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ATTITUDE AND THE NORMATIVITY OF LAW

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ABSTRACT
Though legal positivism remains popular, HLA Hart's version has fallen somewhat by the wayside. This is because, according to many, the central task of a theory of law is to explain the so-called "normativity of law." Hart's theory, it is thought, is not up to the task. Some have suggested modifying the theory accordingly. This paper argues that both Hart's theory and the normativity of law have been misunderstood. First, a popular modification of Hart's theory is considered and rejected. It stems from a misunderstanding of Hart and his project. Second, a new understanding of the mysterious but often-mentioned "normativity of law" is presented. Once we have dispelled some misunderstandings of Hart's view and clarified the sense in which law is supposed to be normative, we see that Hart's view, unmodified, is well suited to the task of explaining law's normativity.

A central concern of philosophy of law—perhaps *the* central concern—is the so-called "normativity of law."[1] Though only explicitly at the center of discussion for the past half-century or so, law's normativity is supposed to be a pretheoretical datum: a relatively uncontroversial feature of law that rules out all theories of law that fail to account for it. Among these doomed theories, it is often thought, is HLA Hart's theory from *The Concept of Law*.[2] Stephen Perry puts the sentiment clearly: "Hart's own theory of law does not fully escape the difficulties of the Austinian theory that he so successfully criticizes because in the end, he, like Austin, does not take normativity [p. 470] sufficiently seriously."[3] The specific complaint against Hart often goes, roughly, as follows. Hart's

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[1] See David Enoch, "Reason-Giving and The Law", in Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law* (Oxford: Oxford University Press, 2011); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Andrei Marmor, "The Nature of Law", *Stanford Encyclopedia of Philosophy* (2008); Gerald J. Postema, "Coordination and Convention at the Foundations of Law", *The Journal of Legal Studies* 11 (1) (1982), pp. 165-203.
[2] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961/1994).
[3] Stephen Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View", *Fordham Law Review* 75 (2006), pp. 1173.

theory of law is psychological. It makes central appeal to a particular psychological attitude, which is called "acceptance" or "the internal point of view."[4] But normativity does not seem like the kind of thing that can be explained merely by appeal to an attitude. The fact that some people have an attitude does not seem to explain the fact that they, or others, ought to behave a certain way. The problem can be rephrased in the now-popular vocabulary of reasons. The normativity of law is the fact that law is reason-giving.[5] And the internal point of view is that attitude by which we take there to be reasons.[6] But how can merely *taking* there to be reasons make it that there really *are* such reasons?[7]

The aim of this paper is to solve this problem—or, more accurately, to offer an understanding of Hart's internal point of view and the normativity of law such that the problem dissolves. The problem is that the putative explanans seems inadequate to explain the explanandum. There are at least two strategies for approaching a problem of this sort. One is to show that the explanans—in this case, the internal point of view—has more explanatory power than previously thought. Many, including Perry, have pursued this strategy, attempting to modify the internal point of view. The other strategy is to show that the explanandum—in this case, the normativity of law—is easier to explain than previously thought. This strategy is less popular, largely, I think, because philosophers of law have failed to see how the normativity of law could be any less substantial without failing to impose a non-trivial condition on the adequacy of theories of law. They think that if the normativity of law is an easier target of explanation, then even sanction- and habit-based theories of law, like John Austin's, will explain it. In this paper, I argue that this is a mistake. There is

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[4] Hart (1961), pp. 55-57.

[5] See Postema (1982, p. 165), Marmor (2008), Dworkin (1977), Raz (1975, §2); Smith (1994, p. 206); Perry (2006, p. 1173).

[6] This is a contentious understanding of the internal point of view. We will come to this issue shortly.

[7] See Jules L. Coleman & Brian Leiter, "Legal positivism", in Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford and London: Blackwell Publishers, 1996), p. 241; Perry (2006, p. 1176). Also see Enoch (2011), Marmor (2008), Green (1999, p. 35). This is obviously related in many ways to moral constructivism, though I resist the urge to enumerate those relations here.

an understanding of the normativity of law—a [p. 471] plausible understanding—on which law is explicable with Hart's psychological resources, but still inexplicable with Austin's behavioristic ones. On this alternative understanding of the normativity of law, the above problem dissolves.

To show how the internal point of view really is capable of explaining the normativity of law, I consider each in turn. In Sections 1 and 2, I argue that a popular understanding of the internal point of view, called "the moral attitude constraint," is mistaken. It is rejected on both interpretive and philosophical grounds. In Section 3, I introduce an alternative understanding of the normativity of law. I do not contend that this precise understanding of the normativity of law is Hart's. Hart was not explicitly concerned with the normativity of law, so it is not clear that he had a worked-out understanding of it. But I argue that this understanding of the normativity of law is (a) compatible with what Hart does say about the topic and (b) explicable by appeal to the internal point of view, thereby dissolving the problem with which we began. Section 4 contains objections and replies.

1. THE INTERNAL POINT OF VIEW AND THE PRACTICE THEORY

Hart himself is not explicitly concerned with the normativity of law. When he first introduces the internal point of view, in chapter 4 of *The Concept of Law*, Hart portrays it not as an explanation of the normativity of law or, for that matter, as an explanation of anything. The "internal aspect" of rules is portrayed as an obvious feature of law that Austin's account cannot capture. However, I am among those who see the internal point of view not as a pre-theoretic feature of law, but as an element of a theory of law.[8] The primary role of the internal point of view is in Hart's so-called

[8] Dworkin also sees Hart as explaining how rules are normative. Ronald Dworkin, *Taking Rights Seriously* (New York: Duckworth, 1977), p. 19. See also Joseph Raz, *Practical Reason and Norms* (London and New York: Hutchinson, 1975); Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1978); Neil MacCormick, *HLA Hart*. 2nd edition (Palo Alto and New York: Stanford University Press, 2008a); Michael Smith, *The Moral Problem* (London: Blackwell, 1994); Richard Holton, "Positivism and The Internal Point of View", *Law and Philosophy* 17 (s 5-6) (1998): pp. 597-625; Bix, Brian, "Legal Positivism and 'Explaining' Normativity and Authority", *American Philosophical Association Newsletter* 5 (2) (2006): pp. 5-9; and Perry (2006).

