Law and Philosophy (2015) 34: 333–368
DOI 10.1007/s10982-015-9226-0

Erratum

KEVIN TOH

ERRATUM TO: FOUR NEGLECTED PRESCRIPTIONS OF HARTIAN LEGAL PHILOSOPHY*

Erratum to: Law and Philosophy (2014) 33: 689–724
DOI 10.1007/s10982-013-9203-4

Prior to the original publication of this paper, a great number of page references were incorrectly changed at the production stage. The correct page numbers have been inserted in this erratum version of the paper.

ABSTRACT. This paper seeks to uncover and rationally reconstruct four theoretical prescriptions that H. L. A. Hart urged philosophers to observe and follow when investigating and theorizing about the nature of law. The four prescriptions may appear meager and insignificant

The online version of the original article can be found under doi:10.1007/s10982-013-9203-4.

* An earlier version of this paper was presented at a workshop on John Gardner's book *Law as a Leap of Faith* (2012), held at the University of Edinburgh, and at a legal philosophy seminar at the University of Genoa, both in May 2013. I thank the members of the two audiences for their instructive and friendly questions and comments, and especially Gardner for his reactions in Edinburgh and Luís Duarte d'Almeida for thoughtful written comments on the draft. I also thank Felipe Oliveira de Sousa and Giovanni Ratti, respectively, for organizing and inviting me to the two events. A little before writing this paper, I wrote and published a short review (2013) of Gardner's book. My intention in this paper was to take a step back and to examine more thoroughly than I had in the review what may really be motivating Gardner's thinking. As I tried to do so, other people's positions, the positions that I believe share much with Gardner's, came into view. In particular, a few weeks before the Edinburgh workshop, Les Green presented an earlier version of his paper 'The Morality in Law' (2013) at the Analytic Legal Philosophy Conference in Miami, and the impression I formed then was that Gardner and Green share significant commitments with which I disagree. I take these to be some of the core commitments of what amounts to the orthodox and dominant position in contemporary legal philosophy, which commitments I believe are in many ways misguided and reverts to some old trends in legal philosophical thinking from which H. L. A. Hart sought a decisive break. Or so I argue in this paper. What resulted is a more wide-ranging paper than a typical contribution to a symposium on a single author's book. I thank Gardner for agreeing to have, and even encouraging, a paper of this sort as a contribution. I also want to take the opportunity to express my gratitude to Green, not only for sharing the copy-edited version of his (2013) with me, but also for his generosity over the years. My serious study of legal philosophy began with reading his review (1996) of the second edition of *The Concept of Law*, which as a student editor I had commissioned and edited for the *Michigan Law Review*. Through various steps, many undetectable to me, I have now come to disagree with him on many fundamental issues. Along the way, however, Green has been a consistent source of instruction and encouragement.

when each is seen in isolation, but together as an inter-connected set they have substantial implications. In effect, they constitute a central part of Hart's campaign to put philosophical investigations about the nature of law onto a path to a genuine research program. The paper takes note of certain prevalent and robust trends in contemporary legal philosophy that detract its practitioners from the four prescriptions, and that have them revert to the some older modes of thinking from which Hart sought a decisive break. A number of contemporary legal philosophers' views and commitments are taken up and assessed, and in particular those of John Gardner and Leslie Green.

Yet the answer is a prosaic one: don't ask what time is but how the word 'time' is being used.

Friedrich Waismann.

I miss the future.

Jaron Lanier.

I. INTRODUCTION

Certain leitmotifs predominate contemporary legal philosophy both in its construal of earlier contributors' works and in its conceptions of the theoretical options now available. New theoretical vistas open up, I believe, when these leitmotifs are turned down a bit in volume, and we listen more closely to some persistent but recently neglected themes that were contained in H. L. A. Hart's legal philosophy. Even Hart himself was not always consistent in his performance of these themes, and some of the themes I have in mind are only implicit in Hart's writings.

The purpose of this paper is to uncover and highlight four recently neglected themes that were explicitly highlighted or at least implicitly relied on by Hart in motivating his legal theory. More particularly, the themes I have in mind are certain prescriptions that we should keep in mind and guide ourselves with in devising theories about the nature of law. Each of these prescriptions may appear inconsequential and meager when taken in isolation. But together they have substantial implications, and some of the aforementioned leitmotifs in contemporary legal philosophy lose much of their hooky appeal when the prescriptions are taken seriously.

No doubt, *The Concept of Law* has become the classic work that it is partly because it has the richness and ambiguities that invite

disparate understandings. I also now and then remind myself of what Scott Shapiro wisely once said during a conversation – that most legal philosophers become legal philosophers by first reading and becoming intimate with Hart's work, and that telling them that they are wrong about Hart is like telling them that one knows their parents or spouses better than they. Obviously, I want to minimize the risk of appearing so vain and illiberal. For this reason, although, for the sake of expositional convenience, I will be speaking below as if I am arguing against the standard understanding of Hart's legal theory and advocating *the correct* understanding, I wish to be taken merely to be presenting *an alternative* to the standard understanding. The claim that this alternative reading has on our attention should be thought to depend on the new possibilities in legal philosophy that it opens up, rather than on its fidelity to what Hart actually said or thought. Although this paper does not itself contain delineations or explorations of the new possibilities, it will consist of some necessary preparatory work for such delineations and explorations.

In a way, the possibilities I have in mind are *old* possibilities. They were the possibilities that Hart's work suggested but then were obscured by Ronald Dworkin and Joseph Raz's works, including their influential presentations of Hart's legal theory. Although I will not be trying to substantiate this claim in what follows, it is my opinion that Dworkin and Raz are largely responsible for the predominance of the aforementioned leitmotifs. Misha Mengelberg, one of my favorite jazz musicians, once said that he has been trying to compose and play the kind of music that would have developed if John Coltrane had never come on the jazz scene.[1] Similarly, I am eager to explore some possibilities that would have developed if Dworkin and Raz had never come on the legal philosophical scene. And this paper is a preparation for explorations of such possibilities.

II. 'THE PRACTICE THEORY OF RULES'

Hart begins the first chapter of *The Concept of Law* by considering the question 'What is law?' (1961/1994, p. 1). He quickly breaks that question down into three interrelated, and apparently more tractable, questions. Answering these three questions, Hart asserts, would go a

[1] I believe that I read this in Whitehead (1998), or in one of the many on-line interviews with Mengelberg, but I have not been able to locate the quote.

long way in addressing the genuine, non-spurious among the concerns and puzzles that motivated his predecessors to ask the question 'What is law?' Among the three, the third is meant to be the most general or basic one, the answer to which will provide the key building block for answering the other two questions. That third question has to do with the nature of rules. Hart asks: 'What *are* rules?' (p. 8).

According to one of the leitmotifs of contemporary legal philosophy, Hart had a simple answer to that question – rules are practices. As far as I can determine, Dworkin prompted this leitmotif when he summarized Hart's view as follows:

> Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behavior *constitutes* a social rule, and imposes a duty. (1972, p. 49)

Raz essentially duplicates this characterization of Hart's conception of rules, and calls it a 'practice theory of rules' (1975/1990, § 2.1). Raz goes a step further than Dworkin in saying that according to Hart rules *are* practices. That is different, significantly, as I will argue below, from saying that the existences of rules are existences of practices. Many others have followed Raz in his terminology of 'practice theory' as well as the understanding that the terminology suggests (e.g., Greenberg 2006a, p. 126, 2006b, pp. 271–272; Marmor 2009, p. 156; Shapiro 2011, p. 95; Green 2012, p. xxi). Leslie Green, for example, says that, according to Hart, rules are 'social constructions', and 'made up of practice' (2012, p. xxi; cf. p. xxvii).

Raz distinguishes between 'personal rules' and 'social rules', and says that the former are 'personal practices' whereas the latter are 'social practices' (1975/1990, p. 52). What Hart calls 'rules of recognition' are the rules that set forth the ultimate criteria of legal validity in legal systems. Classifying rules of recognition as social rules, many contemporary legal philosophers have gone on to characterize them as practices among legal officials. Legal philosophers employ different locutions to get at this idea, but the gist seems to be the same. Brian Leiter, for example, says: '[T]he Rule of Recognition, on Hart's view, is a social rule, meaning its content – that is, the criteria of legal validity – is fixed by a complex empirical fact, namely, the *actual practice* of officials (and the attitude they evince towards the practice)' (2009, p. 1222). John Gardner says that,

according to Hart, rules of recognition are social or customary rules that are 'constituted by' official practices (2008, p. 69). Scott Shapiro says: 'Hart tries to demystify the creation of social rules by reducing them to social practices. In other words, social practices generate rules because these rules *are nothing but* social practices' (2011, p. 95). He goes on to argue that Hart made a category mistake in seeking such a reduction (pp. 102–104).

Sometimes, some of the legal philosophers that I have just discussed display some hesitation about attributing to Hart a practice theory. Green for example says in a 1999 paper:

> When he first wrote *The Concept of Law*, Hart thought that the fundamental norms underlying law are matters of social practice. A practice rule exists, he said, if there is in a given group general conformity to a standard of behaviour, if deviation from that standard is criticized, if that criticism is regarded as appropriate, and if people use the norm to guide and appraise their own behaviour or that of others. Now, although this has come to be known as the ''practice theory of rules,'' I doubt that Hart ever regarded it as a complete *theory* of rules, i.e. a full account of their nature and function. Most of what he says suggests only the more modest aim of providing a test for the *existence* of rules. (1999, p. 37)

As far as I can see, however, in his subsequent writings, Green dispenses with this hesitation. In his introduction to the third edition of *The Concept of Law*, for example, the practice theory is attributed to Hart without any qualification. Moreover, even in the 1999 paper, Green does not really explain why the practice theory is inaccurate, misleading, or incomplete when attributed to Hart. Green senses that something is not quite right, but he seems unable or disinclined to put his finger on what is wrong. I will be providing what I deem the right diagnosis of where the attribution goes wrong in my subsequent discussion.

