The Persistence of Sovereignty and the Rise of the Legal Subject

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In a November 2010 referendum, the Oklahoma electorate passed an amendment to the State Constitution prohibiting courts from “look[ing] to the legal precepts of other nations or culture,” further specifying that “courts shall not consider international or Sharia Law.” Instead, the amendment instructed courts to “uphold and adhere to the law as provided in the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto. . . .” Numerous other states followed suit by considering similar bills aimed at preventing courts from enforcing, considering, or relying on both religious and international law.

Although reaction to this wave of state legislative initiatives has provoked significant commentary or criticism, much of it has focused either on the attack on Sharia law or the rejection of international law. But the simultaneous  

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legislative pushback on both international and religious law is significant in and of itself. Such a two-pronged attack on non-state law reflects a concerted effort on the part of numerous states to consolidate legal authority by asserting the state as the only source of legitimate law. Indeed, at the core of this controversy stands an age-old philosophical dispute over the relationship between sovereignty and law: Does state sovereignty preclude the possibility of law both above the state—that is, international law—and below the state—that is, religious and customary law?

This tension between state and non-state law tracks a long-standing fissure within legal positivism—a bundle of philosophical views that conceptualize law as a social practice separate and apart from considerations of morality and ethics. Many of the early positivists—most notably Thomas Hobbes and John Austin—contended that law was the exclusive province of the sovereign. As a philosophical matter, such sovereignty precluded the existence of any competing legal system; thus, both Hobbes and Austin emphatically argued that customary law and international law were both philosophically incoherent concepts.

Such a perspective has fed continued skepticism of both international and religious law with critics dubious not only of their philosophical coherence, but also their political viability. Indeed, the influence of such “legal centralism”—that is, the view that law remains the exclusive province of the nation-state—persists, with the recent wave of legislation attacking both international and religious law serving as this most recent—and vivid—example. And even

at http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf (noting that “[s]ome commentators couch their objections to courts’ consideration of international or foreign material in the language of sovereignty.”).


8 See infra section, “The Persistence of Sovereignty.”

9 See, e.g., Mehrdad Payandeh, The Concept of International Law in the Jurisprudence of H.L.A. Hart, 21 Eur. J. Int’l L. 967, 970 (2011) (“Nevertheless, doubts about the legal quality of international law may endorse and legitimize proponents of more restrictive approaches to the international legal order. Nevertheless, doubts about the legal quality of international law may endorse and legitimize proponents of more restrictive approaches to the international legal order.”).


11 See, e.g., Civil Rights, AMERICAN PUBLIC POLICY ALLIANCE, at http://publicpolicyalliance.org/?page_id=195 (“Two major legal systems have emerged in America as threats to Constitutional protections and liberties: first, transnationalism, a particularly anti-Constitutional and extremist application of Customary International Law, in opposition to American sovereignty; and second, the Shariah legal doctrine, imposed as a separate legal system in America for Muslims (and eventually for non-Muslims).”).
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with the success of legal pluralism within the academy, legal centralism still drives questions regarding the status of non-state law.

For many, this philosophical trend toward legal centralism reached a peak in the work of H.L.A. Hart. Indeed, conventional interpretations of Hart frequently conclude that law cannot exist in the absence of a complex legal system typified by the "secondary rules" that Hart made famous in his seminal work The Concept of Law. On this reading, Hart’s legal theory presupposed the existence of the nation-state and in particular the institutional infrastructure of legal officials that made the secondary rules possible. In turn, the concept of law is inextricably linked to the concept of a legal system. Thus, John Gardner has argued that "Hart showed that legal norms have no ‘essence,’ nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another." In this way, Hart has been understood as a critic of legal pluralism, embracing instead a positivist brand of “legal centralism” that conceives of law as necessarily linked to the infrastructure of the nation-state.

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13 For example, this was the question addressed by a panel at the 2009 Conference of the American Society of International Law. See generally Antonia Chayes, Thomas Franck, Jose Alvarez & Sean D. Murphy, In What Sense Is International Law Law?, 103 Am. Soc’y Int’l L. Proc. 155 (2009).

14 For a contrary claim, see Jules Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, in Hart’s Postscript: Essays on the Postscript to the Concept of Law 99, 118 (2001) (“The possibility of their being law and purporting to govern as law, however, depends on a rule of recognition.”); see also id. at 121 (“The rule of recognition makes law possible.”).

15 JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 179 (2012); see also Payandeh, The Concept of International Law, supra note 9, at 993 (“While his analysis of international law in Chapter X of The Concept of Law suggests an independent existence of the two concepts [law and legal system], parts of his general theory of law do not reflect this understanding, but rather imply a more intimate relationship between the two.”).

16 See, e.g., Simon Roberts, After Government? On Representing Law Without the State, 68 Mod. L. Rev. 1, 10 (2005) (arguing that Hart’s secondary rules “covertly recall” the “institutional shapes” in “which government and law are cemented securely together” and contending that “any claim that Hart encourages us to think about law as something other than the law of a centralised polity would be misleading.”); Nicola Lacey, Analytical Jurisprudence Versus Descriptive Sociology Revisited, 84 Tex. L. Rev. 945, 959 (2006) (noting that legal pluralists have “long criticized” Hart for “giving . . . priority or distinctiveness to state law”); Nick Barber, The Rechtsstaat and the Rule of Law, 53 U. Toronto L.J. 445, 450–51 (2003) (“Pluralism presents a model of the legal universe in which legal systems and institutions can conflict and overlap. The classic model of the legal order, advanced by Hart and Kelsen, resembled a pyramid. At the top of the structure was the Grundnorm, or rule of recognition, which served to both legally validate and identify the remaining rules of the system. The pluralist view, in contrast, suggests that there can be several legal orders in a given territory, each of which asserts its supremacy over the others.”).
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But while some of Hart’s text is susceptible to this view, there is much in *The Concept of Law* that indicates Hart had something very different in mind. Indeed, in his discussion of both customary law and international law, Hart appears to argue that law can exist in the absence of a legal system. Thus, contrary to many conventional interpretations, Hart provided an alternative conception of law that placed the legal subject – and not the legal authority – at the center of legal theory. By focusing on the legal subject, Hart predicated the existence of law not on the existence of a robust legal system, but on the legal subject’s experience of legal obligation.

