

Power-Conferring Norms and Law's Normative Guidance

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Preface

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text.

It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text.

The total length of the text does not exceed the prescribed word limit for the Law Degree Committee (80,000 words exclusive of footnotes, appendices, and bibliography; 100,000 words exclusive of bibliography, table of contents, and any other preliminary matter).

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Abstract

Law is a social construction. The fundamentally social character of normative facts in the legal domain implies that a legal order is the consequence of a complex interaction of reciprocal forces between norms and human activities. This thesis provides a more comprehensive account of the social facts underlying a legal system, on the basis of which the role of law in providing normative guidance for its addressees can be unfolded. The argument develops by virtue of amplifying the role of power-conferring norms in explaining the core official legal practices, the efficacy of law, the social basis of law, the authority structure of law, and the reason-giving force of law respectively.

One's committed attitude toward an empowering norm is the practical attitude that shows one's recognition of the normative consequences that ensue from exercises of the legal power conferred by that norm. The social basis of law consists primarily in exercises of legal powers that connect formal laws with informal social customs and integrate them into the overall normative order within a jurisdiction. The authority of law is a *de facto* authority, the existence of which depends on a social context in which the legal agents' recognition of their roles within the authority structure is manifested in their exercises of legal powers. Law provides two modes of normative guidance: the directive mode and the constitutive mode. These two modes of guidance jointly constitute the distinctive manner in which law performs the action-guiding function. The normative significance of legal authority is manifested in its ability to render modes of conduct proper responses to pre-existing reasons.

Legal power plays a pivotal role in the operations of law. It is the vital nexus of the sociality of law, the normativity of law, and the authority of law. Exercise of legal powers not only manifests the dynamics and agility of law, but also secures the stability and systematic coherence of a legal order. The exercise of legal power is the core of legal practices as a rational activity of human beings – our ability to be engaged in rule-following activities that establish normative order.

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Chapter One: Introduction

The Sociality of Normative Facts and the Normativity of Social Facts

Exchange of normative claims informs every aspect of legal phenomena. Only when one grasps the normative notions in legal discourse can one understand the meaning and structure of legal activities. But at the same time, law is a social construction.¹ The emergence of a legal system always takes place within some form of governance or social control administered by certain social institutions. And the existence and content of law depends to a considerable extent on historically contingent events. The fundamentally social character of normative facts in the legal domain implies that a legal order is not a matter of unidirectional regulation and guidance of human conduct by a set of abstract norms, but the consequence of a complex interaction of reciprocal forces between norms and human activities. For this reason, the investigation of the existence of a legal system and its normative structure and practical significance must be based on an adequate understanding of the social foundations of law.

The social character of law gives rise to the question that has preoccupied legal philosophers in regard to the normative implication of legal norms. Indeed, the primary function of legal norms is to guide and evaluate behavior, not to make descriptions of past or future events. However, normative propositions involving legal entitlements are jurisdiction-specific normative judgments significantly associated with human will. Such normative judgments seldom express the desirability of the norm acts. Typically, they seem to function in practical deliberations as conclusions or premises with regard to what one must or ought to do.

¹ See, e.g., Jules Coleman, “Beyond Inclusive Legal Positivism,” *Ratio Juris* 22, no. 3 (2009): 383; Leslie Green, “Introduction,” in *The Concept of Law* (Oxford: Oxford University Press, 2012), xvii; Andrei Marmor, *Law in the Age of Pluralism* (New York: Oxford University Press, 2007), 36-37.

Then, how could such artefacts guide human behavior? How could they give reasons for action or make differences to people's practical deliberations?

The questions as to the existence of law and its normative implication form the backbone of jurisprudential investigations. Both a complete analysis of the existence conditions of a legal system and a satisfactory explanation of law's normative guidance, as should be manifest, depend on an adequate understanding of law's social dimension. This thesis aims to develop a more comprehensive account of the social facts underlying a legal system, on the basis of which the role of law in providing normative guidance for its addressees can be unfolded. The argument touches upon many other topics in general jurisprudence, such as the Hartian internal point of view, the social foundations of law, the efficacy of law, the authority structure within a legal system, the reason-giving force of law, and the methodological proclivity toward an official-centered view on legal phenomena. Over and above critical assessment of theoretical accounts of relevant issues in the literature, the chapters to follow provide an alternative explanation of the relation between the sociality of law and the normativity of law by amplifying the role of power-conferring laws. It is generally believed that empowering laws are different from and irreducible to duty-imposing laws. They constitute a distinctive norm-type and enable legal agents to be engaged in a special kind of speech acts, whose point consists in making changes in legal statuses or relations. Normative legal powers represent another form of law's force in addition to coercive control, the use of which is crucial to the establishment and operation of a legal system. Exercise of legal powers not only manifests the dynamics and agility of law, but also secures the stability and systematic coherence of a legal order. Despite the wide recognition of the indispensability of power-conferring norms in modern legal systems, the pivotal role of power-exercising laws in constituting law's social foundations and

in reconciling the social aspect of law with the normative aspect of law is a subject that has not been thoroughly explored by legal philosophers. The analysis in subsequent chapters will reveal how the investigation of power-conferring laws helps explain the duality of sociality and normativity in the legal domain.

My purpose in this introductory chapter is to explain the main question that I seek to answer in the thesis, the theoretical context in which such a question arises, and the main points of the subsequent chapters. I shall commence with a recapitulation of two main interpretations of legal ought in contemporary legal positivism: the distinctive-normative-domain account and the reason-focused account (1.1). Then, I will provide some preliminary remarks on the reason-focused account, which has become the prevailing view among legal positivists (1.2). On the basis of my reflection on the reason-focused approach to law, I point out a paradox about law's normative guidance, the solution to which will become the focal point of this thesis (1.3). In the last section, I will summarize the main points of the subsequent chapters (1.4).

1.1 The Distinctiveness of Legal Ought

In our ordinary lives, we often take account of legal requirements when we determine the actions to be performed or avoided (for example, according to the Tobacco Hazards Prevention Act, I ought not to smoke in this room) or evaluate modes of conduct in light of law's demands (for example, according to the Income Tax Act, what you have done is tax evasion – a breach of legal obligation – rather than tax avoidance). Furthermore, we use the law to define normative statuses of people and objects (for example, the monies are proceeds of crime and shall be confiscated) or the normative relations between them (for example, I have a legal power to waive my right to inherit my father's property). Legal propositions, propositions that

ascribe or invoke legal entitlements, employ normative language and should be distinguished from historical propositions about the law (for example, the legislature has enacted a law that requires citizens to be kept in quarantine for two weeks after returning from the infected areas of the Ebola virus).² Legal propositions express normative judgments made in accordance with the law, whereas historical propositions about the law state only social or historical facts that are related to such legal judgments.

True legal propositions are often designated as legal facts by legal theorists. Legal facts are not ultimate facts. The existence of any legal fact, e.g., the fact that one owes a legal obligation to another, must depend on certain more fundamental facts.³ Legal philosophers have debated the question about the fundamental facts that determine the existence and content of legal facts for more than forty years.⁴ A central claim of legal positivism is that the existence and content of legal norms is ultimately determined by reference to social facts, not by reference to moral facts (*the Social Thesis*). Within the positivist tradition, there are two ways of developing the Social Thesis – exclusive and inclusive positivism. Exclusive positivists hold that legal facts are identified solely in virtue of social facts,⁵ whereas inclusive positivists allow moral facts to be incorporated into the criteria of legal validity, but only when the social-fact-based validity criteria of law render those moral elements relevant to the determination of the existence and content of law.⁶ Both positivist camps seek to highlight the social nature of

² H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982), 145.

³ Mark Greenberg, “How Facts Make Law,” in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, ed. Scott Hershovitz (Oxford: Oxford University Press, 2006), 226-27.

⁴ Jules Coleman, “The Architecture of Jurisprudence,” *The Yale Law Journal* 121, no.1 (2011): 61; See also Scott Hershovitz, “The End of Jurisprudence,” *The Yale Law Journal* 124, no. 4 (2015): 1160.

⁵ See, e.g., Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979); Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon, 1994).

⁶ See, e.g., H. L. A. Hart, *The Concept of Law*, 3rd ed., (Oxford: Oxford University Press, 2012); Matthew Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004); Jules Coleman, *The Practice of*

law and the social-based criteria of legal validity. These positivist views on the ground(s) of legal facts are in stark contrast with those endorsed by most natural lawyers, who contend that law-identifying activities must involve moral reasoning. Ronald Dworkin, for example, believes that the truth of legal propositions depends on their being supported by the set of moral principles that best justify the legal practices of the legal system.⁷

Legal positivists' insistence on the social thesis gives rise to a worry about their explanation of the normative import of legal facts. That is, how can prescriptive or normative statements about rights and obligations be established on descriptive statements about someone doing or saying something? Some legal positivists circumvent the is-ought problem by drawing attention to the distinctive normative domain the law establishes. For example, H. L. A. Hart claimed that "to say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action."⁸ The existence of a legal obligation, on this view, is solely determined by a legal norm. It does not entail any moral reason that counts in favor of the norm act; nor does it imply a belief in or a commitment to the existence of any such reason. As a consequence, legal obligations are separable from moral obligations.⁹ Normative concepts such as "right" and "obligation" have different meanings in legal and moral contexts, even though they share certain common features.¹⁰ Moral obligations are normative because they always imply genuine reasons to act as the moral obligations require.

Principle: In Defence of a Pragmatist Approach to Legal Theory (Oxford: Oxford University Press, 2003).

⁷ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

⁸ Hart, *Essays on Bentham*, 160.

⁹ Ibid., 158-59. See also Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999), 223-24.

¹⁰ Hart, *Essays on Bentham*, 146-47.

In contrast, legal obligations seem to be normative in a formal, rule-involving, sense – they are normative because claims or statements of legal obligations refer to certain standards that determine what is right and wrong, or what is correct and incorrect.¹¹

A number of contemporary legal positivists, however, do not juxtapose legal ought with ought in other normative domains. They espouse the view that normative notions have the same meaning in both legal and moral contexts. Legal obligations are distinctive not because they belong to a specifically legal sense of ought constituted by legal norms, but because they express a certain perspective on what the law-addressee(s) ought to do, namely a perspective on what they have reason to do.¹² On this account, to claim that one has a legal obligation to ϕ is to claim that one has a decisive reason to ϕ from the law's point of view. Since legal obligations frequently require people to defer their desires or interests to others, the reasons for action implied by legal obligations are typically moral reasons. As a result, legal obligations, on this perspectival interpretation, are moral obligations from the legal point of view. Legal theorists who adopt the perspectival conception of legal obligation believe that they solve the is-ought problem in regard to legal obligation because, on the perspectival reading, statements involving legal obligations are not normative statements. Rather, they are statements that represent the law's point of view on morality. One can use legal statements to describe the perspective of those who adopt the legal point of view without themselves committed to such a normative perspective.¹³

¹¹ For an explanation of normativity in difference senses, see Derek Parfit, *On What Matters*: vol. 2 (Oxford: Oxford University Press, 2011), 267-68.

¹² See, e.g., Andrei Marmor, *Philosophy of Law* (Princeton, NJ: Princeton University Press, 2011), 27-28; Joseph Raz, *Practical Reason and Norms* (Princeton NJ: Princeton University Press, 1990), 29-32, 170-77; Raz, *The Authority of Law*, 134-37, 155; Scott Shapiro, *Legality* (Cambridge, MA: Belknap Press of Harvard University Press, 2011), 184-88.

¹³ Joseph Raz, *Between Authority and Interpretation: on the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 185; Shapiro, *Legality*, 188-92.

Legal positivists adopting such a reason-focused approach to legal ought tend to understand law's action-guiding function in terms of its reason-giving force – its ability to make a difference in the addressees' practical deliberations. For example, Scott Shapiro claims that a legal norm guides human conduct only when it supplies its addressee with an additional reason, or a fact that activates a dormant reason, to act *differently* from what the addressee would have done in the absence of the legal norm.¹⁴ Joseph Raz submits that when legal authorities meet certain legitimacy conditions, their instructions will become “protected reasons” or “exclusionary reasons” for law-addressees to perform the norm acts and exclude all or some contrary reasons from being acted on. These law-constituted reasons are *independent* of pre-existing reasons; they would not exist in the absence of relevant legal norms.¹⁵ Accompanied with the perspectival conception of legal obligation and the reason-based account of law's normative guidance is the conviction that law claims its moral legitimacy or even moral authority – law claims that legal requirements, on their own, constitute independent reasons for the addressee(s) to be engaged in the required mode of conduct. Surely those theorists are not committed to the view that law necessarily provides reasons for action solely in virtue of its existence. Law only purports to give reasons for action and it may fail to do so. This manifests their adherence to one of the core tenets of legal positivism: without the addition of further normative premises, the existence of law does not determine whether the law-addressees ought to follow the law's instructions and what they ought to do all things considered.¹⁶

¹⁴ Scott Shapiro, “*Law, Morality, and the Guidance of Conduct*,” *Legal Theory* 6, no. 2 (2000): 145-46.

¹⁵ See, e.g., Raz, *Practical Reason and Norms*, 35-48, 62-65, 73-84; Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 57-62; Raz, *Ethics in the Public Domain*, 194-99; Raz, *Authority and Interpretation*, 126-65, 203-19.

¹⁶ Julie Dickson, “Legal Positivism: Contemporary Debates,” in *The Routledge Companion to Philosophy*

1.2 Some Preliminary Remarks on the Reason-Focused Accounts of Law

The reason-focused approach to law's normative guidance and the perspectival interpretation of legal ought foster a peculiar view on the ontology of law, the nature of normative notions in the legal domain, and the action-guiding function of law. On this view, every legal system claims legitimate authority to impose obligations on the addressees. Legal obligations purport to be categorical reasons for action; to impose legal obligations on law-addressees is, from law's point of view, to treat them as morally bound to fulfill the obligations. Law guides human behavior by virtue of giving independent reasons for action or making the addressees act differently from what they would have done in the absence of the law. Some questions arise under this line of thought. I shall recount them in the rest of this section.

Obscuring the Normative Significance of Law's Social Basis

First, the positivist theories of law that adopt the perspectival interpretation of legal ought seem to obscure their advantage over anti-positivist theories in clarifying the relation between the social aspect of law and the normative aspect of law. The debates over the grounds of legal facts have been revolving around the role of moral facts in determining the truth of legal propositions. Anti-positivists strive to demonstrate that social facts are not the sole element of legal grounds and that law-ascertaining activities must involve moral facts or moral reasoning. Law's normative force, those anti-positivists contend, depends on certain moral reasons or obligations to obey the law. But they seem to take for granted that certain social facts, e.g., the enactment of a new bill, pertain to the truth of legal propositions and seldom delve into the

of Law, ed. Andrei Marmor (New York, NY: Routledge, 2012), 58-59.

relevance of those social facts to the grounds of law or their normative implication.¹⁷ In contrast, the commitment to law's social nature prompts legal positivists to explore the fundamental social practices that underlie a legal system. Although there is no shared view on the nature of those fundamental social facts within the positivist camp,¹⁸ the exchange of views on law's social basis in positivists' works provides ample theoretical resources to advance explanations of the normative significance of legal practices.

The perspectival account of legal ought, however, does not seem to facilitate investigations into the relationship between law's sociality and law's normativity. In fact, whether legal obligations express the legal authority's moral perspective has very little bearing on their normative implications. Since one cannot bootstrap a reason solely by forming a belief about that reason, the normative significance of a legal fact does not depend on the legal authority's belief that there is a decisive law-independent reason for law-subjects to perform the norm act. A legal fact is a normatively significant fact to the law-addressee because the social facts underlying it give rise to a change in the addressee's normative situation. For this reason, investigations into the normative implications of law-related social practices do not need to understand legal ought as the legal authority's moral judgments. More importantly, to see legal obligations as presenting the legal authority's normative perspective on morality, or as the authority's belief in practical reasons, is to replace the complex social practices that constitute the grounds of legal facts with an imprecise personified entity. This figurative

¹⁷ See, e.g., Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon, 2002), 3-4, 14-19.

¹⁸ One of the disagreements among positivists is whether such social facts are best understood as conventional practices. See, e.g., Julie Dickson, "Is the Rule of Recognition Really a Conventional Rule?" *Oxford Journal of Legal Studies* 27, no. 3 (2007): 373-402; Leslie Green, "Positivism and Conventionality," *Canadian Journal of Law and Jurisprudence* 12 (1999): 35-52; Hart, *Essays on Bentham*, 256, 267; Andrei Marmor, *Social Convention: From Language to Law* (Princeton, NJ: Princeton University Press, 2009), 155-75.

expression obscures the establishment and operation of the authority structure of law, within which people exchange their normative opinions against a particular normative background that significantly shapes their roles, capacities, and relations in their social lives.

The Biased Official-Centered Viewpoint toward Law

Second, the perspectival conception of legal ought reinforces a theoretical viewpoint on legal phenomena that predominantly focuses on the role of legal officials in maintaining the operation of a legal system. Theories taking such an “official-centered” approach understate the perspective of citizens and their engagement with the law and thus unjustifiably limit our vision of legal phenomena.

Law is a socially structured institutional normative order. The idea that legal order rests on social facts or that legal order is intimately linked to social practice, though usually highlighted by legal positivists, does not divide legal positivism from natural law theories. Hardly any legal philosopher contends that modern legal systems need not be established against certain social backgrounds. These social practices are significantly related to the determination of the existence and content of legal norms, to the boundaries between different legal systems, and to the authority relations within a legal system – they are essential to the operation of law.

In the tradition of legal positivism, the focus of the social facts underpinning any legal system has been the practices that constitute what is assumed to be the law-validating institution(s). Hart’s emphasis on both the institutional character of law and the conceptual distinction between legal validity and efficacy, combined with his explication of the official legal practices of law-ascertainment that ground the criteria of legal validity specified in the

Rule of Recognition, leads many legal theorists in the positivist camp to explore the social basis of law in terms of the rule-following activities of legal officials. These theorists concentrate on the essential features of the project that officials undertake when creating, applying, and enforcing the laws.¹⁹ Usually, they tend to efface the role of citizens in a legal system, or at least to banish them to the outer circles. They argue, for example, that the ultimate rule that determines the membership of legal norms in any legal system practiced by legal officials constitutes the social basis of law and solves the jurisdictional puzzle about legal systems,²⁰ that “the business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power,”²¹ and that “only the officials of the system need take an internal view of private secondary rules, and that it is sufficient that they regard the procedures as capable of creating valid law.”²² For those theorists, ordinary citizens are accorded a passive role in a legal community. Their practical engagement with legal norms is of minor importance to the operation of law. The only indispensable way in which ordinary citizens contribute to the maintenance of a legal order is to retain their behavioral conformity with the laws.

Such an official-centered viewpoint appears to be reinforced by the perspectival conception of legal ought. As noted above, the institutional character of law detaches the formal criteria of legal validity from ordinary citizens’ compliance with legal norms. The validity

¹⁹ See, e.g., Jules Coleman, *The Practice of Principle*, 96-100; Hart, *Essays on Bentham*, 267; Christopher Kutz, “The Judicial Community,” *Philosophical Issues* 11, no. 1 (2001); Marmor, *Social Convention*, 155-75; Marmor, *Positive Law and Objective Values* (Oxford: Clarendon, 2006), 19-24; Scott Shapiro, “Law, Plans, and Practical Reason,” *Legal Theory* 8, no. 4 (2002): 426-32; Shapiro, *Legality*, 165-68, 178-81.

²⁰ John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2014), 280.

²¹ Shapiro, “Law, Plans, and Practical Reason,” 418.

²² Colin Tapper, “Powers and Secondary Rules of Change,” in *Oxford Essays in Jurisprudence: Second Series*, ed. A. W. B. Simpson (Oxford: Clarendon, 1973), 265.

criteria of law are typically connected with exercises of public legal powers – e.g., legislative power and adjudicative power – by legal officials. That is, whether a legal obligation is imposed on law-subjects is predominantly dependent on the authorized officials' actions and attitudes. For this reason, if legal obligations indeed express someone's perspective on morality, it must be the viewpoint of the authorized officials, rather than that of anyone else. Moreover, if statements of legal obligations, as the Razian view suggests, were mere descriptions of moral judgments made by legal authorities, whether those judgments are genuinely normatively binding would hinge on the epistemic abilities of legal authorities and the qualities of their moral reasoning. In other words, the normative implication of legal obligations would have very little to do with the behavior, attitudes, or beliefs of ordinary citizens or their interaction with the officials. As a result, the core issues in jurisprudence – issues regarding the existence of law and the normativity of law – would be the philosophical questions surrounding the role of officials in a functioning legal system and the relationship between legal officials and the governing legal norms.

However, the official-centered conception of law provides only an incomplete account of law and gives rise to a series of misunderstandings of legal phenomena. For example, taking a legal community as merely composed of legal officials exercising legal authority (public legal powers) over law-subjects fails to discern another vital part of a legal system formed by exercises of private legal powers. Also, without a proper understanding of the role of citizens in sustaining a legal system, we are unable to give a full explanation of the establishment of the authoritative relations within a legal system. Furthermore, excluding ordinary citizens from those whose behavior and attitudes constitute law's social basis will obscure the jurisdictional boundaries between legal systems in some extraordinary cases.

Lacking Internal Coherence

The Razian view that law guides conduct by creating independent reasons for its addressees seems inconsistent with the perspectival interpretation of legal obligation, on the one hand, and unsuitable for explaining law's normative guidance, on the other.

Theorists adopting the reason-focused approach to law's normative guidance are attentive to whether, in what sense, and under what conditions, law is normative in the reason-implying sense. But the two basic tenets of the reason-focused theories of law – that the law gives independent reasons and that legal obligations express the law's moral perspective – are incompatible with each other with regard to the way in which law gives practical reasons. According to the perspectival interpretation of legal obligation, legal obligations seem to guide conduct in a purely epistemic sense.²³ The fact that one has a legal obligation to ϕ indicates that one has a (law-independent) decisive reason to ϕ , or at least a reason to ϕ . The imposition of any legal obligation, on the perspectival interpretation, is not a precondition for the reason's existence; it only reminds the law-addressee of the pre-existing reasons that are applicable in her case. But at the same time, reason-focused theories highlight the difference the law makes in the addressee's practical deliberation. That is, the law provides its addressees with additional reasons for the norm acts. These law-constituted reasons would not exist in the absence of relevant legal norms. Undeniably, it is quite bewildering to say that a norm which is meant to codify pre-existing reasons purports to give an independent reason for the addressee.

Raz's service conception of authority seems to provide a solution to this problem of

²³ For an explanation of epistemic reason-giving, see David Enoch, "Reason-Giving and the Law," in *Oxford Studies in Philosophy of Law vol. 1*, eds. Leslie Green and Brian Leiter (Oxford: Oxford University Press, 2011), 3-4.

incoherence. Since, the service conception of authority suggests, a legitimate practical authority is often in a better position to make normative judgments than its subjects, following the authority's instructions helps the subjects comply with the reasons that apply to them in the long run. Thus, the subjects are morally required to take the authority's directive as *the* reason to perform the relevant behavior – the additional reason given by the authority – rather than act on those pre-existing reasons. The authority's directives, on this view, not only express what the subjects have (law-independent) reason to do but constitute additional reasons that require the subjects to act accordingly. However, it is doubtful that the service conception of authority adequately explains the operation of legal authorities. Law seldom claims this kind of authority to give independent reasons. In most cases, legal norms are directed at people's behavior, not their motivation to perform the behavior. Legal officials will not take coercive measures as long as the law-addressees act as the law requires.

Obscuring the Role of Power-Conferring Laws

The reason-focused approach to legal ought obscures the role of power-conferring norms in the operation of legal systems. No sensible legal philosopher would deny that the empowering aspect of law forms one normative function performed by the law, which is as important as law's ability to obligate. However, the normative implication of power-conferring laws and its relation to law's action-guiding function in general has been understated by legal philosophers, especially by those who adopt the reason-focused approach to law. Power-conferring laws offer law-addressees only conditional reasons for the norm acts – if you intend the normative consequence, then do this or that to exercise the legal power. Once we understand law's normative guidance as its ability to create independent reasons for action through legal norms,

the normative significance of power-conferring laws will be merely “manifested by the fact that statements of such norms are premises of practical inferences which affect the conclusion of the inference.”²⁴

Indeed, the above explanation of the reason-giving force of power-conferring norms represents the power-holder’s practical deliberation leading to her power-exercising act. Power-conferring norms are not categorical reasons; nor do they purport to create such reasons. However, understanding the relation between power-conferring laws and the normative guidance provided by law only in terms of how those rules figure in the practical deliberations of law-addressees as premises obscures the distinctive way in which law creates institutional contexts within which law-addressees interact with one another and by which their normative relations and social lives are shaped.

1.3 A Paradox about Law’s Normative Guidance

Whether the law requires, permits, or authorizes a certain course of action, it aims to, directly or indirectly, offer normative guidance for the law-addressees. By virtue of attaching specific legal meaning to modes of conduct, legal norms provide law-addressees with guidance for behavior (what the law-addressees are obligated, allowed, or empowered to do) and standards for evaluation of behavior (whether a certain course of action is legal or illegal or whether it is valid or invalid). Since providing normative guidance for law-addressees is central to the operations of legal systems, any account of law must include an explanation of the conditions under which and the ways in which the law performs this normative function. According to my preliminary analysis of the Razian positivist account of law in the previous section, however,

²⁴ Raz, *Practical Reason and Norms*, 106.

there seems to be a paradox about law's normative guidance.

The mere correspondence between the contents of legal norms and the addressees' behavior is insufficient to demonstrate that the law has successfully performed its action-guiding function. For one to be guided by the law, there must be a rational connection between the law and its addressees. The existence of such a rational connection establishes that the law-addressee's conformity with the law is not coincidence but the effect of the law's operation, or that the law-addressee's non-conformity is not due to her ignorance of the law.

Generally, the rational connection between a fact and one's behavior is based on one's use of the capacity of reasoning – the capacity to grasp and respond to reasons. Through the use of this rational capacity, one forms psychological states – e.g., to believe P or to intend Q – on the basis of relevant facts. Whether a psychological state is appropriately formed depends on whether the agent properly uses her ability to grasp and respond to reasons, namely whether the relevant facts (reasons) sufficiently support the formation of that psychological state. Under this line of thought, the rational connection between a legal norm N that requires its addressees to φ and its addressees is manifested in the addressees' taking N (or the legal consequences of complying with or violating N such as rewards or punishments) as a reason to φ . To be sure, the law-addressee's motivational pattern varies with practical situations. In some circumstances, law-dependent considerations determine the course of action taken by the law-addressee. For example, a driver may feel disinclined to unload the goods outside the designated parking bays solely because it is legally prohibited to do so, even though no harm to others will be generated on that occasion. Similarly, an unemployed person may abandon his burglary plan because of the increased penalty.

In contrast, law-related considerations may not be decisive in one's practical judgment,

even though one has taken them into consideration. It can often be the case that a person P , who knows that the law requires him to φ , is naturally and strongly inclined to φ irrespective of the law, and that P would φ because the law so prescribes even if he were not naturally inclined to φ . Besides, one may refuse to φ on some law-independent ground, even though one has taken account of the legal norm that prescribes φ . In these cases, although legal norms do not (or do not directly) bring about the compliant behavior, the law still provides action guidance to its addressees. For there exists rational connections between legal norms and law-addressees. Without such a rational connection, one cannot be said to be guided by the law even if one's behavior is not inconsistent with the law's instructions. Along this line of thought, we can formulate a necessary condition of law's normative guidance. Let us call it the *Rational Connection Thesis*:

(RCT) A legal norm provides normative guidance for its addressees to act as the norm requires, permits, or empowers, or to evaluate someone's behavior, only when there exists a rational connection between the norm and the norm-addressees' behavior or their evaluations of behavior.

According to the above analysis, law's action guidance is typically manifested in the law-dependent reasons that motivate law-addressees to perform legally prescribed behavior or would motivate law-addressees to perform legally prescribed behavior if they were not naturally inclined to perform those behavior. Since law aims to guide people's conduct, legal norms are meant to establish rational connections between the law and law-addressees, that is, to provide reasons that motivate their addressees to perform the acts prescribed by legal norms.

However, this line of thought leads to an inadequate view of normative phenomena in the legal realm. As indicated above, the law claims the law-subjects' conformity rather than their reasons for conformity. In most circumstances, compliance with the law for law-independent considerations will not be deemed legally defective; no coercive measures will be implemented by legal officials to force law-subjects to "conform with the law because of the law."²⁵ Moreover, it is not always appropriate for law-addressees to act as the law prescribes precisely because the law so prescribes, especially when the contents of legal norms are morally obligatory. For example, it is worrisome to hear someone express that she does not commit a homicide solely because she is not allowed to do so by the law, for this agent must wrongly assess the (law-independent) reasons for and against killing people. The fact that most people comply with a legal norm solely because of that norm implies that, insofar as the pertinent mode of conduct is concerned, other forms of social control such as morality and social customs are virtually ineffective. Let us formulate this point as what I shall call the *Undesirability Thesis*:

(UT) It is not always desirable that a legal norm motivates its addressees to perform the norm act.

These two preliminary observations about law's normative guidance seem incompatible with each other. According to the *Rational Connection Thesis*, a legal norm provides normative guidance only when there exists a rational connection between the norm and the norm addressees. Since providing guidance of conduct is the central function of law, law aims to

²⁵ Scott Hershovitz, "The Authority of Law," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 65-70.

establish rational connections between legal norms and their addressees. That is, law aims to motivate law-addressees by virtue of legal norms understood and considered by law-addressees. Such a way of action-guidance nicely supports abstract law-independent reasons in specifying the courses of action that the law-addressees have pre-existing reasons to perform. For example, traffic codes facilitate coordinating behavior by virtue of specifying the rights and duties of road users. However, when a law-independent reason – e.g., a moral principle – is independently sufficient to specify the course of action to be taken, as the *Undesirability Thesis* indicates, it will be undesirable for the law to fulfill its action-guiding function by motivating people to perform that course of action. Moreover, if the legal norms in a modern legal system always or almost always motivate people to act accordingly, the network of interdependent social interaction that underlies the society will highly likely be severely undermined and the whole society will thus become extremely unstable. That will certainly be a state that legal agents do not seek. In short, the purpose of setting up a legal system is to establish a set of public standards of behavior, which is meant to provide law-addressees with guidance of behavior and evaluation of behavior. But, on the other hand, excessive guidance provided by the law seems to be undesirable for the maintenance of a legal society.

1.4 Prospects

Solving the paradox about law's normative guidance is the main task of this thesis. My argument will be developed by virtue of exploring the role of power-conferring norms in explaining the core official legal practices, the social basis of law, the efficacy of law, the authority structure of law, the distinctive mode of guidance provided by law, and the reason-giving force of law respectively.

In Chapter 2, I consider Hart's notion of the internal point of view and the emphasis he put on power-conferring norms. It is widely recognized that these two points respectively constitute penetrating critiques of classical positivist theories. But more importantly, joining these two ideas, as Hart himself suggested at one point in *The Concept of Law*, provides Hart's theorizing of legal phenomena with revealing insights and powerful explanatory force.²⁶ In Hart's view, law is a social construct based on rule-following activities and exploring the operation of rules and rule-following activities from the rule-user's perspective offers the most illuminating explanation of the normative aspect of such social practices. Therefore, recognizing power-conferring norms as constituting a distinctive norm-type irreducible to norms that impose duties necessitates an elaborated account of the norm-user's committed attitude that encompasses both types of norms.

Presumably, the success of Hart's model of law as a union of primary rules and secondary rules depends to a considerable extent on the explanatory force provided by this extended notion of the internal point of view. However, Hart's account of the internal perspective, namely the critical reflective attitude, cannot adequately explain the committed attitude toward power-conferring norms. As a result, a whole category of legal statements is left unexplained, and his two minimum existence conditions of legal systems are inadequately formulated. Since one's committed practical attitude in relation to legal norms is manifested in one's use of the laws, it is reasonable to investigate the varying perspectives through the point or purpose of the speech acts one performs by making legal statements. I explore the committed attitude toward power-conferring norms by examining what the power-holder thinks and does when making legal statements in accordance with empowering norms. The internal point of view

²⁶ Hart, *The Concept of Law*, 98-99.

toward a power-conferring norm is the practical attitude that shows one's recognition of the normative roles, capacities, statuses, or relations determined by the norm. Furthermore, when one recognizes certain normative statuses or relations in accordance with a power-conferring norm, one is inclined to get the valid exercise of the relevant legal power and subsequent legal consequences generally recognized by others and to criticize those who refuse to or fail to recognize such legal effects. On the basis of this conception of the committed attitude toward power-conferring norms, I reconsider the relation between the Hartian secondary rules.

Chapter 3 is devoted to the exploration of the social foundations of law – the social practices that sustain the overall normative order established within a legal system. One characteristic feature of law is that law has boundaries: legal propositions can vary from jurisdiction to jurisdiction. And the social basis of law is the key to determining the boundaries between legal systems. Many accounts of law's social foundations center on the social-fact-based criteria of the intra-system validity of law. However, such a view conflates the social basis of law and the social basis of the fundamental legal rule that determines the conditions of legal validity. And in some extreme cases, we may encounter difficulties in ascertaining the scope of a jurisdiction of law if we investigate only the official activities of law-ascertainment and law-application.

Identifying the social basis of law with the social basis of the Rule of Recognition is intimately linked to the theoretical tendency in Anglo-American jurisprudence to focus on legal officials. Such an official-centered approach to law obscures the active role of ordinary citizens and thus unjustifiably limits our vision of legal phenomena. In any functioning legal system, ordinary law-subjects are not merely passively regulated, required, or punished by the law. They are self-directing norm-users capable of understanding and adjusting their normative

positions in light of legal norms. Non-official law-addressees may dissent from particular legal norms or question the values served by the legal system. But they can hardly establish their self-understanding, their interpersonal relationships, and the core of their social lives without any reference to relevant legal norms and the operation of relevant legal institutions. Ordinary people's general use of the role-determining and power-conferring laws to ascertain and adjust their normative positions in their social lives marks their active role in legal practice.

The social basis of law consists in the social practices that sustain the functioning of a legal order. A legal order is the overall normative order in a legal society. It is the consequence of the integration of formal laws and informal social customs that occurs in ordinary people's social lives. Legal agents connect these two normative realms and integrate them into the overall normative order within a jurisdiction primarily through exercising legal powers to form, to eliminate, and to modify (general or particular) normative statuses or relations. Through legislation and adjudication, customary rules developed in people's ordinary interactions can be incorporated into formal laws and legal reasoning and thus be backed by the state's recognition and coercive force. People's extensive exercises of private legal powers and legal officials' enforcement of formal laws, on the other hand, render the normative framework established by enacted laws entrenched in people's ordinary life and transform their informal normative practices.

Chapter 4 will concentrate on the normative function of power-conferring laws. A common view on the practical implications of the conferral and exercise of legal powers is focused on their instrumental value – the fact that rules conferring legal powers are employed to pursue certain ends. However, such a view obscures the distinctive manner in which empowering laws operate in practical deliberations. Power-exercising acts and subsequent

normative consequences are institutional facts that exist within a particular institution established by a set of interlocking rules defining the institutional roles and their statuses, capacities, and relations within that institution. Power-conferring rules of an institution are mutually dependent in the sense that each empowering rule can hardly function independently without the operation of other relevant rules. They guide human conduct by establishing an interpretive scheme in which legal agents represent their actions, roles, and normative statuses and relations in legal terms. In addition, the systematic mode of guidance provided by power-conferring laws implies the applicability of the requirements of rationality in power-exercising. The power holder is rationally required (1) to perform the power-exercising act if she intends the legal consequence, (2) to recognize the relevant normative roles, normative statuses, normative relations, and normative effects if she decides to exercise the legal power, and (3) to take those recognized normative elements as premises or contexts for further reasoning.

In Chapter 5, I argue against the prevailing view that law guides conduct by creating independent reasons for its addressees by examining Shapiro's Practical Difference Thesis and Raz's account of law's normative significance as giving protected reasons. Shapiro's account highlights the causal relation between the imposition of legal obligations and the legal agent's conforming behavior. One's being guided by a legal rule, on this view, means that one's performance of the norm act is due to that rule rather than to any other considerations. Law guides human conduct by virtue of making differences in the addressee's practical deliberations – the additional reason, or reason-triggering fact, given by a legal norm which is necessary for the legal agent's performance of the norm act. Shapiro's view on the practical difference made by law is unsustainable. It results in a distorted view of law's action-guidance and leads to an implausible explanation of the law-giver's psychology. Also, it is inconsistent with the

perspectival interpretation of legal concepts Shapiro endorses.

Raz's analysis of law's normative guidance relies on his explanation of practical authority. Raz submits that a duty-imposing legal rule, as an authoritative directive, constitutes what he calls a protected reason – a first-order reason to perform the norm act and a second-order exclusionary reason not to act on certain contrary reasons.²⁷ However, there is an inherent conflict in Raz's account of protected reasons. The view that legal norms constitute independent first-order reasons, when combined with the idea that such norms have exclusionary force, will result in an unacceptable explanation of the normative phenomena involving applications of duty-imposing laws. In addition, taking duty-imposing norms as constituting independent first-order reasons will commit the mistake of bootstrapping reasons by forming intentions. On the other hand, Raz's stratified model of practical reasons and the notion of exclusionary reason cannot properly capture the normative guidance provided by duty-imposing laws, either. It does not provide a better explanation of normative phenomena involving duty-imposing legal norms than the traditional view on practical reasoning, fails to offer a complete and coherent account of the circumstances in which legal agents are justified in deviating from legal rules, and encounters difficulties in explaining the conflicts between authoritative directives made by different practical authorities.

In Chapter 6, I deal with the issues concerning the authority of law and its reason-giving force. I argue against Raz's service conception of authority and propose an account of the *de facto* authority of law focused on the use of legal powers that manifests the power-holders' recognition of their institutional roles within the authoritative relationship of law. The service conception is questionable in at least two respects. First, the theoretical assumption in the

²⁷ Raz, *The Morality of Freedom*, 26.

service conception of authority that there is a general role performed by practical authorities to mediate between people and reasons for action is inadequate. The role performed by an authority is dependent on the normative context in which the authority is established and the contents of its normative powers and rights conferred by relevant rules. Second, it is questionable that the notion of legitimate practical authority has explanatory priority over that of *de facto* practical authority. One's reason for recognizing someone else as a practical authority only grounds the desirability of one's being subject to that person's authority rather than the existence of an authority relation between them.

For a legal authority to exist, two conditions must be met. First, there must be a normative setting that determines the normative relations between different roles within the legal system's jurisdiction and confers relevant normative entitlements on those roles. Second, most agents involved in the authoritative relations determined by the law must perform or occupy their roles in the legal system. Legal agents perform their institutional roles within a legal system through exercising the legal powers that ensue from such roles. For the use of a certain normative power implies the power-holder's acceptance or recognition of the relevant normative role. One cannot deliberately exercise a power without accepting the role on the basis of which the power is conferred.

The normative significance of legal authority is manifested in its ability to render modes of conduct proper responses to pre-existing reasons. There is no uniformity in the reasons triggered by legal norms. Typically, the desirability of being governed by legal authority enhances the reason for the law-addressee to perform the legally prescribed behavior. But in some extreme cases, the moral defects that undermine the legitimacy of a legal system will reduce the strength of the norms issued by legal authorities. When the role of legal authority is

to determine or coordinate the conduct that law-addressees have pre-existing reasons to do, legal norms connect those reasons with the prescribed or authorized behavior. In addition, a legal authority may trigger prudential reasons through imposing punishments for noncompliance with legal obligations and through offering rewards for compliance.

In the last chapter, I offer my concluding remarks on the role of legal powers and power-conferring norms in legal practices. Legal powers play pivotal roles in the operations of law. They are the vital nexus of the sociality of law, the normativity of law, and the authority of law. Power-conferring laws enable legal agents to adapt their normative relations to changing circumstances and thus manifest the dynamics of law. At the same time, empowering laws secure the systematic coherence within a legal order represented in the general consistency between formal laws and informal customary practices. The exercise of legal power demonstrates the core of legal practices as a rational activity of human beings – our ability to be engaged in rule-following activities that establish normative order.

Chapter Two

Power-Conferring Norms and the Internal Point of View

The concept of the internal point of view occupies a central position in H. L. A. Hart's jurisprudential account. It pertains to the internal aspect of social rules; it highlights the distinctive way legal officials must think, speak, and act in accordance with the law; it constitutes one part of his specification of the necessary and sufficient conditions of the existence of any modern legal system; more importantly, it renders legal practices and legal discourses intelligible. However, Hart's account of the internal perspective, namely the critical reflective attitude, cannot adequately explain the committed attitude of officials or citizens toward power-conferring norms. As a result, a whole category of legal statements is left unexplained and his two minimum existence conditions of standard instances of legal systems are inadequately formulated.

In the present chapter, I shall commence with a textual analysis of Hart's account of the internal point of view and power-conferring norms. I argue that joining these two ideas provides Hart's theorizing of legal phenomena with revealing insights and powerful explanatory force (2.1), but Hart did not provide a satisfactory account of the internalized attitude in relation to power-conferring norms (2.2). In order to elaborate the notion of the internal point of view to include the committed attitude toward power-conferring norms, I discuss the variety of legal statements in which people's practical attitudes toward the relevant legal norms are manifested (2.3). Then, I offer an account of the internal point of view toward power-conferring norms (2.4), on the basis of which I analyze the acceptance and practice of the Hartian secondary rules (2.5).

2.1 The Intersection of Power-Conferring Norms and the Internal Point of View

The Internal Point of View

The “fresh start” of Hart’s jurisprudential investigation resides in his analysis of law in terms of rules – not just any kind of rules, but rather rules practiced in and by social groups. The failure of earlier positivist theories of law which tended to reduce legal phenomena to behavioral regularities, such as those that define law as the sovereign’s orders backed by threats of coercion and those that understand legal statements as predictions that unpleasant sanctions will be imposed in the event of violating the law, Hart explained, is due to the absence of the idea of rules. For without the appreciation of that idea, a large number of legal concepts cannot be rendered clear, and as a result we would be unable to account for the social phenomena central to an operating legal system.²⁸ For example, characterizing law as founded on the vertical structure composed of subjects rendering habitual obedience to a sovereign who renders habitual obedience to no one fails to explicate the continuity of legal authority, namely the succession of different legislators, and the persistence of laws, namely the continued recognition of past legislation as law.²⁹ Nor can the notions of sovereign and obedience satisfactorily represent the fact that in modern legal systems even the supreme legislative power is subject to legal limitation.³⁰ Moreover, reductionist theories, while correctly characterizing law as involving the functioning of a particular kind of social institution, fail to capture the normative significance of such an institution to those who are engaged in legal practices and

²⁸ Hart, *The Concept of Law*, 79-81.

²⁹ Ibid., 51-66.

³⁰ Ibid., 66-71.

those who are subject to the sway of law.³¹

Hart's conceptual objection to the reductionist approach to law is based on his linguistic analysis of statements about obligations, of which statements of legal obligations are a special case. Statements about legal obligations, Hart claimed, are not meant to describe "the past, present, or future actions, attitudes, or beliefs of either subjects or officials of the legal system."³² Rather, they reveal justification for actions taken or to be taken and the grounds for demanding conformity with obligations and criticizing deviation.³³ Although statements about legal obligations typically presuppose descriptive statements such as that citizens generally comply with the rules issued by the legislator and that sanctions are likely to be exacted from offenders, they are statements composed of fundamentally different kinds of concepts. The notion of obligation is a normative concept and therefore statements concerning the existence of legal obligations operate in the normative domain. In contrast, the notions of sovereignty, obedience, habit, and prediction are descriptive concepts and operate in the domain of empirical facts. That is why there is no contradiction in saying that one is under an obligation but that one is (for whatever reasons) highly unlikely to be punished when contravening that obligation, and also why it would not be redundant to add to the statement about one's

³¹ Andrei Marmor understands Hart's project as an alternative reductionist theory of law. Marmor proclaims that "[Hart's] theory is reductive all the way through ... Hart offers a more nuanced and complex picture that puts the idea of social rules at the foundations of law." See Marmor, *Philosophy of Law*, 35. Matthew Kramer rejects such a reductionist interpretation of Hart's theory. Kramer claims that the constitutive relationship between social facts and the existence of a legal system is not aptly classifiable as a relationship of reducibility. Any constitutive relationship, Kramer argues, is classifiable as a relationship of reducibility only when the constituted phenomena are not to be counted in an overall reckoning of entities that exist and events that occur. In those circumstances, the constituted phenomena and the more foundational phenomena are one and the same event under different descriptions. As a result, whether Hart's theory is aptly understood as a reductionist theory depends on whether legal norms and the workings of a legal system, which are constituted by people's behavior, beliefs, and attitudes, are to be counted in an overall reckoning of entities. Since Hart highlighted the crucial role played by norms in the operations of a legal system and repeatedly criticized Austin for obscuring the centrality of norms in a legal system, it would be misleading to understand his theorizing as reductionist in nature. See Kramer, *H. L. A. Hart: The Nature of Law*, 23-28.

³² Hart, *Essays on Bentham*, 144.

³³ Hart, *The Concept of Law*, 84.

obligation the further statement about the likelihood of one's suffering a punitive sanction in the event of disobedience.³⁴ Hence, reducing statements about legal obligations to statements describing or predicting law-subjects' compliance and the imposition of sanctions, Hart believed, obscures the crucial distinction between statements made with different linguistic purposes and conflates two radically different kinds of concepts.

Although Hart resolutely resisted reductionist explanations of legal obligations, he did not treat the normative realm as radically separate from the empirical realm. Rather, to mark his middle way between classical positivists' purely descriptive approach to law and the moralized conception of law proposed by natural lawyers, Hart strove to ground his explication of law and its normative character on the notion of practiced social rules calling for certain actions. The Hartian social rules, as opposed to social habits, distinctively have an internal aspect, which manifests itself in people's taking the committed attitude – *the internal point of view* – toward such rules. Those who take the internal point of view with respect to a rule treat that rule as a public standard, on the basis of which they retrospectively assess their and other community members' behavior and prospectively guide their conduct; they use normative concepts such as ought, must, obligation, and right when making claims in relation to a rule, which shows their practical concerns with regard to the prescribed pattern of conduct. As a result, an adequate articulation of legal practitioners' distinctive attitudes toward the law when engaging in legal activities and how such attitudes figure in their practical reasoning, Hart believed, is essential to understanding the normative dimension of law and that of our social lives.³⁵ Classical legal positivists went astray in this respect because their accounts were

³⁴ Ibid., 84; Hart, *Essays on Bentham*, 134-35.

³⁵ Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Dordrecht: Springer, 2011), 290.

fundamentally focused on the observer's perspective rather than the perspective of legal agents, the insiders of a legal system. Those positivists intended to provide a purely descriptive theory of law without interpreting legal activities from the perspective of those who are engaged in legal practices. Such a methodological flaw makes reductionist theories fail to "mark and explain the crucial distinction that there is between mere regularities of human behavior and rule-governed behavior."³⁶

Hart's penetrating critique of reductionist accounts of law – that those theories obscure legal practitioners' internal point of view toward legal rules and thus ignore the practical import of rule-governed activities in the legal domain, and that those theories conflated normative concepts and descriptive concepts – seems to suggest that the internal point of view is precisely the perspective of someone who considers a certain rule with her practical rather than theoretical concern, or that the internal point of view is present each time one employs normative concepts when making statements about legal phenomena. Both interpretations, however, do not accurately capture Hart's notion of the internal point of view. First, it is not necessarily the case that one who regards legal rules with her practical concern to provide an answer to the question of what ought to be done would commit herself to the relevant rules and *internalize* them as guides for practical decisions or actions. One may be indifferent to whether a certain pattern of conduct is required by a rule but takes the consequence of violating that rule into account in each particular instance and evaluates all the relevant considerations in order to determine the course of action to be taken. In such circumstances, the agent takes a practical, but nevertheless external, attitude toward the rule. To be sure, one who complies with a legal rule solely because of avoidance of sanctions will attain one's objective more effectively,

³⁶ H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), 13.

if one recognizes that other community members take the committed attitude toward that rule and thus becomes better positioned to anticipate the outcome of one's behavior.³⁷ But the agent will not regard the rule as providing a public standard for assessment or guidance of conduct. For that agent, the rule enters her practical reasoning merely because compliance with or deviance from that rule would give rise to consequences such as rewards or punishments that are pertinent to her practical interests. That is, the agent does not subject her practical reasoning to the policy of following a rule but rather includes the operation of a rule in her strategic attitude toward actions.³⁸ Since the agent's practical attitude toward the rule does not manifest her normative commitment to the rule as providing a standard of conduct, she cannot be said to possess the internal point of view in relation to the rule. The internal point of view, though practical in tenor, is not manifested in all instances of practical responses to social rules.³⁹

Second, reference to normative concepts does not necessarily bespeak one's adoption of the internal point of view. To be sure, Hart highlighted the defects of reductionist theories of law by contrasting normative statements expressed from the norm-user's internal point of view with descriptive statements made by external observers intending to record regularities of

³⁷ Kramer, *H. L. A. Hart*, 64.

³⁸ Cristina Redondo, *Reasons for Action and the Law*, trans. Ruth Zimmerling (Dordrecht: Kluwer Academic Publishers, 1999), 132-33. The strategic attitude toward actions, as Redondo claims, must be distinguished from the strategic attitude toward rules. Though both kinds of practical attitudes toward modes of conduct are fundamentally based on prudential concerns, only those who take the latter kind of practical attitude are willing to, for prudential reasons, follow the rules and accept them as establishing public standards of behavior.

³⁹ Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 287-88. For a mischaracterization of the Hartian internal point of view as the viewpoint(s) of those who practically engage with a rule, see Stephen Perry, "Holmes Versus Hart: The Bad Man in Legal Theory," in *The Path of Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000); Perry, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View," in *Fordham Law Review* 75 (2006): 1180-82. Perry conflates the insiders' viewpoint(s) and the Hartian internal point of view. The insiders of a legal system (or a legal practice) may possess many different viewpoints toward the law. Though each of such viewpoints from the insiders represents one kind of their practical responses to the law, only the perspective of those who internalize legal rules as public standard of conduct constitutes the internal point of view. In other words, Hart's idea of the internal point of view is not designed to characterize the rule-addressee's viewpoint(s), namely the viewpoint(s) of a rule-governed practice's participants who have to practically respond to the rule's normative claim; rather, it characterizes the rule-addressee's *committed* attitude toward the rule.

behavior or to predict the occurrence of certain states of affairs. Such reductionist accounts fail to recognize the distinctive normative dimension of legal discourse as well as that of our social lives. However, it is not quite right to say that corresponding to the contrast between the norm-user's internalized viewpoint and the observer's external perspectives is the contrast between statements composed of normative concepts and statements comprising descriptive concepts. The rigid dichotomy between the normative and the descriptive seems to suggest that an eschewal of the extreme external perspective focused on behavioral regularities entails one's embracing the full-fledged internal point of view. But this understanding fails to recognize the possibility that an external observer may, without endorsing the perspective of those whom she is describing, "assert that the group accepts the rules, and thus may from the outside refer to the way in which [the group members] are concerned with them from the internal point of view."⁴⁰ This is Hart's methodological stance on general jurisprudence. Jurisprudential investigations (or at least descriptive jurisprudential accounts), as Hart made explicit in the Postscript to *The Concept of Law*, are aimed at explaining the normative aspect of the rule-governed activities in a modern legal system.⁴¹ In order to capture the normative dimension of legal practices, the descriptive legal theorist "must be able to put himself in the place of an insider,"⁴² using normative vocabulary to express the committed attitude possessed by legal agents. For the descriptive theorist, the purpose of employing normative concepts in the theoretical explication is not to convey her own acceptance or endorsement of relevant legal rules as guides of conduct. Rather, she attributes such a committed attitude to the legal agents whose behavioral regularities and psychological states are to be analyzed.

⁴⁰ Hart, *The Concept of Law*, 89.

⁴¹ Ibid., 239.

⁴² Ibid., 242.

Hence, whether one occupies the internal point of view in relation to a rule depends neither on the incorporation of the rule into one's own practical deliberations, nor on the occurrence of normative concepts in one's statements with regard to the rule. Rather, the internal point of view is a committed attitude toward a rule possessed by an agent using normative concepts to present the binding force of the rule upon herself and others. The internal point of view, as represented by Hart, is the conceptual prerequisite for one to capture the normative implication of rules and rule-governed activities.

Power-Conferring Rules

Another theoretical defect of classical positivist theories of law lies in the lack of awareness of the varieties of legal norms. The complex array of laws, according to these positivist models of law, is reducible to a unified logical form of legal norms that accords the coercive force of law a central place. Such a viewpoint with respect to types of legal norms, as Hart represented it, is unsustainable because some legal rules do not specify certain modes of conduct as required or prohibited but provide legal agents with facilities to effect legal consequences for realizing their wishes.⁴³ Instead of imposing legal duties, these rules confer legal powers as capacity to “create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of law.”⁴⁴ Legal rules that determine the procedure and the number of witnesses for making a valid will, for example, define the conditions the fulfillment of which is necessary for a testator to arrange for the post-mortem distribution of property. Law’s force on these occasions is manifested in imposing normative significance on

⁴³ Of course, one who endorses the view in regard to norm-types that all legal norms are reducible to a unified logical form need not commit herself to the ontological conviction that all legal norms are reducible to empirical facts.

⁴⁴ Hart, *The Concept of Law*, 27-28.

social realities and in locating them in the normative order provided by law.

In Chapter 3 of *The Concept of Law*, Hart rejected two lines of arguments aimed at eliminating the distinction between rules that confer legal powers and rules that impose legal duties. The first attempt is to extend the notion of a sanction to include nullity. This argument insists that, like a sanction attached to a criminal law, the invalidity which ensues from noncompliance with the prescribed procedures for exercising a legal power is a means to urge legal subjects to comply with those procedures. Hart opposed such a view, arguing that power-conferring rules are not designed to suppress any actions or omissions. More importantly, it is logically possible to separate mandates that require certain patterns of behavior from the punishments imposed for breaches of those mandates. Contrariwise, the prospect of nullity resulting from noncompliance with the procedure or requirement specified in a power-conferring law is inseparable from that law.⁴⁵ The other strategy to which Hart responded is to interpret power-conferring laws as merely the antecedents of the “genuine laws” directing officials to apply sanctions or ordering citizens to behave in certain ways. Hart’s retort was that the subsumption of power-conferring norms into duty-imposing norms fails to reproduce the different social functions performed by different types of legal rules.⁴⁶ Power-conferring norms are “thought of, spoken of, and used in social life differently from rules which impose duties.”⁴⁷ Legal powers and the consequences of exercising such powers can be understood only when we look at them from the perspective of those who exercise such powers.

Despite the wide recognition of the distinction between the social functions served by rules that confer powers and those served by rules that impose duties, some have challenged

⁴⁵ Ibid., 33-35.

⁴⁶ Ibid., 36-42.

⁴⁷ Ibid., 41.

its significance in jurisprudential investigation. Richard HS Tur, in a recent essay, impugns Hart's endeavor to depict the variety of laws and his criticism of a general form of legal norms.⁴⁸ Tur responds to Hart's rejoinders to the two arguments indicated above. With respect to the “nullity-as-sanction” argument, Tur concedes that nullity or invalidity indeed functions in a logically different way from sanction. But he argues that it is not sufficient to confirm that power-conferring rules are *logically* different from duty-imposing rules, for “the argument that nullity is a sanction is not a necessary part of the thesis that all laws can be reduced to one logical form.”⁴⁹ To develop a general form of legal norms, Tur compares the validity of a will with the perpetration of an assault:

(W1) A valid will is made if and only if certain legally determined conditions

(a, b, c, d) are satisfied.

(A1) An assault is committed if and only if certain legally determined

conditions (p, q, r, s) are satisfied.

Tur claims that the two statements are formally similar and that they can be formulated as below:

(W2) VALID WILL if and only if $(a \text{ and } b \text{ and } c \text{ and } d)$.

(A2) ASSAULT if and only if $(p \text{ and } q \text{ and } r \text{ and } s)$.