III. THE CONTEXT PRINCIPLE

Whether or not the position thus attributed to Hart commits him to a category mistake, as Shapiro opines, there are reasons to think that the position could not really be Hart's. For Hart could not really occupy the said position without disregarding three of his own prescriptions.[2]

[2] A line of reasoning involving at least the first two of the prescriptions that I will be outlining in what follows can also be found in Waluchow (2011). Waluchow's paper consists in part of criticisms of Shapiro (2011), and both Waluchow and I have been struck by the parallels between his criticisms and the critical comments I had sent Shapiro shortly before the publication of his book. Although there are certain aspects of Waluchow's formulations that I find problematic or misleading, I have benefited much from reading his paper.

When many contemporary legal philosophers say that, according to Hart, rules are practices, they could be attributing to him an analytic claim about the meaning of 'rule', or an a posteriori, metaphysical claim about what rules are. Hart was writing contemporaneously with philosophers like Place (1956) and Smart (1959) who were beginning to distinguish between analytic claims and metaphysical claims of identity in the context of the mind–body problem – between 'the ''is'' of definition' and 'the ''is'' of composition', as Place puts it. But Hart seems consistently to have overlooked the distinction. He seems to treat all noncontingent claims as analytic claims.[3] In what follows, I too shall ignore the distinction. I do not think that ignoring this distinction makes a real difference for the purposes of this particular paper. I shall be treating the practice theory of rules, which contemporary legal philosophers attribute to Hart, as a claim about noncontingent features of rules. Exactly how it is that we have epistemic access to such features is an issue that we can bracket for the purposes of this paper.

When, in the first chapter of *The Concept of Law*, Hart asks what rules are, it is quite clear that he does not treat the question as straightforward. He says that 'dissatisfaction, confusion, and uncertainty concerning this seemingly unproblematic notion underlies much of the perplexity about the nature of law' (p. 8). He points out that even those who are inclined to think of rules as having to do with predictions of punishment 'confess that there is something obscure here; something which resists analysis in clear, hard, factual terms' (p. 11). Bentham for one treated the extra-empirical elements, which supposedly guide and justify our conduct, as 'fictions' that should be explained away. Whatever the merits of such a position, Hart says, it at least calls for 'a further elucidation of the distinction between social rules and mere convergent habits of behavior' (p. 12).

Bentham sought to expose and discredit legal fictions, and the most important tools he employed for those purposes were certain methods of analysis or definition. First, in a step he called 'phraseoplerosis', he prescribed taking as a unit of analysis not a term or phrase that perplexes in its apparent ontological commitments, but whole sentences in which that term or phrase is commonly used. Second, in a step called 'paraphrasis', Bentham called for translations of resulting sentences into sentences that dispense with the per-

[3] Place and Smart treated the relevant identities as contingent, a position that was later challenged by Kripke (1972/1980).

plexing term or phrase.[4] Employing these steps, Bentham famously argued that to say that someone has an obligation is nothing more than to say that he is likely to suffer sanctions in the event of his failing to carry out some action.

It is quite plain that Hart was deeply impressed with Bentham's approach to analyzing problematic terms even if he did not accept the particular analyses that Bentham offered. The approach's salience for him probably had much to do with the fact, which Hart explicitly notes (1966/1982, p. 128), that Bentham in these respects had essentially anticipated some crucial moves of the heroes of the early analytic philosophy, according to whom some terms or phrases lack sense in isolation, and therefore must be defined or analyzed only in sentences in which such terms or phrases are used.[5] This last prescription has since come to be called 'the context principle', and what it prescribes are 'contextual definitions' or 'definitions in use'. At one point in 'On Denoting',[6] Russell says:

> *Everything*, *nothing*, and *something* are not assumed to have any meaning in isolation, but a meaning is assigned to *every* proposition in which they occur. This is the principle of the theory of denoting I wish to advocate: that denoting phrases never have any meaning in themselves, but that every proposition in whose verbal expression they occur has a meaning. (1905, pp. 42–43)

What the terms such as 'everything' and 'nothing' contribute to the meanings of sentences, according to Russell, are not any individuals, but instead quantifiers. Russell went on to argue that descriptive phrases such as 'the author of *Waverly*' and 'the tallest mountain in Europe' can similarly be analyzed as not contributing any individuals that satisfy the descriptions, but instead the concepts expressed by the descriptive phrases, which are in turn incorporated into the quanti-

[4] These and some other components of Bentham's treatments of fictions are clearly and elegantly laid out in Hart (1966/1982, pp. 128–132).

[5] See Frege (1884, pp. x, 71); Russell (1905, pp. 42–45); Whitehead and Russell (1910/1927, vol. 1, Chap. 3); Wittgenstein (1921, 3.3, 3.314); see also Waismann (1956, p. 6; 1965, pp. 156–158). At the end of his inaugural lecture, Hart says:

> [I]t is only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules and their application to conduct. I at least could not see how much of this was visible in the works of our predecessors until I was taught how to look by my contemporaries. (1953, p. 47)

Quine has also connected Benthamite paraphrases with contextual definitions insisted on and employed by Frege and Russell. See Quine (1969, pp. 72–73; 1981, pp. 68–70); cf. Ogden (1932).

[6] I benefited from an illuminating discussion of Russell's theory of descriptions in Bach (1987/1994, esp. Chap. 5).

fictional apparatus that he devised. Employing the context principle, Russell argued, enables us to discern this role of descriptive phrases and thereby facilitates solutions to various philosophical puzzles. For example, according to the then-influential Meinongian doctrine, denoting phrases such as 'the square circle' and 'the present King of France' refer to 'non-subsisting' yet real objects. In opposition, Russell, much like Bentham, argued that such ontological excesses can be avoided by analyzing sentences containing such 'vacuous names' into sentences that dispense with them. According to Russell's analysis (p. 53), 'The King of France is not bald' means 'There is one and only one thing that is now the King of France, and it is not bald'.[7]

The context principle is the first of the four Hartian prescriptions of my title. In his 1953 inaugural address, 'Definition and Theory in Jurisprudence', after taking notice (as he will again later in Chap. 1 of *The Concept of Law*) of 'the great anomaly of legal language – our inability to define its crucial words in terms of ordinary factual counterparts' (p. 25), Hart says:

> Long ago Bentham issued a warning that legal words demanded a special method of elucidation, and he enunciated a principle that is the beginning of wisdom in this matter, though it is not the end. He said we must never take these words alone, but consider whole sentences in which they play their characteristic role. We must take not the *word* 'right' but the sentence 'You have a right', not the *word* 'State', but the sentence 'He is a member or an official of the State'. His warning has largely been disregarded and jurists have continued to hammer away at single words. (p. 26)

Given this commitment, it would be very strange if Hart had gone on in his later works to define or conceive rules as social practices – or if he had conceived rules as constituted by, consisting of, or reducible to social practices. That would mean that Hart himself ignored the context principle that he so explicitly advocated, and then had gone on to 'hammer away' at a single word or concept. Surely, that would be a very uncharitable reading. But that is in fact what many contemporary legal philosophers have him do.

IV. INTERNAL AND EXTERNAL STATEMENTS

What we should expect instead is that Hart would analyze whole sentences or statements in which 'rule' and related terminology are

[7] Not all philosophers have been enamored of doing ontological research by way of such paraphrases. For an influential skeptical note, see, e.g., Alston (1958).

characteristically used. And that is indeed what we find. As it turns out, according to Hart, there are two kinds of sentences or statements in which 'rule' and related terms are typically used. As Hart explains at one point in *The Concept of Law*,

> When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion: for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'. (1961/1994, p. 89)

In fact, statements of rules, or statements of 'existence' of rules,[8] as Hart likes to put it (e.g., pp. 8, 109) – e.g. 'There is a rule against smoking' or 'Smoking is prohibited'; 'Rules allowing books to be checked out exist' or 'Books can be checked out' – are amenable to construal as 'external statements' or as 'internal statements' (pp. 102–103). By making an external rule statement, a speaker describes or states the fact that some person or group of people accept the relevant rule and are thereby guided in their conduct by that rule. By an internal rule statement, on the other hand, a speaker expresses or manifests (as opposed to describing or stating) his own acceptance of the rule, or his own willingness to be guided by that rule.

The second of the four Hartian prescriptions in my title is then to distinguish the two kinds of rule statements. Beginning in the preface of *The Concept of Law* (p. vi), throughout the book, Hart is adamant about this distinction.[9]

At the workshop on his book *Law as a Leap of Faith* (2012) at the University of Edinburgh, where an earlier version of this paper was presented, John Gardner expressed some doubt that the context principle played a significant role in Hart's later thinking, while agreeing with me that the three other prescriptions I am discussing did. Such a view, I believe, overlooks the fact that the four prescriptions form a package. The second prescription, for example, is obviously tightly connected to the first prescription of the context principle. It is because

[8] For a similar disambiguation, by a philosopher who had a large influence on Hart, among different senses of 'existence' in the mathematical discourse, see Waismann (1982).

