

“Regulative Rules: A Distinctive Normative Kind”

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Introduction

What are rules? In philosophy, we use words like ‘convention’, ‘norm’, and ‘rule’ in a variety of ways (e. g. on ‘rule’ see Black 1962). Some senses of these words have been precisified to pick out distinctive, theoretically interesting explanatory kinds. For example, Lewis famously developed a view of *conventions* on which they’re those regularities in behavior backed by pro-attitudes that are furthermore solutions to coordination problems (Lewis 1969). Similarly, Brennan, Eriksson, Goodin, and Southwood (hereafter BEGS) have developed a view of *norms* on which they’re general normative contents to the effect that some action-type has some deontic status like being required, prohibited, or permissible that are *accepted* in a community as standards of conduct, irrespective of the reasons for acceptance (BEGS 2013).

My main aim in this paper is to do same for *regulative rules* by developing a view which shows them to be a distinctive normative kind. The main reason for doing this is that rules are too frequently run together with orders on the one hand and normative facts or truths like moral, epistemic, or strategic ones on the other which leads to a host of bad arguments. The paradigmatic cases of regulative rules (hereafter, rules) that I’m interested in are social rules like rules of etiquette and legal rules like traffic rules.¹ Some philosophers also think that constitutive rules like rules of games, and, if there are any, of language and assertion, are a subset of regulative rules, and on this assumption the

¹ Black distinguishes between the regulation-, instruction-, precept- and principle-senses of ‘rule’ of which he takes the first to be central (Black 1962: 109-115). What we’re interested here are exactly his regulations. His instructions are hypothetical normative truths, and his precepts are what I take to be normative truths like moral or strategic truths. His principles are mere descriptive generalizations, and he considers them to be degenerate cases. It might also be good to note that I avoid the word ‘norm’ because there are several different uses that are widespread. First, many philosophers use ‘norm’ to also talk about things with particular normative content like one-time requirements, prohibitions or permissions whereas they reserve ‘rules’ for things with *general* normative content (Raz 1975/1999: 49-50, Shapiro 2011: 40-41). Second, there’s BEGS’s precisification of ‘norm’ mentioned above.

analysis covers them as well (Alston 2000, Reiland 2020, Williamson 1996). On the view I'll propose, a rule is a general normative content that is *in force* due to human activity: enactment by an authority or acceptance by a community, or, in the case of constitutive rules, usually by those engaged in the constituted activity. Rules are unlike orders in being not necessarily communicative, not an expression of the giver's will, not evaluable for sincerity, and in that they have propositional content. And they're unlike normative truths in that they're themselves not even truth-evaluable (though their contents are). This is because rules qua things that are in force are not like constatives which have a mind to world direction of fit, but more like performatives. Furthermore, they differ from normative truths in that their normativity is isolated from their background justification and is therefore not dependent on contributory notions like reasons coming together in a weighing explanation. As such, they occupy a middle ground between orders and normative truths, much like in H. L. A. Hart's opinion law occupies a middle ground between "coercion" and "morality" (Hart 1961/1994). My second aim is to provide an illustration of the virtues of this understanding of rules by showing how proper appreciation of how they differ from normative truths helps us defuse a common objection to Hart's practice theory of rules.

I will proceed as follows. I will first argue that the class of rules we're interested in can't be analyzed as orders but should be thought to have propositional content involving the attribution of deontic statuses. In this respect rules are like normative truths (Section 1). However, I will argue next, rules differ from normative truths in that while the latter are true or false, the former are in force or not, and are not themselves truth-evaluable. In this respect rules are like orders. Furthermore, I'll argue, the normativity of rules is quite different from the normativity of normative truths. (Sections 2-3). Finally, I will provide an illustration of the fruits of the analysis by showing how distinguishing rules from normative truths helps us defuse a common objection to Hart's practice theory of rules. (Section 4).

1. Rules not Orders

On a common view, rules are something like general, standing orders, something with imperatival content. Commonplace orders are *particular* in being addressed to a specific

person, and *one-off*, in being made at a particular time and targeted at a specific, datable, and locatable, future action. For example, you could order your child to do the dishes after today's dinner. But if there's anything accepted by most philosophers writing about rules it is that rules are by their nature *general* in either applying to more than one person or in recurrent situations, or, usually, both (BEGS 2013: 3, Schauer 1991: Ch. 2, Shapiro 2011: 41).² The idea behind the *Imperative* view of rules is that they're orders that are *general* in being addressed to more than one person, and *standing*, in being not targeted at a specific datable and locatable situation. For example, it is thought, you could give a general standing order to your students to always lift their chairs on the desk after class. On this view, the traffic rule requiring to drive you on the right side of the road can be thought of as the general standing order which can be conveyed with: 'Drive on the right!'

Famously, the 19th-century English legal theorist John Austin took laws to be such general standing orders backed by threats of sanction issued by a sovereign, someone who is habitually obeyed and doesn't obey anyone else (Austin 1832, for discussion see Hart 1961/1994: Ch. 2-4, Shapiro 2011: Ch. 3). Imperative views of law were also very popular in the early 20th century, especially among Scandinavian legal theorists like Olivecrona and Ross (Olivecrona 1939, Ross 1961). However, they were already criticized by the Austro-German phenomenologist and philosopher of law Reinach (Reinach 1913/1983: Ch. 5). And in the realm of Anglo-American philosophy of law they were most influentially criticized by Hart who supported a propositional construal (Hart 1961/1994). As a result, they're generally in disfavor in philosophy of law. MacCormick has even suggested that

² There's a very broad sense of 'rule' used by Wittgenstein in his discussion of rule-following on which a rule is anything that can be followed such that:

- i) our having, grasp, or use of it can play a role in generating and explaining our action.
- ii) our actions can accord or discord with it, in some sense.

Wittgenstein's examples of such rules are both particular and general: intentions, requests, and orders, and functions and properties used as principles for doing things (e. g. continuing a series, sorting). All of these can be followed in the relevant sense and it is the nature of *following* that primarily interests Wittgenstein (Wittgenstein 1953).

