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Shadows or Forgeries? Explaining Legal Normativity

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Abstract

Legal norms serve as practical standards for individuals and officials. While this 'normative aspect' of law is widely acknowledged, its significance for theories of law remains contested. In this paper, I examine three views on the matter. First, that we should explain legal norms as reason-giving. Second, that we should explain legal discourse as being about reasons for action. Third, that we should explain law as capable of being reason-giving. I survey some challenges associated with each of these views. What they have in common is an implicit assumption about the form that normative explanation must take: that it must be a linear, non-reductive explanation. There is an alternative model for normative explanation available, however. That model explains normative notions in terms of the practices and attitudes involved in recognizing, offering, and demanding them. I highlight the potentials, and limitations, of this practice-centered alternative.

Keywords: *Legal Normativity; Normative Explanation; Social Practice; Analytic Jurisprudence; H.L.A. Hart*

I. Introduction

A legal tradition, Robert Cover once wrote, is "part and parcel of a complex normative world."[1] Law has the capacity to "imbue action with significance."[2] The normative world of law is not only occupied by judges and officials, and it is not only occupied by those who endorse law's authority. As Cover wrote elsewhere, we do not "talk our prisoners into jail."[3] Martyrs and revolutionaries and conscientious dissenters are engaged in normatively significant, legally meaningful, action. Our legal understandings are often "staked in blood."[4] When a legal subject recognizes the distinction between a policeman confiscating their property and a thief robbing them; or when a community grasps the distinction between a government and an occupying army; they are engaged with the normative world of law.[5]

1. Robert M Cover, "The Supreme Court 1982 Term—Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4 at 9.
2. *Ibid* at 8.
3. Robert M Cover, "Violence and the Word" (1985) 95:8 Yale LJ 1601 at 1608.
4. *Ibid* at 1607.
5. See Jeremy Waldron, "All We Like Sheep" (1999) 12:1 Can JL & Jur 169.

What should general jurisprudence say about the normativity of law? On one view, nothing.[6] According to this view, what has been called the 'problem of legal normativity'[7] is not really a problem at all: legal normativity stands in no need of independent analysis.[8] What needs to be said about legal normativity can be said, on this view, in terms of morality[9] or principles of good governance.[10] At the conclusion of this paper, I will circle back to reflect on this view. However, to better grasp the so-called 'problem of legal normativity' and the landscape within which it has been grappled with, I set this view aside for now. For the rest of the substantive discussion in this paper I will assume that legal normativity is, indeed, something with which general jurisprudence must grapple.

Before turning to the problem of legal normativity, however, I use this introduction to highlight two lines of thought which cast some doubt upon the force of this eliminativist view. This is not a refutation of that position, but rather an invitation into the intuitions and ideas that animate the rest of the paper.

First, the eliminativist (much like the rest of general jurisprudence) usually assumes we can know, without looking to legal practice, the boundaries of the 'legal community' in question. That community is a municipal nation state (usually, a Western, liberal, democratic one) in which 'legal practice' is implicitly taken to be, for the most part, 'official' practice.[11] However, it is not obvious or uncontroversial to assume that the phenomenon of legal normativity can exist only among judges and other officials. How do subjects distinguish between the robber and the policeman confiscating their property? If these positions have

6. See e.g. Scott Hershovitz, "The End of Jurisprudence" (2014) 124:4 Yale LJ 1160.

7. For recent discussions of this topic, see Frederick Schauer, "On the Alleged Problem of Legal Normativity" in Nicoletta Bersier Ladavac, Christoph Bezemek & Frederick Schauer, eds, *The Normative Force of the Factual: Legal Philosophy Between Is and Ought* (Springer, 2019) 171. Brian H Bix, "Kelsen, Hart, and legal normativity" (2018) 34 Revus, online: journals.openedition.org/revus/3984; Torben Spaak, "Legal positivism, conventionalism, and the normativity of law" (2018) 9:2 Jurisprudence 319; David Enoch, "Reason-Giving and the Law" in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press, 2011) 1.

8. See Hillary Nye, "The One-System View and Dworkin's Anti-Archimedean Eliminativism" (2021) 40:3 Law & Phil 247 [Nye, "One-System View"]; Hillary Nye, "Does Law 'Exist'? Eliminativism in Legal Philosophy" (2022) 15:1 Wash Univ Jurisprudence Rev 29 [Nye, "Does Law 'Exist'?"]. See also Enoch, *supra* note 7. Enoch explicitly puts aside other possible understandings of 'legal normativity' and focusses only on law's ability to be reason-giving. Part of my aim in this paper will be to widen the possible ways in which 'legal normativity' can be fruitfully understood and discussed.

9. See Nye, "One-System View" *supra* note 8.

10. See Lewis A Kornhauser, "Law as an Achievement of Governance" (2022) 47:1 J Leg Phil 1.

11. Gerald Postema comments on the more recent narrowing focus of general jurisprudence, in which "only the practice of officials counts; citizens 'are not *participants* in conventional legal practice and hence do not directly figure, as a conceptual matter, into the existence conditions for a rule of recognition.'" Gerald J Postema, *A Treatise of Legal Philosophy and General Jurisprudence, Volume 11—Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011) at 542, citing Kenneth Einar Himma, "Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States" (2003) 4:2 JL & Soc'y 149 at 155, n 8 [emphasis in original]. Postema also notices a similar narrowing of focus in Shapiro's work (*ibid* at 543), citing Scott J Shapiro, "Law, Plans and Practical Reason" (2002) 8:4 Legal Theory 387 at 418.

any legal significance, should they not be embedded within a normative practice where the offices themselves are grasped as legal ones?

Such a normative practice in turn emerges from the actions and speech of a range of persons that, together and in part because of the significance imposed by the practice, constitute a community. This community occupies a shared reality, one within which the normative world imagined and enforced by law is maintained and endorsed, contested and rejected, relied upon and disregarded: a legal reality. There seems no reason to insist, *a priori,* that the boundaries of such communities necessarily coincide with the boundaries of modern municipal nation-states. If this thought is right, the question of legal normativity is not only a practical question about the normative *force* of legal practice, but also an extensional question about the kinds of practices and communities that are meaningfully *legal.* The so-called 'problem' of legal normativity is at least in part, then, the problem of articulating the role that normativity plays in making a practice a legal one.

Second: when, within such a legal practice, standards are put forward and enforced, rejected, or endorsed, their existence as legal standards does not necessarily turn on their (perceived) moral legitimacy or conduciveness to good governance. Facially immoral standards can be treated and recognized as normatively significant legal standards. To put the point more bluntly: it seems inevitable that this will sometimes be the case. When the United States Supreme Court handed down the *Dobbs* decision on abortion rights, a large proportion of the U.S. population regarded it as a deeply immoral one, and another as a vindication of their most cherished moral principles.[12] On the moral issue, one might think that one of these groups is mistaken. But neither seemed to have misunderstood the *legality* of the decision, its life-and-death consequences, its duty-imposing and power-conferring force. The phenomenon of legal normativity seems not to inhere only in those legal standards that pass some extra-legal moral (or instrumental) muster. This might suggest that questions about legal normativity are perhaps not directly translatable into questions about moral force without loss of meaning.

These animating intuitions, which shape the inquiry in the rest of the paper, are illustrated by Oakeshott in *On Human Conduct*, where he discusses Plato's allegory of the cave.[13] The cave-dwellers inhabit a world with intersubjective normative reality. They are able to look at the projections of shadows and light not only recognizing them, but also aware of each other's recognition. This means they occupy a world of intelligibles: they are capable of recognizing one another's inferences of meaning and significance, and of disclosing and enacting themselves against a background of shared recognition. They share common ground.

But, of course, they are "limited" in their understanding; they do not realize that what seems to them to be real are mere projections and illusions.[14] Their understanding of their common ground is "not fully in command of itself"

12. See *Dobbs v Jackson Women's Health Organization*, [2022] 597 US (S Ct) [*Dobbs*].
13. See Michael Oakeshott, *On Human Conduct* (Clarendon Press, 1975) at 29-31.
14. *Ibid* at 27.

because they are unaware of its conditionality.[15] The wise philosopher escapes from this cave and recognizes the distinction. Unlike the cave dwellers who confuse shadows with reality, the philosopher comes to see the ways in which their reality is, in fact, a mirage. Oakeshott imagines the philosopher, upon uncovering the true nature of reality, running back to the cave, and telling the cave dwellers about their discoveries.

He thinks that the cave dwellers would most likely retort with a kind but indifferent 'that's interesting.' What the philosopher has uncovered is very valuable in its own way, but it does not undermine the cave dwellers' shared world. To uncover the conditions and presuppositions upon which common ground is built is a notable achievement, but it is not, Oakeshott notes, like exposing a fraud. The cave dweller's language and practice would not suddenly become meaningless: "shadows are not forgeries."[16] This paper explores the possibility that general jurisprudence might have been mistaking legal normativity for a forgery rather than a shadow.

II. The Problem of Legal Normativity

Legal norms seem to be, well, *normative* in some way. Giving a more precise account of that precarious 'in some way' has proven surprisingly difficult, however. Authors explaining (or contesting) the idea that law is normative for those subject to it often refer to this topic as the 'problem of legal normativity'. Precisely what legal normativity is, or could be, and whether there is any problem in accounting for it, remains unclear. As I will show, discussions of legal normativity tend to rest on a specific understanding of that idea: equating it with law's ability to be "reason-giving,"[17] and understanding those reasons as "real" (normative) reasons.[18] I will suggest that these conclusions rely upon an implicit assumption about the form that normative explanation must take, and challenge that assumption.

The scope of the article is broad: I survey a range of different authors and discuss in general terms the various explanatory strategies emerging from their work without pinning these to particular authors or theories. This is because my concern is with what is often an unarticulated background assumption about normative explanation, something unspoken or cursorily invoked. I conclude this article with the outlines of an alternative explanatory model. My main purpose, however, is not offering a decisive exposition of that model but rather to illuminate a methodological question about the *kind* of description of our practices needed to elucidate law and legality.

First, some preliminaries. I use 'legal normativity' to refer to the way in which legal norms feature in the thought, speech, and actions of officials in legal practice. This is what H.L.A. Hart had in mind when he focused attention on what he

15. *Ibid.*
16. *Ibid* at 28.
17. Gerald J Postema, "Coordination and Convention at the Foundations of Law" (1982) 11:1 J Leg Stud 165 at 165.
18. Enoch, *supra* note 7 at 19ff.

often referred to as law's normative aspect.[19] Legal norms function as practical *standards* that officials use to evaluate, criticize, and justify their own and others' assertions and actions. A legal subject (or more specifically, one in an official role), when confronted with a legal norm, is confronted with a normative requirement that guides their thought, speech, and actions. This standard is used to classify, justify, evaluate, criticize, and plan. As I hinted at in the introduction, I believe there are important reasons to be skeptical that our analysis of legal normativity can extend only to officials, but in this paper I will, for the most part, keep to the terminology of 'officials' as the focal instance of 'participants' to a legal practice.

