Hart’s Response to Exclusive Legal Positivism

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I begin this Article with a deliberatively provocative statement of its thesis: contemporary philosophical work on obligation can be used to discern H.L.A. Hart’s inchoate and unpublished, but implicitly understood, response to exclusive legal positivism. For some readers, the meaning and importance of this claim will be clear. For others, it will be helpful to step back and locate the claim within the broader history and problematics of analytic jurisprudence.

As is by now familiar, Hart is—by all reasonable accounts—the single most influential twentieth-century philosopher in the field of analytic jurisprudence. Through his publication of *The Concept of Law* in 1961, Hart is typically credited with changing the direction of analytic jurisprudence in a number of fundamental ways, and it would be impossible to understand fully many of the current debates in this field without some understanding of Hart’s work. In order to set the context for the main claims defended in this Article, this Introduction will therefore begin by highlighting three distinct dimensions of Hart’s importance for contemporary analytic jurisprudence. These dimensions have been chosen not because they are exhaustive, or even illustrative, but because they shed special light on the meaning and importance of the claims to be defended.

The first such dimension relates to the set of questions that Hart has brought to center stage. In *The Concept of Law*, Hart not only emphasized the need to produce a satisfying philosophical account of the law, but he also clarified a number of critical contemporary puzzles that any such account should presumably address. For example—and somewhat controversially—Hart thought that

2. 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.” Leslie Green, The Concept of Law Revisited, 94 MICH. L. REV. 1687, 1688 (1996).
4. Green, supra note 2, at 1688 (“For one thing, [The Concept of Law] introduced and clarified a set of questions that came to dominate the literature: Is law always coercive? What are legal rules? Do judges have discretion? Is there a necessary connection between law and morality?”).
5. Hart begins *The Concept of Law* by claiming that there are three related puzzles that generate a persistent need to produce a satisfying philosophical account of the law: that the law appears to issue in directives that are obligatory; that it can therefore be difficult to understand the precise relationship
any satisfying account of the law should refrain from making reference to properties (of actions or events) that could not be understood as consistent with a thoroughgoing naturalistic worldview. Let us call this the “naturalistic constraint.” There are a number of well-known philosophical reasons to think that moral properties—including properties such as goodness and/or rightness—might fail this test insofar as they are viewed as objective properties (of actions or events) that are intrinsically action-guiding. Hart suspected that moral properties might have just this questionable metaphysical status, and this is one of the reasons why he sought to provide an account of the law that did not make essential reference to any such properties. In my view, this aim of Hart’s is what most deeply establishes his work as a form of “positivism,” at least as that term was understood in other areas of philosophy when Hart wrote. This aim also distinguishes Hart’s work in a particularly fundamental way from so-called “natural law theories,” which typically seek to account for the law, and in particular legal validity, in irreducibly moral terms. The aim finds expression, finally, in Hart’s claim that he was attempting to articulate an account of the law between law and morality (which also issues in obligations); and that the law is made up in part of rules—which can be puzzling phenomena in themselves. See Hart, supra note 1, at 6–13.

6. See, e.g., Kevin Toh, Hart’s Expressivism and His Benthamite Project, 11 LEGAL THEORY 75, 83–84 (2005) (explaining Hart’s commitment to accounting for the law in a manner that is consistent with our ongoing naturalistic understanding of the world and observing that this project is consistent with prior positivist projects as well as more recent work in meta-ethics).

7. For a classic set of arguments scrutinizing the objective purport of our ethical language on such grounds, see J.L. Mackie, ETHICS: INVENTING RIGHT AND WRONG 38–41 (1977). For another set of classic arguments that call into question naturalistic definitions of normative terms, see G.E. Moore, PRINCIPIA ETHICA 58–69 (Thomas Baldwin ed., 1993). Moore charged any attempt to define the “good” in purely naturalistic terms as falling prey to a “naturalistic” fallacy and clarified ways in which the meaning of this normative concept appears irreducible to any empirically definable concept. Id. at 59–62. Ross later extended this form of argument to deontological concepts like “right” and “duty” and charged Moore with falling into a similar fallacy when trying to define the right in terms of the good. See David Ross, THE RIGHT AND THE GOOD 8–9 (Philip Stratton-Lake ed., 2002).

8. See, e.g., H.L.A. Hart, Legal Duty and Obligation, in ESSAYS ON BENTHAM 127, 159–60 (1982) (“I do not share but will not dispute here [Raz’s] cognitive account of moral judgment in terms of cognitive reasons for action, though it is currently a matter of great and exceedingly complex dispute among philosophers.”).

9. Phil Soper has provided the following description of how early positivist theories of law were distinguishable from natural law theories: “the legal positivist claims that no necessary connection exists between law and morality; the natural law theorist denies that a sharp separation of these concepts is possible.” See, e.g., Philip Soper, Some Natural Confusions About Natural Law, 90 Mich. L. REV. 2393, 2395 (1992). Thus, while Hart aimed to provide a conventional account of legal validity, he described the Thomist tradition of natural law theory as committed to two basic propositions: “first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly, that man-made laws which conflict with these principles are not valid law.” Cristobal Orrego, H.L.A. Hart’s Arguments Against Classical Natural Law Theory, 48 AM. J. JURIS. 297, 297–98 (2003). Since these early debates, the distinction between natural law theories and positivist theories has not, however, always been framed in terms of whether there is a necessary relationship between law and morality. It is important to recognize, finally, that the term “natural law” can refer both to legal and to moral theories, and that only the former is in question here. See, e.g., Soper, supra, at 2394.
in purely descriptive terms.10

Is the naturalistic constraint a purely ad hoc constraint? An answer to this question will depend on one’s aims in developing a philosophical account of the law. One important set of philosophical puzzles arises from the fact that law is a normative phenomenon—in a number of important respects, some of which will be discussed below—and from the fact that it can be difficult to square such phenomena with our ongoing naturalistic understanding of the world. If one’s aim is to resolve this particular class of problems, then some version of the naturalistic constraint would thus seem to be required. Put differently, the special character of these problems lends importance to the basic aims of Hartian positivism, including the naturalistic constraint.

Unlike earlier positivist legal theorists, however, Hart was equally concerned to produce an account of the law that did justice to the myriad and characteristic ways in which the law appears to participants within a legal regime.11 These participants include not only citizens—who sometimes break the law and sometimes conform to it for a host of different reasons—but also those officials who are empowered to adjudicate legal disputes in accordance with the law.12 Let us call this the “internal accuracy” constraint. Hart thought that earlier positivist theories of law violated this constraint because they tried to provide purely descriptive accounts of the law, and of the obligations it imposes, in terms of things like the predictions of sanctions, or other related phenomena, while leaving out the way the law appears to those who sincerely believe it to have authority over them.13 For these participants, the law sometimes appears to give rise to intrinsically action-guiding rules and obligations—thoughts which are often expressed in the special normative vocabulary that pervades the law. But as soon as this fact has been acknowledged, it should give rise to puzzles of its own. This is because the fact that an action is “required by a rule,” or is “obligatory,” is one that should be equally puzzling from a naturalistic perspective. Given Hart’s naturalistic commitments, any account of the law that made reference to these other normative concepts would thus be unsatisfying, standing alone.

Rather than denying the relationship between the law and various kinds of rules or obligations, however, Hart took a different tack: he sought to supplement his account of the law with a purely descriptive account of rules and obligations.14 This work—which is important in its own right—made reference

10. See, e.g., HART, supra note 1, at 240 (“My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law . . . ”).
11. See, e.g., id. at 38–42, 60–61, 90–91.
12. See, e.g., id. at 91, 96–98 (distinguishing primary obligations from the more complex social situation in which officials adjudicate disputes in accordance with the law).
13. See, e.g., id. at 82–91.
14. See id. at 55–61 (explaining the difference between habits and social rules in a simple society to illustrate the way rules function in a complex modern society); id. at 82–91 (describing the concept of
to a special psychological state, which Hart referred to as the “internal aspect” of rules, or the “internal point of view.” Hart defined this psychological state as “a critical reflective attitude to certain patterns of behaviour as a common standard,” which attitude “display[s] itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.”

From a contemporary perspective, this aspect of Hart’s work thus can be understood as including a so-called “expressivist” account of the special normative terminology that pervades the law. According to this pattern of analysis, the meaning of a given term or phrase is parsed as expressive of a specific type of psychological state, which can be either described or referred to in purely naturalistic terms, without thereby being reducible to any assertions about those psychological states. Accounts of this kind thus promise to provide a purely naturalistic account of these meanings without reducing them to assertions about the natural world. If this pattern of analysis were to work, it would thus help Hart account for the special normative terminology that pervades the law in a way that meets the naturalistic constraint. Indeed, there is another important sense in which Hart’s work on the internal point of view helped him meet the naturalistic constraint: Hart thought he could use reference to the internal point of view to distinguish between situations that display mere convergences in behavior and those that display rule-following or action from obligation.

In particular, Hart used the internal point of view to develop what has come to be known as a “social practice” account of rules and obligations, according to which these phenomena are reducible to social conventions animated by a particular psychology.

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15. See, e.g., id. at 56, 254–55.
16. Id. at 57.
17. See Toh, supra note 6, at 76–77 (identifying an expressivist strain in Hart’s account of legal judgments). I say that Hart’s account of the law includes an expressivist dimension because, in my view, it also includes a cognitivist (and hence non-expressivist) dimension, according to which legal judgments can be true or false, but only by convention.
18. For an illustrative example of this pattern of analysis, see Allan Gibbard, Wise Choices APT FEELINGS 84–85 (1990). Gibbard has proposed an expressivist analysis of rationality as follows: “To call something rational is not to attribute some particular property to that thing—not even the property of being permitted by accepted norms.... We explain the term by saying what state of mind it expresses.” Id. at 8; see also id. at 45–48. For other descriptions of this pattern of analysis see, for example, Bertrand Russell, Reply to Criticisms, in THE PHILOSOPHY OF BERTRAND RUSSELL 679, 679–742 (Paul Arthur Schilpp ed., 1944); Charles Stevenson, Retrospective Comments, in FACTS AND VALUES 186, 204–05 (1963).
19. See, e.g., Hart, supra note 1, at 56–57, 88–90, 155.
20. See, e.g., id. at 255 (“The account I have given of these has become known as ‘the practice theory’ of rules because it treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called ‘acceptance.’”).
There is presently a lively debate going on in analytic jurisprudence as to whether it is ultimately possible to articulate a purely descriptive account of the law.\(^{21}\) One important aspect of this debate concerns whether existing proposals ultimately succeed in their own terms, or whether they should instead be understood as making hidden reference to irreducibly evaluative concepts.\(^{22}\) Still, insofar as we are concerned with trying to square our understanding of the law with our ongoing naturalistic understanding of the world, it will be as relevant today as ever to develop an account of the law that jointly meets the naturalistic and internal accuracy constraints. A second dimension of Hart’s importance for contemporary analytic jurisprudence thus derives from the fact that he developed a highly sophisticated and nuanced account of the law that arguably meets these two constraints—or that at least might, with some further elaboration. This view has been called “inclusive legal positivism,”\(^{23}\) and, in some form, it is still a major contender today.

As Jules Coleman has observed, inclusive legal positivism includes a commitment to at least the following three theses.\(^ {24}\) First, it is committed to some version of the “Conventionality Thesis,” which amounts to the claim that “[l]aw 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.”\(^ {25}\) Hart adopted the Conventionality Thesis not only because he thought it was descriptively accurate, in my view, but because he wanted to provide a purely naturalistic account of what legal officials are doing when they identify the law by employing a shared standard (or what he called a “rule of recognition”) and what ordinary citizens are doing when they act out of a sense of legal obligation. For reasons already discussed, Hart thought he could do this by developing a particular account of social rules, or conventions, which made special reference to the internal point of view.

Second, Hart held the “Practical Difference Thesis,” which I will define as follows: “In order to be law, authoritative pronouncements must in principle be capable of making the precise kinds of practical differences that are characteristic of law: differences of the right kind, that is, in the structure or content of

\(^{21}\) For a good discussion of this debate, see Brian Leiter, Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence, 48 Am. J. Juris. 17, 30 (2003).

\(^{22}\) See, e.g., Stephen Perry, Hart’s Methodological Positivism, in Hart’s Postscript, supra note 3, at 311. Perry says that “in developing his substantive theory Hart in fact combines elements of two distinct methodological approaches, which we can call the descriptive-explanatory method and the method of conceptual analysis. Of these, only the first can appropriately be said to involve a form of methodological positivism. The second, when understood and analyzed in its own terms, turns out in all significant respects to be Dworkin’s interpretivism under a different name.” Id. at 312–13.

\(^{23}\) This position is variously termed “incorporationism,” “soft positivism,” or “inclusive legal positivism.” See, e.g., W.J. Waluchow, Authority and the Practical Difference Thesis, 6 Legal Theory 45, 45 (2000); see also Coleman, supra note 3, at 100 n.5. 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).

\(^{24}\) Coleman, supra note 3, at 101.

\(^{25}\) Id.
deliberation or action.”26 This definition is based on an orthodox one proposed by Jules Coleman.27 For reasons that will become clear in the body of this Article, however, the thesis has been stated in a way that leaves it open to multiple specifications, depending on what kind of practical differences are needed to meet the internal accuracy constraint.

Finally, Hart held the “Incorporation Thesis,” which amounts to the claim that “[m]orality can be a condition of legality: that the legality of norms can sometimes depend on their substantive (moral) merit, not just their pedigree or social source.”28 Hart thought that this thesis was needed to do justice to the way that various moral or evaluative considerations sometimes enter into the processes of adjudication, when officials determine what the law requires. He thus adopted it in part to meet what I have called the “internal accuracy constraint.”

