

B. Sociology and Incommensurability

At this point, it is worth taking a second pass at Hart’s claim that the Concept of Law is an exercise in descriptive sociology. For Hart, I have suggested, separate social practices normative systems that are incomparable inter se. Proving that these practices are incommensurable or

\[255 \text{ Id. For an extended jurisprudential consideration of the bad man theory of law, see } \text{William Twining, The Bad Man Revisited, 58 Cornell L. Rev. 275 (1973).} \]

\[256 \text{ On social and strategically rational action, see Martin Hollis, Trust Within Reason 12 (1998) ("Action is social if it takes account of the behavior of others, and strategic if it takes account of the account which others take.")}\]
intransitive depends upon demonstrating a further feature of these practices: that there is no third position from which to compare or commensurate them. It is here that the idea of descriptive sociology gains additional importance.

For Hart, the existence of a social practice as a distinctive point of view depends upon brute social facts about the existence, within a given social group, of practice-constituting conventions. Each practice or point of view is derived from the actions of human beings, rather than some other normative standard, and these actions provide the ultimate criterion for the existence of a social practice. What makes the rules and reasons generated through the practice normative is no more and no less than the manner in which agents committed to the practice treat the norm. The normativity of norms is a feature of human engagement, rather than, for example, their moral status. Normativity is a sociological, rather than moral, fact.

Hart repeatedly insists that the legal sort of obligation (obligation\textsubscript{l}) is a full-throated obligation but not in the same way as a moral obligation (obligation\textsubscript{m}). Furthermore, his approach in the Concept of Law, and again in the Essays on Bentham, is not primarily exclusionary. That is, he does not distinguish between the legal and moral points of view as being different in scope, but rather different in kind. For Hart, the judge or legislature’s right to impose legal duties (obligations\textsubscript{l}) stems from a legal not a moral power. This legal power to legislate, and the norms enacted pursuant to this power, are, he insists, all different in kind from moral norms. The legal obligation is fundamentally different from, and categorically incommensurable with, the moral one (an obligation\textsubscript{l} is not an obligation\textsubscript{m}).

Once the choice is made among points of view, we can describe the normative reasons for or against a particular course of action from within that system of justification. If, however, we are to respond to critiques from a different point of view, we have perhaps two options (if we are to

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257 See Hart, supra note 1, at ___ discussing internal and external statements about a practice.
258 Hart, supra note 59, at XXX & Hart, supra note 66, at ____.
259 Hart, supra note 1, at ____ & Hart, supra note 66, at ____.
260 Hart, supra note 1, at ____ & Hart, supra note 66, at ____. Hart’s discussion is reminiscent of Kelsen’s account of the incommensurability of separate normative orders. See Kelsen, supra note 8, at 374.
261 And made, not for reasons, although we might have a prudential reason to pick a moral or legal justification, that is, fear of social pressure.
make ourselves intelligible). On the one hand, we could refuse, and say that we are talking about action actions from a legal point of view, understood in terms of legal practice-rules (action_l, not action_m or action_p). Accordingly, the moral or prudential arguments for or against act_l hold no sway from our legal point of view. On the other hand, we could respond in kind, arguing that the action_l is justified by, not only some obligation_l, but also an obligation_m (or perhaps a reason_p as well). 262

What we cannot do, however, is provide a normative justification for the existence of obligations_l (or the legal point of view) independent of the legal system of normative justification without thereby converting that justification into a moral or prudential (or other non-legal) one. Because the concept of obligation is equivocal, which justification we choose (obligation_l, obligation_m, or obligation_p) cannot itself be justified independently of the different points of view constituted by each practice without thereby changing both its meaning and its value. We thus need some non-normative account to explain how these registers came to exist, and how we can choose among them. 263

For Hart, as a legal positivist, that account is provided by the concept of a social practice: these different styles of justification are just those that we have been trained or disciplined to use in particular social circumstances, and that continue to do so based on more or less widespread agreement in judgments that the practice exists and is useful (efficacious). Accordingly, because we have a practice of using the law in our normative relations, we choose among action_l, action_m, or action_p based upon acculturation, social pressure, or some other empirical fact.

What I take this to entail is that, for wholesale incommensurabilists the description of the existence of law and obligation_l is, in part, a matter of (descriptive) sociology: the law is a normative system that exists (and is accepted) for non-normative reasons. 265 That is, we can describe the choice to justify a particular action as action_l, action_m, or action_p as based upon pressure to conform to some normative system (law, morality, prudence).

262 This I take to be the solution proposed by Hart in HART, supra note 59, at ___, and HART, supra note 1, at ___.
263 This position is a form of wholesale incommensurability.
264 I take this to be a Kantian, and not just a Hartian, explanation.
265 Accordingly, descriptive sociology is conceptually necessary for this type of wholesale incommensurability, a point Hart insisted upon but for which he has been roundly criticized. See, HART, supra note 1, at v (asserting that the Concept of Law may be “regarded as an essay in descriptive sociology”); see also e.g., MACCORMICK, supra note 168, at 39 (asserting that this claim is “hotly disputed”).
The issue becomes what the judge or citizen has to accept when she acknowledges (the existence of) distinct legal and moral points of view.

C. Law as Leap of Faith

Here it is worth returning to what it means, for Hart, to accept a practice. John Gardner has recently suggested that: “Hart experimented fruitlessly with the idea that there is some belief or attitude on the part of officials [the attitude of acceptance] which makes it possible [to separate moral judgments from legal judgments].” I tend to think that Gardner either overstates or misstates the problem. Gardner interprets Hart from an exclusionist perspective, one that rejects the idea that law and morality are incommensurable, and that obligations have a different meaning from obligations. While, from an exclusionist perspective, Gardner is normatively committed to the position that the search for some belief that can distinguish the two is bound to be fruitless, it should by now be clear that I believe exclusion produces a misconception of the Hartian project, at least in his early works leading up to and including the Concept of Law.

While Hart’s discussion of acceptance fits uncomfortably with an exclusionist understanding of the legal point of view, one that grounds the value of a social practice in practice-external considerations of morality, it fits snugly with a sociological grounding of normative practices. Under the sociological understanding, from the point of view of the practice, nature of practice-based norms — their rational force as reasons for action — depends ultimately and exclusively upon whether an agent accepts or rejects the practice. To adopt some moral attitude external to the practice adds nothing to the nature of practice-based norms: on the contrary, it risks introducing incoherence into the discussion of an agent’s practice-based rights, duties, and so on by confusing internal and external truth-conditions to evaluate the semantics of the action.

