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Laws as conventional norms[[1]](#footnote-1)

Nicholas Southwood (ANU)

Some normative phenomena – etiquette, dress codes, rules of a game – seem to be straightforwardly conventional. Others – morality, rationality, epistemic normativity – don’t.[[2]](#footnote-2) How about law? What I shall call the *Conventional Thesis* holds that law too is somehow to be explicated in conventional terms. The Conventional Thesis represents an important research program in general jurisprudence.[[3]](#footnote-3) It is not hard to see why. At least on the face of it, legal and conventional phenomena have much in common. The Conventional Thesis might seem to be particularly well placed to vindicate a naturalistic account of law without the apparent costs of rival positivistic accounts.

Yet, in spite of its popularity and promise, a persistent worry concerning the Conventional Thesis is that it is ill equipped to account for the *normativity* of law. The problem is that law seems to have a special normative character that genuinely conventional phenomena seem to lack. Call this the *Normativity Objection*. It is hardly surprising that those with *anti-positivistic* sympathies should be impressed by the Normativity Objection (Dworkin 1978; Letsas 2014). Anti-positivists hold that the normativity of law derives, in part, from the normativity of *morality*. Assuming, plausibly, that the normativity of morality cannot be explicated in conventional terms, it follows straightforwardly that the Conventional Thesis cannot account for the normativity of law. Yet the view that the Conventional Thesis falls foul of the Normativity Objection also transcends jurisprudential party lines. Many card-carrying *positivists* have also rejected the Conventional Thesis on precisely these grounds (see Raz 1999; Green 1990; 1999; Dickson 2007).

To appreciate the force of the Normativity Objection, consider what sorts of conventional phenomena might potentially be thought to be constitutive of law. One possibility is that laws are taken to be explicable in terms of *conventions* – understood as solutions to coordination problems (Lewis 1969). Call this *the Conventions Thesis* (Gans 1981; Postema 1982; Lagerspetz 1989; cf. Marmor 1998; 2001). While the Conventions Thesis had a brief heyday, it has now been virtually universally abandoned – and for good reason. While the precise normative character of law is, of course, a matter of controversy, no one doubts that law is normative in the sense that it is constituted by *rules* or *requirements*. But conventions are not necessarily normative in even this *minimal* sense; some indeed are necessarily non-normative (Southwood 2010; Southwood and Eriksson 2011).[[4]](#footnote-4)

A second possibility is that laws are taken to be explicable in terms of *positive norms*. Call this the *Positive Norms Thesis*. Positive norms are rules that are in some sense “recognised” or “accepted” or “established” in particular groups or communities and that may or may not be valid. They are to be distinguished from so-called *critical norms*, namely *valid* *rules* that may or may not be recognised or accepted or established in any groups or communities.[[5]](#footnote-5) The problem is that positive norms needn’t be *conventional*. Examples of *non-conventional* positive norms include the norms that compose the moral codes that exist within particular societies: say, the norm that one not engage in gratuitous violence towards others. The Positive Norms Thesis is therefore compatible with it being true that laws are to be explicated in terms of norms that are not genuinely conventional. It is therefore not really a version of the Conventional Thesis at all.

A third possibility – the most promising – is that laws are taken to be explicable in terms of *conventional norms* (Hart 1994; Marmor 1998; 2001). Call this the *Conventional Norms Thesis*. H.L.A. Hart is often interpreted as endorsing the Conventional Norms Thesis – an interpretation that Hart himself appeared to confirm in the Postscript to the Second Edition of *The Concept of Law* (Hart 1994). According to this interpretation, a legal system is a system of rules founded on a conventional “rule of recognition” that specifies the conditions that rules must satisfy in order to count as laws of the system.[[6]](#footnote-6) Unfortunately, as we shall see, Hart himself does not provide a remotely plausible account of conventional norms. The theory he offers – the so-called “practice theory” – is subject to fatal shortcomings.

My aim in what follows is to explore a way of interpreting the Conventional Norms Thesis that is very much in the spirit of Hart’s practice theory but that avoids its problems. This is based on the *practice-dependent* account of conventional norms that I have offered elsewhere (Southwood 2011; Southwood and Eriksson 2011; Brennan, Eriksson, Goodin and Southwood 2013). I shall begin by rehearsing the practice-dependent account (section I) and considering what an interpretation of the Conventional Norms Thesis based on the practice-dependent account might look like (section II). I shall then consider whether this interpretation of the Conventional Norms Thesis is vulnerable to the Normativity Objection (section III). To anticipate, I shall argue that it *isn’t*. For it can account for all the ways in which law can justly claim to be normative. While there are ways of being normative that it cannot account for, it is an error to suppose that law is normative in any of those ways. Or so I shall argue.

I. Conventional norms

Paradigmatic examples of conventional norms include norms of etiquette (e.g. the requirement not to talk with one’s mouth full of food); dress codes (e.g. the requirement to wear a suit in certain workplaces); and the rules of games (e.g. the requirement not to tackle below the waist in Australian Rules Football). How should we understand norms of this kind? What unifies them? And what distinguishes them from other related phenomena?[[7]](#footnote-7)

*A. Positive norms*

Conventional norms are special kinds of positive norms. As noted above, positive norms are social facts: rules or normative principles that are in some sense “recognised” or “accepted” or “established” in particular groups or communities, and that may or may not be valid. Take the norm that existed among the pre-20th century Han Chinese that upper-class girls must have their feet bound (see Mackie 1996). This was obviously an absurd norm. Yet it existed for more than 700 hundred years and exerted profound effects. By the 19th century virtually all upper-class girls and women had bound feet.[[8]](#footnote-8)

How should we understand the nature of positive norms? Some philosophers hold that norms are (special) kinds of *conventions* (see Peyton-Young 2003, p. 390; Posner 2000, ch. 1; Verbeek 2002; cf. Ullmann-Margalit 1977; Lewis 1969). The problem with the norms-as-conventions view is that the existence of a convention seems to be neither sufficient nor necessary for the existence of a positive norm (Eriksson and Southwood 2011). It is not sufficient because it seems possible for social practices not to be normative in any sense. (Think of a driving-on-the-left convention in a society of normative nihilists.) It is not necessary because it is possible for positive norms to be virtually universally breached. (Think of a society with an anti-adultery norm (for example, there is strong disapproval whenever one discovers that others are committing adultery), but where adultery is, as a matter of fact, rampant.)

Another view is that positive norms are clusters of *non-normative attitudes* such as (non-normative) beliefs and desires. For example, Cristina Bicchieri (2006, p. 11) holds that a normative principle[[9]](#footnote-9) P is a positive norm of group G if a significant proportion of the members of G prefer to comply with P on condition that a) a significant proportion of the members of G comply with P and b) either i) a significant proportion of the members of G expect her to comply with P; or ii) a significant proportion of the members of G expect her to comply with P, prefer her to comply with P, and may sanction her for not comply with P. Again, I am sceptical that any such cluster of desires is either sufficient or necessary for a positive norm (Brennan, Eriksson, Goodin and Southwood 2013, ch. 2).[[10]](#footnote-10) It is not sufficient since it would seem to be possible for the members of a population to have (secret) desires to behave in a way that is diametrically opposed to the positive norms that actually exist in her society conditional on others also behaving in that way and expecting her to act in that way. (Think of a highly repressive society where the entire population strongly desires to behave in accordance with libertine principles on condition that others behave in a libertine fashion and expect her to act in that way too.) It is not necessary since it also seems possible for the positive norms of a society to be dramatically at odds with members’ desires. (Think of norms that individuals have absolutely no desire to comply with – and yet continue to do so because they have internalised the norms.)