The understanding that general jurisprudence must account for this normative aspect of legal practice gained prominence with Hart's criticism of the utilitarian theorists and the realists.[20] Simply referring to patterns of behavior or speech in the presence of legal norms cannot explain the role that those norms play in the deliberation of officials in the practice. This leaves us without the resources to explain legal obligations (as distinct from mere feelings of compulsion or predictions of unpleasant consequences), legal authority (as a construction of legal rules rather than a precondition for them), as well as other legal powers and permissions, and phenomena such as customary law and international law. It leaves us, that is, without a proper account of law as a matter of *rules*.[21] And unless we analyze law as a matter of rules, Hart believed we would miss out on "the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society."[22] Something about law's normative *structuring* of society must be accounted for, in other words. This understanding has been relatively widely accepted, ushering in what has been referred to as the 'hermeneutic turn' in legal theory.[23] The 'problem' of legal normativity refers to the difficulty of coming up with a satisfactory explanation or analysis of this normative aspect of legal practice. In no small part, the difficulty has to do with underlying disagreements about what precisely is to be explained.[24]

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19. See HLA Hart, *The Concept of Law*, 3d ed (Oxford University Press, 2012) at 40-43, 46, 65, 80, 97-98, 102, 107, 122, 138, 143. Hart, and many others discussing this topic, focus mostly or even exclusively on legal officials.

20. See HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593. But Hart might have constructed a strawman in his critique of the realists. See Neil MacCormick, *H.L.A. Hart*, 2nd ed (Stanford University Press, 2008) at 153-57. MacCormick cites Karl N Llewellyn, "The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method" (1940) 49:8 Yale LJ 1355. See also Brian Leiter, "Positivism, Formalism, Realism Review Essay", Book Review of *Legal Positivism in American Jurisprudence* by Anthony Sebok, (1999) 99:4 Colum L Rev 1138.

21. See Hart, *supra* note 19 at 18-78.

22. *Ibid* at 88.

23. See Brian Bix, "H.L.A. Hart and the Hermeneutic Turn in Legal Theory" (1999) 52 Southern Methodist University L Rev 167.

24. A point noted by all the authors cited in *supra* note 7. This debate overlaps with the debate about the 'describability' of normative practices. See Kevin Toh, "Raz on Detachment, Acceptance and Describability" (2007) 27:3 Oxford J Leg Stud 403; Mathieu Carpentier, "Legal Statements: Internal, External, Detached" (22 March 2022), online: *Social Science Research Network* papers.ssrn.com/abstract=4063702.

The problem of legal normativity is rarely the sole focus of a theory of law, which is why the discussion in this article remains very general. The notion of legal normativity tends to serve as a side-constraint on what counts as a sound theory of law. Raz, for example, criticized Hart for not offering a satisfactory analysis of the normative (for Raz, reason-giving) content of internal statements of law.[25] And more recently, Scott Shapiro's planning theory of law received criticism for its inability to account for the normativity of law.[26] Sometimes, the normativity of law features as an intuitive premise for theories of law. Mark Greenberg's moral impact theory of law as well as his criticism of what he calls the "Standard Picture" of law, for example, are both shaped by the understanding "a legal system, by its nature, is supposed to generate all-things-considered binding obligations,"[27] and he argues that he shares this assumption with a wide range of theorists.[28] And Scott Hershovitz, for example, believes theories of law must take account of the fact that people tend to understand law as imposing determinate practical requirements.[29]

Not all of these invocations of legal normativity have the same phenomenon in mind; nor do they share an understanding of what would count as a satisfactory explanation of that phenomenon. I believe there are at least three different, but related, views on the matter. Each view is an understanding of what it is about 'legal normativity' that requires explaining. As the discussion reveals, they are not quite as separate as this initial division might suggest: the views inform and mutually reinforce one another. In the following three sections, I provide a brief overview of each view and survey some of the difficulties associated with them. The first is the view that the problem of legal normativity requires an explanation of law as providing subjects with 'real', normative, reasons for action (section III). The second is that it requires an explanation of legal language as being *about* 'real' reasons (section IV). The third is that we must explain law as *capable* of giving subjects real reasons for action under some circumstances, and legal practice as necessarily involving presuppositions of—or claims to—that reason-giving force (section V). In these sections, I will refer to 'real', normative, reasons for action as 'robust' reasons for action.

25. See Joseph Raz, "H. L. A. Hart (1907-1992)" (1993) 5:2 Utilitas 145 at 149; Joseph Raz, "The Purity of the Pure Theory" (1981) 35:138 (4) Revue Internationale de Philosophie 441 at 455 [Raz, "Pure Theory"]; Joseph Raz, "Hart on Moral Rights and Legal Duties", Book Review of *Essays on Bentham* by Herbert Hart, (1984) 4:1 Oxford J Leg Stud 123 at 130. A recent discussion of the relationship between Raz's moralized semantics and his positivist theory of law can be found in Ezequiel H Monti, "On the Moral Impact Theory of Law" (2022) 42:1 Oxford J Leg Stud 298.

26. See Connie S Rosati, "Normativity and the Planning Theory of Law" (2016) 7:2 Jurisprudence 307; Michael E Bratman, "Reflections on Law, Normativity and Plans" in Stefano Bertea & George Pavlakos, eds, *New Essays on the Normativity of Law* (Hart, 2011) 73.

27. Mark Greenberg, "The Moral Impact Theory of Law" (2014) 123:5 Yale LJ 1288 at 1323, n 72.

28. See Mark Greenberg, "The Standard Picture and Its Discontents" in Green & Leiter, *supra* note 7, 39 at 84-96.

29. See Hershovitz, *supra* note 6 at 1195.

All three of these views share a background assumption about the form that an explanation of legal normativity must take (section VI). This is an assumption that the explanatory primitive, the unexplained explainer, should be a robust reason for action, and that normative explanation must be in terms of these reasons. This is an instance of what Mark Schroeder has called a 'standard' model of normative explanation.[30] It imposes a 'reasons-first' paradigm on our explanations. I believe there are important reasons to doubt that this model of explanation is suited to theories of socially instituted phenomena such as law. Indeed, I suggest below, Hart might be understood as suggesting that we should understand law on its own terms, constitutively, rather than in terms of standard normative explanations. In the final substantive part of the paper (section VII), I turn to an alternative explanatory model, one which relies on what Schroeder analyses as a "constitutive model" [31] of explanation and which I call a 'practice-first' approach. I provide a brief outline of how such an explanation might go, and survey some of the reasons to prefer it.

III. View 1: Explaining Legal Norms as Reason-Giving

The first view is that the problem of legal normativity requires an explanation of legal norms as necessarily providing subjects with robust reasons for action.[32] I use the term 'robust' to refer to *normative* rather than *motivational* or *explanatory* reasons, and to distinguish between reasons which justify and count towards what we ought to do from reasons of merely formal normativity.[33] Robust reasons could tell us what we ought to do in a conclusive, all-things-considered manner, as when, in the case of most mandatory norms, that reason is a protected reason.[34] Robust reasons might also, while not *settling* what we ought to do, bear on that question. I discuss each of these views below. In both cases, the line of thought goes more or less as follows: if legal norms did provide us with robust reasons for action, that would be all we need to explain these norms' treatment within legal practice as practical standards. If a legal norm provides subjects with robust reasons for action, then officials treating that norm as a justification for action, criticism, coercion, etc., is rationally *appropriate*. This seems to be the animating

30. See Mark Schroeder, "Cudworth and Normative Explanations" (2005) 1:3 J Ethics & Social Phil 1 at 10ff.
31. *Ibid* at 15.
32. See e.g. Postema, *supra* note 17. Many authors who express skepticism about the problem of legal normativity are only expressing skepticism of this idea that law must be understood as providing subjects for robust reasons for action. Enoch, for instance, introduces his article as being about the "spectre of the normativity of law" but limits his discussion to the problem of law's reason-giving force. Enoch, *supra* note 7 at 1.
33. Baker explains the distinction between (mere) formal normativity and full-blooded authoritative normativity: "authoritatively normative facts *really* tell you what to do. The distinction is also sometimes put in terms of normative properties with *normative force* and those without." Derek Baker, "The Varieties of Normativity" in *The Routledge Handbook of Metaethics* (Routledge, 2017) 567 at 568-69 [emphasis in orginal].
34. See Joseph Raz, *Practical Reason and Norms*, 2nd ed (Princeton University Press, 1999) at 17, 50-51.

line of thought for Greenberg when he moves from observations about how officials and/or theorists tend to treat or understand legal norms to conclusions about the appropriate analyses of those norms and their grounding conditions.[35] We treat legal norms as robust reasons for action because we grasp that this is what they are (at least under 'normal' circumstances, or for the most part). This view is compatible with a range of different explanations of legal normativity.

The strongest version insists on a correspondence between legal and moral obligations (powers, permissions, etc.). It holds that necessarily, a legal subject has a legal obligation (power, permission, etc.) ø in circumstances C only if they have a moral obligation (power, permission, etc.) ø in C.[36] This is a stronger position than one that only holds that legal norms give us robust reasons for action but includes that thesis too: if a legal norm imposes upon a subject a legal (and on this view then also moral) obligation, they have a robust reason to comply with that standard.[37]

However, it would seem that such a position faces significant challenges in accounting for the normativity of legal content. Positivists reject this kind of claim for all of the well-rehearsed reasons related to the contingency, and possible immorality, of legal content.[38] Natural lawyers reject such a position as well: law might overall have a moral quality and purpose, but this is a far cry from insisting that a legal standard necessarily corresponds to a moral standard in each case.[39] And as recent careful scrutiny of the one-system theories have shown, there are compelling reasons to doubt the viability of this kind of a thesis. It is easy to come up with examples of contradictions or at least non-correspondence between legal and moral incidents. This should not be surprising: "all-things-considered moral

35. See Greenberg, *supra* note 27. An analysis of Greenberg's use of the justificatory and inferential practices within legal interpretation for his argument about the kinds of facts that could constitute law can be found in Barbara Baum Levenbook, "How to Hold the Social Fact Thesis: A Reply to Greenberg and Toh" in Green & Leiter, *supra* note 7, 75.

