

**HOW AN UNDERSTANDING OF THE SECOND PERSONAL STANDPOINT
CAN CHANGE OUR UNDERSTANDING
OF THE LAW:**

OR

**HART'S UNPUBLISHED RESPONSE
TO EXCLUSIVE LEGAL POSITIVISM**

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One of the most exciting, and, to my mind, potentially fecund modern developments in moral philosophy is due to a recent line of thought developed by the

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philosopher Stephen Darwall.¹ In a series of recent articles,² soon to culminate in a full length book by Harvard University Press,³ Professor Darwall has begun pressing a seemingly innocuous and simple claim, one which may nevertheless have far-reaching implications for normative theory. It is this: while moral and political philosophers have, for some time now, been clear about the distinction between the third personal perspective (of observation, cause and effect) and the first personal perspective (of deliberation), and have sometimes plumbed this distinction to great effect in their moral thought,⁴ they have typically been unaware—or at least insufficiently aware—of the distinctive and critical role that the second personal perspective plays in our practical lives. The second personal perspective is the perspective from which we address one another with claims and grievances, or respond to such claims with apology, excuse or justification.⁵ It is the perspective I take up when I confront you in anger for a perceived wrong, or that you take up in response to me when you say I have no right to treat you that way, and, in Darwall's view, it is a perspective irreducible to the other two.

In his recent work, Darwall has already developed a number of important implications of this distinction, which include, among other things, an enriched account of what awareness of our practical freedom amounts to⁶ and a distinctive foundation for

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² See, e.g., Stephen Darwall, *Respect and the Second Personal Standpoint*, 78 *PROC. OF THE AM. PHIL. ASSOC.* (2004); Stephen Darwall, *Moore, Normativity, and Intrinsic Value*, 113 *ETHICS* 468 (2003); Stephen Darwall, *Autonomy in Modern Natural Law*, in *NEW ESSAYS ON THE H. OF AUTONOMY* (Larry Krasnoff & Natalie Brender eds., 2003); Stephen Darwall, *Because I Want It*, 18 *SOC. PHIL. & POL'Y* 129 (2001); Stephen Darwall, *Fichte and the Second-Person Standpoint*, *INT'L YEARBOOK FOR GERMAN IDEALISM* (forthcoming).

³ STEPHEN DARWALL, *THE SECOND PERSON STANDPOINT: MORALITY AND ACCOUNTABILITY* (Harvard, forthcoming 2006).

⁴ See generally Stephen Darwall et al., *Toward a Fin de Siècle Ethics* 3, 9-12, in *MORAL DISCOURSE AND PRACTICE* (Darwall et al. eds., 1997) (discussing so-called "practical reasoning theories," which try to ground the objectivity of ethics or reasons for action by stressing discontinuities between practical reasoning and the sciences, and noting that the former is concerned only with reasons for action as they appear to agents deciding what to do). As discussed more fully in Section II(B), *infra*, modern decision theoretic and economic models of rational action also presume this distinction.

⁵ See, e.g., Stephen Darwall, *Psychology of the Second-Person Standpoint* 2, in DARWALL, *supra* note 3.

⁶ See, e.g., Stephen Darwall, *Fichte and the Second Personal Standpoint* 9, in DARWALL, *supra* note 3 ("[A]wareness of agency is only possible through a second-personal address that presupposes that rational persons have normative standing as such and that limiting their external freedom can be justified by second-personal reasons that presuppose this standing (and by reasons they can freely decide to limit themselves.").

moral obligation, which is much more robust than in most contemporary deontological thinking.⁷ He has also spent time carefully tracing out important precursors to his thoughts in the history of ethics⁸ and ensuring that his views make moral obligation out to be something we might actually be capable of attending and responding to, given a naturalistically sound moral psychology that is attentive to recent empirical developments.⁹ The force and validity of Darwall's views on moral obligation are sure to become lively sources of debate within moral philosophy proper. This Article argues that there is a further implication of Darwall's work, one that is not yet understood and should be of primary importance to our understanding of the law. To put the thesis in deliberately provocative terms, an understanding of the second personal standpoint will allow us to decipher Hart's undeveloped but at least inchoately understood response to the exclusive legal positivists, thereby clarifying important aspects of the genuine relationship between law and morality.

As is by now familiar, the exclusive legal positivists have developed an important series of arguments according to which it is inconsistent with the nature of legal authority, and law's presumed practical guidance function, for the law to be identified on the basis of substantive moral criteria.¹⁰ An answer to these arguments is thus needed to maintain not only that legal officials can in principle identify the law by means of a social convention (or what Hart sometimes called a "rule of recognition") that incorporates moral criteria—as Hart and other so-called "inclusive" legal positivists like Jules Coleman assert.¹¹ An answer is also needed to maintain that legal officials seeking

⁷ See Stephen Darwall, *Second-Personal Reasons and the Dignity of Persons* 12-16, in DARWALL, *supra* note 3 (arguing that essential features of obligation can only be vindicated from second personal standpoint) (observing problems that prior deontological theories have had in grounding obligation in first personal standpoint).

⁸ See, e.g., Darwall, *supra* note 6 (discussing Fichte's notion of reciprocal recognition as a form of second-personal mutual awareness); DARWALL, *supra* note 3, Ch. 6 (discussing Adam Smith's conception of the role of empathy in human thought and practice as implicitly second personal); THE SECOND PERSON DARWALL, *supra* note 3, Ch. 7 Interlude: Reid versus Hume on Justice" (discussing Reid's criticism of Hume in terms of the second personal standpoint) (noting that Margaret Gilbert's conception of the plural subject may arise only once there is reciprocal second personal recognition) (referencing Tim Scanlon's account of promising as implicitly second personal).

⁹ Darwall has squared his views with a number of contemporary empirical insights, including modern accounts of empathy; role-taking; Stanley Milgram's famous experiments on obedience; Allan Gibbard's evolutionary accounts of norm acceptance; empirical game theoretic findings concerning so-called "altruistic punishment" by Fehr, Schmidt and Gächter; and criminal justice studies by John Thibaut and Laurens Walker. See generally Stephen Darwall, *Psychology of the Second Personal Standpoint* (on file with author) (paper delivered at University of Texas Moral; Psychology Conference).

¹⁰ The most important and influential versions of this argument are due to Joseph Raz and Scott Shapiro. See, e.g., Joseph Raz, *Authority, Law, and Morality*, in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 198-221 (1994); Scott Shapiro, *On Hart's Way Out*, in HART'S POSTSCRIPT 149, 158, 177 (Jules Coleman ed., 2001) ("[A]ny principle that satisfies a social rule of recognition simply by virtue of its moral content cannot guide conduct as a legal norm.").

¹¹ This position is variously termed "incorporationism," "soft positivism," or "inclusive legal positivism" ("ILP"). See W.J. Waluchow, *Authority and the Practical Difference Thesis*, 6 *LEGAL THEORY* 45, 45,

to identify the law must always interpret source based law in its best moral light—as Ronald Dworkin, and other so called “interpretivist” legal theorists contend.¹² Beginning with *The Model of Rules I*,¹³ Dworkin has brought to our attention a rich set of phenomena suggesting that judges sometimes—or perhaps even always—rely on substantive moral insight to identify what the law is,¹⁴ and at issue is nothing less than whether this reliance can ever be part of the law, or grounded in law. Hence, while this Article claims to trace out commitments that are implicit in Hart’s views, or that at least represent the best ways to harmonize Hart’s core philosophical commitments in light of recent advances in moral philosophy, the arguments in this Article should be welcome to more than just inclusive legal positivists. They should be equally welcome to people, like Dworkin, who may see reason to abandon positivism altogether but may still like to absorb some of Raz’s useful insights about legal authority.

I have already acknowledged that the thesis of this Article is stated in a deliberately provocative manner. What exactly do I mean by this? Notice that analytic jurisprudence is currently in a curious position. There is now pretty much universal agreement in the field that Hart was the single most important philosopher of law of the 20th century,¹⁵ as assessed not only by the direct impact he has had on others who have adopted various strains of his thought, or by the transformative and permanent effect he had on the state of the debate in jurisprudence, but also by the fact that the two most prominent alternatives to his inclusive legal positivist views were developed in direct response to core insights that he had. These alternatives have already been mentioned.

notes 2-4 and accompanying text (2000) (defining ILP, broadly, as the assertion that “morality can indeed play a key role in determining the existence and content of valid laws”); *see also* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT 99, 100 (Jules Coleman ed., 2001) (“Very roughly, Incorporationism allows that morality can be a condition of legality: that the legality of norms can sometimes depend on their substantive (moral) merits, not just their pedigree or social source.”). For definitive surveys of inclusive legal positivism or contemporary statements of the view, *see* Jules Coleman, *THE PRACTICE OF PRINCIPLE* (2001); W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994).

¹² For a compact introduction to this aspect of Dworkin’s views, *see* RONALD DWORKIN, *LAW’S EMPIRE* 87-113, 176-275 (1986). As Hart has observed, Dworkin conceives the central task of legal theory as “consist[ing] in the identification of the principles which both best ‘fit’ or cohere with the settled law and legal practice of a legal system and also provide the best justification for them, thus showing the law ‘in its best light.’” H.L.A. HART, *THE CONCEPT OF LAW* 241 (Oxford 1994) (1961).

¹³ *The Model of Rules I*, reprinted in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14 (1977).

¹⁴ Dworkin presents this work in a series of articles, the most important of which are *The Model of Rules I*, *The Model of Rules II*, *Hard Cases*, and *Taking Rights Seriously*, all of which have been reprinted in DWORKIN, *supra* note 13.

¹⁵ As Leslie Green has noted, there is now “a realm of consensus about the way *The Concept of Law* changed the direction of Anglo-American legal theory. For one thing, it introduced and clarified a set of questions that came to dominate the literature Hart also coined the idiom in which we debate the answers to such questions, [introducing] terms and distinctions [that] are now part of cultural literacy for legal theorists writing in English.” *The Concept of Law Revisited*, 94 MICH. L. REV. 1687 (1996).

They are Dworkin's interpretivist theory of law,¹⁶ and Raz's exclusive legal positivist theory,¹⁷ which Scott Shapiro has more recently elaborated in important and influential (though somewhat distinctive) ways.¹⁸ Hart, however, remained largely silent in publication about his take on these major alternatives as they were developed and the motivations behind them shored up.¹⁹ We know that Hart thought he had responses of some kind, though, however inchoate or undeveloped. This is apparent from his lengthy set of draft replies to critics, one half of which made their way into Hart's posthumously published *Postscript to The Concept of Law*.²⁰ But whereas Hart's *Postscript* laid out in detail a point by point response to most of Dworkin's main lines of criticism, Hart's responses to the exclusive legal positivists never made it to print, in large part because they were deemed insufficiently developed for publication.²¹ Perhaps adding to the mystery, some of Hart's later articles suggest that he was ready to absorb many of Raz's insights on legal authority without thinking that they created any internal inconsistencies in his inclusive legal positivist views.²² This has led many to wonder: What might Hart have been thinking? Did he have a substantive response to the exclusive legal positivists, however inchoate or undeveloped? If so, is it a line of response to which Dworkineans or others might equally avail themselves? What *was* Hart's response to exclusive legal positivism anyway?

The received view has it that Hart may not have fully understood the depth of the inconsistencies between inclusive legal positivism and some of his other core

¹⁶ Dworkin developed his interpretivist theory partly in response to Hart's claim that officials identify the law by means of a social convention, arguing that conventional phenomena do not do justice to the many ways that substantive moral insight enters into our interpretations of the law. See, e.g., Ronald Dworkin, *The Model of Rules II*, in DWORKIN, *supra* note 13, at 46, 48-58.

¹⁷ Raz developed his idea of exclusionary reasons in part to identify features he perceived were missing from Hart's social practice theory of rules. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 58 (1999).

¹⁸ See Shapiro, *supra* note 10 at 149.

¹⁹ As Hart himself noted in his posthumously published *Postscript to The Concept of Law*, "Though I have fired a few shots across the bows of some of my critics . . . I have hitherto made no general comprehensive reply to any of them; I have preferred to watch and learn from a most instructive running debate in which some of the critics differed from others as much as they have differed from me." *Id.* at 238.

²⁰ H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

²¹ The editor's note to Hart's *Postscript* says the following: "We found only hand-written notes intended for the second section, and they were too fragmentary and inchoate to be publishable." HART, *supra* note 20, at iix. Hart did, however, respond to another dimension of Raz's work, namely, to the view that for a judge to sincerely believe that someone has a legal obligation the judge must believe or pretend to believe that the person is under a moral obligation. See H.L.A. Hart, *Legal Duty and Obligation*, in HART, ESSAYS ON BENTHAM 127, 154-161 (1982).

²² For example, while maintaining a commitment to inclusive legal positivism, Hart modified his views about the way rules guide conduct, later in his career, by clarifying that legal reasons are what he called "peremptory" reasons. H.L.A. Hart, *Commands and Authoritative Legal Reasons* 253, in HART, ESSAYS ON BENTHAM (1982). Hart attributes his understanding of this phenomenon to Hobbes, but writes, "I do not think I should have seen the full importance of Hobbes's remarks on these topics had I not had the benefit of the work of Joseph Raz on what he terms 'exclusionary reasons' which resembles in many respects the notion I have taken from Hobbes." *Id.* at 244.

philosophical commitments.²³ The most important of these is the so-called “practical difference thesis,”²⁴ especially as elaborated in combination with Raz’s powerful insights about the nature of legal authority and the precise kind of practical difference that law must be capable of making in our lives.²⁵ Hence, even Jules Coleman—the most prominent living inclusive legal positivist—has conceded that “[w]e do Hart no service by uncritically accepting his embrace of Incorporationism.”²⁶ Coleman too thinks that there is an inconsistency lingering in the air. He has even gone so far as to speculate on what Hart would have done if had recognized it, and to draw out what he—Coleman—thinks are the relevant implications for a satisfying development of inclusive legal positivism. Coleman has said: “Whereas I believe Hart is more likely to have abandoned Incorporationism, thus bringing his position considerably closer to Raz’s in crucial respects, I propose that we abandon or at least significantly modify the place of the Practical Difference Thesis within positivism.”²⁷

I believe, on the other hand, that Hart sensed there was no genuine inconsistency, and for roughly the right reasons. What Hart lacked—and what we have all lacked until now—is a clear account of what Darwall calls the second personal standpoint in order to develop and articulate this sense. Section I of this Article thus discusses the relevant aspects of the needed account—which, importantly, include only structural features of the second personal standpoint and its importance in producing a satisfying meta-ethics of obligation. By this, I mean an account of what it is to *say* that one has an obligation, regardless of what obligations we may (or may not) *have*.²⁸ This

²³ See e.g., Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT 99, 101 (Jules Coleman ed., 2001) (“Like many legal positivists who have embraced Incorporationism as a way of absorbing Dworkin’s insights and thereby meeting his objections, Hart did not fully appreciate the implications for his overall position of doing so.”).

²⁴ Coleman defines the practical difference thesis as “the claim that, in order to be law, authoritative pronouncements must in principle be capable of making a practical difference: a difference, that is, in the structure or content of deliberation or action.” See Coleman, *supra* note 24, at 101. Coleman also observes that “there is overwhelming textual and philosophical support for the view that . . . Hart accepts what I call the . . . Practical Difference Thes[is].” *Id.*

²⁵ For classic exposition of these views, see JOSEPH RAZ, PRACTICAL REASONS AND NORMS (1999); JOSEPH RAZ, THE AUTHORITY OF LAW 28-52 (1979); JOSEPH RAZ, THE MORALITY OF FREEDOM chs. 2-3 (1986).

²⁶ Coleman, *supra* note 24, at 99, 101

²⁷ *Id.* Coleman has in some ways retreated from this position. In *The Practice of Principle*, he accepts that the law must be capable of guiding action, but he argues that this need only be true of the law and not of each law. See JULES COLEMAN, THE PRACTICE OF PRINCIPLE 144 (2001). This move allows him to maintain commitment to inclusive legal positivism, though it does in some ways still narrow the practical difference thesis. Scott Shapiro has recently argued that this move cannot be used to produce a satisfying account of the way the law guides conduct. See Scott Shapiro, *Law, Morality and the Guidance of Conduct*, 6 LEGAL THEORY 127, 168-169 (2000). Importantly, the arguments in this Article will allow for a harmonization of inclusive legal positivism with a version of the practical difference thesis that need not be narrowed in this particular way.

distinction will be important in what follows, because it means that none of the arguments in this Article depend on accepting any of Darwall's more substantive normative positions or arguments.²⁹

Section II then discusses Raz's insights about legal authority. It argues that, with an understanding of the second personal standpoint in hand, Raz's insights can be absorbed without requiring acceptance of any of Raz's more far-reaching conclusions. In particular, there is no need to accept his exclusive legal positivist claim that the law must be comprised only of source based law, which is identifiable wholly without recourse to moral evaluation.³⁰ Section III pauses to discuss Hart's views and core jurisprudential commitments. It suggests that while there were some genuine tensions in Hart's views, Hart implicitly understood the importance of something like the second personal standpoint in accounting for obligation throughout his career, and became even clearer by the end. Although he lacked the vocabulary to articulate the consistency between his particular brand of inclusive legal positivism and some of Raz's insights about legal authority, he would have thus welcomed the arguments in this Article as appropriate developments of his view. He would (or at least should) have thought of the views developed here as representing the best available framework for further refinements of positivist thought and debates between positivists and their critics over how to account for law.

Section IV, finally, ends with a discussion of Shapiro's more recent and influential lines of argument in favor of exclusive legal positivism, and with a response.

I. DARWALL AND THE SECOND PERSONAL STANDPOINT

What exactly is the second personal standpoint, and why might it be important? We know that natural languages regularly contain distinct terms or markers for at least three persons.³¹ In English, the first person singular is the familiar "I", the second person "You," and the third person "He," "She" or "It." But does the fact that these three persons recur so consistently in natural language, as basic grammatical categories, mark anything deep about our human modes of thought, or about the classes of questions and problems we are fated to face in human life? Or are these merely adventitious features of language? How, if at all, might philosophical reflection on these issues help us understand the law?

One helpful way to begin answering these questions is to start by distinguishing the first from the third personal perspectives. This distinction is currently

²⁸ For a good introduction to the distinction between meta-ethics and normative ethics, see generally STEPHEN DARWALL, *PHILOSOPHICAL ETHICS* (Westview Press 1997).

²⁹ If, on the other hand, the meta-ethical arguments in this Article are successful, Darwall's normative views may have important consequences for our understanding of legitimate legal authority as well.

³⁰ See, e.g., Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 215 (1994).

³¹ Indeed, as Steven Pinker has noted, all natural languages tend to modify various words or constructions to reflect these distinctions in grammatical person as well. STEVEN PINKER, *WORDS AND RULES* (1999).

well understood in moral and political philosophy—though the distinction and its importance are not always fully appreciated in some legal academic circles. Part A will thus clarify the distinction and use it to exemplify how philosophical reflection can produce insights useful to the law. This discussion will set the stage for a more probing discussion, in Part B, of the second personal standpoint and how it is distinct from the other two. Although this standpoint is currently less well understood, it is—for reasons to be discussed—absolutely central to many phenomena in the law. Reflection on the second personal standpoint will thus be crucial for a complete understanding of the law, and this section will end by pointing to a number of such uses in substantive areas of the law.

A. *Distinguishing the First from the Third Personal Perspective*

The first and third personal perspectives are distinct from one another in a number of familiar ways that can be clarified by reflection. The first personal perspective—or at least the part that this Article will be concerned with—is the perspective from which we ask, “How should I act?” It is thus, at least in part, the practical perspective we employ to decide what to do. The third personal perspective is, by contrast, the perspective from which we observe the world and make judgments like those of cause and effect (or consequence). This is the perspective we take up when we engage in assertive discourse, including most discourse familiar from the sciences, and it is the perspective in which we collect our growing body of empirical knowledge. Though the grammatical forms are at least as old as our specifically human evolutionary history,³² we currently live in a period that has witnessed incredible recent advances in scientific understanding and method. We are thus taught—rightly, in my view—to look to the sciences as providing a model of clear and objective thinking. In the sciences, we are also told to eliminate the first person where possible, and that professional discoveries are to be framed wholly in the third person.³³

Importantly, not every use of a term that marks a particular grammatical person makes ineliminable reference to the correspondingly unique perspective we can take up in that language. For example, I might ask you whether your friend is at work, not knowing that she is actually in the room. Your friend might break in before you can answer and give the relevant response, saying, “No, I am off today.” She would then be using the “I” to give essentially the same information that you could have given me third

³² There is significant expert disagreement as to whether our linguistic capacities were specifically selected for, but most experts believe that our distinctively human linguistic capacities evolved somewhere between the Middle Pleistocene period—between 500,000 to 100,000 years ago—and the appearance of anatomically modern *Homo Sapiens* during the Upper Palaeolithic period—approximately 30,000 to 40,000 years ago. See, e.g., Leslie C. Aiello, *Terrestriality, Bipedalism and the Origin of Language*, in *EVOLUTION OF SOCIAL BEHAVIOUR PATTERNS IN PRIMATES AND MAN* 269, 272-74 (W.G. Runciman et al. eds., 1996). Most experts also agree that “relatively little evolution has occurred since humans became civilized (in about the last 10,000 years) and so much of our mental architecture is thought to have evolved in hunter-gatherer societies, and our minds are best adapted to such societies.” Paul H. Rubin, *Folk Economics* (forthcoming) (on file with author).