A better view, I believe, is that positive norms are clusters of *normative attitudes* plus widespread knowledge of those clusters (Brennan, Eriksson, Goodin and Southwood 2013, p. 29; cf Hart 1961, pp. 55-6). Call this the *norms-as-normative attitudes view*. More precisely, a normative principle P is a positive norm in a particular group G iff a) a significant proportion of the members of G have normative attitudes that reflect P and b) a significant proportion of the members of G know that a significant proportion of the members of G have normative attitudes that reflect P. Take the norm of etiquette in Zealand that holds that one must not talk with one’s mouth full of food. The norms-as-normative attitudes view implies that this is a norm in New Zealand just in case two conditions are met. First, a significant proportion of New Zealanders must have normative attitudes that reflect the requirement that one must not talk with one’s mouth full. For example, they must *believe* that one must not talk with one’s mouth full, or have *expectations* of those who talk with their mouths full, or be disposed to *disapprove* of those who talk with their mouths full. Second, a significant proportion of New Zealanders must *know* that a significant proportion of New Zealanders have such normative attitudes towards talking with one’s mouth fall.

The norms-as-normative attitudes view easily avoids the problems with the norms-as-conventions view and the norms-as-non-normative attitudes view. However, it might seem to face other problems. Consider, for example, a long forgotten rule of chess that permits a player to convert a rook to a bishop when the player’s pieces are configured in some specific way. Given that the rook-conversion rule is long forgotten it is not the case that chess-players have normative attitudes that reflect the rook-conversion rule still less know that others have such attitudes. Yet for all that it might still potentially remain a rule of chess. Suppose that there is some document that details the rules of chess that is generally accepted as authoritative by chess players and that the rook-conversion rule is contained in the document. Plausibly this is enough in order for the rook-conversion rule to be a rule of chess.

This objection is based on a mistake. Normative attitudes may “reflect” a normative principle in two very different ways (Brennan, Eriksson, Goodin and Southwood 2013, ch. 3). First, the conduct covered by the principle may *directly* reflect the principle inasmuch as the principle figures explicitly in the content of the attitudes, as when a New Zealander believes that one must not talk with one’s mouth full or has expectations of those who talk with their mouths full. But, second, the normative attitudes may *indirectly* reflect the principle by directly reflecting some secondary rule (say, a rule of recognition) that is appropriately connected to the principle. This is the sense in which our chess players might potentially have normative attitudes that reflect the rook-conversion rule. That is, the chess players are disposed to criticise other players insofar as the other players are seen to violate the rules that are contained in the authoritative document. Since the rook-conversion rule is contained in the authoritative document, chess players are disposed to criticise players insofar as they are seen to violate the rook-conversion rule (say, by converting the rook to a bishop when a pawn is at C6 rather than C7). To be sure, the normative disposition is never *activated* because, being ignorant of the rook-conversion rule, chess players are not in a position to “see” what would amount to obeying or violating it. But this does not mean that chess players lack normative attitudes that reflect the rook-conversion rule.

*B. Practice-dependence*

Conventional norms, then, are positive norms, which I shall take to be clusters of normative attitudes plus widespread knowledge of those clusters. But, clearly, this cannot be the whole story. As noted above, there are also *non-conventional* positive norms. Take the moral, rational, and epistemic *codes* that exist within different groups. The norms that comprise these codes are clearly also positive norms and, hence (again, assuming that the normative attitudes thesis is correct), clusters of normative attitudes plus widespread knowledge of those clusters. Nonetheless, positive norms of etiquette, dress codes and the rules of games are (or at least seem to be) crucially different from positive moral, rational, and epistemic norms. For example, the positive norm of etiquette according to which one must not spit one’s food onto the floor in a restaurant seems to be crucially different from the positive rational norm according to which one must not believe that p and believe that not-p. In virtue of what are conventional norms distinctive?

Conventional norms are distinctive, I suggest, inasmuch as they involve what I shall call *practice-dependent* normative attitudes (Brennan et al 2013, ch. 4). Here is a rough test for whether a normative attitude counts as practice-dependent in the sense I have in mind: The agent is disposed to adduce a presumed practice in response to a certain kind of “why” question. Consider a paradigmatic conventional norm such as the norm in an Oxbridge college that one must pass the port to the left. Suppose that one asks a member of the college, “But why are you are disposed to disapprove of those who fail to pass the port to the left?” Insofar as her normative attitudes involving passing the port to the left are practice-dependent, we might reasonably expect her to answer by adducing the port-passing practice. “Because passing the port to the left is just what we do.” “Because passing the port to the left is what we do around here.” Compare this to a paradigmatic non-conventional norm such as the norm that one must not torture innocents for fun. Suppose that one asks someone who judges that it is wrong to torture innocents for fun, “But why (do you think that) it is wrong to torture innocents for fun?” We would certainly not expect her to answer, “Because refraining from torturing innocents for fun is just what we do around here.”

Can we say something about what it means for a normative attitude to be practice-dependent in the particular sense I have in mind? I suggest that it means that the attitude is *grounded*, in part, in a presumed *social practice* (Southwood 2011). A social practice is a behavioural regularity that is explained, in part, by the presence of pro-attitudes or beliefs about the presence of pro-attitudes that are a matter of common knowledge (Southwood 2011, p. 775). Consider again the social practice of passing the port to the left. This is a social practice in some Oxbridge college just in case some significant proportion of the members of the college engage in the activity of passing the port to the left and their doing so is explained, in part, by the presence of pro-attitudes (or beliefs about the presence of pro-attitudes) involving passing port to the left, where this is a matter of common knowledge among a significant proportion of the members of the college.

The other important idea is the idea of the *grounds* of a normative attitude. To say that normative attitudes are grounded in a presumed practice in the sense I have in mind is to say that the presumed practice constitutes some non-derivative part of the justification, in the mind of the agent who holds the attitude, for the content of the attitude: the justification for the requirement to act in a certain way, or for disapproval insofar as individuals fail to act that way, or for an expectation that individuals act in that way. So, for example, to say that the judgement of a member of an Oxford college that one must pass the port to the left is grounded in the presumed social practice of passing the port to the left is to say that the port-pass practice constitutes some non-derivative part of the justification, in her mind, for the requirement to pass the port to the left.

It is worth emphasising several features of this account of conventional norms. First, social practices are playing a *justificatory* role with respect to the attitudes that are constitutive of conventional norms. This is by no means the only way that practices might interact with our normative attitudes. They might simply *explain* *why* we came to hold certain normative attitudes (or perhaps why we maintain them). Practices might also figure in the *content* of our normative attitudes. Suppose that a visitor to Britain judges that she (morally) ought to obey the British practice of orderly queuing. This is not a practice-dependent normative attitude in the sense I have in mind. For the queuing practice needn’t be playing any kind of justificatory role in the visitor’s attitude. Rather, it is simply figuring in the content of her attitude.