⁴⁸ Richard HS Tur, “Variety or Uniformity?” in *Reading HLA Hart’s The Concept of Law*, ed. Luís Duarte d’Almeida, James Edwards and Andrea Dolcetti (Oxford: Hart Publishing, 2013), 37-58.

⁴⁹ Ibid., 49.

Then, Tur reformulates both statements in if-clauses:

(W3) If (not-*a* or not-*b* or not-*c* or not *d*), then no VALID WILL.

(A3) If (not-*p* or not-*q* or not-*r* or not-*s*), then no ASSAULT.

Lastly, Tur adds the element of legal consequences in both formulations:

(W4) If there is a valid will, then the legally determined consequences ought to be implemented.

(A4) If an assault is approved to have occurred, then the legally determined consequences ought to be implemented.

Tur admits that the “legally determined consequences” in (W4) and (A4) are different. While the consequence in (A4) typically includes a sanction, the consequence in (W4) will typically not include a sanction. But, Tur contends, “if the will is valid, it justifies, together with the satisfaction of other conditions, the application of a coercive act.”⁵⁰ Tur seems to suggest that both the operations of power-conferring laws and those of duty-imposing laws amount to a constitutive relation between legally determined conditions and legally determined consequences. Legal rules of both types define legal facts, which constitute part or all of the conditions under which “a coercive act is eventually stipulated as an ultimate legal consequence.”⁵¹

⁵⁰ Ibid., 49-50.

⁵¹ Ibid., 50.

With respect to the “power-conferring-rules-as-fragments-of-genuine-laws” argument, Tur does not believe that developing a unified logical form of legal norms distorts the social functions of law. He stresses the contingency of law’s social functions. Since “[q]uestions about the function of law … cannot be answered, definitely … *a priori* through conceptual debates,” Tur explains, “[a] definition of law must be neutral as to social functions.”⁵² As a consequence, any distinction between norm-types based on law’s social functions does not (and cannot) eliminate the possibility of formulating a unified logical form of legal norms;⁵³ nor can any formulation of the logical structure of law obscure our understanding of law’s function, so argues Tur.

Tur’s approach is objectionable in at least three aspects. Firstly, Tur’s contention that the logical form of law does not reveal (and hence cannot distort) any social function presupposes too narrow an understanding of law’s social functions. Tur thus obfuscates the relationship between the forms or structures of legal norms and the functions the norms may perform. To be sure, the ascription of functions to objects typically involves attributions of values. If law’s social functions were the actual realization of substantive values, there would be, as Tur proclaims, no social function necessarily served by all or even some modern legal systems; it would thus be the task of sociologists to tackle the contingent issues concerning law’s social effects. However, this construal of law’s social functions unjustifiably dissociates them from the forms of law’s operation. As we shall see, though law’s social functions are not solely determined by its logical form, some significant functions of law do depend on its form.

Each and every legal norm fulfills at least two conceptually necessary *normative* functions.

⁵² Ibid., 57.

⁵³ Ibid., 53.

On the one hand, legal norms provide standards for assessing human behavior; on the other hand, they guide or aspire to guide human conduct. Both the legal norms that impose duties and the legal norms that confer powers perform these two normative functions, although in different ways. Duty-imposing norms specify certain actions or omissions as legally unacceptable and prescribe penalties for failing to comply with the required patterns of conduct; legal norms of this kind supply their addressees with standards that determine what action is legally *right* and what is legally *wrong*. A duty-imposing rule provides action-guidance for law-addressees by virtue of enunciating a legal fact (the existence of a legal duty) and getting some future state of the world (law-addressees' behavior) to match the content of that legal fact. Power-conferring norms, in contrast, establish standards that determine what actions are legally *relevant* or *significant* for effecting changes in legal relationships. Empowering laws do not guide human behavior by indicating the gap (or the potential gap) between legal facts and the states of affairs in the actual world and calling for elimination of such a gap. Rather, power-conferring norms provide action-guidance by making explicit to law-addressees the methods to create legal facts: the changes in legal entitlements as a result of power-exercising. They invite people to participate in legal practices. Even if we adopt Tur's formulation of the logical structure of legal norms, in which Tur puts coercive acts in the central position, we must admit that law in all its forms necessarily performs these two normative functions.

Law's social functions, especially the intended or actual realization of substantive values, are usually fulfilled by virtue of the performance of its normative action-guiding function.⁵⁴ That is, the social effects of the law within a jurisdiction are grounded in the community

⁵⁴ For a similar view, see Joseph Raz, "On the Functions of Law," in *Oxford Essays in Jurisprudence: Second Series*, ed. A. W. B. Simpson (Oxford: Clarendon, 1973), 289.

members' large-scale compliance with legal norms. In the case of duty-imposing laws, the contents of the legal rules generally obeyed and the values underlying these rules typically determine the social functions they serve. In this regard, though only in this regard, Tur is right to claim that the social functions of law do not depend on the form of duty-imposing rules. Nonetheless, the social functions fulfilled by power-conferring rules do depend, to a considerable extent, on their distinctive form.

The point of power-conferring laws is to enable legal agents to change their normative situations by creating particular institutional legal facts such as *a* marriage, *an* insurance policy against theft, or *a* President and thereby to participate in social institutions more specific than the legal system itself – e.g., the institution of marriage, the institution of insurance, and the institution of election. In this sense, constituting social institutions should be viewed as one of the social functions (and probably the most important function) performed by power-conferring laws. The values underlying each law-dependent institution can be fulfilled only through the establishment of such social institutions and the creation of particular institutional facts. That is, the application of power-conferring laws brings about the intended social effects *because* power-conferring rules are of a constitutive nature. Although, in a very broad sense as Tur represents both types of rules, duty-imposing laws can also be viewed as constitutive rules (since they define certain conduct as *legally* wrong, permitted, or required), only power-conferring norms enable legal agents to intentionally create particular instances within a given institution and thereby enable them to interact with one another within that institution. Such interaction between legal agents is crucial, for many substantive values can be realized only when establishing various connections among agents is possible. In sum, the structure of legal norms is not entirely irrelevant to the social functions performed by the law. A misguided

analysis of such forms/types/structures of legal norms may obscure law's social functions.

Secondly, the distinction between duty-imposing norms and power-conferring norms, *pace* Tur, is conceptual rather than sociological. In his characterization of power-conferring rules, Hart overemphasized the connection between power-conferring laws and the function of providing facilities for private arrangements by individuals. His theory appears to suggest that the facility-providing function is served only by power-conferring laws, while the function of behavioral control is served by duty-imposing laws.⁵⁵ However, there is no perfect correspondence between norm-types and the social functions they serve; to identify the distinction between norm-types with the distinction between the social effects of law would be a mistake.⁵⁶ In fact, the border between the facility-providing function and the action-regulating function may be blurred in particular cases. For example, the rule that confers the power to marry, though widely acknowledged as a paradigm case of rules providing law-addressees with instruments to achieve their goals, may be introduced to control people's behavior. Consider a legal system that denies legal recognition of marriages between same-sex couples. Although a rule that confers the legal power on a woman (man) to marry a man (woman) is logically different from a rule that prohibits marriages between same-sex couples, the nullity of homosexual marriages, at least in some social contexts, as Leslie Green points out, is "no accident or unintended by-product of the relevant power-conferring rules."⁵⁷ These laws are intended to shape people's lives by excluding other possible forms of marriages from being recognized as legally valid. On the other hand, a set of interconnected duty-imposing

⁵⁵ Hart, *The Concept of Law*, 27, 38.

⁵⁶ For a similar view, see Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 277; Kramer, *H. L. A. Hart*, 40.

⁵⁷ Leslie Green, "Introduction," xxxii.

rules may provide facilities for people by virtue of establishing large-scale coordination among legal agents. For example, rules of the road, most of which impose duties upon drivers, riders, and pedestrians, collectively create a mode of interaction, which to a considerable extent prevents confusion, misunderstanding, and traffic accidents from happening and thus assists road users in safe travelling. Hence, although a certain type of legal norms may be fundamentally important in fulfilling a certain social function, the conceptual distinction between different types of legal norms should not be drawn in terms of the social functions they serve. Such a distinction is neither sociological nor functional; it is drawn by conceptual analysis of the normative character of legal norms without conducting any empirical survey and presupposed by a number of conceptual distinctions central to jurisprudence. As we shall see in the next section, without this distinction concerning norm-types, we are unable to investigate the distinctive features of the diverse speech acts we perform by making legal statements on the basis of different kinds of legal norms.

Thirdly, the unified logical structure of legal norms composed of “legally determined conditions” and “legally determined consequences” obfuscates the role of legal agents as norm-users in legal systems. To be sure, such a pithy account reveals the operation of legal norms in its most abstract sense; it represents the way in which the law infuses legal meaning into the social facts and captures the constitutive nature (in its broadest sense) of legal norms. However, the uniformity in Tur’s account is established at the cost of obscuring the circumstances in which legal agents are engaged in legal discourse, especially their involvement in shaping the normative order by exercising legal powers. In other words, Tur’s account entirely obfuscates the active and self-conscious role of legal agents and the distinction between subjects and objects in legal contexts.

The deficiency of theories that fail to distinguish rules which confer normative legal powers and thus define the roles and competence of legal agents from those that impose legal duties and are thus analogous to orders backed by threats, according to Hart, is also evident in the inability of such theories to account for the distinctive structure of modern legal systems. Alongside the laws which confer on private individuals the power-rights to adjust their legal statuses and legal relations to one another is a further class of power-conferring laws that endow legal agents with public legal powers. The operations of these laws sustain the functioning of a legal system by securing its systematicity, agility, and efficiency. Hart characterized these empowering rules as remedies for the defects from which a social order governed only by *primary rules* would suffer – the defects of uncertainty, inertness, and inefficiency. In the light of their respective functions, rules that confer public legal powers are classified by Hart into three main types. The Rule of Recognition establishes the identifying marks of all laws in any given legal system and thereby helps reduce uncertainty about the existence and contents of legal rules.⁵⁸ Rules of change empower qualified office-holders to deliberately introduce, modify, or abrogate legal rules so that the society can suitably adapt law's governance to changing circumstances.⁵⁹ Rules of adjudication provide an effective method for settling

⁵⁸ Hart, *The Concept of Law*, 94-95.

⁵⁹ Ibid., 95-96. Hart included private power-conferring laws among the secondary rules which he characterized as rules of change. But such a classification is inadequate in two respects. First, the primary/secondary distinction, as an important thought-experiment in Hart's theory, aims to underscore the crucial functions the secondary rules perform. These functions remedy or alleviate the problems that face a society that lacks the governance of law. As Hart correctly observed, however, an elementary form of power-conferring rule also underlies the moral institution of a promise (*Concept*, 96). Even in an imaginary society which lacks a modern legal system as Hart described, there must be some rudimentary forms of power-conferring rules that define the formation of, for example, property, contract, and bequest. Second, classifying private power-conferring laws into secondary rules will leave the practices of such laws unexplained in Hart's formulation of the existence conditions of a legal system. In Hart's theory, the primary/secondary distinction not only highlights the vital roles secondary rules play in the operation of a legal system but also figures prominently in the minimum existence conditions of a legal system. According to Hart's formulation of the existence conditions, the only way private citizens contribute to the existence and operation of a legal system is to generally obey the primary rules and only the officials need to take the secondary rules as public standards of behavior. If rules that confer private legal powers are classified into secondary rules, Hart's account will lack an explanation of the practice of such rules by the

disputes about contraventions of legal obligations and for directing the application of law's coercive measures.⁶⁰ Legal rules of these three types are Hartian *secondary rules*. A modern legal system, on Hart's account, must consist of norms on these two levels: the primary rules that regulate ordinary citizens' actions and interactions and the secondary rules that determine the institutional roles and competence of legal officials which are essential to maintaining a legal order.⁶¹

Power-Conferring Laws and the Internal Point of View

As was mentioned above, by virtue of introducing the notion of the internal point of view into his jurisprudential account, Hart tackled the major theoretical difficulties regarding law's normative dimension that had arisen in classical positivists' accounts and established his methodology – the hermeneutic method – for jurisprudence. On the other hand, recognizing the distinctive role of power-conferring laws in modern legal systems and the irreducibility of such rules to duty-imposing ones liberates the positivist portrayal of legal phenomena from the oversimplified model of law as the sovereign's commands, which obscures the varieties of rules and rule-following activities and the interaction among officials in the legal domain.

power-holders.

⁶⁰ Ibid., 96-97.

⁶¹ Hart drew the distinction between primary rules and secondary rules in multiple ways. Sometimes he seemed to suggest that the primary/secondary distinction is equivalent to the distinction between duty-imposing and power-conferring rules (*Concept*, 81, 283); elsewhere he suggested that secondary rules are rules concerned with primary rules rather than with the actions that law-addressees must carry out (*Concept*, 94) or that secondary rules are parasitic upon primary rules (*Concept*, 81). Neither of these ways of distinguishing rules of these two levels, however, can precisely capture the secondary rules of recognition, change, and adjudication as Hart contemplated. For, on the one hand, not all secondary rules only confer legal powers. The Rule of Recognition, for example, also imposes duties on legal officials to acknowledge rules enacted by empowered legislators in accordance with certain procedures as legally valid. On the other hand, some primary rules are concerned with other primary rules and thus parasitic upon them. As indicated in note 59, rules that confer private legal powers should be classified as primary rules, even though the contents of such rules are concerned with other primary rules. As a result, a better understanding of Hart's distinction between primary and secondary rules is that it is a distinction by enumeration. See P. M. S. Hacker, "Hart's Philosophy of Law," in *Law, Morality, and Society: Essays in honour of Hart*, ed. P. M. S. Hacker and Joseph Raz (Oxford: Clarendon, 1977), 18-20.

Obviously, the notion of the internal point of view and the emphasis put on power-conferring rules respectively constitute penetrating critiques of classical positivist theories. But more importantly, joining these two ideas provides Hart's theorizing of legal phenomena with revealing insights and powerful explanatory force.

Hart relied on his explication of the internal point of view, the existence of which distinguishes a social rule from a mere social habit, to offer an account of the normative character of duty-imposing rules. But he was well aware that the normative dimension of law is not exhausted by the imposition of legal obligations and people's denunciatory attitudes or hostile reactions in the event of contraventions of legal obligations. In a passage where Hart argued against theories representing power-conferring laws as mere fragments of duty-imposing laws, he wrote,

The introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel ... [I]t ... may fairly be considered as the step from the pre-legal into the legal world.⁶²

The effective functioning of a modern legal system considerably depends on the operations of legal rules that determine the positions of legal officials and their legal capacities to construct and maintain the multi-layered normative framework of law. Hence, a comprehensive explanation of law's normativity, at least for legal theorists sympathetic to Hart's project, must include an adequate account of people's (in particular legal officials') practical attitudes in relation to such role-determining and power-conferring norms and the exertion of institutional legal powers vested in the legislature, the executive, and the judiciary. Hart's closing remarks

⁶² Hart, *The Concept of Law*, 41-42.

of Chapter 5 of *The Concept of Law* made this point explicit:

Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who ... use the rules as standards for the appraisal of their own and others' behaviour ... Under the simple regime of primary rules the internal point of view is manifested *in its simplest form*, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view is required for the analysis of the basic concepts of obligation and duty. With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and *they demand a reference to the internal point of view for their analysis*. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers, private and public ... [T]o do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules.⁶³

In Hart's view, exploring the operations of rules and rule-following activities from the rule-user's perspective – from her internal point of view – offers the most illuminating insights into the normative aspects of such social phenomena. Therefore, recognizing power-conferring rules as constituting a distinctive norm-type irreducible to rules that impose duties necessitates an elaborated account of the rule-user's committed attitude that encompasses both types of rules. In other words, in modern legal systems one's committed attitude in relation to legal rules is manifested not only in one's demand for compliance with legal duties or one's condemnatory statements about one's own or someone else's breaches of duties, but also in one's shaping the normative legal order (changing legal situations) by virtue of deliberately

⁶³ Ibid., 98-99 (emphases added).

exercising legal powers, public or private. The success of Hart's model of law as a union of primary rules and secondary rules, both of which contain duty-imposing rules and power-conferring rules, depends to a considerable extent on the explanatory force provided by this extended notion of the internal point of view: such an idea can facilitate our understanding of exercises of legal powers as it illuminates people's compliant behavior with legal obligations. However, the pursuit of a comprehensive explanation of the internal point of view applicable to both duty-imposing and power-conferring norms soon disappears from Hart's subsequent chapters (including the Postscript).⁶⁴ Moreover, in a passage where Hart reminded the reader of the inadequacy of explaining law as people's habitual obedience to the sovereign's commands, he ran together the committed attitude toward duty-imposing laws – the critical reflective attitude – and the committed attitude toward power-conferring laws:

What makes 'obedience' misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) need involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfillment of a standard of behavior for others of the social group. He need not think of his conforming behavior as 'right', 'correct', or 'obligatory'. His attitude, in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards.⁶⁵

From the excerpt above, it is obvious that Hart was keen to liberate positivist accounts of law from the model of sovereign's commands by virtue of advancing a rule-based account of legal obligation, of legal power, and of law in general. Despite the justifiable criticism that Hart

⁶⁴ For a similar criticism, see Kramer, *H. L. A. Hart*, 46-50.

⁶⁵ *Ibid.*, 115.

levelled against the command theory of law and the promising approach he adopted to law, what seems to cause theoretical confusion is his conflation of the two kinds of committed attitudes in relation to two different kinds of legal norms. Given Hart's emphasis on the theoretical importance of the internal aspect of power-conferring rules in explaining the structuring and functioning of a legal system, it is particularly puzzling why Hart refocused his attention from developing an elaborated notion of the internal point of view that covers not only legal duties but also legislation, adjudication, legal powers in general and so on, to restating its "simplest form" as the basis of criticism of deviation and justification of demands for conformity.

2.2 The Limitation of the Hartian Internal Point of View

The internal point of view, on Hart's account, represents the perspective of those who *internalize* certain patterns of conduct as public standards for guiding and assessing behavior. Hart characterized this distinctive viewpoint as the *critical reflective attitude*. People who hold the critical reflective attitude toward a rule are disposed to view some pattern of behavior as a public standard, criticize behavior that deviates from that standard, and consider the criticism thus made as legitimate or justified.⁶⁶ While Hart noted different kinds of external points of view, his explication of the internal point of view is univocal throughout *The Concept of Law*. His account of the internal point of view can be formulated as follows:

(IPV) X takes the internal point of view toward a norm N, if and only if X

⁶⁶ Hart, *The Concept of Law*, 55-56.

is inclined to conform to N insofar as N is applicable to her conduct, regards N as a public standard of behavior for a certain social group, criticizes any violation of N committed by any addressee of N, and acknowledges the appropriateness of criticisms of any of her own transgressions of N.

Obviously, Hart's specification of the internal point of view fits duty-imposing rules well. It properly depicts the manner in which these laws figure in one's practical deliberations. However, the critical reflective attitude does not capture the committed attitude in relation to power-conferring laws. Firstly, it is ambiguous or even meaningless to state that a power-conferring norm has been violated.⁶⁷ Although most power-conferring laws provide for the conditions under which people are vested with legal powers and the ways in which such powers are performed, it is difficult to differentiate between (1) the noncompliance with such laws on the part of people who intend to exercise the relevant powers but who fail to follow the requisite procedures and (2) the noncompliance of people who do not seek to exercise such powers at all. Hence, we would be unable to assess one's conduct solely on the basis of the power-conferring rules without sufficient information concerning one's objectives, even if we were convinced that all law-addressees view the laws as public standards. Secondly, despite the possibility that we could in some circumstances readily distinguish between the two types of noncompliance noted above, neither type of noncompliance is appropriately subject to criticism, unless it has involved a breach of legal duty. In the absence of such a contravention of legal duty, any censorious reaction like those envisaged in Hart's account of the critical reflective attitude seems groundless and inapposite.

⁶⁷ Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968), 54.

At least at one juncture in *The Concept of Law* Hart appeared to suggest that we can account for the internal aspect of a power-conferring rule (or the internal aspect of power-exercising acts) in terms of people's critical reflective attitude toward another duty-imposing law. In Chapter 4, Hart argued that Austin's account of law as dictates of a sovereign habitually obeyed by the sovereign's subjects fails to explain "the continuity of law-making power through a changing succession of individual legislators."⁶⁸ Mere habits of obedience to the old legislator confer on a new legislator neither a right to succeed nor a power to legislate; such habitual obedience, moreover, grounds no presumption that the new legislator will be generally obeyed. Hart then concluded, "If there is to be this right and this presumption at the moment of succession there must ... have been the acceptance of the rule under which the new legislator is entitled to succeed."⁶⁹ Subsequent to his contention that there must be generally accepted rules specifying the qualifications of and the legislative powers vested in the lawgiver, Hart adverted to the role of the critical reflective attitude. Hart did not characterize the internal aspect of the legislator's power-exercising acts as the possession of the critical reflective attitude toward the rule conferring legislative powers; rather, he drew attention to the committed attitude toward the rule that "provides for the identification of standards of behavior ... by reference to the words ... of a given person,"⁷⁰ which should be understood as a simple version of the Rule of Recognition. Hart added, "Where such a rule [the rule that provides for the identification of standards of behavior] is accepted Rex ... will have the [power-right] to [specify what is to be done] ... Rex will in fact be a legislator with the authority

⁶⁸ Hart, *The Concept of Law*, 54.

⁶⁹ Ibid., 55. I understand "being entitled to succeed" as being entitled to the right to subjects' obedience and the power to legislate.

⁷⁰ Ibid., 57.

to legislate, i.e. to introduce new standards of behavior into the life of the group.”⁷¹ Then, Hart concluded, “the social practices which underlie such legislative authority will be, in all essentials, the same as those which underlie the simple direct rules of conduct ... and they will differ in the same way from general habits.”⁷²

Hart was cautious about the seemingly sweeping assertion in the excerpt above. The scope of the laws whose social basis is “the same as” those underlying simple rules of conduct is limited to the laws that provide for legislative power. Rules conferring powers to legislate, Hart explained, have a very close connection with the Rule of Recognition: “where the former exists, the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules.”⁷³ Through one’s critical reflective attitude toward the Rule of Recognition, one is inclined (1) to recognize the rules enacted by legislative authorities as valid public standards of behavior and (2) to criticize people who do not in a similar way recognize the validity of such rules.⁷⁴ It seems plausible that accepting the obligation imposed by the Rule of Recognition to acknowledge that norms enacted by the legislator (the changes of normative situations as a result of exercising legislative power) are legally valid implies, or at least supports, a certain viewpoint on or a certain practical attitude toward legislative authorities and their power to make laws.

This explanation of one’s internal perspective toward the rules of change can hardly be

⁷¹ Ibid., 58.

⁷² Ibid.

⁷³ Ibid., 96.

⁷⁴ It is worth noting that in the original text of *The Concept of Law*, the Rule of Recognition is a rule about the validity of legal norms, namely the membership of norms in a legal system. It only requires its addressees to use the criteria it establishes in identifying legal norms. In his later work, Hart expanded the content of the Rule of Recognition to include the obligation to apply the laws identified by it. See Hart, *Essays on Bentham*, 156. For a criticism of such an expansion, see Kramer, *H. L. A. Hart*, 103-5.

applied to other instances of power-conferring rules. For the reference to the exercise of legal powers as an identifying feature of legal validity does not obtain between each power-conferring law and the Rule of Recognition. In the absence of such a connection, it is inapposite to ground the internal aspect of power-conferring laws in the critical reflective attitude toward the Rule of Recognition. The rules that provide for the official powers to apply or enforce the law in particular cases, for example, may not be included in the Rule of Recognition as part of the criteria for legal validity, let alone the rules conferring private legal powers.⁷⁵ The power-holders' critical reflective attitude toward the Rule of Recognition in such cases merely commits them to the obligation to recognize as valid the rules that meet the criteria of validity established by the Rule of Recognition (including the rules conferring on them the relevant legal powers) and to *internalize* the valid legal rules as premises of practical reasoning. As should be clear, the mere reduction of the internal point of view in relation to power-conferring laws to the acceptance of the Rule of Recognition only reaffirms the existence of a certain practical attitude that legal agents must adopt toward such power-conferring rules when they exercise relevant powers but leaves its nature entirely unexplained.

Moreover, were we to develop a general account of the practical attitude toward legal powers and power-conferring laws on the basis of the critical reflective attitude toward the Rule of Recognition, we would be forced to accept an oversimplified picture of law in which both the citizens and the officials are supposed to accept the Rule of Recognition. This is because the conferral and exercises of private legal powers constitute an indispensable part of legal activities. Citizens, according to this view, must adopt the internal point of view toward

⁷⁵ Indeed, in a legal system in which precedents are binding, the official decisions made by judges in particular cases specify a source of laws.

the Rule of Recognition when they make private arrangements by exercising legal powers in their daily lives. Such an account of the internal aspect of power-conferring norms, which forces the theorist to expand the group of practitioners of the Rule of Recognition to include ordinary citizens, obscures the fact that institutionalized official practices constitute the core of a modern legal system, takes no notice of the possible alienation of citizens from the core legal practices, and hence fails to distinguish the law from non-institutional forms of rule-governance such as social customs. Hart himself explicitly dismissed this oversimplified and distorted conception of law and described it as an error and an unrealistic fiction.⁷⁶ Since there is no sufficient reason to embrace that naïve conception in lieu of understanding law as a complex social phenomenon comprising citizens' and officials' respective practices,⁷⁷ we should eschew this oversimplified picture of legal systems and any theoretical account that entails such a view.

In his later work *Essays on Bentham*, Hart delineated in a different way the practical attitude one possesses when exercising or recognizing legislative powers. He suggested a general account of the committed attitude toward the law which embraces both the internalization of duty-imposing norms and that of power-conferring norms. Instead of merely claiming that the committed law-addressees characteristically take legal norms as constituting reasons for acting as the law requires and criticizing deviations from such norms, Hart in the amplified account highlighted the distinctive way in which the reasons constituted by the law typically operate in one's practical reasoning. A law-addressee's committed attitude toward legal rules, Hart explained, involves a standing recognition of the enactments by any legislative

⁷⁶ Hart, *The Concept of Law*, 113-14.

⁷⁷ I shall consider and argue against a theoretical attempt that includes ordinary citizens as the practitioners of the Rule of Recognition in 3.4 of Chapter 3.

authority as constituting *content-independent peremptory* reasons for action. Hart availed himself of Hobbes's notion of a command to develop his idea of a content-independent peremptory reason. A content-independent peremptory reason aims to preclude or cut off the agent's independent deliberation on the reasons for and against the required action (peremptoriness), and it possesses its peremptory force independently of its content (content-independence).⁷⁸ Hart connected the inclination to recognize certain norms as constituting content-independent peremptory reasons with the existence of a social rule, and he appeared to suggest that such a recognition manifests itself in the internal aspect of power-conferring rules as well as in the internal aspect of duty-imposing rules:

[T]he general recognition in a society of the commander's words as peremptory reasons for action is equivalent to the existence of a social rule. Regarded in one way as providing a general guide and standard of evaluation for the conduct of the commander's subjects, this rule might be formulated as the rule that the commander is to be obeyed and so would appear as a rule *imposing obligations* on the subjects. Regarded in another way as conferring authority on the commander and providing him with a guide to the scope or manner of exercise it would be formulated as the rule that the commander may by issuing commands create obligations for his subjects and would be regarded as a rule *conferring legal powers* upon him.⁷⁹

Hart's generalization of the idea of content-independent peremptory reason is ambitious. It aims not only to supplant the notions of sovereign and coercive orders in explaining law-making events but also to ground a general idea of (practical or theoretical) authority.⁸⁰ Unfortunately, although this unified account of the normative components of authority as generating content-independent peremptory reasons for action covers nicely the allocation of

⁷⁸ Hart, *Essays on Bentham*, 253-55.

⁷⁹ Ibid., 258 (emphases added).

⁸⁰ Ibid., 261.

legal duties, it fails to apply to all instances of exercising legal powers: the reasons engendered by exercising legal powers are not always peremptory and content-independent. To exercise a legal power is to bring about a change in normative situations. Normative consequences of power-exercising may involve, as Neil MacCormick explained, “what a person ought to or ought not to do, or may or may not do, or what a person is able or unable to do.”⁸¹ A power-holder, that is, may by exercising a legal power impose obligations, grant permissions, or confer powers or immunities. Obviously, not all instances of exercising a legal power involve rendering certain acts or omissions obligatory. Accordingly, not all instances of exercising a legal power involve constituting content-independent peremptory reasons for those subject to the power. When the legislative authority confers a private legal power on citizens, for example, it is engaged neither in the formation nor in the cancellation of any content-independent peremptory reasons. Rather, it sets up a normative framework and enables people to do something they would otherwise be unable to do. Hence, taking the application of a rule as introducing a content-independent peremptory reason in one’s practical reasoning does not seem to capture the essential part of one’s distinctive practical attitude toward a power-conferring rule.

In sum, Hart does not seem to provide a satisfactory account of the internalized attitude in relation to power-conferring norms. On the one hand, the critical reflective attitude cannot be directly applied to power-conferring norms. Nor is it plausible to reduce the acceptance of a power-conferring rule to the critical reflective attitude toward the Rule of Recognition or any other duty-imposing rule. Such reductionist accounts seem to threaten the crucial distinction

⁸¹ Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 154. See also MacCormick, *H.L.A. Hart* (London: Edward Arnold, 1981), 73; Joseph Raz, *Practical Reason and Norms*, 105-6.

Hart emphasized between the two main types of legal norms. On the other hand, since the creation of legal obligations does not exhaust the consequences of exercising legal powers, to hold that the internal aspect of power-conferring laws consists in recognizing the consequences of exercising powers as constituting content-independent peremptory reasons for action would be untenable.

As noted in the preceding section, the combination of the internal point of view and power-conferring norms is indispensable for characterizing a wide range of legal phenomena. The omission of an adequate account of the internal aspect of power-conferring norms undermines the explanatory force of Hart's model of law as institutional activities governed by two different kinds of norms. In addition, this gap in Hart's theory renders unexplained one of the two minimum necessary and sufficient existence conditions of a legal system proposed by Hart.⁸² For a legal system to exist, Hart submitted, the officials must internalize the secondary rules as common juristic standards of official behavior.⁸³ Since all secondary rules contain power-conferring components, Hart and any proponents of his theory need to elaborate the notion of the internal point of view to include the committed attitude toward power-conferring norms.

2.3 The Variety of Legal Statements

The analysis of Hart's explanation of the internal point of view in the preceding section shows that the critical reflective attitude cannot satisfactorily capture the psychological state one adopts when one seeks to uphold a power-conferring norm. Nor can it be reduced to one's

⁸² Kramer, *H. L. A. Hart*, 107-9.

⁸³ Hart, *The Concept of Law*, 116-17.

adopting the critical reflective attitude toward a relevant duty-imposing norm. The former attempt to shoehorn one's supportive attitude toward power-conferring laws into the notion of the critical reflective attitude would lead to unbearable distortion; the latter attempt to advance a reductionist account leaves certain consequences of exercising legal powers entirely unexplained. Indeed, Hart insightfully highlighted the internal aspect of rules and rule-dependent activities that consists in “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,”⁸⁴ and he persuasively rejected the command theory and the prediction theory of law on the ground that such theories fail to refer to the normative dimension of legal phenomena. Moreover, Hart rigorously distinguished different kinds of external perspectives and discussed the varying circumstances in which one may adopt such viewpoints.⁸⁵ The internal point of view, by contrast, is presented as the critical reflective attitude in *The Concept of Law* through and through. Hardly any further analysis is given in Hart's account with regard to the different ways in which a committed legal agent expresses her adherence to different types of legal rules, although Hart explicitly, and correctly, stated that power-conferring rules are “thought of, spoken of, and used in social life differently from rules which impose duties.”⁸⁶

The realm of law comprehends countless verbal interactions: people, by making statements of legal facts, claim their rights, justify actions as within their liberties, argue against particular legal rulings, adjust normative relations, and so on. Such legal utterances are certainly made in accordance with legal norms and characteristically express the utterer's allegiance to such norms. Since the committed legal agent's internal perspective in relation to

⁸⁴ Ibid., 88.

⁸⁵ Ibid., 89, 102.

⁸⁶ Ibid., 41.

the laws is essential for understanding the nature and structuring of rule-following activities in a legal system, including most notably the acts one performs by making legal statements, it is reasonable to explore the varying points of view toward the law by examining what we think and do by making legal statements in accordance with different types of legal rules.

Corresponding to the contrast between the internal point of view and the external, non-committed, viewpoints toward law, Hart drew a distinction between internal legal statements and external legal statements. External legal statements represent the observer's or the uncommitted legal agent's perspective, aiming at reporting, or predicting, the application of laws by people other than the observer (or the uncommitted legal agent) or any other phenomena related to law-application. In contrast, an internal legal statement, according to Hart, is "the language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose."⁸⁷ Obviously, internal legal statements can be made in diverse contexts of law-application. For instance, an ordinary citizen may claim that, according to the law, she is entitled to compensation for the loss caused by her neighbor's negligence; a police officer may state that she is authorized by the law to search a dwelling; a political pundit may argue that a bill has not been passed because the Members of Parliament did not follow the required procedure. These statements of law are expressed with different purposes or points and give rise to differing legal effects. As suggested above, one way to discern the nature of the internal point of view is to investigate the acts we perform, or the acts we can perform, by making verbal or written reference to legal norms of different types. Speech act theories provide us with abundant theoretical resources for this approach to legal phenomena. In the present section, I shall analyze legal statements in terms of their

⁸⁷ Ibid., 102.

illocutionary force, or illocutionary points, with recourse to John Searle's classification of speech acts.

Searle classifies illocutionary acts into five basic categories: Representatives, Directives, Commissives, Expressives, and Declarations.⁸⁸ Each type of illocutionary act "has a point or purpose which is internal to its being an act of that type ... [which means] that a successful performance of an act of that type necessarily achieves that purpose."⁸⁹ Representatives are meant to represent how things are in the world. The illocutionary force of such an utterance is to commit the speaker to, in varying degrees, the truth (or falsehood) of the expressed proposition. Speech acts of this kind have the word-to-world direction of fit. The success of such an utterance depends on whether the speaker gives a correct account of the relevant state of affairs. The paradigmatic verbs used for this category of illocutionary acts are "assert," "claim," "disclaim," "state," "affirm," and "deny." Directives are illocutionary acts the point of which is to get the hearer to do as the speaker requires, commands, suggests, begs, prays and so on. As opposed to Representatives, directive illocutionary acts are not supposed to describe any state of affairs in the world. Rather, they express how the speaker would like the world to be and the speaker's inclination to make the content of her directive illocutionary act be the case. Directives have the world-to-word direction of fit. If the resultant state of affairs does not match the propositional content of a Directive, the Directive has failed to achieve its illocutionary point. Commissives also have a world-to-word direction of fit. Through a commissive illocutionary act such as making a promise, accepting an invitation, or undertaking a mission, the speaker commits herself to some future course of action. Expressives have no

⁸⁸ John Searle, "A Classification of Illocutionary Acts," in *Language in Society* 5, no.1 (1976): 1-23.

⁸⁹ John Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* (Cambridge: Cambridge University Press, 1985), 13-14.

direction of fit. The point of this category of speech acts is to express the speaker's psychological state about some state of affairs. The relevant state of affairs need not be specified in the propositional content. One may say "Sorry for being late!" to express one's regrets; but one could express the same feeling with a non-propositional utterance (or an utterance that does not contain a full propositional content) such as "Sorry!"⁹⁰ The structure of Searlean declarative illocutionary acts is more complex than that of the other four types of illocutionary acts. The illocutionary point of a declarative act is to bring about a state of affairs which corresponds to the propositional content of that act. To take J. L. Austin's example, when I say "I name this ship the *Queen Elizabeth*" I make it the case that this ship is named the *Queen Elizabeth*.⁹¹ The relationship between the propositional content of a declarative speech act and the world is a double direction of fit. The speaker of a declarative act makes some state of affairs exist and thereby effects a change in the world (world-to-word) by virtue of presenting that state of affairs as existing (word-to-world). The linguistic operation of "making something exist by presenting it as existing" is typically based on the operation of a rule or a set of rules that constitute a social institution.

External Legal Statements

Having encapsulated the classification of illocutionary acts, I commence the analysis of legal discourse by looking first at external statements. An external legal statement is a statement made by a person who, explicitly or implicitly, distances herself from the legal system. The

⁹⁰ Searle regards expressive speech acts with non-propositional utterances as being "not yet linguistic in the full sense of natural human languages." See John Searle, *Making the Social World: The Structure of Human Civilization* (New York, NY: Oxford University Press, 2010), 71-73. Searle remarks that the act of conveying one's intentional states to another without representing any state of affairs is very common even among animals; it does not perform the primary function of natural languages to represent what the world is.

⁹¹ J. L. Austin, *Philosophical Papers* 3rd ed. (Oxford: Oxford University Press, 1979), 235.

illocutionary force of external legal statements is predominantly determined by the speaker's purpose in making such statements. I shall take account of four kinds of external statements that are of chief importance in jurisprudential investigation, though this typology of external statements may not be exhaustive. The first type is the extreme external legal statements. These statements are meant to report people's observable compliance with, or deviation from, legal norms and the general situation and circumstances connected to these actions. Extreme external statements are limited in the sense that the observer is unconcerned with people's intentions, attitudes, beliefs and any other psychological states about legal norms. Nor does the observer see legal mandates as reasons or justifications for people's compliant behavior. On this view, legal norms appear solely as indicators of the presence of convergent human conduct. On the basis of the regularities formed by people's behavior, the extreme external observer may make predictions about how people will behave in the future. All extreme external statements are Searlean Representatives. One can assess these statements as true or false by ascertaining whether the descriptions of people's compliant or deviant behavior in relation to the laws correctly represent the relevant state of affairs in the legal community.

External legal statements of a second type are made by an observer who intends to describe the rule-following activities in the legal domain. The observer endeavors to describe what people think and do in accordance with a set of interconnected legal norms. Although the observer does not commit himself to the legal system he seeks to describe, he takes account of people's committed attitudes toward legal norms in his portrayal of legal phenomena. As opposed to extreme external statements, external statements in this moderate form include normative concepts such as "rule," "acceptance," and "justification" in their representation of legal phenomena. Moderate external statements are also Searlean Representatives.

External statements of a third kind are made by alienated members of a legal system. The alienated members are highly skeptical of rules and legal reasoning; they do not treat legal norms as constituting public standards guiding people's conduct. But since compliance with or deviance from legal norms would give rise to consequences that are pertinent to their practical interests, the alienated members typically take into account such consequences of law-application when making practical reasoning. Their statements about the laws are predictions (Representatives) of what the courts or the officials in administrative branch will do to them when they comply with or deviate from the laws.

External legal statements of a fourth kind are made by those who give voice to a certain legal system's normative perspective on certain modes of conduct without themselves endorsing that normative point of view.⁹² Instead of ascribing the normative perspective expressed in her statement to law-addressees of a legal system, the speaker develops lines of argument about legal facts as if she is a committed member of that system. But at the same time the speaker detaches her own point of view from the content of her statement. Such statements can be found in circumstances where the speaker gives legal advice to another person who belongs to a different legal system. The statement expresses a certain normative perspective on some course of action, but it does not express or imply that the speaker endorses that view. Nor does it imply that the speaker necessarily dismisses that view. To ask whether the speaker really accept the view expressed in such a simulative or detached statement is beside the point. By making a simulative or detached legal statement, the speaker is performing a directive illocutionary act from a certain normative viewpoint or recounting some area of the

⁹² For explanations of statements made with this viewpoint, see Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999), 165-66; Joseph Raz, *The Authority of Law*, 153-59; *Practical Reason and Norms*, 170-77.

law in a jurisdiction.

Internal Legal Statements of Duty-Imposing Norms

Internal statements made in accordance with duty-imposing laws are used by the speaker to highlight a pattern of conduct according to which she guides or assesses behavior. Typically, by making such statements, the speaker demands, corrects, criticizes, or warns against someone's behavior (including her own behavior). Those statements therefore perform the illocutionary force of Directives or Commissives. For example, by uttering the statement "You are legally obligated to avoid drink-driving," the speaker puts forward a demand on the hearer to avoid drink-driving (a directive illocutionary act). In contrast, if the speaker reminds herself of the legal obligation to enlist in the army by saying that "I am legally obligated to engage in military service because the Conscription Act has been passed," she expresses her commitment to join the armed forces (a commissive illocutionary act). Since the point of making internal statements in accordance with duty-imposing rules is to apply the pertinent rules as public standards of behavior, the speaker who performs a directive speech act by virtue of an internal statement of legal obligation also commits herself to the same requirement, though her commitment inheres in the pragmatics rather than the semantics. By the same token, the speaker who commits herself to some mode of conduct by making an internal statement of legal obligation is typically disposed to demand that other community members also fulfill that obligation. Hart's notion of the critical reflective attitude perfectly captures the directive and commissive illocutionary force of internal statements made in accordance with duty-imposing norms.

Internal Legal Statements of Power-Conferring Norms

Despite the crucial role of obligation in legal contexts, statements involving the imposition and implementation of legal obligations do not exhaust legal discourse. The application of power-conferring legal norms constitutes another indispensable part of legal language. Internal legal statements involving power-conferring norms can be divided into two main categories. The first category is concerned with the *possession* of legal powers (for example, You have a legal power to alienate these lands); the second involves the *exercise* of legal powers (for example, He exercised the legal power to conclude a contract by signing the relevant documents). Statements of power-possession are Searlean Representatives; they describe the power-relations between two or more parties. Power-exercising statements have three variants. When one makes an internal statement involving power-exercising, one may perform (1) a *power-exercising Declaration* with which the speaker exerts a certain legal power and brings about a change or changes in legal situations (for example, I waive my right to inherit my father's property),⁹³ (2) a *power-exercising Representation* that describes the speaker's or any other community member's exercise of a legal power and the subsequent normative change (for example, You've exercised your power to terminate the contract), or (3) a *power-exercising Directive* that offers guidance to someone on how to create the intended legal consequence through exercising the pertinent legal power (for example, In order to register as a married couple, you should sign your names on this form). To understand power-possession statements and the latter two kinds of power-exercising statements (power-exercising Representations and power-exercising Directives), one must understand power-exercising Declarations – the first-personal active power-exercising statements with which the speaker exerts her legal power(s).

⁹³ Of course, one need not engage in communicational actions to exercise one's legal powers, unless such actions are specified in relevant laws as conditions of power-exercising.

My analysis of internal statements of power-conferring norms will focus on power-exercising Declarations, for they are fundamental statements of power-conferring norms and exhibit the characteristic illocutionary force of statements involving power-conferring norms.

Typically, a speaker who makes a first-personal power-exercising legal statement intends to bring about a legal status or a legal relation (or a change in preexisting legal statuses or legal relations): e.g., to impose or eliminate a legal obligation, to confer a legal power, to reach some sort of private arrangement, to render some state of affairs legally significant or relevant, and so on. For example, if an inheritor says “I waive my right to inherit my father’s property” and if the inheritor is competent to exercise her power to waive that right and no vitiating condition of exercising that power is present, the inheritor will successfully eliminate her legal right to inherit her father’s property and she will be aware of such a change in legal statuses. Insofar as the change in legal statuses as a result of power-exercising is concerned, what the heir did with her utterance is a typical Searlean declarative illocutionary act. By uttering “I waive my right to inherit my father’s property,” the heir exercises the legal power to waive her right of inheritance (a Hohfeldian liability of inheritance) and thereby brings about the consequent legal effect of her immunities from undergoing the changes in her legal relations that would have been brought about through her inheritance. The heir, as Searle puts it, “makes something the case by representing it as being the case.”⁹⁴ Power-exercising Declarations that effect changes in legal relations in particular cases must be made with the operation of a complex set of general legal rules. These general rules are themselves standing Declarations made by the legislature (or other parts of the government such as the administrative departments) that define the normative positions of legal agents, the normative relations between legal agents, the normative

⁹⁴ Searle, *Making the Social World*, 97.

statuses of material or intangible objects, the conditions required for exercising legal powers, and so forth.⁹⁵ They are constitutive rules that determine the elements of power-exercising in a legal system. Any such Declaration-in-general (or any set of such Declarations) is not meant to create any particular legal consequences but to define a whole category of states of affairs in legal terms.

The dependence of power-exercising Declarations and subsequent legal effects on the operation of general legal rules marks the institutionality of those legal phenomena. In modern societies, institutional roles and facts constitute a significant part of social reality. We use notions such as “tax,” “tax inspector,” “corporation,” “general manager,” “bequest,” “testator,” “government,” “president,” “crime,” and “prisoner” to communicate with others and understand many aspects of our lives. Institutional facts are a sub-category of social facts, but the mode of existence of institutional facts is different from that of ordinary social facts. Unlike a non-institutional social fact that typically obtains when most community members believe it obtains, the existence of an institutional fact depends on the application of relevant rules in the institution to which the fact belongs.⁹⁶ As a result, it is impossible for one to create a non-institutional social fact solely by virtue of one’s own attitude, belief, or behavior in relation to a certain state of affairs. The fact that I believe you are the leader of this group is not sufficient

⁹⁵ For a thorough analysis of types of rules that pertain to power-exercising, see Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (Dordrecht: D. Reidel, 1986), 51-53; MacCormick, *Institutions of Law*, 35-37, 155-60.

⁹⁶ I adopt a narrow understanding of institutional facts: a fact is an institutional fact if and only if the fact depends on the application of some rule(s) and the rule that determines the fact is itself determined by the application of another rule. According to this understanding, facts that exist because of the general application of implicit norms by most people in an informal normative practice are not institutional. Institutionalization, on this view, is a process that makes certain social facts exist without people’s shared beliefs or collective acceptance of their existence. For a similar conception of institutions and institutional facts, see MacCormick, *Institutions of Law*, 21-37. For a classic explanation of institutional facts that understands institutional facts as ranging from informal social practices to complex normative structures such as a modern legal system, see John Searle, *The Construction of Social Reality* (New York, NY: The Free Press, 1995), 1-29; Searle, *Making the Social World*, 90-122.

to make you become the leader of this group. By contrast, it is part of one's ordinary life to create institutional facts on one's own. For example, I can apply for a renewal of my driving license in virtue of filling in a form and signing my name on it. There is no need to acquire acceptance from the vast majority of the community for a renewal of my driving license. My application will be approved if I fulfill all the conditions specified in relevant rules. The opinions of other people on my eligibility for being granted a driving license are immaterial to its validity. The difference between the mode of existence of institutional facts and that of non-institutional social facts implies that any institutional fact must be institution-specific – any institutional fact must exist within and as an instance of some institution (institution as an established rule-defined and rule-governed activity rather than as a social organization).⁹⁷ To the extent that institutional facts are a sub-class of social facts, one indeed brings about a change in the social world by successfully performing a power-exercising Declaration. There must be a correspondence between the propositional content of a successful power-exercising declarative illocutionary act and the facts within the relevant social institution. However, insofar as the difference between institutional facts and general social facts in terms of their modes of existence is concerned, a successful power-exercising Declaration is insufficient to create a social fact outside the particular institution – the general recognition of the institutional legal effect that ensues from exercising the relevant legal power. In our example of inheritance, the law's recognition of the heir's waiving her right of inheritance does not entail that other people in her community will generally recognize the elimination of her right of inheritance.

The potential discrepancy between an institutional legal fact that ensues from the exercise

⁹⁷ MacCormick and Weinberger, *An Institutional Theory of Law*, 52, 54; Dick W.P. Ruiter, *Institutional Legal Facts: Legal Powers and their Effects* (Dordrecht: Kluwer Academic Publishers, 1993), 52.

of a legal power and its counterpart in the non-institutional social world brings to the fore the question about the relationship between the institutional legal domain and the general social domain. A sensible answer to this question will help reveal the point of performing power-exercising speech acts, which include power-exercising Declarations the performance of which effect changes in legal statuses or legal relations, power-exercising Representations that describe the normative change(s) as a result of power-exercising, and power-exercising Directives that offer guidance on power-exercising.

First, each legally-constituted social institution (e.g., contracts, marriages, and stock exchange) provides a normative framework for interpreting, understanding, and regulating general social phenomena in legal terms. Through the application of legal norms, the law infuses distinctive legal meanings and statuses into thoughts, acts, events, objects, subjects and other social facts within its jurisdiction. The outcome of interpreting social phenomena in legal terms is the affirmation of particular instances of a certain legal institution or the lack of such instances. For example, two people, *A* and *B*, reached a verbal agreement that *A* would provide *B* with a piece of land in exchange for fifty thousand pounds. *B* made the payment and then started cultivating that piece of land. Legally speaking, *A* and *B* have not concluded a valid contract for the buying and selling of the piece of land, for they did not make the contract in written form. *A*'s and *B*'s joint act of reaching a verbal agreement on the exchange of land for money and their commitment to such an agreement do not belong to the class of acts the performance of which is recognized by the law as operative to make a legally valid contract for trading a piece of land. Nor did *B* successfully obtain the legal ownership of that piece of land, because no formal conveyance of it has been executed by both “contracting parties.” *B*'s occupancy and use of the land as well as his belief that the ownership of the land has been

transferred on the basis of his possession of the land are legally insufficient to transfer the legal ownership of the land from *A* to *B*. This brief description of social facts is made from the law's perspective, under which the non-institutional social facts such as the verbal agreement between *A* and *B* on the buying and selling of the land, the payment of fifty thousand pounds received by *A*, and *B*'s ploughing of the land are understood as the institutional legal facts of "no valid contract" and "no transfer of ownership of the land." These institutional legal facts represent, from the law's point of view and in legal terms, states of affairs in the social world.

Second, the purpose of representing the social world in legal terms (institutional legal facts) is to get such representations generally accepted or recognized by the community members (non-institutional social facts). Interpreting human activities in accordance with legal norms is certainly not the only way in which ordinary citizens understand and represent their interpersonal relations and social lives at the first consideration. In fact, some social activities proceed within social conventions where the norms shared by the participants are not explicitly articulated. People engaged in such informal social practices interpret human thoughts and behavior on the basis of their mutual beliefs about the implicit norms they share with one another. In the example of buying and selling a piece of land noted above, *A* and *B* rely on their shared experience of trading to interact with each other. From the perspective adopted by *A* and *B*, an agreement on trading the piece of land in exchange for fifty thousand pounds has been concluded and the ownership of the piece of land has been transferred from *A* to *B*. Arguably, a legally-constituted institution is meant to structure or restructure the social order by supplanting or supplementing the pre-existing informal normative order. In some cases, setting up a legal institution amounts to codifying a pre-existing conventional practice. By virtue of formulating implicit norms operative in people's ordinary interaction, the institutionalization

of a social convention renders precise what in the informal conventional practice is vague. It thus enables community members to avoid most controversies in regard to the contents and applications of the rules.

On some occasions, the institution introduced by the government is not grounded on the formulation of implicit norms that people share in some pre-existing informal normative order. Rather, it is a normative framework with which most community members are unfamiliar. Such extreme cases can be found in the colonial history of many countries or areas. For example, for the purpose of facilitating both intercultural dialogue and its control over the Taiwanese, the Japanese colonial government introduced a modern Western-style primary education system into Taiwan during its occupation of Taiwan from 1895 to 1945. At the beginning of Japanese rule, education in Taiwan was limited to children of wealthy families. The curriculum of those traditional Chinese schools contained only the study of Chinese characters and Chinese classics but no subjects which were deemed in Western countries necessary for primary education. During the development of the primary education system, the Japanese colonial government passed laws that determined the compulsory subjects for primary education, the criteria for teacher selection, the length and holidays of an academic term, the qualification of a pupil to access the education system, the duty imposed upon the parents to enable their children to attend schools, and so on. The impact of implementing such a modern compulsory primary education program was enormous. By 1945, the total enrollment rate of Taiwanese children was more than eighty percent. More importantly, the development and operation of this modern primary education system over almost fifty years radically changed most Taiwanese people's conception of education such as their recognition of the right of females to access education resources.

Whether a legal institution is introduced by the government as the codification of an established social convention or as a completely novel regulatory mechanism, the purpose of setting up an institution is to shape some mode of collective activity in the society. A legal institution locates states of affairs in the normative order it establishes, and it calls for acceptance, recognition, and practice of such an institutional order. If it successfully disposes the general populace to recognize its arrangement of people's social lives, the social order will be shaped by the operation of the laws and correspond to the legally-constituted institutional order. Given this understanding of the relation between the institutional legal order and the general social order, the point of making a power-exercising statement in any given legal institution consists in the speaker's attempt to get a certain institutional normative status or relation socially recognized by representing the normative status or relation as legally recognized. In the case of first-personal power-exercising Declarations, the power-holder, by stating that she exercises a legal power, brings about and recognizes the corresponding legal effect. On the pragmatic level, the power-exercising Declaration also has a directive dimension: the power-holder intends others to recognize the legal consequence she claims to have created by exercising the relevant legal power. That is, the power-holder intends to establish a correlation between the institutional legal fact and the general, non-institutional, social fact. Similarly, in the case of power-exercising Representations and power-exercising Directives, the speakers manifest their recognition of the legal consequences effected by exercises of powers and their inclination to get others to recognize such legal consequences in their affirmation of the normative changes as a result of those exercises or their affirmation of the conditions of obtaining such normative changes.

2.4 The Internal Point of View toward Power-Conferring Norms

One's internal point of view toward a norm is manifested in one's use of that norm. Hart's account of the critical reflective attitude satisfactorily captures the internalized perspective in relation to duty-imposing norms because it reveals the illocutionary point of internal statements made in accordance with duty-imposing norms. That is, it fully explains what people do – to guide, criticize, or reflect on people's conduct – in their use of such norms. The acts one performs with internal statements of power-conferring norms, in contrast, are not meant to assess human behavior as right or wrong. Through making internal statements of power-conferring laws, one may exercise a legal power to effect a change in legal relations, confirm that someone has effected a normative change through exercising a legal power, state that someone is capable of exercising a certain legal power, or clarify the necessary procedures or formalities for exercising a legal power.⁹⁸ Obviously, all such speech acts are about exercising legal powers, whether they are Searlean Representatives, Directives, or Declarations. Every and each performance of these power-exercising speech acts, namely every and each use of power-conferring norms in practical discourse, expresses the speaker's understanding and acceptance of the operation of legal powers. As a result, the speaker's distinctive committed practical attitude toward the norms conferring legal powers must evince her appreciation of the point of exercising legal powers.

The point of exercising legal powers, as was noted in the preceding section, consists of two parts. First, exercises of legal powers bring about normative changes in legal statuses or legal relations. Second, someone who makes normative changes in the legal order as a result

⁹⁸ One may perform the final three of these four types of speech acts from the moderate external viewpoint toward the law.

of exercising legal powers seeks recognition by the general public in order to shape the social order. Power-conferring norms make the difference between successful exercises of legal powers and unsuccessful attempts by recognizing the normative consequences of the former as legally valid and the normative consequences of the latter as invalid.⁹⁹ Since the direct result of the exertion of a legal power is to effect a normative change in legal order, accepting a power-conferring legal norm is primarily a matter of recognizing the normative role, the normative status, the normative relation, or even the normative structure determined through the exertion of the legal power conferred by that norm. Indeed, on occasions we refer to power-conferring laws to point out someone's imprudence, recklessness, or ignorance in relation to exercising legal powers and thereby offer guidance on how to perform power-exercising acts. Reference to power-conferring laws in such circumstances seems similar to the application of duty-imposing laws in terms of their action-guiding and action-evaluating function. However, in the case of duty-imposing norms, the appraisal of human behavior is itself the aim or purpose of rule-application, whereas in the case of power-conferring norms, assessing behavior (the power-exercising acts) is secondary to the formation or recognition of normative statuses or relations as a result of exercises of powers. Hence, one's acceptance of a power-conferring norm must include one's recognizing the validity of legal effects that ensue from successful exercises of the legal power conferred by that norm. In addition, such recognition of normative statuses or relations involved in one's acceptance of power-conferring legal norms typically includes one's acknowledging the superiority of institutional legal order over informal normative orders. That is, one who accepts a power-conferring law typically takes the

⁹⁹ For a similar view on the recognitional function of power-conferring rules, see Jeremy Waldron, "Who Needs Rules of Recognition?" in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (New York, NY: Oxford University Press, 2009), 330-31.

normative statuses or relations determined by the exercise of the relevant legal power as *the* normative statuses or relations in regard to relevant states of affairs.