Take, for example, Sir Neil MacCormick’s discussion of acceptance. MacCormick has been perhaps the most consistently “Hartian” of the major legal theorists. He explains the normativity of practice rules as characterized by the distinctive nature of an agent’s commitment to a social practice (or as MacCormick puts it, “pattern[s]” of conduct). MacCormick identifies two distinctive attitudes that an agent could take towards the distinctive point of view constituted by practices, one of which

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267 MacCORMICK, supra note 168, at 33.
he calls a “cognitive” or “detached” attitude that regards the rule as informational only; the other of which is “volitional” attitude that treats the rule as (more or less) normative. MacCormick seeks to ground the concept of acceptance, and with it the normativity of law, in an attitude of commitment towards maintaining the practice as action-constituting and action-guiding, a position I find instructive ultimately unpersuasive.

MacCormick argues that anyone adopting the internal attitude must have a “volitional” commitment to the existence and maintenance of that practice as a point of view. The essence of my worry is that this disposition conflates two distinctive sociological stances: the front-end stance of descriptive sociology that takes patterns of social conduct as indicating the existence and validity of a practice; and the back-end approach of traditional sociology towards a practice as lived or enforced.

MacCormick believes that someone taking the committed, internal perspective may manifest a variety of attitudes ranging from full to reluctant to minimal acceptance of a point of view and the norms it contains, with concomitant postures of full or grudging support, or “support with exceptions.” A more-or-less external (MacCormick originally calls it “hermeneutic” following Joseph Raz, he later calls it “detached”) agent cannot muster even this much support for the system, instead choosing merely to “observe” the law without supporting or otherwise endorsing it. What differentiates the attitudes of commitment and detachment is that, in addition to their “cognitive” understanding of the point of view, committed agents manifest their “wish or preference for conduct in accordance with a given pattern.”

268 See MacCormick, supra note 192, at 18 (detached agent chooses merely to “observe” the law as authoritative without “endorsing” or accepting it); Shapiro, supra note 79, at 149, 173 (discussing detachment in terms of epistemic point of view that does not treat law as the right sort of reason for conformity).

269 See MacCormick, supra note 168, at 35 (discussing people who “merely” or “reluctantly” accept a point of view).

270 MacCormick, supra note 192, at 18.


272 Raz, supra note 4, at ___.

273 MacCormick, supra note 192, at ___.


275 Id.

276 See MacCormick, supra note 168, at 34; MacCormick Legal Reasoning, supra note 271, at 287; MacCormick, supra note 168, at 40.
Here, however, MacCormick has made a very important switch of emphasis. The agent’s “volitional” attitude tracks Rawls’ external, utilitarian, fairness-based or justice-based, consideration that it is best, all things considered, to create, endorse, or utilize some social practice (in MacCormick’s terms, that a practice exist or be maintained). And this attitude is (according to Rawls) completely different from and blocked from counting from the internal perspective of a practice as a point of view.

MacCormick’s practice-maintaining volitional attitude does not track the normative commitments of those who have a fully internal attitude to a point of view. A practice-maintaining volitional attitude simply explains that there can be some reason for adopting the point of view. That reason could be a particularly strong one: some moral justification or other reason of a particularly stringent sort. But it could also be a weak reason (or nor reason at all: a mere whim, for example). A practice-maintaining volitional attitude is, in other words, consistent with non-normative or weakly prudential reasons for adopting or preferring the continued existence of any given point of view. An agent may wish or prefer that the law be binding because it produces useful social standards (or patterns of behavior), not because it produces morally obligatory social standards. That is, a participant may believe that the law is valuable because of the pragmatic or prudential benefit of having a formal and enforceable practice or a social standard.

The normative commitments internal to the practice as a point of view, on the other hand, express the attitude of those who have adopted or accepted or are committed to the practice. An internal or practice-dependent normative commitment is not a reason for adopting a particular point of view (or normative order): it is a disposition or internal attitude to treat as more or less binding that point of view the agent has adopted. For any participant in a of view, accepting that point of view just means acknowledging that it can impose binding obligations of the type associated with that normative order. The agent’s external (practice-maintaining volitional) reason for adopting the point of view need not match her internal commitment to the obligatory character of the point of view. An agent may have weak reasons for adopting a particular point of view and nonetheless be strongly committed, as a participant, to its norms, and vice versa.

\[277\] See MACCORMICK, supra note 168, at 34. See also MACCORMICK, supra note 168, at 34 (describing the “volitional element: a wish or will that that the pattern [of conduct] be upheld, a preference for conforming or non-conforming conduct in relevant circumstances.”).

\[278\] See Hart, supra note 1, at ___. 
Acceptance concerns the notion of commitment internal to the practice, not the reasons or motivation for adopting or maintaining the point of view.

Accordingly, an agent might have a weak or strong or no reason to choose the legal (or any practice-based) point of view. Having adopted or accepted the legal point of view, the participant then regards legal obligations \((\text{obligations}_l)\) as full-throated obligations even though they are not moral obligations \((\text{obligations}_m)\). Intransitivity entails that the legal obligations \((\text{obligations}_l)\) are not weaker or stronger than moral obligations \((\text{obligations}_m)\), and are not made more binding by having moral obligations \((\text{obligations}_m)\) back them up: morality adds nothing to the participant’s internal attitude of (weak, moderate, strong) commitment to the binding character of legal norms.\(^{279}\) The fact that moral reasons also point to the same conclusions as legal reasons might bolster the practice-maintaining volitional aspect of the participants attitude to the law — the reasons, external to the practice, that the participant has for maintaining commitment to the law — but it does not affect the bindingness of legal norms for the agent, nor the participant’s commitment to those norms as binding.\(^{280}\)

The practice-maintaining volitional attitude provides a reason for adopting the point of view or ensuring its continued acceptance, but it cannot describe the internal attitude of a participant who accepts the point of view. To adopt the religious analogy used by John Gardner, in *Law as a Leap of Faith*, a volitional account cannot describe what it means to support the point of view, because “volitional,” on its own, provides a reason for faith, not an account of faith itself (not even what it means to be a doubter or to lapse).\(^{281}\) For MacCormick, the internal attitude is explained, in part, by the “cognitive” aspect of acceptance; the way we understand the point of view. As Gardner puts it, paraphrasing MacCormick, "one has the cognitive internal attitude to law without the volitional internal attitude."\(^{282}\)

\(^{279}\) See id. at ___.
\(^{280}\) An incommensurabilist should point out that the sort of reason an agent has for adopting one point of view cannot be the sort of reason that defeats all other points of view. In other words, there may be reasons for adopting both the legal and the moral points of view, and they may be the same reasons. Hart identifies some prudential reasons for adopting both points of view: the seriousness of the social pressure they produce. The types of social pressure may be different; nonetheless, a prudential desire to avoid any negative social pressure may be the only reason necessary (if any reason at all is required) to adopt both the legal and the moral points of view.