[9] It may be the case that the distinction between internal and external statements is really pragmatic rather than semantic as Hart thought, so that an accurate explanation of the legal talk would characterize a single set of statements as having one kind of meaning, but being used in two different ways. This is a possibility that I have not yet investigated and would like to in the near future. What I am considering here is analogous to the way that Bach (1987/1994, Chap. 6) has responded to Donnellan's (1966) famous distinction between referential and attributive uses of definite descriptions.

certain terms or phrases must be defined only as they are characteristically used that Hart delves into the two kinds of characteristic uses of 'rule' and related normative terminology. Hart's commitment to the distinction between internal and external rule statements incorporates and is premised on his commitment to the context principle.[10]

It is worth noticing that, despite Bentham's strong influence on his thinking, in two significant respects, Hart's distinction between the two kinds of statements, or more specifically his treatment of internal statements, involves departures from Bentham. Let me point to the first departure now, and go on to discuss the second in the next section. Hart differs from Bentham first in noticing that there is a separate class of sentences in which 'rule' or related normative terms typically occur. As he observes in a 1982 paper:

> [Bentham] seems consistently to have thought of commands and prohibitions as assertions or statements of the fact that the speaker has the relevant volition.... Though Bentham has much to say of interest on the difference between the indicative or, as he actually calls it, the assertive style of discourse and the imperative and the way in which the former may 'mask' the latter he did not succeed in identifying the radical difference of function in communication which they standardly perform. A command for Bentham was a kind of assertion differing from others only because it was specifically an assertion about the speaker's volition concerning the conduct of others. He did not recognize it as a form of non-assertive discourse. (1982, p. 248)

Yet, Hart goes on to observe that Bentham's failure here is understandable:

> If this doctrine, that commands and prohibitions because they are expressions of will are assertions seems a gross error, it is I think to be remembered that Bentham was not alone in failing to grasp the distinction between what is said or meant by the use of a sentence, whether imperative or indicative, and the state or attitude of mind or will which the utterance of a sentence may express and which accordingly may be implied though not stated by the use of the sentence. When I say 'Shut the door' I imply though I do not state that I wish it to be shut, just as when I say 'The cat is on the mat' I imply though I do not state that I believe this to be the case. (pp. 248–249)

Hart himself does not think of internal legal statements as commands. But the distinction that Hart is here highlighting – the distinction between a speaker's *expression* of his conative psychological state

[10] Also relevant here is a passage in Hart (1963), which I will discuss at the beginning of the next section.

('volition') and the speaker's *description* of his conative psychological state – is the key to Hart's analysis as well as to Bentham's. This is the distinction that the more recent philosophical literature marks as the distinction between 'expressivism' and 'subjectivism'. What enables Hart to see and deploy the distinction that eluded Bentham is surely the works in speech acts that Hart's contemporaries carried out.[11]

There is a wrinkle in Hart's thinking about the nature of internal and external statements that is worth discussing and setting aside. Hart famously argues in Chap. 5 of *The Concept of Law* that the transition of a community from the pre-legal stage to the legal one can be conceived as that community's adoption of a set of 'secondary rules' to regulate changes in, adjudication about, and identification of the 'primary rules' that directly govern the community members' conduct. At one point in Chap. 6 (pp. 109–110), Hart surprisingly says that in a community with only primary rules, statements that a rule exists can only be external statements. He opines that internal statements are possible or apt only when rules are systematized by a rule of recognition that sets out the ultimate criteria of validity in that system of rules, and by appeals to which the rules that belong to the system can be identified. A concomitant of this set of views is that even when a set of rules is systematized by a rule of recognition, an acceptance of that rule of recognition itself cannot be expressed in an internal statement that asserts the existence of that very rule. Instead, according to Hart, acceptances of such a rule can be expressed only by asserting subordinate rules that are validated by the ultimate rule. He explicitly says: 'The assertion that [a rule of recognition] exists can only be an external statement of fact' (p. 110; cf. 1958, p. 88).

It is far from clear what is motivating Hart to take this last set of positions. One hypothesis is that Hart is thinking that the notion of validity could not appropriately be predicated of rules that are unsystematized – viz., unsystematized either because they do not belong to systems of rules or because they are the rules that validate and are not validated by other rules – and he is over-generalizing from that thought to deny the possibility of internal statements that assert unsystematized rules. His assumption, according to this hypothesis, would be that internal statements are necessarily

[11] Hart's use of the word 'imply' is a bit unfortunate as it invites conflation of communication of non-descriptive content with communication of any kind of content by way of conversational implicature. But we can overlook that aspect, as the context indicates that Hart clearly means the former.

statements of rule-validity. But whatever the explanation, Hart's position here seems an unforced error. We are capable of accepting unsystematized rules as well as systematized rules, and we have no problem expressing acceptances of either kind of rules. In asserting that people ought to refrain from having cellphone conversations in cafés, I express an acceptance of a rule that is not systematized. Sincere expressions of rule-acceptances would imply the speakers' thinking that the relevant rules are correct. Validity is just one type of correctness, and there is no problem with our considering certain norms correct even when the notion of validity is not appropriately predicated of them. We are not stuck, as Hart (or the Hart committed to the above wrinkle in his thinking) would have it, to only describing our own or others' acceptances of such rules. At one point, Hart seems to come nearer the truth when he says:

> [W]e need to remember that the ultimate rule of recognition may be regarded from two points of view; one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law. (1961/1994, p. 112)

Even here, Hart appears reluctant to say that a speaker can express his acceptance of a rule of recognition by asserting the content of that very rule, rather than by his assertions of subordinate rules that are validated by the rule of recognition. And his reluctance seems to be motivated by his thought that internal legal statements are invariably statements of legal validity. But this seems an unwarranted tying arrangement. Speakers can, and frequently do, express their acceptances of rules that are unsystematized. And there is no reason, other than possibly the size and complexity of rules of recognition, that would get in the way of speakers' assertions of the contents of such rules. In sum, I believe that it is best to dispense with Hart's view that internal statements can only be assertions of systematized rules.[12]

With the distinction between internal and external statements in hand (and with the just-discussed wrinkle removed), we can see more clearly where many contemporary legal philosophers go askew. If we focus exclusively on external rule statements, then it is

[12] One additional factor that may have motivated Hart is his analogy of statements of rules of recognition to philosophical statements as Wittgenstein conceived the latter. Wittgenstein asserts, in the preface and the final remark of the *Tractatus*, that philosophical statements are ultimately nonsense, attempts to convey what can only be shown but not said. Time to time (e.g., 1961/1994, p. 101), Hart flirts with the idea that rules of recognition can only be shown and not said. I find the analogy inapt and even frivolous.

not too misleading to say that rules *are* social practices, or that rules are 'constituted by', 'consists of', or even 'reducible to' social practices. The existence of rules in the external sense, according to Hart, consists of, or is constituted by, a group of people accepting and following those rules. But the practice theory of rules is meant to go beyond this, and ultimately distorts the Hartian picture by implying that 'rule' or related terminology can always be replaced by descriptions or references to certain social practices in all their characteristic uses. The practice theory interpretation in effect excises altogether Hart's thinking about internal rule statements from the picture. The theory's claim to accuracy – i.e., its claim of fidelity to Hart's actual thinking – cannot be shored up merely by noting, as many do (e.g., Leiter 2009, p. 1221; Green 2012, p. xxi), that the social practices that amount to or constitute rules include their guiding themselves by those rules, pressuring each other to comply with the rules, and criticizing themselves and others for flouting the rules. As Hart's criticism of Bentham clearly indicates (1982, pp. 248–249), there is a big difference between stating or describing people's possession and expressions of certain psychological attitudes that amount to their commitments to rules on the one hand, and expressing those attitudes on the other.

V. STRAIGHT AND OBLIQUE ANALYSES

This last point can be sharpened by examining the second of the two departures that Hart takes from Bentham that I mentioned near the beginning of the preceding section. In addition to taking notice of internal rule statements, which amount to the second way that 'rule' and related normative terminology are characteristically used, Hart departs from Bentham in offering a particular kind of analysis of those internal statements. Hart delineates the important distinction in types of analyses as follows in a 1963 paper:

> Of course the ideas of 'analysis', 'elucidation', and even 'definition' are vague, and can take many forms. It is not to be expected that the analytical jurist should always, or even usually provide definitions *per genus et differentiam* of single words in which the definition provided is a synonym for the word to be defined. If the distinctive feature of analytical jurisprudence is its concern, in Kelsen's words, to grasp the 'specific meaning of legal rules', there are many different ways in which this may be done. The analytical jurist may give not definitions of single words, but synonyms or 'translations' of whole sentences ('definitions in use'); or he may

even forgo altogether the provision of synonyms and instead set out to describe the standard use of certain expressions. (1963, p. 288)

In the first part of this passage, Hart is obviously taking the Benthamite stance about contextual definitions.[13] But in the last sentence, he is drawing a distinction between a type of analysis that provides translations of the sentences containing the relevant term, and a type that merely describes typical or standard uses of those sentences. This is the distinction between what Gibbard (2003, p. 185) has recently called 'straight' and 'oblique analyses'. If a speaker says that *p*, a straight analysis offers a translation of *p*, whereas an oblique analysis offers a translation of 'The speaker says that *p*'. The analysandum of a straight analysis is the content of the sentence uttered by a subject speaker, whereas the analysandum of an oblique analysis is the content of a theorist's sentence that attributes an utterance to the subject speaker.

The third of the four Hartian prescriptions of my title is then to distinguish straight and oblique analyses. Hart does not really highlight or even explicitly articulate this distinction. But as I will explain presently, keeping the distinction firmly in mind is quite important in getting a clear understanding of what he is up to and what he accomplishes.

The two types of analyses in fact need not be considered mutually exclusive. Once again, according to Hart, external rule statements are to be analyzed as descriptions of states of affairs in which a group of people accept and follow a rule. Here, Hart has provided an oblique analysis of external statements – he has described one type of characteristic use of 'rule' and related terminology. In further specifying the relevant states of affairs, and thereby offering translations of the external statements, Hart is furnishing straight analyses of those statements. In effect, in his analyses of external rule statements, Hart is straightforwardly applying the Benthamite steps of phraseoplerosis and paraphrasis. But that is not exactly what he does with internal rule statements. In uttering an internal rule statement, according to Hart, a speaker expresses his acceptance of a rule. This is an oblique analysis, and Hart stops there. Why does he not go further as he does with external rule statements?

