

# Judging in Bad Faith

Eric J. Miller \*

Saint Louis University School of Law

---

## Rezumat:

Articolul abordează legătura dintre lege și morală, în principal din perspectiva abordării acesteia prin prisma judecătorului, prin prezentarea unor teorii de raportare la cele două noțiuni.

## Abstract:

Must judges apply the law “sincerely” or “in good faith?” H.L.A Hart famously argued that, if legal officials are to require conformity to the law from its subjects, they must accept the law as valid. Hart, however, stopped short of demanding that the personal motivations of legal officials match their public utterances.

In this article, I argue that a judge may be motivated to decide cases for reasons that have nothing to do with the law. Accordingly, the law is systematically de-centered from her calculation of how to decide. Legal norms operate only to constrain or justify her independently motivated action. Whatever the judge publicly says, she need not genuinely endorse the individual laws or the legal system as a whole while engaging in judgment over others. Such judges are often described as acting in “bad faith.”

Legal positivism supports bad-faith judging by separating the public and private attitudes of legal officials into distinct points of view: the moral or prudential and the legal. Positivists argue that these different point of view are either incommensurable or that the legal point of view excludes the moral. It turns out that Hart’s doctrine of the separation of law and morality sits firmly in the incommensurabilist camp. Joseph Raz is a prominent supporter of the exclusionist position.

Any theorist who argues that judicial acceptance is satisfied by the public utterances of legal officials is committed to some far-reaching consequences. If good faith is supposed to rest upon a judge’s personal belief in the law’s legitimacy, no judge need act in good faith for a legal system to exist and operate effectively. That is, a valid legal system may exist even though every judge believes it is immoral.

**Keywords:** theories of law, judicial independence, judgment, good faith

---

\* My thanks to the many people who have reviewed and commented upon earlier versions of this paper, including John Gardner, Professor of Jurisprudence, Oxford University, Robin Kar, Professor of Law and Philosophy, University of Illinois, Ekow Yankah, Associate Professor of Law, Benjamin N. Cardozo School of Law, Scott Berman,

Associate Professor of Philosophy, Saint Louis University, Matthew T. Bodie, Associate Professor of Law, Saint Louis University, Chad W. Flanders, Samuel P. Jordan, Kerry A. Ryan, Anders Walker, and Molly J. Walker Wilson, Assistant Professors of Law, Saint Louis University.

## Introduction

Modern theories of law often presuppose some particular attitude on the part of legal officials towards the rules of the legal system if the system is to count as legal at all.<sup>209</sup> At the very least, if legal officials are to require conformity to the law from its subjects, then the members of them should treat the law as valid.<sup>210</sup> Such attitudes are often caught under the headings of “commitment”<sup>211</sup> to or “acceptance” of law.<sup>212</sup>

Acceptance presents legal positivists with a seeming conundrum, which stems from the nature of moral and legal justification.<sup>213</sup> One common account of moral justification determines what we have reason to do all things considered.<sup>214</sup> So understood, morality appears to leave no room for the legal (or any) morality-independent practical point of view. In other words, if legal reasoning is the same as moral reasoning, and “not a special skill to do with the pursuit of a specific logic.”<sup>215</sup> then what, legally, we ought to do is equivalent to what, morally we ought to do, without remainder.

Legal positivism purports to be a theory about the existence and efficacy of at least one practical point of view. If a

distinct legal point of view is to exist, it must replace an all-things-considered evaluation of the appropriate action on the grounds that some reasons should not, or cannot, count in determining what to do.

Points of view are intransitive: they provide divergent ways to assess the value of an action and preclude the balance of reasons from operating to produce some unique result.<sup>216</sup> Thus, for example, a judge may believe that killing a human being is immoral. However, the law may require her to impose the death penalty in a particular case. She is faced with a dilemma: should she do what is morally right or what is legally right? Here, she is at a crossroads. The moral reasons for decision conflict with the legal ones: neither option seems better than the other nor are they of equal value, nor is there some other point of view from which to determine the outcome.<sup>217</sup> Here, the legal and moral points of view are intransitive.



<sup>209</sup> See, e.g., Joseph Raz, *Ethics In the Public Domain* 215 (1995) (discussing the necessary attitude to law embraced by legal officials).

<sup>210</sup> Joseph Raz, *Practical Reason and Norms* 175 (1990) (discussing the interrelation of legal validity and conformity to law).

<sup>211</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, 139-140 (1994); see also Joseph Raz, *The Authority of Law* 158 (1979) (discussing attitude of commitment to the law).

<sup>212</sup> H.L.A. Hart, *The Concept of Law* 108-116 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994).

<sup>213</sup> For an extended statement of the conundrum, see Philip Soper, *Legal Theory and the Claim of Authority*, 18 PHIL. & PUB. AFF'S, 209-237 (1989). Soper argues that “the standard claim of authority within legal systems is inconsistent with the basic tenet of positivism. Legal officials claim what positivism denies — namely, that there is a necessary connection between law and morality.” *Id.* at 209. He returns to this claim later in the article.

*See id.* at 234

<sup>214</sup> See, e.g., HEIDI M. HURD, *MORAL COMBAT* 3-5 (1999) (discussing the claim that “right action is that action which accords with the balance of reasons”); Raz, *supra* note 2 at 36 (morally justified action is action “all things considered”).

<sup>215</sup> Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 *RATIO JURIS* 1, 10 (1993).

<sup>216</sup> See RAZ, *supra* note 2 at 43-44 (discussing intransitivity); Joseph Raz, *Morality of Freedom* 322, 325-326 (1988) (suggesting that intransitivity exists when: “(1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other.”). While Raz uses this definition of intransitivity to identify incommensurable values, it also describes the conflict of exclusionary reasons. *See infra*.

<sup>217</sup> *Id.* See also Hans Kelsen, *General Theory of Law and State* 374 (Anders Wedberg, trans., 1961) (discussing conscientious objection in terms of the legal and moral points of view).

The moral claim that, all-things-considered, one ought never to kill a human being does not resolve the legal one. The legal point of view can make “‘practical differences’ [in her reasoning] that is, [it] is capable of [empowering] agents to act differently than they would have without the [point of view’s] guidance.”<sup>218</sup> We could call this a “crossroads” experience:<sup>219</sup> she know what, morally, she ought to do but nonetheless recognizes that there is a reason not to act on the balance of reasons.

For a point of view actually to exist or be effective in a given society, some individuals must accept and use it as generating legitimate norms of conduct. In turn, any adequate account of acceptance depends upon which version of intransitivity is used to explain how practical points of view can exist as separate from morality. I shall suggest that the versions of legal positivism advanced by H.L.A. Hart and Joseph Raz each relies on a different form of intransitivity to explain the existence of a point of view. Hart suggests that (what I call) points of view are incommensurable with morality,<sup>220</sup> Raz suggests that they act to exclude the direct operation of moral

reasons in certain circumstances. These methodological and substantive divergences in turn produce different accounts of acceptance.

Both Hart and Raz agreed that a judge’s attitude to the normative status of the law has adjudicative implications. Raz believed that a judge cannot demand that the parties conform to legal norms without claiming to endorse the law as morally justified.<sup>221</sup> Hart believed that legal officials can accept the norms of a legal system without claiming to provide moral reasons for decision. While Raz appeared to believe that judges may misrepresent, deliberately or accidentally, this attitude of endorsement, Hart’s view is compatible with judges openly criticizing the law as immoral and pursuing, for prudential or non-legal motives, their own projects through the law.

Both theories of acceptance are consistent with the claim that a judge may personally believe that the law is immoral, and so adopt a prudential attitude to the law. Both theories, in other words, are agnostic as to the personal motivations of legal officials and regard acceptance as concerned primarily with a judge’s public utterances. The judge, as a prudential agent, need not be directly

---

<sup>218</sup> Scott J. Shapiro, *The Difference that Rules Make* in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33, 37 (Brian Bix, ed., 1998). Shapiro uses “motivating” instead of empowering in the text quoted. I believe, however, that his motivational account of exclusion is somewhat problematic, and so have replaced the term.

<sup>219</sup> I get this useful locution from Scott Berman, Associate Professor of Philosophy at Saint Louis University.

<sup>220</sup> I use the term “points of view” in a slightly different sense to that in which Hart often uses it. For example, Hart famously speaks of there being two “points of view” necessary to understanding the law, the “internal point of view” and the “external point of view.” See Hart, *supra* note 4 at 89. I prefer to call these ways of understanding the law “perspectives,” an reserve the use of the language of points of view for something like what Hans

Kelsen calls a “normative order.” See Kelsen, *supra* note 9 at 374 (discussing the legal and moral points of view). See also R.A. SAMEK, *THE LEGAL POINT OF VIEW* 35-51, 73-81 (1974) (discussing the legal point of view in relation to a system of norms).

<sup>221</sup> “I have constructed a rule concerning the behavior of the agent (‘I ought not to buy sweets’) and accepting a rule concerning the behavior of another (‘He ought not to buy sweets’). I can believe in the validity of the first for reasons of convenience. But I cannot justify a belief in the second by such reasons. That it may be to my advantage if I refrain from having sweets is a reason for accepting that I ought not to buy them. But that it is to my advantage that you refrain from buying sweets is not a reason for me or anyone else for accepting that you ought not to buy them. Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 *OXFORD J. LEGAL STUD.* 123, 130 (1984)

**The moral reasons for decision conflict with the legal ones: neither option seems better than the other nor are they of equal value, nor is there some other point of view from which to determine the outcome.**

motivated to act by legal norms. Accordingly, law is systematically de-centered from her calculation of how to act. Legal norms operate only to constrain or justify her independently motivated action. Whatever the judge publicly says, she need not *genuinely* endorse the individual laws or the legal system as a whole while engaging in judgment over others. Such judges often described as acting in “bad faith,”<sup>222</sup> or “insincerely”<sup>223</sup> or as lacking in “candor.”<sup>224</sup>

In response to this worry, a third account of judicial acceptance demands that the judge personally believe that the law is legitimate. There are a variety of different descriptions of this “internalized” attitude to legal norms:<sup>225</sup> all of them, however, fail to extinguish the sincerity

gap between personal and public motivations or exclude the possibility that a judge may be self-deceived. Any theory of acceptance that depends upon the personal motivations of agents acting from a point of view is susceptible to this critique. The idea that judges can and should disregard their personal political or moral reasons for decision is unnecessary for any acceptable account of law or what it means to speak as a legal official from the legal point of view.

Furthermore, any theorist who argues that judicial acceptance depends upon the public acts of legal officials is committed to some far-reaching consequences. The points-of-view approach uses a membership norm (a rule of recognition) to define what counts as a valid utterance from the point of view. Points of view are identified by criteria, contained in the rule of recognition, that determine what (and who) counts as speaking on behalf of the point of view. Claiming that the existence or efficacy of a rule of recognition depends upon some public act undermines the view that someone must personally believe in the point of view’s legitimacy for it to be in force. On the contrary, if acceptance is supposed to include or rest upon some personal belief about the law’s

<sup>222</sup> Bad faith judging is entertained as a legitimate option by, among others, Duncan Kennedy and Oliver Wendell Holmes. Kennedy suggests that judicial decision making is often ideological choice carried on by judges in “bad faith.” See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION, FIN DE SIÈCLE 2*, 23 (suggesting that judges engage strategic or ideological or (in my terms) prudential behavior, but that “the ideological element in adjudication is ‘denied’ by many ... judges [who] operate in ‘bad faith.’”). Holmes argued that: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” O.W. HOLMES, *THE PATH OF THE LAW 8* (Reprint ed. 1996) (1897).

<sup>223</sup> See, e.g., Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 987 (2008).

<sup>224</sup> See, e.g., David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987).

<sup>225</sup> On internalizing norms, see Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1158 (2006) (henceforward Shapiro, *Internal*); Scott J. Shapiro,

*The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE*

197, 198 (Stephen J. Burton, ed., 2000) (henceforward Shapiro, *Bad Man*). The claim that the judges personal and public reasons must match is one form of judicial sincerity. See Schwartzman, *supra* note 15 at 992-94 (describing sincerity as a correspondence between personal intention and public utterance).

legitimacy, no judge need accept a legal system's rule of recognition for the system to exist and operate effectively.<sup>226</sup> That is, a valid legal system may exist *even though every judge personally believes it is not (morally) justified*. Accordingly, the paradox or conundrum between positivism and judicial attitudes is a chimera.

In Section II, my goal is to disambiguate two general strategies for rejecting the transitive nature of moral justification and so establishing the existence of practical points of view. In Sections III and IV, I argue that the first strategy is broadly incommensurabilist; the second, exclusionist. I shall demonstrate that each provides room for a bad-faith or insincere judge personally motivated by her own prudential reasons, to operate as a legal official. In so doing, I reject those versions of legal positivism that demand that a judge be personally committed to the law, and in Section V I argue that the only defensible versions of acceptance entail either that no judge need personally accept the law or that acceptance must mean at must public acceptance.

## I. CROSSROADS

Any claim that a point of view exists independent of morality must respond, at some level, to the problem of "particularism":<sup>227</sup> the claim that:

even when [rules — or any statement from a point of view] give the right result, we can still ask: Why do I have a reason to guide my actions by the rule rather than just doing the right thing? If it is the right thing to do, then that is the only reason I need.<sup>228</sup>

The particularist argument asserts that the logic of practical reasoning is transitive, so that whenever an agent makes a practical decision she should attempt determine what to do all things considered. Using a rule or point of view to justify her action short-circuits the decision process in a manner that is at best irrelevant and at worst irrational.<sup>229</sup>

One way of characterizing decisions from a point of view is that they replace an all-things-considered evaluation of the appropriate action by suggesting that

---

<sup>226</sup> The concept of acceptance suggests that a judge, or any participant in a point of view, can take a range of positions towards the legitimacy of the point of view ranging from agreeing that "some standard of criticism" can be applied, See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 69 (1993). All page references are to the reprinted version), to full endorsement of the norms' value. Acceptance need not entail a strongly positive attitude towards the rule. Treating a rule as valid need only entail that there is a reason, not necessarily a strong reason, for acting on the rule. For Hart, one such reason is that it is a member of the relevant point of view. As Joseph Raz notes, it is "important to distinguish between one who endorses a rule ... and one who accepts it ..." See Raz, *supra* note 3 at 155 n.13. Raz thinks that endorsement depends upon a stronger sort of reason than that which motivates acceptance: a moral reason rather than a merely prudential one. *Id.* Accordingly, the difference between acceptance and endorsement is the normative counterpart of

the epistemological distinction between accepting something for the sake of argument and believing it. For a discussion of the range of normative attitudes compatible with acknowledging a point of view, see Neil MacCormick, *The Concept of Law and the Concept of Law*, 14 OXFORD J. LEGAL STUD. 1, 18 (1994) (identifying five levels of acceptance of a legal system).

<sup>227</sup> Scott J. Shapiro, *The Rationality of Rule-Guided Behavior: A Statement of the Problem*, 42 SAN DIEGO L. REV. 55, 57 (2005).

<sup>228</sup> *Id.* at 55. As Shapiro more abstractly puts it: "if [an action required by a rule] is supported by the balance of reasons, then [a rational person] should perform that act, not because the rule requires this, but because rational agents should always act according to the balance of reasons." *Id.* at 55-56.

<sup>229</sup> *Id.* at 56. See also HURD, *supra* note 6 at 17 -23, 69-94 (1999) (rejecting the claim that we should treat legal rules as providing a source of practical authority that can provide a justifiable reason for acting contrary to morality).

some reasons should not, or cannot, count in determining what to do. The claim is that there are points of view that cover the same subject-matter as morality but stake out a different position from which to assess the propriety of a course of action. These positions may conflict with morality and provide a ground for rejecting or ignoring moral reasons for action. We could call this a “crossroads” experience: we know what, morally, we ought to do but nonetheless feel or believe that there are reasons for ignoring the balance of reasons.

The crossroads experience marks out a familiar form of conflict arising in law and in life. To take a Razian example, Jeremy the soldier is ordered by a superior to appropriate a civilian’s van.<sup>230</sup> All things considered, Jeremy thinks he should disobey the order; from the military point of view, however, he thinks he should obey the order. “He is faced with conduct which is right on the merits but wrong in disregarding the [military] reason. His reaction is characteristic. He is torn between conflicting feelings.”<sup>231</sup> A final, and celebrated, example is Sartre’s

contrast between a student who has to decide whether to stay at home and care for his sick mother, or leave home to join the army to fight against the Nazi occupation of France.<sup>232</sup> The student’s “wavering,”<sup>233</sup> like Jeremy’s conflicted feelings, express the quintessential crossroads experience.<sup>234</sup>

Points of view explain the crossroads experience produced by conflicts among competing reasons for action using a pluralist, rather than unitary, approach to practical reasoning. Values and points of view are incommensurable if competing options represent radically different schemes of valuing.<sup>235</sup> Rather than aligning on some unitary scale that would permit Jeremy to weigh the reasons for and against taking the van, the competing values of upholding personal property as against ensuring military security “talk past” each other. Incommensurability thus rejects all-things-considered evaluations because there is no one strongest reason for action, nor could there be.<sup>236</sup> There is no way to “weigh”<sup>237</sup> or “balance”<sup>238</sup> or “rank”<sup>239</sup> (by “strength” or “importance”<sup>240</sup>)

<sup>230</sup> See RAZ, *supra* note 2, at 41-43 (discussing the case of a soldier trying to balance conflicting reasons for action).

<sup>231</sup> *Id.* at 43.

<sup>232</sup> See Jean Paul Sartre, *Existentialism Is a Humanism*, in REASON AND RESPONSIBILITY: READINGS IN SOME BASIC PROBLEMS OF PHILOSOPHY, 438, 441 (Joel

Feinberg & Russ Shafer-Landa, eds., 1965).

<sup>233</sup> *Id.*

<sup>234</sup> The crossroads experience I describe does not express some lack of information, and so does not turn on “the level of certainty we have in our beliefs.” Schwartzman, *supra* note 15 at 994. Instead, an agent might with certainty believe she has equally binding but incompatible choices, and personally endorse only one of them. In such circumstances, she may announce a reason for decision that, though publicly acceptable and obligatory for her personally, is not the one that she would select, all things considered. It is this crossroads that raises, even if it does not require, the possibility of insincerity.

<sup>235</sup> Thomas Nagel, *The Fragmentation of Value*, in THOMAS NAGEL, MORTAL QUESTIONS 128 (1979).

<sup>236</sup> Coleman recognizes the problems with such an assertion. See Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 n.3 (1995) (“To say that what I ought to do depends on the reasons that apply to me is not to say that the justification of everything I do is settled by reason and reason alone. There are many choices I am justified in making for which I cannot offer conclusory reasons. Still, reasons figure prominently in determining what I ought to do.”).

<sup>237</sup> JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 115 (1980). See also JOHN FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983).

<sup>238</sup> See BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 97 (1993).

<sup>239</sup> See John Finnis, *Commensuration and Public Reason* in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215, 215 (Ruth Chang, ed., 1997); Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1170 (1998).

<sup>240</sup> See Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 110, 110-28 (Ruth Chang, ed., 1997).

or otherwise commensurate the various competing reasons and identify one of them as decisive (or “conclusive”<sup>241</sup>). An agent cannot to rationally choose which one “overrides,”<sup>242</sup> or “outweighs”<sup>243</sup> the other relevant competing reasons.

#### A. Incommensurability, Values, and Points of View

Points of view represent a particular way in which reasons may be incommensurable. Incommensurability may be limited or unlimited, retail or wholesale. Incommensurability is *unlimited* if every value is incommensurable with every other.<sup>244</sup> There could be no test to distinguish the incommensurable from the commensurable, because (so this position holds) as an ontological matter values are not commensurable. Incommensurability is *limited* if some values are incommensurable with each other and some are not. Limited incommensurability is only possible if there is some “mark of incommensurability”<sup>245</sup> to distinguish values which are incommensurable from those that are commensurable.

Limited incommensurability comes in three forms. The first is retail: it asserts that incommensurability can obtain within one world view or domain of value, and arises between particular reasons or

values within that domain. There may be only one world view or there may be multiple: nonetheless, incommensurability does not track particular domains.<sup>246</sup>

The other two are wholesale: they assert that there are different domains of value, and these domains can be incommensurable with each other. Accordingly, incommensurability can help track the difference between world views or domains.<sup>247</sup>

For example, John Finnis provides a retail version of Sartre’s student’s dilemma. Its horns might be represented as requiring a choice between different types of sociability.<sup>248</sup> Though he acknowledges the two options are both benevolent, one embodying an “impartially benevolent” domestic ideal of friendship or familial commitments,<sup>249</sup> and the other manifesting the “disinterested benevolence” of a certain public form of political commitment,<sup>250</sup> Finnis recognizes that they are incommensurable.<sup>251</sup> Accordingly, because for Finnis the student’s chooses among incommensurable values within the same world view,<sup>252</sup> the type of incommensurability is limited and retail. Faced with a different choice, the domestic sort of sociability we owe to our friends and family may be commensurable with some other form of

<sup>241</sup> See RAZ, *supra* note 2, at 27-28.

<sup>242</sup> See *id.* at 26-27; RAZ, *supra* note 3, at 75.

<sup>243</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 946 (1987).

<sup>244</sup> Similarly, commensurability would be unlimited if every value is commensurable with every other.

<sup>245</sup> RAZ, *supra* note 8, at 325.

<sup>246</sup> Thus, something other than incommensurability would be necessary to identify a domain of value.

<sup>247</sup> It need not be the case that incommensurability is the only marker of different domains. Incommensurability may be over-inclusive: there may be some incommensurable conflicts among

reasons that track domains and some that do not. My claim is that, on this version of the limited incommensurability thesis, it is not under-inclusive.

<sup>248</sup> See Finnis, *supra* note 29, at 176 (discussing Sartre example).

<sup>249</sup> *Id.* at 143.

<sup>250</sup> *Id.* at 149

<sup>251</sup> *Id.* at 175-176 (distinguishing “interdependencies” that exist among family members, on the one hand, and “members of a sound political community, on the other”); see also *id.* at 141-149 (discussing different forms of familial and political community).

<sup>252</sup> In fact it is even more narrow than that: it is a conflict between incommensurable reasons among the same scheme of value.

sociability, even if that which we owe to the larger society is not.<sup>253</sup>

A wholesale version of incommensurability holds that all values within one domain are incommensurable with all values within another domain. Accordingly, when we say that the domestic value of family ties or companionship is different from the political value of public welfare or patriotism, what we mean is that each companionship reason is incommensurable with each public welfare reason, and vice versa.<sup>254</sup> Thomas Nagel, for example, considers that the “specific obligations to other people or institutions” are incommensurable with utility, which he defines as “the effects of what one does on everyone’s welfare.”<sup>255</sup> For Nagel, these two values, which are plausibly the ones at stake for Sartre’s student, represent different and incommensurable domains.

The values are incommensurable, Nagel claims, because they cannot be reduced to a single scale of value. Each value measures the worth of a particular option from the position of a particular point of view, and none of the values or points of view entailed by these values is homogenous with any of the other values or their entailed points of view. Each value is “formally different”<sup>256</sup> and cannot be reduced to any one of the other values. Nagel believes their formal difference is apparent simply by considering the form

or nature of the different types of value. Thanks to this formal difference among incommensurable values we have a means by which to assert that values must be incomparable: given the nature of the values, the values cannot be compared against each other.

The other version of wholesale incommensurability claims that each domain embodies a different category of value. Here, the different domains come with their own conceptual apparatus to structure the nature of value in each domain. It is not simply that there are two different sets of values, companionship and patriotism, and every value in each is incommensurable with those in the other. It is that similar categories in one value serve a different function in the other. Accordingly, companionship and patriotism represent two different and incommensurable points of view. From one point of view, sociability can be represented in terms of domestic arrangements; from another, sociability can be represented in political terms. But we are referring to two different schemes of value when we use “sociability” in these different ways, and to confuse the two is to make something akin to a “category mistake.”<sup>257</sup>

Perhaps the most prominent rejection of a unitary approach to practical reasoning is the Kantian distinction

---

<sup>253</sup> Accordingly, this limited form of incommensurability requires some test to identify when different forms of sociability are incommensurable, and when they are not.

<sup>254</sup> This is the thought pithily expressed by E.M. Forster when he announced that, “if I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country.” E. M. Forster, *What I Believe*, in *TWO CHEERS FOR DEMOCRACY* (1962).

<sup>255</sup> NAGEL, *supra* note 27, at 129-130. Finnis too may be a wholesale incommensurabilist of this sort. His seven types of basic goods do not overlap but instead carve out different, incommensurable

domains of value. Accordingly, Finnis’ retail discussion suggests that incommensurability alone is insufficient to mark off one domain from another. There may be retail incommensurabilities within wholesale domains. Nonetheless, the incommensurability of all values within one domain with all those from another domain could still be a characteristic way of tracking different domains of value. See Finnis, *supra* note 29, at 59-97 (discussing seven basic values which are self-evidently incommensurable).

<sup>256</sup> *Id.* at 131-132.