Second, practices are playing a *subjective* justificatory role. To say that a normative attitude is grounded in a presumed social practice is to say that the practice is playing a role in justifying the content of the attitude *in the* *mind* of the possessor of the attitude. It is entirely possible that the content of the attitude is, in fact, objectively wholly *un*justified, or objectively justified in a way that has nothing to do with any social practice. Indeed, the presumed practice may not even exist. Recall the case of an anti-adultery norm in a society that, unbeknownst to members of the society, is in fact widely violated. In this case, the justification for refraining from adultery may come from a presumed practice of refraining from adultery, even though there is no such practice.

Third, presumed practices must be playing a *non-derivative* justificatory role. Suppose that a western woman judges that she ought to win a head-scarf when she is in Saudi Arabia. Plausibly the practice of wearing a head-scarf is playing a role in justifying the requirement in her mind to wear a head-scarf. But its role may be wholly derivative. The justification, in her mind, for wearing a head-scarf may be simply that she ought to avoid attracting unwelcome attention and that contravening certain social practices associated with how she dresses may result in attracting unwelcome attention. By contrast, practice-dependent normative attitudes are attitudes where the justificatory role of the practice in not purely derivative in this way. Rather, part of the justification for the content of the attitudes comes from the practice itself.

Fourth, practice-dependent attitudes are attitudes that are grounded *in part* in social practices. They need not be – and typically are not – grounded wholly in practices. Rather, practice-independent considerations may also very well figure in their grounds. Thus, for example, someone who judges that one mustn’t commit adultery at least in part because of a presumed practice of refraining from committing adultery might very well also do in part because she judges that adultery tends to be hurtful, to violate trust, and so on. The point is just that such practice-independent considerations must not *exhaust* the grounds of the attitudes. Practices must also figure.

Finally, it might be wondered how this practice-dependent account is supposed to be different from the so-called “practice theory” of conventional norms associated particularly with H.L.A. Hart. According to Hart’s version of the practice theory, “rules are conventional … if general conformity to them is part of the reasons which its individual members have for acceptance” (Hart 1994, p. 255). According to Marmor, “a necessary *reason* for following a [conventional] rule … consists in the fact that others follow it too” (Marmor 2001, p. 5). Why think that the practice-dependent account is anything more than a *version* of the practice theory?

Clearly, there are important similarities between the practice-dependent account and the practice theory. Nonetheless, there are also two key differences. First, whereas the practice-dependent account holds that conventional norms only entail *presumed* practices, the practice theory entails that corresponding practices actually exist. This means that, unlike our practice-dependent account, the practice theory is inconsistent with the existence of conventional norms that are generally violated, such as the anti-adultery norm mentioned above.

Second, and more importantly, whereas the practice-dependent account holds that presumed practices are part of the *grounds* of the normative attitudes that constitute conventional norms, the practice theory holds that practices play a *reason-providing* role. Hart and Marmor disagree about the precise character of this role. For Hart, practices constitute reasons for *accepting* the relevant rules. Accepting a rule presumably does not entail *complying* with it, though plausibly it does entail being disposed to comply with it. For Marmor, practices constitute reasons for *following* the relevant rules. Following a rule *does* involve at least complying with it – and arguably also accepting it (and complying with it *because* one accepts it).

Either way, the practice theory has a fatal defect. For notice that, typically, the mere fact that there is a practice of behaving in a certain way is *not reason-providing*. As Green aptly notes, “[t]he fact that most people X and expect others to do likewise does not generally give one a reason for Xing. Typically, one should do likewise only if there is a reason for conformity” (Green 1998, p. 38). Green himself takes this to show that the practice theory cannot explain the normativity of law. As we shall see, I think this is a mistake. Rather, there is a more obvious and serious defect with the practice theory. Since the practice theory makes the *existence* of conventional norms turn on whether a certain practice provides its members with reasons – either reasons to accept or reasons to follow relevant rules – and the fact that there is a certain practice does *not* typically provide its members with reasons, this means that the practice theory simply cannot accommodate the vast majority of conventional norms. It implies that any norm with which we do not reasons to conform *not a conventional norm*. Such an implication is absurd. By contrast, the practice-dependent account does not have this absurd implication. That’s because it holds that the contribution that presumed practices make to the normative attitudes that constitute conventional norms is simply to constitute part of the justification *in the minds* of those who hold the attitudes for acting accordingly. Clearly it does not follow that the practices *in fact* give individuals reason to do anything. So, unlike the practice theory, the practice-dependent account is perfectly consistent with the existence of non-reason-providing conventional norms.

II. The Conventional Norms Thesis

The Conventional Norms Thesis holds that laws are to be explicated in terms of conventional norms. I have suggested that conventional norms are to be understood in terms of practice-dependent normative attitudes. So, if the practice-dependent account of conventional norms is right, this suggests that we should interpret the Conventional Norms Thesis as the thesis that laws are to be explicated in terms of practice-dependent normative attitudes (plus knowledge of these practice-dependent normative attitudes).[[11]](#footnote-11) Take any law – say, the law in a small nation Legislavia – that forbids driving with a blood alcohol reading of more than .05. This is to be explicated as follows: Some significant proportion of Legislavians (or relevant subset of them) have normative attitudes that are connected in the right way to the requirement not to drive with a blood alcohol reading of more than .05 and that are grounded, at least in part, in a presumed relevant Legislavian social practice. However, this is vague in at least three important respects. First, what exactly is the relation between the attitudes and law? Second, whose attitudes are relevant? Third, what is the relevant practice (and why think the attitudes are grounded in it)? Let us briefly consider some ways in which we might potentially make a start on answering each question in turn.

A. The connection between normative attitudes and law

The first important interpretative issue concerns the character of the connection between the practice-dependent attitudes that are supposed to be capable of explicating laws and the rules that constitute the laws that they are supposed to be capable of explicating. One possibility is that the normative attitudes are supposed to *directly reflect* the rules that constitute the laws they purport to explicate such that the acts covered by the laws figure explicitly in the normative attitudes. On this view, the drink driving law in Legislavia is to be explicated directly in terms of practice-dependent normative attitudes towards the act of driving with a blood alcohol in excess of .05. That is, a significant proportion of relevant Legislavians judge that one mustn’t drive with a blood alcohol in excess of .05, or expect others not to drive with a blood alcohol in excess of .05, or are disposed to disapprove of anyone who drives with a blood alcohol in excess of .05, at least in part because, or so they assume, there is a social practice of refraining from driving with a blood alcohol in excess of .05.

While a *direct* view of this kind is plausible in the case of *informal* conventional norms, such as norms of etiquette and dress, I take it that it is a non-starter in the case of *formal* norms, of which laws are a paradigmatic instance. Consider laws that are known to be generally violated, such as the law in India mandating wearing a seat-belt. Given the extent to which this law is violated, it is not plausible that there is a social practice of wearing a seat-belt in India. Moreover, let’s suppose that this is a matter of common knowledge. In consequence, even if there is a significant proportion of Indians (or some relevant subset of them) who judge that one should wear a seatbelt, it is not plausible to suppose that these attitudes are practice-dependent: that a presumed practice of wearing a seat-belt constitutes any part of the *grounds* of the attitudes. (There simply is no presumed practice.) So, the seat-belt-wearing law cannot be explicated in terms of practice-dependent attitudes that directly reflect the requirement to wear a seat-belt.