In fact, Hart could have gone further and have provided translations of the sentences uttered by speakers of internal rule statements. But the

[13] Though Hart's wording is permissive rather than mandatory, this part of the passage provides some further support to my view that the context principle played a significant role in Hart's thinking in *The Concept of Law* and beyond. I reacted to Gardner's doubt about that view in the preceding section.

important point is that the contents of such sentences are, according to Hart, normative (esp. Hart 1966/1994, pp. 144–145), and such normative contents cannot be translated accurately into analysantia that do not themselves contain the same or some other normative concepts. Translations of sentences containing vacuous names into other sentences containing other vacuous names would not in any way address the ontological and other philosophical puzzles generated by sentences containing vacuous names. Analogously, translations of sentences containing normative terms into other sentences containing the same or some other normative terms would not address the ontological and other philosophical puzzles generated by sentences containing normative terms. This is why Hart stops with oblique analyses of internal rule statements. Going further and offering translations of the sentences uttered by speakers of such internal statements would not lead to further metaphysical and other kinds of illumination. On the other hand, certain oblique analyses can address such philosophical concerns. By construing internal rule statements as expressions of acceptances of rules, and not descriptions of any states of affairs, we can come to see that there is no need to posit rules in our metaphysics. What we need to acknowledge or countenance in our metaphysics are not rules themselves, but instead people's acceptances of rules, existences of which are just prosaic empirical facts – more specifically psychological and behavioral facts. Not positing rules, we would not have to worry about their metaphysical status, or about our epistemic and semantic accesses to them. What motivate people's conduct, we can explain, are not strictly speaking rules that people cognize, but instead the psychological attitudes of accepting those rules, and those psychological attitudes could be explained fully without positing rules themselves.

I hope it is quite plain now why characterizing Hart as conceiving rules as (constituted by, consisting of, or reducible to) social practices – even as social practices that contain people's acceptances and following of rules – massively distorts Hart's actual thinking. In effect, such characterizations have Hart flout the context principle that he so emphasized, lose sight of the phenomenon of internal rule statements that he so carefully delineated, and completely disregard the very motivations that he had for offering an oblique analysis of internal rule statements. We should resist the leitmotif of practice theory that lulls us to such distortions, and thereby deprives us of the noted explanatory benefits that following the three prescriptions confers.

VI. THE PROBLEM OF NORMATIVITY[14]

There is a widespread belief among contemporary legal philosophers that there is a problem of explaining the 'normativity' of law. And this alleged problem could be considered another leitmotif, a big one to be sure, of contemporary legal philosophy.

Somewhat scandalously, despite its frequent mention and discussion, there is no clear conception or articulation of the normativity problem available in the literature. Put broadly, it seems, the problem has to do with explaining the reason-giving or obligation-imposing nature of laws. A strand of the problem appears to originate from Dworkin's early criticism of Hart's conception of rules of recognition. According to Dworkin (1972, § 1), Hart fails to explain why people or officials of a community have reasons or even obligations to do as required by the rules that are validated by the community's rule of recognition. The existence of a rule of recognition, according to Dworkin, consists of certain social practices, and the existence merely of any such social practices cannot morally justify people or officials' compliance with the rules validated by a rule consisting of such practices.[15] Many others have followed Dworkin in articulating this criticism, and they have characterized it as exposing a central defect of Hart's practice theories of rules and his theory of law.[16]

[14] A more thorough discussion of the issues discussed in this and the next sections are contained in Toh (MS, esp. §§ 4–7). In some of my earlier papers, I sought to distinguish two different problems that could be labelled 'the normativity problem' in legal philosophy – (i) the problem of explaining roughly why we have reasons or duties to follow laws; and (ii) the problem of explaining what facts amount to our treating laws as reason- or duty-generating. See e.g. Toh (2010a, p. 331; cf. 2005, p. 77). I argued that (ii) is a genuine problem whereas (i) is not. Given the prevalent focus on (i) and the invariable usage of the label to refer to that problem in the literature, I am abandoning (at least for now) my attempt to re-appropriate the label for (ii).

[15] Dworkin's exposition of his criticism is actually much more complicated than how I have outlined it in the text. And unlike others' expositions that follow his lead, his own exposition repeatedly, and maddeningly, slips in and out of a sound understanding of Hart's actual commitments. But cataloguing where he gets Hart right and where he gets Hart wrong in the relevant eleven pages, and the different versions of the criticism that could be generated from the different things he says, would be a pains-taking and completely thankless task which I do not want to take up. In any case, by the end of this paper, I believe, I will have completely addressed all the various versions of Dworkin's criticisms that can be read into those eleven pages.

[16] Raz (1975/1990, § 2.1), Postema (1982, pp. 165, 171), and Gilbert (1999, § 3) seem to essentially repeat Dworkin's criticism of Hart. Many others seem to be following Raz in articulating the same criticism. See e.g., Green (1999, p. 38; 2012, pp. xxi–xxii); Shapiro (2011, Chap. 4). Greenberg's (2004) argument based on what he calls 'the rational-relation requirement' seems an interesting variation on Dworkin's argument. The argument has been clarified and elaborated in a number of subsequent papers, most notably in Greenberg (2006a, b), and Shapiro's articulation of what he calls 'the Possibility Puzzle' (2011, Chaps. 2, 4) appears significantly influenced by Greenberg's argument, as well as by those of Dworkin and Raz. I assess Greenberg's argument in Toh (MS, § 7).

There is another strand of the alleged problem of legal normativity that seems to originate from Kelsen, which has to do not so much with moral justifiability but with the Humean *is-ought* gap. It is this Kelsenian strand on which I will focus in what follows, although what I end up saying should apply to the Dworkinian strand as well. The idea motivating the Kelsenian strand is the following. The legal validity of any law can be traced to a rule that sets out the ultimate criteria of legal validity in the relevant jurisdiction (which Hart calls 'the rule of recognition'), and the legal validity of that rule in turn can be traced to that of historically earlier ultimate rules. But what about the legal validity of the *earliest* of such earlier ultimate legal rules? By assumption, there is no further law to validate that legal 'ur-rule', so to speak, or what Kelsen calls 'the basic norm'. On the other hand, the argument goes, no mere set of facts about what people do and think could legally validate the basic norm either. Marmor outlines the Kelsenian reasoning as follows:

> The law, Kelsen rightly observed, is first and foremost a system of norms. Norms are ''ought'' statements, prescribing certain modes of conduct. Unlike moral norms, however, Kelsen maintained that legal norms are created by acts of will. They are products of deliberate human action. For instance, some people gather in a hall, speak, raise their hands, count them, and promulgate a string of words. These are actions and events taking place at a specific time and space. To say that what we have described here is the *enactment of a law* is to *interpret* these actions and events by ascribing a normative significance to them. Kelsen, however, firmly believed in Hume's distinction between ''is'' and ''ought'', and in the impossibility of deriving ''ought'' conclusions from factual premises alone. Thus Kelsen believed that the law, which is comprised of norms or ''ought'' statements, cannot be reduced to those natural actions and events that give rise to it. The gathering, the speaking, and the raising of hands, in itself, is not the law; legal norms are essentially ''ought'' statements, and as such, they cannot be deduced from factual premises alone. (2009, p. 158)

As Green says right after outlining the same dialectic (1999, p. 35), what we are supposed to have here is a dilemma. Neither further legal rules nor mere facts could legally validate the basic norm. And Shapiro also motivates the same dialectic in terms of this dilemma, which he calls 'the Possibility Puzzle' (2011, Chaps. 2, 4). A telling indication of the strong hold that this Kelsenian dialectic has on contemporary legal philosophy is the fact that W.J. Waluchow, in a recent paper that makes many of the points that I have been emphasizing above and that criticizes philosophers like Shapiro for

ignoring important Hartian prescriptions, explicitly subscribes to the dialectic (2011, pp. 368–369).

According to the practice theory understanding of Hart's legal theory, Hart commits himself to the second horn of the dilemma. According to Hart, as thus understood, the law ultimately rests on facts of social practices, and a determination of the legal validity of any rule would bottom out with appeals to the psychological and behavioral facts that allegedly make up the rule of recognition. Shapiro, for instance, describes Hart's position as follows:

> [I]f Hart is correct, and social practices explain how legal systems are possible, then legal reasoning must always be traceable to a social rule of recognition. Arguments about who has authority to do what, what rights individuals have, which legal texts are authoritative, and the proper way to interpret them must ultimately be resolved by reference to the sociological facts of official practice. (2011, p. 102)

Gardner says that for Hart 'the conforming behavior' that 'constitutes' a rule of recognition is made 'normative from the legal point of view' (2008, p. 69). And at least some of the contemporary legal philosophers I have been discussing (e.g., Raz 1974, 1977) have found that position unsatisfactory for the Kelsenian reasons that Marmor outlines above. The kind of practice facts that Hart invokes, the thinking goes, cannot bridge the Humean *is-ought* gap in a licit way. Some of these same philosophers (e.g., Postema 1982; Marmor 1998, 2009, Chap. 7; Shapiro 2002, 2011) have been at work devising more sophisticated conceptions of social practices that could do the trick. It is doubtful though, given the dialectic, that any set of practice facts alone, no matter how complex and sophisticated, could enable a licit bridging of the Humean gap.[17]

If we scrupulously follow the three Hartian prescriptions so far outlined, however, we see that the dialectic is less than compelling. External legal statements are analyzable as descriptions of people's acceptances of the rules that make up their legal system and their behavior motivated by such acceptances, and some of those external statements in particular are analyzable as descriptions of legal officials' acceptances of their community's rule of recognition and their

[17] My concerns about Marmor and Shapiro's particular attempts are outlined in Toh (2010b, MS). At the end of the day then, I am in agreement with Greenberg that these and similar attempts are bound to fail. But I disagree with his view that the problem that they address is a genuine problem which legal philosophers should seek to address, and with his conception of Hart's legal theory as meant to address the problem.

behavior motivated by such acceptances. These psychological and behavioral facts are not meant to be the facts in virtue of which the community's rule of recognition is legally valid. Instead, these are meant to be the facts that amount to the members or officials of the community *treating a particular rule as their rule of recognition*. So what are the facts or rules in virtue of which any community's rule of recognition is legally valid? The answer in short is: *nothing*.