36. Varieties of this approach are drawn from Dworkin's so-called "one-system" view which rejects the notion that law and morality are separate domains of normativity. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) at 405. Hasan Dindjer associates the one-system view with, amongst others, Scott Hershovitz, Mark Greenberg, and Steven Schaus. See Hershovitz, *supra* note 6; Greenberg, *supra* note 27; Steven Schaus, "How To Think About Law as Morality: A Comment on Greenberg and Hershovitz" (2014) 124 Yale LJ Forum 224. See Hasan Dindjer, "The New Legal Anti-Positivism" (2020) 26:3 Leg Theory 181.

37. This is the position of the so-called 'new' antipositivists. See e.g. Greenberg, *supra* note 27. For a thorough critical discussion, see Dindjer, *supra* note 36. An even stronger version of the correspondence thesis, Dindjer suggests, is the identity thesis in terms of which legal duties (powers, permissions, etc.,) necessarily *are* moral duties (powers, permissions, etc.). The correspondence thesis includes the identity thesis.

38. The familiar argument is often drawn out with references to the law of Nazi Germany or Apartheid South Africa. But the examples are myriad and contemporary. Could there be a necessary correspondence between your legal right to 'stand your ground' and your moral right to use deadly force on any person entering your property?

39. See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford University Press, 2011) at ch XII. See also Martin Stone, "Legal Positivism as an Idea About Morality" (2011) 61:2 UTLJ 313, arguing that positivists were the ones to mistakenly attribute to natural law the correspondence thesis.

incidents are highly context-dependent in a way that legal incidents are often not."[40]

A way of softening the claim is to say that legal duties (powers, permissions, etc.) only correspond to pro-tanto moral duties (powers, permissions, etc.). But it seems as if the difficulty would remain: pro tanto duties must still have *real* weight to them, and it is hard to see how that could *necessarily* be the case for a legal standard.[41] Perhaps more to the point: the practice that needs explaining seems to be that of treating legal standards as all-things-considered requirements. If our observation was that legal norms are treated in practice as robust practical standards of correctness, their only providing pro tanto reasons would be a puzzling, or at least incomplete, explanation for that observation. It adds to the puzzle: why don't legal officials sanction, rely on, coerce, criticize, and justify, in a more tentative and context-sensitive manner reflective of legal norms' merely pro tanto normative force?

A slightly different version of this strategy is to insist on the same kind of correspondence, not between legal and moral obligations (powers, permissions, etc.) but rather between legal and all-things-considered or pro tanto reasons of instrumental rationality.[42] This is one version of a broader *conventionalist* approach. It suggests that law's "distinctive normativity"[43] can be explained with reference to the idea that the reason-giving nature law is rooted in is a "specific kind of conventional social practice."[44] The conventionalist line of thought goes, broadly, as follows. In addition to reasons for action which agents might have *concurrently,* applying to each of them 'independently,' there are reasons for action which apply to agents *in virtue of* the social practices in which they find themselves participating.[45] These reasons would not apply to participants *had it not been* for the particular normative practice. This is taken to indicate that these practices themselves "can have normative force," giving participants "reason to

40. Dindjer, *supra* note 36 at 191. See also Monti, *supra* note 25 at 312-14.

41. See Dindjer, *supra* note 36 at 192-200.

42. Scott Shapiro's planning theory of law purports to show how legal norms exhibit *claims* to be morally reason-giving, and that they do so in virtue of their connection with instrumental rationality and the complex interdependencies of individual intentional activities. See Scott J Shapiro, *Legality* (Harvard University Press, 2011).

43. Postema, *supra* note 11 at 483.

44. Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2003) at xvii. Postema distinguishes between formal or narrow-based conventionalism, where the focus is exclusively on the practices of a law-applying elite, and a wider conventionalism according to which the "ordinary customs and practices . . . of those subject to law also play a crucial role in constituting law." Postema, *supra* note 11 at 485. There is indeed a lot that turns on this distinction, but to limit the scope of this discussion I set it aside.

45. Where reasons are widely applicable to all agents independently, in cases of what Dworkin called "consensus of independent conviction," the reason-giving force lies not with the legal norm itself, but with the widely applicable reasons that operate independently of that norm. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at 136. That, at least, is how the conventionalist approach is usually framed. See also Hart, *supra* note 19 at 254-63; Raz, *supra* note 34 at 52-58.

comply and no reason unilaterally to defect [from the norms expressed within the practice]."[46] This normative upshot, then, is taken to explain legal normativity, conceived of as "the reason-giving [and] duty-imposing ... character of ordinary legal rules."[47]

The conventionalist suggestion, at least as it applies to the problem of legal normativity, has three components. First, it argues that legal practices solve complex problems of social cooperation and coordination. Second, it suggests that we have robust reasons to resolve these cooperation or coordination problems. Finally, it concludes that, as a result, legal norms are reason-giving. Legal normativity is thus explained with reference to this reason-giving aspect of law. In this way, the suggestion is that legal practices "bridge the gap between the social facts of convergent behavior/attitudes and genuine reason-giving norms."[48]

Criticism has been levelled at each of these three steps. Directed at the third step, the criticism is that the explanation renders a picture of legal normativity which is inappropriately *conditional* or *contingent.*[49] The reason-giving force of conventional practices operate internally to these practices—telling agents how to solve a particular problem of social interaction. It does not tell them whether they have good reason to pursue that solution, or *any* solution, at all.[50] The practice itself can only ever here be *part of* the reasons agents have, reasons which arise out of a broader practical problem of social interaction. This means that the reasons provided by legal norms are always *dependent* on background reasons: "the final word on whether [the convention] does give reasons for action ... is entirely a function of the values it serves."[51] In other words, critics wonder whether the relevant normative requirements are wide-scope or narrow-scope.[52] On a wide-scope reading, one could be equally rational or moral in abandoning legal practice as in engaging with it.

Conventionalist strategies might attempt to characterize these background reasons as robust reasons. This requires a normative characterization of the background problem of social interaction. One way of doing so is by relying on instrumental rationality and the complex interdependency of human plans.[53] Another way is by characterizing the very nature of cooperation and coordination

46. Postema, *supra* note 11 at 494-95. This framing arises from a demand that "Hart must explain how the social facts of the convergent behavior and attitudes of law-applying officials can have normative force" (*ibid* at 494).
47. *Ibid* at 498.
48. *Ibid* at 486. Postema writes: "We might even say, with only slight exaggeration, that conventions are social facts with normative force" (*ibid* at 492). It is this idea—that social facts somehow acquire robust normative force in conventional settings—that motivates the conventionalist approach to explaining legal normativity.
49. An analysis of conventions as *necessarily* contingent and in that sense arbitrary can be found in Andrei Marmor, *Social Conventions: From Language to Law* (Princeton University Press, 2009) at 161-70.
50. See Postema, *supra* note 11 at 492.
51. *Ibid* at 525.
52. See John Broome, "Normative Requirements" (1999) 12:4 Ratio 398. See also a point made by Bratman about Shapiro's attempt to assimilate legal normativity to practical rationality in Bratman, *supra* note 26 at 79-85.
53. See Shapiro, *supra* note 42.

in robust normative terms, analyzing the cooperative situation in terms of substantive moral principles such as fairness.[54]

This still leaves open some potential concerns related to the first and second steps of the conventionalist strategy. One concern is that these broader normative principles might not *necessarily* apply to legal practices. These principles might apply if there were good instrumental or moral reasons to engage in legal practices, and the cooperation they facilitate, in the first place. But it seems at least possible to conceive of legal systems and circumstances in which this would not be true. Do we have robust reasons to solve a cooperation-problem that involves the systematic exploitation of some within our society, as law doubtlessly sometimes does, for example?

A conventionalist strategy which is more responsive to this concern characterizes the broader social coordination or cooperation problem in distinctively legal terms. This strategy points to the essential features of law to argue that the complex interdependence of reciprocal expectations between officials and citizens is part of the very nature of legal governance, and that this gives legal norms reason-giving character.[55] This analysis is then used to explain how legal norms could impose 'genuine obligations.'[56]

It is with this idea of the *obligatory* character of legal normativity, what Llewellyn called the "imperative of mustness" (as opposed to the "normation of oughtness")[57] that another critique of conventionalism crops up.[58] This is that the *kind* of normativity emerging from conventionalist analyses is of the wrong kind: it is too *generic*. It consists of something like 'normative or rational pressure' which only becomes robust reasons for action within a broader context that ultimately depends on individual interests and concerns. Legal normativity, by contrast, operates to *preempt* individual deliberation about one's interests and concerns; it operates where obligation and individual interest are potentially in *conflict*.[59] To draw on Razian terminology, the reasons of conventionalism are not *exclusionary* in the way that legal norms seem to operate.[60] And, some have added, it also operates *second-personally*: it involves justified standing to *demand* that others conform to the standards in question. The thought is that

54. See Govert den Hartogh, *Mutual Expectations: A Conventionalist Theory of Law* (Kluwer Law International, 2002).
55. See Postema, *supra* note 11 at 498; Lon L Fuller, *The Morality of Law*, revised ed (Yale University Press, 1969); Postema, *supra* note 17. Postema suggests that these obligations only extend to legal officials in light of their professional responsibility toward the system of legal governance.
56. See e.g. Gerald J Postema, "Conformity, Custom, and Congruence: Rethinking the Efficacy of Law" in Matthew H Kramer et al, eds, *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (Oxford University Press, 2008) 45 at 49; Fuller, *supra* note 55 at 204, 209.
57. Llewellyn, *supra* note 20 at 1364 [emphasis removed].
58. See Leslie Green, "Positivism and Conventionalism" (1999) 12:1 Can JL & Jur 35.
59. See Hart, *supra* note 19 at 87.
60. See Raz, *supra* note 34 at 62.

the obligations of legal normativity are *reciprocal* in a way that conventionalist analysis cannot easily accommodate.[61]

The force of this criticism depends on whether one believes that legal norms necessarily operate as *authoritative directives* rather than robust, morally significant reasons.[62] I don't intend to resolve that debate here. My purpose is only to highlight the way in which a debate about *legal normativity* has been taken to be a debate about the robust reason-giving force of law, and the modality in which that force operates. Legal normativity is presumed to be about the connections between conventions and robust reasons for action.

There is some reason to doubt this presumption. This last criticism about the exclusionary nature of legal normativity touches upon a deeper point. It is this: legal practice, in its argumentative and discursive nature, does not seem primarily concerned with justifying the overall social value and robust normative force of the legal system. The discursive engagement of law is directed at demands to accept common public standards, not at demands to accept or agree on the background justifications for those standards. That is, the normativity of legal practice seems *internal* to the discursive practice: aimed at "common or coordinated conduct, not consilience of disparate views regarding that conduct."[63] The normativity of law seems less concerned with ultimate public justification than with the ongoing process of *using* a common framework for public justification.