This brings us to the third and final dimension of Hart’s influence that I would like to highlight in this Introduction: the two most prominent alternatives to Hart’s inclusive legal positivist views were developed in response to core insights that he had. These are Dworkin’s interpretivist theory of law,29 which is fundamentally non-positivist, and Raz’s exclusive legal positivist theory,30 which Scott Shapiro has more recently elaborated in important and influential (though somewhat distinctive) ways.31 Beginning with The Model of Rules I,32 Dworkin has, for example, brought to our attention a rich set of phenomena suggesting that judges sometimes—or perhaps even always—rely on substantive moral

26. Jules Coleman has described this commitment in somewhat different terms. Coleman attributes only the following version of the Practical Difference Thesis to Hart: “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.” Id. I do not, however, think that Coleman would object to the statement provided in the main text. The additions merely make explicit the fact that this thesis is open to further specification depending on which type of practical differences the law must be capable of making.
27. Id.
28. Id. at 100.
29. 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 TAKING RIGHTS SERIOUSLY 46, 48–58 (1978).
30. 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 49–53 (1999) (explicating Hart’s practice theory of rules); id. at 53 (“The practice theory suffers from three fatal defects. It does not explain rules which are not practices; it fails to distinguish between social rules and widely accepted reasons; and it deprives rules of their normative character.”); id. at 58–84 (arguing that the law must be viewed as giving rise to exclusionary reasons for action in order to fix these defects).
insight to identify what the law is. This work has thus put significant pressure on the Conventionality Thesis, or the view that judges identify what the law is by employing a rule of recognition that can be understood purely in terms of a social convention. But whereas Dworkin thinks that these phenomena warrant a wholesale rejection of the Conventionality Thesis (and, ultimately, of positivism more generally), Hart thought that these phenomena could be accommodated by adopting the Incorporation Thesis.35

The problem with Hart’s proposal, however, is that subsequent legal positivists—including, most prominently, Joseph Raz and Scott Shapiro—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.36 This work has thus put significant pressure on the Incorporation Thesis itself, by suggesting that the law must be identified solely on the basis of social sources if it is to function in its characteristic ways as law. Because Raz and Shapiro maintain commitment to positivism’s Conventionality and Practical Difference Theses, while rejecting the Incorporation Thesis, their view has been labeled...
“exclusive legal positivism.” It is important to recognize, however, that their arguments would—if successful—make it equally difficult to accept Dworkin’s work on adjudication as revealing anything about the genuine nature of law.

With these introductory remarks on the table, the context is now set to explain the full meaning and importance of the claims that will be defended in this Article. In my view, all of the above mentioned thinkers have illuminated important aspects of the law that one might hope to accommodate in a fully satisfying philosophical account of the law. For reasons already discussed, they have, however, developed their findings in ways that would appear to require rejection of key insights developed by their rivals. The three most important views in contemporary analytic jurisprudence—namely, inclusive legal positivism, exclusive legal positivism, and non-positivist views arising from Dworkin’s work on adjudication—would thus appear to be in a complex logical gridlock. I do not just mean by this that the views themselves are inconsistent; that, after all, is to be expected. I mean to draw attention to the further fact that each view is motivated, in part, by insights into important aspects of the law, which, as things presently stand, would appear to defy harmonization with the rest.

As a historical matter, analytic jurisprudence is, moreover, currently in a curious position. Despite the broad consensus on Hart’s importance, and despite his influence on the development of the two major alternatives to his inclusive legal positivist views, Hart remained largely silent in publication about his take on these major alternatives as they were developed and the motivations behind them shored up. We know that Hart thought he had responses of some kind, 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. But whereas Hart’s Postscript


38. Raz is explicit that he means his arguments to weigh against both inclusive legal positivism and Dworkin’s views. See, e.g., Raz, Authority, Law, and Morality, supra note 36, at 220–26 (using his work on legal authority to argue against Dworkin’s views); id. at 226–30 (using his same work on legal authority to argue against inclusive legal positivism).

39. As Hart himself noted in his posthumously published Postscript:

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.

40. See id. at 238–76 (presenting responses to a number of Dworkin’s early criticisms of legal positivism).

HART, supra note 1, at 238.

For many years Hart had it in mind to add a chapter to The Concept of Law. He did not wish to tinker with the text whose influence has been so great, and in accordance with his wishes it is here published unchanged, except for minor corrections. But he wanted to respond to the many discussions of the book, defending his position against those who misconstrued it, refuting unfounded criticism, and—of equal importance in his eyes—conceding the force of justified criticism and suggesting ways of adjusting the book’s doctrines to meet those points.
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. 41 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.42 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? Is it, perhaps, a response that might even allow for the harmonization of key insights drawn from a number of seemingly irreconcilable quarters? 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 the Incorporation Thesis and the Practical Differ-

That the new chapter, first thought of as a preface, but finally as a postscript, was unfinished at the time of his death was due only in part to his meticulous perfectionism. It was also due to persisting doubts about the wisdom of the project, and nagging uncertainty whether he could do justice to the vigour and insight of the theses of the book as originally conceived. Nevertheless, and with many interruptions, he persisted with work on the postscript and at the time of his death the first of the two intended sections was nearly complete. When Jennifer Hart asked us to look at the drafts and decide whether there was anything publishable there our foremost thought was not to let anything be published that Hart would not have been happy with. We were, therefore, delighted to discover that for the most part the first section of the postscript was in such a finished state.

Id. at vii.

41. 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.” Id. at vii. 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 HART, supra note 8, at 127, 154–61.

It is to be noticed that Raz, true to his general positivist account, does not stipulate as a condition of the existence of a legal system that the belief which a judge may either hold or pretend to hold that there are sound moral reasons requiring compliance with the law as such be true and in fact, as we learn from his writing on political obligation, Raz thinks it must be false. This makes the moral component in the judge’s acceptance very small indeed. Small as this moral component is insistence on it to my mind conveys an unrealistic picture of the way in which the judges envisage their task of identifying and applying the law, and it also rests, I think, on a mistaken cognitive account of normative propositions of law.

Id. at 158.

42. 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 “content-independent” and “peremptory” reasons. See HART, Commands and Authoritative Legal Reasons, in ESSAYS ON BENTHAM, supra note 8, at 243, 253. 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.
ence Thesis. 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.” Coleman too thinks that there is an inconsistency lingering in the air. He has even gone so far as to suggest how Hart would have likely responded to this alleged inconsistency, and what its implications are 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.”

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 has recently called the “second-person standpoint” in order to develop and articulate this sense. Part I of this Article thus begins by discussing the problems that the exclusive legal

43. See, e.g., Coleman, supra note 3, at 101 (“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.”).
44. Id.
45. 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) (“[N]o matter how the general conceptual claim is best analyzed, it simply does not entail any claims about what must be true of any particular law. Law can claim authority in any of these senses without it following that a norm could not be law unless it was capable of being an authority in that sense. What is or must be true of the law need not be true of a law.”). 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 Shapiro, Law, supra note 31, at 168–69 (“While I agree with Himma and Waluchow that one cannot, in general, conclude that a part has the function F just because the whole has the function F—this is a form of the fallacy of division—in the case of legal rules and legal institutions such an inference is sound. For legal rules are the means by which legal systems guide conduct. We can say that the function of legal rules is to guide conduct because they have been produced by legal institutions in order to guide conduct.”). 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.
46. Darwall has been developing this work in a series of articles that has recently led to a full-length book on the topic. See Stephen Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability (2006) [hereinafter Darwall, Second-Person Standpoint]; see also Stephen Darwall, Autonomy in Modern Natural Law, in New Essays on the History of Autonomy 111, 115–16 (Larry Krassnoff & Natalie Brender eds., 2003) [hereinafter Darwall, Autonomy] (arguing that the normative force of obligation, as that notion is understood in modern natural law theories, cannot be understood except by reference to the second-person standpoint); Stephen Darwall, Because I Want It, 18 Soc. Phil. & Pol’y 129 (2001) [hereinafter Darwall, Because] (arguing that when we take up the second-person standpoint and hold one another accountable, we make presuppositions that implicitly commit us to viewing morality as a form of mutual accountability between free and equal persons); Stephen Darwall, Moore, Normativity, and Intrinsic Value, 113 Ethics 468 (2003) [hereinafter Darwall, Moore] (arguing that the reliance of Moore’s claims and arguments on an assumed normativity of intrinsic value gives them their plausibility; yet this intrinsic value is not suited to play the fundamental role on which he casts it); Stephen Darwall, Respect and the Second-Person Standpoint, Presidential Address to the Central Division of the American Philosophical Association (Apr. 24, 2004), in 78 PROC. & ADDRESSES
positivists have raised for Hart’s views. These problems all arise from trying to account for the law in a way that captures the precise kinds of practical differences that the law gives rise to in our lives. Part I will thus refine the Practical Difference Thesis in a number of ways to reflect Raz’s and Shapiro’s contributions to this topic.

Part II will then argue that contemporary work on obligation, due primarily to Stephen Darwall, will allow for further refinements of the Practical Difference Thesis. These refinements will, moreover, allow for the absorption of Raz’s and Shapiro’s refinements of the Practical Difference Thesis without an acceptance of any of their more far-reaching conclusions. In particular, there will be no need to accept the exclusive legal positivist claim that the law must be comprised only of source-based law, which is identifiable wholly without recourse to moral evaluation. The resulting view thus will be capable of absorbing a number of Dworkin’s important insights into the law as well.

Because Part II draws heavily on Darwall’s recent work on the “second-person standpoint,” Part II will also introduce the relevant aspects of this work. Importantly, these aspects include only structural features of the second-person 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. This distinction will be important in what follows, because Darwall believes that his work on the second-person standpoint has a number of substantive normative consequences as well. None of the arguments in this Article will depend on accepting those aspects of Darwall’s work.

Part III will then argue that this more fully refined version of the Practical Difference Thesis is, in fact, the right one—viz., the one that is needed to meet what I have called the internal accuracy constraint. If this is right, then exclusive legal positivism should be rejected.

Part IV, finally, will return to Hart, and will discuss some of his central views...
and core jurisprudential commitments. It will suggest that while there were some genuine tensions in Hart’s views, Hart implicitly understood the importance of reference to something like the second-person 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 for adjudicating debates between positivists and their critics over how to account for the law.

Before proceeding, I would like to make two further preliminary clarifications. First, while I believe that the view to be developed here is an internally consistent version of inclusive legal positivism, which does significant justice to the internal accuracy constraint, I make no claim that the view meets the naturalistic constraint as it stands. Indeed, I am more inclined to believe that further work must be done to provide a purely naturalistic account of the internal point of view. Still, part of my interest in these topics arises from the fact that I think there are promising ways to try to develop such an account. Second, although a number of arguments in this Article draw on Darwall’s recent work, I make no claim that inclusive legal positivism can only be rendered internally consistent with the aid of Darwall’s work. What I believe, instead, is that Darwall’s recent work on the meta-ethics of obligation is both powerful and illuminating, and that its acceptance will in fact yield an internally consistent version of inclusive legal positivism. This version will, moreover, allow for the harmonization of a number of seemingly irreconcilable insights drawn from Dworkin, Raz, and Shapiro, and will shed additional light on both the law and legal obligation. Indeed, as I will note in the concluding remarks, I believe that Darwall’s work on the second person may have a number of more far-reaching implications for legal theory as well.

I. SOME PROBLEMS FOR HART: EXCLUSIVE LEGAL POSITIVISM AND ITS CONTRIBUTIONS

As noted in the Introduction, the central purpose of this Article is to address a set of problems that the exclusive legal positivists have raised for Hart’s views. Joseph Raz and Scott Shapiro have argued, in particular, that one cannot consistently maintain commitment to both the Practical Difference Thesis and the Incorporation Thesis, and that we should abandon the Incorporation Thesis.

51. Elsewhere, I have developed a psychological account of our sense of obligation that, in my view, does part of the relevant job. See generally Robin Bradley Kar, The Deep Structure of Law and Morality, 84 TEX. L. REV. 877 (2006).
to cure this inconsistency. The aim of this first Part is thus preliminary: it is to provide a detailed exposition of the problems themselves.

Whether there is an inconsistency between the Practical Difference Thesis and the Incorporation Thesis ultimately will depend largely on what these two theses assert. The Introduction has set forth a definition of the Incorporation Thesis, along with a first blush characterization of the Practical Difference Thesis, as follows: “In order to be law, authoritative pronouncements must in principle be capable of making the precise kinds of practical differences that are characteristic of law: differences of the right kind, that is, in the structure or content of deliberation or action.” Notice that the italicized portions of this formulation make reference to “the precise kinds of practical differences that are characteristic of law,” which are later referred to as differences of the “right kind.” Through use of this language, I have left the Practical Difference Thesis open to multiple specifications, depending on what precise kinds of practical differences we must understand legal rules as capable of making. Although this is a controversial topic, I believe—for reasons discussed below—that both Raz and Shapiro have contributed to our understanding of the law in ways that should lead to important refinements of the Practical Difference Thesis. Inclusive legal positivists should accept these refinements because they are needed to bring the Practical Difference Thesis into further alignment with the internal accuracy constraint.

Raz and Shapiro have, however, also produced influential arguments suggesting that acceptance of the Practical Difference Thesis, so refined, will require rejection of the Incorporation Thesis. As discussed more fully below, these arguments depend, in part, on how these thinkers believe we should construe

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52. See, e.g., Raz, Authority, Law, and Morality, supra note 36, at 211 (“The main purpose of this essay is to defend the sources thesis against some common misunderstandings and to provide one reason for preferring it to [the incorporation thesis]. The argument turns on the nature of authority . . . .”); Shapiro, Way Out, supra note 36, at 158 (“[A]ny principle that satisfies a social rule of recognition simply by virtue of its moral content cannot guide conduct as a legal norm.”).