<sup>257</sup> See, e.g., GILBERT RYLE, *THE CONCEPT OF MIND* 16-18 (2002)

between prudential and moral points of view.<sup>258</sup> Kant believed morality and prudence are incommensurable, such that prudence might recommend breaking a promise to, e.g., gain a business advantage, whereas morality would forbid doing so.<sup>259</sup> Here, the agent is at a crossroads.<sup>260</sup> She must choose one or other path, but with morality and prudence as ultimate grounds for decision, there is no third reason that can help the agent pick among them.<sup>261</sup> Indeed, because these grounds for decision overlap and may point in the same direction, it is often hard to determine whether an agent is really acting morally or out of self-interest.<sup>262</sup>

Hans Kelsen adapts the idea of ultimate reasons to insist that the different normative orders of morality and law are categorically incommensurable. Kelsen considers an example analogous to the position of Sartre's student, where a law compelling all citizens to undertake military service conflicts with a moral obligation compels something else (for example, the duty to tend to a sick mother).<sup>263</sup> We could represent these conflicting obligations as falling under different normative orders, each structured by a different "chain of

validity."<sup>264</sup> Each normative order has a separate "basic norm" that serves to both identify it as a separate point of view and generates its binding force.<sup>265</sup>

Kelsen thinks that:

[f]rom the point of view of positive law as a system of valid norms, morality does not exist as such; or, in other words, morality does not count at all as a system of valid norm if positive law is considered such a system. In the same way ... law does not appear at all as a system of valid norms if we base our normative considerations on morality. From this point of view, there exists a duty to refuse military service, no contrary duty. Neither the jurist nor the moralist asserts that both normative systems are valid. The jurist ignores morality as a system of valid norms, just as the moralist ignores the positive law as such a system. Neither from the one nor from the other point of view do there exist two duties simultaneously which contradict each other. And there is no third point of view.<sup>266</sup>

Kelsen acknowledges that the moral and legal points of view create the crossroads effect, bringing an agent like Sartre's student "under the influence of

---

<sup>258</sup> See Immanuel Kant, *Grounding for the Metaphysics of Morals; With on a Supposed Right to Lie Because of Philanthropic Concerns* §§421-424 at 31-33 (3d. ed., James W. Ellington, trans., 1993)

<sup>259</sup> *Id.* at 13-14.

<sup>260</sup> See *id.* at 13 (suggesting that when reasons of prudence and morality conflict, "the will stands, as it were, at a crossroads between its a priori principle [moral duty], which is formal, and its a posteriori incentive [happiness], which is material").

<sup>261</sup> See *id.* at 16-17 (discussing the "natural dialectic" between considerations of moral duty and personal happiness).

<sup>262</sup> See *id.* at 10-12 (discussing a variety of examples in which, while agents perform good acts, we would refrain from calling them moral because they are done out of self-interest). This idea, that we can confuse morality and prudence, and that

from a moral point of view it is best to keep them separate, forms the basis of Hart's critique of natural law theory in *Separation of Law and Morals*. See HART, *supra* note 18 at 54. While Hart approached the issue from a sympathetic but devastating critique of utilitarian legal theory, he sought to engage in the same disambiguation as Kant, warning "the danger that law and its authority may be dissolved in man's conceptions of what ought to be and the danger that existing law may supplant morality as a final test of conduct and so escape criticism." *Id.*

<sup>263</sup> See Kelsen, *supra* note 9, at 374.

<sup>264</sup> See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* 97-106 (2d. ed., 1990) (discussing Kelsen's concept of a chain of validity as essential to identifying a system of norms).

<sup>265</sup> *Id.* at 100-102.

<sup>266</sup> *Id.*

two ideas which push him in opposite directions,<sup>267</sup> a “collision of duties,”<sup>268</sup> that endow him with “both a legal and a moral personality.”<sup>269</sup> Psychologically, the agent split in two, regarding the same act – refusing to engage in military service – from two different points of view, established by two different normative orders.

While either version of wholesale incommensurability might make sense of the concept of a point of view,<sup>270</sup> Hart seemed to adopt something like the Kelsenian approach in both his *Separation of Law and Morals*<sup>271</sup> and the *Concept of Law*.<sup>272</sup> Like Kelsen, Hart believes that a point of view constitutes an integrated

<sup>267</sup> *Id.* at 375.

<sup>268</sup> *Id.* at 408.

<sup>269</sup> *Id.* at 377. There are a variety of problems with Kelsen’s view that I shall sidestep here, most particularly his attempt to dissolve the conflict between legal and moral points of view by claiming that they do not logically conflict. See, e.g., *id.* at 375; see also Hart, *supra* note 4, at 293 n.4 (rejecting this aspect of Kelsen’s theory). But Kelsen and Hart share a view that moral norms are in some way posited. For Kelsen’s views, see Kelsen, PTL at 62. See also Raz, *supra* note 3, at 130-31 (discussing Kelsen’s account of moral norms). For Hart’s view, see Hart, *supra* note 4, at 85-93 and the discussion, *infra*.

<sup>270</sup> For example, Nagel seems to associate the first, and Kelsen the second version of wholesale incommensurability with the idea of a point of view. See NAGEL, *supra* note 27, at 129-130.

<sup>271</sup> See Hart, *supra* note 18, at 620. Hart does not think our values can “fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.” *Id.* He rather seems to think that the values form separate, incommensurable, systems. In other words, Hart adopts one of the wholesale positions. His discussion in the *Separation of Law and Morals* is most consistent with the second, point-of-view version of wholesale incommensurability.

<sup>272</sup> Hart appears to have been strongly influenced, during the time he wrote *Separation of Law and Morals* and *Concept of Law* by the ordinary language philosophy championed in Oxford by his friend John Langshaw Austin. See NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM*, 133- 136, 142-146 (2004). Austin’s philosophy emphasized that we use language not only to describe things but also to perform actions, so that in addition to physical acts there are speech acts. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 19-20 (2d. ed., 1975). One of Austin’s examples of a speech act is the act of naming a ship: to successfully perform the act, a person must be entitled to name the ship (occupy the proper office) and employ the correct procedure. See J.L. Austin, *Performative Utterances* in *PHILOSOPHICAL PAPERS* 233,

235, 239- 41 (3d ed., 1979). These offices and procedures are posited rather than, e.g., metaphysical: created by humans and used by humans. Hart’s account of morality in *Concept of Law* is strikingly similar to Austin’s; however the proper office is occupied by a “social group” or “the community at large,” Hart, *supra* note 4, at 169, 86, and the procedures for enacting them include social custom, *id.* at 86, established through the group’s expression of a “common sentiment and belief and placed in a stable environment.” *Id.* at 92. His discussion of the social rules of “primitive communities,” *id.* has attracted criticism for its cultural snobbery and anthropological crudity, but it is better understood as a feature of his employment, in *Concept of Law*, of an Austinian ordinary language approach that commits him to identifying some social offices and procedures for enacting morality. Hart famously identifies law as the union of primary rules of obligation and secondary rules of recognition, change, and adjudication. See *id.* at 91-99. Morality equips a social group with only primary rules: in such a “primitive” system (primitive in the sense of lacking secondary rules), the process for enacting and enforcing primary rules is relatively limited. Hart thus provides a relatively sketchy origin myth as a thought experiment to explain the ways moral obligations can arise. *Id.* at 91-92.

Hart, then, conceives of morality in terms of a set of rules. They are important and have far reaching consequences if breached, *id.* at 173- 75. If social custom is the positive procedure for generating moral rules, then there is “no means, in such a society, of deliberately adapting the rules to changing circumstances,” *id.* at 92. Moral rules are static and immune from change through legislative fiat. *Id.* at 175-78. Finally, the group uses moral rules “as the basis of claims, demands, admissions criticism, or punishment,” *id.* at 90 — and, we might add, praise or encouragement, explanation and teaching — in a manner distinct from their legal use. Moral rules, in virtue of their voluntary character, are maintained, enforced, and adjudicated through appeals to conscience and a widely shared consensus as to the desirability of a particular rule. See *id.* at 178-80

system of norms and that each system is identified by a different set of procedures for bringing the norms into existence, identifying which norms are members of the point of view, and performing normative activities such as explaining, justifying, and guiding conduct from the relevant point of view.<sup>273</sup>

### 1. Incommensurability and Intransitivity

Each of the different accounts of incommensurability (unlimited or limited, retail or wholesale) entails that different values or points of view are intransitive.<sup>274</sup> The conflicting values or points of view may not be measured on a single scale (of strength, importance, etc.) and so balancing is impossible. As Joseph Raz puts it, there is no rational way to break the deadlock because “reason has no judgment to make concerning their relative value.”<sup>275</sup>

Intransitivity exists where *A* is a reason for *B*, and *B* is a reason for *C*, but *A* is not a reason for *C*. A slightly different way of making the same point is that: “*A* and *B* are incommensurate if it is neither true that one is better than the other nor true that they are of equal value... (1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than

the other.”<sup>276</sup> While intransitivity is introduced by Raz to explain the retail concept of incommensurability, it can also explain both forms of wholesale incommensurability.

Under the retail version, intransitivity helps identify those values within a given world view that are incommensurable with each other. Raz, for example, is a retail incommensurabilist. He argues that intransitivity is the “mark of incommensurability”<sup>277</sup> and so serves to establish that particular values are incommensurable. For Raz, if a value, e.g., the value of companionship with one’s mother, is intransitive with another value, e.g., the value of patriotically fighting with one’s country then they are by definition incommensurable. Neither option is better or worse than the other, nor are they equal, nor is there some third value by which to commensurate them.<sup>278</sup>

This form of value-based intransitivity can be applied to Nagel’s wholesale version of incommensurability simply by universalizing the nature of the conflict, so that each value within a given domain is intransitive with every value within another domain. In this case, every companionship reason would be incommensurable with any patriotism reason. Both of these versions of limited incommensurability, retail and wholesale, entail the direct comparison of values and

<sup>273</sup> *Id.* at 89-90.

<sup>274</sup> Intransitivity exists where *A* is a reason for *B*, and *B* is a reason for *C*, but *A* is not a reason for *C*. For various discussions of intransitivity, see RAZ, *supra* note 8, at 322, 325-326 (“*A* and *B* are incommensurate if it is neither true that one is better than the other nor true that they are of equal value... (1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other.”).

<sup>275</sup> RAZ, *supra* note 8, at 324. *And see id.* at 334 (“Incomparability ... marks the inability of reason to guide our action.”).

<sup>276</sup> See RAZ, *supra* note 37 at 322, 325-326; BIX, *supra* note 30, at 96; ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONO-

MICS at 55, 67-8 (1995) (adopting in part Raz’s definition); Richard A. Epstein, *Are Values Incommensurable, Or Is Utility the Rule of the World?*, 1995 UTAH L. REV. 683, 686 (1995) (same); *and see* Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2148-51 2160 (1990); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 801-802 (1994); Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L. J. 813, (1994).

<sup>277</sup> RAZ, *supra* note 8, at 325.

<sup>278</sup> *Id.*

the identification of incommensurability with intransitivity.<sup>279</sup>

Under the second wholesale version endorsed by Kelsen and Hart, we do not compare the value of sociability in quite this way. Instead, the claim is that using sociability in the companionship way is not the same as using it in the political way. Sociability encompasses two different values, domestic and political. The student cannot use sociability as a political term when talking about companionship (nor vice versa) without losing distinctive features of the normative ordering to which it refers and in which it operates. The domestic value of sociability (call it dociability) cannot be represented in terms of the political value of sociability (call it pociability), and vice versa. They do not refer to the same normative ordering, nor are the values reducible to some common or all-encompassing third way of valuing sociability. Dociability and pociability are intransitive, in the sense that they represent different ways of valuing through different normative orders.

However, the student's dilemma does not end by recognizing that there are different normative orders, each with different practical implications that apply to his circumstances. If the student wants to work out what is not just what sociability is, but also what are his duties under it he must go further and ask, for each use of sociability, does the normative ordering that structures each point of view, and in which the different uses of sociability (dociability or pociability) operates embody a worthwhile way of valuing, which is to ask whether the point of view is itself valuable.

It might turn out that the sort of intransitivity that precludes translations of sociability from the domestic to the political use of the term does not, without more, render the two points of view incommensurable. Dociability and pociability may be incommensurable as to meaning (untranslatable without loss), but commensurable as to value. After all, it might turn out that we can rank the different points of view, so that the domestic point of view provides a better scheme of value than the political. In that case, the value of dociability should override the value of pociability whenever they conflict.<sup>280</sup> So the student's choice is straightforward: he should stay with his mother.

To show that dociability and pociability are incommensurable is to show that they embody two different world views or normative orders, and that neither normative order is more valuable than the other, nor are they equal in strength. In other words, the points of view are themselves intransitive as to value. While this form of limited incommensurability is structurally different from the first two, it nonetheless requires a (indirect) comparison of values and the identification of incommensurability with intransitivity. The things compared are values: the value of each different ordered system of norms. We might call this second-order incommensurability: a point of view precludes ranking the first-order uses of a particular term as more or less appropriate by providing a second order reason for regarding them as incommensurable as to value. Accordingly, a point of view presents a second-order reason to regard

---

<sup>279</sup> A feature of Nagel's formal difference theory is that different sets of values, that is, different points of view, do not overlap. See NAGEL, *supra* note 27, at 130. The set of, e.g., personal obligation values does not share any members with the set of, e.g., social welfare values. Accordingly,

sociability cannot both a personal obligation and a matter of social welfare. To be one type of value is to not-be the other.

<sup>280</sup> This is, it seems to me, E.M. Forster's point. See Forster, *supra* note 46.

the terms as intransitive as to value. As we are about to see, this structure of first and second order reasons is also a feature of Raz's discussion of exclusionary reasons.

### *B. Exclusion and Intransitivity*

The varieties of crossroads experiences are not exhausted by incommensurability. It seems odd to suggest that Jeremy faces a conflict among incommensurable values talking past each other. Rather, these values could perhaps readily be ranked. In that case, the crossroads experience derives from the intransitive nature of the options on the table, even it does not have incommensurability as its source. Joseph Raz has identified exclusion as an alternative grounds of intransitivity, one that also accounts for the crossroads experience.

In *Practical Reason and Norms*, Raz notes that we often confront "conduct which is right on the merits but wrong in disregarding [some institutional source of reasons for actions]." A police officer may be morally right, for example, to refuse to use effective but occasionally dangerous choke-holds to subdue violent detainees.<sup>281</sup> That reason may, however, conflict with authoritative departmental orders upon which the officer's colleagues, including his partner, rely in dangerous situations. It seems plausible to recognize that the institutional order can continue to operate as a valid reason for action despite this conflict and is not simply trumped by the moral reason. Accepting that there is a genuine conflict here, however, requires us to recognize

that the standard for justifying the action cannot be what is right all-things-considered.<sup>282</sup> Rather, "[t]he peculiarity of the [crossroads experience] is that we are aware that the action can be assessed in two ways which lead to contradictory results."<sup>283</sup>

Raz's innovation here is to demonstrate how exclusion operates both to explain the crossroads experience and provide an incommensurability-independent manner by which to reject unitary conceptions of morality.<sup>284</sup> His claim is that the hierarchical structure of the conflict of reasons precludes an all-things-considered evaluation. Some hierarchically superior reason operates to block all the first order reasons from operating, at least from a particular point of view. From the point of view of the police department, for example, an officer ought only to consider reasons within the scope of departmental policy (including those reasons not conflicting with departmental policy). The officer knows the obligations imposed upon her by both morality and the department. She may regard them as commensurable: all things considered, it's better to do what is morally right. Nonetheless, she does not experience this as an all-things-considered evaluation. If Raz is right about this sort of crossroads experience, then what does all the work here is the claim that the reasons are of a different order, and so intransitive.

The exclusionist argues that the department's ability to legislate policy for its officials generates a separate point of view from which to evaluate what the officer ought to do. Exclusion provides an

---

<sup>281</sup> See e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (dangerous chokeholds used to subdue resulted in deaths and were predominantly used to subdue minority detainees).

<sup>282</sup> This sort of crossroads case "can hardly be interpreted as ordinary first-order conflicts." RAZ, *supra* note 2, at 43

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

account of how this process works: there are two orders of reasons, first order reasons, such as “when faced with violent detainees, use a chokehold to subdue them,” that requires the officer to use the chokehold in certain dangerous circumstances, and second order reasons, such as “If I am to follow departmental policy, the department demands that I ignore reasons that conflict with its properly-enacted first-order reasons,” that exclude conflicting first-order reasons from operating. Of course, there must also be some reason for thinking that the department has the power to command its officers to ignore conflicting non-departmental reasons.<sup>285</sup>

Most modern legal theorists who accept the point-of-view argument do not consider the incommensurabilist option. Perhaps one reason might be that incommensurability renders obscure why anyone from a legal point of view should care about moral critiques of the law. The opposite, however, need not hold. If law and morality often overlap, if they often concern the same subject-matter, then morality often speaks to the same issues as does the law.<sup>286</sup> Accordingly, from a *moral* standpoint we do care what the law does, and we can engage in a thoroughgoing critique of the law’s moral justifications and moral impact. Thus, for example, both law and morality may have something to say about whether removing a feeding tube from a brain-dead patient

is a wrongful act.<sup>287</sup> The obligations announced by the law may overlap with morality or they may not: to the extent that they do so but generate morally distasteful results, then from the moral point of view we may critique the legal point of view as morally sub-optimal.

Asserting that law and morality often coincide — that they tend to attend to the same sort of thing — makes no assumption, however, that such attention is produced by moral criteria for legal validity. Any overlap may be purely contingent. Nonetheless, the moral interest in critiquing law and legal rules may be quite urgent, even though it proceeds from a point of view that is external to the law’s. And it may be legally relevant, even though the law’s perspective is external to morality.<sup>288</sup>

The moral and legal overlap argument is also Hart’s moral justification for legal positivism. Incommensurabilists can accept that “the development of legal systems had been powerfully influenced by moral opinion, and, conversely, that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles.”<sup>289</sup> Mutual influence and development requires only a coincidence of interests, not an equivalence of value. Law may be prudentially concerned to reflect moral considerations without internalizing its values. And morality may find that legal solutions are morally

---

<sup>285</sup> This problem — of legitimacy or the right to legislate — is one that arises for the exclusionist in a manner that it does not for the incommensurabilist. I shall suggest that, for the incommensurabilist, so long as the legal system has a legal right to legislate, then its legislation is valid whatever morality or prudence might counsel. For the exclusionist, there is no similarly hard distinction between legal and moral senses of right, legitimacy, and obligation. Thus the legal right to impose obligations (legal validity) at bottom rests upon moral legitimacy. I

shall discuss this necessary connection between law and morality, *infra*.

<sup>286</sup> Raz, *supra* note 7, at 8.

<sup>287</sup> See, e.g., *People v. Eulo*, 63 N.Y.2d 341, 472 N.E.2d 286 (N.Y. 1984).

<sup>288</sup> For such correspondence, see Hart, *supra* note 4, at 204-205 (discussing coincidence or “correspondence” of law and morality, and the manner in which this permits moral criticism of law).

<sup>289</sup> Hart, *supra* note 52 at 54.

relevant to practical problems.<sup>290</sup> As Hart himself puts it, “[t]he word ‘ought’ merely reflects the presence of some standard of criticism; one of those standards is a moral standard, but not all standards are moral.”<sup>291</sup>

The incommensurability of law and morality provides the force of his critique of certain notions of law-abidingness. For Hart, there is no moral duty to be law-abiding: to think so is to mistake a moral obligation for what is only a legal obligation — a legal duty not a moral one. The problem with conjoining law and morality is that it provides a justification for treating law-abidingness as a moral virtue. A healthy legal system, Hart seems to believe, is one in which citizens feel free to critique the law rather than unthinkingly follow it, so as to determine whether the law provides defensible grounds of conduct. Such grounds are not to be found in legal validity alone: the “extreme case [in which] the internal point of view ... [is] confined to the official world,”<sup>292</sup> so that the citizens obey habitually, without a critical reflective attitude as to the worth of the legal norms would be “deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.”<sup>293</sup>

The invocation of the slaughterhouse seems to mirror the concern that prompted him to defend legal positivism in *The Separation of Law and Morality*:

the claim that positivism provides a better purchase for morality to criticize the law than natural law does. For Hart, the mark of a vibrant legal system is one in which the citizenry are concerned about the rule of recognition; that is, one in which people are politically and morally engaged with the law. The citizens (and the judiciary) can take this attitude, he suggest from both within and without the legal system, by accepting the rule of recognition as valid, and by providing an external critique of it as prudentially or morally justified.<sup>294</sup> Nonetheless, it is the incommensurability of morality with law that enables it to provide a citizen with some external ground to stand upon and from which to critique legal validity.

For a variety of reasons, however, the exclusionist approach has proven much more attractive. Accordingly, many theorists wishing to distinguish legal and moral points of view claim that the law provides an exclusionary reason for ignoring morality. That is, exclusionists claim legal reasons provide a first-order reason for action and a second-order reason for ignoring competing non-legal (moral) reasons. Since positive law can be generated by the valid or legitimate acts of authorized officials, and even although those acts may ultimately depend upon their (moral) authority to legislate, nonetheless, those acts can create laws that conflict with morality.<sup>295</sup>

---

<sup>290</sup> The coincidence and importance of moral and legal points of view suggest that an incommensurabilist could thus share Hart’s moral motivation for disambiguating the moral and legal meanings of shared terms. An incommensurabilist, looking at the law from the moral point of view, could argue along with Hart that such disambiguation has vital importance because “the simplest ... forms of moral criticism ... say plainly that laws may be law but too evil to be obeyed. This is a moral condemnation that everyone can understand and it makes an immediate and obvious claim to moral attention.” Hart, *supra* note 18 at 77-78.

<sup>291</sup> *Id.* at 69 He adds: “It does not follow that, because the opposite of a decision reached blindly in the formalist or literalist manner is a decision intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals.”*Id.*

<sup>292</sup> Hart, *supra* note 4, at 117.

<sup>293</sup> *Id.*

<sup>294</sup> See *id.* at 109-110: statements of moral approbation of the rule of recognition are permissible, but as external statements; see also *id.* at 103 (“an external statement of fact that the rule is accepted”).

<sup>295</sup> RAZ, *supra* note 3, at 176-77.

Thus, the law claims valid or legitimate authority because from the legal point of view, someone with the right to legislate did legislate. Even if morality counsels the agent to disobey the law (by not paying taxes), nonetheless, from the legal point of view the judge may justifiably punish her for that illegal act.

### *C. Is Hart a Kelsinian Incommensurabilist?*

Both exclusionists and incommensurabilists distinguish legal from moral obligations to argue that, depending upon one's point of view, an agent may be under a legal obligation to act but not a moral one. In what follows, I shall take Joseph Raz as the paradigmatic exclusionist.<sup>296</sup> In discussing the incommensurabilist perspective, I shall advance the claim that H.L.A. Hart embraced something like Kelsen's wholesale incommensurability to explain the difference between legal and moral obligation. Despite Hart's later endorsement of aspects of the exclusionist position,<sup>297</sup> and repeated scholarly assessment of Hart in exclusionist terms,<sup>298</sup> I believe Kelsinian incommensurability usefully illuminates

some features of Hart's otherwise mystifying contention that quite ordinary normative terms have different meanings in law and morality.<sup>299</sup>

In what follows, I shall use incommensurabilist as short-hand for someone who takes the Kelsinian position on the incommensurability of points of view.<sup>300</sup> Even if the claim that Hart was a Kelsinian incommensurabilist is ultimately unpersuasive, nonetheless incommensurability provides a useful stalking horse for developing some features of the exclusionist position. In particular, it serves to illuminate the stakes of the exclusionist claim, and in particular two of its most prominent legal-positivist arguments: that law claims moral authority and that legally valid norms need not be morally binding. In fact, they may not be fit for acting upon at all:<sup>301</sup> legally valid norms may be normatively inert.<sup>302</sup>

Both incommensurabilists and exclusionists face the correspondence problem: that obligation depends upon real objective relations between individuals, such that all obligation has in common the fact that it imposes upon an agent a duty to perform an act.<sup>303</sup> Thus, an obligation expresses some position

---

<sup>296</sup> Because he first advanced the idea of exclusionary reasons.

<sup>297</sup> H.L.A. HART, *ESSAYS ON BENTHAM*, 154-56 (1982).

<sup>298</sup> See, e.g., Raz, *supra* note 3 158-59.

<sup>299</sup> Hart, *supra* note 4, at 178-79, 202-12, HART, *supra* note 18 at 75, HART, *supra* note 89, at 146, 158. Hart reiterated this belief even when appropriating certain aspects of the exclusionist approach. One could easily hold the belief that the sense of obligation are incommensurable *and* that the law operates as an exclusionary reason to preclude legal and moral evaluation. This belt-and-braces approach depends, however, on being able to accept the incommensurabilist claim that "obligation" has different senses in law and morality. Most exclusionists reject this equivocal approach to obligation.

<sup>300</sup> The position I attribute to the incommensurabilists is one or other version of the wholesale account of incommensurability. The central differences between the two versions of wholesale

incommensurability are that under Nagel's version, values in one domain are directly incommensurable with values in another domain and the different domains cannot lay claim to the same value. Sociability operates in only one domain, domestic or political but not both, and it is part of the job of moral reasoning to work out which. The Kelsinian believes that values in one domain are incommensurable because the domains are incommensurable, and that each domain can lay claim to the same value. Sociability can operate in the domestic and political domains, but it imposes different obligations because its bindingness is generated by a different normative order.

<sup>301</sup> Hart, *supra* note 18 at 69 (suggesting that normative may mean only subject to some form of criticism, rather than morally binding).

<sup>302</sup> John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 201 (2001).

<sup>303</sup> See Hart, *supra* note 4, at 204-205 (discussing problems raised by "correspondence" of law and morality)

under norm that has more stringency or bindingness than an ordinary reason.<sup>304</sup> If *A* is under an obligation to *B*, then that *B* has some form of right to demand that *A* perform the act.