\(^{281}\) See Gardner, *supra* note 54, at 16-17 (discussing different attitudes to law in faith-based terms).

\(^{282}\) Gardner, *supra* note 54, at 17.
Treating the existence of a point of view as by itself grounds for compliance is, of course, consistent with the incommensurabilist position. It also fits with Hart’s separation thesis: his claim that judges need not have a moral reason for endorsing a rule of recognition. Rather, a judge can accept the rule of recognition for any reason or no reason.\(^{283}\) If, as I propose, Hart’s approach is fundamentally that of the incommensurabilist, then the internal perspective requires a point of view’s participants to acknowledge its rules not only as stating norms, but as specifying distinctive styles of normative justification (obligations\(_l\), obligations\(_m\), and so on).\(^{284}\)

Incommensurability is compatible with holding in mind different types of obligation (obligation\(_l\) and obligation\(_m\)) while seeking to understand both which type is currently in operation and how the same action or demand for conformity would fit under the alternative points of view.\(^{285}\) It fits, for example, the position of the moralist trying to understand what the legalist claims for the law: the moralist is uncommitted to the normative force of obligations\(_l\), but can still gain understand the law and obligations\(_l\) without endorsing them. Here, as I have suggested before, the semantics or truth-conditions of the statement that there is a legal obligation are different from those of the statement that there is a moral obligation; furthermore, the practice-based nature of the legal obligation blocks consideration of the moral ones. Similarly, legal obligations do not translate to moral ones: as Hart, notes, the legally committed moralist may expressly adopt a publicly anti-law attitude, one that would prefer that this law or this legal system disappear for ever from the face of the earth.\(^{286}\)

V. CHALLENGES TO THE PRACTICE THEORY

Critiques of H.L.A. Hart’s Concept of Law advanced by Ronald Dworkin,\(^ {287}\) Joseph Raz,\(^ {288}\) Peter Hacker,\(^ {289}\) and most recently, Scott

\(^{283}\) Hart, supra note 66, at 150-51.

\(^{284}\) See Hart, supra note 1, at ___.

\(^{285}\) See Hart, supra note 1, at ___.

\(^{286}\) This is what motivates both Hart’s moralistic celebration of positivism in his famous debate with Lon L. Fuller, as well as his separationist insistence on the difference between legal and moral obligations in his debate with Raz. See Hart, supra note 59, at 54-44; 69 (giving moral grounds for separation of law for morality, and arguing that ought can refer to separate moral and legal standards of criticism); Hart, supra note 66, at 150-51, 155 (rejecting moral standards as necessary for legal point of view, and rejecting Raz’s account of authority on that basis).

\(^{287}\) Dworkin

\(^{288}\) Raz
Shapiro,²⁹⁰ forcefully reject Hart's attempt to explain the existence and efficacy of rules, and so of law as a system of rules, using a "practice theory" of norms. The challenges to Hart can be divided into two basic forms: one challenge is to argue that Hart in fact adopts a sanction theory of norms, one that insufficient distinguishes his theory of law from the Austinian or Benthamite theory he seeks to refute. The second challenge is to argue that the practice theory produces an account that is insufficiently normative to establish the obligatory character of rules, and so of law. I shall deal with each in turn.

A. Hacker’s Sanction-Based Critique

Legal theory takes, as one of its tasks, the attempt to explain law as binding or imposing some form of duty to act. P.M.S. Hacker, an early critic of Hart’s, helpfully suggested that theories of obligation could be divided into those that are command-based, rule-based, or reason-based, such that one’s duty to act is characterized as deriving from either the command of some authority, or the existence of a rule (Hacker calls this account “normative”),²⁹¹ or some set of justifying reasons.²⁹²

Hacker also suggests that there are three distinctive ways in which the relationship between the existence of duty and the imposition of a sanction for breach of that duty: predictive, imperatival, and reason-based.²⁹³ Legal positivists, notably Bentham and Austin, have adopted predictive or imperatival theories, such that, under the predictive theory, sanctions probabilistically follow from the breach of a duty, and under the imperatival theory, sanctions are commanded in event of non-performance of a duty. Under Hacker’s third type of theory (reason-based), the breach of a duty is a reason for imposing sanction. Only this third type of theory, Hacker suggests, is properly normative.

Famously, H.L.A. Hart argued that the concept of a duty was fatally ambiguous as between the predictive account, on the one hand, and the normative on the other hand.²⁹⁴ The predictive claim, captured in Austin’s

²⁹⁰ Shapiro, supra note 207, at 161-64.
²⁹¹ Hacker, supra note 207, at 131.
²⁹² Id. at 131.
²⁹³ Id. at 131.
²⁹⁴ For a somewhat different, but still relevant discussion of the ambiguity between empiricist and normative accounts of social bonds, see MARTIN HOLLIS, TRUST WITHIN REASON at 10-11 (1998).
idea of a habit of obedience, is that certain human actions are habitual or repetitive. It is a matter of empirical fact that an individual acts thus and so in a given circumstance. Such action is rational because, based upon these observed regularities of behavior, we may come to develop certain expectations or justified beliefs about what the agent’s conduct will be in the future given our experience of what it has been in the past. A duty thus exists to the extent some sanction is regularly or predictably imposed for non-conformity to some command, rule, or reason.

For the early positivists, such as Bentham and Austin, rules merely stated the likelihood of a sanction being imposed for the failure to obey a command. Hart calls this the external viewpoint of the empirical sociologist, a viewpoint concerned only in observing behavior (habit of obedience, sanction imposed for disobedience) in response to stimulus (command, rule breaking), rather than trying to understand how the participants viewed the situation “from the inside.”

The problem for sanction theories of law is that empirically observable regularities of behavior do not account for the distinctive normative attitude Hart identifies as essential to understanding the nature of obligation. Obligation, according to Hart, is normative and reason-based, and so requires a distinctive approach to rights and duties that is not captured in terms of predictable or conditioned responses. Obligations bind, not because of the shared mutual orientation of social behavior or what (predictably, habitually) an agent will do. Obligation raises a different basis for understanding our rule-governed behavior because, though an agent may act habitually or regularly — she may do what, in fact, given her previous conduct, an observer thought she would do — nonetheless, she may not have engaged in the sort of normative, rule-following activity constitutive of acting out of duty or obligation.

