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In Defense of Hart's Supposedly Refuted Theory of Rules

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Abstract. H. L. A. Hart's "practice theory" of rules is widely thought to face two problems: (1) It fails to account for the normativity of law and (2) it is susceptible to a decisive counterexample dating back to Warnock (1971). In this paper, I offer solutions to both problems. In response to (2), I appeal to an old, but underappreciated, distinction made by Rawls (1955) and argue that the counterexample is no counterexample at all. In response to (1), I apply a newly popular distinction regarding the nature of law's normativity and argue that Hart's practice theory has no problem accounting for the normativity of law.

1. Introduction

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

On H. L. A. Hart's theory of law, the regress halts at one particular law: the rule of recognition, a second-order rule specifying the conditions under which other rules and rule-creating bodies have legal status (Hart 1961). But where does the rule of recognition come from? How does it get *its* legal status? The answer, on pain of regress, must not refer to some other valid law or some other already authoritative body. Instead, Hart suggests that the rule of recognition arises from nonlegal—and indeed non-normative—states of affairs.

Hart's explanation for how the rule of recognition arises from nonlegal states of affairs later came to be called the *practice theory of rules*.[3] This theory attempts to

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

[2] See Green 1999 and Shapiro 2011 for good discussions of jurisprudence framed around this regress. A prominent alternative response to this regress is the coordination convention theory of law, which was developed in the early 1980s by Coleman (1982) and Postema (1982) before somewhat falling out of favor.

[3] For the original use of "the practice theory of rules" see Raz 1984.

explain how a rule of recognition comes to exist, and it does so without reference to any prior legal entities. But the practice theory is even more ambitious than that. It purports to explain the existence not only of legal rules but all sorts of social—i.e., human-created—rules, such as the rules of etiquette, games, clubs, or fashion. That is, the practice theory is not a theory of the legal rule of recognition in particular. It does not present conditions that are sufficient for there to be a rule of recognition. Rather, it is a theory of just that feature of the rule of recognition that allows it to halt the regress—its being a social rule.

Unfortunately, the practice theory is widely—though not universally—taken to be a failure (Kramer 1999, 251–3). This is for two reasons. First, the things to be explained, which in the legal case are the validity of laws and the authority of legislators, are normative phenomena. Hart almost never uses the word "normative" in *The Concept of Law*. But in the sixty years that have passed since that book was first published, talk of "normativity" has exploded within analytic jurisprudence to the point where "the normativity of law" is considered a central explanandum of legal philosophy (Coleman 2001; Enoch 2011; Green 1999; Marmor and Sarch 2019; Postema 1982). The problem is that the practice theory attempts to explain the foundation of legal systems merely by appeal to two types of *descriptive* facts: behavioral facts about what people do and psychological facts about what attitudes people take. The worry is that these descriptive facts could never explain the fact that one legally *ought* to do something.[4] (Though this problem will feel familiar to many philosophers of law, some will immediately worry that mention of the *normativity of law*—and mention of the supposed fact that one "legally ought" do something—is obscure. This worry puts us on the right track, as the exact sense in which law is normative will determine whether this is a genuine problem for the practice theory.)[5]

The second problem is more straightforward. The practice theory provides two conditions that are putatively sufficient for the existence of a social rule. The problem is that there is a counterexample, introduced by G. J. Warnock and reformulated and repeated dozens of times since, in which these two conditions are met but where no rule exists (see Warnock 1971, 45–6, 61–5; cf. Marmor 2001, 3; 2009, 14–5; Perry 2015; Shapiro 2011, 103–4). The vast majority of philosophers who discuss this problem in print accept it as a decisive refutation of the practice theory.[6]

Hart's theory of law is based on a theory of rules that is thought to be, at minimum, troubled, if not altogether doomed. In this paper, I defend the practice theory by offering a solution to the normativity problem and by arguing that the putative counterexample is no counterexample at all. Both of these points draw on existing literature. The original contributions of this paper consist in (a) the application of existing insights to an old—and some think *settled*—discussion, but also, and more interestingly, (b) several original arguments applying existing insights to the supposed problems for the practice theory.

[4] See Bix 2006; Coleman and Leiter 1996, 241; Dworkin 1977, 19; Enoch 2011; Green 1999, 35; Holton 1998; MacCormick 1978 and 1981; Marmor and Sarch 2019; Perry 2006, 1173; Raz 1975; Shapiro 2011, 46–9; Smith 1994.

[5] This is the topic of Sections 6 through 14.

[6] The two exceptions of which I am aware are discussed in Section 4. They are Green 1999 and Kramer 1999.

2. The Practice Theory of Rules

It is best to start by saying what the practice theory is. It is a theory of social rules. It offers the following two conditions as jointly sufficient for the existence of a rule requiring φ within a population *S*:

(1) Enough members of *S* regularly φ.
(2) Enough members of *S* take a special attitude, variously called "the internal point of view" or "acceptance," toward the regular pattern of φ-ing.

For example, there is a rule of etiquette/fashion within a society requiring men to remove their hats upon entering a building if (1) most men in that society remove their hats and (2) most people in that society take the internal point of view toward that pattern of hat removal. (This statement of the practice theory outlines the conditions for rules *requiring* some behavior, but it can alternatively be stated for rules *prohibiting* some behavior.)[7]

What is this mysterious attitude? As it turns out, answering this question is not trivial. Answering it properly requires an examination of both (a) the little Hart says about the internal point of view and (b) the role that this attitude plays in his theory of law. But the focus of the present paper is not the internal point of view. So here I treat the question, What is the internal point of view? as if it were a trivial one and merely state an answer to it, without defending that answer.

Suppose that people move a small icon around on a flat surface. They move the icon in certain ways, but not others. This is a regularity. But a regularity is not a rule.[8] That something is regularly done does not entail that doing so is, in any sense, *correct* or *required* or *in accordance with a rule*. What is needed for a rule is that in addition to the regularity of behavior, people take the right

> reflective attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but "has views" about the propriety of all moving the Queen in that way. (Hart 1961, 57)

Hart does not say much more than this about the internal point of view, but it is clear that it is a form of evaluation and we generate social rules by means of this evaluative attitude. The internal point of view involves treating the pattern as a "reason and justification" both for behavior and for criticism of behavior (Hart 1961, 11).