"practice theory of rules."[9] This is a theory of social rules.[10] It attempts to [p. 472] explain how humans create rules, such as those of games, clubs, and governments. According to Hart, the rule of recognition of a legal system is just such a social rule. The internal point of view is part of Hart's theory of the rule of recognition, which is part of his theory of law.

Social rules are more than just patterns of behavior. What makes a pattern of behavior into a rule is that enough of the right people take a certain

> reflective attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but 'has views' about the propriety of all moving the Queen in that way.[11]

According to the practice theory, two conditions are sufficient for the existence of a social rule.[12] First, there must be a regularity in the behavior of the group members. Second, enough members must take the internal point of view toward that pattern of behavior.[13] This attitude is manifested in criticism using "normative terminology."[14]

So, what *is* this peculiar attitude? We have said something about its role in Hart's practice theory and about its typical form of expression, but what is the internal point of view? Hart does not say much about this. We take "a critical reflective attitude to certain patterns of behavior as a common standard."[15] To take this attitude is to treat a pattern of behavior as a "reason and

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[9] See Joseph Raz, "Hart on Moral Rights and Legal Duties", *Oxford Journal of Legal Studies* 4 (1) (1984).

[10] Hart notes that the practice theory can only account for social or "conventional" rules, and he no longer thinks it works for "morality, either individual or social." H. L. A. Hart, "Postscript", to *The Concept of Law* (Oxford: Oxford University Press, 1994), p. 256.

[11] Hart (1961, p. 57).

[12] I only say sufficient because primary rules, which do not meet these conditions, are also rules.

[13] See Neil MacCormick, *Practical Reason in Law and Morality* (Oxford: Oxford University Press, 2008b), p. 42. The practice theory is only meant as an account of the rule of recognition, and need not be true of other laws. Hart's main reason for introducing the rule of recognition in the first place is to explain how laws can be valid even when they fail to meet the conditions set out in the practice theory—e.g. when they are not regularly followed.

[14] Hart (1961, p. 56).

[15] Ibid.

justification" for behavior.[16] It is also to see the pattern as a source of "legitimacy" of criticism and of punishment.[17]

We don't get much more than that from Hart. But an example is helpful for our purposes. Most people eat breakfast cereal with milk. What kind of attitude might I take toward this pattern? Most likely, a predictive attitude: I will anticipate the future, and adjust my behavior accordingly.[18] If my friend fills a bowl with cereal, I can [p. 473] pass her the milk. If I want the milk for myself, I can quickly grab it before she has a chance. These are ways of taking the "external point of view" toward the pattern.[19] Consider another pattern: Most people eat breakfast cereal with a spoon. What attitude might I take toward this pattern? As before, I can take the external point of view and predict future breakfast behavior. But I can also take an evaluative stance. I can take this regularity as a standard against which behavior is judged or criticized and as a source of justification for this judgement or criticism. Whereas I consider deviating from the first pattern—e.g. eating cereal dry or pouring orange juice over it—to be *unusual*, I consider deviating from the second pattern—e.g. scooping the cereal by hand or slurping it directly from the bowl—to be, in some sense, *inappropriate* or *impermissible*. This latter attitude is the internal point of view.[20]

There is a difference between these patterns. One is a mere regularity of breakfast behavior and the other is a rule of table manners. These examples are not meant to bring out a difference in patterns, but a difference in attitudes. On Hart's practice theory, however, the difference in patterns is determined by a difference in the attitudes that we take toward them. If enough people took the internal point of view toward eating cereal with milk, then there would be a social rule requiring it.

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[16] Ibid., p. 11.
[17] Ibid., p. 56.
[18] Ibid., p. 84.
[19] Ibid., p.55-57, p.90.
[20] This example focuses on deviation from a pattern and disapproval of that deviation. But the attitude is similarly exhibited by approval of behavior that accords with a pattern.

The internal point of view is an intentional attitude, so it is directed at something—it has an object. Hart often speaks of taking the internal point of view toward *rules*. But as we can see from its role in the practice theory, this is potentially misleading. It is better to say that the internal point of view is directed at patterns of behavior, or emerging patterns of behavior, and it is partly in virtue of this that these patterns *become* rules.[21] As a further shorthand, Hart often uses the word "accepts" to mean *takes the internal point of view*. So strictly speaking when one "accepts a rule," one really *takes the internal point of view toward a pattern of behavior*. I follow Hart in occasionally using these shorthands.

Hart repeatedly calls the internal point of view a "critical" attitude.[22] But we might wonder about this. If the internal point of view [p. 474] is a critical attitude, and if it is directed at a pattern of behavior, then is one who takes it somehow critical *of that pattern*? No, or so I will argue. Contrary to what several philosophers say, the internal point of view involves criticism or evaluation of instances of behavior, not whole patterns of behavior. Taking the internal point of view toward a pattern involves critically evaluating instances of behavior based on whether they conform to the pattern. Indeed, we could just as well think of the internal point of view as having two objects: a pattern of behavior and particular instances of behavior.

The labels are also potentially misleading. From Hart's metaphorical use of "internal" and "external," one might think that the internal point of view is whatever attitude is taken by those *inside* the legal system. On this interpretation of Hart, what is missing from Austin's theory of law is an account of what a legal system is like for those living within it.[23] Though some isolated passages in *The Concept of Law* suggest this reading, it is mistaken. Someone within a legal system can fail to see

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[21] The patterns do not need to be long-standing in order to become rules.

[22] Ibid., p.56 and throughout chapter 4.

[23] Perry may have this view, Stephen Perry, "Interpretation and Methodology in Legal Theory" in Andrei Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (London: Clarendon Press, 1995), p. 99. Another good example is Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence", *Texas Law Review* 76 (1997), who follows and quotes Perry in a footnote on p.295, and Gerald J. Postema, "Jurisprudence as Practical Philosophy", *Legal Theory* 4 (3) (1998): pp. 329-357.

the rules of that system as standards for her own conduct or the conduct of others. In this way, Oliver Wendell Holmes's famous "bad man" takes the external point of view even though he is an insider within a legal system.[24] And just as one can take the external point of view from inside a legal system, so too one can take the internal point of view from outside.[25]

So the internal point of view involves taking some pattern of behavior as a standard against which behavior is evaluated. But what kind of evaluation is this? For example, must one evaluate behavior as *moral* or *immoral*? Hart's answer is: no. Taking the internal point of view toward a rule—and this includes when legal officials take it toward a rule of recognition—does not require any moral judgement whatsoever.[26] But, as we will see, many think Hart is mistaken in this. [p. 475]

2. THE MORAL ATTITUDE CONSTRAINT

The *moral attitude constraint* is a proposed revision of the internal point of view. The idea is that the internal point of view must be a moral point of view: In order for the rule of recognition to be law, a sufficient number of the officials must believe that it is *moral*—that it is *morally* binding, and that the officials are *morally* justified in enforcing it.[27]

Here is a version of such a constraint:

> **Moral Attitude Constraint:** In order for a subject *S* to take the internal point of view toward a rule *R*, it is necessary that *S* take *R* to be morally acceptable.