³³ See, e.g., Council of Biology Editors, *SCIENTIFIC STYLE AND FORMAT* (6th ed. 1994); THE AMERICAN CHEMICAL SOCIETY STYLE GUIDE, A MANUAL FOR AUTHORS AND EDITORS (J.S. Dodd ed., 1997).

personally by saying, “No, *she* is off today.” She would be answering a fundamentally third personal question, and would be referring to herself in a manner that is reducible to third personal assertion, though with the indexical “I.”³⁴ This is why her answer can be translated into purely third personal, assertive discourse without any relevant loss of meaning.³⁵

There are, however, other uses of the first personal form that cannot be so translated—including most of the uses relevant to this Article. When I ask, “What should I do?” from the first personal perspective of deliberation, I am not asking a question that can be fully captured in third personal language. I am not, for example, merely seeking information about a host of related third personal facts about what I *will* do, or what I am *likely* to do, or even what the likely consequences of my actions might be. I am asking what I *should* do, which seeks to identify my *reasons* for action, and, in doing so, I am asking a fundamentally first personal, practical question.³⁶ Facts about the world stated third personally may, of course, provide me with such reasons, but these facts cannot be reasons simply in virtue of their truth as third personal statements. This should be clear

³⁴ See generally David Braun, *Indexicals*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2001) (“Indexicals are linguistic expressions whose reference shifts from utterance to utterance. ‘I’, ‘here’, ‘now’, ‘he’, ‘she’, and ‘that’ are classic examples of indexicals.”).

³⁵ I do not mean to suggest, of course, that the statement might not have other dimensions to it, in certain contexts we might imagine. For example, the person making the statement might be using it to surprise the person with her presence (not just with its fact, but with her presence there), and this pragmatic dimension of the statement’s force would presumably not be so translatable.

³⁶ R. Jay Wallace has thus explained that:

Practical reason defines a distinctive standpoint of reflection. When agents deliberate about action, they think about themselves and their situation in characteristic ways. What are some of the salient features of the practical point of view? A natural way to interpret this point of view is to contrast it with the standpoint of theoretical reason. . . . One possibility is to understand theoretical reflection as reasoning about questions of explanation and prediction. Looking backward to events that have already taken place, it asks why they have occurred; looking forward, it attempts to determine what is going to happen in the future. In these ways, theoretical reflection is concerned with matters of fact and their explanation. Furthermore it treats these issues in impersonal terms that are accessible (in principle) to anyone. Theoretical reasoning, understood along these lines, finds paradigmatic expression in the natural and social sciences. . . . Practical reason, by contrast, takes a distinctively normative question as its starting point. It typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. It is thus concerned not with matters of fact and their explanation, but with matters of value, of what it would be desirable to do. In practical reasoning agents attempt to assess and weigh their reasons for action, the considerations that speak for and against alternative courses of action that are open to them. Moreover they do this from a distinctively first-personal point of view, one that is defined in terms of a practical predicament in which they find ourselves

R. Jay Wallace, *Practical Reason*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003). Wallace also notes that there are alternative ways of understanding theoretical reasoning, which align it more closely with practical reasoning, only having a different subject matter—namely, what we ought to believe. See *id.*

from the following observation: when a third personal statement is true, that fact does not alone make it a reason for action.³⁷

The foregoing discussion suggests that there is an important class of first personal questions, including those about how to act and live, which cannot be reduced to purely third personal questions. What are we to make of this irreducibility? There are skeptics of practical reason who claim to think that this irreducibility establishes that questions like “What should I do?” make no real sense and admit of no real answers.³⁸ Interestingly enough, however, they are all skeptics who ask and answer the very same question numerous times in their daily lives, and in ways that show that they take seriously their capacities to do so on those occasions. They thus reject the meaningfulness of the question in one frame of mind, while asking and answering it in all earnestness in many others. What this stance amounts to, in the end, is not so much a general rejection of the questions, or even their meaningfulness, but rather a refusal to take seriously the contention that probing thought and reflection might deepen our practical, first personal insight.

But one should not assume too blithely that our inability to fit our first personal questions into third personal discourse entails that reflection on the first personal standpoint in its own terms will yield no illumination. Consider what a similar stance toward third personal, assertive discourse would have done to the development of the sciences. Philosophical reflection gave birth to the natural sciences and has been instrumental to its development all along—including to our growing self-consciousness about its methods and how they operate to produce reliable knowledge.³⁹ Refusal to reflect on how third personal thought functions in its distinctive ways would not have been an instance of clear and objective thinking—though it may have hindered the development of the sciences and prevented us from generating important insights into

³⁷ *See id.*

³⁸ *See generally* CHRISTINE KORSGAARD, *Skepticism about Practical Reason*, in *CREATING THE KINGDOM OF ENDS* (1996). This line of thought is often framed as if reason can only function in allowing us to discern true and false beliefs about the world, but never—or at least never fundamentally—in identifying things we ought to do. The classic formulation of this view is often attributed to David Hume, and to his famous dictum that “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.” DAVID HUME, *TREATISE OF HUMAN NATURE* 415.

³⁹ For example, the Greeks did not distinguish philosophy from the natural sciences as we do, and philosophy was taken to encompass not just psychology and epistemology but also inquiries into physics. *See, e.g.*, F.H. SANDBACH, *THE STOICS* 69 (2d ed. 1989). Very little progress was made in the sciences between the fall of the Roman Empire and the Renaissance. During the rise of the modern sciences in the 17th century, Galileo—the oft cited “progenitor” of the modern sciences—developed many of his thoughts in explicit reaction to Aristotle’s conception of terrestrial matter. *See* Peter Machamer, *Galileo Galilei*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2005). Galileo considered himself a philosopher, and “[t]he philosophical thread that runs through Galileo’s intellectual life is a strong and increasing desire to find a new conception of what constitutes natural philosophy and how natural philosophy ought to be pursued.” *Id.* Since the rise of the modern sciences, numerous people have produced works aiming to clarify through reflection the methods by which scientific knowledge “progresses”—including early works by Francis Bacon and René Descartes—and/or aiming to undermine the idea that science “progresses” in such a simple way—including works by Thomas Kuhn, Paul Feyerabend and Larry Laudan, among others. *See* Ilkka Niiniluoto, *Scientific Progress*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2002).

how this important mode of thinking functions. Do our relatively recent successes in understanding, producing, and partly formalizing third personal thought really provide good grounds to refuse the same level of reflection to first personal questions about how to act and live? In the law, there is, of course, probably no real way of avoiding the seriousness of these first personal, practical questions. Still, these points seem worthwhile to make in the present context because much legal academic work and many legal professionals currently exhibit what seems to me an unwarranted degree of skepticism about the importance of such reflection in the law. Skepticism of this kind can do damage to the law, to our understanding of what is distinctive about it, and to our ability to contribute meaningfully to it in the full range of possible ways.

As already noted, this Article will not concern itself primarily with the distinction between the first and third personal perspectives. Before continuing, a brief example of how reflection on this distinction can prove useful to the law will nevertheless help set the stage for analogous claims about reflection on the second personal standpoint. The example I will use is due to Christine Korsgaard.

The above discussions should have already clarified how there is apparently no room for our resilient perception of the practical “I,” or for the answers to certain questions we face in deliberation, in a complete, third personal description of the world. But—as Korsgaard has observed in *Morality as Freedom*⁴⁰—the same point can in fact cut both ways. When we ask “What should I do?,” we are—as already noted—asking it a particular frame of mind, which operates under the idea that we have the practical freedom to respond appropriately to the answers we identify.⁴¹ There are, however, facts about the world that at first glance might seem to undermine our freedom to make such choices, facts that depend ultimately on what the world is like from a third personal perspective. These are familiar facts about whether the natural world follows determinate causal laws or is causally indeterminate. And it is sometimes thought that our answers to these questions have direct relevance to whether we can ever genuinely respond to reasons for action, and, hence, whether we can ever be deemed genuinely responsible for our actions.⁴² Indeed, some have argued that the legitimacy of our practices of criminal punishment depend, either wholly or in part, on abstract metaphysical questions like these.⁴³

⁴⁰ Christine M. Korsgaard, *Morality as Freedom*, in *CREATING THE KINGDOM OF ENDS* 159-87 (1996).

⁴¹ See *id.* at 162 (“Kant argues that when you make a choice you must act ‘under the idea of freedom.’ He explains that ‘we cannot conceive of a reason which consciously responds to a bidding from the outside with respect to its judgments.’”).

⁴² As Korsgaard has noted, normative views that assume our practical freedom have “often been criticized for [their] dependence on an untenable conception of freedom of the will.” *Id.* at 159.

⁴³ For a good discussion of these issues, and a response that is related to the ones developed here, see generally Peter Westen, *Getting the Fly Out of the Flybottle: The False Problem of Free Will and Determinism*, 8 *BUFF. CRIM. L. REV.* 599 (2005). As Westen has observed:

Legal scholars and lawyers also worry about free will and determinism, particularly in fields like criminal law that are predicated on notions personal responsibility. Some criminal law scholars argue that, with time, science will reveal that more and more of human conduct is determined, thus leading, perhaps, to “nullifying the entire criminal

As Korsgaard has pointed out, however, careful reflection on the issues suggests that our answers to these third personal questions cannot really have the kind of relevance to first personal deliberation that we might sometimes imagine.⁴⁴ Even if we learn what we will do, for example, or that what we will do is determined (or is not), we still have to decide what *to* do on numerous occasions. We may, for example, face a decision between two courses of action, one of which we discover in the course of deliberation to be very self-destructive, and the other of which we therefore decide is the right course to pursue. Our reasons for this conclusion would be wholly independent of any facts about causal determination: the reasons would go directly to the choiceworthiness of various courses of action, not to what might cause them. And if we were to learn the unfortunate (third personal) fact that we will ultimately do the self-destructive act instead, this would not show that we were wrong about what we had reason to do. Indeed, learning this may be an appropriate occasion for regret, which is an attitude toward our actions that carries with it an imputation that we have not done what we should.⁴⁵ The fact that our first personal questions about what to do are irreducible to third personal questions of fact thus cuts both ways; and those who take third personal questions about causal determination to be capable of undermining the sense of our first personal deliberative questions are misconstruing the nature of the questions.⁴⁶ There are, of course, genuine things that can undermine or mitigate our responsibility—like

law.” Others take a more cynical view. They contend that the framers of criminal law already believe that all human conduct is determined, and that when the law allows a few conspicuously distressed defendants, such as the criminally insane, to claim, “I couldn’t control myself,” they do so as a sop in order to maintain the pretense that everyone else possesses free will.

Id. at 600-01 (footnotes omitted).

⁴⁴ See generally Korsgaard, *supra* note 40, at 162-63.

⁴⁵ Korsgaard puts the argument in the following way:

The point is not that you must *believe* that you are free, but that you must choose *as if* you were free. It is important to see that this is quite consistent with believing yourself to be fully determined. To make it vivid imagine you are participating in a scientific experiment, and you know that today your every move is programmed by an electronic device implanted in your brain. The device is not going to bypass your thought processes, however, and make you move mechanically, but rather work through them: it will determine what you think. Perhaps you get up and decide to spend the morning working. You no sooner make the decision than it occurs to you that it must have been programmed. We may imagine that in a spirit of rebellion you then decide to skip work and go shopping. And then it occurs to you that *that* must have been programmed. The important point here is that efforts to second guess the device cannot help you decide what to do. They can only prevent you from making any decision. In order to *do* anything, you must simply ignore the fact that you are programmed, and decide what to do – just as if you were free.

Id. at 162-63.

⁴⁶ Korsgaard thus speaks of a “failure to appreciate” the “radical nature of the distinction between theoretical and practical reason,” including “their respective domains of explanation and deliberation.” *Id.* at 160.

incapacity, duress, mistakes of fact, and the like—but general metaphysical questions about causal determination seem beside the point. Notice, finally, that we cannot but ask and answer questions about what to do all the time. It can thus be damaging to important and pervasive dimensions of our thinking to lose sight of what these questions are all about.

What philosophical reflection can produce in cases like this, then, is *understanding*—which is in no way reducible to a mere increase in knowledge about the world.⁴⁷ Reflection can help us discern better what kinds of things are genuinely relevant to what, so that we do not misconstrue the types of questions we are asking, or conflate the types of problems we face in human life. We clearly employ the first personal perspective all the time, not just in the law but in ordinary life. It is all around us, and it permeates our lives. But we can sometimes fail to recognize its distinctive features, and this can sometimes impair our first personal thought, or cause us to lose sight of how best to approach or respond to it. We do this, in my view, when we conceive of ourselves and our thinking as thoroughly third personal—as if we were creatures whose only genuine mode of thought were aimed at the formation of beliefs about the world, and as if we were then fated to let our desires just push us around. What would be missing from this view would be all of the thinking we clearly do about how to act and live, and all the important decisions that this thought—which is, again, irreducible to third personal thought—produces.

Finally, although this is only one example, this example should help clarify how philosophical reflection might produce a specific kind of insight that might prove helpful in practical areas like the law. Recent developments in legal academia have witnessed a very positive turn towards empirical research. The above example suggests, however, that for those who do not yet see what is distinctive about the first personal perspective of deliberation, the cure cannot come through the mere acquisition of more knowledge of third personal truths. It must instead come in part from reflections like these, which can result in something that more closely resembles a gestalt shift. Reflection of this kind is, moreover, not only consistent with our goals of increasing our empirical knowledge but can also help clarify when and where such empirical insight is relevant—and, hence, when and where the questions that commonly arise in the law have an importantly different character. This, ultimately, is the kind of gestalt shift that I believe Darwall's work on the second personal standpoint can produce as well but even this brief example should help clarify the role that philosophical reflection can play in changing our understanding of practical fields like the law.

⁴⁷ This use of philosophical reflection is, in my view, closely related to the project typically associated with Wittgenstein, especially as propounded by Burton Dreben, who has said that genuine philosophy should not result in “theory” or “assertion,” but should instead result in “understanding.” For an insightful and charitable reading of this project, which views it as consistent with important developments in political philosophy, see John Rawls, *Afterword* to *FUTURE PASTS: THE ANALYTIC TRADITION IN TWENTIETH-CENTURY PHILOSOPHY* (Juliet Floyd & Sanford Shieh eds., 2001).

B. *Reflections on the Second Personal Standpoint*

Whenever I begin to discuss the second personal standpoint with legal academics, the first question I invariably get is the natural one: “What exactly is the second personal standpoint?” As indicated above, I believe that Darwall’s recent work in moral philosophy can help answer this question. I also believe that his observations on the second personal standpoint can produce a gestalt shift of kinds, which will enrich our understanding of the law—our understanding of both how it functions, and what is distinctive about many of the questions we commonly face in legal thought and practice. To make good on this claim, one must, however, first clarify the common view that is subject to change. It is a view about what kinds of reasons we respond to in practice.

In legal academia, the dominant view on this topic—or perhaps it would be more accurate to say the “quorum” view—is represented most explicitly in the law and economics literature, with its familiar model of the so-called “rational actor.”⁴⁸ This model distinguishes very clearly between our cognitive capacities to produce what are, in effect, reliable third personal beliefs about the world and the questions we commonly ask from the first personal perspective of deliberation.⁴⁹ For example, the model in no way reduces our questions about reasons for action to mere identifications of true beliefs, and instead claims that these reasons arise out of a combination of such beliefs and preferences for various states of affair in the world.⁵⁰ These preferences are used to give sense to the notion that we value some states of affair over others. Deciding what we have most reason to do is then pictured as answering which, of our available options, is most likely to maximize our informed preferences—a question that has received formal treatment in recent decades by Bayesian decision theorists.⁵¹

This description should not be taken to suggest that the law and economics literature always explicitly acknowledges the precise nature of the distinction between the first and third personal standpoints, as discussed in the last subsection. Still, this distinction is at least implicitly presupposed and put to important use in the familiar rational actor model.

⁴⁸ For descriptions of the rational actor model and a number of representative uses in legal academic work, see, e.g., Bruce Chapman, *Legal Analysis of Economics: Solving the Problem of Rational Commitment*, 79 CHI-KENT L. REV. 471 (2004); STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); JAAP C. HAGE, REASONING WITH RULES (1997); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996).

⁴⁹ See, e.g., Peter Gardenfors & Nils-Eric Sahlin, *Introduction: Bayesian Decision Theory—Foundations and Problems*, in DECISION, PROBABILITY AND UTILITY 1 (“[T]here are two main factors determining our decisions. One is our *wants* or *desires*. These determine the *values* or *utilities* of the possible outcomes of our decisions. The other is our *information* or *beliefs* about what the world is like and how our possible actions will influence the world. The beliefs determine the *probabilities* of the possible outcomes. The main aims of a *decision theory* are, first, to provide models for how we handle our wants and our beliefs and, second, to account for how they combine into rational decisions.”).

⁵⁰ See *id.*

⁵¹ See, e.g., *id.*; JAMES JOYCE, THE FOUNDATIONS OF CAUSAL DECISION THEORY (1999) (Cambridge Studies in Probability, Induction, and Decision Theory).

When rational choice theorists acknowledge the distinction between the first and third personal standpoints, they may nevertheless still exhibit an unwarranted degree of skepticism about how useful further reflection on the first personal perspective might prove in producing genuine practical insight. The idea that desires produce reasons for action comes quite readily to mind, and can seem readily and intuitively graspable. Recent developments in decision theory have also helped us formalize this form of practical reasoning, and developments like these can thus lend air of credibility to the conclusion that instrumental reasoning is the only form of trustworthy and reliable practical thought available to us.⁵² Still, it should be clear that the grounds thus far stated—*viz.*, concerning the initial intuitiveness of the idea that desires give rise to reasons for action, and the recent formalizations of instrumental reason—do not strictly speaking entail any conclusions about preferences providing us with our only reasons for action. Hence, these grounds cannot on their own establish the unimportance of further reflection on the first personal perspective in its own terms.

The rational actor model does, on the other hand, have a very different feature that speaks strongly in favor its importance and coherence as at least part of the correct picture. Earlier discussions have suggested how important it can be to distinguish between our different uses of language, so that we do not misconstrue all of the problems we face in human life as fundamentally third personal problems, which seek to identify facts about the world. As important as such care is, however, it is equally important that our credible thought—once properly construed—not commit us to the truth of any third personal views that are either inconsistent with or implausible in light of our developing naturalistic understanding of the world.⁵³ Squaring our understanding of reasons for action in with the findings of science is, moreover, no small feat. To see why, notice that we commonly cite reasons for action in explanation of our actions.⁵⁴ When we do so, we explain our actions in terms of something we took to speak in favor of them at the time.⁵⁵ If our views on what we have reason to do were to be understood in part as expressive of desires for certain states of affairs, then these desires could function in plausible and straightforward naturalistic explanations of our actions.⁵⁶ The explanations would,

⁵² See *e.g.*, MICHAEL BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 5-7 (1987) (describing intuitions that appear to drive belief-desire accounts of practical reasoning and some of their proponents).

⁵³ For a classic set of arguments scrutinizing the objective purport of our ethical language on such grounds, see J.L. MACKIE, *INVENTING RIGHT AND WRONG* 38-40 (1977).

⁵⁴ For classic exposition, see Donald Davidson, *Actions, Reasons and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 5-19 (1980).

⁵⁵ See STEPHEN DARWALL, *IMPARTIAL REASON* 32-34 (1983) (dubbing this sense of “reason” an “agent’s reasons for action”).