Let me repeat: There is supposed to be *nothing* – viz., no fact or norm – in virtue of which a community's rule of recognition is legally valid. Questions of legal validity are supposed to be answered with finality by the rule of recognition. That is an important part of the functional role of any rule of recognition. And it is a mistake to ask about the legal validity of a rule of recognition.[18] This is what Hart is clearly getting at when he says:

> There are, indeed, many questions which we can raise about [a rule of recognition]. We can ask whether it is the practice of courts, legislatures, officials, or private citizens in England actually to use this rule as an ultimate rule of recognition…. We can ask whether it is a satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer [the question of legal validity]… which we answered about other rules with its aid. When we move from saying that a particular enactment is valid, because it satisfies the rule that what the Queen in Parliament enacts is law, to saying that in England this last rule is used by courts, officials, and private persons as the ultimate rule of recognition, we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it. So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it is one worthy of support, we have moved from a statement of legal validity to a statement of value. (1961/1994, pp. 107–108[19]; cf. 1966/1982, pp. 144–145)

Here, Hart in effect eschews the view that questions of legal validity are ultimately answered by appeals to the psychological and behavioral facts that make up a community's acceptances of their

[18] At one point, Hart (1961/1994, p. 109) goes so far as to suggest that to ask about the legal validity of a rule of recognition is like asking whether the standard meter bar kept in Paris is really one meter long.

[19] A more extended discussion of this passage, as well as of some conflicting ones that lend some credibility to the more common reading that others favor, is provided in Toh (2008, § 11).

rule of recognition. Notice how very different Hart's actual position is from the one that Raz outlines partly based on the Kelsenian considerations:

> Two conceptions of normativity of law are current. I will call them justified and social normativity. According to the one view legal standards of behaviour are norms only if and in so far as they are justified. They may be justified by some objective and universally valid reasons. They may be intuitively perceived as binding or they may be accepted as justified by personal commitment. On the other view standards of behaviour can be considered as norms regardless of their merit. They are social norms in so far as they are socially upheld as binding standards and in so far as the society involved exerts pressure on people to whom the apply to conform to them. (1974, p. 134; cf. 1977, pp. 150–151)

Raz goes on to say that Hart developed what is the most successful conception of 'social normativity' (1974, p. 134). But notice that the two options Raz outlines are the ones that Hart explicitly rejects in the above-quoted passage, and that the position that Hart actually endorses there goes missing in Raz's taxonomy. According to Hart, what lawyers and judges appeal to ultimately, to answer questions of legal validity, is a rule of recognition. In making internal legal statements, lawyers and judges express their acceptances of the rules that make up their legal system, and ultimately appeal to their rule of recognition, and not the facts that make up their acceptances of that rule (or any extra-legal norms that may justify that rule).

As for the Humean *is-ought* gap that Hart is supposed to be running afoul of according to some, notice that Hart can be seen as observing it in his conception of internal legal statements. Such statements are, in Hart's view, normative statements and cannot be given straight analyses without significant remainders. This is why, as I explained above, Hart opts only for an oblique analysis of internal legal statements. Such an oblique analysis has the implication of characterizing both speakers and theorists as observing the Humean gap.

In sum, once we adopt the three Hartian prescriptions, the Kelsenian dilemma is no dilemma at all, and the so-called normativity of law problem is exposed as a pseudo-problem. The problem stems from a failure to take seriously the functional role of rules of recognition as the ultimate standards of legal validity, and a disposition to conflate the rules that are accepted and acceptances of those rules. This last distinction is basically the distinction between internal

and external legal statements. Lawyers and judges, in uttering internal legal statements, assert the contents of the rules that they accept and which make up their legal system; whereas theorists describe lawyers and judges' acceptances of the rules in their external legal statements. The problem of legal normativity is another leitmotif of contemporary legal philosophy that we can safely tune out.

VII. GARDNER AND MACKLEM ON PRACTICES AND RULES

At the aforementioned Edinburgh workshop, Gardner cautioned me against grouping him too readily with the other authors I have been criticizing. He pointed out that in a recent review of Shapiro's *Legality*, Gardner and Macklem (2011) took a stance somewhat different from the one taken by Shapiro on the normativity problem. Indeed, while praising Shapiro for 'expertly set[ting] out' 'the genealogical problem' in legal philosophy, Gardner and Macklem take issue with Shapiro's attribution to Hart of the identification of rules with social practices. They explain as follows:

> [According to Hart,] it was a practice of purportedly following a rule which also supplied the content of a rule. This is a point about a particular social practice, not about social practices generally. Hart never says, and indeed goes to some trouble to deny, that 'social practices… necessarily generate social rules', which is the view that Shapiro attributes to him. Nor does Hart identify the practice exactly with the rule. He identifies the content of the practice, or part of it, with the content of the rule. (2011)

Let me make two observations about what Gardner and Macklem say here. These observations are meant to suggest that, despite his protestation, Gardner is a member in good standing in the group that I am criticizing.

First, it is not at all clear what exactly distinguishes Gardner and Macklem's position from Shapiro's. They refrain from actually identifying social practices with rules of recognition, but they identify 'the content of the practice' with 'the content of the rule'. It is not clear what they mean exactly by talking about contents of practices, for practices strictly speaking are not the kind of things that have contents. Psychological attitudes and utterances (or the sentences uttered) that partly make up practices have contents, but not practices themselves. If we overlook this unhappy element of Gardner and Macklem's exposition, then they and Shapiro could be seen as largely agreeing. In effect,

according to the Hart of both readings, what rules of recognition call for – i.e., what obligations, prohibitions, and permissions that they generate – are determined by the psychological and behavioral facts that make up certain social practices. That commitment could be summarized as:

(GM) The content of the rule of recognition is C in virtue of the social facts that constitute the social practices of the kind K.

And this seems an insignificant notational variant of:

(GM′) The fact that the rule of recognition calls for action A obtains in virtue of the social facts that constitute the social practices of the kind K.

At the very least, in order to really delineate their difference, Gardner and Macklem would have to provide further specifics about their conception, or what they see as Hart's conception, of the relation between rules of recognition (or their contents) and social practices.[20]

Second, notice that given the second of the Hartian prescriptions I have discussed, (GM), or any variation on it that Gardner and Macklem see fit to attribute to Hart, is susceptible to two different interpretations. It could be read as an external legal statement, or more specifically an analysis of such a statement, according to which a community members' acceptance of a particular rule as their rule of recognition consists of certain social facts that amount to their having social practices of certain sorts. Alternatively, it could be read as an internal legal statement according to which the legal validity of a rule of recognition obtains in virtue of the existence of certain social facts that amount to the relevant community having social practices of certain sorts. Taken in the former way, there is nothing controversial or notable about what (GM) says.[21] The existence of

[20] In case what Gardner and Macklem really want to deny is that legal rules, or rules of recognition in particular, necessarily generate reasons for action or duties, as Dworkin and some others have unabashedly maintained, and to distinguish the issue of normativity from that of the contents of rules of recognition, it should be observed that legal philosophers like Shapiro and Marmor too have built into their views devices to enable them to refrain from such a commitment. See their conceptions of the obligations imposed by rules of recognition as 'conditional' or 'internal' obligations, or obligations only from 'the legal position of view', in Shapiro (2002, pp. 438–439; 2011, pp. 184–188), Marmor (2009, pp. 168–169). Both positions seem to be modeled on Raz's discussion of taking laws as reason- or duty-generating in a 'detached' way, or from 'the legal point of view', see Raz (1974, 1977), which in turn was prompted by Kelsen's talk of 'presuppositions' of the basic norm. Gardner himself seems to endorse such a move when he talks about 'the conforming behavior' being made 'normative from the legal point of view' (2008, p. 69).

[21] Of course, it would become less anodyne and possibly even controversial once the details about the relevant social practices are filled in.

any kind of rule, in that external sense, consists of certain social, and more particularly psychological and behavioral, facts. Taken in the latter way, however, (GM) is not compatible with what Hart actually says in the long passage (1961/1994, pp. 107–108) I quoted and discussed near the end of the preceding section. In that passage, Hart explicitly rejects the view that the legal validity of any rule of recognition obtains in virtue of certain social facts. Instead, according to him, the functional role of a rule of recognition includes its status as the ultimate standard of legal validity in the relevant jurisdiction.

Now, how do Gardner and Macklem conceive (GM), or a variation on it, which they attribute to Hart? Is it meant to be an external statement or an internal statement? Their review is far from clear on this crucial point. But at one point in his 'Some Types of Law' (2008), Gardner says:

> Especially, but not only where a legal system has no canonical text, it is common to say that ultimate constitutional questions are questions of practice (or *realpolitik*), not questions of law. Hart exposed this as a false contrast. That a question is one of practice does not mean that it is not one of law. For some law is made by what people do…. (pp. 69–70)[22]

An impression that this passage conveys is that Gardner thinks of the conception of the relation between rules of recognition (or their contents) and social practices (or the facts that constitute them) that he and Macklem attribute to Hart – in other words, (GM) or some variation on it – as an internal legal statement. Or at least he does not seem to be minding the difference between the two kinds of statements. The 'questions of law' that he approvingly describes Hart as equating to 'questions of practice' appear to be internal questions of legal validity or legality. My discussion in the preceding section, however, clearly shows that Hart was very far from equating those two sets of questions. In sum, Gardner and Macklem's view that social practices are determinative of (the contents of) rules of recognition appears incompatible with Hart's actual commitment on the nature of the relation between social practices and rules of recognition.

