

Quasi-Expressivism about Statements of Law:
A Hartian Theory¹

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Introduction

Speech and thought about what the law is commonly function in *practical* ways, to guide or assess conduct. Agents often make judgments about what the law is (henceforth ‘legal judgments’) in order to structure their deliberations about what to do, or to evaluate their own behavior. We make statements about the law (‘legal statements’) as a way to guide or evaluate the behavior of others. Judging that the law requires citizens to pay taxes to the government may motivate someone to pay her taxes, for example, and her statements of such a law may constitute criticism of others who fail to pay their taxes, or exhortations to them to pay. If some citizens end up before a court because of their failure to pay, the judge’s legal judgments will commonly help direct her reasoning about what verdict to reach, and her legal statements may provide the vehicle by which the court’s condemnation of their actions is expressed.

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A complete metalegal theory (explaining how the law, and our thought and talk about it, fits into reality) should account for the full range of these practical features.² In this paper, we advance a broad approach to this task. To ease exposition, we focus on central subset of claims about the law; those expressed by the use of sentences of the form ‘It is the law that...’, which we call *statements of law* or *legal statements*. Whether our theory can be expanded to other parts of legal thought and talk is an issue for future work.

Our theory has close affinities with the approach of metalegal *expressivism*, as recently championed by Kevin Toh.³ Metalegal expressivism identifies the meaning of legal words and sentences not with any properties or facts that they represent, but with a conventional function of expressing the speaker’s noncognitive (desire-like) attitudes or prescriptive (command-like) speech acts. This approach is tailor-made for explaining the practical uses of legal statements. But it has a hard time explaining why legal statements seem to *describe* something – and, moreover, something that strikes many as an objective matter of fact and a legitimate object of purely descriptive inquiry in the social sciences. This makes many uncomfortable with metalegal expressivism, and we think rightly so.

Whereas metalegal expressivism is modeled after the popular expressivist strategy in metaethics, our theory is modeled after a rival, “quasi-expressivist” strategy in metaethics, which one of us (Finlay) has championed in previous work. This strategy is quasi-*expressivist* because it agrees with expressivism that a central class of (legal or moral) statements are expressive of noncognitive attitudes or prescriptions. But it is *quasi-expressivist* because it diagnoses this as a feature of the *pragmatics* of these statements, rather than of their (purely descriptive) semantics.⁴ This approach

² Our understanding of ‘metalegal theory’ draws from (Plunkett and Shapiro Manuscript); see also (Toh 2013) for a similar treatment. Our topic could also be labeled ‘general jurisprudence’, which Plunkett and Shapiro understand as a subset of metalegal theory dealing with what is common to law, and thought and talk about it, across all jurisdictions.

³ See (Toh 2005) and (Toh 2011).

⁴ Cf. (Enoch and Toh 2013), for exploration of the pragmatics of legal statements on the model of ‘thick’ ethical terms, and (Silk Manuscript), for a descriptivist view with close affinities to ours. Shortly before publication, Jeff Goldsworthy alerted us to (Holton 1998), which also supplements a Hartian form of positivism with a pragmatic explanation of certain practical features of legal statements. Unlike ours, Holton’s analysis appeals to specifically *moral* attitudes, and isn’t quasi-expressivist.

offers a straightforward vindication of the descriptive appearance of legal statements, while sharing the virtues of the expressivist's account of their practical functions.

While a quasi-expressivist theory of legal statements could be developed in various ways, we develop ours in a way friendly to *legal positivism*, understood as a view about what explains legal facts (about what the content of the law is in a given jurisdiction at a given time). Specifically, we understand legal positivism as holding that legal facts are *ultimately grounded* entirely in contingent social facts, of the kind studied by the social sciences (e.g., descriptive facts about the activity of legislators and judges), and *not* in moral facts (e.g., normative facts about what distributive justice requires or the moral merit of the actions of judges).⁵ Our focus on “ultimate” grounds is addressed to the issue of *constitutive* explanation, of what legal facts consist in, rather than to causal or epistemic issues. It also makes room for *inclusive* legal positivists, who allow that moral facts can play a derivative role in grounding legal facts on the basis of certain contingent social facts such as a constitution explicitly referencing *justice* as a constraint or basis for law – by contrast with *exclusive* legal positivists, who hold that moral facts are never even part of the grounds of legal facts.⁶ By this definition, what unites legal positivists is the view that there is a relatively basic level of explanation of legal facts that makes appeal only to contingent social facts and not to any independent normative facts. Legal *anti*-positivists such as Ronald Dworkin and Mark Greenberg hold by contrast that there is no basic level of explanation at which moral facts do not figure ineliminably.⁷

Our theory is developed in a positivist-friendly form for two main reasons. First, positivism has important virtues, such as easily accommodating the existence of morally bad laws and legal systems, and we believe it to be correct. Second, a quasi-expressivist approach has greater significance when paired with positivism. Positivists might seem *prima facie* to have a harder time

⁵ This understanding draws on (Greenberg 2004), (Rosen 2010), (Shapiro 2011), and (Plunkett 2013). Our theory is also compatible with ‘legal positivism’ on many other definitions.

⁶ See (Waluchow 1994), (Coleman 1982), and the postscript to (Hart 2012) for defenses of inclusive legal positivism, and (Raz 1980), (Green 1990), (Shapiro 2011) for defenses of exclusive legal positivism. Note that exclusive legal positivists can grant that some laws reference moral facts, such as facts about what justice requires. For example, they can hold that the law directs us to *consult* moral or extra-legal norms, just as morality might direct us to follow the rules of grammar without incorporating them into morality itself. See (Raz 1979/2002).

⁷ See (Dworkin 1986), (Dworkin 2011), (Greenberg 2006), and (Greenberg 2014).

accounting for various practical features of legal speech and thought than antipositivists. But if a quasi-expressivist approach can explain these features without endorsing legal antipositivism, this neutralizes some (though not all) of the motivations for antipositivism.

Our theory is additionally formulated in an explicitly *Hartian* framework, drawing on the jurisprudential views of H. L. A. Hart.⁸ This enables us to introduce it in terminology familiar to philosophers of law, and also facilitates a secondary, interpretative goal of the paper. The final part of the paper argues that Hart's views in *The Concept of Law* are best reconstructed as a (positivist) form of quasi-expressivism. We argue against rival interpretations of Hart's theory of legal statements, including pure expressivist readings (Toh, Scott Shapiro) and hybrid expressivist readings (as suggested by some passages from Joseph Raz).⁹ This secondary goal is separable from our primary thesis. One could embrace a quasi-expressivist theory of legal statements while rejecting our reconstruction of Hart as mistaken. Or one could accept our reconstruction of Hart, while rejecting quasi-expressivism about legal statements. We pursue these goals together in part, to give credit where it is (arguably) due, but more importantly, because if this is the best reconstruction of Hart's view then engaging with quasi-expressivism is all the more important for the many legal philosophers who identify as broadly Hartian or who draw on Hartian resources—and for Hart's critics, since quasi-expressivism provides resources for defending a Hartian theory against influential objections.

§1 *Quasi-Expressivism: From Morality to Law*

Part One introduces the key features of a quasi-expressivist approach to statements of law, develops it in a concretely Hartian form, and argues for its superiority over its rivals. First, we introduce a standard Hartian view of the content of legal thought and talk, or the semantics of legal language and the nature of legal facts, as *rule-relational*. This theory is both descriptivist and positivist-compatible. We then explain how it can capture the practical character of certain statements of law, by showing how a directly analogous *end-relational* view of the content of moral

⁸ Especially (Hart 2012).

⁹ See (Toh 2005), (Shapiro 2011), and (Raz 1993).

thought and talk provides quasi-expressivist solutions to parallel problems in metaethics (as argued by Finlay). We extend these solutions from the metaethical to the metalegal case, and observe their advantages over rival proposals. In adopting this approach we do not assume that a relational, quasi-expressivist theory is the correct view in metaethics. Rather, we aim to demonstrate why such an approach might be appealing, and how it can be applied, in relation to parallel puzzles in metalegal theory. A quasi-expressivist view may be correct in the metalegal case even if incorrect in metaethics, and indeed we'll suggest that some central objections in the metaethical domain don't have plausible metalegal counterparts.

§1.1 Semantic Foundations: The Rule-Relational Theory.

While a quasi-expressivist view of legal statements can in principle be combined with any descriptivist theory of their semantics, we will develop it from a particular view, for the following reasons. First, we think this semantics is broadly on the right track. Second, it is structurally parallel to the metaethical theory from which our quasi-expressivist account is derived by analogy. Third, it supports a particular kind of quasi-expressivist account, the details of which are especially attractive. Fourth, it is friendly to legal positivism, which enables us to demonstrate quasi-expressivism's potential as a response to antipositivist arguments. Finally, it lays the groundwork for our critical reconstruction of Hart's views in Part Two.