Exclusionists and incommensurabilists do not differ over the structure of obligation. That is, both think that if *A* is under an obligation to *B* then *A* has a binding reason to *B* to perform an act. Both exclusionists and incommensurabilists assert that even when a legal duty has the same form and content as a moral duty, nonetheless the legal duty derives from a (different) source,<sup>305</sup> which is the legislative act of some institution that has the right to create legal duties.

The problem for the wholesale incommensurabilist<sup>306</sup> is this: when legal and moral obligations conflict there cannot be a single, all-things-considered judgment about what one ought to do. That is because incommensurabilists reject the claim that there is a univocal and ultimate criterion of to commensurate

the legal and moral meanings of obligation. Picking the legal action (call it "laction") is best relative to *legal* criteria for rightness or goodness; picking the moral action (call it "maction") is best relative to *moral* rightness or goodness, and picking the prudential action (call it "paction") is best relative to *prudential* rightness or goodness.<sup>307</sup> If these are truly intransitive, however, then there could be no reason for picking laction over maction and paction because one couldn't compare them from the perspective of some more ultimate criterion. They are intransitive. At that kind of crossroads, there is no tie-breaking reason to ground choice among the different options.<sup>308</sup>

Hart's account of different points of view might take the following form. If Sartre's student is told that the obligations of sociability demand that he either stays with his mother or joins the French army, he can identify the nature of each demand by identifying "the existence of such rules, making certain types of behavior standard

---

<sup>304</sup> An obligation invests the norm with some special stringency, either because of the force of the reason or style of the reaction induced in other members of the relevant community. This definition of obligation is deliberately thin because it rather ecumenically includes both Hartian and Razian or Kelsinian approaches to obligation.

<sup>305</sup> Or perhaps that the moral duty is sourceless (it derives from reason, or some fact about the moral world, or whatever the moral theory one endorses states; although I can imagine that the various forms of constructivism can point to social, individual, or theological sources

<sup>306</sup> The incommensurabilist's attempt to avoid the particularist claim that morality renders law redundant requires something like the wholesale position. The law-preserving response to particularism cannot be retail, because the retail position does not track the different domains of law and morality, and so provides no reason for believing that the two are incompatible or intransitive. The two remaining options are that (1) law and morality never overlap, and so legal values cannot be moral values; or (2) that legal and moral values refer to different normative orders, so that the normative orders can lay claim to the same concept or value,

e.g., sociability, but the different uses refer to different schemes of value.

<sup>307</sup> While the discussion in terms of laction, maction, and paction clearly refers to the Kelsinian form of wholesale incommensurability, Nagel's formal difference generates the same problem. Reason cannot break the tie over which point of view to choose as a grounds for evaluating action. It cannot even clearly explain why there is a formal difference: we just intuit it because it is apparent. See NAGEL, *supra* note 27, at 129-130. 131-132.

<sup>308</sup> This type of choice is often presented as choice for no reason. I would suggest that there are reasons for each of the available choices, there is just no decisive or tie-breaking reason for choosing among them. See, e.g., John Gardner, *Law as a Leap of Faith*, FAITH IN LAW 19, 27 (P. Oliver, S. Douglas-Scott & V. Tadros, eds., 2000) ("Within each point of view there are reasons, but there are no further independent reasons to take one or the other point of view. It is a non-rational although (and thus?) courageous leap which brings a person to one or the other, and from the one to the other. Neither position is absolute except in its own relative eyes, and neither therefore answers absolutely to the other.").

... [and picking out] the normal ... background or proper context for such a statement.<sup>309</sup> Whichever context or set of rules or normative order<sup>310</sup> he points to will specify the point of view from which to evaluate the demands of sociability: the domestic point of view or the political.

Hart separates out the different normative orders by specify, for example, the different types of social pressure that could be brought to bear depending upon which point of view is selected.<sup>311</sup> Law and morality provide two different processes by which to call out non-conforming behavior: morality “depend[s] heavily on the operation of feelings of shame, remorse, and guilt”;<sup>312</sup> whereas the sort of criticism characteristic of the law are “physical sanctions”<sup>313</sup> that are wielded, in the case of civil law, by “a private individual” and in the case of criminal law “by the group of their official representatives.”<sup>314</sup> Hart’s position is that the appropriate type of criticism is different because structured by different rules.

One of the many differences between Hart and Kelsen is that Hart believes that

points of view (certainly the legal and moral ones) can conflict.<sup>315</sup> Unlike, for example, Nagel, Hart believes that different points of view *can* overlap. Hart’s emphasis on rules seeks to account for the different structures of norms in which different concepts operate. To return to the Sartre’s student example,<sup>316</sup> sociability can be a value in the domestic point of view *and* the political or patriotic point of view. The student can distinguish the domestic and political versions of sociability dependent upon the normative order — the point of view — he chooses to explain or evaluate, and so on, his actions. His explanations will appeal to different sets of rules to determine, for example, what counts as sociability within each normative order and what is its value for that order. To the extent that the different concepts of sociability do not point in the same direction but instead mark a crossroads, the companionship sociability points of view provide perspectives from which each can critique the other.<sup>317</sup>

<sup>309</sup> Hart, *supra* note 4, at 85.

<sup>310</sup> I take these to be equivalent.

<sup>311</sup> See Hart, *supra* note 4, at 85 (“Rules are conceived of and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear on those who deviate is great”).

<sup>312</sup> *Id.* at 86.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 87.

<sup>315</sup> Kelsen believes that law and morality cannot logically conflict. See, Kelsen, *supra* note 9, at 375; see also Hart, *supra* note 4 at 293 n.4 (rejecting this aspect of Kelsen’s theory).

<sup>316</sup> The values at stake — sociability, companionship, and politics — may all be moral values under Hart’s definition of morality in the *Concept of Law*. That need not preclude us from providing a different or more fine-grained account in which we attribute different points of view to the (moral) value of companionship and the (political) value of patriotism.

<sup>317</sup> Though neither can ultimately determine which ground the agent ought to choose. In other

words, each perspective provides a critique of the form, “If the student wants to be [companionable] [politically engaged] then he should [stay with] [leave] his mother.” As we shall see, *infra*, Hart endorses this type of position with respect to the incommensurability of the legal and moral points of view in both the *Separation of Law and Morals* and the *Concept of Law*. See, e.g., Hart, *supra* note 18, at 620 (our values cannot “fit into a single system, [such] that no one of them has to be sacrificed or compromised to accommodate another”; accordingly “the most powerful, because it is the simplest form of moral criticism [is that] ... laws may be law but too evil to be obeyed.”). One of the features of the concept of acceptance in the *Concept of Law* is that only in a primitive society must “the bulk of society ... generally share, accept, or regard as binding the ultimate rule of recognition.” Hart, *supra* note 4, at 114. Here, there is no difference between the legal and moral grounds for criticizing legal norms. In a modern legal system, however, legal and moral become sufficiently distinguished that only in pathological legal systems is the moral subsumed into the legal. See *id.* at 117.

Hart repeatedly insists that the legal sort of obligation (lobligation) is a genuine obligation but not in the same way as a moral obligation (mobligation).<sup>318</sup> Furthermore, his approach in the *Concept of Law*, and again in the *Essays on Bentham*, is not primarily exclusionary. That is, he does not distinguish between the legal and moral points of view as being different in scope, but rather different in kind.<sup>319</sup> For Hart, the judge or legislature's right to impose legal duties (lobligations) stems from a legal (perhaps a political) not a moral right.<sup>320</sup> This legal right to legislate, and the norms enacted pursuant to this right, are, he insists, all different in kind from moral norms. The legal obligation is fundamentally different from the moral one (a lobligation is not a mobligation).

Once the choice is made among points of view, we can describe the normative reasons for or against a particular course of action from within that system of justification.<sup>321</sup> If, however, we are to respond to critiques from a different point of view, we have perhaps two options (if we are to make ourselves intelligible). We can either refuse, and say that we are talking about laction not maction or paction, and so the moral or prudential arguments do not fit our point of view; or we can respond in kind, arguing that the laction is justified by, not only our lobligation, but our mobligation and pobligation as well.<sup>322</sup>

What we *cannot* do, however, is provide a normative justification for the *existence* of lobligations (or the legal point of view) independent of the legal system of normative justification without thereby converting that justification into a moral or prudential (or other non-legal) one. Because the concept of obligation is equivocal, which justification we choose (lobligation, mobligation, or pobligation) cannot itself be justified independently of the different registers or schemes of justification without thereby changing both its meaning and its value. We thus need some non-normative account to explain how these registers came to exist, and how we can choose among them.<sup>323</sup>

For Hart, as a legal positivist, one such account is social practice: these different styles of justification are just those that we have been trained or disciplined to use in particular social circumstances,<sup>324</sup> and we continue to do so based on social pressure. Accordingly, because we have a practice of using the law in our normative relations, we choose among laction, maction, or paction based upon acculturation, social pressure, or some other empirical fact.

What I take this to entail is that, for wholesale incommensurabilists the description of the existence of law and lobligation is, in part, a matter of empirical sociology: the law is a normative system that exists (and is accepted) for non-normative reasons.<sup>325</sup> That is, we can

<sup>318</sup> HART, *supra* note 18, at 75 and HART, *supra* note 89, at 150-51, 159-160

<sup>319</sup> HART, *supra* note 4, at 167-80 and HART, *supra* note 89, at 159-160.

<sup>320</sup> HART, *supra* note 4, at 202 -12 and HART, *supra* note 89, at 156. Hart's discussion is reminiscent of Kelsen's account of the incommensurability of separate normative orders. See KELSEN, *supra* note 9, at 374.

<sup>321</sup> And made, not for reasons, although we might have a prudential reason to pick a moral or legal justification, that is, fear of social pressure.

<sup>322</sup> This I take to be the solution proposed by Hart in HART, *supra* note 18, at 77-78, and HART, *supra* note 4, at 200-12.

<sup>323</sup> This position is true of both forms of wholesale incommensurability. For Nagel, remember, the differences between points of view is formal and self-evident.

<sup>324</sup> I take this to be a Kantian, and not just a Hartian, explanation.

<sup>325</sup> Accordingly, descriptive sociology is conceptually necessary for this type of wholesale incommensurability, a point Hart insisted upon but for which he has been roundly criticized. See, Hart, Hart, *supra* note 4, at v (asserting that the *Concept of Law* may be "regarded as an essay in descriptive sociology"); see also e.g., NEIL MACCORMICK, H. L. A. HART 39 (1981) (asserting that this claim is "hotly disputed").

describe the choice to justify a particular action as laction, maction or paction as based upon pressure to conform to some normative system (law, morality, prudence). The issue becomes what the judge or citizen has to accept when she acknowledges (the existence of) distinct legal and moral points of view.

## 2. Accepting Incommensurable Points of View

For an incommensurabilist, any distinct point of view must have some criteria for identifying what are its norms and who gets to speak on its behalf (Hart calls this the “rule of recognition”).<sup>326</sup> The rule of recognition operates to identify which rules count as legal, that is, which constitute “a binding common standard of behavior [for] those whose official power *qua* ‘legal power’ is dependent ultimately upon that very rule.”<sup>327</sup> The rule of recognition thus has adjudicative consequences: if a legal system is to impose obligations upon its subjects, the officials must “accept” the rule of recognition, as well as the norms derived from it, as valid.<sup>328</sup> Hart’s jurisprudence attempts to describe just what this attitude entails.

In the *Concept of Law*, Hart thinks that claims about membership and validity presuppose a particular attitude on the part of the speaker. Validity claims

constitute what Hart calls “internal statements ... expressing the [attitude] of those who accept the rule of recognition.”<sup>329</sup> What the speaker accepts is that the rule of recognition establishes the shared criteria that are (indeed, must be) used to determine what utterances and norms count as belonging to the point of view.<sup>330</sup> Thus, any statement asserting that a point of view is valid, or otherwise communicating acceptance, suggests that some group of individuals recognize the point of view as existing and efficacious.<sup>331</sup>

Hart initially introduces the concept of acceptance in conjunction with the internal perspective (Hart calls it the internal point of view). Acceptance makes its first appearance in his more general discussion of rule-following:

[w]hen a social group has certain rules of conduct, . . . it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’<sup>332</sup>

In the *Concept of Law*, acceptance explains the manner in which rules, or a particular point of view (constituted in part by a community’s “social practice”),<sup>333</sup> gains normative force. The mere fact that a community shares patterns of behavior

---

<sup>326</sup> See, e.g., HART, *supra* note 4, 100-103. The rule of recognition “determine[s] the criteria which settle the validity of the rules of a particular legal system.” MACCORMICK, *supra* note 117, at 21.

<sup>327</sup> MACCORMICK, *supra* note 117, at 22.

<sup>328</sup> Hart, *supra* note 89, at 154-56. See also Hart, *supra* note 4, a 58- 59 (existence of law dependent on its acceptance). Note that valid here does not mean legitimate, i.e., morally binding.

<sup>329</sup> HART, *supra* note 4, at 108.

<sup>330</sup> Hart suggests that it is a feature of “this rule of recognition, in terms of which [the speaker] assesses the validity of a particular statute, [that it]

is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system.” *Id.*

<sup>331</sup> See *Id.* at 116 (“the ultimate rule of recognition in terms of which the validity of other rules is assessed ... if it is to exist at all, must be regarded from the internal point of view as a public, common, standard of correct judicial decision, and not as something which each judge merely obeys for his part only.”).

<sup>332</sup> *Id.* at 89.

<sup>333</sup> *Id.* at 68-69).

does not us tell much about whether the regularity is normative or adventitious.<sup>334</sup> Conduct may conform to a rule because the participants purposely act as the rule directs or because of unthinking habit, or coincidence. Since people may follow norms (or not) for a variety of reasons we need some explanation detailing *why* individuals follow the rules to distinguish those whose behavior is habitual or accidental from those whose is conduct deliberate and reflective.<sup>335</sup>

Hart insists that rule-guided conduct can only be explained on the condition that the rule-follower treats the rule as a norm.<sup>336</sup> As Hart puts it, acceptance is a “distinctive normative attitude ... consist[ing] in the standing disposition of individuals to take [the relevant] 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.”<sup>337</sup> He argues that normative concepts such as obligation and right depend upon the internal perspective of a participant; the “critical reflective attitude”<sup>338</sup> adopted by

an agent when she engages in the standard normative activities of explaining, justifying, and guiding conduct from the relevant point of view.<sup>339</sup>

Hart contrasts the internal perspective with the “extreme external point of view”<sup>340</sup> that records or describes the agent’s regularly repeated acts without seeking to understand, from the participant’s perspective, why the participant acts as she does.<sup>341</sup> External statements simply describe or predict the participant’s conduct in terms of regularities of behavior.<sup>342</sup> The extreme externalist perspective is liable to miss important features of a social practice, at least from the participants’ point of view.<sup>343</sup> Accordingly, in the *Concept of Law*, Hart introduced a more moderate external perspective that enables “the observer ... without accepting the rules himself, [to] assert that the group accepts the rules.”<sup>344</sup> This moderate perspective is that of someone who “may from the outside refer to the way in which [group members] are concerned with [their rules] from the internal point of view.”<sup>345</sup> This type of

---

<sup>334</sup> On norm-governed and norm-guided behavior, see Scott J. Shapiro, *On Hart’s Way Out*, IN ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 149, 153 (Jules Coleman, ed. 2001) (“‘Norm-governed’ behavior is behavior that is subject to the regulation of an actual norm, whether or not the behavior conforms to the norm. ... ‘Norm-guided’ behavior ... is behavior that conforms to a norm for the reason that the norm regulates the action in question.”).

<sup>335</sup> See ROGER A. SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT (1992)

<sup>336</sup> MACCORMICK, *supra* note 117, at 30-31.

<sup>337</sup> Hart, *supra* note 4, at 255.

<sup>338</sup> *Id.* at 57.

<sup>339</sup> *Id.* at 89-90.

<sup>340</sup> *Id.* at 89.

<sup>341</sup> The extreme external perspective is that of “an observer who does not ... refer ... to the internal point of view of the group. Such an observer is content to merely to record the regularities of observable behavior in which conformity with the rules partly consists and those further regularities,

in the form of the hostile reaction, reproofs, or punishments with which deviations from the rules are met.” *Id.*

<sup>342</sup> This perspective permits the observer or theorist to avoid “giv[ing] any account of the manner in which members of the group who accept the rules view their own regular behavior ... [but instead to give an account] in terms of observable regularities of conduct predictions, probabilities, and signs.” *Id.* . This external point of view investigates social phenomena by identifying circumstances indicating the regular recurrences of a particular phenomenon; on the basis of these observed regularities we may, for example, predict the circumstances likely to result in an increase, decrease, or cessation of these repetitions. MACCORMICK, *supra* note 117, at 30-34. HART, *supra* note 4, 54-56. The major impact of the external perspective is to avoid characterizing the observed conduct as normative, or even undertaken in relation to rules.

<sup>343</sup> MACCORMICK, *supra* note 117, at 36-37

<sup>344</sup> Hart, *supra* note 4, at 89.

<sup>345</sup> *Id.*

observer seeks to understand the participants' internal perspective without endorsing any of the underlying values.<sup>346</sup> Hart would later take on board the friendly suggestions of his critics,<sup>347</sup> and re-characterize this intermediate position as a separate "detached"<sup>348</sup> or "hermeneutic,"<sup>349</sup> perspective.

### 3. Incommensurability and Practice

Hart's discussion of acceptance attempts to explain the existence and efficacy of any point of view, and in particular the legal point of view, in terms of the attitudes taken by people towards the social practices constitutive of the point of view. For Hart, what transforms utterances or practices from normatively inert into normatively active is the standing disposition of participants to treat the rules as the basis for criticism and other normative behavior.<sup>350</sup> Accepting the point of view thus transforms utterances or social practices from mindless acts into justifications, explanations, and prescriptions.<sup>351</sup> Accordingly, both the existence and efficacy of a particular point of view depend upon participants' continued support of the practices that constitute it, and in particular, their

conduct in criticizing deviation from the point of view's norms.<sup>352</sup>

The now-classic rejoinder to Hart's practice theory is what might be called the reason-demanding position. Both Ronald Dworkin and Joseph Raz have pointed out that the mere *existence* of a social rule demanding conformity is insufficient for the rule to operate as a reason for action. A rule-follower need not believe that she *ought* to follow the rule, yet do so because of social pressure exerted through the type of normative practice Hart identifies. For the rule to operate as a norm it must constitute a *reason* for action, independent of the social practice of critiquing non-conforming behavior. Furthermore, if an agent is to be justified in treating it as a reason for action, a norm must either *be* a genuine reason, or the agent must *believe* it to be such a reason. Accordingly, reason-demanders identify two defects with the practice theory as a theory of norms: that it conflates the existence of a norm (which is independent of a social practice) with its efficacy (which is not); and it generates the wrong sort of disposition to follow rules (prudence instead of obligation). They thus demand that Hart produce some reason<sup>353</sup> that

---

<sup>346</sup> Both extreme and moderate external observer positions resist endorsing the rules as (morally or politically) requiring, permitting, or empowering the sort of behavior under observation, although the moderate position may take into account that participants do endorse them. See MACCORMICK, *supra* note 117, at 33-34 (discussing cognitive aspect of rules); See also MACCORMICK, *supra* note 3, at 291-92 (discussing "detached" legal statements as presupposing only cognitive commitment to a point of view).

<sup>347</sup> RAZ, *supra* note 3, at 153-57 (discussing "detached" statements); MACCORMICK, *supra* note 117, at 30 (proposing "hermeneutic" point of view between internal and external).

<sup>348</sup> Hart, *supra* note 89, at 154.

<sup>349</sup> H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983).

<sup>350</sup> See Hart, *supra* note 18, at 69 ("The word 'ought' merely reflects the presence of some

standard of criticism; one of those standards is a moral standard, but not all standards are moral.") Scott Shapiro usefully distinguishes two internal attitudes to rules, one of which he calls "internalization" and the other of which he calls the "insider" attitude. Internalization requires only that a participant treat the rules as normative, and so as providing binding standards of conduct. This attitude applies to any legal system, point of view, or rule. The insider attitude requires some system-specific account of how participants understand these rules, and so is anthropologically thicker and system specific. See Shapiro, *Internal*, *supra* note 17, at 1158; Shapiro, *Bad Man*, *supra* note 17, at 198.

<sup>351</sup> Hart, *supra* note 4, at 255.

<sup>352</sup> *Id.* at 57 (discussing the critical reflective attitude).

<sup>353</sup> In other words, reason-demanders demand a norm where Hart produces a (non-normative) social practice.

places the agent under an obligation.<sup>354</sup> I shall discuss these criticisms in turn.

Both Dworkin and Raz support their demand for reasons over practice using the example of the non-conforming vegetarian.<sup>355</sup> Assume that vegetarianism consists in the belief that it is wrong for humans to eat meat on any occasion and vegetarians believe that humans are under some form of obligation to refrain from meat-eating. Dworkin and Raz each assert that the vegetarian norm, e.g., “humans are under an obligation to refrain from meat-eating,” exists even when no-one follows it.<sup>356</sup> The norm does not depend for its existence on some social practice. Furthermore, we can adopt or empathize with the vegetarian point of view even though we are not vegetarians and no vegetarian exists anywhere in the world. This seems to suggest that some points of view can exist without anyone using them in their practical deliberations.

The incommensurabilist need not accept this argument. For the incommensurabilist, the issue remains: to what does the vegetarian norm refer? That is, for the incommensurabilist, the norm “humans are under a – obligation to refrain from meat-eating,” contains a blank, and the sentence is ambiguous until we specify

into which system (moral, prudential, legal, etc.) to place the obligation. Accordingly, until we explain what sort of obligation we are using, then we cannot know whether there is a moral obligation, a prudential obligation, or a legal obligation not to eat meat.

Furthermore, the ambiguity point explains why practice conditions are also existence conditions. For the incommensurabilist there is no such thing as an obligation (for example, a moral obligation, as opposed to a prudential obligation or legal obligation) outside a particular practice (e.g., morality, prudence, law). Lacking some reason-dependent explanation of the generation and existence of different points of view, incommensurability requires something like social practices to provide a reason-independent account of how points of view come into existence. In other words, incommensurabilists are conceptually precluded from providing reasons here. If Hart is an incommensurabilist, then he needs some reason-independent account, such as social practices (or, in the *Postscript* to the *Concept of Law*, some legal convention),<sup>357</sup> to explain the existence of distinct points of view.<sup>358</sup>

My point is not to defend Hart’s social practice thesis, but to suggest that the

---

<sup>354</sup> The problem with a social practice is that it need only *oblige* the participant to follow the rule, rather than placing her under an obligation to do so.

<sup>355</sup> See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 52- 53 (1994) (rejecting Hart’s social rule theory using vegetarian example); RAZ, *supra* note 2, at 53-54 (using vegetarian example to reject Hart’s practice theory of norms).

<sup>356</sup> See DWORKIN, *supra* note 147, at 52; RAZ, *supra* note 2, at 54.

<sup>357</sup> HART, *supra* note 4, at 255-56.

<sup>358</sup> The existence of the legal point of view as a system of obligations independent of any particular legal system might present a problem for incommensurabilists. If no legal system currently exists, so that the only legal point of view we have is that exhibited by dead legal systems (the law of ancient Athens, for example), then it is not clear

why the legal point of view provides a practical source of reasons. If legal reasons are incommensurable with non-legal reasons, and no-one enforces the legal point of view, then there would be no reason to adopt it. The only reasons that exist would be reasons that preclude adopting the independent practice of legal reasoning. Choosing to justify decision from the legal point of view would be arbitrary at best. Accordingly, for the incommensurabilist view to get off the ground as a rational option, that point of view must already be not only efficacious, but sufficiently important as a practical discipline for others to adopt the legal point of view (whatever their motivation for so doing). In other words, the legal (and perhaps, for the incommensurabilist, any) point of view exists so long as some sufficiently powerful social group accepts and applies it (that group is normally a critical mass of the judges of a given legal system).

reason-demanders' challenge to the existence condition makes sense only on condition that that the sort of thing an "obligation" is remains the same across the moral, prudential, and legal points of view.<sup>359</sup> It is this unity of identity that permits them to reject the incommensurabilist's ambiguity point. For the reason-demander, a point of view can exist without specifying the normative system to which it belongs.<sup>360</sup> That is, for the reason-demander, there is a vital difference between suggesting that a rule *exists* and that it is *efficacious* (that someone uses it to justify their reasoning)<sup>361</sup> whereas the incommensurabilist insists that we cannot know the *sort* of existence the rule has until it is put to use — practiced — in some system of norms that fixes what type of rule it is.<sup>362</sup>

The incommensurabilists response to the question of existence, however, is also a response to the reason-demanders' second, and central, objection to the practice theory. They challenge that people who believe we ought not to eat meat believe it is a rule, not that it is a practice.<sup>363</sup> The reason-demander's critique here is that Hart's practice theory

is non-normative and (ironically) overly behavioristic. Hart claims that a necessary element of rule-governed conduct is a "critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified."<sup>364</sup> But this criterion is surely insufficient for our ordinary understanding of normativity. Even where the rule and community behavior correspond, it is not the behavior that does the normative work.<sup>365</sup> What matters is that the rule operates as a *reason* for my behavior whether or not the community endorses it.

