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Weightless Normativity:  
A Theory of Law, Language, and More

by

Jeffrey I Kaplan

A dissertation submitted in partial satisfaction of the

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Committee in charge:

Professor Hannah Ginsborg, Co-Chair

Professor Niko Kolodny, Co-Chair

Professor Christopher Kutz

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# Abstract

Weightless Normativity: A Theory of Law, Language, and More

by

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Doctor of Philosophy in Philosophy

University of California, Berkeley

Professor Hannah Ginsborg, Co-Chair

and

Professor Niko Kolodny, Co-Chair

If laws are just made up, then why do we have to follow them? What normative force do they have? It has seemed to most philosophers of law for the last two centuries that law either has moral or prudential normativity, or that it has no normativity at all. As a result, the normativity of law has seemed to be a serious obstacle for theories that attempt to explain law as a social phenomenon, explicable with descriptive resources. But this obstacle can be overcome. The central claim of my dissertation is that law—and other normative practices, such as language and games—are normative in an alternative, non-moral and non-prudential, fashion. As a result, it is possible to explain this normative practices by appeal to descriptive states of affairs.

This possibility has been ignored because philosophers have often conflated two varieties of normativity. One sense in which a practice might be normative is that it has weight in practical deliberation. That is, it generates considerations suited, by their nature, to be included in deliberation about what to do. But a different sense in which a practice might be normative, which I argue still constitutes a form of normativity, is merely that it consist of rules. To get a sense of this variety of normativity, consider the difference between the fact that (a) cereal is eaten with milk and the fact that (b) cereal is eaten with a spoon. The first is a regularity. Eating cereal dry is unusual. The second, by contrast, is a rule (of table manners). Scooping cereal with one's hand is not just unusual; it is forbidden. This is the hallmark of a rule: it entails that an evaluative or deontic concept, like impermissible or impolite, applies to instances of behavior. Practices like law, language, and games are normative in the sense that they consist of rules, but not in the sense that they necessarily generate reasons with deliberative weight.

The dissertation develops an account of this rule-constituted variety of normativity and applies it law and language. It does this in three parts. The first part outlines the general view. To avoid the complexity and controversy of law and language, the focus here is on a simpler normative practice—table manners—which is taken as a kind of case study. The second part applies the view to law, defending a version of legal positivism that many take to have been decisively refuted. Since law does not necessarily generate reasons, it can be reduced to social facts—facts about what people do and say and think. Moreover, in contrast to prevailing wisdom, the existence of a legal system does not require either officials or ordinary citizens to judge any laws to be morally acceptable.

The third part takes up the issue of the normativity of meaning. In the last half century, there have been many attempts—under the labels of “causal” or “informational” theories of meaning—to reduce linguistic meaning and mental content to descriptive states of affairs. Though many of these accounts fail for idiosyncratic reasons, there is a general question as to whether they are doomed from the start because meaning facts are normative and therefore irreducible. But I argue that meaning is normative only in the sense of being rule-constituted, and that this transforms debates about the nature of meaning and content.

## Acknowledgements

The attached dissertation was influenced by dozens of individuals deserving of more thanks and acknowledgement than this short section can provide. It also owes several debts to people who will inevitably be left entirely unmentioned here due simply to my own poor memory and negligence. I apologize in advance for these oversights.

The first question that people ask me when I mention that I wrote a dissertation partly about the philosophy of law is ‘Oh, did you also go to law school?’ The answer is that I did not and that up until just a few years ago I knew almost nothing about law or the philosophy of law. The idea to start exploring the philosophy of law came from the first committee member who I should mention, John MacFarlane. I was then in the early stages of a dissertation on the normativity of meaning, and as I fumbled out some thoughts about the nature of language, John mentioned that my view sounded like a version of legal positivism as applied to language instead of law. If I recall correctly, he had to explain to me that “positivism” in this context meant something different than in “logical positivism.” It was because of this prompting that I went on to read H.L.A. Hart and this dissertation is, in a way, mostly about Hart. John is no longer a co-chair of my committee, and as of very recently not technically on my committee at all, but this too is occasion for gratitude, acknowledgement, and just a little bit of hagiography. When my dissertation shifted into the philosophy of law it became clear that I needed a co-chair with more expertise in value theory and ethics. John’s willingness to step aside, and thereby convert several years of guidance, draft-reading, comment-giving, and letter-of-recommendation-writing into an uncompensated gift shows quite clearly the kind of faculty member and intellectual mentor that he is.

The faculty member with the expertise in value theory and ethics who stepped in part-way through my ABD phase is Niko Kolodny. Niko has read and commented on every draft of every paper or chapter that I have sent him within an average time of 37 seconds, or somewhere thereabouts. Academics are notorious for taking their time with everything, but Niko has obviously dedicated himself to timeliness and this makes his comments, which are always thorough and incisive, all the more useful. When I came to Niko with nearly half of a dissertation, one involving a distinction between ‘natural’ and ‘artificial’ normativity, Niko spent several days, and one three-hour long session sitting outside of Philz coffee (from which I got a terrible sunburn on my forehead), convincing me that the central distinction at the heart of my half-written dissertation was, in fact, not the distinction that I needed. This prompted a complete re-thinking of the ideas at the core of the dissertation, and one which I am extremely grateful to have been forced to do.

The other co-chair of my committee is perhaps the faculty member who deserves the most acknowledgement here, Hannah Ginsborg. Hannah co-taught the first-year seminar during my first semester of graduate school at Berkeley, and her piercing questions have been forcing me to rethink my gut instincts ever since. I went into her office during my

second year of graduate school to ask if she would supervise one of my qualifying exam questions (John and Niko supervising the other two). I told her that I wanted to work with her, that I had a list of potential questions or topics, but that I was also happy to work on anything else that she thought I should study. She thought this level of deference to a faculty member was “old fashioned” (though not in a pejorative sense) and we proceeded to have a conversation in which she basically revealed that there was a debate in the philosophy of mind and language about the normativity of meaning, which was more-or-less the topic that I had been having inchoate thoughts about without the benefit of interlocutors. My conversations with Hannah have often felt like playing tennis against an instructor who has forsaken her racquet for an oven mitt to allow me a chance to stay competitive.

The partial pivot into the philosophy of law was also made possible by the outside member of my committee, Chris Kutz, being far more involved than any typical outside member is. Chris has read and commented on nearly as many papers and drafts as my other committee members. He has been a nearly-endless source of insight on the philosophy of law, and it has been helpful to have a philosopher as my guide to jurisprudence.

It is often lamented that academic philosophy has, in the last few decades, become increasingly ‘professionalized.’ I am sure that things were never as good as they say they were, but I would not be surprised to learn that faculty are often less generous today with their time than they were when the pressure to publish their own work was less. I am incredibly lucky to have fallen into a dissertation committee stacked with faculty who are somehow still so generous with their time and mental energy. I hope I can live up to their example.

Several other faculty at Berkeley read drafts of my work, gave me comments, and met to discuss the ideas that went into this dissertation. Most prominent among them are Josh Cohen, Veronique Munoz-Darde, Jay Wallace, Barry Stroud, and John Searle. I am also indebted to several of my fellow graduate students at Berkeley, including Justin Bledin, Julian Jonker, Jerry Vildostegui, Alex Kerr, Justin Vlasits, Adam Bradley, Ethan Jerzak, Caitlin Dolan, Richard Lawrence, Austin Andrews, Jeremiah Carey, Ravit Dotan, Nick French, Nick Gooding, Tyler Haddow, Jackson Kernion, Antonia Peacocke, Dan Khokhar, Adam Paris, Rachel Rudolph, and undoubtedly several others. Thanks are also due to Scott Shapiro, Zoe Johnson King, Daniel Wodak, and Ben Strassfeld for reading material and/or discussing issues central to the dissertation. Chapter 3 was shaped by very constructive comments from two anonymous reviewers from *Law and Philosophy*.

My family is deserving of mention for all of the ways they have directly and indirectly shaped this dissertation. I am vaguely aware of the fact that many people have tense relations with their immediate relatives, but that state of affairs remains something that I only imagine. I am extremely lucky to have such loving and brilliant siblings, Eric, Matthew, and Shaina. My father, Harold, has been positively thrilled with my decision to be an academic philosopher, even though that lifestyle is somewhat removed from the ones he is familiar with. My late mother, Deborah, is not around to see the fruits of my academic struggles or even to know me as an adult, but it is easy to see how almost all of my redeeming traits are due to her.

My young children, Ralph and Deborah Sadie, quite frankly did not make the writing of this dissertation any easier, though they were the inspiration for an example here or there.

Rather, they simply improved the depth and richness of my life immensely. But the truest source of stability and love and stimulation and joy in my life during the entire time that I have been thinking through these ideas and writing this dissertation has been my wife, Emily. Had I not decided, somewhat at the last minute, to attend a passover seder in 2012 I would not have met Emily and would have missed out on the most enriching relationship of my life. The kids are fine, but Emily is, without contest, my favorite person. She presses me to be a better person both by very directly telling me when I am slipping but also by modeling a thoughtful, joyful, honest way of life. I am constantly in awe of her brilliance, pleasantness, and sheer likability. It is incredibly fortunate that our society allows one to hold on to such a fantastic partner with an institution like marriage. After writing this acknowledgements section, and ready to send it off, Emily forced me to read it outloud to her, and during that reading I caught several errors. I certainly do not deserve to have someone in my life who I feel completely at ease and unguarded around, but who, somehow, also makes me a better person. Her influence can be seen on every page of this document, and I dedicate it to her.



# Chapter 1

## Introducing Normativity as a Constraint on Theories

Unlike ‘knowledge,’ ‘justice,’ ‘beauty,’ and many other English language terms that pick out objects of traditional philosophical interest, ‘normativity’ is a term of art. Colloquial English includes ‘knowledge,’ ‘justice,’ and ‘beauty’ within its lexicon simply because ordinary English speakers use those terms on an ordinary basis. So it is not unreasonable to suspect, or at least to suppose as a starting point, that these terms pick out real phenomena that are worthy of philosophical investigation. This is not the case for ‘normativity,’ which we would do well to remember *never* appears in ordinary, colloquial English discourse.

This observation is important for two reasons. First, it means that we can be somewhat, though not entirely, cavalier with our use of the term. By that I mean only that we are not beholden to ordinary use in determining how the term is used and meant in a philosophical context.<sup>1</sup> So if, as it turns out, in many contexts we are only interested in normativity because it is supposed to play a certain role in a philosophical inquiry, then we should be, at least *prima facie*, open to slightly alternative uses of the term on which it picks out phenomena that still play that role. As will be discussed throughout the current monograph, it should not bother us whether or not something counts as ‘real’ normativity, or whether something that has an affinity with what we previously thought of as normativity is ‘normative enough.’<sup>2</sup> As I will indirectly argue, normativity broadly understood is an extremely important phenomenon, but the word ‘normativity’ is mostly unimportant.

Second, though their prominence in ordinary English counts as evidence in favor of the reality and importance of many traditional objects of philosophical interest, it does not follow that objects with less colloquial names, like normativity, are less real and less important. Indeed, regardless of what counts as ‘real’ normativity, there are many phenomena that are reasonably called ‘normative’ and which are very much real. This is how normativity can constitute a constraint on theories of various phenomena.

There are two main phenomena that are the focus of this dissertation: law and language. The many similarities between the two are easy to overlook. Both law and language are, more or less uncontroversially, artefacts of human creation. Regardless of what natural resources go into the creation of legal systems or languages, those resources are harnessed by humans in such a way that those individuals, though their behavior, speech, and mental states, shape those systems. Both law and language come in systems. We speak of the Swiss

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<sup>1</sup> I do not mean that the term can be used, by an individual author, inconsistently or ambiguously.

<sup>2</sup> See Leiter 2015; Bix 2006; Enoch 2011; Postema 1998; Kramer 1999; Lance and O’Leary-Hawthorne 1997; Rosen 2001; Papineau 1999. The final three are discussions in the context of the normativity of meaning, whereas the previous five are part of the literature on the normativity of law. Much more discussion of this issue appears in chapter 3, section 4 of the present monograph.

legal system, or the South Korean legal system, or the legal system of the state of Arkansas. It is impossible for a single rule to be a law unless it is imbedded within a whole legal system. We also speak of German, Korean, or English. And, plausibly, it is impossible for a single sentential linguistic expression to be meaningful unless it is imbedded within a whole language.<sup>3</sup> Both law and language have been subject to attempted naturalistic (often behavioristic or dispositional) reduction. As part of a general trend toward naturalism in the 20th century, philosophers offered theories of both law and language that, to one degree or another, attempted to explain these phenomena in naturalistically acceptable terms.<sup>4</sup> Both law and language were then thought, by various philosophers, to be, in various senses, normative and therefore ineligible for naturalistic reduction of one kind or another.<sup>5</sup>

Since these two phenomena have not only such similar characteristics, but such similar philosophical histories, this dissertation offers a unified solution of the normativity problems that they face. In both cases, it is argued that the phenomenon in question is indeed normative in a sense that places *some* constraints on theories of that phenomenon, but not in a sense that rules out *all* reductive theories of that phenomenon.

In the legal case, Austin (1832), building off the thinking of Bentham, introduced a habit- and sanction-based theory of law that attempted to explain the existence of a legal system entirely in terms of the behavior and threatened behavior of individuals. Hart (1961) attacked this theory, in part, because it failed to account for something that could be called the normativity of law. Of course, many have criticized Hart's own theory for failing to adequately capture the normativity of law.<sup>6</sup> The relevant series of questions is the following. Is law normative in any interesting sense that rules out certain theories of law? If it is normative in some such sense, what sense is that? And, finally, which theories of law does law's normativity rule out. The answers defended here are that, yes, law is normative in the sense that it consists of rules, but not in the sense that it necessarily generates reasons for action that, by their very nature, are the appropriate objects of inclusion when deliberating about how to behave. Therefore, Austin's behaviorist theory of law is, so to speak, a non-starter, but Hart's theory of law is fully capable of accounting for the normativity of law.

In the case of language, various reductive, naturalistic theories—including straightforwardly dispositional theories, causal/informational theories, some conceptual role theories, etc.—attempted to explain linguistic meaning (and mental content, though that will not be our concern here) in terms of non-semantic and non-normative facts. But starting with Kripke (1982), these theories were thought to be doomed by the normativity of meaning, which then became the subject of much debate.<sup>7</sup> The debate is about whether

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<sup>3</sup> This point, I think, is less certain than the corresponding point for law. But regardless of whether it is impossible for sentence-sized linguistic expressions to be meaningful outside the context of a language, it is still true that, like law, language comes divided into systems, which in this case we call languages.

<sup>4</sup> Austin 1832; Hart 1961; Dretske 1986; Ruth G. Millikan 1989; Ruth Garrett Millikan 1998; Fodor 1987, 1990; Horwich 2005.

<sup>5</sup> Hart 1961; Dworkin 1977; Kripke 1982; Boghossian 1989

<sup>6</sup> Dworkin 1977; Perry 2015; Coleman and Leiter 1996.

<sup>7</sup> Boghossian 1989, 2003; Fodor 1990; Bilgrami 1993; Rosen 2001; Papineau 1999; Wikforss 2001; Glüer and Wikforss 2018; Whiting 2013; Hattiangadi 2009; Whiting 2009; Bykvist and Hattiangadi 2007; Hattiangadi 2006; Ginsborg 2010, 2012, 2014

meaning is, as Kripke cryptically but influentially claimed, normative. The relevant series of questions, corresponding precisely to the series of questions arising in the case of law, is the following. Is linguistic meaning normative in any interesting sense that rules out certain theories of meaning? If it is normative in some such sense, what sense is that? And, finally, which theories of meaning does the normativity of meaning rule out? The answers defended here correspond to the answers in the legal case: yes, meaning is normative in that it consists of rules, but not in that it necessarily generates moral, prudential, or any other kind of reasons that ought to be included in deliberation. This normativity rules out all theories of meaning that do not appeal to a rich set of attitudes, which includes causal/informational theories, and the other theories just mentioned.

The dissertation is structured as follows. Chapter 2 is an analysis of a social practice that shares all of the above features with law and language: table manners. The same questions that have arisen for law and language can be seen as arising for table manners, and chapter 2 is an attempt to show how. Thus, table manners serves as a kind of case study in which the answers that will be presented for law and for language are first developed. In particular, it is argued that we can only understand table manners by understanding a variety of normativity that I call 'weightless.' The idea is developed in detail in chapter 2, but the crucial point is that this variety of normativity is less demanding as an explanandum than moral and prudential normativity, at least as those are often understood, but still demanding enough to rule out behavioristic and dispositional theories of table manners. In addition to developing many of the core concepts, this chapter gives an initial development and presentation of several of the arguments that will be applied to law and language.

Chapters 3 and 4 both focus on law. Chapter 3 appeared, in slightly modified form, under the same title in *Law and Philosophy*. It focuses on Hart's internal point of view and how this attitude can explain the normativity of law so long as both are understood in particular ways. A good deal of the chapter is taken up with exegetical arguments concerning what Hart mean by 'the internal point of view', but this is supplemented with considerable philosophical argument as to why that understanding does the theoretical work that Hart needs it to do. It is also suggested in this chapter that the normativity of law has to be understood as non-moral, but the bulk of that discussion is left to chapter 4. Chapter 4 focuses on the same issues, and uses some similar arguments, as chapter 3, but with a different focus. There is no concern for exegetical issues concerning the internal point of view (though Hart's practice theory of in which the internal point of view is the center of the discussion), and the normativity of law is discussed in more detail. Here the focus on weightless normativity from chapter 2 is more directly applied to the legal case.

Chapter 5 and 6 focus on meaning. Chapter 5 argues for the normativity of meaning, but in a way slightly different from the method applied to table manners and law in chapters 2, 3, and 4. The focus of chapter five is not directly on the normative force of semantic norms, but on their structure. It is argued that their structure has been systematically misunderstood, both by normativists about meaning and anti-normativists about meaning. Chapter 6 also argues that meaning is normative, and also does so in a way that slightly diverges from the method used for table manners and law. Chapter 6 argues that anti-normativism as it is popularly understood cannot be made to work, but that there is an alternative view that amounts to a form of normativism along the lines suggested for table

manners and law. Chapter 7 summarizes the claims of the previous chapters and adds some concluding points.

Before beginning the discussion of table manners, it is worth addressing one objection that has the potential to derail the entire project of the dissertation before it even begins. This objection comes in a weaker version and a stronger version. The weaker version—weaker in the sense that it makes a less ambitious claim—asks whether it is possible to give a unified account of the normativity of practices as diverse as table manners, law, and language. This worry is addressed in chapter 2, but it is worth mentioning here as well.

The stronger version of the objection more ambitiously claims that we can know in advance that the project will fail. It is obvious, this objection goes, that table manners, law, and language are normatively diverse. That is, they are not merely very different normative social practices, but they are different specifically in the *normative* dimension. Unlike table manners and language, law concerns serious matters governing important aspects of one's life. How one uses a fork or when one says a word are not matters of grave importance, but whether one is imprisoned is. So we can see that these practices are not normatively the same. Similarly, linguistic norms apply to a fundamental part of human life, one that exists prior—both temporally and, perhaps, metaphysically—to law and certainly to table manners. So the norms of language are correspondingly more fundamental and inescapable, making this also a normative difference. Finally, and most obviously, legal norms (typically) have explicit sanctions attached, which norms of table manners and language do not. This, perhaps, is a normative difference. According to the stronger version of the objection, any unified account of the normativity of these practices fails to capture these differences and therefore fails.

The stronger version of this objection is mistaken because two things can be broadly of the same kind, but different in more specific ways. Just as navy blue and light blue are different shades of blue, so too the normativity of table manners, law, and language can all be different but also broadly be of the same color, differing from the normativity of morality in the way that blue differs from red. Of course, the normativity of table manners, law, and language might differ so dramatically that it is a mistake to group them together, but that is not an assessment that we can make in advance of the very project that this dissertation undertakes. This brings us to the response to the weaker version of the objection. It may be that a unified account of the normativity of these three divergent phenomena is not possible, but that is a question best answered by attempting to present the account. This objection is best cast as an objection to the specific details of the proposal as it applies to each case. So it will be revisited in the form of straightforward objections to the proposals regarding the normativity of table manners, law, and language.

## Chapter 2

### A Case Study in Lesser Normativity: Table Manners

A finger bowl is a bowl of water. After the entrée, it is placed before the dinner guest, who dips her fingers into the water and moves the bowl to the left of her plate. Judith Martin, a.k.a. Miss Manners, relates the following story about Queen Victoria and a dinner guest who did not know how to properly use his finger bowl:

At a great London banquet, dear Queen Victoria lifted her finger bowl and drank the water. She had to. Her guest of honor, the Shah of Persia, had done it first.<sup>1</sup>

One moral of this story is that Queen Victoria has demonstrated the *true purpose* of etiquette: to respect the dignity of others.<sup>2</sup> Perhaps. But if that is how we understand “etiquette”—as something that, by definition, carries a kind of moral force—then the topic of this chapter is not etiquette. Instead our focus is on whatever kind of rule Queen Victoria violated. The point of the story, of course, is that Queen Victoria transgressed *something*. And for that thing—one of the several, mundane rules concerning folks and finger bowls—I use the phrase “table manners,” so as to distinguish it from rules of etiquette, which intrinsically demand respect for the dignity of others.<sup>3</sup>

The practice of table manners is—in some broad sense to be discussed in greater detail in the following section—normative. It consists not of regularities of how people behave at the dinner table, but of rules for how people ought to behave at the dinner table. Here is the question: can a practice that is normative in this sense can be captured by a theory that appeals only to descriptive states of affairs?<sup>4</sup> Or, what comes to the same given the notion of *normative practice* employed here, can a rule or system of rules be captured by a theory that appeals only to descriptive states of affairs? This question has been central in other philosophical domains, and in each case it has seemed to many that the answer must be ‘no.’<sup>5</sup> A central debate in philosophy of law for the last two centuries concerns whether

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<sup>1</sup> Martin 1979, 24.