A semantic theory is "descriptivist" in case it identifies the literal and conventional content of the target sentences with an ordinary proposition, which represents the world as being a particular way and is true if and only if the world is so.¹⁰ Such propositions are the contents of ordinary *beliefs*, understood as attitudes with a mind-to-world direction of fit. Hence, sincere assertion of a descriptive sentence '*p*' is a speech act of expressing the speaker's belief that *p*. To develop a descriptivist theory of statements of law, one must therefore identify which propositions are the semantic contents of sentences of the form 'It is the law that *L*'. What properties, relations, states of affairs, etc. are statements of law *about*?

¹⁰ For ease of exposition we here overlook semantically incomplete sentences, which require supplementation from context to determine a proposition.

An obvious but trivial answer is that these statements are about *law*. But what is law? Is it even something that exists “in the world”, as a descriptivist semantics requires? A key insight—emphasized by Kelsen, Hart, and many other legal philosophers—is that laws don’t exist in isolation, but only as parts of particular *legal systems*, such as New Zealand Law and American Law.¹¹ This relativity-to-a-system is plausibly also built into the conceptual and semantic competence of ordinary users of legal language. Claims or judgments about what the law is are made (explicitly or implicitly) relative to particular legal systems, and statements of law are commonly qualified in ways that plausibly function to identify particular legal systems or subsystems; e.g. ‘*In New Zealand*, it is the law that...’, ‘*According to the Californian road code*, it is the law that...’ This suggests a *relational* theory of the semantics and metaphysics of law: legal statements describe some kind of relation in which things stand to a legal system.

Defining law in terms of a relation to a “legal system” is unsatisfying circular, of course. This circularity can be eliminated by developing our relational theory in an explicitly Hartian direction. In *The Concept of Law*, Hart argues that law can be analyzed as a union of first-order rules (e.g. governing behavior) and second-order rules (rules governing rules). Among the second-order rules of a legal system is what Hart calls a *rule of recognition*. This can be defined abstractly as specifying the criteria for a rule to be a part of a given system of rules, or, in Hartian terminology, the conditions of *legal validity* within the system.¹² This yields a relational account of the nature of law itself. Facts about what the law is, relative to a particular legal system, are facts about what rules are valid according to the relevant rule of recognition. Plausibly there are objective facts about many such relations (allowing for some indeterminacy).

On the corresponding, *rule-relational* semantic theory we adopt here, a statement of the form ‘It is the law that L (in X)’ semantically expresses the proposition that L is a rule (requiring,

¹¹ In Kelsen’s words, “Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system” (Kelsen 1945, 3). See also (Hart 2012), (Raz 1980), (Shapiro 2011), (Marmor 2011), and (Gardner 2012b).

¹² Hart normally writes as if there is *one* rule of recognition per legal system (also a common practice in the secondary literature), though occasionally hints at the possibility of multiple rules of recognition; see for example (Hart 2012, 95). For arguments in favor of this reading, and for the idea itself, see (Raz 2002) and (Marmor 2011). We assume one rule of recognition per system to simplify discussion and without prejudice on this issue, following common practice; e.g., (Gardner 2012c, 283).

permitting, or empowering some kind of behavior) satisfying the criteria of the rule of recognition R of legal system X. A legal statement that doesn't explicitly refer to a rule of recognition in this way implicitly relies on the salience of such a rule in the context. (Not all relational or even rule-relational metalegal theories need be committed to giving rules of recognition this role in the semantics, which might be resisted for various reasons.¹³ One might prefer, for example, to posit relativity to more specific rules or sets of rules (e.g. *US Tort Law*) in different contexts. As we adopt this Hartian view here largely for purposes of illustration, we will not address various objections against the details of Hart's appeal to rules of recognition.)

Significant questions can be raised about the metaphysics of *rules*. But while such questions matter for many debates in the philosophy of law we can here remain neutral. All we need is that appeal to rules of the relevant kind is compatible with legal positivism as we have defined it, as we believe. Consider board games like Monopoly, and sports like football, which have rules prohibiting certain actions, permitting others, etc.. It is very plausible that social facts (of some kind) are alone the ultimate grounds of those rules. It is also plausible that there are objective facts about how things stand in relation to those rules; e.g., whether a given move is permitted in Monopoly. These relational facts might arguably not themselves be "social facts" in a narrow sense, but so long as they are not grounded in any moral facts and the rules themselves are grounded entirely in social facts as we suggest, they are consistent with positivism about games. Our theory of legal statements requires nothing beyond rules and relations of this kind, and so we take this appeal to legal rules to be compatible with legal positivism.¹⁴

¹³ One might share the worry that Scott Hershovitz expressed to us, that ordinary legal speech couldn't plausibly be *about* something as abstract as a rule of recognition—an instance of a general concern about semantic theories attributing complex thoughts to ordinary speakers. One might therefore look for different relata, but our theory can allow that speech and thought about the law requires merely a recognition that some criterion of law in the relevant system exists, and the ability to represent it in such *de dicto* terms, without knowing what it is. Hartians can insist that in the absence of this recognition, one lacks the concept of law.

¹⁴ Some recent argument suggest a radical form of antipositivism that extends even to board games; see (Hershovitz 2015), (Greenberg 2006), and (Dworkin 2011). If such a view is correct then our proposals will fail to help the positivist, although our other aims in this paper would be unharmed. However, antipositivism seems far less plausible for board games than for law.

§1.2 The Practical Uses of Legal Statements

In this section we identify several different practical functions of legal talk and thought, and show how a (positivist-friendly) rule-relational theory of the content of legal statements can explain them. The challenge is to explain how mere assertions about the relations in which conduct or rules stand to other, socially grounded rules could function in these practical ways. To meet this challenge we draw on recent developments in metaethics. A parallel challenge confronts relational semantic theories about the content of moral statements concerning (e.g.) what is “good”, or “ought” to be done. According to the *end*-relational theory one of us (Finlay) has championed, these statements assert propositions about the statistical relations in which actions (etc.) stand to “ends”, or potential future states of affairs.¹⁵ So to say that *S ought* to do *A* (in order that *e*), for example, is to assert approximately that *e* is more likely if *S* does *A* than if *S* does anything else. But how could the mere assertion of such ordinary propositions possess the practical features of moral claims? In metaethics, a set of pragmatic resources we call *quasi-expressivist* have been developed to answer this kind of challenge.¹⁶ These resources can also be applied directly in the metalegal case, to explain how rule-relational statements can possess parallel features. We will explain how these solutions work in the metaethical case, and show how to draw the analogy to statements of law.

§1.21 Motivation and Expression

Consider, first, practical features of moral judgment that are *speaker*-centric. A central metaethical challenge is to explain the special connection between moral judgment and motivational attitudes in the speaker. Why is it, for example, that judging that you ought to do *A* reliably (and perhaps rationally) leads to your being motivated to do *A*, and telling somebody that they ought to do *A* expresses your approval of doing *A*? According to (popular though controversial) *motivational internalism*, this connection between moral judgment and motivation holds by necessity. A primary argument for expressivism and against descriptivism in metaethics is that no purely descriptive

¹⁵ E.g. (Finlay 2004), (Finlay 2014). For other relational theories in metaethics, see (Harman 1975), (Harman 1996), (Wong 1984), (Railton 1986), (Copp 2007).

¹⁶ For the most developed version of this strategy, see (Finlay 2014). It is introduced in (Harman 1996) under the label ‘quasi-absolutism’; for other versions see for example (Phillips 1998), (Copp 2001), (Railton 2008), and (Strandberg 2012).

judgment, or mere belief in any kind of properties or facts, could explain this “internal” connection. It is easily seen how this objection applies to a relational metaethical theory like Finlay’s: a mere statement or belief that A raises the probability of some state of affairs has no necessary connection with speaker motivation.

A rule-relational theory of law faces a parallel objection. There is at least a special class of statements about law that seem essentially practical, in that the speaker tends to be reliably motivated to comply with what she asserts to be the law, and thereby to express pro- or con-attitudes towards the relevant conduct. We will call these *internal* statements of law, in contrast to *external* statements of law, which we discuss subsequently. (We take ourselves to be following Hart’s famous and influential distinction between “internal” and “external” statements of law.¹⁷ But it is controversial what distinction Hart intended, and different legal philosophers use this terminology in different ways. We employ these terms stipulatively, without commitment to whether this use aligns perfectly with Hart’s, let alone other philosophers’ use.¹⁸) This characteristic of legal statements is among the primary motivations for metalegal expressivism. It may seem incompatible with the rule-relational theory, since merely describing a relationship between positivistic rules does not have any essential connection with motivational attitudes in the speaker. But relational theories can answer this objection. We start by sketching the metaethical case, then draw the analogy to the metalegal case.