When one recognizes certain normative statuses or relations in accordance with a power-conferring norm, one is inclined to have others recognize such normative statuses and relations. One's acceptance of a norm implies that one takes that norm as a *public* standard. As a result, a person who is committed to a power-conferring legal norm takes the norm as a public standard of ascertaining interpersonal relationships and is *ipso facto* disposed to get the valid exercises of the relevant legal power and subsequent legal consequences generally recognized by others and to criticize those who refuse to or fail to recognize such legal effects (or those who take invalid exercises of legal power as legally binding). Suppose that, in our example of trading a piece of land, there is a real estate agent C representing the seller A for the sale of the piece of land. C is experienced in the buying and selling of real estate and has sufficient knowledge of relevant laws. C will notify B that, according to the law, although A and B have reached a verbal agreement, they have not entered into a valid contract for trading the piece of land because the agreement was not made in written form. If B insists that they have concluded a valid contract, C will criticize B for erroneously recognizing a normative relation that has never been effected by a successful exercise of a legal power.

Thus, the committed attitude one possesses toward power-conferring rules can be formulated as below:

(IPVP) X adopts the internal point of view toward a power-conferring rule R_P if, and only if, (1) X recognizes the validity of legal effects that ensue from successful exercises of the legal power conferred by R_P , and X

recognizes the invalidity of any such effects purportedly brought about by unsuccessful exercises of the legal power conferred by R_P; (2) X is generally inclined to have other community members recognize the validity or invalidity of the aforementioned legal effects; and (3) X is generally inclined to criticize those who fail to recognize the validity or invalidity of such legal effects, and X is generally inclined to acknowledge the appropriateness of those criticisms.¹⁰⁰

The internal point of view toward a power-conferring norm is a practical attitude that shows one's recognition of the normative roles, capacities, statuses, or relations that ensue from exercises of the legal power conferred by that norm. One who accepts a power-conferring norm recognizes the power vested in the power-holder by that norm the validity of exercises of the legal power, and the validity of the normative consequences brought about by valid exercising of that power. In addition, the censorial attitude toward recognizing the validity of power-

¹⁰⁰ This formulation of the internal perspective in relation to power-conferring norms is similar to one of Kramer's two sets of necessary conditions for the existence of an internal point of view toward power-conferring norms, *see* Kramer, *H. L. A. Hart*, 48-49. In addition to the recognitional dimension of power-conferring norms, Kramer suggests that we could approach the internal perspective toward power-conferring norms through the activating dimension of those norms. He submits that we might hold that someone has adopted the internal viewpoint toward a power-conferring norm only if (1) she is generally disposed to exercise the pertinent power in contexts where her exercising of that power will be beneficial and legitimate; (2) she is generally disposed to criticize those who have persistently failed to exercise that power in contexts where the exercising of that power would have been beneficial and legitimate; and (3) she is generally disposed to acknowledge the appropriateness of the criticisms directed at her own persistent failure to exercise that power in contexts where the power-exercising is beneficial and legitimate. Kramer insightfully observes the connection between the conferral and exercise of normative powers and instrumental rationality. However, such a connection is insufficient for including those dispositions and critical attitudes among the necessary components of the internal perspective in relation to power-conferring rules. To be sure, one is generally disposed to exercise a power if the ensuing normative effect is beneficial and legitimate, and one is generally disposed to criticize those who in a similar circumstance fail to avail themselves of that power. But any such disposition attributed to and any such criticism directed at the power-holder does not manifest the use of the relevant power-conferring norm but the use of the requirement of instrumental rationality, for the point of any power-conferring norms is to establish or recognize certain normative statuses or normative relations, rather than to encourage the power-holders to establish those normative statuses or normative relations. Since the use of a power-conferring norm is typically accompanied with the application of the requirement of instrumental rationality, I shall mull over the application of the requirement of rationality in the conferral and exercise of normative powers in 4.4. of Chapter 4.

exercising and its legal consequence, combined with their general recognition of such legal effects, will constitute a derivative *social rule* of obligation that requires the agent to take the mode of conduct that satisfies the conditions specified in the power-conferring norm as valid exercises of legal power and the normative consequences of the power-exercising acts as valid legal changes.¹⁰¹

The recognitional attitude toward power-conferring norms and the critical reflective attitude in relation to duty-imposing norms jointly constitute the internal aspect of a legal system – people’s internal point of view toward the law. The amplified account of the internal point of view, as I shall argue in the next section, provides a better explanation of the officials’ practices of secondary rules. Also, it facilitates our understanding of the social foundations of law that include the active role of ordinary citizens in sustaining the functioning of a legal system.¹⁰²

2.5 Revisiting the Acceptance of Secondary Rules

In Chapter 6 of *The Concept of Law*, where Hart’s attention is centered on “the foundations of a legal system,” he meticulously elucidated the nature of the Rule of Recognition and how such a rule, by virtue of laying down criteria of legal validity, establishes the connection between legal norms and thus determines the boundaries and the unity of a legal system. He made scarcely any further reference to the other two types of secondary rules.¹⁰³ As Jeremy Waldron points out, the Rule of Recognition in Chapter 6 of *The Concept of Law* “has become

¹⁰¹ For a similar view, see Kramer, *H. L. A. Hart*, 49-50. Kramer understands the critical attitude toward the recognition of legal effects as a result of exercises of power in a more capacious way. It covers the situations in which the criticisms are concerned not with a breach of duty but with obtuseness or imprudence.

¹⁰² See Chapter 3.

¹⁰³ Hart, *The Concept of Law*, 100-117.

the be-all and end-all of Hart's fundamental secondary rules" that constitutes the complex social situation underlying the operation of a legal system.¹⁰⁴ The Rule of Recognition provides legal officials and private individuals with authoritative criteria for identifying legal rules. These criteria of legal validity typically include not only legislation but also other sources of law such as customs and precedents. It is worth noting that, though the function to eliminate uncertainty as to the existence and contents of legal rules, on Hart's account, is ascribed to the Rule of Recognition, it is not the only device that one may use for ascertaining legal facts. Rules of change perform a similar recognitional function. For ascertaining the legal validity of a general rule, one can apply the rule that confers legislative power to examine whether the relevant requirements and conditions of legislation have been satisfied; just as one can refer to a private power-conferring rule to ascertain a private legal arrangement.¹⁰⁵ But obviously, rules of change cannot settle all the issues concerning legal validity, in particular those involving conflicts between legal norms validated from different sources of law. When there exist multiple criteria of legal validity, standards that establish the relative subordination among them must be developed through legal officials' long-term practices of creating and applying valid legal norms in particular cases; such practices constitute an essential element of the Rule of Recognition.¹⁰⁶

The prominence of the Rule of Recognition in Hart's account is accompanied by two more or less misleading ideas about the operations of secondary rules. First, with regard to

¹⁰⁴ Waldron, "Who Needs Rules of Recognition," 341; see also Stephen Perry, "Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law," in *The Rule of Recognition and the U.S. Constitution*, ed. Matthew D. Adler and Kenneth Einar Himma (New York, NY: Oxford University Press, 2009), 297.

¹⁰⁵ Waldron, "Who Needs Rules of Recognition," 330-31, 340-42; see also Raz, *The Authority of Law*, 95.

¹⁰⁶ For an opinion that views the rules that determine the order of superiority between different criteria of legal validity as rules of change, see Waldron, "Who Needs Rules of Recognition," 345-46.

law-identification activities, Hart seems to suggest that the role of adjudicative authorities takes precedence over the role of legislative authorities. Legal officials, according to Hart's specification of the existence conditions of legal systems, must accept the secondary rules as public standards for official activities. Regrettably, Hart never gives a unified explanation of the qualifications that make someone a legal official. In *The Concept of Law*, Hart appeared to identify legal officials with those entitled to exercise public legal powers or to enforce the laws; these include legislators, judges, and people working in the administrative branch of the government.¹⁰⁷ But in his later work, Hart associated the Rule of Recognition almost exclusively with the practices of judges, characterizing it as "a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts."¹⁰⁸ Presumably, the shift of attention onto the practices of judges from that of officials in general is partly due to Ronald Dworkin's wide-ranging criticisms of Hart's theory, which are chiefly based on an elaborate account of the theoretical disagreements between judges and their constructive interpretation of legal principles in adjudicative activities.¹⁰⁹ In response to Dworkin's interpretive account of law, Hart explicitly admitted in the Postscript to *The Concept of Law* that "I certainly wish to confess now that I said far too little in my book about the topic of adjudication and legal reasoning."¹¹⁰ He then endeavored to demonstrate why the judicial activities that consist of intensive debates between judges as to the applicable

¹⁰⁷ Hart, *The Concept of Law*, 10, 67, 91, 106, 108, 110. For a textual analysis of Hart's conception of legal official, see Grant Lamond, "The Rule of Recognition," in *Reading HLA Hart's The Concept of Law*, ed. Luis Duarte D'almeida, James Edwards, and Andrea Dolcetti (Oxford: Hart Publishing, 2013), 110-12.

¹⁰⁸ Hart, *The Concept of Law*, 256; see also Hart, *Essays on Bentham*, 143-61. For a criticism of Hart's overemphasis on the role of adjudicative officials and his neglect of the administrative branch of government, see Kramer, *H. L. A. Hart*, 76, 83, 112, 206.

¹⁰⁹ Dworkin, *Law's Empire*.

¹¹⁰ Hart, *The Concept of Law*, 259.

legal principles or rules in particular cases can be explained as, or presuppose, *their* practices of the Rule of Recognition.¹¹¹ The emphasis on law-applying institutions is upheld more resolutely in Joseph Raz's account. Raz regards the recognition by the courts, rather than the enactment by the parliament, as a necessary condition of the existence of legal norms.¹¹² He gives three reasons for privileging the judiciary over the legislature in law-identification. First, law-applying institutions are essential to law in every type of society. In contrast, law-creating institutions "played a minor role or did not even exist in primitive societies, where the laws were conceived as immutable and were in fact changed mainly by slowly evolving customs."¹¹³ Second, the recognition of the courts, Raz argues, is "the only way to determine which are the law-making institutions and procedures of a given legal system."¹¹⁴ Third, law-applying institutions have final authority to declare what the law is, because, when the law-applying institution's opinion of the existence and content of laws is in conflict with the law-creating institution's, it is the decisions of the former that affect the considerations of the law's subjects.¹¹⁵

It is indeed an adequate point of departure to explore the practices of law-identification by examining adjudicative activities, as the ascertainment and application of laws are predominantly represented in judges' legal reasoning and the decisions they reach in the courts. It is implausible, however, to suggest that law-identification activities rest solely on judges' application of the laws. Legal systems in contemporary times, as Hart made explicit when he

¹¹¹ Ibid., 258-68.

¹¹² Raz, *The Authority of Law*, 85-89.

¹¹³ Ibid., 87.

¹¹⁴ Ibid., 88.

¹¹⁵ Ibid.

discussed the functions of secondary rules, necessarily contain institutions authorized by the law to deliberately introduce new legal rules and eliminate old ones for law-subjects. Typically, judges are required to apply the laws validly enacted by the legislature; disregarding applicable statutes without sufficient legal grounds normally constitutes a reason to appeal the case to the higher court. Furthermore, legislation, as a source of laws, is typically superior to other sources such as customs and precedents; otherwise, it can hardly remedy the static character of a society which has no means to opportunely adapt the public standards of behavior to changing circumstances. As a result, it is extremely rare that the law-creating institutions play an insignificant role in a modern legal system, a liberal-democratic one in particular. Such a normative system may be acknowledged as a legal system, but at best a peripheral one. To be sure, judges need not be unreflecting executors of the legislator's will. In most liberal-democratic regimes, judges in the constitutional court are empowered to review the constitutionality of statutes and legislative acts. Judges in local courts are allowed, or even required, to suspend the litigation procedures and petition the constitutional court for constitutional interpretation, if they reasonably believe that the applicable statutes may conflict with the constitution and will affect the ruling in particular cases.¹¹⁶ But that surely does not entail that the functioning of law-making institutions depends on the recognition by law-applying institutions. It is also far too strong to claim that the courts always take precedence over the parliament when there is a conflict between these two organizations and thus have the final authority to declare what the law is.¹¹⁷ The existence of law-creating institutions is typically dependent on the authorization by the law or deeply entrenched in the

¹¹⁶ See, for example, *Constitutional Interpretation* No. 371, 572, Constitutional Court, Judicial Yuan, R. O. C. (Taiwan).

¹¹⁷ For a similar criticism, see Perry, "Where Have all the Powers Gone," 320-21.

practices of the government. Also, it is not the case that the judges' opinions always prevail in particular cases. As Raz himself states, “[legal norms, rules, and principles] are presented to individuals and institutions as guides to their behavior by the body of legal institutions *as a whole.*”¹¹⁸ The judiciary and the legislature, insofar as the practice of law-identification is concerned, exhibit cooperation between two governmental departments. To say that legislative acts and adjudicative activities collectively represent cooperation between legal officials does not imply that there is always no dispute between law-creating institutions and law-applying institutions as to the existence or contents of legal norms, or that such disputes will always end in a consensus between them. That only suggests that, even if the confrontation between the judiciary and the legislature is serious and heated, those debates can take place only when both legal institutions are engaged in a (more abstract) cooperative activity of law-ascertaining or, to borrow Hart’s classic expression, the practice of the Rule of Recognition. To emphasize which institution has the superior, or even the ultimate, authority in law-ascertainment – whether by virtue of regarding legislative acts as merely providing an “unrecognized” source of law or by virtue of trivializing adjudicative activities as merely representing the legislator’s will – is to commit a similar mistake that the command theory of law has made. That is, such approaches more or less obscure the various forms of interaction between legal organizations and thus sidestep the crucial philosophical question regarding how to understand these phenomena as a deeper form of human cooperation which is best represented as a rule-following activity.

Another misunderstanding is that the Rule of Recognition is a purely duty-imposing rule. Hart built the analysis of the Rule of Recognition upon his account of customary social rules,

¹¹⁸ Raz, *The Authority of Law*, 88 (emphases added).

and the Hartian social rules are basically duty-imposing. Hence, some readers of *The Concept of Law* have been led to the view that the Rule of Recognition is a social rule that imposes upon legal officials an obligation to identify valid legal norms in accordance with the criteria of legal validity it specifies.¹¹⁹ In addition, Hart stated a cogent reason for viewing the Rule of Recognition as a duty-imposing rule, or at least as having a duty-imposing aspect:

If only some judges acted ‘for their part only’ on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity.¹²⁰

The duty-imposing aspect of the Rule of Recognition, as Hart rightly observed, is essential for preserving the systematicity of law. It is also essential for the normativity and publicity of a legal system. Without imposing any obligation to adopt the law-validating criteria, the Rule of Recognition, as well as the rules identified through the application of the Rule of Recognition, would be deprived of their normative character. And it would thus not be able to identify any norms as *public* standards of behavior. On the other hand, in a number of passages Hart indicated that the Rule of Recognition also confers legal powers.¹²¹ Some have argued that to understand the Rule of Recognition as a rule that specifies the criteria of legal validity by virtue of conferring legislative power upon legal institutions is to confuse the Rule of Recognition with rules of change;¹²² it is also argued that since the Rule of Recognition can validate social customs and customary laws which usually are not created through deliberately

¹¹⁹ Ibid., 92-93; Perry, “Where Have all the Powers Gone,” 299.

¹²⁰ Hart, *The Concept of Law*, 116.

¹²¹ Ibid., 113, 115. For a thorough textual analysis of the normative character of the Rule of Recognition, see Kramer, *H. L. A. Hart*, 81-84.

¹²² Raz, *The Authority of Law*, 93.

exercising legislative powers, the Rule of Recognition cannot be a power-conferring rule.¹²³ But these remarks seem to miss the point. Indeed, the Rule of Recognition itself does not confer any particular legislative or adjudicative power; it is basically a rule that confers powers as well as imposes obligations on legal officials to recognize the sources of laws from which its addressees identify valid legal norms. As Kramer articulates, “the powers directly conferred by the Rule of Recognition are powers of law-ascertainment rather than powers of law-alteration.”¹²⁴ Moreover, since the main function of the Rule of Recognition is to reduce uncertainty in law-ascertaining activities, and since any criterion of legal validity inevitably has uncertainty in meaning at the borderline, the Rule of Recognition must include standards that determine the superiority of some law-ascertaining determinations over other such determinations.¹²⁵ These standards typically empower the officials at a higher level to cancel the validity of law-identification determinations made by their subordinates. The power conferred on upper-level officials by the Rule of Recognition to invalidate law-identification determinations made by lower-level officials explains why the operations of a legal system based on a fundamental Rule of Recognition do not require full agreement on the contents or application of law-validating criteria between legal officials. As long as the disagreement over the contents or application of validity criteria is relatively minor – so that the disputants can settle the disagreement by reference to the standards that determine the relation of superiority between different law-ascertaining determinations (through exercises of powers to cancel the validity of some law-identifying determinations) – the functioning of the Rule of Recognition,

¹²³ Shapiro, “What is the Rule of Recognition,” 240.

¹²⁴ Kramer, *H. L. A. Hart*, 100.

¹²⁵ I will discuss the different kinds of disagreements about the Rule of Recognition in 3.4 of Chapter 3.

as well as the functioning of the legal system as a whole, will be maintained.¹²⁶

The overemphasis on adjudicative activities in law-identification and the misunderstanding of the normative character of the Rule of Recognition lead quite a few theorists to focus on judges' critical reflective attitude toward the validity criteria specified in the Rule of Recognition when explaining legal officials' acceptance of secondary rules. This view not only ignores the power-conferring aspect of the Rule of Recognition but also provides an incomplete picture of legal officials' acceptance and practice of secondary rules.

One's critical reflective attitude toward a duty-imposing norm presupposes one's understanding of the norm act of that rule. Without a proper grasp of the mode of conduct specified in a norm, it does not make much sense to take the norm as a public standard of behavior. The norm act of the Rule of Recognition, namely identifying valid laws in accordance with the criteria specified in the Rule of Recognition, is a rule-constituted act. One can fully grasp the meaning of law-identifying acts only when one understands what constitutes the sources of law. Chief among the sources of law in a modern legal system are exercises of legislative powers. To understand the elements of legislation and take it as a source of law, one must understand and accept the rules of change that determine who has legislative power and the procedures or formalities for enacting laws. As a result, the critical reflective attitude toward the duty-imposing aspect of the Rule of Recognition presupposes a committed attitude toward the rules of change. There is not only a connection of contents between the Rule of Recognition and the rules of change, but also a conceptual connection between the acceptance of (the duty-imposing aspect of) the Rule of Recognition and the

¹²⁶ For discussions on disagreements over the details of the Rule of Recognition, see Kramer, *A Defense of Legal Positivism*, 142-46; Kramer, *Where Law and Morality Meet*, 105-6; Kramer, *H. L. A. Hart*, 84-85.

acceptance of the rules of change.¹²⁷

The formulation of one's committed attitude in relation to power-conferring rules (the recognitional attitude) proposed in the previous section offers an explanation of such a conceptual connection. A legal official who accepts a rule of change that empowers someone to enact laws will recognize that the performance of an act that satisfies the conditions specified in the rule of change constitutes an exercise of legislative power and thus creates a valid legal rule. Furthermore, the agent will be inclined to get other officials to recognize the validity of the legislative act and its legal consequence (the enactment of laws), and to criticize those who do not show their proper recognition of the relevant legal facts. As a result, the officials' collective acceptance of a rule of change, namely their collective recognition of the legal changes made by exercises of legislative powers, implies their critical reflective attitude toward the acts of law-identification in accordance with the law-making criterion specified in that rule of change. The derivative censorial attitude, combined with the officials' convergent behavior of law-identification, will give rise to a social rule of obligation that requires them to identify legal rules in accordance with the law-making criterion expressed in the rule of change. All such derivative social rules of obligation about law-identification, which stem from the acceptance of the rules of change, constitute the duty-imposing aspect of the Rule of Recognition: the criteria of legal validity that legal officials have an obligation to apply in ascertaining legal rules.¹²⁸

The intertwining of the social rules of law-identification and the basic rules of change does not imply that the role of the Rule of Recognition in law-identification can be entirely

¹²⁷ For similar views, see Gardner, *Law as a Leap of Faith*, 106; Kramer, *H. L. A. Hart*, 97-98, 101-3.

¹²⁸ Indeed, the obligation to take precedents and customary laws as the sources of legal norms is not derived from the acceptance of the rules of change.

replaced by the rules of change.¹²⁹ As we have seen, the Rule of Recognition must contain standards that determine the superiority of some law-ascertaining determinations over other such determinations. These standards typically empower some officials to invalidate the law-ascertaining determinations made by other officials. The powers conferred by the Rule of Recognition are not derived from legal officials' collective acceptance of the rules of change. Therefore, viewing the Rule of Recognition as reducible to the rules of change leaves unexplained the empowering dimension of the Rule of Recognition.¹³⁰ The normative powers conferred on legal officials by the Rule of Recognition is closely related to the officials' acceptance of the rules of adjudication. When one accepts a rule of adjudication, one recognizes as authoritatively binding the determinations of judges about whether any violations of the laws have occurred, and one criticizes those who do not recognize such determinations. Any violation-detecting determination must include the judge's law-ascertaining determination.¹³¹ The fact that the former is authoritatively binding upon other officials implies that the latter is also authoritatively binding. The judge's law-ascertaining determination can be authoritatively binding only when she is empowered to invalidate the conflicting law-ascertaining determinations made by other officials. As a result, the acceptance of the rules of adjudication implies the acceptance of the power-conferring aspect of the Rule of Recognition.¹³² In addition, the acceptance of the rules of adjudication

¹²⁹ For a view that holds the main functions of the Rule of Recognition to provide validity criteria, to obligate legal officials to identify the laws in accordance with such criteria, and to empower some officials to invalidate other officials' law-ascertaining determinations can be performed by the rules of change, see Waldron, "Who Needs Rules of Recognition," 339-45.

¹³⁰ Kramer presents another line of argument against this view of the Rule of Recognition, which is focused on its inability to account for the duty-imposing aspect of the Rule of Recognition, see Kramer, *H. L. A. Hart*, 101-3.

¹³¹ Kramer, *Where Law and Morality Meet*, 104-5.

¹³² For a similar view, see Kramer, *H. L. A. Hart*, 98.

presupposes the acceptance of the rules of change. The rules of adjudication empower the judge to determine the legal relations between legal agents in accordance with the rules enacted by the legislative authority. Only when one recognizes the legislative authority's power to make valid laws can one accept the judicial decisions made in accordance with such laws as authoritatively binding.

In official legal activities, the practices of the three kinds of secondary rules are mutually supportive.¹³³ Legal officials' acceptance of the Rule of Recognition, namely their acceptance of the validity criteria as public standards of law-identification and their acceptance of certain law-identification determinations as authoritatively binding, involves their acceptance and practice of the other two kinds of secondary rules. As was noted above, the power-conferring aspect of the Rule of Recognition is presupposed by the acceptance of the rules of adjudication; the duty-imposing aspect of the Rule of Recognition is derived from legal officials' acceptance of the rules of change. Correspondingly, the acceptance of the rules of change and legislative authorities facilitate the operation of a legal system only when most legal officials accept that the law-identification determinations made by judges or high-level legal officials are authoritatively binding (the power-conferring aspect of the Rule of Recognition) and that judges are empowered to make legal decisions with regard to violations of laws (the rules of adjudication). Similarly, the acceptance of the rules of adjudication is significantly dependent on the acceptance of the Rule of Recognition and the rules of change. Legal officials' collective acceptance of a power-conferring rule of adjudication implies a shared rule of obligation to recognize as legally valid the judicial decisions made by judges. This obligation presupposes another two obligations: one is the obligation to recognize the validity criteria

¹³³ Gardner, *Law as a Leap of Faith*, 106; Kramer, *H. L. A. Hart*, 97-98

specified in the Rule of Recognition as public standards of law-identification;¹³⁴ the other is the obligation to recognize the law-identification determinations made by judges as authoritatively binding. The former is based on the acceptance of the duty-imposing aspect of the Rule of Recognition (which is derived from the acceptance of the rules of change); the latter is derived from the acceptance of the power-conferring aspect of the Rule of Recognition.

¹³⁴ Kramer, *H. L. A. Hart*, 104.

Chapter Three

Power-Conferring Norms and the Social Foundations of Law

The present chapter aims to explore the social foundations of law. The social character of law is of vital importance because law's facticity has a profound effect on the formation of social reality, on the law-addressees' self-understanding, and on the normative structure underlying people's interactions. Most accounts of law's social character center on the criteria of the intra-system validity of law. However, the practices of such validity criteria, as I shall argue, constitute only part of the social foundations of a legal order.

Normative order, in its simplest form, involves people's matching their conduct to a certain prescribed pattern. The social dimension of the simplest normative order consists in people's commitment to a norm that specifies a mode of conduct as obligatory – their compliant behavior and their committed attitude toward that norm. The social foundations of a legal order, by contrast, are much more complex. A legal order, the overall normative order within a modern legal society, is the consequence of the integration of formal laws and informal social customs that occurs in ordinary people's social lives. Legal agents connect these two normative realms primarily through exercising legal powers to form, to eliminate, and to modify (general or particular) normative statuses or relations. Through legislation and adjudication, customary rules developed in people's ordinary interactions can be incorporated into formal laws and legal reasoning and thus be backed by the state's recognition and coercive force. The normative framework established by enacted laws is entrenched in people's ordinary lives and informal normative practices through ordinary people's extensive exercises of private legal powers and legal officials' enforcement of formal laws.

This chapter begins with a brief reflection on the notion of a legal system. I shall argue for the philosophical significance of the concept of a legal system by examining Ronald Dworkin's dismissal of the pursuit of such a concept in jurisprudence (3.1). Then, I will consider a prevailing view that mistakenly conflates the social basis of a legal system with the social basis of the Rule of Recognition (3.2). This misguided conception of the social foundations of law is rooted in a theoretical tendency in contemporary Anglo-American jurisprudence to efface the role of citizens, or at least to banish them to the outer circles. To argue against this official-centered approach to law, I will scrutinize three key notions in Scott Shapiro's planning theory of law – the notions of legal activity, legal community and legal authority – and provide my critique of Shapiro's account (3.3). On the other hand, I will also consider the theoretical attempt to incorporate ordinary citizens' perspectives into the analysis of law by virtue of expanding the practitioners of the Rule of Recognition. This proposal avoids the centralist account of law at the cost of obscuring the boundaries between official and unofficial legal practices (3.4). Finally, I suggest an extended account of law's social basis, which involves both officials' and non-officials' normative activities. This widened conception of law's social foundations highlights the active role of ordinary citizens in maintaining a legal system and the connection between the use of power-conferring laws and the maintenance of legal order (3.5).

3.1 Legal System: General or Parochial?

Not all legal philosophers find the notion of a legal system or a legal order worth a philosophical exploration. Ronald Dworkin, while admitting that the word "law" can be employed to "name a particular type of institutional social structure," dismissed any pursuit of

the concept of law in this sense (what he termed as “the sociological concept of law”) as of minor philosophical importance.¹³⁵ Dworkin insisted that the doctrinal concept of law is of central importance in general jurisprudence.¹³⁶ The doctrinal concept, on Dworkin’s view, is concerned with the grounds that make propositions of law true. Since propositions of law play a crucial role in communicating what the law requires, permits, or empowers in a particular jurisdiction, the grounds of legal propositions—the doctrinal concept of law—must have great practical and philosophical significance. By contrast, the sociological concept of law, which is employed when we make reference to a distinctive social institution of governance, namely a legal system, is typically operative in empirical studies such as sociology and anthropology. Theorizing the notion of a legal system, Dworkin maintained, is only useful in specific contexts to facilitate particular empirical research projects.

Dworkin’s argument can be summarized as follows. Firstly, we have no settled linguistic practice – either through the application of shared semantic criteria or by reference to the intrinsic nature of the denoted phenomenon – that renders it possible to mark out the extension of the concept of law as an institutional social structure. The idea of a legal system is an *imprecise criterial concept*. Concepts that function as criterial, Dworkin explained, “set out the criteria for the correct application of the associated term or phrase.”¹³⁷ The precision of these concepts is dependent on the definitions on which people agree or the rules followed by those who share the concepts. Some criterial concepts are precise because the shared criteria

¹³⁵ Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), 3-4.

¹³⁶ Dworkin distinguished four concepts of law: the doctrinal concept, the sociological concept, the taxonomic concept, and the aspirational concept. The taxonomic concept of law, within any political community that has law in a sociological sense, picks out a set of discrete standards labelled as “legal” as opposed to other kinds of standards. The aspirational concept of law denotes a political ideal of legality. For the sake of argument, I will focus my attention only on the sociological concept and the doctrinal concept.

¹³⁷ Dworkin, *Justice in Robes*, 9.

unambiguously dictate the answer to any question concerning the extension of these concepts.¹³⁸ Other criterial concepts, in contrast, are less precise and cannot always fulfill the criterial function. On the basis of such an understanding of criterial concepts, Dworkin admits that “[w]e – experts and non-experts alike – do share a rough sociological concept of law.” However, he warned, it is silly to argue about whether a particular institutional social structure really counts as law when it lacks some typical features we may find in clear-cut legal systems.¹³⁹ For “our language and idiom are rich enough to allow a great deal of discrimination and choice in the words we pick to say what we want to say, and our choice will therefore depend on the question we are trying to answer, our audience, and the context in which we speak.”¹⁴⁰ Within the wide range of the ordinary concept of a legal system we share, researchers are allowed to stipulate any more refined definitions which better serve their respective purposes. The applicability of any such sophisticated concept is sensitive to the relevant context; employing such a concept outside its apt context may be pointless and bewildering.

Further, Dworkin was emphatic that legal systems are a social kind, not a natural kind; they have no intrinsic structure or essential nature that determines their boundaries and thereby distinguishes them from other social kinds. According to Dworkin’s analysis of criterial concepts and natural kind concepts, any claim about the intrinsic nature of the phenomenon picked out by a criterial concept makes no sense.¹⁴¹ As a consequence, Dworkin was confident that we could never reach an account of a legal system, as a phenomenon picked out by a

¹³⁸ Ibid.

¹³⁹ Ibid., 3.

¹⁴⁰ Ibid., 4.

¹⁴¹ Dworkin, *Law’s Empire*, 9-10.

criterial concept, that reveals its intrinsic nature and thereby yields a determinate answer to every question about the extension of that concept. In short, Dworkin claimed that our concept(s) of a legal system cannot provide us with a set of semantic criteria sufficiently general and precise to delimit the concept's extension. Any refined concept specified in a particular context, by contrast, is always relative to a given research project and thus inevitably fails to serve as a reliable touchstone for identifying legal systems in general. Nor does the sociological concept of law disclose any philosophically interesting essential nature of legal systems, as they are not natural kinds and thus have no intrinsic (physical or biological) structure to be explored. Hence, the concept of a legal system perceived by Dworkin as an imprecise criterial concept does not seem to be *per se* philosophically significant.

Secondly, Dworkin's refusal to ascribe much philosophical interest to the concept of a legal system is partly due to his insistence on a certain method for general jurisprudence. Dworkin viewed any jurisprudential investigation as a project that takes the legal agent's viewpoint (especially the judge's view) and "tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face."¹⁴² He juxtaposed the participant's (internal) viewpoint with the sociological or historical or anthropological (external) perspective, which is typically embraced by those who explore the law as a social phenomenon by examining the interrelationships between law and other parts of a society. The latter – social-scientific – approach seldom delves into the distinctive nature of legal argumentation through which legal agents argue for their entitlements. Instead, social scientists place the law (as an institutional structure) in a broader social context when conducting their research; they demand different working definitions of a

¹⁴² Ibid., 14.

legal system, each of which is dependent on the particular aim of a research project. Through this contrast, Dworkin affirmed a rigid dichotomy between two categories of intellectual pursuits concerning the law and a dichotomy between their respective methodologies. This stark distinction suggests that jurisprudential inquiries should be general, philosophical, and launched within the participant's point of view, whereas the sociology of law is context-specific, empirical, and typically conducted from an observer's viewpoint.¹⁴³ Any concept of a legal system is developed by an observer to describe a set of interconnected social phenomena we perceive as law; such a concept, according to Dworkin, has little to do with jurisprudential enterprises because it lacks concern for law's argumentative nature and is susceptible to alteration for different theoretical aims.

Thirdly, in addition to underscoring the imprecision of the concept of a legal system and its methodological inappropriateness for jurisprudential research, Dworkin saw any attempts to identify legal systems as futile for core jurisprudential investigations. He compared the concept of law in its doctrinal sense and in its sociological sense: "Little normally turns on whether and how the indistinct boundaries of [the sociological concept of law] are solved; but ... a great deal does turn on how precisely we understand [the doctrinal concept of law]."¹⁴⁴ To support his contention without implausibly denying any connection between the grounds of propositions of law in a particular jurisdiction and the legal system in which such grounds are operative, Dworkin stated his understanding of the relation between these two notions. "Nothing is a legal system in the sociological sense unless it makes sense to ask what rights

¹⁴³ Ibid., 13-14. Dworkin did not maintain that these two theoretical viewpoints are entirely separate; He believed that both perspectives must 'embrace or take account of the other'. But Dworkin insisted that the external perspective includes the internal one more pervasively.

¹⁴⁴ Dworkin, *Justice in Robes*, 4.

and duties the system recognizes. ... [But] not every set of norms that deploys rights and duties is a case of law.”¹⁴⁵ In addition, Dworkin claimed that one might for various reasons deny that the Nazis had a legal system, but one can nevertheless intelligibly scrutinize what entitlements the Nazi law recognized.¹⁴⁶ Dworkin seems to suggest that (on the one hand) the possibility of one’s grasp of the doctrinal concept is necessary—but not sufficient—for one’s grasp of the sociological concept and (on the other hand) one’s grasp of the latter concept is *not necessary* for one’s enquiring into what the law prescribes within a jurisdiction. Since, according to Dworkin, the principal task for legal philosophers is to offer answers to questions concerning the doctrinal concept of law, and since the sociological concept is not necessary for tackling these questions, the analysis of legal systems does not obtain a similar philosophical status even if it may contingently facilitate our understanding of the doctrinal concept of law.

The exclusion of the idea of a legal system from core jurisprudential issues, however, is misguided. Dworkin misleadingly employed “the sociological concept of law” to imply that the notion of law as a structure of governance is of interest only to theorists engaged in empirical studies. To be sure, a host of working ideas concerning the nature of a legal-governmental system may be developed by sociologists for the purpose of carrying out different research projects. However, the notion of a legal system is not exclusively for the sociologist’s use. Nor does its vagueness necessarily render the concept worthless in jurisprudence. As Frederick Schauer correctly observes, in addition to the notion of legal system, many other concepts have no settled or precise boundaries. Such concepts have cores as well as penumbras.¹⁴⁷ The inevitable imprecision one may find on the boundary of a

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Frederick Schauer, “Institutions and the Concept of Law,” in *Law as Institutional Normative Order*, ed.

concept does not necessarily eliminate the intelligibility and philosophical significance of that concept, otherwise it would not make much sense to conduct inquiries into the concept of games, the analysis of which is in fact philosophically illuminating.

Also, Dworkin's methodological argument against jurisprudential investigations into the concept of a legal system is unsustainable. According to his stark internal/external dichotomy between the two categories of theoretical stances on legal studies, a legal theorist must either adopt the legal agents' perspective and get involved in legal reasoning and argumentation (if she aims to conduct research in general jurisprudence), or take an entirely external viewpoint to record the regularities in the observable behavior and their relations to other social phenomena (if she is engaged in empirical legal studies). Were Dworkin correct in his positing of the stark distinction between theoretical perspectives, and were he also correct in his insistence that an adequate account of general jurisprudence must proceed from an internal (interpretive and argumentative) perspective, his assessment of the theoretical import of the concept of a legal system in jurisprudence would be undeniable. However, he is incorrect on both counts. Between the perspective of committed legal agents and the extreme external viewpoint of a social scientist, there are alternative points of view legal theorists may adopt. As discussed in the preceding chapter, Hart in *The Concept of Law* revealed one possibility: a jurisprudent may describe the way in which the legal agents in a certain legal community view and respond to the laws from the internal point of view without sharing such a committed perspective. The theorist is still an observer; only for the purpose of understanding what it is to adopt the internal point of view does he project himself into the place of an insider. The theorist attributes the normative attitudes and beliefs to the legal agents whose interactions he

Maksimilian Del Mar and Zenon Bankowski (Farnham: Ashgate, 2009), 37-38.

seeks to elucidate. In addition, a theorist may speak as if he were a member of the legal community who accepts relevant legal rules as public standards. A law professor who teaches and writes about the Penal Code of Japan, for example, may give voice to the Japan Penal Code's perspective as if he is delivering a verdict within Japan's court system. Both viewpoints, the Hartian hermeneutic point of view and the simulative point of view,¹⁴⁸ are neither the committed perspective adopted by an insider of a legal system nor an extreme external perspective that entirely ignores the argumentative nature of law. Hence, even if the application of the concept of a legal system is not illuminating for Dworkin's interpretive and justificatory enterprise of jurisprudence, such a concept may be useful for legal theories developed from a different perspective.

The defenders of Dworkin may argue against the tenability of a descriptive legal theory. It seems that, were they to prevail against their opponents in the methodological debate, their disdain for the sociological concept of law would be vindicated. However, the "sociological question" Dworkin set aside remains crucial even in a theory of law that predominantly concentrates upon issues regarding the truth conditions of legal propositions. Firstly, as John Gardner points out, any answer to the doctrinal question regarding the grounds of propositions of law presupposes that the law is jurisdiction-specific: some propositions of law that are true in one jurisdiction are not true in another. The fact that the law has boundaries is certainly of philosophical significance, for some other normative orders do not share this feature. Once we ask why legal propositions can vary from jurisdiction to jurisdiction and compare legal systems with other normative orders such as morality and religion, we initiate inquiries about the

¹⁴⁸ For the distinction between the Hartian hermeneutic standpoint and the simulative point of view, see Kramer, *In Defence of Legal Positivism*, 165-66.

sociological concept of law.¹⁴⁹ Since the feature of jurisdictionality distinguishes legal propositions from propositions in other normative domains, answers to questions about the scope and boundaries of legal systems – the “sociological” issue of law – are prerequisites for ensuing doctrinal issues. Secondly, since the fact that a normative proposition emanates from a certain legally-constituted body is highly relevant to that proposition being a proposition of law, what makes an institution a legal one, namely what makes that institution part of a legal system, must be of great importance to the doctrinal question.¹⁵⁰ To be sure, as Dworkin has devoted much of his writing to arguing, the fact of being enacted by the parliament or accepted by the courts might not be a sufficient condition for a legal norm to be legally valid; it may be contested whether a general legal rule is defeated in particular cases. But one can hardly deny that the identification of an organization as a legal one is material to the legal validity and binding force of normative propositions it issues, accepts, or applies. Legal norms are fallible normative propositions made by human beings within a complex institutional setting. The legal-ness of an organization can give it the legally recognized powers to render a normative proposition legally valid and, at least presumably, binding upon its addressees. Moreover, though Dworkin’s disregard of the concept of legal systems can be seen as an extension of his efforts to refute the Razian positivist’s central claim that the truth conditions of legal propositions are solely a matter of institutional pedigree, his stark distinction between the sociological concept and the doctrinal concept of law is not shared by all anti-positivists. Nigel Simmonds, for instance, criticizes Dworkin’s dismissive attitude toward the notion of legal systems for underestimating the connections between the sociological concept and the doctrinal

¹⁴⁹ Gardner, *Law as a Leap of Faith*, 270-72.

¹⁵⁰ Schauer, “Institution and the Concept of Law,” 38-41.

concept. By appealing to the interconnectedness of our concepts, Simmonds argues that “any philosophical explication of a concept such as the concept of law (even law in a sociological sense) tends to necessitate analyses of a multiplicity of related concepts.”¹⁵¹ Hence, even though we have no settled linguistic practice that determines the extension of the concept of a legal system, such a concept is not an “empty classificatory box that is to be filled by [a sociologist’s or an anthropologist’s] own stipulation.”¹⁵² The concept of a legal system, according to Simmonds, does have limits; its boundary hinges upon its connections to related concepts such as the doctrinal concept of law, the concept of legal duty, the concept of legal right, and so forth. We can assess the appropriateness of one’s concept of a legal system by examining how one understands the related concepts. As a result, there can and should be a general philosophical inquiry into the sociological concept of law.¹⁵³ The concept of a legal system, as opposed to the doctrinal concept of law, provides a broader view on the overall operation and the orderliness of law. The analysis of such a concept must contain an explication of the systematic connections among the legal norms in a particular jurisdiction as well as a description of how legal agents’ acts (including the speech acts they perform when being engaged in legal discourse) constitute a systematic practice that can sustain the authoritative structure of law. The remaining sections of this chapter will focus attention on the general concept of a legal system and its social basis.

3.2 The Social Basis of a Legal System and the Social Basis of the Rule of Recognition

Law is a socially structured institutional normative order. The idea that legal order rests on

¹⁵¹ Nigel E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), 29-30.

¹⁵² Ibid., 31.

¹⁵³ Ibid., 29.

social facts or that it is intimately linked to social practice, though usually highlighted by legal positivists, does not divide legal positivism from natural law theories. Hardly any legal philosopher contends that modern legal systems need not be established against certain social backgrounds. The central tenet of legal positivism is the *separability* of law and morality. This doctrine impugns any necessary connections between the legal domain and the moral domain that are supposed to establish the character of law as an inherently moral phenomenon.¹⁵⁴ Among the diverse forms of legal positivists' endeavors to dissolve necessary connections between law and morality, the attempts to disentangle the criteria of legality from substantive morality and to base such criteria on social facts have drawn most attention and have given rise to the fiercest debate. An inclusive legal positivist, for example, would submit that the criteria of legality *can* but *need not* incorporate substantive moral criteria (as a necessary or as a sufficient condition for legal validity).¹⁵⁵ From this point of view, the criteria of legality are entirely determined by social facts – the behavior, the beliefs, the dispositions, and the attitudes of certain actors in the community – even when those criteria are focused on moral principles. By contrast, even if we adopt an extreme version of natural law theory according to which the only criteria for validating normative propositions as law are principles of political morality, those principles can be effective as law or incorporated as the criteria of legality only when they are related to certain institutions or entities in the social world.¹⁵⁶ Hence, the supporters of both rival camps must acknowledge a social basis of law.

¹⁵⁴ As Matthew Kramer points out, the separability of the legal domain from the moral domain is multifaceted. The putative “separability thesis” is in fact an “array of challenges to anti-positivist theories.” See Kramer, *In Defense of Legal Positivism*, 2-10; *Where Law and Morality meet*, chapter 5-7. See also Nigel Simmonds, *Law as a Moral Idea*, 39-41. For a denial of the “no necessary connection thesis” as the basic doctrine of legal positivism, see Gardner, *Law as a Leap of Faith*, 48-51.

¹⁵⁵ An anti-positivist need not insist on the necessary incorporation of moral standards into the criteria of legality. One could establish a necessary connection between law and morality in another fashion.

¹⁵⁶ Christopher Kutz, “The Judicial Community,” *Philosophical Issues* 11 no. 1 (2001), 443-44.

From Society-Wide Practices to Official Activities

The shared awareness of the social aspect of law forces a question to the foreground: what constitutes law's social foundation? In the tradition of legal positivism, the focus of the social facts underpinning any legal system has been the practices that constitute what is assumed to be the law-validating institution(s). Classical positivists tended to anchor the sociality of law to a society-wide practice by the bulk of the population. For Austin, the social aspect of law resides in the general observance of the sovereign's commands by law-subjects. The general public's convergent behavior of complying with the laws contributes to the conditions for the existence of law by partly constituting the position of the Austinian sovereign as such.¹⁵⁷ Hart, by contrast, differentiated between validity and efficacy. Although he admitted that “[o]ne who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement to the effect that the system is generally efficacious,”¹⁵⁸ he disentangled what constitutes the social foundation of legal authorities and its ability to issue legally valid rules from the general obedience to such rules by law-subjects. The legal status of any norm, on Hart's account, is no more grounded on the general observance of law-addressees, but is a matter of satisfying the criteria laid out in a fundamental legal rule – the Rule of Recognition in Hart's account. This fundamental rule exists only when the majority of law-applying officials use it as the authoritative standard for law-ascertainment.

It should be noted that, with his conceptual distinction between legal validity and efficacy and his explication of the official legal practice of law-ascertainment that sustains the Rule of

¹⁵⁷ Gerald Postema, “Conformity, Custom, and Congruence: Rethinking the Efficacy of Law,” in *The Legacy of H. L. A. Hart*, ed. Matthew Kramer, Claire Grant, Ben Colburn, and Antony Hatziatavrou (Oxford: Oxford University Press, 2008), 45.

¹⁵⁸ Hart, *The Concept of Law*, 104 (emphasis in original).

Recognition, Hart did not entirely exclude legal practices of laymen from law's social foundations. Admittedly, Hart's account locates the social basis of law predominantly in law-applying activities of officials, in particular the adjudicative activities of judges. But he acknowledged that the general conformity with enacted laws by the populace is also necessary for the existence of a legal system. Thus, Hart recognized two necessary and sufficient conditions for any central instance of a legal system:¹⁵⁹

- (1) Rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed;
- (2) A system's rule of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.

When Hart dealt with the complex phenomena of legal practices, he employed several pairs of concepts to facilitate our comprehension. These include citizens/officials, obedience/acceptance, primary rules/secondary rules, passive/active, external statements/internal statements, and efficacy/validity. Such concepts figure saliently in his elaboration of the two existence conditions of a paradigmatic legal system; they can be divided, by reference to the two conditions, into two groups. The concepts of citizens, primary rules, obedience, passivity, external statements, and efficacy are involved in the first condition, whereas the second condition is concerned with officials, secondary rules, acceptance, activity, internal statements, and validity. This dichotomous structuring of the minimum existence

¹⁵⁹ Ibid., 116-17.

conditions of a paradigmatic legal system represents what Hart perceived as the different relations of the law to private individuals and to legal officials.

First of all, the two conditions describe the social context which is necessary and sufficient for the existence and maintenance of a paradigmatic legal system. This context comprehends two groups of people acting in their respective ways. The majority of legal officials, as Hart indicated in the second condition, adopt the internal viewpoint toward secondary rules which are mainly concerned with the identification, introduction, modification, elimination, and application of primary rules. They must treat such secondary rules as public standards of official behavior, and they must likewise view the primary rules as public standards of behavior – for those primary rules are identified as legally valid by the application of the secondary rules. By contrast, the sole indispensable way in which ordinary citizens contribute to the functioning of their legal system is their general compliance with the legal obligations imposed on them. In Hart's theory, the officials are, *prima facie*, engaged in a shared activity. For, according to the second condition, they are required to take certain rules as *public* standards applied to members in a *community*.¹⁶⁰ With their convergent behavior of applying the same legality criteria, the officials are collectively committed to a larger social activity of running the operations of a legal system. The critical reflective attitude toward deviations from the aforementioned criteria makes the officials responsive to one another's behavior.¹⁶¹ By

¹⁶⁰ The “community” in which those rules are applied as public standards is not (or rarely) limited to the community of legal officials. Typically, it includes some or all law-addressees who are non-officials.

¹⁶¹ Some argue that Hart's notion of the internal point of view allows for both a collective reading and a distributive reading. According to the distributive reading, accepting a rule amounts to forming an “individual disposition” to guide behavior by it without any “we-intention.” See Carlos Bernal, “Austin, Hart, and Shapiro: Three Variations of Law as an Entity Grounded in a Social Practice,” *Rechtstheorie* 44 (2013): 157-88; Damiano Canale, “Is Law Grounded in Joint Action?” *Rechtstheorie* 45 (2014): 289-312. It is, however, far-fetched to understand Hartian rule-acceptance as such an individualistic approach. For, as Hart explicitly stated, “the internal point of view [is] the view of those who do not merely record and predict behavior conforming to rules, but use the rules as standards for appraisal of their own and others' behavior.” See Hart, *The Concept of Law*, 98.

contrast, the general obedience on the part of citizens, as specified in the first condition, does not presuppose any sense of identity with others as a community. Nor do the citizens necessarily treat legal rules as publicly binding. One may yield to legal authority for one's own part only, without commitment to a collective activity.¹⁶²

Hart saw the social basis of law as the combination of both officials' and citizens' practices. Regrettably, he was largely silent about how these two groups interact in legal discourse. The idea of law that informs Hart's theory is an autonomous form of normative reasoning – legal discourse focused on an array of norms brought into existence by the Rule of Recognition and other secondary rules.¹⁶³ Such a distinctive sort of discourse, on Hart's account, is mainly grounded in and supported by the rule-following activities of legal officials, not citizens. The fact that modern legal systems are institutionalized, formalized, and centralized, with officials charged with creating, applying, and enforcing the laws, draws Hart's attention to the crucial role of those officials in legal systems. Moreover, his insightful disentanglement of law's validity and law's efficacy underscores a gap between valid laws traceable to official behavior and their application in the ordinary lives of citizens. It moves ordinary citizens' practices to the margins of the social basis of a legal system.

Eliminating the Misguided Conflation

With the conviction that social practices are essential for the existence of legal systems, legal philosophers sympathetic to Hart's jurisprudential proposal have concentrated on the nature of the Rule of Recognition. Those theorists strive to unravel the essential features of the project

¹⁶² Hart acknowledged that citizens can and often do take the internal point of view toward the laws of their society. See Hart, *The Concept of Law*, 101-2, 108.

¹⁶³ Simmonds, *Law as a Moral idea*, 25, 121.

that officials undertake when identifying the laws and to develop a theory that best explicates (1) the relationship between legal officials and the social basis of the Rule of Recognition and (2) the relationship between the social foundation of law and its normative force.¹⁶⁴ A common view on the social basis of law as the official practices of law-ascertainment, however, suggests a picture of law that departs from Hart's portrayal of legal systems. It conflates (1) the social basis of law and the social basis of the Rule of Recognition and (2) the normativity of law and the normativity of the Rule of Recognition. With this conflation, that common view understates the role of citizens in maintaining a legal system. In the remainder of this section, I shall reflect on the conflation of these two social bases.

When he reflects on the social basis of law, John Gardner explicitly submits that “[t]he answer favored by Hart relied on the idea of a social rule.”¹⁶⁵ Gardner claims that, by arguing that each legal system has an ultimate rule that determines which other rules belong to the system, Hart offered a solution to the question (set aside by Dworkin as uninteresting) regarding the jurisdictional boundaries of law.¹⁶⁶ To be sure, Gardner is correct in maintaining that the “jurisdiction-specific” character is central to law and is certainly a matter of practical and philosophical significance. He also rightly thinks that the social basis of law is the key to this jurisdictional puzzle.¹⁶⁷ But Gardner mistakenly construes the practice of the fundamental Rule of Recognition as the sole element of law’s social basis, and he attributes this misguided understanding to Hart. Were the sociality of law to consist merely in the practice of a Rule of Recognition by legal officials in each legal system, differences between Rules of Recognition

¹⁶⁴ See e.g., Jules Coleman, *The Practice of Principle*, 95-102; Kutz, “The Judicial Community;” Marmor, *Social Conventions*, 153-75; Shapiro, *Legality*, 176-81, 204-11.

¹⁶⁵ Gardner, *Law as a Leap of Faith*, 280.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., 270-71, 280.

should be able to determine the boundaries between jurisdictions *per se* in any circumstances. However, notwithstanding the fact that those official practices settle the jurisdictional issues in most cases, they are not always reliable; a persistent practice of legal officials may not be sufficient to secure the identity of a legal system.

Let us take the strained relations between the Republic of China (Taiwan; ROC) and the People's Republic of China (PRC) as an example. Most people, if not all, recognize the democratic regime in Taiwan as a legal-governmental system separate from its counterpart in mainland China. The jurisdiction of the former includes Taiwan, Penghu Islands, Kinmen Island, and two major islands in the South China Sea – Pratas Islands and Spratly Islands. The legal authority of the PRC government, in contrast, extends over the mainland. People in Taiwan are bound by the laws promulgated by Taiwan's government; the mainlanders, by contrast, are subject to the regulation of the PRC laws. If one condemns a Taiwanese, who has committed a theft in Taipei, for violating a certain provision of the PRC Criminal Code, the censure will be deemed pointless. Likewise, if one maintains that a young couple in Beijing has never been legally recognized as married because they did not follow the ROC Civil Code's conditions for registering their marriage at the Household Administration Bureau, one will be criticized for a lack of knowledge of jurisdictions. If we take note of the correlation between the laws in force in a particular place and citizens' compliant behavior, we will conclude that there exists a boundary between these two jurisdictions.

However, the jurisdictional boundaries we seek in this case will become obscure (or even disappear) if we entirely rely on a study of official behavior and attitudes in both regimes. From the viewpoint of the PRC officials, their legal practices have been unceasingly expressive of

the proposition that Taiwan is part of the sacred territory of the People's Republic of China,¹⁶⁸ a proposition which implies that there is only one jurisdiction across the mainland and Taiwan. Further, PRC officials hold that “the Taiwan Compatriots are under the common obligation of all Chinese people to safeguard China’s sovereignty and territorial integrity.”¹⁶⁹ Similarly, the ROC officials, at least before the democratic reforms that began in the mid-1980s and included the abolition in 1991 of the *Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion*,¹⁷⁰ claimed the legitimate power to rule the mainland for more than forty years. The contrast between the constitutional provisions and the official practices of the two rival governments is not useful in distinguishing one jurisdiction from the other; or rather, it seems to convert the question concerning the boundaries of two legal systems into an inquiry concerning who possesses the legitimate power in one jurisdiction.

As should be clear now, we may face difficulties in ascertaining the scope of a jurisdiction if we investigate only the official activities of law-ascertainment. This reveals the implausibility of holding that the officials’ practice of the Rule of Recognition exhausts the social basis of law. To be sure, the nature of official behavior that underwrites the ultimate rule of any legal system is far from trivial. A thorough survey of such social phenomena facilitates

¹⁶⁸ The preamble of the *Constitution of the People's Republic of China*. See also the *Anti-Secession Law*, Article 2: There is only one China in the world. Both the mainland and Taiwan belong to one China. China's sovereignty and territorial integrity brook no division.

¹⁶⁹ Ibid.

¹⁷⁰ The *Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion* were a series of constitutional amendments to the Constitution of the Republic of China effective from 1948 to 1991. The Provisions established martial law in Taiwan and curtailed civil liberties. The official rationale for the Provisions was the Chinese Civil War that pitted the Nationalist Government against the Communist Party of China. The rescinding of the Provisions caused some ambiguities in cross-strait relations and the political status of Taiwan, raising questions such as whether the Communist rebellion has succeeded and the PRC government is recognized as legitimate by the ROC. See Harvey Feldman, ed., *Constitutional Reform and the Future of the Republic of China* (Armonk, NY: M. E. Sharpe, 1991), 1, 3-7, 39.

our understanding of the formation of legal norms. Moreover, the social foundation of the Rule of Recognition in a crucial sense explains why law is social – for the existence and contents of individual legal norms in any system are ultimately determined by official activities. However, a comprehensive account of law's social basis must satisfactorily resolve the philosophical puzzle of law's jurisdictional feature: it must be capable of explaining the social conditions under which a legal system exists and thus of distinguishing one jurisdiction from another. Since the official practice underpinning the Rule of Recognition is, at least in some cases, insufficient in tackling the jurisdictional issue, we must, conceptually, distinguish the social basis of the Rule of Recognition from the social basis of a legal system and seek a more elaborate account of the latter.