By shifting the concept of law, Hart denied that law was necessarily tied to the edicts of a sovereign or even a legal system. Thus, he argued that it would be a mistake to interpret the citizenry’s recognition of non-state law as a threat to the nation-state’s sovereignty. To the contrary, recognizing the existence of other forms of law – such as international or religious law – represents an understanding that the modern-day legal subject often participates in multiple social practices that entail a variety of expectations and a litany of obligations. And on this account, Hart’s theory embraces a form of legal pluralism, willing to understand law as possible outside the confines of the nation state’s legal system.

Of course, Hart’s theory is positivistic and therefore avoids providing any normative consequences stemming from the distinction between law and legal system. But emphasizing this distinction serves as a useful conceptual framework for exploring normative responses to conflicts between state and non-state law. If the nation-state is to successfully find ways to enable the legal subject to navigate the significant – and often conflicting – demands of alternative forms of law, it cannot simply ignore these other forms of law via legislative fiat. Instead, legislatures must openly encourage discussion and coordination of legal obligations so as to promote the evolution of a social practice that can address the unique dilemmas experienced by individuals who understand themselves as subject to the demands of multiple forms of law.

This chapter proceeds in three parts. In Part I, I consider the work of two early positivists – Thomas Hobbes and John Austin – each of whom served as important interlocutors for Hart in *The Concept of Law*. In so doing, I consider how both Hobbes and Austin understood the concept of law as inextricably

To be sure, one could also be of the view that, on Hart’s account, law lacked substance, but still argue that Hart’s concept of law allows for legal pluralism. But for many of Hart’s critiques, these two claims these critiques are linked; law lacks any independent substance and therefore can only be understood as norms issued by a centralized legal system with exclusive authority over a particular geographic area.
linked to the notion of sovereignty. Part II considers Hart’s own legal theory, focusing on how Hart decoupled the link between law and sovereignty. In turn, I consider some of the primary features of Hart’s own legal theory, including the internal point of view and the distinction between primary and secondary rules. In Part III, I argue that Hart believed law could exist even in the absence of a legal system, allowing for the possibility of a form of legal pluralism. I then further elaborate on this possibility of law without a legal system, emphasizing the importance of the distinction for understanding the dilemmas of the legal subject.

**The Persistence of Sovereignty**

Hart’s argument in *The Concept of Law* served as a response to early legal positivists and their attempt to ground the concept of law in absolute sovereignty. On such early positivist accounts, law could be created only by the utterances of an unbounded authority. In turn, the very notion that a sovereign could submit to some sort of law of nations or that customary law could coexist within the jurisdiction of the sovereign was nothing short of incoherent. Although many early positivists converged on such a view, they differed in their philosophical justifications. Indeed, two of the most notable early positivists – Thomas Hobbes and John Austin – provided divergent accounts of why the concept of law was inextricably linked to a sovereign authority. And it was Hart’s attempt to respond to these two divergent philosophical justifications that ultimately led to his decoupling the philosophical link between the concept of law and the concept of a legal system. In this way, understanding Hart requires that we first explore the theories of both Hobbes and Austin and the origins of their philosophical antipathy for non-state law.

*The Concept of Law and Hobbes’s Leviathan*

Few philosophers have stressed the connection between law and sovereignty more than Thomas Hobbes in *Leviathan*. Hobbes approached the question of law through the prism of political origins, arguing that our political structure is created in response to the hazards of the state of nature. Thus, for Hobbes, the starting point for his legal theory was the state of nature – what he described as “a time of war where every man is enemy to every man”17 – which Hobbes famously characterized as “nasty, brutish and short.”18

18 Id.
On Hobbes’s account, the only way to avoid the devastation of the state of nature is to establish a system of government that could control the natural passions of man. And Hobbes famously believed that the only way to inspire enough fear and awe sufficient to extract society from the state of nature was to establish a single authority to rule over society.19 Hobbes described this all-encompassing authority as the “that great LEVIATHAN” and “by this authority . . . he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad.”20

For the Leviathan to inspire sufficient fear and awe to bring society out of the state of nature, Hobbes believed his sovereignty needed to be uncompromised. Accordingly, Hobbes argued that the sovereign could be the subject of no entity save god,21 and could not even be the subject of his own law.22 Indeed, the sovereign could not submit to the law of another nation; such submission would terminate his status as a sovereign.23 In this way, Hobbes divided society into rulers and ruled – sovereigns and subjects: “he that carryeth this person is called sovereign, and said to have sovereign power; and every one besides, his subject.”24 And it is the sovereign that serves as the exclusive source of law, using law as a tool to ensure that society does not slip back into a state of nature.25

Focusing on law from the perspective of the sovereign, Hobbes rejected the possibility of non-state law. Indeed, the very notion of customary law – that is, customary legal norms experienced by legal subjects – was philosophically incoherent. On Hobbes’s account, no other law could exist within the sovereign’s jurisdiction because there could be no source of law besides the sovereign: “When long use obtaineth the authority of a law, it is not the length of time that maketh the authority, but the will of the sovereign signified by his silence. . . .”26 To allow for other sources of law would detract from the sovereign’s exclusive authority thereby undermining his ability to deploy law as a tool to impose the fear and awe necessary to maintain social order.

19 Id. at 227.
20 Id. at 227–28.
21 Id. at 265 (“[O]therwise than as he himself is the subject of God, and bound thereby to observe the laws of nature”).
22 Id. at 313 (“For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjecti on by repealing those laws that trouble him, and making of new; and consequently he was free before.”).
23 Id. at 273.
24 Id. at 228.
25 Id. at 315.
26 Id. at 313.
Accordingly Hobbes could not countenance pockets of law within the sovereign's nation-state – that is, pockets of law below the state.

The Concept of Law and Austinian Commands

The fact that John Austin’s theory of sovereignty should be equally as unwilling as Hobbes’s to allow for non-state law is, at least at first glance, somewhat surprising. As noted, Hobbes’s conception of sovereignty was driven by his dismal characterization of humanity in the state of nature. According to Hobbes, the only way to ensure that people emerged from the nasty and brutish war of all-against-all was to establish the all-powerful Leviathan as unlimited sovereign over the nation-state. However, notwithstanding his overall admiration of Hobbes,27 Austin derided the notion of a state of nature.28 But Austin’s theory still rejected the possibility of non-state law because non-state law failed to satisfy the conditions of legality under Austin’s command theory of law.