We concede that the end-relational theory, which interprets moral statements as asserting ordinary propositions about relations to ends, does not support any necessary connection between the beliefs expressed and motivational attitudes in the speaker. Notice, however, that motivational internalism is only plausible, at best, in relation to uses of ‘ought’ that are not explicitly relativized. Compare ‘In order to poison your enemy without detection, you ought to feed them arsenic,’ with ‘You ought to feed your enemy arsenic,’ for example. Only utterance of the latter is naturally taken to express positive motivational attitude toward feeding anyone arsenic. But distinctly *moral* uses of ‘ought’ are characteristically nonrelativized. One might therefore conclude that terms like ‘ought’ are

¹⁷ See (Hart 2012, esp. 89, and 102-110).

¹⁸ Some philosophers, including (Toh 2005), use ‘statements of law’ narrowly as a term of art for what by our definitions are strictly internal statements.

ambiguous between a relational, non-moral meaning and a non-relational, moral meaning—rejecting a relational theory of peculiarly *moral* statements. However, there is an alternative explanation of this same observation, which is semantically more parsimonious.

If the semantics of ‘ought’ are indeed end-relational, then asserting an unrelativized sentence such as ‘You ought to feed your enemy arsenic’ can only communicate a complete proposition if some end is salient in the context. In that case the end can be left unstated, since the audience is able to identify it without help. So to explain the intimate connection between moral statements and motivation, the end-relational theory simply needs to explain why the use of terms like ‘ought’ has an especially close connection to motivational attitudes whenever an end is left implicit rather than explicitly stated. Finlay argues that this challenge is easily met.¹⁹ The normal (though by no means only) circumstances in which the end can be assumed are where it is salient in virtue of being of *shared concern to both speaker and audience* (perhaps only under this description). In these circumstances there is a tight, obvious connection to motivation: any agent who has a desire or concern for an end *e* will (rationally) be motivationally disposed towards whatever they believe to stand in such an instrumental relation to *e*.

The end-relational theory is then able to explain how, by using (unrelativized) normative words like ‘ought’, speakers *express* their motivational attitudes. In normal contexts, a person uttering an unrelativized ‘ought’ sentence speaks *as if* the unstated end is salient as the object of her concern. This is an instance of “pragmatic presupposition”: uttering a sentence that would normally make a helpful contribution to a communicative exchange only on the condition that some unasserted proposition *p* is true.²⁰ If the audience does not already recognize that *p* is true, they will engage in “presupposition accommodation”, and understand the speaker to be communicating the additional information *p* that her utterance presupposes. By uttering an unrelativized ‘ought’ sentence, a speaker therefore communicates (or *expresses*) the additional information that she has favorable attitude toward the unstated end. Since she can therefore be expected also to have

¹⁹ (Finlay 2004), (Finlay 2014, Ch. 5); see also (Harman 1996, 15-16).

²⁰ (Dowell Forthcoming) observes that these cases lack some canonical features of pragmatic presupposition identified in (Stalnaker 1974). We think the classification is apt nonetheless, as the practice involves presupposing something and is pragmatic rather than semantic.

derivative favorable attitude toward the action she is asserting to be most promotive of that end, she will also pragmatically express favorable attitude toward the action itself.

This account accommodates the expressive elements of moral discourse that motivate metaethical expressivism, but remains descriptivist because it explains these as pragmatic features, arising from the way in which words like ‘ought’ are used in particular contexts, rather than as semantic features located in the conventional meaning of the words themselves. Like expressivism, it holds that (unrelativized) ‘ought’ statements characteristically express noncognitive attitudes, but unlike expressivism, it holds this to be an entirely pragmatic feature of these statements, generated from a purely descriptivist semantics that is uniform between different kinds of use of ‘ought’; hence the *quasi-expressivist* label.²¹

A parallel quasi-expressivist story can be told in the metalegal case. Clearly, not all statements of law are essentially normative or practical. The existence of external statements of law (unlike the existence of external moral statements), as pure descriptions of fact, is uncontroversial. This is particularly obvious for talk about laws of other times and places; e.g., when a contemporary American citizen says ‘By the Hammurabi Code, it is the law that L’ or ‘In China, it is the law that L.’ As Hart observes, the paradigms of internal statements of law rather involve utterances of simpler, unrelativized sentences, of the form ‘It is the law that L.’²² If all thought and talk about law is rule-relational, then these utterances must be implicitly relativized to some rule of recognition sufficiently salient in the context, which the audience is expected to identify without explicit cues. In general (but not invariably) these will be contexts where the rule of recognition is the object of a particular kind of motivational attitude for both the speaker and audience, an attitude we’ll call *acceptance*.

An agent “accepts” a particular rule of recognition R, in our sense, if she is disposed to use the rules she believes to meet its criteria for law directly as a guide for her own and others’ conduct when in the relevant jurisdiction. This notion of acceptance, modeled broadly on Hart’s discussion of rule-acceptance in *The Concept of Law*, is capacious. One might accept a rule of recognition (or

²¹ Following (Björnsson and Finlay 2010) and (Finlay 2014). (Harman 1996) labels his similar account ‘quasi-absolutist’, focusing instead on the relativist’s mimicry of moral absolutism. The term is inspired by the label ‘quasi-realism’ for the project of explaining the realist appearances of moral discourse with purely antirealist resources (Blackburn 1993).

²² See (Hart 2012, 102).

particular law) because of its perceived moral merits or authority, for example, or for purely prudential or self-interested reasons. Alternatively, one might accept it merely instinctively, and not in response to any perceived reasons.²³ For any agent who accepts a particular rule of recognition R, for any reason or cause, there will obviously be a contingent but intimate connection between believing some first-order rule L to meet the criteria for legal validity provided by R, and being motivated to act in accordance with L. This provides a quasi-expressivist explanation why internal statements of law would characteristically both imply and express motivational attitudes.

The generality and explanation of this connection between unrelativized and internal use of legal statements can be expected to diverge in some ways from the case of moral statements. On the one hand, the fact of *jurisdictional uniqueness*—that usually only a single rule of recognition (or legal system) has social efficacy in any one jurisdiction at any one time—is a strong source of salience competing with the speaker’s and audience’s attitudes of acceptance, which isn’t present to the same degree in the case of moral statements.²⁴ Certainly, agents who don’t accept the law of the land can easily make unambiguous external statements of law by uttering unrelativized sentences—as when professional thieves debate property law to determine which of their activities to conceal from police. On the other hand, the statistical normality of acceptance of the legal system with efficacy in one’s own jurisdiction (whether socially conditioned, or for moral, prudential, or other reasons) restores some of the connection’s strength.²⁵ In any case, the presence or absence of explicit relativization to a rule of recognition will be only loosely correlated with a legal statement’s status as internal or external. Any signal that a legal statement is internal, whatever the mechanism, will support a quasi-expressivist explanation why it expresses the speaker’s motivational attitudes.

²³ We take no stand on whether certain agents (e.g., high-ranking judges) must accept certain rules for particular kinds of reasons in order for there to be a legal system. Hart denied, for example, that there could be a legal system in which all the officials accepted the rule of recognition only for prudential reasons (Hart 2012, Ch. 6), a claim rejected by other philosophers, including (Gardner 2012a) and (Shapiro 2011). The pragmatic account of (Holton 1998) utilizes this Hartian claim to explain why internal legal statements would implicate claims about moral justification.

²⁴ A moral analog: moral ends may have the status of social norms, enabling “amoralists” to make unrelativized statements about moral value without corresponding motivational attitudes (Finlay 2014, 190-2); Cf. (Phillips 1998).

²⁵ (Copp 2001) and (Strandberg 2012) suggest analogous bases for metaethical quasi-expressivism in terms of *generalized conversational implicature*; see also (Holton 1998) for a similar view of legal implicatures.

§1.22 *Making Demands: The Prescriptivity of Legal Statements*

We turn now to consider *audience*-centric practical features of moral and legal statements, in particular their illocutionary force of *prescription*. Addressing moral or legal claims to agents (‘You ought to do A’/ ‘It is the law that you do A’) often has a central function of commanding that the addressee do A. In the metaethical case, we suggested above that in paradigmatic circumstances, ends will be salient on account of being of shared concern both to speaker *and* audience in the context. The audience’s attitudes will be especially salient in second-personal assertions, of the form ‘You ought to do A.’ To be told that a particular action is the option that most promotes an end *e*, which you happen to desire, is to be given reliably and rationally motivating information, and is naturally classified as a speech act of *recommendation*. This extension of the quasi-expressivist solution can also be applied directly to the rule-relational theory of law. To be told that rule L meets the criteria for legal validity provided by the rule of recognition R you yourself accept is to be given reliably and rationally motivating information. It thereby constitutes a legal recommendation to comply with L.