The above sorts of rules in a broad sense differ from the sorts of rules we're interested here in both in that they can be particular, and, second, that the accord/discord they feature doesn't have to be normative in the sense of *deontic*. When you're sorting marbles into two piles by using the property of being green as your rule and put the tenth marble, a red one, into the green pile then your action discords with the rule, it is incorrect and you've made a mistake. But it's at least not obvious that what you did was, in any sense, forbidden. In contrast, rules of etiquette and traffic rules are both general and deontic.

the “confusion between the imperative and the normative is one of the perennial and persistent fallacies in legal philosophy” and deserves to be called the *Imperative Fallacy* (MacCormick 1973: 100-101).

Still, taking rules to be like orders persists in philosophy of language and games. According to Searle:

Regulative rules characteristically have the form or can be comfortably paraphrased in the form “Do X” or “If Y do X”. (Searle 1969: 34)

Pollock, in one of the most insightful discussions of constitutive rules defining institutions, puts both regulative and constitutive rules in imperatival form:

The constitutive rules of an institution typically include more than just definitive rules. There are also rules telling the participants what they are *supposed to do* under various circumstances, eg, ‘Do not jostle the opposing player when he is shooting a basket’, ‘Do not peek at your opponents’ hands’, ‘Do not touch a chess piece unless you are going to move it’, etc. Let us call these the *prescriptive rules* of the institution. (Pollock 1982: 213)

Again, according to Boghossian commenting on Kripke’s discussion of rule-following:

...when Kripke talks about “rules” he is talking about general imperatival contents of the form:

If C, do A!

where ‘C’ names a type of situation and ‘A’ a type of action. (Boghossian 2008: 274)

Finally, in the canonical text of philosophy of games Suits frequently states rules in an imperatival form (Suits 1978: Ch. 3).

On the contrasting, *Propositional* view favored by Reinach, Hart, and Black, social and legal rules are distinct from orders in being things that have a propositional content which attributes some action-type *A* (e. g. driving on the right side, turning right) some *deontic* status *D* (required, prohibited, permissible) perhaps on certain general conditions *C*

(if there's a red light) (Alston 2000: 251, Black 1962: 108, Hart 1961, Reinach 1913/1983: Ch. 5, Schauer 1991: Ch. 1). Such rules can be written down in the following ways which we can think of normal forms for rules:

- (N1) (If/only if/iff C), doing \mathcal{A} is required/prohibited/permissible
- (N2) (If/only if/iff C), one must/can't/may do \mathcal{A}
- (N3) $\forall a$ (a must/can't/may do \mathcal{A} (if/only if/iff C))

The first and second forms differ in the use of a name of a deontic status ('required') versus a deontic modal ('must'), whereas the last one replaces the generic 'one' with an explicit quantification over agents. On this view, the above traffic rule can be conveyed with 'Driving on the right is required' or 'One must drive on the right'.

There are at least three different types of reasons why the sorts of rules we're interested in are unlike orders. Although some of these points will be familiar to those cognizant of philosophy of law, it is worth rehashing them since they are frequently overlooked in philosophy of language and games and wider metanormative theory.

Let's start with differences between commonplace orders and rules. Orders are illocutionary acts that are communicative and second-personal in being directed at, *addressed* to a particular person or persons. But the relationship of rules to whom they apply is quite different. Here's Reinach on the contrast between orders and enactments of rules:

To begin with, both (commands and enactments of law) are to be understood as *social acts*. There are neither commands nor enactments which unfold purely within the person; they always address themselves to others, and the need of being heard is intrinsic to them. But whereas commanding is at the same time necessarily an other-directed act, the act of enacting is not. By its very nature every command presupposes a person or group of persons who are commanded, just as with the act of promising or of granting. But enacting does not have this necessary relation to other person, just as little as do acts like waiving or revoking. Although these acts are addressed to other persons in being performed, their substance (*Gehalt*) lacks any personal moment (*personales Moment*). Whereas I *always* promise to or command *a person*, I

simply waive a claim or simply enact that something should be in a certain way. (Reinach 1913/1983: 105-6).

Reinach thinks that orders and enactments of law are both social acts in the sense that they are, what he calls, in need of being heard (*vernehmungsbefähigt*). In J. L. Austin's terms, they require uptake in order to be fully successful (Austin 1962: 116). For example, for an order to be successfully performed, the addressee needs to grasp both its content, what they're told to do, and the fact that it is an order versus, say, a request. However, Reinach emphasizes, only orders are addressed at a particular person(s). This is reflected in both in that they're communicated to a specific person and in that the action to be performed is indexed to them. In contrast, enactments of law are not communicated to someone in particular but are in need of being heard only in the sense that to be successful they need to be made public to their subjects (compare Olivecrona 1939/1971: 44). Relatedly, their content is just to the effect that some action has some deontic status.

Of course, the supporter of the *Imperatival* view can say that they never took rules to be just commonplace orders, but special sorts of general standing orders, and insist that these don't need to be thought of as communicative or second-personal. Hart grants these points, but still criticizes their view along the same lines in misconstruing the relationship of rules to whom they apply:

Ordering people to do things is a form of communication and does entail actually 'addressing' them, i.e. attracting their attention or taking steps to attract it, but making laws for people does not. ... In this respect making laws differs from ordering people to do things, and we must allow for this difference in using this simple idea as a model for law. It may indeed be desirable that laws should as soon as may be after they are made, be brought to the attention of those to whom they apply. The legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules concerning promulgation, that this shall be done. But laws may be complete as laws before this is done, and even if it is not done at all. ... What is usually intended by those who speak of laws being 'addressed' to certain persons, is that these are the persons to whom the particular law applies, i.e. whom it requires to behave in certain ways. If we use the word 'addressed' here we may both fail to notice an important difference between the making of a law and giving a

face-to-face order, and we may confuse the two distinct questions: ‘To whom does the law apply?’ and ‘To whom has it been published?’ (Hart 1961: 22)³

Even if the supporter of the *Imperatival* view doesn’t take rules to be exactly like commonplace orders they still have a problem distinguishing between enactment by which they come to apply, and their promulgation. Laws, and rules in general come with conditions of application. The rules apply to and are in this sense addressed to whomever satisfies the conditions, whether they are aware of this or not. Thus, even if they need to be made public to apply at all, unlike actual orders they don’t need to be communicated to a particular subject to apply to them. If you go to New York its traffic rules apply to you whether you’re told about them or not.