[24] Holmes, Oliver Wendell (1897). "The Path of Law", 10 *Harvard Law Review* 457, 459-61.

[25] For a thorough demonstration of this point see Scott J. Shapiro, "The Bad Man and The Internal Point of View", in Steven J. Burton (ed.), *The Path of the Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press, 2000); and Scott J. Shapiro, "What Is the Internal Point of View?", *Fordham Law Review* 75 (2006), pp. 1157.

[26] See Hart (1961, p.202-3), Hart (1994, p. 257), and H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy*. (Oxford: Oxford University Press, 1982). p. 267.

[27] See MacCormick (1978) and Holton (1998). Also see Perry (2006) for a similar view. Raz thinks that taking the internal point of view requires, at least, *pretending* that one takes there to be moral reasons in favor of a rule. See his (1984, p.129).

I say "morally acceptable" to mean *not immoral*. This is, I take it, the weakest version of the moral attitude constraint. In the remainder of this section, I argue that even this weakest version of the proposed re-working of the internal point of view is a mistake.

Here is the line of reasoning offered in favor of the moral attitude constraint.

(1) According to Hart, taking the internal point of view toward a rule requires taking there to be some reasons, albeit not necessarily moral reasons, in favor of that rule.
(2) But Hart is mistaken that these reasons can be non-moral. Non-moral reasons are inadequate.
(3) So, *contra* Hart, taking the internal point of view toward a rule requires taking there to be moral reasons in favor of that rule.

None of this is yet to say what reasons there actually *are* in favor of a rule. At this point we are talking entirely in terms of what reasons there are *taken* to be in favor of a rule.

Neil MacCormick introduced this type of criticism of Hart in his 1978 book, *Legal Reasoning and Legal Theory*. MacCormick does not say much more than (1) and (3) above, leaving whatever version of (2) he has in mind implicit. Twenty years later, Richard Holton presents a more fully-developed argument along these lines for the moral attitude constraint.[28] [p. 476]

Premise (1) is an interpretive claim. Writing in the late 1950s and early 1960s, Hart did not use the same normative and meta-normative vocabulary that is popular today. In particular, Hart uses the word "reason" only a few times in *The Concept of Law*. Premise (1) is an attempt to translate Hart's talk of the internal point of view into reasons talk. MacCormick and Holton both translate "*S* takes the internal point of view toward *R*" as "*S* takes there to be reasons in favor of *R*." I think that they get this translation wrong, and this mistranslation is the source of their disagreement with Hart. Here is exactly how Holton puts Hart's understanding of the internal point of view.

[28] Holton (1998).

> **Reasons-In-Favor-Of Translation:** "Acceptance of the law, in Hart's terms, requires the belief that there are normative reasons for acceptance."[29]

It may be immediately objected that it is wrong to think of the internal point of view as a *belief*. I am sympathetic to this criticism, but the objection I wish to make is more fundamental. To take the internal point of view toward a rule, Holton thinks, involves taking there to be reasons in favor of the rule—in favor of accepting the pattern of behavior and making it into a rule. But, it seems to me, Hart is clear that this is not how he understands the internal point of view. To take the internal point of view toward a rule is to see the rule not necessarily as the *object* of some reasons—i.e., what those reasons count in favor of or against—but as a *source* of reasons.[30] Or, alternatively, we can say that to take the internal point of view toward a rule is to take it to *be* a reason.

> **Reasons-Generating Translation:** To take the internal point of view toward a rule is to take that rule as a source of reasons (or as itself a reason) for or against the behavior governed by the rule.

The reasons-generating translation is not the claim that the internal point of view generates reasons, but just that taking the internal point of view toward a rule involves *taking* that rule to generate reasons. To take the internal point of view toward a pattern of [p. 477] behavior is to see the pattern as a standard against which behavior can be judged and from which criticism can be justified.[31]

Of course, *given* the reasons-in-favor-of translation, MacCormick and Holton's line of argument is cogent. Holton is right that Hart provides no argument that reasons in favor of the rule

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[29] Holton (1998, p. 604).

[30] Here is how this is phrased in Hartian, non-reasons terminology: To take the internal point of view toward a pattern of behavior is to see that pattern as an evaluative standard against which instances of behavior are to be judged. It is not the pattern that is evaluated. The instances of behavior are evaluated *against* (or in light of their accordance or discordance with) the pattern.

[31] I do not mean to suggest that I am the first to interpret Hart this way. Although this translation of Hart into reasons-talk is not often made explicit, I would contend that it is maintained by Dworkin (1977, p. 20), and Joseph Raz, *The Concept of a Legal System*, 2nd edition, (Oxford: Clarendon Press, 1970), p. 235. Raz in particular seems to reject the reasons-in-favor-of translation, without explicitly endorsing any alternative translation into reasons talk. Also, see Bix (2006) for the correct translation.

of recognition may be non-moral. Holton looks for such an argument in Hart and finds only the following.

> [I]t is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.[32]

We can see why this is unsatisfactory to Holton. This not a convincing argument (or any argument at all) that the reasons in favor of a rule—or, in this case, in favor of accepting a rule of recognition and thereby accepting the legal system as a whole—might be non-moral. Moreover, when Hart offers explanations for why one might take the internal point of view he even mentions a *non-reason*: "an unreflecting or traditional attitude." Holton points out:

> [W]hilst it might be true that the reason many individuals come to accept the authority of law is because of an unreflecting traditional attitude, such individuals would scarcely cite such a factor as a reason for accepting it.[33]

Holton thinks that Hart has contradicted himself. According to Holton, Hart has claimed that to take the internal point of view one must take there to be reasons for a rule, but also that one might take the internal point of view without taking there to be any reasons for the rule. To explain this, Holton theorizes that Hart has confused "normative reasons" (which can justify) with "motivating reasons" (which can psychologically explain). He thinks Hart has demanded [p.478] that there be a belief in normative reasons (e.g. that some rule is moral), but that he has supplied only a motivating reason (e.g. that one does not reflect on a traditional attitude). But Hart has made no such

[32] Hart (1961, p. 203).
[33] Holton (1998, p. 603).

confusion. Holton's line of criticism is reasonable, given the reasons-in-favor-of translation. It is a virtue of the reasons-generating translation that it avoids attributing this confusion to Hart.