If I am right, then what vitiates Gardner and Macklem's attempt to distance their position from Shapiro and others' is their insufficient

[22] In the preceding section, I quoted a similar statement from Shapiro (2011, p. 102). Brian Leiter goes so far as to say that any dispute that can arise about the content of a rule of recognition would be 'an empirical or 'head count' dispute' (2009, p. 1222).

attention to the distinction of the second Hartian prescription – i.e., the distinction between internal and external legal statements. In this connection, Gardner's 'Law as a Leap of Faith' (2000), which provided the title to his collection (2012), is quite intriguing. In that paper, Gardner appears to appreciate and opt for the kind of theorizing about the nature of law that I have here been attributing to Hart. He there distinguishes the point of view of a participant in a legal system and the point of view of a theorist of law. According to the Kelsenian terminology that Gardner employs, a participant 'presupposes' the 'merits' of the ultimate criteria of legal validity, whereas a theorist attributes or 'hypothesizes' such a presupposition (p. 11). These are dark notions that Gardner does not further explicate. But the trend in thinking that Gardner seems to favor is to distinguish what Hart calls 'internal' and 'external points of view', and to resist collapsing the issues addressed from the two points of view. This is exactly the kind of view that I am attributing to Hart, and that Gardner and Macklem (2011) seem to overlook. And if Gardner were right in his characterization of Kelsen,[23] this would mean that the two most influential legal philosophers of the twentieth century agreed in their two-pronged explanations of the nature of law. In the preface to his collection (2012, pp. vi–vii), Gardner suggests that the thinking in the title paper guided or affected his later discussion of social rules. I regret that I failed to detect this fact in the other papers in the collection, including 'Some Types of Law', which seems to me to pretty much toe the line of the practice theory.

I add that, as I argued at the end of the preceding section, if the two-pronged approach were correctly and scrupulously followed, what results would not so much be a *solution* to any problem about the 'normativity' or 'genealogy' of law, as Gardner (2000, § 2) would have it, but instead a *dissolution* of that problem – i.e., an exposure of it as a pseudo-problem. It should not come as a surprise to anyone, as it apparently does to Shapiro (2011, pp. 97–98), that Hart never explicitly addresses this problem. The fact that Gardner and Macklem endorse Shapiro's articulation of the problem is a notable indication that they too are succumbing to the prevalent legal philosophical leitmotifs, and failing to heed some important Hartian prescriptions.

[23] Given my ignorance, I refrain from judgment on this issue.

VIII. MORAL OBLIGATIONS

Legal philosophers often distinguish social rules from moral rules. While the practice theory of social rules is a recurring leitmotif in contemporary legal philosophy, the practice theory of *moral* rules is not. Not yet, anyway. That may soon change as the result of Green's new discussion of Hart's account of moral obligations, which may prove influential.

At one point in 'The Morality in Law' (2013), Green describes Hart's 'social views' of both legal and moral obligations as follows:

> Now, Hart is well-known as one who takes a social view of law; in fact, he thinks law is *wholly* a social construction. There is no law or legal institution that was not made, whether deliberately or accidentally, as aim or as by-product, by actual human beings living and acting in groups. It is not so well-known that he also takes a social view of morality, or at least the part of morality that has to do with obligations or duties…. According to Hart, to have a moral obligation is to be subject to a social rule, requiring one to ϕ, where: (a) ϕ-ing is generally believed to be important to human life, or to some valued aspect of it; (b) breach of the ϕ-ing norm is met with serious, if diffuse, pressure to conform; and (c) there is a standing possibility that being required to ϕ may conflict with one's own interests, at least as one sees them. This is a social theory of obligation because of the nature of the factual conditions: obligations are marked by a group's beliefs about the importance of certain norms, by its response to breach of those norms, and by the relation between what individuals value and what the group norms requires of them. So the morality of obligation is always a social morality, or 'positive morality' to use John Austin's term. (pp. 184–185)

I hope by now it is quite clear what I will say in reaction to this discussion. Our foregoing worries about characterizing laws or rules as social practices or as 'social constructions', or as constituted by or consisting of social practices, apply to Green's treatment of legal and moral obligations here. It is not too misleading to analyze external obligation statements – that is, external statements asserting existences of rules that impose legal or moral obligations or duties – as descriptions of psychological and behavioral facts of the sort that Green lists as (a)–(c) in the quoted passage. But internal obligation statements cannot be so analyzed into psychological and behavioral analysantia. Internal obligation statements are normative statements by way of which we express our acceptances of rules that impose obligations.

It may be thought that Green is fully on board with the distinction that I am insisting on. As the last sentence of the quote indicates,

what he has summarized is Hart's conception of 'positive morality'. And Green continues the above quote by talking about 'ideal morality' as follows: 'What then is correct, ideal, or valid morality? That can't be purely positive: no ''ought'' from ''is'' alone. I think Hart's answer is essentially Bentham's. Ideal morality is the social morality that we *ought* to practice' (p. 185). One might be tempted to translate what Green says here, using the Austinian terminology of 'positive' and 'ideal moralities', into something that very much resembles what I said in the second half of the preceding paragraph, using the Hartian terminology of 'external' and 'internal obligation statements'. But I doubt that that would be a smooth translation. For given how he conceives the Hartian treatment of obligations, Green does not think that there could be an 'ideal morality' of obligations. After saying that 'ideal morality', as Hart conceives it, is the social morality that we ought to practice, Green says that the last ''ought'' 'cannot be the ''ought'' of obligation, for obligation was the output of the preceding analysis' (p. 185). In other words, Green does not think that Hart provides a logical space for internal obligation statements as I conceived that notion in the preceding paragraph. At best, according to Green's treatment, it appears, internal statements would be expressions of a rule that calls for an adoption of a system of norms that contain rules imposing certain obligations, where the relevant notion of 'calls for' can only be something far weaker and less mandatory than 'obligates'. In the above-quoted passage, Green characterizes Hart as saying that one cannot have a moral obligation in the absence of the facts of the (a)–(c) variety. In other words, according to Green's Hart, an internal statement that someone has a moral obligation could not be correct or properly made unless such facts obtain. Now, clearly, this is a revisionary theory, for a fair amount of our actual (pre-theoretical) moral obligation talk involves assertions of obligations that are not commonly recognized and practiced. Hence Green's suggestion in the long passage quoted above that it would come as a surprise to many that Hart espoused a 'social view of morality, or at least the part of morality that has to do with obligations or duties'.

If we take seriously the three Hartian prescriptions that I have been discussing, then we are well on our way to resisting the temptation to attribute to Hart any such practice theory of moral

obligations. But actually the issues are a little more complicated in ways that I will discuss presently, and we would do well to bring in an additional Hartian prescription, the last of the four in my title, to equip ourselves fully for the task.

IX. ASSERTIONS AND PRESUPPOSITIONS

Kelsen's famous proposal to solve the problem of legal normativity, and to elude both horns of the dilemma that his dialectic sets up, was to conceive the legal validity of the historically earliest of the relevant community's rules of recognition, or the basic norm, as 'presupposed' rather than 'posited'. Much has been written about the inadequacy of this proposal (e.g., Green 1999, p. 36; Marmor 2009, pp. 158–160), though it is not entirely clear what exactly is supposed to be wrong with it. Of course, as I indicated above, I believe that the problem that Kelsen sought to address by proffering this proposal was a pseudo-problem. Nevertheless, it is not clear what exactly is supposed to be wrong with the proposed view as it stands. Hart seems to have contributed to and initiated the skepticism about Kelsen's proposal by asserting that the Kelsenian talk of presuppositions is misleading, and that he himself conceives the 'existence' of rules of recognition as a complex empirical fact (1958, p. 91; 1961/1994, pp. 108–109, 292–293).

It is, however, Hart's own reaction to Kelsen's proposal that is misleading. Although it is true that external statements stating the existence of a rule of recognition describe complex empirical facts – viz., officials' acceptances of the rule of recognition and their behavior motivated such acceptances – internal legal statements do not. As Hart goes on to say (1961/1994, p. 108), in making internal legal statements, lawyers and judges 'presuppose' the rule of recognition that they accept.[24] Whatever the real or full nature of Kelsen's notion of presupposition, it seems to bear sufficient resemblance to the one that Hart himself deploys for his simple

[24] Hart's initial (in my view) misleading reaction seems to have much to do with the 'wrinkle' I discussed in Sect. 4 above. For the reason that I discussed there (having to do with legal validity), Hart seems to have thought that assertions of the existence of rules of recognition can only be external legal statements. But as I argued, Hart seems to have been mistaken in thinking so, and his dismissal of Kelsen's talk of presuppositions is misplaced and also difficult to reconcile with his own deployment of that notion in characterizing internal legal statements.

dismissal of Kelsen's talk of the presupposition of the basic norm to be quite misleading.

Hart's full oblique contextual analysis of internal legal statements seems[25] to be something like: a speaker who utters an internal legal statement expresses his acceptance of some rule that he deems validated by the rule of recognition of his community's legal system, and furthermore *presupposes* (i) the content of that rule of recognition, and also (ii) the efficacy of that rule of recognition. In other words, what Hart proposes as a part of his analysis of internal legal statements is that in making an internal legal statement a speaker presupposes not only the content of the rule of recognition of his community, but also that the relevant rule of recognition is accepted and followed by the officials of his community (pp. 104, 108). The content of this second, factual presupposition – as opposed to the first, normative presupposition – is the same as the content of the external legal statement about the existence of the relevant rule of recognition (p. 104; 1966/1982, p. 145). Here we have a feature of Hart's legal theory that could easily blind us to the distinction between internal and external statements.