The alternative is that laws are supposed to be explicated in terms of practice-dependent normative attitudes that are *indirectly* connected to the requirements that constitute the laws. For ease of exposition I shall focus here on the Hartian view according to which laws are rules that accord with a relevant “rule of recognition” – understood as a “duty-imposing” norm (Shapiro 2009). Suppose that Legislavia contains a very simple rule of recognition according to which laws are those rules that are enacted by the Legislavian legislature. This is to be understood as follows: There is some significant proportion of Legislavians (or some relevant subset of them), who have normative attitudes that reflect the requirement on officials to apply and enforce all and only those rules that are enacted by the Legislavian legislature – normative attitudes that are grounded, at least in part, in a presumed practice of applying and enforcing all and only those rules enacted by the Legislavian legislature. Laws – such as the Legislavian drink-driving law – are to be explicated in terms of these attitudes. The attitudes indirectly reflect the content of the drink-driving law inasmuch as the relevant Legislavians have normative attitudes, not towards drink-driving, but towards the act of applying and enforcing certain rules, of which the rule not to drive with a blood alcohol of more than .05 is an instance.

Unlike the direct view, an *indirect* view of this kind can readily accommodate laws that are known to be generally violated. Consider again the law in India mandating wearing a seat-belt. According to the indirect view, it does not matter whether or not there is a social practice in India of wearing a seat-belt. The relevant practice-dependent attitudes are instead attitudes connected to the act of applying and enforcing laws that satisfy certain conditions.[[12]](#footnote-12) So long as the seat-belt-wearing law satisfies these conditions, this is enough for it to count as a law in India.

B. Whose attitudes?

A second important interpretative issue concerns the set of individuals whose attitudes are supposed to be capable of explicating laws. One possibility is that the relevant set includes *all* (sane, adult) members of the relevant community. So, for example, the Legislavian law is to be explicated in terms of the practice-dependent normative attitudes of all (sane, adult) Legislavians concerning the application and enforcement of rules that are enacted by the Legislavian legislature. In the imaginary case of Legislavia, an *inclusive* view of this kind has some plausibility. That’s because the imaginary Legislavian rule of recognition is extremely simple – simple enough that it is plausible to suppose that a significant proportion of all Legislavians could potentially have normative attitudes that directly reflect it. It is plausible to suppose, in other words, that a significant proportion of all Legislavians have normative attitudes concerning the act of applying and enforcing all and only those rules that are enacted by the Legislavian legislature.

But when we turn to *actual* legal systems, it might seem that an inclusive view is hopeless. The problem is that the rules of recognition that characterise actual legal systems are extraordinarily complex. There is simply no way that ordinary citizens who lack legal training and expertise can possibly be expected to have the requisite understanding of these complexities. In consequence, there is simply no way that they can the requisite normative attitudes – attitudes concerning the application and enforcement of those rules that have the right kind of complex profile.

What is the alternative? It might seem that the only alternative is some kind of *exclusive* view according to which the relevant set includes some special *subset* of the (sane, adult) members of the relevant community: say, the legal officials of the community (Hart 1961, p. 114). The main advantage of an exclusive view of this kind is that it is better equipped to accommodate the complex rules of recognition that exist within actual legal systems. For, in virtue of their special training and expertise, a society’s legal officials are clearly better equipped than ordinary citizens to appreciate and be sensitive to the complexities of the legal system’s rule of recognition.

But there is also a different kind of inclusive view that is worth mentioning. Return again to the obscure rook-conversion rule in chess. We saw that a chess player who is unaware of the rook-conversion rule might nonetheless have normative attitudes that are connected (albeit indirectly) to it – say, if she judges that chess players must obey all and only those rules that accord with the relevant chess “rule of recognition:” say, all and only those rules that are written down in the authoritative Rule Book. Now consider a modification of this case. Suppose that the player is unaware, not merely of the rook-conversion rule, but of the rule of recognition itself. She might still retain normative attitudes that are connected – albeit even more indirectly – to the rook-conversion rule. To see this, suppose that her reliable chess partner, who is one of the Special Few who knows what the rule of recognition is and who also possesses a copy of the authoritative Rule Book, informs her that he has discovered the existence of the rook-conversion rule, but does not tell her how he has discovered it. This might very well lead her to employ the rook-conversion rule in her subsequent chess playing. But it is hard to see how this could be so unless she has normative attitudes connected to the rule of recognition in spite of being ignorant of what it is. That is, she is disposed to judge that chess players must abide by all and only those rules that satisfy the chess rule of recognition – whatever it is.

This suggests the possibility of a different kind of inclusive view of the law. On this view, it is not enough that the rule of recognition is enshrined within the normative attitudes of a significant proportion of legal officials. In addition, what matters is that a significant proportion of the population at large have practice-dependent normative attitudes that are indirectly connected to this rule of recognition – whatever it is. One possibility is that a significant proportion of the population must judge that citizens must *obey* those rules that accord with the society’s rule of recognition. A second possibility is that a significant proportion of the population must judge that legal officials are entitled to apply and enforce those rules that accord with the society’s rule of recognition. Or perhaps both are required.

C. Practices

A third important interpretative issue concerns the presumed practices that ground the normative attitudes that are supposed to be capable of explicating laws. One question is simply: What *are* these practices? Consider, first, the presumed practice that grounds the (rule of recognition-constituting) normative attitudes of *legal officials* concerning the application and enforcement of certain rules. The obvious thing to say here is that the presumed practice is a practice of applying and enforcing certain rules and not others. Thus, for example, in the case of Legislavia, we might reasonably expect a significant proportion of legal officials to be disposed, if asked why they judge that legal officials must apply and enforce all and only those rules that are enacted by the Legislavian legislature, to adduce a presumed practice of applying and enforcing all and only those rules that are enacted by the Legislavian legislature. This does not necessarily mean that there *is* any such practice. It could very well be that, as a matter of fact, the rules that legal officials tend to apply and enforce come apart from the rules that are enacted by the Legislavian legislature (in either or both directions).

Next, what kind of presumed practices might ground ordinary citizens’ normative attitudes? This will depend on what we think these attitudes are. Suppose that we think that a significant proportion of ordinary citizens must judge that there is a *duty to obey* those laws that accord with their society’s rule of recognition. In that case, presumably the attitudes must be grounded in a presumed practice of obeying those rules that accord with the society’s rule of recognition. This needn’t mean a presumption of universal obedience for any such rule, or even a presumption of general obedience for all such rules. It is enough that there is a presumed practice of obeying such rules in general. And, again, even the weaker presumption may very well be mistaken. Or suppose instead that we think that a significant proportion of ordinary citizens must judge that legal officials are entitled to apply and enforce all and only those laws that accord with their society’s rule of recognition. In that case, the presumed practice will presumably be of the same kind as the legal officials’ practice mentioned above.

A further question is why we should think that these sorts of presumed practices should be capable of grounding the normative attitudes of legal officials and/or ordinary citizens in the first place. Even if we are happy to grant that presumed practices are capable of grounding the normative attitudes that are constitutive of, say, norms of *etiquette*, law might seem importantly different. What exactly is the *mechanism* by which these practices are supposed to take on a “normative life of their own?”

One possible mechanism is what I have called elsewhere *identification* (Southwood 2011, p. 779). That is to say that particular presumed practices come for us to represent aspects of a valued identity; they come to be part of what it means for us to see ourselves as members of groups to which we belong. This is surely part of the story. The normative attitudes of *some* legal officials and ordinary citizens surely *sometimes* reflect a sense of identification with the group and its practices. It is less clear, however, that recourse to identification has sufficient generality for this to be a credible general account. As William Edmunston nicely puts it, it doesn’t seem plausible to suppose that “legal insiders” always or even typically “identify so strongly and stickily with legal practice” (Edmundston 2011).