<sup>2</sup> Buss 1999; Martin 1979; Calhoun 2000.

<sup>3</sup> Buss (1999) makes the same distinction.

<sup>4</sup> Coleman and Leiter 1996, 241; Perry 2006, 1176.

<sup>5</sup> This problem need not be motivated by any particular reading of Hume’s brief comments about “is” and “ought” in book 3 of the *Treatise*. The question of whether normative facts can be reduced to descriptive ones has rightly puzzled many even if it did not puzzle Hume in that particular passage. Bix (2006) includes a good discussion of the problem and Hume. Another good discussion of the general issue, couched in terms of reasons, is at the heart of Scanlon (1998).

positivist accounts of law—many of which are descriptive, reductive accounts of law—can accommodate the “normativity of law.”<sup>6</sup> In parallel, a central debate in the philosophy of language over the last three decades concerns whether causal, informational, or dispositional theories of meaning—all reductive theories of meaning—can accommodate the controversial “normativity of meaning.”<sup>7</sup> In each case, it is thought that any descriptive account leaves out the normativity.

I argue that once we are clear about the exact sense in which these practices are normative, we can see that the answer to the above question is ‘yes’—it is possible to give an adequate theory of a normative practice by appealing only to descriptive resources. In addition to arguing that such theories are possible, I partially present and defend just such a theory. Advancing such theories of complex practices like law and language about which little is uncontroversial requires a lot of space, and it is therefore the focus of the remainder of the present dissertation. Luckily, it is possible to present the core of such an account, and to avoid some red herrings, by focusing on a simpler practice: table manners. Those familiar with the debates about the normativity of law and the normativity of meaning will not have difficulty seeing the connections between what I say about table manners and those more established debates. But I resist the temptation to state those connections outright, at least for the remainder of this chapter. My hope is that it will take only a few more pages for the genuine philosophical curiousness of table manners to interest us in its own right.

### 1. What Is It For a Practice to be Normative?

Is it possible to explain the practice of table manners—a normative practice—with only descriptive explanatory resources? That is the question I attempt to answer in the first half of this chapter. But first we need to get clear on what it means to say that a practice, like law or language or table manners, is “normative.” I suggest that there are two distinct features of practices that might reasonably be labeled “normativity” and I argue that that table manners only necessarily exhibits one of them. That variety of normativity presents no obstacle to descriptive reduction. To present this argument, several distinctions are required. But I keep the discussion of them brief.

The first has already been mentioned: the distinction between a **regularity** and a **rule**.<sup>8</sup> Consider the following state of affairs: people add salt to soup. This is a regularity (or suppose that it is). When someone fails to add salt to her soup, her behavior is *unusual*. Contrast that with the following: people consume soup without slurping. This is also a regularity. But, at least in some societies, it is more than that. It is a rule.<sup>9</sup> Slurping soup is not just unusual, but *impermissible*. Consuming soup without slurping is not just typical, it is

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Scanlon is fond of open-question arguments against reductive theories of reasons. In a sense, these open-question arguments are a paradigm of the traditionally Humean concern.

<sup>6</sup> Enoch 2011; Coleman 2001; Marmor 2008; Postema 1982; Perry 2006; Fuller 1969.

<sup>7</sup> Kripke 1982; Boghossian 1989; Bilgrami 1993; Papineau 1999; Rosen 2001; Wikforss 2001.

<sup>8</sup> Sellars (1954) draws a related distinction between ‘conformity to’ a rule—that is, behaving in a way that fits a pattern—and ‘acting according to’ a rule.

<sup>9</sup> Hart 1961, 56. Also, these rules need not be rigid or explicit. For Dworkin (1977), “rule” suggests a kind of rigidity. He uses “principles” and “policies” to pick out standards that are less rigid than rules. For Brandom (1994), “rule” is reserved for explicitly stated norms. But for our purposes, the term will encompass all sorts of evaluative standards, whether they be rigid or flexible, spoken or unspoken.

*required*. This is the feature that characteristically distinguishes rules from regularities: the existence of the rule entails that some evaluative or deontic concept applies to accordance or discordance with the pattern.<sup>10</sup> Naturally, not *all* evaluative and deontic concepts apply.<sup>11</sup> Because the rule against slurping soup is merely a rule of table manners, violating it is not necessarily *immoral*, though it is necessarily *forbidden*. The existence of a regularity, on the other hand, entails only that descriptive concepts—such as *common*, *uncommon*, *ordinary*, *extraordinary*, etc.—apply to accordance or discordance with the pattern. Of course, rules are not the only things that entail the application of evaluative or deontic concepts. All normative objects—rules, norms, reasons, obligations, duties, authorities, etc.—do this. Our primary focus here, since we are interested in table manners, will be on rules.

Among these normative objects there is a second distinction to be drawn: between those normative objects that are **deliberatively weighty** and those that are **deliberatively weightless**.<sup>12</sup> As I understand it here, to have weight in deliberation is to count against or in favor of some potential action.<sup>13</sup> It is not that these objects are in fact always treated in deliberation as counting against or in favor of some action, but that they are the appropriate objects to be treated in deliberation as counting against or in favor of some action.<sup>14</sup> Though inevitably controversial, examples of normative objects with deliberative weight might include moral and prudential rules.<sup>15</sup> If there is a moral rule against forcing human beings into slavery, and if  $\square$ -ing is a potential action that forces human beings into slavery, then one will count this fact against  $\square$ -ing if one deliberates correctly about whether or not to  $\square$ .

Thus, there are two ways in which a practice like table manners might deserve the title “normative”: it is itself **deliberatively weighty** or it is **constituted by rules**.<sup>16</sup> For a practice to itself be deliberatively weighty is for it to *necessarily* consist in or generate rules or other normative objects with deliberative weight. For a practice to be rule-constituted is for it to, at least partly, consist of rules, which entail the application of evaluative or deontic concepts. I will argue that the practice of table manners is normative only in the sense of

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<sup>10</sup> By “applies to” I mean *is truly predicated of*.

<sup>11</sup> I am simply taking the distinction between evaluative/deontic concepts and descriptive concepts for granted.

<sup>12</sup> Parfit (2011, 144-6) briefly and suggestively draws a similar distinction between rule- and reason-involving conceptions of normativity.

<sup>13</sup> Since the topic is action, the type of deliberation at issue is practical, as opposed to epistemic, deliberation.

<sup>14</sup> Alternatively, to have weight in deliberation is to be treated as counting against or in favor of some action by an ideal agent.

<sup>15</sup> By “moral” I mean what is often called critical morality, as opposed to merely believed or accepted conventional morality. By “prudence” I mean that which prescribes actions that further the satisfaction of one’s goals or flourishing, construed in the broadest sense. So rules of healthy eating are prudential. They say what one ought to do to be healthy. For relevant discussion of morality, see Blackburn 1993; 1999; Gauthier 1986; Street 2006.

<sup>16</sup> The most similar distinction drawn in the literature is perhaps the normativity/norm-relativity distinction discussed by Hattiangadi (2007), though it is crucially different in some ways. Broome (2013) and McPherson (2011) make insightful points in the neighborhood, and an opaque and brief passage in Dworkin 1986, 136-7. For the sake of space, I will not argue, but simply assert that none of the distinctions that I have drawn in this section are the same, even in extension, as the regulative/constitutive rules distinction discussed by Searle (1969) and others, the moral/conventional distinction discussed by Southwood (2011) and others, the internal/external reasons distinction made famous by Williams (1981), the distinction between different ways of reason-giving defined by Enoch (2011), or the Kantian distinction between hypothetical and categorical imperatives.

being constituted by rules. Since the practice of table manners lacks deliberative weight, its normativity is no obstacle to descriptive reduction.

For this to work, it needs to be possible for a practice to be rule-constituted, but not deliberatively weighty. Is it possible?<sup>17</sup> It might seem not. Moral rules, for example, are rules. They entail the application of concepts like *moral* and *immoral*. And they have deliberative weight. If they somehow lost their deliberative weight—if it was not the case that some action's being a way of enslaving someone should be counted against that action in deliberation—then there would be no moral rule against slavery. It would no longer be true that the concept *immoral* applies to slavery. Moral rules always have deliberative weight.

The best argument for the possibility of weightless rules is an argument by example. Though not strictly necessary for the argument, one last distinction will be helpful in picking out the example that I use in the argument: the distinction between **natural rules** and **artificial rules**.<sup>18</sup> A natural rule requiring or prohibiting  $\square$  exists whether or not anyone takes there to be such a rule or has any opinions of  $\square$  whatsoever. Examples of such rules are inevitably controversial, but they may be co-extensional with examples of rules with deliberative weight: moral and prudential rules. If there is a moral rule against forcing human beings into slavery, then this is so independently of what anyone thinks about it. An artificial rule requiring or prohibiting  $\square$ , by contrast, exists because people take there to be a rule requiring or prohibiting  $\square$ . Examples include the rules of games, fashion, clubs, and law, as well as gender norms, rules of social class, linguistic rules (both semantic and syntactic), and the rules of a society's accepted conventional morality.<sup>19</sup> Rules of table manners are artificial as well.<sup>20</sup> Slurping soup is impermissible because—in a sense to be further specified in sections 7, 8, and 9—people take it to be impermissible. If we all thought otherwise, slurping would be permitted.

The question is whether some rules can be rules—whether they can entail the application of some evaluative or deontic concepts—without having deliberative weight. If they can, then it is an open possibility that the practice of table manners is normative in the sense of being rule-constituted and not in the sense of being deliberatively weighty, and that they can be fully explained by appeal to descriptive states of affairs. We saw that natural

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<sup>17</sup> Some, including Parfit (2011) and Broome (2015), simply assume that it is. I agree with their conclusion, but think that it might be worth providing some considerations in favor of the possibility of deliberatively weightless rules, which I do in the remainder of this section.

<sup>18</sup> For clarificatory purposes, the first two distinctions were those (a) between the deliberatively weighty and the deliberatively weightless, and (b) between rules and regularities or, more precisely, between that which entails the application of evaluative or deontic concepts and that which entails only the application of descriptive concepts. Leiter (2015) seems to have something like my natural/artificial distinction in mind, calling natural normativity “real normativity.” Lance & O’Leary-Hawthorne (1997) make a distinction between the “attributive” and the “transcendental.” Their distinction, however, concerns types of normative judgements and the meanings of normative terms.

<sup>19</sup> I am following many, including Coleman (1982) in using the term “conventional morality.” Lewis (1969) calls this “social morality,” as does Hart in the *Postscript*. Austin (1832) calls it “positive morality.”

<sup>20</sup> Artificial rules can be either created unintentionally or purposefully. What matters is that that they result from the thought and behavior of human beings. Also, it is tempting to say that all artificial rules are arbitrary. But this need not be so. The rules of conventional morality may result from careful thought, but they are still artificial. Lewis (1969) famously advances a view of convention that captures a kind of arbitrariness. See Marmor (2009) for more explicit discussion of this, as well as a more comprehensive account of convention. Also see Foot 1972, 309; Marmor 2009, 141.



moral rules seem like they cannot be weightless. But corresponding to those natural rules, are artificial rules of conventional morality. Consider a system of conventional morality that prohibits sodomy. In some cases, of course, such rules will have deliberative weight. If one's sexual practices are not private, then one may have prudential reason to obey conventional morality. And if one made a promise to one's grandmother to obey conventional morality, then one may have moral reason to obey conventional morality. But if neither of these things are the case, and if this rule of conventional morality is misguided, then it seems that there is still a rule—sodomy is still *forbidden*, even if it is not *immoral*—but that it is deliberatively weightless. One who wishes to maintain that all rules have deliberative weight has two options in response to cases of this sort, one of them seems intolerable and the other simply implausible. The first option is to deny that mistaken rules of conventional morality are really rules. This is a departure from both ordinary language and the somewhat more technical notion of a rule that we have been operating with. Even when a rule of conventional morality is mistaken, violations of it are still forbidden. It is bizarre to maintain that mistaken rules of conventional morality are not rules. The second option is to insist that even when one has no moral or prudential reason to obey conventional morality, one has some other type of deliberatively weighty reason. It is hard to see what the source of this deliberative weight could be. And it is even harder to see how this alternative source of deliberative weight would *necessarily* attach to rules of conventional morality such that when it is absent the rules are as well.

## 2. The Possibility of Reduction

This brings us back to our original question: is it possible to give an adequate theory of the practice of table manners that appeals only to descriptive states of affairs? The answer depends on whether the practice of table manners is normative in the sense of having deliberative weight or merely in the sense of consisting of rules.

Deliberative weight is an obstacle to reduction. If the practice of table manners is deliberatively weighty, then it necessarily generates or is constituted by normative objects that ought to be included in deliberation. If so, then facts about table manners entail facts about what agents ought to do, or what they ought to do were they to deliberate. It may be possible to fully explain these “ought”s with appeal only to facts about what “is.” But it is not unreasonable that philosophers have seen this as puzzling at least since Hume's suggestive passage in Book 3 of the *Treatise*.<sup>21</sup>

By contrast, rules are less of an obstacle to reduction. If a practice is normative merely in the sense that it consists of rules, then no fact about what an agent ought to do follows from characteristic facts of that practice. If, for example, the practice of table manners consists of artificial rules that occasionally have deliberative weight but often do not, then the only sense in which the practice of table manners itself is normative is that it entails the application of evaluative or deontic concepts. The only normativity to be explained is the fact that slurping soup is forbidden. Theories of table manners need not explain facts about what people ought to do, when they deliberate or otherwise.

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<sup>21</sup> *Supra* note 6. In addition to the Hume, see Bix 2006; Enoch 2011; Coleman 2001; Marmor 2008; Postema 1982; Perry 2006; Fuller 1969; Bilgrami 1993; Papineau 1999; Rosen 2001; Wikforss 2001; Boghossian 1989.

So if we understand normativity to include *only* the deliberatively weighty, then normative practices cannot be accounted for in terms of descriptive states of affairs. But that is not a problem for such an account of table manners because, as I will argue, on that we of understanding “normative” table manners is not normative. If, on the other hand, we understand normativity to also include deliberatively weightless rules, then the practice of table manners is normative. But a normative practice in that sense can be accounted for in terms of descriptive states of affairs.

### 3. Is the Deliberatively Weightless Really Normative?

If some these rules have no deliberative weight, and if they can therefore be reduced to descriptive states of affairs, then do they warrant the title “normative”?<sup>22</sup>

Weightless rules are normative in the sense that they are rules and not just regularities. They entail the application of evaluative or deontic, and not just descriptive, concepts. The real question is not the terminological one about whether this warrants the title “normative,” but the following: if these rules are deliberatively weightless, why do they matter?

The fact that some practice consists of rules does not matter for deliberating about what to do. But it does matter for understanding the nature of that practice—for understanding what that practice is. If the practice of table manners consists of rules, that matters for our theories of table manners. Rule-constituted normativity functions as a constraint on those theories, ruling out the simplest behavioristic ones. Consider a theory of table manners—reminiscent of early positivist theories of law or dispositional theories of meaning—that appeals only to habits and dispositions of table behavior. Even if people are consistently disposed not to slurp soup, that only explains how soup slurping is *uncommon*. The fact that table manners consists of rules and not just regularities dooms such behavioristic theories. The explanation of this feature of table manners—that it consists of rules—is not trivial.<sup>23</sup>

### 4. The Triggering Approach

Is the practice of table manners is deliberatively weighty? Of course some rules of table manners do carry deliberative weight some of the time. If one made a promise to one’s grandmother to eat decorously, then one has moral reason to obey the rules of table manners and these rules ought to be included in deliberation. But the relevant question is whether deliberative weight is a necessary feature of table manners and therefore something for which a theory of that practice must account.

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<sup>22</sup> Leiter 2015.

<sup>23</sup> There are two different senses in which the deliberatively weightless might matter. It might matter practically, for what we ought to do, or it might matter theoretically, for our theories of human practices. I have suggested that it matters in the theoretical and not the practical sense. One might object, saying that if something does not matter practically—if it does not make a difference for what we really ought to do—then it does not deserve the title “normative.” Though I am not sympathetic to this terminological view, I am happy to surrender the term “normative.” The point is that deliberatively weightless rules must be reckoned with if we are to adequately explain the nature of table manners and other, more important practices.

When artificial rules, like the rules of table manners, acquire deliberative weight they do so in one—and, I suggest, *only* one—way: triggering. I argue that the rules of table manners do not, essentially or always, gain deliberative weight by way of triggering. So the practice of table manners is only normative in the sense that it consists of rules, and therefore it is possible to give an account of it by appeal exclusively to descriptive states of affairs.

*The triggering approach* is a general method for explaining how descriptive facts determine normative facts.<sup>24</sup> In particular, artificial rules can gain deliberative weight when there is a standing norm that can be formulated as ‘if  $p$  is the case, then one ought to  $\square$ .’ Descriptive facts satisfy the condition  $p$  in the antecedent and thereby *trigger* the standing norm such that that norm applies in more specific circumstances.<sup>25</sup> For example, suppose that there is a standing (though *pro tanto*) moral norm requiring one to keep one’s promises. Suppose also that you promise to eat with proper table manners. This descriptive fact *triggers* the standing norm, generating a more specific moral norm: *you should not slurp your soup tonight*.<sup>26</sup> An artificial norm acquires deliberative weight, by, so to speak, syphoning off some deliberative weight that is already out there.<sup>27</sup>

Undoubtedly, rules of table manners sometimes acquire deliberative weight in this way. If, however, normativity in the deliberatively weighty sense is going to be a feature of the practice of table manners itself—if it is going to be something for which theorists of table manners must account—then the rules of table manners must *necessarily* acquire deliberative weight in this way. This is the case for etiquette (as distinguished from table manners). Suppose there is a standing moral rule of the form: if  $\square$ -ing respects the dignity of a rational agent, then one ought to  $\square$ . Etiquette, as we are defining it, consists of rules requiring behavior that—due to the habits and expectations of others—shows respect. If etiquette typically requires one to  $\square$ , but in this particular case  $\square$ -ing will embarrass and thereby disrespect someone, then etiquette does not require  $\square$ -ing (as in the Queen Victoria example). Indeed, etiquette may require one to not- $\square$ . All the rules of etiquette are deliberatively weighty. If some behavior failed to respect someone, then it would lose its moral deliberative weight. But, by definition, it would no longer be required by etiquette.

Rules of etiquette necessarily have deliberative weight because etiquette has a feature that systematically ensures that all rules of etiquette trigger an underlying weighty norm. Do rules of table manners systematically trigger an underlying norm in this way? There are only two ways that they could. First, there might be an underlying weighty norm that could be formulated as including an antecedent that is perfectly matched to table manners. This is plausibly how the practice of promising necessarily triggers weighty normativity. There is an underlying norm that, so to speak, specifically mentions promising in its antecedent: ‘if one

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<sup>24</sup> I adapt the term “trigger” from the use of Enoch (2011). For a demonstration that a social rule can trigger underlying norms not only because its existence would have desirable or valuable consequences, but also because such a rule would be valuable *for its own sake*, see Owens 2017.

<sup>25</sup> Raz (2006, 1013) and Dworkin (1977) both espouse triggering views, though in different domains. Shapiro (2011)’s plan-based account of legal requirements is a triggering account. And, Hume (1738) has a triggering theory of promising, though this reading is no doubt controversial.

<sup>26</sup> Buss 1999; Foot 1972.

<sup>27</sup> Cf. Prichard 1940/2002.

promises to  $\square$ , then one ought to  $\square$ .’ In the case of table manners, there would have to be a weighty moral or prudential rule of the form ‘if there is a rule of table manners requiring  $\square$ , then one ought to  $\square$ .’ While it is plausible that there is such a norm for promising, it is doubtful, I think, that there is one for table manners.

If there is no underlying deliberatively weighty norm that is structured in such a way as to systematically be triggered so as to apply to rules of table manners, then the only other way that such a systematic connection might come about is if it resulted from some constraint on the content of the rules of the practice itself, guaranteeing that it only requires behavior that some deliberatively weighty norm requires and only prohibits behavior that some deliberatively weighty norm prohibits. This is how it is for etiquette. There is a constraint on what etiquette can require: etiquette can only require behavior that respects the dignity of others. If there is an underlying norm like ‘if  $\square$  respects the dignity of others, one ought to  $\square$ ,’ then, since there is a condition guaranteeing that all the rules of etiquette respect the dignity of others, etiquette will always trigger this norm. It is only because there is this constraint on the content of rules of etiquette—they only require actions that respect others—that those rules necessarily have deliberative weight. If a rule lacks this constraint, it will sometimes fail to trigger the underlying respect norm. Of course, in *some* cases unconstrained artificial rules will trigger some underlying weighty norm or other. But there is no reason to think that this will always take place.

The practice of table manners includes no necessary constraint on its content whatsoever. So just as its rules will not systematically trigger underlying weighty norms by trivially meeting the conditions in the antecedent of an underlying norm perfectly matched to table manners, so too they will not systematically trigger some other underlying weighty norm by having their contents constrained. Of course, it is simply by means of stipulation that they have no such constraints. At the outset, the label “table manners” was stipulatively given to those rules that have no intrinsic connection to respect. The *label* was stipulated. But it is not by stipulation—at least not by my stipulation within the confines of this chapter—that there exists a rule that Queen Victoria violated. There really is a rule forbidding drinking from finger bowls. But Queen Victoria drank from her finger bowl anyway. That is the point of the story. My claim is simply that that rule exists and is not of a type so as to have any necessary constraints on its content. Therefore, it, and other rules of table manners, can be weightless.