⁵⁶ R. Jay Wallace has thus noted that an expressivist theory of this like will typically have the following virtues:

It is naturalistic metaphysically, insofar as it makes no commitment to the objective existence in the world of such allegedly questionable entities as values, norms, or reasons for action. If normative and evaluative claims do not represent genuine cognitive achievements, then their legitimacy does not depend on our postulating a realm of

moreover, be of the right kind, because they would be in terms of motives that, on the present assumptions, give sense to our thought that something spoke in favor of the desired outcome at the time. For this reason, nothing in the rational actor model commits us to the view that there is some mysterious, independent realm of non-natural facts (about our reasons), which are irreducible to descriptive facts about the world but that nevertheless somehow causally interact with the world to produce actions.⁵⁷ There would also be no puzzling question as to how we might have epistemological access to these perceived reasons, because our view that we had reasons to act would be accounted for in terms of expressions of desire, rather than beliefs about some independent realm of third personal facts.⁵⁸ Factors like these represent deeper reasons for crediting the rational actor model as at least part of the correct picture.

There is, at present, no simple way to capture the full range of ways that this model of decision appears in legal academic thought and practice. The basic picture can be developed in a number of different ways, which tend to render it more or less sophisticated or plausible. Sometimes the picture is far less formal than the present discussion would suggest but nevertheless provides an underlying assumption about how things work in basic outline. Informal pictures like these operate whenever people assess civil legislation primarily in terms of the incentives it produces, or evaluate criminal legislation primarily in terms of its deterrent effects.⁵⁹ When, on the other hand, the picture is given more formal treatment and coupled with certain assumptions about the alleged impossibility of interpersonal utility comparisons,⁶⁰ orthodox efficiency maximization accounts of rational action and legal doctrine tend to emerge.⁶¹ More

normative or evaluative facts to which those claims must be capable of corresponding. It is also naturalistic psychologically, insofar as it yields explanations of intentional human behavior that are basically continuous with explanations of the behavior of non-rational animals.

R. Jay Wallace, *Practical Reason*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2003). It is important to remember that, for reasons I have discussed elsewhere, expressivist theories like this can in principle be consistent with theories that attribute robust truth conditions to our normative talk. See Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEXAS L. REV. (forthcoming 2006).

⁵⁷ For classic exposition of this potential problem for our normative language, see MACKIE, *supra* note 53, at 38-40 (arguing that we purport to be referring to objective properties when we use ethical language but that this view cannot be squared with the facts).

⁵⁸ For classic discussion of this dimension of the problem, see *id.* at 41 (noting problems with the view that there might be non-natural “normative” facts that somehow causally interact with the world).

⁵⁹ Paul H. Robinson and John M. Darley have, for example, noted that “[f]or the past several decades, the deterrence of crime has been a centerpiece of criminal law reform. Lawmakers have sought to optimize the control of crime by devising a penalty-setting system that assigns criminal punishments of a magnitude sufficient to deter a thinking individual from committing a crime.” *The Role of Deterrence in the Formulation of Criminal Law Rules*, 91 GEO. L.J. 949 (2003).

⁶⁰ See e.g., Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635-41 (1938) (cited in Patrick B. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501 (1997)).

⁶¹ See e.g., Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 84-85 (1992).

recently, there have been a number of important developments in behavioral economics.⁶² These have made great strides in challenging the basic psychological assumption that we typically decide what to do on the rational actor model, and have collected important empirical findings that better characterize our human decision-making processes.⁶³ Still, on the whole, even this literature tends to retain the model as an account of what we have most *reason* to do, and does not typically challenge the more basic idea that we are motivated solely by beliefs about the world and desires for various states of affairs.⁶⁴

In *The Deep Structure of Law and Morality*,⁶⁵ I recently presented a number of evolutionary game theoretic arguments, and collected a number of contemporary psychological, sociological and anthropological findings, to suggest that this psychological picture is incomplete in a more fundamental way. As discussed more fully in that Article, our psychologies include motivational attitudes that have as their objects not just states of affairs that we might produce—which is how “preferences” or “desires” are typically defined in the relevant literature.⁶⁶ Our psychological repertoire also includes certain attitudes *towards* and expectations *of* specific persons and their conduct, which give rise to a distinctive class of perceived reasons for action in accordance with norms and perceived grounds for criticizing or reacting to their breach in specific ways.⁶⁷ I have called one important class of these attitudes “obligata,” because they give rise to our sense of moral and legal obligation in my view.⁶⁸ Importantly, attitudes like these also have what moral philosophers call an “agent-centered” dimension

⁶² Daniel Kahneman and Amos Tversky have, for example, developed the field of bounded rationality. See *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979). See generally also *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* (Francesco Parisi & Vernon L. Smith eds., 2005); Elizabeth Anderson, *Beyond Homo Economicus*, 29 *PHIL. & PUB. AFF.* 170-200 (2000) (discussing empirical evidence and modern attempts to account for some of it from within basic economic frameworks); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998) (citing 112 *Q. J. ECON.* No. 2, which contains a number of articles related to behavioral economics); Richard H. Thaler & H.M. Shefrin, *An Economic Theory of Self-Control*, 89 *J. Pol. Econ.* 392 (1981) (on bounded willpower); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 *AM. ECON. REV.* 1281 (1993).

⁶³ *Id.*

⁶⁴ For a good discussion of this fact, see Anderson, *supra* note 62, at 170-200 (2000) (arguing that a more fundamental shift is needed to capture the ways we respond to norms).

⁶⁵ 84 *TEX.L. REV.* (forthcoming 2006).

⁶⁶ See generally Darwall, *supra* note 5, at 4 (“As they are usually understood in this literature, desires are always desires-that-*p*, where *p* is some possible state of the world”)

⁶⁷ See 84 *TEX. L. REV.* (forthcoming 2006). In my view, these attitudes are what Hart was describing when he used the term “internal points of view,” as an integral part of our attitudes toward the law when we accept it as having its particular kind of authority. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 89 (2d ed. 1994) (defining the internal point of view as concern with rules from the perspective of a member of a group, who accepts the rules as guides to conduct and as grounds for criticizing deviations).

⁶⁸ 84 *TEX.L. REV.* (forthcoming 2006).

to them. A requirement is “agent-centered” if in at least some circumstances it purports to give each agent a different aim or goal, namely that *he* or *she* fulfill a given requirement, even if by failing to do so he or she could cause two or more others to fulfill the requirement in equally weighty circumstances.⁶⁹ If, for example, I believe I have a moral obligation to *you* to act respectfully toward your friends at an important social gathering, then this obligation to *you* would not seem to be discharged by the fact that I could cause two or more others to act respectfully toward *their* friends in equally weighty circumstances by acting the fool—and perhaps thereby teaching them just how hurtful such action can be. Legal obligations typically function in the same way. A father’s legal obligation to pay child support would not be extinguishable under law, for example, on the ground that that father might provide useful instruction to other fathers by failing miserably and publicly to support his child, thereby helping them to see just how important their obligations are. As a number of people have observed, both common sense morality and the law are, in fact, replete with requirements that purport to provide us with agent-centered restrictions.⁷⁰

There is, however, a notorious problem with trying to square these features of our moral and legal practice with the dominant model of rational action that pervades much of the current legal literature.⁷¹ The model gives clear sense to how we might have reason to produce certain states of affairs. Reasoning in this way, we might also conclude that we have reason to set up and follow certain shared moral or legal rules, given their likely consequences for human welfare. But if action in accordance with a rule were justifiable only on these grounds, then there would seem to be no good reason not to depart from the rules if by doing so we could get two or more others to comply with them in equally weighty circumstances. Common sense morality and the law typically deny that this is the case, but it is hard to find a foundation for this denial in first personal instrumental reason. In value theory, this problem is commonly referred to as the “problem of agent-centered restrictions.”⁷² Many who have understood this problem have concluded that there may be no way to justify persistent features of our moral and legal practices, including the perceived way that moral and legal obligations seem to bind us and give rise to agent-centered reasons for action.⁷³ Upon close examination, there would seem to be no foundation, in particular, for our recurrent thoughts that we have obligations *to* specific persons.

It is at this point that Darwall’s reflections on the second personal standpoint can help change our understanding of the law, and produce helpful insight. Darwall defines the second personal standpoint as the standpoint from which we address

⁶⁹ See, e.g., DEREK PARFIT, *REASONS AND PERSONS* 55 (1986); see also Stephen Darwall, *Agent-Centered Restrictions from the Inside Out*, reprinted in *DEONTOLOGY* 112, 112 (Stephen Darwall ed., 2003).

⁷⁰ See e.g., Darwall, *supra* note 69, at 112; ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 73 (1993).

⁷¹ See *id.* (discussing problem).

⁷² See *id.*

⁷³ See, e.g., See, e.g., PARFIT, *REASONS AND PERSONS* 54-55 (1986); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 80 (1982).

one another with claims or grievances, or respond to such claims with things like apology, justification, or excuse.⁷⁴ It uses a distinctive grammatical person—which can be seen in our uses of things like commands and imperatives—and, as Darwall’s recent work has helped clarify, it engages a standpoint that is distinctive from both first personal deliberation, as so far described, and third personal observation.

To see what is distinctive about the second personal standpoint, consider the thoroughly second-personal question I might ask you if I were to look you directly in your eyes, and say: “How could you have *done* that to me?” There are (at least) two different ways that you might take this question and respond to it. One way would be to see my question as doing nothing more than giving you fundamentally third personal information about the state of mind I am in—namely, a form of frustration or anger. My question would certainly imply that I am in such a state. You might then combine this belief with a number of pre-existing preferences for various states of affairs, which—let us stipulate—contain a preference to avoid my anger in this case. Reasoning from this starting point, and from certain other beliefs you have about what it will take to appease my anger, you might think, “I should probably say the words ‘I’m sorry,’ or I will never hear the end of this.” This might, in turn, lead you to decide to say the words, “I’m sorry.” Your reasoning up until this point would be thoroughly first and third personal, in the senses presently under discussion.

But my question was not really meant just to give you third personal information about my state of mind. Any person could have given you information of that kind, whereas my question was meant to address you directly, and take you to task for the perceived breach of an obligation that you owed to *me*. This is something that only *I* could have done in this precise way with my question. Complaints of this kind can, of course, also be answered in various ways, including through apology. Still, the apology must be to *me* from *you*, and must be based on your acknowledgment that it is *owed to me by you*, for it to function as a genuine apology. Both the relevant question and the relevant answer in this case are thus fundamentally second-personal, and, as Darwall has observed, “their second-personal character explains their agent-relativity.”⁷⁵ Moreover, while it is true that these critical features of our sense of obligation cannot be reduced to or derived from first personal thought about how to achieve our various goals, the same point—once again—cuts both ways. It suggests that we are misconstruing the nature of these problems by trying to fit them into the model of first personal deliberation as elaborated in the rational actor model. These problems are instead inherently relational: they engage forms of interpersonal address that allow us to negotiate, manage, repair—and sometimes dissolve—our social relationships with one another.

Once these facts have been acknowledged, it should become clear just how pervasive the second personal standpoint and second personal thinking are in both morality and the law. In our day to day lives, we commonly address one another with agent-centered reminders, or demands, backed by the perceived authority of morality or law. These can range anywhere from relatively innocent phenomena, where for example we may let someone know that he has picked up our piece of luggage rather than his by

⁷⁴ See, e.g., Darwall, *supra* note 66.

⁷⁵ *Id.*

mistake, to much more charged demands, where for example we may threaten to call the police if a menacing person does not leave the premises immediately. When we address one another in these ways, our second personal interactions sometimes end in an adequate resolution of the problem (the luggage is returned, say, or the person leaves or shows an official badge). At other times, however, disputes arise, and continue, and can end up in court. Here, the basic form of civil action begins with the Complaint—which states the relevant causes of action and ends with a demand for relief—and which is met with an Answer, which will include any defenses one might wish to raise. These are nothing more than legal analogues of the moral complaint I made to you in the above example and the answer you gave to me by apologizing (and perhaps trying to make things up to me). The basic form of criminal prosecution also begins with a charge, which is a second-personal form of address to the defendant, and is met with a defense that implicitly concedes the authority of the law to issue in agent-centered criminal obligations.

In morality, analogous forms of moral charge and defense arise. They are typically imbued with life by the moral emotions—by things like blame, resentment, moral indignation, and guilt. As Darwall has noted, these attitudes are, however, all implicitly second personal.⁷⁶ A careful look at our moral and legal practices thus suggests that second personal forms of interaction are in no way peripheral, and are instead the mainstay, of these normative practices. We therefore misconstrue central aspects of common moral and legal problems, and what many of our interactions are all about in important areas of social life, if we think that the only practical questions that are live for us are first personal question about what to do to achieve our various goals. What is missing from this picture—and what is thus missing from the now-dominant rational actor model and its near cousins in so much current legal thought—is all of the common and irreducibly second personal thinking we engage in when we ask whether someone has the standing to raise a particular claim, whether we have the right to react to others in the ways we do, whether an apology or compensation is warranted for a given action, and the like. Questions like these form a distinctive class of human problems, which invite a particular species of answer, and it is these special problems that give morality and law so much of their distinctive lives.

As indicated earlier, the primary purpose of this Article will be to trace out how an understanding of the second personal standpoint can help unravel certain central questions in analytic jurisprudence. The foregoing discussion suggests, however, that an understanding of the second personal standpoint might be useful for untangling a much broader set of legal issues. Before turning, in the next section, to this Article's central task, it will therefore be useful to pause for a moment to give some indication of these broader consequences. The remainder of this section will touch briefly on three possibilities, by way of illustration.

First, in a recent and thought-provoking Article, criminal law theorist Alexandra Natapoff has traced a number of ways that the Miranda doctrine—which purports to provide criminal defendants with a purely beneficial and prophylactic right to remain silent and to speak primarily through counsel—has served to silence criminal defendants and effectively extricate them from many of the workings of the criminal

⁷⁶ See *id.* at 2-15.

process.⁷⁷ Natapoff argues that in our zeal to protect criminal defendants, we may be overlooking some of the losses that this silence generates, even to criminal defendants. She therefore outlines some of these potential losses and pleads for a renewed investigation into this issue.

Although Natapoff does not frame the problem in the precise terms offered here, one of the implications of her work is that many of the second personal forms of address that may engage natural attitudes that can lead to things like reconciliation or reintegration may be disappearing from our criminal process. This disappearance may, in turn, help explain why rates of recidivism are so high in countries like the United States, and so much lower in places like Japan, where practices of criminal punishment include things like “reintegrative shaming,” which engage deeply second personal forms of address.⁷⁸ As long as we remain wedded to dominant paradigms of practical reasoning, however, it can be hard to put our finger on what exactly is being lost here. The relevant loss may not be measurable, for example, simply in terms of the accuracy or number of accurate prosecutions (on the State side), or in terms of obtaining the shortest or most highly preferred sentences (on the defendant’s side), or even in terms of the potential deterrence effects of criminal legislation. Ultimately, the greatest loss may lie in the quality of relations we have with one another, as partly engendered by criminal process, and in an inability to genuinely integrate various valuable subcultures into mainstream society.

Second, in *The Textualization of Precedent*,⁷⁹ the linguist and legal theorist Peter Tiersma has recently traced out a number of ways that judicial decisions in the United States have slowly been transforming from oral bench decisions, which were sometimes recorded by court reporters or others in essentially non-authoritative written forms, into full-blown written and authoritative texts that are crafted by judges. Concomitant with this has been the rise of legal formalism as an interpretive methodology, which aims to interpret these judicial pronouncements as presenting us with fairly general statements of the law, which are importantly divorced from factual circumstance. Although Tiersma does not—once again—frame his discussion in terms of the second personal standpoint, the oral decisions he describes were essentially decisions addressed to specific parties in all their concrete particularity. In contexts of interpersonal address like this, basic conversational maxims would have rendered the judges’ relevant statements of reasons to include only those that were not already clear to both parties. Understanding that judicial decisions functioned in this way would, in turn, have invited a relationship to prior precedent that was less formalistic, and much more intent on harmonizing the underlying rationales and purposes behind prior decisions, and making relevant distinctions, where needed, to capture their true meaning and import in relation to novel fact patterns. A very different interpretive methodology and relationship to precedent would, on the other hand, be required if judicial decisions were viewed more

⁷⁷ Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. (forthcoming 2005).

⁷⁸ For classic discussions of reintegrative shaming, see JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); John Braithwaite, *Restorative Justice*, 25 CRIME & JUST. 1 (1999).

⁷⁹ Peter M. Tiersma, *The Textualization of Precedent* (March 2005) (forthcoming) (on file with author).

as a series of abstract and fundamentally third personal, authoritative statements about the content of the law. So we might ask: could a failure to understand specific dimensions of the second-personal standpoint, and how it arises in adjudication, be doing damage to important features of common law adjudication? Might a failure to understand important aspects of how judicial decisions typically function be causing us to lose sight of our ordinary routes to judicial success?

Finally, consider the more well-known accounts of tort law in terms of corrective justice.⁸⁰ These accounts are meant to provide an alternative to efficiency maximization accounts of tort law, and one of the central claims that corrective justice theorists typically make is that there are dimensions of our tort obligations that cannot be accounted for in terms of efficiency maximization. One such important dimension is the fact that we owe a duty of care to *specific persons* who we may have harmed, and, hence, the adjudication of tort claims is not typically viewed simply as an occasion to make decisions that might maximize human welfare. It is instead viewed as an occasion to decide whether that duty has been breached in relation to a specific person, and, hence, whether the defendant has a specific duty to the plaintiff to compensate for any harmful consequences.⁸¹ Although corrective justice theories do not use the specific terminology suggested here, one way of understanding these issues is to say that what is missing from efficiency maximization theories is an understanding of the thoroughly agent-centered and second personal features of tort law. In failing to understand these features, there can, moreover, be a concomitant tendency—even among corrective justice theorists—to think of tort law’s duty of care to be reducible to an agent-neutral, instrumental duty *to be careful to avoid certain harmful consequences*. A reexamination of these issues with the aid of contemporary work on the second personal standpoint might allow us to ask whether the duty of care is not better understood in different terms: as an agent-centered duty *to care* for others, and their interests and concerns, in at least a minimally appropriate manner, and to show this care either by avoiding certain harms or by making amends when one has failed in that respect. What can be lost, then, in accounting for tort law in purely economic terms is the importance that these practices play in allowing us to maintain and repair our relationships with one another.

These last three examples are meant only to be suggestive. The next section turns to a more thoroughly worked out application of Darwall’s work on the second personal standpoint to some of the central questions in analytic jurisprudence.

II. RAZ AND AN ENRICHED UNDERSTANDING OF LEGAL AUTHORITY

With some understanding of how the second personal standpoint is distinctive, we can now turn to a more probing discussion of Raz and some of the central debates in analytic jurisprudence. Raz’s corpus of work is both rich and far-ranging. There would be no way, in an Article like this, to address the full set of considerations

⁸⁰ See generally Symposium, *Corrective Justice and Formalism: The Care One Owes One’s Neighbors*, 77 IOWA L. REV. (1992).

⁸¹ See e.g., Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 1 - 63 (2001).

that motivate Raz's particular brand of exclusive legal positivism. Still, one strand of his work has been most influential and central for the development of exclusive legal positivism. This is Raz's work on legal authority and "exclusionary" reasons;⁸² and his subsequent use of this work to argue that it would be inconsistent with the nature of legal authority, and with the precise kind of practical guidance the law purports to provide us with, for the law to be identified by means of a social convention that incorporates moral criteria.⁸³ Because this last proposition is what inclusive legal positivists like Hart and Coleman assert as partly definitive of their view, these arguments are central to important and contemporary debates within positivism. Moreover, as indicated in the introduction, this strand of Raz's work would—if valid—undermine a number of non-positivist views of the law as well—including Dworkin's "interpretivist" view, which claims that judges must interpret the law in its best moral light.⁸⁴ An assessment of these arguments is thus equally critical to larger contemporary debates between the positivists and their rivals on how to understand the law. This section will focus on these particular Razeian arguments.

In my view, Raz's work on legal authority—which includes his familiar work on exclusionary reasons—points to an important phenomenon that should be fit into any satisfying account of the law. This section thus describes that phenomenon and why it is important. It then argues that Raz's particular account of the phenomenon has nevertheless been hampered by an attempt to account for it in wholly first personal terms. For reasons to be discussed, our understanding of the phenomenon will be enriched by contemporary reflection on the second personal standpoint. This reflection will both clarify further what legal authority is, and allow us to absorb Raz's important insights about it without following him to his exclusive legal positivist conclusions.