Hart's response is to re-emphasize that both he and Dworkin believe rules are "reason-giving":<sup>366</sup> for participants in the practice, the fact that a norm is a valid utterance from the legal point of view is a reason for treating it as imposing legal rights or duties. But the decision to adopt and accept a point of view does not respond to the demand for some further reason. Hart explicitly rejects *both* the claim that for a social practice to operate

<sup>359</sup> Scott Shapiro expresses the reason-demanders' challenge in this way: "To generate normative relations of legal authority and obligation, the objection goes, a group needs more than social facts – it needs moral facts as well." Scott J. Shapiro, *What Is The Rule Of Recognition (And Does It Exist)?* at 24, electronic copy available at: <http://ssrn.com/abstract=1304645>. The idea that normativity depends upon moral facts that maintain their meaning across points of view is central to the reason-demanding position. See, e.g., RAZ, *supra* note 2, at 162-177 (discussing the interrelation of morality, normativity, and law). Shapiro's response is to "suggest that when we say that the law necessarily has the power to confer legal rights and impose legal obligations, we are using the word "legal" in [a] ... qualifying sense. We are distancing ourselves from our normative assertions, claiming only that from the legal point of view the law's activities are reason-giving." Shapiro, *id.* at 24. This is somewhat similar to the

incommensurabilist perspective I suggest Hart embraces.

<sup>360</sup> Accordingly, Raz suggests that "[r]ules need not be practiced in order to be rules." Raz, *supra* note 3, at 53 Legal and social rules must be practiced, but "[m]oral rules are perhaps the clearest example of rules which are not practices." *Id.* Hart concedes this point in his *Postscript*. See Hart, Hart, *supra* note 4, at 255-56 (rejecting aspects of his practice theory of rules as applied to morality).

<sup>361</sup> See RAZ, *supra* note 2, at 177.

<sup>362</sup> This is to again suggest that for the incommensurabilist, a point of view only exists as a practical option to the extent that some person or group currently uses it as a source of reasons.

<sup>363</sup> RAZ, *supra* note 2, 53-54

<sup>364</sup> Hart, *supra* note 4, at 57.

<sup>365</sup> See, e.g., Andrei Marmor, Legal Conventionalism in Hart's Postscript 197

<sup>366</sup> See Hart, *Supra* Note 4, at 256.

as a normative justification there must be some genuine reason (Hart calls it “good grounds”) supporting the practice,<sup>367</sup> and the claim “that participants must *believe* that there are good moral grounds for conforming to it.”<sup>368</sup>

Hart believed that participants could adopt the legal point of view for any reason or no reason. Adopting the legal point of view, however, means treating its rule of recognition (and any utterances or norms ascribed by that rule to the legal point of view) as valid. He suggests that:

if all that is required is that judges should have some comprehensible motives for behaving as they do [when accepting the legal point of view], this can be easily satisfied by motives which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law.<sup>369</sup>

For Hart, then, a judge may choose to justify or critique the law from the moral or prudential points of view (that is, for moral or prudential reasons), so long as she acknowledges the laws as valid from the legal point of view.<sup>370</sup> The point of the internal attitude is to identify, in part, what are obligations, as opposed to prohibitions or permissions. It is enough for Hart’s “descriptive sociology” that distinctive legal norms exist and are used to separate out law from morals.<sup>371</sup>

Put differently, Hart’s theory is reason-accepting rather than reason-demanding. The participants in a point of view cannot, from within the point of view, justify the validity of its rule of recognition, they can only accept it as valid. It may

also be valid from some other point of view, but this is to provide the wrong sort of reason: alternative grounds of validity might answer questions about my motivation for adopting the point of view, but they could not explain why the point of view is (on its own terms) valid. Hart’s position only makes sense, it seems to me, if it rests upon the presupposition that something like incommensurability blocks the move to some extra-systemic justification — some justification from a different point of view.

For Hart, as a reason-accepter, validity-statements are simply internal statements about the status of a (legal) rule as a member of the (legal) point of view as a system of rules. A valid rule is one generated by members of the relevant group using the relevant norm-generating process. This process marks out the rule as, e.g., a legal rule (as opposed to some other rule). So a legal rule is not a rule of golf or morality or etiquette – those rules are generated by some other group using some other process. Once the rule is identified as a member of the relevant point of view, participants in the point of view take a particular attitude to the rule: they treat it as a “reason” for decision.<sup>372</sup> From the participants’ internal perspective, the rule is a reason for action.

Whenever a participant makes an internal statement, she not only claims the rule is valid (a membership claim), but also in that the system exists and is in effect. Existence “shown”<sup>373</sup> or “presupposed”<sup>374</sup> by statements that claim to be currently valid. Hart, however,

<sup>367</sup> *Id.* at 257

<sup>368</sup> *Id.*

<sup>369</sup> Hart, *supra* note 89, at 265. See *id.* at 159 (though the judge is ... committed to following the rules his view of the moral merits of doing so ... is irrelevant. His view of the merits may be favorable or unfavorable, or simply absent, or, without dereliction of his duty as a judge, he may have

formed no view of the moral merits”).

<sup>370</sup> See *id.* at 158.

<sup>371</sup> On descriptive sociology, see Hart, *supra* note 4, at v.

<sup>372</sup> *Id.* at 105.

<sup>373</sup> *Id.* at 101.

<sup>374</sup> *Id.* at 104.

distinguishes his version of presupposing some ultimate norm of recognition from Kelsen's account.<sup>375</sup> Hart believes that what is presupposed is precisely not the validity of the ultimate rule: the concept of validity makes no sense here.<sup>376</sup> The question of which rule of recognition is in operation cannot be answered by some further rule, or asserting what rule would be good, or effective, or whatever.<sup>377</sup> The answer in each case is going to be: this is the rule that the group accepting the point of view uses to identify rules from that point of view, and then we just have to look and see which rule they do, in fact use.

The reason-demander's need for a further reason here is premised upon the claim that a point of view can only be valuable if based on some further reason.<sup>378</sup> Hart's insight, however, is that the point of view itself constitutes the value of the norms that are its members. To ask whether the point of view is valuable, "whether it is a satisfactory form of legal system ... [or] does it produce more good than evil" is a different sort of question.<sup>379</sup> Such questions demand external statements as answers,<sup>380</sup> and such

statements are the wrong category of statement to ground the value of internal statements from the point of view.

Difficulties associated with reason-accepting might explain why two influential theorists, Sir Neil MacCormick and Scott Shapiro, have attempted to explain Hart's theory by avoiding his non-cognitivist descriptions of the internal attitude. Each proposes a mixed cognitive and volitional theory of acceptance. The cognitive component is supposed to furnish the missing link between Hart's theory and the demand that norms or points of view function as reasons for action. It is supposed to show, in other words, that the participants believe the norm operates as a reason for action. In my view, the cognitive component cannot distinguish between public and personal reasons for accepting the law, and so fails to provide the missing link. Without this link, we cannot distinguish between good-faith and bad-faith judges. Our inability to distinguish does not result from some lack of information or some failure of discernment. Rather, it suggests that the problem of judicial sincerity does not exist or is misplaced.

---

<sup>375</sup> *Id.* at 108-109 (discussing Kelsen on validity).

<sup>376</sup> *See id.* (rejecting the application of the concept of validity to the rule of recognition itself).

<sup>377</sup> *See id.* at 107, 109 (discussing reasons for accepting points of view).

<sup>378</sup> For example, Raz draws a distinction between thinking that the rule is a reason for others (endorsement) and thinking that it is a reason only for oneself (acceptance). This, for Raz, is a distinction between moral and prudential attitudes to a rule. *See Raz, supra* note 3, at 155 n.13; *see also Raz, supra* note 13, at 136. But Hart's discussion of acceptance does not distinguish between prudential and moral attitudes as expressive of different levels of commitment to the law, but between different points of view. Hart believes a point of view may be adopted for any reason — prudential, moral, or whatever. For Hart, morality cannot add anything to the

obligation-imposing status of a legal rule. The legal rule imposes a legal obligation: there may be external moral reasons to suggest that it also imposes a moral obligation, but those reasons arise externally, in the moral point of view. The two points of view may overlap, in the sense of providing multiple reasons, both internal and external, for valuing the legal rule. But the points of view do not accumulate, in the sense of adding together to provide a stronger reason for valuing the legal point of view. They simply point in the same direction.

<sup>379</sup> *Id.* at 107.

<sup>380</sup> *See id.* at 109-110 (discussing the concept of validity in relation to the rule of recognition and internal and external perspectives); *see also* 103 "an external statement of fact that the rule is accepted").

#### 4. Cognition, Volition, and Acceptance: MacCormick and Shapiro

MacCormick and Shapiro do not use incommensurability to explain the existence of distinct points of view. Instead, they each separate out two distinct attitudes compatible with being guided by a rule, one of which is a “cognitive” or “epistemic” detached attitude that regards the rule as informational only, and the other of which is volitional or motivational attitude that treats the rule as (more or less) normative.<sup>381</sup> Each seeks to ground acceptance and the normativity of law in the volitional disposition to rules, a position I ultimately find unpersuasive.

Sir Neil MacCormick argues that anyone adopting the internal attitude must have a “volitional” commitment to the existence and maintenance of that point of view. He believes that someone taking the committed, internal perspective may manifest a variety of attitudes ranging from full to reluctant to minimal acceptance of a point of view and the norms it contains,<sup>382</sup> with concomitant

postures of full or grudging support, or “support with exceptions.”<sup>383</sup> The detached agent cannot muster even this much support for the system, instead choosing merely to “observe”<sup>384</sup> the law without supporting or otherwise endorsing it.<sup>385</sup> What differentiates the attitudes of commitment and detachment is that, in addition to their “cognitive” understanding of the point of view, committed agents manifest their “wish or preference for conduct in accordance with a given pattern.”<sup>386</sup> The detached perspective is thus, MacCormick suggests, not truly internal, but rather “parasitic” on the volitional attitude, and “makes sense only if those who hold it suppose (and it may be a false supposition) that there are some [who do adopt the internal perspective].”<sup>387</sup>

MacCormick’s volitional attitude does not track the normative commitments of those who have a fully internal attitude to a point of view. Volition simply explains that there can be some reason for adopting the point of view (even if the points of view are incommensurable).<sup>388</sup> That reason could be a particularly strong one: some moral justification or other

---

<sup>381</sup> See MacCormick, *supra* note 18, at 18 (detached agent chooses merely to “observe” the law as authoritative without “endorsing” or accepting it); Shapiro, *supra* note 126, at 173 (discussing detachment in terms of epistemic point of view that does not treat law as the right sort of reason for conformity).

<sup>382</sup> See MacCormick, *supra* note 117, at 35 (discussing people who “merely” or “reluctantly” accept a point of view).

<sup>383</sup> MacCormick, *supra* note 18, at 18. MacCormick identifies five different levels of acceptance of a legal system: full; moderate; reluctant; minimal; and prudential. The first two levels entail fully support the authority of the system; reluctant acceptance involves only grudging support; and minimal acceptance involves “support with exceptions.” Prudential agents have “no real commitment to law’s authority as an exclusionary reason,” but simply “observe” the law as a social authority. *Id.*

<sup>384</sup> MacCormick, *supra* note 18, at 18.

<sup>385</sup> MacCormick uses the term “endorse” to refer to an attitude that approves of the content of legal norms. MacCormick’s use of “endorse” is thus narrower than Raz’s. I thus use endorse to apply to (potentially) both approval of a norm’s content and of the system’s authority.

<sup>386</sup> See MACCORMICK, *supra* note 117, at 34. MacCormick argues that someone accept the point of view, *id.* at 39.

<sup>387</sup> MacCormick, *supra* note 3, at 287; MACCORMICK, *supra* note 117, at 40. See also UTA BINDREITER, WHY GRUNDNORM?: A TREATISE ON THE IMPLICATIONS OF KELSEN’S DOCTRINE 110 (2002) (discussing MacCormick’s explanation of internal and detached perspectives).

<sup>388</sup> See, e.g., John Gardner, *Law as a Leap of Faith*, at 6-7 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397138](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397138) (section omitted from Gardner, *supra* note 100) (discussing the ways in which one might have a reason for adopting a point of view, even though the points of view are themselves incommensurable).

reason of a particularly binding sort. But it could also be a weak, reason. A volitional attitude is, in other words, consistent with non-normative or weakly prudential reasons for adopting or preferring the continued existence of any given point of view. An agent may wish or prefer that the law be binding because it produces *useful* social standards (or patterns of behavior), not because it produces *morally obligatory* social standards. That is, a participant may believe that the law is valuable because of the pragmatic or prudential benefit of having a formal and enforceable practice or a social standard. The volitionally committed participant need not believe that the practice imposes an obligation (of any sort).

Normative commitments, on the other hand, express the attitude of those who have adopted or accepted or are committed to the point of view<sup>389</sup> (or as MacCormick puts it, the “pattern[s]” of conduct,<sup>390</sup> or as Hart, puts it, the “social practice”<sup>391</sup>). A normative commitment is not a reason for adopting a particular point of view (or normative order): it is a disposition or internal attitude to treat as more or less binding that point of view the agent has adopted. For any participant in a of view, accepting that point of view just means acknowledging that it can impose binding obligations of the type associated with that normative order.<sup>392</sup> The agent’s

external (volition) reason for adopting the point of view need not match her participant’s internal (commitment) to the obligatory character of the point of view. An agent may have weak reasons for adopting a particular point of view and nonetheless be strongly committed, as a participant, to its norms, and vice versa. Acceptance concerns the notion of commitment, not the reasons or motivation for adopting or maintaining the point of view.

Accordingly, an agent might have a weak or strong reason to choose the legal point of view. Having adopted or accepted the legal point of view, the participant then regards legal obligations as genuine obligations even though they are not moral obligations. The legal obligations are not weaker or stronger than moral obligations, and are not made more binding by having moral obligations back them up: morality need add nothing to the participant’s attitude of (weak, moderate, strong) commitment to the binding character legal norms.<sup>393</sup> The fact that moral reasons also point to the same conclusions as legal reasons might bolster the volitional aspect of the participants attitude to the law — the reasons the participant has for maintaining commitment to the law — but it does not affect the bindingness of legal norms, nor the participant’s commitment to those norms as binding.<sup>394</sup>

---

<sup>389</sup> See *id* at 34 (“The notion of an ... ‘internal attitude’ is to be understood by reference to those who have an act upon a wish or preference for conduct in accordance with a given pattern”). See also *id.* at 34 (describing the “volitional element: a wish or will that that the pattern [of conduct] be upheld, a preference for conforming or non-conforming conduct in relevant circumstances.”).

<sup>390</sup> MACCORMICK, *supra* note 117, at 33

<sup>391</sup> HART, *supra* note 4, at 55. Jules Coleman calls this “convergent social behavior.” Jules L. Coleman, *Rules and Social Facts*, 14 Harv. J. L. & Pub. Pol’y 703, 705 (1991).

<sup>392</sup> HART, *supra* note 89, at 158 (discussing legal duty to follow law as emanating from a “settled practice ... warranting criticism [and] counter-

action” for any breaches).

<sup>393</sup> See HART, *supra* note 4, at 203.

<sup>394</sup> An incommensurabilist should point out that the sort of reason an agent has for adopting one point of view cannot be the sort of reason that defeats all other points of view. In other words, there may be reasons for adopting *both* the legal *and* the moral points of view, and they may be the same reasons. Hart identifies some prudential reasons for adopting both points of view: the seriousness of the social pressure they produce. The types of social pressure may be different; nonetheless, a prudential desire to avoid any negative social pressure may be the only reason necessary (if any reason at all is required) to adopt both the legal and the moral points of view.

The volitional attitude provides a reason for adopting the point of view or maintaining it, but it cannot describe the internal attitude of a participant who accepts the point of view. To adopt the religious analogy used by John Gardner, in *Law as a Leap of Faith*, a volitional account cannot describe what it means to support the point of view, because “volitional,” on its own, provides a reason for faith, not an account of faith itself (not even what it means to be a doubter or to lapse).<sup>395</sup> For MacCormick, the internal attitude is explained, in part, by the “cognitive” aspect of acceptance; the way we understand the point of view. As Gardner puts it, paraphrasing MacCormick, “one has the cognitive internal attitude to law without the volitional internal attitude.”<sup>396</sup>

The cognitive internal attitude is sufficient to explain the binding character of the norms, even for an observer who is not a participant in the group. So volition does not quite do the work MacCormick wants it to do. MacCormick, remember, thinks the presence of a volitional attitude marks out the committed participant from the detached observer. An observer can certainly adopt and maintain a point of view for a reason. But that does not distinguish, without more, between someone who entertains a detached attitude to the law and someone who is fully or partially committed. After all, the “puzzled man,” whom I take to be the quintessentially detached agent, has his reasons for engaging in a cognitive understanding of the law, and perhaps for maintaining legal patterns of conduct.<sup>397</sup>

Wishing or preferring that a practice be maintained seems too *thin* an attitude to distinguish the internal attitude from the detached.

Including the detached perspective within the concept of acceptance renders MacCormick’s volitional account unable to justify the central requirement for judicial sincerity: that judge’s personal reasons for adopting and maintaining the legal point of view must rest upon the same grounds as the judge’s legal reasons for deciding the case. Instead, detached acceptance makes room for separate sets of reasons (including personal prudential reasons) for adopting and enforcing the legal point of view. Accordingly, a detached participant may think the law is immoral but nonetheless accepting that it is able to impose valid obligations on third parties. And the detached judge may choose to enforce the law because it advances her own self-interest or political agenda.

Scott Shapiro provides a thicker account of volition, though one that shares MacCormick’s differentiation between cognitive and volitional attitudes, or as Shapiro calls them, “epistemic” and “motivational.”<sup>398</sup> His account picks up on the distinction between norm-guided and norm-governed conduct. The distinction roughly maps Hart’s differentiation of internal and external points of view: norm-governed behavior tracks the extreme external perspective in that it “is subject to the regulation of an actual norm, whether or not the behavior conforms to the norm.”<sup>399</sup> Norm-guided behavior, on the other hand, “is behavior that conforms

---

<sup>395</sup> See Gardner, *supra* note 100, at 28-29 (discussing different attitudes to law in faith-based terms).

<sup>396</sup> *Id.* at 29.

<sup>397</sup> A detached agent (such as a puzzled law student learning, or a law professor teaching, German law) may, for example, have prudential or self-interested reasons for hoping that the law does not

change, e.g., to make it easier to learn or explain the law. They have reasons for adopting and maintaining the law, but they have no commitment to it.

<sup>398</sup> On motivational and epistemic reasons, see Scott J. Shapiro, *Law, Morality, and the Guidance Of Conduct*, 6 LEGAL THEORY 127, 149, 173 (2000).

<sup>399</sup> *Id.* at 153.

to a norm for the reason that the norm regulates the action in question.”<sup>400</sup>

Behavior-guiding reasons can themselves take two forms, motivational and epistemic. Motivational reasons reflect the internal perspective of the committed agent who believes a norm provides a reason for action.<sup>401</sup> Epistemic reasons reflect the detached attitude of the prudential person. The rule provides information about the existence and demands of a practical authority without thereby entailing that the person regards the authority as legitimate;<sup>402</sup> the epistemically guided person acts in conformity with the rule but upon some *extrinsic* motivation.

Shapiro’s motivational reasons give the volitional description of acceptance a particularly strong spin. His argument is that participants taking an internal attitude treat the point of view not only as *action-guiding*, but as *action-generating*.<sup>403</sup> For Shapiro, “an agent is “motivationally”

guided by a rule when the agent takes the rule as the sole source of his motivation for conformity, i.e., when he conforms simply because the rule regulated the conduct in question.”<sup>404</sup> That is, that the point of view is not simply one reason among others *justifying* action; from the internal perspective, the reason is the source of action.

To be motivated to act by a point of view is to regard it as precluding competing reasons (whether consistent or conflicting) from operating as the right sort of grounds for conduct.<sup>405</sup> That, according to Shapiro, is the “practical difference” that a point of view makes.<sup>406</sup> Motivational reasons thus *replace* or pre-empt an agent’s normal reasons for action.<sup>407</sup> Epistemic reasons do not make this sort of practical difference to an agent’s reasoning; rather they simply provide information to be figured into the balance of reasons. From this detached perspective, the agent is not motivated to

<sup>400</sup> *Id*

<sup>401</sup> “To be motivated to conform to a legal rule by the rule itself is to believe that the rule is a legitimate standard of conduct and to act on that belief.” *Id.* at 173.

<sup>402</sup> *Id.* at 172. *See also id.* at 173 (“It is not necessary that the agent be motivated to follow the rule because of the rule”).

<sup>403</sup> *See id.* at 173. *See also id.* at 162 (“an agent is motivationally guided by a rule when he takes the rule as the sole motivating reason to comply. That agent complies simply because the rule regulates the action.”).

<sup>404</sup> Shapiro, *supra* note 190, at 146.

<sup>405</sup> The claim that a point of view — for example, the legal point of view — makes a practical difference by providing motivational reasons for someone who has an internal attitude — for example, a judge — is consistent with the claim that non-legal reasons feature in legal decision-making. Raz, for example, makes this argument (though he does not endorse the motivational model) in Raz, *supra* note 3, at 33, (suggesting that “what is excluded by law is not all other reasons, but merely all those other reasons which are not themselves legally recognized”). Even if legal reasons motivate judicial decisions, that does not mean only legal reasons operate in the decision-making process. The legal point of view

may be limited in scope and fail to govern a particular circumstance, or prove vague, ambiguous, or contradictory. Where legal reasons run out or fail to provide a clear answer, non legal reasons may operate to fill in the gaps. *See, e.g.,* Scott J. Shapiro, *Judicial Can’t*, 35 *NOÛS*, 530, 550 (Supp. 1, 2001) (“A rule, once adopted, is not a factor to be considered in future deliberation about whether to comply. Once adopted, the agent no longer deliberates about whether to comply. The rule-guided agent merely figures out what counts as implementation of the rule”); *see also id.* at 552 (discussing judicial interpretation as permitted despite Shapiro’s strong account of acceptance); Shapiro, *supra* note 7, at 33. The freedom to resolve applicative problems may be quite large.

<sup>406</sup> *See* Shapiro, *supra* note 7, at 37. *See also* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in *ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 99, 101 (Jules Coleman, ed. 2001).

<sup>407</sup> That is in line with what he says about practical difference. *See* Shapiro, *supra* note 7, at 37. “The P[ractical]D[ifference]T[hesis] allows that law might make a practical difference either *epistemically* (i.e., by providing information) or *motivationally* (i.e., by providing reasons).” Coleman, *supra* note 198, at 122.

act by the rule itself, but independently of it.<sup>408</sup>

The distinction between epistemic and motivational reasons must be treated with care. It does not precisely mirror the familiar distinction between theoretical and practical reasons. That is, calling a reason “epistemic” in this context does not call into question whether a legal reason is, in fact, a practical reason. An epistemic reason, in this context, is not a theoretical, that is, non-practical reason for action. It does have practical force.<sup>409</sup> It just does not operate to preclude extra-legal reasons from counting in the decision-making process, or to explain how legal reasons can operate as a separate ground of decision.

Accordingly, from the detached perspective, an agent must still prudentially understand what the law requires if she wants to be law-abiding: she simply does not take being law-abiding as a motivating reason for action. Being law-abiding simply features as one among many concerns. It may operate as a justification of action – but as a justification in addition to other competing reasons. To that extent, for the detached agent law is undifferentiated from morality and the balance of reasons.

There may be practical reasons for an agent to use or observe the law’s authority in addition to the manner in which the content of any legal norm factors into the balance of reasons. In other words, law often provides “content-independent” practical reasons,<sup>410</sup> based upon its structure and societal role, that require an

agent to include in her deliberations the fact that officials recognize or treat the law as efficacious.<sup>411</sup> It is thus wrong to suggest that a detached or prudential perspective entails that the law makes no difference in practical deliberation; it simply does not make the difference that treating law as a justified authority would make for someone who accepts the legal point of view. That is, the detached or prudential agent still recognizes that the law claims authority. She simply does not endorse that claim to authority as justified.

Shapiro argues that this account of volition is consistent with Hart’s later discussion of rule-following. He thinks Hart marked a significant break with the practice theory by introducing the concept of peremptory, content-independent reasons. Shapiro describes a peremptory reason as “a reason to suspend deliberation about the merits of following the rule.”<sup>412</sup> Peremptory reasons are thus reasons that both demand and justify refusing to act on the balance of reasons.

The principal advantage of Hart’s later version of rule-following, according to Shapiro, is that it solves the two central rule-demanding problems besetting the practice theory: its failure to distinguish between rules and “generalized normative judgements”;<sup>413</sup> and its inability to explain how rules (and so the rule of recognition) can make a practical difference for anyone, citizen and judge alike.<sup>414</sup> Peremptoriness solves these problems by demonstrating how rules are “capable of ... motivating agents to act differently from

---

<sup>408</sup> “Epistemic” thus cannot mean simply a theoretical, as opposed to practical, reason. The information provided by an epistemic reason has a place in practical deliberation. It is just not a pre-emptive or exclusionary reason. Rather, it takes its place among balance of reasons.

<sup>409</sup> See Shapiro, *supra* note 190, at 146 (arguing that “[e]pistemic guidance is not purely epistemic,”

but does operate as part of the reason for rule-guided behavior).

<sup>410</sup> On content-independent reasons, see Hart, *supra* note 89, at 18, 254-55.

<sup>411</sup> See Shapiro, *supra* note 190, at 146-49 (discussing epistemic guidance).

<sup>412</sup> *Id.* at 163.

<sup>413</sup> Shapiro, *supra* note 126, at 176.