53. Because most—though not all—of this Part is exegetical, those who are well-versed in Raz’s and Shapiro’s arguments may want merely to skim the rest of this Part or skip directly to Part II.

54. The Incorporation Thesis amounts to the claim that “[m]orality can be a condition of legality: that the legality of norms can sometimes depend on their substantive (moral) merit, not just their pedigree or social source.” Shapiro, supra note 31, at 100.

55. Jules Coleman has described this commitment in somewhat different terms. Coleman attributes only the following version of the Practical Difference Thesis to Hart: “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.” Coleman, supra note 3, at 101. I do not, however, think Coleman would object to the additions I have made. As explained, they are needed, in the present context, to allow the thesis to remain open to multiple specifications, depending on what precise kinds of practical differences the law must be capable of making.

56. See generally Raz, Authority, Law, and Morality, supra note 36, at 210–11 (2001) (arguing that the Incorporation Thesis is inconsistent with the Practical Difference Thesis and Conventionality Thesis); Shapiro, Law, supra note 23, at 127, 133–34 (“Exclusive legal positivism remains the only option for legal positivists who believe that every legal system contains a social rule of recognition and that every legal rule must in principle be capable of securing conformity by making a practical difference.”).
the Practical Difference Thesis in order to produce a satisfying account of the law. The following two subsections therefore discuss Raz’s, and then Shapiro’s, work in turn. Each subsection will seek, first, to isolate the important contributions that these thinkers have made to our understanding of the law and the Practical Difference Thesis, and then, second, to articulate why these thinkers believe that acceptance of this thesis requires rejection of the Incorporation Thesis. No attempt will be made in this Part to resolve the problems discussed. That project will begin only in Part II.

A. UNDERSTANDING RAZ’S CONTRIBUTIONS: LEGAL AUTHORITY, EXCLUSIONARY REASONS, AND AN INITIAL CHALLENGE TO HART

One of Raz’s great contributions to jurisprudence has been to clarify an important dimension of the non-optionality 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.”57 It can nevertheless be much more difficult to identify in what precisely this non-optionality of legal obligation consists.

As discussed in the Introduction, 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.58 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.59 As discussed, Hart called this psychology the “internal point of view,” and he described it—in his early work—as “a critical reflective attitude to certain patterns of behaviour as a common standard,” which gives rise not only to guides (or what we would now call reasons) for action but also to grounds for criticizing deviations.60 When the members of a group take up the internal point of view toward a shared pattern of behavior, and when this attitude generates the convergent pattern, Hart thought that the members could be understood as following a rule in a way that people who merely converge in behavior cannot. Hart thus thought

57. Hart, supra note 1, at 6.

58. 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.”).

59. 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’.”).

60. Id.
that reference to the internal point of view could be used to make the distinction he was concerned with, and thereby clarify one dimension of the non-optionality 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-optionality that is at issue with legal obligations. Reference to the internal point of view 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 a general reason to act—a reason that applies generally to all similarly situated members of the group—and situations in which they believe the action is in some further sense required.

To illustrate, 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 preference satisfaction 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 actions that maximize the actor’s preference satisfaction as a generally applicable standard: i.e., they take the standard not only as a guide to the relevant individual’s actions but also as a ground for criticizing one another’s deviations (as failures of rationality). It is still perfectly possible—indeed likely—that none of these persons would take the maximization of individual preferences 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 look more carefully at what is happening when people take themselves to be under an obligation. Raz suggests that such people differ from people like our hypothetical rational choice theorists, insofar as members of the former group take the obligation in question to give rise not only to generally applicable 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. Exclusionary reasons for action are a species of what Raz calls “secondary reasons,” and, in ways to be
discussed, they function distinctively in our practical reasoning.66

Many common examples can be used to illustrate this phenomenon. An ordinary person who has made a promise that is 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. These reasons typically arise from self-interest but can also arise from a number of altruistic or other-regarding motives. 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 (non-promise-based) reasons. These reasons not to act on other reasons are thus “exclusionary reasons,” in Raz’s sense. If, moreover, 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 such non-promise-based reasons. Thinking of moral and legal reasons in this way would seem needed 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 promises, and do not just think of our promises as giving rise to 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 provide us with obligations that are in some sense non-optional. Moral philosophers have written extensively on this topic, and they typically refer to it by saying that moral imperatives purport to be “categorical.”67 But as the moral philosopher David Brink has usefully observed, this common claim can 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 independently of that person’s contingent desires, inclinations or interests; they have (iii) “supremacy,” in that they provide each person with reasons to act that are independent of that

66. Id. ("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 182–86.

67. See e.g., David O. Brink, Kantian Rationalism: Inescapability, Authority and Supremacy, in ETHICS AND PRACTICAL REASON 255, 259 (Garrett Cullity & Berys Gaut eds., 1997) ("[W]e might identify two distinguishable senses in which imperatives might be categorical. In one sense, imperatives are categorical just in case they apply to people independently of their aims or interests; if so, we might say they express categorical norms. Imperatives are categorical in another sense just in case they provide those to whom they apply with reasons for actions independently of their aims or interests; if so, we might say they generate categorical reasons.").
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.68

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 to give rise to reasons for action. Both of these features are thus part of Hart’s early conception of the internal point of view.69 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.70 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 is needed to account for morality’s purported 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.71 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 not even morality should be understood as strictly overriding.72 If they are right, but still want to claim that morality gives rise to obligations of some more limited kind (that is, as opposed to just generally applicable reasons to follow rules), then the concept of an exclusionary reason might therefore 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

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68. Id. at 255.
69. See, e.g., HART, supra note 1, at 89 (defining the internal point of view as concerned with rules of conduct from the perspective of a member of a group who accepts them as general guides for conduct and as grounds for criticizing deviations).
70. See Brink, supra note 67, at 255.
71. See Raz, supra note 30, at 40.
exclusionary reason is framed at the right level of generality to characterize a distinctive, structural feature of obligation in many forms. Indeed, when Raz first developed the notion, he used it to account for the distinctive perceived reason-giving force that a host of phenomena have—from rules and legally authoritative directives to garden-variety plans and commitments.73

One concerned to absorb both Hart’s and Raz’s contributions to our understanding of obligation might therefore take the following tack: she might try to build reference to exclusionary reasons into her understanding of the internal point of view, at least when accounting for those legal rules 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 obligations in the law, we take them as providing us not just with any guide to action but rather with guides that are “peremptory.”74 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.75 In my view, this absorption of Raz’s work is both needed and appropriate. It leads to the first promised refinement of the Practical Difference Thesis (R-1): In order to constitute an obligatory aspect of the law, a legal rule must in principle be capable of making an exclusionary practical difference in the structure or content of deliberation or action—at least with regard to those persons who respond to the rule as an obligation. I propose that we accept (R-1).

It is one thing to accept (R-1), however, and quite another to think that this poses a problem for inclusive legal positivism.76 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 practical authority? Let us begin with some reconstruction. Raz begins with the commonplace notion that we ordinarily have the capacity to engage in practical deliberation and to act on the reasons we perceive as applying to us. When we do so, we typically engage our basic capacities as practical agents, and we use them to decide what to do based on the considerations we take to bear on that question.77 We may, for example, deliberate on the merits of various courses of

73. See Raz, supra note 30, at 35–39 (using notion of exclusionary reasons to account for the practical force of a commander’s orders to his subordinates, the practical force of a promise, and the practical force of a past decision made in circumstances where one has more trust in one’s rational capacities than in the present); see also id. at 69 (arguing for the “status of decisions as exclusionary reasons”).
74. See Hart, supra note 42, at 243.
75. See id. at 244.
76. See generally Raz, Authority, Law, and Morality, supra note 36, at 210–11 (arguing that acceptance of the fact that the law gives rise to exclusionary reasons for action requires rejection of the Incorporation Thesis).
77. 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. See Joseph Raz, Introduction to Authority, 1,
action, and this 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 presumably view ourselves as having a categorical reason that settles what we ought to do in those circumstances—a reason, that is, that has the authority to override any desire-based reasons to the contrary. To act on this reason would be to respond to this perceived moral obligation. I will call this deliberation “first-personal” because it is engaged in from the perspective of the deliberating agent, who is asking, in effect, “What should I do?”

Raz accepts these commonplaces but believes that the law operates in ways that are importantly distinct from all of this, including our capacities for independent, first-personal deliberation about what to do. 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 such deliberation. If we assume further, with Raz, that 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. 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. Notice that both of these theses ultimately rely not only on structural features of obligation but also on a particular normative view: that legitimate legal authority is reducible to some form of pre-existing (and non-legal) authority, or, put differently, that the law’s authority ultimately depends on whether it is telling us to do what we really ought to do based on other,

1–19 (Joseph Raz ed., 1990). Citing Robert Paul Wolff’s work as raising the “challenge of philosophical anarchism,” Raz writes: “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.” Id. at 6.

78. See, e.g., id. at 11–19.

79. See Raz, Authority, Law, and Morality, supra note 36, at 212 (“What distinguishes authoritative directives is their special peremptory status. One is tempted to say that they are marked by their authoritativeness. This peremptory character has led other people to say that in accepting the authority of another, one is surrendering one’s judgment to him, that the acceptance of authority is the denial of one’s moral autonomy, and so on.”); id. at 214 (“The first two theses articulate what I shall call the service conception of authority. They regard authorities as mediating between people and the right reasons that apply to them, so that the authority judges and pronounces what they ought to do according to right reason. The people on their part take their cue from the authority whose pronouncements replace for them the force of the dependent reasons.”).

80. See Joseph Raz, Authority and Justification, in Authority, supra note 77, at 115, 129.

81. Id. at 125. Raz complicates this definition in some ways that are not relevant to the argument here. See Raz, Authority, Law, and Morality, supra note 36, at 214, 230 n.13 (“By the same reasoning it also established that not all the factual consequences of a rule of law are part of the law.”).
non-legal grounds.

Together, these two theses also comprise 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.\(^{82}\) Raz explicitly connects this service conception to his earlier work on exclusionary reasons by asserting the “preemption thesis.” According to this thesis, when a legal authority requires the performance of an action, it provides its subjects with a reason to act that should not just be added to all of the other reasons that would ordinarily apply in first-personal deliberation; it should replace—or preempt—some of those ordinary reasons for action.\(^{83}\) We are still several steps away from Raz’s favored conclusions, but what we have already is an account of both what I will call the normal function of law (that is, to give us practical, first-personal guidance by identifying what we ought to do) and the normal mode of law (that is, 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 or is commonly believed to have this authority. (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 function of law (that is, to give us practical, first-personal guidance by identifying what we ought to do) and the normal mode of law (that is, to give us this practical guidance by means of instructions that are both general and exclusionary in character).

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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.\(^{85}\)

\(^{82}\) See Raz, supra note 80, at 131–32.

\(^{83}\) Id. at 124 (“I am arguing for one main thesis claiming that authoritative reasons are preemptive: The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”).

\(^{84}\) See Raz, Authority, Law, and Morality, supra note 36, at 211–15.

\(^{85}\) Shapiro, Way Out, supra note 31, at 177. The relevant point can, in fact, be put in slightly different terms. Just as Raz recognizes that the law may not always serve the normal function he ascribes to it, see Raz, Authority, Law, and Morality, supra note 36, at 215, 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,
Let us sum up the main morals of the considerations adduced thus far. They suggest that, in order for there to be a distinctively legal (as opposed to moral) obligation in play, we must be able to cash out how the law might provide us with a distinctive source of exclusionary practical guidance on what to do. We must, in other words, be able to identify independently what the law requires of us and not just decide legal disputes 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, rather than moral insight. Because the Incorporation Thesis would instead allow legal validity to depend on moral considerations, this thesis must—a conclusion reached by Raz—be abandoned.

Viewed as a whole, Raz’s work thus presents a subtle and highly nuanced account of how the law might provide us with a distinct class of exclusionary reasons for action, one which takes seriously the desideratum that we be able to cash out how this exclusionary guidance operates in terms of concrete practical effects. Indeed, absent some other account of how the law’s overriding character shows up in our lives or a rejection of the law’s overriding character, I see no easy way to avoid Raz’s further conclusions. Raz’s work thus provides a particularly deep challenge to inclusive legal positivism. And while one might in principle try to meet this challenge by rejecting the refinements of the 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. See Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 10–12 (2004). 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; 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. See id. at 10. In comparing purported cases of the incorporation of morality to reference to the application of foreign laws, Raz writes:

> U.K. and U.S. statutes give legal effect to company regulations, to university statutes, and to many other standards without making them part of the law of the United Kingdom or the United States. Conflict-of-law doctrines give effect to foreign law without making it part of the law of the land. Such references make the application of the standards referred to legally required, and rights and duties according to law include thereafter rights and duties determined by those standards. But they do not make those standards part of the law. They no more become part of the law of the land than do legally binding contracts, which are also binding according to law and change people’s rights and duties without being themselves part of the law of the land.

Id. Applications like these in no way transform foreign laws into domestic laws or make foreign obligations into obligations arising from domestic law. Id.

86. See, e.g., Raz, *Authority, Law, and Morality*, supra note 36, at 210, 211–15; id. at 214–15 (“The mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend.”) (emphasis added).