Austin’s legal theory builds on his intuition that laws are a subset of commands. Commands, according to Austin, are “significations of desire,”29 which is distinguished “by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.”30 In this way, Austin envisioned the subjects of commands being duty bound to the person issuing the command.31 Laws, according to Austin, are simply commands that “oblige generally to acts or forebearances of a class.”32

On Austin’s account, the fact that laws are a subset of commands meant that laws could only “proceed from superiors, and to bind or oblige inferiors.”33 That laws can only be issued by superiors flows from Austin’s definition of legal superiority: “the term superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct as one wishes.”34 Accordingly, Austin presented what he understood as a tautology: laws are commands backed by the threat of sanctions. In turn,

27 John Austin, The Province of Jurisprudence Determined 231 n.22 (Wilfred E. Rumble ed., 1995) (writing of Hobbes “I know of no other writer (excepting our great contemporary Jeremy Bentham) who has uttered so many truths, at once new and important, concerning the necessary structure of supreme political government, and the larger of the necessary distinctions implied by positive law”).
28 See id. at 253–81.
29 Id. at 21.
30 Id.
31 Id. at 22.
32 Id. at 25.
33 Id. at 29.
34 Id. at 30.
laws – by definition – can only be issued by entities that have the ability to impose such sanctions – that is, by superiors.\(^{35}\)

Positing that laws could be issued only by superiors required Austin to define who qualified as a superior. First, for an entity to qualify as a superior, he had to be “certain or determinate” such that he could formulate the intent required to issue a command.\(^{36}\) Again, this condition was predicated on Austin’s view that laws were a subset of commands; laws had to “flow from a determinate source” because each command, by definition, entails “a wish that another shall do or forebear.”\(^{37}\) And only “a determinate source” could formulate an intent to “wish that another shall do or forebear.”

Second, to qualify as a superior entailed two other related characteristics: “the bulk of the given society are in the habit of obedience or submission to a determinate or common superior” and that superior “is not in the habit of obedience to a determinate human superior.”\(^{38}\) This final condition of legality led Austin to divide political society into two distinct groups whose relation to each other could be expressed as “the relation of sovereign and subject, or the relation of sovereignty and subjection.”\(^{39}\)

Given these conditions of legality, Austin’s concept of law treated the very notion of customary law as a conceptual impossibility. Proponents of customary law, according to Austin, mistakenly conceived of such customary obligations as legal obligations “because the citizens or subjects have observed or kept them.”\(^{40}\) Austin found such arguments deeply misguided; customary obligations are established “by spontaneous adoption of the governed, and not by position or establishment on the part of political superiors.”\(^{41}\) Therefore, because the customary laws were not issued by a political superior, they cannot be considered law.\(^{42}\) Accordingly, there could be no other forms of law circulating within the province of the nation-state. All such forms of law are promulgated by political inferiors and therefore fail to satisfy Austin’s requirements to be considered law.

Similarly, Austin rejected the possibility of international law. To exist as an independent political society, the sovereign “must not be habitually obedient to a determinate human superior.”\(^{43}\) If a political society stood as subordinate

\(^{35}\) Id. at 31.

\(^{36}\) Id. at 118.

\(^{37}\) Id. at 117, 118.

\(^{38}\) Id. at 166.

\(^{39}\) Id.

\(^{40}\) Id. at 34.

\(^{41}\) Id.

\(^{42}\) Id. (“[C]ustomary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive laws, are not laws or rules properly so called.”).

\(^{43}\) Id. at 170.
to another, then it could not claim to have its own sovereign; instead, it was “merely a limb or member of a society political and independent.”\textsuperscript{44} Instead, Austin understood international law as a form of political morality merely “imposed upon nations of sovereigns by opinions current among nations.”\textsuperscript{45} Thus by defining law as a command issued by a determinate political superior, Austin foreclosed the possibility of non-state law. Both international law and customary law represented misnomers to Austin, as each improperly adopted the moniker of law without being issued by a determinate political superior. Like Hobbes before him, Austin linked his conception of law to his understanding of sovereignty. Without a political sovereign, there could be no law.

\textbf{SEVERING THE LINK BETWEEN LAW AND SOVEREIGNTY}

As exemplified by Hobbes and Austin, legal positivism before Hart was hostile to the possibility of non-state law. Although Hobbes and Austin each began from different premises, both concluded that law could only be issued by the sovereign. Moreover, the sovereign could not be the subject of the law; such a possibility represented a conceptual mistake.

In fact, to claim the status of law within the jurisdiction of a nation-state was to attack the very foundations of that nation-state’s authority. For both Hobbes and Austin, the sovereign could exist only to the extent he maintained exclusive authority within his borders. If law existed above the sovereign – in the form of, for example, international law – the sovereign would cease to retain his title, transforming him into a mere limb of the ultimate political superior. Similarly, to claim that law existed below the sovereign – in the form of, for example, customary or associational law – was to claim that such customs or associations were not, in reality, governed by the nation-state and thereby reject the sovereignty of the nation-state.

In this way, sovereignty and law were inextricably intertwined – each necessary conditions for the other. Accordingly, competing claims to the status of law constituted more than philosophical triflings. Such claims were outright attacks on state sovereignty – forms of political treason – because to claim law existed outside the state was to relocate sovereignty outside the state as well. One could not claim that international law existed above the nation-state without undermining the nation-state’s sovereignty – or, to use Austin’s phrase, turning the nation-state into the “mere limb” of another sovereign. And one could not claim to be following customary law without identifying a

\textsuperscript{44} Id. at 171.

\textsuperscript{45} Id. at 123.
competing sovereign, thereby undercutting the authority of the nation-state. By binding law and sovereignty so closely together, Hobbes and Austin turned the philosophical concept of law into a zero-sum game with the stakes no less than claim to ultimate political authority.

Many view Hart’s legal theory as continuing in this positivist philosophical tradition by linking the concept of law to the nation state’s legal system. On this account, Hart understood a complex series of secondary rules – most notably, the rule of recognition – as necessary preconditions for the existence of law. And by linking the concept of law to these secondary rules, Hart – for all intents and purposes – adopted a legal theory that understood law “as the law of a centralised polity,” rejecting the possibility of non-state law coexisting alongside the nation-state. In this way, law was simply defined by reference to a legal system with all of its attendant complexities and infrastructure.