<sup>414</sup> *Id.*

how they might have without their guidance.<sup>415</sup>

Peremptory reasons, like volitional ones, constrain decision, so that normative judgments are particularized to a point of view, rather than generalized all things considered. A point of view can only exist, Shapiro believes, if its norms are sufficiently definite, such that agents can distinguish its demands from moral ones.<sup>416</sup> Particularization is thus epistemically important: it enables an agent to factor into the balance of reasons a point of view's distinctive claims. Shapiro believes this particularity is necessary because otherwise all practical reasons would collapse into or be indistinguishable from moral ones.<sup>417</sup> However, participants in the point of view — for example, judges making legal decisions — must not only recognize the distinctive identity of the point of view, it must make a practical difference to their decision-making.<sup>418</sup>

That, indeed, is why he believes any theory of law needs to account for motivational rules as well as epistemic ones: for legal officials, epistemic reasons are not enough. They are not free, as the citizenry is, to reconsider the value of law each time they act, for then law would be indistinguishable from morality.<sup>419</sup> Accordingly, he suggests that any rule must operate by precluding further deliberation about the grounds for

decision. Rules motivate by ending deliberation: this is how they make a practical difference in our reasoning.<sup>420</sup>

To explain how participants are motivated to use the law as a reason for decision independent of morality, Shapiro provides a somewhat controversial will-based theory of motivational guidance. What motivates participants to use a point of view, Shapiro contends, is their staunch pre-commitment to its rule of recognition. He believes that rules are binding, if at all, in a particularly strong manner: they constrict our will by “doing internally what Ulysses was able to do externally when he lashed himself to the mast. [To adopt a rule or point of view] is to forgo later choice by the operation of the Will.”<sup>421</sup> Shapiro's idea is that accepting a rule of recognition dedicates an agent to unquestioningly apply the point of view whenever relevant in the future.<sup>422</sup> This volitional constraint — the refusal to consider competing reasons — motivates the participant's reliance on the point of view when deciding how to act. When acting sincerely, according to Shapiro, the judge is psychically disabled from willing to act otherwise than in accordance with the rule.<sup>423</sup> Accordingly, “rule-guided behavior is essentially compelled behavior.”<sup>424</sup>

According to Shapiro, a properly committed participant may not even

<sup>415</sup> *Id.*

<sup>416</sup> Shapiro, *supra* note 190 at 161-62; Shapiro, *supra* note 126, at 176-77.

<sup>417</sup> *Id.* at 163; Shapiro, *supra* note 126, at 177.

<sup>418</sup> See Shapiro, *supra* note 126, at 174 (arguing that Hart is best understood as asserting that “the essential function of law [is] about epistemic guidance ... the primary function of the law is to provide rules so that citizens may determine which standards of conduct the law deems legitimate.”). Epistemic guidance is not, however, an option for judges: “While Hart thought that the primary function of the law is the epistemic guidance of ordinary citizens, this cannot be true for legal officials. The rule of recognition ... must motivationally guide the conduct of judges.” *Id.*

<sup>419</sup> Shapiro, *supra* note 190 at 163; Shapiro, *supra* note 126, at 178.

<sup>420</sup> *Id.* at 165; Shapiro, *supra* note 126, at 146-77; Shapiro, *supra* note at 10, 37

<sup>421</sup> Scott J. Shapiro, *Judicial Can't*, 35 *NOÛS*, 530, 549 (Supp. 1, 2001)

<sup>422</sup> *Id.* at 550 (discussing rule of recognition and proposing that “when an agent is committed to a rule, that agent has no choice but to apply the rule when she recognizes that it is applicable.”).

<sup>423</sup> *Id.* at 553.

<sup>424</sup> *Id.* at 552. Shapiro does acknowledge that some judges may dissimulate, and so refuse to be constrained in this sort of manner, *Id.* at 551. Nonetheless, feigned commitment is parasitic upon the motivational perspective.

*consider* reasons consistent with or contrary to those prescribed or permitted by the point of view as a ground for decision.<sup>425</sup> While the decision to adopt a rule or point of view is reason-dependent, continuing to adhere to that point of view is reason-independent: reason has no more to say about the matter. Having once chosen there is no more choice to make:<sup>426</sup> the agent is now volitionally predisposed to follow the rules, and should disregard any reasons to reconsider her choice. Detached or epistemic reasons are insufficient for participants acting from a point of view because epistemic reasons operate on the wrong decision-making apparatus: the participant's understanding rather than her will. The relevant practical difference points of view make must be, Shapiro

supposes, will-constricting and so motivational.

Volitional guidance thus achieves two distinct objectives: first, it satisfies the reason-demanders' demand. It provides a reason for adopting a point of view: that for reasons of certainty and efficiency,<sup>427</sup> it is necessary to end deliberation and bind one's will (or one's future self) as a participant in the institution or social practice adopting that point of view.<sup>428</sup> Second, it orients the judge forcefully towards the law as the only source of reasons for action. For Shapiro, the practical difference the law makes is that it precludes future deliberation about the proper grounds for determining what to do.<sup>429</sup>

While I shall not offer a knock-down argument against Shapiro, a few

---

<sup>425</sup> *Id.* at 553 (a participant's commitment to a point of view — that is, commitment to its rule of recognition — “prevent the agent from considering the reasons for disobeying the rule.”).

<sup>426</sup> At least over whether to continue to accept the point of view. Shapiro, *supra* note 213, at 541 (“A judge who presides over any dispute must be seen as having no choice whether he will apply the law or not.”) There may, however, be choices about how best to operationalize it given the circumstances. See *id.* at 552 (“when they are guided by the law, [judges'] decisions are generally about whether the law is applicable, never whether to apply the law. Once these decisions of applicability are made, judges no longer make choices—they merely apply the law.”).

<sup>427</sup> Shapiro calls these “rule of law” reasons. See Shapiro, *Judicial Can't* at 550 (judicial “commitment [to the law as constraining choice] enables the Rule of Law to flourish. When judges constrain themselves to apply the rules, people will be led to predict that they will follow through on the law's threat.”).

<sup>428</sup> See Shapiro, *supra* note 213, at 549 (“An agent who adopts a rule is strategically interacting with another agent—his later self. The present self, by his decision to guide his actions by a rule, constrains his later self, precluding future choice behavior inconsistent with the rule.”).

<sup>429</sup> Both MacCormick and Shapiro appear to believe that the value of law consists in the value of rules. To that extent they follow Hart, though perhaps for different reasons. As John Gardner

concisely puts it, Hart believed laws had merit in virtue of “their normative generality ... wherever laws go a kind of justice (and hence a kind of merit) automatically follows, for the correct re-application of any law entails that like cases are treated alike.” Gardner, *supra* note 94, at 205-206. MacCormick seems to endorse a similar approach, emphasizing the law as an embodiment of “formal justice ... a choice between the rational and the arbitrary in the conduct of human affairs ... [the] fundamental principle that human beings ought to be rational rather than arbitrary in the conduct of their public and social affairs.” MacCormick, *supra* note 3, at 76-77. MacCormick calls this view legalism: “The stance in legal politics according to which matters of legal regulation and controversy ought so far as possible to be conducted in accordance with predetermined rules of considerable generality and clarity, in which legal relations comprise primarily rights, duties, powers and immunities reasonably clearly defined by reference to such rules, and in which acts of government however desirable teleologically must be subordinated to rules and rights.” Neil MacCormick, *The Ethics Of Legalism*, 2 *RATIO JURIS* 184, 184 (1989); Neil MacCormick, *Reconstruction After Deconstruction: A Response To CLS*, *OXFORD J. LEG. STUD.* 539, 541 (1990) (same quotation). Shapiro takes a similar view, embracing his volitional account — and so law more generally — as promoting the Rule of Law virtues of predictability and reliance. Shapiro, *Judicial Can't* at 541, 550.

considerations provide some reasons for worrying about his account.<sup>430</sup> Matthew Kramer advanced a relatively powerful response to Shapiro's motivational theory: Shapiro appears to be endorsing Joseph Raz's account of exclusionary reasons. But Raz suggests that norms or points of view are limited in scope, and so at the boundary we may have cause to engage in further deliberations about the limits of the rule or point of view (about the nature of its rule of recognition).<sup>431</sup> This objection, if correct, would render Shapiro's guidance theory incoherent: the point of his guidance theory is to preclude deliberations of this sort.

Shapiro's response is to argue that his theory of norm-guidance is not Razian, but Hartian; not a theory of exclusionary reasons limited in scope, but of peremptory reasons having unlimited scope.<sup>432</sup> The problem with this response is that Shapiro escapes the frying pan but only as far as the fire. If motivational reasons are universal, then it is not clear how a citizen, having once given herself over to the legal point of view, could later decline that commitment and adopt a

different one. Practically, there must be some way of shifting among points of view and deliberating about when to do so — otherwise whenever legal and other points of view conflict, the agent is pre-committed to the legal one. It is thus difficult to see how anyone could choose among points of view, if they are already pre-committed to some one (say, the moral) point of view.<sup>433</sup>

Both the incommensurabilist and Shapiro thus face the question of how their enterprise could ever get off the ground. The incommensurabilist can turn to acculturation (social practice or convention) to suggest that different points of view are, in practice, available and so an agent can just plump for one or the other. Shapiro's problem is that the peremptory version of his motivational account provides a reason for henceforward never considering the other competing reasons. Such universal reasons obliterate points of view because, once an agent adopts one, there is no other point of view available for consideration. Here, the problem is that motivation makes *too much* of a practical difference.<sup>434</sup>

---

<sup>430</sup> My argument is, accordingly, abductive. For a brief account of some of the worries that I share, see Heidi M. Hurd, *Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn't)*, 42 SAN DIEGO L. REV. 75, 82-83 (2004) (discussing the problems with Shapiro's volitional approach).

<sup>431</sup> See Matthew Kramer, *How Moral Principles Can Enter Into the Law*, 6 LEGAL THEORY 83, 90 (2000) (discussing questions of scope as requiring deliberation about moral issues); Shapiro, *supra* note 190 at 165-66 (discussing and responding to Kramer's criticisms of motivational guidance).

<sup>432</sup> Shapiro, *supra* note 190 at 166 (distinguishing between Raz's theory of exclusionary reasons and Hart's theory of peremptory reasons based on the nature of their scope). Shapiro claims that "since peremptory reasons have universal scopes, no one can deliberate about the merits of following a rule and still treat the rule as a peremptory reason for action." *Id*

<sup>433</sup> If we are, as Aristotle suggests, trained to adopt an understanding of the good as children that

we then use as adults, *Aristotle, Nicomachean Ethics*, then this childhood pre-commitment would appear to preclude the properly-trained child from engaging in future re-commitments to different points of view.

<sup>434</sup> Like Goldilocks, I have criticized the volitional accounts for doing too little or too much. Could there be a version of the volitional approach that is just right? Or must we abandon volition as helping us understand private acceptance of the law? The problem with the volitional response, it seems to me, is that it attempts to fill a cognitive gap, not a volitional one. No matter what the private volitional disposition of the agent to the law, questions about the relation of the agent's beliefs to her actions and utterances will still remain. A volitional account, it seems to me, will always struggle to explain those cognitive questions unless it abandons the cognitive aspect of acceptance and explains how volition fits into a fully non-cognitivist account. I provide some reasons supporting this view in the next sub-section.

### A. Separation and Detachment

Treating the existence of a point of view as by itself grounds for compliance is, of course, consistent with the incommensurabilist position. It also fits with Hart's separation thesis: his claim that judges need not have a moral reason for endorsing a rule of recognition. Rather, a judge can accept the rule of recognition for any reason or no reason, including prudential reasons.<sup>435</sup> If, as I propose, Hart's approach is fundamentally that of the incommensurabilist, then the internal perspective requires a point of view's participants to acknowledge its rules not only as stating norms, but as specifying distinctive styles of normative justification

(obligations, mobligations, and pobligations).<sup>436</sup>

Incommensurability is compatible with holding in mind different types of obligation (lobligation, mobligation, and pobligation) while seeking to understand both which type is currently in operation and how the same action or demand for conformity would fit under the alternative points of view.<sup>437</sup> It fits, for example, the position of the moralist trying to understand what the legalist claims for the law: the moralist is uncommitted to the normative force of lobligations, but can still gain understand the law and lobligations without endorsing it. Indeed, as Hart, notes, the legally committed moralist expressly adopts a publicly anti-law attitude, one that would prefer that this law or this legal system

<sup>435</sup> HART, *supra* note 89, at 159.

<sup>436</sup> My approach is thus similar to but importantly different from Scott Shapiro's thoughtful distinction between insider and internalized perspectives. See Shapiro, *Internal*, *supra* note 17, at 1158-59 (contrasting insider and internalized perspectives). The nub of my difference with Shapiro is that he engages in an exclusionist interpretation of Hart, whereas I believe Hart is better understood as an incommensurabilist. Accordingly, Shapiro's insider/internalized distinction is both too thick and too thin for my liking. The insider's perspective is too thick in that it imports too much cultural specificity; information that is unnecessary to understand a universal, culture-independent concept of law (as Hart might put it). The internalized perspective is too thin, however, because Hart envisages accepting the legal point of view as something more than understanding it as normative and "engender[ing] criticism ... deemed to be legitimate and made with good reason." See *id.* at 1162. Rather, he thinks that there is some form of genuine obligation engendered by the legal point of view. See Hart, *supra* note 89, at 266 ("where the law is settled and determinate, judges, in speaking of the subject's legal duty, speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' to the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication

of their statements of the subject's legal duty.")

<sup>437</sup> Accordingly, if Hart is an incommensurabilist, Thomas Morawetz is, in a sense, right to analogize this attitude as the position of the cross-cultural observer (although I think he takes this analogy too far: one need not actually be from a different culture). Morawetz characterizes the moderately external attitude as the perspective of a "cross-cultural" observer, one who attempts to appreciate the significance of the participants' conduct on the basis of her own community's internal point of view. Thomas Morawetz, *Law as Experience: Theory and the Internal Aspect of Law*, 52 SMU L. REV. 27, 34 (1999). What differentiates the cross-cultural observer's perspective from an extreme external one is that she adopts a hermeneutic perspective: "[s]he assumes that [the subjects] have a comparable set of attitudes towards their own system [as she does towards hers]." *Id.* Morawetz presents the observer's hermeneutic perspective as requiring translation from one set of cultural understandings into another. While her perspective requires projecting her internal point of view onto the subjects' conduct, it nonetheless depends upon a hermeneutic understanding of her own practice and an empathetic understanding of the subjects'. *Id.* Morawetz's explanation of the moderately external point of view permits the observer to understand a group's norms without necessarily understanding the internal point of view of that group's members. That why he locates the observer as from a different culture, projecting her culture's norms onto the foreign culture.

disappear for ever from the face of the earth.<sup>438</sup>

An incommensurability like Hart need not find some detached or normatively inert perspective from which to identify norms. The incommensurabilist can quite happily gloss over the distinction between detached and differently committed perspectives. All the incommensurabilist requires is some *legally* uncommitted (rather than *normatively* uncommitted) perspective from which to understand and critique the law. Thus, from a moral or prudential point of view, an agent can discuss obligations without endorsing them as genuine obligations, and so without approving or accepting the law's normative underpinnings.

The detached or hermeneutic perspective thus may present a problem of Hart. Hart suggests that a detached statement is not a statement merely *about* [the] law[ ], but a statement *of* the law which in the mouth of this speaker is uncommitted or detached. Similar normative statements of law (not merely statement about the law) may be made from the point of view of one who accepts the laws of some system as guides to conduct, but though made from that point of view are in fact made by one who may be an anarchist and so does not share it. These are detached or uncommitted statements of law which may be made both by subjects of a legal system who do not accept its laws even though they

purport to apply to them, or may be made about foreign or even extinct systems of law which do not apply to those who make such statements.<sup>439</sup>

From the reason-accepting perspective, normativity is established by the fact that people engage in the practice of treating the utterances, conduct, etc., as norms. It is the public features of the participants attitude towards the point of view that matters. Accordingly, an account of normativity that requires a theorist to identify some inward or interior psychological fact about the agent's beliefs or some particular mental disposition towards the point of view undermines the reason-accepting account.<sup>440</sup>

Consider, for example, a United States federal court judge who rejects the validity of the legal system, and in particular, the United States Constitution. That judge will not treat the Fourth Amendment prohibition on warrantless searches and seizures as valid law; nonetheless, the judge may believe she could protect privacy rights better *on condition that* she treats it as good law. Her private justification for any particular outcome may be moral or political. Nonetheless, she adopts a prudential attitude to the law rather than one that recognizes the validity of the legal point of view. At most, the law provides a public, epistemic rationale and justification for her private reasons for decision.<sup>441</sup> We no longer need to suppose that the judge follows the law because she

<sup>438</sup> This is what motivates both Hart's moralistic celebration of positivism in his famous debate with Lon L. Fuller, as well as his separationist insistence on the difference between legal and moral obligations in his debate with Raz. See Hart, *supra* note 18, at 54-44; 69 (giving moral grounds for separation of law for morality, and arguing that ought can refer to separate moral and legal standards of criticism); EOB at 150-51, 155 (rejecting moral standards as necessary for legal point of view, and rejecting Raz's account of authority on that basis).

<sup>439</sup> HART, *supra* note 89, at 154.

<sup>440</sup> MacCormick, for one, acknowledges that "[i]t is not clear to me how far Hart himself would go in accepting this wholeheartedly mentalistic view of the nature of what he identifies as 'the internal point of view.'" MacCormick, *supra* note 3, at 284.

<sup>441</sup> For a short argument in support of this position, see, e.g., Coleman, *supra* note 198, at 147 n.59 ("A rule's legality allows it to play a role in the justification or the resolution of a dispute that, in the absence of it having that status, it could not play."). MacCormick also emphasizes the justificatory rather than the purely instrumental role of the law. See MacCormick, *supra* note 3.

thinks it is *binding*, but only because she thinks it is *useful*.

This raises the issue of sincerity and bad faith. The sincerity of an agent's utterance depends upon its conformity with her actions, so that when act and "inward mental state" conflict, what is to be doubted is at least the match between the two. More worryingly, we can doubt the match between her (self-) description of her inward mental state and the mental state itself (rather than just the success with which she targeted her action). That is, her self-description of her state of mind cannot function as a guarantee for her public, manifest actions.

The problem of determining whether her motivational state matches her actions may be obscure to even to the agent. That is, unless she can infallibly know her mental state she may be self-deceived as to what attitude she has — motivational or epistemic.<sup>442</sup> That is, the motivational matching issue depends upon my knowing what the agent really meant to do: to act for the law reason and not for the non-law reason. So a judge may justify the outcome of a case by saying that the law justifies her decision even though what really motivates her is self-interest. And there is a question as to whether she can really know whether she was motivated by self-interest or morality.<sup>443</sup> So the motivational problem is not simply one of volitional pre-commitment, but the possibility of self-knowledge.

If the difference between detached and committed perspectives were to turn on some mental disposition, a superficially committed participant may turn out to be *self-deceived*. Individuals may be mistaken about their own mental states, or what it means to accept a point of view as valid. Accordingly, even judges who wish to be committed to the internal perspective and so who think that they are accepting the law as valid may in fact take a detached or habitual and so external attitude. Self-deception is not a problem, however, if the existence or efficacy of law depends upon some social practice or set of public standards. What matters is that the judge follow the standards and treat them as normative and binding for whatever reason.

Hart avoids this mentalist (he calls it "cognitivist")<sup>444</sup> issue either by including the detached point of view within the concept of acceptance or by producing a non-mentalist account of the relation between mental states and observable conduct. I think he embraces and consistently holds on to the latter approach. Doing so, however, engenders certain problems associated with what it would then mean to adopt a detached perspective to a point of view.

There is, I believe, a genuine issue as to whether this *separate* attitude is the detached or hermeneutic point of view. That is, Hart's attitude to legally uncommitted statements is compatible with

---

<sup>442</sup> This is a worry raised by Kant in the *Grounding for the Metaphysics of Morals*. See KANT, *supra* note 50, at 57.

<sup>443</sup> Kant makes this point, too. *Id.*

<sup>444</sup> Hart describes his theory as non-cognitivist. This may be taken as embracing a more-or-less expressivist position about the status of normative concepts. See Kevin Toh, *Hart's Expressivism And His Benthamite Project*, 11 LEGAL THEORY 75–123 (2005). I am unconvinced that Hart is an expressivist, and so associate Hart's use of cognitivism with a rejection of what might, following

MacCormick, be called a "mentalist view" of action, whereby reasons for action depend upon beliefs about what reasons exist, and action is designed to achieve operationalize those reasons. Accordingly, either reasons (as facts) or desires motivate our actions, and our actions can succeed or fail to match out motivations. A different account suggests that our actions in part explain what it was we really had in mind. Accordingly, there is not a simple causal relation between reasons or desires and actions, where reasons or desires motivate actions.

them being morally or prudentially committed. It need not be normatively inert in the ways MacCormick and Raz describe it, but may simply describes a different sort of social practice.<sup>445</sup>

If commitment or acceptance is manifested in what we do – if the internal attitude is given in part by the participant's external acts – then there is no space for the detached attitude to gain purchase unless it too is constituted by a set of (public) practices. In other words, for Hart (particularly if he is an incommensurabilist) the detached perspective may constitute yet another *type of use*: one that takes its place outside the practice of doing law and more in the practice of teaching or reporting about the law. What matters, in terms of the internal attitude, is the fact that the agent employs a obligation rather than a mobligation or a pobligation. The internal attitude thus demonstrates whether a participant is (or is not) committed to using a relevant point of view as grounds for justifying action, that is, whether the participant treats the point of view as valid.

My claim here is that a detached person – for example, Hart's "puzzled man"<sup>446</sup> – stands on different normative ground than a committed one. Hart introduces the puzzled man to illustrate what he elsewhere identifies as the moderately external or detached perspective. A puzzled person seeks primarily information about what sort of conduct a point of view prohibits or permits. Based

on that information, she "is willing to do what is required, if only he can be told what it is."<sup>447</sup> Nonetheless, even though she understands what the point of view requires, does not treat it as valid or legitimate. Accordingly, she withholds even the minimally supportive attitudes identified by MacCormick, and so merely prudentially "observes"<sup>448</sup> the law. To the extent she follows the law, she does so for some other, law-independent reason.<sup>449</sup>

This understanding of Hart is thus similar to but importantly different from the positions carved out by Stephen Perry and Scott Shapiro's debate over the nature of Hart's internal attitude.<sup>450</sup> They usefully distinguish two internal attitudes to rules, one of which Shapiro calls "internalization"<sup>451</sup> and the other of which Perry calls the "insider" attitude.<sup>452</sup> Internalization requires only that a participant treat the rules as normative, and so as providing binding standards of conduct. This attitude applies to any legal system, point of view, or rule. The insider attitude requires some system-specific account of how participants understand these rules, and so is anthropologically thicker and system specific.

The distinction between the internalized and insider attitudes is both too thick and too thin for my liking. Perry's insider's perspective is too thick in that it imports too much cultural specificity;<sup>453</sup> information that is unnecessary to distinguish a pobligation or mobligation from a

<sup>445</sup> Hart suggests that "those who make ... 'detached' statements must understand the point of view of one who accepts the rule and so their point of view might well be called 'hermeneutic.'" Hart, *supra* note 141, at 14.

<sup>446</sup> Hart, *supra* note 4, at 40.

<sup>447</sup> *Id.*

<sup>448</sup> MacCormick, *supra* note 18, at 18.

<sup>449</sup> Coleman, *supra* note 198, at 122 n.38 (distinguishing puzzled from bad man).

<sup>450</sup> See Stephen R. Perry, *Holmes vs. Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 158, 165-66 (Stephen J. Burton, ed., 2000). See also Shapiro, *Internal*, *supra* note 17, at 1158-59 (contrasting insider and internalized perspectives).

<sup>451</sup> See Shapiro, *Internal*, *supra* note 17, at 1158 (2006); Shapiro, *Bad Man*, *supra* note 17, at 198.

<sup>452</sup> Perry, *supra* note 242, at 165-66, 196 (describing internal or socialized attitude).

<sup>453</sup> *Id.*

obligation. The internalized perspective is too thin, however, because (if he is an incommensurabilist) Hart envisages accepting the legal point of view as something more than *just* understanding it as normative. Rather, he thinks that the legal point of view engenders a *particular* form of obligation, a lobligation that is distinct from the dictates of morality or prudence.<sup>454</sup>

There is, however, a simple cognitivist response that Hart could have essayed: that participants may accept the law from either the committed or detached perspectives.<sup>455</sup> Such an approach is, I believe, consistent with judges acting in bad faith. The detached point of view permits an observer to disregard the rules' normative force while nonetheless using

---

<sup>454</sup> See Hart, *supra* note 89, at 266 ("where the law is settled and determinate, judges, in speaking of the subject's legal duty, speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' to the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject's legal duty.")

<sup>455</sup> John Gardner has recently suggested that "Hart experimented fruitlessly with the idea that there is some belief or attitude on the part of officials [the attitude of acceptance] which makes it possible [to separate moral judgments from legal judgments]. See John Gardner, *How Law Claims, What Law Claims* (November 10, 2008). Oxford Legal Studies Research Paper No. 44/2008. Available at SSRN: <http://ssrn.com/abstract=1299017>. I tend to think that Gardner either overstates or misstates the problem. If Hart is interpreted from an exclusionist perspective, one that rejects the idea that law and morality are incommensurable, and that lobligrations are not obligations, then Gardner is correct that the search for some belief that can distinguish the two is bound to be fruitless. My claim is that Hart is, however, better understood as an incommensurabilist as to moral and legal obligations. The obligations are generated by different processes and offices (legal obligations, for instance, is more amenable to alteration and specification of our duties, law consisting in the union of primary *and* secondary rules, the latter of which include rules of change and adjudication that are absent from morality, see Hart, *supra* note 4, at 86-87), and identified by (though not dependent for their existence upon, *id.* at 84-88) the different forms of social critique and enforcement appropriate to each (punishment, among other things, in the case of law; shame- or guilt-inducing criticism in the case of morality, see *id.* at 86-87). (For an argument that Hart implicitly assumes law and morality are dependent upon their different modes of

enforcement, see P.M.S. Hacker, *Sanction Theories of Duty* in OXFORD ESSAYS IN JURISPRUDENCE 131-171 (A.W.B. Simpson ed., 1973 (arguing that Hart's theory of law necessarily includes sanctions within it). I think this account is mistaken: Hart suggests that the concept of legal obligation cannot be falsified by the failure to punish, or feel that there is an obligation, or other such facts; accordingly enforcement merely identifies that a particular concept of obligation is in use, and which one it is. See Hart, *supra* note 4, at 86-87).