A. *Understanding Raz's Contribution: Law's Authority and Exclusionary Reasons*

One of Raz's great contributions to jurisprudence has been to clarify an important dimension of the non-optionalness that legal obligations claim for themselves. As Hart famously observed in *The Concept of Law*, "[t]he most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory."⁸⁵ It can nevertheless be much more difficult to identify what precisely this non-optionalness of legal obligation consists in.

⁸² See generally JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-48 (1999) (1975).

⁸³ See, e.g., Joseph Raz, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194-221 (1994); Joseph Raz, *Authority and Justification*, in *AUTHORITY* 115 (Joseph Raz ed., 1990); JOSEPH RAZ, *THE AUTHORITY OF LAW* 22-33 (1979).

⁸⁴ See generally RONALD DWORKIN, *LAW'S EMPIRE* ch. 3 (1986).

⁸⁵ H.L.A. HART, *THE CONCEPT OF LAW* 6 (2d ed. 1994) (emphasis in original).

In *The Concept of Law*, Hart himself offered important early illumination on this issue by elaborating his well-known “social practice” account of obligation—an account that he thought had application to obligations of all kinds. As Hart saw the problem at the time, the primary difficulty was to account for the intuitive distinction we make between situations involving mere convergent behavior and situations involving genuine rule following.⁸⁶ He proposed that we do this by observing that the latter situation involves a more complex psychology on the part of the relevant rule followers.⁸⁷ Hart called this psychology the “internal point of view,” and he defined it—in his early work—as the critical reflective attitude that persons have toward a standard for action when they take it as a guide (or what we would now call a reason) for action, which applies generally to the members of a group, and also as a ground for criticizing deviations by those members.⁸⁸ When people take up the internal point of view toward a shared rule, and this attitude generates the convergent behavior, they can be understood as following a rule in a way that people who merely converge in behavior cannot. The internal point of view can thus be used to make the distinction that Hart was concerned with, and thereby clarify one dimension of the non-optionalness that we commonly perceive obligations to have.

As Raz has pointed out, however, this account does not yet go far enough to capture the full sense of non-optionalness that is at issue with legal obligations.⁸⁹ The problem, as Raz has usefully highlighted, is that reference to the internal point of view as so far defined does not yet allow for another important and intuitive distinction. This is the distinction between situations in which the members of a group believe there is an ordinary reason to act, which reason applies generally to all similarly situated persons, and situations in which the members of the group believe that the action is in some further sense *required*.⁹⁰

To illustrate with an example from the last section, consider a hypothetical group of orthodox rational choice theorists or economists who sincerely believe that each person has a reason to maximize his or her individual preferences and no other reasons for action. We might stipulate, in addition, that this shared belief consists in the fact that the members take up the internal point of view toward a standard of self-interest

⁸⁶ See, e.g., *id.* at 10 (“What then is the crucial difference between merely convergent habitual behaviour in a social group and the existence of a rule of which the existence of the words ‘must’, ‘should’, ‘ought to’ are often a sign? Here indeed legal theorists have been divided, especially in our own day when several things have forced this issue to the front.”).

⁸⁷ *Id.* at 57 (“What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, and ‘right’ and ‘wrong.’”).

⁸⁸ For Hart’s early descriptions of the internal point of view, see *id.* at 55-57, 79-91.

⁸⁹ Raz presented his early criticisms of Hart, concerning Hart’s failure to take account of the exclusionary character of legal reasons, in Raz, *supra* note 82, at 35-58.

⁹⁰ See e.g., *id.* at 80-85 (elaborating on Raz’s earlier criticism of Hart’s practice theory of norms).

maximization: they take the standard not only as a guide to individual action but also as a ground for criticizing deviations (as failures of rationality). It is still perfectly possible—indeed likely—that none of these persons would take self-interest maximization to be *obligatory*. The standard—after all—merely purports to articulate what each person has most reason to do, not what each *must* do. But if the internal point of view is present in situations like these while a sense of obligation is not, then the internal point of view—as thus far defined—cannot be enough to capture the full sense in which we commonly take obligations to provide us with requirements of action.

To fill this gap, Raz proposes that we examine more closely the precise kinds of reasons that people commonly take obligations to provide them with.⁹¹ Raz suggests that people who perceive themselves to be under an obligation differ from people like our hypothetical rational choice theorists insofar as the former take the obligation in question to give rise not only to ordinary reasons for action but also to what he calls “exclusionary reasons.” Raz defines these as any reason not to act on some other class of ordinary reasons.⁹² Exclusionary reasons are a species of what Raz calls “secondary reasons” for action, and, in ways to be discussed, they function in distinctive ways in our practical reasoning.⁹³

Many common examples can be used to illustrate this phenomenon. An ordinary person who has made a promise supported by consideration will, for example, commonly find herself faced with a number of ordinary reasons not to fulfill her promise later on down the road, which reasons typically arise from self interest. If, however, the person has a moral and legal obligation to fulfill that promise, then, in ordinary circumstances, both morality and law will provide the person not only with reasons to fulfill the promise but also with reasons not to act on at least some of those other self-interested reasons. These reasons not to act out of self-interest are exclusionary reasons, in Raz’s sense. Moreover, if we are to credit these legal and moral reasons as having the precise kind of authority that law and morality purport to have, then it would seem that we must think of them as having the authority to exclude at least some reasons arising from self interest. Thinking of moral and legal reasons in this way would seem needed, for example, to distinguish us in the right way from our hypothetical rational choice theorists and how they view their standard of action. We—after all—typically think of ourselves as in some sense *required* to follow through with our promise, and do not just think of the promise as one reason to be weighed in with (and that can perhaps be outweighed by) all the rest. A reference to exclusionary reasons helps capture this further thought.

In my view, one sign of the strength of Raz’s analysis is that it can bring into vivid relief an important structural feature that obligations of many kinds appear to have. As the last example suggests, it is not only law but also morality that purports to

⁹¹ See *id.* at 15-49.

⁹² *Id.* at 39.

⁹³ *Id.* at 39 (“A *second-order reason* is any reason to act for a reason or to refrain from acting for a reason. An *exclusionary reason* is a second-order reason to refrain from acting for some reason.”). Elsewhere, Raz discusses the apparent paradox of having “reasons for not being guided by reasons whose very nature is that they should guide.” *Id.* at 183-86.

provide us with obligations that are in some sense non-optional. Moral philosophers have in fact written extensively about this topic, and they typically refer to it by saying that moral imperatives purport to be “categorical.”⁹⁴ But, as the prominent moral philosopher David Brink has usefully observed, this common claim can in fact be broken down into three further ones. To say that moral obligations are “categorical” is to say that they have at least the following three properties: they are (i) “inescapable,” in that their application to persons does not depend on that person’s contingent desires, inclinations or interests; they have (ii) “authority,” in that they provide each person with reasons to act that are independent of that person’s antecedent aims, desires or interests; and they are (iii) “supreme,” in that the reasons they give rise to are imperative or overriding of any arising from a person’s antecedent aims, desires or interests.⁹⁵

Notice several points about this more fine-grained account of the structure of moral obligation. First, the term “inescapability”—from element (i)—refers to a species of generality of application, and the term “authority”—from element (ii), and *which is not to be confused with Raz’s use of the term “authority”*—refers here to the fact that morality purports gives rise to reasons for action. Both of these features are thus part of Hart’s early conception of the internal point of view.⁹⁶ Second, the term “supremacy”—from element (iii)—refers to the fact that moral reasons are commonly taken to be strictly overriding, which is to say that they have the authority to exclude all other reasons for action.⁹⁷ Third, for reasons already discussed, it would seem difficult—if not impossible—to account for the full sense in which morality purports to give rise to *obligations* without incorporating something like this third, exclusionary element.

The notion of an exclusionary reason is, however, a more general notion than that of supremacy. As Raz defines the term, “exclusionary reasons” can differ in scope, and can thus exclude all or only some other reasons that might apply in a given situation.⁹⁸ The concept of an exclusionary reason might thus be used to account for the obligatory nature of a number of non-moral obligations, which we do not typically think of as strictly overriding. A plausible list would include things like social obligations, professional obligations, obligations to friends, and—of course—legal obligations. Some people have argued that morality itself should not, in fact, be understood as strictly overriding.⁹⁹ If they are right, but still want to claim that morality gives rise to obligations of some more limited kind (*i.e.*, as opposed to just reasons to follow rules),

⁹⁴ See generally, David O. Brink, *Kantian Rationalism: Inescapability, Authority and Supremacy*, in *ETHICS AND PRACTICAL REASON* 255, 259-61 (Garrett Cullity & Berys Gaut eds., 1997).

⁹⁵ Brink, *supra* note 94, at 255, 255.

⁹⁶ See, e.g., HART, *supra* note 85, at 89 (defining the internal point of view as concern with rules of conduct from the perspective of a *member of group* who accepts them as general guides for conduct and as grounds for criticizing deviations).

⁹⁷ Brink, *supra* note 94.

⁹⁸ See RAZ, *supra* note 82, at 40.

⁹⁹ See e.g., Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 *PHIL. REV.* 305, 305 (1972). Foot later revised her views, however, in Philippa Foot, *Does Moral Subjectivism Rest on a Mistake?*, 15 *OXFORD J. OF LEGAL STUD.* 1-14 (1995).

then the concept of an exclusionary reason might be used to clarify their position and crystallize what exactly is at stake. Facts like these suggest to me that Raz's notion of an exclusionary reason is framed at the right level of generality to characterize a distinctive and structural feature of obligation in many forms. Indeed, when Raz first develops the notion, he uses it to account for the distinctive perceived reason-giving force that a host of phenomena have—from rules and legally authoritative directives to much more ordinary and garden-variety plans and commitments.¹⁰⁰

At this level of generality, one concerned to absorb both Hart's and Raz's contributions to our understanding of obligation might therefore take the following tack: one might try to build reference to exclusionary reasons into one's understanding of the internal point of view, at least as it applies to legal directives that give rise to obligations. This is, in effect, what Hart did later in his career. In *Commands and Legally Authoritative Reasons*, Hart amends his view in *The Concept of Law* by adding that when we take up the internal point of view toward legal obligations, we take them as providing not just any guide to action but rather with guides that are both “peremptory” and “content-independent.”¹⁰¹ He describes “peremptory” reasons in strongly Razean language, and—although he credits Hobbes as first raising the issue to his attention—he acknowledges that Raz helped him understand the nature and importance of this dimension of the law.¹⁰² In my view, this absorption of Raz's work is both needed and appropriate.

It will be helpful to pause, finally, to remind ourselves of what the foregoing arguments are about before continuing. I have said on a number of occasions that the features of moral and legal authority presently under discussion are “structural.” In the Introduction, I similarly said that this Article would be concerned only with a “meta-ethics” of obligation. By using these terms, I mean to say that arguments like the ones in this section aim to clarify what we mean when we say or believe that we are under an obligation—and how such perceived obligations function in our lives—but not (or at least not directly) what obligations we actually have.¹⁰³ It is, of course, possible to think that there is a connection between these two questions. Kant, for example, famously argues that only one moral standard—namely, his categorical imperative—can have the precise authority that common sense morality purports to have.¹⁰⁴ But these normative questions are still in principle separable from meta-ethical ones, and one need not agree that there is any such connection. It is useful, I think, to understand Raz's work as pointing out structural features of obligation as well,¹⁰⁵ and, hence, as contributing in

¹⁰⁰ See RAZ, *supra* note 82, at 35–39.

¹⁰¹ See H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM* 243, 243 (1982).

¹⁰² *Id.* at 244.

¹⁰³ See generally STEPHEN DARWALL, *PHILOSOPHICAL ETHICS* (1998).

¹⁰⁴ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge University Press, 1998) (1785).

¹⁰⁵ Raz sometimes calls them “logical” features. See, e.g., RAZ, *supra* note 82, at 1725.

part to a meta-ethics of obligation. Raz puts the point in the following way. He says that every legal system has “*de facto*” authority,¹⁰⁶ by which he means that it either claims to have authority (to provide us with exclusionary reasons), or is commonly believed to have such authority.¹⁰⁷ But he distinguishes this from the question whether the law has “legitimate” authority, by which he means that the law really has the reason-giving force it claims for itself.¹⁰⁸ In Raz’s work, like Kant’s, there are ultimately some connections between his meta-ethical views and his normative views, but the two views are—strictly speaking—separable. Hence, one might absorb Raz’s work on exclusionary reasons, and view them as providing useful contributions to a meta-ethics of obligation, even if one were to disagree with him on more substantive normative matters.

B. *Capturing, rather than Excluding, Law’s Authority from the Second Personal Standpoint*

As the last section suggested, Raz has been instrumental in clarifying ways in which the law purports to provide us with exclusionary reasons for action, and, hence, one important and previously underappreciated dimension of legal authority and legal obligation. One might nevertheless accept that legal authority necessarily has some exclusionary force without following Raz to all of the conclusions he tries to draw from this fact. As indicated above, the important Razean conclusion to examine for present purposes is the following: Raz believes that it is inconsistent with the nature of legal authority for the law to be identified by recourse to moral or evaluative criteria.¹⁰⁹ This section discusses Raz’s grounds for believing there is such an inconsistency and then articulates an alternative account of exclusionary reasons that is informed by reflections on the second personal standpoint and would relieve the pressure towards thinking there is a genuine inconsistency.

So how exactly does Raz get from his work on legal authority to the idea that the law must be identifiable solely on the basis of social sources for the law to have its particular kind of authority? Let us begin with some reconstruction. Raz begins with the commonplace that we ordinarily have the basic capacity to engage in practical deliberation and to act on the reasons we perceive as applying to us. When we do so, we engage our capacity to act as autonomous agents, in Raz’s view, and our use of this capacity helps us settle what we think we ought to do.¹¹⁰ We may, for example,

¹⁰⁶ JOSEPH RAZ, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194,199 (1994) (“I will assume that necessarily law, every legal system which is in force everywhere has *de facto* authority.”).

¹⁰⁷ *Id.* (“That [the law has *de facto* authority] entails that the law either claims that it possesses legitimate authority or is held to possess it or both.”).

¹⁰⁸ *Id.* at 194, 200 (“[I]n many cases the law’s claim to legitimate authority cannot be supported. There are legal systems whose authority cannot be supported by the normal justification thesis or in any other way.”).

¹⁰⁹ RAZ, *supra* note 106, at 198-221.

¹¹⁰ In the Introduction to *Authority*, Raz thus frames one of the central questions regarding authority as how we might square it with our personal autonomy. Citing Robert Paul Wolff’s work as raising the

deliberate on the merits of various courses of action, and the process may result in the conclusion that we ought to return something that a friend has loaned us, given the moral reasons that apply to us. We would then view ourselves as having a categorical reason that settles what we ought to do in those circumstances, one which overrides any self interested reasons to the contrary.

Raz accepts these commonplaces but believes that the law operates in ways that are importantly external to all of this, including our capacities for autonomous first personal deliberation.¹¹¹ Clearly, however, the law purports to settle what we ought to do, and, hence—it would seem—to give us direction on the very same question that we commonly ask when engaging in autonomous first personal deliberation.¹¹² If we assume further, with Raz, that ordinary extra-legal reasons exhaust the ordinary reasons that apply to us in first personal deliberation, and that legal reasons nevertheless purport to exclude some of those reasons, then it is a short step to Raz's conclusion that the normal or primary way that the law can do this legitimately is by providing us with guides to what we should do better than our own first personal deliberation would. Raz calls this his "normal justification thesis," and it plays a central role in his account of legitimate legal authority.¹¹³ A closely related thesis is his "dependence thesis," which asserts that all authoritative directives (such as legal directives) should be based on the ordinary reasons (Raz sometimes calls these "dependent" reasons) that apply to the subjects of those directives and which bear on the circumstances covered by the directives.¹¹⁴ Notice that both of these theses rely partly on Raz's substantive normative views and not only on what I have called his meta-ethical reflections.

Together, these two theses also make up what Raz calls the "service conception" of legal authority, according to which the function of law is to mediate between persons and the dependent reasons that apply to them in first personal deliberation and absent the law.¹¹⁵ Raz explicitly connects this service conception up with his earlier work on exclusionary reasons, then, by asserting the "preemption thesis." According to this thesis, the fact that an authority (such as a legal authority) requires performance of an action is a reason for its performance that is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.¹¹⁶ We are still several steps away from Raz's favored conclusions, but what we have here already is an account of both what I will call the normal *function* of law (i.e., to give us

"challenge of philosophical anarchism," Raz says: "And here lies the paradox. In obeying the authority they abdicated their autonomy, says the philosophical anarchist, they abdicated their responsibility to decide on the balance of reasons themselves."

¹¹¹ See, e.g., *id.* at 11-19.

¹¹² See RAZ, *supra* note 106, at 194, 196.

¹¹³ See Joseph Raz, *Authority and Justification*, in *AUTHORITY* 129 (Joseph Raz ed., 1990).

¹¹⁴ *Id.* at 115, 125. Raz complicates this definition in some ways that are not relevant to the argument here. See RAZ, *supra* note 106, at 194, 214 n.13.

¹¹⁵ Raz, *supra* note 113, at 115, 131-32.

¹¹⁶ *Id.* at 115, 124

practical guidance by identifying what we ought to do) and the normal *mode* of law (i.e., to give us this practical guidance by means of instructions that are both general and exclusionary in character).

Now, Raz recognizes—as he must—that the law may not always serve the function that he ascribes to it well or even at all. This just means that the law may not always have “legitimate” authority, in Raz’s terminology, even if it claims to have this authority or is commonly believed to have it. (Presumably, whether the law actually has the authority it claims will depend on what precisely the law requires of us.) Still, if the law is to function in what I have called its normal mode—i.e., if there is to be anything that we can understand as a specifically legal directive that requires an action of us regardless of what we would otherwise decide to do—then, on the present assumptions, it would seem that we must be able to identify what the law requires of us without engaging in the very same first personal deliberation that the law necessarily excludes.¹¹⁷ This is because—as Scott Shapiro has recently put it quite vividly—“Telling people that they should act on the rules that they should act on is not telling them anything! Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms. However, a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless.”¹¹⁸

The relevant point can, in fact, be put in slightly different terms, which will further clarify Raz’s point. Just as Raz recognizes that the law may not always serve the normal function he ascribes to it,¹¹⁹ he is aware that the law may not always function in what I have called its “normal mode.” In Raz’s view, this would happen if legal officials were to employ a social convention that incorporated moral criteria to identify the law, one telling them in effect to identify what we ought to do by engaging in substantive moral reflection. Judges using such a rule would be deciding what the law is on moral grounds.¹²⁰ But—and this is the important point—the law would not be playing any independent role either in helping them determine what we ought to do or in providing anyone with any independent exclusionary guidance on that question. Morality would have already done that on its own, as it were; and judges would merely be deciding legal disputes on the basis of what we all know *morality* requires. This—according to Raz—should therefore be understood much more like cases where judges are called upon to apply the laws of a foreign nation.¹²¹ Applications like these in no way transform foreign laws into domestic laws, or make foreign obligations into obligations arising from domestic law.¹²²

¹¹⁷ See RAZ, *supra* note 106, at 194, 196-99.

¹¹⁸ Scott J. Shapiro, *On Hart’s Way Out*, in HART’S POSTSCRIPT 149, 177 (Jules L. Coleman ed., 2001).

¹¹⁹ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 3-27 (1979)

¹²⁰ See, e.g., Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 10-12 (2005).

¹²¹ See *id.* at 10.

¹²² See *id.*

For there to be a distinctively legal (as opposed to moral) obligation in play, we must therefore be able to cash out how the law might provide us with a *distinctive* source of exclusionary practical guidance on what to do, in Raz's view.¹²³ We must be able to identify what the law independently requires of us, and not just decide legal questions based on what morality requires of us. Raz infers from considerations like these that judges must employ an exclusive rule of recognition to identify the law: a rule that identifies the law's requirements based wholly on social facts, and not on moral insight.¹²⁴ Importantly, the class of social facts that might fit this bill is broad, and can in principle include everything from informal custom and precedent to explicit legislation.¹²⁵ Still, if and when the law is identifiable not on these kinds of bases but rather on the basis of substantive moral criteria, Raz believes we can no longer make sense of the idea that there is a specifically *legal* obligation in play.