## 5. A Normative Attitude Theory

The point of all this is that the practice of table manners is normative merely in the sense that it is constituted by rules and not in the sense that it necessarily or constitutively has deliberative weight. Therefore, it is possible to give an account of table manners that captures its normativity with appeal only to descriptive states of affairs. I now attempt, at least in part, to present and defend such an account.

In order for there to be a rule of table manners requiring table-behavior-type  $b$  in a society  $s$  the following descriptive state of affairs must obtain: enough members of  $s$  take a special critical attitude toward instances of table behavior based on whether those instances

of behavior are of type *b*.<sup>28</sup> This is—at least for rules of simple systems without established second-order rules—a necessary condition.<sup>29</sup> It may not be sufficient. It may also be necessary that enough members of *s* have knowledge (though plausibly not common knowledge) that others have an attitude of this sort.<sup>30</sup>

An account of table manners centered on a normative attitude in this way is akin to H.L.A. Hart’s practice theory of social rules, which will be discussed at length in chapters 3 and 4.<sup>31</sup> In fact, as elaborated below, the special critical attitude just mentioned is Hart’s famous *internal point of view*.<sup>32</sup> What makes the account of table manners defended here different from Hart’s version—other than its application to table manners specifically and its tentative inclusion of a knowledge condition—is that Hart’s practice theory includes a condition requiring a regularity of behavior. The necessity of such a condition has been plausibly attacked.<sup>33</sup>

What exactly is this “special critical attitude”? Sections 7, 8, and 9 of the present chapter (as well as much of chapter 3) are dedicated to saying exactly what the attitude is and how it can explain the existence of the rules of table manners. In brief, to take the requisite critical attitude toward to some type of behavior is to evaluate particular instances of behavior—regarding them, e.g., as appropriate/inappropriate or proper/improper—based on whether those instances conform to a pattern. Since there are many ways to evaluate instances of behavior, there are many ways to take this attitude. One way is to regard some behavior as immoral because it deviates from a pattern that one takes to be a moral rule. However, one could also regard some behavior as impolite or simply incorrect because it deviates from a pattern that one takes to be a rule of table manners. To take the critical attitude is to use a pattern of behavior or possible pattern of behavior as an evaluative standard that is applied to instances of behavior.

Crucially, even though the attitude is normative, *the fact that people take the attitude* is a descriptive state of affairs. So explaining the existence of the normative practice of table manners in terms of people taking this attitude is a way of explaining a normative practice in terms of descriptive states of affairs.

As mentioned, some kind of knowledge condition may be necessary as well. This is the view of. If some kind of knowledge condition is also required for the existence of a rule of table manners—as Geoffrey Brennan, Lina Eriksson, Robert E. Goodin, and Nicholas

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<sup>28</sup> This formulation includes both positive (e.g. thou shall consume soup silently) and negative (e.g. thou shalt not slurp soup) rules so long as behavior types can be formulated negatively. Fuller (1969, 42) calls these disjuncts “requirements of forbearances” and “affirmative” demands.

<sup>29</sup> It is a necessary condition in societies where the systems of table manners are not so formal and well-codified that there are authoritative (typically written-down) versions of table manners rules and authoritative table manners officials who, by way of division of social labor, can determine that there is a rule of table manners even when very few members of the society are aware of it.

<sup>30</sup> Southwood & Eriksson 2011; Brennan et al. 2013.

<sup>31</sup> Hart 1961; Raz 1982; Lance & O’Leary-Hawthorne 1997, 62. Something like this view as applied to language is espoused by many, including Brandom (1994), who calls it “phenomenalism.”

<sup>32</sup> For a thorough discussion of the internal point of view, see chapter 3. One relevant point: taking the internal point of view toward a rule does not involve taking that rule itself to be justified in any way, it only involves taking instances of behavior (and criticism of behavior) to be justified.

<sup>33</sup> See the “Moldovians” example in Southwood & Eriksson 2011, 204; Brennan et al. 2013, 20.

Southwood argue—then the normative practice of table manners is still explained in terms of descriptive states of affairs.<sup>34</sup>

Though I find it plausible that some kind of knowledge condition is required, my focus here is on the normative attitude condition because it is more puzzling and philosophically interesting, and also because it is the main target of two serious objections to the account.<sup>35</sup> The remainder of the chapter focuses on this attitude. In the following section, I contend with the claim, widely-if-not-universally-accepted for nearly 40 years in the philosophy of law, that accounts based on this attitude are subject to a decisive counterexample. I argue that it is no counterexample at all. Then, in sections 7, 8, and 9, I consider and respond to the argument that an account based on this attitude is viciously circular.<sup>36</sup>

## 6. First Objection: a Putative Counterexample

The putative counterexample will be discussed in greater detail in chapter 4, but . When I was eight or nine, my family went to a middle-class Jewish vacation resort in the Catskill Mountains. The included dinner was ‘all you can eat.’ I remember hearing my grandfather say, “Don’t fill up on bread.” For the sake of example, let’s say that all members of my family (or society, if we prefer a larger group) eat only a little bread at the beginning of an all-you-can-eat meal. And they take the required critical attitude—positively evaluating those who eat little bread and negatively evaluating those who eat too much bread. Say as well that every member of my family knows that the others take this attitude. The conditions of the theory are met. So there should be a rule against filling up on bread. But unlike, say, the rule against slurping soup, there simply is no rule against filling up on bread. So the attitude-based account fails.

This counterexample—in one form or another—has been taken as a decisive refutation of Hart’s practice theory of rules. As far as I am aware, this counterexample is universally accepted within the philosophy of law literature—explicitly presented by G.J. Warnock, Andrei Marmor, Scott Shapiro, and many others.<sup>37</sup> And this is not without good reason. It is a compelling objection. There is a rule against slurping soup. But there is no rule against filling up on bread. It seems, therefore, that the attitude based account, even when it includes a knowledge condition, fails.

Despite appearances, this is not a counterexample because there *is* a rule prohibiting filling up on bread. It is easy to miss this rule because it is not a rule of table manners. Instead, it is a rule of *my family’s dinner strategy*. My family’s dinner strategy and table manners are both practices consisting of artificial rules. But they are importantly different. My family’s

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<sup>34</sup> Brennan et al. 2013, 30-31.

<sup>35</sup> It was suggested at the outset, and at the beginning of this section, that this is a “partial” account. It is partial both in the sense that I am more-or-less neutral on the necessity of the knowledge condition, and also in the sense that there may be other conditions required in order to distinguish rules of table manners from other similar social rules, such as rules of the proper way to set a table (as opposed to eat at it), rules of fashion, etc.

<sup>36</sup> If successful, both this discussion and the response to the putative counterexample are this is helpful to the Brennan et al. (2013) account.

<sup>37</sup> Warnock 1971, 45-6, 61-65; Marmor 2001, 3; 2009), 14-15; Shapiro 2011; 103-4; Wodak 2016, 49; Perry 2014. Marmor (2009) presents a slightly more developed version of this attack, but it is directed (correctly) not at Hart’s practice theory but at the claim that a generally recognized reason alone is a rule.

dinner strategy is a practice consisting of rules prescribing how one ought to behave to maximize one's enjoyment of dinner. These rules are the product of the attitudes of my family members—our shared opinion of what dinner behavior is strategically best. The rules of table manners are rarely written down. The rules of my family's dinner strategy, by contrast, are *never* written down.<sup>38</sup> Still, they are all genuine social rules.

That may be correct, as far as it goes, but merely pointing out that there is a rule against filling up on bread is not enough. Even if there is such a rule, it seems *very different* from the rule of table manners against slurping soup. A somewhat precise statement of this difference would be nice, and it would also go some way to explaining why so many theorists of law have failed to see this rule if it really is there.

We can derive just such a difference from John Rawls's distinction between "summary" and "practice" rules.<sup>39</sup> For our purposes, though, it is best to ignore practice rules and focus on the distinction between *summary* and *non-summary* rules. Summary rules, Rawls says, are "reports that cases of a certain sort have been found on other grounds to be properly decided in a certain way."<sup>40</sup> These are artificial rules that attempt to summarize the considerations that bear on one's action independent of the existence of the rule. Lots of strategic considerations bear on how much bread one should eat at the beginning of an all-you-can-eat meal. My family members take themselves to be attuned to these considerations, and thereby regard filling up on bread to be strategically mistaken and they evaluate bread-filling-up behavior as unwise. Also, members of my family are aware that others have similar attitudes. According to the theory that I am defending, this is sufficient for the existence of a rule prohibiting filling up on bread. This rule is a synopsis or 'report', as Rawls might say, of my family's opinion about what prudential/strategic considerations already bear on bread eating. The rules of a society's conventional morality are also summary rules. Just as rules of conventional morality exist even when they fail to accurately capture morality itself, so too if my family's opinion is mistaken—if it is actually best to fill up on bread—there is still a rule of my family's dinner strategy prohibiting it.

Non-summary rules, by contrast, do not summarize independent considerations. The rule of table manners against slurping soup is not a report on how, even absent such a rule, one ought to eat soup. A summary rule, like a summary, can be inaccurate. But a non-summary rule cannot. If a society has a rule of table manners *requiring* soup slurping, that is not some kind of mistake. Non-summary rules, such as rules of games and clubs, are artificial rules that constitute normative practices without summarizing other rules or considerations.<sup>41</sup>

There are several important differences between summary and non-summary rules. But none of these differences should incline us to say that the former are not rules. One

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<sup>38</sup> The exception being right now, in this chapter.

<sup>39</sup> Rawls 1955. Those familiar with Rawls's paper will recall that in the early and middle parts of the paper Rawls discusses the distinction as one between two conceptions of rules. But he admits toward the end that it is misleading to think of these as competing conceptions and that it is better to think of them simply as two different kinds of rules.

<sup>40</sup> Rawls 1955, 19.

<sup>41</sup> Rawls's does not acknowledge that summary rules can also constitute a practice. Regardless of this error by omission, his distinction stands.

such difference is in how the rules are used to explain behavior.<sup>42</sup> To the question, “Why did you not slurp your soup?” one can appropriately answer, “Because slurping soup is prohibited by a rule of table manners.” But to the question, “Why did you not fill up on bread?” it is less appropriate to answer “Because filling up on bread is prohibited by a rule of my family’s dinner strategy.” Rather, it is more appropriate when offering such an explanation to bypass the summary rule altogether and directly cite the considerations that the rule summarizes: “Because filling up on bread would have prevented me from enjoying the more desirable main course.” There is no reason to take this difference to indicate that summary rules are not rules.<sup>43</sup> Summary rules, like the rules of conventional morality and the rules of my family’s dinner strategy, still entail the application of evaluative or deontic concepts. Deviation from these standards is appropriately labeled *impermissible*. If I were to fill up on bread, even if it were clear that I had made the correct strategic choice, I could still be said to have “violated a sacrosanct rule of dinner strategy.” Since summary rules are rules, my family’s strategy for eating an all-you-can-eat meal is not a counterexample to the Hartian account of table manners.

But if there is a rule prohibiting eating too much bread, and if there is such an important difference between it and the rules of table manners, then the question becomes: what makes this rule a rule of my family’s dinner strategy and not a rule of table manners? This question is answered in the following sections.

## 7. Second Objection: We Cannot Make Sense of the Critical Attitude

I am defending an account of the practice of table manners centered around an evaluative attitude. In the remainder of the chapter I consider the objection that there is no coherent way of making sense of this attitude. Responding to this objection will also give us a better sense of what this attitude is, though chapter 3 of this dissertation is much more heavily focused on the nature of this attitude.

To take the critical attitude toward a pattern of behavior, and thereby transform that pattern into a rule, one evaluates instances of behavior in virtue of their according or failing to accord with the pattern. For instance, because we recognize soup-slurping to be in discord with the pattern of silent-soup-consumption we regard instances of soup-slurping as not just *uncommon*, but *inappropriate* or *impermissible*. That is the critical attitude.

But now that we have made the distinction above between two ways in which a practice might be normative we can ask the following question about this attitude: when those who take this attitude regard instances of behavior as *appropriate* or *inappropriate*, do they take this evaluation to have deliberative weight or do they take it to be merely the application of a rule?<sup>44</sup> When participants regard soup slurping as *indecorous*, do they take there to be

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<sup>42</sup> Warnock 1971; Marmor 2009.

<sup>43</sup> It should also be emphasized that summary rules are more than just generally accepted reasons. It may be generally accepted that one should not fill up on bread, but this does not constitute a social rule for a group of people unless enough of those people actually refrain from filling up on bread. And even when such a rule is in place, it is distinct from other, non-summary rules in all the ways discussed above.

<sup>44</sup> Regarding language, Lance & O’Leary-Hawthorne (1997, 175-6) are forced into the former position—that linguistic normativity arises from taking there to be some kind of weighty normativity—because they do not seem to consider the possibility of a practice being normative in my artificial sense. Moreover, Raz (1979, 154) might also have this view about legal normativity, although it is hard to say.



deliberative weight against slurping soup, or do they merely take soup slurping to be a violation of a rule of table manners?

The problem is that either answer seems to lead to difficulty. If we say that participants take the rules of table manners to have deliberative weight, then we are committed to an error theory, at least for those rules of table manners which lack deliberative weight. On such a view, the rules of table manners are like the rules of a false conventional morality. A code of conventional morality is, at least in part, constituted by members of that society taking there to be deliberatively weighty normative objects. And a false conventional morality results from members of a society taking there to be deliberatively weighty normative objects that there are not—e.g. they can take there to be a moral rule against sodomy. An error theory of such a system of conventional morality is plausible precisely because such a system of conventional morality is itself an error. In contrast, however, the practice of table manners does not seem like a mass delusion, so any theory that makes it out to be one cannot be correct.

Alternatively, however, if participants take the artificial rules of table manners to merely be rules, taking indecorous behavior merely to be rule-violating without attaching deliberative weight, then there appears to be a different problem—a circularity problem.<sup>45</sup> We are assessing an account of what it is for there to be a certain kind of artificial or social rule. However, the crucial condition in the account makes mention of an attitude and on this way of spelling out the attitude we make mention of the very thing that we set out to explain: the artificial or social rules of table manners. If this is how we understand the attitude, then we have answered the question ‘What is it for there to be a rule of table manners prohibiting □-ing?’ with ‘It is for enough people to take instances of □-ing to violate a rule of table manners.’ It is not immediately clear whether this circularity is vicious, but it is certainly striking.

## 8. The Vulgar

I can give some preliminary responses to this problem, though it will be discussed again in chapters 4 and 5. The first thing to say is that most participants in practices like table manners do not consider whether or not the rules that they apply are weighty or not. Most of the time participants simply do not distinguish between weighty rules and weightless ones.<sup>46</sup> They simply use the rule to make an evaluation. Behavior is appraised as, for instance, *polite* or *impolite*, with no particular determination of whether they are thereby appraising the behavior as something that there are deliberately weighty considerations for/against or merely as something that violates a rule.

This answer might seem immediately incoherent. Participants in practices like table manners are applying a rule. They take slurping soup to be a violation of a rule. But I have claimed that, most of the time, they do not consider this rule to be weighty and they do not consider it to be weightless. So what kind of rule do they take the soup slurping to be a

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<sup>45</sup> The circularity problem that I outline below is not even the only circularity problem that arises for this attitude. So there is much more to say. For a start, see chapters 3 and 4.

<sup>46</sup> We could thus be called “vulgar” on analogy with those who, according to Hume, fail to distinguish between perceptions and the objects perceived. The vulgar “never think of a double existence internal and external, representing and represented.” See Hume 1739 Selby-Bigge (ed.), 205.

violation of? It seems that they must take soup slurping to violate a rule that is neither weighty nor weightless. But this is incoherent.

To clear up this apparent problem, an analogy is helpful. All beers fall into one of two categories, depending on which type of yeast is used in fermentation: lagers and ales. A beer drinker who is not aware of the distinction might look at a beverage and think, “that’s beer.” Does she take the beverage to be lager or ale? Neither. She just takes it to be beer. But still, there is no third type of beer—generic beer, which is neither lager nor ale—of which she takes this particular beer to be an instance. Generic beer does not exist. All beer is either lager or ale. Yet this does not imply that when someone takes something to be beer, she must take it to be lager or ale. Someone’s beer concepts may be coarse-grained, and it is a mistake to impose more detail and sophistication onto her thought than it really has. This is how we should understand the paradigm case of taking the critical attitude. We simply take it that soup slurping is incorrect without that judgement or attitude include the further content as to whether soup slurping is weightily incorrect or rule-violatingly incorrect.<sup>47</sup>

The beer analogy is imperfect. In most cases table-manners participants do not make the weighty/weightless distinction, but when pressed they may admit that rules of table manners do not intrinsically have moral, prudential, or some other kind of deliberately weighty normative force. And once they do this it should still be possible for such individuals to have a practice of table manners. But if that is the case—if participants can create a weightless artificial rule of table manners by taking there to be a weightless artificial rule of table manners—we have arrived back at the circularity problem.

## 9. Responding to Circularity

The problem, once again, is that in our account of what it is for there to be an artificial or social rule we appeal to the fact that people take there to be an artificial or social rule. This kind of circularity has appeared in many areas of philosophy and much ink has been spilled attempting to say whether it is vicious.<sup>48</sup> Instead of cursory discussions of a wide range of cases, I engage in a single, but still cursory, discussion of a nearby case. Allan Gibbard faces a parallel circularity problem.<sup>49</sup> According to Gibbard: *R* being a reason to do *X* is accounted for by appeal to *R* being taken to weigh in favor of doing *X*.<sup>50</sup> But T.M. Scanlon points out the circularity:

This analysis does not avoid reliance on the idea of being a reason, or ‘counting in favor of,’ since that very notion, in the

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<sup>47</sup> I should add that the coherence of this option shows that the weighty/weightless distinction is not a semantic one. It is not a distinction between different meanings of the word “rule” or “normative.” Of course, once we have made the distinction we can ask of any rule whether it is weighty or weightless. But we cannot always ask of any use of the word “rule” whether it is meant in the weighty or weightless sense. Similarly, lager and ale are not two meanings of “beer.” Someone ignorant of the lager/ale distinction can still meaningfully use the word “beer,” and we cannot demand to know of such a use whether “beer” was meant in the lager or ale sense.

<sup>48</sup> This issue is seen in discussion of representational theories of consciousness and in discussion of fitting attitude theories of value. For a start, see Anscombe 1965; Wiggins 1987; Gibbard 1990; Crane 2003. For a good argument against the viciousness of such circularities, see Levine 2003.

<sup>49</sup> Gibbard 1990; 2003; 188-191.

<sup>50</sup> This formulation of Gibbard’s view is presented by Scanlon (1998, 58-59).

form of ‘weighing in favor of,’ appears in the characterization of the attitude he describes.<sup>51</sup>

Gibbard’s response is to escape the circularity by further reducing the attitude. Taking *R* to weigh in favor of doing *X* is explained computationally or, we might say, dispositionally. This state of mind just is “calculating what to do on a certain pattern, a pattern we could program a robot to mimic.”<sup>52</sup> Gibbard uses “mimic” only because the robot would calculate differently than we would. But he is clear, as he must be if he is to adequately respond to Scanlon in this way, that the robot does literally weigh considerations.

The drawback of Gibbard’s approach is that he has to make good on the proposed computational reduction of the attitude. Can he successfully reduce this attitude to some computational facts? Gibbard does not offer a suggestion for how this reduction goes or an argument that it is possible. Whether he *needs* such an argument depends on what kind of attitude is supposed to be reducible to computational facts. There are two ways to think about this attitude of taking some consideration to weigh in favor of doing something. The phrase used to pick out the attitude in question—‘taking *R* to weigh in favor of doing *X*’—is either (a) part of folk psychology or natural language and picks out a commonplace mental state, like belief, desire, anger, love, etc., or (b) the phrase is a technical or theoretical term, which has its extension determined by the role that it plays in Gibbard’s theory. Either way, I think, will not do. If this attitude is part of ordinary folks psychology, then Gibbard is making a very contentious claim for which he presents no argument. The view that ordinary mental states can be reduced to computational or dispositional facts has been around in philosophy of mind for some time. But it is highly contentious. I would suggest that most philosophers of mind deny that simple robots *literally* have commonplace folk psychological mental states like belief and desire. Gibbard does not present an argument that such reduction is possible because, I suspect, he uses the phrase ‘taking *R* to weigh in favor of doing *X*’ not to pick out some ordinary folk psychological mental state with which we are already familiar. Rather, he may be using the phrase as a technical, theoretical term. Terms like ‘electron’ or ‘Jack the Ripper’ refer to whatever thing or things happen to meet enough of the descriptions contained in the theory of which those terms are a part. The label ‘Jack the Ripper’ is introduced as part of a detective’s theory that several murders were committed by the same individual. Whoever committed the murders is the referent of ‘Jack the Ripper’. If Gibbard is using the phrase ‘taking *R* to weigh in favor of doing *X*’ as a theoretical term, then no argument for reducing ordinary mental states to computational states may be needed. Gibbard is only committed to the computational reducibility of whatever state meets the descriptions that are part of Gibbard’s theory. The attitude of ‘taking *R* to weigh in favor of doing *X*’ is just whatever attitude is (a) partly constitutive of *R* being a reason to do *X* and (b) computationally reducible. No argument for reducibility is needed because it is a matter of stipulation. But in this case, Gibbard’s account seems to have lost its explanatory force and intuitive plausibility. The account comes to the claim that having reason to do something consists in an unspecified computational fact about people’s brains. Though we

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<sup>51</sup> Scanlon 1998, 58.