Consider another example. Most people cross the street by walking and not by skipping. This is a regularity. What attitude might I take toward those who deviate from this regularity? Most likely, a predictive attitude. I will regard skipping as *uncommon* or *unlikely*, and anticipate that if someone is crossing the street, she will likely not be skipping. If I wish to see some skipping, then I will not waste my time watching people cross the street. Hart calls such an attitude "the external point of view." Here is another regularity: Most people cross the street at a crosswalk. What attitude

[7] There exists a rule prohibiting φ within population *S* if (1) enough members of *S* regularly refrain from φ-ing and (2) enough members of *S* take the internal point of view toward the regular pattern of non-φ-ing.
[8] For the best statement of this distinction, albeit in application to language, see Sellars 1954.

might I take toward it? Again, I can take the predictive, external point of view. But in addition to regarding jaywalking as uncommon, I may regard it as *inappropriate* or *forbidden*. This evaluative, or critical, attitude is the internal point of view. To accept or take the internal point of view toward a pattern of behavior is to regard it as a standard against which behavior is judged.

The two patterns just mentioned—walking (and not skipping) across the street and crossing the street at a crosswalk—are different kinds of patterns. One is a mere regularity and the other partly constitutes a rule (see Sellars 1954). But the discussion of the previous paragraph is not meant, primarily, to bring out the difference between these patterns. Rather, it is meant to bring out the difference in *attitude* that one can *take* toward these patterns. According to the practice theory, it is partly by way of these different attitudes that the patterns themselves are different. It is partly because people take the internal point of view that there exist social rules.

Three more details about the internal point of view should be mentioned. First, it is an intentional mental state directed at two objects: a pattern of behavior and individual instances of behavior.[9] To take the internal point of view toward crossing the street at a crosswalk, one regards individual instances of non-crosswalk-crossing as impermissible because they deviate from the pattern of crosswalk-crossing. Hart repeatedly calls the internal point of view a "critical" attitude (Hart 1961, 56, 86, 117, 155). What is being critiqued? Not patterns of behavior.[10] Rather, the objects of criticism are *instances* of behavior.[11]

Second, we should not be misled by Hart's "internal" and "external" talk. Even those outside a legal system can take the internal point of view by evaluating instances of behavior based on their conformity with a pattern.[12] And an insider can take the merely external point of view, like Oliver Wendell Holmes's famous "bad man" (Holmes 1897).

Finally, the internal point of view is *evaluative*, but it is not necessarily *moral*.[13] There are various forms of evaluation, and the internal point of view encompasses many of them. To take this attitude one need not consider jaywalking *immoral*, though that would be more than enough. Considering it *impermissible* is sufficient.[14]

[9] This will be important later.

[10] For opposition on this point see Holton 1998 and MacCormick 1978. Holton and MacCormick advocate what has been called the "moral attitude constraint." For a response, see Kaplan 2017.

[11] It may be that systematically regarding instances of behavior as, say, impermissible involves regarding certain patterns of behavior as impermissible as well.

[12] For opposition on this point see Perry 1995, 99. Also see Kaplan 2017; Leiter 1997, 295; Postema 1998, 329–57; Shapiro 2000 and 2006.

[13] For opposition on this point see Holton 1998 and Perry 2006, 1173. Also, it should be noted that in the main text above, it may be necessary to replace the word "evaluative" with "evaluative or deontic" if one suspects that the judgement falls on the latter side of the distinction between the good and the right. See also Kaplan 2017.

[14] Of course, one may wonder what it is to regard some instance of behavior as impermissible if that does not involve taking it to be morally forbidden. I will not go into that digression here. Hopefully, it is sufficient to say that one can regard, for instance, passing the port to the right (when the rule requires passing it to the left) as in violation of a rule without regarding there as being any moral reason whatsoever to pass the port to the left. See Kaplan 2017.

3. The Putative Counterexample

Here is the putative counterexample to the practice theory.

After three strikes, batters typically retire to the dugout. Players, coaches, and fans consider instances of conformity with this pattern to be appropriate and they consider deviations inappropriate. The practice theory's two conditions—that there be a regularity and that participants take the internal point of view—are met. According to the practice theory, there is a rule requiring batters to retire after three strikes. And there really is such a rule.[15] By contrast, however, when a weak player is at bat or when a bunt is suspected, the fielders typically draw closer to home. Here too, conformity is considered appropriate and deviation is considered inappropriate. So the two conditions set out by the practice theory are met. But, while there is a rule requiring batters to retire after three strikes, there is no rule requiring fielders to draw closer to home when a weak player is at bat.

This is a serious problem. It appears that the two conditions are not sufficient. The theory fails.[16] This counterexample was introduced by G. J. Warnock (1971, 45–6, 61–5) nearly fifty years ago.[17] Since then, it has been endorsed and repeated by dozens of philosophers, including Andrei Marmor (2001, 3; 2009, 14–5) and Scott Shapiro (2011, 103–4; also see Perry 2015). And with good reason. There really is a regularity of behavior by which fielders draw closer to home when a weak player is at bat. And it is true that participants take the internal point of view: They evaluate instances of fielding behavior based on whether or not it accords with the pattern of drawing closer to

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

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

[17] Warnock's original example concerned cricket, but I follow Shapiro 2011 in translating it into baseball.

home when a weak player is at bat. So there should be a rule. But, plainly, there is not.[18]

4. Defense of the Practice Theory against the Putative Counterexample

As far as I am aware, the practice theory has been defended against this attack exactly twice in published literature: by Matthew H. Kramer (1999) and by Leslie Green (1999).[19] These two defenses were not only both published in the same year, but they were also both largely ignored in the literature.[20] Many times since their publication, philosophers of law have appealed to Warnock's counterexample as demonstrating that Hart's practice theory fails to provide sufficient conditions for the existence of social rules (Marmor 2001, 3; 2009, 14–5; Perry 2015; Shapiro 2011, 103–4).