Before assessing this line of argument, it is important to acknowledge Raz's account for what it is. It is a subtle and highly nuanced account of how the law could provide us with a distinct class of exclusionary reasons for action, one that takes seriously the desideratum that we be able to cash out how this exclusionary guidance operates in terms of concrete practical effects. The sense in which law's reasons are exclusionary is given practical teeth, in Raz's account, through the suggestion that we can identify what the law requires of us based wholly on social sources, and without engaging in the very deliberation that the law's requirements are meant to exclude. The law can thereby settle what we ought to do and independently move us to act, where the ways that it is capable of moving us are comprehensible upon reflection. Indeed, absent some other account of how the law's exclusionary character shows up in our practical lives, or a rejection of law's exclusionary character, I see no easy way to avoid Raz's conclusions.

As the above sketches of Raz's argument suggest, however, much of the pressure toward his particular conclusions arises from trying to account for law's exclusionary character solely from the first person perspective of deliberation. Darwall's recent work on the second personal standpoint might therefore prove helpful at just this juncture. This work clarifies, in particular, that there is another distinctive and irreducible practical standpoint that might be used to develop an alternative account of the law's exclusionary character. Taking a lead from Darwall, one might therefore try the following thought:

- (*) *the law provides us with exclusionary reasons for action, which can have genuine and distinctive practical effects in our lives, insofar as the breach of a legal obligation—however identified—gives some other person or group the second-personal standing to raise a legal claim for non-compliance.*

¹²³ See, e.g., RAZ, *supra* note 106, at 194, 196-99.

¹²⁴ See *id.* at 195-219.

¹²⁵ See JOSEPH RAZ, *Legal Positivism and Sources of Law*, in *THE AUTHORITY OF LAW* 48 (1979).

This idea should already have some basic intuitiveness to it, and it is in fact a legal analogue of what Darwall urges us to acknowledge about moral obligation—namely, that to understand moral obligation we must see it as giving some person or group the second personal standing to raise (moral) claims for non-compliance.¹²⁶ This account of legal obligation would also place it within a familiar tradition in moral and political philosophy. The basic idea already arises in embryonic form in Mill's famous account of obligation, for example, where he says that "[w]e do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience."¹²⁷ For reasons to be discussed in the next section, many of Hart's relevant descriptions of the internal point of view also fit nicely within this tradition—though this is a topic that will be returned to in the next section, where it can be discussed in greater detail. These provide sufficient grounds at least to try out the idea.

An account of this kind would also relieve much of the pressure toward exclusive legal positivism. This is because reference to the second personal standpoint reveals an important source of practical differences that the law can still make, even if the law incorporates moral criteria or must be interpreted in its best moral light. To say that one ought (as a matter of law) to do what one ought (as a matter of morality) to do might say nothing of practical significance when the statement is assessed solely in terms of its implications for first personal deliberation.¹²⁸ But the statement does appear to give rise to different second-personal implications. The claim implies, in particular, that some person or group has the second-personal standing to raise not only a moral but also a legal claim for non-compliance. In practice, this is thus a distinction that shows up not in our first personal thinking about how to act but rather in our second-personal thought about how to *react* to one another, and what reactions are either warranted or permissible. The practical difference that this makes in our lives would, moreover, appear to be of the right kind. It is true, for example, that a judge employing an inclusive rule of recognition, or identifying the law in its best moral light, would be basing her legal conclusions at least partly on substantive moral or evaluative criteria. Still, the fact that she believes that the *law* requires a specific action would be different her belief that *morality* requires that same action, and this difference would show up in the fact that she believes the legal obligation to give some person or group the second-personal standing to raise a specifically legal claim for non-compliance. That is a distinct thought—on the present account—with distinct practical effects that are guided by the judge's recognition of the obligation as a specifically legal obligation.

¹²⁶ Stephen Darwall, *Moral Obligation and Accountability*, in *THE SECOND PERSON STANDPOINT: MORALITY AND ACCOUNTABILITY* (forthcoming 2006) ("That an action would cause severe harm . . . is a reason for someone not to do it, whether or not there is such a thing as a normative standing to demand that. But the action cannot violate a moral obligation unless such a standing exists, so the reason that derives from the moral obligation must be second-personal.").

¹²⁷ JOHN STUART MILL, *UTILITARIANISM* 193 (Bantam Books 1993) (1863). It is particularly relevant that Mill, who is a consequentialist, would nevertheless agree on this basic feature of obligation. *See id.*

¹²⁸ Ultimately, I think even this contention may be too strong, for reasons discussed in Section IV, *infra*.

Naturally, for an account like this to work, we must be able to distinguish between moral and legal claims. I think we do make this distinction, however, at least intuitively. We might also try to make it more precise. In my view, for example, moral claims are expressive of a number of characteristically moral emotions like blame, resentment, guilt, shame, indignation, and the like, which give life to the charged settings in which we take one another to task for perceived wrongs, make excuses, point to justifications, seek reconciliation, and the like.¹²⁹ When we bring moral complaints against one another and answer them, we hash things out under a shared standard of the right that we take ourselves each to be capable of accessing on our own, and the content of which is coordinated through processes of informal discussion and living in the kinds of small group settings that characterized our environment of evolutionary adaptation.¹³⁰ Legal claims, by contrast, are raised to external authorities, and—in my view—engage attitudes of deference to such authorities for final binding adjudications of the disputes.¹³¹ Legal officials also employ a distinguishable standard to identify the content of the law, which we do not all take ourselves to have independent access to. Often—though not always—legal claims also give external authorities, rather than private individuals, the standing to sanction relevant breaches.¹³² Importantly, however, this is only one view on how to make the distinction more precise, and nothing in this Article hinges on the validity of this particular attempt to provide clarification. The main arguments presented here should thus survive ongoing debate on how to draw this particular distinction.

The foregoing discussion should have established that there is a way to make sense of how the law might show up in our practical lives as a distinctive phenomenon, which makes reference to the second-personal standpoint and, hence, would not require the law be identified solely on the basis of social sources like precedent and legislation. The basic contours of the view should also be clear enough, and the view should have some preliminary motivation and *prima facie* intuitiveness behind it. Still, it is one thing to make initial gestures like these, and quite another to argue for adoption of the view. The next subsection will present six considerations that speak in favor of such an adoption.

C. *Six Grounds for Adopting the New Account*

There are at least six important reasons to adopt an account of legal authority and legal obligation that allows the law to make practical differences in our

¹²⁹ See generally Kar, *supra* note 56.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² There are some examples of so-called “primitive” legal systems that allow for organized adjudications but leave the sanctioning to private individuals and their kin or social cohorts. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 291-92 (notes to page 94) (discussing adjudication without organized sanctions in the Nuer and early Roman law).

lives that show up not only in the first personal perspective of deliberation but also in the second personal standpoint—as elaborated in the last subsection.

The first relevant consideration begins by accepting Raz’s maxim that we should seek an account of legal authority that captures the full sense in which the law purports to be non-optional. The discussions thus far have suggested that there are at least three such senses: first, the law purports to give rise to standards for action that are general in application, irrespective of a person’s antecedent aims, desires or interests; second, the law purports to give rise to reasons for action that are independent a person’s antecedent aims, desires, or interests; and third, the law purports to give rise to reasons for action that exclude at least some class of other reasons for action. But—as Stephen Darwall has observed in the related context of moral obligation—this cannot be enough to give rise to the sense that there is an *obligation* in play.¹³³

Perhaps the easiest way to see this is by examining the rules of deductive logic. Deductive logic contains a set of rules of inference that clearly meet the above three criteria: they have not just general but universal application, they give rise to reasons to revise various beliefs so as to render them consistent, and these reasons are overriding or have the standing to exclude any reasons we may have to want to maintain such inconsistencies despite the rules of logic. This does not mean that we always follow the rules, of course, but this is presumably what we mean when we say that logic gives rise to *requirements* on our thought. Still, nothing so far establishes that deductive logic gives rise to *obligations*, at least on its own, and it would seem to reflect an overly moralized sense of logic to claim anything to the contrary. The difference between logic and morality—according to Darwall—is that in the case of logic we do not typically think the of the rules of inference as giving others the second personal standing to raise claims for non-compliance.¹³⁴ We can, of course, correct each other for logical mistakes, and often do—but this is very different. We can also sometimes acquire obligations to think logically or to render our beliefs logically consistent, which arise from things like professional obligations in the academy, or background maxims that govern ordinary conversation, or our participation in genuine moral or legal argumentation. But deductive logic is not itself a set of obligations.

If, moreover, reference to the second-personal standpoint is necessary to characterize the distinctive authority that legal obligations purport to have, then the account on offer here better captures essential features of legal authority than Raz’s current view. As noted, one of the basic motivations for Raz’s move to exclusive legal positivism is that he believes it is the only view that can be rendered consistent with the full facts about legal authority. Consistency of this kind is indeed very important. But if further reflection on the facts suggests that legal authority must be understood in part by reference to the second personal standpoint, and if this fuller account of legal authority

¹³³ See, e.g., Darwall, *supra* note 5 (“What we are morally obligated to do is what we can warrantedly be held responsible for doing, what the moral community can and does demand that we do.”).

¹³⁴ As Darwall puts it: “But [categoricity] is only part of it, since there can be requirements *on* us that no one has any standing to *require of* us. We are, for example, under a requirement of reason not to believe propositions that contradict the logical consequences of known premises. But it is only in certain contexts, say, when you and I are trying to work out what to believe together, that we have any standing to demand that one another reason logically.”). *Id.* at 3.

and legal obligation is perfectly consistent with inclusive legal positivism, then Raz's motivation should be redirected and turned away from his current preferred conclusions.

The use of logic as an example is vivid, and is therefore particularly good for explanatory purposes. It is important to recognize, however, that nothing in the argument so far depends on the fact that logic governs our theoretical reasoning about what third personal beliefs to maintain rather than our first personal practical reasoning about how to act. As an initial matter, logic purports to govern both.¹³⁵ Moreover, there are perhaps less vivid but equally valid examples of rules that govern action alone and that make the same point. Consider, for example, the Western rules of etiquette governing which side of the plate to put the forks, and which side the knife. If we accept these rules, we might think that "forks really must go on one the left, and knives on the right." We might also exhibit this acceptance by correcting others for mistakes or pointing them out. Still, we need not think of the rules as giving anyone the standing to raise claims against one another for non-compliance.¹³⁶ It is *possible* to think this way too, but it would seem to require a further thought on our part; and this further thought would seem to entail that we take the rules as giving rise to something more obligatory—to obligations. Perhaps we will think this further thought if—as in the example from the last section—we are in a situation where we have an obligation to a friend to act appropriately and respectfully in an important social situation, where everyone accepts these particular rules of etiquette, and takes them to express respect for the occasion. Absent second personal consequences like these, however, the rules are just rules.

A second and closely related consideration that favors the present account can be clarified with the aid of Don Regan's helpful remarks in *Authority and Value*.¹³⁷ In that Article, Regan reviews Raz's views on legal authority as presented in *Morality of Freedom*, and shows that an important kind of rule, which he calls an "indicator rule," can meet both Raz's service conception of authority and Raz's preemption thesis, thus showing itself capable of having the precise kind of authority that Raz attributes to the law.¹³⁸ As Regan defines them, indicator rules are rules that derive their authority from their capacity to help produce intrinsically valuable states of affairs in the world, and that thus make unconditional demands on our moral attention.¹³⁹ We can reasonably debate what, if anything, has this particular status, but whatever has this status is intrinsically worthy of pursuit. In Regan's words, indicator rules can thus help us "promote noncontingent, obligatory ends."¹⁴⁰ But Regan is careful to distinguish this fact from the

¹³⁵ See, e.g., Gärdenfors & Sahlin, *supra* note 49, at 1, 6.

¹³⁶ See, e.g., STEPHEN DARWALL, *Moral Obligation and Accountability*, in THE SECOND PERSON STANDPOINT: MORALITY AND ACCOUNTABILITY (forthcoming 2006) (discussing Phillipa Foot's comparisons between morality and etiquette) ("The point is that *accountability* is no part of the concept of etiquette in the way it is of moral obligation.").

¹³⁷ 62 S. CAL L. REV 995 (1988-89).

¹³⁸ *Id.* at 1003.

¹³⁹ See *id.* at 1005.

¹⁴⁰ *Id.*

thought that the rules give rise to obligations in the full sense that we commonly think of in relation to law and morality. This is because the rules are merely fallible guides to non-contingent ends. As Regan puts the point quite nicely, indicator rules are thus “something more substantial than a rule of thumb, but less substantial than a rule *simpliciter* (even after we take into account that most rules *simpliciter* impose only *prima facie* obligations).”¹⁴¹ Here is one of Regan’s examples:

Let us assume for purposes of argument (what I take to be true) that sex between unmarried persons is not invariably immoral, but that it is to be avoided if either party’s participation is not fully voluntary. Under these circumstances, an excellent indicator rule for a university faculty member is not to have sexual relations with any of his (or her) students. . . . This indicator-rule is not infallible. It is not impossible that a student should have sex fully voluntarily with her (or his) professor, and so the indicator-rule in question might lead one to avoid a non-harmful, perhaps even a genuinely valuable, relationship. But it is very unlikely that the student’s participation is fully voluntary, even if the professor does nothing that could possibly be thought of as actively coercive. So, “Never have sex with your students” is a good, albeit fallible, indicator-rule.¹⁴²

But if indicator-rules like these fit Raz’s account of legal authority, then—as Regan points out—Raz’s account of legal authority does not capture the full sense of authority that legal obligations purport to have. Indicator rules are in fact less obligatory than Raz perceives the law to be, and Regan acknowledges this fact by saying that Raz “wants obligations to be a bit more substantial, friendship to be a bit ‘thicker,’ and commitments to particular projects to be a bit more existentially significant than they really are.”¹⁴³ But Regan himself thinks we should reject this further sense of obligatoriness because Regan himself is a sophisticated consequentialist, who recognizes that this further sense cannot be fully squared with a fundamentally consequentialist theory of value. Regan think that Raz’s basic account of legal authority is nevertheless correct, and so he pins a form of consequentialism on Raz, “perhaps to some extent *malgré lui*”—or despite himself—as Regan nicely puts it.¹⁴⁴

I have said that Regan is a “sophisticated consequentialist.” By this, I mean to distinguish him from consequentialists who assume that preference satisfaction (of some kind) is the sole goal worthy of pursuit and do not accept the value of further reflection on this question.¹⁴⁵ As indicated earlier, the thought that preference

¹⁴¹ *Id.* at 1004.

¹⁴² *Id.* at 1005.

¹⁴³ *Id.* at 999.

¹⁴⁴ *Id.* at 997.

¹⁴⁵ See, e.g., *id.* at 998 (agreeing with the need to reject certain views “common among consequentialists concerning what has intrinsic value or what we should promote,” which include the views that (i) pleasure

satisfaction is valuable springs readily to mind, but Regan thinks that knowing what is intrinsically valuable can be much harder than this and deserves further reflection.¹⁴⁶ It would thus be possible to learn, in the process, that many other things are intrinsically valuable, such as friendship, self-respect, dignity, or perhaps human happiness, which, as Mill defines it, is “not a life of rapture, but moments of such, in an existence made up of few and transitory pains, many and various pleasures, with a decided predominance of the active over the passive, and having as a foundation of the whole, not to expect more from life than it is capable of bestowing.”¹⁴⁷ Still, acceptance of a fundamentally consequentialist view would have two distinct effects. First, it would mean that legal or moral rules like “Never have sex with your students” should be deemed fallible, and, hence, should allow for exceptions in some cases where it is clear that none of the purposes behind the rule are being served. I have no interest in challenging this part of Regan’s views. Second, it would mean that even in cases where the purposes behind various legal and moral rules are being served by giving rise to obligations *to* specific people, the perceived agent-centered force of these obligations would be illusory in the final analysis. Hence, specific persons should always lack standing to bring successful claims for non-compliance if the person who has breached the purported obligation has done so to cause two or more others to fulfill their obligations in equally weighty circumstances. I will be concerned to challenge this second consequence here.

This second consequence would, indeed, make moral and legal obligations out to be less obligatory than we commonly take them to be. An account of obligation that makes reference to second-personal standing to raise claims for non-compliance would, on the other hand, bridge this particular gap. Though this point can in principle cut both ways, considerations like these provide a second reason to think that Raz’s account of legal authority cannot fully capture the distinctive normative force that we commonly take legal obligations to have. Hence, if Raz is to resist being dubbed a consequentialist about legal authority—even, perhaps, to some extent *malgré lui*—Raz may need the account on offer here to ground his resistance.

A third set of considerations that speak in favor of the present account arises from reflection on a number of commonplaces about our uses of moral and legal language. These commonplaces rest on a distinction that philosophers are now quite familiar with: the distinction between expressing various psychological attitudes (such as beliefs) in language, and using language to say that one is in the relevant state of mind. In *Commands and Authoritative Legal Reasons*, for example, Hart says that “[p]hilosophers are no doubt now quite familiar with these distinctions which enable them for any proposition ‘p’, not mentioning the speaker’s belief, to explain the oddity of

is the sole such good, that (ii) we should promote the satisfaction of desires as such, and that (iii) that even “informed desires” or “rationally criticized desires” can capture what has intrinsic value.).

¹⁴⁶ See *id.* at 998 (describing as “a very difficult project which has received to little attention” “the project of identifying what we really think is good, once we agree it is not pleasure or the satisfaction of desire”) (“Once we try to say just what is valuable in friendship, or just what should be our attitude and behavior to great art, or just how it is that certain actions have intrinsic value or disvalue, we find that these questions are much more difficult than they may have appeared.”).

¹⁴⁷ MILL, *supra* note 127, at 193.

saying ‘p but I do not believe that p’ without maintaining that we have here a contradiction or that p means or entails that I believe p.”¹⁴⁸ Hart uses distinctions like these to motivate his own rejection of Bentham’s command theory of law.¹⁴⁹ If, however, we have correctly identified various structural or meta-ethical features of legal authority and legal obligation, then we might expect to find them reflected in similar oddities in our moral and legal language.

We do in fact see such phenomena, at least in relation to the account proposed here. For example, it would sound odd to address someone second-personally and say, “What you did to me was wrong, and I don’t blame you for doing it.” It is hard to know what exactly one might mean with such an expression. Similarly, it would be hard to understand what someone might mean if he were to say, “What you did to my friend was wrong, and he has no right to be upset with you or blame you for it.” We could, on the other hand, easily explain these facts if—as Darwall has suggested—blame is an implicitly second personal response to moral wrong, and if our moral language were in part expressive of attitudes that have an intrinsic tie to such second personal reactions and their perceived warrant.¹⁵⁰ The pattern of explanation is one that could, moreover, be extended to similar phenomena in the law. For example, we would not quite know what to do with a judge’s pronouncement that ended a bench trial or a written opinion with: “The defendant therefore has a legal obligation to compensate the plaintiff, and I hold for the defendant.”

By contrast, some of the purportedly logical features of Raz’s narrowly first personal account of legal authority lack this particular quality. There is, for example, nothing obviously odd about a judge saying something like: “The modern law of contracts does not allow for the legal enforcement of all promises, but where—as here—the defendant’s promise was also supported by consideration, the defendant had a legal obligation to follow through with the clear demands of conscience.” This is a case where both judge and citizen may be identifying what the law requires in part by drawing on substantive moral insight, but where the statement appears perfectly informative. This manner of identifying legal obligations, when explicitly recognized, seems perfectly compatible with thinking that there is still a distinctive legal obligation in play.

Let me expand on this last example to clarify a fourth consideration favoring an account that makes reference to the second personal standpoint to cash out some of the practical effects of legal obligations. Contract law is an instructive case because it is an area of the law that is commonly thought to incorporate moral requirements, while narrowing them to allow for the legal enforcement of only some promises that might otherwise be morally binding. One might dispute whether this reference to moral criteria is ineliminable, and try to argue that there are now social facts that allow legal officials to know that there is a legal obligation to follow through with certain promises or pay compensation. But this would seem to miss a critical practical point of the law of contracts. By allowing individuals the standing to enforce certain

¹⁴⁸ H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *AUTHORITY* 97 (Joseph Raz ed., 1990).

¹⁴⁹ *See id.* at 93-102.