There are two further, related points to be made. First, Reinach continues:

This difference [between ordering and enacting] is of course also reflected in the internal experiences which underlie the two social acts. Authentic commanding presupposes the intention that some action be realized by the other person. But the intention which underlies enacting refers quite generally to the fact that something ought to be. (Reinach 1913/1983: 106)

Orders are an expression of their giver’s will and insincere if the giver doesn’t really want the addressee to do it. In contrast, enactments of rules don’t have anything to do with the enacter’s personal will and can’t be sincere or insincere (compare MacCormick 1973: 114-116). Second, construing of rules as orders can’t make sense of the fact that rules often apply also to those who make them (Shapiro 2011: 88).

To sum up the discussion so far, the supporter of the *Imperatival* view can’t take rules qua general standing orders to be like ordinary orders in being communicative but must claim that they can be enacted without being communicated. Furthermore, they must claim that general standing orders are not the expression of the giver’s personal will and can’t be sincere or insincere. Finally, they must make sense of the idea that rules qua orders apply also to the giver themselves.

³ Reinach and Hart seem to disagree on whether enactments can be fully successful even before they’re made public. This difference needn’t concern us here.

The above points already show that the supposed analogy between orders and rules is strained close to a point of breaking. The most that is left is that rules are somehow especially closely tied to imperatives. But here we hit upon the question how to think of the meanings of imperatives. One view in contemporary linguistic semantics is that imperatives have propositional contents containing deontic modals. More precisely, on Kaufmann's view the meaning of 'Drive on the right!' is the same as the meaning of 'You must drive on the right' on its *performative* use, not to report a fact, but to set a requirement (Kaufmann 2012: 59-60, for discussion see Charlow 2015: 542-545, Jary & Kissine 2014: 225-247, Portner 2018: 169-174). If you accept the *Imperatival* view together with this view of imperatives then your view is identical to the view of rules I defend in the next section and we're home free.⁴

Suppose we bracket such views of the meanings of imperatives and consider views on which they don't have propositional contents. For example, it's common to take imperatival contents to be properties or actions (Barker 2012, Portner 2004, for discussion see Charlow 2015: 545-548, Jary & Kissine 2014: 268-277, Portner 2018: 213-217). On this view, 'Drive on the right!' is, roughly, semantically for *telling* someone to perform the action of driving only while being on the right side of the road. Assuming such views, there are several well-known problems with taking rules to be closely tied to imperatives. First, and fundamentally, imperatives so construed do not seem, in *any sense*, normative (Boghossian 2008: 475, Hart 1961: Ch. 5). Their effect is to tell someone to do something, they're expressions of a person's desires. In contrast, rules like traffic rules at least seem normative, involving deontic statuses like required or forbidden, even if their ('formal') normativity is quite different from the ('authoritative') normativity of ethics and practical reason.⁵ Thus, many suspect that imperatives don't really allow us to derive the statuses of being required or forbidden. As MacCormick puts it: " 'Ought' is no more derivable from 'shall' than from 'is'" (MacCormick 1973: 112).

⁴ Olivecrona who thought that legal rules are not orders, but what he called *independent imperatives* might've had something like this in mind (Olivecrona 1939: 42-49; for discussion and criticism see Spaak 2014: Ch. 8).

⁵ In Parfit's terms, the notion of normativity in play here is that of rules and not of (authoritative, genuine) reasons, or what more recently has come to be called *formal* versus *authoritative* or *robust* normativity (Baker 2017: 568, Berman 2019: 143, Finlay 2019: 204-208, Parfit 2011: 144-146). I'll say more about the difference in section 3 below.

Of course, the claim that the *Imperative* view can't make sense of the fact that orders are normative is somewhat unlikely to sway its die-hard supporters who could insist that the seeming normativity of rules is sham and quite different from that of normative truths. I grant that there is something behind the intuition of difference but deny that this supports the *Imperative* view. I will return to this in the next two sections.

On the assumption that imperatives are for telling people to do things, the second well-known problem with taking rules to be closely tied to imperatives is that rules come in different deontic flavors and it's hard to see how imperatives can mimic one of them. Some rules tell us what we must or can't do, but others tell us merely what we *may* do. For example, in most states of the USA there's a traffic rule that *permits* turning right on red (the opposite rule is in force in New York and many European countries). Furthermore, most constitutive rules like rules of games and language governing actions or uses take a permissive form (Alston 2000, Reiland 2020). The problem is that it's at least unclear how to express such permissive rules with imperatives (Boghossian 2008: 477-478, Thomasson 2020: 61-62, von Wright 1963: Ch. 5, for an attempt to make sense of this see Portner 2012). In contrast, as can be seen from the above formulations, the *Propositional* view can easily capture permissive rules since rules qua things with propositional content can attribute the status of being permitted.⁶

All the above considerations taken together show that construing rules on the model of general standing orders is problematic, unless you think that imperatives are synonymous with deontic modal sentences on their performative use. Instead, as far as their content, rules are more like normative truths in having a propositional content that

⁶ Boghossian provides another reason in favor of the propositional view. Namely, that the propositional view can easily distinguish between different types of rules or normative truths (legal vs. moral) by sticking a relevant modifier in front of the deontic modal:

Legal:	If C, you legally must/can't do A.
Moral:	If C, you morally must/can't do A.

In contrast, the imperative view can't do this because there's nowhere to put the modifier. As he puts it: "all imperatives are alike – they all assume the form 'If C, do A!'" (Boghossian 2008: 475).

But this line of thought is problematic in the case of rules. The propositional view can't distinguish between different kinds of rules by putting the modifier in the content because this leads to circularity. Why is stopping at stop signs legally required? Because there's a legal rule that requires stopping at stop signs. In other words, it is the existence of the legal rule that explains the legal requirement. But then the legal rule itself can't be stated in terms of a legal sense of requirement since that notion doesn't make sense antecedently to there being the legal rule. The right way to distinguish between different types of rules is instead by their ground or source: why they are in force.

involves the attribution of deontic statuses. However, this is not to say that rules aren't, in different way, quite unlike normative truths and more like orders. It is this dimension of them that we'll now turn.