Broadly, Kramer and Green resist the Warnock counterexample by suggesting that, despite appearances, there *is* a rule requiring fielders to draw closer to home when a weak player is at bat. It *seems*—and has seemed to many for fifty years—like there is no such rule because it is juxtaposed with the rule of baseball requiring batters to retire after three strikes. The rules of baseball are often quite determinate and codified. You can look them up in a book, or on Major League Baseball's website. So it is not surprising that more nebulous, unspoken rules seem insignificant in juxtaposition. The rule requiring fielders to draw closer to home when a weak player is at bat is not a rule of baseball. It is a rule of what

[18] As I have made out the purpose of Warnock's counterexample, it is an attack on a *metaphysical* view. It is meant to show that Hart's theory cannot explain when certain rules *exist*. However, one might wonder whether the true purpose of the counterexample is significantly more *normative*. That is, perhaps the example was meant to show that there are cases where there is no *binding* rule. That is, Hart's practice theory overgenerates instances where there are rules that *ought* to be followed. Indeed, some of what Warnock says can be taken to indicate that this is what he meant. (See Schauer 1993 and Warnock 1971, 46, for more on the distinction between binding and nonbinding rules.) I do not, however, think that this is the right way to understand Warnock's counterexample for two reasons. First, Hart's practice theory is a metaphysical theory. It is not an attempt to present conditions for rules that are binding. It would be very implausible if that were what it was attempting to do. It attempts to say how such rules come into existence, and how they get status as rules. Part of Hart's version of legal positivism (as is discussed in Section 6 and onward) involves agnosticism as to whether legal rules are binding. So if Warnock's counterexample were about which rules are binding, it would fail to target the practice theory. Second, Warnock (in the modified baseball example that we are considering) contrasts a rule requiring batters to retire to the dugout after three strikes and a rule requiring fielders to draw closer to home plate when a weak player is at bat. This cannot be a contrast between a binding rule and a nonbinding rule, simply because the first rule is not obviously binding. Are the rules of baseball binding? I suspect there will be disagreement. My own view is that the rules of baseball are only occasionally binding, depending on the particular circumstances. Dworkin (1977), for instance, disagrees. But if Warnock were interested in drawing that contrast, then he surely would have chosen a different example.

[19] One notable defense of the practice theory that does not focus on the Warnock counterexample is Lovett (2019). Lovett defends the practice theory by arguing (persuasively) that the role of Hart's rule of recognition has been misunderstood, and that once that role is properly understood, the practice theory is up to the task.

[20] I do not mean that Kramer's 1999 book and Green's 1999 article have been ignored. Indeed, both are widely cited. Rather, the fact that these works contain claims (persuasive claims, in my opinion) that the Warnock counterexample fails, seems to have been missed.

we might call *popular defensive baseball strategy*. Popular defensive baseball strategy is the normative practice consisting of rules that prescribe—according to the strategic opinions of influential baseball players and coaches—how one ought to behave in order to prevent one's opponent from scoring runs. Baseball and popular defensive baseball strategy are both human-created normative practices consisting of social rules. But they are different. Popular defensive baseball strategy depends for its existence on baseball. Yet baseball can exist without the defensive behavior and opinions of baseball players and coaches being consistent enough to constitute a practice. In reality, there may be multiple practices of defensive baseball strategy: a more traditional school of thought and a newer, statistically oriented school of thought. These two schools of thought yield distinct normative practices consisting of different social rules.

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

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

What I have said in the last three paragraphs already expands considerably on the brief remarks offered by Kramer and Green. I have attempted to present their suggestion so as to bring out what I take it be its significant plausibility. But, as it stands, we can see why their insight might have failed to be appreciated. In order to undermine the Warnock counterexample, we need more than the *assertion* that there is a rule requiring fielders to draw closer to home, even if that assertion is plausible on its own. The three-strikes rule and the fielders-draw-closer rule *feel* like very different kinds of rules or normative standards, so it would be nice to have an illuminating explanation of (a) how they differ and (b) what they still have in common in virtue of which it is sensible to account for them both with a unified theory like the practice theory. Luckily, something like that illuminating explanation has

existed for over sixty years, though it has never been applied to this kind of case. Rawls introduced the distinction between "summary" and "practice" rules.[21] Drawing on Rawls's distinction, I suggest that we should understand rules of popular defensive baseball strategy as *summary rules* and rules of baseball itself as *nonsummary rules*.[22]

Summary rules are, as Rawls (1955, 19) says, "reports that cases of a certain sort have been found on other grounds to be properly decided in a certain way." Rules of this kind attempt to capture and state the considerations that bear on an action independent of the existence of those rules. There are lots of strategic considerations bearing on where fielders should stand and how they should move. Baseball players, coaches, and fans examine—as best as they are able—these considerations. When a group within the baseball community agrees about how fielders should move, then, *ceteris paribus*, fielders regularly move as it is thought that they ought. And their movement is critically evaluated by those in the baseball community. When a fielder does not draw closer to home, her behavior is compared to the pattern or standard of behavior, found to be in deviation, and regarded as *strategically mistaken* or *unwise*. This is the internal point of view. So, according to Hart's practice theory, there is a rule requiring players to stand and move in these ways. This rule is a synopsis or "report" of what those members of the baseball community take to be the relevant strategic considerations bearing on baseball fielding. Summary rules need not be accurate summaries of the independent considerations that they attempt to summarize. The popular defensive baseball strategy may be misguided.

Nonsummary rules are human-created normative standards that do not summarize or report what there are independent grounds to do. The rule requiring players to retire after three strikes does not attempt to capture considerations that independently bear on player behavior.[23] A rule of baseball cannot be *mistaken* or *misguided*—at least not in the way that summary rules can. The three-strikes rule cannot be criticized because, as it turns out, players should retire after two strikes. Of course, that rule can be criticized in other ways. Perhaps the game is too boring, so players should be allowed only two strikes, or ten. But this criticism concerns what justification there may or may not be for *creating and maintaining the rule*, and

[21] Rawls (1955) initially makes out the distinction as one between two *theories* of rules, but by the end of the paper (on the top of page 29) he makes it clear that the distinction is best understood not as a distinction between two competing theories of what rules are, but rather as a distinction between two *types* of rules.

[22] I refrain from using Rawls's exact terminology for three reasons. First, this paper is concerned with the *practice theory of rules*, which, following Raz's name for that theory, includes the word "practice." Using Rawls's terminology would introduce a use of the word "practice" with a different meaning. Second, Rawls's terminology is potentially confusing because both summary and practice rules can constitute normative, rule-based practices. The terminology suggests that only practice rules constitute a practice. But summary rules can constitute a practice as well. Finally, it is not essential to my purposes in this paper that the distinction discussed here be the same distinction that Rawls had in mind. By abandoning Rawls's terminology, we avoid the possible digression into Rawls exegesis.