A second possible mechanism is simple *habituation* (Southwood 2011, p. 780). That is to say that through force of habit, some ways of doing things come to strike us as especially valuable or important. Again, this is surely an important part of the story in the case of law. It may well be the primary mechanism in the case of ordinary citizens who tend to be relatively unreflective about the law and its putative normative credentials. But, again, it is doubtful that it is the whole story. Consider, in particular, the normative attitudes of legal officials. Even if habituation can explain the normative attitudes of those legal officials who have been living and breathing the relevant legal practice for years, this seems less plausible in the case of newcomers. Moreover, whereas habituation seems to be a potent force in relatively unreflective contexts, contexts of legal application, interpretation and enforcement at least sometimes require being highly explicit and reflective about the rules and practices that are being evoked.

It seems likely, then, that further mechanisms will also have to be at play – mechanisms beyond identification and habituation. One interesting candidate mechanism is some kind of *pretence* (Toh forthcoming; Wodak ms). The idea would be that legal officials engage in a kind of *fiction* or *make-believe* according to which certain practices have a special kind of normative significance that is not reducible to practice-independent features; that grounds corresponding normative attitudes; and that makes it appropriate to “take one’s cue” from these practices.[[13]](#footnote-13)

This is all I am going to say here about how we might go about filling in the details of the Conventional Norms Thesis, interpreted in light of the practice-dependent account of conventional norms. Obviously I have only scratched the surface. Let us now turn to the key question of whether the Conventional Norms Thesis, thus interpreted, is vulnerable to the Normativity Objection.

III. The normativity of law

The Normativity Objection holds that law possesses a certain kind of normative character and that conventional phenomena lack the right kind of normative character for law to be explicable in conventional terms. Is our interpretation of the Conventional Norms Thesis vulnerable to the Normativity Objection?

A. Minimal normativity

Let’s start with the idea that law is *minimally normative*.[[14]](#footnote-14) Call this the *Minimal Normativity Thesis*. A phenomenon is minimally normative inasmuch as it involves *rules* or *requirements* that permit, forbid and require certain actions and attitudes. The Minimal Normativity Thesis is relatively weak. To say that law is minimally normative is merely to say that it possesses the kind of normativity that is possessed by children’s games such as Tiddlywinks and Snakes and Ladders. Tiddlywinks and Snakes and Ladders are also normative in the minimal sense inasmuch as there are moves that are permissible, impermissible and obligatory insofar as one is playing these games. At the same time, this certainly doesn’t mean that the Minimal Normativity Thesis is entirely toothless. Recall that I relied upon the Minimal Normativity Thesis above when I argued against the Conventions Thesis. To recap: the argument was that the Conventions Thesis is false because whereas a) law is necessarily minimally normative, b) conventions – understood as solutions to coordination problems – are not necessarily minimally normative.

Might a critic seek to deploy the Minimal Normativity Thesis to argue against our interpretation of the Conventional Norms Thesis in the same fashion? The idea would be that our interpretation is false because whereas a) law is necessarily minimally normative, b) conventional norms – understood as practice-dependent normative attitudes – are not necessarily minimally normative.

Perhaps. But notice that there is a significant difference between our account of conventional norms and the Lewisian account of conventions. The Lewisian account holds that the attitudes that partially constitute conventions are *non-normative* attitudes: desires and non-normative beliefs (Lewis 1969). So the Conventions Thesis, thus interpreted, is perfectly consistent with there being no minimally normative talk and thought whatsoever associated with law. It is enough that legal officials and/or ordinary citizens have *desires* to behave in certain ways conditional on others also behaving in those ways and *beliefs* that others will do so. In contrast, our account of conventional norms holds that conventional norms are clusters of special *normative* attitudes. There simply cannot be law unless legal officials and/or ordinary citizens possess practice-dependent normative attitudes that are appropriately connected to relevant rules.

A natural response is that, at most, this shows that conventional norms are *taken* to be minimally normative, not that they really *are* minimally normative. Thus, it might be argued, it does not follow from the fact that a significant proportion of the legal officials and/or ordinary citizens of Legislavia *judge* that Legislavians must not drive with a blood alcohol level of more than .05 that there is a *genuine rule* that requires Legislavians not to drive with a blood alcohol level of more than .05 – any more than it follows from the fact that a significant proportion of the citizens of Saudia Arabia judge that women who commit adultery should be stoned to death that there is a genuine rule that requires that women who commit adultery be stoned to death.

This is based on a simple confusion. Of course, if we interpret “a genuine rule” to mean “a robustly normative rule” – that is, a genuinely reason-providing rule – then it is obviously right that believing falsely doesn’t make it so. But we are not interested here in robust normativity. Rather, we are interested in whether a cluster of normative attitudes plus knowledge of that cluster is *minimally* normative. So, the question is whether a cluster of normative attitudes plus knowledge of the cluster is sufficient for there to be a positive norm that permits, forbids or requires individuals to act in certain ways. It seems clear that it *is* sufficient. Thus, for example, if a significant proportion of the citizens of Saudia Arabia judge that women who commit adultery should be stoned to death and this is a matter of common knowledge among Saudi Arabians, then this *is* sufficient for there to be a genuine rule in Saudi Arabia that requires that women who commit adultery be stoned to death. Not a reason-providing rule, obviously. But a genuine rule nonetheless.

B. Robust normativity

Next, what about the idea that the normativity of law is somehow to be understood, not merely in terms of minimal normativity, but in terms of *robust* normativity? Call this the *Robust Normativity Thesis*. Robust normativity as I shall understand it here is a matter of entailing claims about what we *ought* or *have* *reason* all-things-considered to do.[[15]](#footnote-15) The “all-things-considered” is critical in order for there to be a meaningful distinction between robust and minimal normativity. There is a sense in which we might say that the rules of Tiddlylinks tell us what we “ought” (or “have reason”) to do. But the “ought” here is certainly not the all-things-considered ought.[[16]](#footnote-16) Rather, it is simply, as we might put it, the “ought of Tiddlywinks.” But the claim that we oughttiddlywinks to refrain from playing a “sqopped” piece certainly does not entail that we oughtall-things-considered to refrain from doing so. (Suppose that the only way to avert a nuclear war is to annoy one’s opponent by illegitimately playing a sqopped piece.) Nor does it entail the weaker claim that one has *reason* to refrain from doing so. Reasons for action are considerations that *contribute* to positive verdicts about what we ought all-things-considered to do.[[17]](#footnote-17) It will *often* be the case that one has some reason to refrain from playing a piece that has been sqopped. But it doesn’t take much imagination to devise scenarios where this isn’t so: say, where one ought not to be playing Tiddlywinks in the first place; where one’s opponents are notorious cheats; where there is much to be gained and nothing to be lost by flouting the rules; and so on.