This would not suggest that conventionalist analyses of law are necessarily incorrect—indeed, this paper will draw on some conventionalist ideas below. Rather, it would suggest that the explanatory desiderata imposed upon conventionalist analyses might be misplaced. Perhaps the aim should never have been to articulate a necessary connection between law's conventional structure and its robust reason-giving force.

All of these are reasons to conclude that explaining the characteristically normative aspect of legal practice—officials treating legal rules as practical standards which they use in guiding, interpreting, justifying, defining, and criticizing their own and others' actions and assertions—need not be accounted for by explaining law as reason-giving in a robust sense. This has also led many to conclude that there really is no problem of legal normativity. But the spectre haunts us still, to echo Enoch.[64] It haunts us because the idea of legal normativity is not necessarily an idea about specific legal standards as robust standards. It seems to also be an idea about the nature of legal language, and the nature of law. I discuss these views in sections IV and V, below.

61. See Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford University Press, 2013) at 23-24.
62. See Postema, *supra* note 11 at 504.
63. *Ibid* at 537.
64. See Enoch, *supra* note 7.

IV. View 2: Explaining Legal Language as Being About (Robust) Reasons

A central touchstone of Hart's account of the normative aspect of legal practice was his focus on the language of officials.[65] His argument was that legal norms are used as normative standards within legal practice, and his *evidence* for this was the way in which legal statements are deployed within that practice. He highlighted the 'performatory aspect' of internal legal statements of law.[66] Officials could of course use a statement such as, 'You ought to pay taxes by April 18' to simply describe a state of affairs that includes a relevant Internal Revenue Code. But officials also use these statements to manifest a practical attitude toward the standard in question: their acceptance of it as a normative requirement. This is, for Hart, an *internal* statement of law. The second view of the problem of legal normativity is that the only thing in need of explanation is this use of language—the prevalence of normative and deontic language among legal officials.[67]

Joseph Raz has been very influential in articulating what has become the commonly accepted desideratum for such an explanation. The line of thought goes as follows. If we want to explain how statements within legal practice refer to *common* practical standards, to which officials hold *each other,* the statements cannot be understood to express personal beliefs, sentiments, preferences, or emotions.[68] After all, these statements are being put forward as *justified,* as properly entitled to others' deference and recognition. For this reason, the statements could also not be manifesting a practical attitude of acceptance toward merely social normativity—that which is, as a matter of fact, accepted by a community:

> To anyone regarding the law as socially normative, the question 'why should the law be obeyed?' cannot be answered by pointing out that it is normative. The law is normative because of social facts. It should be obeyed, if at all, for moral reasons. Not so to people who admit only the concept of justified normativity. For them to judge the law as normative is to judge it to be just and to admit that it ought to be obeyed. The concepts of the normativity of law and the obligation to obey it are analytically tied together.[69]

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65. Joseph Raz discusses the background context of the time and how that shaped Hart's focus on language (particularly Hart's initial attraction to prescriptivist and emotivist semantics) in Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" (1998) 4:3 Leg Theory 249.

66. See Hart, *supra* note 19. For an argument that Hart never intended this point about the performatory aspect of legal statements to serve as a complete analysis of such statements, see Luís Duarte D'Almeida, "Geach and Ascriptivism: Beside the Point" (2016) 4:6 J History of Analytical Phil 221.

67. In conversation, Scott Shapiro has recently said that this is all he intended to account for in his analysis of the normativity of law in *Legality*. Interestingly, many others did not understand him to be engaged in this more limited explanatory endeavor. See generally *supra* note 26.

68. See Raz, *supra* note 65 at 253.

69. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed (Oxford University Press, 2009) at 137.

Neither subjective expressions of emotions or prescriptions, nor invocations of the norms of social normativity, Raz believed, could account for the way in which legal language displays a use of legal norms as common public standards to which officials take themselves to be justifiably holding each other. His conclusion, one he found "impossible to resist," was that most first-order statements of law are moral statements: claims about robust reasons for action.[70] He was quick to add that they need not be expressing sincere beliefs about such moral reasons —internal legal statements could be made insincerely.

This argument has proven influential: many authors in general jurisprudence adhere to a moralized semantics of legal statements.[71] The view is that, generally, officials think, speak, and act *as if* legal standards provide officials with robust reasons for action. This idea is often put somewhat anthropomorphically: *from the point of view of the law,* there are robust reasons to comply with legal standards. Another way of putting the same idea is that the statements are made by officials who orient themselves theoretically towards the law, expressing what robust reasons for action there would be *if* law were 'really' reason-giving.[72] As Shapiro articulates the point, legal statements are made from the perspective of a *theory* which holds that law is reason-giving. Legal language, then, should be interpreted "perspectivally."[73]

A different approach is to say that legal officials make statements of law on the assumption that legal norms provide robust reasons for action, but without committing to that assumption. That is, legal officials make "detached legal statement[s]."[74] In other words: thought and speech (including the justification, explanation, and interpretation of official legal action) are *about* robust reasons for action. However, the relevant thought, speech, or action need not go along with any sort of commitment to the truth or soundness of those claims.[75]

The challenge for these approaches is of using such *semantic* theses to explain an essentially practical phenomenon: the activity of *using* legal norms as common

70. Raz, "Pure Theory", *supra* note 25 at 455.

71. See Raz, *supra* note 69 at 137; Shapiro, *supra* note 42 at 191; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) at ch 5; Jules L Coleman, "Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence" (2007) 27:4 Oxford J Leg Stud 581; Leslie Green, "Law and Obligations" in Jules L Coleman, ed, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 514 at 514-19. For critical discussion of the arguments for such moralized semantics, see Robert Mullins, "Presupposing Legal Authority" (2022) 42:2 Oxford J Leg Stud 411. For an argument against moralized semantics in law, which the author notes is the "dominant view in contemporary jurisprudence" despite being "largely ignored in other fields," see Daniel Wodak, "What Does 'Legal Obligation' Mean?" (2018) 99:4 Pacific Philosophical Q 790 at 791 [footnotes omitted].

72. This is how Rosati explains the idea. See Rosati, *supra* note 26 at 311-13.

73. Shapiro, *supra* note 42 at 184ff.

74. Raz, *supra* note 69 at 153. Ezequiel Monti calls this Raz's linguistic thesis. "The linguistic thesis is that, despite legal facts being moral facts, not all legal statements are morally committed." Monti, *supra* note 25 at 307. This is different from saying officials merely express a theoretical point of view: it is parasitic upon actual acceptance and endorsement by some.

75. Hart was critical of this idea, arguing that it "conveys an unrealistic picture of the way in which judges envisage their task of identifying and applying the law." HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford University Press, 1982) at 158.

standards within a practice. Even if we were to grant that legal statements simply express a legal point of view, that is not in itself an account of the ongoing practice of *relying* on this point of view to justify and exhort, imprison, and fine, for example. Legal claims are constantly being used in arguments where they are taken to have pragmatic upshots for what we are licensed to do, say, and think. This is the legal normativity that needs accounting for, and without more it would seem as if the idea of legal statements expressing 'a legal point of view' falls short.[76]

The notion of 'detached' statements faces a similar difficulty. The suggestion that we utter statements which are *about* robust normative requirements, but without any commitment to the truth of these statements, is not immediately able to clarify *why* we do that in the first place. What is required is some account of why, and how, these detached statements are recognized as expressing standards that have pragmatic upshots. If a detached statement is one which withholds judgment on the normative force it expresses, this seems to be the wrong kind of explanation for a practice characterized by judgments of normative force.[77]

That officials make statements about moral reasons is no explanation for why their pronouncements or actions are, or should be, *treated* or *understood* as practical standards with reference to which participants in legal practice should guide and evaluate conduct. That people regularly talk about $\not{p}$ does not as such explain why $\not{p}$ plays a practical role in their lives.[78] On the contrary: one would expect the explanation to work the other way around. Since 2020 we are regularly talking and thinking about social distancing—this is not the *explanation* for social distancing practices, of course. The opposite is true. This is why these kinds of semantic theses are usually (but not always) supplemented by an analysis of law as capable of being reason-giving under certain circumstances.[79] That is the third view.

V. View 3: Explaining Law as Capable of Being Reason-Giving

The third view explains law as, by its nature, capable of giving us robust reasons. It then explains legal practice as necessarily involving presuppositions of, or claims to, that reason-giving force. As the previous section suggested, analyses of legal statements don't quite explain the way officials use legal standards as practical guides in their thought, speech, and action. The answer is often to

76. For an argument about the failures of perspectivalism in what he calls mixed arguments, see Adam Perry, "According to Law" (2023) 20:20 Analysis 1.

77. To be sure, if we *assume* that the judgments of normative force must be judgments about robust reasons for action, we would perhaps face theoretical pressure to 'caveat' our semantics of the statements within the practice by saying they are merely 'detached.' But this only becomes necessary once we have assumed that judgments of normative force must be judgments about moral reasons, which we need not necessarily do. For a similar argument, see Luís Duarte D'Almeida, "Legal Statements and Normative Language" (2011) 30:2 Law & Phil 167.

78. A point illustrated in Mullins, *supra* note 71.

79. The view that we can merely talk about the claims that law makes, rather than the circumstances rendering those claims justified or appropriate, is 'perspectivalism'. For a critical discussion, see Perry, *supra* note 76.

supplement an analysis of legal statements with an account of the (potentially) reason-giving nature of law, thereby demonstrating how, and when, legal language could appropriately refer to robust reasons, in the right circumstances.

The thought goes as follows: law is capable of being 'really' reason-giving, and we treat it as such within our legal practices. This is what shows up in our language and actions as the normativity of law. We tend to treat legal standards as being reason-giving because we understand it as capable of giving us robust reasons in some or certain circumstances. This idea is very influentially cashed out in terms of authority.[80] Law is capable of being practically (legitimately) authoritative, and we (at least, legal officials) treat it as bearing such authority even where it might not actually have it. Similar versions of this kind of explanation rely on law's capacity to be instrumentally reason-giving[81] or morally reason-giving[82] under the right circumstances.[83]

This view holds that legal thought, speech, and action is parasitic upon a perspective which regards law as reason-giving, and law is the kind of thing which could make these thoughts, assertions, and actions warranted and appropriate at least under some circumstances. Thus, law is sometimes reason-giving in just the way that internal legal statements purport. And for the most part, independently of whether this is actually the case, legal officials treat and accept law as being reason-giving in this way (or pretend to do so insincerely).[84]

On this view, when we are faced with a legal standard, we are not necessarily faced with anything 'really' normative: we are not necessarily faced with a robust practical standard.[85] Rather, we are confronted with something presupposed, assumed, accepted, or treated as such. Thus, legal norms provide standards that are formal, 'weightless.'[86] If, and when, they do have practical force, this is contingent upon something external to law: our individual reasons for action, prudential reason, or morality. This leads us to the familiar positivist conclusion that whether we have robust reasons to comply with a legal norm is a separate issue from the question of whether that norm exists.