[23] Indeed, the example of a practice rule that Rawls (1955, 25–6) gives is this same example: the rule requiring baseball players to retire to the dugout after three strikes.

not what justification there may or may not be for *when to walk back to the dugout*.[24]

I use the term "rule" to refer exclusively to prescriptive rules, as opposed to descriptive rules. Both summary and nonsummary rules are prescriptive rules. A descriptive rule is just a pattern or regularity, perhaps one with good reason for its existence. And because summary rules "summarize" the reasons there are to engage in certain behavior, it is natural to understand them as descriptive in this sense. But that is not how either Rawls or I understand summary rules. Summary rules prescribe certain forms of behavior, just as nonsummary rules do. The three-strike nonsummary rule is not a mere description of some behavior. And, so too, the fielders-draw-closer summary rule is not a mere description of behavior. Of course, as it turns out, there is a pattern of behavior whereby fielders draw closer to home. And one can describe that pattern of behavior. But there is also a rule that prescribes drawing closer to home. And it is that rule that falls on the summary side of the Rawlsian distinction.

The suggestion is that both nonsummary and summary rules are *rules* in the proper, prescriptive sense of the term. Once we see that social rules may be summary rules, the counterexample dissolves. However, it is worth dwelling on the summary/nonsummary distinction for just another page or so to be as clear as possible about what it is.

First, it is a distinction having to do with a certain *purpose* or *function* that some rules have and others lack. To make an analogy, consider the difference between two images: an abstract expressionist painting, such as one by Jackson Pollock, and a courtroom sketch. They are both images, but only one of them has a certain kind of representative function. The courtroom sketch represents, among other things, the shapes, sizes, and arrangement of objects in a room. The Pollock painting might also represent things—like late capitalism or the feeling of *ennui*—but it does not represent the shapes, sizes, and arrangement of objects in a room.[25] Both images can be evaluated along many different lines—they might both be beautiful or ugly, colorful or drab. But only the courtroom sketch can be said to be *accurate* or *inaccurate*. The courtroom sketch can be criticized as inaccurate, for instance, if the defendant was sitting on the left side of the table and not the right. But one who says of the Pollock painting that it gets wrong the location of the defendant is confused about what sort of thing that painting is.

[24] It is worth explaining how this summary/nonsummary distinction relates to the distinction between regulative and constitutive rules, as discussed by Searle (1969) and others. Searle's distinction is best understood not so much as a distinction between *types* of rules as one between *guises* under which most rules can be viewed. I say this because the vast majority of rules are regulative under one guise and constitutive under another. The fielders-draw-closer rule, for instance, is a summary rule. And it is both regulative and constitutive. It regulates a form of behavior that was possible prior to the existence of the rule—i.e., walking and standing on the baseball field. And it is constitutive, in Searle's terminology, in the sense that it makes possible a form of behavior that is only possible after the rule comes into existence—i.e., playing putatively strategically sound or unsound baseball defense. Whether nonsummary rules also come in both varieties depends on how we understand the prior forms of behavior that regulative rules regulate. The three-strikes rule is certainly constitutive in that it makes new forms of behavior possible—i.e., striking out. But whether it regulates a previously possible form of behavior depends on whether one thinks that "moving around on a baseball field" counts as a form of behavior in the right kind of way.

[25] Or, if some of Pollock's paintings are bizarrely said to represent the arrangements of objects in a room, we can consider any abstract image that does not.

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

Lastly, it is worth reiterating that summary rules can be mistaken and still be the rules that they are. Consider another example of a summary rule: the rule of popular health folklore requiring one to drink eight glasses of water each day. This summary rule fails to accurately summarize how much water one has reason to consume each day (with a normal diet and other beverages, zero glasses of water can be sufficient). Yet, so long as enough members of the relevant community obey this rule and apply it as a normative standard for the evaluation of behavior, there is such a rule. Even though one does not independently have health-related reason to drink eight glasses of water a day, it is still true to say that failing to drink that many glasses is *prohibited by the eight-glasses-a-day rule*. So too, the fielders-draw-closer rule continues to exist even if it turns out that it fails to accurately summarize or report what fielders have independent reason to do.[26]

5. Objections and Replies

The previous section introduced an attack on Warnock's counterexample that comes originally from Kramer and Green, and supplements that attack. But there are several potential objections that may also have prevented the attack on Warnock from being fully appreciated. This section, therefore, briefly considers and responds to three defenses of the counterexample.[27]

First, it might be objected that summary rules are not rules at all because they do not constitute or generate reasons for action. Though reasons-talk is now ubiquitous in moral, political, and legal philosophy, it is not immediately clear what this objection comes to. Here, I consider one way of making out this objection. The relationship between reasons and law is also discussed in Section 12.

Perhaps the most natural way to understand this reasons-based objection is in terms of the explanation of behavior. The objection is: Summary rules should not be considered rules because they are not used to explain behavior. To the question,

[26] It is perhaps worth mentioning, as an aside, that some legal rules are summary rules (such as laws prohibiting murder) and some legal rules are nonsummary rules (such as laws requiring one to drive on the right or left side of the road).

[27] A fourth potential objection, which has been suggested to me, but which I am keeping out of the main text for the sake of saving space, is that the reply focuses too much on a specific counterexample. In a different context, suppose that members of a community all, or almost all, believe that eating meat is immoral. They, therefore, regularly abstain from eating meat and they negatively evaluate instances of meat eating, both in their own behavior and the behavior of others, in virtue of the fact that those instances fit the general pattern of meat eating. The practice theory gets the result that there exists a rule against meat eating. But, the objection goes, there is no rule against meat eating. This is simply a case where members of the community do something (refrain from eating meat) that they think should be done. But in this case as well there actually *is* a rule against eating meat. It is a rule of the *conventional moral code* of the relevant society. These rules, just like the rules of *popular defensive baseball strategy*, are summary rules. Talk of the rules of conventional morality is not uncommon.

"Why did you retire after your third strike?" a baseball player can appropriately answer by citing a rule of baseball, saying, "Because retiring after three strikes is required by MLB rule #5.04(c)." But to the question, "Why did you draw closer to home when that weak player was at bat?" it seems natural not to cite the summary rule of defensive baseball strategy, but instead to skip right over the supposed summary rule and directly cite the considerations that it attempts to summarize, saying, "Because drawing closer to home allows me to more rapidly retrieve the short-distance balls that such a player is likely to hit."