87. See Raz, *Authority, Law, and Morality*, supra note 36, at 210–14 (using observations about law’s exclusionary character to argue against the incorporation thesis); id. at 214–19 (arguing that these observations about law’s exclusionary character are nevertheless consistent with the sources thesis, and hence, with exclusive legal positivism).
Practical Difference Thesis suggested here, Hart importantly—and rightly, in my view—did not do this. 88

B. UNDERSTANDING SHAPIRO’S CONTRIBUTIONS: MOTIVATIONAL VERSUS EPISTEMIC GUIDANCE, AND A SECOND CHALLENGE TO HART

The previous subsection suggested that some reference to exclusionary reasons may be needed to distinguish between the person who follows a legal rule because she takes the rule to give rise to overriding requirements of action and the person who merely conforms to the rule because she believes there is a reason (even a generally applicable reason) to conform. It is, however, equally important not to exaggerate the place of this distinction within a satisfying account of the law. Hart clearly thought that an account of the law must include an account of legal obligation.89 In The Concept of Law, Hart was also careful to observe, however, that not all citizens need take the law to give rise to genuine obligations in order for the law to exist. 90 Hart instead accounted for the law as a more complex union of so-called “primary” rules of conduct (that is, rules that give rise to direct requirements of action) and a number of specific “secondary” or “power-conferring” rules that gave officials the power to identify the law, to adjudicate legal disputes, and to change the law through specific conventional processes.91 Hart thought that we could account for the existence of law (including the existence of distinctively legal obligations) by referring to this more complex social situation, so long as there was a community of officials who believed the law to have its distinctive authority and so long as a sufficient number of citizens conformed to the law—regardless of their reasons for conformity.92

88. Later in his career, Hart instead began to define the internal point of view, as it relates to legal obligations, in a way that makes implicit reference to exclusionary reasons. See, e.g., Hart, supra note 42, at 255–61 (defining “peremptory” reasons in terms that track Raz’s concept of an “exclusionary reason,” and arguing that legal obligations must be understood as purporting to give rise to peremptory reasons for action).
89. See Hart, supra note 1, at 82–91 (exploring the nature of obligation); id. at 85–86 (“The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation.”).
90. See, e.g., id. at 61 (observing that a proper account of the law, and of legal obligation, must take cognizance not only of the internal point of view but also of the “relatively passive aspect of the complex phenomenon which we call the existence of a legal system,” which is reflected in the fact that ordinary citizens must merely conform to the law—for any number of reasons, including a mere fear of arrest—for legal systems to exist).
91. See id. at 79–99 (accounting for central aspects of the law in terms of a union of primary and secondary rules).
92. See, e.g., id. at 116–17.

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, . . . its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials. The first condition is the only one which private citizens need
One way to understand Shapiro’s contributions to the issues raised in this Article is to see him as reminding us of these basic Hartian insights and elaborating on them in important ways. Shapiro begins with the Hartian proposition that the law need not ordinarily be concerned with the reasons that citizens conform to the law so long as they conform.93 But rather than leaving us here, Shapiro has developed an important distinction between two ways in which the law might produce conformity with the law which he dubs “epistemic” and “motivational” guidance.94

Assume that a given citizen learns that it is against the law to perform a specific action. That person would be “motivationally” guided by the law if the person were to refrain from this action because she takes the brute fact of the action’s illegality as a sufficient reason for refraining95—if, that is, she is moved by a belief in the law’s distinctive authority to act in accordance with this particular directive. However, this same person might not take the law to have this authority, while still being 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 of other reasons—as, for example, if the person were to act out of a fear of sanctions, or out of a sense of moral obligation arising from a gratuitous promise to a friend to follow the law.96 Shapiro calls these latter forms of guidance “epistemic guidance.”97

Because Shapiro believes that the law must be capable of guiding the actions of citizens in some way or other and because he attributes this view to Hart, Shapiro says: “[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 its primary rules and to motivationally guide the conduct of judicial officials via its secondary rules.”98 Shapiro’s work can satisfy: they may obey each ‘for his part only’ and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other’s deviations as lapses. Of course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey.

Id.

93. See Shapiro, Law, supra note 31, at 147.
94. See, e.g., Shapiro, Way Out, supra note 31, at 173.
95. See id. ("Someone is motivationally guided by a legal rule when his or her conformity is motivated by the fact that the rule regulates the conduct in question.").
96. See id. ("A person is epistemically guided by a legal rule when he learns of his legal obligations from the rule provided by those in authority and conforms to the rule . . . . Notice that it is not necessary that the agent be motivated to follow the rule because of the rule. A rule can epistemically guide conduct even though compliance is motivated by the threat of sanctions, just in case the person learns from the rule what he must do in order to avoid being punished.").
97. See id.
98. Id. at 175.
thus be used to articulate a second important refinement to the Practical Difference Thesis (R-2): *In order to be a legal obligation, a rule must meet two requirements: (i) it must in principle be capable of epistemically guiding the conduct of ordinary citizens; and (ii) it must in principle be capable of motivationally guiding the conduct of judicial officials who identify the rule via a relevant rule of recognition.* 99 I propose that we accept (R-2), along with Hart’s view that a satisfying account of the law must include an account of legal obligation.

How might an acceptance of (R-2) affect the debates between the inclusive and exclusive legal positivists? At first blush, Shapiro’s work might seem to undermine Raz’s challenges because it suggests that the law need not always be capable of providing citizens with exclusionary practical guidance to guide them in ways that are characteristic of law. For a number of reasons, however, it would be better to conclude that Raz and Shapiro have produced independent challenges to inclusive legal positivism, both of which must ultimately be met to render the view internally consistent.

First, even if Shapiro is right that ordinary citizens need not always be motivationally guided by legal rules for there to be law, legal rules must still be capable of motivationally guiding some people—namely, judicial officials—for the rules to function as distinctively legal obligations. This should be clear from the above statement of (R-2). For such a rule to motivationally guide officials, however, it must—if Raz is right—make an exclusionary practical difference in those officials’ practical reasoning. Raz’s challenge to inclusive legal positivism must therefore still be met in order to produce a satisfying account of this necessary aspect of the law.

Second, although Shapiro is right that not all citizens need to be motivationally guided by the law in order for law or legal obligations to exist, ordinary citizens often *are* so motivated, because they often act out of a sense of legal obligation. 100 Hart himself recognized this fact. It was implicit in his insistence

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99. Shapiro explains what it means for a judicial official to be guided by a rule of conduct that is addressed to citizens as follows:

> We can say that, according to the Practical Difference Thesis, every legal rule must in principle be capable of performing a dual role. First, a legal rule is supposed to motivate the norm-addressee to act in ways he might not have acted had he not appealed to the rule in his practical reasoning. Second, a legal rule is supposed to motivate an evaluator to evaluate conduct of norm-addressees in a way that she might not have done had she not appealed to the rule in her evaluations. The function of a no-jaywalking rule, therefore, is to get people not to jaywalk, as well as to get judges to evaluate jaywalking as wrongful behavior.

Shapiro, *Law*, supra note 31, at 133. These two proposed roles relate to elements (i) and (ii) of (R-2), respectively.

100. Shapiro does not disagree. In *Law, Morality, and the Guidance of Conduct*, he writes:

> More plausible is the idea that the essential function of legal rules is to ensure that people obey the law, not that they obey it for a certain reason. To be sure, it is an essential feature of legal rules that they have the capacity to motivationally guide, and, indeed, this capacity explains why many do in fact conform to the law. Yet, the guidance function of the law is
that a satisfying account of the law should illuminate not only how the law appears to the “bad man,” but also the “‘puzzled man’ or the ‘ignorant man’ who is willing to do what [the law] require[s], if only he can be told what it is.”101 At the very least then, Raz’s challenges must be met for a second reason: to account for what is happening when the law motivationally guides ordinary citizens.102

As the last two arguments suggest, acceptance of (R-2) should affect only the scope of applicability of Raz’s work. If we accept (R-2), we should limit the cases in which we must understand the law as capable of giving rise to exclusionary practical guidance. Still, this limitation in no way detracts from Raz’s arguments that the law must still be capable of providing exclusionary guidance in a broad range of cases. Nor does Shapiro’s work undermine Raz’s arguments that the law cannot do this if it is identified by means of an inclusive rule of recognition.103 Raz’s arguments against inclusive legal positivism must therefore still be met if the view is to be rendered internally consistent.

Shapiro has, moreover, produced an independent and influential argument suggesting that the Incorporation Thesis is inconsistent even with the more minimal claim that the law must be capable of providing people with epistemic guidance.104 If Shapiro is right about this, then he has produced a separate challenge to inclusive legal positivism, and one which applies to the law regardless of the form of practical guidance it must be capable of providing. Because of the importance and influence of this argument, the remainder of this subsection will discuss it in further detail.

served regardless of whether people conform out of a sense of moral obligation, tradition, habit, or fear.

Id. at 147 (emphasis added).

101. Hart, supra note 1, at 40.

102. Indeed, I believe an even more robust conclusion is likely warranted. It is more likely true that, even if the law can exist while citizens conform to the law for many reasons, legal obligations cannot exist unless ordinary citizens are at least in principle capable of responding to the rules out of a sense of obligation. If I am right, then we should accept not only (R-2) but the following:

(R-2)’: In order to be a legal obligation, a rule must meet two requirements: (i) it must in principle be capable of both epistemically and motivationally guiding the conduct of ordinary citizens—even if, in particular cases, citizens are sometimes guided in these different ways and even if they sometimes conform to the law without being guided by the law at all—as, for example, if they act out of habit or because it has never occurred to them to do what the law would forbid; and (ii) it must in principle be capable of motivationally guiding judicial officials who identify the rule by employing the relevant rule of recognition.

I will not defend (R-2)’ here. Many readers will find it plausible, and Shapiro appears to believe in this proposition. See Shapiro, Law, supra note 31, at 147. Still, a choice between (R-2) and (R-2)’ will only affect the scope of legal rules to which Raz’s challenge applies. Raz’s challenge must therefore still be met, either to account for those limited cases in which ordinary citizens respond to legal rules out of a sense of legal obligation—as in (R-2)—or to account for how any primary legal rule must be capable of functioning in their reasoning—as in (R-2)’. This disjunctive proposition is all that is needed for the present argument.

103. See supra Part I.A.

104. See, e.g., Shapiro, Law, supra note 31, at 127; Shapiro, Way Out, supra note 31, at 149, 158.
Shapiro begins his argument by articulating a broad test for determining whether a given rule is capable of making any practical difference (whether epistemic or motivational) in an agent’s practical reasoning. He initially proposes the following 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 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.105

As Shapiro later recognized, however, there is an important difference between appealing to a rule under some description or other and appealing to it specifically as a legal rule.106 If, for example, both morality and law require that we return an item that has been loaned from another person, then the relevant question to ask will presumably be whether the fact that the law requires that we return this item can make a difference in our practical reasoning—a difference which is independent of the fact that morality (or anything else) might require the very same thing as a rule. Shapiro thus amends the above test in the following way: he asks that when we consider the various possible worlds in which an agent may conform to a legal rule as a result of appealing to it (or not), we limit our consideration to those worlds in which the appeal in question is to the rule as a legal rule.107 In every other respect, the test is the same.

The next step is to apply Shapiro’s test to a legal rule that is picked out by an

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106. See id.
107. Shapiro says:

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.

*Id.*
inclusive rule of recognition and valid by virtue of its moral content.\textsuperscript{108} Consider the admittedly simplistic rule of recognition stating that “an action is required by law if and only if Congress has passed a statute requiring the action, and if morality would also require the action.” This rule of recognition is inclusive because it instructs that the law be identified by relying on moral insight, in at least a specified set of circumstances. Suppose, further, that Congress has passed a statute requiring people to follow through with any promise that is supported by consideration. Assume, finally, that one particular citizen has made such a promise. That citizen—or, indeed, anyone—might then turn to the law to seek practical guidance on the question of whether the citizen ought to keep the promise.\textsuperscript{109}

The relevant question to ask for our purposes will be the following: can the legal rules in question play any role at all in guiding action as legal rules? Let us begin with the case of judicial officials. We should have no trouble seeing how the inclusive rule of recognition under discussion could itself make a relevant practical difference under his test. We just need to begin by looking at the case in which a judge finds that the citizen ought, as a matter of law, to keep the promise (and thereby conforms to the rule of recognition) as a result of appealing to the rule of recognition as a law-identifying rule. We then need to imagine a 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 legal conclusion. Because the content of the rule of recognition is fixed by social convention, and because social conventions are contingent, there are many possible worlds in which this rule has a different content. One such (admittedly bizarre) one is the one in which the relevant rule of recognition says instead that “an action is required by law if and only if Congress has passed no statute requiring the action.” In such a world, the judge would have appealed to this alternative rule as the relevant law-identifying rule, and would have come to the exact opposite 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, and is, moreover, capable of doing so as a legal rule of the

\textsuperscript{108} We should limit our consideration to rules that have these two properties because the question we are trying to ask is whether the Incorporation Thesis—which allows legal validity to depend on moral considerations—is inconsistent with the Practical Difference Thesis—which requires that valid laws must be capable of making practical differences of the relevant kind in a person’s practical reasoning.

\textsuperscript{109} Our answer to this last question need not turn out to be a simple one. It is sometimes said that morality requires that we keep all of our promises, but this is probably 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 of recognition, 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, we might thus 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 uncontroversially requires that the person follow through with the promise.
relevant kind.

The problem, Shapiro thinks, comes only at the next step, when we try to see whether the primary rule that is picked out by the original inclusive rule of recognition (namely, that “one must keep one’s promise in these circumstances”) can make a practical difference as a legal rule in the judge’s reasoning. Once again, we are to start by imagining a case in which the judge concludes that the citizen must keep the promise as a matter of law, and does so as the result of appealing to the moral rule requiring us to keep our promises because it has been incorporated by the relevant inclusive rule of recognition. By doing so, the judge will be treating the moral rule as a legal rule. We are then to imagine worlds in which the judge does not appeal to this same moral rule as a legal rule but still identifies what the law requires via the original inclusive rule of recognition. If we assume further—as Shapiro does—that moral rules are necessarily true, and if we hold the original inclusive rule of recognition fixed, then there would seem to be no possible worlds in which the judge could come to a different legal conclusion. The only relevant worlds are ones in which the judge still figures out what the original inclusive rule of recognition identifies as the law, but only by deferring to some external authority to determine what morality requires in these circumstances, rather than engaging in independent moral deliberation. But since this should lead the judge to the same legal conclusion, the rule that one must keep one’s promises in these circumstances cannot be playing any independent role in

110. See Shapiro, Law, supra note 31, at 127, 133–34.

111. 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, Way Out, supra note 31, at 149, 181.