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80. "The law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority. . . . Since the law claims authority should its claim be acknowledged? Is it justified?" Raz, *supra* note 69 at 33. I tend to agree with Neil MacCormick that it is 'misleading' to impute claims to law, but that these insights can be translated as analyses of "the presuppositions and implications involved in the performance of acts-in-law." Neil MacCormick, "Why Law Makes No Claims" in George Pavlakos, ed, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Bloomsbury, 2007) 59 at 63.

81. For example, the planning theory of law. See Shapiro, *supra* note 42.

82. For example, the moral impact theory of law. See Greenberg, *supra* note 27.

83. An alternative strategy is to take a normativist, rather than naturalist, analysis of that which confers upon law is practical force. This is Kelsen's approach. See Meir H Yarom, "Positivism and Unity" (2023) 36:1 Can JL & Jur 241. That strategy does not fall prey to the criticism I set out here, but also does not have anything to say about the practice of treating norms as guiding standards.

84. The idea is that legal practice involves claims and presuppositions about law's reason-giving force. See MacCormick, *supra* note 80.

85. See Raz, *supra* note 69 at 152-59.

86. See Jeffrey Kaplan, "In Defense of Hart's Supposedly Refuted Theory of Rules" (2021) 34:4 Ratio Juris 331 at 345ff.

Now, as a description of the (robust, all-things-considered) duty to obey the law, this analysis seems to me on the right track. But it does yield a rather puzzling picture of legal normativity. On Raz's view, "the normativity of the law and of the obligation to obey are analytically tied together."[87] If we understand "obligation to obey" as a 'robust', all-things-considered, obligation, this would mean that normativity of law and the existence of legal norms are analytically separate. But this conclusion seems to deny the thrust of Hart's hermeneutic insight. Hart's point was that the existence of legal norms seemed inextricably bound up with their functioning normatively—as obligation-imposing and power-conferring—in officials' thought, speech, and action.[88]

Unless we are willing to assume that legal officials are systematically mistaken or disingenuous about their own practices, we are left with the impression that the normative aspect of legal practice is a contingent rather than constitutive feature of law. This is precisely what Hart wanted to deny. According to him, the ultimate rules of a legal system are *used* as normative standards by courts and legal officials, and can be said to exist "only as a complex, but normally concordant, practice of the courts, officials, and private persons."[89] Though he is sometimes misread on this point, Hart recognized that the normativity of legal standards cannot be reduced to facts about how they are used within practice.[90] However, his insistence on the 'normative aspect' of legal practice was an insistence on paying careful attention to the "contextual connection" between the fact that legal norms are generally recognized, grasped, and used on the one hand, and the normative reality of legal norms on the other.[91] Arguably, the problem of legal normativity is the problem of making sense of this contextual connection. Completely separating questions of existence (or formal validity) from questions of normativity seems to deny the connection rather than explain it.

There is another puzzling upshot here. If statements about legal obligations express moral obligations, and the existence of a legal norm need not correspond to any obligation at all, it seems reasonable to conclude that "[t]here is simply no reason to insist that our legal obligations must be what the legal institutions claim them to be."[92] Again, as a point about our 'robust' obligations, that might be the case. But as an explanation of what it is legal institutions understand themselves to be doing and saying (and how they are understood within legal practice), this is an odd place to land.

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87. Raz, *supra* note 69 at 137.

88. Within a legal system, the statement that a legal rule exists and is valid may "no longer be what it was in the simple case of customary rules," a statement of fact about how the rule is treated within practice; it can also be a statement which manifests the application of "an accepted but unstated rule of recognition." Hart, *supra* note 19 at 110. That rule of recognition, for Hart, exists as a complex concordant official practice.

89. *Ibid* at 110.

90. For a discussion and correction of these misreadings, see Thomas Adams, "Practice and Theory in *The Concept of Law*" in John Gardner, Leslie Green & Brian Leiter, eds, *Oxford Studies in the Philosophy of Law Volume 4* (Oxford University Press, 2021) 1.

91. Hart, *supra* note 19 at 104.

92. Monti, *supra* note 25 at 323.

And what is more, if we accept the idea that moral and rational standards are rooted in autonomous individual reason, an insistence on an analytic connection between legal normativity and the obligation to obey the law renders legal normativity a personal and piecemeal, individual, matter.[93] What remains of the notion of legal norms as *common, shared* standards to which officials hold each other, is unclear. To be clear: moral standards might be common and shared but unless we assume they coincide with legal ones, the explanation would not work. There is nothing about legality, on this view, that puts various agents in a shared normative situation.

As an account of our duty to obey the law, and of the circumstances under which we have robust reasons to comply with law, this view is surely right.[94] But whether or not this is a sound description of legal practice, of the ways in which legal standards function in the thought, speech, and action of officials, is another matter. Whatever it is that explains why and how we grasp legal norms as practical standards is, on this view, not part of our theory of law. It seems that we are explaining law in precisely the regularist manner Hart sought to move beyond.

VI. A Common Paradigm

The three views set out in the previous sections proceed according to the same background assumption about the form that a satisfactory explanation of legal normativity must take. All three approaches to legal normativity take for granted that the appropriate explanatory primitive is the notion of a 'robust' reason for action. This assumption traces back to Raz's criticism of Hart: if we say that people treat norms as common standards, they must be referring to facts about moral or otherwise 'robust' normative reasons.[95] The force of this conclusion depends on two assumptions. The first is that normativity is fully analyzable in terms of reasons: that, as Raz puts it "the normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons."[96] The second is that an analysis in terms of individual reasons for action is all we need (and the only way) to properly describe what it is for a practice to have a 'normative aspect.' In the

93. This is part of the criticism Nicole Roughan levels at Raz' theory of legal authority. See Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory.* (Oxford University Press, 2013) at 37-42.

94. As long as we take seriously, as I think we mostly do, that "it is right to insist on the judgment of the autonomous moral agent as the final touchstone of morality," there is simply no reason to expect legal standards to necessarily correspond to moral ones. Neil MacCormick, "Institutional Normative Order: A Conception of Law" (1996) 82 Cornell L Rev 1051 at 1068.

95. Kevin Toh argues that this position arises from a combination of a first-order non-naturalistic realism and a form of existentialism. See Toh, *supra* note 24 at 419. The position depends on an assumption that the distinction between normative statements that purport to give objective reasons and those that purport to give 'subjective' or 'personal' reasons overlaps with the distinction between statements that describe normative entities and those that express non-cognitive attitudes.

96. Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press, 2000) at 67.

remainder of this paper, my challenge is mostly directed at the second assumption.[97]

These two assumptions together yield a 'reasons-first' approach to thinking about legal normativity. It starts by positing objective normative entities ('reasons for action') and then explains our legal practices in those terms (e.g., giving, claiming, presupposing, or theoretically positing those reasons). The advantage of such an approach, and I suspect the reason Raz found it impossible to resist, is that it avoids the problem of relativism. On the reasons-first approach, our explanation of normativity is never in terms of what anyone or any group merely believes can be imposed on or demanded of someone, but in terms of what can justifiably be imposed or demanded. This immediately gives us a firm grip on the notion of justifiability because we start with a conception of the justified and explain everything else in those terms. There is also the benefit that this approach unifies legal theory with normative theory and practical philosophy more generally.[98]

But the disadvantage of this approach is that it never breaks out of its "definitional circle."[99] It is never quite clear where in the real world, in our practices and circumstances, the explanation does its work. It never gives an account of what grasping and making intelligible the notion of justifiability is supposed to consist of. In the terms of this paper, the reasons-first approach tries to account for the *grounds* of legal normativity. What it does not do is describe how legal normativity is manifested in the role played by such grounds within social and political practices.

The reasons-first paradigm represents an insistence on non-reductive—or non-redundant—normative explanation. It requires that we account for the normativity of law in terms of that which we already assume about normativity: it consists of 'robust' reasons for action. This is what Mark Schroeder calls a "standard model for normative explanations."[100] On this model, normative explanations start with a premise about what counts as 'justified,' about that which has an authoritative grip upon us. It then accounts for the explanans in those terms: in terms of what we "antecedently ought to do."[101]

I should perhaps emphasize here that none of these comments should be construed as criticism of standard explanations of our duties under law or of legal authority. I only wish to make the point that these features of standard explanations are reasons to suspect that this kind of explanatory paradigm is not well-suited to account for legal normativity.

97. Though I don't discuss that here, there might also be reason to scrutinize the first assumption. See e.g. Christoph Möllers, *The Possibility of Norms: Social Practice Beyond Morals and Causes* (Oxford University Press, 2020) at ch 1.
98. See Raz, *supra* note 34.
99. Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005) at 21.
100. Schroeder, *supra* note 30 at 10.
101. *Ibid* [emphasis removed].

In the case of legal normativity, standard explanations attempt to account for the normativity of law in terms of that which we antecedently, independently of law, ought to do. But this implies that law is not necessarily normative, only contingently. The normative force of legal standards arises out of reasons that apply to us independently and (explanatorily) prior to legal practice. And this would, naturally, lead to the conclusion that the existence of legal standards and their practical grip upon us are two separate things. Which is precisely, it seems, what Hart argued against: for him, legal norms' existence and their having this practical grip upon (at least) officials within legal practice are inextricably bound up.

One common reaction to this is to conclude that Hart was mistaken, and that his practice theory of legal rules is doomed. But another possible response, the one I examine in this paper, might be that the explanatory paradigm is mistaken; that our (moral, all-things-considered) duty to obey the law is *not* directly analytically linked to legal normativity in the way usually presumed; and that to explain legal normativity we need a different kind of explanation than the one we need to explain our all-things-considered reasons for action under law.