Hart’s oft-cited example is the gunman situation, in which an armed robber sticks up some passers by and demands their money. An observer can predict that the passersby will give the gunman their money in response

\[^{295}\text{See John Austin, ___}.
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\[^{296}\text{Cite to Austin}
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\[^{297}\text{HOLLIS, supra note 294, at 10.}
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\[^{298}\text{It is this aspect of Austin’s account that is similar to Holmes’ Bad Man theory of law. Both are social, strategic, predictive and can be expressed in terms of rational choices based upon justified expectations of human behavior}
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\[^{299}\text{Cite}
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\[^{300}\text{HART, supra note 1}
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\[^{301}\text{Id. at ___}.
\]
to his command, and that the gunman will impose a sanction — shoot his victims — if they do not comply. However, the passers by are under no obligation to hand over their property. Absent the threat of force, it is unlikely that they would do so; they would avoid doing so if they thought they could get away with it; and they may criticize the gunman’s actions as wrong even if they complied.

An equally apt example is the following. Suppose some students habitually spend Thursday evenings out in a particular bar. The mere fact that they regularly attend the same bar at the same time each week does not place any of them under an obligation to attend. Failure to do so would not result in the sort of criticism attendant upon failure to honor an obligation.

1. Hart’s Anti-Predictive Account of Obligation

Acting as obliged or under an obligation entails, Hart thinks, two different normative attitudes, and so requires two different sorts of critiques of an agent’s failure to act. If an agent fails to act as she prudentially should do or regularly has done before, the appropriate critique of her behavior takes the form of suggesting that she is doing something unwise or unusual, perhaps out of character. On the other hand, if the agent fails to do what she was under an obligation to have done, then an observer can critique her as acting wrongly, or badly, and so on. In addition to being surprised or disappointed, the observer can suggest that the agent has broken some sort of social or moral rule.

Hart’s account of rules is in part a reaction against externalist, empiricist theories claiming that rules are simply predictive facts—rules merely state the likelihood of a sanction being imposed for the failure to obey a command. Hart developed his normative theory in conjunction with a description of the “internal point of view” held by an individual asserting a rule. From the internal point of view, the individual means to assert that the rule really requires a particular behavior. Internal statements about what one ought to do, how one ought to behave, etc., do more than predict

302 Id. at 82: being obliged is often a statement about “the beliefs and motives with which an action was done … he believed some harm or other unpleasant consequences would befall him.”

303 See HART, supra note 1, at 82-83.

304 See id. at 84: the impossibility of punishment does not falsify the existence of an obligation, but under the command theory, it would: “it would be a contradiction to say he had an obligation … but that owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer.”
behavior; they manifest their author's acceptance and endorsement of a rule. Furthermore, for Hart, the internal point of view expresses the binding force of the rule by invoking that social practice which constitutes the rule, the practice-conditions that determine how to act in accordance with the rule. Internal statements are to be contrasted with external statements that purport to describe the norm without invoking its binding force.

According to Hart, when we contend that someone ought to perform a particular act, the “ought” is usually used to draw attention to the rule and to deviations from it. This involves a critical attitude towards the rules on the part of those who accept or follow them as guides to conduct, and who point to the rules as determining the existence and delimiting the scope of an obligation to act. What the predictive or external account of rules misses is internal point of view of the agent citing the rule as a guide to action.

Accordingly, Hart rejects Austin's predictive theory, instead developing an account of obligation in which the concept of a rule replaces that of a command; obligation is dependent on rules. Hacker's critique, however, is that Austin’s theory has (like any account of obligation) two distinct elements: an explanation of the source of the duty to perform the act (command, rule, justifying reasons) and an explanation of the relation between the obligation imposed by the duty and any sanction for non-compliance (predictive, imperative, reason-based). According to Hacker, Hart’s switch from command to rules addresses only the first of these, but retains a sanction theory of duty. Hart’s theory is thus insufficient to dispel the critique Hart himself has leveled at Austin: that a sanction theory of norms is insufficient to ground a theory of obligation.

2. Stringency

Unlike Hacker, I do not believe that Hart understands obligations as existing only if efficacious. That is, I do not believe that Hart advances a sanction-theory of norms, in part because normativity, for Hart, depends upon front-end issues about the existence and validity of practice-norms and various practice-based moves (including justifications and defenses), not their efficacy. One way to understand Hart’s approach to the existence of obligations (legal or moral), then, is to remind ourselves of the structure of a practice.

The first thing to recognize is that the existence of a practice, on its own

305 See Hacker, supra note 207, at ___.

does not explain the stringency of legal or other reasons for action. Rawls, in particular, missed this aspect of practices, and so did not develop an account of how stringent are the reasons generated by practices. Put differently, Rawls apparently assumes that the whole point of a practice is to generate obligations. The practice of punishment depends upon the fact “[t]hat a criminal should be punished follows from his guilt”. The practice of promising depends upon the obligation to keep one’s promises. In each case, the practice generates obligations in a manner that consequentialism cannot. Considering only these examples, it might appear that, while not every practice-reason is an obligation (there are constitutive reasons, excuses, exemptions, and so on), a central purpose of a social practice is to replace evaluation all-things-considered with a practice-based considerations organized primarily around some mandatory reason to act given by the practice.

Hart implicitly rejects this contention (and perhaps, along with it, Rawls’ somewhat inconsistent description of the nature of practices). He points out that rules of etiquette, for example, are practice-dependent and so block the sort of summary rules or evaluation all-things-considered; nonetheless, they do not generate obligations or duties to act. Practice-dependent reasons may be more or less stringent; only those of sufficient stringency generate obligations. Accordingly, to differentiate between rules (or other practice-based reasons) that impose an obligation and those that do not, Hart points to the potential sanction that could be imposed. “Rules,” he suggests, “are conceived and spoken of as imposing obligations when the demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”

For Hart, practice rules provide a standard of conduct that we invoke to suggest that particular person's conduct is governed by the practice. However, for the standard of conduct to be normative, that is, for it to operate as an obligation, it must permit some “hostile reaction,” often in the form of criticism, from failures to act as the rule requires. This aspect of stringency is such that if one fails to abide by the rule, the agent or others are justified in engaging in a distinctive form of criticism: the norm is not

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306 Rawls Concepts, supra note 75, at 5. Here, I take it that “should” is equivalent to “ought to.”
307 See id. at 18.
308 Id. at 15.
309 Id. at 32 n.27.
310 See HART, supra note 1, at 86
311 Id. at 89.
312 Id. at 90.
only binding, but certain criticism or punishment is appropriate for deviations from the norm.