112. See Shapiro, Law, supra note 31, at 133 (“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. This shows that moral norms that lack pedigrees cannot make practical differences to judges, because a judge would always conform to those rules regardless of whether he appealed to them as legal rules or not, provided, of course, he guides his conduct by an inclusive rule of recognition.”); Shapiro, Way Out, supra note 31, at 149, 179 (exemplifying this possibility through a hypothetical where a judge defers to a rabbi to find out what morality requires, and hence, what an inclusive rule of recognition identifies as required in a given set of circumstances).

113. Here is how Shapiro presents the relevant 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 norms as legal norms in his deliberations, would he have been motivated to conform to those norms anyway in his evaluations?

Shapiro, Law, supra note 31, at 133. According to Shapiro, “[t]he answer to this question appears to be yes.” Id. 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. Id. This is supposed to show that only an exclusive rule of recognition is consistent with Hart’s practical difference thesis. Id. at 134.
guiding the judge’s deliberations as a legal rule.\textsuperscript{114}

The foregoing arguments apply to judicial officials, but Shapiro believes that he can extend them to the case of ordinary citizens. The extension is not trivial because citizens—unlike judicial officials—do not typically know the rule of recognition, and therefore do not typically appeal directly to it to identify what the law requires of them.\textsuperscript{115} This means that the arguments immediately preceding cannot be applied directly to the case of most citizens.

In order to make the extension, Shapiro distinguishes between “direct” and “indirect” guidance as follows:

[W]e can distinguish between two ways in which an agent might become informed about the content of a rule—one direct, the other indirect. An agent is directly informed about the content of a rule when he learns the information from the rule itself without engaging in deliberation on the merits. An agent is indirectly informed about the content of a rule when he learns this information from someone who was either directly or indirectly informed about the content of the rule.

Likewise, we can distinguish between direct and indirect epistemic guidance. An agent is directly epistemically guided by a rule when he conforms to such a rule as a result of being directly informed about the rule’s content. An agent is indirectly epistemically guided by a rule when he conforms to such a rule as a result of being indirectly informed about the rule’s content.\textsuperscript{116}

With these distinctions in hand, Shapiro rightly observes that his arguments relating to judicial officials have an important implication for ordinary citizens. His arguments suggest that ordinary citizens—who can learn what the law requires of them in a number of different ways, and without directly referencing the relevant rule of recognition—cannot be indirectly epistemically guided by legal rules that are valid by virtue of their moral content as legal rules. This is because the content of these legal rules depends on moral considerations. Somewhere in the informational chain through which the ordinary citizen learns

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114. See id. at 134. Importantly, Shapiro does not think that the same problem would arise if the judge were to employ an exclusive rule of recognition. His reasons for thinking this 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 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., id.

115. Id. at 150 (“There are many ways an agent can learn about the law: He can read legal how-to books, speak to criminals, consult lawyers, and so on. Indeed, in most modern legal systems, most citizens have no idea what their rule of recognition is and hence have, at best, a partial knowledge of the marks of authority. They do not always, and perhaps only rarely, find the rules in the ‘official way,’ i.e., by reference to the appropriate marks.”).

116. Id. at 151–52.
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of such legal requirements, moral deliberation must therefore play a critical role in determining what the law requires, and this fact makes it impossible for the rule to independently guide conduct as a legal rule for all the above reasons. This conclusion is, moreover, all that Shapiro needs for his main argument: it suggests that legal rules that are valid by virtue of their moral content cannot play the independent kind of role that they would need to play to provide either judges or ordinary citizens with guidance that is independent of moral guidance. Because these rules cannot provide any relevant practical guidance as legal rules, they cannot be genuine instances of law in Shapiro’s view.

If Shapiro’s arguments are valid, then the Incorporation Thesis is indeed inconsistent with the Practical Difference Thesis, even in those instances where the law need not be understood as capable of providing motivational guidance to agents. These considerations thus provide a second and independent challenge to inclusive legal positivism.¹¹⁷

II. RESOLVING THE PROBLEMS: BRINGING THE SECOND-PERSON STANDPOINT INTO OUR UNDERSTANDING OF THE LAW

As discussed above, the exclusive legal positivists have refined our understanding of the Practical Difference Thesis in ways that should—in my view—be accepted if we hope to produce a fully satisfying account of the law. They have, however, also developed powerful arguments suggesting that acceptance of the Practical Difference, so refined, will require rejection of the Incorporation Thesis and, hence, of inclusive legal positivism more generally. As noted, even Jules Coleman—one of the most important contemporary inclusive legal positivists—has conceded the force of these arguments.¹¹⁸ He has said: “[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.”¹¹⁹

This Part will develop a different resolution of the problem. Rather than abandoning or modifying the place of the Practical Difference Thesis within positivism, I will suggest that we should extend Stephen Darwall’s recent work on the so-called “second-person standpoint” to further refine it. Drawing on this work, Section A will argue that there is a distinctive and hitherto unappreciated standpoint—the second-person standpoint—through which the law can in principle provide people with practical guidance. It will then argue that our moral and legal lives are pervaded by practical dilemmas that we address primarily

¹¹⁷. A number of other people have responded to Shapiro’s basic line of argument. See, e.g., Kenneth Himma, H.L.A. Hart and the Practical Difference Thesis, 6 LEGAL THEORY 1 (2000); Matthew Kramer, How Moral Principles Can Enter Into the Law, 6 LEGAL THEORY 83 (2000); Waluchow, supra note 23. Shapiro’s responses to those criticisms are contained in Shapiro, Law, supra note 31. The arguments in this Article are distinct from those criticisms raised by previous authors.
¹¹⁹. Id.
from within this standpoint. Section B will canvass some of the orthodox models of practical reasoning in the legal literature, and point out that, despite their many facial differences, they all fail to recognize the distinctive role that the second-person standpoint plays in our lives. Section B will also provide a first blush diagnosis of this failure, which cannot—in my view—be thought of as a mere oversight. Section C, finally, will propose a new refinement to the Practical Difference Thesis, which makes specific reference to the second-person standpoint, and which would—if accepted—render the Practical Difference Thesis as fully refined wholly consistent with the Incorporation Thesis. The resulting view will thus be capable of harmonizing a number of seemingly irreconcilable insights drawn from competing legal theorists.

Of course, as Shapiro has rightly observed in response to a different line of criticism raised by Kenneth Himma, the arguments for exclusive legal positivism discussed in the preceding sections cannot be undermined simply by changing the relevant sense of practical guidance in an arbitrary manner. I believe there are, however, a number of reasons to think that the refinements proposed in this Part are, in fact, the right ones—i.e., the ones needed to bring the Practical Difference Thesis into further alignment with the internal accuracy constraint. I nevertheless will defer presenting the bulk of these reasons until the next Part. Those arguments will only be relevant if I can do three things: first, render it plausible that morality and law are pervaded by problems addressed from within the second-person standpoint; second, establish that orthodox accounts of practical reasoning leave out all reference to the second-person standpoint as a distinctive phenomenon; and third, show how further refinements of the Practical Difference Thesis, which make reference to the second-person standpoint, would make the problems raised by Raz and Shapiro disappear. The remainder of this Part turns to those key tasks.

A. INTRODUCTION TO THE SECOND-PERSON STANDPOINT

What exactly is the second-person standpoint, and why might it be important? In English, the first-person grammatical singular is typically marked by the familiar “I,” the second person by the familiar “You,” and the third person by the familiar “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 prove illuminating?

120. I will argue—in particular—for the following refinement (R-3): the law can provide us with overriding 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 a distinctively legal second-personal standing to demand compliance or raise a claim for non-compliance.

121. As Shapiro puts it: “[S]electing the appropriate conception of rule-guided behavior is not like picking the right pair of socks to go with one’s shoes.” Shapiro, Law, supra note 31, at 137.
In his recent work, Darwall has argued that there is a distinctive standpoint—namely, the “second-person standpoint”—which is critical to our understanding of moral obligation, but which has been underappreciated in most contemporary moral, legal, and political philosophy. Darwall defines the “second-person standpoint” as “the perspective you and I take up when we make and acknowledge claims on one another’s conduct and will.” We typically use a distinctive (second-personal) grammatical person to make such claims—as is seen in garden variety cases of orders, requests, commands, promises, reproaches, and the like. Importantly, however, nothing in Darwall’s arguments depend on how these claims are ultimately expressed at the level of surface grammar. Indeed, second-personal claims can in principle be expressed even without language—as might be the case if someone were to curtail an interruption in conversation by raising an eyebrow. For our purposes, the critical features that distinguish claims made from the “second-person standpoint” (or “second-personal claims”) from other claims are the following: they are addressed person-to-person, and they presuppose that the addressee and addressee stand in specific authority relations to one another, ones which are sufficient to give the addressee the relevant standing to raise the claim to that addressor.

Clearly, one can have the standing to raise a claim without having any reason to do so; and one can also have reasons to raise claims while lacking the relevant standing. In what follows, I will therefore use another term—“second-personal standing”—to refer to the standing, or authority, or power to raise a second-personal claim. Darwall defines “second-personal reasons,” finally, as reasons the validity of which depend on the possibility of their being addressed person-to-person (i.e., as second-personal claims), and hence, on the types of presupposed authority relations under discussion. Darwall believes that moral obligations must ultimately be understood as giving rise to second-personal reasons; and there are, in my view, good reasons to think that these arguments apply to legal obligations as well. The question I want to explore first,

122. See, e.g., Darwall, Second-Person Standpoint, supra note 46 (presenting a general account of morality as a form of equal accountability between free and equal persons that arises and is sustained through second-personal interactions between persons); Darwall, Autonomy, supra note 46, at 111, 115–16 (arguing that the normative force of obligation, as that notion is understood in modern natural law theories, cannot be understood except by reference to the second-person standpoint); Darwall, Because, supra note 46, at 129–30 (arguing that when we take up the second-person standpoint and hold one another accountable, we make presuppositions that implicitly commit us to viewing morality as a form of mutual accountability between free and equal persons); Darwall, Moore, supra note 46.

123. Darwall, Second-Person Standpoint, supra note 46, at 8.

124. Id.

125. See, e.g., id. at 8 (defining the second-person standpoint as the standpoint from which we provide one another with a specific kind of reason: a “second-personal” reason, which is “one whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason’s being addressed person-to-person . . . . [R]easons addressed or presupposed in orders, requests, claims, reproaches, complaints, demands, promises, contracts, givings of consent, commands, and so on, are all second-personal . . . ”).

126. Id. at 99–100 (“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
however, is how this standpoint might be distinct from what we might call the first- and third-person standpoints.

Let us call the “first-person standpoint” the standpoint we take up when we ask questions, or come to conclusions, the validity of which depend on their capacity to govern us, rationally, as deliberating agents. When we engage in practical deliberation—and ask, in effect, “How should I act?”127—we are, for example, trying to settle a question by coming to a conclusion, the validity of which depends on its capacity to motivate us to act through that very process of deliberation. The questions we ask in practical deliberation are thus asked from the first-person standpoint, in the sense under discussion.

It does not follow, however, that all of the considerations that we take to bear on these first-personal questions are also first-personal. Many are instead addressed from what I will call the “third-person standpoint,” or the standpoint we take up when we ask questions, or come to conclusions, the validity of which are independent both of their relations to us and our relations to one another. When we make descriptive claims about the world, we are, on this definition, making third-personal claims—because the validity of the claims depends on their truth, which is independent of any relations to us or our relations to one another. When we make claims about whether various states of affairs are intrinsically worthy of pursuit, we are, however, also making third-person claims—because the validity of these claims depends only upon whether the

127. R. Jay Wallace has thus explained:

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), http://plato.stanford.edu/entries/practical-reason/. 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. at 2.
relevant states of affairs are good. Although other people might try to tell us what is good or what is true, the validity of claims about the good or the true does not in any way depend upon the possibility of their being addressed person-to-person. Importantly, claims about the good and the true are also ones that give rise to agent-neutral reasons: they are claims that, if valid, give all agents the same reasons—namely, to pursue the good or believe the true, respectively.

To illustrate what is distinctive about the second-person standpoint, against this backdrop, consider the thoroughly second-personal question I might ask you if I were to look directly in your eyes, and say: “How could you have done that to me?” There are a number of different ways that you might take this question and respond to it. One 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 beliefs about what states of affairs are to be pursued, which—let us stipulate—include a belief that my anger is to be avoided. Reasoning from this starting point, and from certain other beliefs you have about what it will take to avoid 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. If, moreover, there were other means to avoid my anger (other than by your addressing me with an apology), or if other people could achieve the same end without you, there is nothing yet in this form of reasoning that would specially validate the conclusion that you—and you alone—should apologize to me.

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. When I hold you accountable for a perceived wrong, I would thus seem to be doing something more than taking myself to have a reason to hold you accountable; I would also appear to be presupposing that I have the second-personal standing to raise the claim in question. Similarly, when you apologize to me, you would seem to be doing more than trying to avoid my anger; you would appear to be acknowledging my second-personal
standing to demand such a response. These judgments about standing depend upon presupposed authority relations between us, which makes the issues addressed in these interactions fundamentally second-personal.

Once facts like these have been acknowledged, it should be clear just how pervasive the second-person standpoint and second-personal thinking are in both morality and the law. In our day-to-day lives, we commonly address one another with demands or complaints, backed by the perceived authority of morality or law. These demands 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 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 cause(s) 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 examples, 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 obligations that can be charged in this way.