Standard, 'reasons-first' explanations have another noteworthy feature: since they insist on non-reductive explanations of normativity in terms of further normative reasons, any *difference* in the normative positions of individual agents must be explained in terms of a further, general reason that those agents have in common. On standard explanations, "if normative differences between what different individuals ought to do can be explained at all, they must be explained by things that *everyone* ought to do."[102] This means that such explanations are not able to account for differences in normative position. It cannot account, that is, for the *impact* that politics and practices might have on such positions, except in terms of more general reasons that all agents have in common. 'Reasons-first' explanations therefore necessarily explain the normativity of social and political institutions like law as arbitrary features of those practices.[103] In such a posture, we are unable to specify which aspects, parts, or dimensions of our practices explain legal normativity.[104]

But Hart's insistence seemed to have been on taking legal practice seriously on its own terms. Officials are not under an illusion or disingenuous about the nature of law, and yet they use legal norms as *common* practical standards to which they hold *each other.* Legal practice just *is* a normative practice. It *just has* a normative aspect as a constitutive characteristic. Perhaps this practice should be the proper explanatory primitive. We might think of an explanation that starts here as following a 'practice-first' approach.

On the practice-first approach, the explanatory primitives are not practical standards or the reasons they give us, but rather the practice of treating legal

102. *Ibid* at 14 [emphasis in original]. Schroeder's point is that this, along with other characteristics of standard explanations, makes it highly implausible to assume that standard explanations are the only available form of normative explanation, a position he calls the "Standard Model Theory" (*ibid* at 11).

103. See Marmor, *supra* note 49.

104. I thank an anonymous reviewer for this formulation of the concern.

norms as practical standards. On this view, legal normativity does not require explanation in terms of anything prior or more foundational than it. It requires, rather, analysis on its own terms. Such an explanation is what Schroeder calls a "constitutive explanation": explaining legal normativity in terms of something else—the properties and proprieties of that rule-governed social and political institution we identify as 'law'.[105] We take as an unexplained primitive the fact that we seem to be compelled by legal reasons and standards in a way distinguishable from the compulsion of brute force and of moral reason, that our legal practices are intelligible to us as normative in distinctive terms.[106]

VII. Practice-First Explanation

This section will explore the outlines of an alternative, practice-first explanatory paradigm. Within that paradigm, we explain legal normativity in terms of the normative aspect of the practice that manifests legal norms. We start with the critical reflective attitudes involved in such a practice, and the performances that derive from them, to explain the normativity of the practice in terms of those attitudes and performances. Legal normativity *just is* a feature of our legal practices, on this count: for a practice to be normative *just is* for it to have a normative aspect. The material, conceptual link between these two ideas is what I suspect Hart had in mind as the "contextual connection" between norms' existence within a practice and their normative force.[107]

The explanation in question is a *constitutive* one, in Schroeder's terms. I follow Schroeder in calling this explanatory model *reductive,* but use the term broadly.[108] The fact that this explanation will be a constitutive one might lead to familiar worries about reductionism, but that should not *necessarily* be a reason for concern. All explanations are reductive in some sense; even standard explanations must run out in constitutive ones at some point (for example, for a consideration to be a reason *just is* for it to count in favor of a belief or action). Reductive explanations work at some levels of abstraction and not at others.[109] The question, at each level of abstraction, is what we are prepared to regard as a satisfactory explanation. The main purpose of this paper is to raise *this* question

105. Schroeder, *supra* note 30 at 17ff.

106. Of course, the 'we' here is relative to a legal community the boundaries around which we cannot draw if we have not first characterized what it is that makes such a community a legal one.

107. Hart, *supra* note 19 at 104. "A grasp of the normal contextual connection between the internal statement that a given rule of a system is valid and the external statement of fact that the system is generally efficacious, will help us see in its proper perspective [realist theories of legal validity]" (*ibid*).

108. I don't mean to refer to metaphysical reduction in the sense that there would be 'nothing more' to legal norms than the behaviors and attitudes of the practice in which they manifest. Kramer criticizes the use of the term 'reduction' for any other kind of constitutive explanation, as I do here. See Matthew H Kramer, "Hart and the Metaphysics and Semantics of Legal Normativity" (2018) 31:4 Ratio Juris 396 at 398-401. I retain this terminology from Schroeder.

109. See Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton University Press, 2004) at 26.

about legal normativity: At which level of abstraction are we prepared to accept an explanation of legal normativity? The previous section suggested that robust normativity is a level of abstraction at which our explanations of legal normativity become unenlightening.

The practice-first approach suggests that we look at features of the practice, and not beyond it. Analyzing what is involved in treating a set of standards as binding, and as common, tells us what it is for a practice to be normative, and what it is for norms to be 'practiced'—it accounts for an internal *circularity* between (normative) practice and (practiced) normativity. This is not a reduction of norms to facts about beliefs or attitudes, but to the justificatory, social, and historical endeavor of grasping and grappling with shared normative requirements.

At the outset, two notes of caution are in order in case too much is expected of the account offered here. First, the practice-first explanatory account I offer draws on some aspects of normative pragmatics and inferentialist semantics, notably the work of Robert Brandom.[110] But my aim is limited: I am looking for an articulation of the normativity of local, contingent practices. Whether Brandom's work provides the tools needed to analyze the *robust* normativity of legal standards is an important question which I do not discuss here.[111] I attempt to sketch the outlines of a *thin* explanation of legal normativity, in line with the normative reticence that, I believe, Hart quite appropriately championed within general jurisprudence.

Second, the explanation I provide here will necessarily be incomplete. I will analyze some features of normative practices to demonstrate the structure of a practice-centered explanation of normativity. I leave aside the characterization of these practices as distinctively *legal.* Much more would have to be said on that count. In other work, I offer some characterizations of the distinctive aspects of *legal* normative practices. If we conceive of normative orders as consisting of norms that are related to one another by common mechanisms,[112] I suggest that we can identify two distinctively legal mechanisms.[113] The first is *externalization:*

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110. See Robert B Brandom, *Articulating Reasons: An Introduction to Inferentialism* (Harvard University Press, 2000) at 79-97 [Brandom, *Articulating Reasons*]; Robert B Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Harvard University Press, 1994) at 245-53 [Brandom, *Making It Explicit*]. Where Brandom discusses intentional action as an 'exit' from the game of giving and asking for reasons, he describes (with no suggestion that this is an exhaustive list) three patterns of inferential practical reasoning. These patterns are endorsed and ascribed in the relevant intentional activities. The first involves a pattern of material inferences regarding personal preferences. The second involves a pattern of material inferences regarding "social-institutional statuses" (like being a bank employee) (Brandom, *Articulating Reasons*, *supra* note 110 at 91). The third involves a pattern of material inferences regarding (impersonal, agent-neutral) duty. I am interested in the second pattern. Brandom provocatively suggests that it might be a mistake to assimilate all analysis of practical reasoning to either the first pattern (as Humeans do) or the third pattern (as Kantians do). It is worth further exploration whether the analysis I offer here can stand on its own without being assimilated into either of the other patterns once we start asking questions about the robust normativity of legal standards. I don't make an argument for that here.

111. But see Thomas Bustamante, "Is Protestant Interpretation an Acceptable Attitude Toward Normative Social Practices? An Analysis of Dworkin and Postema" (2021) 66:1 Am J Juris 1.

112. See Möllers, *supra* note 97.

113. See Alma Diamond, "The Practice & Normativity of Law" (2023) (JSD Thesis, NYU Law).

the conferral of normative significance upon common or public facts ('legal sources'). The second is *formalization*: the internal regulation of (some) norm-production and application ('legal authorities'). The former yields a kind of distinctive *publicity* to legal normative order, the latter a kind of *autonomy*. But beyond these hints, a more detailed analysis of *legal* normativity remains beyond the scope of this paper. Here, I will only explore the feasibility of explaining normativity in terms of normative practices.

Practice-first explanation takes the normativity of legal practice on its own terms. Participants (who might be only officials) treat legal norms as practical standards. This entails *using* the norms to clarify, explain, guide, justify, evaluate, criticize, and plan.[114] The norms have a guiding, explanatory, and justificatory presence within the activities, speech, and thought of participants. Or, stated slightly differently, participants take part in the practice with a critical reflective awareness of the legal norms *as* standards for conduct, speech, and thought.

I use the word 'standard' here to convey that the norms operate as *constraints*: they determine one option, or one subset of options, as appropriate or correct or required in some way.[115] The normative aspect of the practice consists in this constraining force: participants are free to do and say as they wish, but they are not free to determine the propriety of what they say or do.[116] The standards determine what action counts as a correct, appropriate, or justified response in advance, *independently* of that response. The standards have, in this sense, normative force.

This will be our point of departure. Instead of commencing with an analysis of normative force in terms of some further normative concept (say, reasons for action), we will attempt to deal with it in terms of the attitudes involved in recognizing it. The reasons-first explanatory approach departs from a presumption about the form of the normative ('reasons for action'). The practice-first explanatory approach departs from a presumption about the form of normative practice ('recognitions of normative force'). We abandon our firm-footed analysis of the normative in favor of a firm-footed analysis of the attitudes involved in recognizing normativity.

A. Normative Force

Before turning to an analysis of the critical reflective attitudes involved in recognizing normativity, some observations about the object of those recognitions: 'normative force'. What I mean by 'normative force' is the constraint of

114. This is, in the end, perhaps the best way to define rules. Rules are dynamic and functional: we *use* rules. See Gordon P Baker & P M S Hacker, *Wittgenstein: Rules, Grammar and Necessity: Volume 2 of an Analytical Commentary on the Philosophical Investigations, Essays and Exegesis 185-242*, 2nd ed (Wiley-Blackwell, 2009) at 49-51.

115. Philip Pettit suggests treating rules as normative constraints, "in particular normative constraints which are relevant in an indefinitely large number of decision-types." Philip Pettit, "The Reality of Rule-Following" (1990) 99:393 Mind 1 at 2.

116. As Brandom would say, the sophist might not respond to normative force, "but even the sophist ought to." Brandom, *Making It Explicit*, *supra* note 110 at 17 [emphasis removed].

necessity: the authority one becomes subject to in identifying and applying standards.[117] When we use standards as guides, we recognize them as determining, independently of us, some option as appropriate. This independence is key: that is what allows us to be *guided* rather than *described* by our standards. When I refer to critical reflective attitudes within a normative practice, I don't mean that participants are in conformity with their standards, though they might be at times. Being, in a particular moment in time, in conformity with a standard is not the same as *using* that standard as a practical guide. Critical reflective awareness refers to this *using*. The former is a property of a particular state of affairs. The latter is a property of a process: it is to exhibit a particular state of mind toward the standard, *using* it to determine propriety or success in certain instances.[118] This state of mind, in recognizing normative force, recognizes constraints that operate independently of it. It involves, in other words, a recognition of that unreachable gap between one's performance and success: fallibility in conforming to a standard. This observation can be formalized to make two familiar points about normative force.