2. Rules in Force, not True

Boghossian has suggested that rules are simply bare contents of the right sort (Boghossian 2015: 4-5). Even though we do sometimes use the word 'rule' like this, just to talk about bare contents, and for some purposes it is fine to do so, this doesn't work as an analysis of the nature of the sorts of rules we're interested in. Our paradigmatic rules like rules of etiquette or social rules are contents that are *in force*, contingently, and due to human activity: because they've been enacted or accepted. For example, legal rules are contents that are in force because they've been enacted by the relevant authority.⁷ Social rules like rules of etiquette are in force in a community because they're generally accepted (BEGS 2013, Hart 1961/1994). Rules of games are in force for the players at the time of playing usually, though not always, because they accept them as binding (Reiland 2020, 2022). Similarly, normative truths are not just bare contents, but true for one reason or another. If some content of the right sort isn't true or in force, then it is just a normative content, a possible or potential normative truth or rule, but not yet an actual one.

Rules are in force while normative truths are true. This is a crucial difference that is frequently not sufficiently appreciated. Suppose one thought that rules must be true to be in force, even if something further is needed. This would immediately lead to several puzzles.

First, consider *No Right*:

(*No Right*) Turning right on red is forbidden.

This can be used to capture the traffic rule that is in force in New York, but not in most places in Europe, but also a legal fact or truth that in New York turning right on red

⁷ It is of course plausible that enactment by an authority, for example, legal authority or the authority of a club, depends ultimately on acceptance that grants this authority.

is prohibited. On the supposition that rules must be true to be in force what *No Right* says must be true. But what makes it the case that it's true in New York? The obvious explanation is that it is true because there's a rule to this effect in force in New York (von Wright 1963: 106). But then the rule's being in force can't involve its being true. Thus, the supposition that the rule itself is true is incompatible with the most natural explanation of legal truths.

Second, consider *Self-Defense*:

(*Self-Defense*) Killing in self-defense is permitted.

This can be used to capture a legal rule that is in force in some place or another. It can be also used to state a moral truth which, if true, is necessarily true. But what happens when a legal rule conflicts with a moral truth? On the common assumption that morality takes precedence or is overriding, what the legal rule says must be false (Parfit 2011: 146). But on the assumption that rules have to be true to be in force it looks like then it couldn't be a legal rule. It would follow that there can be no unjust laws, immoral rules of games etc.⁸

These apparent puzzles point to the fact that for rules to be in force they don't have to be true. But we can say something stronger. Rules are unlike normative truths, including legal truths, and more like orders in not being themselves truth-evaluable (though their contents are) (compare Black 1962: 113, 120, Reinach 1913/1983: 103-104).

Here's how to think of this. Start with judgments and assertions. Distinguish between particular datable and locatable acts of judging and asserting from judgments and assertions in the sense of propositions as judged or asserted. We can model the latter by using Frege's use of the assertion-sign '⊢' together with 'p', a variable over propositions.

⁸ Something like the above assumption is obviously related to what Hart saw as the basic error of those who ran law together with morality. Even though this assumption might seem feeble in the context of contemporary philosophy of law, I've frequently heard a structurally analogous objection in the context of discussing rules of language. Take a putative rule of English:

(*Ouch!*) $\forall a$ (a may use 'Ouch!' iff a is experiencing a sudden sharp pain) (Kaplan MS)

The objection is that this can't be the rule since what it says is false because there are situations where you're not permitted to say 'Ouch!' even if you're in pain (e. g. etiquette demands that you should be silent) and situations where you're permitted to say 'Ouch!' even if you're not in pain (e. g. an evil demon forces you to do it). The considerations that follow show why such objections are confused.

Every asserted proposition ‘ $\vdash p$ ’ can be, at least nominally, divided into two components: its assertive force ‘ \vdash ’ and its content ‘ p ’. Rules are propositions that are *in force*, and they allow for a similar separation between their being in force and their content. We can model these with ‘ $\textcircled{R}p$ ’. For example, the bare propositional content that one is required to drive on the right is not in force in the UK and therefore not a rule there, even though it is of the right type in attributing an action type a deontic status. Now, for rules to be in force is for them to be enacted and/or generally accepted (BEGS 2013, Hart 1961). The key point is that to make a rule, to *enact*, to put one in force, is not to judge or assert. This was forcefully emphasized by Reinach:

The proposition, “*The ability of man to be a subject of rights begins with the completion of birth,*” has just as little a *hypothetical* character as does the proposition, “*Man is mortal.*” And further, it cannot possibly be considered to be a *judgment*. We do not have here a positing of being which, according as this being is really there or not, could be judged as true or false; we rather have an *enactment (Bestimmung)*, which stands beyond the alternative of true or false. (Reinach 1913: 103-104, compare MacCormick 1973: 114).

To use J. L. Austin’s terms, to judge and assert is to do something *constative*: it is to take a stand on how things already are and thus to do something that has a mind-to-world direction of fit. In other words, it is to do something that has to fit pre-existing reality to be correct. This is why judgments and assertions themselves can be said to be true or false (and not just their contents). In contrast, consider declaring a session open by using a sentence like ‘The session is open’ (as opposed to using what Austin called an explicit performative like ‘I hereby open the session’). To do this is to do something *performative*, something that lacks a mind-to-world direction of fit. In other words, it is not to report on pre-existing reality, but to seek to change it (Recanati 1987: Ch. 6). To enact is similarly to do something performative, to create a rule and thereby seek to bring into existence a legal truth and perhaps also a more general normative truth (compare Black 1962: 118, von Wright 1963: 96). This is why enactments can’t be said to be true or false (even though their contents can).

The foregoing was based on philosophical arguments. But it might help to point out that it’s a common claim in linguistic semantics that some *uses* of sentences involving

deontic modals are performative. Kaufmann gives the following examples which can't be followed up by an assessment of truth/falsity (where '#' marks unacceptability):

A: You must empty out the trash!