As further evidence for the reasons-generating translation, I point to the one occasion in *The Concept of Law* where Hart does use the term "reason" in characterizing the internal point of view.[34] For those who take this attitude:

> the red [traffic] 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 behavior and an obligation. To mention this is to...refer to the internal aspect of rules seen from their internal point of view.[35]

Here the red light, and admittedly not the rule itself, is taken to be a reason for stopping. But it is still clear that, for Hart, taking the internal point of view involves taking there to be reasons concerning the conduct required or prohibited by the rule—that is, concerning instances of behavior—and not reasons concerning the acceptance of the rule itself. Contrary to the reasons-in-favor-of translation, one need not think there are any reasons in favor of the rule that one accepts. Indeed, one need not consider whether the rule is in any way good or bad, worthy or unworthy of acceptance.

None of this is to say that officials *cannot* take rules that they accept to be moral. A legal system may be at its "healthiest" when officials and citizens take their laws to have moral force.[36] But rules can be accepted for any reason, or no reason at all. There is simply no necessary connection between taking the internal point of view and one's motivation for taking it.

If I am right, then we should reject the reasons-in-favor-of translation, and therefore reject MacCormick and Holton's argument for the moral attitude constraint. But aside from rejecting the argument in its favor, why should we reject the moral attitude constraint itself? [p.479]

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[34] Hart also uses the term again, on the very same page, but in reference to a reason for sanction.

[35] Hart (1961, p. 90).

[36] Ibid., p. 231-2.

It is worth remembering the theoretical job of the internal point of view: it is the central element of Hart's practice theory of rules. And the practice theory is a theory of legal and non-legal rules. Though Hart's primary interest is obviously law, in a sense, the practice theory applies *more* in the non-legal domain. In the legal case, it only applies to the rule of recognition. The other rules in the legal system have their status as rules of the system instead by meeting the conditions set out in the rule of recognition.[37] For practices like table manners and bare-knuckle boxing, the internal point of view must be taken not just by a select group of officials toward a single higher-order rule, but by many participants toward first-order rules of the practice.

The moral attitude constraint is especially implausible for these non-legal social rules. When we accept the rules of chess or boxing, do we have views about the moral status of these games or their rules? Often, we accept rules of games thoughtlessly. According to the practice theory, boxing exists because enough boxers, coaches, and fans take the internal point of view toward the rules of boxing. For example, they see kicking as *impermissible*. If enough boxers follow the rules and take the internal point of view, then we have a game. Must boxers think that the rules of boxing are moral? If we are assessing MacCormick and Holton's version of the moral attitude constraint, then this is not a question about what boxers think about *kicking*, but rather a question about what boxers think about *the rule prohibiting kicking*. For boxing to exist boxers must accept the rule prohibiting kicking. But is it plausible that they must think that there are moral reasons for accepting such a rule? Must they think that there are moral reasons for boxing to be boxing and not kickboxing? I do not think so. Of course, many boxers will have views about what rules are best. But this does not seem required for the existence of the game. Acceptance of a game and its rules can be done, as Hart might say, in an "unreflecting" way.[38] Is Hart right that these considerations apply to law as well?[39]

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[37] This is not a problem for the practice theory. The practice theory is not the only way for a social rule to exist, but it is a way for a rule to exist in the absence of other, higher-order rules.
[38] Hart (1961, p. 203).

Though I think there is a *prima facie* plausibility to a uniform account, a full discussion of this would take us too far afield. My purpose here is not to mount a full defense [p. 480] of the internal point of view as Hart understood it. Rather, it is enough to say what Hart's understanding of the internal point of view is and how it can explain the normativity of law.

3. THE NORMATIVITY OF LAW

Why was the reasons-in-favor-of translation attractive in the first place? Perhaps it is a way of solving the puzzle with which we began. The problem is that the internal point of view seems inadequate for explaining the normativity of law. The internal point of view is just an attitude. The fact that some people take an attitude is a descriptive fact. The goal, though, is to explain how law is normative, how it gives us reasons. But, the thinking goes: If we are going to get reasons *out*, then we have to have reasons *in*.[40] The reasons-in-favor-of translation is perhaps an attempt to get these reasons going in, so to speak.

This project—regardless of whether MacCormick, Holton, or Raz are undertaking it—seems doomed. If our goal is to explain how there really *are* reasons generated by law, then it will not help to claim that we *take* there to be reasons.[41] And it does not matter whether we take there to be reasons going in or going out, whether the reasons are moral, prudential, or of any other kind. The problem seems to be simply that the descriptive fact that certain people have an attitude, no matter what kind of attitude it is, is insufficient for the normative fact that people ought to behave a certain

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[39] Ibid., p.202-3, Hart (1994, p. 257), and Hart (1982, p. 267).

[40] See David Hume, *Treatise on Human Nature* (Oxford: Oxford University Press, 1739), book III, part I, section 1. Bix (2006) cites Hume in particular as a source of difficulty for positivism. Some elements of this are present in Scanlon's discussion of reasons. Thomas Scanlon, *What We Owe to Each Other* (Boston: Belknap Press of Harvard University Press, 1998). Scanlon is fond of open-question arguments against reductive theories of reasons. In a sense, open-question arguments are the paradigm argument from a reasons-out-reasons-in principle.

[41] Coleman and Leiter (1996, p.241), as well as Perry (2006, p. 1176), state this problem very clearly.

way. If the problem we are trying to solve is the one with which we began, then it will not work to solve it by modifying the internal point of view. No attitude is up to the job.