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. 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 deeply entrenched aspects of morality and law. If this is right, then we misconstrue central aspects of our moral and legal problems, and what many of our interactions are all about in these areas of life, when we think that the only questions that are live for us are ones addressed from the first- and third-person standpoints. What is missing from this picture is all of the common and distinctively 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.

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128. Both the relevant question (the claim) and the relevant answer (the apology) in this case are fundamentally second-personal; they depend—or so I will argue—for their validity on the possibility of their being addressed person-to-person.

129. See Darwall, Second-Person Standpoint, supra note 46, at 15–18.
One might object that, despite superficial appearances, the issues we address from the second-person standpoint are ultimately reducible to ones that can be addressed wholly from within the first- and third-person standpoints. There is, however, an important obstacle to any such reduction. Moral and legal obligations typically have what philosophers call an “agent-centered” quality 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. 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 replete with requirements that purport to provide us with agent-centered restrictions.

There is, however, a notorious problem with trying to derive the agent-centered features of our moral and legal claims from within a form of reasoning that is exhausted by first- and third-person thinking. If this were the only mode of valid reasoning available to us, we might easily find that we have reasons to produce certain intrinsically-valuable states of affairs. Reasoning from thoroughly first- and third-person standpoints, we might also conclude that we have reasons 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 any combination of purely first- and third-person reasoning. In value theory, this problem is commonly referred to as the


131. See, e.g., Elizabeth Anderson, Value in Ethics and Economics 73 (1993); Darwall, Second-Person Standpoint, supra note 46, at 37 (“It is well known that [agent-relative] constraints” are “part of moral common sense.”).

132. See Anderson, supra note 131, at 73 (discussing manner in which agent-centered restrictions structure relations among many sets of persons).
“problem of agent-centered restrictions.” 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. Upon close examination, there would seem to be no foundation, in particular, for our recurrent thoughts that we have genuine obligations to specific persons.

The important point to recognize is, however, that this irreducibility cuts both ways. It means that important aspects of what we do when we interact with one another in morality and law cannot be understood in purely first- and third-personal terms or as reducible to problems addressed solely within those standpoints. When, on the other hand, we make second-personal claims, we presuppose certain authority relations that naturally and directly explain the agent-centered force that these claims are commonly perceived to have. The problems we address from the second-person standpoint would thus appear to form a distinctive class of human problems, which invite a particular species of answers. When we engage in second-personal forms of address, we are resolving problems that have an inherently relational aspect; we are engaging in forms of interpersonal address that allow us to negotiate, manage, repair, and sometimes dissolve, our social relationships with one another. It is, in the end, these special problems that give morality and law much of their distinctive lives.

B. ABSENCE OF THE SECOND-PERSON STANDPOINT IN ORTHODOX ACCOUNTS OF PRACTICAL REASONING

Despite how pervasive second-personal phenomena are in morality and law, reference to the second-person standpoint is curiously absent from orthodox models of practical reasoning found in the legal literature. The aim of this Section is to establish that the predominant models in this literature—including those most relevant to the issues in this Article—are instead fundamentally first- and third-personal.

Let us begin by examining what has become the dominant view, or perhaps it would be more accurate to say the “quorum” view, of how practical reasoning works. This is represented most explicitly in the law and economics literature, with its familiar model of the so-called “rational actor.” This model distin-

133. See id.
134. See, e.g., Parfit, supra note 130, at 54–55; Samuel Scheffler, The Rejection of Consequentialism 80 (1982).
135. Darwall, Second-Person Standpoint, supra note 46, at 20, 37–38, 126–31 (arguing that when we take up the second-person standpoint and hold one another accountable, we implicitly presuppose certain authority relations between persons that can explain the agent-relative force of the claims so addressed).
136. For descriptions of the rational actor model and a number of representative uses in legal academic work, see Bruce Chapman, Legal Analysis of Economics: Solving the Problem of Rational Commitment, 79 Chi.-Kent L. Rev. 471 (2004). See generally Steven J. Burton, An Introduction to Law and Legal Reasoning (1985); Jaap C. Hage, Reasoning with Rules (1997); Neil MacCormick,
guishes 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 practical deliberation. 137 For example, the model in no way reduces our questions about reasons for action to mere identifications of true beliefs about the world, and instead it claims that these reasons arise out of a combination of such beliefs and preferences for various states of affairs in the world. 138 These preferences are used to give sense to the notion that we value some states of affairs over others—that we take some states of affairs to be better—in an agent-neutral sense. Deciding what we have the 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. 139

It is important to recognize that the rational actor model has one feature that speaks strongly in favor of its importance and coherence as at least part of the correct picture. Reflection on how first-personal deliberation works suggests just 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 descriptive views that are either inconsistent with or implausible in light of our developing naturalistic understanding of the world. 140 Squaring our understanding of reasons for action 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. 141 When we do so, we explain our actions in terms of something we took to speak in favor of them at the time. 142 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

137. See, e.g., Peter Gärdenvors & Nils-Eric Sahlin, Introduction: Bayesian Decision Theory—Foundations and Problems, in Decision, Probability and Utility 1, 1 (Peter Gärdenvors & Nils-Eric Sahlin eds., 1988) (“[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.”).

138. See id.


140. For a classic set of arguments scrutinizing the objective purport of our ethical language on such grounds, see Mackie, supra note 7, at 38–40.

141. For a classic exposition, see Actions, Reasons and Causes, in Essays on Actions and Events 3, 5–19 (Donald Davidson ed., 2d ed. 2001).

function in plausible and straightforward naturalistic explanations of our actions. The explanations would be of the right kind, moreover, 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. 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. Factors like these represent important reasons for crediting the rational actor model as at least part of the correct picture, especially insofar as we are interested in meeting Hart’s naturalistic constraint.

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

143. 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 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.

Wallace, supra note 127, at 3–4. It is important to remember that, for reasons I have discussed elsewhere, someone who accounts for parts of the meanings of our moral and legal judgments in expressivist terms might still, in principle, hold the view that these judgments still have robust truth conditions. See Kar, supra note 51, at 933 (“The question whether there are objective properties that might explain our moral and legal judgments will likely depend on two things: (i) whether we can settle on a normatively satisfying account of what is required of us by morality or law, and (ii) whether the correct evolutionary explanation of our capacities for normative judgment shows that they function to identify the natural facts upon which these requirements supervene.”).

144. For an exposition of this potential problem for our normative language, see Mackie, supra note 7, 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).

145. For a 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).
deterrent effects.146 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,147 orthodox efficiency maximization accounts of legal doctrine tend to emerge.148 More recently, there have been a number of important developments in behavioral economics. These developments 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.149 Still, on the whole, even this literature tends to retain the assumption that we are motivated solely by beliefs about the world and various outcome-regarding motivations.150 Deliberation is still, in other words, pictured as engaging capacities that address fundamentally first- and third-personal questions.

In my view, Raz’s work marks an important advance over economic accounts of practical reason because it tries to account for the overriding practical authority that legal obligations are sometimes taken to have. When we act out of a sense of obligation, we take the law to give rise to practical guidance that cannot be understood in purely instrumental terms. As discussed, Raz proposes to account for this feature of legal obligations by saying that we sometimes act on “exclusionary reasons,” and by providing an account of how these reasons might operate so as to make distinctive practical differences in our lives. Notice, however, that Raz still pictures deliberation as fundamentally first- and third-personal. This assumption forces him to account for the way legal obligations provide their overriding force in purely first-personal terms: by excluding independent first-personal deliberation on the merits of what to do and by

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146. Robinson and 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.” Paul H. Robinson & John M. Darley The Role of Deterrence in the Formulation of Criminal Law Rules, 91 GEO. L.J. 949, 950 (2003).


150. For a good discussion of this fact premise, see Anderson, supra note 149, at 170–200 (arguing that a more fundamental shift is needed to capture the ways we respond to norms).
giving us distinctive guidance on that very same first-personal question. Hence, while Raz’s views on practical reasoning are more sophisticated than those typically found in the law and economics literature, his views still fail to make reference to the second-person standpoint as a distinctive standpoint.

The same point can be made of Shapiro. Although Shapiro allows for ordinary citizens to be guided by the law to conform to the law in a number of ways, he still views practical guidance as exhaustively speaking to the fundamentally first-personal question of what to do. This assumption shows up in his arguments against inclusive legal positivism, which presuppose that the only forms of epistemic or motivational guidance that the law can provide us with are on questions of how to act, which guidance would be foreclosed if the law were to be identified by turning to morality to decide that same question. The assumption also shows up in Shapiro’s view that when judges evaluate conduct in accordance with a rule, they are asking the same question that ordinary citizens are when they turn to the law: namely, what, from the citizen’s first-personal perspective of deliberation, that person should do or should have done.151

If the second-person standpoint is so pervasive in morality and law, how could leading accounts of practical reasoning fail to make special reference to it? All of the above thinkers are well-aware of the brute existence of things like our typical reactions to moral and legal wrongs. To suggest otherwise would be to charge them with a rather gross and unlikely oversight. But the problem lies not in seeing these phenomena but rather in seeing them for what they really are. There is, I think, a very natural and apparently powerful tendency to view second-person practical questions as nothing more than instances of first-personal questions. The issue of what reactions are warranted to persons (and their conduct) is thereby assumed to be reducible to yet another question of how to act. From this common starting point, seeing the second-person standpoint for what it is will thus require more than just the accumulation of more (first-personal) practical knowledge about how to act, and more than just increased (third-personal) knowledge about the world or about value. It will require something that more closely resembles a gestalt shift.

To keep things properly in view, one must also get clearer about the distinctive normative presuppositions that go into second-personal address, and understand how these presuppositions might explain and justify the agent-centered quality of the claims we make on one another from this standpoint. One must also have a firm understanding of the problem of agent-centered restrictions and thus see how the considerations under discussion indicate that the tendency to reduce second- to first-personal questions should be resisted. Finally, one must begin to understand that there is a conceptual tie between concepts like obliga-

151. See, e.g., Shapiro, Law, supra note 31, at 133 (“[T]here is a sense in which we can speak of judges conforming to rules that are not directed at them, namely, when they are charged with applying rules to others to whom they are addressed.”).
tion and second-personal address—as discussed more fully below. Seeing what is distinctive about the second-person standpoint thus requires a distinctive constellation of insights, which can change the way we look at a number of familiar phenomena in morality and law. It is only with Darwall’s recent work in moral philosophy that this particular constellation has been brought to light. What Darwall’s work provides, then, is a highly sophisticated antidote to the natural tendency we often have to conflate interpersonal reaction with first-personal action and thereby misconstrue a distinctive form of practical guidance that is at our disposal.

C. A RESPONSE TO EXCLUSIVE LEGAL POSITIVISM: REFINING OUR UNDERSTANDING OF LEGAL OBLIGATION AND THE PRACTICAL DIFFERENCE THESIS

We are now in a position to address how recognition of the second-person standpoint, and some of its distinctive features, might affect the arguments that Raz and Shapiro have leveled against inclusive legal positivism. I will begin with Shapiro’s challenge because it purports to be broader in scope. As discussed above, Shapiro purports to show that legal rules that are valid by virtue of their moral content cannot make any practical difference at all in our legal reasoning as legal rules.152

A close look at Shapiro’s argument shows, however, that it depends on the contention that valid legal rules purport to answer the very same practical question that moral deliberation does, namely, how to act. It should be clear by now that this question is wholly first-personal. To infer that legal rules cannot guide conduct as legal rules, Shapiro must therefore presume that first-personal questions exhaust the practical questions that are available to us. For all of the above reasons, I take this assumption to be false. What Shapiro’s arguments actually show is thus something more limited: namely, that legal rules that incorporate morality to identify the relevant legal requirements on action cannot guide first-personal deliberation as legal rules. Those same legal rules can, however, still give rise to different second-personal practical consequences concerning what reactions are warranted for deviations, what kinds of claims are available, and to whom.

To illustrate, consider a case in which both morality and the law forbid a specific action, such as murder, and where the law is identified by an inclusive rule of recognition that renders the legal rule against murder valid by virtue of its moral content. Can this legal rule against murder make a practical difference as a legal rule in the deliberations of either an ordinary citizen or judicial official? In most advanced industrial nations, the state has taken a monopoly over criminal prosecutions, and individuals therefore lack the standing to raise criminal claims on their own. This is so even though individual moral blame and reproach would still be warranted in response to murder. For a judge,

152. See supra Part I.B (discussing Shapiro’s arguments against inclusive legal positivism).
treat ing this particular moral rule as a legal rule would thus appear to bring with it distinctive practical consequences, relating to who precisely has the standing to raise claims for non-compliance (namely, the state), and which precise consequences will follow non-compliance (namely, state-sanctioned punishment). To the extent that ordinary citizens are indirectly guided (either epistemically or motivationally) by the law against murder, they too can in principle be guided by this rule as a legal rule in their second-personal practical deliberations.

Of course, when a legal rule that requires a particular action is valid by virtue of its moral content, it is possible for the accompanying legal rules that govern standing and remedies to incorporate analogous moral rules too. In these limited circumstances, Shapiro’s arguments might be extended to suggest that the legal rules in question are literally incapable of making any practical differences at all as legal rules. As a practical matter, however, these circumstances are most likely rare and possibly even non-existent. One would have to imagine a legal rule that not only provides first-personal guidance by recourse to morality but also decides who has standing to make demands and what reactions are warranted by recourse to morality.