There is a genuine difference between nonsummary and summary rules in this respect, but it is not as stark as the above suggests. It is not as if nonsummary rules can explain behavior whereas summary rules cannot. When an explanatory question is asked relevant to a nonsummary rule, the nonsummary rule can be provided as an answer. By contrast, when an explanatory question is asked relevant to a summary rule *either* the summary rule can be provided as an answer *or* the independent considerations summarized by that rule can be provided as an answer. For example, when asked, "Why did you draw closer to home?" one can respond by citing the relevant independent considerations, as in the example from the previous paragraph, *or* one can respond by citing the summary rule itself, saying something like, "Oh, that's the accepted strategic practice. The popular defensive baseball strategy, which I learned as a child, requires it. Why? Should I not have drawn closer?" This response explains why the player drew closer to home. Whether or not it *justifies* that behavior depends on the circumstances and the status of the particular system of summary rules. But precisely the same can be said of nonsummary rules. They can be cited to explain behavior, and whether they justify behavior depends on the circumstances and the status of the particular system of nonsummary rules.

Still, there is a difference here: Unlike nonsummary rules, summary rules are often skipped over when explaining behavior. But this is unsurprising. In the case of summary rules, there are two things available to be cited in the explanation: the rule itself and the independent considerations that the rule attempts to summarize. But in the case of nonsummary rules, since they do not attempt to summarize independent considerations, there are no independent considerations to skip to. There is only one thing available to cite: the rule itself. The reason that summary rules are occasionally skipped over when explaining behavior is that there is something to skip to.

Here, then, is the question: Is this difference between summary and nonsummary rules relevant to whether summary rules are rules—specifically to whether they are prescriptive rules of the type for which the practice theory is meant to account? I see no reason to think it is relevant. As suggested above, if proponents of the counterexample are insistent, we can surrender the term "rule" and restrict its use only to nonsummary rules. But summary rules are still *something*. They still prescribe behavior. Whatever we call them, summary rules are normative or evaluative standards against which behavior is systematically judged. And just like nonsummary rules, they are a product of our behavior and attitudes. If we wish to withhold from them the title of "rule," then the practice theory should be labeled not as a theory of "rules," but as a theory of human-created "normative standards," such as the "normative standard of recognition" that Hart claims is at the heart of every legal system.

But defenders of the counterexample can do more than insist on a restricted use of "rule." They can point out that if we allow summary rules, like the rules of defensive baseball strategy, then there will be far more rules than anyone has thought: rules against licking electrified fences, against dipping credit cards in hydrochloric acid, etc.[28] This is the second objection that one might offer in defense of the practice theory. It appears that any type of behavior that is (a) rare and (b) thought to be foolish will be prohibited by a summary rule. This is indeed an unwelcome result.

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

Keeping this fact in mind, we can see that the practice theory already rules out these outlandish rules while ruling in those summary rules that there intuitively are. The practice theory is able to do this because of the nature of the internal point of view. As mentioned in Section 2, the internal point of view is an intentional mental state with two objects: a pattern of behavior and individual instances of behavior. To take the internal point of view one evaluates instances of behavior *in virtue of their conformity or nonconformity with a pattern of behavior*. It is not enough to regard instances of credit-card-in-hydrochloric-acid-dipping as foolish. One must have some mental representation of the behavior type *dipping a credit card in hydrochloric acid* and evaluate behavior tokens based on whether they fall under that description. Since people do not think in these terms—since they apply a variety of other descriptions, like *destroying a credit card* or *dipping an object of some value in a destructive acid*—they do not take the internal point of view toward the pattern of not dipping credit cards in hydrochloric acid. Therefore, the practice theory's conditions are not met. People do not take the internal point of view toward the pattern of not dipping credit cards in hydrochloric acid simply because people do not think about hydrochloric acid. They do not often enough conceive of the behavior of themselves and others in those terms.

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

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

[28] Thanks to Scott Shapiro for raising this point and suggesting these examples to me.

A third defense of the counterexample is as follows: Rejecting the counterexample and adopting Hart's practice theory gets the mistaken result that a rule of baseball and a rule of popular defensive baseball strategy are the same type of rule, but these are very different types of rules.[29] The best response to this objection is to simply point out that the practice theory simply does not yield this result. The practice theory *does* imply that both rules are social rules. In that sense they are the same. But that the two rules are of the same broad type does not entail that they are not of very different subtypes. Indeed, the summary/nonsummary distinction carves out two very different types of social rules.

6. The Normativity of Law

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

Before discussing the normativity problem in depth, it is worth noting an important difference between it and the putative counterexample. The counterexample aims to show that the practice theory fails to explain social rules *in general*. If it succeeds, then the practice theory fails to explain not only the rule of recognition, but also rules of games, etiquette, fashion, etc. The normativity problem, by contrast, purports to doom the practice theory *specifically in its role within Hart's theory of law*. The objection is simply that law has a certain normative character and that the practice theory cannot account for that.[30] So when assessing the success or failure of the normativity problem, we are interested in the specific sense in which law is normative. The normativity problem stands or falls based on what exactly the normativity of law turns out to be.

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

If both of the practice theory's conditions are descriptive, how can they be sufficient for the existence of a normative entity like the rule of recognition of a legal system? This is a specific version of a widely discussed question in general jurisprudence. Concern with the so-called "normativity of law" has motivated a great deal of the literature in philosophy of law for at least the last half-century (Coleman and Leiter 1996, 241; Perry 2006, 1176). Law's normativity is supposed to be a pretheoretical datum. It is a feature of law that theories of law must reckon with, and with which the practice theory cannot successfully reckon (Dickson 2007; Dworkin 1977; Green 1990 and 2008; Letsas 2014; Perry 2006; Raz 1975).