I suggest that the best strategy is to approach the puzzle the other way around. What should be rethought is not the internal point of view, but the normativity of law. To simply say "law is normative" is not enough to fix on a feature of legal systems determinate enough to productively guide our enquiry. And to add that "law generates reasons" is not much help. We need to say in what *sense* law is [p. 481] normative. In the remainder of the paper I attempt to do that. This is not a presentation of Hart's view of the normativity of law, because it is not obvious that he had a worked-out view of the normativity of law. Still, I argue that this view of the normativity of law is consistent with everything Hart does say on the matter, and that it is helpful to his overall project. This is also not a full defense of the view of the normativity of law, but rather a presentation of it. Still, I offer some defense by responding to several of the most pressing objections. As I will argue, if this view of the normativity of law is correct, then we have solved the explanatory problem with which we began. The normativity of law can be explained by appeal to the internal point of view. The trick is getting clear on what exactly the normativity of law is.

What is the understanding of the normativity of law on which attitudes like the internal point of view *cannot* explain it? It is an understanding that, it seems to me, is obviously non-Hartian. Indeed, it is a kind of Dworkinian understanding of the normativity of law.[42] According to Dworkin (at least in earlier publications, like *Model of Rules I*), there is a difference between the norms we express with "ought" and those we express with "obligation" or "duty." The latter are said by

[42] This understanding seems to be shared by Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), p. 148-151. Raz calls this conception of the normativity of law "the justification view of legal validity," which he credits to Kelsen. And the justification that Raz has in mind, as he makes clear, is moral justification. See also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), p. 216. Raz emphasizes that legal authority is indeed moral authority, but that a legal system need not have such authority to be legal. It merely needs to claim to have it and be capable of having it.

Dworkin to be "much stronger."[43] What is this strong normative force that is had by law and which a theory of law must explain? Dworkin is clear that it is *moral* force.[44] Stephen Perry agrees, putting the point concisely: "Legal normativity is moral normativity."[45]

Hart obviously thinks that law has no necessary connection to morality.[46] But if Hart is to have any chance of solving the above problem, we must take seriously the idea that the rejection of morality as even a loose model for law extends to the sense in which law is normative. If we understand the normativity of law as moral [p.482] normativity, then Hart's practice theory is in trouble—the kind of trouble not alleviated by modifying the internal point of view. Dworkin sets up Hart's practice theory in such a way that makes its inadequacy apparent.

> Hart's answer may be summarized in this way. Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behavior constitutes a social rule, and imposes a duty. Suppose that a group of churchgoers follows this practice: (a) each man removes his hat before entering church, (b) when a man is asked why he does so he refers to 'the rule' that requires him to do so, and (c) when someone forgets to remove his hat before entering church, he is criticized and perhaps even punished by the others.' In those circumstances, according to Hart, practice-conditions for a duty-imposing rule are met. The community 'has' a social rule to the effect that men must not wear hats in church, and that social rule imposes a duty not to wear hats in church....The existence of the social rule, and therefore the existence of the duty, is simply a matter of fact.[47]

[43] Dworkin (1977, p. 48).
[44] Ibid., p. 48, 57.
[45] Perry (2006, p. 1174).
[46] H. L. A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review* 71 (4) (1958): pp. 593–629.
[47] Dworkin (1977, p. 49-50).

The above characterization leaves out the internal point of view. But elsewhere Dworkin acknowledges its importance.[48] So we can add it in on Dworkin's behalf. Still, we are left short of explaining the thing Dworkin thinks Hart must explain: moral duty. Hart's response, stated in the *Postscript*, is that explaining moral duty is too great of a demand to make of the practice theory.[49] Accounts of law, and of games and etiquette, need not capture moral duty because these practices do not, at least not necessarily, have moral force.

All of these practices consist of rules, understood in Wilfrid Sellars' sense.[50] Sellars' distinction between rules and regularities can be brought out using our examples from earlier. Eating cereal with milk is a regularity, not a rule. Eating it dry or with orange juice is *unusual*. The pattern of eating cereal with a spoon is a rule—specifically, a rule of table manners. Scooping cereal by hand or drinking it from the bowl is not just uncommon. It is *forbidden*. Of course, there *could be* a rule requiring cereal to be eaten with milk. It could be a rule of the state, a rule of a well-organized social club, or [p. 483] an unspoken rule of a poorly-organized social group. But it need not be any of these. It could just be uncommon, without being incorrect.

Boxing is constituted by rules. It is a normative practice just in the sense that it consists (partly) of rules about how boxers may behave, as opposed to mere patterns or regularities of their behavior. The slogan, "boxing normativity is moral normativity," is false. The only philosopher of which I am aware who thinks games and similar practices are normative in the moral sense is Dworkin, whose view will be discussed below.[51] But for now, I think it is safe to say that games are normative just in the sense that they are rule-constituted practices. If Hart's practice theory of social rules is correct, then social rules are constituted entirely by human behavior and attitudes. This is the

[48] Ibid.
[49] Hart (1994, p. 257).
[50] Wilfrid Sellars, "Some Reflections on Language Games", *Philosophy of Science* 21 (3) (1954): pp. 204-228.
[51] Dworkin (1977, p. 57).

sense—the minimalist sense of being constituted by social rules—in which games are normative.[52] My suggestion is that perhaps law is normative in this sense as well.[53]

Does Hart agree? Hart does not typically talk about the "normativity of law." For that matter, as mentioned early on, Hart does not even talk about the internal point of view as being introduced to explain anything, let alone the normativity of law. Still, there is reason to think that if Hart were to have a view of the normativity of law, then it would be this one.

When Hart uses the word "normative" in *The Concept of Law* it is typically meant to pick out a type of terminology. The internal point of view is expressed with internal statements, which paradigmatically make use of "the normative terminology of 'ought' 'must' and 'should', 'right' and 'wrong'."[54] But we want "normative" to apply not to *terminology*, but to *phenomena,* like law. One option is to simply extend Hart's use of "normative" to apply to any domain that characteristically uses normative terminology. In that sense, it is trivial that law is normative. Its being normative in this sense places no constraints on theories of law. Austinians can account for normative terminology. But in the *Postscript*, Hart provides a rare glimpse at a different, less trivial, understanding of what it is for some phenomenon to be normative. His theory of law: [p.484]

> seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect.[55]

This suggests that for Hart, law is normative in the sense that it is rule-governed. Law is a system of rules, like boxing or etiquette. This is not to say that law *is* a game or that law *is* a system of etiquette. There are many important differences. On Hart's view, law must have a hierarchical structure, being