This still omits the *categoricity* characteristic of moral and legal prescriptions, however. Consider the metaethical case: sometimes unrelativized ‘ought’ claims are addressed to audiences who transparently do not share the speakers’ own concerns or preferences. This is especially characteristic of *moral* ‘ought’ statements, which address “categorical imperatives” to agents that demand compliance regardless of the agent’s desires (contrasting with mere “hypothetical imperatives”). Many legal statements have a similarly categorical quality, such that telling an agent, “It is the law that you do A,” functions prescriptively despite his declarations of indifference towards (or nonacceptance of) the rules of the relevant legal system.

Perhaps it is enough to explain the categoricity of moral talk that the speaker expresses her own motivational attitudes (as outlined in the previous section), thereby pressing her own second-personal authority on her audience—as some expressivists have thought. The end-relational theory supports a further explanation of this prescriptive feature, however.²⁶ When a speaker utters an

²⁶ See especially (Finlay 2004) and (Finlay 2014, 180-188).

unrelativized ‘ought’ sentence, by speaking as if one end were uncontroversially salient she behaves as if her attitudes were shared by her audience, even though (in prototypically moral contexts) this presupposition is transparently false. Taking a wider view of our linguistic practices, this can be recognized as a familiar kind of rhetorical device we’ll label *moralism*.²⁷ Communicating something—especially about your audience—that you are clearly in no epistemic position to assume true is a familiar way of expressing a demand or “expectation” that it be made true. Consider the typically moralistic force of saying “We don’t do that around here,” for example, or “You will take out the trash.”²⁸ Unrelativized use of ‘ought’ when the audience transparently does not share the speaker’s attitude towards the end can therefore be predicted to function, pragmatically and rhetorically, to express a demand that they share (or at least respect) the speaker’s attitude towards the end, and derivatively towards the action being claimed to promote it. A semantics of “hypothetical imperatives” can in this way aim to accommodate our practice of addressing “categorical imperatives” to others.²⁹

A parallel quasi-expressivist story can be told about the categorically prescriptive character of certain (especially second-personal) legal statements, on behalf of the rule-relational theory. When the audience transparently doesn’t accept the rule of recognition accepted by the speaker (e.g. in legal addresses to scofflaws), to talk as if one rule of recognition were uniquely salient in the context will sometimes be to talk *as if* that rule of recognition was accepted by the audience. This will rhetorically express a demand that it be accepted, and derivatively, that the law being claimed to follow from it also be accepted and obeyed.

We concede that this story may not be as compelling in the metalegal case as it (arguably) is in metaethics. This is because, again, jurisdictional uniqueness will often be sufficient by itself to make a particular rule of recognition salient. (An exception involves cases of “bedrock legal disputes”, discussed below). But a quasi-expressivist account of categorical legal prescriptions can be supported by other mechanisms. If the speaker is evidently aiming to advise or influence the agent, for example, then she is talking as if the agent accepts the relevant system of law; in contexts

²⁷ See (Finlay 2014, 186-187).

²⁸ Cf. (Stevenson 1937, 24-25), and (Barker 2000) on a “rhetorical objectivity effect”.

²⁹ See (Finlay 2004, 220) and (Finlay 2014, Ch. 7). Cf. (Foot 1972).

where this presupposition is transparently unjustified, a rhetorically-expressed demand can be predicted as described above. The rule-relational theory therefore supports a quasi-expressivist explanation of the categorical prescriptivity of internal legal statements.

§1.3 *Bedrock Legal Disputes*

Thus far we have focused on how a quasi-expressivist, rule-relational theory can explain key practical features of legal talk and thought, in a way consistent with legal positivism. To bolster this case, we now consider an influential objection against legal positivism and show how a quasi-expressivist account can help positivists to respond.

In *Law's Empire*, Ronald Dworkin points to cases where speakers persist in a dispute about what to count as “the law” in a particular jurisdiction, despite complete, mutually recognized agreement on all relevant empirical facts.³⁰ Following terminology introduced by Plunkett and Sundell, we’ll call such disputes *bedrock legal disputes*.³¹ Dworkin argues that there are many bedrock legal disputes in actual legal practice, and, moreover, that many of them express genuine disagreements. Antipositivists can easily explain such disputes as involving disagreement over the moral facts they allege to be among the ultimate grounds of law, such as (on Dworkin’s theory in *Law's Empire*) facts about which principles provide the strongest moral justification for the relevant social practices.³² In contrast, it is less clear what positivists should say if they grant the existence of such disputes. Consider that on a straightforward positivist view, these disputes will often involve speakers employing different criteria for determining legal validity-in-the-system.³³ At least prima

³⁰ (Dworkin 1986). Cf. (Dworkin 2006) and (Dworkin 2011).

³¹ We use ‘dispute’ to refer to exchanges that *appear* (but may fail) to express genuine disagreement, following (Plunkett and Sundell 2013a) and (Plunkett and Sundell 2013b). Dworkin’s label *theoretical disagreements* has become general currency among legal philosophers; we avoid it partly because his definition builds in parts of his own analysis we don’t endorse (e.g. that these disputes concern what he calls the *grounds of law*). For discussion see (Plunkett and Sundell 2013b).

³² For a similar reading of *Law's Empire*, see (Greenberg 2006).

³³ Part of Dworkin’s objection to Hart’s particular form of legal positivism is that such disagreements can (allegedly) arise between the very legal officials whose convergence in practice is what, for Hart, grounds a rule of recognition. On Hart’s theory, such divergence seemingly entails that no rule of recognition exists in that jurisdiction, and hence no law. For discussion see (Shapiro 2011, Ch. 10). Because of this, one might think that a Hartian theory, such as our own, should *not* endorse the claim that bedrock legal disputes involve speakers employing different criteria for determining legal validity-in-the-system, but must instead explain

facie, this seems to commit the positivist to denying that such disputes involve genuine disagreements. According to our rule-relational theory, for example, such intuitively and superficially conflicting statements of law are assertions that L is the-law-according-to-R1/ not the-law-according-to-R2; assertions that are logically, conceptually, and metaphysically consistent with each other. So relational theories may seem committed to saying that participants in such disputes are merely talking past each other, expressing no genuine disagreement. Dworkin argues that the best versions of legal positivism do indeed have such commitments, and that this is a powerful reason to reject positivism.³⁴

This objection to positivism parallels a well-known objection in metaethics based on the observation that moral disagreement can persist despite complete, mutually recognized agreement on all scientifically describable facts. This presents a challenge particularly for relativistic theories, as easily illustrated with Finlay's end-relational theory.³⁵ Settling all the relational facts about which actions best promote which ends does not settle the issue of what one morally ought to do, because the question remains of what end to pursue. Consider an assertion by a Benthamite utilitarian of the sentence 'Sometimes one ought to tell a lie.' An obvious end-relational analysis of this is as meaning that *sometimes one promotes utility most by telling a lie*. A Kantian deontologist might believe this proposition, but wouldn't thereby agree with the utilitarian's moral claim. So the end-relational theory confronts the objection that it cannot account for the existence of moral disagreements in such cases.³⁶ By contrast, the existence of fundamental disagreements of this kind is claimed to count in favor of expressivism, which explains them as disagreements "in attitude" (e.g. preferences or plans) rather than disagreements in belief. Metalegal expressivists claim the corresponding

bedrock legal disputes in some other way. However, this is not a problem for our view in this context. Our rule-relational theory isn't committed to Hart's views about which social facts ground rules of recognition, and we are concerned with a more general objection that is just one element of Dworkin's challenge to positivism in *Law's Empire* but receives greater emphasis in his later work; see (Dworkin 2006) and (Dworkin 2011). For discussion see (Plunkett and Sundell 2013b) and (Shapiro 2011, Ch. 10).

³⁴ (Dworkin 1986). Cf. (Dworkin 2006) and (Dworkin 2011).

³⁵ (Moore 1922/1970).

³⁶ See for example (Olson 2011).

advantage over descriptivist and positivist theories, explaining bedrock legal disputes as expressions of conflicting attitudes of acceptance.³⁷

Many positivists respond by simply denying that there are bedrock legal disputes, or that bedrock legal disputes express genuine disagreements. This stance is more plausible than any parallel claim in defense of *metaethical* relativism, and if correct, then our view faces no real problem here. But the rule-relational theory also provides quasi-expressivist resources that positivists can deploy to allow that these exchanges involve an important kind of disagreement.³⁸ This strategy can again be adapted from metaethics.

Disagreement challenges to relational theories crucially assume that to vindicate intuitions of disagreement a conflict must be found in the utterances' asserted or semantic content. This assumption is challenged on the grounds that some disagreements are *pragmatic*, involving conflicts in what is expressed without being asserted—via implicature, connotation, or presupposition. One kind of such dispute involves *metalinguistic negotiation*, for example, in which speakers use (rather than mention) a word differently in order to pragmatically communicate conflicting views about how it should be used.³⁹ A central kind of metalinguistic negotiation occurs when one speaker uses a term 'X' to express one concept (what she means by 'X') and another uses the same term to express a rival concept (what he means by 'X').⁴⁰ Potential examples are open to competing interpretations, but consider disagreement over whether Pluto is a *planet* between two scientists who agree on all Pluto's physical properties. If each speaker means something different by 'planet' then the literal contents of their assertions may both be true, but they nonetheless disagree in virtue of their incompatible views about how the word should be used—a disagreement they express by their

³⁷ See (Toh 2005) and (Toh 2011). Toh's full account of bedrock legal disputes incorporates additional features not under discussion here. See also (Toh 2008).