Hart’s discussion of obligations as stringent, practice-based reasons, begins with a contrast between obligations and habits. Unlike habits, there is a “varied normative vocabulary (‘ought,’ ‘must,’ ‘should’) [which] is used to draw attention to the standard and to deviations from it, and to formulate the demands, criticisms, or acknowledgments which may be based on it.”\(^{313}\) Nonetheless, certain types of practice-rules, such as rules of etiquette or rules of grammar do not give rise to obligations, even though we use normative language in discussing etiquette and grammar.\(^{314}\)

Other approaches might try to account for the stringency of an obligation by suggesting that what makes a reason obligatory is not its reception but its typology; not the sort of community reaction it justifies, but the fact that it is, for example, a moral reason. Such an approach would require some account of the manner in which moral reasons generate obligations: whether merely in virtue of their pedigree or typology (as moral) or whether there is some other feature necessary.\(^{315}\)

Scott Shapiro, for example, adopts an account of normativity that requires some link between practice-reasons and moral reasons: normativity, according to Shapiro, is parasitic on morality. Shapiro endorses a Dworkinian critique of Hart’s practice theory: the first step is to assert that a “‘normative’ rule … necessarily provides reasons for action. If we criticize someone for violating the rule against smoking indoors, we are not simply asserting that most others do not smoke indoors and would criticize others for doing so. Rather, we are identifying the ground of our criticism: smoking indoors is wrong because there is a (normative) rule against it.”\(^{316}\)

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\(^{313}\) Id. at 85.

\(^{314}\) Id. at 86.

\(^{315}\) There are two ways to consider the problem posed here: either that normative reasons are reasons of a certain (ontological) type, e.g., moral reasons, or that we are entitled to hold that certain practices be morally justified, particularly where the practice or the act evaluated under the practice overlap with morality. My worry in this section is about the ontological nature of norms: whether they must be of a certain type to count as a reason for action. I will deal with the demand that valid norms be morally justified in the next subsection.

\(^{316}\) Scott J. Shapiro, *What is the Rule of Recognition (And Does it Exist?),* in *The Rule of Recognition and the U.S. Constitution*, 13 (Matthew Adler, Kenneth Himma, eds., 2009).
This initial step is, ambiguous, however, as between two claims, a stringency claim and a typological claim. The stringency claim is that some rule against smoking exists that people treat as imposing an obligation; the typological claim is that “genuine” or full-throated normative reasons are of a particular type: that they derive from morality. At the very least, for the law to be normative, Shapiro claims, agents must make both the stringency and the typological claims, in part because, Shapiro assumes, norms can only be stringent if they at least claim to be of the relevant type.\textsuperscript{317}

The typological claim is, for reasons Hart anticipates in his discussion of etiquette, implausible. It cannot be the case that every normative ought derives from a moral ought. For example, the rules of chess are normative, not predictive, nor descriptions of habitual behavior. Yet they do not derive from, nor generate, moral oughts. The same point applies to Shapiro’s example: smoking indoors is wrong, not because there is a moral rule against it, but because there is a rule of etiquette, which is precisely a non-stringent rule.

The smoking example fits neatly into the Rawlsian distinction between summary and practice rules. The only way to characterize the rule not to smoke indoors as a moral rule rather than a practice rule is to treat it as an external rule of thumb. The reason not to smoke derives from considerations of social welfare: it is better on the whole not to smoke indoors because of the state of affairs it produces (adverse health consequences for others in the room).\textsuperscript{318} Any more mandatory version of the rule is not about smoking indoors, that is, the effect on others, but smoking at all, that is, the effect on the smoker. So, while the smoking rule is (in one sense) normative, as all summary rules are normative, it is precisely insufficiently stringent to produce the sort of mandatory norm that Hart (and, one would have thought, Shapiro) takes as differentiating the gunman’s “obliger” from the judge’s “ought.”

Of course, we could make a different claim: that every stringent reason, that is, every obligation, is a moral norm. There are reasons and stringent reasons (“oughts” and “obligations”), and rules obtain their stringency (their obligatory force) from morality. That typological claim is contestable in the same manner as before: from the point of view of a practice, the norms may

\textsuperscript{317} Id., at 23.

\textsuperscript{318} The smoking example is Shapiro’s own: Dworkin’s example, a rule about hat-doffing in church, is a practice-rule rather than a summary rule. That is, Dworkin provides a practice-based, mandatory reason, rather than a summary, defeasible reason. DWORKIN, supra note 204, at 50-51.
confer an obligation. To demand more — to demand that the obligation also be normatively justified — is to make a claim about conflicts between morality and social practices that depends not upon the concept of normativity, but upon the priority and relation of morality to social practices.\textsuperscript{319}

Hart, by contrast, looks for account of stringency that inheres in the actions of individuals, rather than seeking it as justified by some pedigree or typology of norms. His question is: what sort of practice is sufficiently stringent to generate an obligation? The answer is that: “[r]ules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”\textsuperscript{320} Here, the idea is (again) conceptual: that, for there to be a normative obligation as distinct from etiquette-style rule of prudence, we need some form of stringency such that violation of the norm produces some form of negative response.

Stringency falls, however, on the validity rather than the efficacy side of the ledger. The failure of and individual or group to manifest such criticism need not indicate that there is no obligation (that the obligation does not exist). What matters is the appropriateness of such criticism, given the internal point of view. Stringent criticism is a valid move for some social practices, such as law or morality, and not for others, such as etiquette or games.

Accordingly, for Hart the stringency of practice-based reasons is given by the internal point of view:\textsuperscript{321} some account of the valid moves or offices given by a practice. From the internal point of view, obligations generated by the practice rules operate “as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow, but a reason for hostility.”\textsuperscript{322} Such rules, I have been at pains to argue, are categorical and \textit{a priori}, not prudential and \textit{a posteriori}, concerned with valid moves within a practice rather than the efficacy of rules as lived or as subject to the imposition of sanctions. In Hacker’s

\textsuperscript{319} So Shapiro does not reconstruct and critique Hart’s view, but his own, which is at variant with Hart’s. Nor, as I have suggested, \textit{supra} note ____, does he accurately present Dworkin’s critique.