In any event, even in these limited circumstances, there is—in my view—a further sense in which legal obligations can make distinctive practical differences in our lives. As indicated earlier, when we make second-personal claims, we presuppose specific interpersonal authority relations. It is thus possible for the relations that we presuppose in making moral and legal claims to differ. I think there are, moreover, good reasons to think this is the case. When we make moral claims against one another, we make them as members of the moral community. We take our standing to arise most fundamentally from our basic status as persons, and we take breaches of these obligations to express disrespect for persons and for our most fundamental and universal relations to one another. By contrast, when we make legal claims against one another, we take our standing to arise from the fact that we are either citizens or subjects of a localized state, and hence, from distinctive and local civic relations. Violations of the law can thus constitute acts of disrespect toward either the political community or towards our civic relations to one another.

These facts are perhaps easiest to see in cases where morality and law present us with conflicting requirements. In such cases, we will have to follow one requirement at the expense of the other, and our choice will therefore say something important about the relative respect that we grant to morality and law. We will be strengthening some relations—either moral or civic—while alienating others. But similar points would seem to hold when morality and law fully coincide. When, for example, we act in accordance with both morality and law, we would appear to be expressing commitment to both important forms of interpersonal relation. If the fact that there is a legal obligation in play as well can draw on a distinctive source of motivation (namely, respect for the law), can render the action expressive of commitment to a distinctive social relation, and
can have larger-scale consequences for the strength of this particular relation, then I think it would be better to view the law as capable of making distinctive and important practical differences even in the admittedly rare cases like the one under discussion.

The above discussion suggests that legal rules can, in fact, make second-personal practical differences in our lives as legal rules even if the first-personal guidance that they provide us with is identified solely by recourse to moral deliberation. Still, nothing has been said so far about whether these legal rules can also provide us with *overriding* practical guidance—which is the kind of practical authority that legal obligations purport to have. For reasons discussed above, Raz’s challenge to inclusive legal positivism arises at just this point, and this challenge must also be met to render inclusive legal positivism internally consistent.\footnote{153}

To see if this challenge can be met, consider the following extension of Darwall’s work, which articulates a competing account of the overriding nature of legal obligations—(R-3): *The law can provide us with overriding 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\footnote{154} the second-personal standing to raise a legal claim for non-compliance—i.e., one that presupposes specific interpersonal authority relations that arise from our civic relations to one another. 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.\footnote{155} 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, 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.”\footnote{156}}

\footnote{153. See supra Parts I.A–B.}

\footnote{154. One might want to know who specifically these persons or groups are. In American law, there are, for example, rules of standing, which tend to give the state the standing to prosecute criminal violations and specific individuals (usually those who have suffered harm as a proximate cause of some civil violation) the standing to raise civil claims. The arguments in the main text, however, do not depend in any way on how this standing is distributed, and I have thus stated (R-3) in a way that is fully compatible with any legal rules of standing.}

\footnote{155. See DARWALL, SECOND-PERSON STANDPOINT, supra note 46, at 99–100 (“That an action would cause severe harm . . . is a reason for someone not to do it, whether or not anyone has any standing to demand that he not, and it supports, moreover, a relevant demand. But the action cannot violate a moral obligation unless such a standing exists, so any reason that is entailed by the moral obligation must be second-personal.”).}

\footnote{156. JOHN STUART MILL, Utilitarianism, in ON LIBERTY AND UTILITARIANISM 137, 193 (Bantam Books 1993) (1871). It is particularly relevant that Mill, who is a consequentialist, would nevertheless agree on this basic feature of obligation.}
An account of this kind would also relieve much of the pressure toward exclusive legal positivism. 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. But the statement does appear to give rise to different second-personal implications, and these second-personal implications may be sufficient to explain the overriding nature of legal obligations. If this is right, then we might modify (R-1) so that it reads (R-1)′: *In order to constitute an obligatory aspect of the law, a legal rule must in principle be capable of making an overriding practical difference in the structure or content of deliberation or action—at least with regard to those persons who respond to the rule as an obligation.* The sense in which legal obligations give rise to overriding practical guidance can then be accounted for by accepting (R-3). What this discussion shows is that one can, in fact, consistently accept both the Practical Difference Thesis—at least as refined by (R-1)′, (R-2) and (R-3)—and the Incorporation Thesis. The resulting position thus promises to harmonize a number of seemingly irreconcilable features of the law that have been pointed out by Raz, Dworkin, and Shapiro.

III. WHY WE SHOULD ADOPT THIS NEW ACCOUNT OF LEGAL OBLIGATION AND THE PRACTICAL DIFFERENCE THESIS

The foregoing discussion should have established that there is a way to refine the Practical Difference Thesis, which would render it fully consistent with both the Incorporation Thesis and important insights raised by Raz and Shapiro. 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. This Part discusses a number of important reasons to adopt this new account of legal authority and legal obligation.

I begin 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 of 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

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157. Ultimately, I think even this contention may be too strong for reasons discussed in Part IV, infra.
158. See, e.g., Raz, Authority, Law, and Morality, supra note 36, at 215–16.
159. See, e.g., Brink, supra note 67, at 259–61.
there is an obligation in play.\textsuperscript{160}

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 that may be behind our desire 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 \textit{requirements} on our thought. Still, nothing so far establishes that deductive logic gives rise to \textit{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—as Darwall has observed—is that in the case of logic we do not typically think of the rules of inference as giving others the second-personal standing to raise claims for non-compliance.\textsuperscript{161} 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, both of which can arise from things like professional obligations in the academy, 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-person 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.\textsuperscript{162} 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-person standpoint, and if this fuller account of legal authority 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

\textsuperscript{160}. See, e.g., \textsc{Darwall}, \textsc{Second-Person Standpoint}, supra note 46, at 13 n.25 (“In my view, failure to observe this distinction infects Raz’s account of authority . . . .”).

\textsuperscript{161}. 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 under a requirement of reason, for example, 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 we each reason logically . . . .

\textit{Id.} at 13–14.

\textsuperscript{162}. See, e.g., \textsc{Raz}, \textsc{Authority, Law, and Morality}, supra note 36, at 214–37.
argument so far depends on the fact that logic governs our third-personal theoretical reasoning about what beliefs to maintain rather than our first-personal practical reasoning about how to act. As an initial matter, logic purports to govern both. Moreover, there are perhaps less vivid but equally valid examples of rules that govern action alone and make the same point. Consider, for example, the Western rules of etiquette governing which side of the plate to put the fork, and which side the knife. If we accept these rules, we might think that “forks really must go on 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. 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 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—well—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. 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 authority that Raz attributes to the law. 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 thus make unconditional demands on our moral attention. 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.” But Regan is careful to distinguish this thought from the thought that indicator rules necessarily give rise to full obligations, as we commonly think of obligations in morality and law. This is because the rules are merely fallible guides to non-contingent ends. As Regan

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163. See, e.g., Gärdenfors & Sahlin, supra note 137, at 1, 6.
164. See, e.g., Darwall, Second-Person Standpoint, supra note 46. In discussing Philippa Foot’s comparisons between morality and etiquette, Darwall writes: “The point is that accountability is no part of the concept of etiquette in the way it is of moral obligation.” Id. at 99.
166. See id. at 1003.
167. See id. at 1005.
168. Id.
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).”\textsuperscript{169} 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.\textsuperscript{170}

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.”\textsuperscript{171} But Regan thinks we should reject this further sense of obligation 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 thinks 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.\textsuperscript{172}

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 who do not accept the value of further reflection on this important question.\textsuperscript{173} The thought that preference satisfaction is valuable can spring readily to mind, but Regan thinks that figuring out what is intrinsically valuable will require more than this and

\begin{itemize}
  \item \textsuperscript{169} \textit{Id.} at 1004.
  \item \textsuperscript{170} \textit{Id.} at 1005.
  \item \textsuperscript{171} \textit{Id.} at 999.
  \item \textsuperscript{172} \textit{Id.} at 997.
  \item \textsuperscript{173} \textit{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 is the such good; (ii) we should promote the satisfaction of desires as such; and (iii) even “informed desires” or “rationally criticized desires” can capture what has intrinsic value.).
\end{itemize}
deserves further reflection.\textsuperscript{174} It would thus be possible to learn 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 the foundation of the whole, not to expect more from life than it is capable of bestowing.\textsuperscript{175}

Still, acceptance of a fundamentally consequentialist view would have two distinct consequences. 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, people should always lack the standing to bring valid claims for non-compliance if the person who has breached a 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 less obligatory than we commonly take them to be. An account of obligation that makes reference to the second-person standpoint 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 \textit{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 with which philosophers are now quite familiar: 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 \textit{Commands and Authoritative Legal Reasons}, for example, Hart says that “[p]hilosophers are no doubt now quite familiar with

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\textsuperscript{174} See \textit{id.} (describing “a very difficult project which has received too little attention” as “the project of identifying what we really do 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. \textit{Id.}

\textsuperscript{175} \textit{Mill, supra} note 156, at 151.
\end{flushright}
these distinctions which enable them for any proposition ‘p’, not mentioning the speaker’s belief, to explain the oddity of 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.” Hart uses distinctions like these to motivate his own rejection of Bentham’s command theory of law. 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. 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 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 the judge and the citizen may be identifying what the law requires in terms of action by drawing on substantive moral insight, but where the statement appears perfectly informative. This manner of identifying legal obligations 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 of legal obligation that makes reference to the second-person standpoint. Contract law is instructive 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

177. See id. at 93–102.
178. See Darwall, Second-Person Standpoint, supra note 46, at 46.
ineliminable and suggest that there are now social facts in precedent that allow legal officials to identify distinctive legal obligations to follow through with some 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 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.179 This greatly expands the boundaries of our cooperation and allows for the rise of modern markets as a vehicle 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 apparently 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 these different nations have been able to achieve. According to Nobel Laureate Douglass C. North, “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.”180

This last example has been chosen very carefully for a related reason. As Raz has rightly noted, 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.181 Raz urges that we have at least an intuitive idea of the distinction between the genuine incorporation and mere application of extra-legal standards.182 Still, contract law is in no way a tangential phenomenon, comparable to instances where courts might be called upon to decide cases in accordance with some foreign set of laws without thereby incorporating those laws into domestic law. Contract law instead is a

179. See generally Douglass C. North, Institutions, Institutional Change, and Economic Performance (1990) (arguing that specific legal conditions that arise in modern contract law are needed for modern economic exchange); id. at 58 (“Quite complex exchange [as in the case of transactions between strangers] can be realized by creating third-party enforcement via voluntary institutions that lower information costs about the other party; ultimately, however, viable impersonal exchange that would realize the gains from trade inherent in the technologies of modern interdependent economies requires institutions that can enforce agreements by the threat of coercion.”).

180. Id. at 54. 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., Donald C. Clarke, Economic Development and the Rights Hypothesis: The China Problem, 51 Am. J. Comp. L. 89, 92–94 (2003); 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).

181. See, e.g., Raz, Incorporation by Law, supra note 85, at 10–12; id. at 12 (“I believe that so-called ‘incorporating’ reference to morality belongs, with conflicts-of-law doctrines, to a nonincorporating form of giving standards legal effect without turning them into part of the law of the land.”).

182. See, e.g., id. at 12.
central feature of the law of many nations, and it seems on its face to incorpo-
rate, 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 intuitive distinction,
to think that the specific obligations that arise from particular contracts 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.

Yet another reason to adopt the account of legal obligation under discussion
here derives from a close inspection of ordinary legal adjudications. When a
judge decides a case, she will naturally have to decide whether any legal
standard has been breached and, if so, whether that breach warrants a legal
response. But if a judge decides these questions in the affirmative and renders a
verdict, this is not all that she 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 legal
standing to raise the claim. Indeed, this standing requirement is 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.183 As
Fletcher has put the point, “standing is a preliminary jurisdictional requirement,
formulated at a high level of generality and applied across the entire domain of
law.”184 Hence, absent a claim brought by someone with the relevant second-
personal standing, courts lack the power to decide that a legal obligation has
been breached.

If no court has the authority to adjudicate a claim for breach of a purported
obligation, then it will make little sense to say that there is anything recogniz-
able as a legal obligation still in play. Hence, even run-of-the-mill adjudications
show that reference to the second-person standpoint and standing to raise claims
is an implicit feature of legal obligation.

It is also 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

has argued that some of the standing requirements (such as “injury in fact,” “causation,” and “redressabil-
ity”) 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 that the highly intuitive features of second-personal standing remain a deep and pervasive part of
the law. See id.
184. Id. at 223.
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.”\footnote{185} Gilbert Harman has, in fact, recently identified the rejection of what he 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.”\footnote{186} If Harman is right, then seeking reflective equilibrium starting with our considered legal judgments may be a surer route to knowledge about what legal requirements have legitimate authority.\footnote{187}

This is not the place to enter into these thorny 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.

One final concern that one might have with the account of legal obligation proposed here is that it presupposes capacities to respond to legal obligations that are ultimately implausible from a naturalistic perspective. As indicated earlier, our ability to engage in purely instrumental practical reasoning can be squared with a highly plausible and purely naturalistic account of action as produced by separable beliefs about the world and desires for various states of affairs. In \textit{The Deep Structure of Law and Morality},\footnote{188} however, I recently

\footnote{185. 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.” Norman Daniels, \textit{Wide Reflective Equilibrium and Theory Acceptance in Ethics}, 76 J. Phil. 256, 258 (1979). This same process can—and has in the case of Rawls—led to independent inquiry into what our genuine political obligations are. See generally John Rawls, \textit{A Theory of Justice} (1971).}


\footnote{187. \textit{Id.} at 416–17.}

\footnote{188. Kar, \textit{supra} note 51.}
presented a number of evolutionary game theoretic arguments, and collected a number of contemporary psychological, sociological, and anthropological findings, to suggest that 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. Our psychological repertoire also includes certain attitudes towards and expectations of specific persons and their conduct, which gives 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. 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. Whether or not this account is right at the level of detail, work like this renders it not only plausible but likely—in my view—that we have special attitudes that constitute our sense of obligation and that function in many of the ways described here.