3.3 Debunking the Official-Centered Approach to Law

Identifying the social basis of law with the social basis of the Rule of Recognition is intimately linked to the theoretical tendency in Anglo-American jurisprudence to efface the role of citizens, or at least to banish them to the outer circles. As was noted in the preceding section, Hart's conception of a fundamental Rule of Recognition that determines the criteria of legal validity in any legal system has led legal philosophers to concentrate on the nature of such a fundamental legal rule. Some philosophers understand the Rule of Recognition as a social convention. For example, Hart expressly stated in the Postscript to *The Concept of Law* that “[c]ertainly the rule of recognition is treated in my book as resting on a conventional form of judicial custom.”¹⁷¹ Andrei Marmor also sees the Rule of Recognition as a conventional rule. But he suggests that it is a constitutive convention, rather than a coordination convention, that

¹⁷¹ Hart, *The Concept of Law*, 267.

constitutes the partially autonomous practice of law-identification and undergirds the relevant organizations in official practices such as the parliament and the court.¹⁷² Some other legal philosophers avail themselves of theories of collective action and intention to account for the practice of the Rule of Recognition. For example, Jules Coleman, Scott Shapiro, and Christopher Kutz draw on Michael Bratman's notion of "shared cooperative activity (SCA)" to explain the Rule of Recognition.¹⁷³ More recently, Shapiro develops his "planning theory of law," which is grounded on Bratman's theory of social planning.¹⁷⁴ With the invocation of theories of convention or of shared cooperative activity or of social planning, legal philosophers seek an adequate account of law's social foundations that also has explanatory power for law's normative character. Despite the quite different analyses of the nature of the fundamental legal practice, the core idea of law's social foundation shared by these theorists is that law is social to the extent that the criteria of legal validity are grounded in legal officials' practice of recognizing and applying valid laws. That practice constitutes what Hart deemed a social rule that is the fundament of a modern legal system.

This "official-centered" approach to law fosters an impression that legal practices amount to the activities of law-ascertainment, law-application, and law-enforcement. The group of

¹⁷² Marmor, *Philosophy of Law*, 79; Marmor, *Positive Law and Objective Values*, 19-24.

¹⁷³ Bratman sees a SCA as a set of individual intentions and actions. Each participant of a SCA must (1) attempt to respond to the actions and intentions of other participants, (2) have a commitment to the joint activity, and (3) be committed to supporting other's efforts to play their roles in the shared activity. Although Coleman, Shapiro, and Kutz all refer to Bratman's theory, they understand the Rule of Recognition as a shared activity in different ways. Coleman sees the Rule of Recognition as a straight Bratmanian SCA. Shapiro thinks a Rule of Recognition can exist with its practitioners sincerely committed to mutual support. Kutz holds a minimal understanding: A Rule of Recognition may exist when the officials are only committed to the joint activity, without any commitment to mutual responsiveness and commitment to mutual support. See Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press, 1999), 94-95; Coleman, *The Practice of Principle*, 96-100; Shapiro, "Law, Plans, and Practical Reason," 426-32; Kutz, "The Judicial Community." For an analysis of the conception of law as a social practice, see Matthew Noah Smith, "The Law as a Social Practice: Are Shared Activities at the Foundations of Law," *Legal Theory* 12, no. 3 (2006): 265-92.

¹⁷⁴ Shapiro, *Legality*.

people who are engaged in such practices consists mainly of legal officials. However, this viewpoint falls short of an adequate explanation of both the social and the normative aspects of law. On the one hand, the omission of the role of citizens in elucidating the social foundations of law, as we have seen in the preceding section, may fail to establish the boundaries between different legal systems in some cases. Also, official-centered theories unduly concentrate on the way in which the law is presented as a form of governance, i.e., how legal rules are enacted, applied, enforced, and nullified by the ruling class for the purpose of guiding and coordinating people's behavior; such theories set aside issues concerning the interactions between officials and non-officials. At the same time, official-centered theories of law conflate the normative force of law and the normative force of the Rule of Recognition and thus encounter difficulties in explaining the authority structure of law and its binding force on ordinary people.

In the present section I shall demonstrate that the obfuscation of the role of citizens in analyzing law gives rise to a series of misconceptions regarding legal phenomena. My dissent from official-centered accounts of law's social basis will be based on a critical assessment of Scott Shapiro's planning theory of law. By examining Shapiro's views on legal community, legal activity, and legal authority, I shall reveal the extent to which such official-centered theories may distort our understanding of law.

Shapiro's Planning Theory

The central claim of Shapiro's planning theory of law – the claim that the law is first and foremost a social planning mechanism – presents the law as an instrument designed and employed by legal officials for creating and maintaining social order.¹⁷⁵ Shapiro views a *legal*

¹⁷⁵ Ibid., 172.

community as a group of social planners.¹⁷⁶ These planners adopt and apply a variety of plans and policies for the rest of the society in order to coordinate human behavior, distribute limited resources, specify the normative relations among citizens, settle disagreements, and so forth. The planners' ability to arrange public affairs is authorized and organized by a higher, more fundamental social plan. This fundamental plan – the master plan – establishes the hierarchical structure among the planners and the separation of the planning powers; it also stipulates the formal conditions for acquiring and exercising such powers. By this vertical division of labor, social policies can be formulated and implemented by certain authorized individuals, without a broad consensus among the general public. Shapiro submits that law, as a sophisticated form of social planning, is necessary for the modern world because any sizable society will inevitably face a situation in which moral disputes are diverse and significant. Solutions to these problems are hence complex, contentious, and arbitrary. In such circumstances, nonlegal forms of social planning turn out to be inefficient and costly. The hierarchical, impersonal, and institutional method of legal planning, in contrast, provides an agile, durable, and cost-efficient way to solve relevant quandaries. Given our moral need to overcome these “circumstances of legality,” legal institutions are indispensable for maintaining order in modern societies.¹⁷⁷ The planners in those legal institutions – the officials – constitute the legal community.

Shapiro's official-centered understanding of law is also manifest in his explication of *legal activities*. For Shapiro, legal activity is one variant of *social* planning; it is shared by all, or virtually all, legal officials. Legal planning is social because any of its instantiations creates or administers norms that represent communal standards of behavior; they regulate via general

¹⁷⁶ Ibid., 165. A similar understanding of the legal community was operative in Shapiro's early work. See Shapiro, “Law, Plans, and Practical Reason,” 418.

¹⁷⁷ Shapiro, *Legality*, 170-73.

policies and publicly accessible standards.¹⁷⁸ Shapiro further claims that legal activities characteristically involve exercises of *authority*. Legal officials claim authority when planning for the whole society by issuing directives irrespective of the law-addressees' consent; or they may authorize some members of the society to plan for others.¹⁷⁹ In sum, Shapiro believes legal activities are fundamentally the exclusive practice of legal officials; “[t]he business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power.”¹⁸⁰

Shapiro's explanation of legal authority is, again, an official-based account. One theoretical aim of the planning theory of law is to solve what Shapiro calls “the Possibility Puzzle.” This puzzle challenges the possibility of legal authority. On the one hand, a legal agent has a legal power to create legal norms only if some already-existing norm has bestowed that power on her; on the other hand, a norm that confers power on someone to create other legal norms exists only if some authorized individual or body has created it. Hence, any account of legal authority seems to enter into either a vicious circle (the authority's power is conferred by the norm he creates) or an infinite regress (the authority gets the power from a norm created by another authority, who gets his power from another authority, and so on).¹⁸¹ The planning theory of law, Shapiro believes, provides a solution to the possibility of legal authority without recourse to any moral facts. According to the planning theory, one possesses legal authority because one is authorized by the “master plan” to plan for other community members.¹⁸²

¹⁷⁸ Ibid., 203

¹⁷⁹ Ibid., 195.

¹⁸⁰ Shapiro, “Law, Plans, and Practical Reason,” 418.

¹⁸¹ Shapiro, *Legality*, 36-40; Shapiro, “On Hart's Way Out,” in *Hart's Postscript: Essays on the Postscript to The Concept of Law*, ed. Jules Coleman (Oxford: Oxford University Press, 2001), 149-53.

¹⁸² Shapiro, *Legality*, 180.

Shapiro believes that the planning theory can secure the existence of the fundamental legal rules that confer powers on legal authorities without generating vicious circles or infinite regresses, because the power to adopt the master plan is vested in the officials on the ground of the norms of instrumental rationality. The norms that confer the rational power to plan are acceptance-independent principles; they have not been created by any other authority.¹⁸³ In short, the source of legal powers for legal authorities to plan for others – e.g., to legislate and to adjudicate – is the master plan,¹⁸⁴ and the power to adopt the master plan is rooted in a universal rule of rationality. Shapiro’s account of legal authority is official-based because the master plan is a social plan designed for and shared by officials. The general public need not accept the master plan in order for it to obtain. On this view, legal authorities can emerge without any input from those who are subject to the sway of the authorities.¹⁸⁵ Shapiro is convinced that the exclusion of non-officials from the notions of legal community and legal activity would not undermine his explication of authority. He writes,

This objection fails ... because it neglects the possibility that legal officials can be subject to each other’s authority. Judges, for example, are subject to the authority of the legislature, for they are required to apply the rules enacted by them. Indeed, the legislature has the authority it has precisely because judges are committed to treating their directives as reasons for action and modifying their intentions and actions accordingly.¹⁸⁶

Shapiro coherently explicates his conceptions of legal community, legal activity, and legal

¹⁸³ Ibid., 181.

¹⁸⁴ The notion of the master plan should be distinguished from the Hartian Rule of Recognition. Since, according to Shapiro, the master plan establishes the authority structure of any legal system and confers legal powers on the “social planners,” it at least comprises all the Hartian secondary rules.

¹⁸⁵ Shapiro does include citizens’ compliant behavior among the conditions for a body to have legal authority. See Shapiro, *Legality*, 180. However, citizens’ attitudes, beliefs, or actions, on this view, have nothing to do with the source of power and the formation of the hierarchical authority structure.

¹⁸⁶ Shapiro, “Law, Plans, and Practical Reason,” 418-19.

authority. On the planning theory of law, these three concepts mutually define and support one another and ultimately converge on officials' rational power to create and adopt plans. The way in which Shapiro wields these legal concepts conveys the idea of law as a form of governance in a novel fashion: the law amounts to officials' plans for the society. Also, the planning theory cleverly articulates the rational ground of law's governance without recourse to any moral idea. However, the picture of law suggested by Shapiro's planning theory is incomplete. For it understates the perspective of citizens and their engagement with the law. I shall elaborate this criticism by reflecting on the three legal concepts highlighted above.

A Rebuttal of the Planning Theory

Shapiro's official-centered view of law is encapsulated by his claim that "the business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power."¹⁸⁷ Let us begin with his understanding of "the business of law." Shapiro sees legal activities as wielding legal authority by exercising legal powers. We can safely assume that by "legal power" Shapiro refers to the public legal powers to create, modify, eliminate, apply, and enforce general legal rules or particular legal rulings. For only such powers are associated with the exertion of legal authority.

To be sure, exercises of public legal powers by officials constitute the core of legal activities. But they are not the entire story. The conferral and exertion of private legal powers are also indispensable in modern legal regimes. One of Hart's theoretical contributions is to highlight the untenability of ignoring the function of power-conferring norms. Hart repeatedly referred to the far-reaching effects of the norms that bring private legal powers into existence.

¹⁸⁷ Ibid., 418.

As he wrote, “there could be no buying, selling, gifts, wills, or marriages if there were no power-conferring rules; for these things … just consist in the valid exercise of legal powers.”¹⁸⁸

In a similar vein, Hart declared that “[the rules conferring private powers] appear then as an additional element introduced by the law into social life over and above that of coercive control.”¹⁸⁹ Positive laws, as Hart elaborated, are used by law-subjects in various ways “to control, to guide, and to plan life out of court.”¹⁹⁰ Moreover, he expressly contended that one characteristic function of law is that it remedies the evident drawbacks of an imagined situation in which private power-conferring laws are unavailable:

In an extreme case the rules may be static in a more drastic sense. This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case … the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual … they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance.¹⁹¹

As is indicated in the quotation above, exercises of private legal powers are one of the indispensable phenomena in legal practices that should be taken into account by theorists. Admittedly, the exercising of private legal powers is not self-contained. Without officials’ recognition or assistance, at least in some circumstances, intended legal consequences would not obtain their legal validity. Private legal powers, therefore, only give effect to personal arrangements within the context of systematized public powers and are usually subject to

¹⁸⁸ Hart, *The Concept of Law*, 32.

¹⁸⁹ Ibid., 41.

¹⁹⁰ Ibid., 40.

¹⁹¹ Ibid., 93.

limitation or even cancellation through legal officials' authoritative decisions. Some may take this point to an extreme, as Colin Tapper does, by claiming that "only the officials of the system need take an internal view of private secondary rules, and that it is sufficient that they regard the procedures as capable of creating valid law."¹⁹² Tapper then submits that any stronger view, which "requires of ordinary private individuals a more profound acceptance of the rules determining when a contract was binding than of the obligations imposed by it, would be absurd ... [The citizens] do not have a point of view about the exercise of powers because [they] do not wittingly use the procedures."¹⁹³

The excerpt from Tapper's work errs doubly. First, to accept a rule as binding is not always to advert explicitly to that rule beforehand. Hart explained that "the most important of these factors which show that in acting we have applied a rule is that if our behavior is challenged we are disposed to justify it by reference to the rule."¹⁹⁴ As a consequence, the fact that private individuals frequently do not advert explicitly to power-conferring rules when exercising their legal powers does not entail that they have no viewpoint about those rules. Holders of private powers, when someone questions their legal powers and the legal arrangements thereby established, can appeal to the relevant rules to vindicate the existence and effects of their legal powers. Second, a system of legal governance under which no citizen ever accepts private power-conferring laws is not merely an unhealthy legal system; it is not a credible legal system at all. Any private legal arrangements would not be brought into existence without exercises of private legal powers by citizens. Deliberately exercising a legal power implies a committed attitude on the part of the power-holder toward the pertinent power-conferring law. That is, the

¹⁹² Tapper, "Powers and Secondary Rules of Change," 265.

¹⁹³ Ibid.

¹⁹⁴ Hart, *The Concept of Law*, 140.

power-holder recognizes the legal consequence effected by exercising the legal power and is inclined to get others to acknowledge the legal consequence.¹⁹⁵

Both types of legal powers are essential to the functioning of a modern legal system. Each exertion of public legal powers contributes, directly or indirectly, to the practice of the Rule of Recognition, which preserves the systematic unity of legal norms. On the other hand, the conferral of private legal powers enables citizens to adjust their legal relations to others, which forms another vital part of a legal system. These two categories of normative powers intertwine with each other in actual legal practices. Certain kinds of private powers are introduced into a legal system only when some officials wield their legislative authority to enact new laws conferring those powers; and the legal consequences of exercising private powers are effectuated with the assistance of public powers. At the same time, the pervasive exercises of private legal powers usually help achieve the goals of exercising legislative powers to introduce legal institutions, such as marriage and inheritance, into the society. Although one can explore the functioning of public and private legal powers in a certain jurisdiction independently, it is unjustifiable to conceive them as two discrete power systems. They belong to one normative system, and each connects to the other significantly. Hence, both Shapiro's understanding of legal activities and his portrayal of a legal community are incomplete. Legal activities do consist predominantly in operating "the levers of legal power," but they include the exertion of private legal powers as well as that of public legal powers. Since the exercise of private legal powers is indispensable in modern legal systems and since the behavior and attitudes of power-holders are essential to any instantiation of exercising legal powers, ordinary citizens must be taken as members of a legal community.

¹⁹⁵ I offer my explanation of the internal point of view toward power-conferring rules in 2.4 of Chapter 2.

The inadequacy of the official-centered approach to law is also manifest in Shapiro's explanation of legal authority. The planning theory grounds the hierarchical authority structure of law and normative legal powers on the rational ability of human beings to plan for themselves and others. Any official who accepts the fundamental plan that sets up the power-relations among legal agents is committing herself as a rational agent to accepting her position within the authority structure, to acting consistently with the instructions issued by superior officials, and to forbearing from attacks on the master plan and derivative legal plans without compelling reasons.¹⁹⁶ The "inner rationality" of law sustained by our ability to plan, according to the planning theory, provides the source of the normative constraints upon the planners and those who take the plans as public standards of behavior. An immediate objection to the planning account, as Shapiro admits, will be that one's ability to plan does not necessarily establish one's practical authority over others. Products of such a rational ability, whether the master plan of a legal system or the derivative legal plans, may be morally illegitimate and therefore incapable of imposing moral obligations upon the addressees of the plans.¹⁹⁷ If one does not accept the master plan and if the master plan happens to be morally undesirable, one is not required, morally or rationally, to abide by the law. We are therefore unable to understand in what sense such an alienated agent is subject to the normative power of legal authorities. It seems that the planning theory merely accounts for the normative force of legal norms over legal agents committed to the master legal plan but leaves the normativity of law in relation to non-officials unexplained.

In response to this challenge, Shapiro concedes that only those who accept the master plan

¹⁹⁶ Shapiro, *Legality*, 183.

¹⁹⁷ Ibid., 182.

of a legal system – mainly the legal officials – are rationally required to adhere to it and derivative legal mandates. But he contends that, once we understand the word “legal” in legal discourse correctly, such a normative limitation of the master plan will not undermine the positivist framework that legal authority can be established solely on social facts without reference to any moral ground. Shapiro compares two different ways in which the word “legal” functions in statements regarding legal authority. One is what he calls the “adjectival” interpretation. The word “legal,” on this reading, modifies the noun-phrase “authority.” When one interprets legal authority adjectivally, one is imputing a certain type of moral authority to those who possess legal authority: a judge or a legislator acquires moral power to impose obligations on law-subjects by virtue of holding a position in a legal institution. The adjectival interpretation, Shapiro claims, fails to serve as a general account of legal authority, for it precludes the possibility of morally illegitimate legal authorities. In contrast, one may adopt the “perspectival” reading of legal authority, which Shapiro believes permits the attribution of legal authority to iniquitous ruling bodies. Once we adopt the perspectival interpretation of the word “legal” and acknowledge that it is meant to “qualify the statement in which it is embedded,”¹⁹⁸ the ascription of legal authority means only that “from the legal point of view, the person in question has morally legitimate power.” On the perspectival reading, as a result, law-subjects are not necessarily morally obligated to comply with requirements emanating from legal authorities. Statements about legal authority and legal obligations carry no moral commitment or implication but merely represent a certain normative theory. According to this normative theory, those who are authorized by the law have moral authority and are thus

¹⁹⁸ Shapiro, *Legality*, 185.

capable of imposing moral obligations upon law-subjects.¹⁹⁹ On the perspectival reading, the asserter of a legal statement typically distances herself from the legal point of view on morality; she is simply reporting or simulating, rather than endorsing, the moral conception of the legal system. As a consequence, Shapiro argues, even alienated members of a legal system can still employ legal statements to evaluate their own as well as others' behavior without being committed to the legal point of view on morality themselves.

The rational ground of social planning and the perspectival reading of legal authority, Shapiro maintains, jointly provide a more plausible theoretical ground for the positivist conception of legal authority. The authority structure of a legal system is solely determined by the master plan and derivative legal plans, which are created, shared and applied by legal officials. By virtue of exercising their rational power to make and adopt social plans, the officials purport to wield morally legitimate powers on behalf of the law to impose obligations on law-subjects. Legal officials express what the law deems morally permissible or even morally obligatory when making or adopting legal plans for the general public. On this account, legal activities are rational planning activities aimed at moral worthiness. The normative force the law claims, on the planning theory, amounts to a combination of the normativity of rationality and the normativity of morality. Violators of legal obligations are morally criticizable from the law's perspective, on the one hand, and rationally criticizable if they embrace the legal point of view, on the other.

However, the planning account of legal authority suggested by Shapiro cannot satisfactorily solve the puzzle about the power-relations between authorized legal officials and law-subjects uncommitted to the master legal plan. The general validity of the perspectival

¹⁹⁹ Shapiro, *Legality*, 186.

interpretation of legal authority, which construes the conferral of legal authority to a particular body as ascribing moral legitimacy to that body from the law's point of view, depends on the fact that law necessarily claims moral legitimacy or moral authority over its addressees. As we shall see, since it is not a conceptual truth that legal officials necessarily portray legal obligations as moral requirements, the perspectival reading turns out to be an inadequate account of the authority structure of law. As a consequence, the planning theory of law, which focuses predominantly on the planning activities of legal officials, will be deficient in providing a credible positivist explanation of legal authority.

Obviously, not all planning activities involve the planners claiming moral authority. A private arrangement among a small group of people about the place for disposing of household waste, for example, can fulfill its coordinating function without any such claim. But law, Shapiro insists, has a characteristic moral aim and necessarily claims to moral legitimacy each time it imposes obligations upon addressees. The moral aim of a legal system is to "rectify the moral deficiencies associated with the circumstances of legality."²⁰⁰ In such circumstances, the communal life is complex and the solutions to the moral problems it faces are contentious. The community as a consequence experiences a "[need] for social planning that can only be met by highly sophisticated technologies of plan adoption and application."²⁰¹ In addition, the moral need to have a hierarchical and institutional structure of social planning for dealing with public affairs does not merely consist in resolving complex moral issues in a more efficient manner. Sometimes legal plans are designed to "increase the cost of adopting plans so as to decrease the risk that bad plans will be adopted."²⁰² The law "claims to compensate for the

²⁰⁰ Shapiro, *Legality*, 213.

²⁰¹ Ibid., 156.

²⁰² Ibid., 171.

deficiencies of nonlegal forms of planning by ... adopting and applying morally sensible plans in a morally legitimate manner.”²⁰³ It “purports to represent the moral point of view.”²⁰⁴

In the arguments just outlined, Shapiro seems to make two claims that can and should be conceptually distinguished from each other. One is about the need for any sizeable society to have law as a sophisticated mechanism for social planning; the other contends that the law in any modern society necessarily purports to be endowed with moral authority. To maintain the plausibility of his perspectival interpretation of legal statements and thus the planning account of legal authority, Shapiro has to vindicate the idea that legal authorities always purport to be endowed with moral legitimacy when planning for law-subjects. However, such a view cannot be sustained. Legal officials need not pursue, or pretend to pursue, noble aims when promulgating general legal rules or rendering particular legal rulings.

First, neither of the above two claims implies the other. Even if the participants in a social institution presume that the institution is morally authoritative, we cannot validly infer that that institution is necessary for the workings of every credible society. Contrariwise, the fact that a society needs social institutions of a certain kind to settle complex and contentious moral issues does not entail that such institutions, or the representatives of such institutions, necessarily presume that they make morally permissible or obligatory arrangements for the public. Indeed, Shapiro correctly observes that any modern society needs a hierarchical, impersonal, and institutional planning mechanism as a means to tackle numerous complex moral problems.²⁰⁵ On Shapiro’s view, law is not designed to solve any particular moral issues but “an answer to

²⁰³ Shapiro, *Legality*, 171.

²⁰⁴ Ibid., 187.

²⁰⁵ Ibid., 161-73.

a higher-order problem, namely, the problem of how to solve moral quandaries in general.”²⁰⁶ Society-wide activities are not well handled by nonlegal planning methods, because customs develop too slowly to coordinate and guide human conduct under changing social conditions and because private negotiations are often too costly to reach consensus among relevant parties. Therefore, the superiority of law over other forms of social planning in circumstances of legality consists in the distinctive (institutional, impersonal, and hierarchical) way in which it arranges social planning and reduces the costs and risks associated with nonlegal forms of social planning. That superiority does not consist in the law’s purporting to be endowed with moral authoritativeness. As a result, from the fact that law is necessary or valuable for modern societies one cannot validly infer that law purports to be endowed with moral legitimacy, moral correctness, or moral authority.²⁰⁷

Second, Shapiro seems to assume that legal officials either adopt and apply social plans arbitrarily or endeavor (sincerely or insincerely) to justify such plans morally.²⁰⁸ Indeed, legal planning is not planning for planning’s sake, and on many occasions legal officials do explain their decisions as morally justified. Presenting legal entitlements as morally justified or as determined in a morally legitimate manner is usually an effective measure to encourage compliant behavior. The ability of legal authorities to dispose law-subjects to obey the law, as Shapiro correctly observes, is necessary for an authorized legal official or institution to guide and organize people’s conduct; one who is unable to motivate the members of a community to follow her instructions does not count as a planning authority and thus does not count as a legal

²⁰⁶ Shapiro, *Legality*, 173.

²⁰⁷ For an analysis of the distinction between the claim to moral correctness and the claim to moral authority, see Gardner, *Law as a Leap of Faith*, 125-48.

²⁰⁸ Shapiro, *Legality*, 171.

authority.²⁰⁹ Affirming the moral warrantedness of legal decisions, however, does not exhaust the possible ways to increase incentives to comply with the law. The officials may make explicit to the general public the correlation between the infliction of punishments and the violation of legal duties, to reinforce their incentives to adhere to the laws. Or the officials can make explicit the (punishment-independent) prudential reasons the law-addressees have for lawful behavior. When legal officials lay down requirements or prohibitions aimed at advancing the interests of citizens, the officials demonstrate their altruistic concern for the citizens; their explanation of legal obligations by reference to citizens' pre-existing punishment-independent interests are therefore morally pregnant.²¹⁰ However, when officials in an evil regime attempt to sustain people's motivation to submit to morally malevolent laws by emphasizing the connection between punishments and breaches of legal obligations, the purpose of explaining legal obligations in such a way is focused on maintaining a normative system by which the officials derive benefits for themselves without intending, or pretending to intend, to further the citizens' interests or to protect the citizens' moral rights.²¹¹ Though those who run such an iniquitous legal system on most occasions characterize the laws as morally benevolent or as aimed at promoting citizens' interests for the purpose of strengthening their control over the subjects (e.g., North Korea ruled by the Kim Dynasty), it is not necessary for them to do so. The frequency of moral claim or moral pretenses on the part of legal officials does not rule out the credible possibility that some legal officials foster the motivation of citizens to comply with

²⁰⁹ Shapiro, *Legality*, 179-80. Shapiro claims that a body has legal authority in a particular legal system when two conditions are met: (1) the system's master plan authorizes that body to plan for others, and (2) the members of the community normal heed all those who are authorized, which means legal authorities must be able to motivate their subjects to obey under normal conditions.

²¹⁰ Kramer, *In Defense of Legal Positivism*, 84

²¹¹ Ibid., 89-92.

legal obligations solely by conveying to the public that unpleasant consequences will be imposed upon them as a result of contravening the law.

In addition, legal authorities may induce their subjects to engage in a certain mode of behavior by virtue of providing positive incentives.²¹² A government may subsidize farmers to purchase and install agricultural machinery for developing industrial agriculture. Similarly, instead of offering subsidies to citizens, the government might provide rewards for those who engage in the preferred behavior. For example, straight monetary payments from the government, for the purpose of encouraging organic farming, might be received by farmers who avoid pesticides and chemical fertilizers. When legal authorities provide welfare, benefits, subsidies, rewards, or any other positive incentives to encourage a certain mode of conduct,²¹³ they need not present the desired behavior as morally legitimate. Just as what they do in deterring people from certain modes of conduct by highlighting the likelihood of resultant punishments, legal officials could merely wield positive inducements to sustain people's motivation to engage in state-desired behavior. To be sure, it is mistaken to assume that people's compliance with the law is always driven by self-interest. Decisions made by a rational being are usually driven by a mixture of moral motivations and prudential reasons. Legal authorities may guide people's conduct by calling attention to the moral reasons or prudential reasons for which a legally required action ought to be carried out; they may also channel the behavior of subjects by adding prudential reasons (such as punishments and rewards) for them. Social control via the operation of modern legal systems is, as Shapiro strives to present, a complex

²¹² For a discussion of the ways in which the state provides positive incentives as inducements to encourage citizens to adopt desired behavior, with a discussion of the role of such social control programs in jurisprudence, see Frederick Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2013), 110-23.

²¹³ Indeed, the government's supply of benefits and welfare for citizens is not always aimed at reinforcing their motivation to act in certain ways. On many occasions, the provision of welfare represents the fulfillment of political obligations on the part of the government.

mechanism for social coordination, resource distribution, and dispute settlement. Presenting legal requirements as morally obligatory does not exhaust the legal techniques to maintain social order.

Theorists who take law's moral claim as central to law's identity constantly argue that law's distinctive moral aim or moral claim is the crucial feature that renders legal systems distinguishable from sheer use of coercive force,²¹⁴ other variants of normative systems,²¹⁵ or some mixture of them (such as an organized criminal syndicate).²¹⁶ Legal authorities may render legal decisions in an illegitimate manner or fail to produce morally desirable consequences even though they do adhere to legitimate legal procedures. Legal activities in such circumstances have a similar appearance to the use of raw coercion by bands of gangsters or to one's being compelled to subject oneself to someone else's unwise instructions. On the other hand, nearly all normative systems impose duties, confer rights and powers, and grant permissions just as legal systems do. These normative systems, like law, typically make normative claims over the participants or subjects in their respective systems. They also specify the formal conditions for exercising normative powers, the possession and forfeiture of normative status and so on. It seems quite plausible that we are unable to set the boundaries between legal systems and other normative systems in terms of their systematic and institutional structure and the context-specific normative claims they make. The determinative factor that distinguishes legal systems from these nonlegal phenomena, those theorists contend,

²¹⁴ See e.g., Alexy, *The Argument from Injustice*, 36-38; Green, "Law, Legitimacy, and Consent," *Southern California Law Review* 62, no. 6 (1989): 837-40; Raz, "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies* 4, no.1 (1984): 129-31; Raz, *The Authority of Law*, 9, 158; Raz, *The Morality of Freedom*, 26; Raz, *Ethics in the Public Domain*, 203, 221; Andrei Marmor, *Interpretation and Legal Theory* (Portland: Hart Publishing, 2005), 113.

²¹⁵ Gardner, *Law as a Leap of Faith*, 136-39.

²¹⁶ Shapiro, *Legality*, 213-17.

consists in the moral tenor of legal statements – the moral legitimacy or even moral bindingness of legal claims presupposed or professed by those who make such claims. Joseph Raz confirms this view recurrently in his writings. For example, he claims, “A person needs more than power (as influence) to have *de facto* authority. He must either claim that he has legitimate authority or to be held by others to have legitimate authority. There is an important difference, for example, between the brute use of force to get one’s way and the same done with a claim of right.”²¹⁷ Much the same view appears in Gardner’s works when he attempts to draw a distinction between legal systems and games. He writes, “Games include such things as obligations, permissions, rights, powers, and liabilities … It is a normative system, so far indistinguishable from a legal system. Where it differs is in the claims it makes on the players …[T]hese claims are not moral claims.”²¹⁸ Shapiro holds a similar view, arguing that “the distinguishing factor is that it is the nature of [legal systems] that they are supposed to be [morally better] … [I]t is part of the identity of law to have a moral mission, whereas it is not in the nature of nonlegal criminal syndicates to have such a mandate.”²¹⁹ The law possesses the moral aim “because high-ranking officials represent the practice as having a moral aim or aims.”²²⁰ Despite the different contrasts made in their arguments, these theorists converge on the belief that law’s moral claim is essential to law’s identity. But, as I shall argue, we can

²¹⁷ Raz, *The Authority of Law*, 9.

²¹⁸ Gardner, *Law as a Leap of Faith*, 136.

²¹⁹ Shapiro, *Legality*, 215.

²²⁰ Ibid., 216-17. Shapiro distances his stance on law’s moral claim from Raz’s viewpoint by arguing that “it is possible to imagine a legal system staffed mostly by alienated bureaucrats who merely follow the rules because it is their job.” The concession of the possibility that most officials except the “high-ranking” bureaucrats in a legal system issue and implement legal mandates for self-interests, however, to a certain extent undermines the idea that law has a moral aim/claim represented by legal officials. If the distinctive moral aim or moral claim of legal systems can only be made through legal officials’ expression of the moral value underlying legal obligations and legal rights, and if most legal officials are alienated participants of a legal system, the moral claim from a small number of high-ranking judicial officials will not be practically significant in the overall functioning of the legal system.

satisfactorily distinguish legal systems from the non-legal phenomena mentioned above without attributing to law any moral aim or moral claim.

The crucial distinction between law and the use of raw coercion consists in the difference between the form in which legal authorities promulgate and apply legal norms and the way in which the gunman issues his directives and threats. The gunman's commands are usually directed at certain specific instances of behavior and limited to a brief period of time and to a small group of people who are in proximity with him. Since the gunman typically requires immediate responses from the victims to his intimidation, a face-to-face mode of directives proves to be effective for his committing a robbery. In contrast, laws are usually designed to regulate general modes of behavior and applied to the general public for long stretches of time. The generality and durability of legal norms are necessary for a form of governance whose aim is to sustain a long-lasting normative order in a society.²²¹

Furthermore, as Hart explicitly stated, the general efficacy of legal norms is one necessary condition for a legal system to exist. To sustain a generally efficacious legal system, legal officials have to foster the incentives of law-subjects to comply with the laws. They may provide inducements such as punishments and rewards to encourage law-compliance. More importantly, the implementation and enforcement of the laws must be generally consistent with their terms. Otherwise, the expectation of law-subjects to avoid punishments or receive rewards by adhering to the law's dictates will be frustrated. The incentives of law-addressees to follow the laws will thus be gravely impaired, and the requirement of the minimum degree of efficacy of a legal system will not be satisfied. In contrast, though a gunman is also concerned about the victim's incentive to submit to his coercion, he does not have to worry about the effect of

²²¹ Kramer, *In Defense of Legal Positivism*, 95.

his treatment of the current victim on the responses of future victims to his orders backed by coercive force.²²² As a result, a gunman, who threatens a teller with death if the teller does not hand over money to him, might have strong prudential reasons for shooting her even if she submits to his behest. As far as committing a crime is concerned, maintaining the regularity of a mode of conduct (the victims' general submission to the gangster's will) is certainly not central to the point of the gunman's threatening to use raw force. The gunman *presupposes* such regularity and takes advantage of it, instead of attempting to achieve that regularity when issuing his orders with his weapon.²²³

As should be evident, the general applicability and durability of legal norms, the systematized and institutionalized structure of law, and the maintenance of the regularities of law-subjects' compliant behavior highlight the crucial difference between the exercise of legal authority and the threat of coercion issued by a gunman. Then, does the claim to moral legitimacy constitute the determinative element that demarcates law from other artificial normative systems such as games, to take Gardner's example? Here we should note another crucial feature of law – its compulsory nature. As a form of governance, a legal system must be a compulsory normative system in the sense that the issuance and enforcement of legal obligations is not conditional on the consent of law-addressees. The rules of a game, in contrast, merely constitute a normative setting as a background for those who voluntarily enter a game. A complex game may contain a large number of rules that define the roles and even the hierarchical structure among the roles, specify the entitlements, and regulate the players'

²²² Ibid., 96.

²²³ But criminal organizations which often persist over long periods are concerned about the incentives of victims to continuously submit to their control. The decisive elements that distinguish crime syndicates from legal systems will be examined in this section presently.

interaction just as a legal system would do. Players of a game, like law-subjects, occupy the roles and are capable of instituting changes in normative relations within the game. But participants in a game can get rid of their roles and the normative constraints placed upon them because of those roles, each time they leave the game. From the game's point of view, its main task does not consist in exerting its control over the players irrespective of their consent. The applicability of the rules of a game is always or nearly always contingent on the voluntary participation of players.²²⁴ Correspondingly, from the player's point of view, his motivation to follow the rules of a game depends predominantly on his willingness (or the reasons for him) to play the game. It does not make much sense for one to ponder the reasonableness of any particular rule of a game and determine whether one should follow that rule without first confirming one's willingness or reasons for joining the game.

We have seen that the decisive elements of a legal system that distinguish them from the use of naked coercive force and from other normative systems do not lie in any claim to moral legitimacy or moral authority but other essential features of law. Raw coercion differs from law because it lacks a system of general norms. Games are distinguishable from law because they are not compulsory normative systems and regulate very limited areas of life. Then, can we distinguish nonlegal compulsory normative systems such as organized crime syndicates from law without recourse to the allegedly distinct claim of law to moral authority? Crime syndicates and legal systems share some common features. Both are compulsory normative systems; both lay down general and long-lasting directives that cover a wide-range of human behavior; both are concerned about the subjects' long-term motivation to follow their dictates. Despite the

²²⁴ Compulsory games are not conceptually impossible. For example, a teacher may require her students to play a math game in order to assess their performance on probability theory. But on most such occasions, the compulsory games are brought into effect and supported by a deeper compulsory normative order.

similarities, as I shall argue, organized crime syndicates are still distinguishable from legal systems that make no moral claims. The crucial distinction lies in the different structures of normative order constituted by these two forms of governance. The normative order established by an organized crime syndicate is essentially a *vertical* one, in the sense that such a normative order is primarily a matter of obeying the dominator's commands or rules by the subjects. To strengthen their control over people's social and individual lives, the gangsters of a complex syndicate may lay down a great number of rules prescribing obligations and authorizing punishments for failure to comply with obligations. The gangsters may enforce such obligations and punishments in accordance with the rules' terms as well. However, slim is the chance that the gangsters will seek to organize and regulate many of the private-law activities of citizens. Issuing rules that allow private individuals to modify their obligations and rights that arise under general rules is usually beside the point of running a crime syndicate – to plunder the people of their wealth or redistribute it in an illegitimate way. Central to the governance by a crime syndicate is its overwhelming control over the oppressed people's resources, not its arrangement of the people's normative relations and interactions. What the gangsters need is a relatively static normative matrix in which major decisions about public order and distributions of wealth are unilaterally made and enforced by those in the dominant position. Moreover, it would generally be imprudent for a crime syndicate to grant to private individuals as many normative powers as any liberal-democratic legal system confers on law-subjects. The conferral of extensive private normative powers may undermine the syndicate's absolute control over the people.

The disinclination of the bandits in a crime syndicate to confer extensive normative powers on those subject to their coercive control poses the main obstacle for them to initiate a

governance of law. The operating of a crime syndicate is usually within a pre-existing legal system which has wielded its control over the people by virtue of comprehensively infusing normative meaning into virtually all aspects of their social lives and extensively conferring normative powers on the citizens. In such circumstances, the functioning of legal institutions has been deeply embedded in people's interaction and co-operation. Ordinary people understand themselves as competent agents of the legal system. They use the rules of the legal system to guide their lives, evaluate their behavior, pursue their goals, define their normative relations to others, settle disputes with others, and so on. Even the members of the crime syndicate avail themselves of the legal competences invested by the legal system to run the syndicate. A crime syndicate operating as such does not establish a legal system, because it does not establish a normative order which invests people with myriads of private-law powers. If a crime syndicate indeed issues a series of obligating and empowering rules which supplant the rules of the pre-existing legal system and are extensively employed by people to plan their lives and shape the social order, the syndicate should be designated as a legal system irrespective of the fact that a claim to moral worthiness has or has not been made with the issuance of the rules.

Lurking in Shapiro's official-centered view on legal authority is a conceptual connection between legal authorities and their moral claims. Shapiro's perspectival interpretation of legal authorities is applicable only when the law claims to moral legitimacy or moral authority. Since a legal system (through its representatives) does not necessarily make moral claims, legal statements do not necessarily describe, or purport to describe, the legal point of view on morality. As a result, the perspectival interpretation cannot serve as a general account of legal statements and legal authority. Since the perspectival reading is unsustainable, Shapiro's idea

of legal authority, which is grounded on the master plan created or adopted solely by legal officials, cannot satisfactorily explain the power-relations between officials and non-officials.²²⁵

In sum, Shapiro's explanation of legal activity, legal community, and legal authority, which is developed predominantly from the perspective of legal officials, unjustifiably limits our vision of legal phenomena. It provides only an incomplete account of law's social dimension and its normative structure. Hence, it is advisable to abandon the official-centered approach to law and to view the law from both the perspective of the official and the perspective of the law-subjects.²²⁶

3.4 Citizens and the Rule of Recognition

In the preceding section, I have argued that viewing the law from both the perspective of the official and the perspective of the law-subject is advisable. The interaction between these two groups constitutes an indispensable part of legal practice. In the present section, I shall consider a theoretical attempt to incorporate the perspective of ordinary citizens into the analysis of law

²²⁵ Even if law always makes moral claims, the perspectival interpretation itself is still controversial. Legal statements, according to the perspectival reading, are reports about what ought to be done from the law's point of view. These statements, though descriptive in nature, may be used in justification and evaluation, for the concepts they employ such as obligation and right are normative concepts (*Legality*, 191). Legal statements so construed allow the asserter to "make descriptive assessments about the law's perspective on moral rights, obligations, and validity" (*Legality*, 192). This account has at least two weaknesses in supporting the planning theory. First, the perspectival understanding of legal statements leaves aside the criticism from rationality one may express by making legal statements. On the planning theory of law, the norm of rationality plays a crucial role in planning activities. It confers rational powers on human being to adopt plans and is thus significantly involved in establishing legal powers and legal authorities. But the perspectival interpretation of legal statements omits this critical element of the planning theory. Second, the perspectival interpretation seems to obscures the distinction between the full-blown internalized perspective toward the law and other viewpoints. On the one hand, the perspectival reading makes internal legal statements indistinguishable from statements made from the simulative perspective, for, on this account, one who makes an internal legal statement always distances herself from the perspective expressed by the statement she has made. On the other hand, the perspectival reading confuses internal legal statements with statements made from the moderate external point of view. For legal statements, on this view, are descriptions of a certain normative perspective.

²²⁶ For a similar view, see Matthew Noah Smith, "Officials and Subjects in John Gardner's Law as a Leap of Faith," in *Law and Philosophy* 33 (2014): 795-811.

by virtue of expanding the practitioners of the Rule of Recognition. As we shall see, this attempt is futile, for it obscures the main function of the Rule of Recognition and ignores the difference between the implications of official practices of the Rule of Recognition and the implication of citizens' applications of such a fundamental rule of a legal system.

The “Group-Relative” account of the Rule of Recognition

With a similar concern over the obfuscation of the role of citizens, Matthew Adler suggests a “group-relative” account of the Rule of Recognition. Adler repudiates the prevailing view that there is “a single canonical recognitional community,” whose social practices determine the laws of a given legal system.²²⁷ For Adler, different social groups, official or non-official, can engage in law-ascertaining activities even though the members of each group do not necessarily see themselves as cooperating with members of other groups.²²⁸ That is, each social group can independently ground a part of the constitutional law (and derivatively a part of the law). On the basis of this understanding, Adler argues that citizens, through a wide range of activities such as voting, litigating, lobbying, and political speechifying, can work together to “maintain or realize some particular criterion of legal validity.”²²⁹

Adler scrutinizes the history of U.S. constitutional practices and correctly observes that any member of a political community can in various ways exert influence on official legal activities. However, the group-relative account of the Rule of Recognition, which includes citizens as practitioners of such a rule, errs in two respects. First, it takes no account of the

²²⁷ Matthew Adler, “Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?” in *Northwestern University Law Review* 100 (2006): 745.

²²⁸ Ibid., 746, 753.

²²⁹ Ibid., 763.

hierarchical structure among the criteria of legal validity and hence obscures the main function of the Rule of Recognition. Second, it ignores the difference between the implications of official practices of the Rule of Recognition and the implications of citizens' applications of such a fundamental rule of a legal system.

Adler's pluralist conception of the Rule of Recognition is parasitic on Joseph Raz's understanding of the Rule(s) of Recognition.²³⁰ Raz claims that "there is no reason to suppose that every legal system has just one rule of recognition."²³¹ Multiple rules of recognition, Raz argues, may exist in a given legal system which comprises two or more sources of legal validity. In such circumstances, the Rule of Recognition may contain no standard for resolving conflicts between laws that emanate from different sources, which means the criteria of legal validity amount to a set of independent and unranked rules. Alternatively, the rules specifying distinctive bases of legal validity may each independently indicate the superiority or subordination of respective validity criteria.²³² Furthermore, Raz raises a possibility that each of the Rules of Recognition may not be practiced by all legal officials: each may be applied by merely "one or more of the [primary law-applying] organs instituted under [a legal system]."²³³ That is, legal officials may be engaged in law-ascertaining activities in divergent ways: discrete official activities independently constitute different parts of the Rule of Recognition and collectively form the whole range of criteria of legal validity. So Raz argues.

The Rule of Recognition as an Overarching Unity

²³⁰ Ibid., 746.

²³¹ Raz, *The Authority of Law*, 95.

²³² Ibid., 96.

²³³ Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (Oxford: Clarendon, 1980), 192.

Despite the possibility of multiple criteria of legal validity, neither Raz's contention that there may be multiple Rules of Recognition nor his view that certain components of the Rule of Recognition may be practiced by only some officials is tenable. The main function of the Rule of Recognition, as Hart explicitly held, is to remedy "the uncertainty of the regime of primary rules."²³⁴ It cures this defect by providing specific standards for identifying the laws in particular cases. Ideally, legal agents can discern valid legal norms by having recourse to such standards. But, as I have discussed in the preceding chapter, in any realistic legal system there will be disagreements among legal agents as to the prioritization of relevant criteria of legal validity and as to the prioritization of the results of applying such criteria by different people. Disputes over legal validity can be preliminarily divided into three categories. The first kind of validity disagreement is concerned with the conflicts between legal propositions rooted in different sources of legal validity. In such circumstances, there must be standards ranking different sources of law. Even if there is no explicitly articulated rule, there must be convergent official practices that establish the hierarchical structure of sources of legal validity.²³⁵

The second kind of validity disagreement consists of conflicts between the results of applying validity criteria by legal officials at different levels. Criteria of legal validity stated in the Rule of Recognition, just like any particular legal rules, inevitably have their "open texture" that gives rise to unsettledness in some cases.²³⁶ Legal officials may infer from the same criterion of legal validity incompatible legal propositions. Since the main function of the Rule of Recognition is to eliminate *uncertainty in law-ascertaining activities* and since any criterion of legal validity inevitably has *uncertainty-promotive indeterminacy in the grey area of*

²³⁴ Hart, *The Concept of Law*, 94.

²³⁵ Kramer, *Where Law and Morality meet*, 106.

²³⁶ Hart, *The Concept of Law*, 128, 148.

borderline cases, the Rule of Recognition must include standards that determine the superiority of some law-ascertaining determinations over other such determinations. Typically, the Rule of Recognition requires the officials at a lower level to abide by the law-ascertaining determinations made by upper-level officials.²³⁷ The relationship of superiority and subordination among official applications of law-validating criteria specified by the Rule of Recognition corresponds to the hierarchical structure of legal officials and manifests the powers conferred on them by the Rule of Recognition.²³⁸ That is, although all legal officials are obligated as well as empowered to identify particular laws in accordance with the Rule of Recognition, a higher-ranking official, as opposed to his subordinates, is typically invested with an additional power-right to invalidate the determinations made by lower-ranking officials.

There are still some validity disagreements that do not stem from the diversity of sources of legal validity; nor are they associated with different interpretations of law-validating criteria by legal officials at different levels. A conflict may emerge between two or more law-ascertaining determinations made in accordance with the same criterion by the same legal agent (or legal institution). Hence, there is a need for some general rules such as *Lex specialis derogat legi generali* and *Lex posterior derogate legi priori* to deal with the issues about legal validity which cannot be solved by applying the rules that determine the prioritization of different sources of validity or the power-relations among officials. Indeed, the three categories of validity disagreement and the solutions thereto are not mutually exclusive. In a complicated case, we may find that all three kinds of disputes are involved; hence we must apply the meta-rules of validity of all three sorts to arrive at a conclusion – to identify a legally valid norm.

²³⁷ Kramer, *Where Law and Morality Meet*, 109.

²³⁸ Ibid., 105.

Moreover, we may need a yet higher rule to determine the prioritization of these meta-rules of legal validity. For it is entirely conceivable that such meta-rules of validity may in some circumstances collide with one another. All the meta-rules of validity (and the meta-meta-rules, if any) jointly constitute an indispensable part of the Rule of Recognition which renders all first-order validity criteria systematically connected rather than a set of unrelated criteria. It is the systematicity and the hierarchical structure among divergent sources of legal validity established by those meta-rules that enable the Rule of Recognition to *ultimately* avoid the uncertainty in identifying primary legal rules.²³⁹ Ideally, all criteria of validity in a particular legal system, combined with the meta-rules of validity, constitute a complicated rule that not only determines the sources of law but also settles most disagreements about them. An advisable understanding of the Rule of Recognition is what Matthew Kramer calls “an overarching unity” for remedying uncertainty in law-ascertaining activities rather than discrete rules specifying criteria of legal validity.²⁴⁰ Otherwise, the Rule of Recognition will fail to serve its function of law-ascertainment. For the same reason, this overarching unity of the Rule of Recognition must be accepted by most legal officials on most occasions. To be sure, the Rule of Recognition cannot eliminate all indeterminacy about the legal status of norms. Around the core of settled meaning of the Rule of Recognition, there must be a penumbral area that gives rise to disputes about its application. But the indeterminacy and disagreements must remain at modest levels, or they will jeopardize the functionality of a legal system.

Hence, Raz’s suggestions that there may be multiple Rules of Recognition and that

²³⁹ In modern societies, disputes over legal validity reside more often in disagreements about the prioritization of the criteria of legal validity or in disagreements about the prioritization of law-ascertaining determinations than in disagreements about the existence of a certain criterion.

²⁴⁰ Kramer, *Where Law and Morality Meet*, 105-10.

different Rules of Recognition are addressed to and practiced by different groups of officials has missed the point of the Rule of Recognition. Raz's understanding of the Rule of Recognition has departed from Hart's original idea. It cannot rigorously explain how the Rule of Recognition averts rampant unsettledness in law-identifying activities by supplying a hierarchical order of validity criteria.²⁴¹ Since Adler grounds his group-relative account of the Rule of Recognition on Raz's theory, my counterarguments to Raz's explanation also apply to Adler's view. The group-relative account, as much as Raz himself, fails to take account of the various circumstances in which legal agents face disagreements over law-identification issues and the solutions with which the Rule of Recognition furnishes them.²⁴²

In addition, the group-relative account of the Rule of Recognition obscures the implications of employing the Rule of Recognition by different groups of legal agents. To be sure, the Rule of Recognition is not exclusively accessible to officials. Citizens, as Hart acknowledged, certainly can invoke such a rule to identify legal rules, to criticize legal decisions that are grounded on misinterpretations of pertinent law-validating criteria, or to demand adherence to it.²⁴³ Further, citizens' interpretations of a particular criterion of legal validity may be at odds with the prevailing official understanding of that criterion. Of course, citizens can in various ways exercise their influence with the governing body to bring about a

²⁴¹ Hart explicitly stated that “[custom and precedent] owe their status of law … to the acceptance of a rule of recognition which accords them this independent though *subordinate place* … [T]he existence of such a complex rule of recognition with this *hierarchical ordering of distinct criteria* is manifested in the general practice of identifying the rules by such criteria.” See Hart, *The Concept of Law*, 101 (emphases added).

²⁴² Adler repeatedly refers to the U.S. constitutional debates to demonstrate that different groups of people accept different U.S. rules of recognition. See Adler, “Popular Constitutionalism,” 752-65. However, most constitutional disagreements – divergent views on constitutional law – can proceed only when the unity of the Rule of Recognition is generally accepted by disputants. To be sure, persistent constitutional disagreements over the core of the Rule of Recognition which would probably result in revolution are conceptually possible. Were those disagreements to become widespread among officials, however, the very functionality of their legal system as such would be in jeopardy.

²⁴³ Hart, *The Concept of Law*, 116.

change in constitutional practices. However, the effect of such efforts is by no means tantamount to independently grounding a part of the Rule of Recognition. As Hart submitted, “[t]here is, of course, a difference in the use [of the law-validating criteria] … by courts … and the use of them by others: for when courts reach a particular conclusion … what they say has a special authoritative status conferred on it by other rules.”²⁴⁴ For the most part, citizens, like the lower-level officials, are required to defer to determinations made by higher-ranking officials. Citizens’ subordinate position in the power-relations constructed by the Rule of Recognition leaves them on the periphery of the practices of such a rule. Adler’s contention that citizens’ practices can independently constitute criteria of legal validity obscures the fact that modern legal systems characteristically have an institutionalized and centralized structure in which certain individuals are empowered as officials in the hierarchical power relations among legal agents.

The Practitioners of the Rule of Recognition

Even in an imaginary legal system in which both officials and non-officials adhere to the Rule of Recognition when identifying the laws, the general acceptance and practices of such a rule do not render it a rule of all the people subject to that legal authority. Then, how do we determine who will count as the practitioners of the Rule of Recognition? A common view suggests that the Rule of Recognition is a rule of officials because citizens’ practices are not *determinative* of its content.²⁴⁵ Should there be a divergence between non-officials’ understanding of the Rule of Recognition and the criteria legal officials in fact adopt when

²⁴⁴ Ibid., 101-2.

²⁴⁵ See, e.g., Lamond, “The Rule of Recognition,” 109-10.

identifying the laws, the official practice would normally take priority. Even if citizens' interpretation of the Rule of Recognition is morally or prudentially preferable, their understandings never or very seldom override the official view.

However, whether one's practice is determinative of the content of a Rule of Recognition is not the very criterion in accordance with which we exclude ordinary citizens from the practitioners of the Rule of Recognition. To be sure, we can exclude virtually all private individuals from the practitioners of that rule on the basis of peoples' capacities for shaping the rule's content. But by the same standard some legal officials must be excluded from the relevant group: we would have to conclude that officials who defy the Rule of Recognition are not among the practitioners of it. The Rule of Recognition is a social rule. The existence and content of any social rule, according to Hart, hinge on the fact that the *majority* of a group of people accept it as a public standard in their largely convergent behavior. Hence, the statement that a social rule obtains is compatible with "the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or for others."²⁴⁶ In any legal system in which aberrations in official behavior and attitudes toward the Rule of Recognition occur, the officials who take a defiant stand – the minority – are still within the community of legal officials and therefore are among the community of practitioners of the Rule of Recognition. Nevertheless, only the compliant behavior and the committed attitudes of the majority *determine* the content of the Rule of Recognition, whereas the disobedience of the few hardened mavericks exerts no influence on the criteria of legal validity. Similarly, were we to specify the group of practitioners of the Rule of Recognition by examining the influence each person exerts in determining the rule's content, we would have to exclude some legal

²⁴⁶ Hart, *The Concept of Law*, 56.

officials, who act only in advisory roles and not in decision-making roles, from the practitioners of the Rule of Recognition.²⁴⁷ Also, the views of some legal experts on the criteria of legal validity may be considered by officials and hence become influential in determining the rule's content.²⁴⁸ But they are not among the practitioners of the Rule of Recognition. In sum, the impact one can make on the content of the Rule of Recognition cannot serve as the criterion of identifying the legal agents whose practices are collectively constitutive of the content of the Rule of Recognition. For the consequences of applying such a standard would be sometimes underinclusive, and sometimes overinclusive.

We must repudiate the misconceived criterion suggested in the preceding paragraph. Any attempt to ascertain the practitioners of a Rule of Recognition by individually inquiring into the relationships between the rule and each legal agent is misguided because this approach omits the collective character of a social rule. The crucial question concerning the identity of the practitioners of the Rule of Recognition is: which group is indispensable for the existence of the Rule of Recognition?

Let us imagine a legal system in which most of the officials converge on the way in which they identify valid laws. In addition, most private individuals follow the publicly promulgated laws; some of them who work with the law such as practicing lawyers and law professors know the law even better than the low-ranking officials. One day, the state goes through a bloodless revolution, in which the old ruling class is overthrown by a group of well-educated rebels. They

²⁴⁷ Disparities in the possession of legal powers to determine the existence and content of legal norms are ubiquitous. In any credible legal institutions, the office-holders comprise not only core authorized agents such as legislators and judges and administrators but also officials who act only in advisory roles rather than in decision-making roles. A junior civil servant, for instance, is conceivably granted no powers to reach legally binding decisions.