¹⁵⁰ *See* STEPHEN DARWALL, *Moral Obligation and Accountability*, in *THE SECOND PERSON STANDPOINT: MORALITY AND ACCOUNTABILITY* (forthcoming 2006).

forms of promissory exchange in courts of law, the modern law of contracts helps create the conditions of trust needed for non-simultaneous exchanges between relative strangers. This greatly expands the boundaries of our cooperation, and allows for the rise of markets as vehicles to human welfare. This is not, moreover, an ancillary practical consequence of contract law, which takes a back seat to the role that social facts now play in helping us recognize that we have a duty to keep our promises. This is the more important practical consequence of contract law. Indeed, the second personal standing to raise legal complaints for non-compliance in circumstances of exchange may be of such practical importance that—as some authors have suggested—its existence is what principally distinguishes first world from developing nations and explains the varying degrees of economic success that they have been able to achieve. According to Nobel Laureate Douglas C. North, for example, “the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.”¹⁵¹

This last example has, moreover, been chosen very carefully for a related reason. As Raz has rightly notes, we should not be too quick to assume that every time a legal official decides a case by applying a given standard, the official is thereby incorporating that standard into the law. Raz urges that we have at least an intuitive idea of the distinction between genuine incorporation and applying non-legal standards. Still, contract law is in no way a tangential phenomenon, comparable to instances where courts might be called upon in isolated instances to decide cases in accordance with some foreign set of laws. Contract law instead is a central feature of the law of many nations, and it seems on its face to incorporate, at least in part, a moral norm the content of which we all have ready access to. And while it would be plausible, when employing Raz’s distinction, to think that the specific obligations that arise from a particular contract are not literally parts of the law, it is much less plausible, under that same standard, to think that the basic obligation to keep our contracts is not a genuine legal obligation. This is a legal obligation the content of which we often identify in part on the basis of moral criteria. Given that important and central areas of the law have this particular quality to them, an account of the law would—all other things equal—be more satisfying if it were to illuminate how these areas of the law might give rise to genuine legal obligations.

Fifth, it is important to recognize that reference to the second personal standpoint is an implicit feature of legal adjudication. When a judge decides a case, one part of her decision will involve determining whether a legal standard has been breached and whether that breach warrants some kind of legal response. But if a judge decides these questions in the affirmative and renders a verdict, this is not all the judge is doing. This is because a judge can only hold for a particular party who has brought a suit if the party in addition has the standing to raise the claim. Indeed, this standing requirement is

¹⁵¹ INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). Some more recent authors have questioned whether formal legal enforcement mechanisms are really necessary for this kind of development, but these authors tend to argue that there are informal substitutes that can do the same work in particular social contexts, thus effectively assuming the same basic point about the need for conditions of trust to underwrite exchanges among strangers. See, e.g., Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99, 108 (2004); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 92-94 (2003).

so fundamental that—as William Fletcher has noted—it is read into the Constitution even though the Constitution has no explicit language stating the requirement.¹⁵² Moreover, “standing is a preliminary jurisdictional requirement, formulated at a high level of generality and applied across the entire domain of law.”¹⁵³ What this means is that courts only have the power to decide and render judgments concerning the violations of legal standards in cases where the party bringing the claim has the second-personal (legal) standing to do so. Moreover, while one might try to argue that these facts are merely local facts about domestic law, there would seem to be a rather fundamental difference between the adjudication of disputes under the law and abstract statements about the law or orders that certain actions be taken made by political institutions. Only the former would seem to be specifically *legal* decisions—as opposed to advisory opinions or executive orders.

If no court has the authority to adjudicate a claim that someone has breached a purported obligation, then it would seem to make little sense to say that there is anything we might recognize as a legal obligation still in play. Hence, even run-of-the-mill, ordinary adjudications implicitly show that reference to the second-personal standpoint and standing to raise claims is an implicit feature of legal obligation.

Finally, sixth, it is worth remembering that Raz’s account of *de facto* legal authority is influenced in part by his substantive normative views, including his belief that the law obtains what authority it has from morality. For reasons discussed above, it is this belief that, in part, pushes Raz to the conclusion that the law must give us independent source-based guidance on the very same question to which morality speaks if the law is to have legitimate authority. This conception of legitimate legal authority is, however, a form of moral foundationalism: it seeks to ground legal authority in, or derive it from, morality. This conception thus reflects commitment to a substantive, normative view in political theory, which goes well beyond any claims about the meta-ethics of legal obligation. It is also a normative view that is separable, at least in principle, from positivism. An alternative would be to join John Rawls and seek instead to understand what legal obligations we legitimately have by engaging in what he calls “wide reflective equilibrium.”¹⁵⁴ Gilbert Harman has, in fact, recently identified the rejection of what he

¹⁵² See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222-23 (1988). Fletcher has argued that some of the standing requirements (such as “injury in fact”, “causation in fact” and “redressability”) that are read into the Constitution should be eliminated, thus giving Congress the unlimited power to decide who has standing to raise a claim, but the fact remains that Congress does not have this right and highly intuitive features of second-personal standing remain a deep and pervasive part of the law.

¹⁵³ *Id.* at 223.

¹⁵⁴ Norman Daniels has provided a lucid definition of “wide reflective equilibrium” as follows:

The method of wide reflective equilibrium is an attempt to produce coherence in an ordered triple of sets of beliefs held by particular persons, namely (a) a set of considered moral judgments, (b) a set of moral principles, and (c) a set of relevant background theories.

calls “special foundationalism”—which would include Raz’s form of moral foundationalism—as one of the “three good trends in moral and political philosophy over the last fifty years.”¹⁵⁵ Harman thinks that the process of reflective equilibrium is a surer route to knowledge about when common sense moral rules and legal requirements might have the specific authority they claim.¹⁵⁶

Clearly, this is not the place to try to enter into these complex substantive and methodological debates. The relevant point here is just that Raz’s substantive normative position helps motivate, and is in turn partly motivated by, his particular account of how exclusionary reasons function in first personal practical deliberation to give rise to requirements on action. The views are mutually supporting and make up part of an internally coherent and interdependent set of views about de facto and legitimate legal authority. For those of us who would question Raz’s commitment to moral foundationalism, however, there is one less motivation to accept his particular account of how exclusionary reasons provide us with practical guidance, and some reason to abandon it. The existence of the alternative account on offer here can, in fact, help pave the way for a number of non-foundationalist accounts of legitimate legal authority, which may be in better keeping with contemporary insights on normative methodology.

III. HART AND A RENEWED DIRECTION FOR LEGAL POSITIVISM

The preceding section presented a number of philosophical reasons to resist the claim that Raz’s important and influential work on legal authority necessitates a move to exclusive legal positivism. The section also outlined a distinctive way of capturing the most important aspects of Raz’s work, by extending some of Darwall’s recent thought on the second personal standpoint to produce a richer account of legal obligation. I have argued that this alternative better—and perhaps uniquely—captures the full facts about legal authority, and helps illuminate the full range of ways in which the law can show up in our practical lives by providing us both with guides to action and grounds for specific kinds of critical reactions to normative deviations. Arguments like these would surely help someone like Hart absorb Raz’s contributions without having to follow Raz to his exclusive legal positivist conclusions. There is, however, still a separate question as to how best to interpret Hart, and whether the position developed here represents the best elaboration of his basic views and core jurisprudential commitments. This question is partly exegetical, but partly also philosophical—at least in this particular case. I say this because, for reasons to be discussed, an answer will require resolving various tensions in Hart’s thought and writing in ways that best capture his most fundamental positivist commitments.

This section begins by discussing some of the relevant tensions in Hart’s work. There is a well known inconsistency, which is commonly attributed to Hart, and

Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76:5 J. OF PHIL. 256, 258-59 (1979). This same process can—and has in the case of Rawls—led to independent inquiry into what our genuine political obligations are. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971).

¹⁵⁵ Gilbert Harman, *Three Trends in Moral Philosophy*, 37 VALUE INQUIRY 415 (2003).

¹⁵⁶ *Id.*

which would challenge the coherence of his version of inclusive legal positivism. The first subsection describes that purported inconsistency, but argues that it only arises if Hart is interpreted as insisting that the law must be capable of making a practical difference in our lives in ways that are narrowly first personal. Once this fact has been recognized, a close look at Hart's text suggests that there was an even deeper and underappreciated tension in Hart's thought on just this issue. As discussed below, although Hart sometimes used language suggesting commitment to this narrow version of the practical difference thesis, Hart also exhibited an implicit understanding of the need to refer to something like the second personal standpoint to produce a satisfying account of legal obligation throughout his career. This understanding even developed to the point of near explicitness by the time Hart ended this career. What Hart lacked was the vocabulary to fully articulate this understanding, which fact made him feel constrained to describe his absorption of Raz's insights in ways that are—strictly speaking—inconsistent with other parts of his views. It is my belief Hart had some understanding of these issues, however inchoate and undeveloped, and that this fact—rather than any failure to understand Raz's work or its supposed implications for positivism—ultimately explains his resistance to exclusive legal positivism.

Regardless of whether these last claims are true, however, the second subsection argues that the account on offer here better captures and harmonizes Hart's core jurisprudential commitments. If this is right, then any vestigial tensions in Hart's mature views should be resolved in favor of the present account. Hart would (or at least should) have welcomed the present account as an appropriate development of his own, and as the right basic framework from within which to further develop and refine legal positivist theory. He would have recognized it as the right basic framework from within which to understand the law, including the relevant grounds for choosing between positivist and non-positivist accounts of the law.

A. *Locating the Deeper Tensions in Hart's Views*

This subsection aims to clarify some of the relevant tensions in Hart's views. As indicated above, Hart remained relatively silent during many of the early debates between inclusive and exclusive legal positivists. In his posthumously published *Postscript to The Concept of Law*, however, Hart explicitly endorsed an incorporationist version of positivism, according to which officials identify the law by means of a rule of recognition that can in principle incorporate moral criteria.¹⁵⁷ The received view has it that this endorsement—which was in fact implicit in his work even as early as *The Concept of Law*—created an important tension in Hart's views. Jules Coleman, for example, is the predominant living inclusive legal positivist and is charitable to Hart's views. Coleman nevertheless acknowledges that there is at least an apparent inconsistency, and Coleman's discussion will thus be useful in locating the problem.

The relevant tension arises from the fact that Hart, as commonly interpreted, held three inconsistent theses. As Coleman has observed, there is “overwhelming textual and philosophical support for the view that, in addition to

¹⁵⁷ See H.L.A. HART, *THE CONCEPT OF LAW* 250-54 (2d ed. 1994) (1961).

Incorporationism, Hart accepts . . . the Conventionality and the Practical Difference Theses.”¹⁵⁸ Coleman defines the Conventionality Thesis, roughly, as “the claim that law is made possible by an interdependent convergence of behavior and attitude: what we might think of as an ‘agreement’ among individuals expressed in a social convention or rule.”¹⁵⁹ Coleman then parses the Practical Difference Thesis as “the claim that, in order to be law, authoritative pronouncements must in principle be capable of making a practical difference: a difference, that is, in the structure or content of deliberation or action.”¹⁶⁰

But, as Coleman has observed, the Practical Difference Thesis—so construed—cannot be held in combination with both Incorporationism and the Conventionality Thesis. Earlier sections have already clarified one important reason why this is so: it would be difficult, if not impossible, to account for how the law might provide us with exclusionary practical guidance if these effects were to have to be cashed out in wholly first personal terms and if one were to permit the legal rule of recognition to incorporate moral criteria. This was Raz’s basic point, and while one might in principle try to resist this move by rejecting Raz’s contributions to our understanding of legal authority, Hart importantly—and rightly, in my view—did not do this. By the end of his career, Hart instead explicitly acknowledged that reference to something like exclusionary reasons (he called them ‘peremptory reasons’) was needed to fully capture the specific kind of authority that the law purports to have in our lives, and he began to build such reference into his account of the internal point of view in relation to legal obligations.¹⁶¹ Hence, if it is appropriate to attribute to Hart the Practical Difference Thesis—as so far construed—then Hart would indeed seem to hold an inconsistent trio of beliefs. This is in part¹⁶² why Coleman has said that “[w]hereas I believe that Hart is more likely to have abandoned Incorporationism, thus bringing his position considerably closer to Raz’s in crucial respects, I propose that we abandon or at least significantly modify the place of the Practical Difference Thesis within positivism.”¹⁶³

The last section should have also clarified, however, that there are at least two ways to cash out a relevant Practical Difference Thesis. According to the first—which Coleman and the exclusive legal positivists have thus far attributed to Hart—authoritative legal pronouncements must be capable of making practical differences in our lives that show up in the structure or content of first personal deliberation or action.

¹⁵⁸ Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT 99, 101 (Jules Coleman ed., 2001).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., H.L.A. Hart, *Commands and Authoritative Reasons*, in H.L.A. HART, *ESSAYS ON BENTHAM* 243-68 (2002).

¹⁶² I say “in part” because Scott Shapiro has articulated a distinctive set of arguments that have also influenced Coleman, and have raised the specter of an inconsistency from another angle. Shapiro’s arguments will be addressed in detail in Section IV, *infra*.

¹⁶³ Coleman, *supra* note 158, at 99, 101.

According to the second—which is under development here—the relevant practical differences might show up either from this first personal perspective or in permissions or warrants for specifically legal, second personal reactions to deviations, which can include things like legal demands for compliance, complaints, claims, prosecutions, and the like. Although the first version of the Practical Difference thesis might create an inconsistency in Hart’s views, the second would not—or at least not for any of the reasons Raz has pointed out. Which version should we fairly attribute to Hart?

This last question cannot, in my view, be answered solely on the basis of exegesis. Hart lacked access to contemporary work on the second personal standpoint, and was therefore unable to frame the issue explicitly enough to prompt a conscious and articulate decision that might show up in his text. Still, as the rest of this subsection seeks to establish, a careful look at Hart’s writings will prove useful for two preliminary reasons. First, it will suggest that while there were indeed competing currents in Hart’s views, one important and underappreciated tension involved this very issue. This more basic tension must, moreover, be resolved before any of the more familiar inconsistencies can be fairly attributed to Hart. Second, the textual evidence suggests that Hart was aware, and became increasingly aware, of the need to make the kind of distinction under discussion here. An examination of this textual evidence will therefore set the stage for a more probing look at which version of the Practical Difference Thesis better captures Hart’s core views, and better harmonizes his deepest jurisprudential commitments. That discussion will take place only in the next subsection.

Let us begin, then, with the first prong of what I have called the “underappreciated” tension in Hart’s work. On the one hand, Hart not only claimed to accept many of Raz’s insights about legal authority and exclusionary reasons toward the end of his career; Hart also used terms to describe how peremptory reasons function that are strikingly close to Raz’s. At one point, Hart says, for example, that when one gives a peremptory command, one:

characteristically intends his hearer to take the commander’s will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of the commander’s will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act. The commander’s expression of will therefore is not intended to function within the hearer’s deliberations as a reason for doing the act, not even as the strongest or dominant reason, for that would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it. This I think is precisely what is meant by speaking of a command as ‘requiring’ action and calling a command a ‘peremptory’ form of address. Indeed the word ‘peremptory’ in fact just means cutting of deliberation, debate, or argument”¹⁶⁴

On one highly plausible reading of this passage, Hart is adopting Raz’s account of how exclusionary reasons function in first personal deliberation to make sense of the idea that there is a requirement in play with concrete practical effects.

¹⁶⁴ Hart, *supra* note 161, at 243, 253.

It should be noted that language like this is in no way persistent or pervasive in Hart's work. Still, it does appear explicitly, at least late in his career. For reasons already discussed, there is also great pressure to understand exclusionary reasons in roughly this way if one aims to understand them wholly from within the first personal standpoint, and if one takes seriously the desideratum that this exclusionary force must be accounted for as capable of having real practical effects in our lives. Hart's adoption of Raz's language is thus—to my mind—wholly understandable, at least in the absence of a clearly defined alternative.

On the other hand, there is a competing strand in Hart's writing, which appears to reflect a more consistent commitment to a version of the Practical Difference Thesis that references second personal phenomena. Consider, for example, the kinds of passages on the basis of which exclusive legal positivists typically attribute the Practical Difference Thesis to Hart. When Scott Shapiro makes the attribution, he says that "the only function that all law can be said to satisfy, according to Hart, is that it seeks to guide human conduct."¹⁶⁵ Shapiro's support for this proposition is the following remark by Hart in his *Postscript*: "I think it quite vain to seek any more specific purpose which law serves as such beyond providing guides to human conduct *and standards of criticism of such conduct*."¹⁶⁶ But once we have a clearer understanding of how the second personal standpoint is distinct, we can see that this passage actually makes dual reference both to guides to action and grounds for reaction. Indeed, Hart consistently describes the internal point of view with language that makes such dual reference throughout his career.¹⁶⁷ And while Hart did not yet have the vocabulary to ask whether this second element should be framed in terms of specifically second personal standing to raise claims, Hart's repeated use of the conjunction does suggest something very important for present purposes. It suggests that Hart thought these two elements were distinguishable and did independent work in his account of the law. The second element is, moreover, one that directly guides criticisms of conduct, not conduct.

Not all such reaction is, of course, second personal. As earlier discussions have noted, we sometimes use normative language merely to call attention to the fact that a particular case meets or fails to meet a given standard, as, for example, when we point out a logical or mathematical error in circumstances where no one has an obligation to get things right. It seems to me that Hart did not always adequately distinguish such uses from our more robust uses of normative language involving obligations when he wrote *The Concept of Law*. For example, while Hart took great pains to distinguish his account of obligation from earlier predictive accounts, he sometimes tried to clarify the distinction with words like the following:

¹⁶⁵ Scott Shapiro, *On Hart's Way Out*, in HART'S POSTSCRIPT 149, 170 (2001).

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., HART, *supra* note 157, at 57, 84, 85, 90; Hart, *supra* note 161, at 243, 257; H.L.A. Hart, *Legal Duty and Obligation*, IN H.L.A. HART, ESSAYS ON BENTHAM 127, 154. There are occasional times where Hart says only that the internal point of view is merely that of "a member of the group which accepts and uses [the rules] as guides to conduct." THE CONCEPT OF LAW at 89. He does so, however, only in contexts where he makes dual reference to guides to conduct and grounds for criticizing deviations in a number of other places. See *id.* at 84, 85, 90.

While the difference may seem slight between the analysis of a statement of obligation as a prediction or assessment of the chances of hostile reactions, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person's case falls under such a rule.¹⁶⁸

Statements like this do not, however, fully capture the distinction between asserting that there has been a deviation from a standard and either saying that there has been a breach of an obligation or raising a claim against someone for failure to fulfill an obligation. The passage does refer to "hostile reactions," which adds an important dimension to the account. But this reference—standing alone—is not quite enough to attribute to Hart an incipient understanding of the importance of referring to the second personal standpoint. This is because Hart neither indicates in this passage that obligation statements imply that such reactions are warranted nor spells out that they should be understood in terms of any second-personal phenomena like claims or demands.

Still, other passages of *The Concept of Law* suggest that Hart was at least incipiently aware that he needed to make something like these further distinctions even at that point. As an initial matter, Hart explicitly raises the fact that he needs to say *something* to distinguish rules from obligations early in the book.¹⁶⁹ In trying to clarify the distinction, he also uses a number of phrases that are much more in line with the account being developed here. He says at one point, for example, that "[r]ules are conceived and spoken of as imposing obligations when the general *demand* of conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great."¹⁷⁰ This statement now makes explicit reference to *demands* for conformity, which are implicitly second-personal responses to conduct. The passage also suggests that Hart's uses of terms like "serious social pressure" should be understood as reflected in things like demands of this kind. In my view, a fair reading of Hart's overall text suggests that, at this stage, Hart may have placed more emphasis on trying to account for the relevant distinction in terms of a number of things like the seriousness of the social pressure,¹⁷¹ its physicality,¹⁷² its hostility¹⁷³ and a number of other similar

¹⁶⁸ HART, *supra* note 157, at 86.

¹⁶⁹ *See id.* at 82-91.

¹⁷⁰ *Id.* at 86. Hart also adds to two other features to his account of obligation, which will not be of direct relevance here but should be noted. The first is, in my view, a general feature of obligation: "It is generally recognized that the conduct required by these rules may, while helping others, conflict with what the person who owed the duty may wish." *Id.* at 87. The second may be better construed as pervasive feature of moral and legal obligation, and perhaps some other kinds of obligations that have similar centrality in social life, but not necessarily all kinds of obligation. In particular, Hart says: "The rules supported by this serious social pressure are thought important because they are believed to be necessarily to the maintenance of social life or some highly prized feature of it." *Id.*

¹⁷¹ *Id.* at 86. ("What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.").

characteristics. These are best understood as a series of false starts, which could not ultimately support the weight Hart tried to place on them. Still, the passages suggest that Hart was aware both that his account of obligation needed to make dual reference to guides to action and grounds for reaction; and that he recognized that he needed to distinguish obligations from rules in part in terms of the types of reactions that were warranted for deviations. Hart also sometimes explicitly described the relevant type of reactions in terms of inherently second personal phenomena.