IV. HART AND A RENEWED DIRECTION FOR LEGAL POSITIVISM

The preceding discussions have argued for an account of legal obligation, and for corresponding refinements of the Practical Difference Thesis, which make special reference to the second-person standpoint. I have argued that the position being developed here not only has independent philosophical support but would also render consistent all three of Hart’s basic inclusive legal positivist commitments: namely, the Incorporation Thesis, the Practical Difference Thesis, and the Conventionality Thesis. 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 also partly philosophical. 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. In what follows, I will argue that there is a combination of textual and philosophical reasons to think that Hart would have accepted the views developed here as appropriate elaborations of his own.

A. AN UNDERAPPRECIATED TENSION IN HART’S VIEWS

As earlier discussions should have established, there are at least two distinct

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189. See Darwall, Second-Person Standpoint, supra note 46, at 153–62 (observing that, as they are usually understood in this literature, desires are desires-that-\(p\), where \(p\) is some possible state of the world).

190. The main lines of this argument can be found in Kar, supra note 51, at 877–80, 894–934, 941–42. 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., Hart, supra note 1, at 89 (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).

191. See Kar, supra note 51, at 878.
ways of understanding the 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. 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 will not. Which version should we fairly attribute to Hart?

This last question cannot be answered solely on the basis of exegesis. Hart lacked access to contemporary work on the second-person 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 section 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 reference to second-personal phenomena in his accounts of legal obligation and legal authority. 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 section.

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 delibera-

192. This corresponds to the Practical Difference Thesis as refined by (R-1) and (R-2).
193. This corresponds to the Practical Difference Thesis as refined by (R-1)', (R-2), and (R-3).
tions 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 off deliberation, debate, or argument... 194

On one highly plausible reading of this passage, Hart is here 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.

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 reasons that have the authority to override 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 overriding 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 reflects 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.”195 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.”196 But once we have a clearer understanding of how the second-person standpoint is distinct from the first, 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.197 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

194. HART, supra note 42, at 253.
196. Id.
197. See, e.g., HART, supra note 1, at 57, 84, 85, 90; HART, supra note 42, at 243, 257; HART, supra note 8, at 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.” HART, supra note 1, 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.
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. 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:

> The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, 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.198

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-person 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 states that he needs to say *something* to distinguish rules from obligations early in the book.199 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

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199. See id. at 82–91. “The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation.” Id. at 85–86.
brought to bear upon those who deviate or threaten to deviate is great.”200 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 use of terms like “serious social pressure” should be understood as reflected in demands. In my view, a fair reading of Hart’s overall text nevertheless 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 brute seriousness of the social pressure,201 its physicality,202 its hostility,203 and a number of other similar 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 consistent and explicit references to second-personal phenomena into his 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.204

Similarly, when he describes various features of his mature views on legal

200. Id. at 86. Hart also adds 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 benefiting others, conflict with what the person who owes the duty may wish to do.” Id. at 87. The second may be better construed as a 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 pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.” Id.

201. Id. (“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.”).

202. Id. at 86. (“[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 a primitive or rudimentary form of law.”).

203. Id. at 88 (statements of obligation “presuppose[] a background in which deviations from rules are generally met by hostile reactions . . .”).

204. Hart, supra note 8, at 154.
authority, Hart says that when one accepts certain directives as authoritative,

[T]he . . . words may be 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 forms of coercive pressure on others to conform, whether or not those others themselves recognize the commands as peremptory reasons for their own actions.\textsuperscript{205}

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.

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 discusses the obligation that he thinks judges have to identify the law by employing a relevant rule of recognition, he says:

[N]ot 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.\textsuperscript{206}

Second, at the end of \textit{Legal Obligation and Legal Duty}, Hart contrasts his own view of obligation with Raz’s. He makes 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 a categorical reason 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.\textsuperscript{207}

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

\textsuperscript{205} Hart, \textit{supra} note 42, at 257 (emphasis added).
\textsuperscript{206} Hart, \textit{supra} note 8, at 158 (emphasis added).
\textsuperscript{207} Id. at 159–60 (emphasis added).
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 the Incorporation Thesis, the Practical Difference Thesis, and the Conventionality Thesis will only be true if we harmonize Hart’s texts in favor of a narrowly first-personal account of the Practical Difference Thesis.

B. WHY HART WOULD HAVE ACCEPTED THE VIEWS DEVELOPED HERE AS ELABORATIONS OF HIS OWN

The last section argued that there is an underappreciated tension in Hart’s texts: it is unclear 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-person 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 section provides a number of 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.

As an initial matter, one should remember why it is even necessary to attribute some version of the Practical Difference Thesis to Hart. 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 ignore the characteristic ways the law figures in ordinary people’s lives when they accept the law as having its particular authority. 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. What is missing from accounts like these is—according to Hart—the
internal point of view.\textsuperscript{211} As already noted, Hart ultimately described the internal point of view as a critical reflective attitude toward certain patterns of conduct as a common standard, which provides us with content-independent and peremptory guides to action as well as standards for evaluation of deviations, and for permitting what would otherwise be resented—namely certain forms of demands for compliance or coercion for non-compliance.\textsuperscript{212} But, if there is an ambiguity in how we should understand the internal point of view—namely, in strictly first- or also in second-personal terms—and if Hart’s purpose was to capture the way the law appears to ordinary participants, then what we should attribute to Hart is not just any version of the Practical Difference Thesis, but rather the version that correctly describes the way participants view legal rules.

For reasons already discussed, people take the rule of recognition and the rules it identifies as having both first- and second-personal practical implications. 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.\textsuperscript{213} To maintain a narrowly first-personal version of the Practical Difference Thesis in the face of facts like these would thus invite a criticism that is very much Hartian in spirit: the resulting theories would leave out of the picture important features of how the law appears to ordinary participants engaged in legal practice. Adopting a version of the Practical Difference Thesis that makes reference to the second-person standpoint would, by contrast, not only help render Hart’s views more consistent with the internal accuracy constraint but would also strengthen Hart’s challenge to command theories of law. This is because the account on offer here would suggest that command theories of law leave out even more about how the law appears to participants than has typically been acknowledged.

In fact, some of Hart’s central arguments in \textit{The Concept of Law} were directed at earlier positivist views for which pointing out the second-personal aspects of the internal point of view were arguably 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

\textsuperscript{211} See id. at 89 (‘When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view’.'

\textsuperscript{212} See \textsc{Hart, supra} note 42, at 243 (‘I have argued that to understand these features of law there must be introduced the idea of an authoritative legal reason: that is a consideration (which in simple systems may include the giving of a command) which is recognized by at least the Courts of an effective legal system as constituting a reason for action of a special kind. This kind of reason I call ‘content independent and peremptory’ . . .’); see also id. at 257.

\textsuperscript{213} See \textsc{supra} Part III.
legal obligations as predictions of official reactions to deviations. When Hart says that these accounts ignore the characteristic ways that officials treat the rules, he is not referring to the way officials take the rules to guide conduct in first-personal deliberation. He is referring to how they take the rules to warrant specific second-personal reactions. For officials engaging in adjudication, these 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 that 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.

For reasons discussed in earlier sections, a broader Practical Difference Thesis, which makes reference to the second-person standpoint, is also needed to produce a satisfying account of our ordinary conception of legal obligation. Hart clearly understood the need to distinguish obligations from mere categorical rules, and it was central to his project to articulate an adequate account of legal obligation. As earlier discussions have observed, however, 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.” Whatever force this last line of argument might have for Raz, Hart was absolutely clear that his goal was to provide an account of obligation that was true to ordinary usage. In discussing some of Bentham’s failures to capture aspects of ordinary usage, for example, Hart noted 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 and his standpoint was critical and reformative.” 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. Given

214. See, e.g., HART, supra note 1, 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 84, 88–91 (arguing against predictive theories and pointing out that they ignore the internal point of view).
215. See supra Part III.
216. See HART, supra note 1, at 85–86 (“The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation... . [T]hough the line separating rules of obligation from others is at points a vague one, the main rationale of the distinction is fairly clear.”).
217. See id.; HART, supra note 8, at 127, 243.
218. See supra Part III.
219. HART, supra note 8, at 137.
220. See id. at 137–61.
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 ordinary concept of legal obligation to cohere better with a fundamentally consequentialist theory of value.

Indeed, 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, or more explicitly, someone’s view on the very same question that we would ordinarily answer by using our autonomous capacities for deliberation about what to do.221 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. For example, Hart notes 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.”222 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,223 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 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.224 This rejection plausibly would have 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

221. See Raz, Authority, Law, and Morality, supra note 36, at 218 (“[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.”).


223. See Hart, supra note 1, at 83–84, 88–91.

224. See, e.g., id. at 19–20.

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons’ behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.

Id. at 90–91.
go—as someone’s view as to what we ought to do. We might, after all, sometimes come to understand legal rules as affecting only various facts about who has standing to make demands, what kinds of remedies might be required, or both.

Is this last suggestion plausible upon sustained reflection? I think so. It is, after all, not at all clear that even commands can 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.

Before continuing, it is, finally, worth noting that much of the pressure towards Raz’s particular version of the Practical Difference Thesis arises from two views that Hart did not share. The first is Raz’s view that the only legitimate function of law is to point us toward what “right reason” would tell us to do, as revealed in ideal first-personal deliberation. As the last section indicated, this substantive normative view partly supports Raz’s particular conception of how exclusionary reasons must purportedly function in first-personal deliberation. Because Hart did not share this particular normative view, however, those same motivations would have been missing for Hart.

Second, Raz believes that to sincerely believe that a person is under a legal obligation, one must also believe (rightly or wrongly) that the same person is under a moral obligation. Hart explicitly rejects this part of Raz’s view. Hart thought instead that it was perfectly possible—and, 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

225. See Hart, supra note 8, 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.”).

226. See supra Part III.

227. See Hart, supra note 8, at 153–61; id. at 155 (“I would quarrel, however, for reasons I explain later both with Raz’s characterization of the legal point of view from which he considers such detached statements are made and with his account of what is involved in the judges’ acceptance of the laws of their system. Into both of these Raz injects a moral element which is, I think, unrealistic but is necessary for his account of the normativity of legal statements of duty.”).
necessarily being under a moral obligation. Even late in his career, Hart says, for example, that:

[A]t 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.

From the first-person 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 purport to provide us with overriding reasons for action that are general in application. Hence, from the first-person 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-person 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 obligation and sincere belief that a legal rule has moral force. The fact that adopting the present account would allow Hart to maintain one of his central distinctions is yet another reason to think that this account better captures Hart’s core philosophical commitments.

What we are left with, in the end, is two possible interpretations of Hart. On one version, Hart absorbed Raz’s work on legal authority but failed to understand the clear inconsistencies that this created in his views. On the other, which is better in keeping with Hart’s core jurisprudential commitments, Hart recognized the importance of Raz’s work but sensed that it could be rendered consistent with the Incorporation Thesis. On this version, Hart was also willing to recognize the importance of the phenomena that Dworkin has brought to our attention, and he would have acknowledged the usefulness of Shapiro’s work on epistemic and motivational reasons as well. Hart’s basic inclination, however, was to resist any account of the law that could not harmonize all of these important aspects of the law.

Unfortunately, Hart lacked the contemporary vocabulary and philosophical resources to articulate this internally consistent version of inclusive legal positiv-

228. See id. at 161 (“I have only argued that when judges or others make committed statements of legal obligation it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation.”).
229. Hart, supra note 42, at 266.
ism. But where, as here, Hart’s work can be refined in two ways—one of which would render it clearly inconsistent and the other of which would render it not only internally consistent but better in keeping with his core aims and jurisprudential commitments—basic principles of charity suggest that Hart should be attributed a developing sense of the latter position. If this is right, then any vestigial tensions in Hart’s texts should also 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.

CONCLUSION

Second-personal phenomena are both important and pervasive in the law, and yet reference to the second-person standpoint has been curiously absent from most discussions in contemporary legal theory. The reasons for this absence are not hard to find: it is only with Darwall’s recent work on moral obligation that the distinctiveness of the second-person standpoint has come fully to light. Still, as the arguments in this Article should have made clear, a failure to appreciate the second-person standpoint for what it is can distort our understanding of the law. In this Article, I hope to have established that this failure has led to a near-universal consensus that it would be logically impossible to articulate an account of the law that does justice to important features of the law identified by Raz, Dworkin, and Shapiro. Put in the affirmative, I hope to have shown how to account for these various features of the law in a unified manner—thereby resolving one of the central problems in analytic jurisprudence.

Ultimately, however, I believe that an appreciation of the second-person standpoint may have broader implications for legal theory as well. Though this is not the place to defend this claim in any detail, I do hope that the arguments in this Article are suggestive of the types of applications I have in mind. I can also gesture, by way of conclusion, towards other applications that may prove useful.

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 process. 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

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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.\(^{232}\) 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 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 procedure, and in our inability to sustain genuine communities between various valuable subcultures and mainstream society.

Second, in *The Textualization of Precedent*,\(^{233}\) 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-person 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 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 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-person 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 function be causing us to lose sight of our best routes to judicial success?

Finally, consider the more well-known accounts of tort law in terms of corrective justice. 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.

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-person 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, including 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 to be suggestive only of some of the broader implications that an understanding of the second-person standpoint may have for the law. Still, if applications like these hold even initial promise, it would behoove legal theorists working in many different areas to consider whether, or how, an understanding of the second-person standpoint might change their understanding of the law.

234. See generally Symposium, Corrective Justice and Formalism: The Care One Owes One’s Neighbors, 77 IOWA L. REV. 403, 404 (1992) (analyzing the disturbance in equality as it relates to right and duty represented within the structure of corrective justice).