²⁴⁸ Lamond, "The Rule of Recognition," 110; see also Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014), 34-35.

shut down the old supreme court and open a new one under the revolutionary constitution, whose content is virtually indistinguishable from the abandoned constitution. By contrast, nothing has changed on the streets. The bulk of the population, even some of the legal experts, might not be aware of such a radical reformation of the government. Nor do they realize that the laws they have been employing in guiding their conduct are valid under a new Rule of Recognition since the revolution.²⁴⁹ In these circumstances, the old Rule of Recognition no longer exists, because virtually no official heeds it (despite the beliefs of citizens to the contrary). Official practices are *necessary* for the existence of the Rule of Recognition. The new Rule of Recognition, in contrast, has been established, for the officials (at least the high-ranking officials) have submitted themselves to another legal authority by being collectively engaged in a different practice of law-ascertainment. The citizens' ignorance or even small-scale resistance to the new Rule of Recognition does not jeopardize its existence at all – it shows that official practices are *sufficient* for the existence of the Rule of Recognition. As a result, official practices of identifying other legal rules constitute the necessary and sufficient existence condition for a Rule of Recognition. It is the officials who form the group of the practitioners of the Rule of Recognition.

3.5 The Role of Citizens, Legal Powers, and Law's Social Basis

From the analysis in the preceding three sections, a dilemma in explaining the social foundations of law has become manifest. On the one hand, a comprehensive account of the sociality of law must include an explanation of the relation of ordinary citizens' conformity

²⁴⁹ This example is borrowed from Gardner, *Law as a Leap of Faith*, 284-85; see also Simmonds, *Central Issues in Jurisprudence: Justice, Law, and Rights*, 3rd ed. (London: Sweet & Maxwell, 2008), 159-60. However, as I argue in 2.3, I disagree with Gardner's contention that by this thought experiment we realize that the social basis for a system of rules to qualify as a legal system is the official practice of law.

with the law to the law's operations. Any account of law's social basis that is exclusively focused on the convergence of the official practices of law-identification cannot satisfactorily deal with jurisdictional issues and inevitably yields a distorted view of legal phenomena. On the other hand, it is implausible to ascribe an equally active role to ordinary citizens in law-ascertainment and law-application activities. Taking the Rule of Recognition as grounded on the general acceptance of such a rule by both the citizens and the officials in a legal system will obscure the inevitable alienation of citizens from particular enacted laws that emanate from the law-ascertaining practices of legal elites. Hart's endeavor to distill the individually necessary and jointly sufficient conditions for the existence of any paradigmatic instance of a legal system, as noted in 3.2, can be taken as an attempt to resolve this dilemma by explaining the social foundations of law in terms of the different relations of law to legal officials and to the general populace. Hart accorded a passive role to non-officials; the only indispensable way in which ordinary citizens contribute to the functioning of a legal system is to generally obey the rules that prescribe legal obligations. He restated this view in a passage where an imaginary precarious legal system is considered:

[W]here there is a union of primary and secondary rules ... the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.²⁵⁰

²⁵⁰ Hart, *The Concept of Law*, 117.

According to this view, whether ordinary citizens in fact take legal norms as public standards and use them to determine their normative relationships to others is immaterial to the existence of a legal system.²⁵¹ Central to a normative system that manifests the rule of law, on this view, is the allegiance with the law on the part of legal officials: although the widespread alienation of law-subjects from the law in the imaginary society makes it “sheeplike,” the proper identification and application of the laws by legal officials, combined with the general obedience to the law by citizens, ensure that it is a legal system. However, whether the “sheeplike” society really deserves the title of a legal system depends on whether such a tenuous connection between ordinary citizens and the law (the citizens’ general obedience to legal norms) accurately represents the role of citizens in sustaining a legal system.

The Role of Citizens in a Legal System

Hart was indeed correct in the observation that, in respect of structuring the normative framework of formal laws, ordinary citizens play a passive role. For the most part, they are not entitled to determine the contents of legal norms by their application or endorsement of such norms; and they are seldom empowered to enforce the laws. What they can and are often expected to do is grasp and respond to the normative demands expressed in general legal norms traceable to the Rule of Recognition. Ordinary citizens are norm-addressees rather than norm-issuers. However, the passive role of non-officials in law-constituting activities does not imply their passive role in legal practice as a whole.

Law is a normative system which is meant to shape the social order by virtue of enacting and implementing general norms that define legal statuses and relations, regulate behavior,

²⁵¹ For a similar view, see Gardner, *Law as a Leap of Faith*, 284.

coordinate collective activities, and settle disputes. A legal system exists only when it to a substantial degree fulfills those functions by providing action-guidance for the addressees. Legal norms guide people's conduct only when the interactions between law-subjects (and the interaction between law-subjects and legal officials) are rationally connected to the operation of legal norms.

Generally, ordinary citizens must be able to understand what the law requires, permits, and enables them to do. Otherwise, it would not be possible for the law to guide their conduct. To be sure, expecting individual citizens to always accurately grasp the contents of legal rules by themselves is a wishful thinking. Most of them have only vague and uncertain legal knowledge and limited access to legal materials. However, in any functional legal system, as Jeremy Waldron points out, “[t]he citizen has got to be in a position to know for himself what sorts of situations call for expert legal advice and what sorts of situations he can reliably handle on the basis of his own knowledge.”²⁵² In ordinary circumstances, citizens' limited legal knowledge should be sufficient for them to interact with others: buying milk and eggs in a grocery store, claiming compensation for damages caused by someone's negligence, reporting to the police drug dealing and gang warfare on the streets, and so on. In complex cases, they will be expected to seek assistance from law professionals: suing for breach of contract, arranging distribution of family assets after divorce, filing for bankruptcy, and so on. To obtain such rudimentary legal knowledge, ordinary law-subjects must understand themselves as members of the legal community. The citizens' self-understanding as legal agents does not imply that they must take most legal norms as public standards of behavior; nor do they necessarily endorse the values the law seeks to preserve. The citizens may be critical of the

²⁵² Jeremy Waldron, “The Rule of Law in Contemporary Liberal Theory,” *Ratio Juris* 2, no. 1 (1989): 91.

governing norms of the legal system, but they must realize that, to a considerable extent, the roles of community members and the forms of their interaction are constituted and regulated by the law. In addition, they must be able to anticipate that legal officials will regard them as duty-bearers and power-holders in the legal system and judge their actions in accordance with legal norms.

The rational connection between ordinary citizens and the law can be established only when the citizens see themselves as legal agents and have a general understanding of the legal system. The most important way in which non-official law-addressees acquire rudimentary knowledge of the law and of their normative positions within the prevailing legal system is participating in the social practices that give shape to their social lives. As Postema correctly observes, legal norms are grasped “to the extent that they can be located in a familiar network of normative inferences made concrete in a normative practice.”²⁵³ Informal social practices, on this view, play a crucial mediating role between formal laws and their addressees, facilitating ordinary citizens’ understanding of what the institutionalized legal norms empower or require them to do.

The relationship between formal laws and informal social practices is a complex interaction of reciprocal forces.²⁵⁴ As noted in Chapter 2, through formulating customary rules in legal texts, the law makes explicit what may be implicit in informal practices. It thereby reduces uncertainty and disagreements as to the contents of customary rules, provides enforcement machinery for applying those rules, and enables ordinary citizens to reaffirm their commitment to those rules. Correspondingly, the contents of formal laws thus formulated are

²⁵³ Postema, “Conformity, Custom, and Congruence,” 58–59.

²⁵⁴ Ibid., 61; Lon Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing, 2002), 257.

influenced by people's customary social practices. When the law-issuer gives formal expression to customary rules and incorporates them into the body of law, ordinary law-subjects learn of legal requirements primarily through their participation in relevant pre-existing informal social practices or through their observation of others participating in such practices. However, the codification of a social custom does not imply that the legal norms duplicate relevant customary rules. The institutional articulation of customary rules by the law may slightly alter the contents of such customary rules or even significantly transform an entire social custom. Moreover, the law may establish unprecedented normative settings (legal institutions) for its addressees. Under these circumstances, the correlative unofficial practices are law-constituted, or at least partly law-constituted. Citizens' participation in these practices – their cooperation, coordination, and exchange of normative opinions within these practices – must involve their use of relevant legal norms, perhaps with the assistance of law professionals. To be sure, the specifics of ordinary citizens' use of legal norms are different from those of legal officials' use of legal norms. Applications of legal norms by ordinary law-subjects need not, and typically do not, involve their use of the rules regarding official law-identification. Citizens may, e.g., misunderstand the process of enacting laws or the meanings of particular legal concepts and thus might not employ rigorous legal reasoning to extract true legal propositions as law professionals. But that does not imply that the citizens only take legal rules as discrete requirements. Any informal social practice typically defines the normative statuses and relations of the participants and ascribes normative meaning to their actions and interactions within the practice. In order to interact effectively and sensibly with other community members in these practices, citizens must gain knowledge about the basic elements of the practices – such as the different roles in the practices and the normative capacities and

entitlements ascribed to those roles. Since the principal social practices and social institutions are at least partly defined or shaped by the law, ordinary citizens acquire their initial understanding of the normative structure of these social practices and of their normative positions and entitlements within those practices partly through the laws that determine the normative statuses and capacities of legal agents within the relevant legal institutions. In addition, ordinary citizens, when engaging in the partly law-constituted informal social practices, typically are able to adjust their normative relations to other community members in order to form their private arrangements. Exercises of normative powers to alter normative situations within such informal practices by the citizens typically imply their use of relevant legal powers. As a consequence, ordinary citizens' participation in informal social practices, the most important way in which they gain the knowledge of what the law requires of them, is typically accompanied with their use of relevant power-conferring and role-determining laws.²⁵⁵

In any functioning legal system, ordinary law-subjects are not merely passively regulated, required, or punished by the law. They are self-directing norm-users capable of understanding and adjusting their normative positions in light of legal norms. Non-official law-addressees may dissent from particular legal norms or question the values served by particular law-constituted institutions. But they can hardly establish their self-understanding, their interpersonal relationships, and the core of their social lives without any reference to relevant legal norms and the operations of relevant legal institutions. Ordinary people's general use of the role-determining and power-conferring laws to ascertain and adjust their normative

²⁵⁵ This seemingly circular explanation that citizens understand what the law requires of them by virtue of participating in informal social practices, which involve the citizens' use of legal norms to understand their normative positions and entitlements, shows the deep interpenetration of the law and the social reality within any jurisdiction.

positions in their social lives marks their active role in legal practice. And, as I shall argue in the next sub-section, the active role of citizens in legal practice is as vital as the officials' role in sustaining a legal system, because it secures the legal system's efficacy by virtue of applying the normative framework of formal laws to informal social practices.

Validity, Efficacy, and the Social Basis of Law

Having clarified the active role of ordinary citizens in legal practice, this dissertation can proceed to explore the social dimension of law. The social basis of law consists of a diverse array of social phenomena that sustain a legal order. A legal order is the overall normative order within a modern legal society. The dissociation between the validity of legal norms and ordinary people's use or acceptance of those norms implies an inevitable gap between the official practice of formal laws and the customary normative practices shared by the general populace. Such a gap, however, does not imply that formal laws and social customs govern different aspects of a society or that no significant relationship between them obtains. Since informal, customary social practices play a crucial mediating role between formal laws and law-addressees, the overall normative order in a legal society amounts to the establishment of the normative framework of formal laws and its interaction with informal social customs that occur in people's ordinary social lives. The framework of formal laws is concerned with the validity of legal norms and legal reasoning; the interaction of that framework with informal social practices is connected with the efficacy of a legal system. I shall develop my account of the social basis of law in terms of these two aspects of a legal order.

The intra-systemic validity of formal laws ultimately depends on legal officials' convergent practices of law-identification – practices that involve legal officials taking norms

that satisfy certain criteria as binding on legal agents and recognizing some of them as having the ultimate authority on the validity issues. Typically, these law-identifying activities are carried out through legal officials' acceptance of legislative power and exercise of adjudicative power. As I argue in 2.5, the obligatory dimension of the Rule of Recognition – the obligation to ascertain legal norms in accordance with the criteria specified in the Rule of Recognition – is integrally connected to legal officials' acceptance of the rules of change. The general acceptance of a rule of change, namely the collective recognition of the legal changes made by exercising certain legislative powers, implies the critical reflective attitude toward acts of law-identification in accordance with the validity criterion specified in that rule of change. That attitude, combined with the officials' law-ascertaining activities, sustains a social rule of obligation that requires the officials to identify legal rules in accordance with the relevant validity criterion. On the other hand, the empowering aspect of the Rule of Recognition – the power conferred upon some officials to invalidate the law-ascertaining determinations made by other officials – is presupposed by the officials' acceptance of the rules of adjudication. The judge's power to determine whether a legal norm has been violated makes sense only when the judge has a power to determine whether the norm is a legal norm.²⁵⁶ As a result, the exercise and acceptance of public legal powers by legal officials, in particular the legislative power and the adjudicative power, are inextricable from the social practices that ground legal validity and are therefore an indispensable part of law's social foundations.

Whereas the notion of legal validity is usually used to refer to the quality of norms as belonging to a legal system, what theorists try to capture when they characterize a legal norm,

²⁵⁶ To be sure, individual judges' legal power to invalidate other officials' law-ascertaining determinations may be limited in scope, and they may be subject to superior officials' power to make authoritatively binding law-ascertaining decisions.

or a legal system, as efficacious seems equivocal.²⁵⁷ The notion of efficacy may pertain to the invocation of legal norms in rendering normative judgments; it may also pertain to the consistency between the contents of legal norms and the behavior of law-addressees. It could be focused on the practical responses people make toward particular legal norms; it could also refer to the social phenomena in the proper functioning of a legal system as a whole. Moreover, it could denote ordinary citizens' practices, but it could also be related to official activities. Given these complexities surrounding law's efficacy, it is advisable to clarify the sense in which such a notion should be used for the present purpose before conducting further analysis.²⁵⁸

Some theorists view law's efficacy as manifested in its norms being generally applied or enforced by legal officials. For example, Alf Ross claimed that a legal norm is efficacious if and only if it is generally applied by courts, and that the application of a legal norm amounts to its being employed as a premise in the judge's legal reasoning, constituting "one of the decisive factors determining the conclusion at which the court has arrived."²⁵⁹ On this view, the only criterion of law's efficacy lies in the consonance between formally announced laws and official legal reasoning. A legal system is generally efficacious, whether the citizens generally fulfill their legal obligations or not, so long as legal officials faithfully adopt legal

²⁵⁷ The efficacy of law is usually regarded as a quality of norms or normative systems. For a peculiar view that efficacy is a quality of actual behavior, see Hans Kelsen, *General Theory of Law and State* (New York, NY: Russel & Russell, 1961), 40.

²⁵⁸ For an analysis of different accounts of law's efficacy, see Luka Burazin, "The Concept of Law and Efficacy," in *Encyclopedia of the Philosophy of Law and Social Philosophy*, ed. Mortimer Sellers and Stephan Kirste, (Dordrecht: Springer, 2017).

²⁵⁹ Alf Ross, *On Law and Justice* (Berkeley and Los Angeles: University of California Press, 1959), 42. Another way of understanding the official application of legal norms that establishes the law's efficacy is to identify the application of legal norms as the determination and execution of sanctions in accordance with the law by judges. See Kelsen, "Validity and Efficacy of the Law," in *Essays in Legal Philosophy: Eugenio Bulygin*, ed. Carlo Bernal, Carla Huerta, Tecla Mazzarese, José Juan Pablo E. Moreso, and Stanley L. Paulson (Oxford: Oxford University Press, 2015), 52-68. But Kelsen sees the efficacy of law as consisting primarily in its being applied by the proper legal organ and secondarily in its being obeyed by the law-subjects. See Kelsen, *General Theory of Law and State*, 62.

norms to render normative judgments in relation to people's conduct and to determine how they treat the citizens – e.g., to compel the citizen's compliance or inflict sanctions specified by the law when deviations are detected. However, this view of the efficacy of law distortively presupposes that only legal officials are the addressees of legal norms. Indeed, in any legal system there must be norms that are meant to direct legal officials, and the general application of legal norms by legal officials will certainly encourage ordinary citizens to use the law to guide and evaluate their conduct. But it is the ordinary citizens who are the principal addressees of legal norms, and it is their actions and interactions which the law principally regulates. In addition, the view that law's efficacy consists in the application of laws by legal officials obscures the distinction between the efficacy of law and the validity of law.

Another way to interpret law's efficacy shifts the focus from officials' use of legal norms in evaluating people's behavior and rendering normative judgments to ordinary citizens' actions, beliefs, or attitudes in relation to legal norms. Generally, theoretical accounts of law's efficacy adopting this approach are focused on citizens' compliance with legal norms. There are two major interpretations of ordinary people's compliance with the law. One is to understand compliance with the law as people's conscious obedience to law's requirements. A law-addressee complies with a legal norm, on this account, only when she acts as the norm requires because the norm so requires, namely only when she is motivated by the legal norm to act accordingly.²⁶⁰ Some critics have impugned this conception of law's efficacy by claiming that it is impossible to ascertain the actual motives of people's conforming behavior with the law and thus the degree of efficacy understood in this sense.²⁶¹ More importantly, as

²⁶⁰ Norbert Hoerster, *Was ist Recht? Grundfragen der Rechtsphilosophie* (München: C. H. Beck, 2013), 48–50.

²⁶¹ Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford: Clarendon, 1991), 138; Andrzej Grabowski, *Juristic Concept of the validity of Statutory Law*, trans. Małgorzata Kiełyka (Berlin: Springer-Verlag,

I shall argue in Chapter 5, this view misunderstands what law requires of its subjects and the way in which law guides conduct. Typically, legal norms are directed at people's actions, not at their reasons for performing those actions. Even if the law-addressee's conformity with a legal norm is based on law-independent reasons, the legal norm does not misfire. By the same token, a legal system where most people act as the law requires for reasons other than the existence of relevant legal norms could be an efficacious legal system, as long as a certain rational connection can be established between the law and the addressees.²⁶²

The other salient interpretation of ordinary people's compliance with the law is that one complies with a legal norm if and only if one incorporates the norm into one's practical deliberation on the basis of which the conforming behavior is performed. According to this view, the law-addressee need not take legal norms as public standards of behavior, nor does the addressee have to act as the law requires because of the law. It is entirely acceptable for the addressee to adopt a strategic attitude toward her compliant behavior and evaluate all the relevant reasons in particular cases to determine the appropriate course of action. As long as the addressee takes into account the consequences of breaking (or following) the legal norm such as sanctions and rewards, or any dormant reason that is activated by the norm, the addressee's conforming behavior will be recognized as compliance with the legal norm.²⁶³ A legal system is generally efficacious, on this view, if most ordinary citizens, when planning much of their lives and many of their activities, (1) generally act in conformity with law's demands and (2) are mindful of the relevant legal duties or the legal consequences of

2013), 335.

²⁶² A complete explanation of the rational connection between legal facts and law-addressees will be given in 7.3.

²⁶³ Hart, *The Concept of Law*, 112.

performing (or not performing) those duties. Indeed, there will undoubtedly always be some ordinary citizens who do not regard the law as a set of public standards; nor are they motivated by legal norms to be engaged in certain modes of conduct. Their inclinations to obey the law are determined substantially by the prospect of avoiding disadvantages or gaining benefits. Still, such a “bad man” image is not suitable for a general explanation of law’s efficacy. For it is inescapably subject to two critical remarks. First, although the notion of compliance covers nicely people’s practical responses to duty-imposing laws, it does not properly capture the practice of power-conferring laws. Power-conferring rules do not call for compliance or obedience. They leave to power-holders the choice of whether or not to alter normative relations by exercising normative powers. As a result, the efficacy of an empowering norm cannot be identified with compliance with that norm. When a power-holder, who intends to exercise a legal power, declines to comply with the relevant power-conferring norm and thus fails to exercise the power, to be sure, the power-conferring norm is not efficacious. However, if the power-holder has no intent to exercise the pertinent power, her non-compliance with the relevant procedures does not detract from the efficacy of the norm that confers the power. The point of a power-conferring rule is to enable the power holder to establish, modify, or eliminate normative statuses or relations. Thus, its efficacy is manifested in its being used for establishing or recognizing intended normative changes, rather than in the congruence between the contents of the empowering norm and the power-holder’s behavior. To identify law’s efficacy by reference to compliance with legal norms will miss the point and function of a whole category of legal norms.

Second, even in the case of duty-imposing laws, acting in accord with a legal norm, whether because of the norm or because of other substantial considerations, does not exhaust

the ways in which the norm can be used by the addressees. One may express one's criticism of another's behavior or justify one's own behavior on the basis of a legal norm. To describe such critical assessment of behavior or justification of normative judgments as the asserter's compliance with the relevant norm would miss the point of the asserter's use of that norm – to take it as a standard for evaluation.

Two points are worth noting from the above reflections on different accounts of law's efficacy. First, law's efficacy is law's tendency to operate as premises or contexts in the practical deliberations of law-addressees, namely its tendency to provide normative guidance for law-addressees. Any account of law's efficacy must include an explanation of law's normative guidance. Since the law provides normative guidance only when a certain rational connection obtains between legal norms and the conforming behavior or normative judgments of law-subjects, any explanation of law's efficacy that fails to capture the vital links between the law and law-subjects – such as those based on the application of legal norms by legal officials and those based on the mere behavioral conformity of law-subjects – is doomed.

Second, the implausibility of the “conscious obedience” account and the “bad man” account of law-compliance shows that law's normative guidance is not primarily manifested in the citizens' direct practical responses to legal norms. Both accounts attempt to establish the relationships between legal norms and law-addressees on the basis of a “quasi-command model” of law. This model implies that the standard mode of guidance provided by law is through the law-giver laying down general norms addressed to individual law-subjects. However, such an image of the relationship between the law and law-addressees does not capture the distinctive mode of guidance the law offers. To be sure, the fact that many legal norms in any modern society are not anchored in behavioral patterns of those to whom the norms are addressed, but

instead in the operations of law-making institution, can foster the impression that the relationship between the law-giver and the law-addressee is like that between a commander and her subordinates. However, the possible alienation of informal social customs from formal laws and the professionalization of legal activities that ensues from the institutional character of law set up a barrier for ordinary people to access the laws by themselves. Without the assistance of law-experts, ordinary citizens seldom directly respond to legal requirements by employing rigorous legal reasoning to determine what to do. As is noted in the preceding subsection, they often gain knowledge of law gradually through their participation in informal social practices which are partly shaped by the law (and which partly shape the law). And, correspondingly, their practical responses to particular legal norms are mainly presented in their interaction with other community members within those informal social practices. The quasi-command model obscures the vital mediating role performed by informal social practices in law's action-guidance.

Since ordinary citizens grasp and respond to legal norms through their informal social practices, the efficacy of a legal system depends on the extent to which the customary social practices are consistent with the law.²⁶⁴ A legal system is generally efficacious only if the core social practices – e.g., property, contract, marriage, family, and so on – are generally consistent with the law. The customary social practices need not be identical with the practices prescribed by the formal laws. Consistency can be established with variations in minor parts of the practices, as long as the fundamentals of those practices are not in conflict with the law.

There are two ways in which the requisite consistency can be established. One is to incorporate social customs into formal laws through legislation and adjudication; the other is

²⁶⁴ Postema, "Conformity, Custom, and Congruence," 63-64.

to introduce the formal laws into people's ordinary lives. The most prominent and systematic way to introduce formal laws into informal social practices is through ordinary people's exercising normative powers and ascertaining normative relations in light of relevant power-conferring and role-determining laws. According to my analysis of the committed attitude toward power-conferring norms in Chapter 2, the common use of a power-conferring norm gives rise to a social rule that requires the recognition of the normative statuses or relations effected by exercising the relevant normative power. The general use of a private power-conferring law by the citizens, on this view, is inextricable from a social rule that requires them to recognize the law's expression of the normative statuses and relations in the relevant aspects of people's ordinary life. The practice of such social rules shapes the society's informal normative order and connects it to the normative framework of law.

In sum, the social basis of law consists in the social practices that sustain the functioning of a legal order. The overall normative order in a legal society is the consequence of the integration of formal laws and informal social customs that occurs in ordinary people's social lives. Legal agents connect these two normative realms and integrate them into the overall normative order within a jurisdiction primarily through exercising legal powers to form, to eliminate, and to modify (general or particular) normative statuses or relations. Through legislation and adjudication, customary rules developed in people's ordinary interactions can be incorporated into formal laws and legal reasoning and thus be backed by the state's recognition and coercive force. People's extensive exercises of private legal powers and legal officials' enforcement of formal laws entrench many enacted laws in people's ordinary lives and transform their informal normative practices.

Chapter Four

Power Conferring Norms and Power-Exercising Acts

The empowering aspect of law reveals one normative function performed by the law, which is as important as law's ability to obligate. In any credible legal system, the law not only regulates people's conduct by virtue of communicating what is legally required, prohibited, or permitted, but also enables people to alter their legal relationships to others by granting them normative powers in legal contexts. Legal philosophers have developed many theories about legal powers and power-conferring norms. They mull over the nature of power-conferring norms and ponder whether such norms constitute a distinct norm-type.²⁶⁵ They also discuss the differences and relations between legal powers and powers of other kinds.²⁶⁶ However, issues about the relation between power-conferring laws and power-exercising acts have seldom been broached. A common view on the practical implications of the conferral and exercise of legal powers is focused on their instrumental value – the fact that rules conferring legal powers are employed to pursue certain ends. For example, Joseph Raz claims that the normative implications of power-conferring norms are “manifested by the fact that statements of such norms are premises of practical inferences which affect the conclusion of the inference.”²⁶⁷ However, such a view obscures the distinctive manner in which empowering laws operate in practical deliberations.

²⁶⁵ For theories that suggest power-conferring laws should be reduced to duty-imposing laws, see e.g., Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge MA: Harvard University Press, 1945), 58-64; Alf Ross, *On Law and Justice*, trans. Margaret Dutton (Berkeley and Los Angeles: University of California Press, 1959), 33. For theories that suggest power-conferring laws should be reduced to permissive legal norms, see e.g., Georg H. von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge & Kegan Paul, 1963), 192; Lars Lindahl, *Position and Change: A study in Law and Logic* (Dordrecht: D. Reidel, 1977), 193-211. For theories that regard power-conferring laws as irreducible norms, see e.g., H. L. A. Hart, *The Concept of Law*, 27-33, 39-42; Alf Ross, *Directives and Norms*, 54-56.

²⁶⁶ See, e.g., MacCormick, *Institutions of Law*, 153-55; Raz, *Practical Reason and Norms*, 98.

²⁶⁷ Raz, *Practical Reason and Norms*, 106.

The present chapter aims to explore the normative function of power-conferring norms. I shall commence with examining a simplistic thesis about the action-guiding function of power-conferring laws: the thesis that those laws furnish power-holders with effective means to attain intended legal consequences. Such a view obscures the more fundamental practical import of power-conferring laws and is at best an unilluminating way to understand the normative phenomena involving power-conferring laws (4.1). I then consider the constitutive nature of power-conferring norms, which marks a crucial difference between such norms and the rules that only specify means-end relationships (4.2). Power-conferring laws guide human conduct by virtue of setting up law-dependent social institutions. Power-conferring laws of a legal institution are mutually dependent in the sense that each of these empowering norms can hardly function independently without the operations of the other norms. Normative judgments made in accordance with empowering laws discern what is recognized by the law as existing and what is not so recognized. The “recognitional” character of power-conferring laws and their distinctive mode of guidance open up the opportunities for law-addressees to systematically represent their actions, roles, and normative statuses and relations in legal terms (4.3). In addition, the fact that power-conferring laws interact in determining the validity of power-exercising acts and intended legal consequences implies the applicability of the requirements of rationality in power-exercising (4.4).

4.1 The Simple Explanation of Power-Conferring Laws’ Action-Guiding Function

To be sure, foregrounding the instrumental value of power-conferring laws does capture the active role the power-holder plays in most cases of power-exercising. However, when theorists explain the normative guidance provided by power-conferring laws solely in terms of the

means-end relationship between power-exercising acts and subsequent legal consequences, they obscure the more fundamental practical import of power-conferring laws. This section will be tersely outlining two common views of power-exercising act, which to a certain degree foster a simplistic understanding of the normative significance of power-conferring norms. Then, I will demonstrate that such an oversimplified explanation distortively represent normative phenomena involving power-conferring norms.

The Notion of Power-Exercising Act

A power-exercising act is obviously an act the performance of which amounts to wielding a legal power. The consequence of exercising a legal power is an alteration in legal statuses or legal relations. Someone who undergoes such a change might acquire a new claim-right, liberty, power, or immunity, or might come to bear a new duty, no-right, liability, or disability. No theorist would deny that exercises of legal powers necessarily bring about changes in the legal entitlements of relevant parties. Views diverge on whether any act that gives rise to a certain change in legal relations counts as a power-exercising act. Wesley Newcomb Hohfeld held a wide-ranging conception of legal power, which amounts to one's ability to effect a legal change.²⁶⁸ Many theorists have been unsatisfied with this view and developed narrower accounts of legal power, as they found the Hohfeldian legal power inadequately classifies the legal changes in some cases as products of power-exercising acts. Among the refined notions of legal power and power-exercising act are two common views: the value-laden account and the intention-based account.

²⁶⁸ Wesley N. Hohfeld, *Fundamental Legal Conceptions: As Applied in Judicial Reasoning* (Clark, NJ: The Lawbook Exchange, 2010), 50.

Joseph Raz champions a value-laden conception of legal power: a view that there must be evaluative elements in the concepts of legal power and power-exercising act. Raz submits that power in all its forms is “related to the idea of the possibility of realizing one’s wishes.”²⁶⁹ But his account of legal powers does not put emphasis on the intentions of power-holders. Raz claims that there are some cases in which an agent intends to produce a certain legal consequence by performing a certain act but does not exercise a legal power: e.g., committing an offence in order to be punished. But at the same time, he holds that there are some cases in which an agent acts with no intention to effect a certain legal change but nonetheless does exercise a legal power: e.g., entering into a contract without a correct appreciation of the legal consequence.²⁷⁰

In order to deal with this conundrum, Raz claims that central to any exercise of a normative power is the justification for regarding such an act as effecting normative changes:

An act is the exercise of a normative power if, and only if, it is recognized as effecting a normative change because, among other possible justifications, it is an act of a type such that it is reasonable to expect that, if recognized as effecting a normative change, acts of this type will be generally performed only if the persons concerned want to secure this normative change.²⁷¹

According to the quotation, it appears that Raz connects the idea of legal powers to the point of the institutions set up by the law. Procedures not designed by the lawmaker for citizens to effect certain legal changes, on Raz’s account, are not procedures for the exercise of legal powers.

²⁶⁹ Joseph Raz, *Practical Reason and Norms*, 98.

²⁷⁰ Ibid., 104. See also Raz, “Voluntary Obligations and Normative Powers,” *Aristotelian Society Supplementary* 46, no.1 (1972): 81.

²⁷¹ Raz, *Practical Reason and Norms*, 103.

To be sure, there are central cases of power-exercising acts the performance of which is directly linked to the point or value of the relevant law-constituted institutions. The connection manifests the desirability of such power-exercising acts and explains why acts of a certain type become the normal way to achieve a particular goal by legal agents. Value-laden accounts of power-exercising acts indeed capture the typical functions served by exercises of legal powers. However, the criterion Raz suggests fails to serve as a general touchstone for distinguishing legal powers and power-exercising acts, because its application in concrete cases may plunge us into confusion in identifying power-exercising acts. Raz's value-laden account takes no notice of the fact that a power-exercising act may engender more than one alteration in legal relations (on the basis of different legal grounds). Multiple legal changes indicate multiple legal consequences. Quite normal is a situation in which some legal consequences are desirable to the power-holder, others are undesirable, and still others are irrelevant to the power-holder's situation. Among the legal consequences desirable to the power-holder, moreover, some are central to point of the relevant law-constituted institution, and others are not. Since the multiple consequences brought about by a power-exercising act may diverge in their desirability to the power-holder (and in their relations to the point of the relevant legal institution), application of value-laden criteria may result in conflicting judgments when ascertaining whether an act is a power-exercising act.

A direct response to the argument above is that not all the abilities of a legal agent to effect legal changes by performing a certain act are properly classified as legal powers. Some legal consequences brought about by a power-exercising act are not due to the exercise of a legal power. But that response seems to be unaware of the interconnectedness of law-constituted institutions. Like individual power-conferring norms, law-constituted institutions do not

function independently, though they are designed to govern distinct aspects of our social lives. The performance of a power-exercising act may give rise to multiple legal changes which belong to different legal-institutional settings. Typically, institutional roles and relations in one law-constituted institution are recognized or even presupposed in the functioning of relevant institutions. Indeed, we may regard a certain mode of conduct as the typical means to achieve some legal consequences and as an anomalous means to bring about some other legal consequences. However, the law will not deny the validity of power-exercising acts solely because such an act is performed for a legal consequence which is not expected to be the main reason or justification for that act. Such being the case, on what ground can we refuse to recognize that in these cases the agents are exercising legal powers?

As opposed to the value-laden account outlined above, more theorists endorse an intention-based account of legal powers, which views the power-holder's intention (or imputed intention) to effect legal changes as central to the notion of legal power. Neil MacCormick held that one exercises a legal power by performing a certain act only when one intends his act as an act fulfilling a condition set in a rule and intends that others recognize his intention to act as fulfilling the condition set in that rule.²⁷² Such intentions, MacCormick added, can be imputed to a power-holder if his outward attitudes or behavior can be reasonably interpreted as so intending.²⁷³ Furthermore, MacCormick distinguished legal consequences that are "incurred only on condition that one acts with the actual or imputed intention of invoking the conditions for having [the legal consequences]" from legal consequences that are "conditional on free and intentional acts of individuals, but are not in the same sense within their power."²⁷⁴ That is, for

²⁷² Neil MacCormick, *H. L. A. Hart*, 73.

²⁷³ Ibid., 74.

²⁷⁴ Ibid., 75.

one to exercise a legal power to bring about a legal consequence C , one's intention to act as fulfilling the condition of C that are specified in the relevant rule must be necessary for C – if the rule applies irrespective of one's intention to invoke that rule, one is not empowered by that rule. With this distinction, MacCormick excluded cases involving people intending to be jailed by committing crimes from exercises of legal powers. However, MacCormick's account cannot provide a general standard to demarcate the realm of legal power. For in many ordinary cases, one's intentional act to effect legal changes is not accompanied with an additional intention that others recognize his intention to effect those legal changes. And, moreover, it is quite unlikely that, in those circumstances, one's outward behavior or attitude is sufficient for others to impute such a complex intention to him.

Recently, more intention-based accounts have been developed. For example, Lars Lindahl and David Reidhav ground their account on the *manifestation* of intentions in exercises of legal powers. They maintain that any power-exercising act fulfills the following three conditions: (1) the power-holder X performs the behavior B , which constitutes the legal ground for the legal consequence C ; (2) X 's behavior B manifests that X intends to achieve the legal consequence C by performing B ; (3) X 's behavior B not manifesting that X intends to achieve the legal result C by performing B is a legal ground for C not to follow from B .²⁷⁵ Like MacCormick, Lindahl and Reidhav observe the circumstances in which someone's behavior or attitude leads someone else to believe reasonably that he has the intention to bring about a certain legal consequence. To include such cases among exercises of legal powers, they highlight the manifestation of intentions, rather than actual intentions: an act B manifests the agent's intention to effect the

²⁷⁵ Lars Lindahl and David Reidhav, "Legal Power: The Basic Definition," *Ratio Juris* 30, no. 2 (2017): 158-85.

legal consequence C by performing B if “it gives others reasons for concluding that X intends C as a consequence of B .²⁷⁶ As a result, this formulation of legal power successfully includes cases involving entering into a contract inadvertently (if the power-holder’s behavior or attitude leads other legal agents to believe justifiably that he intends to achieve the relevant legal consequence). On the other hand, it excludes commission of crimes by requiring the manifestation of the power-holder’s intention to be a necessary condition of the relevant legal effect.

In contrast, Visa Kurki propounds another intention-based account of legal power (which he terms legal competence) with the idea of minimal sufficiency.²⁷⁷ Kurki grounds his definition of legal power on the notion of act-in-the-law – intentional acts that constitute the creation, upholding or termination of entitlements. He submits that an act A performed by X is an act-in-the-law if and only if (1) X performs A with the intention to bring about the legal consequence C , and (2) the fact that X has performed A in order to bring about C is an element of a set of actually occurring conditions minimally sufficient for C .²⁷⁸ One holds a legal power to effect a legal consequence, Kurki explains, if and only if one can perform an act-in-the-law to bring about the legal consequence. And if one holds a legal power to bring about the legal consequence C , any of his acts that effects C is an exercise of the relevant legal power.²⁷⁹ The strength of Kurki’s account is manifested in two aspects. First, Kurki cleverly inserts the notion of possession of legal power into his account and thereby severs the direct connection between

²⁷⁶ Ibid., 173-75.

²⁷⁷ Visa Kurki, “Legal Competence and Legal Power,” in *New Essays on the Nature of Rights*, ed. Mark McBride (Oxford: Hart Publishing, 2017), 37-39. Minimal sufficiency obtains when a set of facts is jointly sufficient for some state of affairs to obtain, and every element in the set is necessary for the sufficiency of the set.

²⁷⁸ Ibid., 38.

²⁷⁹ Ibid., 39.

acts-in-the-law and exercises of legal powers. On the one hand, Kurki's account is still intention-based, because it explains one's possession of a legal power in terms of one's ability to effect the relevant legal consequence by performing certain intentional acts. On the other hand, whether one exercises a legal power, on Kurki's view, depends no more on one's intention (or one's manifestation of intention) to effect the legal consequence in particular cases, but on one's normative ability to effect the pertinent legal consequence. Such a view averts the formidable task of establishing proper criteria for the imputation of intentions. Second, Kurki does not exclude commission of crimes (and any other instances of wrongdoing) from the analysis of legal powers entirely. He classifies commission of crimes as exercising (Hohfeldian) powers that are not competences, which he recognizes as a useful category in the analysis of legal powers.²⁸⁰ As Kurki correctly observes, "power is not a completely outlandish term even when used in the broader sense, given that it always has to do with changing legal relations through a volitional action."²⁸¹ Although, as I shall argue presently, Kurki's classification can be questioned, his treatment of those unusual exercises of legal powers is advisable.

Both Lindahl and Reidhav's and Kurki's analyses are influenced by the continental law tradition of acts-in-the-law (*Rechtsgeschäfte*) as declarations of will (*Willenserklärungen*).²⁸² Both accounts emphasize the role of the power-holder's intention to bring about the resultant legal effect. And both accounts establish standards that distinguish criminal acts from exercises of legal powers (or from the central cases of exercises of legal powers). But those distinctions, as well as the criteria according to which those distinctions are made, are still arbitrary. The point of excluding the perpetration of crimes from exercises of legal powers (or from the central

²⁸⁰ Kurki, "Legal Competence and Legal Power," 44-45.

²⁸¹ Ibid., 45.

²⁸² Ibid., 32; Lindahl and Reidhav, "Legal Power: The Basic Definition," 161.

cases of exercises of legal powers) will be unclear if we compare criminal offenses with bona fide acquisitions of properties as a result of unlawful disposition. In many jurisdictions, a person who pretends to be the owner of an object is legally endowed with the normative ability to sell the object and transfer the ownership of it to a bona fide purchaser, even though he is not legally permitted to do so. According to Lindahl and Reidhav's definition, the person who fraudulently conveys property to a bona fide purchaser is performing a power-exercising act because (1) his behavior constitutes part of the legal ground for the conveyance of property, (2) his behavior manifests his intention to convey property to the bona fide purchaser, and (3) the manifestation of such an intention is necessary for conveying the property. Similarly, the person is performing an act-in-the-law if we apply Kurki's definition, because (1) he conveys the property to the bona fide purchaser with his intention to do so and (2) the fact that he intends to convey the property to the bona fide purchaser is an element of a set of actually occurrent conditions minimally sufficient for the conveyance of that property. However, if those who unlawfully dispose of other people's properties are recognized as performing power-exercising acts (or acts-in-the-law) that effect legal changes which they intend (under certain conditions), on what ground can we deny that a perpetrator of criminality is in a similar way performing a power-exercising act to render himself liable to punitive measures?²⁸³ In each case, the agent intends to achieve the legal consequence by virtue of some illicit way of behaving. Confronted with criminality, legal officials will enforce the legal consequences thereof – the punitive response to which the criminal has rendered himself liable – which the perpetrator wishes. His case is thus similar to a case in which the officials recognize a bona fide acquisition as a result

²⁸³ Although Kurki sensibly admits that the perpetrator is exercising a Holfeldian power (rather than a competence, a power in the narrower sense), his account lacks an explanation of the difference between commission of crimes and bona fide acquisition of properties (which on his view amounts to an act-in-the-law).

of unlawful disposition, which is intended by the person who pretends to be the owner of the property.

The two views of legal powers outlined above – the value-laden account and the intention-based account – provide different pathways to the notion of legal power and have their own defects respectively. But on one point they concur: both approaches highlight the instrumental value of power-exercising acts. That fosters a common view about the normative significance of power-conferring laws: such laws furnish power-holders with effective means to attain preferred legal consequences.²⁸⁴ As I shall argue in the rest of this section, overemphasis on the means-end relationships between power-exercising acts and the ensuing legal consequences obscures the distinctive way in which power-conferring laws operate.

The Simple Explanation

Unlike norms that prescribe legal duties, power-conferring laws do not directly regulate people's behavior. Rather, they make it possible for the empowered to effect changes in legal entitlements by performing certain acts. Typically, these rules incline the law-addressees toward some feasible ways to arrange their normative relations to others – the ways distinctively supported by the system of law. To the extent that we are at liberty to exercise legal powers, a power-conferring law resembles, e.g., the instruction manual of a vacuum cleaner. Both lay out rules that are non-mandatory, and both indicate means to certain ends. These similarities lead some theorists to explain the action-guiding function of power-conferring laws by drawing an analogy between empowering legal rules and the rules specifying means-end relationships. I designate any analysis of this sort as a “simple

²⁸⁴ See e.g., Raz, *Practical Reason and Norms*, 97-106; Shapiro, *Legality*, 59-62.

explanation,” for it understands the practical significance of power-conferring laws merely as providing instruments for power-holders.

Torben Spaak, who has systematically analyzed the concept of legal competence (legal power), advances a typical simple explanation of the ability of power-conferring laws to guide human conduct.²⁸⁵ Highlighting the similarities between power-conferring laws and what he calls technical norms (rules that specify means-end relationships),²⁸⁶ Spaak states that both power-conferring laws and technical norms indicate the necessary means to given ends. He adds that they fulfill the same function in practical reasoning, and that neither of them gives complete reasons for action to the norm-addressees. He then conceives of power-conferring laws as one sort of technical norm and claims that such legal rules “could not be said to guide [the power-holder’s] behavior, since they only say that he has a certain legal quality.”²⁸⁷ Moreover, since on Spaak’s view power-conferring laws do not distinctively guide human behavior, he contends that we should not understand legal norms of the empowering sort as an independent norm-type.²⁸⁸

Rebutting the Simple Explanation

To begin with, the point of departure of the simple explanation – that power-conferring norms provide means to certain ends – is more or less misleading. As noted in Chapter 2, there is no

²⁸⁵ Torben Spaak, *The Concept of Legal Competence* (Brookfield, VT: Dartmouth Publishing Company, 1994), 166-79; Spaak, “Norms that Confer Competence,” *Ratio Juris* 16 no. 1 (2003): 99-102. Spaak follows a Scandinavian tradition within the philosophy of law in using the term “legal competence” rather than “legal power” to denote the abilities to change legal entitlements. For similar accounts, see, e.g., Raz, *Practical Reason and Norms*, 104-6; Andrei Marmor, “Norms, Reasons, and the Law,” in *Unpacking Normativity: Conceptual, Normative, and Descriptive issues*, ed. Kenneth Einar Himma, Miodrag Jovanović, and Bojan Spaić (Oxford: Hart Publishing, 2018), 103-8.

²⁸⁶ Spaak, “Norms that Confer Competence,” 99-100.

²⁸⁷ Spaak, *The Concept of Legal Competence*, 169.

²⁸⁸ Not all theorists who hold a similar view on the practical significance of power-conferring rules deny that such rules constitute a particular norm-type. See Raz, *Practical Reasons and Norms*, 104-6.

perfect correspondence between norm-types and the social functions they serve. Although power-conferring norms are fundamentally important in providing facilities for the addressees to achieve their goals, duty-imposing norms may perform such a function in some cases. Overemphasizing the connection between power-conferring rules and the facility-providing function overlooks the fact that the border between the facility-providing function and the action-regulating function may be blurred in particular cases. In two ways, the simple explanation errs in regard to the action-guiding force of power-conferring laws. First, it obscures the background against which power-exercising acts operate – the coercive structure of law. The simple explanation fails to take account of the institutional support from the law to enforce legal consequences. Most theorists refer to H. L. A. Hart's explication of the distinctive features of power-conferring laws and highlight the service such laws provide for power-holders. But Hart said more than that: “[Power-conferring laws] provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create ... structures of rights and duties within the coercive framework of the law.”²⁸⁹ In addition to highlighting the ability of power-conferring laws to assist law-addressees in fulfilling their wishes, Hart mentioned law's coerciveness. The coercive structure of law, within which legal consequences that ensue from power-exercising acts receive the support of the state's force, marks a substantial difference in action-guidance between power-conferring laws and norms specifying means-end relationships.²⁹⁰ To be sure, legal powers are often used as means, but

²⁸⁹ Hart, *The Concept of Law*, 27-28.

²⁹⁰ For example, the parties of a certain contract are bound to perform their obligations under the contract. In the event of a breach of contractual obligations, the party who has suffered damages as a result of the other party's contravention of duties is entitled to start a civil judicial proceeding. If the judge decides that the claimant is entitled to damages, she will award a suitable remedy to the claimant. In contrast, in a situation where I boil some water in order to brew a pot of tea, it makes no sense to ask whether I am entitled to appeal to collective might to boil the water.

this truth does not give us sufficient reason to ignore the underlying authoritative structure of law and the support of the state's coercive force in cases involving exercises of legal powers.

Second, Spaak's conclusion that power-conferring laws lack any action-guiding ability is based on an unworkable criterion that is too strict to acknowledge even the action-guiding capacity of duty-imposing norms. Spaak claims that power-conferring laws and technical norms are associated with a similar logical structure of practical reasoning. Both types of norms, Spaak submits, constitute complete reasons for action only in combination with certain preferences pertaining to the consequences in question. Spaak seems to suggest that whether a norm guides people's conduct depends on whether it provides the agents with a complete reason for action. On this account, a power-conferring norm is unable to independently guide one's conduct, because whether a power-holder has reason to exercise her legal powers depends ultimately on whether she wishes to achieve the pertinent legal consequence or whether any reason to bring about the legal consequence is present. Power-conferring laws do not present power-holders with such underlying reasons.²⁹¹ According to this stringent criterion, however, even duty-imposing laws are incapable of providing action-guidance. To be sure, power-conferring laws impose conditional requirements, whereas duty-imposing laws lay down unconditional requirements. But our conformity with duty-imposing laws in our ordinary lives is such that those laws give legal agents complete reasons for action only when they are considered in combination with the legal agents' preferences or some other facts that ground the ultimate reasons for them to follow pertinent rules (or to follow the law in general). We can press this point by considering the "puzzled man" Hart envisaged – a person who is willing to

²⁹¹ Spaak, "Norms that Confer Competence," 102.

do whatever is required by the law.²⁹² Let us suppose that the puzzled man does not comply with the law blindly. Rather, he adheres to legal requirements because he believes that his compliance prevents him from being open to public censure and is thus beneficial to his social interaction with other community members. For this puzzled man, any individual legal rule does not itself constitute a complete reason to act accordingly; the existence of any legal norm must be combined with his ultimate reason to comply with the law – to avoid his fellow members' censorial attitude – to constitute a complete reason for him to act as the law requires. In this case, any single duty-imposing law is much the same as other means for the puzzled man to avoid criticism from other citizens. If Spaak's conception of action-guidance provided by legal norms were correct, no legal rule would be able to guide the puzzled man, for individual legal norms say nothing about the ultimate reasons for compliance with the law. Obviously, such a conclusion is unacceptable.

In sum, the simple explanation mistakenly understands power-conferring laws as technical norms and thus neglects the dissimilarities between them. Also, it understates the action-guiding ability of power-conferring laws by implausibly equating action-guiding with giving *complete* reasons for action – an equation that would entail the denial of even the action-guiding ability of duty-imposing laws. Although power-conferring laws do not render any actions or omissions obligatory and although power-conferring laws do not constitute complete reasons for exercising legal powers, it is unwise to underestimate the way in which such laws figure in our practical deliberations and shape our conduct. The impact exerted by power-conferring laws on the normative situations of legal agents is more intricate and profound than the effects of duty-imposing laws. A more plausible account of the normative implication of

²⁹² Hart, *The Concept of Law*, 40.

power-conferring laws, as I shall demonstrate in the rest of this chapter, needs a careful investigation into the structure and the operation of such laws.

4.2 The Constitutive Nature of Power-Conferring Norms

Power-conferring norms, as opposed to duty-imposing norms, have a constitutive dimension. The existence of power-conferring norms renders the norm acts specified in such norms (the power-exercising acts) possible and intelligible, while the norm acts of duty-imposing norms can exist without the operation of such rules. In this respect, power-conferring norms and duty-imposing norms stand in different kinds of relationships vis-à-vis the norm acts. The constitutive nature of power-conferring laws has been recognized by legal philosophers for more than half a century. Hart, when describing the function of private power-conferring laws, reminds us,

Without such private power-conferring rules society would lack some of the chief amenities which law confers upon it. For the operations which these rules *make possible* are the making of wills, contracts, transfers of property, and many other voluntarily created structures of rights and duties which typify life under law.²⁹³

Alf Ross also states,

[I]n legal terminology a promise is called an ... act-in-the-law, which aptly expresses that the promise is not a natural act but one constituted by legal rules. An act-in-the-law is a declaration which (normally) by virtue of constitutive legal rules produces legal effects according to its content.²⁹⁴

²⁹³ Hart, *The Concept of Law*, 96 (emphasis added).

²⁹⁴ Alf Ross, *Directives and Norms*, 56.

A preliminary observation of the operation of power-conferring laws, as the excerpts above indicate, is that legal norms of this sort authorize certain patterns of conduct in legal contexts and attach legal consequences to them. The contents of such laws determine the conditions under which an act or event will be recognized by the law as successfully exercising a legal power and then effecting corresponding changes in legal statuses or relations, whether intended or unintended. In this respect, power-conferring laws resemble definitions rather than directives.²⁹⁵ They define forms of activities the meaning of which in legal contexts would not obtain if relevant power-conferring laws were absent. In contrast, when one delivers judgments in light of duty-imposing laws, those judgments assess certain modes of conduct which exist independently of the relevant legal norms. As a result, it is natural to think that power-conferring norms have a constitutive force. Such laws define and thus establish the modes of conduct they are meant to govern.

The notion that power-conferring laws have a constitutive function, of which duty-imposing laws fall short, is reminiscent of John Searle's treatment of the distinction between regulative rules and constitutive rules.²⁹⁶ By contrasting constitutive rules with regulative rules, Searle submits that "regulative rules regulate antecedently or independently existing forms of behavior ... constitutive rules do not merely regulate, they create or define new forms of behavior."²⁹⁷ Also, he claims that "where the rule (or systems of rules) is constitutive, behavior

²⁹⁵ Eugenio Bulygin, "On Norms of Competence," 280; Georg H. von Wright, *Norm and Action*, 6.

²⁹⁶ Searle's theory of constitutive rules was inspired by John Rawls and G. E. M. Anscombe. See Searle, "How to Derive Ought from Is?" *Philosophical Review* 73, no. 1 (1964): 55, n6 and n7. Rawls distinguished rules with which we comply only because of their utility in concrete cases from rules that define institutions. Anscombe distinguished brute facts and institutional facts. Both accounts emphasize that certain facts only exist in institutional settings. Searle develops the notion of constitutive rules to deal with the ontological issues regarding social institutions. Extensive research of the concept of constitutive rules can also be found in the works of some Polish and Italian legal philosophers. See Wojciech Żelaniec, *Create to Rule: Studies on Constitutive Rules* (Milan: Ed. universitarie di lettere ecologia diritto, 2013), 27-28.

²⁹⁷ Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press,

which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist.”²⁹⁸ Moreover, Searle explains, constitutive rules have a distinctive logical structure, even in cases where the logical form is not obvious from the expression of such rules. The logical structure of constitutive rules is formulated by Searle as “*X counts as Y in context C.*”²⁹⁹ The X term, in this formula, stands for an act, an object, an event or even a person. The Y term represents the function, meaning, or status that is assigned to X. The C term covers the whole range of circumstances required for transforming X into Y. The force of such rules to constitute modes of conduct is manifested in this “count as” locution. Through the application of rules with such a distinctive form, a certain status or function will be assigned to acts of a certain type and thereby constitute a new mode of activity.³⁰⁰ What is imposed on the objects specified by the X term is a new status that the objects do not already have just in virtue of satisfying the conditions specified in the X term.³⁰¹ Thus, the statement “objects that we can use to write in ink count as pens” is not a constitutive rule, because the property of being able to be used in writing in ink is sufficient for the objects to function as pens. In this case, the function expressed in the Y term (being used as pens) is not imposed on the objects through the application of a rule. Rather, the status of being a pen is entirely determined by the physical properties of the objects specified in the X term. All that we have

1970), 33. See also Searle, *The Construction of Social Reality*, 27-28.

²⁹⁸ Searle, *Speech Acts*, 35.

²⁹⁹ Searle, *The Construction of Social Reality*, 27-29.

³⁰⁰ Although the function of constitutive rules is paradigmatically manifested in its ability to infuse a specific meaning into brute facts and thus constitute institutional facts, the X terms need not be brute facts. Many constitutive rules transform institutional facts of a certain kind into another kind of institutional facts. For example, the sound uttered through one’s mouth counts as saying “I agree” in English because of the rules of English. Saying “I agree” in certain circumstances counts as accepting an offer because of contract laws. Iterating the constituting mechanism of such “count-as” rules is a prerequisite for us to create complex social structures. See Searle, *Mind, Language, and Society: Philosophy in the Real world* (New York: Basic Books, 1998), 128-30.

³⁰¹ Searle, *The Construction of Social Reality*, 44.

done in designating some objects as pens is attach a label to those objects. On Searle's account, central to the notion of constitutive rules is not their ability to label or classify objects, but their ability to create social institutions and the roles, acts, or events that are available within such institutions.

Before applying the concept of constitutive rules to the analysis of the operations of power-conferring laws and the normative guidance they provide, let us consider some critiques of Searle's account of constitutive rules. First, some may argue that every rule is constitutive in the sense that it constitutes the practices of complying (and not complying) with that rule. An act can be understood as complying with a rule only when the rule exists. A regulative rule, according to this view, not only prescribes acts of a certain type as obligatory, permitted, or prohibited, but also makes it possible that such acts, under certain conditions, count as compliance, or noncompliance, with the rule.³⁰² To be sure, in a broad sense, any rule of behavior determines what count as compliance with it. This understanding of the constitutive nature of rules, however, obscures more than it illuminates. There are radical differences between complying with regulative rules and acting in accord with constitutive rules³⁰³ and between the ways in which these two types of rules guide conduct. People's conforming behavior with constitutive rules typically, though not always, indicates their involvement in a certain social institution that comprises human interaction, mutual-beliefs, and usually a form of cooperation. In contrast, one who complies with a regulative rule need not be engaged in such collective activities.

³⁰² Andrei Marmor, *Social Conventions: from Language to Law* (Princeton, NJ: Princeton University Press, 2009), 34.

³⁰³ All constitutive rules impose institutional meanings on acts, objects, or events. But only the constitutive rules in regard to human acts can sensibly be said to be complied (or not complied) with.

Second, it is argued that acts in accordance with regulative rules also receive a specification or description that they would not receive if the regulative rules were absent. On this account, it is implausible to draw a distinction between constitutive rules and regulative rules in terms of the descriptions one can make of the norm acts. Raz gives an example in which a description of the norm act of a regulative rule seems unavailable if the regulative rule is not in place.³⁰⁴ The act of paying income tax, Raz explains, can be described in two ways. One is “a person is paying £100 to another person.” This description could be given regardless of the existence of the rule that requires tax-payers to pay income tax. In this regard, the rule, in light of Searle’s criterion, is a regulative rule. The other way to describe the norm act is to characterize it as “a person is paying £100 for income tax to the tax inspector.” The second specification of the tax-payer’s act of paying £100, according to Raz, can be made only when the rule that requires the tax-payer to pay his income tax exists. It follows that this rule is constitutive as well. Raz claims that one can formulate a similar pair of act descriptions for every rule. As a result, all rules are both constitutive and regulative; the contrast between regulative rules and constitutive rules is therefore illusory.