\textsuperscript{320} \textit{Hart}, \textit{supra} note 1, at 86.

\textsuperscript{321} \textit{Id.} at 89-90

\textsuperscript{322} \textit{Id.} at 90.
terms, it is the validity of the practice that generates a reason-based account of the imposition of a sanction, rather than some (empirical) command or prediction that a sanction will be imposed. Hart’s empiricism is front-end and concerned with the existence of concepts, not the back-end sort contemplated by sanction theories of duty.

B. The Reason-Demanding Position and Hart’s Reason-Accepting Response

The second rejoinder to Hart’s practice theory is what might be called the reason-demanding position. Both Ronald Dworkin and Joseph Raz have pointed out that the mere existence of a social rule demanding conformity is insufficient for the rule to operate as a reason for action. A rule-follower need not believe that she ought to follow the rule, yet she might do so because of social pressure exerted through the type of normative practice Hart identifies. For the rule to operate as a norm it must constitute a reason for action, independent of the social practice of critiquing non-conforming behavior. Furthermore, if an agent is to be justified in treating it as a reason for action, a norm must either be a genuine reason, or the agent must believe it to be such a reason. Accordingly, reason-demanders identify two defects with the practice theory as a theory of norms: that it conflates the existence of a norm (which is independent of a social practice) with its efficacy (which is not); and it generates the wrong sort of disposition to follow rules (prudence instead of obligation). They thus demand that Hart produce some reason that places the agent under an obligation. I shall discuss these criticisms in turn.

Both Dworkin and Raz support their demand for reasons over practice using the example of the non-conforming vegetarian. Assume that vegetarianism consists in the belief that it is wrong for humans to eat meat on any occasion and vegetarians believe that humans are under some form of obligation to refrain from meat-eating. Dworkin and Raz each assert that the vegetarian norm, e.g., “humans are under an obligation to refrain from meat-eating,” exists even when no-one follows it. The norm does not depend for its existence on some social practice. Furthermore, we can adopt or empathize with the vegetarian point of view even though we are

323 In other words, reason-demanders demand a norm where Hart produces a (non-normative) social practice.
324 The problem with a social practice is that it need only oblige the participant to follow the rule, rather than placing her under an obligation to do so.
325 See Dworkin, supra 140; Raz supra note 4.
326 See Dworkin, supra 140; Raz supra note 4.
not vegetarians and no vegetarian exists anywhere in the world. This seems to suggest that some points of view can exist without anyone using them in their practical deliberations.

Two points are worth making here. First is the subsidiary but influential claim Dworkin and Raz advance using the vegetarian example: that the social practice thesis cannot account for the case of the vegetarian non-conformist (or any non-conformist for that matter) because she precisely sets herself up against the general practice of society. Put differently, Dworkin, followed by Raz, both appear to believe that the social nature of a practice theory of rules requires a more or less large social group to enforce the rule or obligation. That view is mistaken.

The stringency discussion makes clear why: the practice theory emphasizes the front-end question of the existence of legislation by a given group rather than the back-end question of how widespread is the social nature of the response or sanction. It is conceptually and empirically possible, under the practice thesis, to have a practice of one, because it is conceptually and empirically possible to have a group of one. All that is required is one individual to legislate practice norms, and that group of one to take the reason generated by the practice to be sufficiently serious as to justify the sort of (self-)critical response characteristic of obligation.

Second is the existence claim: that reasons can exist independent of empirically effective social practices. Put differently, the fact that no-one uses a point of view does not demonstrate its non-existence. It merely demonstrate that it is not practiced. To be able to adopt and empathize with the point of view it must in some (conceptual, rather than empirical) sense exist, that is, we must be able to create, recognize, and adjudicate contested cases using the practice. Accordingly, for the incommensurabilist, the issue remains: to what does the vegetarian norm refer? That is, for the incommensurabilist, the norm “humans are under a _____ obligation to refrain from meat-eating,” contains a blank, and the sentence is ambiguous until we specify into which social practice or normative system (moral, legal, etc.) to place the obligation. Accordingly, until we explain what sort obligation we are using, then we cannot know whether there is a obligation\textsubscript{m}, or a obligation\textsubscript{l} (or a prudential “obligement”) not to eat meat.

Furthermore, the ambiguity point explains why practice conditions are also existence conditions. For the incommensurabilist there is no such thing as an obligation (for example, a obligation\textsubscript{m}, as opposed to an obligation\textsubscript{l}) outside a particular practice (e.g., morality, law, and so on). Lacking some
reason-dependent explanation of the generation and existence of different points of view, incommensurability requires something like a sociological description of the existence of social practices to provide a reason-independent account of how points of view come into existence. In other words, incommensurabilists are conceptually precluded from providing reasons here: such reasons would be arbitrary or nonsensical from the point of view of each practice. If Hart is an incommensurabilist, then he needs some reason-independent account, such as social practices (or, in the Postscript to the Concept of Law, some legal convention), to explain the existence of distinct points of view.

The reason-demanders’ challenge to the existence condition makes sense only on condition that that the sort of thing an “obligation” is (or perhaps our response to the various sorts of obligation) remains the same across the moral and legal points of view. Typological unity (or univocal response to different types of obligation) would permit reason-demanders to reject the incommensurabilist’s ambiguity point. For the reason-demander, a point of view can exist without specifying the normative system to which it belongs. That is, for the reason-demander, there is a vital difference between suggesting that a rule exists and that it is practice-dependent, whereas the incommensurabilist insists that we cannot know the sort of existence the rule has until it is linked to a social practice or system of norms that fixes what type of rule it is.

The incommensurabilists response to the question of existence, however, is also a response to the reason-demanders’ central objection to the practice theory. They challenge that people who believe we ought not to eat meat believe it is a rule, not that it is a practice. I have already introduced a version of this claim in discussing the stringency of obligations: the reason-demanders’ critique here is that Hart’s practice theory is non-

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327 HART, supra note 1, at 255-56.
328 Id.
329 Scott Shapiro expresses the reason-demanders’ challenge in this way: “To generate normative relations of legal authority and obligation, the objection goes, a group needs more than social facts – it needs moral facts as well.” Scott J. Shapiro, What Is The Rule Of Recognition (And Does It Exist)? 24, electronic copy available at: http://ssrn.com/abstract=1304645.
330 Accordingly, Raz suggests that “[r]ules need not be practiced in order to be rules.” RAZ, supra note 4, at 53
331 This is to again suggest that for the incommensurabilist, a point of view only exists as a practical option to the extent that some person or group currently uses it as a source of reasons.
332 RAZ, supra note 4, 53-54
normative and (ironically) overly behavioristic. Hart claims that a necessary element of rule-governed conduct is a “critical reflective attitude to certain patterns of behavior 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.”