Although some of Hart’s statements support such a view, much of the text in The Concept of Law provides the groundwork for a radically different approach to both legal pluralism and non-state law. Indeed, contrary to some of his critics, Hart predicated his legal theory on a distinction between the concept of law and the concept of a legal system, providing a radical alternative to earlier legal positivists. This distinction emerged from Hart’s dual response to earlier positivist theories that mistakenly bound law and sovereignty in one inseparable bundle. By contrast, Hart’s legal theory disaggregated the concepts of sovereignty and law, opening up the possibility of law outside the state. To do so, Hart adopted an alternative methodological approach to the questions of law, focusing not on the role of the sovereign in the creation of law, but on the experience of being a legal subject. In so doing, Hart conceived of law as

46 Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, supra note 15, at 118 (“The possibility of their being law and purporting to govern as law, however, depends on a rule of recognition.”); see also id. at 121 (“The rule of recognition makes law possible.”).


48 Nick Barber, The Rechtsstaat and the Rule of Law, supra note 16, at 450–51 (“Pluralism presents a model of the legal universe in which legal systems and institutions can conflict and overlap. The classic model of the legal order, advanced by Hart and Kelsen, resembled a pyramid. At the top of the structure was the Grundnorm, or rule of recognition, which served to both legally validate and identify the remaining rules of the system. The pluralist view, in contrast, suggests that there can be several legal orders in a given territory, each of which asserts its supremacy over the others.”).

49 Gardner, Law as a Leap of Faith, supra note 15, at 179 (“Hart showed that legal norms have no ‘essence’, nothing that makes them distinctively legal, except that they are norms belonging to one legal system or another”); see also Mehrdad Payandeh, The Concept of International Law, supra note 9, at 933 (“While his analysis of international law in Chapter X of The Concept of Law suggests an independent existence of the two concepts [law and legal system], parts of his general theory of law do not reflect this understanding, but rather imply a more intimate relationship between the two.”).
analytically distinct from the nation-state, providing important insight into the relationship between state and non-state law.

**Legal Systems and Law’s Persistence**

Much of Hart’s legal theory emerges from a critique of Austin’s concept of law and the problematic link between law and sovereignty. In critiquing Austin’s definition of law, Hart argued that Austin’s theory failed to account for laws that were not simply commands backed by threats. Most notably, Hart highlighted how rules that confer power failed to fit Austin’s definition of law.\(^{50}\) As noted, Austin had argued that sovereignty exists when “the bulk of the given society are in the habit of obedience or submission to a determinate of common superior.”\(^{51}\) Such circumstances identify the sovereign as the supreme legal authority able to enact and impose law on his legal subjects.

But such a view, Hart noted, failed to explain the persistence of a legal system.\(^{52}\) Thus, the fact that citizens recognize the existence of rules governing legal succession indicates that legal authority is not simply a function of a widespread habit of obedience within a given society.\(^{53}\) In Hart’s example, the fact that a society may recognize that Rex II has the right to rule after his father, Rex I, dies cannot be explained by a definition of sovereignty that predicates the right to rule on a widespread habit of obedience.\(^{54}\) A political society will typically recognize such a right to succession long before there exists any widespread habit of obedience to the new sovereign. In this way, Hart argued that some elements of law must precede legal authority.

Moreover, not only did Hart contend that law preceded legal authority, but it also persisted after the demise of a particular authority. Examples abound of instances where a law’s legitimacy long-survived the life of the sovereign promulgating them. Thus, it seemed implausible to understand law’s legitimacy as contingent on the obedience to the sovereign who issued the law.

To explain the continuity of legal systems, Hart sought to replace Austin’s vision of habitual obedience to a certain and determined sovereign with a legal system that incorporates a set of not only “primary rules,” but also “secondary rules.” On Hart’s account, primary rules describe a set of laws that require individuals “to do or abstain from certain actions, whether they wish to or not.”\(^{55}\) Secondary rules, on the other hand, “provide that human beings may

\(^{50}\) Hart, The Concept of Law, supra note 50, at 50–78.

\(^{51}\) Austin, The Province of Jurisprudence Determined, supra note 27, at 166.

\(^{52}\) Hart, The Concept of Law, supra note 50, at 51–66.

\(^{53}\) Id. at 52–60.

\(^{54}\) Id. at 53–54.

\(^{55}\) Id. at 81.
by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.” Put succinctly, “rules of the first type impose duties; rules of the second type confer powers, public or private.”

Secondary rules, argued Hart, explained how legal systems persist even as the system’s leadership changes. Without secondary rules, a legal system would lack methods to identify the content of its rules, choose to change its rules, and determine when one of its rules had, in fact, been broken. Thus, Hart argued that a legal system required a “rule of recognition,” which would provide the method for determining when a rule had become a legal rule of the group. Such a rule would avoid rampant uncertainty regarding what were the mutually shared legal rules within the group. In addition, Hart contended that a legal system required some sort of “rule of change,” which provided for adapting the rules to new circumstances so as to ensure that group’s legal rules did not become static. And finally, Hart asserted that a legal system required “rules of adjudication,” which enabled the group to determine when rules had been broken.

Of these rules, Hart emphasized the centrality of the rule of recognition to the creation of a legal system. It is the rule of recognition, explained Hart, that facilitates discussion within the group regarding what the law is. Thus, “[t]o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.” In this way, the rule of recognition serves as not only the supreme rule of a legal system, but also as a necessary rule for the existence of a legal system. As Hart argued, the rule of recognition “is logically a necessary condition of our ability to speak of the existence of a single legal system” because without a mutually shared rule of recognition “the characteristic unity and continuity of a legal system would have disappeared.”

For a legal system to exist, there must be a shared standards regarding what constitutes legality so that both those applying the law and those adhering to the law are participating in a common social practice. Moreover, this rule

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56 Id.
57 Id.
58 Id. at 92.
59 Id. at 94–95.
60 Id.
61 Id. at 95–96.
62 Id. at 96–97.
63 Id. at 103.
64 Id. at 116.
of recognition must be shared by those applying the law from the internal point of view; it must serve as a “public, common standard of correct judicial decision.” If officials fail to share a rule of recognition, a legal system cannot hope to maintain consistency and continuity in its notions of legality as applied in legal proceedings; officials must be able to critique deviations from the standards of legality prescribed by the rule of recognition. Indeed, without such a rule of recognition, a legal system would devolve into chaos, failing to have coordinated standards for the application of the requisite social pressure necessary to maintain a legal system.