Raz’s construal of the rule-constituted descriptions of human behavior, however, confuses the operation of constitutive rules with that of regulative rules. We can describe someone’s act of paying money to another as paying income tax only when there are rules that constitute the institution of income tax. Such rules determine the roles of taxpayers and tax inspectors, the rate of income tax, the tax-free personal allowance, and other elements of the institution of income tax. Not only do such rules enable the description of paying income tax, but they also render the norm act – paying income tax – intelligible. Without an established institution of

³⁰⁴ Raz, *Practical Reason and Norms*, 108-9.

income tax, it does not make any sense to prescribe paying income tax as obligatory. That is, the rule that requires citizens to pay income tax is logically dependent on the rules that constitute the institution of income tax in the first place. As long as there are rules defining the institution of income tax, it will be intelligible to characterize an act as paying income tax even if there is no rule prescribing paying income tax as obligatory, (though such an institution of income tax will certainly be ineffective). Hence, it is the constitutive rules, rather than the regulative rules, that impose institutional meanings on human behavior or states of affairs and thereby allow a different description of relevant facts. What the rule imposing the obligation to pay income tax regulates is still a pre-existing mode of conduct, a mode of conduct defined by the relevant constitutive rules.

Third, some theorists may argue that there are many rules having both constitutive and regulative aspects. These rules define behavior and then regulate it. As a result, “it is a mistake to assume that regulative rules are not part of the world of rule-created practices and institutions.”³⁰⁵ On this view, the logical structure “*X* counts as *Y* in *C*” is not unique to constitutive rules and thus cannot serve as a criterion for demarcating constitutive rules from regulative rules. Andrei Marmor envisages a regulative rule that instructs the students that sending an essay assignment by email before the deadline counts as timely submission. This rule, Marmor argues, has the “count-as” logical structure; nevertheless, it is a regulative rule that requires the students to submit assignments punctually.³⁰⁶

This example does not undermine the distinction between regulative rules and constitutive rules. Marmor attaches far too much importance to superficial terminology and far too little

³⁰⁵ Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon, 1991), 7.

³⁰⁶ Marmor, *Social Conventions*, 33.

importance to underlying normative structures. If the ostensible rule which he adduces is indeed a rule rather than simply a clarificatory adjunct to a rule, then it is a regulative rule that generalizes over any number of more specific regulative rules that prescribe particular deadlines. The wording of the instruction does not make it have the logical structure “*X* counts as *Y* in *C*.”

Having clarified some misunderstandings of the notion of constitutive rules, I shall follow Searle’s lead in accepting a distinction between regulative rules and constitutive rules, and I shall apply Searle’s account of constitutive rules to the analysis of power-conferring norms in legal contexts. When one applies a power-conferring law in a particular case, as was noted in Chapter 2, the message communicated by one’s judgment or statement pertains to whether the act at issue is legally recognized as exercising a legal power, or to whether the intended legal arrangement or legal effect is successfully established. In other words, what concerns the speaker is whether a certain act *counts as* exercising a legal power, which in turn *counts as* effecting changes in legal relations. Power-conferring norms are paradigmatic examples of constitutive rules; they have the form of “*X* counts as *Y* in *C*.” The application of a power-conferring norm typically involves at least two “count-as” operations. In the first place, a certain act is assigned a legal status as exercising a legal power. Then, the power-conferring law assigns yet another legal status, the legal status of effecting a change in legal positions or relations, to the valid power-exercising act. Let us take concluding a marriage for example. Suppose that, in a certain legal system, the fact that two people fill in a registration form in the Household Administration Bureau with the signatures of two witnesses counts as exercising the power to marry by both agents. The norm prescribing the procedure for a valid exercise of the power to marry can be formulated as follows:

(P1) $X1$ (the fact that two people fill in a registration form in the Household Administration Bureau with the signatures of two witnesses) *counts as* $Y1$ (the fact that both people successfully exercise their power to marry each other) in context C (the institution of marriage).

Then, the successful power-exercising acts by these two agents will be recognized by the law as effecting a marriage that comprises a structure of legal entitlements between both parties of the marriage. The relationship between the exercise of powers and the legal consequence has a similar “count-as” structure. Here the constituted fact (the Y term) in (P1) becomes the fact to be interpreted (the X term) in another “count-as” operation of the power-conferring norm:

(P2) $X2$ (the fact that the two people successfully exercise their power to marry) *counts as* $Y2$ (a marriage that comprises a structure of legal entitlements between both parties of the marriage) in context C (the institution of marriage)

(P1) and (P2) constitute the two necessary parts of the operation of the rules that confer the legal power to marry. (P1) specifies the conditions under which certain acts will be recognized by the law as exercising the legal power to marry. (P2) determines the consequences of

exercising such a power. These two parts function complementarily.³⁰⁷ Without the occurrence conditions of power-exercising acts specified in the former part, the latter part would not be able to attach the legal consequence (concluding a marriage) to human behavior in any particular cases. Without the latter part, exercising the legal power to marry would be pointless. The analysis above can be generalized to all power-conferring laws, as every power-conferring rule must include a specification of the conditions of exercising the legal power and a determination of the legal consequence. We could combine (P1) with (P2) and formulate the basic structure of power-conferring laws as follows.

(P) Acts of a certain kind, A , count as exercising a legal power, P , which in turn count as effecting a certain change in legal positions, R , in a context, C .

The constitutive nature of power-conferring norms marks a crucial difference between such norms and technical rules that only specify means-end relationships. The application of the former depends on the use of language in some mode of social cooperation, whereas the application of the latter does not necessarily involve such human interaction. In the case of technical rules, a causal relation connects the intended consequence with the means one adopts to obtain that consequence. That is, the state of affairs one pursues is realized solely by virtue of the physical properties of the means and the operation of relevant scientific laws. The act of

³⁰⁷ For a similar analysis, see Corrado Roversi, “Constitutive Rules in Context,” 96 *Archiv für Rechts- und Sozial-philosophie/Archives for Philosophy of Law and Social Philosophy* 96, no. 2 (2010): 223-38. Roversi deals with the notion of constitutive rules in general rather than power-exercising rules. He designates the rules that determine the existence condition(s) of institutional facts as the “condition-setting” constitutive rules, and the rules that specify the consequences of institutional facts as the “consequence-setting” constitutive rules. Roversi claims that the complementarity of these two types of constitutive rules is necessary for the constitution of meaningful institutional elements.

consuming a glass of water, to illustrate, causally gives rise to the intended result of eliminating thirstiness. There is no need to refer to any social context or background to explain the way in which people eliminate thirstiness by drinking water. By contrast, the physical properties of a power-holder's bodily movement or utterance are insufficient to produce the legal consequence attached to a power-exercising act. For instance, when one makes a will, the neatness of the testator's handwriting, the color of the witnesses' signatures, the quality of the paper on which the will is written, and any other related physical qualities are immaterial (or at least not decisive) for the validity of that will and the normative changes as a result of exercising such a power. This feature of power-conferring norms corresponds to Searle's explanation of the transformation of the X term into the Y term in a constitutive rule that "the Y term has to assign a new status that the object does not already have just in virtue of satisfying the X term."³⁰⁸

The relationship of a power-exercising act to its legally warranted normative consequence should be understood as a justificatory one. An act that fulfills the conditions specified in a certain power-conferring law, namely an act of exercising a legal power, is the normative *ground* for the subsequent legal change. Recognizing a certain legal change as the valid legal effect of a power-exercising act (the "count-as" operation) through the application of a power-conferring norm involves a certain form of social cooperation, which is manifested in people's practical attitudes toward that empowering norm. Taking power-conferring norms and technical rules as having the same practical bearing on rule-addressees will obscure the social cooperation involved in the operations of power-conferring rules.

4.3 The Systematic Guidance of Power-Conferring Norms

³⁰⁸ Searle, *The Construction of Social Reality*, 44.

The possession, the exertion, and the effects of legal powers, as noted above, are all constituted by relevant power-conferring laws – they are institutional facts. Any institutional fact exists within a particular institution established by a set of interlocking rules that define the institutional roles and their statuses, capacities, and relations within that institution. As a consequence, exploring the practical significance of empowering laws by individually considering their instrumental value to the power holder is incomplete. Such an approach obscures the fact that power-conferring laws guide human conduct by virtue of setting up law-dependent social institutions. Any instance of power-exercising involves a series of application of relevant norms.

A better understanding of power-exercising, as MacCormick pointed out, depends on “adequate awareness of the whole range of circumstances required for validly exercising power.”³⁰⁹ To begin with, the possession of a certain legal power depends on a variety of conditions: the general qualifications of a power-holder (e.g., whether one has come of age and has sound mentality), the legal capacities which are based on the holding of certain legal positions (e.g., whether one is appointed as a judge), and the presence of certain background conditions or the absence of certain vitiating conditions (e.g., whether one is deprived of some of one’s civil liberties as a consequence of being convicted of a felony). Further, a legal power is typically exercised by the power-holder through her performance of a power-exercising act.³¹⁰ There are always prescriptions established by the law concerning the procedure(s) under which a power-exercising act can be successfully carried out. Such procedures vary. Typically, the more complex an institution in which a legal power is exercised, the more complicated are

³⁰⁹ MacCormick, *Institutions of Law*, 156.

³¹⁰ Ibid., 157; Jaap Hage, “What is a Legal Transaction?” in *Law as Institutional Normative Order*, ed. Maksimilian Del Mar and Zenon Bankowski (Farnham: Ashgate, 2009), 118.

the procedures that are needed for exercising the legal power. For example, contracting parties only need to exhibit, directly or impliedly, their concordant intent to enter into a contract and agree on all the essential elements of a contract. Legislative procedures may involve activities of different bodies and lengthy processes. Each instance of power-exercising comprises a series of interpretation of the facts in the physical world in light of relevant power-conferring and role-determining laws within a certain legally constituted institution. In the process of institutionalizing social phenomena in legal contexts, power-conferring laws are the vital nexus between the possession, the exertion, and the effects of legal powers. They not only define the individual concepts in regard to exercises of legal powers, but also weave a web of institutional settings within which such concepts are interconnected. Given the interlocking structure of the operations of power-conferring laws, they are mutually dependent in the sense that each of these empowering rules can hardly function independently without the operations of the other norms.

The systematic guidance of conduct by power-conferring rules is also manifested in the interconnectedness between law-constituted institutions. For example, the institution of succession relies on the relationships defined by the institution of family to determine the order of heirs, and on the institution of property to regulate the partition of inheritance. Like individual power-conferring norms, law-constituted institutions do not function independently. Typically, institutional roles and relations in one law-constituted institution are recognized or even presupposed in the functioning of relevant institutions. Power-conferring laws create modes of activities (institutions) in which certain modes of human speech or behavior give rise to specific normative consequences, and those activities defined and regulated by the law relate to one another significantly. As a consequence, the distinctive way in which power-conferring

norms figure in a legal agent's practical reasoning lies in the normative context they collectively establish – within which attitudes, actions, and events are articulated, and on the basis of which legal agents define, adjust, and dispute their normative statuses and relations. The systematic guidance provided by power-conferring laws extends the scope of law's governance over our social lives. Any voluntary power-exercising act trades upon the power-holder's recognition of the institutional roles he occupies and the relevant normative relations.

In contrast with duty-imposing laws that are focused on the addressee's behavior, power-conferring laws are meant to integrate the normative beliefs of the law-addressees. Normative judgments made in light of duty-imposing norms express whether a particular act, or a mode of conduct, is legal or illegal, namely whether it is right or wrong from law's perspective. Duty-imposing norms have little to do with the ascertainment or recognition of changes in legal statuses or relations, though one may make such changes through one's breach of legal obligations. By contrast, a judgment one makes in accordance with a power-conferring norm is not meant to express the acceptability or justifiability of any pre-existing action or event. Instead, such a judgment marks the boundaries between the *legal* and the *non-legal*. It discerns what is recognized by the law as existing (valid) and what is not so recognized (invalid).³¹¹ The recognition expressed through the invocation of power-conferring laws demarcates the autonomous realm of legal discourse, entities, relations, and activities.

The "recognitional" character of power-conferring laws and the distinctive mode of guidance opens up the opportunities for law-addressees to systematically represent their actions,

³¹¹ In fact, failure to fulfill the conditions specified in power-conferring laws may lead to different consequences. In some cases, the nonconformity with a power-conferring law renders the power-exercising null; in some other cases, the nonconformity makes the consequences of power-exercising liable to be declared invalid. Despite the slight differences in the consequences of power-exercising, legal judgments by reference to power-conferring laws are chiefly concerned with validity and law's recognition.

roles, and normative statuses and relations in legal terms. As explained in Chapter 2, the point of making a power-exercising statement consists in the speaker's attempt to get a certain institutional normative status or relation socially recognized by representing the normative status or relation as legally recognized. By virtue of exercising a legal power, the power holder not only brings about the intended legal consequence but also interprets certain aspects of her social lives within the institutional settings established by the law.

4.4 Legal Powers and the Requirements of Rationality

The fact that power-conferring laws interact in determining the validity of power-exercising acts and intended legal consequences implies the applicability of the requirements of rationality in power-exercising. In 3.3, I have considered Shapiro's planning account of law, in which the requirements of rationality have a vital role to play in establishing the hierarchical authority structure of law and in imposing normative constraints on those who adopt the fundamental legal norms as public standards of behavior. On Shapiro's account, any legal officials who accept those fundamental legal norms can be charged with irrationality if they disobey the law without sufficient reasons. On the other hand, ordinary citizens are not so criticizable insofar as they do not accept the authority structure of law.³¹² Shapiro is indeed insightful in highlighting the relation between the requirements of rationality and the recognition of legal authorities and legal powers. However, the applicability of requirements of rationality is not limited to circumstances involving official activities. In fact, each instance of power-exercising is attended by the requirements of rationality.

The notion of rationality is understood here as a person's ability to respond appropriately

³¹² Shapiro, *Legality*, 180-83.

to her own normative judgments, not the ability to respond appropriately to (objective) reasons.³¹³ That is, one's being rational is manifested in the *coherence* of her practical deliberation. Irrationality in the sense of incoherence can be detected by comparing the attitudes one person holds (or the existence of some attitudes and the lack of some other attitudes), independently of the reasons for which the person adopts those attitudes. For example, if a person believes that she has sufficient evidence that *P*, it would be irrational for her to refuse to believe that *P*, or to refuse to rely on *P* as a premise for further reasoning. It might be the case that there is no sufficient reason for believing that *P*. But as long as the agent believes that she has sufficient reason to believe that *P*, rationality would require her to believe that *P* and to take *P* as a premise for further reasoning. Similarly, if one decides to do *A*, it would be irrational for her to refuse to take the fact that doing *B* is necessary in order to do *A* as a reason for doing *B*. The person might come to believe at a certain point that doing *B* is not necessary for doing *A*, or she might abandon the prior decision to *A*. But as long as she does not do either of these, it would be irrational for her to refuse to do *B*.³¹⁴

The requirements of rationality in the sense of coherence are applicable to practices involving exercises of legal powers, because of the constitutive nature of power-conferring norms and their distinctive systematic mode of guidance. First, as long as one decides to bring

³¹³ The requirements of rationality referred here are similar to what Thomas Scanlon designates as “requirements of structural rationality” and what John Broome calls “normative requirements.” See Thomas Scanlon, “Structural Irrationality,” in *Common Minds: Themes from the Philosophy of Philip Pettit*, ed. Geoffrey Brennan, Robert Goodwin, and Frank Jackson, 84-103; John Broome, “Normative Requirements,” *Ratio* 12, no. 4 (1999): 398-419.

³¹⁴ Scanlon, “Structural Irrationality,” 83, 92-93. The applicability of the requirement of rationality in the contexts of decisions differs from that in the contexts of beliefs. Decisions function in an all-or-nothing fashion: one either makes a decision or not. Therefore, the requirement of rationality always requires one who has made a decision to take that decision as a premise or context for further reasoning. In contrast, beliefs come in degrees. Our confidence in the truth of some propositions is higher than our confidence in other propositions. When the degree of one’s belief that *P* is low, it might be rational for one to decline to take *P* as a premise or context for further reasoning.

about a legal consequence C , instrumental rationality will require one to perform the power-exercising act that gives rise to C . A power-conferring norm renders the norm act (the power-exercising act) and the ensuing legal effect possible and intelligible. Since the exercise of a legal power is necessary for establishing the relevant legal effect, one would be irrational if one intended to achieve a legal consequence but refused to perform the power-exercising act. The applicability of the requirement of instrumental rationality manifests the force of power-conferring laws. To be sure, the general purpose of enacting power-conferring norms is to provide “facilities” for power holders to achieve certain goals. Where the powers are not compulsory, the power holders are free to make use of the constitutive capacity of empowering laws at their discretion. Power-conferring laws are hardly coercing anyone to engage, or not to engage, in those law-constituted activities. In theory, power holders are allowed to achieve the same goals in a law-independent manner. For example, a person could instruct someone to donate a sum of money to an environmental organization upon her death, though sometimes doing this without established legal processes will be less effective and more controversial. However, the fact that the law recognizes only the normative consequences that ensue from valid exercises of legal powers significantly reduces the importance of the nonlegal alternatives. Consider the law of marriage. A marriage (in the legal sense) is constituted by the law, but a union of two people is not. Two people could, after all, cohabit and live as if they are spouses. And they may be considered a married couple by most of their friends and relatives. But in fact, there is no marital relation between them. Each of them has no legal right, for example, to inherit the other’s property upon death, to receive the other’s pension and worker’s compensation, and to sue for the other’s wrongful death, until they enter into a legally recognized marriage by virtue of exercising their legal power to marry.

Second, rationality as coherence requires one who exercises a legal power or recognizes another's exercise of a legal power to recognize the relevant normative roles, normative statuses, normative relations, and normative effects, and it also requires the legal agent to take those normative elements as premises or contexts in subsequent reasoning. It may be the case that what the power holder has the most reason to do is refuse to exercise the power. But as long as the power holder decides to exercise the power, she is rationally required to reason and act within the normative context that renders the relevant power-exercising possible and to recognize the normative consequences that ensue from exercising that power. Otherwise, she would be irrational, or incoherent, in exercising the power. Such a requirement from rationality becomes salient in bilateral power-relations. For example, in a reciprocal contract, not only is one contractual party rationally required to recognize her own normative role and her normative entitlements within the contract, she is also required to recognize the other party's normative role and normative entitlements correlative to hers. The mutual recognition between the contractual parties as a result of satisfying the requirement of rationality associated with exercising legal power is essential to the formation of a contract. One who fails to meet the requirement of rationality can hardly avail herself to such an instrument provided by law.

In sum, the requirements of rationality attend the conferral and exercise of legal powers. Rationality requires the power holder (1) to perform the power-exercising act if she intends the legal consequence, (2) to recognize the relevant normative roles, normative statuses, normative relations, and normative effects if she decides to exercise the legal power, and (3) to take those recognized normative elements as premises or contexts for further reasoning. The arrangements over normative relations as a result of exercising legal powers are essentially rational activities. As a result, compliance with the requirements of rationality is necessary for power-exercising.

Chapter Five

Practical Difference, Reason-Generating, and Legal Obligation

In the present chapter, I shall shift the focus to duty-imposing laws. A Razian view among some contemporary legal positivists suggests that legal obligations are distinctive because ascriptions of them express a certain perspective on what law-addressees have reason to do. To claim that one has a legal obligation to ϕ , on this account, is to claim that one has a decisive reason to ϕ from the law's point of view. Since legal obligations frequently require people to subordinate their desires or interests to others, the reasons for action implied by legal obligations must be moral reasons. As a result, legal obligations, on the perspectival interpretation, are moral obligations from the legal point of view. On the other hand, theorists adopting this reason-focused approach to legal obligations tend to understand the normative guidance provided by law as the difference legal authorities make to the subjects' reasons for action through the imposition of legal obligations. A number of further questions arise along this line of thought. For example, what counts as a practical difference? Do duty-imposing laws generate independent practical reasons for duty-bearers? And do they purport to do so? If yes, what kind(s) of reasons do they offer, or attempt to offer? If not, what normative guidance do duty-imposing laws provide?

I shall tackle relevant issues by examining Scott Shapiro's and Joseph Raz's accounts. I argue that Shapiro's view of the practical difference made by law is unsustainable. It results in a distorted view of law's action-guidance and leads to an implausible account of the law-giver's psychology. Also, it is inconsistent with the perspectival interpretation of legal concepts Shapiro endorses (5.1). Shapiro's account can be absorbed into a more general explanation of

law's normative guidance: legal norms steer human conduct by virtue of generating practical reasons. Raz's account of law's normative guidance has been the most influential theory to adopt the "law as reason-generating" approach. Raz submits that a duty-imposing norm, as an authoritative directive, constitutes what he calls a protected reason – a first-order reason to perform the norm act and a second-order exclusionary reason not to act on certain contrary reasons (5.2). Raz's exposition of the reason-giving force of duty-imposing norms is untenable. As I shall argue, there is an inherent conflict in Raz's account of protected reasons. The view that legal norms constitute independent first-order reasons, when combined with the idea that such norms have exclusionary force, will result in an unacceptable picture of the normative phenomena involving applications of duty-imposing laws. In addition, taking duty-imposing norms as constituting independent first-order reasons will commit the mistake of bootstrapping reasons by forming intentions (5.3). Raz's stratified model of practical reasons and the notion of exclusionary reasons cannot properly explain the normative guidance provided by duty-imposing norms, either. It does not provide a better exposition of normative phenomena involving duty-imposing legal norms than the traditional view on practical reasoning, fails to offer a complete and coherent account of the circumstances in which legal agents are justified in deviating from legal rules, and encounters difficulties in explaining the conflicts between authoritative directives made by different practical authorities (5.4).

5.1 Law's Action-Guidance as Making Practical Differences

Scott Shapiro's Practical Difference Thesis

Scott Shapiro characterizes law's action-guiding function as manifested in circumstances where the law-addressee acts in compliance with a legal norm *because of* that norm. This

explanation highlights the causal relation between the imposition of legal obligation and the legal agent's conforming behavior. Although this account does describe many occasions where one's behavior is significantly influenced by the law, it is too strong to serve as a general exposition of the normative guidance given by duty-imposing laws.

Shapiro specifies two different ways in which legal norms guide human behavior. One is *motivational guidance*, which occurs when a legal rule provides its addressees with a motivational reason. "Someone is motivationally guided by a legal rule when his or her conformity is motivated by the fact that the rule regulates the conduct in question."³¹⁵ Shapiro believes that Hart's exposition of the internal point of view highlights the motivational guidance of law: one who accepts a legal norm as a public standard is motivated by that norm to act accordingly. The other mode of law's action-guidance is *epistemic guidance*. "A person is epistemically guided by a legal rule when he learns of his legal obligations from the rule provided by those in authority and conforms to the rule."³¹⁶ Someone can be guided by a legal rule epistemically without being motivated by the rule's existence. One may, for example, be motivated to follow a legal norm because of one's inclination to avoid the unpleasant consequences of breaking the law. The point of epistemic guidance is that knowledge of relevant legal norms must be included in the law-addressee's practical deliberations. When legal norms guide epistemically, Shapiro explains, they mediate between officials and non-officials and also between competing practical considerations. Such rules mediate between officials and non-officials because they allow legal officials to communicate their demands to

³¹⁵ Scott Shapiro, "On Hart's Way Out," 173.

³¹⁶ Ibid. In addition, Jules Coleman attributes to Hart a similar distinction between guidance by information and guidance by reason, see Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," *Legal Theory* 4, no. 4 (1998): 403.

ordinary citizens without laying down particular norms for each individual occasion. They mediate between rival standards of behavior because they designate certain norms as legally obligatory and do not extend that designation to a myriad of other standards of behavior.³¹⁷ The idea of epistemic guidance, Shapiro states, helps explain how legal rules guide ordinary citizens who often do not adopt the internal point of view toward legal rules.³¹⁸

Shapiro insists that a legal rule guides human conduct, whether motivationally or epistemically, only when the rule makes a practical difference in the agent's practical deliberations. A practical difference occurs, according to Shapiro, only when the legal agent would not have φ -ed if a rule that requires φ -ing had been absent or if the agent had not appealed to it (as a legal rule); otherwise the rule does not bring about any difference in the agent's practical deliberations and therefore does not perform its action-guiding function.³¹⁹ In other words, the practical difference made by any legal norm is manifested in the additional reason, or the reason-triggering fact, given by the norm, which is *necessary* for the legal agent's performance of the norm act. On this account, one is not guided by the rule not to murder, Shapiro explains, if one has no inclination to kill anyone. In such a situation, “[one does] not [refrain from committing murder] *because* of the rule, although [one thinks] that the rule is a reason to refrain from so acting.”³²⁰ It is the concept of practical difference and its relation to law's action-guiding function that is a focus of debate among legal positivists. Shapiro, as an exclusive legal positivist, contends that a Rule of Recognition which incorporates principles of

³¹⁷ Scott Shapiro, “On Hart’s Way Out,” 173-74. Shapiro’s construal of the mediating role of legal rules when guiding law-addressees epistemically has a Razian flavor, as such rules, in this view, purport to eliminate the normative questions which law-addressees encounter.

³¹⁸ Ibid., 170-72.

³¹⁹ Shapiro, “Law, Morality, and the Guidance of Conduct,” *Legal Theory* 6, no. 2 (2000): 132.

³²⁰ Ibid., 145-46.

morality as criteria of legal validity strips any and all rules validated as laws under such a Rule of Recognition of their ability to make a practical difference and therefore their ability to provide action-guidance.³²¹ Shapiro strives to reveal the incoherence of inclusive legal positivism: allowing a Rule of Recognition to include moral principles as touchstones for legal validity entails the denial of the action-guiding function of laws under that Rule of Recognition. Since legal positivists are committed to the view that the essential function of law is to guide conduct, legal positivists would have to accept that any legal rule must be capable of making a difference to the agent's practical reasoning (the *Practical Difference Thesis*). And since any inclusive Rule of Recognition deprives legal rules of their ability to make practical differences, legal positivists are left with two options – either to accept exclusive legal positivism or to abandon legal positivism altogether.

Defenders of inclusive legal positivism have replied to Shapiro's argument in a variety of ways. Some have argued that the fact that law must be capable of making differences to the practical reasoning of legal agents does not entail that every legal rule must be capable of making such practical differences. Wilfrid Waluchow explicitly claims that "it fails to follow

³²¹ The gist of Shapiro's arguments against inclusive legal positivism could be summarized as follows. First, it is an essential function of law to guide people's conduct. The action-guiding function of law, according to Shapiro, is fulfilled only when legal rules provide motivational guidance or epistemic guidance and thus secure conformity by making practical differences to the practical deliberations of legal agents. Therefore, if a rule is in principle incapable of making a practical difference to secure conformity, it is incapable of performing the action-guiding function. Since all legal rules have, as their function, the guidance of conduct, no rule that is in principle incapable of making a practical difference can be a legal rule. When a Rule of Recognition includes principles of morality as criteria of legal validity, the norms validated as laws under it are stripped of the ability to provide motivational guidance. For even if a judge who follows the inclusive Rule of Recognition did not appeal to the moral principle (as a legal norm) in a particular case, she would still act in the same way – act as the moral principle requires – because of the guidance given by the Rule of Recognition. That is, normative guidance provided by the inclusive Rule of Recognition by itself is always sufficient to give the judge the right legal answer. Furthermore, rules validated by an inclusive Rule of Recognition are incapable of providing epistemic guidance. For the authoritative marks of being legally valid set out by an inclusive Rule of Recognition do not enable legal agents to figure out the contents of legal norms without being engaged in deliberation on the merits of applying such norms. If law-addressees are required to deliberate in order to ascertain what the law requires of them, legal rules thus identified are incapable of making any practical difference. As a result, allowing the Rule of Recognition to incorporate moral principles as criteria of legal validity will deprive rules valid under it of the ability to guide conduct by virtue of making practical differences.

from the fact that a function is attributable to the legal system that it must be attributable to any and all laws within the system.”³²² Matthew Kramer holds a similar view, arguing that “[a] legal system can admirably carry out its function of laying down authoritative directives to steer human conduct into prescribed channels, even if some of its mandates do not contribute to that function but instead play only heuristic and confirmatory roles.”³²³ An exclusive legal positivist who accepts Hart’s characterization of law’s function, Kramer explains, “must also accept that any particular legal system can and does perform that function notwithstanding the occurrence of lacunae in the system’s matrix of source-based norms.”³²⁴ In hard cases where the source-based law has run out, no adequate source-based legal guidance is possible on some or all of the relevant points of contention. The moral principles (identified as legally valid by the Rule of Recognition that permits morality to be a sufficient condition of legal validity) correctly invoked by the judges in such circumstances to fill the gaps in source-based law are incapable of serving as “reason-creating guides” for people’s conduct. They are employed by the judges for the purpose of terminating disputes – the top priority of judges when handling such cases.³²⁵ Moral principles invoked by judges in hard cases clarify and distill the demands of the Rule of Recognition and express such demands to citizens and other officials. Kenneth Himma believes that the textual evidence Shapiro uses to support his arguments does not suggest Hart endorsed a functionalist account of law in Shapiro’s sense. Himma explains,

³²² Wilfrid Waluchow, “Authority and the Practical Difference Thesis,” *Legal Theory* 6, no. 1 (2000), 76.

³²³ Matthew Kramer, *Where Law and Morality meet*, 61.

³²⁴ Ibid., 62.

³²⁵ Ibid., 36. Kramer defends a moderate version of the Rule of Recognition that includes moral principles as a sufficient condition of validity. He argues that it is plausible to design a Rule of Recognition specifying moral principles as a sufficient validity condition in cases where the legal norms from empirically ascertainable sources do not prescribe determinate results. In contrast, Waluchow insists that no inclusive legal positivist would endorse a sufficient condition version of inclusive legal positivism. See Waluchow, “Authority and the Practical Difference Thesis,” 76.

“[T]he word ‘law’ in the sentence ‘law has an essential function’ is more plausibly construed as referring to the law as an institution. Indeed, we would not generally refer to the function of legal norms by talking in terms of ‘law’s essential function.’”³²⁶

Inclusive legal positivists also offer their replies in terms of the role moral criteria play in the Rule of Recognition. When the Rule of Recognition pronounces that moral correctness is a sufficient condition for legal validity, most inclusive positivists acknowledge the inability of legal norms to provide action-guidance in such circumstances.³²⁷ But Himma doubts whether the *Practical Difference Thesis* is sufficient to argue against the possibility of the sufficiency version of an inclusive Rule of Recognition. Himma argues that it is not always a contingent matter that certain laws exist in a legal system which has an exclusive Rule of Recognition.³²⁸ Himma relies on Hart’s contention that, considering human nature, there are some rules of conduct that any viable legal system must contain (the minimum content of the natural law).³²⁹ If Hart is correct, Himma argues, exclusive legal positivism is also inconsistent with the *Practical Difference Thesis*. For in any legal system which has an exclusive Rule of Recognition, there must be some legal rules whose existence does not depend on its social pedigree but on its content. Even if the legal agent does not appeal to the legal rules that reproduce some portion of the minimum content of the natural law, she will still act as the rules require. That makes such rules incapable of making practical differences.

When a Rule of Recognition includes a moral principle or a set of moral principles as a

³²⁶ Kenneth Einar Himma, “H. L. A. Hart and the Practical Difference Thesis,” *Legal Theory* 6, no. 1 (2000): 31-34.

³²⁷ See, e.g., Kramer, *Where Law and Morality Meet*, 18-20; Waluchow, “Authority and the Practical Difference Thesis,” 76-81.

³²⁸ Himma, “H. L. A. Hart and the Practical Difference Thesis,” 14.

³²⁹ Hart, *The Concept of Law*, 192-93

necessary condition for the status of a rule as legally binding, rules validated by such a Rule of Recognition, the inclusive positivists argue, are still capable of providing epistemic and motivational guidance. Waluchow claims that rules valid under the necessity version of an inclusive Rule of Recognition can provide partial epistemic guidance by narrowing the scope of deliberations or disputes. And such rules can provide motivational guidance by each settling on one among an indefinite number of possible rules that are consistent with the moral criteria included in the Rule of Recognition.³³⁰ Kramer argues that Shapiro's contention that legal rules identified by a necessity version of an inclusive Rule of Recognition cannot give a peremptory reason for legal agents ignores the "possible restrictions on the scope of any particular reason's exclusionary or peremptory force."³³¹ Since the scope of a reason's exclusionary force is almost always limited, rules validated by a Rule of Recognition which includes moral principles as a threshold condition of legal validity can still exclude some reasons for action from the legal agent's practical reasoning.

A Reply to the Practical Difference Thesis

Shapiro grounds the core of his critique of inclusive legal positivism on his explication of law's action-guiding function – the ability of legal rules to make differences to an agent's practical deliberations. The replies from inclusive legal positivists also focus attention on whether rules identified by an inclusive Rule of Recognition as legally binding can meet the requirement of the *Practical Difference Thesis*. In this respect, Shapiro and his opponents illuminatingly connect a standard for assessing different versions of positivist theories with the essential

³³⁰ Waluchow, "Authority and the Practical Difference Thesis," 62-64, 78. For Shapiro's response in regard to the partial epistemic guidance, see Shapiro, "Law, Morality, and the Guidance of Conduct," 152-54.

³³¹ Kramer, *Where Law and Morality Meet*, 22-24.

function of law to guide conduct. However, Shapiro's understanding of the practical difference that must be made by law is unsustainable. As I shall argue, it clashes with his recent (perspectival) view on legal concepts, results in a distorted view on law's action-guidance, and leads to an implausible explanation of the law-giver's psychology. Since Shapiro's account of practical difference fails to capture the distinctive way in which law guides human behavior, the Practical Difference Thesis cannot serve as a convincing argument against Inclusive Positivism.

According to Shapiro, a legal norm makes a practical difference if and only if (1) the norm-addressee conforms to the norm³³² and (2) the existence of the rule is necessary for the agent's conformity, whether it provides a reason or triggers another reason. The first condition is meant to present the influence of legal rules on the actions of law-addressees; it excludes contraventions of legal obligations from the instantiations of being guided by the law. The second condition highlights the normative change produced by legal norms in the practical deliberations of law-addressees; it requires that legal norms, when guiding people's conduct, must contribute to the agent's motivation to act differently from what she would have done if she had not appealed to such rules.

However, both conditions of practical difference are questionable. First, being guided by a reason does not entail acting in accordance with what the reason favors. In most circumstances, the agent is confronted by a variety of practical considerations before reaching any decision to be engaged in a certain course of action, e.g., to φ . The agent is supposed to take into account the relevant considerations and to weigh the considerations for φ -ing against those for not- φ -ing to determine whether to φ . Since a decision is supposed to be based on all

³³² Shapiro, "Law, Morality, and the Guidance of Conduct," 146.

relevant considerations, for and against φ -ing, the agent is guided by all those reasons rather than merely by the reasons that prevail in her deliberation. A defeated reason has exerted its action-guiding force by virtue of being assessed in the agent's practical deliberation. By the same token, for a law-addressee to be guided by a legal norm, it is not necessarily the case that the addressee's action is consistent with what the rule requires. Legal norms are not absolute mandates; they may be defeated in some circumstances because of, e.g., the emergence of unforeseen factors. Hence, an agent's contravention of a legal norm does not imply that the agent has ignored or resisted the rule's guidance. Nor does violating a norm imply the ineffectiveness of the norm's action-guiding function. A defeated norm still guides its addressees to the extent that it has figured in the addressees' practical deliberations. As a result, there is no necessary link between the action-guiding function of a norm and the addressee's conformity with that norm.

Second, for a legal norm to guide conduct, it need not be the case that the norm contributes to the legal agent's motivation to act *differently* from the ways in which she would have acted in the absence of the norm. Here Shapiro's point is that legal norms must be capable of guiding conduct by means of supplying additional reasons, or additional facts that trigger certain pre-existing but dormant reasons, that reverse the consequences of the law-addressees' practical deliberations. On this view, legal norms, when providing action guidance for legal agents, give rise to a gap between the actions that ought to be performed on the basis of law-independent reasons, on the one hand, and the actions required by the legal norms (or by the reasons triggered by the application of legal norms), on the other. Such a gap purportedly demonstrates the force of legal norms in guiding conduct. It is a robust condition of the action-guiding function of law. For, on this view, norms which encapsulate reasons for action that already

apply to the addressees are incapable of guiding conduct, as they do not, and do not purport to, add anything to the rule-addressees' practical deliberations.

Such a construal of the practical difference made by legal norms, however, does not gain much support from Shapiro's more recent writings. As was noted in Chapter 3, Shapiro proposes a "perspectival" reading of legal concepts. On the perspectival interpretation, legal statements are reports of the law's point of view on moral legitimacy, moral authority, moral obligation, moral right, and so on. Hence, the ascription of legal authority to someone does not entail that someone has moral authority; it only indicates that, from the legal point of view, someone has morally legitimate authority and thus her demands are morally legitimate and obligating.³³³ Correspondingly, "to say that one is legally obligated to perform some action ... mean[s] only that from the legal point of view one is (morally) obligated to perform that action."³³⁴ The perspectival reading of legal concepts, however, does not square with Shapiro's explication of law's action-guiding function as making practical differences. As we have seen, Shapiro contends that a legal norm makes a practical difference only when it contributes to a legal agent's motivation to act differently from what she would have done in the absence of the norm. Rules that purport to recapitulate pre-existing reasons for action for their addressees fail to meet this requirement and hence are incapable of guiding conduct by making practical differences. Adopting the perspectival interpretation of legal obligations, however, seems to view duty-imposing laws as incapable of making any practical difference. On the perspectival interpretation, legal statements are meant to present the law's point of view in regard to moral appropriateness; they indicate the law's judgments as to what people have reason to do and

³³³ Shapiro, *Legality*, 185-86.

³³⁴ Ibid., 185.

thus indirectly express the law's perspective on what (law-independent) reasons should prevail in particular circumstances. Any legal obligation, when understood perspectively, amounts to what the law presumes to be the balance of pre-existing law-independent reasons for action. But if legal obligations should be regarded as moral judgments made by legal authorities, how could they make, or purport to make, practical differences (in the robust sense proposed by Shapiro) for legal agents – how could such requirements add anything other than the pre-existing reasons for and against the required action to our practical reasoning?

A direct response to this line of argument is that the practical differences the law makes are differences about motivational reasons, rather than normative reasons.³³⁵ The *Practical Difference Thesis* is compatible with the perspectival understanding of legal obligations, if it is focused on the law-addressees' motivational reasons. On this view, legal norms guide behavior as long as what the law presumes to be the actual law-independent balance of reasons does not coincide with what the addressees of the law presume to be the actual law-independent balance of reasons. Under two types of circumstances, a legal obligation understood perspectively can make practical differences in its addressees' motivational reasons. First, the legal obligation is the product of the law-giver's correct balance of law-independent reasons and it leads the law-addressees, whose judgments about the same set of reasons are erroneous, to act against their former balance of reasons. Second, the legal obligation is based on the law-giver's erroneous balance of law-independent reasons but motivates its addressees, whose judgments about the

³³⁵ Shapiro does not sufficiently distinguish normative reasons and motivational reasons when he develops the Practical Difference Thesis. When Shapiro claims that legal norms must constitute practical reasons other than pre-existing reasons for the norm acts, what he has in mind are normative reasons. However, when he refers to the law prohibiting murder as a typical case in which the law gives no normative guidance (no practical difference) to its subjects who are disinclined to kill anyone, he focuses instead on motivational reasons. For a similar criticism, see David Enoch, "Reason-Giving and the Law," in *Oxford Studies in Philosophy of Law*, volume 1, ed. Leslie Green and Brian Leiter, 15.

same set of reasons are correct, or erroneous in some way that differs from the way in which the law-giver's balance is erroneous, to act accordingly.

Such a motivation-focused conception of practice difference, however, is doubly misguided. First, morally acceptable legal obligations, on this view, provide action-guidance only for those who (1) fail to reach accurate judgments on law-independent reasons and (2) comply with legal obligations on the ground of law-dependent reasons. As a result, those duty-imposing legal norms – e.g., most of the statutes in the criminal code – do not offer guidance for those who are inclined to perform the legally prescribed behavior for law-independent reasons and those who violate the norms. However, for a legal norm to guide conduct, it need not be the case that the rule contributes to the legal agent's motivation to act differently from the ways in which she would have acted in the absence of the norm. A legal norm may not directly bring about the compliant behavior, because the addressee has strong reasons to φ irrespective of the law. But the addressee would φ because of law-dependent reasons if the strong law-independent considerations to φ were absent. In such cases, the norm still provides guidance for its addressees. In addition, an agent's contravention of a legal norm does not imply the ineffectiveness of the norm's action-guiding function. A defeated rule still guides its addressees to the extent that it has figured in the addressees' practical deliberations.

Second, on this view, other things being equal, just laws are less likely to guide people's conduct than unjust laws. This is because, in a normal society, it is reasonable to expect ordinary people to make more correct or acceptable practical judgments than incorrect or unacceptable practical judgments. As a result, what the just legal norms require, which is always or nearly always consistent with the actual balance of applicable law-independent reasons in particular cases, usually coincide with what ordinary people presume to be the

balance of law-independent reasons. Conversely, what the unjust legal norms prescribe, which is always or nearly always inconsistent with the actual balance of pre-existing reasons in particular cases, typically collide with what most ordinary people presume to be the balance of law-independent reasons. Any such account is distortive of law's normative guidance, however. The main function of law is to provide action-guidance. If just legal norms seldom guide behavior, then such a core function of law would be predominantly performed by unjust or contentious legal norms. Admittedly, when the performance of a legal obligation results in the agent's deviation from her balance of law-independent reasons (or from the correct balance of those reasons), the law does exert a significant impact on the agent's practical deliberation as well as her action. The ability of law to reverse the consequences of its addressees' practical deliberations, however, is by no means a necessary component of law's normative guidance. Were making a practical difference as envisaged by Shapiro central to the law's practical significance, the fulfillment of the law's action-guiding function, on many occasions, would consist in leading people to do things they have no law-independent reasons to do. A legal system which effectively and extensively performs its action-guiding function, according to this view, would be a normative system in which the legal authority, to a considerable extent, requires its subjects to act at odds with what they have reason to do.

In addition, understanding law's normative guidance as manifested in generating differences in the law-addressees' motivational reasons would result in an implausible explanation of the law-giver's psychology. On many occasions, the law-giver as well as other community members would expect legal agents to act as the law requires not because legal authorities have laid down rules designating certain modes of conduct as legally obligatory, but

because there are conclusive law-independent reasons for performing the required actions.³³⁶ If someone, for example, refrains from committing theft because of the legal rule prohibiting theft (or because of her disposition to avoid the punishment as a result of committing theft) rather than her respect for others' moral rights to their own property, we will consider that the agent does not act for the right reason. She might mistakenly believe that she has undefeated reasons to purloin other people's property in the absence of law. Hence, if the action-guiding function of a duty-imposing legal norm, as Shapiro suggests, were fulfilled only when it makes a difference to the agent's motivation – only when it leads the legal agent to ϕ whereas the agent would not have ϕ -ed in the absence of the rule – the law-giver would hope that the law fails to perform its action-guiding function each time the law-giver enacts a legal rule whose conformity to the actual balance of law-independent reasons is evident to any reasonable addressee of the rule. In such cases, an agent's being guided by the legal norm implies that she does not correctly evaluate the law-independent reasons for and against the norm act and does not act for the right reason. But it is preposterous that law-givers generally hold a negative attitude toward the action-guiding function of law. Legal rules are artifacts whose essential function is to provide guidance of conduct. A law-giver who enacts legal norms with her unwillingness to guide people's conduct by virtue of those norms either contradicts herself or misunderstands the point and purpose of law-making.

In sum, the *Practical Difference Thesis* propounded by Shapiro is based on an unsustainable idea of the way in which the law performs its action-guiding function through imposing legal obligations. Shapiro's conception of practical difference overemphasizes the independent operation of legal norms in legal agents' practical deliberations and therefore

³³⁶ Raz, *Between Authority and Interpretation*, 143-45.

places excessive constraints on the ways in which the law guides the addressees' behavior. It is advisable to broaden the concept of practical difference for a more capacious explanation of the normative guidance of duty-imposing laws and therefore a more elaborate functionalist account of law.

5.2 Law's Action-Guidance as Reason-Generating

In the previous section, I have examined Shapiro's account of law's action-guidance that highlights the law's ability to elicit conformity by virtue of providing reasons for action that reverse the consequences of legal agents' practical reasoning. Shapiro's account can be absorbed into a more general explanation of law's normative guidance: legal norms guide human behavior by virtue of creating practical reasons.³³⁷ In the rest of this chapter, I shall train my focus on the plausibility of the reason-generating approach to law's action-guiding function by examining Joseph Raz's theory.

The explication of law's normative aspect advanced by Joseph Raz has been the most wide-ranging and the most prominent theory to adopt the "law as reason-generating" approach.³³⁸ Raz's explication of the normative significance of law heavily relies on his analysis of the distinctive way in which mandatory norms, of which duty-imposing legal norms are a species, figure in practical deliberations.³³⁹ The law affects the deliberations of legal agents, Raz submits, because mandatory legal norms are themselves reasons, not statements of pre-existing reasons. Such rules constitute reasons which law-addressees would not have in the absence of

³³⁷ See, e.g., Coleman, *The Practice of Principles*, 71; Raz, *Between Authority and Interpretation*, 7.

³³⁸ See, e.g., Raz, *Practical Reason and Norms*, 35-48, 62-65, 73-84; Raz, *The Morality of Freedom*, 57-62; Raz, *Ethics in the Public Domain*, 194-99; Raz, *Between Authority and Interpretation*, 126-65, 203-19.

³³⁹ Raz, *Between Authority and Interpretation*, 205.

such rules, and they exclude all or some contrary reasons from being acted on. Legal rules constitute both reasons for action and reasons against acting for certain reasons.

Raz observes that, when a rule is taken as a reason for action, it does not indicate any inherent value or advantageous consequences of the action prescribed by the rule: typically, a rule requires its addressees to φ without specifying why φ-ing is advisable.³⁴⁰ For example, the rule that all male citizens are obligated to fulfill military service does not indicate why such service is good. The “*opaqueness*” of rules, according to Raz, results from two other characteristic features of rules. First, the justification of a rule’s existence is a *content-independent justification*. It is independent of the nature or merits of the prescribed action.³⁴¹ Legal rules that establish national conscription are valid not because the reasons for forcing male citizens to serve in the armed forces override the countervailing reasons. Such rules are valid because they are enacted by the legislature in a legally required manner. Some may ask what makes the rules enacted by the legislature binding on citizens. The answer, as Raz explains, bears on some considerations related to the desirability of having someone decide public affairs for citizens rather than the desirability of performing the legally required actions. Hence, rules seem to leave a potential gap between what ought to be done (the normative) and what is good or desirable regarding the norm acts (the evaluative). Furthermore, since the justification of the validity of rules does not depend on the merits of their contents, it could justify legal rules with different, even contradictory, contents.³⁴²

³⁴⁰ Ibid.

³⁴¹ Ibid., 208-10. It is worth noting that Raz has subscribed to a different view on the justification of the binding force of rules, according to which a rule’s binding force is grounded on the “dependent reasons,” the reasons for and against the required action. See Raz, *The Morality of Freedom*, 58-61; *Practical Reason and Norms*, 70-71. I will discuss both versions of Raz’s explanation of the ground of the binding force of legal rules when I advance my arguments against Raz’s case.

³⁴² Raz, *Between Authority and Interpretation*, 210-11.

On the other hand, although the desirability of conferring normative powers on someone to lay down general rules justifies the validity of legal rules, the normative force of such rules is not derived from these content-independent considerations. Practical reasoning with rules, in Raz's terminology, lacks *the transitivity of justification*. In normal cases, the transitivity of justification obtains in practical reasoning. That is, if *A* justifies *B* and *B* justifies *C*, then *A* justifies *C*. But, on Raz's view, such transitivity is absent when we invoke rules to justify our actions. Suppose that we support the public standards of behavior enacted by the parliament for the reason *R* that a centralized legislative institution coordinates collective activities more efficiently. Suppose further that the parliament lays down a rule *r* that prohibits smoking. The reason *R* justifies the existence of the rule *r* and *r* justifies one's not smoking. Since *R* does not depend on any value or property of not smoking, *R* cannot by itself justify the omission of smoking. The reason *R* for delegating the parliament to regulate our behavior can justify another rule *r₁* whose content contradicts *r* – a rule that permits smoking or even requires smoking.

According to Raz, the *lack of transitivity* and the *content-independent justification* of rules explains why a rule constitutes a reason for action independent of both the justification of its existence and the justification of its content, and therefore makes a difference in the addressee's practical deliberation. Since the normative force of a legal rule is not derived from the merits of its content and the justification of its existence cannot itself justify the required action, each rule is not merely a statement of any pre-existing reason for the action. Rules constitute reasons for action in their own right and thereby give rise to a difference in the agent's practical deliberation.³⁴³ Moreover, according to Raz, a rule constitutes not only a single reason but a

³⁴³ Ibid., 214.

structure of interrelated reasons for action. That includes, in Raz's terminology, a *first-order reason* for performing the norm act and a *second-order reason* for not acting on some or all conflicting reasons. Second-order reasons are not reasons for action; they are reasons for or against acting for certain reasons.³⁴⁴ The first-order reason brought about by a rule is *protected* by the second-order reason since the latter *excludes* the first-order reasons (or some of them) that conflict with the former.³⁴⁵ Raz believes the presence of second-order reasons marks another practical difference made by (legal) rules: rule-addressees ought not to try to act in accordance with the balance of first-order reasons.³⁴⁶

In sum, on Raz's account, legal rules make practical differences in two ways. On the one hand, they constitute additional first-order reasons for the addressees to act as the rules require. On the other hand, they constitute second-order reasons that exclude all or some of the conflicting first-order reasons. While the first-order reasons given by legal rules are far from trivial, the second-order exclusionary reasons play the crucial role in Raz's theory. Raz stresses that it is the force of rules to exclude other reasons, rather than their weight, that characterizes

³⁴⁴ Raz, *Practical Reason and Norms*, 38-48, 73-80. According to Raz, a reason to act for another reason is a positive second-order reason; a reason to refrain from acting for another reason is a negative second-order reason. Raz also calls the latter type of second-order reasons "exclusionary reasons."

³⁴⁵ Raz, *The Authority of Law*, 17-18; *Between Authority and Interpretation*, 216. Raz has been equivocal about the scope of a rule's exclusionary force. I shall discuss his different accounts in the next subsection.

³⁴⁶ Raz, *The Morality of Freedom*, 60; Raz, *Ethics in the Public Domain*, 220. Generally speaking, reasons have a dimension of strength or weight. Stronger reasons outweigh weaker reasons and thus prevail in practical deliberations. In normal cases of conflicts between reasons, a reason that wins over all competitors for a certain course of action becomes the conclusive reason for the action that ought to be performed by the agent. It is one of Raz's philosophical insights to have noticed that the traditional account of the way in which conflicts of practical reasons are (and should be) resolved may encounter difficulties in explaining the circumstances in which the agent ought to act differently from her own independent perception of the balance of reasons regarding a certain course of action. In those seemingly peculiar cases, Raz asserts, the agents recognize that they have reasons for "not acting on the balance of reasons." Raz's idea of the action-guiding function of rules hinges on his explanation of conflicts between first-order and second-order reasons. On Raz's view, when a rule is in conflict with a first-order reason, it prevails in virtue of being "a reason of a higher order." A rule-addressee is required to exclude the conflicting first-order reasons when acting. Only when the conflicting reasons in a particular case are not excluded by the rule, should the agent act on the basis of a comparison between the weight of the rule and the weight of the unexcluded reasons.

rules' distinctive function in practical reasoning. A rule is not meant simply to be added to the balance of first-order reasons. The point of applying rules in particular cases is to change the landscape of practical reasons on which the rule-addressees can properly act.

Not only does Raz suggest that normative phenomena involving law-compliance must be *explained* in terms of the acceptance of second-order exclusionary reasons, but he also maintains that there can be *justified* second-order reasons that determine what ought to be done. On Raz's view, every functioning legal system possesses *de facto* authority and claims that it possesses *legitimate* authority.³⁴⁷ Obviously, law's claim to legitimate authority may be false because it lacks certain qualities. Raz grounds such qualities on the distinctive role played by authorities. The role of authorities, Raz suggests, is to mediate between citizens and applicable reasons for action. Authorities provide a service for those subject to them: through compliance with authoritative directives, the agents will indirectly act in accordance with reasons – reasons other than the authoritative directives – that apply to them. Hence, Raz labels his idea of practical authority as the “service conception of authority.”³⁴⁸ He advances two theses to explain how authorities serve their subjects. One is the dependence thesis, according to which “all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”³⁴⁹ Raz calls such reasons the dependent reasons. The other is the normal justification thesis, which submits that normally one is likely better to comply with applicable reasons if one acts in accordance with the authoritative directives than if one tries to follow the

³⁴⁷ For challenges to Raz's view on law's claim to moral legitimacy, see Hart, *Essays on Bentham*, 264-68; Kramer, *In Defense of Legal Positivism*, 78-112.

³⁴⁸ Raz, *Ethics in the Public Domain*, 195-99; Raz, *Between Authority and Interpretation*, 134-42.

³⁴⁹ Raz, *The Morality of Freedom*, 47; Raz, *Ethics in the Public Domain*, 198.

reasons directly.³⁵⁰ On the basis of these two theses, Raz infers the pre-emption thesis, which states that “the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”³⁵¹ Either of the two theses of the service conception of authority, Raz believes, implies the pre-emption thesis. On the one hand, according to the dependence thesis, authorities have assessed the relevant first-order reasons when issuing directives. If one takes authoritative directives as first-order reasons and adds them into the balance of dependent reasons, one errs in double-counting the reasons that have been considered by the authority. On the other hand, according to the normal justification thesis, legitimate authorities can perform their function – to improve subjects’ conformity with the reasons that apply to them – because their judgments about dependent reasons are normally better than the subjects’ judgments. Since authorities are, generally, in a better position to assess the dependent reasons than the subjects, one can better comply with such reasons only when one tries to follow authoritative instructions rather than assesses relevant reasons by oneself, namely only when authoritative directives pre-empt the dependent reasons in one’s practical reasoning.

Raz ingeniously connects law’s action-guiding function with his exposition of the characteristic features of rules, the idea of a stratified structure of practical reasoning, and the service conception of authority. His jurisprudential account is therefore embedded in a more general moral philosophy.³⁵² Nevertheless, many critics have impugned Raz’s accounts of

³⁵⁰ Raz, *Ethics in the Public Domain*, 198.

³⁵¹ Raz, *The Morality of Freedom*, 46.

³⁵² Michael S. Moore, “Authority, Law, and Razian Reasons,” *Southern California Law Review* 62 (1989): 839-40.

authority and practical reason.³⁵³ In the rest of this chapter, I will argue that Raz's account of law's action-guidance as creating protected reasons – reasons that each comprises a first-order reason and a second-order reason – is untenable. It is worth noting that neither of these two types of reasons generated by rules in Raz's theory necessarily implies the emergence of reasons of the other type. Nor does the implausibility of the occurrence of one of these two types of reasons imply the implausibility of the occurrence of reasons of the other type. Logically, it is possible to envisage that something constitutes a first-order reason but no second-order reason, and *vice versa*.³⁵⁴ Hence, a rebuttal of Raz's account must address the relations between the law and these two types of reasons respectively. In the subsequent two sections, I shall first discuss the law's ability to create first-order reasons and then examine whether the law constitutes second-order reasons. The implausibility of applying Raz's service conception of authority in the legal domain will be considered in the next chapter.