By the time Hart absorbed Raz's work, however, his accounts of legal obligation underwent a subtle transformation, and he began to build very consistent and explicit references to second personal phenomena into the account. For example, in *Legal Duty and Legal Obligation*, Hart says the following:

To say that a man has a legal obligation to do a certain act is not, though it may imply, a statement *about* the law or a statement that a law exists requiring him to behave in a certain way. It is rather to assess his acting or not acting in that way from the point of view adopted by at least the Courts of the legal system who accept the law as a standard for the guidance and evaluation, of conduct, determining what is permissible by way of *demands and pressure for conformity*.¹⁷⁴

Similarly, when he describes various features of his mature views on legal authority, Hart says that when one accepts certain directives as authoritative,

[the] words maybe taken not only as [i] a peremptory guide to action by those who are themselves commanded to act but also as [ii-a] a standard of evaluation of the conduct of others as correct or incorrect right or wrong (though not necessarily morally right or wrong) and as [ii-b] rendering unobjectionable and permissible what would normally be resented, that is *demands for conformity, or various coercive pressure on others to conform, whether or not those others themselves recognize the commands as peremptory reasons for their own actions*.¹⁷⁵

This move from [ii-a] to [ii-b] distinguishes obligations from rules much more clearly; and it does so by making reference to phenomena that are fundamentally second personal. The passage even intimates that the notion of 'peremptory reason' that is in play is one that might be reflected in a judge's view that certain persons have standing to raise claims for non-compliance even if the person against whom the claim has been raised does not view the standard as playing any role at all in his or her first personal deliberation.

¹⁷² *Id.* ("[W]hen physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as primitive or rudimentary form of law.").

¹⁷³ *Id.* (Statements of obligation "presuppose[] a background in which deviations from rules are generally met by hostile reactions . . .").

¹⁷⁴ Hart, *Legal Duty and Obligation*, in H.L.A. HART, *ESSAYS ON BENTHAM* 126, 154.

¹⁷⁵ Hart, *supra* note 16 , at 243, 257.

Indeed, by the end of his career, Hart's account of obligation consistently has this quality to it. I will mention only two other passages to make this point. First, when Hart extends his account of obligation to the duties or obligations that he thinks judges have to follow the law by adjudicating disputes under the rule of recognition, Hart cashes this thought out by saying the following:

not to follow [this settled practice] would be regarded as a breach of duty one not only warranting criticism but counter-action where possible by correction in a higher court on appeal. It is also acknowledged that *demands for compliance* would be regarded as proper and are to be met as a matter of course.¹⁷⁶

Second, at the end of *Legal Obligation and Legal Duty*, Hart contrasts his own view of obligation with Raz's. He make the contrast as follows:

Far better adapted to the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have categorical reasons to do but, as the etymology of 'duty' and indeed 'ought' suggests, such statements refer to actions which are due from or owed by the subjects having the duty, in the sense that they may be *properly demanded or exacted* from them."¹⁷⁷

This last phrase is thoroughly second-personal and helps clarify that the references to social pressures that sometimes still arise in Hart's final account of legal obligation are best understood as public versions of second personal address—whereby society or the state (rather than individuals) exact things from citizens under the law.

Hart's text thus shows a growing tendency to refer to phenomena that are second-personal as an integral part of his account of legal obligation, and a growing awareness that references of this kind were needed to capture the distinctive qualities of legal obligations. There are, however, also a few swatches of text that appear late in his career, which appear to describe how peremptory reasons function in wholly first personal terms. These tendencies are in tension with one another, but the familiar view that Hart cannot consistently maintain commitment to incorporationism, the practical difference thesis and the conventionality thesis at once will only be true if we harmonize Hart's texts by accepting these latter descriptions rather than the other important currents in Hart's writing. The next subsection sets forth ten reasons to reject these few descriptions, rather than the other dominant currents in Hart's writing, if we want to harmonize Hart's absorption of Raz with Hart's more basic and deeply held jurisprudential commitments.

B. *TerReasons to Change our View of Hart's Basic Commitments*

¹⁷⁶ Hart, *supra* note 174, at 126, 158.

¹⁷⁷ *Id.* at 160.

The last subsection argued that there is an underappreciated tension in Hart's texts: it is not clear whether he should be understood as committed to a form of the practical difference thesis that must be cashed out in narrowly first personal terms or to a version that makes ineliminable reference to the second personal standpoint. There is, in fact, sufficient textual evidence to pin an implicit commitment to either version of the thesis to Hart, but the two versions are, strictly speaking, inconsistent. This subsection provides ten reasons to resolve this tension in favor of the broader version of the practical difference thesis if we are to best capture and harmonize Hart's core jurisprudential commitments.

First, although a number of commentators have correctly observed that we must attribute some version of the practical difference thesis to Hart,¹⁷⁸ it should be remembered why exactly we must do this. One of Hart's most important and influential contributions to jurisprudence was to clarify that earlier positivist accounts of the law—such as Austin's famous "command theory"—tended to leave out of the picture the characteristic ways the law figures in ordinary peoples' lives who accept the law as having its particular kind of authority.¹⁷⁹ For such people, Hart observed, the law is not just a matter of habitual obedience to a set of sovereign commands, and legal judgments are not just predictions of the relevant sanctions that legal officials are likely to impose.¹⁸⁰ What is missing from accounts like these is—according to Hart—*the internal point of view*.¹⁸¹ As already noted, Hart ultimately described the internal point of view toward the law as an attitude toward it as providing us with content-independent and peremptory guides to action as well as standards for evaluation of deviations, and for permitting would otherwise be resented, namely certain forms of demands for compliance or coercion for non-compliance.¹⁸² But if reference to the internal point of view was crucial to central contributions that Hart made to jurisprudence, then what we need to attribute to Hart to maintain these contributions is not just any version of the practical difference thesis, but rather the one that correctly reflects or describes the internal point of view of citizens and judges in real legal systems.

For reasons already discussed, these people take the rule of recognition and the rules it identifies as having both first and second personal practical implications. These people also sometimes take certain moral criteria as grounds for concluding that there is a legal obligation, as in many of the examples already discussed.¹⁸³ Importantly, adopting a version of the practical difference thesis that makes reference to the second personal standpoint would also be sufficient to underwrite Hart's challenge to earlier positivist theories. Indeed, one might even think that maintenance of a narrowly first

¹⁷⁸ See, e.g., Coleman, *supra* note 158, at 99, 101; Scott J. Shapiro, *Law, Morality and the Guidance of Conduct*, 6 LEGAL THEORY 127 (2000).

¹⁷⁹ See, e.g., HART, *supra* note 157, at 18-25, 50-61, 79-91.

¹⁸⁰ See *id.* at 50-61, 79-91.

¹⁸¹ See *id.* at 50-61, 79-91.

¹⁸² See Hart, *supra* note 161, at 243, 257.

¹⁸³ See Section II(C), *supra*.

personal version would invite a criticism that is very much Hartian in spirit. The challenge—like Hart’s challenge to earlier positivist theories—would be that the resulting theories would leave out of the picture important features of how the law appears to ordinary participants engaged in legal practice.

Moreover, second, it is worth noting that some of Hart’s central arguments in *The Concept of Law* were directed at positivist views for which pointing out the second personal aspects of the internal point of view were more relevant than pointing out any first personal aspects. For example, Hart spends a great deal of time arguing against predictive theories of law, which try to account for statements of legal obligations as predictions of official reactions to deviations.¹⁸⁴ When Hart says that such accounts leave out of the picture the characteristic ways that officials treat the rules, he is not, however, referring to any claim that officials guide their conduct by the law in first personal deliberation. For officials engaging in adjudication, the second personal consequences of normative breaches typically loom much larger than any first personal functions that rules might play in helping ordinary citizens decide what to do. And while Hart clearly thought legal rules play a dual role, it would be wrong, in light of facts like these, to think either that his emphasis was always on first personal aspects of the internal point of view or that his jurisprudential contributions relied primarily on reminding us of those aspects.

Third, for reasons discussed in earlier sections, a broader practical difference thesis, which makes reference to the second personal standpoint, is in fact needed to produce a satisfying account of legal obligation.¹⁸⁵ Hart clearly understood the need to distinguish obligations from mere categorical rules,¹⁸⁶ and it was central to his project from start to finish to articulate an adequate account of legal obligation.¹⁸⁷ Hart should not be attributed a version of the practical difference thesis that undermines ones of his central jurisprudential goals.

Indeed, fourth, as the last section observed, maintaining Raz’s account of legal authority may force one to concede that legal obligations are less obligatory than we commonly perceive them to be, and to adopt a fundamentally consequentialist account of the law as having only the force of “indicator rules.”¹⁸⁸ But whatever force this line of argument might have for Raz, Hart was absolutely clear that his goal was to provide an account of obligation that is true to ordinary usage. In discussing some of Bentham’s failures to capture aspects of ordinary usage, Hart noted, for example, that he thought “Bentham would . . . have replied in a tough ‘rational reconstructionist’ or revisionist manner, since, for all his interest in language, he was no ordinary language philosopher

¹⁸⁴ See, e.g., HART, *supra* note 157, at 83 (“Some theorists, Austin among them, seeing perhaps the general irrelevance of the person’s beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of these subjective facts, but in terms of the *chance* or *likelihood* that the person having the obligation will suffer a punishment or ‘evil.’); *id* at 83-91 (arguing against predictive theories and pointing out that they leave the internal point of view out of the picture).

¹⁸⁵ See Section II(C), *supra*.

¹⁸⁶ See HART, *supra* note 157, at 82-91.

¹⁸⁷ See, e.g., *id.*; Hart, *supra* note 161; Hart, *supra* note 174.

¹⁸⁸ See Section II(C), *supra*.

and his standpoint was critical and reformative.”¹⁸⁹ Hart himself, however, declined to follow that lead and instead took these gaps in Bentham’s account to warrant a more robust account of obligation.¹⁹⁰ Given Hart’s methodological inclinations, it seems likely that Hart would have resisted the analogous challenge here, which—much like Bentham’s work—challenges us to reform our concept of legal obligation to cohere better with a fundamentally consequentialist theory of value.

Fifth, Hart shared neither Raz’s substantive normative views nor his idea that the only function of law was to point us toward what “right reason” would tell us to do as revealed in ideal first personal deliberation.¹⁹¹ As the last section indicated, these substantive normative views partly support Raz’s particular conception of how exclusionary reasons must purportedly function in first personal deliberation.¹⁹² Because Hart did not share these particular normative views, however, those same motivations would have been missing for Hart.

Indeed, sixth, parts of Raz’s work may reflect commitment to a picture of how the law operates that Hart was concerned to reject. When Raz presents his service conception of legal authority, he says that we need to be able to understand the law not only as (i) providing us with exclusionary reasons to act but also as (ii) someone’s view on what we ought to do—i.e., as someone’s view on the very same question that we would ordinarily figure out using our autonomous capacities for deliberation about what to do absent a legal authority.¹⁹³ The fact that we are inclined to picture legal directives as commands from some entity that can be personified may indeed reflect a deep feature of our ordinary language and psychology, but Hart had an ambivalent relationship to such pictures. Hart notes, for example, with some approval Bentham’s idea that it can be helpful to make “explicit the more or less confused imagery which is buried in our use of [normative] expressions,” and observes that “Bentham says that in the case of obligation one ‘archetypal image’ is that of a man held down by a heavy weight.”¹⁹⁴ Hart’s own account of legal obligation was meant in part to give us a more realistic account of obligation than this pre-reflective imagery could sustain,¹⁹⁵ and another archetypal image in the law would seem to be that of an authoritative figure—perhaps a parental figure or a religious deity—who gives us commands. Hart was, however, equally ambivalent about

¹⁸⁹ Hart, *supra* note 174, at 137.

¹⁹⁰ *See id.* at 137-61.

¹⁹¹ *See id.* at 159 (“Raz’s views on this point are . . . part of a comprehensive theory of practical reason, according to which normative propositions, asserting the existence of duties, committed or uncommitted, true or false, sincere or insincere, assert the existence of such reasons. . . . I do not share but will not dispute here his cognitive account of moral judgment in terms of objective reasons for action.”).

¹⁹² *See* Section II(C), *supra*.

¹⁹³ *See* JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194, 202 (1994) (“[A] directive can be authoritatively binding only if it is, or is at least presented as, someone’s view of how subjects ought to behave.”).

¹⁹⁴ Hart, *supra* note 174, at 131.

¹⁹⁵ *See, e.g.*, HART, *supra* note 157, at 83-84, 87-91.

moving from such imagery to full blown command theories of law, and, while he thought that the idea of trying to account for the law on the model of sovereign commands might provide a useful starting point, command models were ultimately something he rejected.¹⁹⁶ This rejection would have plausibly brought with it a rejection of the idea that we must always be able to understand the law—in the final analysis, and not just as a pre-reflective picture of how things seem to go—as someone’s view as to what we ought to do.

In any event, seventh, it is not at all clear that commands only have genuine practical effects when they provide us with independent means of figuring out what we ought to do better than first personal deliberation would. In ordinary circumstances, a command will, of course, probably only be useful if it can change the way the addressee would have acted—such that saying “do what you ought to do” will ordinarily say nothing very useful. But this is only true in central cases of commands, and there are other cases. For example, a parent, after learning of her child’s struggle deciding between various suitors, one part of which arises from a sense of familial duty, might, upon reflection, tell the child: “Do what you ultimately think is best.” The practical effect of this command would then be to relinquish any second personal claim against the child for engaging in unfettered first personal deliberation on this important life decision, and, perhaps, even to generate some second personal standing to complain if the child does not do so with a free and clear conscience.

Eighth, Raz’s account of legal authority gains considerable plausibility to the degree that instances in which judges decide legal cases on moral grounds are relatively peripheral to the law. This is because Raz frames his account as one of the nature of law. Hart, however, appeared to view the legal incorporation of morality as central to the law. In the opening sections of *The Concept of Law*, Hart listed, for example, as one of the three major factors that tend to generate jurisprudential perplexities the following:

[n]ot only do law and morals share a vocabulary so that there are both legal and moral obligations, duties, and rights; but all municipal legal systems reproduce the substance of certain fundamental moral requirements. Killing and the wanton use of violence are only the most obvious examples of the coincidence between the prohibitions of law and morals.¹⁹⁷

A version of the practical difference thesis that allows the law to prohibit the same things that morality does in a large and central range of cases would thus be truer to the spirit of Hart’s views.

Ninth, some of the pressure towards Raz’s particular version of the practical difference thesis arises from a specific and controversial view of Raz’s: namely, that to sincerely believe a person is under a legal obligation one must believe (rightly or wrongly) that that same person is under a moral obligation. Hart, however, explicitly rejects this part of Raz’s views.¹⁹⁸ Hart thought that it was perfectly possible—and,

¹⁹⁶ See, e.g., *id.* at 18-91.

¹⁹⁷ HART, *supra* note 157, at 7.

¹⁹⁸ See, e.g., Hart, *supra* note 174, at 153-61.

indeed, that it was a critically important distinction between law and morality—that judges be able to sincerely believe that someone is under a legal obligation without that person necessarily being under a moral obligation.¹⁹⁹ Even late in his career, Hart says, for example, that:

at least where the law is clearly settled and determinate, judges, in speaking of the subject's legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' by the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject's legal duty.²⁰⁰

From the first personal perspective of deliberation, it can, however, be very difficult to identify what it would mean to sincerely believe that one is under a legal but not a moral obligation. This is because both morality and law seem to provide us with exclusionary reasons for action that are general in application. Hence, from the first personal perspective of deliberation, there does not appear to be any relevant difference between the thought that one has a genuine legal obligation and the thought that the obligation has moral force. For reasons already discussed, however, relevant practical differences do emerge once we attend to the second personal standpoint. A broader version of the practical difference thesis may therefore be needed to make the distinction that Hart consistently wanted to make between sincere belief in the existence of a legal as opposed to a moral obligation. The fact that adopting the present account allows for the clarification and maintenance of one of Hart's central distinctions is yet another reason to think that this account better captures Hart's core philosophical commitments.

Tenth, it should not be forgotten that Hart was well versed in Raz's arguments, including his arguments that absorbing his work on legal authority would create inconsistencies for inclusive legal positivism. Still, Hart neither refused to absorb Raz's contributions nor accepted that there was any genuine inconsistency. Facts like these do not warrant simple deference to Hart's views. But where, as here, Hart apparently had a probing understanding of the issues, and where his work can be further refined in two different ways—one of which makes his position internally coherent—Hart should be attributed a developing sense of the coherent position. This is not blind deference, but rather use of a basic and seemingly applicable principle of charity of interpretation.

For these ten reasons, Hart would (or at least should) have welcomed the account developed here as an appropriate development and refinement of his basic views. He would have thought of the views developed here as providing the best basic framework for further developments in analytic jurisprudence, and as helping to capture what is importantly true and helpful about inclusive legal positivist theory.

¹⁹⁹ *See id.*

²⁰⁰ Hart, *supra* note 161, at 266.

IV. SHAPIRO AND A MORE COMPLETE UNDERSTANDING OF HOW THE LAW FUNCTIONS IN OUR LIVES

The preceding sections have argued that the best way to harmonize Hart's basic philosophical commitments, while absorbing Raz's contributions to our understanding of legal authority, is to adopt a specific version of the practical difference thesis, which allows law's obligatory nature to show up in practice either in the first or the second personal perspectives in specific ways. None of the above arguments have, however, directly addressed the more recent and influential arguments for exclusive legal positivism due to Scott Shapiro.²⁰¹ Even if Hart would (or should) have welcomed the position developed here as representing the best basic framework within which to develop and further refine positivist thought, Shapiro's recent work provides an independent set of arguments that might cast doubt on the internal consistency of such a position. The purpose of this section is to examine Shapiro's arguments, and to extend the present account of legal obligation to address his concerns.

Shapiro's arguments resemble Raz's in the following important sense: they purport to identify an inconsistency between Hart's commitments to incorporationism and the conventionality thesis, on the one hand, and the practical difference thesis (as properly construed) on the other.²⁰² Before examining these arguments, there are, however, two features of Shapiro's views that I would like to highlight because they are, in my view, genuine strengths of his position.

First, as earlier sections have suggested, one of the motivations behind Raz's particular version of exclusive legal positivism is the idea that the normal function of law is to provide us with authoritative marks that allow us to identify what we ought to do, as revealed in ideal first personal moral deliberation, better than we could ourselves through unaided deliberation. I suggested that this part of Raz's thought reflects commitment to a form of moral foundationalism—or the view that law's authority must in some way be reduced to or derived from moral authority—and observed that foundationalism of this kind has been questioned in many other areas of philosophy. Importantly, Shapiro's arguments for exclusive legal positivism, which will be discussed in a moment, do not depend on any such commitment.²⁰³ Shapiro believes instead that one of the functions of law is to help produce coordination over the content of what we

²⁰¹ Shapiro began these arguments in *The Difference Rules Make*, reprinted in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33 (Brian Bix ed., 1998); and *On Hart's Way Out*, reprinted in *HART'S POSTSCRIPT* 149 (Jules Coleman ed., 2001) [*hereinafter* "Shapiro I"]. His most recent and mature formulation of the arguments appear in *Law, Morality and the Guidance of Conduct*, 6 *LEGAL THEORY* 127 (2000) [*hereinafter* "Shapiro II"].

²⁰² See, e.g., Shapiro I, *supra* note 201, at 149, 158 (Jules Coleman ed., 2001); Shapiro II, *supra* note 201, at 127 ("The Conventionality Thesis, coupled with inclusive legal positivism, turns out to be inconsistent with another core commitment of Hart's positivism, which might be called the "Practical Difference Thesis.").

²⁰³ See, e.g., Shapiro I, *supra* note 201, at 149, 178 n.57 (pointing out that for Raz, legal rules mediate between persons and the reasons that apply to them absent legal authority, whereas for Shapiro, legal rules mediate between competing standards of conduct).

owe to one another, where the content and authority of the legal norms in question need not be reducible to, or derivable from, anything that our unaided sense of right and wrong might allow us to perceive, even in ideal conditions.²⁰⁴ The way Shapiro puts this point is to say that one of the functions of law is to provide us with authoritative marks that allow us to distinguish legitimate from illegitimate norms, and to do so from among all of the logically possible norms that may compete for our allegiance.²⁰⁵ As stated, this position is thus consistent with a number of different accounts of legal legitimacy, including non-foundationalist ones, which do not depend on accepting Raz's service conception of legitimate authority. To the extent that Shapiro's arguments are independent of this particular conception of legitimate authority, Shapiro's arguments present a more robust argument for exclusive legal positivism.