[52] The way of distinguishing senses of normativity is similar to a distinction hinted at, but not thoroughly developed, by Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011), vol. 1, p. 144-6. Parfit distinguishes between the rule- and reason-involving conceptions of normativity.
[53] Though he puts things differently, I have an ally in Enoch (2011).
[54] Hart (1961, p. 56).
[55] Ibid., p.239.

composed of primary and secondary rules. Also, law must claim a kind of priority over games, etiquette, and other rule-based institutions.[56] So there is more to law than what we find in games or etiquette. But there is not more to the *normativity* of law. Compared with moral normativity, this kind of normativity is minimal—minimal enough that Hart puts it in scare quotes. But what good is this minimal normativity? If, like games and etiquette, law does not necessarily generate moral reasons for action, if it is not morally binding on us, then why should we care whether law is intrinsically normative in this minimal sense? The answer is that law's being constituted by rules is *theoretically* important. It serves as a constraint on our theories of law. Since law is normative in this minimal sense, habit- or sanction-based positivist theories of law are doomed. Hart can capture rules, whereas Holmes, Austin, and Bentham can only capture regularities.[57]

And since Hart can capture rules, we might think, he can avoid the problem for the practice theory with which we began. The problem was that our attitudes are insufficient for normativity. Or, put another way, our merely *taking* there to be some "reason and justification" regarding an action or criticizing an action does not make it that there *is* such a reason or justification. The solution, I suggest, comes not from inflating the attitude so that it is up to the task of explaining the normativity of law, but rather from deflating the normativity of law so that the attitude is up to the task of explaining it. I have not presented a full-blown account of the normativity [p. 485] of law. However, if law is normative just in the sense of being a practice consisting of rules, then it is not at all mysterious how this normativity can be explained by appeal to an attitude. Importantly as well, even absent a full defense of this conception of the normativity of law, we can see that there is such

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[56] In Hart (1994, p. 249), "the distinctive features of law are the provision it makes by secondary rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards."

[57] It might be objected that Hart cannot think of law as normative in the sense that boxing is normative on the grounds that Hart things legal reasons are "peremptory." See Hart (1982, p. 253-64). Without entering into a full discussion of the peremptory/non-peremptory distinction, I will just suggest that the distinction deals with formal features of reasons and it is orthogonal to the distinction between moral normativity and the normativity involved in games. Some of the constitutive rules of boxing constitute peremptory reasons.

a conception that is minimal enough to be potentially explicable with Hartian resources, but substantial enough to be inexplicable with Austinian ones.

There is one more reason to think that this minimal understanding of the normativity of law fits well with Hart's project. Recall the well-known positivist insistence on "the distinction between what law is and what it ought to be."[58] Hart touted not just the theoretical cleanliness of this view, but its "practical merits," the most salient of which is that it facilitates disobedience to immoral laws: settling the content of law does not settle what one morally ought to do.[59] This merit of positivism is inexplicable on the moralized conception of the normativity of law espoused by Dworkin, Perry, and others. If the legal "ought" is a moral one, then settling the content of law does settle what one morally ought to do because legal prescriptions include the moral "ought." But on the minimal conception of the normativity of law, settling the content of law is normatively tantamount to determining the rules of a game. And there is no problem for the disobedience of immoral games.

As I have said, I cannot offer a full case in favor of this picture of the normativity of law, but I should say *a few* things in its defense. Practices like games and etiquette are normative in that they are constituted by regulative and constitutive rules. (The rules of etiquette are mostly regulative and the rules of games are mostly constitutive.) As Hart stressed in his discussion of duty-imposing and power-conferring rules, legal rules are also regulative and constitutive.[60]

One glaring disanalogy between games/etiquette and law involves their stakes: When we are concerned with life and liberty, as opposed to sport and dining, the stakes are higher. Legal sanctions are also much more severe than those involved in games or etiquette. Though this is a genuine disanalogy, it is not clearly one that [p. 486] affects the nature of the normativity involved. Most importantly, neither the "oughts" of law nor the "oughts" of games and etiquette are moral

[58] Hart (1961, p. 211).
[59] Ibid., p. 210. Also, Hart (1958).
[60] Hart (1961, p. 31).

"oughts." The argument for this is the traditional, though not obviously decisive, argument from unjust legal systems to legal positivism.[61] If we grant that unjust legal systems are possible—that they are in fact *legal*—then we have examples of legal systems that do not have moral normative force. If a statute requires one to φ, then legally one ought to φ. But if the legal system is wholly unjust, and if φ-ing is unjust or at least morally neutral, then it is not true that one morally ought to φ. So the legal "ought" cannot be a moral "ought." I do not invoke this familiar argument as an attack on natural law. The suggestion is just that it is plausible that the normative force involved in law, games, and etiquette is not moral.

If law is normative in the way that games are, then do its norms apply only to those who accept them? No. This kind of restriction is a holdover from the moral conception of normativity. If games are normative in the moral sense, then perhaps we are bound to follow the rules of games because we have consented or agreed to play.[62] On this view, the rules of games are attitude-dependent, but they only apply to those on whose attitudes they depend. But the minimal sense of normativity does not always work this way. Consider, instead of games, dinner-table etiquette. According to the practice theory, the rules of etiquette depend for their existence on *someone's* attitudes. But one's behavior can violate a rule of etiquette independently of *one's own* attitudes. The behavior of those who do not accept a rule of etiquette can still fall within the range of application of such a rule. Spreading butter on bread with the butt end of one's fork is forbidden even for those who are unaware of a rule prohibiting it or who otherwise do not take the internal point of view toward such a rule. If someone spreads butter with the butt end of her fork she can be accused of being ill-mannered. It is no defense to say: 'Her behavior is not ill-mannered. The rule for fork use does not apply to her because she does not accept the rules of table-manners." The deflated

[61] Hart (1958); Lon L. Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart", *Harvard Law Review* 71 (4) (1958), pp. 630–672.
[62] Dworkin (1977) has this view of the normativity of games.

normativity of games and etiquette is attitude-dependent, but it can apply to particular individuals irrespective of their attitudes. [p. 487]

4. OBJECTIONS AND REPLIES

Before concluding, I consider four objections. The first concerns whether Hart's view is compatible with *any* view of the normativity of law. Hart took up the positivist mantle from Bentham, Austin, and Kelsen by insisting on "the distinction between what law is and what it ought to be."[63] It might seem, therefore, that Hart's theory of law cannot include or come to include a theory of normativity because that would undermine his contention that the normative question is to be left to the moral philosopher. This, however, is not so. The normativity of law, as I have outlined it, is a descriptive feature of law—it is an aspect of what law is. Law *is* a system of social rules. The question of what law ought to be is a moral question, and as such Hart indeed refused to answer it, except when he wore his moral-philosopher hat. Saying that law is normative in the sense that is consists of rules for how individuals ought to behave does not commit one to any view about what those laws themselves ought to be. Nor do such rules directly entail anything about whether citizens have a moral obligation to obey.