For these reasons, Hart articulated two necessary and sufficient conditions for the existence of a legal system. First, “those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed.” Second, “its rules of recognition specifying the criteria of legal validity and its rule of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.” Where these conditions obtain, a legal system’s continuity will not be threatened by transition from one sovereign to another. Instead, adherence to secondary rules that enable a set of officials to identify and interpret the law ensures that legal systems can continue even as the nation-state transitions from one particular sovereign to another.

**Law and Legal Pluralism**

While Hart’s secondary rules explained the continuity often exhibited by legal systems, it has also served as the source of significant critique, especially from legal pluralists. Legal pluralism captures a wide range of anthropological, social science, and legal thinking, capturing “a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual).” On this basis, “legal pluralism challenges a perceived monopoly of the state in making and administering law.”

According to his critics, Hart’s emphasis on secondary rules forecloses the possibility of embracing legal pluralism. Hart is explicit that secondary rules of
recognition, change, and adjudication are necessary and sufficient for the existence of a legal system. Such secondary rules largely presuppose the existence of state government with its attendant officials and institutions. For example, Simon Roberts contends that Hart’s secondary rules “covertly recall” the “institutional shapes” in “which government and law are cemented securely together.” “In this respect,” claims Roberts, “any claim that Hart encourages us to think about law as something other than the law of a centralised polity would be misleading.” Others have echoed similar sentiments regarding what we might refer to as Hart’s statist turn.

There are passages in The Concept of Law that justify the criticisms leveled against Hart by legal pluralists. Hart notes that in complex legal systems, it is the officials of the legal system who must accept secondary rules as critical common standards of behavior. This is because in such complex legal systems it is the officials who adopt and adapt legal rules, thereby applying them to particular facts and circumstances. Accordingly, it is official behavior that must live up to the internally held standards embodied in the rules of recognition, change, and adjudication. The average citizen, explains Hart, might simply be “deplorably sheeplike” in simply following the commands of officials without adopting from an internal point of view the standards of validity within the legal system. Thus for Hart, secondary rules are necessary for the existence of a legal system — but participation of the citizenry in the social practice of legal validity is not. In this way, Hart’s conception of a legal system mimics the hard distinction between legal subject and legal sovereigns typical of Hobbes and Austin, once again raising the sovereign nation-state to the pinnacle of the legal system.

If true, then Hart’s reformulation of the positivist project might be less ambitious than initially thought. Indeed, some have pursued this line of analysis, describing Hart as having merely “refined earlier notion of law as sovereign

71 Id.
72 Id.
73 Id.
74 See, e.g., Nicola Lacey, Analytical Jurisprudence Versus Descriptive Sociology Revisited, 84 Tex. L. Rev. 945, 950 (2006) (noting that legal pluralists have “long criticized” Hart for “giving . . . priority or distinctiveness to state law”); William Twining, General Jurisprudence, 15 U. Miami Int’l & Comp. L. Rev. 1 (2007) (describing Hart as an example of “[t]he great bulk of mainstream Western legal theory and legal scholarship in the twentieth century[,] which] focused on the domestic law of municipal legal systems, sometimes extending to public international law in the narrow sense of law governing relations between states (‘The Westphalian Duo’)).

75 Hart, The Concept of Law, supra note 50, at 117.
command," with state law continuing to serve as the paradigm for analyzing the concept of a legal system. On such an account, Hart's emphasis on secondary rules constituted a missed opportunity to reconceptualize law beyond the state.

But this conclusion underestimates Hart's contribution to ongoing debates regarding legal pluralism. In fact, a close reading of Hart would appear to require a rethinking of his so-called statist turn. Indeed, to appreciate Hart's oft-ignored contribution to the legal pluralism literature requires recalling that his theory not only sought to explain the continuity of law, but also the experience of the legal subject. In meeting this twofold objective, Hart advanced a somewhat de-emphasized distinction between two fundamental but disparate concepts: the concept of law and the concept of a legal system.

For Hart, one of the key features distinguishing laws from mere habits of obedience was the "internal aspect" of such social rules. According to Hart, such an internal point of view is typified by a shared "critical reflective attitude to certain patterns of behaviour as a common standard." This shared view "should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified." Hart noted that in this way his theory shared an important characteristic with Austin's theory: Both "started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory." Hart posited this internal point of view as a contrast to an external point of view, where the term legal obligation is entirely predictive; that is, an observer from an external point of view speaks of legal obligations simply in terms of the likelihood that individuals will comply with a stated rule. For Hart, to speak merely from an external point of view missed a core feature of how law functions. In one of his most oft-cited examples, Hart describes this distinction as follows:

76 See H. Patrick Glenn, A Transnational Concept of Law, in The Oxford Handbook of Legal Studies 839, 842 (Peter Can & Mark Tushnet eds., 2003) ("In the common law Hart refined earlier notions of law as sovereign command and explained national legal systems as a combination of primary rules of obligation, directed to citizens, and secondary rules of recognition and change (of state primary rules) and adjudication. Hart was sufficiently confident of state law that he could present his analysis as simple description . . . and as general or universal in character.").
77 Hart, The Concept of Law, supra note 50, at 57.
78 Id.
79 Id. at 82.
Michael A. Helfand

[The observer’s] view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural sign that people will behave in certain ways... In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them, the red light is not merely a sign that others will stop: they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation.80

Accordingly, Hart’s concept of law replaced the Hobbesian or Austinian sovereign with a shared commitment to a social practice, whereby individuals jointly commit to mutually held social rules. On such an account, law cannot simply be understood from an external point of view which defines legal obligation as a prediction of conforming conduct; instead, members of a social group experience law from the internal point of view, where legal obligation captures their experience of obligation to mutually shared rules. And deviation from such rules is understood by members of the social group to be sufficient reason for criticism and sanction.