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

[29] My thanks to Niko Kolodny for raising this point.
[30] It is perfectly compatible with this that the practice theory successfully explains the nature of games, etiquette, etc.

normative.[31] Law is normative in only one of the two senses. And, as I argue, practices that are normative in that sense can be explained in descriptive terms.[32]

7. Varieties of Normativity

We have already been operating with a distinction between regularities and rules.[33] If everyone goes to the movies on Friday, that is a regularity. Not going to the movies is *unusual*. By contrast, buying a ticket before entering the theatre is a rule. Entering without a ticket is not just unusual, it is *forbidden*. This is the characteristic feature of rules that distinguishes them from mere regularities: The existence of a rule entails that an evaluative or deontic concept—some of which are moral, like the concepts *moral* and *immoral*, and some of which are not, like the concepts *permissible* and *forbidden*—applies.[34]

Among these rules, there is another distinction that has come to prominence very recently, though under different labels: between those with deliberative weight and those without deliberative weight.[35] A rule has deliberative weight when it is appropriate to treat that rule as counting for or against certain courses of action when

[31] Of course, there may be other senses in which law might be normative. One might think that even if individual laws lack normative force of a certain kind, nonetheless the legal system as a whole is, in some sense, normative. For instance, Robert Alexy is well known for having, like others, proposed that legal systems necessarily make a "claim to correctness." (For the introduction of this thesis, see Alexy 1978, and for further developments see Alexy 1998 and 2002.) Alexy's core idea is that this claim to correctness is *moral*, and that, therefore, the positivist separation thesis is false. There are two ways to think about this system-level claim to correctness thesis. First, the claim to correctness might be such that its normativity trickles down to individual laws, so to speak, imbuing those laws with moral normative force. In this case, Alexy's view, and views like it, fit into one of the two senses of legal normativity discussed here. Second, however, the claim to correctness's normativity might be thought to remain at the system level. In that case, this is genuinely different from the two senses in which law might be normative discussed in this paper, but it brings us too far afield.

[32] Strictly speaking, law can exhibit either, but it only *necessarily* exhibits one of them and therefore theories of law must only account for that variety of normativity.

[33] For the best explication of this distinction, see Sellars 1954.

[34] This feature is also had by other normative objects, such as rights, duties, authorities, permissions, and reasons.

[35] The distinction that I have in mind is more commonly labeled as "robust" and "merely formal" normativity, though I believe these labels obscure what is at the heart of the distinction, which is the rule that normative considerations ought to play in practical deliberation. Regardless, this distinction appears in Berman 2019, 138; Broome 2013 and 2015; Copp 2004; Enoch 2019; Leiter 2015; Lord and Maguire 2016; McPherson 2011, 2017, and 2018; Plunkett 2019, 113–5; Plunkett and Shapiro 2017, 48. Parfit (2011, 144–6) hints at the same sort of thing with his distinction between rule- and reason-involving conceptions of normativity. It is worth noting two differences between Parfit's distinction and mine, aside from the obvious fact that his is only briefly gestured at. First, there can be reasons, as Parfit understands them, even where there is no rule to have deliberative weight or not. Second, I shy away from the word "reason" because analytic jurisprudence is full of mentions of "merely legal reasons," which lack deliberative weight, as I understand it.
Also, it might be wondered whether there are other varieties of normativity as well. For instance, Millikan's view of linguistic norms seems to fit into neither of these categories. That, however, is because linguistic norms, as Millikan understands them, are "nonevaluative norms." That is, these are norms in the sense that a simple mathematical average is a norm (see Millikan 2005, vi). Biological norms are regularities. They are not rules or normative in any sense. According to Millikan, language involves no "prescriptive rules." She says: "The bare existence of a convention neither mandates, nor gives permission for anything" (Millikan 1998, 173).

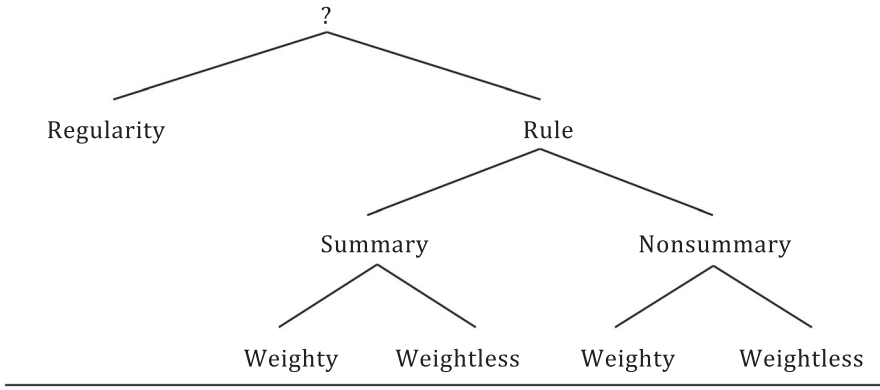

Figure 1. Four types of rules, classified according to the summary/nonsummary and weighty/weightless distinctions

deliberating about what to do. Or, putting the same somewhat more schematically, a rule r requiring or prohibiting an action φ has *deliberative weight* for an agent S at a time t when it is appropriate for S to treat r as counting for or against φ-ing when deliberating about whether to φ at t.[36] Not all rules have deliberative weight.

Examples are inevitably controversial, but they are helpful for getting a grip on the distinction. Figure 1 above shows four types of rules (although there are undoubtedly more), so it is worth quickly going through all four.[37]

7.1. Weighty Summary Rules

There is a somewhat well-known rule of popular health folklore: One must drink eight glasses of water each day. This is a summary rule.[38] As it turns out, this rule is misguided. With a normal diet, one can be perfectly healthy without drinking any

[36] Why introduce the term "deliberative weight"? Could I just as well have used the term "reasons," which is now ubiquitous in moral, political, and legal philosophy? Unfortunately, reasons-talk is not consistent enough among various philosophers to be useful here. We could say that some or all rules constitute or generate reasons. And on this way of talking, it is meant that when a rule constitutes or generates a reason, then one really must follow that rule, or, at least, that one must include that rule in deliberation and follow it when the reasons it constitutes or generates are not outweighed by other reasons. Put this way, the central claim of the second half of this paper is that not all rules constitute or generate reasons and that one way that a practice like law might be normative is that it consists of rules even though those rules may or may not constitute or generate reasons. This is perhaps what Parfit (2011, 144–6) has in mind in a short and suggestive passage. Alternatively, however, the literature in philosophy of law contains considerable mention of "merely legal reasons," and these are understood not to be reasons at all in the previous sense, since one can have a merely legal reason to do something without it being appropriate to give that consideration any weight in deliberation. Since what matters for the purposes of this paper is whether or not a rule is the kind of thing that is appropriate to include in practical deliberation, I think it best to talk directly about that and minimize potentially confusing reasons-talk.

[37] The question mark appears at the top of this figure because, as far as I am aware, there is no English word for the type of entity of which both regularities and rules are instances.

[38] The rules of conventional morality, also called "popular morality" or "social morality" and often contrasted with "critical morality" or morality itself, are other good examples.

water whatsoever. Still, this rule exists. And, moreover, there are occasions when it has deliberative weight. For instance, if one is at risk of developing a damaging reputation as an unhealthy person, one may have prudential reason to follow the eight-glasses-of-water rule. Similarly, if one has promised to obey the rules of popular health folklore, then the rules may acquire moral deliberative weight.