B: #No, that's not true.

A. You may take a cookie now.

B: #No, that's not true. (Kaufmann 2012: 58)

Similarly, Ninan has claimed that the deontic 'must', in contrast to 'ought' or 'should', always gets a performative interpretation when occurring unembedded:

Mary must leave.

#Mary must leave now, but I know she won't.

Mary must've left (#deontic)

(Ninan 2005, Portner 2009: 189-191)

His point is that the deontic 'must' functions to set a requirement and doing that is incompatible with saying that you know that the addressee won't do it. Similarly, you can't use a deontic 'must' to talk about the past, using 'must' to talk about the past immediately forces an epistemic reading. My above claim about enactments being performative is exactly along these lines. What I add is that rules qua *products* of enactments, rules-as-enacted or '@p', have their performative force built in and thus they're not truth-evaluable and are distinct from both the legal truths they generate and the normative truths they purport to generate.

Enactment is performative and therefore not truth-evaluable. What about acceptance? Hart famously took acceptance to be a matter of the participants taking an *internal point of view* towards the rules:

The account I have given of these [social rules] has become known as 'the practice theory' of rules because it treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance'.

This consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity. The external point of view of social rules is that of an observer of their practice, and the internal point of view is that of a participant in such practice who accepts the rules as guides to conduct and as standards of criticism. (Hart 1961/1994: 255)

BEGS go a bit further and say that acceptance needs to be understood in terms of normative attitudes:

A normative principle [in my terms: a normative content] P is a norm within a group G if and only if:

- (i) A significant proportion of the members of G have P-corresponding normative attitudes;
- and
- (ii) A significant proportion of the members of G know that a significant proportion of the members of G have P-corresponding normative attitudes. ...

We take normative attitudes to include at least the following: (a) normative beliefs, judgements, and other cognitive states, (b) normative expectations, (c) reactive attitudes and dispositions to have such attitudes, and (d) any other attitudes that entail (a), (b), or (c). ... Roughly speaking, P-corresponding normative attitudes are those normative attitudes that appropriately reflect the *content* and *normative force* of P. (BEGS 2013: 29)

On these Hartian views, to accept a normative content as a rule is to have normative beliefs, expectations, reactive attitudes, and dispositions that reflect the content and force of the rule. Although some of these attitudes might be truth-evaluable, plausibly acceptance as a whole is not.⁹ And it's a short step from this to the claim that rules qua

⁹ Space precludes us from going deeper into how to think of acceptance as non-truth-evaluable, but see Toh's expressivist and Finlay's and Plunkett's quasi-expressivist views for a start (Finlay & Plunkett 2018, Toh 2005).

products of acceptance, ‘@p’, have the acceptance built in and as such are not truth-evaluable.

To sum up, rules qua things that are in force, ‘@p’, are not themselves in the business of truth and falsity even though they have the right sorts of contents. It’s the truths they purport to generate that are.

Taking rules to be not truth-evaluable dissolves the above puzzles. Let’s walk through them to make this as explicit as possible. If an authority enacts *No Right* in New York then it comes to be in force, becomes a rule in New York. The rule’s being in force purports to generate a legal fact or truth. Absent conflicting rules, it suffices to make it into a legal fact or truth that that turning on right on red is prohibited in New York.¹⁰ However, the latter is not a rule, but a rule-generated legal fact or truth. Similarly, the fact that a legal rule conflicts with a moral truth doesn’t entail that it’s not in force nor even that it fails to generate a legal truth. All it entails is that it fails to generate an all-things-considered normative truth.

To sum up, we’ve made explicit how rules are unlike normative truths and more like orders. Namely, they are not constative, but performative, and thus not truth-evaluable. In fact, this intuitive difference between normative truths like moral truths and rules is one reason why likening rules to orders has been found continually attractive by many in the first place. Those who found the *Imperative* picture attractive put their finger on the way in which laws and rules in general differ from normative truths. But the point of the previous section is that this shouldn’t lead us to think of rules as orders. As already Reinach and Hart pointed out, law, and rules occupy a middle ground between orders and normative truths, “coercion” and “morality”:

Category	Content	Truth-Evaluable
Orders	Imperative	No
Rules	Propositional	No
Normative Truths	Propositional	Yes

¹⁰ Not every rule manages to generate a corresponding truth. If it is a part of a system where there’s a conflicting rule in force then the truths they purport to generate might not actually amount to truths (for discussion, see Johnston 2015).

The tendency to run rules together with normative truths is by no means rare and bears on a common and important objection to Hart's practice theory of rules. Before demonstrating this, let me say a bit more about the difference between them insofar as their normativity.¹¹

3. Normativity of Rules not Contribution-Dependent

In recent metanormative theory philosophers have started to both grant that rules are normative while also taking more of an interest in how the normativity of rules differs from the normativity of morality, epistemology, and practical reason. Parfit influentially put the point as follows:

On the reason-involving conception, normativity involves reasons or apparent reasons. On the rule-involving conception, normativity involves requirements, or rules, that distinguish between what is correct and incorrect, or what is allowed and disallowed. Certain acts are required, for example, by the law, or by the code of honour, or by etiquette, or by certain linguistic rules. ... These conceptions of normativity are very different. On the rule-involving conception, we can create new normative truths merely by introducing, or getting some people to accept, some rule. ... In contrast, on the reason-involving conception, there is normativity only when there are normative reasons or apparent reasons. (Parfit 2011: 145-146)

This contrast has recently been generalized into the contrast between the merely formal normativity which, contra Parfit, can also involve merely "formal" reasons, versus authoritative or robust normativity that involves "genuine" or intrinsically significant reasons (Baker 2017: 568, Berman 2019: 143, Finlay 2019: 204-208). The idea is that

¹¹ This might be a good moment to comment on how my notion of a rule connects with BEGS's norms. BEGS distinguish between *objectively valid rules or normative principles* and *accepted rules or normative principles* and reserve 'norm' for the latter (BEGS 2013: 3). My 'rule' therefore doesn't map onto their 'norm' since we're interested in slightly different things. Their 'norms' are *all* normative contents that are accepted in a particular community irrespective of whether they're rules or normative truths in my sense. Consider *Self-Defense* again. On their use of 'norm', if *Self-Defense* is accepted in a community then it is a norm of the community, a moral norm in the sense of a norm of positive morality (BEGS 2013: 7, Ch. 4). This is irrespective of the fact that it's a normative truth (or as they say, objectively valid) and not a rule that is in force due to its acceptance. My rules however are *all* normative contents that are in force due to human activity. Thus, some of my rules and their norms overlap, but not all of them.

although rules etc. tell you what you must, can't, or may do, and thus also provide reasons for and against actions, they don't provide any "genuine" reasons that have normative authority over us, that figure into what we all-things-considered ought to do.