<sup>52</sup> Gibbard 2003, 190.

no longer need an argument that the relevant mental state is computational, we now need an argument for the view itself.

This is less discussion than Gibbard's account warrants. But to give it the treatment it deserves would take us far afield. We need only cast enough doubt on Gibbard's approach to warrant considering an alternative solution to circularity problems of this sort.<sup>53</sup> The circularity arises because the notion to be explained—*reason*, in Gibbard's case, or *rule*, in mine—is accounted for by appeal to an attitude in the content of which appears that very notion. Gibbard attempts to escape the circularity by analysing away the attitude. By contrast, I embrace the circularity and argue that it is not vicious.

There are vicious circularities. An account of causation in terms of 'one event making another event occur' is viciously circular. It gives us no insight because *making* an event occur just is *causing* it to occur. But other circular accounts seem to do just fine in spite of their circularity. Consider the following account of tables: to be a table is to be a collection of tiny (so tiny as to be invisible) and spacious (that is, consisting almost exclusively of empty space) molecules arranged table-wise. For our purposes it does not matter whether this the correct account of what it is to be a table. What matters is just that the account makes use of the concept *table*, but it is far from trivial or uninformative. It is highly unlikely that someone lacking modern scientific training or equipment would stumble on the conclusion that tables are mostly empty space. So whether or not this account is correct, it is substantive. Of course, this account is useless if our aim is to give the concept *table* to someone who does not already have it. But those with the concept *table* learn something when they are taught such a theory.<sup>54</sup> Just as this theory is circular but informative, so too our theory of table manners is circular but informative. Artificial rules are explained in terms of people's behavior and attitudes. If correct, this is substantive and informative, though perhaps not as bold as the above theory of tables. Yet when specifying which attitude people must have, like when specifying which arrangement the table-composing molecules must be in, we appeal to the very thing the account is an account of.<sup>55</sup>

Even if we agree that the table-wise-molecules account is not viciously circular, and even if we agree that the account of table manners is similar, it would still be nice to say *why* these circularities are not vicious. What is the difference between these non-vicious circularities and the vicious ones? Here is a proposal (one simple enough to border on stipulation): the circularity of an account is vicious if it prevents that account from fulfilling its purpose. There are, it seems to me, at least three purposes that accounts might have, and so at least three types of accounts. Some accounts are mere definitions. The purpose of these

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<sup>53</sup> I suspect that McDowell (1985) would endorse an answer like the one I present in response to a similar circularity worry for his view of secondary qualities and of value. Unfortunately, McDowell only mentions the worry in a footnote and does not spell out a response.

<sup>54</sup> If the theory is true, of course.

<sup>55</sup> There is a disanalogy between the analysis of tables in terms of particles arranged table-wise and the analysis of artificial rules in terms of people taking there to be artificial rules. In principle, it is possible to remove the mention of tables from the account of tables by characterizing what table-wise arrangement is—e.g. with legs and a flat surface. It is less clear whether this can be done for the account of artificial rules. This disanalogy, however, is irrelevant. The question is whether the circularity of the account makes it uninformative or otherwise useless. If an account is uninformative, then this would be so even if it could be changed so as to become informative. But, as it turns out, the circular account of tables is informative. It is irrelevant that it could be made even more informative.

accounts, if they can even be called “accounts,” is to give those who already possess a concept a new *term* for that concept. Even the above account of causation is not viciously circular when considered as a definition. If our aim is to explain the term “cause” to someone who already possesses the concept *cause* but only has terms like “make,” then the circularity is no problem.

But this kind of definitional account is less interesting than what we might call a “reductive” account.<sup>56</sup> On one way of thinking about reduction, reduction is possible when two propositions pick out the very same state of affairs. The same state of affairs can be described as including lightning or electric discharge. If one did not already know that these different descriptions pick out the very same phenomenon, then the account is informative. In some reductive accounts, the two descriptions are *very* different. There may be no conceptual overlap between them whatsoever. This seems to be the case when lightning is accounted for as electric discharge. Of course, not all electric discharge is lightning. So we may wish to say *which* electric discharge counts as lightning. If fulminology (the study of lightning) is sufficiently advanced, then fulminologists can specify the type of electric discharge without mentioning “lightning.” But if it is not, if all that can be done is to say that lightning is the kind of electric discharge that constitutes lightning, then the account does not become vacuous. It is still informative to say that lightning is electric discharge, even if we are unable to specify which type of electric discharge without resort to the concept *lightning*. What this circular account will not be able to do is give the concept *lightning* to someone who does not already have it.<sup>57</sup>

There are at least two kinds of reductive accounts: those that inform or explain the nature of some phenomenon and those that give a concept to those who do not already possess it. Many accounts serve both purposes and therefore are of both types. If an account is meant only to explain some phenomenon, then it is enough to inform us that that phenomenon is identical to one described in another way, even if that description also contains some of the concepts contained in the initial description. Of course, if the two descriptions turn out themselves to be relevantly the same, then the account fails even at this task. But that does not seem to be the case for the reduction of tables to molecules arranged table-wise, the reduction of lightning to electric discharge, or the reduction of artificial rules to behavior and (in some cases) taking there to be artificial rules.<sup>58</sup> This is not to suggest that circularity is a virtue. Any amount of circularity reduces the degree to which an account is informative. The account of tables in terms of table-wise arranged tiny and spacious molecules is informative. It would be even more informative if it the arrangement of those molecules were characterized without use of the concept *table*. Similarly, the account of social or artificial rules in terms of people taking there to be social or artificial rules would be more informative were it not circular. But since the accounts are still informative, and since their

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<sup>56</sup> I use the term more loosely than Ernest Nagel (1961) and other mid-20th century philosophers of science, who were interested in theory reduction. For alternative versions of reduction, see Hooker 1981; Schaffner 1993; Weber 2004.

<sup>57</sup> McDowell 1985.

<sup>58</sup> This is not to say that there are no disanalogies among these three accounts. What matters is the point of similarity: as the theories are stated here there is conceptual overlap between the initial description of the phenomenon and the description given by the account. The point is just that such accounts can be enormously significant and informative as to the nature of the phenomenon described.

purpose can be seen as illuminating the nature of their target phenomena and not as providing concepts to those who do not already have them, the circularity is not vicious. When philosophers call a circularity “vicious,” we mean more than just *this account is informative, but it could be more informative*. These accounts’ circularities are vicious when the accounts are considered as attempts to give their target concepts to those who do not already possess them. But for mere attempts to informatively explain that two states of affairs are one and the same, this kind of circularity is not fatal.<sup>59</sup>

Of course, to say that we can give a theory of table manners that is in some sense reductive is not to say that such a theory can be given for other normative domains, like law or language or morality. Obviously, there has been resistance to such theories. As McDowell put it:

By Wittgenstein’s lights, it is a mistake to think we can dig down to a level at which we no longer have application for normative notions (like “following according to the rule”).<sup>60</sup>

At least as regards table manners, I think we can dig down to a level at which all the phenomena are non-normative. But I allow that it may only be possible for us to describe this level using normative terms.

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<sup>59</sup> This could all be put more ecumenically, allowing for disagreement about what constitutes reduction. Either the account that I am offering is reductive but is put to a purpose such that circularity is not vicious, or it is non-reductive, making circularity not an issue, but still illuminating.

<sup>60</sup> McDowell 1985, 341.

## Chapter 3

### Attitude and the Normativity of Law<sup>1</sup>

The previous chapter introduced the idea of weightless normativity, as well as several other distinctions. The goal is to claim that law is also normative in the sense that it consists of weightless rules (and sometimes consists of weighty rules, though only contingently) and thereby rule out Austinian positivism, but not Hartian positivism. This task, however, will only be achieved in chapter 4. The present chapter goes a considerable way toward that goal by discussing the internal point of view and its ability to explain the normativity of law.

The normativity of law is perhaps the central concern of philosophy of law in the late 20th and early 21st centuries.<sup>2</sup> 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*.<sup>3</sup> 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 criticises because in the end, he, like Austin, does not take normativity sufficiently seriously."<sup>4</sup> The specific complaint against Hart often goes, roughly, as follows. Hart's theory of law is psychological. It makes central appeal to a particular psychological attitude, which is called "acceptance" or "the internal point of view."<sup>5</sup> 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 re-phrased in the now-popular vocabulary of reasons. The normativity of law is the fact that law is reason-giving.<sup>6</sup> And the internal point of view is that attitude by which we take there to be reasons.<sup>7</sup> But how can merely *taking* there to be reasons make it that there really *are* such reasons?<sup>8</sup>

The aim of this chapter 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

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<sup>1</sup> A slightly modified version of this chapter appears, with the same title, in *Law and Philosophy* 36(5): 469-493, 2017.

<sup>2</sup> Enoch 2011; J. Coleman 2001; Marmor 2008; Postema 1998.

<sup>3</sup> Hart 1961.

<sup>4</sup> Perry 2006, 1176.

<sup>5</sup> Hart 1961, 55–57.

<sup>6</sup> Marmor 2008; Dworkin 1977; Joseph Raz 1975, chap. 2; Perry 2006, 1173.

<sup>7</sup> This is a contentious understanding of the internal point of view. We will come to this issue shortly.

<sup>8</sup> See J. L. Coleman and Leiter 1996; Perry 2006, 1176; Enoch 2011; Marmor 2008. This is obviously related in many ways to moral constructivism, though I resist the urge to enumerate those relations here.

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 chapter, I argue that this is a mistake. There is an understanding of the normativity of law—a 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, which is fundamentally the same understanding of normativity that was applied to table manners in the previous chapter, 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, though some of those will be delayed until chapter 4 of the present dissertation.

### 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.<sup>9</sup> The primary role of the internal point of view is in Hart's so-called “practice theory of rules,” which was mentioned in section 5 of the previous chapter.<sup>10</sup> This is a theory of social rules.<sup>11</sup> It attempts to 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.

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<sup>9</sup> Dworkin also sees Hart as explaining how rules are normative. Dworkin 1977, 19; Joseph Raz 1975, chap. 2; MacCormick 1978; Bix 2006, 5–9; Holton 1998; Perry 2006, 1176.

<sup>10</sup> J. Raz 1984.

<sup>11</sup> Hart (1961, 256) 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.”



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.<sup>12</sup>

According to the practice theory, two conditions are sufficient for the existence of a social rule.<sup>13</sup> 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.<sup>14</sup> This attitude is manifested in criticism using “normative terminology”.<sup>15</sup>

So, what *is* this peculiar attitude?<sup>16</sup> 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.”<sup>17</sup> To take this attitude is to treat a pattern of behavior as a “reason and justification” for behavior.<sup>18</sup> It is also to see the pattern as a source of “legitimacy” of criticism and of punishment.<sup>19</sup>

We don’t get much more than that from Hart. But an example, reminiscent of though different from some examples from the previous chapter, 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.<sup>20</sup> If my friend fills a bowl with cereal, I can 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.<sup>21</sup> 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*.

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<sup>12</sup> Hart 1961, 57.

<sup>13</sup> I only say sufficient because primary rules, which do not meet these conditions, are also rules.

<sup>14</sup> 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.

<sup>15</sup> Hart 1961, 56.

<sup>16</sup> This section expands heavily on the discussion of the internal point of view from the previous chapter.

<sup>17</sup> Hart 1961, 56

<sup>18</sup> Hart 1961, 11.

<sup>19</sup> Hart 1961, 56.

<sup>20</sup> Hart 1961, 84.

<sup>21</sup> Hart 1961, 90.

This latter attitude, as mentioned more briefly in the previous chapter, is the internal point of view.<sup>22</sup>

The difference between these patterns is the same one pointed out in section 1 of the previous chapter. 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.

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.<sup>23</sup> 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.<sup>24</sup> But we might wonder about this. If the internal point of view 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.<sup>25</sup> Though some isolated passages in *The Concept of Law* suggest this reading, it is mistaken. Someone within a legal system can fail to see 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.<sup>26</sup> 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.<sup>27</sup>

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<sup>22</sup> 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.

<sup>23</sup> The patterns do not need to be long-standing in order to become rules.

<sup>24</sup> Hart 1961, 56 and throughout chapter 4.

<sup>25</sup> Perry (1995) may have this view. Another good example is Leiter (1997), who follows and quotes Perry in a footnote on p.295, Postema (1998).

<sup>26</sup> Holmes 1897.

<sup>27</sup> For a thorough demonstration of this point see S. J. Shapiro 2000.

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.<sup>28</sup> But, as we will see, many think Hart is mistaken in this.

## 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.<sup>29</sup>

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.

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.<sup>30</sup>

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

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<sup>28</sup> Hart 1961, 202.

<sup>29</sup> MacCormick 1978; Holton 1998; Perry 2006, 1176.

<sup>30</sup> Holton 1998.

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.

**Reasons-In-Favor-Of Translation** "Acceptance of the law, in Hart's terms, requires the belief that there are normative reasons for acceptance."<sup>31</sup>

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.<sup>32</sup> 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 behavior is to see the pattern as a standard against which behavior can be judged and from which criticism can be justified.<sup>33</sup>

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 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

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<sup>31</sup> Holton 1998, 604.

<sup>32</sup> 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.

<sup>33</sup> 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, it is maintained by Dworkin (1977, 20). Also, see Bix (2006) for the correct translation.

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.<sup>34</sup>

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:

...whilst 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.<sup>35</sup>

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 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 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.<sup>36</sup> 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

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<sup>34</sup> Hart 1961, 203.

<sup>35</sup> Holton 1998, 603.

<sup>36</sup> Hart also uses the term again, on the very same page, but in reference to a reason for sanction.

mention this is to...refer to the internal aspect of rules seen from their internal point of view.<sup>37</sup>

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.<sup>38</sup> 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?

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.<sup>39</sup> 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

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<sup>37</sup> Hart 1961, 90.

<sup>38</sup> Hart 1961, 231–2.

<sup>39</sup> 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.

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.<sup>40</sup> Is Hart right that these considerations apply to law as well?<sup>41</sup> 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 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*.<sup>42</sup> 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.<sup>43</sup> 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 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 normative. Briefly in the remainder of this chapter, and in more depth in the following chapter, 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

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<sup>40</sup> Hart 1961, 203.

<sup>41</sup> Hart 1961, 202.

<sup>42</sup> Scanlon (1998) 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.

<sup>43</sup> Coleman and Leiter (1996, 241), as well as Perry (2006, 1176) state this problem very clearly.

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.<sup>44</sup> 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 Dworkin to be “much stronger.”<sup>45</sup> 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.<sup>46</sup> Stephen Perry agrees, putting the point concisely: “Legal normativity is moral normativity.”<sup>47</sup>

Hart obviously thinks that law has no necessary connection to morality.<sup>48</sup> 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 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

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<sup>44</sup> This understanding seems to be shared by Raz (Joseph Raz 1979, 148–51). 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. Raz emphasises 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.

<sup>45</sup> Dworkin 1977, 48.

<sup>46</sup> Dworkin 1977, 48, 57.

<sup>47</sup> Perry 2006, 1174.

<sup>48</sup> Hart 1958.



existence of the social rule, and therefore the existence of the duty, is simply a matter of fact.<sup>49</sup>

The above characterization leaves out the internal point of view. But elsewhere Dworkin acknowledges its importance.<sup>50</sup> 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.<sup>51</sup> 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's sense.<sup>52</sup> Boxing, for example, 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.<sup>53</sup> 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 sense—the minimalist sense of being constituted by social rules, as introduced and discussed in section 1 of the previous chapter—in which games are normative.<sup>54</sup> What I wish to suggest here, and further defend in the following chapter, is that this is also the sense in which law is normative.<sup>55</sup>

Does Hart agree with this suggestion? 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'."<sup>56</sup> 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

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<sup>49</sup> Dworkin 1977, 49–50.

<sup>50</sup> Dworkin 1977, 49–50.

<sup>51</sup> Hart 1961, 257.

<sup>52</sup> Sellars 1954.

<sup>53</sup> Dworkin 1977, 57..

<sup>54</sup> The way of distinguishing senses of normativity is similar to a distinction hinted at, but not thoroughly developed, by Parfit (2011, 144–6), who distinguishes between the rule- and reason-involving conceptions of normativity.

<sup>55</sup> Though he puts things differently, I have an ally in Enoch (2011).

<sup>56</sup> Hart 1961, 56.

glimpse at a different, less trivial, understanding of what it is for some phenomenon to be normative. His theory of law:

...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.<sup>57</sup>

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 composed of primary and secondary rules. Also, law must claim a kind of priority over games, etiquette, and other rule-based institutions.<sup>58</sup> 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 the 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.<sup>59</sup>

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 of law.<sup>60</sup> 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 before the more comprehensive defense of this conception of the normativity of law that is the focus of the following chapter, we can see that there is such a conception that is minimal enough to be potentially explicable with Hartian resources, but substantial enough to be inexplicable with Austinian ones.

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<sup>57</sup> Hart 1961, 239.

<sup>58</sup> In Hart (1961, 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.”

<sup>59</sup> It might be objected that Hart cannot think of law as normative in the sense that boxing is normative on the grounds that Hart thinks legal reasons are “peremptory”. 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.

<sup>60</sup> See the following chapter.

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."<sup>61</sup> 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.<sup>62</sup> 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.

A fuller defense of this picture of the normativity of law is taken up in the following chapter, but one question is worth discussing immediately. 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.<sup>63</sup> 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, weightless normativity of games and etiquette is attitude-dependent, but it can apply to particular individuals irrespective of their attitudes.

#### 4. Conclusion and Preview of Chapter 4

There are some objections that might be raised to the claim that law is only essentially normative in the sense that it consists of rules. They include the concern that any positivist who respects the separation of law and morality is unable to have a view of the normativity of law, the counterexample to the practice theory discussed in the previous chapter, and others. I discuss lingering objections in the following chapter.

In this chapter, 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

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<sup>61</sup> Hart 1961, 211.

<sup>62</sup> Hart 1961, 210, 1958.

<sup>63</sup> Dworkin (1977) has this view of the normativity of games.

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 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 chapter 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.

## Chapter 4

### More Defense of the Practice Theory from Normativity as a Constraint

Having introduced the idea of weightless rules (chapter 2), and having argued that the internal point of view should be understood in a non-moralistic way and that this attitude can, at least potentially, explain the normativity of law (chapter 3), we are now able to formulate what was implicit in the previous chapter: an account of the normativity of law in terms of weightless rules. This is a decidedly Hartian picture of the normativity of law, even though Hart himself did not characteristically talk in those terms. This account takes the form of a defense of Hart's practice theory of rules, expanding on the brief defense of it as applied to table manners from chapter 2, showing how the normativity of law must be understood in order for that theory to succeed. The practice theory, of course, is a theory of the origin (less temporal and more metaphysical) of legal systems.

Where do laws come from? They come from legislative bodies—like congress, or parliament, or the monarch—with law-making authority.<sup>1</sup> Where, then, do these legislative bodies get their authority? They get their authority from other laws—like those contained in a constitution—which specify which bodies can legislate and under what conditions. Since these second-order laws are themselves created by legislative bodies, the threat of regress is not difficult to see.<sup>2</sup>

On H.L.A. Hart's theory of law, the regress halts at one particular law: the rule of recognition, a second-order rule specifying the conditions under which other rules and rule-creating bodies have legal status.<sup>3</sup> But where does the rule of recognition come from? How does it get *its* legal status? The answer, on pain of regress, must not refer to some other valid law or some other already authoritative body. Instead, Hart suggests that the rule of recognition arises from non-legal—and indeed non-normative—states of affairs.

Hart's explanation for how the rule of recognition arises from non-legal states of affairs is the theory of rules discussed in chapter 2, section 5 and chapter 3, section 1—the

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<sup>1</sup> Laws can be understood broadly so as to include regulations, executive orders, and even judicial precedent. Correspondingly, legislators can be understood to include members of the executive and judiciary in their regulation- and precedent-creating modes.

<sup>2</sup> See Green 1999; Shapiro 2011. A prominent alternative response to this regress is the coordination convention theory of law, which was developed in the early 80s by Coleman (1982) and Postema (1982) before somewhat falling out of favor.

<sup>3</sup> Hart 1961.

practice theory of rules.<sup>4</sup> This theory attempts, without reference to any prior legal entities, to explain how a rule of recognition comes to exist.<sup>5</sup>

Unfortunately, the practice theory is widely—perhaps universally—taken to be a failure. This is for two reasons. First, the things to be explained, which in the legal case are the validity of laws and the authority of legislators, are normative phenomena. Hart almost never uses the word “normative” in *The Concept of Law*. But in the nearly 60 years that have passed since that book was first published, talk of “normativity” has exploded within analytic jurisprudence to the point where “the normativity of law” is considered a central explanandum of legal philosophy.<sup>6</sup> The problem is that the practice theory attempts to explain the foundation of legal systems merely by appeal to two types of *descriptive* facts: behavioral facts about what people do and psychological facts about what attitudes people take. The worry is that these descriptive facts could never explain the fact that one legally *ought* to do something.<sup>7</sup> (Though this problem will feel familiar to many philosophers of law, some will immediately worry that mention of *the normativity of law*—and mention of the supposed fact that one “legally ought” do something—is obscure. This worry puts us on the right track, as the exact sense in which law is normative will determine whether this is a genuine problem for the practice theory.)<sup>8</sup>

The second problem is more straightforward, and we encountered a version of it in chapter 2, section 6. The practice theory provides two conditions that are putatively sufficient for the existence of a social rule. The problem is that there is a counterexample, introduced by G.J. Warnock (1971) and reformulated and repeated dozens of times since, in which these two conditions are met but where no rule exists.<sup>9</sup> Nearly every philosopher who discusses this problem in print accepts it as a decisive refutation of the practice theory.<sup>10</sup>

Hart’s theory of law is based on a theory of rules that is thought to be not just troubled, but altogether doomed. Building off of the previous chapter, I defend the practice theory by offering a solution to the normativity problem and by arguing that the putative counterexample is no counterexample at all.