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

7.2. Weightless Summary Rules

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

7.3. Weighty Nonsummary Rules

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

7.4. Weightless Nonsummary Rules

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

One might wonder whether weightless rules are really possible. There are only two ways to resist the conclusion that cases like B and D are instances of weightless rules: insist either (1) that in cases like these there ceases to be a rule or (2) that such rules exist but retain some deliberative weight. Neither option seems promising. Option (1) strikes me as a dramatic departure from ordinary language and our ordinary conception of a *rule*. We certainly talk about social rules that continue to exist even when we are in private and which we have not promised to obey, and that the specific rules just discussed apply in those cases is, I take it, a matter of stipulation. Option (2) is *ad hoc*, at best. There is nothing about moral or prudential reasons that guarantees that there will always be such a reason to obey every social rule. And there may be other varieties of reasons, but it is hard to assess whether they always attach to social rules without knowing what

types of reasons they are. And, of course, any other varieties of reasons would have to attach to social rules not just in some cases, but of necessity, in all cases.

So there are at least two senses in which a practice, like law, might be normative. Law might be normative in the sense that all of its rules are deliberatively weighty all of the time. For example, if all illegal behavior is, by that very fact, also immoral, then law is normative in this sense. We can call this *normativity in the deliberatively weighty sense*. Alternatively, law might not always have deliberative weight. Perhaps, like popular health folklore or school dress code rules, law consists of rules that occasionally lack deliberative weight. In such cases, though, law still consists of rules, which are more than merely regularities of behavior. So law might be normative merely in the sense that it consists of rules. We can call this *normativity in the rule-constituted sense*.[39]

8. Terminology

Having distinguished these two varieties of normativity, the next step is to determine whether law is normative in the deliberatively weighty sense or in the rule-constituted sense and to determine how that affects the practice theory's ability to account for the foundation of law. But first, it is worth briefly discussing the word "normative." Is it a mistake to honor the rule-constituted phenomenon with that title? Perhaps. Rule-constituted normativity could be considered, so to speak, the *lesser* form of normativity when compared to weighty normativity. But the weighty/rule-constituted distinction already codifies the difference between them. So it is not obvious why we should, in that case, be so conservative with the term.

Nonetheless, if we wish to withhold the title "normative" from the rule-constituted phenomenon, then we must offer a replacement title. Even if rule-constituted normativity is not "genuine" or "real" normativity, whatever that means, it is a genuine feature of certain human practices and it *places genuine constraints on theories of those practices* (see Kramer 1999; Leiter 2015). The rule of recognition of a legal system is a rule, and not just a regularity. That fact alone is enough to rule out early positivist theories of law, such as those of Bentham and Austin. "Rule-constituted normativity" is just a name for the feature of law by which it consists not of regularities, but of rules. That, as Hart points out in the early chapters of *The Concept of Law*, is what habit- and sanction-based theories cannot explain.

9. Defense of the Practice Theory against the Normativity Challenge

Terminological issues aside, the question remains: In what sense is law normative? If law is normative in the weighty sense, then law's normativity is indeed an obstacle to the success of the practice theory as an account of the foundation of law. If,

[39] There are distinctions in the literature that are similar to this one, and some of them may be identical to it, but it would constitute too egregious a digression to discuss them in detail. See Broome 2013 and 2015; Kaplan 2017; Leiter 2015; McPherson 2011; and Parfit 2011. I can say emphatically that the weighty/rule-constituted distinction is not the same as the regulative/constitutive-rules distinction, the normativity/norm-relativity distinction, the moral/conventional distinction, the internal/external-reasons distinction, or the hypothetical/categorical-imperatives distinction. See, in corresponding order, Searle 1969; Hattiangadi 2007; Southwood 2011; Williams 1979; and Kant 1997.

alternatively, law is normative only in the rule-constituted sense, then the practice theory is in much better shape. If the normativity of law is just the fact that law consists of rules as opposed to regularities, then the practice theory seems *designed* to account for the normativity of law. Law is a system of rules. Those rules derive their status as legal rules from the rule of recognition. The rule of recognition is nothing more than a social rule, which, according to the practice theory, is constituted by a regularity of behavior and an attitude.[40]

If the normativity of law is the fact that law essentially has moral, prudential, or some other kind of deliberatively weighty normative force, then the practice theory is doomed.[41] But law lacks that kind of normative force. If we use "normative" only for weighty normativity, then we should say that law is not normative. Of course, particular laws and particular legal systems sometimes have, e.g., the force of morality. But when this is the case, it is for reasons other than that those laws or legal systems are *legal*. Rather, it is because those legal systems are democratic and those particular laws are just, or something similar.

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

It has often been thought that law has moral normativity (Dworkin 1977, 48, 57; Perry 2006, 1174). Part of what makes this view tempting is that it is hard to see how anything less than moral normativity could place a genuine constraint on theories of law. The thought, correctly, is that something about law's prescriptive or normative character must rule out *at least some* theories of law. Austin's habit- and sanction-based theory fails to capture something normative about law. If the only candidate for this "something normative" is morality, then law must have moral force. But this line of thought will only tempt us if we have a blind spot for the way in which law might be, so to speak, *less* normative than morality but still *more* normative than habits and the threat of sanctions. This is rule-constituted normativity. Once it is available, the practice theory is back on the table.

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

Within the space of this paper, I cannot respond to every objection to the claim that law is normative merely in the rule-constituted sense. But I can respond to several of the most pressing objections, which I do in Sections 10 through 14.[42]

[40] Of course, it is possible to deny even that law is normative in the rule-constituted sense. See discussion in Plunkett 2019, 114.

[41] This kind of objection is most commonly associated with Dworkin 1977, 48–76.

[42] It might be wondered whether Hart himself would accept such a view of the normativity of law. See Kaplan 2017. I will not discuss it here at length. But it is worth pointing out that one of the very few occasions when Hart does use the term "normative" in relation to law he indicates that he sees the fact of law's normativity not as its having anything like moral or prudential force, but rather in its consisting of rules. In the Postscript, Hart (1961, 239) says that his theory "seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect."

10. The Triggering Objection

On many positivist and antipositivist views, laws are artefacts of human creation.[43] The central controversy concerns whether these artefacts nonetheless have deliberative weight. Typically, the deliberative weight in question is the deliberative weight of morality. As Stephen Perry (2006, 1174) boldly puts it: "Legal normativity is moral normativity."