Whether the above contrast between the formally and authoritatively normative is a defensible one and whether any normativity is authoritative is a substantive question in metaethics.¹² I'm here interested in a different contrast between the normativity characteristic of rules and that characteristic of all those normative truths that are contribution-dependent, whether formal or authoritative. Note that even if all rules are formal, it's not the case that all normative truths are authoritative. A paradigm case is provided by strategic *precepts* or putative strategic truths like the one stated by 'You should occupy the center with pawns in the opening'. These are generated by the nature plus ends of the game and have authority over us only if we want to win the game.¹³ What I want to argue is that the normativity characteristic of rules is different from that characteristic of such normative truths since it is isolated from their background justification and therefore not dependent on contributory notions like reasons coming together in a weighing explanation. In contrast, the normativity of contribution-dependent normative truths, whether formal or authoritative, is so dependent.¹⁴

¹² For skepticism see Baker 2017, Finlay 2014. For the idea that only practical reasons, but not epistemic ones are authoritative see Maguire & Woods 2020.

¹³ A referee wonders whether such strategic truths aren't prudential and thus still authoritative. But this doesn't seem to be true. Prudential truths are truths about the promotion of the agent's own well-being and they're authoritative only on the assumption that there's something authoritative about well-being, for example, that it's objectively valuable (for discussion and defense see Fletcher 2021: Ch. 1). In contrast, strategic truths are truths about what it is good to do given the ends of the game and, ultimately, winning. They're therefore not obviously about the agent's own well-being. And more importantly, they're also not authoritative since there isn't something authoritatively normative about winning a game per se. Thus, strategic truths have authority over us only hypothetically, if we want to win. However, if one is a Humean and thinks that prudential truths are authoritative dependent on the agent's desire, then they are as authoritative as any other desire-dependent reasons.

¹⁴ It might help to say a few words about reasons and their relation to oughts. Reasons are considerations that count in favor of or against options. As such, they are *gradable*, in that they have weight, and *contributory* or *pro tanto* in the sense that they don't, by themselves, determine what you ought or must do, but only contribute to such determination which is settled by a weighing explanation (compare Maguire 2018: 784-785) Furthermore, reasons, even authoritative ones, are *slack* in that not doing what you have a reason to doesn't immediately make you liable to criticism. This distinguishes reasons from commitments which are similarly *pro tanto* in that they don't by themselves determine what you ought to or must do, but *strict* in that failing to do what you're committed to do makes you liable to criticism (Shpall 2014: 159-160). As I will argue below, rules are like commitments in being strict. Note that we can draw all these distinctions even in the case of mundane reasons like strategic ones which figure into what we strategically

One impressionistic way of seeing this is that rules paradigmatically, and perhaps exclusively, tell us what we're required, forbidden, or permitted to do. It's hard to find rules that tell us what we should or ought to do, what is best or optimal. For example, laws paradigmatically tell us what we must, can't or may do, but not what we ought to do. Similarly, the constitutive rules of games tell you what you can't or may do – they don't tell you what you should do. In contrast, normative truths like moral truths and, more to the point, strategic truths can also tell us what we ought or should do.

This is just impressionistic, and to advance deeper we should say a bit more about *why* rules are enacted or accepted. Rules are enacted/accepted for reasons. These are what constitute the rule's justification (Schauer 1991: 25-26). For example, *No Right* is put in force by the relevant authority in New York City because traffic is dense, and it helps to prevent accidents. Rules of games are accepted by the players because they want to play the game (Suits 1978: 45). The important point is that the normativity of rules is independent of their justification. Once a rule is in force it is *isolated* from its justification in the sense that its normative force isn't defeated if it turns out that in this particular case there's more reason to do the opposite (compare Schauer 1991: 4, Ch. 3.4). If you are legally prohibited from driving through a red light then this legal prohibition doesn't go out of effect if there is good reason to do so. In such cases we usually just break the rule, and the fact that we consider this *breaking* proves the point. This is the sense in which the normativity of rules is not dependent on contributory notions like reasons coming together. In contrast, most normative truths don't allow such a separation between their normative force and their justification. They depend very much on the balance of reasons. In the above case, if there is overwhelming reason to drive through a red light then this is what you ought to do. Similarly, if there is overwhelming reason to violate a strategic precept like that you should occupy the center with pawns in the opening, then this is what you should do.¹⁵

ought to do, and not only in the case of genuine reasons and the all-things-considered ought (compare Maguire & Woods 2020: Section 4).

¹⁵ This point has connections to Rawls's distinction between practice rules and summary rules (Rawls 1955). As we will see in the next section, I think this shows that the so-called summary rules aren't really rules in our sense, but normative truths. It also has connections to Raz's idea that some rules, the mandatory ones, provide exclusionary reasons, second-order reasons not to act on countervailing reasons (Raz 1975/1999: Ch. 2). Yet, the point remains different since even the normativity of *permissive* rules allows a separation between their force and justification.

To sum up the discussion of the previous two sections, there are two important differences between rules and normative truths. First, rules are in force or not, but not themselves truth-evaluable, while normative truths are true. Second, the normativity of rules is isolated from their justification while that of at least contribution-dependent normative truths isn't. In the next section I will provide one illustration of the virtues of this understanding of rules by showing how proper appreciation of how they differ from contribution-dependent normative truths helps us defuse a common objection to Hart's practice theory of rules.