³⁸ These can supplement other positivist responses, including appeal to inclusive legal positivism or denial of the philosophical importance of such disputes. For other positivist resources, see (Leiter 2009), (Shapiro 2011), and the postscript in (Hart 2012). For a similar pragmatic contextualist treatment of bedrock legal disputes see (Silk Manuscript).

³⁹ See (Plunkett and Sundell 2013a), (Plunkett and Sundell 2013b), and (Plunkett and Sundell 2014).

⁴⁰ Cf. (Robinson 2009), who offers related thoughts in analyzing what he calls "bedrock moral disputes".

competing metalinguistic uses of it.⁴¹ In bedrock legal disputes similarly, speakers use a common word ('law') divergently despite apparent awareness that they agree on all relevant empirical facts. One option for legal positivists and/or rule-relational theorists is therefore to analyze such disputes as metalinguistic negotiations, as Plunkett and Sundell have argued.⁴²

A related, quasi-expressivist solution can be directly derived from the pragmatic resources we introduced in response to the previous challenges (§1.21, §1.22), modeled after quasi-expressivist responses to parallel challenges for metaethical views like the end-relational theory.⁴³ This solution grants that many bedrock legal disputes involve speakers employing different criteria for determining legal validity-in-the-system. In §1.21 we argued that by making statements about the law that are implicitly relativized to a rule of recognition she accepts, a speaker pragmatically expresses acceptance of the first-order rule she thereby asserts to satisfy those criteria. So when A asserts that L is "the law" (relative to a rule of recognition R1 which she accepts as uniquely determining authoritative law in the jurisdiction), and B asserts that L is *not* "the law" (relative to a rule of recognition R2 which he accepts as uniquely determining authoritative law in the same jurisdiction), they pragmatically express conflicting attitudes of acceptance/ nonacceptance towards L. A and B thereby engage in a disagreement in attitude over the law, as expressivists like Toh maintain, but through the pragmatics rather than the semantics of their utterances. Additionally, by speaking as if one rule of recognition were uniquely salient in the context, A pragmatically presupposes that B accepts the same rule of recognition R1 she does (and vice versa), although this may be transparently false or unjustified. As argued in §1.22, this can be expected to function rhetorically as expression of a demand or prescription that B come to accept R1, and derivatively, L. By the same reasoning, B expresses the prescription that A come to accept R2, and derivatively, not L. The rule-relational

⁴¹ As demonstrated in (Plunkett and Sundell 2013a), standard linguistic markers for disagreement, such as "That's false", "You're mistaken", etc., are also typically licensed in metalinguistic negotiations. For connected discussion, see (Khoo and Knobe 2016).

⁴² See (Plunkett and Sundell 2013b). This schematic strategy leaves open whether the expressed stances consist in beliefs or in desire-like attitudes.

⁴³ See (Harman 1996), (Björnsson and Finlay 2010), and (Finlay 2014, Ch. 8). For an opinionated comparison with the metalinguistic strategy, see (Finlay 2016).

theory thereby predicts that bedrock legal disputes would involve a quasi-expressivist disagreement in prescription.⁴⁴

Some philosophers may here object, with Dworkin, that bedrock legal disputes intuitively involve disagreement over an objective matter of fact—over what the law really is, or what its grounds are—rather than being “mere” clashes of attitude. If so, then quasi-expressivist and metalinguistic analyses may be committed to attributing an implausible degree of error to the self-understanding of ordinary speakers. We reply, first, that attributing such error to folk metalegal theory may not be a great cost, because ordinary speakers plausibly needn’t possess sophisticated theories of their own practice. Second, one may challenge whether pretheoretical intuitions speak unambiguously and univocally against our proposal about the division of labor between semantics and pragmatics in disputes over what “the law is”.⁴⁵ One can reasonably be skeptical of Dworkin’s claims both about the need to preserve the “face-value” of bedrock legal disputes, and about what that “face-value” actually is.⁴⁶

§1.4 *The Normativity of Law.*

A common objection to positivist metalegal theories is that they omit the allegedly essential *normativity* of (at least internal) legal talk and thought. To evaluate the force of this against our proposals we first need to investigate what is meant by “normative” here, as this term is used in different ways by different philosophers, including in the philosophy of law.⁴⁷ A distinction is often drawn between normativity in a purely *formal* sense and in a *robust* sense.⁴⁸ Something is formally normative if it provides a standard or norm against which conduct (for example) can be compared, and found either to conform or not to conform. Formal normativity is mundane, found everywhere from the rules of games to standards of etiquette and to shopping lists. By contrast, something is

⁴⁴ See (Ridge 2014) for the idea of disagreement in prescription.

⁴⁵ See (Plunkett and Sundell 2014). For similar points in metaethics or more generally, see (Finlay 2008), (Plunkett and Sundell 2013a), (Finlay 2014, 241-4, 256-8), and (Plunkett 2015).

⁴⁶ See also (Leiter 2009).

⁴⁷ See (Enoch 2011a) on different ways legal philosophy uses the word “normative”, and the confusion it causes.

⁴⁸ Our terminology follows (McPherson 2011).

robustly normative if it possesses some kind of *authority* over agents, which in metaethics is often glossed in terms of providing *reasons for action*, or *rational requirements*.

We agree that law must have formal normativity, which positivism easily accommodates. Formal normativity poses no challenge to a rule-relational theory, because rules are paradigmatically things with which one might or might not conform. But like other positivists, we simply deny that law as such necessarily has robust normativity. This is compatible with allowing that law as such necessarily *purports* to have robust normativity—perhaps by claiming moral correctness (as Robert Alexy maintains) or practical authority (as Joseph Raz maintains).⁴⁹ Laying claim to normativity doesn't entail actually having it, but may give law a claim to being “normative” in an attenuated sense that distinguishes it from most things with mere formal normativity, like rules of games.⁵⁰ However, we do not ourselves endorse this idea.

Law may be argued to have more than merely formal normativity on the basis of the practical features of its use in guiding and evaluating behavior, such as its connection to motivation and the categorical nature of legal prescriptions. These practical features are, of course, precisely what we have attempted to explain by appeal to quasi-expressivism, which can be viewed as a rival, positivist-friendly explanation of some of the alleged evidence that law essentially has (or claims) robust normativity. This explanation aligns with the expressivist's in appealing to the motivating role, expression, and conflict of noncognitive attitudes (of acceptance). But because of this, quasi-expressivism may be accused of sharing expressivism's perceived failure to accommodate the *objective* character of the prescriptivity of internal legal statements; i.e. that they purport to communicate authoritative facts rather than mere subjective wishes, and that we accept rules for our behavior *because* we believe them to be the law, not vice versa.

We reply, first, that unlike expressivism proper, quasi-expressivism at least accommodates the appearance that legal statements aim to describe objective, attitude-independent facts about law, which guide our actions and influence our attitudes toward first-order rules. In our treatment,

⁴⁹ See (Alexy 2002), (Raz 1979/2002), (Raz 1994). Having practical authority over an agent in Raz's sense involves an ability to change what it is rational for that agent to do; for discussion see (Hershovitz 2011). Raz famously argues from this to (exclusive) legal positivism, whereas Alexy advances his version in arguing against positivism; see (Gardner 2012a) for a positivist response.

⁵⁰ See (Plunkett and Shapiro Manuscript), (Enoch 2011a).

acceptance of first-order rules is not explanatorily basic, but derivative from the combination of (i) beliefs in rule-relational propositions and (ii) (more fundamental) noncognitive attitudes towards a rule of recognition.

Second, we deny that legal prescriptions have any further, more robust kind of objectivity. In metaethics, many philosophers remain skeptical of quasi-expressivist attempts to explain the intuitive objectivity of moral prescriptions, insisting that a genuinely *moral* end must have “to-be-pursuedness somehow built into it,”⁵¹ or be commanded by the world itself rather than merely by other agents, a metaphysically objective kind of authority.⁵² In the metalegal case, however, parallel claims have nothing like the same plausibility. Legal requirements as such do not seem to entail rational or moral requirements, so there is no pressure to construe legal prescriptions as demands the world itself makes on us.⁵³ There is nothing obviously odd in the idea of a morally bad or heinous law, or entire legal system, which an agent has no genuine, rationally demanding (versus merely “institutional”) reason to obey. We can naturally say that it really was a law of the United States in the early 19th century that fugitive slaves were to be returned to their owners, but that agents in that jurisdiction didn’t have any genuine reason (prudence aside) for obeying that law. Antipositivists may dissent,⁵⁴ but to prosecute this case they must reject ubiquitous intuitions about such cases, and adopt what many will find highly revisionary views about what is and isn’t law.