Undoubtedly, some legal rules have moral force. How do legal rules, assuming we take them to be a variety of artificial social rules created by people, acquire this normative force? There is only one way. The only way for descriptive social events to have deliberatively weighty normative consequences is for those events to trigger some underlying norm such that that norm comes to apply to a state of affairs to which it did not previously apply.[44] For example, the descriptive fact that I utter the words "I promise to attend the recital" has the normative consequence that I am obligated to attend the recital. The descriptive fact about what words I say triggers an underlying moral norm that can be crudely put in the form of a conditional: "If you promise to φ, then you are obligated to φ." The descriptive fact satisfies the conditions in the antecedent, so one acquires an obligation of the variety indicated in the consequent.

All of this is familiar enough, and we saw several examples of it in Section 7. What matters for our purposes here is whether law consists entirely of socially created rules that trigger underlying deliberatively weighty norms. It is not enough that laws do this some of the time. All kinds of rules, including rules of games, clubs, fashion, and table manners, do this some of the time. The question is whether legal systems do this as a matter of *necessity*. Only if laws necessarily trigger deliberatively weighty norms does this fact constitute an essential characteristic of law that a theory of law must accommodate (Raz 2004, 6).

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

[43] For a good examination of how legal norms can themselves be "manmade," while the normativity involved is not, see Raz 2004, 5–6.

[44] The "triggering" phrase is a modification from a discussion of reasons in Enoch 2011. Accounts of this kind are common. Raz (2004; 2006) and Dworkin (1977) endorse triggering accounts of norms, though of different varieties. Also, on my own, admittedly controversial reading, Hume (2000) has a triggering theory of promising. Also, Shapiro's 2011 Bratman-inspired plan-based account of legal requirements is, at its heart, a triggering account.

does not actually demand that one wink. It is not that one is all-things-considered obligated to violate courtesy. Rather, as we are defining courtesy, failing to wink in such circumstances is not a violation of courtesy at all. Courtesy is a practice consisting of social rules that *necessarily* trigger underlying weighty norms.

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

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

Is there anything about *law* that guarantees that all laws have moral, or some other weighty, force?[45] This, of course, is an old and controversial question in general jurisprudence and I will not settle it here. There are many, no doubt, who would claim that law has the same kind of conceptual feature that courtesy has connecting it to morality. Though I cannot refute that view here, it is perhaps enough simply to note that the Hartian positivist would deny that law has any feature connecting it to morality in this way (Hart 1961, 207; Raz 1975, 164). If the triggering objection rests on the claim that law, or the concept of law, makes reference to morality or prudence or some form of weighty normativity in such a way as to rule out the possibility of weightless laws, then that objection is only as strong as the arguments for that position. All of this concerns us because the normativity of law was supposed to be a problem for the practice theory of rules. If that "problem" turns out to be no different than the claim that law has some conceptual connection to morality, then it is not a problem for the practice theory, but for positivism in general.

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

11. The Possibility Objection

It is natural to point out that, though law does not necessarily carry weighty normative force, it *can* carry such force and it is *this* fact that the practice theory cannot explain (Perry 2006). Law does, indeed, sometimes generate weighty normativity. I have suggested that this places no constraint on a theory of law. But that is an

[45] If the answer is yes, law would necessarily trigger some underlying weighty norm in the way that courtesy does.

oversimplification. The capacity of law to trigger weighty normative force does, if we like, place a constraint on theories of law. It is a feature of law that any putative theory must be able to explain. If the practice theory cannot explain this capacity of law, then it is not the correct theory of law.

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

12. The Reasons Objection

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

The most sophisticated version of this argument—developed by Leslie Green (1999) and building off of Joseph Raz's (1979) account of legal authority—starts from the fact that law consists of rules. All rules, Green (1999, 37) contends, constitute reasons for action. But this reason-generating capacity is out of the practice theory's explanatory reach. So the theory fails. And if Green is right that reason-generation is an essential feature of rules, then the practice theory fails not only in its specific application to law, but it fails to explain its direct object of explanation: rules.

Why should we think that all rules generate reasons? Green points out that rules can be cited in response to "why" questions. But rules can only be cited as explanations of behavior in this way if they are reasons (or, what perhaps comes to the same thing, if they generate reasons). So rules are reasons (Green 1999, 37–8).

What matters for assessing Green's argument—and this will not be surprising given similar discussions above—is what we mean by "reasons." If we understand only weighty normative considerations to constitute reasons, then the crucial premise in Green's argument—that only reasons can be cited in response to "why" questions—is false. We frequently cite weightless rules in response to the relevant type of "why" questions. Alternatively, if we understand rule-constituted normative considerations to constitute reasons, then all rules do generate reasons, but these reasons are just what the practice theory explains.

13. The Separation-of-Law-and-Morality Objection

It may be true that law is normative in the rule-constituted sense. And therefore the practice theory of law may, in general, be capable of explaining the normativity of law. But, it may be objected, none of this could have been accepted by H. L. A. Hart himself. The thought is that Hart's theory of law is not compatible with *any* account of the normativity of law. After all, Hart (1961, 211) followed other positivists like Bentham, Austin, and Kelsen in upholding "the distinction between what law is and what it ought to be." Doesn't this imply that Hart's theory of law must include only a descriptive account and not a normative one?

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

14. The Seriousness Objection

Famously, or infamously, Hart downplays the role of sanction in law. When it comes to the normativity of law, though, sanctions have often been thought relevant because they are what make legal consequences *serious*. This point is made by Joseph Raz (2004, 5–6), Scott Shapiro (2011, 114), and others. Unlike the bylaws of the local bridge club, legal rules have consequences that affect "central areas of life," such as where and how one lives, with whom one associates, whether one is drafted into the military in the service of which one might die, or whether one is convicted of a crime and as a result is put to death by the state (Raz 2004, 6). We are not talking about going to jail in Monopoly (Shapiro 2011, 114). We are talking about going to jail in *reality*.

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

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

15. Conclusion

In addition to the two problems with the practice theory discussed here—the putative counterexample and the normativity of law—there may be others. But these two are the most prominent. I hope to have shown that the practice theory has been

prematurely forsaken. Even when transported from the mid-twentieth century, in a time and place mired in ordinary language philosophy, to the early twenty-first century, where the focus of general jurisprudence is on reasons and the normativity of law, the practice theory retains significant promise.

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