If the problem is that Hart prevaricates over where the detached point of view fits in his account of acceptance, then I am more sympathetic to that claim. That problem is whether Hart takes a cognitivist account, in which beliefs are tested for fit with the facts, or a non-cognitivist account. I am not convinced that the cognitivist account is the one that fits best with the rest of Hart's claims. The work of J.L. Austin, Hart's philosophy mentor and close friend at Oxford, may be instructive here. Austin attempted to get away from the idea that mental acts simply accompany an activity like "promising" or "welcoming." See J.L. Austin, *Performative Utterances*, in J.L. AUSTIN, PHILOSOPHICAL PAPERS 233, 236-39 (J. O. Urmson & G. J. Warnock, eds., 1961). Austin suggests that promising, for example, does not simply rest on "inward" act but in part upon the procedures and offices surrounding the promise. Accordingly, in saying that someone performed an act, we can say that they must have had, or claimed to have a certain mental state attached, in this case, sincerity. Austin provides the example of welcoming someone to a party, *id.* at 239. He thinks that our mental state is given by what we do — our subsequent acts or practice — as well as what we say. This, it seems to me, is the picture that Hart has of accepting a point of view. That it is problematic on other grounds is a point to be developed at another time.

Either way, however the account Hart provides rests upon the idea that the judge engages in a practice, and practices are public. It is the public nature of the practice that important for acceptance and, I believe, allows Hart to duck the full force of Gardner's objection

them epistemically as part of a scheme of practical reasoning. That position is, however, open to observers *and* participants. Someone who engages in the enterprise of stating and using legal norms can, from a detached perspective, remain “cognitively” internal,<sup>456</sup> while refusing to accept the validity of law. In that case, it becomes impossible to tell just by observing *what* motivates acceptance, particularly given the graduated styles of “real” acceptance, including reluctant acceptance, that MacCormick identifies.

## II. EXCLUSIONISTS AND THE LEGAL POINT OF VIEW

The exclusionist also seeks to separate legal from moral obligations. Exclusionists, however, argue that the two senses of obligation are identical, not only in form and content, but meaning as well. What separates legal from moral obligation is the law’s claim to pre-empt or exclude moral reasons from operating as a valid ground of justification from the legal point of view. From a legal point of view, the law is an exclusionary reason that pre-empts moral reasons for decision.

Exclusionary reasons separate out different points of view by providing both a first-order reason for action and a second-order reason for ignoring competing non-legal reasons. Accordingly, from the legal point of view, positive law can be generated by the legitimate acts of authorized officials, even if it conflicts with a moral account of what we ought to do. Exclusion works to delimit the scope of a reason’s (or set of reasons’) operation. It includes (or protects)<sup>457</sup> those reasons within the relevant point of view and

excludes (or rejects) the others, placing them outside the point of view. Those first-order reasons that are not expressly included continue to operate so long as they do not conflict with the included or protected first-order reasons.<sup>458</sup> Accordingly, if legal and moral reasons overlap, the meaning of obligation remains the same and dependent upon morality: to assert that we have an obligation is to make a claim that someone with the right or power to alter our normative status did so.

### A. Exclusionary Points of View

Exclusionists believe they can distinguish among different points of view while retaining the unitary meaning of obligation. In order to maintain that there can be separate moral and legal points of view, exclusionists face two tasks: first, to explain why legal norms are not redundant (the problem of particularism);<sup>459</sup> and second, to explain how legal and moral norms can diverge. They claim that exclusionary reasons supersede and replace alternative reasons for action.

The solution to this problem is to make the intransitivity argument. Consider the following example. On the one hand, I believe that it is morally best, all things considered, to ride my bicycle to work every day because it lowers my carbon footprint and increases my healthiness (call this the environmental point of view). On the other hand, my wife often demands that we carpool, even though it uses more petrol, so that we can spend more time together (call this the companionship point of view). I recognize that the companionship point of view cannot be justified, all things considered, in part

---

<sup>456</sup> MacCormick, *supra* note 3, at 291.

<sup>457</sup> See RAZ, *supra* note 3 at 29, 235 (discussing protected reasons for action).

<sup>458</sup> *Id.* at 29-33.

<sup>459</sup> See Shapiro, *supra* note 19, at 57.

because we could become more organized in the way we spend time together. Furthermore, I certainly feel the tug of the environmental point of view: nonetheless, I think that companionship provides a reason for me to carpool with my wife.

I can rationally rely upon the companionship point of view to the extent that my wife has the ability (“normative power”<sup>460</sup>) to replace or exclude (“pre-empt”<sup>461</sup>) the other reasons that I have against taking the car.<sup>462</sup> Thus, companionship won’t justify my driving the car to work on my own. But when my wife demands that we carpool, the companionship point of view *replaces* the balance of reasons (that I ought, all things considered, to ride my bike).<sup>463</sup> That is, from the companionship point of view, my wife’s demand *supersedes* the environmental calculus of what I ought to do, all things considered, because it excludes conflicting environmental reasons from operating.<sup>464</sup> Under the companionship point of view, my wife’s demand operates as an exclusionary reason: a second-order reason to act for a reason. Acceding to my wife’s demand, in other words, operates to exclude my own evaluation of what do do, and replaces my evaluation with hers.

It is worth noting that the companionship point of view operates as an independent reason even if it does not increase our carbon footprint, and so does not conflict with the environmental point

of view. Companionship provides an independent grounds for decision that makes a practical difference even when my environmental reasons match my companionship reasons. Accordingly, if my wife and I *both* invest in bicycles and decide to carpool that way, then I still have a companionship reason for riding to work with her at the same time as having an environmental reason to bicycle. Her demand for companionship retains its exclusionary force and continues to make a practical difference in my decision-making. Put differently, if I want to keep my wife happy and show that companionship matters to me, I can only do so by accepting the companionship point of view (“I’m biking to work to be with you”). Acting on the environmental one (“I’m going out of my way to make me more healthy”) will not do if I am to treat her as an authority. Exclusion thus explains the relative incompatibility of moral and other points of view: a point of view is a set of norms, limited in scope, that claims to preclude the operation of competing reasons.

So far, we have dealt with the compatibilism claim by suggesting that points of view make a practical difference to all-things-considered decisions. Points of view, according to the exclusionary account, restrict the range of reasons we can consider by replacing competing norms or sources of authority. They do so by providing “a reason for judging or acting in the absence of understood

---

<sup>460</sup> See RAZ, *supra* note 3 at 18, 20-21

<sup>461</sup> RAZ, *supra* note 8, at 41-47.

<sup>462</sup> *Id.* at 46 (“the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”). Raz’s example may be more congenial: his example of the crossroads experience in the context of exclusionary reasons is a soldier who must choose whether to act on the order of a

superior officer that the soldier believes conflicts with morality. RAZ, *supra* note 2, at 43. The structure of the dilemma is the same in both my example and Raz’s.

<sup>463</sup> *Id.* at 42; see also *id.* at 46: “the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”

reasons, or disregarding at least some reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way."<sup>465</sup> Furthermore, this practical difference explains the divergence of legal and moral norms. Norms from the legal point of view have a different, more limited scope than moral norms yet claim to supersede or replace moral norms in the agent's decision-making process.

One further feature of the exclusionary account is worth noting. In the carpooling example, the companionship point of view has an identifiable source independent of morality. My wife generates the companionship point of view, and its efficacy depends upon my willingness to continue to defer to her wishes in this matter (or her ability to ensure my continued deference).<sup>466</sup> But also note that when my wife suggests that I have an obligation to carpool with her she does not mean that I have an obligation (or that she has a right to demand) that is a "carpool" type of obligation (a cobligation). Rather, she means that I have an obligation of the same type I claim to have when I assert my environmental duty to bike to work. Unlike the incommensurabilist, she does not assert that my reasons are of a different sort to hers and do not operate here; rather, she asserts that, from the companionship point of view, I ought to ignore the environmental

reasons I have for biking to work because she is an authority able to replace these reasons with hers.

### B. Exclusionist Positivism

That a competing point of view exists and is efficacious need not, by itself, justify the agent's rejection of morality. Whether or not I should listen to my wife when the companionship point of view conflicts with morality depends not only upon the fact that these points of view *can* make a difference in our practical decision-making, but also that they *ought* to.<sup>467</sup> That is, there is a further issue concerning the exclusionary account of points of view: if the companionship and legal senses of obligation are the same as and derived from the moral, then I am only justified in treating these points of view as generating genuine obligations to the extent that the points of view can be morally justified. There must be some moral reason for a point of view to exclude moral reasons.<sup>468</sup>

A distinctive feature of the legal point of view is that it claims to impose genuine obligations, and those obligations would be genuine in respect of being moral obligations. Positivists believe, however, that what matters in identifying the legal point of view is legal validity: not the (normatively active) moral validity of the legal claim, but only the (normatively inert)<sup>469</sup> fact that the claim purports to be

---

<sup>464</sup> *Id.* at 42.

<sup>465</sup> Finnis, *supra* note 29, at 233 (citing RAZ, *supra* note 2, 25-48, 58-73). As Finnis elegantly puts it: "A person treats something (e.g., and opinion, a pronouncement, a map, an order, a rule ...) as authoritative if and only if he treats it as giving him sufficient reason for believing or acting in accordance with it notwithstanding that he himself cannot otherwise see good reason for so believing or acting, or cannot evaluate the reasons he can see, or sees some countervailing reason(s), or

would himself otherwise (i.e., in the absence of what it is that he is treating as authoritative) have preferred not so to believe or act. In other words, a person treats something as authoritative when he treats it as, in Joseph Raz's useful terminology, an exclusionary reason." *Id.* at 232-233.

<sup>466</sup> See Raz's military example in RAZ, *supra* note 2, at 53-5.

<sup>467</sup> This may amount to the same thing.

<sup>468</sup> This was the reason-demander's demand.

<sup>469</sup> See Gardner, *supra* note 94, at 202.

moral (whether it is or not).<sup>470</sup> For the positivist, then, an important feature of law is that it can remain law while failing to impose moral obligations. For Raz, John Gardner, and other positivists operating in the exclusionist tradition, there is an important distinction between what law *claims* to do and what it *succeeds* in doing.<sup>471</sup>

Two things may be worth noting here. First, the exclusionist claim is not the incommensurabilist claim. The incommensurabilist need not believe that the law claims anything. Instead, incommensurabilists can believe that law imposes real duties upon people, just not moral duties. Obligations are not moral obligations. Accordingly, incommensurabilists can reject the natural law idea that laws that succeed *qua* laws are ones that impose moral duties. Rather, the incommensurabilist believes that legally successful laws impose obligations. We may also want, from a moral point of view, morally successful laws. So we can morally criticize the law for failing to impose obligations. But for the incommensurabilist, morality does not provide the central criterion for the success of a law *qua* law. Exclusionists cannot dispose of morality so easily.

Second, since the exclusionist believes that legal obligation is derivative of moral obligation, then the positivist exclusionist is left insisting that there is (and must be) a gap between failure and success in imposing moral obligations and that this constitutes the gap between law and morality. In other words, the natural lawyer believes that law is the sort of thing that does impose a moral obligation. The sort of thing that merely purports to impose an obligation is not law; it is something else. We can indeed study that something else, but we should not call it law. We could call it force or might.<sup>472</sup>

The problem for the exclusionist positivist here is that if words such as “right” and “duty” and “obligation” all have a distinctively moral meaning (as opposed to, in addition, a distinctively legal one),<sup>473</sup> then in order to use these terms at all we must use them in the moral sense. Accordingly, that when I say “you have a legal duty to X,” I mean “the law claims moral authority to impose upon you the (moral-legal) duty to do X.” Deontologically, we are on the edge of a vicious regress.<sup>474</sup> If the law’s claim is derived from a moral one,<sup>475</sup> then at some point there must be some real moral right or

---

<sup>470</sup> One way to differentiate exclusionists who are natural lawyers from those who are legal positivists is to examine the nature of the claim that each makes about what it is to constitute a valid law, where we can understand valid law as member of the set of norms constitutive of the legal point of view. One way to put the difference is to suggest that natural lawyers believe that the central case of law is one that succeeds in imposing moral obligations upon its subjects, and that central case establishes what counts as the legal point of view. See Finnis, *supra* note 29, at 15 (calling the perspective of the practically reasonable person the “central case of the legal viewpoint”; Gardner, *supra* note 94, at 227. The positivists rejoinder is that she is not only interested in the central case, but also the peripheral ones: the morally failed as well as the morally successful aspects of law. See *id.* at 227.

<sup>471</sup> RAZ, *supra* note 3, at 8, 30-33; RAZ, *supra* note 1, at 215.

<sup>472</sup> What Hart calls force I would call might to try and forestall post-modernists who think of force as a particular, and slippery, form of power. The sort of thing a Foucauldian or Nietzschean would call an act or effect of power could be a valid norm as far as Hart is concerned.

<sup>473</sup> See Leslie Green, *Legal Obligation & Authority*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY §2: that is, they claim the right and power over legal subjects’ conduct

<sup>474</sup> See, e.g., John Gardner, *Law and Morality* at 2 (forthcoming in Skorupski (ed), *The Routledge Companion to Ethics*, <http://users.ox.ac.uk/~lawf0081/progress.htm>, posted on 09 September 2008).

<sup>475</sup> Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY, 1, 7 (2004).

duty underlying the legal one, otherwise we hit the problem of legislating the right to legislate. In other words, if the positivist's move to second-order exclusionary reasons were to be justified by some non-moral authority to legislate, that would not preclude the demand for a real, third-order moral justification (in fact, it necessitates it if obligation is univocal). If the positivist attempts to obviate that claim by asserting that there is a third-order claim about the authority to impose authority, then we are into the vicious regress. The positivist exclusionist's solution is to deny that he is using the term "obligation" (or "right," etc.) in its active sense, but only in its inert, descriptive sense.

Inertness is thus central to the exclusionist positivist theory. For the positivist, there must be some gap between failure and success in imposing moral obligations. One way to motivate this gap is to suggest that, while laws can claim to be genuinely — that is, morally — valid, they may fail to be so in a variety of ways. Accordingly, Raz identifies three ways in which a norm may be valid: it may be valid through and through (what I will call genuinely valid), legally valid, or systemically valid.<sup>476</sup> Raz explains that a norm is genuinely valid when it provides a moral reason for action. The people to whom it applies ought to endorse and follow it.<sup>477</sup> Legitimate authorities are legitimate in virtue of issuing genuinely valid norms; norms that its subjects morally ought to follow.

A norm is legally valid if it is valid from the legal point of view. Legal validity entails that the norm "belongs to some legal system."<sup>478</sup> Legal validity depends upon establishing criteria for membership in some legal system, and not a criterion of genuine validity.<sup>479</sup> Legal validity thus says nothing about the moral value of the norm: legal validity is morally inert. Legal systems claim that their norms ought to be endorsed and followed as genuinely valid norms;<sup>480</sup> however, the claim that the norm is *genuinely* valid could be false. Hence legally valid norms need not be genuinely valid.

Legal validity does not, by itself, establish that a given legal point of view exercises effective authority over a group of people, in large part because because legal validity does not guarantee that the legal system at issue is currently in force. A valid legal norm may be a member of a defunct or hypothetical legal system.<sup>481</sup> Accordingly, to explain the sort of validity necessary for an efficacious or effective authority, Raz introduces the idea of systemic validity, which entails not only that the norm is a member of some system, but also that the system is actually in force.<sup>482</sup>

Legal and systemic validity do not, however, guarantee that a norm is genuinely valid. They simply establish that the norm is valid from a particular point of view, and so operate as criteria indicating membership in a system of norms.<sup>483</sup> Systemic validity is simply the property possessed by effective authority.<sup>484</sup> Raz's description of law, and with it any point of

---

<sup>476</sup> RAZ, *supra* note 2, at 127-28.

<sup>477</sup> "A norm is valid if its norm subjects ought to endorse and follow it." *Id.* at 127; Raz says essentially the same thing, *id.* at 80.

<sup>478</sup> Raz, *supra* note 2, at 127.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.* at 128.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* ("legal and similar systems ... are

systemically valid only if they are practiced systems").

<sup>483</sup> It is "the fact that the[ norms] were created or are applied by the relevant institutions" that makes them systemically valid. *Id.* at 128. As Raz further suggests, "A norm is systemically valid if and only if the fact that it belongs to a certain institutionalized system is (part of) the reason for its validity." *Id.*

<sup>484</sup> *Id.*

view established by virtue of exclusionary reasons, depends, however, on the fact that systemic validity is derived from and underwritten by genuine validity.

#### *E. The Adjudicative Consequences of Validity*

The central claim of legal positivism is the validity thesis:<sup>485</sup> that the legal validity of a norm is independent of its merits. The validity thesis is “normatively inert. It does not provide any guidance at all on what anyone should do about anything on any occasion.”<sup>486</sup> In particular, it does not tell judges what to do, and so says nothing about how a judge ought to decide a case. To believe otherwise, John Gardner has argued, is to fall into the “myth” of “positivistic adjudication”: the belief that “legal positivists are ... committed to a distinctive view about the proper way of adjudicating cases, according to which judges should not have regard to the merits of cases when deciding them.”<sup>487</sup>

The myth of positivistic adjudication mistakenly tries to recast a theory about what law *is* as a theory about what *judges ought to do*. Instead, as Gardner helpfully points out, the validity thesis “only tells us that, insofar as judges should apply legal norms when they decide cases, the norms they should apply are [legally valid] norms. But that leaves completely open the vexed questions of whether and when judges should only apply legal norms.”<sup>488</sup>

Nonetheless, the validity thesis does have at least one important adjudicative

consequence. At the very least, positivism purports to establish when an agent does in fact speak from or on behalf of the legal point of view. The positivists' validity thesis thus properly addresses the claim that an agent does not do so, or worse, is conceptually precluded from doing so. Accordingly, while validity may be morally or normatively neutral, the validity thesis makes claims about the legal status of official statements. In particular, it suggests (perhaps uncontroversially) that if a judge or other legal official fails to act in the appropriate manner, then she no longer acts as a legal official. Instead, she acts outside, and sometimes contrary to, law. The validity thesis is thus not adjudicatively inert.

For Raz and Gardner, the legal status of official acts depends upon the sort of claim officials make about the moral underpinnings of the law. They maintain that while validity remains agnostic about the moral value of the legal point of view, legal officials cannot.<sup>489</sup> If a legal official is to speak *as a legal official*, then she must speak from or on behalf of the legal point of view. This adjudicative consequence is a feature of Raz's theory of authority and the relation between validity and legitimacy.

The legal point of view is not just any point of view: it is interested in exercising normative power. According to Raz, and Gardner, only legitimate institutions or officials can genuinely exercise normative powers. The exercise of normative power is what distinguishes law from might.

---

<sup>485</sup> Gardner, *supra* note 94, at 201.

<sup>486</sup> *Id.* at 202.

<sup>487</sup> *Id.* at 211.

<sup>488</sup> *Id.* at 213. Gardner also explodes a related myth, which he calls the myth of “[i]nterpretation [whereby] [i]t is sometimes hinted by critics, and widely believed by students, that legal positivists must favor particular methods of legal interpretation.” *Id.* at 218. Just as positivism is not a theory about when to apply valid legal norms, nor is it a theory about whether and when to apply particular interpretive methods. See *id.* at

218-19.

<sup>489</sup> This paradox has been rejected by, among others, Philip Soper. See Soper, *supra* note 5, at 209-237. Soper believes that positivism demands of legal officials that are impossible to fulfill. I think Soper is mistaken about this: positivism demands that legal officials claim the law is justified, but they need not believe, or more importantly, know with certainty that it is. This is a consequence of Raz's Normal Justification Thesis, Raz, *supra* note 8, at at 53, and will be discussed in greater detail, *infra*.

Accordingly, valid official utterances must take a particular form – they must at least claim legitimacy on behalf of the law. The thesis advanced by Raz and Gardner is that legal officials must make a particular *type* of claim or forfeit the right to speak as a legal official.

Even if the law is in fact not justified, nonetheless “someone who does not claim moral justification for what she does is not, in doing it, acting as a legal official, for ... she is no longer acting on behalf of the law.”<sup>490</sup>

This formal requirement of official pronouncements from a legal – or any normative – point of view suggests a further conclusion: so long as the claim is made by the right official in the proper institution, and takes the appropriate form, then it does not matter what the judge actually believes about the moral justifications of the law or legal system. Put differently, so long as the official’s claim takes the appropriate form, then the public aspect of the claim cancels any private reservations the official might have.

### 1. Claiming Legal Authority

Raz makes at least two points about a legal system’s claims to establish genuinely valid reasons for action (and which, I would suggest, apply to points of view more generally): first, legal systems are the sort of institutional systems that *claim* to be legitimate,<sup>491</sup> that is, able to establish genuinely valid norms. The

legitimacy claim distinguishes legal systems from systems of force or might: “the gunman situation writ large.”<sup>492</sup> But second, Raz claims that we can empirically identify the law’s claim to legitimacy: it depends upon statements by legal officials about the nature of their authority. These are claims about the scope and nature of their jurisdiction — whether legal norms are genuinely valid. Yet these claims may be wrong or maliciously motivated, so that while the legal norm is identifiably a member of the legal point of view (it is systemically valid) it lacks moral merit and so is not legitimate (it is not genuinely valid). In this manner a legal system’s claim to authority often outstrips legitimate authority.<sup>493</sup>

To take up the second issue: Raz points out that “[t]he claims the law makes are evident from the language it adopts and from the opinions expressed by its spokesmen.”<sup>494</sup> That is, from an internal point of view,<sup>495</sup> legal officials regard themselves as able to impose obligations on legal subjects and demand that the parties obey the judge’s pronouncements. Raz does not think that these claims to authority are always justified.<sup>496</sup> Rather, to be justified, legal officials must possess legitimate authority, which just is a moral reason justifying their decision and their claim to authority.

For Raz, the officials’ authority-justifying claim is that they are better able to evaluate the parties’ reasons for action than the parties are themselves.<sup>497</sup>

<sup>490</sup> Gardner & Holmes at 20.

<sup>491</sup> Raz, *supra* note 1, at 215.

<sup>492</sup> Hart, *supra* note 18, at 59. Raz suggests that “[p]ower over a person here is not normative power. It means ‘the ability to make that person do what one wishes.’” Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF’S 3, 4 (1985).

<sup>493</sup> See RAZ, *supra* note 3, at 29-33; RAZ, *supra* note 1, at 215.

<sup>494</sup> RAZ, *supra* note 1, at 215; see also *id.* at 216

<sup>495</sup> *Id.* at 216.

<sup>496</sup> *Id.*

<sup>497</sup> An authority is thus legitimate if it is justified in replacing a subject’s reasons for action because it is more knowledgeable or has more expertise in

resolving the relevant issues than those subjects do. Raz calls this the Normal Justification Thesis. See RAZ, *supra* note 8, at 53 (a norm subject is “likely better to comply with reasons which apply to him if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.”); Raz, *supra* note 1, at 214 (same); Joseph Raz, *The Problem of Authority: Revisiting the Service Conception* 90 MINN. L. REV. 1003, 1014 (2006) (same). The Normal Justification Thesis asserts that the most direct reason individuals have for deferring to legitimate authority is our inability to judge best what we ought to do in a complex and plural society. RAZ, *supra* note 8, at 53-55

Because this claim to authority is defeasible given the facts of a particular case, Raz calls it the Normal Justification Thesis.<sup>498</sup> Accordingly, to use the carpool example once more, my wife claims that the companionship point of view generates a genuine obligation for me to ride to work with her.<sup>499</sup> She may, however, make claims on my attention that morally she has no right to make. In that case, her claim to authority outstrips her actual authority. Her claim is properly authoritative only if she is correct about the moral justification underlying her claim. Nonetheless, according to the Normal Justification Thesis, I am justified in choosing to act from the companionship point of view rather than the environmental one if I believe that she is better able to evaluate the underlying moral reasons (what it is better to do, all things considered) than I am. If I act for prudential reasons (I worry how she will treat me if I don't act from the companionship point of view) then I do not treat her as a justified authority, though I might treat her as an effective one (what Raz calls a *de facto* authority).

## 2. Legal Authority: Legitimate and De Facto

For Raz, legal systems (or the legal point of view) are distinctively those sorts of authority that claim to be supreme and comprehensive within a particular jurisdiction.<sup>500</sup> Accordingly, they necessarily

claim more authority than they possess. They claim to exercise legitimate authority even in areas in which they only have *de facto* authority. As Raz puts it, "To establish an obligation ... to obey the law ... is to establish that ... the law indeed has the legitimate authority it claims to have."<sup>501</sup>

*De facto* authority enables us to distinguish between might (or force) on the one hand, and valid authority on the other. The mugger uses might or force to require his victims to hand over their wallets, but does not claim that there is some moral obligation justifying his demand. The mugger (or, as Hart would call him, the gunman)<sup>502</sup> is an agent who uses might to achieve his aims, and so does not even claim that his actions impose some form of normative duty upon his victims. A military Junta, on the other hand, claims *de facto* authority, and argues that the citizenry is obligated to do what it commands. But the mugger and the Junta do not have legitimate authority if there is no legitimate, that is, moral reason to do as they command.