§1.5 *Quasi-Expressivism versus Expressivism*

Quasi-expressivism is a strategy that enables descriptivists to say many of the same things about internal legal statements as the expressivist. So it may be wondered why we should opt for quasi-expressivism over expressivism, especially since the expressivist’s story is much simpler.⁵⁵ In this section we argue that quasi-expressivism enjoys significant advantages over expressivism proper.

⁵¹ (Mackie 1977, 40).

⁵² See for example (Parfit 2011), (Enoch 2011b), (Scanlon 2014), and the response to Finlay in (Joyce 2011).

⁵³ See (Enoch 2011a) for further argument.

⁵⁴ See for example (Dworkin 2011), (Greenberg 2014), and (Hershovitz 2015), according to whom (roughly) legal requirements are a subset of moral requirements.

⁵⁵ A parallel metaethical challenge is raised in (Thomson 1996, 198).

One advantage concerns legal disagreement. The rule-relational theory has a straightforward explanation of disagreements about law between one speaker making an internal legal statement, and another speaker making an external legal statement concerning the same legal system. Intuitively, outsiders can make claims about the law in some legal system that disagree with the legal claims of a speaker who lives under and accepts that same law as a guide to his conduct (e.g. when we describe laws of first century Rome). According to the rule-relational semantics, these are descriptive claims about the same subject: whether a particular first-order rule satisfies the criteria of a particular rule of recognition. By contrast, since these statements apparently don't express the speaker's pro-attitudes, legal expressivists like Toh seem committed to a separate account of the semantics of external statements of law, and therefore are hard-pressed to explain how such disagreements are possible.

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A second advantage is that quasi-expressivism avoids all expressivism's problems arising from rejecting traditional propositional contents for legal statements. Consider particularly the knot of difficulties known as the *Frege-Geach Problem*. An adequate semantics needs to account for the meaning of a word or expression not only in the assertion of simple, atomic sentences ('S ought to do A' / 'It is the law that L'), but also when those sentences are used in nonassertoric ways, such as embedded in interrogatives ('Ought S to do A?' / 'Is it the law that L?'), in attitude reports ('J believes that S ought to do A' / 'J believes it is the law that L'), and in negations, disjunctions, and conditionals. This is a challenge for expressivism, since a speaker who uses 'ought' or 'law' in these other ways is typically *not* expressing the attitude that expressivist semantics associate with the word.

This problem has drawn enormous attention in metaethics over recent decades, and it remains highly controversial whether it can be solved.⁵⁸ By contrast, our rule-relational metalegal theory, like relational theories in metaethics, faces no such challenge. Because it identifies the

⁵⁶ To avoid *radical* semantic disunity expressivists could offer "inverted commas" analyses (popular in metaethics) of external legal statements as an indirect way of describing others' (internal) legal statements. However, this strategy famously fails to account for internal-external disagreements. They might, perhaps, appeal to pragmatic disagreement, but (i) it is unclear what the mechanisms of this might be, and (ii) this would undermine the simplicity argument for expressivism over quasi-expressivism.

⁵⁷ For a similar objection offered in support of a pragmatic treatment of the speaker-endorsement expressed by internal legal statements, see (Enoch 2011a, 23-24). For related discussion, see (Enoch and Toh 2013).

⁵⁸ For discussion see (Schroeder 2008) and (Woods Forthcoming).

semantic content of a simple declarative sentence about the law as an ordinary descriptive proposition with an ordinary kind of truth value, there are no puzzles about how it can be used nonassertorically. The expressive and prescriptive character of assertoric uses is explained pragmatically, as following partly from the fact that in sincere assertions the speaker *believes* the asserted proposition; an explanation that doesn't extend to nonassertoric uses, which don't indicate such belief.

A quasi-expressivist account of internal statements of law thus has the advantage of explaining the prevalence of both descriptivist and expressivist intuitions among philosophers of law. We conclude that in combination with a rule-relational semantics, it provides an account that compares favorably with rival approaches. While our case on its behalf is far from the final word, we hope to have made its virtues clear, inviting further critical exploration by other philosophers. We hope also to have demonstrated, more generally, that positivists have powerful but underappreciated resources for developing and defending descriptivist accounts of legal statements.

§2. *A Quasi-Expressivist Reading of Hart*

We believe it is no coincidence that our rule-relational and quasi-expressivist account of legal statements is so easily articulated by appeal to Hart's work in *The Concept of Law*. Hart's views on legal statements are the object of considerable controversy in the philosophy of law, and have been interpreted in a wide variety of ways, ranging from a flat-footed descriptivism about the practices of legal officials, to a form of pure expressivism, as well as a semantic hybrid of these. But in our opinion, Hart's overall position in *The Concept of Law* is best reconstructed by attributing him a view of just the kind we have proposed above.⁵⁹ We conclude this paper by advancing a reading of Hart as offering (i) a descriptivist and positivist rule-relational semantics, and (ii) a quasi-expressivist account of internal legal statements. We argue that this reconstruction makes the best sense of core claims Hart makes about legal statements, given the text and the overall jurisprudential views of *The Concept of Law*.

⁵⁹ Note that we don't claim that Hart accepted everything we argued for above (e.g. our account of bedrock legal disputes).

What is uncontroversial is that Hart aimed to give a thoroughly *naturalistic* analysis of law, making no appeal to what he described as the “obscure metaphysics” of nonnatural properties and relations.⁶⁰ In the philosophy of law this impulse has often led toward positivism, as it did for Hart. However, Hart was also concerned to refute certain (unproblematically naturalistic) views that legal statements either *describe* or *predict* the behavior of judges and other legal officials.⁶¹ A central emphasis of *The Concept of Law* was that legal statements (and law itself) function to *guide* behavior, and not simply describe or predict it. Such views are inadequate, Hart claimed, because they leave out the internal point of view, “the view of those who do not merely record and predict behaviour conforming to rules, but use the rules as standards for the appraisal of their own and others’ behavior.”⁶² A primary goal of *The Concept of Law* was therefore to provide a third option, one that neither posited obscure nonnatural properties nor omitted the action-guiding character of law.

Kevin Toh has argued that “an expressivist analysis...is the third alternative Hart has in mind.”⁶³ Toh’s proposal that we give an expressivist reading of Hart’s account of internal legal statements has since been taken up by others, including Scott Shapiro.⁶⁴ A primary reason Toh gives for this reading is that expressivism is tailor-made to accommodate both the action-guiding role of a statement (as expressing motivational attitudes) while remaining consistent with a naturalistic metaphysics. A similar line of reasoning can be used to support reading Hart’s legal semantics as a form of *hybrid* expressivism, according to which the semantics of (internal) legal statements are both expressive of the speaker’s acceptance of a rule (or other motivational attitudes) and descriptive of social (or relational) facts.⁶⁵ A hybrid reading of Hart is suggested by some key passages from Joseph Raz.⁶⁶

⁶⁰ (Hart 2012, 84).

⁶¹ (Hart 2012) treats such views (put forward by Scandinavian and American Realists) as forms of rule-skepticism rather than positivism, but they could be developed in positivist-friendly ways. For criticism of Hart’s treatment, see (Leiter 2013).

⁶² (Hart 2012, 98).

⁶³ (Toh 2005, 85).

⁶⁴ See (Shapiro 2011, Ch. 4). Shapiro and Toh differ on the details of their expressivist readings of Hart.

⁶⁵ For recent discussion of hybrid expressivism in metaethics, see the articles in (Fletcher and Ridge 2014).

⁶⁶ See (Raz 1993), (Raz 1999). Raz’s treatment is schematic, and doesn’t identify the mechanisms by which Hart thinks speaker’s acceptance is expressed. While Raz is often interpreted as offering a hybrid expressivist reading (as in (Toh 2005)), his text doesn’t conclusively rule out a quasi-expressivist reading (which (Toh

However, these same desiderata are also satisfied by a quasi-expressivist account, attributing the attitudinally expressive features of internal legal statements to the pragmatics of legal discourse rather than to its semantics. So it is worth considering whether the alternative Hart had in mind was *quasi-expressivism* rather than expressivism proper (pure or hybrid). We hold that a quasi-expressivist interpretation fits Hart's writings better in multiple ways, and is the more charitable reading. We first argue (§2.1) that Hart embraced a rule-relational, descriptivist semantics. Subsequently (§2.2), we argue that he offered a version of quasi-expressivism rather than hybrid expressivism.