## 1. The Putative Counterexample

Since both the practice theory itself and the internal point of view were introduced in both of the previous chapters, I assume that the reader is familiar with them.<sup>11</sup> We can, therefore, return to the counterexample, which was discussed in chapter 2, section 6. There, the

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<sup>4</sup> For the original use of “the practice theory of rules” see Raz 1984.

<sup>5</sup> It should be emphasized that the practice theory is not a theory of the legal rule of recognition in particular. It does not present conditions that are sufficient for there to be a rule of recognition. Rather, it is a theory of just that feature of the rule of recognition that allows it to halt the regress—its being a social rule.

<sup>6</sup> Enoch 2011; Coleman 2001; Marmor 2008; Green 1999; Postema 1982.

<sup>7</sup> Perry 2006, 1173; Coleman & Leiter 1996, 241; Green 1999, 35; Dworkin 1977, 19; Shapiro 2011, 46-49; Green 1999, 35; Bix 2006, 5-9. Also see Enoch 2011; Marmor 2008; Raz 1975; MacCormick 1978; 1981; Smith 1994; Holton 1998.

<sup>8</sup> This is the topic of later sections.

<sup>9</sup> Warnock 1971, 45-6, 61-65; Marmor 2001, 3; 2009, 14-15; Shapiro 2011, 103-4; Wodak 2016, 49; Perry 2015.

<sup>10</sup> The one exception of which I am aware is Green (1999), whose underappreciated, brief mention of this counterexample is discussed in a footnote in section 3.

<sup>11</sup> For a refresher, see chapter 2, section 5 and chapter 3, section 1.

putative counterexample was reconceived in terms of table manners, but since the focus is now on law, it can be presented in a more traditional form. Here is the counterexample:

After three strikes, batters typically retire to the dugout. Players, coaches, and fans consider instances of conformity with this pattern to be appropriate and they consider deviations inappropriate. The practice theory's two conditions—that there is a regularity and that participants take the internal point of view—are met. According to the practice theory, there is a rule requiring batters to retire after three strikes. And there really is such a rule.<sup>12</sup> By contrast, however, when a weak player is at bat or when a bunt is suspected, the fielders typically draw closer to home. Here too, conformity is considered appropriate and deviation is considered inappropriate. So the two conditions set out by the practice theory are met. But, while there is a rule requiring batters to retire after three strikes, there is no rule requiring fielders to draw closer to home when a weak player is at bat.

This is a serious problem. It appears that the two conditions are not sufficient. The theory fails.<sup>13</sup> As mentioned in chapter 2, this counterexample was introduced by G.J. Warnock nearly 50 years ago.<sup>14</sup> Since then, it has been endorsed and repeated by dozens of philosophers, including Andrei Marmor and Scott Shapiro.<sup>15</sup> And with good reason. There really is a regularity of behavior by which fielders draw closer to home when a weak player is at bat. And it is true that participants take the internal point of view: they evaluate instances of fielding behavior based on whether or not it accords with the pattern of drawing closer to home when a weak player is at bat. So there should be a rule. But, plainly, there is not.

## 2. Defense of the Practice Theory Against Putative Counterexample

Just as with the version of this putative counterexample that applied to table manners, I think that this legal version fails because, despite appearances, there *is* a rule requiring fielders to draw closer to home when a weak player is at bat. It *seems*—and seemed to many for 50 years—like there is no such rule because it is juxtaposed with the rule of baseball requiring batters to retire after three strikes. The rules of baseball are often quite determinate and codified. You can look them up in a book, or on Major League Baseball's website. So it is not surprising that more nebulous, unspoken rules seem insignificant in juxtaposition. The

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<sup>12</sup> Actually, I do not think that this is the right way to think about the relevant rule of baseball. Rather, the rule of baseball states that after three strikes a batter is out, and batters who are out lose certain powers or privileges, which means that they are no longer permitted to stand at home plate. This kind of difference between duty-imposing and power-conferring rules is prominent in Hart 1961, but the best discussion of it is in Raz 1975, ch 4.

<sup>13</sup> The typical explanation for the practice theory's failure is this: the theory cannot explain the difference between a social rule and a widely-accepted reason. (See Warnock 1971, 45-6 and Marmor 2009, 14.) There is a rule requiring batters to retire after three strikes. There is a widely-accepted reason in favor of drawing closer to home when a weak player is at bat. As it turns out, Hart's theory can explain this difference. It can be widely accepted within a group that there is reason to □ even though members of the group do not regularly □. So the first condition of the practice theory—the condition requiring a regularity of behavior—distinguishes rules from widely-accepted reason. But this does not save the practice theory. The difference between a social rule and a widely-accepted reason only enters the story as part of a common explanation of the effectiveness of the counterexample. The success or failure of the counterexample is independent of any such explanation. It still seems that we have an example where the putatively sufficient conditions are met but where there exists no rule. If this is so, then the practice theory fails.

<sup>14</sup> Warnock 1971, 45-6, 61-5. Warnock's original example concerned cricket, but I follow Shapiro (2011) in translating it into baseball.

<sup>15</sup> Marmor 2001, 3; 2009, 14-15; Shapiro 2011, 103-4; Wodak 2016, 49; Perry 2014.

rule requiring fielders to draw closer to home when a weak player is at bat is not a rule of baseball. It is a rule of what we might call *popular defensive baseball strategy*. Popular defensive baseball strategy is the normative practice consisting of rules that prescribe—according to the strategic opinions of influential baseball players and coaches—how one ought to behave in order to prevent one’s opponent from scoring runs. Baseball and popular defensive baseball strategy are both human-created normative practices consisting of social rules. But they are different. Popular defensive baseball strategy depends for its existence on baseball. Yet baseball can exist without the defensive behavior and opinions of baseball players and coaches being consistent enough to constitute a practice. In reality, there may be multiple practices of defensive baseball strategy: a more traditional school of thought and a newer, statistically-oriented school of thought. These two schools of thought yield distinct normative practices consisting of different social rules.<sup>16</sup>

As mentioned above, the rules of baseball are more frequently written down and, as a result, more determinate. Still, we apply the word “rule” to both types of rules. Suppose that the fielder intentionally and systematically fails to draw closer to home when weaker players are at bat. She has analyzed the data and concluded that, counterintuitively, it is strategically best not to draw closer to home. Even if she is right, popular defensive baseball strategy still requires drawing closer. Popular defensive baseball strategy is constituted not by mind-independent strategic facts, which this one player may or may not have discovered, but by the behavior and evaluative attitudes that are popular in the baseball community. Suppose that this fielder fails to draw closer to home on a crucial play. It would be appropriate to say that she, “broke a sacrosanct rule of defensive baseball strategy.” Such rules are different from the rules of baseball, but they are rules nonetheless.

The point here is not merely that we use the word “rule” for both the rules of baseball and the rules of popular defensive baseball strategy, though I do think that that fact is important. Rather, the point is that both of these normative standards broadly the same kind of phenomenon, and that the practice theory is most productively understood as an account of that phenomenon, whatever we call it. Though it does some violence to the English language, we can perfectly well restrict our use of “rule” to exclude the rules of popular defensive baseball strategy. If they are not rules, however, then they are “normative standards” or “rules\*” and the practice theory need only be a theory of that.

These two types of rules are the summary and non-summary rules discussed in chapter 2, section 6. Those unfamiliar with the distinction should return to this chapter after having read chapter 2. The 3-strikes rule is a non-summary rule and the fielders-draw-closer rule is a summary rule. So it should not be surprising that they feel like very different kinds of rules. They *are* very different kinds of rules.

It is worth offering a brief further explanation of the summary/non-summary distinction that would have been too cumbersome to include back in chapter 2. This

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<sup>16</sup> Something like this response is what Leslie Green appears to have in mind at the beginning of his well-known, but still underappreciated 1999 paper, “Positivism and Conventionalism.” Green’s suggestion to this effect is brief and seems to have been entirely unappreciated in the literature, since the counterexample continued to be repeated and endorsed: see Marmor 2001, 3; 2009, 14-15; Shapiro 2011, 103-4; Wodak 2016, 49; Perry 2014. What Green’s point needs in order to have an effect on the literature is for some illuminating explanation of the difference between these two kinds of rules to be given, which is what I attempt to do in the remainder of this section drawing on an old Rawlsian distinction.



distinction is one having to do with a certain *purpose* or *function* that some rules have and others lack. To make an analogy, consider the difference between two images: an abstract expressionist painting, such as one by Jackson Pollock, and a courtroom sketch. They are both images, but only one of them has a certain kind of representative function. The courtroom sketch represents, among other things, the shapes, sizes, and arrangement of objects in a room. The Pollock painting might also represent things—like late capitalism or the feeling of *ennui*—but it does not represent the shapes, sizes, and arrangement of objects in a room.<sup>17</sup> Both images can be evaluated along many different lines—they might both be beautiful or ugly, colorful or drab. But only the courtroom sketch can be said to be *accurate* or *inaccurate*. The courtroom sketch can be criticized as inaccurate, for instance, if the defendant was sitting on the left side of the table and not the right. But one who says of the Pollock painting that it gets wrong the location of the defendant is confused about what sort of thing that painting is.

Similarly with rules. The rules of baseball and the rules of popular defensive baseball strategy can all be evaluated as useful or useless, fun or annoying, well-chosen or ill-conceived. But only summary rules, like the fielders-draw-closer rule, can be criticized for failing to capture how baseball players independently ought to move. Non-summary rules, like the 3-strikes rule, can not be evaluated along these lines because they do not aim to capture what players ought to do independent of the existence of the rules themselves. Non-summary rules lack that function.

Lastly, it is worth reiterating that summary rules can be mistaken and still be the rules that they are. Consider another example of a summary rule: the rule of popular health folklore requiring one to drink eight glasses of water each day. This summary rule fails to accurately summarize how much water one has reason to consume each day (with a normal diet and other beverages, zero glasses of water can be sufficient). Yet, so long as enough members of the relevant community obey this rule and apply it as a normative standard for the evaluation of behavior, there is such a rule. Even though one does not independently have health-related reason to drink eight glasses of water a day, it is still true to say that failing to drink that many glasses is *prohibited by the eight-glasses-a-day rule*. So too, the fielders-draw-closer rule continues to exist even if it turns out that it fails to accurately summarize or report what fielders have independent reason to do.<sup>18</sup>

### 3. Objections and Replies

This section briefly considers two defenses of the counterexample that would have been too much of a digression to include in chapter 2, but are appropriate here because our focus is more squarely on the practice theory as it applies to law.

First, it might be objected that if we allow summary rules, like the rules of defensive baseball strategy, then there will be far more rules than anyone has thought: rules against licking electrified fences, against dipping credit cards in hydrochloric acid, etc.<sup>19</sup> This is the

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<sup>17</sup> Or, if some of Pollock's painting are bizarrely said to represent the arrangements of objects in a room, we can consider any abstract image that does not.

<sup>18</sup> It is perhaps worth mentioning, as an aside, that some legal rules are summary rules (such as laws prohibiting murder) and some legal rules are non-summary rules (such as laws requiring one to drive on the right or left side of the road).

<sup>19</sup> Thanks to Scott Shapiro for this example.

second objection that one might offer in defense of the practice theory. It appears that any type of behavior that is (a) rare and (b) thought to be foolish will be prohibited by a summary rule. This is indeed an unwelcome result.

The trick is to say how there is a fielders-draw-closer rule, but not a credit-cards-in-hydrochloric-acid rule. Hart's practice theory, I think, already does the trick. To see this, we must first notice a curious fact about the kinds of rules that putatively flow through the floodgates if summary rules are allowed: *the more specific the potential rule, the stronger our intuition that such a rule does not exist*. For example, we might have inconclusive intuitions as to whether there exists a social rule, say, prohibiting the destruction of credit cards. But we have clearer intuitions that there is no rule against dipping credit cards in hydrochloric acid. And, as to a rule prohibiting using one's left index and pinky fingers to dip a VISA card ending in 4540 in hydrochloric acid shipped from Argentina, we feel altogether certain that there is no such rule.

Keeping this fact in mind, we can see that the practice theory already rules out these outlandish rules while ruling in those summary rules that there intuitively are. The practice theory is able to do this because of the nature of the internal point of view. As mentioned in section 1, the internal point of view is an intentional mental state with two objects: a pattern of behavior and individual instances of behavior. To take the internal point of view one evaluates instances of behavior *in virtue of their conformity or nonconformity with a pattern of behavior*. It is not enough to regard instances of credit-card-in-hydrochloric-acid-dipping as foolish. One must have some mental representation of the behavior type *dipping a credit card in hydrochloric acid* and evaluate behavior tokens based on whether they falls under that description. Since people do not think in these terms—since they apply a variety of other descriptions, like *destroying a credit card* or *dipping an object of some value in a destructive acid*—they do not take the internal point of view toward the pattern of not dipping credit cards in hydrochloric acid. Therefore, the practice theory's conditions are not met. People do not take the internal point of view toward the pattern of not dipping credit cards in hydrochloric acid simply because people do not think about hydrochloric acid. They do not often enough conceive of the behavior of themselves and others in those terms.

Of course, if hydrochloric acid were more common, if retailers kept a small vat of it on the checkout counter, then consumers would regularly think of their credit-card behavior in terms of hydrochloric acid. In that case, the practice theory's conditions would be met, and the theory would yield the result that there is a credit-cards-in-hydrochloric-acid rule. And that would be the correct result.

This feature of the internal point of view also explains why our intuitions fall onto the spectrum based on the generality/specificity of the putative rule. The more specific a putative rule is—like a rule prohibiting using one's left index and pinky fingers to dip a VISA card ending in 4540 in hydrochloric acid shipped from Argentina—the less likely it is that people evaluate behavior under that specific description. And as we are more confident that people do not have such specific attitudes, so too we can be more confident that there is no such rule.

A second defense of the counterexample is as follows: rejecting the counterexample and adopting Hart's practice theory gets the mistaken result that a rule of baseball and a rule of popular defensive baseball strategy are the same type of rule, but these are very different

types of rules. The best response to this objection is to simply point out that the practice theory simply does not yield this result. The practice theory *does* imply that both rules are social rules. In that sense they are the same. But that the two rules are of the same broad type does not entail that they are not of very different subtypes. Indeed, the summary/non-summary distinction carves out two very different types of social rules.

#### 4. The Normativity of Law

Whatever we think about the putative counterexample, it may have only been a superficial problem at best—a problem having to do with the details or phrasing of some sufficient conditions. The normativity problem, by contrast, seems to get at a *deep* issue with the practice theory: a set of descriptive conditions will never be adequate for fully explaining a normative phenomenon like law.

Before discussing the normativity problem in depth, it is worth noting an important difference between it and the putative counterexample. The counterexample aims to show that the practice theory fails to explain social rules *in general*. If it succeeds, then the practice theory fails not only to explain the rule of recognition, but also rules of games, etiquette, fashion, etc. The normativity problem, by contrast, purports to doom the practice theory *specifically in its role within Hart's theory of law*. The objection is simply that law has a certain normative character and that the practice theory cannot account for that.<sup>20</sup> So when assessing the success or failure of the normativity problem, we are interested in the specific sense in which law is normative. The normativity problem stands or falls based on what exactly the normativity of law turns out to be.

Recall that according to the practice theory two things are required for a social rule: a regularity of behavior and an attitude. That there are such things is a descriptive matter. The *attitude* is not descriptive. Taking the internal point of view involves some kind of evaluation. But *the fact that individuals take an attitude*, regardless of the nature of the attitude, is a descriptive fact. That members of *S* ought to  $\square$  is an evaluative fact. That some people *take it* that members of *S* ought to  $\square$  is a descriptive one.

If both of the practice theory's conditions are descriptive, how can they be sufficient for the existence of a normative entity like the rule of recognition of a legal system?<sup>21</sup> This is a specific version of a widely-discussed question in general jurisprudence. Concern with the so-called “normativity of law” has motivated a great deal of the literature in philosophy of law for at least the last half-century. Law's normativity is supposed to be a pretheoretical datum. It is a feature of law that theories of law must reckon with, and with which the practice theory cannot successfully reckon.<sup>22</sup>

My response to this problem, which is admittedly straightforward and not entirely unprecedented is to ask not ‘is law normative?’, but ‘in what sense is law normative?’ As I will suggest, there are two senses in which a practice like law can be normative. Law is

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<sup>20</sup> It is perfectly compatible with this that the practice theory successfully explains the nature of games, etiquette, etc.

<sup>21</sup> Coleman & Leiter 1996, 241; Perry 2006, 1176.

<sup>22</sup> Dworkin 1977; Perry 2006; Letsas 2014; Raz 1975; Green 1990; 2008; Dickson 2007.

normative in only one of the two senses. And, as I argue, practices that are normative in that sense can be explained in descriptive terms.<sup>23</sup>

### 5. Varieties of Normativity

To make this move work, specifically applied to the legal case, recall two distinctions from chapter 2, section 1: the distinction between regularities and rules, those rules with deliberative weight and those without deliberative weight. Figure 1 below shows four types of rules (although there are undoubtedly more).<sup>24</sup>

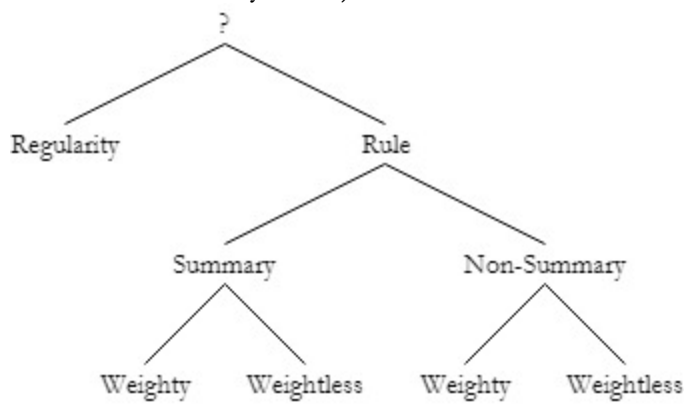


Figure 1

As a refresher, here are examples of each type of rule.

#### A. Weighty Summary Rules

A good example of a weighty summary rule is the example from section 2 of the somewhat well-known rule of popular health folklore: one must drink eight glasses of water each day. This is a summary rule.<sup>25</sup> As it turns out, this rule is misguided. With a normal diet, one can be perfectly healthy without drinking any water whatsoever. Still, this rule exists. And moreover there are occasions when it has deliberative weight. For instance, if one is at risk of developing a damaging reputation as an unhealthy person, one may have prudential reason to follow the eight-glasses-of-water rule. Similarly, if one has promised to obey the rules of popular health folklore, then the rules may acquire moral deliberative weight.

The eight-glasses-of-water rule would acquire weight in the same way even if it were accurate—that is, even if drinking eight glasses of water as actually necessary for maintaining good health. In such a case, one has deliberately weighty prudential reason to drink eight glasses independent of the existence of a social rule requiring it. The mere fact that such a social rule exists does not give one more reason to drink eight glasses of water. When the eight-glasses-of-water rule does acquire deliberative weight, it acquires it not from its accuracy, but from the fact that there are social sanctions attached to violating it, one has promised to obey it, etc.

<sup>23</sup> Strictly speaking, law can exhibit either, but it only *necessarily* exhibits one of them and therefore theories of law must only account for that variety of normativity.

<sup>24</sup> The “?” appears at the top of this figure because, as far as I am aware, there is no English word for the type of entity of which both regularities and rules are instances.

<sup>25</sup> The rules of conventional morality, also called “popular morality” or “social morality” and often contrasted with “critical morality” or morality itself, are other good examples.

### B. Weightless Summary Rules

But when no one will know how much water one consumes, when drinking fewer than eight glasses harms no one, breaks no promises, and has no negative health effects, then the eight-glasses-of-water rule is deliberately weightless. Drinking eight glasses is still required, of course. The rule continues to exist and it applies even to the behavior of those who have not promised to obey it. In this case, when one will not suffer a hit to one's reputation, and when one will not violate a promise or otherwise fail to treat others as they should be treated, the rule requiring eight glasses of water is not the sort of rule that it is appropriate to count in favor of drinking water when one is deliberating about how much water to drink.

### C. Weighty Non-Summary Rules

Consider rules of a dress code, such as those of a school requiring skirts of a certain length or collared shirts. Like summary rules, these non-summary rules acquire deliberative weight when social sanctions are attached to violation, or when violation hurts someone's feelings, etc.

### D. Weightless Non-Summary Rules

But when obeying the dress code offers no prudential advantage whatsoever, and when morality is entirely neutral on the matter as well, then even the slightest reason to wear a shorter skirt or a collarless shirt can be decisive. The rule itself is weightless.