Second, as will become clearer below, Shapiro's arguments do not ultimately depend on the claim that the law must be capable of providing us with *exclusionary* practical guidance. They depend only on the more minimal claim that the law must be capable of providing us with practical guidance of some kind or other. This fact might seem beside the point with respect to the main arguments in this Article. Earlier sections have already acknowledged that legal obligations should be understood as purporting to have some exclusionary force. For reasons discussed below, however, Shapiro's work has helped remind us of the need to examine carefully the distinct ways the rule of recognition and the law can sometimes function in judges' and citizens' lives, respectively. A closer examination of these issues will reveal that Shapiro's more general test is needed to capture some aspects of this practical guidance.

Let us turn, then, to an examination of Shapiro's arguments for exclusive legal positivism. As already noted, these arguments depend on revealing a purported inconsistency between Hart's commitments to inclusive legal positivism and the practical difference thesis, properly construed. In *Law, Morality, and the Guidance of Conduct*,²⁰⁶ Shapiro sets forth in very clear terms the relevant test he thinks we should employ to determine whether a given rule can make a practical difference in our lives. Here is Shapiro's initial formulation of the test:

In order to evaluate whether a rule is capable of making a practical difference, we begin by considering cases where an agent conforms to a rule as a result of appealing to it in his practical reasoning. We then engage in the following thought experiment: We consider what the world would have been like had the agent not appealed to the rule in his practical reasoning. If the agent might not have conformed to the rule, then we say that the rule does make a practical difference for him, and therefore, is capable of making a practical difference. If, however, the agent would have conformed to the rule even if he had not appealed

²⁰⁴ See, e.g. *id.* at 178 n.57.

²⁰⁵ See, e.g., Shapiro I, *supra* note 201, at 149, 177 ("Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms."); *id.* at 189: ("[G]iven the multitude of standards available, there must be some rule by which people can determine which standards ought to guide their conduct.").

²⁰⁶ 6 LEGAL THEORY 127 (2000).

to it, then we say that the rule is not capable of making a practical difference for that agent. If the rule is not capable of making a practical difference for any agent, then we can say that the rule is not capable of making a practical difference simpliciter.²⁰⁷

Notice that this formulation tests for practical differences simpliciter rather than for the narrower class of exclusionary practical differences.

As Shapiro recognizes, there is, however, an important difference between appealing to a rule and appealing to it as a legal rule.²⁰⁸ If, for example, both morality and law require that we keep a given promise, then the relevant question to ask will presumably be whether the fact that the *law* requires that we keep the promise can make a difference in our practical reasoning, a difference that is independent of anything arising from the fact that there is a *moral* rule (or some other kind of unadorned rule) that requires the very same thing. Because of facts like this, Shapiro rightly says the following:

I now think that a slightly more nuanced test is needed. The complication is that an agent can appeal to a rule under several different descriptions. She might, for example, appeal to a rule because the rule is a moral rule, although the rule is also a legal rule. It is possible that the rule may make practical difference as a moral rule, but not as a legal rule. In order to determine, therefore, whether a legal rule makes a difference qua legal rule, it will not be enough to ask whether the agent might not have conformed if that agent had not appealed to the rule. We will ask whether the agent might not have conformed if that agent had not appealed to the rule *as a legal rule*. If the agent might not have conformed to such a rule if the appeal is not made under that description, then we will say that the rule did make a difference to the agent's practical reasoning as a legal rule.²⁰⁹

This amendment does, indeed, seem needed to test for the relevant class of practical differences.

There are, finally, two other wrinkles to this test that should be mentioned before applying it. First, Shapiro defines the way a person can “conform to a rule” under this test in a way that is broad enough to capture both instances of citizens doing what the law requires of them, as primary addressees of the legal directives, and judges applying the law and rendering verdicts about citizens' conduct in ways that are consistent with the law.²¹⁰ This broadened definition is needed to capture the forms of practical differences that the law must presumably be capable of making in our lives in both contexts.

Second, as Shapiro has helpfully observed, rules can in fact make relevant practical differences in our lives in more than one way. One important distinction is

²⁰⁷ *Id.* at 132.

²⁰⁸ *See id.*

²⁰⁹ *Id.*

²¹⁰ *See id.* at 133.

between what Shapiro calls “epistemic” and “motivational” guidance.²¹¹ Let us assume that a citizen learns, in some manner or other, that it is against the law to perform a given action. The person would be “motivationally” guided by the law if the person were to take the brute fact that it is against the law as a reason for action, and if that belief were to cause the person to refrain from performing the illegal action.²¹² The person might, however, not take the law to have that particular kind of authority and still be guided by the law to conform with the law in another sense. This would occur if knowledge of what the law was were to play a role in getting the citizen to conform to the law but only because the citizen was motivated by things like the fear of sanctions that would likely accompany a violation of the law.²¹³ Shapiro calls this “epistemic guidance.”²¹⁴ Shapiro then notes—rightly, in my view—that the law need not ordinarily be concerned with the reasons that a citizen conforms to the law so long as they conform. Shapiro thinks that Hart is nevertheless committed to the idea that the officials of a system must be motivationally guided by the law. He thus says that “Hart’s claim about the guidance function of law . . . turns out to be a composite claim: the law’s primary function is to epistemically guide the conduct of its ordinary citizens via primary rules and to motivationally guide the conduct of judicial officials via its secondary rules.”²¹⁵

In a moment, I will add some further refinements to this part of Shapiro’s discussion. For present purposes, however, the important point to recognize is that Shapiro’s test captures cases of both epistemic and motivational guidance. This is because the test asks us to begin with cases where an agent “conforms to a rule as a result of appealing to it in his practical reasoning.” Appealing to a rule can, however, result in such conformity either due to the rule’s epistemic or motivational guidance. Shapiro’s test is thus robust enough to capture an adequate range of relevant types of practical guidance.

The foregoing discussion should clarify the test that Shapiro proposes we use to check for relevant practical differences. The remainder of this section will accept this test at face value and ask whether its application really must lead to the results Shapiro suggests. Use of this tack should not be interpreted as indicating that there are no other grounds for reservation about Shapiro’s formulation or about other steps in his arguments. Rather, this tack has been chosen because it clarifies what reflection on the second personal standpoint can reveal that is distinctive for this debate.

To determine whether the law can provide us with relevant practical guidance if it is identified by means of an inclusive rule of recognition, let us examine a test case. Consider a rule of recognition, one part of which can be expressed as follows: “In circumstances where someone has made a promise that is supported by consideration, that person has a legal obligation to follow through with the promise if, but only if,

²¹¹ See, e.g., Shapiro I, *supra* note 201, at 149, 173.

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See *id.*

²¹⁵ *Id.* at 175.

morality would so require.” This rule of recognition instructs that we identify what our legal obligations are by relying on moral insight, in at least a specified set of circumstances. The rule also makes the existence of a moral obligation both a necessary and a sufficient condition of our having a legal obligation in those same circumstances. If this rule were consistent with the practical difference thesis, as properly construed, then two important versions of inclusive legal positivism would thus be shown to be consistent with this thesis: namely, both what Shapiro calls “the most important versions” of inclusive legal positivism, which “permit morality to be a sufficient condition of legality,” and those that “relegate morality to a possible necessary condition of legality.”²¹⁶

Whether we have a legal obligation under this particular rule of recognition need not turn out to be a simple question. It is sometimes said that morality requires that we keep all of our promises, but this is probably something of an overstatement, and the rule of recognition under discussion will incorporate our moral reasoning in all of its complexity and nuance. If, for example, one were to make a promise that is supported by consideration, but the promise were induced by deception, then whether one would be legally required to follow through with the promise under this rule would depend on whether one were morally required to follow through with promises that are fraudulently induced. Presumably, the answer to this last question is no. In order to simplify the example, let us therefore fix the context so that we are looking at a case in which a person has made a promise that is supported by consideration and in which morality would require that the person follow through with the promise. Let us also focus on the kinds of practical differences that arise for judges rather than ordinary citizens. Shapiro’s arguments are meant to show that use of an inclusive rule of recognition like this is inconsistent with the full range of practical differences that the law must be capable of making in such judges lives. Is this true?

Shapiro believes—rightly—that we should have no trouble seeing how an inclusive rule of recognition like this could *itself* make a practical difference in our lives under his test.²¹⁷ We just need to begin by looking at the case in which a judge finds that the given promise is legally enforceable (and thereby conforms to the rule of recognition) as a result of appealing to the rule of recognition. We then need to imagine a possible world in which the judge does not appeal to this same rule *as a law-identifying rule*, and ask if the judge might not have come to the same decision. There are many possible worlds in which the applicable rule of recognition has a different content. Let us therefore look at the possible world in which the relevant rule of recognition says instead that promises are never legally enforceable. In such a world, the judge would have appealed to this alternative rule as a law-identifying rule, and would have come to a different legal conclusion. This shows that the original (inclusive) rule of recognition is indeed capable of making a practical difference in the judge’s legal reasoning.

²¹⁶ Shapiro II, *supra* note 201, at 127, 131.

²¹⁷ See, e.g., Shapiro I, *supra* note 201, at 149, 179 (noting that the problem is not with the inclusive rule of recognition).

The problem—Shapiro thinks—comes only at the next step,²¹⁸ when we try to see whether the primary rule that is picked out by this inclusive rule of recognition (namely, that “one should keep one’s promise in these circumstances”) can still make a relevant practical difference *as a legal rule*. Here again we are to start by imagining the case in which a judge finds the promise legally enforceable because she appeals to the inclusive rule of recognition and then to the moral rule that it incorporates *as a legal rule*. We are then to imagine a possible world in which the judge does not appeal to this same moral rule *as a legal rule*. If, however, we assume—as Shapiro does—that moral rules are necessarily true,²¹⁹ and if we hold the inclusive rule of recognition fixed, there would seem to be no possible world in which the judge would come to a different decision. The only possible worlds that would seem to be relevant are ones in which the judge figures out what the inclusive rule of recognition identifies as the law by deferring to some other authority rather than directly to the moral norm.²²⁰ But since this should lead to the same result, treating this other authority *as a legal rule* should yield the same legal decision.

Here is how Shapiro puts the argument:

To test whether such moral rules can guide conduct, we should ask whether this judge might have acted differently had he not appealed to such rules as legal rules in his practical reasoning. We thus pose the following counterfactual question: If the judge had not appealed to those moral rules as legal norms in his deliberations, would he have been motivated to conform to those norms anyway in his evaluations?²²¹

According to Shapiro, “[t]he answer to this question appears to be yes.”²²² Shapiro explains: “Because the rule of recognition will require the judge to evaluate conduct in accordance with rules that are morally appropriate, his evaluative practices will conform to the moral norms regardless of whether he directly appealed to these norms themselves as legal rules.”²²³ The conclusion that Shapiro draws from this is that if an inclusive rule of recognition can make a practical difference, then the moral rules that it incorporates cannot make a practical difference in judges’ reasoning.²²⁴ And this is supposed to show

²¹⁸ See *id.*; Shapiro II, *supra* note 201, at 127, 133-34.

²¹⁹ See, e.g., *id.* at 139 (“Moral rules do not go in and out of existence. If, at some time, some rule is morally valid, then it is always morally valid.”); see also Shapiro I, *supra* note 201, at 149, 181.

²²⁰ See *id.* at 133.

²²¹ *Id.* at 133.

²²² *Id.*

²²³ *Id.*

²²⁴ See *id.*; see also, Scott J. Shapiro, *The Difference Rules Make*, reprinted in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33, 57 (Brian Bix ed., 1998) (“[I]f a legal agent is to be guided by the master rule which sates ‘Act in accordance with the rules of morality when the law is controversial’, he cannot be guided by the rules which constitute morality.”).

that only an exclusive rule of recognition is consistent with Hart's practical difference thesis.²²⁵

Notice, however, that Shapiro's argument focuses on the kinds of differences that can show up by treating something other than the moral rule as a legal rule. Shapiro does not countenance those possible worlds in which the judge treats the same moral rule as the relevant standard for evaluation, but does not treat it as a specifically *legal rule*. In these possible worlds, the judge would still conclude that the breach of the promise was wrongful, and would thus necessarily evaluate the conduct as wrongful *in a sense*. But she would not take the wrong that is so identified to warrant the specific second personal standing to raise a legal claim for non-compliance as she did in the original hypothetical. Treating the wrong as a specifically legal wrong can thus generate genuine practical differences for the judge, although the relevant practical differences will show up in second personal terms, and not in terms of conclusions about what one ought or ought not do considered from the first personal perspective or in less charged applications of the relevant standard.

Some care must be taken in understanding the possibility that is under discussion. Hart clearly believed that the ordinary attitude of a judge toward the law is to treat both the rule of recognition as the relevant and authoritative standard for identifying what the law requires, and the law itself as having the specific authority that it purports to have to generate legal obligations.²²⁶ Though Hart is right that these attitudes typically come together, they are at least logically separable. Consider, for example, the ordinary citizen who, out of sincere moral conviction, deeply distrusts her legal system and does not accord it any genuine authority. This citizen might nevertheless feel that she will repeatedly encounter troubles with the law, and will be unable to change the law for the better, without an intimate and personal understanding of what the law requires. This person might therefore decide that it is in her best interests to enter law school to learn for herself the conventions by which the law of her society is identified. This person might then use the rule of recognition to guide her conclusions as to what the law does or does not require in many cases. In taking certain grounds to warrant these conclusions, and/or to provide grounds for criticizing others' judgments as correct or incorrect, she would be exhibiting an internal acceptance of the rule of recognition as a law identifying standard

²²⁵ Shapiro's reasons for thinking that the same consequences do not follow for exclusive rules of recognition are as follows. An exclusive rule of recognition can itself make practical differences in a judge's reasoning for the same reasons observed in the main text in relation to inclusive rules of recognition. But when an exclusive rule of recognition tells judges to treat as a legal rule any rule that arises from a particular source—say from a particular form of legislation—there are possible worlds in which different legislation has been passed, and in which the this fact would thus lead the judges to different legal conclusions. Hence, the primary rules that are identified by an exclusive rule of recognition as legal rules can indeed make the kind of practical differences that Shapiro's test picks out. *See, e.g.,* Shapiro II, *supra* note 201, at 127, 133-34.

²²⁶ For example, Hart asks at one point in *Legal Duty and Obligation*: "What then is it for judges to accept or endorse such rules of recognition and so derivatively to accept or endorse the laws which such rules require them to apply?" Hart, *supra* note 174, at 126, 155. Although this statement acknowledges a distinction between these two forms of acceptance, the passage also suggests that Hart thinks that they typically come together in the attitudes of an ordinary judge. *See id.*

in a sense. Her conclusions about what the law requires would, however, be what Hart called “external” rather than “internal” legal judgments: they would not express acceptance of the law’s authority.²²⁷ These judgments might also guide her actions, but they would do so only epistemically—to use Shapiro’s terms. This person might do what the law requires out of a fear of sanctions, for example, or perhaps to infiltrate into mainstream legal society to effect certain changes in the law. But the brute fact that something is required by law would do nothing to move her.

There is, moreover, nothing far-fetched about pointing out this possibility for present purposes. As an initial matter, the possibility does not seem far fetched at all as a description of some ordinary citizens’ psychologies, at least in some frames of mind. The possibility may occur much less frequently with regard to people who find their way into judicial roles, but the important point to recognize here is that the possibility picks out perfectly an important distinction that is critical for the present argument. This is the distinction between treating an inclusive rule of recognition as setting forth the genuine grounds for judgments that something is (or is not) required by law—where the law is thought of as a system of rules that happen to operate in one’s system but that has no real authority—and treating it as a rule that helps one identify genuine obligations, which have the full authority that internal acceptance of the law brings with it.

This difference is also precisely what is needed to seal the present argument, because it brings with it real practical consequences, which show up second personally. To see this, let us return to the inclusive rule of recognition that we have been using as a test case, and stipulate that the citizen under discussion has become a judge. This newly minted judge might look at the breach of the promise under discussion, and, employing the inclusive rule of recognition, recognize that this was indeed the breach of a legal obligation. In coming to this conclusion, she would be relying in part on her sense that there was a moral obligation to fulfill the promise, such that failure to do so was genuinely wrong (in a moral sense). We have assumed that this judge rejects the law’s authority on moral grounds, so the judge would also believe that the promisee had the second personal standing to be morally indignant, or to react in certain ways to the breach, and may even feel personally condemning toward the breach. The judge’s internal acceptance of the rule of recognition as a law-identifying standard would also lead the judge to the *external* legal judgment that the law requires that the person fulfill the promise. But absent an internal acceptance of the law itself, the judge might not think that any of this shows that the promisee has any second personal standing to raise a specifically legal claim or that any of the typical legal consequences that would follow from a successful claim are permissible or warranted. The new judge’s distaste for the law may run so deep that she may think that this particular kind of standing never really exists, and may think that these particular consequences are never genuinely warranted or permissible. She might—in other words—be occupying her role only to subvert it; and, while she her legal judgments about standing, and the like, might guide

²²⁷ See, e.g., HART, *supra* note 157, at 88-91. Hart says that “external statements” are descriptive statements *about* the law, made by someone who is not a participant and/or by someone who does not necessarily accept the law’s authority. “Internal statements” are, by contrast, statements made by those who take the law to have its particular kind of authority, and, hence, as something that gives rise to genuine guides to conduct, genuine grounds for criticizing deviations as right or wrong, and genuine permissions or warrants for what would otherwise be resented, namely demands for compliance or coercion for non-compliance. *See id.*

her conduct, they would do so only epistemically, and need not do so at all. By contrast, treating the moral rule *as a legal rule*, and *with the full sense of authority that internal acceptance of the law brings with it*, would have just these further practical consequences. Hence, the moral rule that is picked out by the inclusive rule of recognition can indeed make a relevant practical difference as a legal rule, even under Shapiro's test, and even given the rest of his assumptions.

Now, as Shapiro has rightly observed in response to a different critic, his arguments for exclusive legal positivism cannot be undermined simply by changing the relevant sense of practical guidance in an arbitrary manner. As Shapiro puts it: "selecting the appropriate conception of rule-guided behavior is not like picking the right pair of socks to go with one's shoes."²²⁸ It should therefore be conceded that the above argument depends in part on broadening the range of practical differences that we take as relevant. But the parsing that is being proposed here is in no way arbitrary. For reasons discussed in the previous sections, there are numerous philosophical and textual reasons for thinking that it is ultimately the better interpretation of the relevant practical difference thesis that should be used in trying to understand Hart's views and elaborate a satisfying account of the law. In fact, there is an important sense in which the more narrowly focused first personal version of the thesis, which Shapiro and others have been using to date, can itself be seen to be arbitrary: the narrower version was not so much consciously chosen as it was forced upon us in part by lack of any clearly defined alternatives that make appropriate reference to the second personal standpoint. Darwall's recent work has helped clarify that there are, however, other genuine options, which better capture the rich ways that obligations function in our practical lives. Hence, we can now make the relevant choice, and, ultimately, as Shapiro observes, "[T]he positivist is committed to subscribing to the conception of rule-guided behavior that is correct, or at least as correct as all others."²²⁹ The same is clearly true for the non-positivist.

For reasons discussed in the body of this Article, the correct conception of the practical difference thesis is—I submit—one that references the second personal standpoint, either in the ways described here or in ways very much like them. Adopting this version of the practical difference thesis would avoid many of the well-known problems associated with harmonizing inclusive legal positivism with the practical difference thesis. Adopting this version of the practical difference thesis would also render a number of non-positivist accounts of the law—such as Dworkinian interpretivist accounts—consistent with our best understanding of how legal authority and legal obligation function. If this is right, then this new version of inclusive legal positivism is an internally consistent and viable account of the law, which represents the best available framework within which to develop and further refine positivist accounts of the law. If this is right, we will, moreover, ultimately need to choose between positivist and non-positivist accounts of the law on grounds other than those arising from the nature of legal authority.

²²⁸ Shapiro II, *supra* note 201, at 127, 137.

²²⁹ *Id.*