The importance of this distinction to Hart’s own legal theory cannot be overstated. Hart’s legal theory conceives of law as a social practice where notions of legal obligation are premise upon “generally accepted” rules that are “supported by social criticism and pressure for conformity.”81 Such rules give rise to obligations “when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate is great.”82 In turn, Hart understands such obligations to rise to the level of legal obligations where the forms of pressure include the use of physical sanctions: “when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor closely administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law.”83 And here is the key point: Hart is explicit in his view that secondary rules as applied by legal officials are not necessary for the existence of law – even though, as noted above, they are necessary for the existence of a legal system.84

80 Id. at 90.
81 Hart, The Concept of Law, supra note 50, at 57.
82 Id. at 86.
83 Id.
84 Payandeh rejects this possibility, in part, because Hart describes the introduction of secondary rules as “a step from the pre-legal world into the legal world.” Payandeh, The Concept of International Law, supra note 9, at 94. But Hart is clear in that same discussion that in the
Of course, Hart’s emphasis on the role of physical sanctions as a distinguishing characteristic of law poses a problem. Much of Hart’s critique of Austin focused on the error of defining laws as commands backed by threats or sanctions. To do so, argued Hart, conceptualized law as merely a predictive enterprise where the existence of a legal obligation simply constituted a statement predicting that the legal subject, in light of the looming sanctions, was likely to comply. But if Hart himself understood law as intertwined with the existence of physical compulsion, his theory would appear at first glance to be subject to a similar critique.

Hart was keenly aware of this potential pitfall and his response emphasized the internal aspect of law: “The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of a hostile reaction or deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person’s case falls under such a rule.”

The physical sanctions imposed by a social group for noncompliance do not serve as the source of the legal obligation. They simply indicate the degree of importance attached to the social rules by members of the group. In this way, physical sanctions serve to measure the degree to which members of the group experience – from the internal point of view – the importance of compliance with certain mutually shared obligations and the need for social criticism where members of the group fail their obligation to comply.

Here we begin to see how Hart’s concept of law builds upon the internal point of view. The concept of law operates on the legal subject. The legal subject experiences, as a member of a social group, obligations. Failure to comply with these obligations is understood by members of the group to be sufficient reason for social criticism and in turn physical sanction. At the core of the concept of law is the experience of being a legal subject; the legal subject both experiences obligation and, as a member of a social group, opens himself up to the possibility of sanctions. Thus, the possibility of sanction is an experience inextricably intertwined with a self-understanding that includes membership in the social group.

absence of secondary rules, “the rules by which the group lives will not form a system, but will simply be a set of separate standards. . . .” Hart, *The Concept of Law*, supra note 50, at 92 (emphasis added). It seems clear, although not without some ambiguity, that Hart conceives of a social group governed by merely primary rules as having law, but not a legal system. He therefore describes such societies as “pre-legal” in the sense as they do not yet have a legal system.

Highlighting the internal experience of being a legal subject brings the contrast between the concept of law and the concept of a legal system into clearer focus. In Hart’s view, the subject of the concept of law is the legal subject while the subject of the concept of a legal system is the legal official. Importantly, the legal subject can experience legal obligations even in the absence of an official world that coordinates—through secondary rules—those legal obligations into an actual legal system. Thus one of Hart’s key contributions to legal theory is the possibility of being a legal subject—with the potential for enduring physical sanction—in the absence of a system coordinating those obligations.86

This gap between law and legal system is most prominent in Hart’s discussion of international law. From the outset of his discussion, Hart emphasizes the gap between law and legal system, indicating that international law might fit squarely between the two concepts: “[T]hough it would accord with usage to treat the existence of this characteristic union of [primary and secondary] rules as a sufficient condition for the application of the expression ‘legal system,’ we have not claimed that the word ‘law’ must be defined in its terms.”87 From there Hart moves on to reject arguments that refuse to accord international law the status of law on the grounds that it lacks an organized method to impose sanctions: “To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats.”88 On Hart’s account, legal obligation remains viable even in the absence of organized sanctions. This is because law can exist even in the absence of secondary rules; a social group can simply maintain a series of legal obligations without an overarching legal system that coordinates legal validity, change and adjudication.

Hart next critiques those who argue that there can be no international law that is consistent with the sovereignty of nation-states. Such arguments, Hart notes, echo the claims of early positivists—such as Hobbes and Austin—who argued that to be sovereign meant to stand outside the scope of legal obligation; on such accounts, to be a sovereign state would preclude being

86 On this account, it would be a mistake to characterize the rule of recognition as necessary to Hart’s concept of law—just to his concept of a legal system. For a contrary claim, see Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, supra note 15, at 118 (“The possibility of their being law and purporting to govern as law, however, depends on a rule of recognition.”); see also Id. at 121 (“The rule of recognition makes law possible.”).
87 HART, THE CONCEPT OF LAW, supra note 50, at 213.
88 Id. at 217.
subject to international law. Having already criticized both the Hobbesian and Austinian conceptions of sovereignty, Hart reiterates the incoherence of the argument as applied to international law. To predetermine that states cannot be subject to international law ignores the possibility that, as a matter of social fact, there exists a social practice among states to abide by a collection of rules – rules referred to as international law – and that failure to comply opens state to the possibility of criticism. As a matter of fact, Hart notes, “when the rules [of international law] are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts.”

Such behavior indicates the existence of a social practice where the participants, from an internal point of view, understand themselves to be legally obligated to conform to a body of rules described as international law.

Hart’s reservations regarding international law stem from the lack of an institutional framework to determine legal validity and impose legal sanctions. Indeed, Hart believed that this lack of framework was most apparent in the lack of a “basic rule providing general rules of validity for the rule of international law.” As a result, Hart argued that international law is best understood not as a “system but a set of rules.” Hart therefore compared international law to other primitive legal societies, where there exist primary rules without overarching secondary rules.

But international law’s status as law – as opposed to a legal system – was not, on Hart’s account, a reason for belittling international law. To the contrary, Hart thought that attacks on the structure of international law as lacking a basic rule missed the possibility of legal obligation existing even in the absence of a legal system. Indeed, “if rules are in fact accepted as standards of conduct, and supported with appropriate forms of social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules. . . .” Moreover, Hart believed that while international law constituted a set of independent legal obligations, the social practices between states were in the process of evolving whereby international law might soon become a legal system. In this way, international law served as a paradigmatic example of law without a legal system. On Hart’s account, the existence of law did

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89 Id. at 220.
90 Id. at 232–37.
91 Id. at 236.
92 Id.
93 Id. at 232.
94 Id. at 234.
95 Id. at 236–37.
not depend on the state and its institutional infrastructure; it emerged from the legal subject’s experience of shared obligation, criticism and physical sanctions.