The question that matters for our purposes here is whether weightless rules are possible. This was discussed in chapter 2, section 1, so I will not repeat the considerations offered there. But perhaps an even more persuasive means of answering that question in the affirmative is simply by considering the two examples of such rules just given. There are only two ways to resist the conclusion that cases like B and D are instances of weightless rules: insist either (1) that in cases like these there ceases to be rule or (2) that such rules exist but retain some deliberative weight. Neither option seems promising. Option (1) strikes me as a dramatic departure from ordinary language and our ordinary conception of a *rule*. We certainly talk about social rules that continue to exist even when we are in private and which we have not promised to obey, and that the specific rules just discussed apply in those cases is, I take it, a matter of stipulation. Option (2) is *ad hoc*, at best. There is nothing about moral or prudential reasons that guarantees that there will always be such a reason to obey every social rule. And there may be other varieties of reasons, but it is hard to assess whether they always attach to social rules without knowing what types of reasons they are. And, of course, any other varieties of reasons would have to attach to social rules not just in some cases, but of necessity, in all cases.

There are two senses in which a practice, like law or table manners, might be normative. Law might be normative in the sense that all of its rules are deliberately weighty all of the time. For example, if all illegal behavior is, by that very fact, also immoral, then law is normative in this sense. As in chapter 2, we will call this *normativity in the deliberately weighty sense*. Alternatively, law might not always have deliberative weight. Perhaps, like popular health folklore or school dress code rules, law consists of rules that occasionally lack deliberative weight. In such cases, though, law still consists of rules, which are more than

merely regularities of behavior. So law might be normative merely in the sense that it consists of rules. We will call this *normativity in the rule-constituted sense*.<sup>26</sup>

#### 6. Defense of the Practice Theory Against Normativity Challenge

Having distinguished these two varieties of normativity, the next step is to determine whether law is normative in the deliberatively weighty sense or in the rule-constituted sense and to determine how that affects the practice theory's ability to account for the foundation of law. In what sense is law normative? If law is normative in the weighty sense, then law's normativity is indeed an obstacle to the success of the practice theory as an account of the foundation of law. If, alternatively, law is normative only in the rule-constituted sense, then the practice theory is in much better shape. If the normativity of law is just the fact that law consists of rules as opposed to regularities, then the practice theory seems *designed* to account for the normativity of law. Law is a system of rules. Those rules derive their status as legal rules from the rule of recognition. The rule of recognition is nothing more than a social rule, which, according to the practice theory, is constituted by a regularity of behavior and an attitude.

If the normativity of law is the fact that law essentially has moral, prudential, or some other kind of deliberatively weighty normative force, then the practice theory is doomed.<sup>27</sup> But law lacks that kind of normative force. If we use "normative" only for weighty normativity, then we should say that law is not normative. Of course, particular laws and particular legal systems sometimes have, e.g., the force of morality. But when this is the case, it is for reasons other than that those laws or legal systems are *legal*. Rather, it is because those legal systems are democratic and those particular laws are just, or something similar.

The practice theory is thought to fail because it cannot account for the normativity of law. But as it turns out, law is not normative, at least not in the sense that rules out the practice theory. It is, of course, normative in a sense that is no obstacle to descriptive reduction.

It has often been thought that law has moral normativity.<sup>28</sup> Part of what makes this view tempting is that it is hard to see how anything less than moral normativity could place a genuine constraint on theories of law. The thought, correctly, is that something about law's prescriptive or normative character must rule out *at least some* theories of law. Austin's habit- and sanction-based theory fails to capture something normative about law. If the only candidate for this "something normative" is morality, then law must have moral force. But this line of thought will only tempt us if we have a blind spot for the way in which law might be, so to speak, *less* normative than morality but still *more* normative than habits and the

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<sup>26</sup> There are distinctions in the literature that are similar to this one, and some of them may be identical to it, but it would constitute too egregious a digression to discuss them in detail. See Parfit 2011; Leiter 2015; Broome 2013; 2015; McPherson 2011. I can say emphatically that the weighty/rule-constituted distinction is not the same as the regulative/constitutive rules distinction, the normativity/norm-relativity distinction, the moral/conventional distinction, the internal/external reasons distinction, or the hypothetical/categorical imperatives distinction. See, in corresponding order, Searle 1969; Hattiangadi 2007; Southwood 2011; Williams 198; Kant 1785.

<sup>27</sup> This kind of objection is most commonly associated with Dworkin 1977, 48-76.

<sup>28</sup> Dworkin 1977, 48, 57; Perry 2006, 1174.

threat of sanctions. This is rule-constituted normativity. Once it is available, the practice theory is back on the table.

And we do not need to worry about whether rule-constituted normativity is “real” normativity. If it is not real normativity, then we can simply abandon the claim that law is normative and still account for the prescriptive-ish or normative-ish characteristic of law that rules out Austinian positivism.

Within the space of this chapter, I cannot respond to every objection to the claim that law is normative merely in the rule-constituted sense. But I can respond to several of the most pressing objections, which I do in the following sections.

## 7. The Triggering Objection

The first objection is one that was discussed in relation to table manners in chapter 2. Law is sufficiently different from table manners to warrant discussing it here again, but readers who are satisfied that the discussion from chapter 2, section 4 will apply to the legal case may skip to section 8 of this chapter. It is uncontroversial, among both legal positivists and anti-positivists alike, that laws are artefacts of human creation.<sup>29</sup> The controversy concerns whether these artefacts nonetheless have deliberative weight. Typically, the deliberative weight in question is the deliberative weight of morality. As Stephen Perry boldly puts it, “Legal normativity is moral normativity.”<sup>30</sup>

Undoubtedly, some legal rules have moral force. How do legal rules, which are uncontroversially a variety of artificial social rules created by people, acquire this normative force? There is only one way. The only way for descriptive social events to have deliberatively weighty normative consequences is for those events to trigger some underlying norm such that that norm comes to apply to a state of affairs to which it did not previously apply.<sup>31</sup> For example, the descriptive fact that I utter the words “I promise to attend the recital” has the normative consequence that I am obligated to attend the recital. The descriptive fact about what words I say triggers an underlying moral norm that can be crudely put in the form of a conditional, “If you promise to □, then you are obligated to □.” The descriptive fact satisfies the conditions in the antecedent, so one acquires an obligation of the variety indicated in the consequent.

All of this is familiar enough, and we saw several examples of it earlier. What matters for our purposes here is whether law consists entirely of socially created rules that trigger underlying deliberatively weighty norms. It is not enough that laws do this some of the time. All kinds of rules, including rules of games, clubs, fashion, and table manners, do this some of the time. The question is whether legal systems do this as a matter of *necessity*. Only if laws

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<sup>29</sup> For a good examination of how legal norms can themselves be “man-made” while the normativity involved is not see Raz 2004, 5-6.

<sup>30</sup> Perry 2006, 1174.

<sup>31</sup> The “triggering” phrase is a modification from a discussion of reasons by Enoch (2011). Accounts of this kind are common. Raz (2006; 2004) and Dworkin (1977) endorse triggering accounts of norms, though of different varieties. Also, on my own, admittedly controversial, reading, Hume (1738) has a triggering theory of promising. Also, Shapiro (2011)’s Bratman-inspired plan-based account of legal requirements is, at its heart, a triggering account.

necessarily trigger deliberately weighty norms does this fact constitute an essential characteristic of law that a theory of law must accommodate.<sup>32</sup>

What would it look like for a system of social rules to necessarily trigger underlying deliberately weighty norms? Assume that there is an underlying moral norm requiring a certain degree of respect for other human beings. Say, as well, that society *s* has a social practice called “courtesy” that consists of rules for how to show respect for others. Perhaps, for instance, there is a rule of courtesy requiring members of *s* to wink at anyone who enters a room as a way of acknowledging their presence. Additionally, however, it is a component of courtesy—it is part of the concept of *courtesy* had by members of *s*—that only behaviors that in fact show respect are required. So, for example, if someone recently forgot to wink, then winking at them when they enter a room may call attention to this fact and embarrass them in front of others. Embarrassing someone in front of others, let us say, is a way of disrespecting them. In cases such as this, courtesy does not require one to wink at this person when they enter a room. To be clear, the point is not that the demands of courtesy are *outweighed* by one’s reasons to avoid embarrassing someone. Rather, in cases like this, courtesy does not actually demand that one wink. It is not that one is all-things-considered obligated to violate courtesy. Rather, as we are defining courtesy, failing to wink in such circumstances is not a violation of courtesy at all. Courtesy is a practice consisting of social rules that *necessarily* trigger underlying weighty norms.

The title of this section is “The Triggering Objection.” What is the objection? This chapter, building off of the previous one, is a defense of the practice theory of rules. One apparent problem with that theory is that it is unable to account for the normativity of law. My proposed solution to that problem involves claiming that law is normative only in the sense of being rule-constituted, and not, at least not necessarily or essentially, in the sense of being deliberately weighty. The triggering objection to this is simply that law *does* necessarily have deliberative weight. Like courtesy, it necessarily triggers some underlying weighty norm or norms. Since this is a necessary feature of law, theories of law must account for it.

The question then is whether law does necessarily trigger some underlying weighty norm. I do not think it does. In order for a practice to necessarily trigger some underlying weighty norm, there must be some feature of either (a) the practice or (b) the underlying norm that leads to the necessary connection. Let’s take each in turn.

Is there anything about *law* that guarantees that all laws have moral, or some other weighty, force?<sup>33</sup> This, of course, is an old and controversial question in general jurisprudence and I will not settle it here. There are many, no doubt, who would claim that law has the same kind of conceptual feature that courtesy has connecting it to morality. Though I cannot refute that view here, it is perhaps enough simply to note that the Hartian positivist would deny that law has any feature connecting it to morality in this way.<sup>34</sup> If the triggering objection rests on the claim that law, or the concept of law, makes reference to morality or prudence or some form of weighty normativity in such a way as to rule out the

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<sup>32</sup> See Raz 2004, 6.

<sup>33</sup> If the answer is ‘yes,’ law would necessarily trigger some underlying weighty norm in the way that courtesy does.

<sup>34</sup> Hart 1961, 207; Raz 1975, 164.



possibility of weightless laws, then that objection is only as strong as the arguments for that position. All of this concerns us because the normativity of law was supposed to be a problem for the practice theory of rules. If that “problem” turns out to be no different than the claim that law has some conceptual connection to morality, then it is not a problem for the practice theory, but for positivism in general.

Is there anything about *deliberatively weighty normativity* that guarantees a connection to law? Or to put it another way, is there some underlying weighty norm that can be formulated as “If there is a law requiring  $\square$ , then one ought to give that fact weight when deliberating about whether or not to  $\square$ .”? When put this plainly, it seems implausible that the answer is yes. There is no such moral norm, or so I am comfortable claiming. There is no such prudential norm. Perhaps there is such a norm of another type, but I cannot see what it would be.

#### 8. The Possibility Objection

It is natural to point out that though law does not necessarily carry weighty normative force, it *can* carry such force and it is *this* fact that the practice theory cannot explain.<sup>35</sup> Law does, indeed, sometimes generate weighty normativity. I have suggested that this places no constraint on a theory of law. But that is an oversimplification. The capacity of law to trigger weighty normative force does, if we like, place a constraint on theories of law. It is a feature of law that any putative theory must be able to explain. If the practice theory cannot explain this capacity of law, then it is not the correct theory of law.

The fact that law can sometimes issue in moral, prudential, or otherwise weighty normative force, however, is not difficult to explain. And it has already been shown how the practice theory is more than up to the task. The practice theory explains how we get social rules. When the circumstances are right, these rules can trigger general moral, prudential, or otherwise weighty norms such that those norms apply. This is how law can carry weighty normative force.

#### 9. The Reasons Objection

It may be objected that this entire discussion of the normativity of law has omitted the most obvious and plausible understanding of the normativity of law. Law generates reasons. This is what theories of law must explain, and it is what any theory with the practice theory of rules at its foundation cannot explain.

The most sophisticated version of this argument (developed by Leslie Green and building off of Joseph Raz’s account of legal authority), starts from the fact that law consists of rules.<sup>36</sup> All rules, Green contends, constitute reasons for action.<sup>37</sup> But this reason-generating capacity is out of the practice theory’s explanatory reach. So the theory fails. And if Green is right that reason-generation is an essential feature of rules, then the practice theory fails not only in its specific application to law, but it fails to explain its direct object of explanation: rules.

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<sup>35</sup> Perry 2006.

<sup>36</sup> Green 1999; Raz 1979.

<sup>37</sup> Green 1999, 37.

Why should we think that all rules generate reasons? Green points out that rules can be cited in response to “why” questions. But rules can only be cited as explanations of behavior in this way if they are reasons (or, what perhaps comes to the same thing, if they generate reasons). So rules are reasons.<sup>38</sup>

The first thing to note, as discussed above, is that it is not obvious that rules of all kinds can be cited in response to “why” questions. Citing summary rules in this way is awkward at best. But we can ignore this complication for the moment. What really matters for assessing Green’s argument—and this will not be surprising given similar discussions above—is what we mean by “reasons.” If we understand only weighty normative considerations to constitute reasons, then the crucial premise in Green’s argument—that only reasons can be cited in response to “why” questions—is false. We frequently cite weightless rules in response to the relevant type of “why” questions. Alternatively, if we understand rule-constituted normative considerations to constitute reasons, then all rules do generate reasons, but these reasons are just what the practice theory explains.

#### 10. The Separation of Law and Morality Objection

It may be true that law is normative in the rule-constituted sense. And therefore the practice theory of law may, in general, be capable of explaining the normativity of law. But, it may be objected, none of this could have been accepted by H.L.A. Hart himself. The thought is that Hart’s theory of law is not compatible with *any* account of the normativity of law. After all, Hart followed other positivists like Bentham, Austin, and Kelsen in upholding “the distinction between what law is and what it ought to be.”<sup>39</sup> Doesn’t this imply that Hart’s theory of law must include only a descriptive account and not a normative one?

The answer depends on how we interpret “normative account.” The normativity of law, as I have understood it in the entire foregoing discussion, is a *descriptive* feature of law. The fact that law is normative is a fact about what law is, not what it ought to be. What law ought to be is indeed the kind of question that Hart thought the jurist ought to leave for the moral philosopher. But articulating a descriptive view of law’s normativity does not violate this prohibition. Hart’s theory of law cannot be too intimately combined with what an account of what the law ought to be. But it would be more appropriate to call that a “normative theory of law” than a “theory of the normativity of law.”

#### 11. The Seriousness Objection

Famously, or infamously, Hart downplays the role of sanction in law. When it comes to the normativity of law, though, sanctions have often been thought relevant because they are what make legal consequences *serious*. This point is made by Joseph Raz, Scott Shapiro, and others.<sup>40</sup> Unlike the bylaws of the local bridge club, legal rules have consequences that affect “central areas of life,” such as where and how one lives, with whom one associates, whether one is drafted into the military in the service of which one might die, or whether one is

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<sup>38</sup> Green 1999, 37-8.

<sup>39</sup> Hart 1961, 211.

<sup>40</sup> Raz 2004, 5-6. Also see Shapiro 2011, 114.

convicted of a crime and as a result is put to death by the state.<sup>41</sup> We are not talking about going to jail in Monopoly.<sup>42</sup> We are talking about going to jail in *reality*.

The seriousness of legal consequences has been wielded to many ends. Relevant here, it might be thought that law must be normative in a weighty, particularly moral, sense simply because law affects such important parts of our lives.

It is true that typical legal consequences are more serious than typical bridge-club-bylaw consequences. But some laws have insignificant consequences, and yet they are legally valid. So the seriousness of the serious laws is not a feature had in virtue of their legality. The seriousness does not indicate something about the normativity of law itself that functions as a constraint on theories of law. An analogy is helpful. Consider a different structured system of primary and secondary rules: the rules of the National Collegiate Athletic Association (the NCAA). The consequences of NCAA rules are less serious than legal consequences. But some NCAA rules affect people's dignity or livelihood, not to mention billions of dollars. This subset of NCAA rules may therefore carry moral force, but NCAA rules do not in general and in virtue of their NCAA-ness have such force. The rules of the NCAA are normative in the rule-constituted sense, though some of the rules inherit weighty normative force by some triggering mechanism. Indeed, the bylaws of the local bridge club are the same (in kind, though perhaps not in degree). Since legal rules only sometimes have serious consequences, they only sometimes have moral normative force. Serious consequences trigger standing moral norms such that those norms apply. Though most legal rules are serious, legality itself is not.

## 12. Conclusion

In addition to the two problems with the practice theory discussed here—the putative counterexample and the normativity of law—there may be others. But these two are the most prominent. I hope to have shown that the practice theory has been prematurely forsaken. Even when transported from the mid-20th century, in a time and place mired in ordinary language philosophy, to the early-21st century, where the focus of general jurisprudence is on reasons and the normativity of law, the practice theory retains significant promise.

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<sup>41</sup> Raz 2004, 6.

<sup>42</sup> Shapiro 2011, 114.

## Chapter 5

### The Structure of Semantic Norms

Just as law has been thought to be, in some sense, normative and that this normativity rules out certain naturalistic theories of law, the same has been thought about linguistic meaning and mental content. Most of the arguments against the normativity of meaning (as we will see in this chapter and the next) argue that meaning cannot be normative in any weighty sense (i.e., morally or prudentially normative). But the debate has left out the plausible possibility that meaning might be normative in a weightless sense. This chapter, however, sets the stage by discussing not the normative force of semantic norms, but their structure. This stage-setting is necessary because before it can be suggested that anti-normativism about meaning is a failure and that a new kind of normativism is to be preferred, some common and seemingly powerful objections to normativism must be addressed. This chapter addresses those objections by arguing that semantic norms can exist, albeit in a form different from the form that those in the normativity of meaning debate have had in mind.

Are there semantic norms? Semantic norms are norms that follow directly and invariably from meaning facts. If there are such norms, then normativity is an intrinsic feature of meaning that constitutes a constraint on theories of meaning. And that constraint, it has been thought, rules out behaviorist, dispositional, causal, or informational theories of meaning.<sup>1</sup> This is why the normativity of meaning matters: if meaning is normative, then dispositional (and other) theories of meaning are doomed. At first, the normativity of meaning was seen as obvious, nearly-uncontestable.<sup>2</sup> But in the decades since Kripke's initial presentation of it, the normativity of meaning has been challenged.<sup>3</sup>

The aim of this chapter is argue that the normativity of meaning has been fundamentally misunderstood, by both its opponents and its advocates. The misunderstanding concerns how semantic norms are *structured*. This is not a small, technical point, but a fairly lofty one: the reconceived version of the normativity of meaning that I introduce and defend here (a) departs significantly from all versions mentioned in the philosophical literature by normativists, anti-normativists, and even Kripke himself, (b) avoids the central arguments that have been presented against the normativity of meaning, but (c) still constitutes a genuine form of meaning normativism that places a significant constraint on theories of meaning.

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<sup>1</sup> Wikforss (2001) uses “pure-use” as a label for theories of meaning that utilize purely descriptive explanatory resources, accounting for meaning in terms of how a term is used or how it is disposed to be used.

<sup>2</sup> Kripke 1982; Boghossian 1989.

<sup>3</sup> Bilgrami 1993; Papineau 1999; Wikforss 2001; Glüer and Wikforss 2009; Glüer and Pagin 1998; Hattiangadi 2006, 2007, 2009. Those defending normativism include Rosen 2001; Whiting 2007, 2009, 2016; Ginsborg 2012.

1. What are the Semantic Norms?

Normativists about meaning occasionally disagree about the order of explanatory priority—some holding that meaning facts should be explained in terms of semantic norms, and others holding that the norms should be explained in terms of meaning.<sup>4</sup> I remain neutral on this question here by understanding normativism, roughly, as the view that meaning facts directly entail normative facts (this entailment relation being neutral as to explanatory priority).

But what exactly are these norms that follow directly, without substantive auxiliary premises, from meaning facts? Here is a first attempt. It follows from the fact that “cat” means *cat* that:

(A) “cat” ought to be applied to all and only cats.<sup>5</sup>

As many have noted, this is too strong.<sup>6</sup> We are not required to apply “cat” to every cat we see (let alone *all* cats). So consider instead:

(B) “cat” ought to be applied only to cats.<sup>7</sup>

Though more plausible on its face, this norm merely says how things “ought to be.” As Hattiangadi (2009, 61) points out, this kind of ought can fail to be “agent-implicating.”<sup>8</sup> By analogy, a knife ought to be used for cutting, but this does not entail that any agent ought to cut anything with the knife.<sup>9</sup> Here is a 3rd attempt (in this case, as a semantic norm entailed by the fact that a speaker *S* means *cat* by “cat”):

(C) *S* ought to apply “cat” only to cats.

This norm is agent-implicating, but what exactly is it for an agent to “apply” a term? If one merely forms and expresses a proposition—e.g., by asking the question of whether that proposition is true, or by asserting a conditional with that proposition in the antecedent—that predicates “cat” of something, then, in some sense, one has applied “cat” to that thing. Understood this way, norm (C) is far too strong.<sup>10</sup> There is no prohibition against forming false propositions in questions or the antecedents of conditionals. To avoid this, we can understand “apply” more restrictively: one has applied “cat” to something only when one *asserts* of that thing that it is a “cat.” But the norm should then be restructured to make this

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<sup>4</sup> For overview discussions, see Glüer and Wikforss 2009, 2018.

<sup>5</sup> Hohwy 2001, 9–10.

<sup>6</sup> Boghossian 2003; Bykvist and Hattiangadi 2007; Hattiangadi 2006, 2007, 2009, 58; Whiting 2009, 544.

<sup>7</sup> Whiting (2007, 137) holds something like this, though he presents it not as a semantic norm, but as a formulation of the normativism thesis itself:  $w$  means  $F \rightarrow \Box x (w \text{ ought to be applied to } x \rightarrow x \text{ is } f)$ . Hattiangadi (2009, 61) points out a scope ambiguity, resolved by reformulating as:  $w$  means  $F \rightarrow \Box x (w \text{ ought to (be applied to } x) \rightarrow x \text{ is } f)$ .