First, this normative force cannot reduce to causal regularities. This is the familiar Humean insight. If normative force operates to constrain and guide, if we are subject to a kind of *authority* in using standards, those standards cannot merely be facts about what we do, or tend to do. Standards are only *normative* to the extent that we use them and apply them *fallibly*.[119] Our recognitions of normative standards involve "a distinction between what is in fact done and what ought to be done."[120] Of course, this is not to deny the existence, and possible normative significance, of causal regularities within our practices. It is just to point out that if and when such causal regularities have *normative* significance, this is because of a further standard which confers that status upon the causal regularity.[121] If our standards constrain us, they stand "beyond" us in this way.[122]

Second, this normative force cannot reduce to explicitly formulated or formulatable rules.[123] This is the familiar Wittgensteinian argument also illustrated by

117. See *ibid* at 9-11. This is a Kantian insight, involving a shift from what Brandom calls "Cartesian certainty" toward "Kantian necessity" (*ibid*). Under Cartesian certainty, we are concerned with what we can know. Under Kantian necessity, we are concerned with the normative significance of knowledge.

118. In addition to the distinction between a 'state' and a 'process' there is also an 'event', an example of which would be an action described in terms of a particular intention. Rule-following is not an intentional action in this sense, since it is always ongoing, and not reducible to descriptions of success in following it. It is a 'basic activity', one which cannot be described in terms of its success conditions. See Antony Galton, "The Ontology of States, Processes, and Events" (2012) [unpublished, archived at ore.exeter.ac.uk/repository/handle/10871/21881]; Jennifer Hornsby, "Basic Activity" (2013) 87 Proceedings of the Aristotelian Society Sup Vol I, 1.

119. See Paul A Boghossian, "The Rule-Following Considerations" (1989) 98:392 Mind 507.

120. Brandom, *Making It Explicit*, *supra* note 110 at 27.

121. See *ibid*: "No one doubts that actions and linguistic performances are subject to [causal laws of nature] and so conform to rules or are regular. The thesis of the normative significance of intentional states [as the critical reflexive attitude is] sought to distinguish intentional states from states whose significance is merely causal."

122. Pettit, *supra* note 115 at 2.

123. See Eugenio Bulygin, "Norms, Normative Propositions, and Legal Statements" in Guttorm Fløistad, ed, *Contemporary Philosophy Volume 3: Philosophy of Action* (Springer, 1982) 127.

Lewis Carroll's fable.[124] Correctness or propriety requires standards that stand apart from it. This means that no standard can be correct except by regress to a further standard. Standards don't apply themselves, their implications can only be extracted from them in a context where we can "[distinguish] correct from incorrect inferences."[125] On pain of infinite regress, "[t]here is a kind of correctness that does not depend on explicit justifications, a kind of correctness of practice."[126] When we recognize normative force, we cannot simply be recognizing explicit standards: we recognize also that they rest upon further, practiced, implicit proprieties.[127] I refer to the attitude of *recognizing* normative force in this sense as a 'critical reflective attitude'.

B. Critical Reflective Attitudes

Hart wrote of participants to normative practice having a "critical reflective attitude" towards the standards within the practice.[128] This attitude involves a recognition of the authority of the standards in determining propriety: a recognition of constraints in the sense I set out above. This, I believe, is what Hart had in mind when he discussed the distinction between merely "[feeling] obliged" and having an obligation according to a standard. [129] The recognition involved in normative practice consists not simply in unmediated reactions, but in drawing from standards conclusions about the propriety of possible reactions.[130] The critical reflective attitude involves a recognition of subjection to normative force—the authority—that standards have when we use them as guides. Though this is no exegesis of Hart, I believe the idea of a 'critical reflective attitude' is a useful jumping-off point for a practice-centered explanation of normativity.

Normative practice involves 'critical' attitudes. Participants, when confronted with a particular factual situation, evaluate, explain, justify, define, etc., that situation in terms of normative standards that stand apart from the facts themselves.[131] The attitude in question is normative: it involves recognizing the constraining force of the standard, its authority. It involves the capacity, in other words, to recognize one's answerability to a standard, a capacity for responsibility.[132] There is a difficulty here: how can one ever take responsibility simply in

124. See Lewis Carroll, "What the Tortoise Said to Achilles" (1895) 4:14 Mind 278; Brandom, *Making It Explicit*, *supra* note 110 at 22-26.
125. Robert B Brandom, "A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel" in Graham Hubbs & Douglas Lind, eds, *Pragmatism, Law, and Language* (Routledge, 2013) 19 at 21.
126. Brandom, *Making It Explicit*, *supra* note 110 at 22.
127. See *ibid* at 22-25.
128. Hart, *supra* note 19 at 57.
129. *Ibid* at 88.
130. In *The Concept of Law*, Hart very clearly has in mind the role of norms as *reasons,* rather the *predictions* for our reactions. "[A judge's] statement that a rule is valid . . . constitutes not a prophecy of but part of the *reason* for his decision." *Ibid* at 105 [emphasis added].
131. Another way of putting this point is that recognitions of normativity involve the capacity to conceive of possibilities and to affirm those possibilities. See Möllers, *supra* note 97 at 72.
132. See Brandom, *supra* note 125 at 28.

virtue of one's own attitudes? "If whatever I acknowledge as correct—as fulfilling the [responsibility] I have undertaken—is correct, then in what sense is what I did in the first place intelligible as binding myself," as placing myself under the authority of a standard which stands apart from what I in fact did?[133] I return to this difficulty momentarily.

First, there is a more immediate difficulty: how could one ever come in contact with a normative constraint if it is not reducible to causal regularities or explicitly formulated rules? How does one ever come to grasp implicit proprieties? The first part of the answer relies on the second modifier of the relevant attitude: it is 'reflective'. Perhaps an even better expression would be that the attitude is 'reflexive'. The thing about social normativity is that it does not stand apart from facts about our practices, or so I will suggest. Participants are not confronted with abstract normative requirements; they are confronted first and foremostly with concrete situations. "[Social] norms are recognizable in so far as they are divested in the social realm," and they become "part of some communication that takes place in time and space, in order to be recognizable by others."[134] Our norms become part of social mechanisms: speech, action, text, ritual, repetition, tradition, story, myth. The norms don't reduce to these things, of course. They form "a counter-world that is part of this world."[135] But the norms are only grasped in the process of engaging with factual particularities.

Participants are confronted with concrete factual situations, and insofar as they are capable of a critical reflective attitude, they are able to grasp the situation as falling under a standard.[136] There is no way to grasp the infinite range of possible normative constraints that might apply with a finite mind, of course. But it is possible to treat a particular circumstance as an *exemplification* of rightness, or correctness, or propriety.[137] When a participant responds to a particular factual circumstance by treating it as appropriate, they are *extrapolating* from that exemplification toward an underwriting normative constraint, perhaps an explicit one, often an implicit one.

This reflective or reflexive activity involves a capacity for normative generalization from particular concrete instances toward underlying standards of propriety, something that Karl Llewellyn emphasized. As he said, "[t]o see that something is *right,* or that something is *a* right, is to generalize. There is no

133. Robert B Brandom, "Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms" (1999) 7:2 Eur J of Phil 164 at 171 [emphasis removed].

134. Möllers, *supra* note 97 at 72.

135. *Ibid* at 75. Möllers draws on an analogy to poetry: the poetic world distinguishes itself from this world while still existing within it.

136. Hart often emphasizes that normative practices involve recognitions that particular situations fall under a normative standard. See Hart, *supra* note 19 at 85. One might want to put this differently: it is in our confrontations with particular situations that we come to recognize normative standards.

137. As Philip Pettit explains, exemplification is a three-way relationship, not (as in the case of instantiation) a two-way relationship. It involves not just a set of examples and a rule, but also a person for whom the examples are supposed to exemplify these rules. See Pettit, *supra* note 115 at 9.

practicable way, in ordinary life, to get at the notion of rightness without having, somewhere in your mind, a *general* picture or pattern which the case in hand fits into and fits under."[138] This generalization is a creative action, and it is *fallibly* undertaken.

A word on each of these observations. First, the process of generalization works by way of our inclinations to extrapolate from concrete situations toward abstract normative standards.[139] This is creative in that it involves a capacity for imagining alternative possibilities, and for affirming those possibilities. In this way, normative practices involve attitudes that go along with a kind of creative "self-distancing"—the capacity to imagine possibilities that are not real, and to draw from this conclusions about that which is real.[140]

This leads us to the second point: We do so fallibly. That one correctly abstracted from a concrete situation toward the normative standard that applies to it could only ever be the case in virtue of a further normative consideration. We might have a sense of what it would be for our creative generalizations to function correctly, and we might appreciate in principle that it would be possible for us to get things right, but there is no drawing a conclusion of correctness simply from the fact of our generalization.[141]

This would seem to lead us to a further difficulty. The first difficulty was that it seems incoherent to understand oneself as being *responsible* in virtue of one's own commitment to that responsibility. How do standards operate *normatively* simply in virtue of our recognitions of their normativity? The second, related, difficulty is this: how could we ever know our standards? Even if we extrapolate from particular factual circumstances toward normative generalizations, we seem to only ever do so fallibly. How could we know we got things right? The answer to both difficulties lies in the *sociality* of normative practices.

C. Sociality and Reciprocal Recognition

Within a normative practice, participants are not only recognizing the authority of standards. They are also recognizing fellow participants of that practice, those who share in their subjection to the standards. Analytically, this follows from the structure of the recognition itself. And on a more sociological level of observation, our normative social practices involve the *leveraging* of reciprocal recognitions to negotiate and administer common normative standards within specific political and historical contexts. I briefly discuss both points in this section.

First, the analytical point. The creative capacity for normative generalization means not only that one must 'self-distance' from immediate factual particularities. It also implies, necessarily, a 'self-distancing' from oneself. It involves grasping oneself as subject to standards that extend beyond a particular

138. Llewellyn, *supra* note 20 at 1359 [emphasis in original].
139. See Pettit, *supra* note 115.
140. Möllers, *supra* note 97 at xiii.
141. See Pettit, *supra* note 115 at 10.

instance.[142] One might even be tempted to formulate the point inversely: to recognize that one has a situation in common with other agents is to recognize that there are such things as normative constraints—perspectives other than one's own, and possible principles that underwrite commonalities between perspectives.[143] In reality, these recognitions are probably coeval: to recognize a normative constraint is to recognize the in-principle possibility of having that constraint in common with others.[144] And to recognize commonality between oneself and others is to recognize normative constraints.

Recognizing a normative constraint means recognizing the abstract possibility of others. To believe that one has successfully or appropriately conformed to a standard is, at least in principle, to believe that another agent might come to believe that too. The normative attitude of recognizing the authority of a standard involves, in other words, the recognition of other agents' standing in holding us answerable to that standard. When those we recognize thus in turn recognize us, *reciprocal* normative recognition arises. The standards we recognize are therefore administered by others with whom we have those standards in common.