§2.1 Hart as Rule-Relational Theorist

Hart's theory of law uncontroversially posits the existence of a realm of objective relational facts relevant to law. As discussed above, he understands a legal system as a particular kind of union of primary rules (i.e., first-order rules) and secondary rules (i.e., rules about rules). These secondary rules most importantly include the rule of recognition, which provides the criteria for identifying particular rules (both first-order and second-order) as part of a given legal system, or legally valid within the system. (In turn, Hart holds that facts about the existence and content of the rule of recognition are explained by social facts, such as facts about the convergence of behavior among legal officials. This is crucial for the development of his view as explicitly a form of *legal positivism*, and for the defense of his theory as purely naturalistic.⁶⁷) He clearly thinks that it is a matter of objective, naturalistic fact whether or not a particular rule meets the criteria of legal validity laid out by the rule of recognition, or whether this is indeterminate. These are facts about the logical relations in which first-order rules stand to the rule of recognition. Therefore, he would presumably think that we sometimes talk about these facts, and that statements of the form 'It is the law that L' are an integral part of such talk. Passages in *The Concept of Law* strongly suggest such a view of legal semantics. For example, he writes of specifically internal statements of law,

2005) in effect acknowledges.) This would make Raz's interpretation much closer to ours, although differences may remain over semantic content, attitudes expressed, and pragmatic mechanisms involved.

⁶⁷ There is a vast literature on what Hartians should identify as the relevant social practices underwriting the rule of recognition, and whether they are conventions (see e.g. (Postema 1982) and (Marmor 2009)). As our focus is on the language and not the metaphysics of law, we will not wade into these issues here.

To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition... We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition.⁶⁸

Here the text clearly supports a descriptivist, rule-relational reading, and is an uncomfortable fit with an expressivist interpretation.

Further evidence is provided by the pains Hart takes to insist it is a mistake to talk about the “validity” of the rule of recognition. He writes,

We only need the word ‘validity’, and commonly only use it, to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.⁶⁹

This is in tension with Toh’s interpretation that claims of legal validity are mere expressions of acceptance, because Hart is clear (as in this passage) that rules of recognition are indeed objects of acceptance. If Toh’s reading is correct, this is the wrong thing for Hart to say. By contrast, a rule-relational interpretation vindicates Hart’s insistence as appropriate. If to be “valid” is to meet the criteria of a rule of recognition for being a first-order rule of the system, then rules of recognition are not themselves legally valid.⁷⁰

One potential obstacle to reading Hart as a descriptivist, cited by Toh, is his claim—in work published eight years before *The Concept of Law*—that “the primary function of these [legal] words is not to stand for or describe but a distinct function,”—roughly, the function of guiding behavior.⁷¹ However, the evidential weight of this passage in favor of an expressivist reconstruction of Hart’s

⁶⁸ (Hart 2012, 103).

⁶⁹ (Hart 2012, 109).

⁷⁰ For further discussion see (Green 1996).

⁷¹ (Hart 1953, 31). Technically this claim is compatible both with Hart’s accepting that legal statements have a (non-primary) descriptive function, and with his not assuming that this distinction between primary/secondary function aligns with the distinction between semantics/ pragmatics. However, Hart’s retraction (discussed below) indicates he wasn’t hedging in either way.

views in *The Concept of Law* is seriously undercut by the fact that Hart later disowned it. We quote at length:

Had I commanded ... in 1953 the seminal distinction between the ‘meaning’ and the ‘force’ of utterances, and the theory of ‘speech acts’...I should not have claimed that statements of legal rights and duties were not ‘descriptive’...⁷²

...in [1953] I fail to allow for the important distinction between the relatively constant meaning or sense of a sentence fixed by the conventions of language and the varying ‘force’ or way in which it is put forward by the writer or speaker on different occasions... Neglect of this distinction...vitiates parts of my account in [1953] of the meaning of statements of legal rights... It was just wrong to say that such statements *are* the conclusions of inferences from legal rules, for such sentences have the same meaning on different occasions of use whether or not the speaker or writer puts them forward as inferences which he has drawn. If he does put such a statement forward as an inference, that is the force of the utterance on that occasion, not part of the meaning of the sentence. What compounds my error is that though I speak of such sentences as capable of being true or false I deny that they are ‘descriptive’ as if this were excluded by the status which I wrongly assign to them as conclusions of law, and my denial that such sentences are ‘descriptive’ obscured the truth that for a full understanding of them we must understand what it is for a rule of conduct to require, prohibit, or permit an act.⁷³

As Toh holds that Hart remained committed to expressivism about legal statements throughout his career, he confesses that he finds these disavowals “particularly baffling”.⁷⁴ A virtue of our proposed reconstruction is that what Hart says here is exactly what it predicts he should. Granting that Hart’s metalegal views in 1953 may well have been expressivist, this evidence suggests that at least by 1967 he had come to accept descriptivism about legal language.⁷⁵ This leaves open whether a descriptivist semantics should be assigned also to *The Concept of Law*, published in 1961; we’ll return to this issue below.

⁷² (Hart 1983, 2).

⁷³ (Hart 1983, 5).

⁷⁴ (Toh 2005, 99n).

⁷⁵ In (Hart 1983), Hart references his (Hart 1967/1983) as correcting the earlier error of rejecting descriptivism. Although Hart is here explicitly addressing statements about *legal duties*, rather than statements of *law* (as we define them), he can reasonably be expected to hold parallel views of the latter.

Further evidence for a descriptivist reconstruction of Hart’s mature views is his treatment (or lack thereof) of the Frege-Geach Problem, sketched above in §1.4, concerning the meaning of sentences in embedded or nonassertoric uses. This is arguably the central problem facing expressivism—whether about moral, legal, or any other kind of apparently descriptive discourse—and despite decades of sustained attention in metaethics the jury is still out on whether it can be solved. Toh thus rightly presents this as a serious issue for the metalegal expressivist theory he attributes to Hart. One would therefore expect that *if* Hart were indeed advancing a nondescriptivist legal semantics, then he would have been highly motivated to address how this problem might be solved, at least in broad outline. Yet Hart is silent on the topic, even in his later writings discussing and defending his views on legal discourse.⁷⁶ By contrast, this silence presents no problems for our proposed reconstruction. For if the practical features of legal statements are accommodated within the framework of a *descriptivist* semantics, the Frege-Geach problem doesn’t arise.⁷⁷

For all we’ve said, it might still be thought that Hart’s views specifically in *The Concept of Law* are best reconstructed as expressivist, or perhaps indeterminate between expressivism and descriptivism. For example, it may seem plausible that when *The Concept of Law* was published Hart was simply not aware of the Frege-Geach Problem—which was first raised in P.T. Geach’s paper “Ascriptivism”, published in 1960, just a year prior. However, on closer examination this conjecture seems exceedingly unlikely. Not only was Geach a colleague of Hart’s at Oxford, but Hart’s own earlier expressivist views (in the philosophy of action rather than jurisprudence) provided one of the principal and explicit targets of Geach’s seminal paper.⁷⁸ Indeed, ‘ascriptivism’ has, following Geach, become the standard label for Hart’s own expressivist theory of action-statements. So we can rather

⁷⁶ Toh points to some potentially relevant passages (e.g. on a logic of imperatives) in (Hart 2011); see section X of (Toh 2005). However, Hart could have perceived a need for such a logic even if he were (as on our interpretation) merely a *quasi*-expressivist about the imperatival force of internal legal statements.

⁷⁷ For problems facing *hybrid* expressivist attempts to avoid the Frege-Geach Problem, see (Schroeder 2008).

⁷⁸ See (Geach 1960), in relation to (Hart 1951). While Geach does not mention Hart by name, it is uncontroversial in the literature that Hart is his target (see, for example the entry on ascriptivism in *The Blackwell Dictionary of Western Philosophy* (Bunnin and Yu 2009)). Hart’s 1983 disavowals of legal nondescriptivism, quoted above, are in effect an acknowledgment of Geach’s basic point. In the Preface to (Hart 1968), he cites Geach’s 1960 objections in explaining why he chose not to reprint (Hart 1951) in that collection. Toh acknowledges that Hart’s remarks in the Preface to (Hart 1968) are a problem for his expressivist reading; see (Toh 2005, 102). (Thanks to Luis Duarte d’Almeida for helpful discussion of the relationship between Hart and Geach.)

presume that Geach's point would have been particularly salient to Hart at the time that he published *The Concept of Law*.

One final consideration in favor of a descriptivist over an expressivist reconstruction of Hart is the status of Hart's legal positivism as a *metalegal* theory (explaining how the law, and our thought and talk about it, fits into reality). Consider first the metaethical case. Metaethical expressivists rightly emphasize their neutrality with respect to questions about what explains why certain moral "truths" obtain, or what grounds moral "facts" (on appropriately minimalist readings of "truth" and "fact"). They don't take a stand, for example, on whether what we morally ought to do is ultimately explained by our contingent attitudes, any more than on whether consequentialism is true. This is because expressivism is a theory about what we are doing when engaged in moral thought and talk that doesn't itself require taking any stand on object-level moral issues. For expressivists, these are substantive or first-order moral questions and therefore not the province of metaethical theory.