5.3 Duty-Imposing Norms and First-Order Reasons

Raz claims that the traditional account of conflicts between reasons for action and the solution thereof cannot satisfactorily describe practical reasoning involving rules. The practical principle “one ought to act on the balance of reasons for action,” Raz explains, cannot account for the circumstances in which the agent departs from her assessment of the reasons for and against an action and takes the rule as the justification (or part of the justification) of such a

³⁵³ See, e.g., Stephen Darwall, *Morality, Authority, and Law* (Oxford: Oxford University Press, 2013), 135-78; Scott Hershovitz, “The Role of Authority,” in *Philosophers' Imprint* 11, no. 7 (2011): 1-19; Hershovitz, “The Authority of Law,” in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 65-70; Michael Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2007), 128-92; Stephen Perry, “Second-Order Reasons, Uncertainty and Legal Theory,” *Southern California Law Review* 62 (1989): 927-33; Schauer, *Playing by the Rules*, 88-93.

³⁵⁴ Raz explicitly admits that there may be rules that constitute only exclusionary reasons. See Raz, *Practical Reason and Norms*, 77.

deviation from her balance of reasons. Calling attention to this intuition about rules and practical reasoning, Raz suggests that “we should start from the assumption that rules are reasons, for they are commonly treated as such.”³⁵⁵ To vindicate this assumption, Raz grounds his arguments on the relation between a rule’s being a reason for action and the justification of the rule’s normative binding force. In his early writings, Raz holds that “the justification of the binding force of [rules] rests on dependent reasons,”³⁵⁶ for the role of a rule is to “mediate between deeper-level considerations and concrete decisions.”³⁵⁷ A rule, according to this view, should be understood as the rule-maker’s decision made as a result of her deliberation on the required action. Since a rule amounts to a judgment or conclusion as to the balance of relevant considerations that the rule-maker is supposed to take into account when determining what ought to be done, Raz claims, any rule cannot be juxtaposed with the underlying considerations. One should count either a rule or the reasons it is meant to reflect, but not both.³⁵⁸ In addition, for rules (and rule-makers) to play a mediating role between the rule-addressees and the reasons applicable to them, the addressees are not allowed to challenge the rule-maker’s decision each time it fails to assess reasons correctly. Otherwise, the advantage of accepting a rule as a mediation between reasons and agents will disappear. On the basis of his explanation of the relation between a rule and the background considerations that support the content of the rule, Raz concludes that rules themselves must constitute first-order reasons independent of the

³⁵⁵ Raz, *Between Authority and Interpretation*, 207.

³⁵⁶ Raz, *The Morality of Freedom*, 59. See also Raz, *Practical Reason and Norms*, 79. The bracketed word “rules” actually replaces “authoritative directives” in the original. But in a relevant passage Raz claims that “[a]uthoritative directives are often rules, and even when they are not, because they lack the required generality, the same reasoning applies to them.” Raz’s recognition of his application of the analysis of rules to that of authoritative directives ensures that the replacement is not a problem.

³⁵⁷ Raz, *The Morality of Freedom*, 58.

³⁵⁸ Ibid.

dependent reasons.³⁵⁹

As we have seen, Raz in his more recent works subscribes to a different view on the justification of a rule's normative force.³⁶⁰ His newly developed perspective grounds the justification of a rule's existence and its binding force on the merits of having or complying with rules or, more generally, on the value of the form of governance constituted by rules. This account of the foundation of a rule's normative force shifts its focus from dependent reasons to what I shall call *formal reasons*: reasons concerned with the value of a system of rules rather than with substantive considerations about the norm acts.³⁶¹ Such formal reasons, Raz emphasizes, cannot by themselves justify the norm acts because they do not bear on the desirability of the acts for which the rules are reasons.³⁶² Practical reasoning involving rules hence lacks what Raz calls the transitivity of justification. The inability of rules to transmit normative force from the underlying formal reasons to the norm acts, Raz seems to suggest, explains why rules constitute reasons for action in their own right. That is, since a rule's existence is a fact that counts in favor of the required action and since a rule is incapable of transferring normative force from the underlying formal reasons to the norm acts, a rule must by itself constitute a reason for action.³⁶³

In sum, Raz attempts to highlight the independence of rules in practical reasoning from

³⁵⁹ Although on this view Raz maintains that the normative force of a rule is derived from the dependent reasons, the rule still has a relative independence from the dependent reasons. Even if a rule does not successfully reflect the correct balance of the dependent reasons, it is still binding on the rule-addressees.

³⁶⁰ Raz, *Between Authority and Interpretation*, 201-19.

³⁶¹ I borrow the term “formal reason” from Robert Alexy. See Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford: Oxford University Press, 2010), 57-59.

³⁶² Raz, *Between Authority and Interpretation*, 210.

³⁶³ Strictly speaking, in this account Raz does not address the question of whether rules constitute reasons for action directly. His argument only establishes that if a rule gives its addressees an additional reason for action, it must be a reason in its own right because of its characteristic content-independent justification and its lack of transitivity of justification.

the reasons justifying their binding force, whether such underlying considerations are reasons concerning the merits of performing the norm acts or reasons that justify the governance of a normative system. On the basis of recognizing the independence of rules from the underlying reasons, Raz contends that rules must constitute independent first-order reasons for action for addressees. Neither of Raz's two accounts about the justification of a rule, however, vindicates this contention. I shall consider Raz's two approaches respectively.

The Binding Force of Rules and Dependent Reasons—Rules as Decisions

First, let us consider the explanation that grounds a rule's binding force on the strength of dependent reasons. If a rule is binding because it reflects (or is meant to reflect) the normative force of the dependent reasons, rules will resemble decisions based on the balance of relevant considerations. On this view, the role of a rule is to reach a conclusion or judgment as to the balance of reasons applicable to the rule-addressees. If a decision or judgment creates a reason for its addressees, it seems plausible to say that rules constitute first-order reasons for their addressees in a similar way. In fact, the analogy between rules and decisions or voluntary undertakings such as promises is central to Raz's understanding of the role rules play in one's practical reasoning.³⁶⁴ The point of making a decision, according to Raz, is not only to reach a conclusion regarding what to do, but also to put an end to deliberation – a disinclination to review the agent's assessment of relevant reasons on the basis of which the decision has been made. Raz believes that these features indicate that a decision constitutes an exclusionary

³⁶⁴ Raz, *Practical Reason and Norms*, 71-73; *Between Authority and Interpretation*, 215, 217. Although I agree with Raz that an analogy can be drawn between the role of decisions and that of mandatory norms in practical reasoning (in some respects), his analogy between decisions and promises is debatable. I will not address the parallel between decisions and promises, because it is beside the point here. For an analysis of the dissimilarities between decisions and promises in generating reasons for action, see, e.g., T. M. Scanlon, "Reasons: A Puzzling Duality?" in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, ed. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (Oxford: Clarendon, 2007), 245-46.

reason. And since decisions are exclusionary reasons, Raz submits, it is preferable to regard them also as first-order reasons on the ground of developing a coherent general theory of practical reasons.³⁶⁵

Let us, for the sake of argument, grant that decisions have exclusionary force. It does not seem quite right to say that a decision, whose point is to terminate the agent's deliberation and to keep the agent from acting upon the excluded reasons, constitutes also a first-order reason. Such a claim appears to be redundant even in Raz's theory: why should we be concerned about the first-order strength of a decision if its function in practical reasoning is to exclude rather than to outweigh conflicting first-order reasons? A Razian might reply that it is because the exclusionary force of a decision is not unlimited; there may be circumstances in which some reasons have not been excluded by the decision, or some new factor unexpectedly arises after making the decision. In these situations, the agent is allowed to weigh the first-order strength of the decision against the unexcluded reasons, in order to determine whether to abandon the prior decision. But recognizing the limits of a decision's exclusionary force does not imply that, conceptually, decisions give rise to first-order reasons. Much the same point concerning the scope of a decision's exclusionary force can plausibly be made by claiming that, e.g., the agent is allowed to reassess all relevant considerations when she detects some reason which is beyond the scope of the decision's exclusionary force. In addition, viewing a decision as constituting a first-order reason, which should be compared with the unexcluded conflicting non-dependent reasons, is unfit for Raz's own conception of decisions. According to Raz, if one who has made a decision to perform a certain course of action is willing to, for whatever reason, reopen her deliberation on the relevant considerations for and against the decision, such a decision is at

³⁶⁵ Raz, *Practical Reason and Norms*, 70.

least partly abandoned.³⁶⁶ It is because that decision has been deprived of its exclusionary force – the core of a decision’s practical import. Hence, if we stringently adhere to Raz’s conception of decisions, we should describe such circumstances as involving the agents’ evaluating both the dependent reasons that the agent has taken into account and the reasons that have not been considered, rather than as involving the agent’s weighing the decision against unexcluded considerations. For such a “decision” is no longer operative as a decision. As a result, even in Raz’s theory, the requirement of theoretical coherence does not call for a decision’s being a first-order reason; quite the contrary, theoretical consistency appears to require a Razian to dismiss such an idea.

The incoherence of Raz’s theory as a consequence of regarding decisions and mandatory norms as constituting first-order reasons is also manifested in Raz’s account of the scope of exclusionary reasons. In Raz’s view, decisions, as well as mandatory norms, constitute “protected reasons.” Any instantiation of protected reasons contains a first-order reason and a second-order reason. The second-order aspect of a protected reason excludes conflicting first-order reasons and thereby shields its first-order aspect from being balanced against the excluded reasons. In order for a decision (or a mandatory norm) to protect the first-order reason it creates, the conflicting dependent reasons – the dependent reasons that count against the decision or the norm act – must be within the compass of exclusion. It is controversial, however, whether the reasons that count in favor of the decision or the norm act are also excluded. Raz holds different views on this issue in his own works.³⁶⁷ Sometimes he claims that a protected

³⁶⁶ A decision is completely abandoned, Raz claims, only when the agent abandons his decision-based intention to take the action he has decided to do. *Ibid.*, 67-68.

³⁶⁷ For an analysis of the different views and of the theoretical difficulties Raz’s notion of protected reasons encounters, see Christopher Essert, “A Dilemma for Protected Reasons,” *Law and Philosophy* 31, no.1 (2012): 49-75.

reason excludes both the dependent reasons that support the protected reason and the dependent reasons that conflict with the protected reason.³⁶⁸ At other times, he restricts the scope of exclusion to the dependent reasons that collide with the protected reason.³⁶⁹ Either way of understanding the exclusionary force of protected reasons, when combined with the idea that decisions and mandatory norms constitute first-order reasons, will result in unacceptable accounts.

Let us consider the first possibility that a protected reason excludes all the dependent reasons. This view suggests that a protected reason should be regarded as displacing the reasons which an agent is supposed to consider when making a decision, or the reasons a rule-maker is supposed to consider when issuing a rule.³⁷⁰ One who adopts this view believes that when one abides by a decision or a norm, one ought *not* to act as the decision indicates or as the norm requires for *any* of the dependent reasons on which the decision or the norm is based. The first-order aspect of a protected reason brought about by a decision or a norm therefore becomes the *only* reason for the agent to act accordingly (assuming that there is no unexcluded reason).³⁷¹ As a result, the agent, when asked for the reasons for performing the action (rather than asked for the reasons on which the decision or the norm is based), does not seem to be allowed to

³⁶⁸ Raz, *Practical Reason and Norms*, 192. See also Raz, *The Morality of Freedom*, 38-61; Raz, "Facing Up: A Reply," *Southern California Law Review* 62 (1989): 1153-35; Raz, *Between Authority and Interpretation*, 216.

³⁶⁹ Raz, *Between Authority and Interpretation*, 144-45.

³⁷⁰ Ibid., 216; Raz, *Practical Reason and Norms*, 192.

³⁷¹ In circumstances where any non-dependent reason is detected, the agent is allowed to (or even supposed to) evaluate the relevant first-order reasons, excluded and unexcluded, to reach a new decision (or to determine whether to conform to the norm). As I have argued above, in such cases the prior decision is no longer a decision and thus deprived of its force to figure in one's practical deliberation. The agent ought not to include the prior decision in her reassessment of reasons. Also, though an institutionalized rule normally remains valid in similar situations, it does not make much sense to maintain that it is still a reason for the addressees. The addressees in such cases are considering whether there are sufficient underlying reasons to conform to the rule, rather than taking the rule as a reason or justification for conformity.

refer to even the strongest dependent reasons that count in favor of the decision (or of the norm).

For, on this view, all the relevant dependent reasons are replaced by the first-order reason given by the decision (or the norm).

According to Raz's first interpretation of the exclusionary force of decisions, the underlying reasons that have been considered when one makes a decision are excluded by that decision. The agent is only allowed to be motivated by the first-order reason created by the decision to do what she has decided to do. But such a requirement is certainly too demanding. A decision is one's judgment or conclusion as to whether to act in a certain way; it expresses the outcome of the agent's deliberation on relevant reasons for action. According to Raz, to make a decision is to bring an end to deliberation. One who has reached a decision ought not to reopen her evaluation of the relevant importance of the underlying considerations. Otherwise, the decision would be abandoned. Such being the case, whether a dependent reason ought to be excluded or replaced by the decision appears to depend on whether the reference to such a reason for explaining the agent's behavior is equivalent to a reassessment of dependent reasons or to an abandonment of the decision. Obviously, if one who has made a decision to φ refers to a dependent reason not to φ to explain her behavior (not- φ), it must be the case that she has already abandoned her decision to φ (or has reached a new decision to disregard the prior decision to φ). In contrast, the fact that an agent states that she will φ because of a dependent reason to φ entails neither that she has abandoned her decision to φ nor that she has reassessed the dependent reasons.³⁷² As a consequence, referring to a dependent reason to φ when asked

³⁷² For example, I decided to be a vegetarian after I had considered the reasons for and against consuming animal products. Suppose that, among various reasons that count in favor of my decision to be a vegetarian, I regard my religious faith as the most significant one. That reason defeated all the contrary reasons. Each time I was asked why I became a vegetarian, I referred to my religious faith rather than my decision. Did I abandon my decision to be a vegetarian? Certainly not. My responses to the questions about my becoming a vegetarian, which were focused on the overriding reason on which my decision was based, did not imply that I had reassessed the reasons pro and con or that I had disregarded my decision to be a vegetarian; nor did they render the result of my

why doing φ does not undermine the point of making a decision: to arrive at a conclusion and to cut off further deliberation. There is no need for an agent to exclude the dependent reasons to φ and take her decision as the only reason to φ when she has reached a decision to do so.

Likewise, it is questionable to claim that a legal obligation to φ must replace the dependent reasons to φ and become the only reason for the law-addressees to φ . To be sure, the law claims obedience from its addressees. Obedience, according to a common view, involves that one does what one has been told to do *because* one has been told to do so.³⁷³ But such a conception of obedience, as Scott Hershovitz points out, misrepresents what legal authorities claim when issuing duty-imposing laws. The law typically claims its subjects' conformity with legal obligations, rather than the reasons for conformity.³⁷⁴ Conformity with legal rules for, e.g., moral reasons will not be deemed legally defective in most circumstances, as the reasons for which legal agents adhere to legal obligations are seldom specified in the contents of legal rules. The way in which the law performs its action-guiding function should not be more than what the law claims. Since the law does not necessarily claim a right to its subjects' taking legal rules as reasons for action, why should the law's action-guiding function have to consist in the law's being taken as creating new reasons for action and excluding the supporting underlying reasons?

deliberation undetermined.

³⁷³ Donald Regan, "Reasons, Authority, and the Meaning of Obey: Further Thoughts on Raz and Obedience to Law," *Canadian Journal of Law and Jurisprudence* 3, no.1 (1990): 15; Raz, *Ethics in the Public Domain*, 343; Marmor, *Philosophy of Law*, 61-63; Robert Paul Wolff, *In Defense of Anarchism*, (Berkeley and Los Angeles, CA: University of California Press, 1998), 9.

³⁷⁴ Scott Hershovitz, "The Authority of Law," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, NY: Routledge, 2012), 65-70. Hershovitz admits that in extraordinary circumstances the law may claim not only conformity but also conformity for the reason that the law prescribes it. Michael Moore holds a similar view, arguing that "[t]hose in authority who issue rules are concerned about conforming behavior; rarely are they concerned with the motives with which they conform their behavior to the rule." See Michael Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2007), 168; see also Essert, "A Dilemma for Protected Reasons," 62-65.

Now it seems implausible to see the Razian protected reason given by a decision or a mandatory norm as excluding both types of dependent reasons. Let us consider what would result if a protected reason excludes only the dependent reasons that count against it. If the dependent reasons to φ are not excluded by the protected reason to φ , the operation of a protected reason in one's practical deliberation will amount to, on the one hand, giving rise to a new reason to φ (the first-order aspect of a protected reason), and, on the other hand, excluding the conflicting dependent reasons not to φ . The difficulty that arises in this view, as Christopher Essert points out, is that some dependent reasons will be counted twice.³⁷⁵ Remember that first-order reasons, according to Raz, operate in one's practical deliberation by competing with conflicting reasons. Hence, for the claim that decisions and mandatory norms constitute first-order reasons to be sensible, a reasonable explanation of the strength or weight of such reasons is needed. At one point, Raz states that "the arbitrator's decision is meant to be based on the [dependent] reasons, to sum them up and to reflect their outcome."³⁷⁶ This implies that the first-order strength of the protected reason given by a decision to φ is determined by the balance of the dependent reasons that have been considered by the agent. Although this seems to be the most plausible explanation of the strength of the first-order aspect of a protected reason in Raz's theoretical framework,³⁷⁷ it is incompatible with the view that the dependent reasons to φ are not excluded by the protected reason. One has taken into account the dependent

³⁷⁵ Essert, "A Dilemma for Protected Reasons," 65-72.

³⁷⁶ Raz, *The Morality of Freedom*, 41.

³⁷⁷ Raz has advanced another interpretation of the first-order strength of a protected reason. He writes, "The first-order strength of a norm depends on the value it serves; it depends on the strength of the reasons for the norm which are reasons for doing what is required by the norm. These are all the reasons for the norm except those which justify its character as an exclusionary reason." See Raz, *Practical Reason and Norms*, 77. But excluding the dependent reasons against a norm from being contributory to the first-order strength of that norm is inconsistent with Raz's own understanding of the role of a norm (or a decision), according to which a norm (or a decision) is meant to sum up the dependent reasons.

reasons to φ , along with the dependent reasons not to φ , when one makes a decision (or a norm) to φ . If the decision or the norm to φ constitutes an additional reason and if the dependent reasons that count in favor of φ -ing remain valid reasons for the agent to φ , the agent will inevitably count such reasons – the reasons that count in favor of φ -ing – twice. To be sure, Raz fully recognizes that it is erroneous to count a reason more than once in practical reasoning and reminds his readers that one should count either the dependent reasons to φ or the protected reason to φ .³⁷⁸ However, this claim lacks support even in Raz's theory. For a general principle of practical reasoning, Raz holds that “it is always the case that one ought, all things considered, to act for an undefeated reason.”³⁷⁹ In Raz's view, reasons for action can be defeated in two ways. They may be outweighed by other reasons or excluded by exclusionary reasons. As a result, in circumstances where a decision (or a norm) to φ is issued, we can disregard the dependent reasons to φ only when they are overridden by other first-order reasons or excluded by second-order exclusionary reasons. In such cases, however, these reasons are not outweighed by conflicting reasons (this is why there is a decision or a norm to φ rather than not- φ); nor are they, according to the second interpretation of the scope of exclusionary reasons, excluded by the decision or the norm. Unless there are further grounds for disregarding these dependent reasons, one should, according to the practical principle suggested by Raz himself, consider them in determining what to do. And that will certainly result in an error of double-counting reasons.³⁸⁰

³⁷⁸ Raz, *The Morality of Freedom*, 58.

³⁷⁹ Raz, *Practical Reason and Norms*, 40.

³⁸⁰ The irrationality of double-counting reveals another substantive concern why decisions made by an agent or by a rule-maker cannot be (first-order) reasons for action. Decisions, as we have seen, are based on underlying reasons; they are conclusions or judgments oriented to the relative importance of such reasons. Hence, a decision, like a judgment about the correctness or wrongness of an action, cannot itself be added as a new reason in the agent's practical deliberation on which the decision is based. See Jonathan Dancy, “Should We Pass the Buck?” *Royal Institute of Philosophy Supplement* 47 (2000): 166; T. M. Scanlon, “Wrongness and Reasons: A Re-

As we have seen, there exists a dilemma in Raz's theory with regard to the scope of a protected reason's exclusionary force. On the one hand, it is inappropriate to state that a decision or a mandatory norm excludes the dependent reasons for and against the decision (or the mandatory norm) that have been considered; on the other hand, if the protected reason given by a decision or a mandatory norm excludes only the countervailing dependent reasons, the agent would inevitably commit an error of double-counting some reasons when engaging in practical reasoning. In other words, there is an inherent conflict in Raz's account of protected reasons. The first-order aspect of a protected reason is incompatible with its second-order aspect. A Razian must abandon one of the two features of protected reasons to maintain theoretical coherence. Since the ability of mandatory norms to create second-order exclusionary reasons is central to Raz's practical philosophy and abandoning such a core contention would be equivalent to abandoning Raz's theory, it appears that a Razian must abandon the claim that mandatory norms and decisions constitute first-order reasons.

The Binding Force of Legal Rules and Formal Reasons—Rules as Intentions

In this sub-section, I shall consider Raz's second (and probably his current) interpretation of the justification of a rule's binding force and examine whether we can via this approach substantiate the claim that mandatory legal rules constitute independent first-order reasons. On this view, the justification of the validity and binding force of a legal rule does not bear on the merits of the norm acts but on the value of being subject to a system of rules. A variety of

examination," in *Oxford Studies in Metaethics II*, ed. Russ Shafer-Landau (Oxford: Oxford University Press, 2007), 5-20. In other words, both decisions and actions are responses to reasons for action. In any particular case, a decision to φ is a response to the reasons for and against φ -ing, and to φ is also a response to those reasons. Since they are both responses to the same set of reasons, it is implausible to say that one response can be added as an additional reason to the reasons for the other response. See Garrett Cullity, "Decisions, Reasons, and Rationality," *Ethics* 119, no.1 (2008): 63.

considerations may provide such content-independent justifications.³⁸¹ The reasons for sustaining a legal system necessarily constitute or imply reasons for conferring legal powers on someone to determine what the community members ought to do or to refrain from doing. As a consequence, the reasons that justify the bindingness of legal rules also justify the conferral of legal powers in the legal system – the powers that enable an authority to determine what (legally) ought to be done. Under this line of thought, legal rules resemble someone's intentions as to what the community members ought to do within the jurisdiction of a legal system, rather than practical judgments based on the balance of relevant reasons.

However, the idea that the law provides law-addressees with reasons stemming from the law-giver's intentions is confronted by an objection which is well known in the philosophy of action and the philosophy of normativity. As Richard Holton contends: "Forming an intention to do something surely cannot give one a reason to do it that one would not otherwise have. If it did, we could give ourselves a reason to do something just by intending to do it; and that

³⁸¹ Obvious examples are the functions performed by Hartian secondary rules. The Rule of Recognition dispels uncertainty about the identity and content of legal rules; rules of change enable a society to adapt law's governance to changing circumstances; rules of adjudication provide efficient methods for settling disputes and directing the application of coercive measures. The crucially salutary functions of Hartian secondary rules provide some good reasons for sustaining a modern legal system. In contrast, Raz's Normal Justification Thesis is *not* a paradigmatic content-independent justification. To be sure, it appears to be a justification detached from the contents of individual authoritative legal rules. An authoritative directive is binding on the subjects not because it presents a morally warranted requirement, but because in the long run obeying authoritative directives enables the subjects to better conform with the reasons that apply to them – even though the authority may make mistakes in particular cases. But the Normal Justification Thesis implies the Dependence Thesis that authoritative directives must be based on evaluations of relevant reasons applicable to the subjects. Only when the authority's practical judgments are based on its deliberations about dependent reasons can the authority render determinations that correctly reflect such reasons. Through the connection between the binding force of authoritative directives and the superiority of the authority's ability in practical reasoning, the legitimacy of authoritative directives is at least partly due to the contents of such directives. That gives Raz's account a degree of content-dependence. My main concern in this chapter is not with Raz's conception of authority and its application in jurisprudential investigation, but with the question whether a certain approach to the justification of authoritative legal rules can vindicate the claim that such rules constitute reasons for their addressees. Hence, although for the sake of argument I will sometimes take Raz's account as an example of a content-independent justification of legal authority, I am not committed to the view that the Normal Justification Thesis is the best content-independent justification of legal norms.

cannot be right.”³⁸² Holton and others deny that an agent or a group of agents can bootstrap a reason to φ into existence just by forming an intention to φ (henceforth the bootstrapping objection).³⁸³

One main argument for the bootstrapping objection is the metaphysical claim that we “cannot bootstrap a reason into existence *from nowhere*, just by forming an intention.”³⁸⁴ Raz, however, is convinced that there is nothing metaphysically puzzling in such bootstrapping phenomena. He draws an analogy between authoritative directives and promises, when explaining how such speech acts give us reasons. “By promising, we impose on ourselves obligations that we did not have before, and we do so simply by communicating an intention to do so. In exercising authority, we impose on others duties that they did not have before, and we do so simply by expressing an intention to do so.”³⁸⁵ Raz believes that bootstrapping reasons by forming intentions is neither mysterious nor implausible. Various actions, Raz submits, give rise to reasons for action or even obligations, if there are sufficient pre-existing reasons for us to take such actions as giving rise to reasons or obligations. Giving birth to a child, for example, gives rise to an obligation for the parents to look after the child, because there is a general reason for such an obligation to be imposed on parents.³⁸⁶ By the same token, promisors and practical authorities do not create reasons for action *ex nihilo* by forming intentions. A promise

³⁸² Richard Holton, “Rational Resolve,” *The Philosophical Review* 113, no. 4 (2004): 513.

³⁸³ For some statements of the bootstrapping objection, see Michael Bratman, *Intention, Plans, and Practical Reason* (Stanford, CA: CSLI, 1999), 23–27; John Broome, “Are intentions reasons? And How Should We Cope with Incommensurable Values?” in *Practical Rationality and Preference: Essays for David Gauthier*, ed. Christopher Morris and Arthur Ripstein (New York, NY: Cambridge University Press, 2007), 98–120; Holten, “Rational Resolve,” 507–35.

³⁸⁴ John Broome, “Are Intentions Reasons?” 98 (emphasis added).

³⁸⁵ Raz, *Between Authority and Interpretation*, 135. In this quotation, Raz conflates forming an intention and communicating of an intention in his response to the bootstrapping objection. Obviously Raz must hold that both promisors and practical authorities can impose duties by virtue of forming and communicating their intentions and therefore can create reasons by virtue of forming and communicating intentions.

³⁸⁶ Ibid., 135–36.

– an intention formed and expressed by the promisor – is binding on the promisor, Raz explains, only when “the promised action is of a class regarding which there are sufficient reasons to hold the promisor bound by the promise.”³⁸⁷ An authoritative directive constitutes a reason for the addressees only when “there are sufficient reasons for [the addressees] to be subject to the duties at the say-so of [the authority].”³⁸⁸ On the basis of such an understanding of why intentions could generate reasons,³⁸⁹ Raz explains why a legitimate legal authority’s communication of intentions creates reasons for its subjects. He grounds his answer to that question on his answer to the moral question of how a rational being can justifiably be subject to another’s will and practical judgment.

Raz proposes two conditions under which the legitimacy of an authority is justified and people subject to the authority therefore have sufficient reasons to take authoritative directives as their reasons for action.³⁹⁰ The first condition requires that the subjects would better conform to applicable reasons if they follow the authority’s directives than if they make practical judgments by themselves. It is a restatement of Raz’s Normal Justification Thesis, which is central to the service conception of authority: a practical authority serves its subjects by helping them conform with reasons for action. The second condition is that it is better to conform with reasons than to decide for oneself. It states the independence condition, aimed at clarifying the relationship between one’s autonomy and one’s conformity with reasons. A person is a rational being and has the abilities to form a view of the world, to engage in practical reasoning, to make practical judgments, and thereby to guide her own conduct. The

³⁸⁷ Raz, *Between Authority and Interpretation*, 136.

³⁸⁸ Ibid.

³⁸⁹ For a similar strategy to argue against the bootstrapping objection, see Christian Pillar, “The Bootstrapping Objection,” *Organon F* 20, no. 4 (2013): 622-25.

³⁹⁰ Raz, *Between Authority and Interpretation*, 136-37.

development of such abilities is constitutive of a person's autonomy and independence. Obeying authoritative directives, however, restricts one's ability to deliberate and act independently. For if one is subject to an authority, one must, when engaging in practical reasoning, take into account the authority's requirements. The key to the justification of legitimate authority, therefore, is to reconcile the tension between a person's rational autonomy and her yielding to the authority's will, or to explain why obedience to authoritative directives could be a rational choice. Since, on Raz's account, an authority is legitimate only when it improves the subject's conformity with reasons, the primary moral question concerning practical authority in his theory is about the conflict between the importance of personal autonomy and the importance of conformity with reasons.

Raz attempts to eliminate the opposition between the two values by arguing that the purpose or function of our rational capacity is to secure conformity with reason.³⁹¹ We value our rational ability to guide conduct because, Raz writes, "there are reasons that we should satisfy and ... this ability enables us to do so."³⁹² Hence, although there may be some cases in which these two concerns are radically different and incommensurable, they are not incommensurable in all possible cases. Nor does the fulfillment of one entail the infringement of the other. Moreover, to act on one's own judgment is not the only way for a rational human being to conform with reasons. In some contexts, one may better conform with reasons by following one's emotions or instinctive reactions, by committing oneself to a future course of conduct without deliberating at the time of acting, or by being subject to another's practical judgments.³⁹³ If an authority is justified by its ability to enable its subjects to conform better

³⁹¹ Raz, *Between Authority and Interpretation*, 139.

³⁹² Ibid., 140.

³⁹³ Ibid.

to reasons, yielding to its directives shares the same purpose as exercising our rational ability to deliberate on our own – to conform with reasons. Obeying authorities is therefore “not a denial of people’s capacity for rational action, but simply one device, one method, through the use of which people can achieve the goal of their capacity for rational action, albeit not through its direct use.”³⁹⁴ This way of understanding one’s obedience to legitimate authorities affirms that submitting oneself to legitimate authorities is part of one’s rational ability and autonomy. By choosing to act as the legitimate authority requires, one demonstrates one’s rational abilities to pursue the goal of conforming with reasons. It is therefore plausible to say that in most cases the second condition regarding the moral justification of legitimate authorities will be met. As a result, normally, if an authority’s directives enable its subjects to conform better with reasons, there is a moral reason for the subjects to act as the authority requires. Or so Raz contends.

Raz combines the theoretical question whether an authority’s intention can be a reason for its subjects with the moral question regarding the legitimacy of practical authorities, and he offers his answer to both questions on the basis of the service conception of authority. He thus seems to provide a response to the metaphysical version of the bootstrapping objection: the reasons given by an authority’s communication of intentions are not created from nowhere; they are embedded in the moral ground of legitimate authorities.

But such a response, as I shall argue, is not successful. On Raz’s view, if an authority is legitimate according to the service conception of authority, its subjects have moral reasons to follow the authority’s directives – to do what the authority intends them to do. That is, each subject has a conditional reason. Let us call it R_m :

³⁹⁴ Ibid.

(R_m) If a legitimate authority communicates an intention that its addressees should φ , each of its addressees has a moral reason to φ .

Raz believes that if the authority is legitimate and the subjects thus have a general reason to act as the authority intends, the authority's communication of the intention that the subjects φ will create an additional, independent, reason for the subjects to φ . Let us call this intention-based reason R_i :

(R_i) the legitimate authority's communication of the intention that its subjects φ is a reason for the subjects to φ .

Can we infer R_i from R_m ? According to the bootstrapping objection, R_i seems impossible. Since no reason can be created merely by forming an intention, the communication of intentions is insufficient to create reasons. In contrast, Raz believes that if there is sufficient reason for us to act as the authority intends, the authority's communication of intentions will create reasons for us. That is, if R_m , then R_i .

Let us begin by scrutinizing R_m . R_m is a statement of a sufficient condition for the existence of a moral reason. It directs the subjects to act as the legitimate authority intends, because following the authority's instructions has some moral worth – to conform better with reasons. When the subjects refer to R_m as an answer to the question of why to φ , they highlight the moral worth of following the authority and indicate that they are constantly under the moral requirement that if a legitimate authority intends you to φ , you have a reason to φ .³⁹⁵ The

³⁹⁵ This interpretation is inspired by John Broome's explanation of how a promisor can impose a moral

authority's communication of his intention that the subjects φ does not bring about that underlying moral requirement; rather, it figures as the antecedent in the conditional moral requirement. On this view, a proper explanation of the subjects' conformity with the authority's directive is that the subjects φ because φ -ing helps them better comply with reasons by virtue of being consistent with the authority's intention. The subjects comply with the authority's requirements not simply because the required actions are intended by the authority but because compliance with legitimate authorities enables the attainment of a moral goal. This analysis is applicable to other content-independent justifications of legal rules. For example, if an authority is justified because following authoritative directives is the most efficient way to cope with public affairs, the subjects have a reason regarding efficiency to act as the authority intends. When one refers to an underlying reason such as R_m as the ground of the subjects' compliance, one is committed to the view that R_i cannot itself provide a complete explanation of the ground of subjects' conformity; the authority's conveying of an intention cannot be an independent normative reason for the subjects to comply with the intention.

To reinforce this point, let us consider another case where the agent has a similar structure of practical reasoning. Suppose that my grandfather has hypertension. And he always flies into a rage when he finds someone disregarding his needs. To maintain his health and control his high blood pressure, I have a good reason to satisfy his needs. My grandfather avails himself of this situation. He always notes down his needs on a whiteboard and expects me to notice them and to help him accomplish them. By tacitly letting me know what he needs, my grandfather intends to give me a reason to do as he wishes. One day he writes on the whiteboard

requirement on herself. See Broome, *Rationality Through Reasoning* (Chichester: Wiley-Blackwell, 2013), 124-25.

that he wants someone to borrow a book for him from the library every morning. I proceed to borrow a book for him every morning, even though doing so is a troublesome task. Before long, the librarian notices me and asks me why I borrow a book every morning. A proper reply will be that I borrow a book every morning because such an action helps preserve my grandfather's health by satisfying his need. I borrow books for my grandfather not simply because my grandfather intends me to get what he needs, but because I have a pre-existing reason to satisfy my grandfather's needs. That reason outweighs the fact that borrowing books in the early morning is a troublesome task. In this case, my grandfather indeed intends to give me a reason to borrow a book for him every morning. But all he has done with regard to reason-giving is to trigger an application of the pre-existing reason that I ought to alleviate my grandfather's hypertension by satisfying his needs. To say that my grandfather's intention constitutes an independent reason for me to borrow books for him is to miss the point. The mere existence of an underlying reason for someone to comply with another's intentions does not mean that such intentions are themselves reasons that justify the intended actions on their own.³⁹⁶

David Enoch provides a more rigorous account of intention-based reasons, reasons that are given through what he terms “robust reason-giving,”³⁹⁷ by elaborating the content of the reason-giver’s intention. For one to give another a practical reason solely by virtue of communicating an intention such as making a request or a command, Enoch argues, it is not sufficient that the reason-giver intends to give the reason-receiver a reason. In many cases, the

³⁹⁶ For a similar view that Raz’s service conception of authority does not solve the metaphysical problem regarding the reasons given by authoritative directives (intentions), see David Enoch, “Authority and Reason-Giving,” *Philosophy and Phenomenological Research* 89, no. 2 (2012): 329.

³⁹⁷ Enoch distinguishes three kinds of reason-giving: (1) *Epistemic Reason-Giving*: one gives reasons by indicating certain pre-existing reasons to the reason-receiver; (2) *Triggering Reason-giving*: one gives reasons by manipulating non-normative circumstances to trigger pre-existing reasons; (3) *Robust Reason-Giving*: one gives reasons by forming intentions.

reason-giver, who seems to give a reason to the reason-receiver by forming an intention, only triggers a pre-existing reason (recall the grandfather in the above example). That is, the reason-giver's intention in such cases plays only a role as non-normative circumstances, the manipulation of which by the reason-giver fulfills the condition specified in a pre-existing reason. These intentions are not themselves reasons, at least not independent reasons. What makes intention-based reasons unique, Enoch submits, is the reason-giver's intention to "give a reason merely by the very forming of the intention to give a reason."³⁹⁸ Based on such considerations, Enoch puts forward the following account of intention-based reasons. One person A who attempts to give another person B an intention-based reason to φ only when:

- (1) A intends to give B a reason to φ , and A communicates this intention to B;
- (2) A intends B to recognize this intention;
- (3) A intends B's given reason to φ to depend in an appropriate way on B's recognition of A's communicated intention to give B a reason to φ .

The third condition, Enoch explains, "can be understood as a generalization of such natural thoughts as that when I ask you to φ , I intend that your reason for φ -ing be that I asked you to; that when I command that you φ , I intend that your reason for φ -ing be that I said so."³⁹⁹ It is the existence of the reason-giver's intention that the reason-receiver φ because of the reason-giver's intention that the reason-receiver φ , that shows the reason-giver is attempting to

³⁹⁸ David Enoch, "Authority and Reason-Giving," 302; See also Enoch, "Giving Practical Reasons," *Philosophers' Imprints* 11, no. 4 (2011): 14-18.

³⁹⁹ Enoch, "Authority and Reason-Giving," 303.

robustly give a reason – to give an intention-based reason. An intention-based reason misfires if the reason-receiver acts as the reason requires for other considerations.

On the basis of Enoch’s account of what the reason-giver intends when attempting to give an intention-based reason, we could reformulate the underlying reason (R_m) for complying with the legitimate authority:

(R_m') The subjects of a legitimate authority have a moral reason to [φ and accept the authority’s intention that the subjects φ because of the authority’s intention that the subjects φ as their reason to φ] if the legitimate authority intends the subjects to φ and intends them to φ because of the authority’s intention that they φ .

Now it seems that we can infer from (R_m') that the legitimate authority’s intention constitutes an independent, intention-based, reason for the subjects to φ (R_i). The subjects now have a reason to φ because the legitimate authority intends them to φ . Notwithstanding that the ultimate reason for the subjects to “ φ because of the legitimate authority’s intention” is a pre-existing reason, the authority’s communication of the intention can serve as an independent reason for the subjects to φ .

Enoch’s elaboration of the content of the reason-giver’s intention provides a promising approach to establishing the plausibility of intention-based reasons. I take no stance here on whether this general account is successful. But even if it successfully vindicates the claim that one’s intention, under certain conditions, can provide an independent reason for another, its

applicability in the legal domain is dubious. As Enoch makes explicit, one who attempts to give an intention-based reason for another to φ must intend the reason-receiver to “ φ because of her intention.” As a result, if a legal authority attempts to give an intention-based reason for its subjects to φ , the legal authority must intend not only that its subjects φ but that its subjects φ because the legal authority intends them to φ . But a law-giver need not intend the law-addressees to act as the law requires solely because of the law. It need not so intend because even if the conformity of the law-addressees with a legal rule is based on law-independent reasons, that rule does not misfire. Typically, legal rules are directed at people’s actions, rather than at the reasons for which the actions are performed. The legal authority should not intend the law-addressees to conform with legal duties solely because they are required by the law, for a society in which most people conform with the law solely because it is the law will be an undesirable society. As I argue in the response to Shapiro’s *Practical Difference Thesis*, in many cases, the law-giver as well as other community members in a society would expect legal agents to act as the law requires not because legal authorities have laid down rules designating certain modes of conduct as legally obligatory, but because there are conclusive law-independent reasons for performing the required actions. It is worrisome to hear someone express that she does not commit a homicide solely because it is not allowed by the law, for this agent must ignore the respect for human life or wrongly assess relevant reasons regarding killing people. The fact that most people in a society are such “law-fundamentalists” will jeopardize the existence of the society, for the function of law in such a situation marginalizes other forms of regulation such as morality and social customs. And that will certainly not be a state that the law-giver should intend. As a result, legal authorities are not supposed to give intention-based reasons for law-addressees. Intending the law-addressees (the reason-receivers)

to act in a certain way solely on the basis of the law-giver's (the reason-giver's) intention is inconsistent with the way in which the law should guide conduct.

5.4 Duty-Imposing Norms and Second-Order Reasons

In the preceding section, I have demonstrated the implausibility of viewing legal rules as constituting independent first-order reasons. But that does not imply that legal rules cannot exert their influences on the practical deliberations of legal agents by giving practical reasons in another way. According to Raz, the other dimension of law's action-guiding function consists in the second-order exclusionary reasons given by legal rules. Such reasons operate in a negative manner: they refrain legal agents from acting upon certain reasons. Raz believes that the recognition of second-order exclusionary reasons is the key to solving the paradox of practical authority – how it could be rational to act contrary to the balance of reasons for action because one has been told to do so.

The paradox of practical authority, on Raz's view, is based on the traditional view on practical reasoning which identifies what we ought to do, all things considered, with what we ought to do on the balance of first-order reasons. Since a practical authority may require its subjects to engage in a certain course of action which, according to the evaluation of first-order reasons, ought not to be taken, obedience to practical authorities seems to violate the principle of rationality. By introducing second-order reasons into our practical deliberations, Raz explains, what we ought to do, all things considered, will not necessarily be identical to the balance of first-order reasons. And if practical authorities are capable of creating second-order reasons, it will not be necessarily irrational to obey the authoritative directives which are contrary to the balance of first-order reasons. I shall in this section consider the plausibility of

second-order exclusionary legal reasons. As I will argue, Raz's exclusionary reason model is inadequate because (1) it does not provide a better explanation of normative phenomena involving legal rules than the traditional view on practical reasoning; (2) it fails to offer a complete and coherent account of the circumstances in which it is rational for legal agents to deviate from legal rules; (3) it has difficulties in explaining the conflicts between authoritative directives made by different practical authorities.

In *Practical Reason and Norms*, Raz advances a phenomenological argument to demonstrate that exclusionary reasons are frequently used in ordinary practical reasoning and that the two-layer model of practical reasons explains such circumstances in a more satisfactory manner than any alternative model.⁴⁰⁰ Three examples are provided. In the first example, the agent, who is physically and psychologically exhausted, is presented with an offer in regard to a possible investment which must be considered by the end of the day. The agent is interested in such a business proposal, but she is also aware that her physical and psychological condition may impair her judgment and thus she may reach an inaccurate conclusion. She politely declines the offer and explains that it is not because the reasons for accepting the offer are outweighed by the contrary reasons; rather, it is because she cannot trust her own judgment at that moment. The reason for which she rejects the offer is not a first-order reason against accepting the offer but a second-order exclusionary reason not to act on her balance of first-order reasons regarding the merits of the offer. The second example involves a soldier who receives an order to φ from a commanding officer in the army. The soldier believes that on the balance of all relevant first-order reasons, he ought not to φ . But he ought to φ , all things considered, because the commanding officer's order constitutes an exclusionary reason that

⁴⁰⁰ Raz, *Practical Reason and Norms*, 37-45.

requires him not to act on his own balance of first-order reasons. In the third example, the agent makes a promise that, when deciding whether to φ , she will not take into account a certain reason R that counts in favor of φ -ing. The promise constitutes an exclusionary reason for the agent not to count R as a reason to φ in her practical reasoning. In these three cases, Raz argues, the reasons on the basis of which the agents make their decisions or refrain from taking a certain reason into account are all second-order reasons that exclude all or some first-order reasons, rather than strong first-order reasons. Raz insists that, only by the application of the two-tiered model of practical reasons, as opposed to the traditional model which consists only of first-order reasons, can we capture the agent's distinctive psychological state in such cases and observe that the action taken by the agent can be assessed in two different ways.

Every and each agent in the examples, Raz stresses, when acting on the exclusionary reason, is “torn between conflicting feelings.”⁴⁰¹ The agents possess an ambivalent attitude toward their practical judgments in such cases because they view their actions as simultaneously right, according to the exclusionary reason, and wrong, according to the assessment of first-order reasons. Introducing reasons at a different level enables us to “admit that one assessment is subordinate to the other and still regard it as having a certain autonomy so that it is not merely cancelled by the other.”⁴⁰² By contrast, one will fail to capture the ambivalence in the agent's psychological state if one considers an exclusionary reason as merely a first-order reason added to the agent's practical reasoning. For the single-layered model of practical reasons suggests that all reasons for action are comparable in terms of strength and the only method to reach a conclusion of practical inference is to assess the relative

⁴⁰¹ Raz, *Practical Reason and Norms*, 43.

⁴⁰² Ibid.

strength of competing reasons. Such an account is unable to explain the different ways of evaluating practical judgments we find in the above examples which are common in our ordinary life.

The phenomenological argument, however, seems unsuccessful in demonstrating the superiority of the double-layered structure of practical reasons in explaining relevant normative phenomena. Let us begin with the first and the third example, as they do not provide good examples for the Razian exclusionary reason model. In the first example, Raz claims that the state of exhaustion is a second-order exclusionary reason for the agent not to act on her evaluation of first-order reasons regarding the merits of the offer. The second-order reason operates at a different level than the first-order reasons for and against accepting the offer. This characterization does not accurately represent the operation of our ordinary practical deliberations. On the one hand, the state of exhaustion gives the agent a strong reason to believe that she will probably make an inaccurate decision with regard to the investment.⁴⁰³ On the other hand, such a consideration is typically included in the evaluations of first-order reasons. In normal circumstances, an agent can hardly be in possession of perfect epistemic ability. Poor physical or mental states, the possibility of unforeseen events, information asymmetry, and many other factors may undermine one's epistemic ability or epistemic confidence and increase the risk of wrong judgments. Consequently, one's assessment of one's epistemic ability and of the possible loss as a result of wrong judgments always or nearly always constitutes a crucial element in one's practical deliberations. Raz's characterization of the facts that undermine one's epistemic abilities as seconds-order reasons that exclude first-order reasons from being operative in one's practical deliberations obscures the role of risk management in one's

⁴⁰³ Heidi M. Hurd, "Challenging Authority," *The Yale Law Journal* 100 (1991): 1623-24.

practical reasoning. Whether one's impoverished epistemic ability and the ensuing risk of wrong judgments deter one from acting in a certain way depends on whether the relevant facts are sufficient for one to take the risk in particular circumstances. For example, one's lack of experience in the stock market and the risk of one's money being tied up in stocks may be outweighed by the potentially huge profits and one ought to take a chance when making the investment. In contrast, as Raz's first example describes, it may be the case that one ought not to take the risk because the expected benefits do not worth it. The lack of epistemic ability or confidence (as well as any other facts that might increase the risk of wrong judgments) in most cases is commensurable with other first-order reasons. To regard them as second-order reasons that ought not to be weighed against first-order reasons is to obscure the phenomena involving risk management which permeates people's ordinary practical reasoning. In the third example, the content of the promise renders such an example unfit for establishing the existence of exclusionary reasons given by making promises. Arguably, Raz intends to demonstrate that the promisor has an exclusionary reason not to act on certain reasons precisely because she has made a promise to act in a certain way, not because of the content of the promise. But the example assumes that the agent promises that she will not act for certain reasons. Even if the promisor indeed has an exclusionary reason by virtue of making such a promise, it is unclear whether the exclusionary force is derived from the act of promising or from the specific content of the promise. As a result, such an example cannot support a general thesis about exclusionary reasons given by promising.⁴⁰⁴

Let us then turn to the core of Raz's phenomenological argument that the traditional view on practical reasons lacks explanatory force for circumstances in which the agent possesses an

⁴⁰⁴ Moore, *Educating Oneself in Public*, 152-53.

ambivalent attitude toward her practical judgment because the two different ways to assess the judgment – one based on the balance of first-order reasons, the other based on the exclusionary reason – lead to contradictory results. Despite Raz’s careful observation of human psychology, such phenomena are not sufficient to vindicate a conceptual link between authoritative directives and the notion of second-order exclusionary reasons. Theoretical accounts that are not based on the double-layered structure of practical reasons have no difficulties in explaining situations involving what Raz calls “a general test by which exclusionary reasons can be distinguished from strong first-order reasons.”⁴⁰⁵ The single-layered account provides an even more nuanced description of practical reasoning involving authoritative directives.

Let us elaborate Raz’s second example by taking into account the relative importance of relevant reasons to compare Raz’s exclusionary reason model with the traditional account of practical reasoning. I shall designate the first-order reasons for engaging in the action required by the commanding officer’s order as the *substantive first-order reasons*, the first-order reasons against engaging in the required action as the *competing first-order reasons*, and the reasons that justify the soldier’s obedience to his superiors in the army as the *formal first-order reasons*. There are three possible situations in which the soldier receives an order from his superior:

Situation 1: The commanding officer’s order that the soldier φ is based on a correct balance of the first-order reasons in regard to the required action (the substantive first-order reasons and the competing first-order reasons) and the soldier obeys the order.

⁴⁰⁵ Raz, *Practical Reason and Norms*, 41.

Situation 2: The commanding officer's order that the soldier φ is based on an incorrect balance of the first-order reasons in regard to the required action, namely the competing first-order reasons outweigh the substantive first-order reasons to φ . But the competing first-order reasons are overridden by the combination of the substantive first-order reasons to φ and the formal first-order reasons. The soldier obeys the order.

Situation 3: The commanding officer's order that the soldier φ is based on an incorrect balance of the first-order reasons in regard to the required action. The competing first-order reasons outweigh not only the substantive first-order reasons but the combination of the substantive first-order reasons to φ and the formal first-order reasons. The soldier disobeys the order.

In Situation 1, the action required by the order is consistent with the action required by the balance of the first-order reasons regarding the action (the substantive first-order reasons and the competing first-order reasons). According to Raz, the soldier ought to obey the order because the competing first-order reasons are excluded by the exclusionary reason given by the order and replaced by the first-order reason given by the order. According to the single-layered account of reasons, the soldier ought to act as the commanding officer requires because the reasons that count against the required action are outweighed by the substantive first-order

reasons.

In Situation 2, the order is inconsistent with the balance of first-order reasons regarding the required action. If the soldier acts on the balance of the substantive and the competing first-order reasons, he will deviate from the commanding officer's order. According to Raz, in cases of this type the soldier realizes the inconsistency between the order and the balance of first-order reasons. He is torn between conflicting feelings. Whether the soldier complies with the rules or not, he feels that he has violated a certain standard of behavior. Since the order gives the soldier an exclusionary reason, he ought not to act on the balance of first-order reasons but to obey the order. In contrast, according to the single-layered model of reasons, the soldier complies with the order because the competing first-order reasons are overridden by the combination of the substantive first-order reasons to φ and the formal first-order reasons, even though the competing first-order reasons are stronger than the substantive first-order reasons to φ . On this view, the soldier has an ambivalent attitude toward his obedience to the commanding officer because he sacrifices the correct balance of reasons with regard to the required action for other reasons – the reasons that require him to act as the commanding officer requires.⁴⁰⁶ By comparing the balance of first-order reasons before the issuance of the order with the balance of first-order reasons after the issuance of the order with which the formal reasons are introduced, the soldier will find himself “torn between conflicting feelings.” Both the Razian theory and the common view explain why the soldier does not act on the assessment of the reasons with regard to the required action and why in such a case there exist conflicting judgments in the soldier's practical deliberation.

⁴⁰⁶ For a similar analysis, see Veronica Rodriguez-Blanco, *Law and Authority under the Guise of the Good*, 146-48.

In Situation 3, the commanding officer's order is based on an incorrect evaluation of the relevant first-order reasons. And the competing reasons are so strong that even the combination of the substantive first-order reasons and the formal reasons are outweighed by them. In cases of this type, the two theoretical perspectives diverge. According to Raz's exclusionary reason model, the order is not an additional first-order reason which is meant to be added into the soldier's practical reasoning and to compete with contrary reasons. The relative importance of pertinent first-order reasons is immaterial to the explanation of the binding force of the order. Therefore, the difference between Situation 2 and Situation 3 is of no normative significance (given that no competing reasons fall outside the scope restriction of the commanding officer's order). In both contexts, the soldier ought to comply with the commanding officer's order because the second-order aspect of the order restrains the soldier from taking account of the competing reasons when acting (unless any of such reasons is ignored by the authority). In contrast, according to the single-layered view on practical reasons, the soldier ought to disobey the order. The disobedience is not based on the balance of the substantive and competing first-order reasons and thus does not imply that the soldier takes no notice of the commanding officer's authority. The soldier disobeys because he finds the reasons that count in favor of φ and the reasons that justify the legitimacy of the commanding officer's authority are not strong enough to defeat the reasons not to φ .

In sum, the Razian double-layered model of practical reasons is not as clearly superior as Raz envisages in explaining the normative phenomena in the presence of practical authorities. By comparing the practical judgment made in the absence of the directive with the judgment made in the presence of the directive, one can satisfactorily explain the distinctive psychological state of the agent who faces an authoritative directive the requirement of which

is contrary to the agent's own balance of reasons for action. Moreover, Raz's exclusionary reason model seems incomplete in that although it provides an explanation why it is rational not to act on the balance of first-order reasons in Situation 2, it lacks a coherent explanation of why in Situation 3 it is rational for the agent to deviate from authoritative directives.

Some may argue that the criticism levelled above at the explanatory force of the exclusionary reason model regarding situations in which the agent can rationally deviate from authoritative directives fails to take notice of the limitation of exclusionary reasons in Raz's account. Raz explicitly states that the agent is allowed to reassess first-order reasons if the authority fails to recognize certain relevant reasons when laying down directives. That is, an authoritative directive is binding upon its addressees only when the requirement of the Dependence Thesis is met. The Dependence Thesis requires the authority to consider all the reasons for and against the required action. Reasons that have not been taken into account by the authority are not excluded by the authoritative directive. Through the limitation on the exclusionary force of authoritative directives imposed by the Dependence Thesis, it seems that Raz's account relieves the tension between obeying authorities and acting on the balance of first-order reasons. It is Raz's description of the exceptions to authoritative directives (those based on unexcluded reasons), however, that demonstrates the lack of a complete and coherent account in his theory of the circumstances in which an agent is allowed to disobey an authority.

The causes of the inconsistency between the requirement of an authoritative directive and the balance of relevant first-order reasons vary. Let us consider three main types of mistakes legitimate practical authorities may make:

Type 1: The authority ignores some first-order reasons.

Type 2: The authority mistakenly considers some reasons which are in fact irrelevant to the practical judgment.

Type 3: The authority inaccurately evaluates the relative strength of the relevant first-order reasons.

The former two types, according to Raz, are clear mistakes – the mistake that can be detected without engaging in rigorous practical deliberations.⁴⁰⁷ In contrast, the mistakes of the third type are not clear ones, for one needs going through the underlying practical reasoning to discover those mistakes. Raz claims that the legitimate power of authorities is not “generally limited by the condition that it is defeated by significant mistakes which are not clear.”⁴⁰⁸ Therefore, the agent is not allowed to reevaluate first-order reasons if the authority’s mistake is not a clear mistake, even if it is a significant one. As a result, mistakes of the third type are not legitimate grounds for the agent to deviate from the legitimate authority’s directives. On the other hand, Raz equivocates on whether clear mistakes made by the authority undermine the binding force of authoritative directives.⁴⁰⁹ But since Raz acknowledges that reasons that have not been considered by the authority (Type 1) ought not to be excluded and the agent is allowed to weigh such reasons against the directive, it seems, for coherence in his theory, that

⁴⁰⁷ Raz, *The Morality of Freedom*, 62. Raz claims that “[e]stablishing that something is clearly wrong does not require going through the underlying reasoning.” Although we cannot logically infer from this sentence that all the mistakes that can be detected without rigorous practical deliberation are clear mistakes and that unclear mistakes are mistakes that can only be detected with going through the underlying reasoning, a reasonable understanding of Raz’s distinction between clear and unclear mistakes should be focused on the way in which these mistakes are discovered. Since Raz explicitly claims that clear mistakes are detectable without engaging in rigorous practical deliberations, unclear mistakes should be understood as mistakes that cannot be detected without engaging in rigorous practical reasoning.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid. Raz writes, “Even if legitimate authority is limited by the condition that its directives are not binding if clearly wrong, and I wish to express no opinion on whether it is so limited, it can play its mediating role.”