4. Defusing a Common Objection to Hart

On Hart's practice theory of rules, for a social rule to be in force two things need to be true. First, there must be a social practice consisting of an actual behavioral regularity to act in accordance with the rule. Second, the participants need to *accept* the rule.

There is a common and important objection to Hart's theory originally given by Warnock, repeated by Raz and Marmor, and later taken by Shapiro to decisively refute it (Shapiro 2011: 103-104, Warnock 1971: 43-46). The blunt version of the objection given by Shapiro aims to show that these conditions can be satisfied while there is no social rule in force. Raz and Marmor put their version in a more nuanced way by saying that it aims to show that the practice theory cannot distinguish between rules and generally accepted reasons (Marmor 2001: 3-4, Raz 1975/1999: 55-56). This nuance will be important in what's to follow. But let's start with Shapiro's blunt version:

The problem with this version of the Practice Theory is that the metaphysical relation it claims exists simply does not obtain: social practices do not necessarily generate social rules. In baseball, for example, third basemen typically draw toward home plate when a bunt is suspected. Moreover, if they fail to draw near they would be criticised for not doing so. Drawing near, in other words, is a Hartian social practice. Yet there is no rule that requires third basemen to draw near when a bunt is suspected. Contrast this practice with batters retiring after three strikes. The latter activity is rule governed. (Shapiro 2011: 103-104)

Shapiro's point is that there is a regular activity in baseball of drawing towards home plate when a bunt is suspected and that other players and observers take an internal point of view towards the idea that this must or ought to be done. Yet, intuitively, there is no rule of baseball requiring that this be done.

In a recent discussion, Kaplan has built on earlier attempts by Green and Kramer to try to respond to this objection by saying that the right thing to say about this case is that there is a corresponding rule, just not of baseball, but of popular baseball strategy (Green 1999: 37, Kaplan 2017: 491, Kramer 1999: 251-253). On his view, such a rule of popular baseball strategy is an instance of what Rawls called summary rules: rules which summarize independent considerations (Rawls 1955).

However, part of Raz's and Marmor's more nuanced way of putting the point against Hart's practice theory is that such strategic precepts or summary rules are not really rules in the sense in which traffic rules and rules of games are rules (Marmor 2009: 14-15).¹⁶ Instead, Raz and Marmor say, they're just generally accepted reasons. Of course, since such generalizations are usually stated in terms of 'ought' or 'should' it is more precise to say that they're things that are generally *believed* to be normative truths. In the light of this it seems to me that Kaplan's response fails. Such strategic precepts and summary rules in general are not rules in the relevant sense. The main difference is exactly the one that we established in the previous two sections. First, while regulative rules are not truth-evaluable, strategic precepts and summary rules are. To put the point in a slightly different way, while in the case of rules 'acceptance' is performative or a matter of non-constative set of attitudes, in the case of summary rules 'acceptance' is something constative like belief.¹⁷ Second, and relatedly, while the normativity of regulative rules is

¹⁶ Rawls comes close to granting this as well: "...there are rules of practices (rules in the strict sense), and maxims and "rules of thumb."" (Rawls 1955: 29)

¹⁷ A referee suggests that summary rules are not truth-evaluable, but *accuracy-evaluable* on the grounds that we generally evaluate summaries of texts etc. for accuracy. Two points. First, and less importantly, this depends on how summary rules are stated. If they're stated with sentences like 'You should draw towards home plate when you suspect a bunt' then it seems that they're quite unlike summaries of texts and can be straightforwardly evaluated for truth and falsity. Second, and more importantly, even if it were true that summary rules are only accuracy-evaluable, this wouldn't bear on my fundamental point that this still distinguishes them from regulative rules. Truth and accuracy are both dimensions of assessment for correctness for something *constative*, something that has to fit pre-existing reality to be correct. However, to recap the point of section 2, regulative rules are not constative, but *performative* or dependent on acceptance, and thus not evaluable for neither truth nor accuracy.

therefore isolated from their background justification, the normativity of summary rules is straightforwardly contribution-dependent.

Let's look at this in detail by working through a few examples. There are two types of considerations that show that such strategic generalizations are not rules, but putative normative truths. To see them clearly, let's switch examples from baseball to chess which I know more about and where it is easy to make sense of strategies leading to an objective advantage in terms of a computer evaluation. As in baseball, there have been numerous strategic generalizations throughout the development of the game that have had a similar status as the above baseball generalization. For example, the so-called classical theory distilled by Siegbert Tarrasch (1862-1934) insisted that one should occupy the center with pawns in the opening and it was widely thought up until quite recently that one should not make flank pawn moves (e. g. with Harry the h-pawn) early in the game. Players, teachers and observers believed such precepts to be true much like the generalization about baseball mentioned by Shapiro.

The first type of consideration has to do with what it makes sense to say when somebody acts contrary to the strategic precepts, but with success. Consider the historical development of chess strategy. After World War I so-called hypermodern players like Aron Nimzowitsch (1886-1935) started advocating not occupying the center with pawns in the opening but instead developing pieces to control the center from afar in the hope of attacking the opponent's classical center later. This consistently resulted in Nimzowitsch's gaining an advantage out of the opening and winning many of these games. Would it have made sense for other players and observers to say that he was nevertheless breaking a rule? No. The fact that he proved that it was a good strategy to let the opponent build a classical center to attack it later completely defeats the *should* of the classical strategic precept, simply falsifying it. And this shows that it wasn't really a rule that was in force, but a putative strategic truth. In contrast, in the case of rules that are in force you can be charged of having broken one even if what you did was the best thing to do.¹⁸

¹⁸ A referee points out that old-fashioned players and observers would've likely still criticized Nimzowitsch and could've put this in terms of him breaking long-standing rules of chess strategy. I agree and in fact they did criticize him. But the nature of the criticism is plausibly that he violated long-standing strategic precepts with the point that these continue to be true despite him winning this or that particular game. The appropriate response was that the proof is in the pudding: the fact that the strategy worked

The second type of consideration has to do with the differences between the dynamics of changes of beliefs about strategic precepts versus changes in accepted rules. Consider a scenario in which it becomes objectively clear (e. g. because our computer overlords play this way) that a previous strategic generalization is not well-founded and there are viable strategies that involve doing the exact opposite (e. g. h4! on the third or fourth move). In such a case, is it possible that the new strategies become widely known while the strategic generalization persists for some time? No. Rather, the fact that the new strategies are viable immediately defeats the *should* of the strategic generalization. People will instantaneously adopt them and say about the old precept that perhaps it holds in many cases, but not always. Again, this shows that it wasn't really a rule that was in force. In contrast, in the case of rules that are in force by acceptance the change is much more glacial (BEGS 2013: 108-110, Hart 1961/1994: 92-93). Even if a rule of etiquette becomes widely believed to be unjustified because, say, it was originally motivated by racism, it will take some time before its hold on people in the form of their dispositions for conformity and enforcement disappears.