How might we seek to capture the normativity of law in terms of robust normativity? The simplest idea is to insist that law *is* robustly normative. Morality and prudence are commonly (though not universally) thought to be robustly normative. That is to say that, necessarily, if morality or prudence requires one to perform some act then one ought or has reason to perform it. Similarly, we might hold that, necessarily, if there is a *law* that requires one to perform an act, then one ought or has reason to do so. If this is right, then it spells doom for our interpretation of the Conventional Norms Thesis. For it is demonstrably false that conventional norms, understood as clusters of practice-dependent attitudes, *entail* corresponding claims about what we ought or have reason to do.[[18]](#footnote-18) Consider a ghastly conventional norm that exists among the male students of a prestigious university of hall of residence, that prescribes that male freshman drug and rape their female counterparts. Suppose that a significant proportion of the students judge that male freshman “must” do this – at least in part because they judge that this is “just the done thing.” Yet it is manifestly false that male freshman ought or have reason to drug and rape their female counterparts.[[19]](#footnote-19)

The crucial question, I take it, is whether law is indeed robustly normative. I see absolutely no reason to think that it is (cf. Enoch 2011). Just as there are ghastly conventional norms with which we have no reason to comply, so too there are ghastly *laws* with which we have absolutely no reason to comply. Until 1997 when the Tasmanian Criminal Code was revised in the aftermath of *Croome v Tasmania*, homosexuality was a criminal offence. It does not follow that until 1997 homosexual men necessarily had reason to refrain from homosexual activities?[[20]](#footnote-20)

However, it is worth briefly mentioning an important argument due to Leslie Green that might be thought otherwise. The arguments centres on “the way that rules figure in practical reasoning.” According to Green,

[t]he fact that a valid rule exists may be cited as a *reason* for action. To the novice’s question, ‘why must I move my rook diagonally?’ a complete response is ‘It is required by the rules.’ Of course, … there may be cases in which the fact that a rule exists does not provide a conclusive reason for acting one way or another. But *as far as this question goes*, the citation of the rule is an answer, and any plausible theory of rules needs to explain how that could be so. … The fact that most people X and expect others to do likewise does not generally give one a reason for Xing (Green 1999, pp. 37-8).

Green’s thought appears to be as follows: Laws are rules that can be (and often are) appealed to in practical reasoning. But rules can only be appealed to in practical reasoning insofar as they entail reasons for action. So it follows that laws must entail reasons for action – something that the Conventional Norms Thesis manifestly cannot explain.

Suppose we grant Green’s claim that laws are rules that can be appealed to in practical reasoning. Nonetheless, we should reject his claim that rules can only be appealed to in practical reasoning insofar as they entail reasons for action. Recall the appalling conventional norm that exists among the male students of a certain hall of residence that prescribes that male freshman drug and rape their female counterparts. Suppose that a newly arrived freshman asks the question, “Why must I drug and rape them?” Here, too, a “complete” response is “Because it is required by the rules.” Of course, to say that the response is “complete” is not to say that it is correct. On the contrary, the response is utterly atrocious. But surely Green cannot think that the only rules to which we can appeal in practical reasoning are nice rules. If he does think that, then we obviously shouldn’t grant his claim that all *laws* are rules that can be appealed to in practical reasoning.

To be sure, there is a *different* interpretation of Green’s argument. According to this alternative interpretation, the “reasons” needn’t be all-things-considered reasons. In the case of chess, they may be “reasons of chess.” In the case of the law, they may be “legal reasons.” And so on. We can grant Green’s claim that rules can only be appealed to in practical reasoning insofar as they entail reasons, thus construed. But, of course, that’s because we are now simply talking about minimal normativity. And, as we saw, there is no reason to think that conventional norms lack this kind of normativity. Either way, we do not yet have any reason to suppose that law possesses a kind of normativity that the Conventional Norms Thesis is incapable of capturing.

I have argued that the idea that law is robustly normative cannot plausibly be maintained. But this is not the only way to understand the Robust Normativity Thesis. A promising alternative is that law *claims* to be robustly normative (Raz 1979; 1999; Shapiro 2011; Plunkett and Shapiro forthcoming). For example, David Plunkett and Scott Shapiro (forthcoming) write: “[T]he law itself *claims* or *invokes* the same kind of loaded sense of normativity that is the focus of metaethical concern. When the law obligates adults to pay taxes, for example, it is claiming that adults have an all-things-considered reason for paying their taxes. Tax-evaders are punished precisely because they reject the normative claims of the law”. If this is right, then plausibly it suffices to explain how the normativity of law differs from, say, the normativity of the rules of Tiddlywinks. While both are minimally normative, it seems a considerable stretch to hold that the rules of Tiddlywinks claim to be robustly normative. It also avoids the objectionable implication that, necessarily, agents ought or have reason to comply with abhorrent laws. Recall the Tasmanian anti-homosexuality laws. The idea that law claims to be robustly normative implies that, before 1997, Tasmanian law claimed that, necessarily, homosexual men had all-things-considered reason to refrain from homosexual intercourse. But it does *not* imply that they in fact had reason to do so.

What does it mean to say that law “claims” to entail reasons? On one view, it means that a significant proportion of legal officials and/or ordinary citizens *take* it to entail reasons. This implies that a significant proportion of legal officials and/or ordinary citizens are in the grip of a serious error. It also suggests a way of rendering a law legally invalid: Get enough legal officials and/or ordinary citizens to see the error for what it is. Finally, it means that, insofar as we think law is a valuable institution that we have reason to preserve, it is important to take steps to ensure that the error remains intact. These implications are not credible, or so it seems to me.

On a different proposal, it means that *from a certain* *point of view* one has reasons to comply with law (Raz 1979; 1999; Shapiro 2009). As Scott Shapiro puts it, “To say that one has a legal obligation, for example, is simply to assert that *from the legal point of view*, one has an obligation. Statements of legal obligation, on this interpretation, are perspectival assertions.” On the face of it, talk of what we ought or have reason to do “from a point of view” sounds awfully like we are back within the domain of minimal normativity.[[21]](#footnote-21) However, Shapiro means something quite specific by “the legal point of view,” namely “the perspective of a certain normative theory. … The legal point of view of a certain system, in other words, is a theory that holds that the norms of that system are morally legitimate and obligating” (Shapiro 2009). So the idea is that where there is a law requiring us to X, this means that there is a normative theory that claims (or entails the claim) that one has reason to X. This is supposed to explain how law is different from Tiddlywinks since, whereas we need to postulate such a normative theory to make sense of law, we do not need to postulate a normative theory that makes claims about what moves we ought or have reason to take in order to make sense of Tiddlywinks. Moreover, it needn’t entail that legal officials and ordinary citizens are in the grip of an error. That’s because judging that a certain normative theory *claims* that, say, homosexuals have reason to refrain from homosexual intercourse clearly doesn’t entail judging that in fact homosexuals have reason to refrain from homosexual intercourse.

While this isn’t the place to evaluate Shapiro’s important proposal in depth, it also seems to have some unwelcome implications. For one, if I have understood the proposal correctly, it is possible that not a single member of a society (not a single legal official or ordinary citizen) *accepts* the normative theory that claims that we have reason to perform the various acts that law prescribes. But then it is hard to see why we are entitled to privilege *this theory* in particular? There is presumably a different theory that says that one ought or has reason *not to* *perform* the acts that the law of one’s own society prescribes. Why privilege the former over the latter? For another, while it is true that Shapiro’s proposal does not entail that legal officials and ordinary citizens are in the grip of an error, it entails something that, if anything, seems even worse: namely, that the entire edifice of law rests on an error. Since it’s false that, necessarily, we have reason to obey the laws, the legal point of view consists in the perspective of a theory that is straightforwardly mistaken. Theories aim at truth, and the theories that constitute the legal point of view fall spectacularly short. That being so, it is tempting to say: So much the worse for the legal point of view.