It is worth emphasizing the difference between (a) a theory of the normativity of law and (b) a theory of normativity *tout court*. A theory of the normativity of law describes the sense in which law is a normative phenomenon. A theory of normativity, as it might be understood in the above objection, prescribes behavior, morally or otherwise. The positivist mantra—distinguish what law is from what it ought to be—allows Hart's view to include the former while delegating the later to moral philosophy.

[63] Hart (1961, p. 211).

This leads us to a second objection. The minimal normativity involved in games and etiquette does not seem like *real normativity*.[64] This depends, of course, on what we mean by "real normativity." Brian Leiter understands the phrase to mean "standards of what one ought to do or believe that are not dependent for their binding force on the attitudes, feelings, or beliefs of persons."[65] On this understanding of normativity, the kind of normativity that we get on the minimal picture is not real normativity. But then it might plausibly [p. 488] be denied that law is really normative. Many laws lack the kind of force that binds independently of being represented as so binding. If, however, we allow that the kinds of rules that constitute boxing make it really normative, then law is really normative.

But there is perhaps more to this objection. It is not satisfying to say that whether law is really normative depends on what we mean by the phrase, even if that is true. The objection is that it is an *abuse* of the term to call the rules of boxing or etiquette "normative." This kind of normativity is so deflated that it is nothing more than world-to-mind direction of fit. Desires and recipes have world-to-mind direction of fit. Unlike descriptions, which are truth-apt and can be satisfied when they themselves change to match the world, desires and recipes cannot be true or false or accurate or inaccurate. They are satisfied when the world changes to match them. But, so this objection goes, world-to-mind direction of fit is far too ubiquitous to count as normative in any significant sense—any sense worth labeling or worth altering our theories of law to accommodate. On the view that I have been sketching, is a law just a flipped-around description?[66]

Mere world-to-mind direction of fit may be too minimal to warrant the title "normative." But the rules of games are not just world-to-mind direction of fit, at least not if we understand world-to-mind direction of fit to be a structural quality that a pattern can have without being taken

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[64] See Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999) and Enoch (2011, p. 11-12).
[65] Brian Leiter, "Normativity For Naturalists", *Philosophical Issues* 25 (1) (2015): p. 76.
[66] Thanks to Hannah Ginsborg for pressing me on this point.

up by anyone as a standard. There is something more to these socially-constructed rules than merely being in the form of an imperative. Perhaps unsurprisingly, that "something more" is the internal point of view. Consider, if there can be such a thing, a recipe toward which no one takes the internal point of view. Say that it is a recipe that has never been written down, or been the content of any intentional mental state. But, if we like, we can think of it as a recipe nonetheless. Perhaps it is merely a *possible recipe*. We can say that it has world-to-mind direction of fit. This possible recipe would not be normative even in the minimal sense. It would be a standard against which behavior *could* be measured and evaluated, but in the absence of individuals taking the internal point of view, this recipe is not a rule.[67] The minimal sense of normativity is not so [p. 489] deflated as to be useless. It requires appeal to a special evaluative attitude and thereby rules out the Austinian and Benthamite version of positivism.

A third objection claims that the appeal to rules, like the rules of games, does not free us from reliance on moral normativity. The supposedly deflated normativity of games is not deflated at all. It is moral normativity in disguise. Adapting a term from David Enoch, we can call this the "triggering" approach.[68] Consider, for example, the fact that one should not place a large chair or sofa in the middle of a boxing ring before a boxing match. Normally, placing a sofa somewhere is a perfectly good thing to do. But because of certain conventional facts about boxing, having one in the middle of a boxing ring inconveniences, or even endangers, people. If we like, we can say that there is a rule against placing sofas in boxing rings. Call it a *sofa-boxing rule*. Crucially, this sofa-boxing rule is not an additional rule over-and-above the ordinary moral rules governing our boxing and non-boxing behavior. If we were compiling an exclusive and exhaustive list of rules, it would be a mistake to list "moral rules" and alongside it "sofa-boxing rules." That is because the sofa-boxing

[67] We may maintain that a merely possible recipe has no direction of fit at all. This, in fact, is my view. But the point in responding to this objection is to just to say that the deflated sense of normativity is not so deflated as to require no resources to explain it. It requires appeal to the internal point of view.

[68] Enoch (2011).

rule is just an application of morality. There is a standing moral rule prohibiting needlessly inconveniencing or endangering others and the particular boxing circumstances *trigger* that rule. The descriptive facts in the example make the already-present moral facts apply in a way they would not otherwise apply. The "ought" in 'one ought not place a sofa in a boxing ring' is really a moral "ought."

Though not phrased in quite these terms, Joseph Raz's well-known service conception of authority is a triggering theory. Here is what Raz says about (at least some) obligations that arise from human action.

> Various of our actions incur obligations. Conceiving and giving birth to a child is often assumed to be one such case. Infringing other people's rights is another (it generates an obligation to make amends, etc.). Claims that we have an obligation because of what we did, or because of how we acted, are true, if they are, by virtue of general reasons for people who acted in certain ways to have certain reasons or obligations. There are, it is assumed, general reasons for anyone who has a child to [p. 490] look after it, a general reason for anyone who violates another's right, to compensate them, and so on.[69]

It is unclear whether Raz thinks this kind of triggering theory applies to all human-generated obligations. Dworkin, however, is clear that it does. He thinks that men have a *duty* to remove their hats when entering a church.[70] But this duty does not arise because the practice meets the conditions set out by Hart in the practice theory of rules. Rather, Dworkin claims, it is because the practice "creates ways of giving offense" that are not present in its absence.[71] There is already a moral duty not to offend others, and since failing to remove one's hat will offend, there is a duty to remove

[69] Joseph Raz, "The Problem of Authority: Revisiting the Service Conception", *Minnesota Law Review* 90 (2006): p. 1013.
[70] Dworkin (1977, p. 57).
[71] Ibid.

one's hat.[72] The question is whether this kind of triggering story can be told about *all* laws. Once we see that this is the question, it is clear what the positivist, and in particular Hartian, answer is: it cannot. Unjust laws, within wholly unjust legal systems, are still rules. So the legal "ought" is not a triggered moral "ought."