Correspondingly, metalegal expressivism implies that claims about what grounds facts of law are substantive, first-order legal claims, and therefore express the speaker's attitudes of acceptance rather than describe objective facts about the nature of law. So metalegal expressivism is hard to square with the idea that legal positivism is a descriptive claim about the nature of law, to be proven or refuted through metalegal theorizing.⁷⁹ The issue is that many of Hart's methodological remarks strongly suggest that he accepted that the truth of legal positivism is established as *part of* what we

⁷⁹ See (Plunkett and Shapiro Manuscript). Toh apparently agrees, arguing in (Toh 2008) that his preferred form of legal positivism (as a thesis one can advance by making an internal legal statement, not just external ones) is *compatible* with but not established by expressivism about internal legal statements, as the correct metalegal theory. See also (Toh 2013).

are here calling his “metalegal” theory.⁸⁰ The same is true of the views put forward by many contemporary positivists.⁸¹

By contrast, descriptivist analyses are perfectly compatible with taking on substantial commitments about the nature and grounds of law as part of one’s metalegal theory. Such commitments can be both a part and a consequence of developing a descriptive semantic theory, and may easily include a form of legal positivism. A commitment to positivism follows, for example, from the Austinian view that legal statements refer to facts grounded in the commands of a sovereign. It also follows from the rule-relational view that legal statements describe relations to a rule of recognition whose existence and content is fully grounded in social facts. So on our rule-relational reading of Hart’s views, his legal positivism can clearly be an element of his metalegal theory rather than a first-order legal commitment about the content of law. For this and the other reasons we’ve observed, we think Hart is best interpreted as a descriptivist about legal statements.

§2.2 Hart as *Quasi-Expressivist*

Hart is perfectly clear that he thinks that (internal) legal statements express the speaker’s attitude of acceptance. But is he best interpreted as attributing this expressive function to their semantics (as on a hybrid expressivism, or a subjectivism on which legal statements are descriptions of such attitudes) or to their pragmatics (quasi-expressivism)?

The language of his 1983 disavowal of nondescriptivism points strongly in the direction of pragmatics. He contrasts the “meaning... of a sentence fixed by the conventions of language” with the “‘force’ or way in which it is put forward by the writer or speaker on different occasions”. A pragmatic reading is also supported by his failure to observe a contrast between “expressing” and

⁸⁰ See for example the methodological remarks in the postscript to *The Concept of Law*. Hart writes that his account, which we take to *include* a commitment to legal positivism, “is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.” (Hart 2012, 240). It should be noted, however, that Hart’s varied methodological remarks in *The Concept of Law* point in different directions on this point. In particular, see his remarks in chapter 9, which support a reading on which his commitment to legal positivism flows partly from substantive moral and political commitments. This arguably suggests a different reading of the status of his legal positivism. See also his earlier (Hart 1958), in exchange with (Fuller 1958).

⁸¹ For example (Leiter 2007), (Marmor 2006), (Gardner 2012b), (Shapiro 2011).

“implying” in a passage in his *Essays on Bentham*. Hart first observes, against subjectivism, that it is vital to distinguish between reporting and expressing a noncognitive attitude, because many statements need to be understood as expressing the speaker’s attitude without reporting that she has it.⁸² While this contrast between “expressing” and “reporting” an attitude is traditionally emphasized by expressivists, Hart also makes clear that the expression of the attitude needn’t be a part of the literal meaning of a statement. He writes:

Bentham was not alone in failing to grasp the distinction between what is said or meant by the use of a sentence, whether imperative or indicative, and the state or attitude of mind or will which the utterance of a sentence may express and which accordingly may be implied though not stated by the use of the sentence. When I say ‘Shut the door’ I imply though I do not state that I wish it to be shut, just as when I say ‘The cat is on the mat’ I imply though I do not state that I believe this to be the case.⁸³

Here Hart appears to suggest that the attitudes are expressed via *implication*, which is a pragmatic mechanism. If he rather intended an expressivist (i.e. semantic) claim, then he would be running together ‘express’ and ‘imply’ in a way that is at worst confused, and at best idiosyncratic. Since the context is a discussion of (Bentham’s view of) internal legal statements, this passage also fits best with a quasi-expressivist account of those kind of statements in particular.⁸⁴

Even so, this leaves open the questions of whether these passages represent Hart’s view in *The Concept of Law*, and whether his view of the pragmatic mechanisms involved resembles our quasi-expressivist account. We think there is compelling evidence for positive answers in each case. Consider Hart’s remarks on the relationship between internal and external statements of law. He identifies as a distinguishing characteristic of internal statements that they are standardly expressed by sentences of the form ‘The law is that...,’ contrasting with the typical expression of external statements by sentences like ‘In the U.K. they accept as law that...’⁸⁵ This is to highlight a key

⁸² (Hart 2011, 249-250).

⁸³ (Hart 2011, 248-249).

⁸⁴ Thanks to Kevin Toh for bringing these passages from (Hart 2011) to our attention, and for helpful discussion.

⁸⁵ A puzzle for our reconstruction is that Hart at one point characterizes external legal statements as describing what people accept as law, rather than relations of legal validity (Hart 2012, 103). We speculate he

element of our quasi-expressivist story: that internal statements standardly do not specify which legal system or rule of recognition they are made relative to. He writes,

The use of unstated rules of recognition...in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them...⁸⁶

Observe that Hart says it is by the “use” of “unstated” rules of recognition that we “thereby manifest” our acceptance. In other words, we express our attitudes by using a rule to which we omit reference. It does not seem a leap to interpret Hart as here articulating the quasi-expressivist claim that it is often through presupposition of a rule of recognition (speaking *as if* exactly one such rule were salient) that a speaker expresses her acceptance of it.⁸⁷

In our opinion, all this evidence adds up to a strong circumstantial case for reconstructing Hart’s view as combining a rule-relational theory of the semantics of legal statements with a quasi-expressivist view of the special subset of those statements that are internal. However, while we believe our reconstruction offers the best and most charitable way of reading Hart, we hesitate to claim this is the precise view animating every line of *The Concept of Law* and subsequent texts. Hart’s relevant texts are often ambiguous, and different passages lend credence to rival readings.⁸⁸ Given that Hart was not primarily concerned about issues in the philosophy of language, and that the distinctions we now possess are more nuanced than those at Hart’s disposal when he produced his core work in legal philosophy, it wouldn’t be surprising to find indeterminacy between a range of

may be thinking that speakers taking an external point of view with regard to a legal system typically aren’t interested in judging validity-within-the-system. In any case, he proceeds to qualify this as merely “normal”, acknowledging external statements of legal validity.

⁸⁶ (Hart 2012, 102).

⁸⁷ A further alignment between Hart’s text and our view is his (sometimes faulted) vagueness about whether the object of expressed acceptance (in internal legal statements) is the rule of recognition, the first-order rule, or the behavior it describes. Recall that our quasi-expressivist story predicts expression of acceptance toward multiple objects.

⁸⁸ In his *Essays on Bentham*, for example, Hart writes (criticizing Raz’s alternative approach): “I find little reason to accept such a cognitive interpretation of legal duty in terms of objective reasons or in the meaning of ‘obligation’ in legal and moral contexts which this would secure. Far better adapted to the legal case is a different, non-cognitive theory of duty.” (Hart 2011, 159-160). See also (Hart 2011, 144-145). As Toh observes, this provides support for a pure expressivist reading, though we think it also can be reconciled with quasi-expressivism.

different but closely related theories, such as pure, hybrid, and quasi- expressivism. However, without having the quasi-expressivist option squarely in view, it is also easy to mistake a text advancing such a view as vacillating inconsistently between descriptivism and expressivism. Hart's views about legal statements may therefore turn out to be more determinate (also: consistent and defensible) than interpreters have often assumed. These exegetical questions are ripe for further investigation.

Conclusion

This paper has advanced a rule-relational, descriptivist view of legal statements of a kind compatible with positivism. Views of this kind face a variety of challenges, concerning (inter alia) motivational and practical elements of internal legal statements, and the possibility and extent of legal disagreement. We demonstrated how some of these challenges can be met by appeal to a form of quasi-expressivism, and more generally, the rich pragmatics of legal statements. We formulated our proposal in an explicitly Hartian framework, and went on to argue that the best critical reconstruction of Hart's own position in *The Concept of Law* is a similarly rule-relational and quasi-expressivist theory. Since the philosophical promise and explanatory power of much of this package of relational semantics and quasi-expressivist pragmatics is independent of this particular Hartian articulation, however, we believe these linguistic resources can be put to gainful employment by Hartians and non-Hartians alike.

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