C. Authority

Next, consider the idea that law is an *authoritative* institution (Raz 1979; 1999). Call this the *Authority Thesis*. The notion of authority is often understood in terms of special (all-things-considered) *reasons*. For example, on the popular Razian view, law is authoritative in the sense that it provides or claims to provide *exclusionary reasons* (Raz 1979). That it is to say that law necessarily “offers a reason for acting as it requires and a reason for not acting on certain valid reasons against acting as it requires” (Green 1999, p. 44). I shall set aside this view. If I’m right that we should reject the Robust Normativity Thesis, then it follows, a fortiori, that we should the Authority Thesis, thus construed. If law does not entail reasons or claims about reasons, then, a fortiori, it does not entail or claim to entail special kinds of reasons or claims about exclusionary reasons.

How else might we understand the authority of law if not in terms of reasons? Part of the answer is simply the Hartian idea that law encompasses certain kinds of secondary rules: in particular, rules of enforcement and change (in addition to rules of recognition). The fact that law encompasses rules of enforcement means that there is a recognized power to enforce many laws. This is plausibly part of what makes law authoritative in a way that is different from, say, the rules of Tiddlywinks.[[22]](#footnote-22) The fact that law encompasses rules of change means that there is a recognized power to create new (minimally normative) obligations. This is plausibly part of what makes law authoritative in a way that is different from, say, the norms of etiquette.[[23]](#footnote-23) Clearly, there is no reason to think that this kind of “authority” poses any difficulty for the Conventional Norms Thesis. The Conventional Norms Thesis is perfectly capable of accounting for both rules of enforcement and rules of change.

But, more interestingly, we might also go further and hold that that, even if law does not entail, or claim to entail, exclusionary reasons, it nonetheless has, as it were, an *exclusionary structure*. What might this exclusionary structure look like? Here is one idea: Suppose that we understand the obligations of law as (minimally normative) demands to treat the relevant rules *as if* they are exclusionary reasons. This might be thought to be enough to make problems for our interpretation of the Conventional Norms Thesis. As Leslie Green has pointed out, “it is obvious not all [conventional norms] impose obligations. It is a [conventional norm] in my society that men do not wear skirts, but there is no obligation to refrain from doing so.” That’s because conventional practices do not generally have an exclusionary structure. Rather, as Green puts it, “it is the ordinary process of balancing all reasons against each other, taking into account all the available information, which itself recommends these practices” (Green 1999, p. 44).

My response is that there are special conventional norms that *do* have the requisite exclusionary structure. Consider the rules of chess. These plausibly involve requirements to treat the rules as if they are exclusionary reasons. Thus, the rule that forbids moving a rook diagonally seems to involve a requirement to set aside the strategic advantage one might achieve by moving one’s rook from A1 to E5, the fact that this would make one’s opponent laugh, and so on. According to the Conventional Norms Thesis, this rule can be explained in terms of the fact that a significant proportion of chess players, say, judge that one must exclude such considerations at least in part because, in their minds, there is a practice of excluding such considerations.

Returning now to the law: Suppose that we hold that law has a special kind of exclusionary structure. This can be explained by the Conventional Norms Thesis as follows: A significant proportion of legal officials and/or ordinary citizens judge that we must exclude certain considerations (say, the fact that other social authorities issue in conflicting directives) at least in part because there is a presumed corresponding exclusionary practice. While conventional norms do not necessarily have this exclusionary structure, the particular conventional norms that are constitutive of law do. Or so it might be argued.

D. Categoricity

Finally, consider the idea that laws are categorical imperatives. Call this the *Categoricity Thesis*. Once again, we had better not understand this as the claim that law entails *categorical* *reasons*. But this is consistent with the idea that law nonetheless has a *categorical* *structure*. That is to say that many laws make *unconditional demands*. In this respect, laws are quite different from those norms that make *conditional* demands. Consider norms of fair play. Plausibly, these entail that we must perform certain acts so long as – but only so long as – others generally do so.

It might seem that our interpretation of the Conventional Norms Thesis is straightforwardly inconsistent with the Categoricity Thesis. That’s because the normative attitudes that constitute conventional norms might seem to be straightforwardly conditional rather than unconditional. Consider my judgement that one must hold a fork in one’s left hand. If this is a practice-dependent attitude, then it must be grounded, in part, in a presumed social practice of people holding their forks in their left hand. If I become aware that individuals no longer behave in the relevant way (they no longer hold their forks in their left hand), this will necessarily undercut part of the justificatory support that is required in order for it to be a practice-dependent normative attitude. So my judgement would seem to involve a principle that makes a demand that is conditional on the way people generally behave.

This objection involves a mistake. It does not follow from a normative attitude being practice-dependent that it makes demands that are conditional on the practice. The easiest way to see this is to consider cases where practice-dependent attitudes involve *rigidification* with respect to the relevant practices (see Southwood 2011, pp. 793-94). Take my judgement that one must hold one’s fork in one’s left hand. As we have seen, if this is a practice-dependent attitude, then it follows that the practice of people holding their forks in their left hand must constitute part of the justification, in my mind, for the requirement to hold one’s fork in one’s left hand. But this does not mean that, in my mind, were there not to be such a practice, one would not be required to hold one’s fork in one’s left hand, Even if the justification in my mind for the requirement comes, in part, from a practice, which does not exist necessarily, given that there is such a practice, I may believe that one must hold one’s fork in one’s left hand even in the absence of such a practice. It may be that I would not judge that one must hold one’s fork in one’s left hand if I took there to be no such practice. Still, right now, I do presume there to be such a practice; and the practice justifies a requirement that has application, in my mind, to cases where there is no such practice. So, it is simply false that the normative attitudes that constitute conventional norms must be conditional rather than unconditional. Our interpretation of the Conventional Norms Thesis is perfectly capable of capturing law’s categorical structure after all.

IV. Conclusion

I have offered a particular interpretation of the Conventional Norms Thesis and considered its capacity to account for the normativity of law. I have argued that we have reason to be optimistic – and certainly more optimistic than many critics have assumed. Suppose I’m right. This provides us with some reason to believe that the Conventional Norms Thesis, thus interpreted, is true. Only some reason, to be sure. Law is complex and multifaceted. There are many other things that an account of law, to be plausible, will also have to account for. A thoroughgoing defence of the Conventional Norms Thesis would have to consider in depth many topics that I have not even touched upon here.

Suppose instead that I am wrong. Our interpretation of the Conventional Norms Thesis fails to account for the normativity of law. Suppose, first, that my account of conventional normativity is correct (or that we have very good reason to believe that it is correct). In that case, the failure of our interpretation of the Conventional Norms Thesis would give us very good reason to believe that the Conventional Norms Thesis is false. Alternatively, suppose that we have good independent reason to believe that the Conventional Norms Thesis is correct. (I’m not quite sure what those reasons would be but never mind.) In that case, the failure of my interpretation of the Conventional Norms Thesis would give us very good reason to reject my account of conventional normativity.

I retain the (pious) hope that the first of these three possibilities is the correct one. But each of them is interesting. Either way, we will have learned something about legal and/or conventional normativity.