Crucially for both Hart and Raz, the mugger's power or might is not normative. It does not impose an obligation or a duty. The victims have, at best, prudential not moral reasons to obey, where prudential reasons are reasons that respond to considerations of might. Accordingly, if the mugger approaches two victims, *A* and *B*, and demands at gunpoint, "Your money or your life," and *A* turns to *B* and says,

<sup>498</sup> In other words, there may be other justifications based on the facts of particular circumstances, but normally the authority will have a superior claim to knowledge or a superior ability to coordinate social action, and so a subject will normally be justified in treating the authority as legitimate. See RAZ, *supra* note 8, at 53-55.

<sup>499</sup> This is called the "dependence thesis." See *id.* at 47: "all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to

their action in the circumstances covered by the directive." See also Raz, *supra* note 1, 212 (discussing "dependent reasons").

<sup>500</sup> Raz, *supra* note 3, at 121 ("The law ... is a system for guiding behavior and for settling disputes which claims supreme authority to interfere with any kind of activity. It also regularly either supports or restricts the creation and practice of other norms in the society.")

<sup>501</sup> RAZ, *supra* note 3, at 237.

<sup>502</sup> HART, *supra* note 4, at 82.

“What ought I to do?” that “ought” is not a moral or normative ought but a prudential one. It does not ask, “what is my duty?” (“what am I under an obligation to do?”), but “what is the best course of action in order to avoid getting killed?”

We might try to make the same distinction between might and morality apply to the Junta: however things are more complicated than in the mugger example. Again, analogizing the Junta to the mugger, we could try to draw a distinction is between force and legitimate authority. The analogy suggests that authority is, for any legal system, both comprehensive and binary: the law exists as a seamless web regulating all aspects of society (comprehensive)<sup>503</sup> and its rules are either legitimate or not (binary). Raz proposes a different solution. He thinks that the legal authority is limited and analog. Raz ascribes limits to legal authority because he thinks legal systems, though they are things that claim comprehensive authority, often lack it. That is just the sort of social institution they are. They claim to regulate more stuff than they (legitimately) can. So the Junta may have legitimate authority when it regulates the traffic code (sets the maximum speeds and which side of the road to drive upon), but lack legitimate authority when it prosecutes political dissidents.

Raz’s position is analog to the extent that he inserts in-between might and morality this third thing, claimed morality (or claimed legitimacy). Law is only legitimate to the extent that it identifies what we ought, morally, to do. The idea that law must be morally valid to be legitimate raises the compatibilist and crossroads problems: even the most

well-drafted law will often fail to identify what we ought to do on every occasion.<sup>504</sup> Insofar as morality is concerned, legal obligation not only depends upon moral obligation, but legal rules often operate more like rules of thumb than a morally accurate series of specifications. The law often fails precisely to identify what we have a moral reason to do. On the other hand, the law often succeeds in determining what it is an agent ought to do better than the agent could or serves to co-ordinate social activity in a way that individuals could not, and does so based on the reasons that do, in fact, apply to us. In such circumstances, Raz suggests, the agent has a reason to follow the law.<sup>505</sup>

He suggests that “the notion of a de facto authority depends on that of a legitimate authority since it implies not only actual power over people but, in the normal case, both that the person exercising that power claims to have legitimate authority and that he is acknowledged to have it by some people.”<sup>506</sup> If effective authority “depends” upon the notion of legitimate authority, it cannot be force or might. The sort of authority possessed by the mugger is not one that has any relation to legitimate authority. The mugger’s command does not state a duty, but only states what will happen if the victim does not pay up. It is a statement about consequences, and so not normative in the manner that Hart and Raz believe essential to law.

Accordingly, the manner in which the Junta’s enforces conformity with its demands must take a different form from the mugger’s. Its claim is not, “obey or die,” (at least not expressly), but rather, “since we are the folks in charge, and we have enacted the laws, then (normatively)

---

<sup>503</sup> DWORKIN, *supra* note 147, at 15-16 (discussing law as a “seamless web”).

<sup>504</sup> Hart says this too, in the *Concept of Law* on the failure of rules to predict every instance. See

HART, *supra* note 4, at 127-29.

<sup>505</sup> This is the normal justification of authority. See RAZ, *supra* note 8, at 53.

<sup>506</sup> *Id.* at 65.

you ought to obey us.” Put in Razian terms, the Junta “claims not only the obedience but the allegiance of its subjects.”<sup>507</sup>

The importance of this argument for Raz’s theory of law cannot be overstated. The point, for Raz, is that law can only *be law* if it attempts to govern *in a particular sort of way*. That is, for Raz, it is of the essence of law is that it is *normative*, because the sort of power it exerts is *normative power*. Normative power, however, has a particular form: it is valid only in certain circumscribed ways. Since to be a normative authority is to exercise normative power, accordingly, even to *pretend to be* a normative authority is at the very least to claim to exercise power in particular ways.

Accordingly, for Raz, the sorts of claim that an authority can make and still *be* an authority are limited by the concepts of normative authority and normative power. Since legal systems are, and claim to be, normative authorities – that is, they are the sort of social institution that seeks to impose duties and confer rights upon norm subjects – then even morally bankrupt legal systems insist that the sort of power they exercise is normative in nature. Legal systems, in other words, do not pose as muggers or gunmen, but as

obligation-imposing authorities. The sorts of claim a legal system – or its agents – can make and still be a legal system are limited by the concepts of normative authority and normative power.

The flip side of this is Raz’s argument that the law, if it is to be an authority, must at least purport to possess legitimate authority if it is to have effective authority.<sup>508</sup> As Raz puts it: “To claim authority [a legal system] must be capable of having it, it must be a system of a kind that is capable of possessing the requisite moral properties of authority.”<sup>509</sup> For Raz, all authority is derivative of moral authority, legal authority no less than any other form.<sup>510</sup> Accordingly, it should be no surprise that the conceptual status of law as the sort of thing that does, or could, claim or possess authority is dependent upon making a moral claim.<sup>511</sup> Accordingly, legal officials or anyone else claiming to be even an effective authority must in turn claim to exercise legitimate authority.<sup>512</sup>

### III. THE INTERNAL ATTITUDE: PUBLIC AND PRIVATE CLAIMS TO AUTHORITY<sup>513</sup>

The discussion to this point indicates that, for Raz, the concept of authority is

<sup>507</sup> Raz, *supra* note 3, at 158.

<sup>508</sup> Raz, *supra* note 1, 215 ; *see also id.* at 216

<sup>509</sup> *Id.* at 215. As Himma puts it, for Raz “a normative system that is not the kind of thing capable of possessing authority is conceptually disqualified from being a legal system.” Kenneth Einar Himma, *Inclusive Legal Positivism*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 147 ( 2002)

<sup>510</sup> Raz, *supra* note 267, at 7 (“we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality.”)

<sup>511</sup> Raz, *supra* note 1, at 217 (“one cannot sincerely claim that someone who is conceptually incapable of having authority has authority if one understands the nature of one’s claim and the person of whom it is made.”).

<sup>512</sup> See Raz, *supra* note 3, 28-33, esp. 29 n.1

<sup>513</sup> I use the terms public and private here in a slightly different sense than they are employed in the debate over public reasons. See, e.g., Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006); John Finnis, *On Public Reason*, Notre Dame Legal Studies Paper No. 06-37, <http://ssrn.com/abstract=955815>. In my usage, the reasons could be rephrased as “personal” and “legal” reasons for decision. A difficult issue arises in considering how to distribute preferences (which are not reasons), private reasons and public reasons across the terms personal and legal. I believe that a judge may have preferences, private reasons and public reasons for decision, none of which are legal. A judge may rely on non-legal public reasons: the difficult issue is whether she should rely on private reasons (however defined) and preferences. These issues are too complex to be resolved in a footnote, but are worth raising, nonetheless.

intimately connected to both legitimacy (moral validity) and normativity. Authorities claim to exercise normative powers. But, for the exclusionist, an authority can only genuinely possess a normative power if that power is morally valid. Accordingly, for any individual or institution that claims to be an authority must claim that its exercise of power is morally valid. Put differently, authorities are limited in the nature of the claim that they can publicly make and still claim to be a normative authority.

While in the previous section I sought to tease out the limits on the exclusionist claim to authority – that any normative authority must make a claim to legitimacy or moral validity – in this section I propose to consider what it means that an institution must claim authority or be recognized as possessing it in order to exercise authority. In other words, in this section I shall look at the public nature of authority.

As positivists, both Raz and Gardner think what counts as law (or a point of view) does not depend upon whether the law (or a point of view) is in fact morally justified.<sup>514</sup> They think it depends upon the public claims and acknowledgments of legal officials and legal subjects (or anyone claiming to speak on behalf of a point of view). These claims and acknowledgments are social rather than moral facts. Since the issue is who gets to speak on the law's behalf (from the legal point of view), the Raz and Gardner

formulation of that issue states *how* one gets to speak on the law's behalf. Their answer is that one must be *publicly* disposed to do so. That is, they believe, an official must publicly accept or endorse the legal system, where endorsing the law means manifesting the appropriate belief through official statements about the law from a legal point of view.

We could, therefore, disaggregate the type of attitude that an individual may have towards the law – their private orientation, we might call it – from her public statements about the law. For Raz, to constitute an authority or a point of view as authoritative, requires professing in public that the authority or point of view is morally justified or legitimate.<sup>515</sup> This form of “avowal”<sup>516</sup> expresses moral endorsement of the point of view no matter what one privately believes. As Raz puts it: “[a] judge who ... weakly [that is, privately] accepts [the legal point of view] must, it would seem, pretend that he fully endorses it. Hence his [public] statements are fully normative.”<sup>517</sup>

Publicity thus plays a particular role in Raz's exclusionist positivism, not only in the sense that any government or community institution is public,<sup>518</sup> but also because as an effective or *de facto* authority. Law is the sort of entity that “claim[s] ... legitimate authority or [is] held by others to have legitimate authority.”<sup>519</sup> Put differently, to be able to function as an effective authority, an entity must either be capable of transmitting or broadcasting

<sup>514</sup> *Id.* at 21; Gardner, *supra* note 247.

<sup>515</sup> “The claims the law makes are evident from the language it adopts and from the opinions expressed by its spokesmen.” Raz, *supra* note 1, at 215; see also *id.* at 216.

<sup>516</sup> Raz, *supra* note 3, at 28.

<sup>517</sup> *Id.* at 155 n.13

<sup>518</sup> “It is a system for guiding behavior and for settling disputes which claims supreme authority

to interfere with any kind of activity.” *Id.* at 121.

<sup>519</sup> *Id.* at 8. See also *id.* at 33 (“the law claims authority. The law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority.”). In “presenting itself,” the law holds itself out, *publicly*, as an authority. Again, the public aspect is essential to the nature, not only of *law's* authority, but effective authority in general.

its directives,<sup>520</sup> or perceived as so endowed.<sup>521</sup>

Publicity, on its own, is insufficient for legal authority. To act in their official capacity, legal officials must profess that their authority rests upon the right sort of reason. They must claim, publicly, that the legal point of view is a morally justified exclusionary reason for action.<sup>522</sup> This public claim expresses their commitment to the legal point of view. Commitment, in other words, depends for Raz upon a specific type of public utterance rather than the private mental states of any particular agent.<sup>523</sup> An agent establishes herself as committed to a normative point

of view by claiming it is morally valid (legitimate): that is, speaking out (publicly) on its behalf. It is the agent's public actions — holding herself out as an authority because speaking on behalf of a morally justified point of view — that establish she is a valid authority relying upon the right sort of normative reason.

Providing the right sort of reason need not mean expressly endorsing that reason. When judges use the law to decide cases, they rarely explain to the parties that they think the system itself is justified. Rather, they simply apply the law. Raz appears committed to the view that, in applying the law, the judge tacitly

---

<sup>520</sup> For example, Andrei Marmor, glossing Raz, suggests that “only an agent capable of communication with others can have authority over them.” ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 115 (1992).

<sup>521</sup> See Raz, *supra* note 1, at 217-18. Raz suggests that while trees cannot function as a practical authority because “what cannot communicate with people cannot have authority over them.” *Id.* at 217. But a child might think that trees can communicate, and so could function as an authority. Raz thinks that the child is simply wrong. But I think it is clear that some people take inanimate or etherial objects as able to communicate, and so as authorities. For example, a stone idol may be authoritative if water seeps from its eyes and is understood by its subjects as “crying tears.” Lest such an example be thought too exotic, Boston Red Sox baseball fans have, for many years, taken non-communicative natural phenomena as authoritative signs of some impending disaster communicated by some long-dead player sold to the New York Yankees in 1918. That they are wrong about his ability to communicate does not preclude them from taking what they perceive as communications as authoritative and acting in a ritualistic fashion upon these “signs.”

<sup>522</sup> The right sort of reason must be a reasons for the parties, and not simply judicial self-interest. Raz, *supra* note 13, at 130. An agent's self-interested or prudential reasons will not obligate a third party unless there is some reason that the third party should promote the agent's interest. *Id.* Since only moral reasons justify imposing a rule upon someone else, prudential reasons do not count as reasons of the right kind for imposing an obligation upon another. Accordingly, even were I

to pretend that I had a reason for imposing an obligation upon you, I would have to pretend that I had a moral reason or altruistically prudential reasons (your interests or convenience) at heart, rather than selfishly prudential reasons. Raz notes that the same applies to judges accepting the legal point of view. So long as the rule identifying the legal point of view (the rule of recognition) “is accepted sincerely and in good faith, then it is accepted for the right reasons. But there can also be insincere acceptance, or pretend acceptance for reasons of a different kind. ... Judges who accept the rule of recognition accept a rule which requires them to accept other rules imposing obligations on other people. They, therefore, accept a rule that can only be accepted in good faith for moral reasons. They, therefore, either accept it for moral reasons or at least pretend to do so [i.e., insincerely].” *Id.* John Gardner makes the same point more succinctly: “Law makes moral claims, and when it makes those claims sincerely it has moral aims.” Gardner, *supra* note 266, at 3.

<sup>523</sup> For Raz, the committed perspective is “not identical to the point of view of any person or set of persons, although it is a point of view that any person can take up.” Gerald J. Postema, *Norms, Reasons, and Law*, 51 *CURRENT LEGAL PROBLEMS*, 149, 170 (1998). Rather, the Razian internal attitude “refer[s] to what any sensible individual, putting him or herself in the position of a representative of the legal system — e.g., the officials who are responsible for the creation and implementation of the system's directives — ought to recognize as the implicit claim that accompanies such official action.” Philip Soper, *Law's Normative Claims*, in *THE AUTONOMY OF LAW*, 218 (Robert P. George, ed., 1996).

endorses the legal system. Her “internal” attitude derives from her public utterance of the law’s claim to authority. It has nothing to do with what she really believes about the moral status of the legal system (or some other practical point of view) on whose behalf she speaks. The act of relying upon the right sort of (legal) reasons is sufficient to claim (legal) authority. We might call this the moral claim thesis.

The moral claim thesis has two consequences for the Razian theory of legal authority. The first concerns the distinction between detached and committed statements. For Raz, that distinction concerns the normative force of an official’s statements or attitudes towards the law. Statements are normatively committed when they publicly claim that the law is valid. Statements are detached when they make no such claim.

The second consequence concerns the necessary attitude of all of the legal officials to the law. If legal authority depends upon the public utterances of legal officials (whatever their private beliefs)<sup>524</sup> then it could be the case that *no legal official believes law is morally justified and still the legal system exists and is efficacious*. Every official of a legal system may morally reject the law while nonetheless endorsing its claim to authority. Such systemically insincere acceptance of the law is not ideal: it is positively pathological. But it does not disqualify the legal system from counting as law, nor the judges from counting as legal officials acting within their proper legal role. I shall deal with each of these issues in turn.

#### A. Public and Private Acceptance

Raz thinks we can take at least two different attitudes towards, or make two different sorts of statements about, a point of view. Both, I shall suggest, say nothing about the speaker’s private beliefs or state of mind, but rather depend only upon the speaker’s public utterances. One sort of statement or attitude is committed.<sup>525</sup> For example, a committed legal statement asserts that the law imposes genuine obligations upon the law’s norm subjects. It is a normative, moral statement about what the law requires.<sup>526</sup> The speaker publicly asserts that the law is justified in claiming that there is an obligation to do as it commands: that the law has legitimate authority.<sup>527</sup> Commitment thus depends upon the speaker’s public reasons rather than her private ones.

Statements may be committed in one of two ways. A committed speaker might acknowledge or endorse a norm or a point of view as (1) genuinely morally justified or (2) as valid without thereby endorsing the norm as morally justified.<sup>528</sup> The second, validity-acknowledging type of committed statement treats the authority as both effective and possessing the right to generate norms and pre-empt the speaker’s reasons for action. But this type of committed statement (or this type of committed attitude) can remain agnostic about the moral underpinnings of the particular laws enacted.

Raz’s version of exclusionist positivism is thus concerned with what claims people do in fact make about points of view and what such claims do in fact indicate about their beliefs.<sup>529</sup> To

<sup>524</sup> Either utterances endorsing or the absence of utterances rejecting the legal system’s claim to moral justification.

<sup>525</sup> Raz, *supra* note 3, at 158-59

<sup>526</sup> *Id.* at 154 (discussing internal or “full-blooded” normative statements).

<sup>527</sup> *Id.*

<sup>528</sup> RAZ, *supra* note 2, at 175-77.

<sup>529</sup> “[T]o claim authority or to accept that someone has authority over one ... means to believe that one has legitimate authority, or that that person has authority over one.” RAZ, *supra* note 8, at 65.

determine whether a legal official makes the relevant claim or holds the relevant belief, Raz looks at what claims she makes or endorses<sup>530</sup> or avows,<sup>531</sup> that is, whether she asserts that legal reasons pre-empt or exclude conflicting non-legal reasons for action.

Committed statements or attitudes should be distinguished from detached ones.<sup>532</sup> Detached statements “do[ ] not carry the full normative force of an ordinary normative statement. Its utterance does not commit the speaker to the normative view it expresses.”<sup>533</sup> In particular, it does not commit the speaker to treating a point of view as authoritative (valid or legitimate). Nonetheless, detached statements do permit the speaker to assert that the norm is valid, *according to a point of view*. The speaker need not believe that the point of view has, or ought to have, the power to generate valid norms. Detached statements or attitudes thus fit within, and are vital to, Raz’s account of validity and legitimacy.

Detached statements or attitudes thus preserve the normative underpinnings of reason statements because they are,

“though not committed ... nevertheless normative.”<sup>534</sup> Some caution is warranted here, however. Detached statements are normative: they *use* norms, rather than simply reporting them;<sup>535</sup> nonetheless, the use they make of the norms remains neutered or inert.<sup>536</sup> Nonetheless, detached statements are more than just descriptive statements about what reasons there are, and their degree of acceptance within the community. Detached normative statements preserve the normative import of the full normative statement, without implying commitment to it.<sup>537</sup>

Another way of making the same point is that both committed and detached statements (or attitudes) understand the point of view as necessarily claiming the right to exclude competing reasons. Committed normative statements are thus statements by people who endorse a point of view, that is, people who treat it as effectively replacing or pre-empting their reasons for action.<sup>538</sup> Detached statements enable the speaker to treat the point of view as exclusionary without thereby endorsing it as valid or justified.<sup>539</sup>

<sup>530</sup> Raz, *supra* note 3, at 155.

<sup>531</sup> *Id.* at 28.

<sup>532</sup> *Id.* at 158-59

<sup>533</sup> *Id.* at 153 See also *id.* at 154 (“It [the analysis of detached normative statements] shows that normative language can be used without a full normative commitment or force”).

<sup>534</sup> *Id.* at 158-59

<sup>535</sup> Accordingly, Toh’s description of detached statements as a form of simulation misses the fact that they may be quite actively, if “cognitively,” MACCORMICK, *supra* note 3, at 291-92, or “epistemically,” Shapiro, *supra* note 190, at 146, used in legal reasoning.

<sup>536</sup> “Legal scholars ... can use normative language when describing the law and make legal statements without thereby endorsing the law’s moral authority.” Raz, *supra* note 3, at 156

<sup>537</sup> One way to bring out the force of detached normative statements by comparison with Kevin Toh’s claim that detached statements simulate legal reasoning (or normative reasoning from a point of view). Kevin Toh, *Raz On Detachment, Acceptance*

*And Describability* 27 OXFORD J. LEGAL STUD. 403, 411 (2007). I understand Raz to insist that detached statements engage in legal reasoning (or reasoning from a point of view), most particularly by acknowledging the exclusionary character of the norms. Detached statements simply withhold endorsement of the point of view’s normative claims — detached statements take no position on whether the claims are legitimate or not — and so the exclusionary reasons do not operate to pre-empting the agent’s own reasons.

<sup>538</sup> RAZ, *supra* note 3, at 10, 12

<sup>539</sup> See RAZ, *supra* note 1, 210-37. See also Patrick Durning, *Joseph Raz and the Instrumental Justification of a Duty to Obey the Law*, 22 L. & PHIL. 597, 600 n.12 (2003) (citing RAZ, *supra* note 8, at 39) (“Raz clarifies that the subject is not barred from thinking about the pre-empted reasons, nor even from coming to a decision about what he ought to do on the basis of those reasons. What he may not do is let his evaluation of those reasons affect his actions.”).

The detached agent thus recognizes that her detached statements are statements of legal fact; of what rights or duties, for example, that people do, in fact, have. They do not simply report or describe legal facts, or state what rights or duties people believe they, or others, have.<sup>540</sup> The prudential agent accounts for such facts in her reasoning, by treating them as valid exclusionary reasons.<sup>541</sup> To resuscitate the wife example: my wife wants me to endorse companionship because it says something about my relationship with her: if I am committed to her as an authority, then I should treat her reasons as authoritative reasons for action. But I may act from a detached perspective, treating the norms as valid but not legitimate. In that case I treat them as exclusionary reasons — as claiming the right to pre-empt my moral and environmental reasons for cycling to work.<sup>542</sup> I recognize that the reason does have “binding force” for someone, just not for me.<sup>543</sup>

Even from this detached, prudential perspective, I still recognize my wife claims the status of authority able to produce valid companionship reasons. My wife, however, wants me to adopt the

committed perspective. She thus wants me to endorse the companionship point of view because it says something about my relationship with *her*: that I treat her as an authority able to generate valid reasons for action.<sup>544</sup> That is, I treat my wife as a valid authority when I treat the reasons she generates as exclusionary because I treat her as the sort of person able to generate such reasons.<sup>545</sup> If I act from a detached perspective, I treat her companionship rule — that we should carpool to work to spend more time together — as informationally useful, but neither valid nor legitimate.

In other words, I accept that my wife could genuinely oblige me to carpool if she knew more than me about what I ought to do, all things considered, or is better able to coordinate our activities than I am on my own. And I might choose, for prudential reasons — peace and quiet or marital harmony — to treat her as this type of authority, while privately refusing fully to buy into it. This means that I may justifiably (if secretly) resent her companionship demand as undermining my commitment to the environment. From a fully committed perspective — one in which I both publicly *and* privately

<sup>540</sup> “A detached legal statement is a statement of law, or what legal rights or duties people have, not a statement about people’s beliefs, attitudes or actions.” Raz, *supra* note 3, at 153

<sup>541</sup> For example, Raz believes that decisions are, or are analogous to, exclusionary reasons. If an agent “has taken a decision, he now has an exclusionary reason not to reconsider the matter.” Raz, *supra* note 2, at 68. The agent may later reconsider the decision, for example, on the grounds that it was premature. Accordingly, the agent no longer treats the decision as justified. Nonetheless, “[t]hat the decision was premature is a consideration which may lead the agent to reopen the matter for further consideration but this is never an automatic result. A decision to disregard a decision is itself a new step which should be based on reasons.” *Id.*

<sup>542</sup> I may even be faced with the crossroads experience, recognizing the validity of the norms,

and my wife as an authority, but also the conflict between her claim to authority and what I think it is right, all things considered, to do.

<sup>543</sup> Raz, *supra* note 3, at 155. Raz suggests that people who accept the law, “[w]hen they state the legal validity of a rule do mean to assert its binding force, though not necessarily its moral force.” *Id.*

<sup>544</sup> As Raz puts it, Raz, *supra* note 1, at 218: “whoever issues the directives has authority if and only if his directives are authoritatively binding because he makes them, that is (1) they are authoritative, and (2) part of the reason is that he made them”

<sup>545</sup> Furthermore, I treat her reasons as valid when I recognize that, systemically, they are part of the companionship point of view. Raz, *supra* note 3, at 152. Raz uses the example of parental commands as part of a systemic authority, see Raz, *supra* note 2, at 153.

acknowledge that she is a valid authority – I have no such justification.

The quintessential detached statement, that of a “[l]awyers’ advice to their clients, law teachers’ expositions in front of their students,”<sup>546</sup> makes no claim about the validity of the law,<sup>547</sup> and so denudes the statement of its full normative force. It is perhaps worth noting that these examples of detached utterances are not those of a public agent withholding private endorsement of their public utterances. We are not dealing with the sort of attitude attributed by J.L. Austin to Hippolytus: though “my tongue swore to, but my heart (or mind, or other backstage artiste) did not.”<sup>548</sup> Rather, they are public acts of advising, teaching, and so on. The public claim in each instance is one that refuses to endorse the law. It is precisely this *public* withholding of endorsement (this social fact) that distinguishes detached from committed statements.