<sup>8</sup> Humberstone 1971.

<sup>9</sup> It may be wondered whether this is really a problem, but what matters here is merely that it is taken to be a problem in the literature.

<sup>10</sup> Speaks 2009.

explicit. So we arrive at the wolloing semantic norm, which the normativist will maintain follows from the fact that *S* means to assert that something is a cat by uttering “That’s a cat.”:

(D) *S* ought to assert “That’s a cat.” only of cats.<sup>11</sup>

## 2. Problems for Normativism

If meaning facts directly entail norms like (D), then normativity is an intrinsic or essential feature of meaning that theories of meaning must explain. But there are two oft-repeated objections to meaning normativism understood this way.<sup>12</sup>

### 2.1 The Permissibility of Lying Problem

It seems to many philosophers that there are no norms like (D), and that they are therefore are not entailed by meaning facts, because “we do not have any categorical semantic obligations: there are, for example, many circumstances in which it is permissible to lie.”<sup>13</sup>

By itself, the occasionally permissibility of lying does not show that there are no categorical norms like (D), but only that any such norms are *defeasible*, allowing for circumstances in which they are outweighed by other, non-semantic norms or considerations.<sup>14</sup> But the problem persists. It seems to some philosophers that there is not always even a *pro tanto* reason against asserting a falsehood. Rosen (2001, 621) offers the following example:

You’re playing math games with a child, but she’s getting frustrated. So you decide to cheer her up by flubbing the next question. She says, ‘Your turn: What’s 68 +57?’ You think and then sputter, ‘It’s ... uh ... 126’ The answer is incorrect, and you knew it all along. But given your aim this did not provide you with a reason not to give it. In the normal case you have some reason to speak the truth. But sometimes you have every reason

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<sup>11</sup> Alternatively, we might wish to phrase this norm negatively:

(D’) *S* ought not assert “That’s a cat.” of non-cats.

Nothing in what follows hinges on the difference between (D) and (D’). Indeed, none of the norms mentioned so far are phrased precisely as they are in the literature. (In particular, Hattiangadi 2009, 61 and Whiting 2009, 544 debate these issues not in terms of the semantic norms, but of the normativity of meaning thesis itself. Some further discussion of the differences between their formulations and the ones discussed here appears below.) This chapter, however, presents a critique of the structure of semantic norms that is indifferent to the differences among all of these norms, including those mentioned here and those states elsewhere in the normativity of meaning literature.

<sup>12</sup> The two objections seem to operate a different levels, and may come to the same, though I do not dwell on questions of the individuation of objections here.

<sup>13</sup> Here Ginsborg (2010, 5) summarises the view of Hattiangadi (2006, 227, 2007, 186–188). Also see Verheggen 2011. It might be wondered whether fiction is a similar counterexample (if lying is a counterexample at all). The answer depends on whether fiction involves genuine assertion or pretend assertion, a discussion I wish to avoid here. (With the exception of Currie (1986) and Parsons (1980), the consensus is that fiction is best understood in terms of pretending to engage in ordinary speech acts. See Walton 1990; Currie 1990; Martinich 2001; Searle 1979. Hoffman (2004) persuasively argues that Walton’s can be understood in terms of speech acts, even though Walton himself explicitly denies it.)

<sup>14</sup> Whiting 2007, 137, 2009.

to assert a falsehood, and when you do the practical valence of the claim of correctness is reversed, which is just to say that it has no valence of its own.

A proposition's mere falsehood is not even a *pro tanto* reason against asserting it. The meaning of "cat" does not entail a norm like (D) because there are no such norms—not even defeasible ones.

## 2.2 The Assertion Problem

But even if there are norms like (D), their existence does not itself show that meaning is normative. Such norms might show something not about the nature of *meaning*, but the nature of *assertion*.<sup>15</sup> Put another way, the fact that there exists a norm like (D), does not show that it is a *semantic* norm (i.e., one directly entailed by a meaning fact). It might instead be some kind of *assertoric* norm. The fact that *S* means *cat* by "cat" might be purely descriptive. So long as there exists the right constitutive norm for assertion—e.g., 'only assert the truth'—there will be more specific norms for assertion like (D). If normativity is merely a feature of assertion, then theories of assertion need to explain it, but theories of meaning do not.<sup>16</sup>

## 3. Semantic Power-Conferring Norms

These are the most prominent and pressing problems for normativism. But they are problems specifically for the version of normativism from the end of section 1. There is, however, another way to think about the normativity of meaning.

### 3.1 Duty-Imposing and Power-Conferring Norms

Consider again the semantic norms considered so far:

- (A) "cat" ought to be applied to all and only cats.
- (B) "cat" ought to be applied only to cats.
- (C) *S* ought to apply "cat" only to cats.
- (D) *S* ought to assert "That's a cat." only of cats.<sup>17</sup>

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<sup>15</sup> Wikforss 2001, 206–207; Hattiangadi 2007; Glüer and Wikforss 2009. Also, Boghossian (2003, 38) offers a response to the corresponding problem for normativism about mental content.

<sup>16</sup> Norms similar to (D) might exist for other kinds of speech acts—questions, commands, etc. But, similarly, this may be not because meaning is normative, but because the speech acts are.

The assertion problem can either be formulated at the level of semantic norms, or at the level of semantic correctness. In the literature on the normativity of meaning, a distinction is drawn between (a) meaning facts entailing facts about which uses to linguistic expressions are correct/incorrect and (b) meaning facts putatively entailing facts about how speakers "ought" or "ought not" use linguistic expressions. Most anti-normativists (the exception being Bilgrami 1993) accept (a) but deny (b). In construing the assertion problem as a problem for (a), it would be pointed out that merely forming a false proposition in the antecedent of a conditional is in no way "incorrect". So, it would be argued, correctness facts are fundamentally facts about speech acts and not about meaning itself.

<sup>17</sup> And (D') from note 11.

All of these norms—and all semantic norms discussed in the literature—are *duty-imposing norms*.<sup>18</sup> They specify what individuals must or must not do. They impose duties or obligations. But there is another type of norm that those in the normativity of meaning literature fail to consider: *power-conferring norms*. These norms are associated with normative entities of a distinct type from duties or obligations. They confer authorities or normative powers.<sup>19</sup>

H.L.A Hart made this distinction famous, and used it to criticize John Austin’s behaviorist theory of law.<sup>20</sup> Austin claimed that legal systems could be understood as a series of commands backed by sanctions. This theory works well enough for a law prohibiting assault, which imposes a duty. But a law specifying the conditions for creating a will—e.g., that such-and-such a document signed in front of two witnesses constitutes a legally valid will—does not say what one must or must not (or may or may not) do. Rather it confers the authority, in some limited domain, to generate duties and other authorities. By writing a legally valid will, one imposes a legal duty on others to distribute one’s estate in some specific way. Or one confers on others the authority to distribute one’s estate. But a law specifying how citizens create a will imposes no duty on *those citizens*. Rather than imposing duties, power-conferring norms are, as Hart says, “recipes for creating duties” (and, we might add, for creating other powers).<sup>21</sup>

Duty-imposing norms can be formulated as follows:

**Duty-Imposing:**  $S$  ought to  $\square$ .<sup>22</sup>

Power-conferring norms can be put in the following form:

**Power-Conferring:**  $S$  has the power to  $\square$ ; in order to exercise this power  $S$   $\square$  s.<sup>23</sup>

In a power-conferring norm,  $\square$  is an action *described in the characteristic vocabulary of the relevant social institution*, and  $\square$  is an action described in either institutional or neutral vocabulary. For

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<sup>18</sup> This is a slight exaggeration for two reasons. First, Hattiangadi (2009, 58) and Whiting (2009, 544–545) consider semantic norms that are permission-granting. I discuss this possibility in section 3.1. Permission-granting norms amount to the claim that one lacks duties. Seen in that light, it seems positively bizarre that the fact that “cat” means cat entails that a speaker lacks a duty (what kind of duty?) not to apply “cat” to cats.” Second, if, as has been suggested, (A) and (B) are not agent-implicating, then they plausibly do not impose duties. Nonetheless, as we will see, if they constitute norms at all, then they fall on the duty side of the relevant distinction.

<sup>19</sup> I use “power” and “authority” synonymously.

<sup>20</sup> Hart 1961, 33. Hart used the term “rule” where I use “norm.” Some philosophers impose a distinction between these terms, but nothing discussed here hinges on any of the common ways of distinguishing the two, so understand them as synonymous. Also, as I am using the terms, a law is a kind of norm.

<sup>21</sup> Hart 1961, 33.

<sup>22</sup> This need not be an all-things-considered ought.

<sup>23</sup> What about non-normative powers, i.e., the mere ability to do something? They can be stated in this form as well. This shows that this form is what distinguishes power-conferring norms from duty-imposing norms, and not what distinguishes authorities or normative powers from mere abilities or non-normative powers. What distinguishes normative from non-normative powers is something other than structure or form. In particular, the exercise of normative powers alter the duties and normative powers of others.



instance, a law for creating a will might be formulated as: *Citizens and legal residents of sound mind and over the age of 18 have the power to create a last will and testament; in order to exercise this power the citizen or legal resident signs such-and-such a document in the presence of two witnesses.* Here □ is “create a last will and testament,” which is a legal status characterized in legal language. The action □ is “sign such-and-such a document in the presence of two witnesses,” which is a set of instructions for achieving that legal status.

A power-conferring norm is not the kind of thing that can be *violated*. If one fails to write a legally valid will, then one has not violated the law. One has simply failed to make a legally valid will. Of course, for example, if one’s condominium board requires all owners to have a will, then failing to make one violates the duty-imposing norm of the condominium board. Or if one intends to create a will, then failing to make one violates one’s intention—violates, so to speak, a duty to oneself. In these cases, failing to write a legally valid will violates some duty (to one’s condominium or oneself). It does not violate the law. And that is because the law, in this case, is power-conferring and is not the sort of thing that can be violated.<sup>24</sup>

Another example is helpful. What is the rule of chess regarding the movement of a rook? The rule is not that a rook must be moved vertically or horizontally, because it is not true that a rook must be moved at all. Nor is the rule that a rook must not be moved diagonally, as one who moves a rook diagonally is not playing chess (because she does not want to play, does not know how to play, etc.) and is not *violating* a rule of chess. In some cases, of course, moving a rook diagonally violates a duty, such as the kind one acquires if one promises to play chess. But this duty is promissory, and not constitutive of chess.

The rule of chess regarding the movement of a rook, as Raz (1975, 115) points out, is power-conferring. One has the power to move a rook vertically or horizontally. And one lacks the power to move a rook diagonally, just as one lacks the power (or authority) to move any of one’s opponent’s pieces. This is how it is possible to make an *incorrect move* when attempting to play chess.<sup>25</sup> One makes a move without the appropriate authority.<sup>26</sup>

Two clarificatory points are relevant. First, both duty-imposing and practice-conferring rules can be constitutive of practices. Both the law requiring pedestrians to cross only at crosswalks and the rule of the municipal code empowering the town council to make traffic laws are constitutive of the legal system. However, only duty-imposing rules are naturally thought of as regulative. The cross-only-at-crosswalks law regulates an activity that

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<sup>24</sup> This point about power-conferring norms not being subject to violation, supplies some of the best evidence that philosophers of mind and language simply have not considered that semantic norms might be power-conferring. We can see this from the fact that several anti-normativists rely on the thought that all norms can be violated. See Bilgrami 1993; Wikforss 2001, 213. Hattiangadi (2006, 221) says that normative statements “tell us what to do, whereas non-normative statements simply describe how things are.” If power-conferring norms are normative, then it is not true of all normative statements that they ‘tell us what to do’. Some of them give us authority to tell others what to do.

<sup>25</sup> It might be wondered whether power-conferring norms can only exist within a system that also includes duty-imposing norms, in the way that Raz (1975) thinks of chess. I remain neutral on that issue here.

<sup>26</sup> What about cheating? One might try to understand moving a rook diagonally with the intention of having one’s opponent not notice as a violation of a duty-imposing rule against moving one’s rook diagonally. But it is better, I suggest, to understand one as having a power to move a rook only vertically or horizontally as well as having a general duty only to exercise powers that one has within the game. That is, when one cheats one is violating something, but what is violated is *one’s opponent’s trust*—or a norm to only exercise one’s legitimate powers or to, so to speak, play by the rules—and not a specific rule regarding movement of a rook.

was previously possible: crossing the street. However, it is hard to fix on a description of the kind of behavior that the town-council-legislative-authority law regulates that was possible prior to the existence of the rule conferring the town council with legislative authority.<sup>27</sup>

Second, it might be wondered how permissions, which seem to be neither duties nor powers, fit into this story. The answer is that they fall on the duties side of the dichotomy. The fact that one may  $\square$  or has permission to  $\square$  is just the fact that one lacks a duty to not- $\square$ . Such permission-granting norms relate directly to duties, but they do not *impose* them (and so should not strictly be called “duty-imposing”). Permission-granting norms are not of the form ‘*S* ought to  $\square$ .’, but rather ‘It is not the case that *S* ought to  $\square$ .’ Ultimately, the fact that one has permission to do something concerns one’s duties, even if it is a fact not about what duties one has, but what duties one lacks.

### 3.2 Power-Confering Semantic Norms

The central idea of this chapter is that semantic norms should be understood not as duty-imposing, but as power-conferring. The semantic norm entailed by the fact that a speaker *S* means *cat* by “cat” is:

(E) *S* has the power to refer to cats; in order to exercise this power *S* says “cat.”

This norm confers the power *to use a word meaningfully*, not the power to give a word some standing meaning. The fact that *S* means *cat* by “cat” entails that *S* has the power to use “cat” to refer to cats, not the power to establish *cat* as the meaning of the English word “cat” (though depending on *S*’s social position, she may have that power as well). It is also worth noting that there is nothing illicit about the fact that the statement of the semantic norm (E) includes a semantic term, “refer.”<sup>28</sup> The first action mentioned in all power-conferring norms is characterized in the status-laden terminology of the relevant social institution.<sup>29</sup>

The powers or authorities that such norms confer might themselves be reducible to duties, but not in a way that obviates the distinction. One’s power to move a rook might be restate-able as a series of duties had by one’s opponent. But the power is not restate-able in terms of duties had *by the same player*. The power to create a will may bottom out in duties of others, but not in duties of oneself.

What those ‘duties of others’ are in the semantic case is unavoidably a matter of controversy. Perhaps, for instance, asking a question imposes a duty on others to provide an answer. Making an assertion may grant others duties and authorities, including the authority to demand reasons for believing the proposition asserted. For the present purpose, however, I can remain neutral as to the details. And I can also remain neutral as to explanatory priority. Perhaps the most prominent proponent of a view on which speech acts impose duties and confer authorities on others is Brandom (1994). For him, the norms are fundamental and meaning is explained in terms of them. But all that needs to be the case to accept that semantic norms are power-conferring is that it is plausible that there are such

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<sup>27</sup> See Rawls 1955; Searle 1969; Raz 1975; Ludwig 2017.

<sup>28</sup> Similarly, norms for other parts of speech will include other semantic terms such as “predicate” (the verb).

<sup>29</sup> By analogy, in computer chess a player has the power to move her rook to a6, by clicking on the square marked “a2” and then on the square marked “a6”. The phrase “move her rook to a6” is phrased as a status in the game of chess, whereas “clicking on the square marked ‘a2’ and then on the square marked ‘a6’” is phrased neutrally.

duties for other members of the language community, not anything specific about what those duties are or that they are explanatorily prior to meaning.

Whether or not it solves the problems that beset meaning normativism, the idea that semantic norms are power-conferring should first seem plausible in its own right. Being able to use a word meaningfully occasionally imposes duties or obligations on the speaker. But it seems to more fundamentally involve a semantic power had by the speaker. Is the ability to use a word meaningfully more like the duty of a motorist to stop at a red light or more like a governor's power to pardon someone for a traffic violation? The suggestion is that it is more like the latter.

### 3.3 Are Power-Conferring Norms Normative?

There are two worries that one might immediately have about the suggestion that semantic norms are power-conferring. These are briefly addressed in this and the following subsection. With those worries then out of the way, section 4 lays out the principal advantage of understanding semantic norms as being structured in this way: the problems outlined in section 2 are avoided.

The first worry is: if power-conferring norms are mere “recipes” (to use Hart’s phrase), if they say nothing about what those to whom they are directed *must* or *ought* or even *may* do, and if they are not the kind of thing that can be violated, then are they even normative?<sup>30</sup>

The answer is: it does not matter. The debate about the normativity of meaning arose because Kripke noticed that meaning seemed to have a feature that dispositionalist theories could not explain.<sup>31</sup> It was natural to call this feature “normativity.” And for several decades there was a debate about whether meaning really has this feature. Recall the reason that anyone ever cared about the normativity of meaning in the first place: it promised to rule out dispositionalist theories of meaning. So what matters for our purposes is whether meaning has some feature in the neighborhood of normativity that makes trouble for dispositionalism. Whether or not we deign to call power-conferring norms “norms,” they cannot be explained merely by appeal to dispositions. So we should care about them exactly as much as we ever cared about the normativity of meaning.

### 3.4 Sentential and Sub-Sentential Norms

The second worry is that (E) does not at first glance seem analogous to (D). The difference between them was supposed to be that (D) is duty-imposing while (E) is power-conferring. But they also seem to differ in a second respect: (D) is a sentential norm governing the use of “That’s a cat.” whereas (E) is a subsentential norm governing the use of just the single word “cat.” And as it will turn out, this sentential/subsentential difference is what is going to allow (E) to escape at least one of the problems for (D) discussed in section 2. The worry is

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<sup>30</sup> This question, and the response that follows, could alternatively be phrased in terms of reasons without any substantive changes. Power-conferring norms do not seem to generate reasons, and so they do not seem to be normative. First, they do involve reasons insofar as power-conferring norms confer the authority to generate reasons. But second, power-conferring norms constitute a constraint on theories of meaning, whatever terminology we use for them.

<sup>31</sup> Kripke 1982, 37.

that any advantages that (E) has over (D) will be due not to its power-conferring structure, but the fact that it is subsentential.

This need not worry us, however, because (E) can be formulated as subsentential *because it is power-conferring*. So any problems that it avoids by being subsentential are ultimately the result of its being power-conferring.

To see this, recall that (C) was subsentential, governing the application of “cat.” But when understood broadly, so as to include the mere formation of propositions, any norm prohibiting the *application* of “cat” is wildly implausible. The only way to make a norm like (C) plausible was to reinterpret it to apply only to assertion. And though predicates can be *applied*, only full sentences can be *asserted*. So to make a plausible version of (C) explicit, it had to be transformed into the sentential norm (D). That is how we got from the subsentential norms (A), (B), and (C) to the sentential norm (D). But when restructuring semantic norms as power-conferring we are able to remain at the subsentential level. The power-conferring norm (E) is analogous to (C), and when thinking of semantic norms as structured like (E) we are not forced to ascend to the sentential level because power-conferring semantic norms don’t mention the *application* of a predicate.

All of this may seem rather abstract at the moment, but its relevance becomes clear in the following section. What matters is simply that any advantages that accrue to (E) because it is subsentential (e.g., that it avoids the assertion problem because it involves reference as opposed to assertion) are ultimately due to its being power-conferring.

#### 4. Returning to the Problems for Normativism

Understanding semantic norms as power-conferring solves the problems from section 2.

##### 4.1 Solving the Permissibility of Lying Problem

The permissibility of lying problem rests on the following intuition: sometimes lying does not violate any norm. Therefore there cannot be norms like (D) that apply to all meaningful language use. However, as mentioned earlier, power-conferring norms are not kind of thing that can be *violated*. So while the fact that sometimes lying does not violate any norm is evidence that there are no duty-imposing semantic norms, it is not evidence that there are no power-conferring semantic norms. Since power-conferring norms are not the kind of thing that can be violated, their existence is compatible with any intuitions whatsoever about when norms are or are not being violated.

The fact that so many in the normativity of meaning debate—e.g., Wikforss (2001, 213), Bilgrami (1993), etc.—assume that the possibility of violation is required for normativity is evidence that they have simply failed to consider the possibility of power-conferring norms.

##### 4.2 Solving the Assertion Problem

Power-conferring norms like (E) are subsentential, and make no mention of particular speech acts, like assertion. So, as some readers will have already gathered, there is no danger that their normativity is a feature of the nature of the speech act as opposed to meaning itself. We know that (E) is a semantic (and not assertoric) norm because it makes no

mention to assertion. And, unlike (C), since (E) does not concern the mere *application* of terms, there is no need to ascend to a new norm at the level of sentences or speech acts.

## 5. Conclusion

This chapter is defense of meaning normativism against the most significant and frequently-cited objections to it. And it executes that defense by revising the normativist thesis. But because the revision concerns the form of structure of the norms involved, it might seem like a minor tweak. This is not so. The mistake diagnosed here goes all the way back to Kripke's original statement of the normativity of meaning:

The point is not that, if I meant addition by '+', I will answer '125', but that, if I intend to accord with my meaning of '+', I *should* answer '125'.<sup>32</sup>

Kripke understands meaning as entailing a duty-imposing norm, though he does not say what that norm is. Since the version of normativism introduced in this chapter departs from all previous forms, it should not be surprising that it saves that doctrine from its most pressing objections.