But this criterion is surely insufficient for our ordinary understanding of normativity. Even where the rule and community behavior correspond, it is not the behavior that does the normative work. What matters is that the rule operates as a reason for my behavior whether or not the community endorses it.

Hart’s response is to re-emphasize that he believes rules are “reason-giving”: for participants in the practice, the fact that a norm is a valid utterance from the legal point of view is a reason for treating it as imposing legal rights or duties. But, for Hart, the decision to adopt and accept a point of view does not respond to the demand for some further reason. Hart explicitly rejects both the claim that for a social practice to operate as a normative justification there must be some external reason (Hart calls it “good grounds”) supporting the practice, and the claim “that participants must believe that there are good moral grounds for conforming to it.”

Hart believed that participants could adopt the legal point of view for any reason or no reason. Adopting the legal point of view, however, means treating its rule of recognition (and any utterances or norms ascribed by that rule to the legal point of view) as valid. He suggests that:

if all that is required is that judges should have some comprehensible motives for behaving as they do [when accepting the legal point of view], this can be easily satisfied by motives which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law.

For Hart, then, a judge may choose to justify or critique the law from the moral or prudential points of view (that is, for moral or prudential reasons), so long as she acknowledges the laws as valid from the legal point

333 HART, supra note 1, at 57.
334 See, e.g., Andrei Marmor, Legal Conventionalism in Hart’s Postcript 197
335 See HART, supra note 1, at 256.
336 Id. at 257.
337 Id. at 257.
338 HART, supra note 66, at 265.
of view.\textsuperscript{339} The point of the internal attitude is to identify, in part, what are oughts\textsubscript{l}, as opposed to oughts\textsubscript{p} or oughts\textsubscript{m}.\textsuperscript{340} It is enough for Hart’s “descriptive sociology” that distinctive legal norms exist and are used to separate out law from morals.\textsuperscript{341}

To return to the Nazi law example: a judge can assert that Nazi laws permitting denunciation of political dissidents are valid laws without thinking they are moral ones: indeed while expressly and robustly acknowledging their immorality. Indeed, on my interpretation of Hart, a Nazi judge could, without inconsistency, believe that the law creates a stringent reason or full-throated obligation from the point of view of legal practice, one that requires and justifies imposition of a legal sanction upon the dissident, but nonetheless believe and assert that it would be immoral and/or imprudent to enforce the obligation.

According to Hart, on my view, a judge operating from the internal point of view of the practice of law does not simply treat the law as reason-giving. If Hart is right, the judge must believe that rules are reason-giving: that there is a good reason — a good legal reason — justifying her actions. Accordingly, the judge does not “endorse” the law, because such an attitude, according to Raz, requires acknowledging the moral value of law.\textsuperscript{342} This step, Hart thinks, is unnecessary in order to generate full-throated legal obligations because Hart does not believe that any further, external judgment about the moral or prudential value of the law is required to generate obligations. Of course, we might want some deep commitment to law-as-a-practice to have a place in valuable projects.\textsuperscript{343} But that is an issue that concerns the health or pathology of legal systems evaluated from within a particular society, not a question of legal validity.

Put differently, Hart’s theory is reason-accepting rather than reason demanding. The participants in a point of view cannot, from within the point of view, justify the validity of its rule of recognition, they can only accept it as valid. It may also be valid from some other point of view, but this is to provide the wrong sort of reason: alternative grounds of validity

\textsuperscript{339} Id. at 158.
\textsuperscript{340} Where the indexicals l, p and m indicate a legal, prudential and moral sense of “ought.” And note that, depending upon the nature of the act, \textPhi itself may have a practice-based and non-practiced based connotation.
\textsuperscript{341} On descriptive sociology, see HART, supra note 1, at v.
\textsuperscript{342} See RAZ, supra note 4, at 155 n.13.
\textsuperscript{343} Bernard Williams, Consequentialism and Integrity in CONSEQUENTIALISM AND ITS CRITICS 20, 32 (Samuel Scheffler, ed. 1988).
might answer questions about an agent’s motivation for adopting the point of view, but they could not explain why the point of view is (on its own terms) valid. Hart’s position only makes sense, it seems to me, if it rests upon the presupposition that something like the sociological basis of practices generates intransitivity — not through excluding competing points of view, but through incommensurability blocking the move to demanding some extra-systemic justification — some justification from an external or different point of view.

For Hart, as a reason-accepter, validity-statements are simply internal statements about the status of a (legal) rule as a member of the (legal) point of view as a system of rules. A valid rule is one generated by members of the relevant group using the relevant norm-generating process. This process marks out the rule as, e.g., a legal rule (as opposed to some other rule). So a legal rule is not a rule of golf or morality or etiquette — those rules are generated by some other group using some other process. Once the rule is identified as a member of the relevant point of view, participants in the point of view take a particular attitude to the rule: they treat it as a “reason” for decision. From the participants’ internal perspective, the rule is a reason for action.

Whenever a participant makes an internal statement, she not only claims the rule is valid (a membership claim), but also (the descriptive sociological claim) that the system exists and (the traditional sociological claim) that it is in effect. Existence is “shown” or “presupposed” by statements that claim to be currently valid. Hart, however, distinguishes his version of presupposing some ultimate norm of recognition from Kelsen’s account. Hart believes that what is presupposed is precisely not the validity of the ultimate rule: the concept of validity makes no sense here (because we are now occupying a perspective external to the practice). The question of which rule of recognition is in operation cannot be answered by some further rule, or asserting what rule would be good, or effective, or whatever. The answer in each case is rather provided by descriptive sociology: this is the rule that the group accepting the point of view uses to identify rules from that point of view, and then we just have to look and see

344 Hart, supra note 1, at 105.
345 Id., at 101.
346 Id., at 104.
347 Id., at 108-109 (discussing Kelsen on validity).
348 See id. (rejecting the application of the concept of validity to the rule of recognition itself).
349 See id., at 107, 109 (discussing reasons for accepting points of view).
which rule they do, in fact use.