Raz must admit that clear mistakes of other variants such as overinclusion of reasons (Type 2) also cancel the binding force of relevant directives and constitute legitimate grounds for the subjects to reevaluate the first-order reasons. If the agent is allowed to reassess the relevant first-order reasons in order to determine whether she ought to perform the required action when any of the pertinent reasons has been omitted by the authority, on what ground can we say that the agent is not entitled to reevaluate first-order reasons if the authority has considered irrelevant reasons? Regrettably, Raz has never been explicit about whether the agent ought to comply with an unreasonable authoritative directive if the mistake is due to assessing irrelevant considerations. It is probably because recognizing Type 2 mistakes as legitimate grounds for challenging authoritative directives is in conflict with the core idea of Raz's service conception of authority. The function of practical authorities, according to the service conception, is to assist the subjects to conform with reasons. They provide the service by virtue of issuing directives to exclude reasons or replace the subjects' practical deliberations. Since practical authorities have considered relevant first-order reasons when laying down directives and since they have better abilities in assessing practical reasons, reasons that have been considered by authorities ought to be excluded from the agent's practical deliberations and displaced by authoritative directives. Under this line of thought, exceptions to authoritative directives can only be made in circumstances involving omitted or unforeseen reasons, namely the reasons that have not been considered by the authority. The agent is not allowed to query the quality of the authority's practical deliberations in particular cases if the authority does not ignore any relevant reasons. Challenging authoritative directives on the basis of any reason that has been considered by the authority is equivalent to challenging the authority's ability in making practical judgments, which is certainly in conflict with Raz's service conception of authority.

As a result, the exclusionary reason model has difficulties in explaining why the agent is entitled to reassess first-order reasons and deviate from authoritative directives when the authority wrongly considers irrelevant reasons.

Such a defect in Raz's account is more serious than it may seem. If Raz admits that the agent is allowed to reassess first-order reasons when a certain irrelevant reason has been considered by the authority (Type 2), it seems that he must admit that the agent is allowed to challenge authoritative directives on the basis of incorrect evaluations of first-order reasons made by the authority (Type 3). For the two types of mistakes are similar to the extent that both are based on the reasons that have been considered by the authority. Both challenging authoritative directives on the basis of Type 2 mistakes and challenging authoritative directives on the basis of Type 3 mistakes, therefore, amount to challenging the authority's abilities in practical deliberations. If it is allowed to challenge authoritative directives on the basis of Type 2 mistakes, Type 3 mistakes should also constitute reasonable grounds for deviation from authoritative directives. To draw a distinction between these two types of mistakes and treat them differently would be a challenging task for the Razian scholars.

Defenders of Raz's account are hence on the horns of a dilemma. They may either deny that Type 2 mistakes are sufficient grounds for agents to reconsider the cases, or admit that all clear mistakes made by the authority that can be detected without the agent engaging in rigorous practical reasoning render it rational for the agent to reassess first-order reasons. If the Razian scholars take the first horn of the dilemma, the service conception of authority and the exclusionary reason model would fail to provide a complete explanation of the circumstances under which the agent can rationally deviate from authoritative directives. For it does not explain why some clear mistakes (Type 1) made by the authority constitute rational grounds

for deviation from authoritative directives but some other clear mistakes (Type 2) do not. If they take the second horn of the dilemma, they will be forced to admit that legal agents are allowed to challenge authoritative directives on the basis of the quality of the authority's practical deliberations and Raz's theory will thus be drastically modified.

In addition, Raz's service conception of authority and the exclusionary reason model fail to provide an adequate solution to the conflicts between directives issued by different authorities. We all are subject to many practical authorities in our ordinary lives. The jurisdictions of different authorities often overlap and the authorities may express contrary opinions upon the same issue. Such a conflict between directives issued by different authorities can be easily solved if there is a hierarchical structure among these authorities. I call conflicts of this kind the *apparent conflicts between authorities*. In such circumstances, the authority of higher rank typically has a power to abolish or modify the directives given by the authorities of lower rank. In contrast, there may be cases in which one is subject to more than one authority in regard to the same subject matter and no hierarchical structure among these authorities obtains. When these authorities issue conflicting directives, there will be *genuine conflicts between authorities*. How can we settle such genuine conflicts and rationally determine what we ought to do? Raz's answer is as follows:

When several authorities pronounce on the same matter and their directives conflict, we must decide, to the best of our ability, which is more reliable as a guide ... In such cases the question whether a given authority's power extends to exclude the authority of another is to be judged in the way we judge the legitimacy of its power on any matter, namely whether we would conform better to reason by trying to follow its directives than if we do not.⁴¹⁰

⁴¹⁰ Raz, *Between Authority and Interpretation*, 143.

Can we settle genuine conflicts between authorities by comparing their abilities in assisting us to conform with practical reasons? Let us consider a situation in which the agent is subject to two practical authorities, one is the authority possessed by the law and the other is the authority possessed by a group of moral philosophers in a philosopher's association of which the agent is a member. Suppose that the moral philosophers' instructions are generally more reliable than the rules given by the legal authority. According to Raz, the agent ought to comply with the moral philosophers' instructions whenever a legal rule is inconsistent with the moral philosophers' judgment and the subject matter is within both the legal authority's and the moral philosopher group's jurisdictions, because the philosophers provide "a better service" than the legal authority for the agent in guiding her conduct. On this view, any conflict between authoritative directives is in fact an apparent conflict. For there is always an implicit hierarchical structure among practical authorities with regard to any subject matter, which is established on the reliability of relevant authorities. The solution to any such conflicts is to identify the most reliable authority and follow his instruction.

Two questions arise. First, Raz's understanding of practical reasoning in the presence of authoritative directives is a hierarchical process. The rational course of action for the agent is to establish the legitimacy, the jurisdictions, and the hierarchy of practical authorities, and then to comply with the authority's directives without further considering relevant reasons for action.⁴¹¹ While it is possible for an agent to compare her epistemic ability with that of an authority, expecting an agent to determine whether an authority is superior to another in evaluating practical reasons seems unrealistic. How could it be rational to let the agent – the least reliable one among the three parties – determine whether the moral philosopher group is

⁴¹¹ Hurd, "Challenging Authority," 1631.

more reliable than the ruling elite in the government? If it is unreasonable to expect the agent to unerringly assess the epistemic abilities of both authorities, her judgment cannot constitute a sufficient ground for excluding the directive issued by the purportedly inferior authority.

Second, a genuine conflict between directives issued by different authorities involves (but is not equivalent to) a conflict between the different reasons for accepting authorities. One accepts other people or institutions as practical authorities for reasons of various kinds. For example, one may accept one's parents as practical authorities because of familial values; one may accept the law as a practical authority for certain moral-political ideals; one may choose to become a mercenary soldier and thus accept the superior officials in the army as practical authorities for the prudential reason that it is a lucrative career. The different underlying reasons for accepting someone as practical authority constitute part of the strength of authoritative directives issued by different authorities and account for the varying degrees to which we accept deviations from correct balance of reasons. Raz's solution to genuine conflicts between authorities fails to take notice of the role of the underlying reasons in solving genuine conflicts between authoritative directives.

In sum, Raz's exclusionary reason model assumes a hierarchical structure among legal authority and legal agents. Such a hierarchical structure requires legal agents to defer to the legal authority when the authority's legitimacy has been established on the basis of its ability to make better practical judgments and forbids legal agents to challenge the authority's practical deliberations. As we have seen, this model fails to provide a complete and coherent explanation of the circumstances in which legal agents can rationally deviate from the legal authority. Also, it fails to offer a satisfactory solution to genuine conflicts between the legal authority and other practical authorities. The exclusionary force of authoritative directives can

solve only the conflicts between reasons on the lower level, but not the disputes among authorities themselves. Hence, Raz's idea that legal rules, as directives issued by legal authorities, generate second-order exclusionary reasons is unsustainable.

Chapter Six

Legal Power, Legal Authority, and Law's Normative Significance

In the last section of Chapter 5, I argue against Raz's exclusionary reason model for its lack of explanatory force in analyzing practical deliberations involving authoritative directives. My arguments there also cast doubt on Raz's service conception of authority. In the present chapter I shall concentrate on the notion of authority and the relation of law's authority to its normative significance. I will commence with a critical reflection on Raz's service conception of authority (6.1). Then, I propose an account of the *de facto* authority of law focused on the use of legal powers that manifests the power-holder's recognition of her institutional role within the authoritative relationship of law (6.2). On the basis of this power-focused account of legal authority, I provide an explanation of how legal authorities make changes in the law-addressees' normative situations through issuing legal norms. Law enhances (and sometimes reduces) an addressee's reasons-for-action by virtue of triggering pre-existing reasons (6.3).

6.1 The Service Conception of Authority

The core idea of the service conception of authority, as was mentioned in Chapter 5, is that *A* has authority with respect to *B* if *B*'s taking *A*'s directive as a protected reason for action – a reason for conformity and a reason to exclude some other reasons from being acted upon – generally helps *B* better comply with applicable reasons.⁴¹²

To be sure, the fact that taking someone's instructions as protected reasons will generally

⁴¹² Raz, *The Morality of Freedom*, 26.

help us conform to reasons gives us a reason for taking her instructions as protected reasons. However, taking someone's instructions as protected reasons is not equivalent to taking her instructions as authoritatively binding; nor does one's reason for taking someone else's instructions as protected reasons imply one's reason to take that person's instructions as authoritative directives. The possession of practical authority is grounded on a relational structure between an authority and those subject to it, in which the authority is conferred a distinctive normative standing that typically contains a normative power to introduce changes in normative statuses of those subject to the authority and a right to the subject's acceptance of such normative changes. Any satisfactory explanation of practical authority must be able to capture the authority's normative standing vis-à-vis its subjects and the normative claims made by the authority on the basis of such a normative standing. The service conception of authority that understands authoritative directives as protected reasons, however, falls short of an explanation of the right to obedience typically claimed by the authority. On many occasions, we do have sufficient reasons to follow someone's (or even a device's) guidance and to refrain from reasoning on our own because that person has superior knowledge or experience and is thus much more reliable than we are in such circumstances. But, as Stephen Darwall points out, the expert in Raz's example would have no standing to make any claim to my compliance with her instruction or to hold me accountable if I ignored her instruction. Since the expert has no normative standing to claim my compliance, I have no obligation *owed to* the expert to follow her instructions and she cannot be said to have authority over me even if her instructions offer protected reasons.⁴¹³ Jules Coleman also states that the service conception of authority

⁴¹³ Stephen Darwall, *Morality, Authority, and Law* (Oxford: Oxford University Press, 2013), 43, 147. See also Scott Hershovitz, "The Role of Authority," in *Philosophers' Imprint* 11, no. 7 (2011): 6-7; Andrei Marmor, "The Dilemma of Authority," in *Jurisprudence* 2, no. 1 (2011): 125-26. The service conception cannot deflect the criticism by amending the Normal Justification Thesis to state that the normal way to justify a practical authority

involves “a relationship between reasons and persons,” while the ordinary understanding of authority is focused on “a relationship primarily between or among persons.”⁴¹⁴ Although Raz seems to construe the components of practical authority as involving “an appeal for compliance by the person(s) subject to the authority” which makes sense because it is “an invocation of the duty to obey,”⁴¹⁵ such a reason-based account of practical authority has difficulties in explaining the rights and duties between the authority and the subject.

Another fundamental defect of the service conception of authority is that it lacks an adequate account of the existence condition(s) of practical authority. The service conception submits that the concept of legitimate authority has explanatory priority over the concept of *de facto* authority: any *de facto* authority claims its moral right to exercise normative power over its subjects.⁴¹⁶ This moral claim, Raz contends, makes practical authorities, even mere *de facto* authorities, different from the exertion of naked power. Obviously, those who exercise normative powers over others and claim their moral right to do so may not meet the normative requirements specified in the service conception and therefore be unqualified as legitimate authorities. Not even legitimate authorities always succeed in rendering accurate judgments. However, argues Raz, concepts regarding practical authority must be understood in terms of their ideal functioning – to issue directives that facilitate the subjects’ conformity with reasons by virtue of being taken as protected reasons by the subjects. For this is “how they are supposed to function ... how they publicly claim that they attempt to function ... and that is the normal

is that obeying an authority would help us better perform our preexisting moral obligations. Even if the only way one can comply with moral obligations is to take someone else’s directive as a protected reason, that would not make the latter acquire the normative standing to demand the former’s compliance with her directive.

⁴¹⁴ Coleman, “Beyond Inclusive Legal Positivism,” *Ratio Juris* 22, no. 3 (2009): 359–94.

⁴¹⁵ Raz, *The Morality of Freedom*, 26.

⁴¹⁶ Raz, *Between Authority and Interpretation*, 128.

way to justify their authority.”⁴¹⁷ For Raz, an account of practical authority is first and foremost an account of legitimate authority; the Normal Justification Thesis “identifies the case that must normally be established to show that a person has authority … not a matter of showing that he is entitled to have authority.”⁴¹⁸

It is questionable that the notion of legitimate practical authority has explanatory priority over that of *de facto* practical authority. Social phenomena involving practical authorities are fundamentally a matter of normative claims based on the relational structure among relevant parties. A practical authority has a normative power to change the norms that apply to her subjects and a claim-right to the subjects’ obedience. The distinctive normative relation between a practical authority and her subjects does not depend on the alleged authority’s epistemic capacity or any other reason that justifies her having authority over another. A fact that counts in favor of one’s treating another as practical authority only establishes the desirability of one’s entering into an authority relation, rather than the authority relation itself.⁴¹⁹ We are familiar with circumstances in which one is recognized as a practical authority, while another is considered to be more eligible for the role of authority. It is the former person, rather than the latter, who occupies the relevant normative standing as a practical authority. The conferral of a practical authority’s normative standing and her normative power over subjects must depend on a social or institutional background, because authoritative relations must be based on the relationships between different roles that are embedded in a social or institutional

⁴¹⁷ Raz, *The Morality of Freedom*, 47.

⁴¹⁸ Ibid., 56.

⁴¹⁹ Darwall, *The Second Personal Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2009), 312; Hershovitz, “The Role of Authority,” 12. Marmor, “The Dilemma of Authority,” 130-31.

normative practice.⁴²⁰ Such a social or institutional background determines not only the contents of authority relations but also the scope of the authority's normative power.⁴²¹ For example, I have parental authority and concomitant normative powers (as well as relevant rights and duties) over my daughter, not my friend's daughter. Obviously, this is because the social practice regarding families in the society where I live determines that only a child's biological parents or adoptive parents have parental authority in relation to her. The service conception of authority, however, seems to encounter difficulties in accounting for this simple truth about an authority's jurisdiction. In fact, there must be a great number of children who will conform better to reasons if they follow my instructions. According to the service conception, I have practical authority over them (in regard to certain fields) and they ought to treat my instructions as authoritative directives. But only the children's biological or adoptive parents have authority over them. The service conception lacks a general account of the existence conditions of practical authority.⁴²²

Although Raz admits that any legitimate practical authority necessarily enjoys *de facto* authority,⁴²³ his account of such a factual condition for legitimate authority is insufficient for a full explanation of the practice that underwrites the power relation between an authority and its subjects. Raz characterizes a *de facto* authority as one who exercises one's normative power to impose duties and confer rights⁴²⁴ and who is generally regarded as legitimate authority by the people over whom one has authority.⁴²⁵ Such a general recognition, Raz explains, need not

⁴²⁰ Hershovitz, "The Role of Authority," 11.

⁴²¹ Marmor, "The Dilemma of Authority," 132-33.

⁴²² Ibid., 131.

⁴²³ Raz, *Between Authority and Interpretation*, 158.

⁴²⁴ Ibid.

⁴²⁵ Raz, *The Authority of Law*, 28-29.

be based on the genuine beliefs of all the subjects; the avowal of such beliefs by some of the population is sufficient for an effective authoritative relation, as long as “they are sufficiently prominent or powerful to enable [the authority] to impose his rules on the others.”⁴²⁶ However, the functioning of a system of governance involving practical authority, whether it is justified or not, is fundamentally a matter of exchange of normative claims based on the normative relations between relevant parties, namely the claims made on the basis of the different roles ascribed to the parties involved. These normative claims include the authority’s appealing to its right to rule and its power to obligate as well as the subjects’ practical responses to authoritative directives. With regard to the existence and maintenance of an authoritative relationship, both the authority’s and the subjects’ recognition of their normative positions and their normative opinions thus made are necessary. Raz’s account lacks an explanation of the social context that sustains a system governance involving the operations of practical authorities.

6.2 Legal Power and the *de facto* Authority of Law

Every and each legal authority, whether legitimate or not, is a *de facto* authority. A *de facto* legal authority enjoys a group of normative entitlements conferred by a set of legal norms.⁴²⁷ Law’s claim to authority amounts to law’s claim to these normative entitlements. As noted above, the normative entitlements conferred on a practical authority, in particular the normative powers, depend on a certain social or institutional normative context, in which the normative

⁴²⁶ Ibid., 28.

⁴²⁷ These normative entitlements typically include (1) the power to make normative changes in the legal domain that correlates to the subject’s liability to recognize such legal changes, (2) the liberty to make normative changes in the legal domain that correlates to the subject’s no-right concerning the authority’s making such legal changes, and (3) the legal right to the subject’s obedience. See Kramer, *In Defense of Legal Positivism*, 100.

relationship between the authority and its subjects, namely their respective roles within the authoritative relation, is determined.

The normative framework constituted by the formal laws is a paradigmatic institutional normative setting that involves authoritative relations. Yet, a set of norms that determine the power relations between the legal authority and the law-subjects is insufficient to establish a *de facto* legal authority. It is because the authoritative relations determined by a set of norms may not be practiced by the relevant parties.⁴²⁸ Thus, for a *de facto* legal authority to exist, two conditions must be met. First, there must be a normative setting that determines the normative relations between different roles within the legal system's jurisdiction and confers relevant normative entitlements on those roles. Second, most agents involved in the authoritative relations determined by the law must perform or occupy their roles in the legal system.

What, then, counts as performing or occupying a role within an authoritative relationship? One way in which legal agents occupy their roles is through their explicit recognition of the legal statuses ascribed to them. Legal officials, when discharging their responsibilities, typically identify themselves with the official positions they occupy. They apply or enforce the laws *as* legal officials. On some occasions, ordinary citizens also explicitly express their identification with the normative standing ascribed to them by the law or their commitment to the authoritative relations determined by the law. The most obvious example is the acquisition of nationality and citizenship through naturalization. One might liken each application for

⁴²⁸ It is entirely conceivable that, for example, a group of legal experts draft a constitution in which the power relations between legal agents are clearly and explicitly specified. The legal experts designate it as the Constitution of the country of which they are citizens. Obviously, no actual practical authority is established on the basis of the “unofficial constitution,” though it provides a complete normative structure that precisely defines the authoritative relations between different roles within the jurisdiction and their normative attributes. It is because no one performs or occupies her role ascribed by the unofficial constitution.

naturalization to an application for membership of a private association such as a football club. The applicant must have adequate knowledge of the normative structure underlying the social institution she intends to join in, the role she will assume, and the normative capacities she will have once the application is approved. In addition, the applicant also has to exhibit her willingness to commit herself to such a normative structure. The acquisition of citizenship through naturalization is typically conditional on the applicant's taking an oath of allegiance that includes a promise to obey and uphold the country's laws, an undertaking to defend the Constitution and other laws against all enemies, and sometimes even a renouncement of any other citizenship that the applicant currently holds. These acts manifest the applicant's commitment to the institutional role she will assume and the authority relationship she will be involved in within the legal order.

However, it is unusual for most citizens to display such explicit commitment to their roles as citizens subject to the legal authority. In most cases, the acquisition of an institutional role in a legal system and ensuing normative capacities is the consequence of natural facts such as being born and coming of age, not the consequence of "voluntary participation" in a legal system. In contrast with those who opt in to a certain legal system, the vast majority are incorporated into a legal system and ascribed certain roles without conscious choice. Moreover, there may be some ordinary citizens who find their normative relation to the legal authority (or to other citizens) exploitative or discriminatory and thus their normative positions in the legal system undesirable. Some of them might even intend to migrate to other countries. But the non-voluntary involvement in the legal system and the dissatisfaction with the authoritative relationship do not entail the subjects' disengagement from their roles ascribed by the law and relevant legal relations. One ceases to perform one's institutional role within a legal system

only when one no longer interacts with others by virtue of legal entitlements, legal statuses, and legal relations. For most citizens, the identification with their institutional roles in a legal system is implied by their use of laws in determining normative statuses and relations.

Not all normative judgments made in accordance with the law manifest the asserters' commitment to the authoritative relationship established by the law. At times, such judgments are made from a detached or simulative viewpoint. The assertor expresses what ought to be done according to the law, without herself being committed to the normative premises provided by the law. The only kind of normative judgments that cannot be made from a detached viewpoint is what I call "power-exercising Declarations" in Chapter 2 – the first-personal active power-exercising statements with which the speaker exerts her legal power(s) to bring about certain normative changes in her legal status or her legal relations to others. One who sincerely declares that she has made certain changes in her legal positions by exercising a legal power is committed to the proposition that she possesses that power, otherwise she would make a performative contradiction in her declaration of power-exercising. Since each normative power is attached to a certain normative role as an essential part of it, one's deliberate use of a certain normative power implies one's acceptance or recognition of the relevant normative role. One cannot deliberately exercise a power without accepting the role on the basis which the power is conferred.⁴²⁹

Some may argue that the deliberate use of private legal powers by ordinary citizens only implies that the power-holder performs her role in the relevant private legal arrangement, not the role in her relation to the legal authority. This view obscures the interrelatedness between

⁴²⁹ When one exercises a power inadvertently, one may be uncommitted to or ignorant of the power and the relevant normative role.

private powers and public powers in actual legal practices. Private legal powers give effect to personal legal arrangements within a normative context that involves public legal powers. The conferral and exercise of private powers is possible only when some officials wield the legislative power to enact laws that confer those private powers. When disputes arise, the intended legal consequences of exercising private powers are conclusively established with the assistance of legal officials exercising their public powers to adjudicate and enforce the law. In addition, legal authorities may impose limitations on the exercise of private legal powers in exceptional circumstances. The operation of private legal powers, as a result, is not self-contained but embedded in the authoritative relationship of a legal system. The roles that individual legal agents recognize in their private legal relation to others are parasitic on their roles in the authoritative relationship of a legal system. One who extensively avails herself of the normative powers conferred by the law cannot reasonably deny that her role within the authoritative relation of law has saliently figured in her social life and determined her normative relations to others.

In sum, the *de facto* authority of law depends on a social context in which the authoritative relationships determined by formal laws are generally practiced by legal agents. These practices consist in people's recognition of their institutional roles and their use of ensuing normative capacities within the legal system. Legal officials exercise public legal powers to establish and apply the normative framework that specifies the roles within the authoritative relationships of law. Ordinary citizens form derivative power relations among them by exercising private legal powers. The use of normative legal powers by legal agents to define or modify their (general or particular) normative positions presupposes, and also upholds, the

functioning of legal authority.⁴³⁰

6.3 The Authority Structure of Law and Law's Reason-Giving Force

With the general account of the role of practical authority and a normal justification of its existence, the service conception of authority embraces a unified explanation of the way in which authorities operate – to give independent reasons for action by virtue of issuing directives. This view on the normative implication of authoritative directives, as I argue in Chapter 5, is unsuitable for analyzing the operations of legal authority. In this section, I shall explain how a legal authority makes changes in the law-addressee's normative situation through legal norms.

Rule as a Transmitter of Normative Force

To begin with, let us consider a misleading idea in Raz's account of the relation between the justification of a rule and the way in which the rule operates. As was noted in Chapter 5, Raz claims that (1) the justification of a rule's existence does not depend on the value of its content and (2) the normative force of such a content-independent justification cannot be transmitted to the required action.⁴³¹ While (1) is true, (2) is not entirely indisputable. Since the justification of a rule's existence is independent of its content, the same consideration could justify contradictory rules. As a result, the content-independent justification of a rule's existence cannot itself justify the action required by the rule. It shows that reasoning involving rules, in Raz's terminology, lacks transitivity. However, the lack of transitivity in practical

⁴³⁰ The exertion of legal powers itself exhibits the power-holder's recognition of the normative framework constituted by the law, but in some extreme cases, the purpose of power-exercising is to subvert the legal system.

⁴³¹ Raz, *Between Authority and Interpretation*, 210-15.

reasoning involving rules does not imply that the normative force of the underlying reason(s) cannot be transmitted to the mode of conduct specified in the rule.

It is not mysterious that the normative force of the content-independent justification of a rule's existence can be transmitted to the action required by the rule. Practical reasoning involving social coordination illustrates this point. A coordination problem arises when a group of people have a distinctive structure of preferences for acting concertedly and there are two or more options open to them.⁴³² Although the group members may have their own preferences with regard to the available options, each of them attaches greater importance to acting in concert with the other members than to her own preferred option. Hence, the solution cannot be reached by merely comparing the merits of the options open to the group members. In addition, each of the workable schemes can satisfactorily solve the coordination problem. The underlying reason for coordination is insufficient to determine which plan to adopt – a lack of transitivity in practical reasoning in regard to coordination problems.

Let us consider a simple case of coordination, in which the members of a community are inclined to act in concert with one another when driving. Since driving on the same side of the road keeps the traffic flow smooth and helps avoid traffic collisions, the community members have a sufficient reason to coordinate with one another in regard to the side to drive:

(R₁) Each community member has a sufficient reason to drive on the same side of the road as other members.

To solve the coordination problem, two options are available: left-hand traffic or right-hand

⁴³² For a classic analysis of coordination problems and conventional rules, see David Lewis, *Convention*.

traffic. And people's preference to coordinate with one another is stronger than their preference to drive on either side of the road. Hence, the community members have two reasons that are inferable from R_1 and the relevant facts:

(R_2) Each member has a sufficient reason to drive on the left side if all or nearly all of the other members drive on the left side.

(R_3) Each member has a sufficient reason to drive on the right side if all or nearly all of the other members drive on the right side.

Also, the community members have a sufficient reason not to choose randomly the side for driving and not to deviate from an established conventional practice of driving. Otherwise, the purpose of establishing a coordination convention for driving will be undermined:

(R_4) Each member has a sufficient reason not to choose randomly the side for driving and not to deviate from the established conventional rule.

Then, let us further assume that a conventional practice of right-hand traffic has been established. According to R_3 , each member has a sufficient reason to keep on the right side when driving. Undeniably, the need of coordination, namely R_1 , only requires the drivers to act concertedly. It underdetermines the specific mode of conduct that will solve the coordination problem and is thus insufficient to require that the community members ought to drive on the right-hand side. The emergence of the conventional practice of driving on the right side changes the community members' normative situation. It adds the specification of the reason

to coordinate and helps determine what people have reason to do when driving. In this case, only when the conventional practice is established will the community members have a sufficient reason to drive on the right side and, according to R_4 , a sufficient reason not to drive on the left side. Nevertheless, a full explanation of why a community member ought not to drive on the left side must include the need of a coordination convention: the community member ought not to drive on the left side because she has a sufficient reason to coordinate with others in determining which side to drive and there is a conventional practice (rule) of right-hand traffic. Without reference to the underlying reason for coordination, it is unclear why the convergent behavior of others constitutes a reason for a community member to abstain from a certain mode of conduct.

Let us add some institutional and authoritative elements in this context of social coordination. Suppose that the community has a certain hierarchical structure. Some members are authorized to deal with public affairs; they are empowered to issue general standards of behavior. And the community members generally uphold this power-relation and follow the authoritative instructions because this normative structure provides transparent and efficient decision-making processes. Hence,

(R_5) Each community member has a sufficient reason to uphold the power-relation between community members and follow the instructions made by the authorized members.

Now suppose that the authorized community members issue a rule that requires all drivers to keep on the right side. Given the effectiveness of the public standards in this community, a

conventional practice of driving on the right side is soon established. Much the same as the previous case, the community members have a reason regarding coordination to drive on the right side (R_3). Apart from the reason for coordination, right-hand traffic in the latter case is also supported by the reason that counts in favor of sustaining the authoritative relation within the community and following the instructions made by the authorized members (R_5). Similar to R_3 , R_5 is also a content-independent justification in relation to right-hand traffic. The fact that empowering some community members to lay down general standards of behavior for others provides transparent and efficient decision-making processes cannot by itself justify abstention from driving on the left side. But once the rule that requires right-hand traffic is issued, R_5 will give the community members a reason to abstain from driving on the left side. As a result, a complete explanation of why the community members ought not to drive on the left side must include both the need for coordination and the consideration regarding the authoritative structure of the community – the community members ought not to keep on the left side when driving because (1) they have a reason to coordinate with others in determining which side to drive and there is a conventional practice among the drivers of keeping on the right-hand side and (2) they have a reason to sustain the power-relation within the community and to comply with the norm issued by the authorized members.

The simple cases presented above illustrate two points. First, any reasons sufficient to justify a rule's existence are to be included in explaining what requires the complying behavior of addressees. The issuance of a rule (or the emergence of a conventional rule) connects the underlying reason(s) with the mode of behavior it requires. The rule's existence renders the performance of the prescribed action an appropriate response to the underlying reason(s).⁴³³

⁴³³ The underlying reason does not depend on the existence of the relevant rule, but is triggered by the rule.

Driving on the right side is a proper response to the reason for coordination because it contributes to the maintenance of a pre-existing coordination convention; it is also a proper response to the reason that counts in favor of the authoritative relation in the community because, in that case, to drive on the right is to comply with a directive issued by the authority.

Second, in contrast with conventional rules, a legislated rule can connect the mode of conduct it specifies with not only the justification of its existence, but also some other reasons that apply to the rule-addressees. These reasons are closely related to the purpose of issuing the relevant rules. In the traffic-rule case, the right-hand traffic rule is meant to tackle the coordination problem in regard to traffic direction; it connects the reason to coordinate with the act of driving on the right side. Such a connection would not exist if the right-hand traffic rule were absent.

Law's Reason-Giving Force

A rule's ability to render modes of conduct proper responses to pre-existing reasons for action explains the differences the law typically makes in its addressees' practical deliberations. First, the reasons that justify a *de facto* legal authority form a part of the reason to perform any legally required behavior. The justification of an authority is sensitive to its role within the relevant authoritative relation, and the role of a practical authority is determined by the authority's normative entitlements and the relevant social context. An authority may be assigned a particular role, such as the role to coordinate and the role to solve disagreements, or a combination of such roles. Legal authorities typically play multiple roles in the operation of a legal system: e.g., to distribute resources, to solve disagreements, to administer punishments,

See Enoch, "Reason-Giving and the Law," 4.

and so on. A variety of reasons, as a result, may justify the authoritative relations within a legal system.⁴³⁴

The fact that the justification of legal authority constitutes a reason that counts in favor of complying with legal norms explains how the law makes differences to the practical deliberations of law-addressees when issuing legal norms codifying the reasons for action that apply to law-addressees. A legal system contains myriads of norms that are meant to formulate sets of pre-existing reasons for action – e.g., norms in the criminal code, tort law, and so on. As noted in Chapter 5, one is acting for reasons of the wrong kind if one takes such legal norms, rather than the reasons those norms are meant to capture, as one's reason to act. The law does not, and should not, seek to guide people's conduct by providing independent reasons in those cases. On the basis of this view, some may argue that these codifying norms play no normative role, as they do not add anything to people's practical deliberations. However, this view fails to take into account the underlying reason(s) for sustaining the legal system. To be sure, those formal justifications are not decisive in most cases. For, in any conceivable legal system, most legal norms are consistent with normative judgments made in accordance with law-independent reasons. But those underlying justifications will become salient in the law-addressee's practical reasoning if the content of particular legal norms is controversial or the relevant law-independent reasons underdetermine the specific mode of conduct that ought to be done. Moreover, we cannot rule out the possibility that, in some extreme cases, the reasons that undermine the legitimacy of the legal authority may tilt the balance against complying with legal norms. Examples can be found in certain forms of civil disobedience. Suppose that

⁴³⁴ For example, conferring legislative power on someone to determine a solution is the most efficient way to solve coordination problems; issuing general rules helps secure people's expectations of consistent behavior within the legal system.

the legislature enacts a new bill that deprives female citizens of the right to participate in elections. This rule significantly changes the structure of the authoritative relations in the legal system and severely threatens the legal system's legitimacy. For this reason, citizens may form a peaceful blockade or occupy a governmental facility to protest the deprivation of women's right to elect. Both are violations of just laws that citizens would have reason to comply with if women's right to vote had not been abolished.

Not only does the law connect modes of conduct with the underlying principles that support the legal system, but it also transmits the normative force of some other pre-existing reasons to the prescribed behavior. The reason to coordinate with others is a representative example, but not the only one. A great number of legal norms, whether empowering or obligating ones, are meant to specify the modes of conduct that the addressees have pre-existing reasons to do. For example, citizens have a general moral reason to promote the public interest of the political community. From this general reason and the relevant facts, we can infer a relatively concrete reason for citizens to contribute their shares to the government's efforts to build infrastructure. However, even the more concrete reason is insufficient to determine every community member's share of the public expenditure. Now, suppose that the legislature enacts an income-tax law that determines the tax rates in light of people's levels of annual total net income. The income-tax law helps specify what the moral reason (to promote the public interest) requires the citizens to do. In addition, the law may establish boundaries between conflicting moral reasons and determines what law-addressees have reason to do in the case of moral conflicts. Consider *Negotiorum Gestio* in the civil law jurisdictions. It refers to a form of voluntary management of another's business in which the agent acts on behalf and in the interest of another (the principal) without the latter's prior consent. The agent is entitled

to reimbursement for necessary expenses, but not allowed to profit from her intervention in the principal's business. This legal institution is the consequence of balancing the value of personal autonomy and the virtue of altruistic behavior. It helps determine the boundaries between these two moral considerations and specify what we have reason to do in the cases involving conflicts between them.

Legal norms also trigger prudential reasons, typically through imposing punishments and offering rewards as a result of contravening or complying with the law. With the development of governing tactics and monitoring technology, the prudential reasons that the law may trigger become diverse. In contrast with disenfranchisement, imprisonment, mulct, or even execution, the disadvantage as punishment for a crime or other offence may be transformed into more intricate modes of social control, such as tarnishing one's reputation, invasion of personal privacy, limitation of private legal powers, deprivation of job opportunities, and so forth. Similarly, the law may offer incentives other than pecuniary advantage to encourage law-addressees to adhere to its instructions, such as easier access to bank loans and consumer credit, priority status for children's school admission, discounts on public transportation fares, and so on.

The divergence of the reasons that may be connected to legally prescribed behavior by virtue of legal norms establishes two points concerning law's reason-giving force. First, there is no uniformity in the reasons given by legal norms.⁴³⁵ Typically, the desirability of a legal system, through the issuance of legal norms, enhances the strength of the reasons that count in favor of performing the legally prescribed acts. But in some extreme cases, the moral defects

⁴³⁵ For similar views, see Enoch, "Reason-Giving and the Law," 26-33; Marmor, "Norms, Reasons, and the Law."

that undermine the legitimacy of a legal system will reduce the strength of the norms issued by legal authorities. In addition, although the law builds connections between law-independent reasons and the legally prescribed or authorized acts when the role of legal authority is to determine or coordinate the pattern of conduct that law-addressees have pre-existing reasons to adopt, what reason will be thus triggered and what action will be specified by the law are entirely contingent matters.

Second, if the normative implication of legal facts consists in law's ability to render modes of behavior responsive to certain pre-existing reasons, namely its ability to transmit normative force from those reasons to the legally prescribed or authorized behavior, then the investigation of the normativity of law should not center on whether and under what conditions legal facts are *normative*. Rather, we should concentrate on what makes legal facts, legal practices, and the authoritative structure of law become *normatively significant* facts.⁴³⁶

⁴³⁶ David Enoch, "Reason-Giving and the Law," 27.

Chapter Seven

Legal Power and the Operation of Law

Law is a social construct necessary for modern societies. It is an institutional normative practice that typically involves exercise of practical authority. The sociality, the normativity, and the authoritative character of law jointly form the most fundamental issues in general jurisprudence. Since Hart liberated the positivist portrayal of legal phenomena from the oversimplified model of law as the sovereign's commands backed by threats of coercion, legal theories have been predominantly focused on the rule-following activities in the legal domain and on the notion of legal obligation. In contrast, although power-conferring norms have been recognized as an independent category of norms with distinctive social and normative functions, such recognition has not made the notion of legal power central to jurisprudential investigations. The analysis in the preceding chapters aims to reveal the pivotal role of legal power. As should be manifest, the elucidation of the operation of power-conferring laws deepens our understanding of law. The practice of power-conferring laws – the exercise and recognition of legal power – connects the social foundations of law with its normative and authoritative aspects.

In this chapter, I explain the role of power-conferring norms in the operations of law. First, I consider the distinctive mode of guidance provided by power-conferring laws (7.1). Then, I offer a solution to the paradox about law's normative guidance I propose in the opening chapter, which is focused on the use of power-conferring laws by legal agents (7.2). Finally, I offer my concluding remarks on the role of legal power

and power-conferring norms in legal practices (7.3).

7.1 Two Modes of Law's Normative Guidance

Normative phenomena within a legal system consist of two main modes of normative guidance: the directive mode and the constitutive mode.⁴³⁷ Although it is advisable to take the directive mode of action-guidance as the point of departure for analyzing law. Yet, overemphasis on the directive model mistakenly isolates the effect of the law and thus obscures the interaction between the legal domain and other normative domains.

The directive model characterizes the relationships between legal norms and law-subjects as direct and explicit. On this mode of guidance, legal norms are addressed to individual law-subjects, as if the legal authority issued directives to them. And it is generally believed that a directive effectively guides its addressees only when it figures appropriately in their practical deliberations and makes a normative change for the addressees. Under this line of thought, the issue of law's normative guidance is often framed as an opposition between the effect of the law and that of other normative domains. Inquiring into law's normative guidance and normative effect, as a result, seems to require distinguishing law-produced reasons from law-independent reasons. For example, Hart contrasted his idea of the puzzled man, who wants to follow the law just because it is the law, with Oliver Wendell Holmes's image of the bad man, who is only motivated by self-interest. A puzzled man takes the existence of a law as a reason – a reason independent of its content – to comply with it. Hart argued that explaining the normative significance of law in terms of its coercive force is an inadequate representation of the role of law in people's practical deliberations because it fails to take account of the puzzled people in a legal system. Similarly, Raz's application of the

⁴³⁷ I borrow the notion of “constitutive mode” of normative guidance from Postema, “Conformity, Custom, and Congruence,” 53-56.

notion of exclusionary reason in his analysis of the functioning of legal authority expresses a sharp distinction between law-constituted reasons and other reasons. Legal norms, Raz insists, give law-subjects reasons at a higher level, which refrain law-subjects from acting on all or some other reasons. Furthermore, Shapiro's Practical Difference Thesis holds that a legal norm must be able to motivate its addressees to act differently from what they would have done on the balance of law-independent reasons if the norm were absent.

Obviously, the theoretical construct of distinguishing the effect of the law and the effect of other normative domains is closely related to the view that law gives independent reasons (reasons that are additional to pre-existing reasons), against which I devote a large portion of Chapter 5 to argue. Characterizing law's normative guidance as manifested in legal norms constituting independent reasons, for which legal agents do what he would not do in the absence of the law, will lead to distorted explanations of law's normative guidance such as that the action-guiding function of law would be predominantly performed by unjust or contentious legal norms, and that a generally effective legal system would be a normative system in which the legal authority often requires its subjects to act at odds with what they have reason to do. To be sure, we could, and should, explain the normative force of law by virtue of comparing one's normative situation before the enactment of a legal norm with one's normative situation after the enactment. Law's normative force become manifest when a legal norm's involvement in one's practical reasoning produces an outcome different from the outcome that would otherwise have prevailed. In addition, we should acknowledge the possibility of puzzled people, who consider and obey legal norms entirely independently from other premises in their practical deliberations. But none of this implies that the law typically functions in practical deliberations independently from other normative premises. Law is a normatively significant practice. It triggers reasons

of various kinds for (or against) the modes of conduct specified in legal norms. And the reasons thus triggered depend on the relevant normative contexts. Most people make practical decisions on the basis of some complex mixture of reasons, prudence, preferences, desires, sympathy, and so on. When a legal norm applies, the law-addressee typically juxtaposes the reasons that count in favor of the legally required action (including the reasons triggered by the law) with those that count against it. The reasons triggered by legal norms are not conclusive reasons and it will not always be the case that the reasons for legally required modes of conduct outweigh the reasons against them. As a result, it is necessary to recognize the commensurability between law-related reasons and other reasons and to refrain from isolating the normative function of law in practical deliberations.

More importantly, isolating the normative function and the normative effect of law in practical deliberations as a result of overemphasis on the directive model of law obscures the indirect relationship between the law and ordinary law-subjects mediated by informal social practices. As explained in Chapter 3, formal laws and informal social practices mutually support each other. On the one hand, people establish their interpersonal relationships in their social lives through the law: employer and employee, husband and wife, business partners, mayor and citizens, and so on. Law organizes and regulates how normative powers and rights within such relations are conferred, claimed, exercised, constrained, and cancelled, and how such normative roles and capacities are integrated into legal institutions. On the other hand, ordinary law-subjects practice the law primarily by virtue of their interaction with others in their ordinary social lives. Citizens often gain knowledge of law gradually through their participation in informal social practices that are significantly shaped by the law. And, correspondingly, their practical responses to legal norms are mainly presented in those informal social practices.

Such an indirect relationship between the law and its subjects can only be captured by the constitutive model of law's normative guidance. On this model, law guides human behavior by virtue of setting up institutions in which normative meaning and significance are ascribed to certain actions, roles, and relations. Such law-constituted institutions offer an interpretive scheme through which empirically observable social facts can be articulated. They significantly shape the corresponding informal social practices and thus exert profound impact on people's social lives. As a result, ordinary citizens are able to acquire legal knowledge through participating in relevant informal social practices. Furthermore, since the informal social practices are significantly shaped by the law, people inevitably use relevant laws (primarily power-conferring and role-determining laws) to define, create, or change their normative relations when they interact with others. And according to the analysis in chapter 4, power-conferring norms guide behavior systematically. The operation of individual empowering norms depends on the application of relevant norms. One who recognizes a legally defined normative status or exercises a legally conferred power must understand relevant normative facts in law's terms. As a consequence, people engaged in informal social practices, by virtue of their exchange of normative claims, will indirectly act in accordance with the law.

The two modes of normative guidance are not mutually exclusive. In fact, they jointly constitute the distinctive manner in which law performs the action-guiding function. Hardly any individual legal norm can be implemented without reference to a normative context in which the normative statuses of relevant actions, attitudes, events, and agent are defined by the law. For example, the application of the legal norm that prohibits theft – a typical directive issued by the legal authority – must refer to the concepts in the institution of property to determine whether the object under the perpetrator's control is the victim's property. On the other hand, a law-constituted institution without prescriptions is unable to serve its purpose. If the institution of

income tax is deficient in prescribing paying income tax as obligatory, it will certainly be ineffective.

7.2 Resolving the Paradox about Law's Normative Guidance

The paradox about law's normative guidance, as indicated in Chapter 1, consists in the relation between legal facts and law-addressees. On the one hand, the main function of law is to provide guidance for action or evaluation. For one to be guided by the law, there must be a rational connection between the legal facts and one's behavior. The rational connection between a legal norm N that requires its addressees to φ and its addressees is typically manifested in the law-dependent reasons that motivate the law-addressees to φ . But, on the other hand, it is not always desirable for law-addressees to act as the law prescribes precisely because the law so prescribes, especially when the contents of legal norms are morally obligatory. The fact that most people comply with a legal norm solely because of that norm implies that, insofar as the pertinent mode of conduct is concerned, other forms of social control such as morality and social customs are virtually ineffective. If the legal norms in a modern legal system always or almost always motivate people to act accordingly, the network of interdependent social interaction that underlies the society will highly likely be severely undermined and the whole society will thus become extremely unstable. The solution to this paradox lies in a necessary link other than giving independent reasons between legal facts and law-subjects, which explains the normative significance of law. The analysis in the preceding chapters has furnished us with sufficient theoretical tools to accomplish this task.

First, as noted in Chapter 6, although legal facts are not themselves reasons, they are normatively significant facts. That is, some normative judgments are sensitive to the existence of legal facts or, to put it in another way, some reasons are conditional on

the existence of legal facts.⁴³⁸ Legal facts play a role of transmitting the normative force from certain reasons to the modes of conduct they prescribe or authorize. Through rendering the modes of conduct it specifies proper responses to certain considerations, the law enhances or reduces one's reason to be engaged in those modes of conduct. The reasons that legal facts may trigger vary and one legal fact may trigger multiple reasons. It is because the authoritative structure of law in which legal facts are generated is grounded on complex normative practices between legal agents. These practices involve the legal authority's governance over ordinary citizens (e.g. the enactment of a new bill that coordinates commercial activities, the implementation of punishment, and the provision of the authoritative interpretation of the Constitution), the participation of ordinary citizens in establishing the authoritative structure of law and forming legal facts (e.g. to vote in the parliamentary election, to sign a petition against the installation of nuclear reactors, and to advance arguments in courts), and the formation of derivative normative relations within the authoritative structure of law (e.g. to enter into a contractual relation, to adopt children, and to declare bankruptcy).

Most of the reasons connected with modes of conduct by legal facts are context-specific. For example, the legal norm that requires a contract which is made for transferring of the rights of real property to be made in notarization triggers the reason about transaction security. Such a reason is only sensitive to legal norms aimed to ensure transaction security; it will not be triggered by a legal norm that, for example, prohibits the installation of cigarette vending machine in some areas. In contrast, there is a group of reasons that provide general support for the patterns of behavior specified in legal norms. These reasons, as mentioned in Chapter 6, are not directly related to the norm acts but to the operation of the legal system or to the exercise of legal authorities.

⁴³⁸ Enoch, "Reason-Giving and the Law," 4-5, 27-28.

They indicate the value of having law or being subject to legal authorities. Let us call them “the underlying reasons of legal authority.”⁴³⁹ The fact that legal facts transmit the normative force of these underlying reasons to the acts or act-types specified in legal norms represents the general normative significance of legal facts.

In any legal system, both the legal facts and the underlying reasons that count in favor of the legal authority depend on the operation of the *de facto* authority within the legal system. Legal facts are normative judgments made by legal authorities; they are the products of the authoritative structure of law. The underlying reasons of legal authority are determined by the content of the authoritative structure of law, namely the normative relations between legal authorities and law-subjects. The *de facto* authority of law, as noted in Chapter 6, is grounded on legal agents’ recognition of their institutional roles and their use of the ensuing normative capacities in their interactions. As a result, legal facts and the underlying reasons of legal authority are both dependent on the normative practices of legal agents that represent their recognition of law’s authority. The rational connection between legal facts and legal agents consists in the establishment and the operation of the *de facto* authority of law through power-exercising by legal agents. Legal agents, by virtue of their use of the rational ability to form normative relations in light of legal norms (primarily through recognition of legal positions and exercise of legal powers), uphold the *de facto* authority of that legal system. And legal facts, as the consequence of the operation of legal authority, bring the desirability of the normative practices of legal agents that support the authority structure of law into the practical deliberations with regard to the modes of conduct they specify. In addition, when legal agents ascertain or modify their normative

⁴³⁹ Indeed, the distinction between the underlying reasons of legal authority and other reasons is not clear-cut. However, for the present purpose, it suffices to note that there are reasons that have nothing to do with and thus separable from the reasons for having law or being subject to legal authorities.

relations in accordance with empowering norms, as explained in Chapter 4, the requirements of rationality will impose normative constraints on them to recognize the normative consequences that ensue from power-exercising and to take those legal facts as premises or contexts for further practical reasoning.⁴⁴⁰

Though the desirability of a functioning legal system provides the general normative support for legal norms, what reasons are thus triggered depends entirely on contingent social facts – the *de facto* authoritative relationships in a legal system determined by the normative practices of legal agents. It is often related to political morality that justifies the governance of the state. But in some cases, the legitimacy of legal authorities is severely undermined and the only reason that demands obedience to legal authority is some prudential consideration. Such formal reasons determine the “thickness” of a legal system, as they provide support for individual legal norms other than the underlying substantive principles. The formal reasons that count in favor of deference to legal authority differ from one jurisdiction to another. A healthy legal system that, e.g., ensures equal opportunity and protects basic human rights, as opposed to a legal system in which the state’s force is used to oppress law-subjects, lends more normative support for individual legal norms. These formal reasons will become salient in circumstance where epistemic uncertainties with regard to relevant substantive reasons arise or the content of a rule is controversial.⁴⁴¹

7.3 Conclusion: Legal Power as the Pivot of Law

⁴⁴⁰ I take no stance here on whether the requirements of rationality are normative in the reason-implying sense.

⁴⁴¹ For relevant discussion regarding the balance of formal reasons against substantive considerations in legal reasoning, see, e.g., Robert Alexy, “Formal Principles: Some Replies to Critics,” *International Journal of Constitutional Law* 12, no.3 (2014): 511; T.R.S. Allen, “Constitutional Rights and the Rule of Law,” in *Institutionalized Reason: The Jurisprudence of Robert Alexy*, ed. Matthias Klatt (Oxford: Oxford University Press, 2012), 132, 135–36.

Legal practice is a rational activity that gives shape to normative order and guides conduct by virtue of exercising practical authority. Law aims to establish a systematic coherent normative order in a society where customary normative practices by the general populace are simultaneously in place. Legal norms guide people's conduct through transmitting the normative force of pre-existing reasons to the specified modes of behavior. The authority of law is a *de facto* authority that is invested with a power to obligate and a right to rule the law-addressees. Its existence depends on a social context in which the normative practices of legal agents manifest their recognition of their roles within the authority structure. On the other hand, law is fundamentally a rule-following activity. With reference to legal norms, legal agents make or respond to normative claims, ascertain or change normative relations, and guide or evaluate behavior. In legal reasoning, norms that confer normative powers upon legal agents and thus define normative roles within legal institutions have explanatory priority over norms that impose legal obligations. For most legal norms – whether general legal rules or particular legal rulings – are institutionalized normative facts that emerge as a result of exercising legal power. That is, the use of duty-imposing legal norms in guiding and evaluating behavior is typically premised on the recognition of the legal power on the basis of which the relevant legal duties are determined. To put it another way, as explained in Chapter 2, a person who is committed to a power-conferring legal norm takes the norm as a public standard of ascertaining normative relationships and is *ipso facto* disposed to get the valid exercises of the relevant legal power and subsequent legal consequences generally recognized by others and to criticize those who refuse or fail to recognize such legal effects. As a result, the general acceptance of a power-conferring norm by a group of people will constitute a derivative social rule of obligation that requires them to take the mode of conduct that satisfies the conditions specified in the power-conferring rule as valid exercises of legal power and the

normative consequences of the power-exercising acts as valid legal changes. By contrast, no power-conferring norm can be derived from the general acceptance of a duty-imposing norm.

The use of power-conferring laws performs a pivotal role in legal practice. It is the key to explaining the central elements of law, including validity, legislation, adjudication, jurisdiction, authority, law's social basis, and law's normative force. First, the elucidation of the operations of power-conferring laws provides a more comprehensive account of official legal practices. The Hartian Rule of Recognition is not merely a social rule that imposes upon legal officials an obligation to identify valid legal norms in accordance with the criteria of legal validity it specifies. Since the main function of the Rule of Recognition is to reduce uncertainty in law-ascertaining activities, it must include standards that determine the superiority of some law-ascertaining determinations over other such determinations. These standards typically empower the officials at a higher level to cancel the validity of law-identification determinations made by their subordinates. The power-conferring aspect of the Rule of Recognition is closely related to the use of adjudicative power. When one accepts a rule of adjudication, one recognizes as authoritatively binding the judge's determinations about whether any violation of the laws have occurred, and one criticizes those who do not recognize such determinations. Any violation-detecting determination must include the judge's law-ascertaining determination. The fact that the former is authoritatively binding upon other officials implies that the latter is also authoritatively binding. The judge's law-ascertaining determination can be authoritatively binding only when she is empowered to invalidate the conflicting law-ascertaining determinations made by lower-echelon officials. As a result, the acceptance of the rules of adjudication implies the acceptance of the power-conferring aspect of the Rule of Recognition. On the other hand, the duty-imposing aspect of the

Rule of Recognition is closely related to the use of legislative power. The officials' collective acceptance of a rule of change, namely their collective recognition of the legal changes made by exercising the legislative power, implies their critical reflective attitude toward the acts of law-identification in accordance with the validity criterion specified in that rule of change. The derivative censorial attitude, combined with the officials' convergent behavior of law-identification, will give rise to a social rule of obligation that requires them to identify legal rules in accordance with the validity criterion expressed in the rule of change. All such derivative social rules of obligation about law-identification from the acceptance of the rules of change constitute the duty-imposing aspect of the Rule of Recognition: the criteria of legal validity that legal officials have an obligation to apply in ascertaining legal rules. In addition, the acceptance of the rules of adjudication presupposes the acceptance of the rules of change. The rules of adjudication empower the judge to determine the legal relations between legal agents in accordance with the rules enacted by the legislative authority. Only when one recognizes the legislative authority's power to make valid laws can one accept the judicial decisions made in accordance with such laws as authoritatively binding.

Second, the practice of power-conferring laws by legal agents, namely their exercise and recognition of legal powers, constitutes the social foundations of law and determines the boundaries between jurisdictions. The social basis of law consists in the social practices that sustain the functioning of a legal order. A legal order is the integration of formal laws and informal social customs. Legal agents integrate these two normative realms primarily through exercising legal powers to form, to eliminate, and to modify (general or particular) normative statuses or relations. On the one hand, the normative framework of formal laws depends on legal officials' convergent practices of law-identification – practices that involve legal officials taking norms that

satisfy certain criteria as binding on legal agents and recognizing some of them as having the ultimate authority on the validity issues. Typically, these law-identifying activities are carried out through the exercise and acceptance of legislative power and adjudicative power by legal officials. Through legislation and adjudication, customary rules developed in people's ordinary interactions can be incorporated into formal laws and legal reasoning and thus backed by the state's recognition and coercive force. On the other hand, ordinary citizens' extensive exercises of private legal powers entrench the normative framework established by enacted laws in people's ordinary lives and transform their informal normative practices. Again, it is because the general acceptance of a power-conferring norm will give rise to a social rule that requires its addressees to recognize the normative consequence as a result of exercising the relevant normative power.

The power-focused account of law's social basis also reveals the active role of ordinary citizens in the operation of a legal system. Indeed, ordinary citizens are law-addressees rather than law-issuers; they play a passive role in law-identification and law-enforcement. But they are self-directing norm-users capable of understanding and adjusting their normative positions in light of legal norms. In any functioning legal system, namely a normative system in which the normative framework of formal laws is generally consistent with informal social customs, ordinary law-addressees can hardly establish their self-understandings, their interpersonal relationships, and the core of their social lives without any reference to relevant legal norms and the operations of relevant legal institutions.

Third, people's use of power-conferring laws is closely related to the general normative significance of legal facts. Legal facts are the consequences of the operations of the authority of law, whose existence is based on the normative practice of legal agents that manifests their recognition of their institutional roles within the authority

structure of law. Such recognition, as explained in Chapter 6, is primarily constituted by the use of power-conferring laws. The general normative significance of legal facts is grounded on the normative practices that involve people's use of law in defining and altering their normative positions and relations to specific modes of conduct.

In sum, legal power plays a pivotal role in the operation of law. It is the vital nexus of the sociality of law, the normativity of law, and the authority of law. Power-conferring laws enable legal agents to adapt their normative relations to changing circumstances and thus manifest the dynamics of law. At the same time, empowering laws secure systematic coherence within a legal order through the general consistency between formal laws and informal customary practices. The exercise of legal power is the core of legal practices as a rational activity of human beings – our ability to be engaged in rule-following activities that establish normative order.

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