Here we find an answer to the first puzzle: how can our own recognitions leave us subject to authority in any non-illusory sense? The answer: "It is necessary and sufficient to be a normative subject that one is recognized as such by those one recognizes as such."[145] In recognizing normative standards, and one's own answerability, one is also recognizing others and the standing to hold responsible. In this we see our normative statuses as the product of reciprocal normative attitudes.

And from this follows an answer to the second question: in recognizing the commonability of our normative standards, and concomitantly the *others* with whom we share those standards, we are engaging in a division of normative labor.[146] The resulting process is of "normative negotiation of reciprocally constraining authority."[147] We do administer and negotiate the norms we recognize *fallibly,* but we do so publicly, and in discursive engagement with others who do the same. There is a process of negotiation involving reciprocal attitudes. The negotiation iterates between concrete particulars, which condition participants' normative generalizations, and normative generalizations, which in turn exercise authority over participants' recognition of concrete particulars.[148]

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142. This capacity for perspective-taking lies at the core of higher-level reasoning. See Michael Tomasello, *A Natural History of Human Morality* (Harvard University Press, 2016).

143. See Thomas Nagel, *The View From Nowhere* (Oxford University Press, 1989).

144. See R Rhees, "Wittgenstein's Builders" (1960) 60:1 Proceedings of the Aristotelian Society 171. At a bare minimum, it would involve recognizing oneself at different points in time. See Pettit, *supra* note 115.

145. Brandom, *supra* note 125 at 28.

146. See Philip Pettit, *The Common Mind: An Essay on Psychology, Society, and Politics* (Oxford University Press, 1996) at 180.

147. Brandom, *supra* note 133 at 172.

148. In more technical terms, with our non-inferentially elicited judgments, the particular exerts authority over the universal. With our mediated (inferentially articulated) judgments, universals exert authority over the particulars to which they apply. The practice in question involves negotiation between these reciprocal dimensions. See *ibid* at 175.

This is all very abstract. The more immediate point that I wish to emphasize is that these capacities—for the reciprocal recognition and administration of common norms—lie at the heart of social practices. Common norms are worked out and concretized, divested into the social environment, within an ongoing social and political process. This process operates locally, contextually, concretely, and—importantly—*fallibly*.

An individual agent finds themself struck or compelled by a particular situation under a normative characterization (implicitly or not). In adopting this normative attitude, they are not only recognizing a constraint but also an abstract class of subjects with whom they have it in common. Agents derive performances from their normative recognitions, and in this make *public* their normative attitude. These public, social, and political manifestations are in turn interpreted and contested by those they recognize: they *ascribe* to the agent responsibilities and entitlements. Each recognition of a norm is also a recognition of a community, and normative practice involves negotiating and administering both these aspects—shared constraints and shared subjection to them. Where these recognitions become reciprocal, normative statuses—authority and responsibility—are instituted by way of normative attitudes.

This process is shaped by the factual circumstances, the socio-political and material context, that we find ourselves responding to and performing within. And it is dependent upon reciprocal recognition, which is by no means inevitable: we are all too capable of withholding fully normative recognition from others. I would even go further to suggest that normative social practices rest implicitly upon an ongoing struggle for such recognition.[149] It involves an ongoing engagement with what Bernard Williams calls the "Basic Legitimation Demand."[150]

Out of this ongoing process, shaped by our actual history and experience, there emerge areas of stable 'common ground': publicly salient shared bodies of normative constraints and notions of membership to them. These normative practices are not only social, they are also historical. They involve local, practice- and circumstance-relative bodies of normative authority and communities of subjects to those authorities. This normative authority does not stand apart from the practice which manifests it, and it is also not reducible to that practice. It is empirically accessible but not empiricized: it allows for a divergence between the normative pretense and practice of a community.[151] This, the practice-first approach suggests, is what the normativity of law consists of.

D. Implications

All of this remains, as I cautioned at the start of this section, only a sketch. It hopes to be the start, rather than the end, of explorations of practice-first

149. See Axel Honneth, "'You' or 'We': The limits of the second-person perspective" (2021) 29:3 Eur J of Phil 581.
150. Williams, *supra* note 99 at 4.
151. See Möllers, *supra* note 97 at 40.

normative explanation. Before I conclude this sketch, a few thoughts about the implications of this kind of explanatory posture. First, it follows a broadly naturalistic approach. The strategy is of making normativity intelligible without appealing to something behind or beyond our empirical activities.[152] The hope would be that such an account could, if fleshed out properly, resist the withdrawal of "the normative from the sphere of empirical observability."[153]

Second, this strategy does not yield an account of the determinateness of normative *content.* Instead, it trades that for "determinateness of relations that articulate conceptual contents with a dynamic account of the process of determining those contents."[154] As Brandom puts it, the focus is placed on the determinateness of necessity (does this standard apply, what follows from it) rather than the determinateness of certainty (is the content of this concept clear, is it distinct).

Third, this account highlights the inherent link between grasping a norm and grasping its applicability to a particular situation. To grasp a standard as a practical guide is to grasp a situation as falling under it. The idea that one can grasp norms as practical guiding standards, but do so 'detachedly,' or 'theoretically,' is perhaps a bit more peculiar than often assumed. When our judgments manifest the norms they rely on, they also manifest a conception of the situation falling under them. When Raz wrote about the notion of detached statements of law, his example was of a Catholic informing an Orthodox Jew about their obligations under Rabbinical law.[155] It is clearly possible to grasp the situation covered by Rabbinical law and also oneself as not being a 'member' of the shared normative situation characterized by answerability to that system of norms. But how does that work for law? How does an official grasp legal norms *as legal* without grasping the *legal situation* as one in which they are implicated? [156]

Fourth, this analysis also has some upshots for the now familiar metaphysical discussion about 'how facts make law.' Hart's practice theory has been criticized for grounding legal norms in social facts, and in therefore violating Hume's law. But this is a misunderstanding of the practice-first explanatory approach. The norms on this account are not matters of facts about behavior, attitudes, or beliefs, or any other 'descriptive' facts. They are grounded in justice, value, fairness, authority, and the like. Their grounding is securely normative.

However, that specific grounding relationship obtains in virtue of the social practice. One way of putting the point is that the practice is an 'anchoring' fact—it is what the grounding relationship is contingent upon. If the practice were different, the grounding relationship would have been different.

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152. See Brandom, *supra* note 133 at 169.
153. Möllers, *supra* note 97 at 32.
154. Brandom, *supra* note 125 at 34.
155. See Raz, *supra* note 69 at 156-157.
156. As David Dyzenhaus recently argued, citing James W Harris, "Kelsen's Pallid Normativity" (1996) 9:1 Ratio Juris 94, the hypothetical detached legal perspective has nothing to stand on, nothing to grasp. See David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press, 2021) at 171ff. For Raz's legal man, law "is a transmission belt for objective reasons and its authority depends not on its being law but on … transmitting right reason." *Ibid* at 180.

Actions and assertions take on normative significance and meaning—become intelligible—in light of the common ground established by the practice. In this way, social practices are adverbial, they make possible new modes of being and relating.[157] Such an ongoing justificatory practice *institutes,* rather than *constitutes,* both a set of practical standards and membership to the normative situation these govern.[158] It imposes significance on reality, and constitutes new kinds and layers of shared concepts that are in turn presupposed within legal practice.

Finally, the question of whether law is reason-giving in a 'robust' sense, and why it is, remains an important one. The analysis here cannot tell us why and whether a legal standard will have robust reason-giving force. Arguably, that is a question for individual moral agents, about how to regard their communities. But this does not diminish the reality of the legal question: the legal question is why law is normative *to legal subjects,* in their capacity as *legal subjects.* It is a question about what it means to be part of a legal community, and it is worked out within rather than outside of legal practice.[159] *This* is the reality of legal normativity.

VIII. Conclusion

One common response to practice-based theories of law is that these theories cannot escape the spectre of relativism and so cannot account for legal normativity. Insofar as this objection amounts to an insistence that we cannot ground our theories of law in facts about particular communities' attitudes and actions, the criticism is correct but also misplaced. Practice theories such as the one put forward here do not root law in facts about actions and attitudes but in the norms and reasons manifested in those actions and attitudes, and in the discursive practice of grappling with those norms and reasons.

Insofar as the objection insists that we cannot ground legal normativity in practice-relative, localized reasons and norms, I think we might want to resist it. What is really *required* of an explanation of legal normativity? Are we interested in all-things-considered normativity, or in the shared normative reality of a particular kind of social and political practice? The main focus of this article has been to draw attention to the implicit model of normative explanation which dominates the debate about legal normativity, and to show that there is an alternative. Such an alternative explanation would require more than has been set out here. It would require a more thorough analysis of the characteristics which distinguish legal practice from other social and political practices.

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157. See Oakeshott, *supra* note 13.

158. See Craig L Carr, ed, *The Political Writings of Samuel Pufendorf*, translated by Michael J Seidler (Oxford University Press, 1994); Brandom, *Making It Explicit*, *supra* note 110.

159. A question the importance of which has been neglected, I believe, because most theorists assume that being a legal subject *just is* being a citizen in a modern municipal nation-state. But this begs the question: we surely can't equate legal communities to nation-states and then define nation-states as legal communities.

This paper has also used the term 'official' rather liberally and I have made no attempt to clarify the relationship between official and non-official legal subjects. For Hart, only officials need take an internal point of view towards the practice. I am dubious of this idea, but apart from highlighting it in the introduction I did not address that issue in this paper. A thorough practice-first explanation would have to distinguish between the practices of officials and of non-official subjects.

Even the most complete practice-first explanation would not be able to offer a complete account of the (robust) reason-giving force of legal norms. That must surely depend on how things are with the world and with the legal system in question. An answer to the question 'what should I do?' will never be able to depend solely on how things are with law. Precisely because of this, we should doubt that a description of the relationship between legal subjects and the legal community and the standards that bind them can be rendered *intelligible* in terms of robust normativity alone.

The suggestion put forward in this paper is that the normativity of law, on the practice- view, *just is* the thing instituted by the social and political rule-governed institutions we sometimes call 'law'. We need that understanding before we can ask questions about the robust reasons we have to obey the law. An evaluation of the duty to obey the law takes place within the general conceptual framework of legal normativity; it does not involve questioning that whole framework.[160]

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160. Winch makes the same point about the notion of authority. See Peter Winch, "Certainty and Authority" (1990) 28 Royal Institute of Phil Supplement 223.