The reason-demanders’ need for a further reason here is premised upon the claim that a point of view can only be valuable if based on some further reason. Hart’s insight, however, is that the point of view itself constitutes the value of the norms that are its members. To ask whether the point of view is valuable, “whether it is a satisfactory form of legal system … [or] does it produce more good than evil” is a different sort of question. Such questions demand external statements as answers, and such statements are the wrong category of statement to ground the value of internal statements from the point of view.

VI. CONCLUDING ISSUES

Characterizing Hart — at least the Hart of Separation of Law and Morals and the Concept of Law — as engaged in a project that attempts to ground notions of obligation, law, and morality in human action and attitudes leads to a number of problems. One central problem — whether there can be a moral critique of the law on the incommensurabilist approach — looks like a hard one, but is in fact quite straightforward. As I have suggested earlier, while the truth-conditions of the moral and legal statements, “agent X ought to Φ,” may differ (because oughț means something different from oughțm), their truth-values may be the same. That is, it may be the case that, from both the perspective of law and morality, X ought to Φ is true. So the same action may be both legally and morally mandatory. Where the agent is morally required to ¬Φ, but legally required to Φ, then the truth-values of the statement “X ought to Φ” differ depending on the point of view: morally, the statement is not true; from the legal point of view the statement is true.

Turn once more to the example of the Nazi informant: the informant’s choice to denounce her husband is morally indefensible. Morally, “X ought to Φ” (where X is the informant, and Φ is denouncing her husband) is not true. Furthermore, the law permitting her to denounce her husband is also

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350 For example, Raz draws a distinction between thinking that the rule is a reason for others (endorsement) and thinking that it is a reason only for oneself (acceptance). This, for Raz, is a distinction between moral and prudential attitudes to a rule. See Raz, supra note 4, at 155 n.13.

351 Id. at 107.

352 See id at 109-110 (discussing the concept of validity in relation to the rule of recognition and internal and external perspectives); see also id 103 “an external statement of fact that the rule is accepted”).
immoral. Nonetheless, the law is valid, and legal officials are under a legal obligation to enforce the law.

Hart’s point is that, though moral criticism is external to the legal point of view, morality has something to say about whether we should create, engage with, or maintain the legal point of view. Hart famously opines that the existence of a law is one thing; its merit another; but that is just to suggest that the existence of law is a matter for the legal point of view, its merit a matter for morality.

A valid law generating valid legal obligations may nonetheless be immoral. Here, the legal official faces a genuine crossroads experience: insisting on a legalistic solution precisely fails to address the full range of critiques that apply to her action. As Rawls’ discussion of practices made clear, we can (though we need not) have moral reasons for engaging in a social practice. On each occasion we might be inclined to engage in the practice there is a moral question: ought the agent (morally) to engage in the practice?

Where, as with law, the practice consistently overlaps moral considerations, the question, “ought X to Φ?” is ambiguous as between the moral and legal senses of “ought” (ought\(i\) and ought\(m\)). In such circumstances, reason demands an answer from each perspective, not that the agent hide from the moral perspective by insisting on the legality of her actions, nor — as Hart insisted in the *Separation of Law and Morals*, that the agent misrepresent the legality of actions from the legal point of view as a means of engaging in moral criticism of them. Nettles must be grasped, and though we should be candid that moral reasons cannot affect legal validity, we should also acknowledge that the agent may, at some point, be held morally accountable for her legal actions whether she likes it or not. A healthy individual, like a healthy society, had better make sure that law and morality overlap.

**CONCLUSION**

Hart’s early work presents a strong account of the separation of law and morality. According to the picture I have painted, Hart believed that law is a social practice, one capable of generating valid norms that not only block the operation of moral norms, but are wholesale incommensurable with them. Wholesale incommensurability entails that law, as a form of social practice, constitutes a discrete normative system in which the truth-
conditions of legal propositions are distinct from the truth-conditions of moral propositions: put differently, normative terms such as right, duty, obligation, permission, and so on, have a different meaning in law as in morality, because made true by different facts.

The claim that social sources can generate norms prompted Hart’s claim to engage in descriptive sociology. That claim, however, is much misunderstood, in large part because of his idiosyncratic understanding of sociology. For Hart, the issue was to focus on front end issues about the existence and validity of practice norms: these issues implicate sociology only to the extent that the existence and validity of norms depends upon human activity. Most of Hart’s interpreters have, however, focused on the back-end issue of efficacy, and so emphasized a traditional sociological concern with norms as lived or enforced. This has produced a series of unfortunate misrepresentations of his work: that he promotes a sanction-theory of rules or obligation; that he thinks rules cannot exist without widespread social pressure to conform to them; and that his understanding of rules or obligation substitutes social pressure for normativity. The wholesale incommensurabilist approach, one that re-emphasizes descriptive sociology as at the center of his theory of law and obligation, can account for each of these objections.

It is worth re-emphasizing, in concluding, the adjudicative impact of Hart’s claim that law and morality are conceptually separate, at least as presented in the Separation of Law and Morals. Hart certainly rejects the Razian thought that judges must expressly claim that laws are moral if they are to exercise legitimate authority. Hart’s strong separation of law and morality entails that legal legitimacy is not dependent upon morality. Judges may expressly claim the law is immoral while at the same time considering themselves bound by law. That, indeed, is the moral of the Nazi informant. Equally important, however, is Hart’s claim that legal agents may be motivated to engage with and maintain the law for any reason or no reason: what Gardner has called “law as a leap of faith.”

Hart’s Nazi informant example is a frontal attack on legalistic understandings of judicial (or lay) motivations for action. While the law may provide a means of claiming authority to do engage in a contract, transfer property, punish offenders, or denounce political dissidents, the decision to engage in the social practice of law is, for Hart, essentially external to the practice, and must be assessed by non-legal standards. To engage in a moralistic account of legal motivation is, on Hart’s view, to
make a category mistake: it produces conceptual incoherence by confusing moral standards with legal ones.

The upshot is that Hart takes a distinctively strong view of judicial power: judges can expressly reject morality in the course of their decision-making. The power possessed judicial authority rests on no more, but no less, than a set of social conventions, and judges get the power to decide cases based on those conventions alone. The practice of law enables the judge to change and determine the scope of these conventions, as well as to impose them on others. And the judge may use the practice of law to pursue her own agendas: her underlying moral, political, or personal motivations are irrelevant to the validity of law or of her individual decisions from the legal point of view.

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353 See HART, supra note 1, at 89 (discussing external nature of justifications of the rule of recognition).