But the claim that semantic norms are power-conferring really is only about the structure of meaning normativity, not about the nature of the normativity itself. And that is its greatest virtue. If semantic norms are power-conferring, then the brand of normativity involved remains the same. That is because, plausibly, one person having some authority entails that others have duties. So if some set of naturalistic resources struggled to explain duty, then it will equally struggle to explain authority. The normativity of meaning understood in terms of power-conferring norms will be just as much of a non-trivial condition on the adequacy of theories of meaning as if it were understood in terms of duty-imposing norms. But the problem for normativism about meaning discussed here concern structural features of meaning norms: whether they involve implicit or explicit appeal to assertion, or whether they are the kind of norms that can be violated. It is by noticing the distinction between these two features of normativity—its structure and its, so to speak, metaphysical variety—that we sidestep the problems with normativism without diminishing its significance to our understanding of the nature of meaning.

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<sup>32</sup> Kripke 1982, 37. Also see other early work from both normativists (McDowell 1985, 1984, 1994; Boghossian 1989) and anti-normativists (Fodor 1990; Bilgrami 1993; Papineau 1999).

## Chapter 6

### The Problem with Descriptive Correctness

The previous chapter paved the way for the possibility of semantic norms by responding to the main objections to their existence. This was achieved by suggesting that they are structured differently than has been thought. But it is still an open question of whether meaning is normative. In this final chapter I argue that meaning is normative. The only plausible version of anti-normativism about meaning, which I call sophisticated anti-normativism, cannot be made to work. There is, however, an unappreciated alternative way in which meaning might be normative, which is the sense of necessarily consisting of weightless rules. Previously, however, meaning being normative in this sense was not seen as a live possibility.

In the 1980s and early 1990s, the normativity of meaning was thought to be more-or-less “incontestable.”<sup>1</sup> But in the last 25 years it has been contested by many philosophers of mind and language in what appear to be a variety of different ways.<sup>2</sup> This, however, is partly a matter of appearance. There is an unappreciated commonality among nearly all anti-normativist arguments, and this commonality, I argue, is a fatal flaw. Rejecting this near-universal version of anti-normativism, however, does not leave the normativity of meaning debate back where it started. Rather, an insight from the anti-normativist position can be harnessed to move the debate forward from the plateau on which it has stood for at least a decade or so.

#### 1. The Origin and Importance of the Normativity of Meaning

In the second half of the 20th century, naturalistic theories of meaning proliferated. But in 1982, Kripke claimed that there is a certain feature of meaning that cannot be explained by broadly dispositional naturalistic theories. That feature is normativity.

Kripke did not so much argue that meaning is normative as he did assert it:

The point is not that if I meant addition by ‘+’, I will answer ‘125’, but that, if I intend to accord with my meaning of ‘+’, I should answer ‘125’.<sup>3</sup>

Though Kripke says little more than this, the idea is simple and *prima facie* compelling. The fact that one means *addition* by “+” does not have a descriptive relation to one’s use of “+.”

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<sup>1</sup> Boghossian 1989.

<sup>2</sup> Bilgrami 1993; Glüer and Pagin 1998; Papineau 1999; Wikforss 2001; Rosen 2001; Hattiangadi 2007; Bykvist and Hattiangadi 2007; Hattiangadi 2006; Glüer and Wikforss 2009; Gibbard 2012; Fodor 1990

<sup>3</sup> Kripke 1982, 37.

It does not entail that one *does* use “+” a certain way, but rather that one *ought* to use “+” a certain way, or, at minimum, that using “+” a certain way is *correct*.<sup>4</sup> To say that meaning is normative is not the uncontroversial claim that language use is governed by norms. Everything is governed by norms. Rather, the claim is that, in some sense to be more precisely specified, normativity is intrinsic or essential to meaning. Normative facts of some kind follow directly, without any further substantive premises, from meaning facts.

What counts as a “normative fact” in this context is a question best answered by recalling why the normativity of meaning matters in the first place. It matters because if meaning is normative, then certain theories of meaning—dispositional theories broadly, including causal/informational theories, pure use theories, and certain kinds of inferentialist and conceptual role theories—are doomed.<sup>5</sup> The thought, quite simply, is that the explanatory resources that these theories make use of cannot explain the normative facts that, if meaning is normative, follow directly and without any significant auxiliary premises from meaning facts. Since this is why the normativity of meaning matters, as will be relevant shortly, if some feature of meaning is not troublesome for broadly dispositional theories of meaning, then it is not, for our purposes, normativity.

## 2. Sophisticated Anti-Normativism

The normativity of meaning seemed uncontestable, at least for a time.<sup>6</sup> Akeel Bilgrami (1993) was among the first to challenge it, which he did by simply denying that there is any sense, inherent to meaning, that the use of linguistic expressions is ever correct or incorrect. He grants, of course, that many uses of expressions are morally or prudentially permissible or impermissible, but he denies any such status that follows from the meaning of an expression alone.

This early version of anti-normativism attracted few proponents. But it was followed by a more sophisticated version that has become much more popular.<sup>7</sup> This more sophisticated form of anti-normativism is founded on the following insight. It is possible to grant that answering “68 + 57” with “125” is semantically *correct* while denying that one semantically *ought* to do it. One can allow for what seems right about Kripke’s claim while denying that this amounts to the kind of full-blown normativity that rules out dispositionalist theories of meaning.

This dialectical move broke the debate about the normativity of meaning wide open and made it interesting. Fundamentally, it is a way of distinguishing two different senses in which we might think that meaning is normative: a full-blown sense that involves how agents ought to behave and a lesser sense that still involves a standard of correctness but is a less burdensome explanandum. With this distinction, it is possible to grant that there are

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<sup>4</sup> The difference between these last two ways of characterizing the normativity of meaning will concern us for much of the following.

<sup>5</sup> Wikforss (2001, 203) introduces the phrase “pure use theories” to include certain Davidsonian theories of meaning. Boghossian (1989) makes clear that Kripke’s discussion of dispositionalism is best understood so as to include all of these various use-based naturalistic theories. (Cf. Goldfarb 1982.) Also see Whiting 2007; Verheggen 2011; Ginsborg 2012; Haddock 2012.

<sup>6</sup> Boghossian 1989 says the normativity of meaning is “incontestable.”

<sup>7</sup> Papineau 1999; Wikforss 2001; Glüer and Pagin 1998; Glüer and Wikforss 2009; Rosen 2001; Horwich 2005.

semantic standards of correctness while denying that meaning is normative, which is what every anti-normativist of which I am aware (other than Bilgrami) is keen to do.

Sometimes this distinction is explicit.<sup>8</sup> Other times not.<sup>9</sup> But any anti-normativist who wishes to grant the reality of semantic standards of correctness must rely on this distinction. There is no way to acknowledge such standards of correctness and to deny that meaning is normative other than by distinguishing such standards of correctness from the normativity of meaning. So, for example, while Papineau (1999) focuses his anti-normativist argument almost entirely on the claim that meaning, or content, does not have moral or prudential normative weight, he implicitly relies on the distinction between varieties of normativity when he allows for semantic correctness. Facts of semantic correctness, he claims, are merely shorthand for claims about truth. So the fact that answering “125” is semantically correct is nothing more than the fact that “ $68 + 57 = 125$ ” is true. And truth is “a descriptive property, like car-speed or celibacy.”<sup>10</sup> Papineau grants the reality of semantic correctness, while denying that it is an explanatory obstacle for naturalistic theories of meaning.<sup>11</sup>

### 3. Descriptive Correctness

So, according to the sophisticated anti-normativist meaning exhibits not full-blown normativity, but some lesser variety that has two characteristics: (a) it can be fully accounted for with naturalistic, descriptive explanatory resources and (b) it does justice to the intuition that the meaning of an expression entails facts about which uses of that expression are correct and incorrect. We can call this lesser variety of normativity *descriptive correctness*.

It does not matter for our purposes whether descriptive correctness is “real” normativity, whatever that might mean. What matters is only that there is a single feature of meaning with these two characteristics. It must have both in order to play the role that the anti-normativist needs it to play. If descriptive correctness were not descriptive, if it were out of the explanatory reach of dispositionalism, then acknowledging its reality would be to accept normativism about meaning. Alternatively, if descriptive correctness were not a form of correctness, then sophisticated anti-normativism, which was supposed to accommodate apparent semantic correctness facts, collapses into unsophisticated anti-normativism.

### 4. The Problem with Descriptive Correctness

The problem is that sophisticated anti-normativism cannot be made to work because there can be no such thing as descriptive correctness. The two characteristics that descriptive correctness must have are incompatible with one another. Correctness cannot be explained in descriptive, dispositional terms.

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<sup>8</sup> Hattiangadi 2007.

<sup>9</sup> Supra. note 7.

<sup>10</sup> Papineau 1999.

<sup>11</sup> Similarly, Wikforss (2001) thinks that the problem of error, which Kripke presented against dispositionalism, and correctness more generally, has nothing to do with normativity. This amounts to making the same distinction, though it is less explicit than Hattiangadi (2007) makes it. See also Rosen 2001.



To see that this is the case, consider the following example. Walking on (or near) the surface of the earth is common. Walking on the surface of the moon is uncommon. But walking on the surface of the earth is not therefore correct and walking on the moon is not incorrect. When Neil Armstrong and Buzz Aldrin walked on the moon on July 21st 1969, they did something *uncommon*, but in no sense *incorrect*.<sup>12</sup>

Patterns or regularities of behavior are unable to explain standards of correctness. Prior to 1969, not a single human had ever walked on the moon. But even a regularity of behavior as robust as this cannot generate a standard of correctness. And adding dispositions appears to get us no closer to correctness. Say that every person, including Armstrong and Aldrin, were disposed not to walk on the moon were they to land there. Perhaps they mistakenly think that walking there would be to their detriment, or perhaps it is just a brute fact that it never occurs to them to walk on the moon even if they found themselves sitting in a lunar lander. Such dispositions would make walking on the moon *unlikely*, but not *incorrect*. The fact that □ -ing is uncommon, even in combination with the fact that everyone is disposed not to □, does not make □ -ing incorrect. And the fact that □ -ing is common, even in combination with the fact that everyone is disposed to □, does not make □ -ing correct.

What more than behavior and dispositions is required for standards of correctness is a matter of some controversy, and one which was discussed in chapters 2 and 4. But what matters for our purposes is just that any feature of meaning that has the characteristic of being fully explicable in terms of behavior and dispositions cannot also due justice to the seeming fact that there are semantic standards of correctness. The sophisticated anti-normativist needs descriptive correctness to have both characteristics, which it cannot because correctness is more than a matter of dispositions.

But exactly what kind of argument is this? We have seen some examples of patterns of behavior and dispositions that fail to constitute standards of correctness. And it is hard to see how adding more behavior and more dispositions will help. But one can imagine a minimalist about correctness who simply insists that there is nothing more to correctness than dispositions. Indeed, this may be the best remaining option for the sophisticated anti-normativist. Have I begged the question against such a view? Have I done anything more than espouse an a priori prejudice?

The claim that patterns of behavior and dispositions are insufficient for standards of correctness does, in part, rest on an appeal to intuition (or, more pejoratively, a priori prejudice). But the argument just presented against the possibility of descriptive correctness does at least *a little* more than make that intuitive appeal. It shifts the dialectical burden.

Clearly not *all* behavior and dispositions are sufficient for standards of correctness. The walking-on-the-moon example shows that decisively. The sophisticated anti-normativist dispositionalist will therefore have to insist that at least some semantic behavior and dispositions manage, without richer explanatory resources, to generate standards of correctness. So the burden is on her to explain how behavior and dispositions can be sufficient for standards of correctness in some cases, when in others they manifestly are not.

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<sup>12</sup> Sellars (1954) draws a distinction between behavior that accords with a pattern and behavior that follows a pattern, or between regularities and rules.

That is the sense in which the dialectic burden has been shifted, which is very often the effect of examples in philosophy.

To clarify, the argument presented here does not show that sophisticated anti-normativism is false, so much as it shows that the sophisticated anti-normativist has a previously unnoticed, but daunting task: to explain the difference between those sets of regularities and dispositions that do not generate standards of correctness and those sets of regularities and dispositions that supposedly do, and to explain that difference without appeal to richer explanatory resources.<sup>13</sup>

#### 5. A Non-Descriptive Correctness

Where does this leave the inquiry into whether or not meaning is normative? The sophisticated anti-normativist attempted to introduce a middle road between (a) accepting that meaning is normative in a moral, prudential, or some other highly significant sense and (b) denying that there is any semantic sense in which an expression can be used correctly or incorrectly. If we reject descriptive correctness, are we left with only those two options? No.

The sophisticated anti-normativist argument takes the following form.

1. Meaning either essentially exhibits full-blown normativity or mere descriptive correctness.
2. If it essentially exhibits mere descriptive correctness, then anti-normativism is true.
3. Meaning does not exhibit full-blown normativity.
4. Therefore, anti-normativism is true.

Though never put in quite this form, this is the argument of all sophisticated anti-normativists, including Papineau (1999), Wikforss (2001), Hattiangadi (2007), and others. And these anti-normativists tend to focus their energy motivating some version of premise 3, typically arguing that meaning does not essentially exhibit moral normativity or prudential normativity. But I imagine that very few would have thought that meaning exhibited moral, prudential, or any other type of full-blown normativity, whatever that might be. Rather, the premise that should occupy our attention is the first one. It is false not only because there is no such thing as descriptive correctness, but also because there are more than two alternatives regarding whether meaning might be normative.

To see what other alternatives there are, recall the problem with descriptive correctness from the previous section. Descriptive correctness needed to have two characteristics—the ability to do justice to semantic correctness and the ability to be itself explained dispositionally—that could not be had together. But it is still true that *prima facie* meaning might have either of these characteristics, even if meaning cannot, in the end, have both of them. So it therefore seems to me like there are three potential answers to the normativity of meaning question.

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<sup>13</sup> One small piece of evidence that more behavior and dispositions will not be adequate to explain standards of correctness is the naturalness of an explanation of standards of correctness in just slightly richer explanatory terms, as we saw in chapters 2 and 4.

## Meaning is Not Normative

This is unsophisticated anti-normativism. On this view, meaning is not normative and there are no semantic standards of correctness. There is no such thing as using an expression correctly given its meaning. And there is no obstacle to dispositional explanations of meaning.

## Meaning Exhibits Full-Blown Normativity

It is not clear what exactly full-blown normativity is. And I attempted to explain it in chapters 2 and 4. But without recalling the details of those chapters, it is enough to note, first, that moral and prudential normativity, if there are such things, plausibly count. If meaning necessarily carries moral force, or even prudential force, then that would place a very significant constraint on theories of meaning and almost certainly rule out dispositionalism. More generally, we might say that any phenomenon that generates reasons for action—or, using the more precise terminology of chapter 2, deliberately weighty considerations—is normative in a similar sense that rules out dispositionalism.

## Meaning Entails of Standards of Correctness

This is a middle road, though not one that the sophisticated anti-normativist can take while remaining anti-normativist. The sophisticated anti-normativist was right in thinking that standards of correctness and full-blown normativity can be distinguished.<sup>14</sup> It is one thing for to say that “125” is the *correct* answer (and that this correctness is something that a theory of meaning must explain), and it is another thing to say that one *ought* to answer “125” (and that this altogether rules out dispositional theories of meaning).

Recalling chapter 2, consider rules of table manners.<sup>15</sup> These standards of correctness make it the case that slurping one’s soup is *table-manners-wise incorrect*. But plausibly, the rules of table manners are not necessarily backed by either moral or prudential force. Sometimes there is overlap between what table manners requires or forbids and what morality or prudence requires or forbids. And, moreover, sometimes a whole rule of table manners can contingently acquire moral or prudential force (e.g., when one promises to follow a rule of table manners). But there is no intrinsic connection between table manners and morality or prudence. So the former can require or forbid some behavior that the latter are neutral toward.<sup>16</sup> The suggestion is that meaning might entail the existence of standards of correctness that, like table manners, have no necessary or essential connection to any variety of full-blown normativity, including morality, prudence, or any other flavor that might be relevant but has been left out of the relevant philosophical literature.

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<sup>14</sup> For a similar distinction see Parfit (2011, 144–146) on rule- and reason-involving normativity.

<sup>15</sup> We could also consider the rules of a game, though there may be some important ways in which games and table manners are different.

<sup>16</sup> Some, including perhaps Dworkin (1977), may object to this particular example on the grounds that table manners, or game, necessarily carry moral or prudential force. This seems to me to be a fringe view, but it should not distract us from the main point, as table manners was merely meant as an illustrative example, and the reader can supply her own example that more accurately makes the point.

This suggestion differs from sophisticated anti-normativism because the standards of correctness are not thought to be explainable in dispositionalist terms. I am dropping the “descriptive” component of descriptive correctness. Semantic correctness is real, but this places a genuine constraint on theories of meaning. If meaning is normative in the sense that it necessarily entails standards of correctness, and if, as was suggested above, patterns of behavior and dispositions are insufficient for standards of correctness, then dispositional theories of meaning are doomed. And therefore the view that meaning is normative in this sense is a genuine form of normativism. But standards of correctness may still be a less burdensome explanandum than full-blown moral or prudential normativity. Table manners, as the example from chapter 2, may be explainable in terms of certain normative attitudes that, perhaps, are nonetheless insufficient for explaining morality or prudence. So if meaning is normative broadly in this sense, then reductive, naturalistic theories may still hold promise, though not the most reductive, dispositional ones.

## Chapter 7

### The Weightless Normativity of Meaning and Some Concluding Points

It may not be immediately obvious how the previous two chapters about the normativity of meaning fit together. The aim of this final chapter is to state how they do and where that leaves the normativity of meaning. This task is essential because its result cannot be cleaned from the previous two chapters themselves, but it can be achieved in a brief space. Therefore, this chapter also serves as a conclusion to the dissertation as a whole.

The kind of normativity mentioned at the conclusion of the previous chapter is, as may be obvious to those who have read chapters 2 and 4, weightless normativity. The suggestion is therefore that the meaning of an expression does not itself entail any facts about how one properly deliberates about the use of that expression, but it does entail that there is a semantic rule. Taken in isolation, the arguments of chapter 6 might suggest that this semantic rule is a standard of correctness that is duty-imposing and therefore determines whether an expression has been used correctly or incorrectly. Indeed, this is a plausible view that, on its own, would be superior to the views currently on offer in the normativity of meaning literature. But I propose that, in keeping with the considerations of chapter 5, the semantic rules entailed by meaning facts are power-conferring. So the normativity of meaning, as it turns out, is the following feature of meaning facts: they directly entail facts about what weightless authorities language speakers have. If these authorities are weightless, then how are they still authorities? Weightless authorities allow speakers to generate permission and duties for others, or for themselves. These permissions and duties are themselves weightless. But so long as we grant the reality of weightless duty-imposing rules, we should accept as well that there are weightless power-conferring rules and, by extension, weightless authorities.

It is worth mentioning as well that the claims of this chapter, as well as chapters 5 and 6 relate specifically to linguistic meaning and not to mental content. It has been thought by many in the normativity of meaning literature that meaning and content go together—that is, that either they are both normative or they are both non-normative.<sup>1</sup> But having presented the defense of the practice theory in chapter 4 we can see that there is a potentially relevant difference between linguistic meaning and mental content. If meaning is normative in the weightless sense, then it might be explainable along the lines of the practice theory, which is to say by appeal to a combinations of patterns of behavior and *attitude*. If such an account were to succeed, then it would be a reductive, non-trivial, illuminating account. But a

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<sup>1</sup> Boghossian 1989; Papineau 1999; Glüer and Wikforss 2009; Whiting 2009. Boghossian (2003) is the one exception that comes to mind.

corresponding account of mental content would be an explanation of mental states in terms of other mental states, which, while possibly still illuminating, would be considerably less so.

An account of meaning that makes appeal to attitudes, even evaluative, deontic, or normative attitudes is still reductive. Of course, it may be less satisfying than some extreme naturalists would like it to be. If one was interested in an account that made appeal only to externally observable behavior, then one is likely to be disappointed with any version of the practice theory. However, an explanation of meaning in terms of non-semantic and non-normative facts is perhaps as satisfying of an explanation as one might have hoped to get. Of course, this dissertation did not present such an explanation, but it did argue that such an explanation might be possible given the nature of the normativity of meaning. That same variety of normativity, it was argued in the early chapters, is found in table manners and law, which opens to the door to attitude-based theories of those practices while closing the door to behavior-based theories.

By way of conclusion, it is worth making a brief point about one of the broader implications of what has been said so far. Law, language, and table manners are all human-created normative practices. They are systems of rules that, consciously or unconsciously, we create with our words, actions, and thoughts. One might think, therefore, that the kind of normativity found in these practices is the same found in other human-created rule-constituted systems, such as fashion, clubs, and games. Moreover, one might think that weightless normativity is the *only* kind of normativity that humans can create with our words, actions, and thoughts alone. That is, even though we can alter weighty normativity by triggering underlying weighty norms (see chapters 3 and 4), the only kind of norms that we can generate from purely descriptive states of affairs are weightless. Though it has not been argued for here, this, I believe, is indeed the correct view. The fundamental thought behind Kripke's initial mention of the normativity of meaning, as well as behind the traditional normativity-based criticism of legal positivism, is that some kind of fact/value distinction is metaphysically significant. That is, if some phenomenon intrinsically includes some value component, then merely descriptive states of affairs are inadequate to explain it or account for its existence. One might think that the central thrust of this dissertation—the reality of weightless normativity—is in tension with that thought. And it is. There is a kind of value that can be explained in descriptive terms. But it captures the essence of that thought as well. There remains a kind of metaphysical fact/value distinction worth making. If the central thought of this dissertation is correct, then there is a kind of value that can be explained in descriptive terms, though perhaps not as minimal ones as some would have hoped. But there is still the possibility of another kind of value that cannot be explained in terms of what people think and say and do.

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