The fourth objection targets Hart's practice theory. It is raised by Scott Shapiro in his book, *Legality*. Shapiro offers the following counterexample:

> The problem with this version of the Practice Theory is that the metaphysical relation it claims exists simply does not obtain: social practices do not necessarily generate social rules. In baseball, for example, third basemen typically draw toward home plate when a bunt is suspected. Moreover, if they fail to draw near they would be criticised for not doing so. Drawing near, in other words, is a Hartian social practice. Yet there is no rule that *requires* third basemen to draw near when a bunt is suspected. Contrast this practice with batters retiring after three strikes. The latter activity is rule governed.[73]

Although Shapiro does not mention the internal point of view, he makes it clear enough in the following paragraphs that he means it to be included. Shapiro is offering a straightforward counterexample. [p. 491] The conditions set out in the practice theory are met, yet there is no social rule. So the practice theory fails to give sufficient conditions for the existence of social rules.

This is not, however, a counterexample to Hart's practice theory because there *is* a social rule requiring third basemen to draw toward home plate when a bunt is suspected. It is easy to miss this rule because it is not a rule of baseball. Rather, it is a rule of *popular baseball strategy*. Popular baseball strategy is the practice consisting of rules that prescribe—according to the popular opinion of baseball players, coaches, and commentators—the correct strategy is for playing baseball. Baseball and popular baseball strategy are two different practices consisting of social rules. Popular baseball

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[72] The claim, as understood for the purposes of this objection, is not that there is a moral requirement to fulfil the requirements of boxing or table manners or law. Rather, it is that the requirements of boxing and table manners and law *are* moral requirements. This kind of Razian distinction, though, is not essential to the point.

[73] Scott J. Shapiro, *Legality* (Cambridge: Harvard University Press, 2011), p. 103-4. In a footnote, Shapiro points out that he got this idea from G. J. Warnock, *The Object of Morality* (London: Methuen, 1971), p.61-65.

strategy is parasitic on baseball (there can only be a strategic practice for playing a game when that game exists). The rules of popular baseball strategy are less frequently written down, but they are rules nonetheless.

The difference between the rules of popular baseball strategy and the rules of baseball is the difference between Rawls' "summary" rules and "practice" rules, introduced in his often-cited but rarely-appreciated paper, *Two Concepts of Rules*.[74] Summary rules are "reports that cases of a certain sort have been found on *other* grounds to be properly decided in a certain way."[75] A summary rule is a summary—a potentially inaccurate summary—of the considerations that bear on how one should act in some circumstance independently of the existence of the rule. Many strategic considerations bear on how to respond to a suspected bunt, and they do so whether or not players and coaches have thought about these strategic considerations. But once the players and coaches think hard about how to respond to a suspected bunt, their bunt-response behavior may form into a pattern. This is actually the case: Almost all third basemen draw toward home when a bunt is suspected. Also, the players and coaches may take the internal point of view toward bunt-response behavior based on whether that behavior accords with the pattern. This is actual as well: They take failure to draw toward home to be *strategically mistaken*. According to Hart's practice theory, this is sufficient for the existence of a social rule requiring third basemen to [p. 492] draw toward home. Plausibly, there is such a rule. When a player fails to draw toward home he or she may be criticized for, say, violating a widely-accepted and sacrosanct rule of defensive strategy.

In contrast to summary rules, practice rules do not summarize independent considerations. Rawls's example of a practice rule is the exact same rule mentioned by Shapiro: Batters must retire after three strikes.[76] Unlike the strategic rule requiring third basemen to draw toward home, this rule

[74] John Rawls, "Two Concepts of Rules", *The Philosophical Review* 64 (1) (1955): pp. 3-32.
[75] Ibid., 19.
[76] Ibid., 25-6.

does not summarize what batters should already know to do, prior to the institution of the rule. If a third baseman were smart enough, he or she would not need a rule of popular baseball strategy to tell him or her to draw toward home. Not in need of a summary, he or she would do it anyway. Suggesting the same thing about batters and the rule of baseball is incoherent. In the absence of a rule of baseball requiring batters to retire after three strikes, there is no need to retire after three strikes. The rules of baseball constitute the practice of baseball. Rawls criticizes opponents of utilitarianism (and utilitarians themselves) for assuming that utilitarian rules of conduct are summary rules. He reminds them that there is another type of rule: practice rules. My response to Shapiro goes in the opposite direction, so to speak. I am pointing out that there are not only practice rules, but summary rules as well. Once we see that there can be a summary rule of popular baseball strategy requiring third basemen to draw toward home, Shapiro's counterexample disappears.

5. CONCLUSION

I have argued against the moral attitude constraint and the reasons-in-favor-of translation of the internal point of view. Perhaps the most important point concerning the internal point of view is that it is an ordinary attitude. It is like belief or desire. It may not be a form of belief or a form of desire, but it is *like* them in that no special motivation is required to take it. As we saw, the moral attitude constraint has the feature of requiring that this attitude can only be taken when it has a certain motivation—a moral motivation. This is an odd way to think about mental states. If we like, we can use the older-fashion term "mental act" and think of taking the internal point [p. 493] of view as an action. Like most actions, it can be performed for any reason, or for no reason whatsoever.

I have also presented a conception of the normativity of law. This conception is distinctive in that it falls short of the moralized conception of Dworkin and Perry, but it is robust enough to be

out of explanatory reach for Austin and Bentham. And if this conception is accurate, then the internal point of view stands a chance of fulfilling its role in explaining the normativity of law. But the reader may have noticed that I switched to talking about the internal point of view as having another role, in Hart's practice theory of rules. These may seem like two different roles for the internal point of view, between which I was sliding. But, as I hope to have shown, they are the same. For Hart, law is normative in that it is composed of rules. So explaining the nature of rules and explaining the normativity of law are the same task. In fact, this is another way that the problem of this paper could have been posed: How can the internal point of view both explain how rules differ from mere regularities and how law is a normative phenomenon? The answer involves rethinking the sense in which law is normative. Once we do that, the problem dissolves.

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