My suspicion is that Green's treatment of Hart's conception of moral obligations is partly affected by neglecting the distinction between what is asserted and what is presupposed in internal obligation statements. What we find in Hart's 1958 paper 'Legal and Moral Obligation'[26] is what could be considered a prototype of Hart's conception of internal legal statements that we find in *The Concept of Law* and other later works. In the later version, both the content of what is asserted by an internal legal statement and the content of the first presupposition are normative, whereas the content of the second presupposition is factual, and more specifically descriptive of psychological and behavioral facts. In the 1958 paper, Hart does not rely on the semantic and pragmatic terminology to carve up the different components of internal legal statements as he does in his later works. More importantly, he emphasizes the factual

[25] I say 'seems' because it takes some amount of rational reconstruction to arrive at this analysis. The version I outline in the text is a little different from the one that I outlined in Toh (2005, § 4). I believe that the new version is more accurate of Hart's considered opinion in light of what Hart says in Hart (1961/1994, p. 108; 1966/1982, pp. 144–145).

[26] Green cites this paper in his (2013, p. 183 n. 22), but only to substantiate an unrelated point. But he confirmed in personal communication that the 1958 paper is one of his main sources for the conception of moral obligations that he is attributing to Hart.

component in a way that overshadows the normative components. At a crucial point, he says:

> [I]n any social group where obligations are created by legislation, and the expressions 'I have a legal obligation to do this' and 'He has a legal obligation to do that' have their present force, there must be a social practice at least as complex as I have described and not merely habitual obedience on the part of the members of the group. (p. 90)

What immediately follows is a very tentative and somewhat cryptic mention of a normative component of internal legal statements:

> Anyone who uses such forms of expression as 'I (you) have an obligation to' implies that his own attitude to the legislator's words is that described, for these statements of obligation are used to draw conclusions from legal rules on the footing that the rules are authoritative for the speaker.

This is what he later came to describe as the speaker's expression of his acceptance of a rule of recognition or of some subordinate legal rules.[27] Hart goes on in the later parts of the same paper (1958, § 3) to argue that there is a 'sector' of morality, the one having to do with moral obligations, that is marked by several features that also characterize the law. One of the features he names is 'dependence on the actual practice of a social group' (p. 100). Prefacing his discussion of obligations arising from promises, obligations generated by offices or roles, and the obligation to obey the law as examples of moral obligations, Hart further says: 'The area of morality I am attempting to delineate is that of principles which would lose their moral force unless they were widely accepted in a particular social group' (p. 101). These are remarks that can easily lead us to conclude, as Green for one does, that Hart has a 'social view of morality, or at least the part of morality that has to do with obligations or duties' (2013, p. 184).

It is important, however, to keep firmly in mind that the facts that amount to the efficacy of the relevant rules – (a)–(c) in Green's discussion – are only presupposed and not asserted by internal obligation statements according to Hart's analysis. The importance of the distinction is highlighted in the following passage from a 1959 paper in which Hart compares legal rules of recognition with rules of recognition of games:

[27] Once again, as I said in footnote 11 above, Hart's use of the word 'imply' rather than 'express' or some similar term is a little unfortunate.

> When the scorer records a run or goal he is using an accepted, unstated rule in the recognition of critical phases of the game which count towards winning. He is not predicting his own or others' behaviour or feelings, nor making any other form of factual statement about the operation of the system. The temptation to misrepresent such internal statements in which use is made of an unstated, accepted rule or criterion of recognition as an external statement of fact predicting the regular operation of the system is due to the fact that the general acceptance of the rules and efficacy of the system is indeed the *normal context* in which such internal normative statements are made. It will *usually* be pointless to assess the validity of a rule… by reference to rules of recognition… which are not accepted by others in fact, or are not likely to be observed in future. We do, however, sometimes do this, in a semi-fictional mood, as a vivid way of teaching the law of a dead legal system like classical Roman law. But this normal *context* of efficacy presupposed in the making of internal statements must be distinguished from their normative meaning or content. (1959, pp. 167–168)

There are several important things to notice in this passage, but let me limit myself to highlighting just two. First, Hart here warns explicitly against conflating internal and external statements, and in particular says that we should not be misled by the fact that the efficacy of a rule of recognition is presupposed by a speaker making an internal statement. Second, Hart points out that what the factual presupposition represents is the 'normal' or 'usual' context of internal statements. The implication is that there are *abnormal* or *unusual* situations in which internal statements could be made, and made properly and without infelicity, in the absence of the facts presupposed in the normal uses of internal statements. Hart points out one such abnormal context – when teaching Roman law. But there are bound to be many others.

This second aspect just noted accords with the more recent linguistic thinking about presuppositions, according to which presuppositions are defeasible and could be cancelled by a variety of factors (see, e.g., Levinson 1983, § 4.3.1). For example, a speaker who says (1) is likely presupposing (2):

(1) Bob knows that the President was born in Kenya.
(2) The President was born in Kenya.

The word 'know' is one of what linguists call 'presupposition-triggers'. But the normally-triggered presupposition can be cancelled by a variety of means. The speaker could follow up his utterance of (1) with an utterance of (3):

(3) But that is hogwash!

Here, (3) cancels any presupposition of (2) triggered by the use of 'know' in (1). The cancelling could be done by other means – e.g., by a particular intonation in saying 'knows', by a well-timed eye-rolling, or just by other presuppositions that constitute the common ground between the speaker and his audience. Similarly, 'obligation' may be a presupposition-trigger, so that when a speaker says that someone has an obligation to ϕ, he also conveys his presupposition that people in his community commonly accept and follow a rule or rules that require people in positions relevantly similar to that someone's to ϕ – in other words, something like Green's conditions (a)–(c). But like the presupposition of (2) that is triggered by (1), such a presupposition of the existence of social practices would be defeasible and could be cancelled in some situations. That meshes well with the upshot of what Hart says in the passage from his 1959 paper quoted above.[28]

The fourth and last of the four Hartian prescriptions of my title then is to distinguish assertions from presuppositions. With this distinction, and a proper understanding of presuppositions, we are not disposed or tempted to think that internal obligation statements are apt or felicitous only in contexts in which people accept and follow the rules that impose the relevant obligation on someone. At least sometimes, even in the absence of such social practices, internal statements of legal or moral obligations may be made properly and with good effect. It is not entirely clear to me exactly how much of what I have so far argued conflicts with Green's thinking. But it is quite clear, I believe, that Hart did not really have a 'social theory of obligation', as Green calls it. It is not the case that legal or moral obligations consist of social practices, according to Hart. Nor is it the case that internal obligation statements, as Hart conceives them, can be made properly only in contexts in which such social practices obtain. What we can say is that external obligation statements are

[28] Some may wonder whether it is appropriate to link Hart's conception of presuppositions to the more recent linguistic thinking about presuppositions. I believe that it is. Both Hart and the recent linguists theorizing about presuppositions were prompted in their thinking partly by P.F. Strawson's pioneering work on presuppositions. See Strawson (1950; 1952, Chap. 6), cf. Waismann (1965, pp. 144–145). Hart's discussion is actually not fine-grained enough for us to attribute to him the particular conception of presuppositions that Strawson himself used – namely, the semantic conception of presuppositions. In any case, Robert Stalnaker's pragmatic conception of presupposition is meant to be a broad notion that incorporates the semantic explanations of the sort that Strawson offers. See Stalnaker (1973, 1974). I think it is best to see Hart's notion of presupposition as something like Stalnaker's.

true or correct when certain social practices exist. But that does not make those obligations, or the rules that impose them, very special. External statements asserting existences of any kinds of rules are true or correct when certain social practices exist.

With the distinction between assertions and presuppositions, we also see that much of Dworkin's (1972, § 1) massively influential early criticism of Hart's treatment of obligations is off target. Dworkin's discussion ignores this distinction at crucial junctures. In particular, Dworkin's (p. 52) celebrated counter-example of a vegetarian's claim that we have no right to kill and eat animals, or that we have obligations or duties not to do so, while recognizing full well that there is no social practice of adhering to a rule to that effect,[29] is not a genuine counter-example to Hart's position. Dworkin is conflating internal and external deontic statements, or conflating what is asserted with what is merely presupposed by internal deontic statements. Even if internal obligation or right statements usually or normally trigger presuppositions, such presuppositions may be cancelled in certain situations without thereby undermining the aptness or felicity of such statements. And vegetarians' claims may occur in one or more of such unusual or abnormal contexts. All of this we come to see merely by following scrupulously a few modest-seeming prescriptions in Hart's legal philosophy.

X. CONCLUSION

The four Hartian prescriptions that I have discussed can be summarized as follows:

1. Instead of defining or analyzing terms in isolation, always define or analyze full sentences in which the relevant terms are characteristically used. (The context principle).
2. Distinguish between two kinds of sentences (or statements) – internal and external – in which 'rule', 'law', 'obligation', and other such normative terms are characteristically used.
3. Distinguish between straight and oblique analyses of the internal sentences (or statements) containing 'rule', 'law', 'obligation', etc., by uses

[29] See Raz (1975/1990, pp. 53–54) for an example of the common reliance on this alleged counter-example.

of which sentences (or statements) speakers typically express their normative commitments.

4. Distinguish between what is asserted and what is presupposed by speakers who utter internal sentences (or make internal statements).

These prescriptions may appear meager and inconsequential on first glance, but together they have substantial implications. Hart began the first chapter of *The Concept of Law* by discussing a number of views about what law is. Despairing of gaining disciplined instruction from his predecessors' various claims about what law is, Hart sought to reconfigure the debate about the nature of law and legal philosophy as a whole. In many ways, his efforts resemble Quine's (1948) campaign, begun slightly earlier, to put ontology on a path to a genuine research program and away from undisciplined 'swapping of hunches about what exists'.[30] Hart sought to recast the debate about the nature of law by scrutinizing how 'law' and its cognates, and more fundamentally 'rule' and related terms, are actually and characteristically used. At one point in a later chapter of *The Concept of Law*, after canvassing various actual and possible attempts by command theorists of law to portray power-conferring rules as duty-imposing rules, Hart says with a touch of exasperation:

> Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be? (p. 41)

This is basically the attitude or strategy that he sought to bring to the study of the nature of law and the nature of rules in general, and the four prescriptions are basically building blocks or implementing devices of that strategy. Hart conjectured that much illumination could be gained from his recasting of the debate, and by sober and unfiltered examinations of the phenomena that are called for by such a recasting. To a great extent his works testify to the soundness of that conjecture.