But how do we distinguish sincere claims from insincere ones or detached attitudes from committed ones? Two speakers, *A* and *B*, may each personally regard the law as immoral *and* invalid, and each make the same utterance, e.g., “the Fourth Amendment permits racial profiling so long as the officer has an independent reason for searching or seizing a suspect.”<sup>549</sup> Imagine *A* makes a detached statement and *B* makes a committed one. The only way to differentiate the statements as detached or committed would be to ask whether the agent speaks on behalf of the legal point of view or not. But this is precisely the question that validity in general, and the moral claim thesis in particular, was supposed to solve: when does a legal official act on

behalf of the law?

The idea that judges could privately reject the law while publicly relying upon it raises the specter of judicial activism and bad-faith judging with which this article began. Exclusion, remember, seemed like it would preclude this prudential style of decision-making, or at any rate all-things-considered decision-making. A privately motivated prudential person need not regard law as preempting non-legal reasons for action. Rather, she could factor legal norms into the balance of reasons for action. But she need not disregard the exclusionary nature of legal norms. She could recognize that some people treat it as valid by claiming it is morally valuable. Accordingly, while the prudential person may not *personally* be committed to endorsing the legal system’s claim to validity or legitimacy, she may nonetheless be concerned to understand law as a valid or legitimate practical authority. This, remember, is simply the epistemic attitude to the law.

If this prudential person were a judge who has adopted a detached attitude to the legal system and its rule of recognition, the issue of withholding personal approbation would take on a complex cast. Her private evaluation of the balance of reasons would be colored by her public perspective as an official who gets her authority to render legal decisions from the system itself. Accordingly, she would have a prudential interest in publicly observing the system and acting according to its norms in order to ensure her own efficacy and authority. She might thus prudentially choose to treat the legal system’s norms as providing exclusionary

<sup>546</sup> *Id.* at 153.

<sup>547</sup> *Id.*

<sup>548</sup> J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 9-10 (1990). Raz is thus not discussing the sort of bad faith private mental finger-crossing

that provides the welcher with a get-out from his promise,

<sup>549</sup> See, e.g., *Whren v. United States*, 517 U.S. 806 (1996).

reasons even if she did not believe that they morally ought to pre-empt her own reasons for acting.

Raz acknowledges that committed statements need not reflect the judge's true belief about legal validity. The Moral Claim Thesis, after all, holds that acceptance only depends upon the judges' public reasons for applying the law. So long as these take the right form, then an insincere judge may privately rely upon prudential reasons.<sup>550</sup> Such private, prudential reasons include "salary, social involvement, etc.[,] or ... no reason at all."<sup>551</sup> In other words, although the judge may publicly proclaim fidelity to the law, the judge may not have internalized the law as valid.

The Moral Claim Thesis only suggests that a judge who *publicly* imposes her own prudential reasons on third parties ceases to act as a judge.<sup>552</sup> There is nothing that guarantees that committed statements are internalized, and so that judges regard the law as the source of legal obligations. Raz, in fact, seems to believe that judges are and should be motivated to follow the law independently of the law's pronouncements.

the legal standards addressed to [the courts and other high-ranking state officers] are not there only to enable others to predict how the officials will act but primarily to guide the officials themselves ... But while it is intended that the officials will conform to the law, it is not *expected* that they should do so through desire to avoid the sanctions, but

because they are *predisposed* by independent considerations to obey the law. The law's role here is merely to mark the standards to which that independent motivation then attaches itself.<sup>553</sup>

In other words, it is the fact that judges, when sincere,<sup>554</sup> regard the law as morally justified that motivates them to treat it as properly guiding their decision-making. But it is worth noting that the law itself may be insincere and so fail to provide the moral justification (and so the legitimate authority) it claims. Insincere law is still valid law. That is the central positivist contention. In the face of insincere law, legal officials may be morally justified in acting, privately, upon other morally or prudentially justifications reasons for legally valid outcomes. Nonetheless, these judges act in a non-legalistic manner, that is, in bad faith.

#### *B. No Judge Need Privately Endorse the Law*

The positivist's descriptive claim about permissible judicial attitudes has an adjudicative impact. A judge may personally or privately refuse to endorse a legal rule or the legal system as morally justified yet still believe that she can impose valid legal obligations upon the parties. But what goes for one legal official goes for all of them. A legal system can exist and create valid obligations even though *none* of its officials personally, that is, privately endorse the legal point of view as morally justified. In other words, it is

<sup>550</sup> According to Raz, judges "may have reservations concerning the moral justifiability of the law but nevertheless they accept and apply it for their own reasons." Raz, *supra* note 3, at 155. See also RAZ, *supra* note 56, at 235 ("Acceptance ... does not impart moral approbation of the rule, nor even belief that there are adequate moral reasons for obeying it ... All it means is belief that the agent should follow the rule according to its terms.").

<sup>551</sup> *Id.* at 155. See also RAZ, *supra* note 56, at

235 ("Acceptance could be for moral, prudential or any other reasons, or for no reason at all.").

<sup>552</sup> Because she decides for the wrong sort of reason. See Raz, *supra* note 13, at 130. See also Gardner, *supra* note 266, at 4.

<sup>553</sup> Raz, *supra* note 3, at 247 (my emphasis).

<sup>554</sup> On sincerity, see Raz, *supra* note 1, at 217; Raz, *supra* note 13, at 130. See also Gardner, *supra* note 266, at 4.

<sup>555</sup> HART, *supra* note 4, at 116.

not necessary that any official personally endorses it for a legal system to exist.

Hart famously rejects the possibility that an efficacious legal system could exist where no legal official acknowledges the legal system as valid.<sup>555</sup> I have suggested that his existence claim is a consequence of incommensurability: unless some sufficiently influential group of individuals support the legal (or any) point of view the would literally be no reason to treat it as authoritative.<sup>556</sup> Because, however, legal validity and moral validity refer to two separate systems of justification, a legal system may be legally valid yet morally iniquitous.

I further suggested that detachment presented a problem for Hart, and the problem of universal official detachment from the system suggests why that might be the case. There are essentially two forms that the Hartian account of detachment could take. The first is a practice-based account, the second a more cognitive account. Under either account, the motivation for endorsing a point of view is irrelevant. What matters for the practice-based account is that the judge or other legal official be critically engaged in the practice of law. The fact that the agent “really” does so for moral or prudential reasons is irrelevant. What matters for the cognitive account is that the detached attitude counts as accepting the law. Then, under either account, all that matters is that the agent accept the legal system’s rule of recognition and treats it as efficacious and is normative for those who would endorse it. That is, it is consistent with Hart’s other claims about the nature of legal validity that every

legal official may morally reject their legal system yet the system would still exist and be efficacious.

### **1. Hart’s Practice Version of Judicial Non-Endorsement**

My claim is that a legal system, though pathological, can exist and be efficacious even though no legal official publicly endorses the law as morally (the practice version) or genuinely (the cognitive version) valid.<sup>557</sup> Because the notion of acceptance is slightly different under each of these versions, it is worth considering them in turn

Where the distinction between the various attitudes of acceptance takes the form of some shared practice or regularity of conduct, then it often becomes difficult to tell precisely what attitude individuals have. People may simply follow norms without critically reflecting on them, or rather than follow norms, just not act against them. Roger Shiner makes the point that we cannot tell much about the attitudes of a group of people from the brute fact of a shared practice.<sup>558</sup> Accordingly, mere observation of an individual’s orientation towards the rules is often insufficient to determine whose behavior is governed or guided by the point of view, or whose is habitual or accidental.

I tend to think that Shiner has underestimated the fact that a practice includes a critical reflective aspect. Shiner appears to think that a practice is just the physical conduct in accordance with the rule. Accordingly, the practice of doffing one’s hat on entering church is just the act of removing one’s hat, and so does

---

<sup>556</sup> Thus, for example, because my wife is a sufficiently influential person in my life, I have a reason for recognizing the validity of the companionship point of view. “Influential” need not mean politically powerful. What matters is that the other person’s opinion is important to me.

<sup>557</sup> A legal system may exist and be efficacious even if the citizenry does not endorse the law, as discussed *infra*.

<sup>558</sup> SHINER *supra* note 127, at 66.

not tell us much about the attitudes people have to hat-doffing.<sup>559</sup> We could, however, separate the manner in which people doff their hats – out of habit, thoughtlessly, carelessly, coincidentally, accidentally, intentionally, deliberately, on purpose, and so on – from the reasons they might give if they were challenged to defend the practice or criticize others' performance. It is this *further* practice – the practice of criticism – that is essential to differentiating among the different attitudes manifested by participants in hat-doffing. That practice helps us to determine whether someone is speaking from within the hat-doffing point of view, or from somewhere outside it.

For example, Gerald Postema argues that, for Hart, the practice does the work of setting out the contours of the legal point of view emphasizes the practice of critique.<sup>560</sup> Postema claims that a practice “requires [the judge] to apply rules identified by criteria established by this practice ... the practice determines the central duties of his office, and if he were to fail to discharge them he knows he would be soundly and legitimately criticized.”<sup>561</sup> Hart points out that judges typically believe that it is this practice (which includes the practice of criticism), rather than some moral norm, that requires them to apply the law. Accordingly, it is the fact that the judges accept the legal system – that they treat obligations as normative – that generates and

justifies their critical reflective practice.

Of course, it is still open to an observer to make the further challenge that the participant's critical engagement is itself habitual or rote or thoughtless. But that challenge is more limited than the sincerity point. The challenge amounts to either the claim that the participant is not fully participating, though she remains within the practice; or that she is no longer within the practice, because she is not (actually, really) using the rules.

This is to point to the different types of pathology that can infect the practice of law. Neil MacCormick provides a useful gloss on the range of committed statements or attitudes, one that helps in understanding detached ones. MacCormick believes that someone taking the committed perspective may manifest a variety of attitudes ranging from full to reluctant to minimal acceptance of a point of view and the norms it contains, with concomitant postures of full or grudging support, or “support with exceptions.”<sup>562</sup> The detached agent cannot muster even this much support for the system, instead choosing merely to “observe”<sup>563</sup> the law as authoritative without supporting or otherwise endorsing it.<sup>564</sup> To the extent that an individual claims to act from a point of view she is committed to it: she makes a “full-blooded normative statement[ ] ... a sign of endorsement of the rule concerned.”<sup>565</sup> Detached statements are

<sup>559</sup> On hat-doffing, see HART, *supra* note 4, at 86, 125-26.

<sup>560</sup> Postema, *supra* note 315, at 169 (quoting Hart, *supra* note 89, at 158, that “when a judge takes office, he finds himself in a settled practice of adjudication.”).

<sup>561</sup> *Id.*

<sup>562</sup> MacCormick, *supra* note 18, at 18. MacCormick identifies five different levels of acceptance of a legal system: full; moderate; reluctant; minimal; and prudential. The first two levels entail fully support the authority of the system; reluctant acceptance involves only grudging

support; and minimal acceptance involves “support with exceptions.” Prudential agents have “no real commitment to law's authority as an exclusionary reason,” but simply “observe” the law as a social authority. *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> MacCormick uses the term “endorse” to refer to an attitude that approves of the content of legal norms. MacCormick's use of “endorse” is thus narrower than Raz's. I thus use endorse to apply to (potentially) both approval of a norm's content and of the system's authority.

<sup>565</sup> RAZ, *supra* note 3, at 154.

thus “parasitic on the full-blooded normative statements.”<sup>566</sup>

My view is that, to the extent that MacCormick’s categories allude to the non-cognitive, practice oriented version of Hart, they nicely describe the sorts of pathologies that can undermine a point of view from within. The practice of using the rules becomes half-hearted, and subject to criticism by other participants or by detached observers. At some point it may become so thoughtless and mechanical as to be as sham. But this need not depend upon intuiting the participant’s inner mental state: the practice of critique and challenge is fully public. The point is that using the rules as justifications for action constitutes treating the rules as valid. Even if a person is primarily motivated by morality or prudence, then although they genuinely and publicly believe the legal system to be immoral and imprudent, nonetheless, so long as they engage in the practice of law – so long as they insist that there is a obligation to act – then that is sufficient to accept (in the Hartian sense) the legal point of view as valid.<sup>567</sup>

## 2. Hart’s Cognitive Version of Judicial Non-Endorsement

The more cognitive account precludes anyone, the agent included, from being able to tell definitively what was their motivation. What any or every judge personally believes is impossible to determine (the problem of sincerity), but fortunately irrelevant for the existence of law. The reason is that even a uniformly detached attitude on the part of the judiciary – a judiciary of (morally or prudentially motivated) puzzled men and

women – is consistent with judges understanding the law and complying with its norms when otherwise justified in so doing.

The major difference between the practice and cognitivist versions of Hart thus becomes how to characterize the detached attitude: as one that is included within the concept of acceptance or excluded from it. Hart was not terribly clear about this point,<sup>568</sup> and the two positions are not mutually exclusive. Whatever version one subscribes to, however, the motivational account cannot properly ground the positivist’s version of the judicial attitude necessary for law to exist and be effective in a given jurisdiction.

The nub of the motivational claim is that beneficent and prudential types of reasons are inadequate practical reasons for, at the least, judges. If the judge accepts the law, then there must some further obligation requiring her to apply the law just because it is the law<sup>569</sup> – what might be called a legalistic reason. The demand for a legalistic reason precludes detachment as sufficient for acceptance.

Detachment-as-acceptance and the motivational accounts both address the same problem: the idea that some influential group of officials must treat the law as existing and efficacious if the is in fact to exist and be effective within a particular jurisdiction. Furthermore, identifying someone who accepts the law is even more important for the incommensurabilist, for without some acceptor there is no reason to adopt the point of view.

A central problem with the detached cognitive version of acceptance is that it describes pathological legal systems – systems in which something has gone

---

<sup>566</sup> *Id.* at 159.

<sup>567</sup> And note that the practice-based take on the detached attitude excludes it from counting as acceptance, whereas the cognitivist take includes

it within the concept of acceptance. Hart is, I think, quite unclear as to which he really endorses.

<sup>568</sup> HART, *supra* note 4, at 89-91.

<sup>569</sup> See also Shapiro, *supra* note 190, at 162.

wrong. Things can go wrong in different ways. In an oligarchy, a minority of the legal officials imposes the law they accept upon a recalcitrant or apathetic citizenry. The citizenry does not fully accept the rules. Some might accept them from a detached perspective. Others may not accept the rules at all, taking an externalized perspective. Hart's version of legal pathology in the *Concept of Law*,<sup>570</sup> is of oligarchy: law as bordering upon might.

A different style of pathology not considered by Hart is colonialism. If the existence of law depends upon someone endorsing the legal point of view, then that someone could be the citizenry. Accordingly, the legal officials could "go along with" the citizenry for utilitarian reasons (to keep them compliant) even though no official endorses the system. Here, the legal officials would accept and apply the law, and so the law would exist and be efficacious, but none would endorse it as morally justified. Some significant group of citizens would endorse the law, however. Accordingly, the incommensurabilist's existence problem is solved.

Colonialism, however, presents a morally bad version of legal pathology; however there can be morally beneficent pathological legal systems as well. Consider, for example, the case in which no-one, judge or citizen, adopts a cognitively committed (motivational) attitude to their legal system. No-one

believes the law is valid. Nonetheless, so long as the judiciary and other legal officials enforce, for prudential or other reasons, the legal system — treat the law as valid and binding — the legal system exists and is effective.

This type of legal pathology need not be morally iniquitous, however. Even if the judges regard obligations as "really" invalid, so long as they engage in the practice of law they could treat the legal system as comporting with a system of obligations. In this case, we would have the public form of law — the practice of law — without its distinctive normative features (obligations as opposed to different types of obligation).

This raises the compatibilist problem — as it should. It is, after all, a borderline, pathological legal system. Nonetheless, if judges engage in the practice of law, and every law comports with what, morally we ought to do, then that may be the morally best legal system there could be. This not-quite paradox should give us pause about the merits of law.

Pausing to reflect about the merits of legalism is particularly important for the motivational account. A detached agent could be and "honest man," motivated to act for moral reasons and seeking to pursue his moral projects through the law.<sup>571</sup> Or the puzzled man may have only prudential, that is, non-moral and non-legal, reasons to obey the law.<sup>572</sup> The honest man will do whatever morality requires, and so will follow the law where

---

<sup>570</sup> HART, *supra* note 4, at 117-123 (discussing pathology of a legal system).

<sup>571</sup> See, e.g., Holmes, *supra* note 14, at 8; HENRY DAVID THOREAU, A WEEK ON THE CONCORD AND MERRIMACK RIVERS 61 (1985) (1849) (suggesting that the "honest man" has "little occasion for" moral rules).

<sup>572</sup> There are, however, two distinct prudential attitudes possible here, only one of which is compatible with puzzled perspective. The first (compatible) one is that of a "bad-faith man," seeking to pursue immoral projects through the law.

The bad-faith man seeks to understand the normative structure of the law. He contrasts with the simply bad man who regards the law as a prediction of positive or negative judicial outcomes. The bad man takes a different approach to the law than the bad-faith puzzled man: the bad man is concerned only with the judge's prior "form," in much the way a gambler looks the past performance of animals on the racetrack. From this perspective, Holmes's predictive theory regards the judge as a horse or greyhound or an automaton: the judge lacks any agency or autonomy with regard to the rules.

there are no moral costs and practical advantages. For the bad man, too, the law plays an informational role. He will do whatever it takes to avoid legal sanction and take advantage of whatever opportunities the law offers. But there is also the legalistic man who seeks to make the law's motivations his own, and for him the law makes all the difference in the world. It not only provides reasons for actions; it cuts off further deliberation about what to do. His only consideration is to determine what is the law; once he has settled that issue, the law binds by precluding thought of any competing reasons.

As a consequence of their explanation of the force of rules in judicial reasoning, motivational accounts of the law exclude not only bad men, but honest ones as well.<sup>573</sup> If so, the good man features in legal decision-making only at the law's interstices, where there is some form of "gap."<sup>574</sup>

Motivational accounts thus think there is some independent value to law as a system of rules. They are, in John Gardner's terms, "positivity welcoming."<sup>575</sup> The motivational value of rules is, however, not a necessary feature of legal positivism<sup>576</sup> and, I have hoped to show, extrinsic to the concept of law. Motivational accounts valorize the form of law over its content. In so doing they make a moral mistake.

### 3. A Razian Version of Judicial Non-Endorsement

Raz believes that a judge cannot demand that the parties conform to legal norms without claiming to endorse as morally justified the law she applies.<sup>577</sup> He asserts, in contrast to Hart, that judges who claim to apply the law necessarily publicly endorse a moral claim and so cannot publicly claim to be morally neutral about the rule's application to the parties in a given case. Nonetheless, his position is compatible with judges privately withholding (and so publicly misrepresenting) endorsement of the legal point of view.

Sincerity is not necessary for legal validity: every judge may insincerely claim authority. So long as they act as or are regarded as a *de facto* authority, then a legal system exists and is efficacious. Raz believes, however, that a judge must at least publicly claim moral authority. Hart's view is compatible with judges openly pursuing, for prudential or non-legal motives, their own projects through the law without thereby endorsing the law. In fact, Hart thinks judges may go so far as to publicly reject their legal system as lacking morally justification.<sup>578</sup>

The idea that acceptance depends upon making the right sort of claim causes Gerald Postema to suggest that Hart and Raz are talking at cross purposes when discussing judicial acceptance of the

---

<sup>573</sup> See, e.g., Holmes, *supra* note 14, at 8 (rejecting "conscience" as a ground of legal obligation).

<sup>574</sup> See, e.g., Raz, *supra* note 7, at 8 (discussing reasoning according to law, which conforms to the motivational account, and reasoning about the law, which does not).

<sup>575</sup> Gardner, *supra* note 94, at 205.

<sup>576</sup> *Id.*

<sup>577</sup> "I have constructed a rule concerning the behavior of the agent ('I ought not to buy sweets')

and accepting a rule concerning the behavior of another ('He ought not to buy sweets'). I can believe in the validity of the first for reasons of convenience. But I cannot justify a belief in the second by such reasons. That it may be to my advantage if I refrain from having sweets is a reason for accepting that I ought not to buy them. But that it is to my advantage that you refrain from buying sweets is not a reason for me or anyone else for accepting that you ought not to buy them." Raz, *supra* note 13, at 130.

<sup>578</sup> Hart, *supra* note 89, at 159.

law.<sup>579</sup> For Raz, Postema explains, the committed perspective is “not identical to the point of view of any person or set of persons, although it is a point of view that any person can take up.”<sup>580</sup> Rather, the Razian internal attitude “refer[s] to what any sensible individual, putting him or herself in the position of a representative of the legal system — e.g., the officials who are responsible for the creation and implementation of the system’s directives — ought to recognize as the implicit claim that accompanies such official action.”<sup>581</sup> In other words, Postema recognizes that, for Raz, the internal attitude is about the minimal claim necessary for law to be authoritative, rather than what anyone actually or sincerely believes.

While Postema is right that Hart and Raz have different ideas about what constitutes acceptance, I do not think that the difference between Hart and Raz is precisely captured by focusing on what individuals claim as opposed to what the point of view claims. In part, that is because I think that there are two readings of Hart: the practice account and the cognitive one. And in part that is because I believe Postema underplays the social nature of publicly claiming authority.

As I have indicated, the cognitive account also raises the problem of sincerity, and so must acknowledge that insincere judges can accept the law. Claiming authority is thus a social activity. It may have certain conceptually necessary constitutive features; Raz’s

point is that sincerity is not one of them.

Accordingly, the difference between the Hartian and Razian views of acceptance is about what it means to speak on behalf of a point of view. Hart believes that speaking on behalf of a point of view means treating the point of view as fully normatively valid. For Hart, however, fully normatively valid does not mean morally valid. Raz thinks there is more to acceptance than that. He thinks that, in addition, genuinely valid norms are, and must be, moral norms. For Raz, to speak on behalf of the law is to *claim* it is fully normatively valid. The judge need only believe the point of view is *systemically* valid, rather than morally valid, but the judge must at least not deny that the law is morally valid if she is to exercise a normative power rather than mere might. Accordingly, Raz thinks that a judge may permissibly personally reject the moral authority of her legal system, and thus in fact privately adopt a morally neutral or antagonistic perspective, so long as she publicly claims that the law is authoritative.<sup>582</sup> For Raz, the judge’s actual attitude to the law is less important than the reasons she publicly relies on for following the law.

But if that is the case, *no judge need believe that the law is valid or treat it as such for a legal system to exist*. All that matters is that the relevant officials *publicly* treat the laws as effective. That is, for whatever reason, a legal system

---

<sup>579</sup> Postema, *supra* note 315, at 169.

<sup>580</sup> *Id.* at 170.

<sup>581</sup> Soper, *supra* note 315, at 218. By contrast, “Hart merely thinks of ... acceptance ... in terms of the attitudes of particular judges.” Postema, *supra* note 315, at 170 n.47.

<sup>582</sup> Raz believes that a judge may not publicly reject the law and still claim legal authority: to justify the existence of the law and her power as a judge, the judge “must either accept [the legal point of view] for moral reasons or at least pretend to do so.” Raz, *supra* note 13, at 130. See also AL at 28 (contrasting

the claim that those following the law need not “genuinely ... believe that the person possessing effective authority is a legitimate authority ... [so long as] they avow such a belief.” MacCormick seems to agree, asserting that “[w]hen persons purport to act under authority of law as governments, law-makers, or judges, they necessarily assert the authoritativeness of law as they determine it, representing it as a justified common exclusionary reason for action and judgment by those they say it binds.” MacCormick, *supra* note 18, at 18

exists and is effective so long as a sufficient number of relevant officials acknowledge publicly that it is genuinely valid, even if in fact it is not. So long as the relevant officials publicly treat the law *as if it were* valid, then the law *is* in force, whatever private reason the judges have for acknowledging and supporting the rule of recognition.

#### IV. CONCLUSION

Under either the Hartian or Razian theories of acceptance, there can be normative systems in which no-one, whether judge or citizen, personally or privately endorses the rule of recognition, or the validity of the legal system. Whatever the judge publicly says, she need not genuinely endorse the individual laws or the legal system as a whole while engaging in judgment over others. Such judges often described as acting insincerely or in bad faith.

Hart and Raz each, however, propose different relations between law and morality. I have advanced the controversial claim that Hart thinks that law is incommensurable with morality. If this is the case, then morality generates obligations of a different sort than legal

obligations, though the two may overlap or, in his terms, coincide. Moreover, this separation of law and morality provides agents with some independent ground to stand upon, from which to critique valid laws and resist the moral value of law-abidingness — a value Hart suggested led the sheep to the slaughterhouse.

So while the issue of force or might directly concerns both the existence and efficacy of legal systems, as well as the authority of the judge or legal official, force or might takes many forms, some of which are non-legal, some of which are clothed in legal form, though they are politically or morally pathological. A thriving, healthy legal system requires both citizens and officials to critique legal norms, both internally, as individuals who recognize the system as legally valid, and externally, to determine whether the legal system is morally worthwhile, whatever the officials in fact believe about the underlying justification of the system.

**Nota redacției:** Articolul a fost publicat inițial în Saint Louis University School of Law. Working Paper. August 25, 2009, Revista Forumul Judecătorilor privind permisiunea autorului și a revistei americane în vederea republicării exclusive a studiului în România.