**LEGAL SUBJECTS AND LEGAL PLURALISM**

This all raises a final and ultimate question: why did Hart – and why should we – care about the gap between the existence of law and a legal system? Put differently, is this philosophical distinction merely a matter of semantics or does it tell us something important about the interaction between state and non-state law? My own view – which I believe tracks Hart’s own intuitions – is the latter. While Hart intended his legal theory to serve as a merely descriptive project, his concept of law provides a philosophical diagnosis that can enable the nation-state to better address the challenges of non-state law. To understand why requires appreciating how Hart’s conceptual shift – focusing the concept of law away from the legal sovereign and toward the legal subject – inverted the way legal positivists related to the concept of non-state law.

First, Hart’s embrace of law without the nation-state opens the door for legal pluralism, recognizing the vulnerability inherent in the experience of the legal subject. And once the nation-state recognizes this vulnerability, the obvious failings of legislative initiatives – like the anti-Sharia initiatives in the United States – come into sharper focus. Second, Hart’s distinction also provides a framework to appreciate the depth of conflicts between state and non-state law – or, to use Hart’s terms, between law and legal system. While conflicts between legal systems entail tensions between symmetrical entities, conflicts between law and legal system place law in a far more vulnerable position, lacking the secondary rules that allow for coordination of efforts within a legal system.

**Embracing the Legal Subject and the Possibility of Legal Pluralism**

As previously noted, Hart’s discussion of customary and international law emphasizes that such bodies of rules can, in fact, be considered law. In making these claims, Hart adopted the perspective of the legal subject, highlighting the internal point of view as experienced by members of the relevant legal community. In this way, Hart’s concept of law is premised on the vulnerability of the legal subject to the distinctive forms of social pressure that typify uniquely

\[\text{id} \text{ at 239-40 (“My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law.”)}\]
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legal obligations: “when physical sanctions are prominent or usual among the forms of pressure . . . we shall be inclined to classify the rules as primitive or rudimentary forms of law.” Indeed, in his discussion of the minimal content of natural law, Hart emphasizes the importance of human vulnerability and the fact of limited resources as underlying the human need for social practices such as law and morality. Law exists where individuals experience an internal sense of obligation to comply with the rules of a social practice; moreover, they experience such obligations under conditions where the failure to comply with such rules is met not simply with criticism, but with physical sanctions. This twofold combination – the internal experience of obligation and the threat of physical sanction – highlights law’s firm grasp on the individual legal subject.

Importantly for Hart, this sense of vulnerability and obligation can exist in the absence of an all-powerful sovereign. Thus, Hart’s concept of law opens the door for a brand of legal pluralism where multiple social practices of law coexist in the same geographic area. As examples, religious law, customary law and international law all, on Hart’s account, can exist simultaneously alongside the law of the nation-state. So long as the legal subject has an internal experience of pressure to conform to shared rules, then the legal subject can be said to experiencing law.

Hart, of course, understood his legal theory as descriptive, and therefore did not explicitly embrace a set of normative consequences. However, recognizing that the legal subject’s experience stands at the heart of legality can still serve as first step in considering how the nation-state should treat various forms of non-state law. Indeed, on such an account, to identify various forms of non-state law – such as religious or customary law – is to identify instances where individual citizens face significant social pressure, criticism, and sanction for noncompliance with shared rules. In turn, members of communities with non-state law will often aim to organize their lives in such ways as to ensure compliance with these shared rules.

Inevitably, these various forms of non-state law will find their way into the courts of the nation-state. This may be because these shared rules will be incorporated into contracts between members – a party might contract, for example, to abide by certain shared rules regarding the financial obligations of marriage. Parties might also incorporate this shared body of law into arbitration agreements, empowering a set of communal authorities to resolve

97 Id. at 86.
98 Id. at 194–95, 196–97
99 See supra note 96.
their dispute in accordance with the shared body of law. Or the conduct required by a particular body of non-state law might conflict with the legal requirements imposed by the nation-state. In all such instances, the nation-state will have to determine how much space to create for non-state law within the law of the nation-state, employing a variety of techniques for resolving these tensions.

But when addressing such tensions, Hart’s theory strongly discourages both courts and legislatures from seeing non-state law as somehow threatening the sovereignty of state law. On Hart’s account, to recognize the existence of non-state law does not entail recognition of a competing sovereign within the border of the nation-state. It is simply a statement about the experience of the legal subject – and a realization that legal subjects often experience significant doses of social pressure, criticism and sanction to justify consideration within the courts of the nation-state. Thus, to reject non-state law – and banish non-state law from the courthouse – amounts to ignoring the experience of the legal subject on account of nonexistent claims of sovereignty.

This type of wholesale rejection of non-state law is best exemplified by the recent spate of anti-Sharia laws in the United States, which generally prohibit courts from considering religious or foreign law in their decisions. In so doing, these legislative initiatives require courts to remove themselves from cases that touch upon the intersection of state and non-state law, unable to take the legal subject’s complex set of commitments both to the nation-state and to their community into account when addressing legal conflicts. This is not to say that courts ought to bend state law to the demands of non-state law. But it would be a terrible mistake for legislatures to prohibit courts from considering non-state law for fear that such consideration undermines the sovereignty of U.S. law.

Indeed, to announce an inflexible rule of rejection prevents the nation-state from accounting for the vulnerable position of the legal subject who


102 Examples of such cases abound in debates over whether law should provide religious accommodations to practices that violate state law. Recent examples before the United States Supreme Court include *Employment v. Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

103 See supra notes 2–4 and accompanying text.
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experiences the internal pull of two legal systems and the attendant criticism and sanctions for noncompliance with their conflicting demands. Where individual legal subjects experience two sets of legal obligations, the possibility for conflict is ever present. And where the potential for conflict exists, so does the possibility that the legal subject will find himself in a position where social criticism and physical sanction is inevitable – he may have to choose which set of legal obligations to comply with at the expense of the other. If the legal subject’s experience of vulnerability stands at the heart of what it means to be law, then the nation-state’s approach to non-state law should be sufficiently nuanced to consider that experience so as to consider the widest range of options when addressing conflicts between state and non-state law. At a minimum, phantom worries about sovereignty should not foreclose courts from accounting for the complex experience of the legal subject. By decoupling the link between law and sovereignty, Hart’s theory reminds us that courts can consider non-state law by simply taking the experience of the legal subject seriously; judicial consideration of non-state law need not be seen as threatening the sovereignty of the nation-state.