Of course, philosophical movements wax and wane, and legal philosophers are once again talking in terms of what law is, or at least of what law consists of, is constituted by, is founded on, etc. So arguments have recently been made to characterize law as (or consisting of) a type of morality, social construction, social practices,

[30] Both the characterization of Quine (1948) and the quote are taken from Yablo (1998, p. 117).

conventions of various kinds, plans, etc. Recent legal philosophers have additionally 'recruited' Hart for their mode of thinking about the nature of law, which in fact seems to revert to the approaches that Hart himself explicitly rejected, and which seems to abandon fairly thoroughly the four prescriptions that played critical roles in shaping Hart's own legal theory. What results seems to be a very premature closing-off of the possibilities that Hart's work opened up. Hart's analyses of internal and external legal statements are hardly the last words on the nature those statements, and they are susceptible to significant improvements.[31] And, to echo Hart (1961/1994, p. vi), who in turn was echoing J.L. Austin, with improved analyses would come sharpened perceptions of both the relevant data and the available theoretical options. As I have suggested above, certain metaphysical options overlooked by contemporary legal philosophers would become visible. No longer will legal philosophers have to swing back and forth between the option of conceiving legal phenomena as consisting solely of psychological cum sociological facts on the one hand, and the option of conceiving legal phenomena as a part of morality, which in turn is given an implicit nonnaturalist metaphysics, on the other. With more metaphysical options we could also anticipate more options in epistemology, psychology, and even first-order legal thinking. And integrated sets of positions on such issues regarding the law would amount to philosophical theories about the nature of law that have so far largely eluded us. All of these riches could be within our prospects again by recovering some of the old and neglected approaches that Hart once so eagerly pressed on his contemporaries. What stands in our way are only some facile and unlovely leitmotifs, mere jingles really, that impair our perceptions and misdirect our theoretical efforts.

REFERENCES

Alston, William, 'Ontological Commitments', *Philosophical Studies* 9 (1958).
Bach, Kent, *Thought and Reference*, ppb ed. (Oxford: Clarendon Press, 1987/1994).
Donnellan, Keith, 'Reference and Definite Descriptions', *Philosophical Review* 75 (1966).
Dworkin, Ronald, 'The Model of Rules II', reprinted in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).
Frege, Gottlob, *The Foundation of Arithmetic* (J. L. Austin, tr.) (Oxford: Basil Blackwell Publisher, 1884/1953).

[31] I proposed some modest steps to improve upon Hart's conception of internal legal statements in Toh (2011).

Gardner, John, 'Law as a Leap of Faith' (2000), reprinted in John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012).
Gardner, John, 'Some Types of Law' (2008), reprinted in John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012).
Gardner, John, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012).
Gardner, John and Timothy Macklem, Review of Shapiro (2011) in Gary Gutting (ed.), *Notre Dame Philosophical Reviews* (2011), http://ndpr.nd.edu/news/27609-legality/.
Gibbard, Allan, *Thinking How to Live* (Cambridge: Harvard University Press, 2003).
Gilbert, Margaret, 'Social Rules: Some Problems for Hart's Account, and an Alternative Proposal', *Law and Philosophy* 18 (1999).
Green, Leslie, '*The Concept of Law* Revisited', *Michigan Law Review* 94 (1996).
Green, Leslie, 'Positivism and Conventionalism', *Canadian Journal of Law and Jurisprudence* 12 (1999).
Green, Leslie, 'Introduction' to H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Clarendon Press, 2012).
Green, Leslie, 'The Morality in Law', in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds.), *Reading H. L. A. Hart's 'The Concept of Law'* (Oxford: Hart Publishing, 2013).
Greenberg, Mark, 'How Facts Make Law', *Legal Theory* 10 (2004).
Greenberg, Mark, 'On Practices and the Law', *Legal Theory* 12 (2006a).
Greenberg, Mark, 'Hartian Positivism and Normative Facts: How Facts Make Law II', in Scott Hershovitz (ed.), *Explaining Law's Empire* (Oxford: Oxford University Press, 2006b).
Hart, H. L. A., 'Definition and Theory in Jurisprudence' (1953), reprinted in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).
Hart, H. L. A., 'Legal and Moral Obligation', in A. I. Melden (ed.), *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958).
Hart, H. L. A., 'Scandinavian Realism' (1959), reprinted in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).
Hart, H. L. A., *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1961/1994).
Hart, H. L. A., 'Kelsen Visited' (1963), reprinted in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).
Hart, H. L. A., 'Legal Duty and Obligation' (1966/1982), revised and reprinted in H. L. A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982).
Hart, H. L. A., 'Commands and Authoritative Legal Reasons', in H. L. A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982).
Kripke, Saul, *Naming and Necessity* (Cambridge: Harvard University Press, 1972/1980).
Leiter, Brian, 'Explaining Theoretical Disagreements', *University of Chicago Law Review* 76 (2009).
Levinson, Stephen, *Pragmatics* (Cambridge: Cambridge University Press, 1983).
Marmor, Andrei, 'Legal Conventionalism', *Legal Theory* 4 (1998).
Marmor, Andrei, *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009).
Ogden, C. K., *Bentham's Theory of Fictions* (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1932).
Place, U. T., 'Is Consciousness a Brain Process?', *British Journal of Psychology* 47 (1956).
Postema, Gerald, 'Coordination and Convention at the Foundations of Law', *Journal of Legal Studies* 11 (1982).
Quine, W. V., 'On What There is' (1948), reprinted in W. V. Quine, *From a Logical Point of View*, 2nd ed. (Cambridge: Harvard University Press, 1961).
Quine, W. V., 'Epistemology Naturalized', in W. V. Quine, *Ontological Relativity and Other Essays* (New York: Columbia University Press, 1969).
Quine, W. V., 'Five Milestones of Empiricism', in W. V. Quine, *Theories and Things* (Cambridge: Harvard University Press, 1981).
Raz, Joseph, 'Kelsen's Theory of the Basic Norm' (1974), reprinted in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979).
Raz, Joseph, *Practical Reason and Norms*, 2nd ed. (Princeton: Princeton University Press, 1975/1990).
Raz, Joseph, 'Legal Validity' (1977), reprinted in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979).
Russell, Bertrand, 'On Denoting' (1905), reprinted in Bertraind Russell, *Logic and Knowledge* (London: Unwin Hyman Limited, 1956).
Shapiro, Scott, 'Law, Plans, and Practical Reason', *Legal Theory* 8 (2002).
Shapiro, Scott, *Legality* (Cambridge: Harvard University Press, 2011).
Smart, J. J. C., 'Sensations and the Brain Processes', *Philosophical Review* 68 (1959).
Stalnaker, Robert, 'Presuppositions', *Journal of Philosophical Logic* 2 (1973).

Stalnaker, Robert, 'Pragmatic Presuppositions' (1974), reprinted in Robert Stalnaker, *Context and Content* (Oxford: Oxford University Press, 1999).
Strawson, P. F., 'On Referring' (1950), reprinted in P. F. Strawson, *Logico-Linguistic Papers* (London: Methuen & Co., Ltd., 1971).
Strawson, P. F., *Introduction to Logical Theory* (London: Methuen & Co., Ltd., 1952).
Toh, Kevin, 'Hart's Expressivism and His Benthamite Project', *Legal Theory* 11 (2005).
Toh, Kevin, 'An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)', *Law and Philosophy* 27 (2008).
Toh, Kevin, 'The Predication Thesis and a New Problem about Persistent Fundamental Legal Controversies', *Utilitas* 22 (2010a).
Toh, Kevin, Review of Marmor (2009), *Ethics* 120 (2010b).
Toh, Kevin, 'Legal Judgments as Plural Acceptances of Norms', in Leslie Green and Brian Leiter (eds.), *Oxford Studies in Philosophy of Law* 1 (Oxford: Oxford University Press, 2011).
Toh, Kevin, Review of Gardner (2012), in Gary Gutting (ed.), *Notre Dame Philosophical Reviews* (2013), http://ndpr.nd.edu/news/39497-law-as-a-leap-of-faith/.
Toh, Kevin, 'Plain-Attitudes, Plan-Contents, and Bootstrapping: Some Thoughts on the Planning Theory of Law' (unpublished manuscript).
Waismann, Friedrich, 'How I See Philosophy' (1956), reprinted in Friedrich Waismann, *How I See Philosophy* (Rom Harré, ed.) (London: Macmillan, 1968).
Waismann, Friedrich, *The Principles of Linguistic Philosophy* (Rom Harré, ed.) (London: Macmillan, 1965).
Waismann, Friedrich, 'On the Notion of Existence in Mathematics', in Friedrich Waismann, *Lectures on the Philosophy of Mathematics* (Wolfgan Grassl, ed.) (Amsterdam: Rodopi B.V., 1982).
Waluchow, W. J., 'Lessons from Hart', *Problema* 5 (2011).
Whitehead, Kevin, *New Dutch Swing* (New York: Billboard Books, 1998).
Whitehead, A. N., and Bertrand Russell, *Principia Mathematica*, 2nd ed. (Cambridge: Cambridge University Press, 1910/1927).
Wittgenstein, Ludwig, *Tractatus Logico-Philosophicus* (D. F. Pears and B. F. McGuinness, trs.) (London: Routledge & Kegan Paul, 1921/1961).
Yablo, Stephen, 'Does Ontology Rest on a Mistake?' (1998), reprinted in Stephen Yablo, *Things* (Oxford: Oxford University Press, 2010).

San Francisco State University,
San Francisco, CA, USA
E-mail: ktoh@sfsu.edu