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2. This is not to deny that there are conventionalist accounts of these phenomena (e.g. Mackie 1977, Harman 1975; Wong 2006); or even that such accounts might well turn out to be true. The point is just that morality, rationality and epistemic normativity, unlike norm of etiquette, dress codes and the rules of a game, do not *seem* to be conventional. I take it that this is commonground between conventionalists and anti-conventionalists – and part of what makes conventionalist accounts of these phenomena especially philosophically interesting. [↑](#footnote-ref-2)
3. Canonical statements of the Conventional Thesis include Hart 1994; Gans 1981; Postema 1982; Lagerspetz 1989; Marmor 1998; 2001. [↑](#footnote-ref-3)
4. Another problem is that the Conventions Thesis appears to lack sufficient generality. While *some* laws certainly serve a coordination-facilitating function, it is highly implausible to suppose that this is true either of laws *in general*, or of those norms that purport to confer legal validity on putative laws (Green 1990; 1999). [↑](#footnote-ref-4)
5. The distinction between “positive” norms and “critical” norms is based on Hart’s (1994) well-known distinction between norms of “positive morality” and norms of “critical morality.” Morality is, of course, just one domain where this distinction is at play. [↑](#footnote-ref-5)
6. While Hart is *often* interpreted this way, such an interpretation is not universally accepted. For important dissenting voices, see Dickson 2007 and Green 1998, pp. 39-41. [↑](#footnote-ref-6)
7. The issue of how to understand conventional norms has received little systematic attention to date from meta-ethicists, who have tended to focus more or less exclusively on *moral* norms, or, more recently, *robustly normative* norms, and to mention conventional norms only in order to note that they are *not* moral and/or *not* robustly normative. Daniel Wodak has aptly likened meta-ethicists’ interest in conventional norms to an “interest in fool’s gold: once we ascertain that we are not dealing with the genuine article, it is cast aside, ignored” (Wodak ms, pp. 1-2). [↑](#footnote-ref-7)
8. It is important to distinguish positive norms from two other types of norms. The first distinction is the distinction mentioned above between positive norms and critical norms. As noted above, critical norms are not social facts. Rather, they are *valid* normative principles that may or may not be recognised or accepted or established in any groups or communities. Take a moral norm according to which affluent individuals must give up most of their discretionary income to assist the destitute. This norm might well be valid. Hence, there may very well be such a critical norm of morality to that effect. However, it is certainly not sufficiently widely recognised or accepted or established within our own societies for us to be able to say that there is a positive norm to the effect that affluent individuals must give up most of their discretionary income to assist the destitute.

   It is also important to distinguish positive norms from what we can call *statistical norms*. Statistical norms are simply true generalisations. They do not involve normative principles in any way. Consider the claim that giving birth to 4-18 pups is the “norm” among female Mako sharks. That is just to say that most female Mako sharks give birth to 4-18 pups. It certainly does mean that there is any kind of normative principle that would be violated if a female Mako shark were to give birth to more or less than that. [↑](#footnote-ref-8)
9. Notice that by a “normative principle” in this context I mean a *minimally normative* (as opposed to a *robustly normative*) principle. See below, n. ?? [↑](#footnote-ref-9)
10. Notice that Bicchieri does not say that it is necessary, only that it is sufficient. [↑](#footnote-ref-10)
11. I shall generally omit the knowledge condition in what follows. [↑](#footnote-ref-11)
12. Of course, there are different views about precisely what these conditions are. I shall touch on some of the relevant issues in the following sub-sections. [↑](#footnote-ref-12)
13. I am not committing myself to a fictionalist proposal of this kind. But it strikes me as a promising and intriguing subject for further inquiry. I am grateful to Daniel Wodak and Kevin Toh for helpful discussion here. [↑](#footnote-ref-13)
14. The idea that that we must distinguish between *minimal* (or *formal*) normativity, on the one hand, and *robust* (or *substantive*) normativity, on the other, has come to be an important theme in the contemporary philosophy of normativity is (see e.g. Parfit 2011; Broome 2013; McPherson 2011; McPherson and Plunkett forthcoming; Plunkett and Shapiro ms). [↑](#footnote-ref-14)
15. Notice that this is nonetheless neutral regarding the issue of whether reasons (or something else, such as, say, value) is the *most fundamental* normative notion. [↑](#footnote-ref-15)
16. I have argued elsewhere that, rather than a *single* all-things-considered ought, there is in fact a *plurality* of all-things-considered oughts (Southwood 2016). However, this is not relevant in the current context, so I shall set it aside. [↑](#footnote-ref-16)
17. This isn’t supposed to be an *analysis* of the notion of a reason. Some philosophers hold that reasons are somehow to be analyzed in terms of the notion of ought (Broome 2013; Schroeter and Schroeter 2011). Others hold that reasons are to be analysed in some other way, say in terms of actual or hypothetical desires (Smith 1994; Schroeder 2007). Still others hold that the notion of a reason should be treated as a primitive and hence as unanalyzable (Scanlon 1998; Parfit 2011. I shall remain neutral on these difficult questions here. [↑](#footnote-ref-17)
18. This version of the Normativity Objection is particularly associated with Ronald Dworkin (1978, pp. 46-80; see also Shapiro 2009). Dworkin famously took Hart to task for confusing “social” and “normative” rules. By a “normative” rule Dworkin means precisely a robustly normative rule: that is, a rule that necessarily provides agents with reasons for action. As Dworkin correctly notes, the fact that the members of a group have certain (practice-dependent) normative attitudes does not necessarily provide agents with reason to act accordingly. Given that law involves “normative” (i.e. robustly normative) rules, explicating law in terms of “social” (or conventional) norms is plainly incapable of accounting for the normativity of law. As a matter of fact, Dworkin’s claim is even stronger than the claim that law is robustly normative as I have been interpreting it since he holds, not merely that law *entails* that we have corresponding reasons for action, but that law *provides* us with (i.e. is a *source* of) corresponding reasons for action. [↑](#footnote-ref-18)
19. To be sure, we may have *often* have reason to comply with conventional norms. The point is just that this is not *necessarily* so. Whether we ought or have reason to comply with conventional norms depends, inter alia, on their particular content and the particular circumstances in which agents find themselves. [↑](#footnote-ref-19)
20. It might be said that homosexual men necessarily had *prudential* reason to do so: namely, to avoid legal sanctions. But even this is false. For one, from the 1980s, the anti-homosexuality laws were – thankfully – not enforced [check]. Even before the 1980s, there were plenty of homosexual men who had reason to believe that there was no realistic prospect of sanctions. [↑](#footnote-ref-20)
21. As such, it is not obvious how this is supposed to capture something special about the normativity of law – something that makes is qualitatively normatively different from, say, the rules of Tiddlywinks. (That is, to say that one has an obligation of Tiddlywinks (say, to refrain from playing a sqopped piece) is to simply to assert that *from the Tiddlywinkish point of view*, one has an obligation to refrain from doing so.) And, as we have seen, the Conventional Norms Thesis is perfectly compatible with the Minimal Normativity Thesis. [↑](#footnote-ref-21)
22. At the same time, this does not distinguish law from games as such. Australian Rules Football also encompasses rules of enforcement. [↑](#footnote-ref-22)
23. Alternatively, it might be said that while this makes law *different* from etiquette, it does not make it any more *authoritative*. I am grateful to David Plunkett for this observation. [↑](#footnote-ref-23)