Responding to Conflicts Between Law and Legal System

Hart’s concept of law provides insight into the experience of the legal subject by decoupling the link between law and sovereignty. In so doing, his theory refuses to see judicial consideration of non-state law as a threat to the law of the nation-state. But his distinction between law and legal system also raises the stakes of the potential conflict experienced by a legal subject. By drawing the distinction between law and legal system, Hart draws attention to the unique precariousness of being a legal subject without a legal system.

At the core of Hart’s concept of law is the severing of the link between law and sovereignty. As a result, law can exist in the absence of a sovereign. Having severed this link, Hart conceives of law as logically prior to and distinct from a legal system. Where law exists in the absence of a legal system, legal subjects experience the internal aspect of law and are vulnerable to social criticism and physical sanctions imposed by the group. But what makes the experience of the legal subject so precarious is that he experiences the internal aspect of law without the coordinating framework of a legal system. Thus, the possibility of critique and sanction occur in an environment typified by Hart’s three worries about primitive law: uncertainty, static-ness, and inefficiency. Living under law – but not a legal system – requires the legal subject to contend with uncertainty regarding the content of his obligations, the absence of mechanisms to prevent the law from remaining static, and the inefficient use
of social criticism to ensure conformity with social rules. And the legal subject must contend with criticism and sanction without some overarching method – typically embodied in secondary rules – to coordinate these obligations.

This challenge becomes only more fraught when we consider the possibility that such “primitive” forms of law can conflict with a robust legal system. On the standard legal pluralist account, legal systems conflict, but there remains the possibility of coordination – most likely, among officials – to address such conflicts. However, navigating conflicts between law and legal system is significantly more fraught for the legal subject because law exists in the absence of secondary rules.

Consider an individual who experiences legal obligations both as a citizen of a nation-state and a member of a religious community. Where the two come into conflict, the legal subject has little hope for a coordinated effort on the part religious law to modify its rules or alter its imposition of physical sanctions. The religious law might lack the body of secondary rules whereby religious officials might engage the host legal system in a process of coordination in order to enable the legal subject to comply with conflicting legal obligations. This lack of a legal system coordinating the religious law thereby handcuffs the legal subject in his attempt to comply with two sets of legal obligations.

In sum, it is Hart’s identification of law without a legal system that helps us identify the depth of the challenges faced by the legal subject in a world of legal pluralism. It is precisely because such law can exist without the coordination of secondary rules that the legal subject faces immense challenges in navigating conflicts between non-state law and the state’s legal system. Law, in the absence of a legal system, is uncertain, static, and inefficient, leaving it with limited resources to coordinate conflicts with a competing legal system. And it is the legal subject – who experiences legal obligations from both law and legal system – that is left in the unenviable position of facing such conflicts. It is this precarious experience of the legal subject that those who elide the distinction between law and legal system miss.

CONCLUSION

Hart himself claimed that his theory was merely descriptive. It is therefore an unlikely candidate for providing any programmatic approach to addressing such conflicts between law and legal system. Indeed, it is difficult to imagine much about how Hart would have us resolve such conflicts. That being said, Hart’s diagnosis does, at a minimum, provide the philosophical resources to frame contemporary clashes between law and legal system. Most notably, it offers a powerful basis for critique of the contemporary trend among state
legislatures to prohibit courts from considering or referencing religious or international law in their decisions.\footnote{See supra notes 2–6 and accompanying text.}

First, by decoupling the link between law and sovereignty, Hart’s theory avoids the conclusion that mere recognition of another brand of law entails undermining the sovereignty of the nation-state. In this way, Hart’s view stands in stark contrast with those of early positivists such as Hobbes and Austin who believed that recognition of other forms of law were incompatible with the sovereignty of the nation-state. Hart’s concept of law, however, is not premised upon the authority of the sovereign, but instead the experience of the legal subject. Thus, for Hart, law exists where an individual experiences – from an internal point of view – obligations flowing from membership in a social group. Where failure to comply with such obligations opens the individual to both social criticism and physical sanction, the member of the social group can be said to experience something we call legal obligations.

Importantly, to say that an individual experiences law or legal obligations parallel to the legal obligations imposed by the nation-state is in no way contradictory. Hart’s theory allows for the existence of multiples forms of law within the same geographic area – an endorsement of legal pluralism. As a result, for an individual to see himself as subject to multiple set of legal obligations is merely to say that he participates in multiple social practices each of which comes with the potential for social criticism and sanction. But to recognize religious norms as imposing legal obligations in no way undermines the sovereignty of the nation-state. To recognize alternative forms of law is merely to recognize social fact and practice. For state legislatures to pass laws that conceptualize other forms of law as threats to the sovereignty of the United States is to resurrect the positivism of Hobbes and Austin – theories that simply wilt in the face of Hart’s criticism.

Second, and relatedly, Hart’s concept of law highlights the challenges faced by legal subjects when law and legal system collide. In such instances, individuals can be forced to navigate competing demands of two forms of law – the law of the group and the law of the state; however, navigating conflicts between law and legal system is significantly more fraught for the legal subject because law exists in the absence of secondary rules. Thus, in legal communities that lack a legal system, legal subjects must often address conflicts in the absence of secondary rules that help coordinate legal obligations. Without rules of recognition, change, and adjudication, law struggles to adapt, leaving legal subjects in a particularly precarious position when trying to resolve tensions between state and non-state law.
Indeed, this added layer of complexity only further brings into question the tactic of instructing courts to ignore religious law. The strategy of marginalizing non-state law – and prohibiting such law from entering the court room – represents an attempt to bury social facts as opposed to engage them. For Hart, the existence of law – as opposed to the existence of a legal system – is premised upon the experience of the legal subject. The combination of internally experienced social norms – with the attendant possibility of social criticism and physical sanction – highlights the vulnerability of the legal subject as he hopes to comply with a form of law that, in the absence of secondary rules, is uncertain and static.

To address conflicts between other forms of law and the nation-state’s legal system, legal actors will have to coordinate the validity and application of these conflicting legal obligations. Such coordination can evolve only through social dynamics between law and the legal system – the interaction of criticism, sanction, and obligation. And the only way to foster the evolution of a new social practice addressing legal conflicts is by recognizing – and not ignoring – the existence of non-state law. Indeed, if Hart’s concept of law tells us anything, it is that legal obligations arise from independent social practices that do not cease to exist merely because we close our eyes to them. We must be encouraging courts to think more about how to navigate conflicts instead of simply demanding that courts ignore them.