Elsewhere Kaplan considers an analogous, but slightly different case than Shapiro's baseball case as an instance of the same objection. It is worth separate discussion since it is a bit more complicated:

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. (Kaplan 2021: 8)

consistently over many games shows that the classical precepts simply aren't true. In contrast, if Nimzowitsch had broken a rule that was in force then such criticism and the response wouldn't make any sense.

Kaplan responds to this objection again by saying that there is such a rule, just not a rule of etiquette, but one of his family's dinner strategy.

This case is a bit more complicated in that one could conceive of there actually being a family dinner rule in this case, but it might also be just a putative strategic truth. A case which could decide between these two options is the following. Suppose a new member of the family, say, someone's partner, emphatically insists that they get most enjoyment out of dinner if they fill up on bread first, for some reason. If the family insists that this is wrong then it is indeed a real rule and there is no problem for Hart's view. But this wouldn't, of course, be a summary rule summarizing independent considerations, but a rule that has been accepted and put in force for some reasons, without summarizing these reasons. However, if the family allows that this wouldn't be wrong in their individual case then it's not a rule, but a mere putative strategic truth for increasing your enjoyment at an all-you-can-eat dinner.

I conclude that Kaplan's defense of Hart's theory against the common objection fails. But this doesn't show that this objection is a good one and it is at least somewhat puzzling why Raz and Marmor who put the point in the more nuanced manner didn't see it. One reason might again be, perhaps a bit paradoxically, that even they didn't properly attend to the difference between rules and what it takes to accept them, and normative truths like strategic truths. The point is twofold. First, as I argued above, acceptance in the Hartian sense is not constative and thus not a truth-evaluable act or attitude. Second, rules qua enacted or accepted tell us what's required, forbidden, and permissible, but not what we should or ought to do or what's best. The strategic generalizations plainly do not have this form. As I argued, this is not an accidental feature of rules, but rather derives from their normativity as distinct from the normativity of contribution-dependent normative truths. All of this means that in the Warnock-style cases we do not have Hartian acceptance at all, but simply widely shared normative beliefs about what one should strategically do. I conclude that given a proper appreciation of the differences between rules and normative truths, the objection fails to gain any hold on Hart's theory since in the proposed cases the conditions of the theory are not even met.¹⁹

¹⁹ This is not to say that Hart's practice theory is beyond reproach as far as the first component, the idea that the behavioral regularity is necessary for the rule to be in force. As BEGS have convincingly argued,

Conclusion

I have argued that rules occupy a middle ground between orders and normative truths. Unlike the former, they're not necessarily communicative, not an expression of the giver's will, not evaluable for sincerity, and have propositional content. Unlike the latter, they are not truth-evaluable, but in force or not. Let me conclude by briefly noting that rules should also not be run together with social practices and conventions.²⁰

Social practices can be understood to be regularities in behavior that are backed by pro-attitudes towards the behavior that are a matter of common knowledge (BEGS 2013: 16). Conventions, at least in the Lewisian sense, are a subset of social practices that solve coordination problems (BEGS 2013: 16-17).

Now, even though philosophers sometimes call practices or conventions rules or rules practices or conventions, at best there are *relations* between practices and rules, like on Hart's practice theory, or between conventions and rules, like on Marmor's or Southwood's theories (Marmor 2009, Southwood 2019).²¹ Namely, rules can be in force *because* they're conventionally accepted. That is, they are accepted because there is a related conventional regularity in behavior, because what they prescribe is the done thing. Thus, even though conventions are not rules, they can be the *ground* of rules, and in this sense rules can be conventional. Plausibly etiquette rules and rules of language are exactly such conventional rules.

To return to our main thread and sum it up, the tendency to take rules to be orders is not widespread in philosophy of law anymore but persists in philosophy of language

rules could be in force via acceptance even if breaking them is widespread (BEGS 2013: 20-21). Nic Southwood therefore analyses conventional rules not in terms of an actual practice of following them, but merely a publicly *presumed* practice of following them which is compatible with widespread secret breaking (Southwood 2019).

²⁰ Shapiro faults Hart for making exactly such a category mistake in running together social practices and rules (Shapiro 2011: 103). But Hart's practice theory is much better understood to be about what it is for rules to be in force. Rules, according to Hart, are not social practices, but the right sorts of normative contents that are in force due to satisfying the conditions of the practice theory. Shapiro also says that rules are timeless abstract objects which is the real category mistake here. As I argued above, rules in the interesting sense are not bare normative contents but contents that are in force. Rules are therefore at best temporal abstract objects that are created and can cease to exist like perhaps words.

²¹ Marmor uses the word 'convention', but it is clear that what he's really interested in are conventional rules (Marmor 2009: X, 1-2).

and games. I hope to have shown why this should be resisted. In contrast, the tendency to miss the idea that rules differ from normative truths both in not being truth-evaluable and in their isolation from their background justification is still widespread even in philosophy of law. I hope to have shown why this should be resisted as well, and how doing this can help us to properly understand and defuse a common objection to the important Hartian idea that acceptance can put a rule in force.²²

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²² I want to thank Justin Snedegar, Manolo Garcia-Carpintero, audiences at the *Slippery Slope Normativity Summit* at the Inland University of Norway and the University of Nantes, and the anonymous referee and editors of this journal for their helpful comments and discussion.

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