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Bárbara Ronsoni de Oliveira

TOWARDS AN EXPECTATIONAL ACCOUNT OF LEGAL OBLIGATIONS:

an introduction to an alternative approach to predictive theories

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Orientador: Prof. Dr. Thomas da Rosa de Bustamante (UFMG)
Coorientador: Prof. Dr. Lucas Miotto Lopes (University of Surrey)

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Nada de novo existe nesse planeta
Que não se fale aqui na mesa de bar

There is nothing new on this planet
That hasn't been spoken at the bar table

— Fernando Brant & Milton Nascimento, Saudade dos Aviões da Panair

ABSTRACT

Although law is commonly described as binding, mandatory, and categorical, the sense in which legal directives are obligatory remains philosophically contested. Building on the long-standing debate about the relationship between legal obligation and morality, this work examines whether and how legal obligations, as expressed in authoritative pronouncements, can guide our behaviour without thereby making a moral claim. The dissertation advances this inquiry by reassessing so-called sanction-based theories of obligation. Rather than treating authors such as Holmes, Bentham, and Austin as offering mere variants of a single sanction-based model, I argue that their views are better understood as distinct forms of predictive theories. What unifies these accounts is not the presence of sanctions as such, but the explanatory role played by expectations concerning institutional responses to action and non-compliance. I argue that the practice theory and the standard view both fail to answer important challenges. I then introduce an alternative account centred on the role of expectations in legal obligation. On this view, legal obligations are better understood as authoritative pronouncements backed by empirical (an individual's beliefs that a sufficiently large portion of the relevant population in fact complies with a given rule in situations of a certain kind) and normative expectations (an individual's beliefs that a sufficiently large portion of the relevant population expects her to comply with a given rule in situations of a certain kind), both of which consist in beliefs about probabilistic generalizations concerning other people's behaviour and attitudes. By emphasizing this expectational dimension, the dissertation identifies a potential explanatory basis for legal obligations and sketches a broader research agenda aimed at deepening our understanding of law.

Keywords:
Legal obligations; Predictive theories; Practice theory of rules; Standard view; Legal positivism.

RESUMO

Embora o direito seja comumente descrito como vinculante, obrigatório e categórico, o sentido em que as diretivas jurídicas são obrigatórias permanece filosoficamente controverso. Partindo do debate de longa data sobre a relação entre obrigação jurídica e moralidade, este trabalho examina se e como as obrigações jurídicas, tal como expressas em pronunciamentos autoritativos, podem orientar o nosso comportamento sem, com isso, formular uma pretensão moral. A dissertação desenvolve essa investigação por meio de uma reavaliação das chamadas teorias da obrigação baseadas na sanção. Em vez de tratar autores como Holmes, Bentham e Austin como oferecendo meras variantes de um único modelo de teoria baseada na sanção, sustento que suas posições são melhor compreendidas como formas distintas de teorias preditivas. O que unifica essas abordagens não é a presença de sanções enquanto tais, mas o papel explicativo desempenhado pelas expectativas relativas às respostas institucionais à ação e ao descumprimento. Argumento que tanto a teoria prática de regras quanto a visão padrão falham em responder a desafios importantes. Em seguida, introduzo uma abordagem alternativa centrada no papel das expectativas em obrigações jurídicas. Nessa perspectiva, obrigações jurídicas são melhor compreendidas como pronunciamentos autoritativos baseados em expectativas empíricas (a crença de um indivíduo de que uma parcela suficientemente grande da população relevante de fato cumpre uma determinada regra em situações de certo tipo) e normativas (a crença de um indivíduo de que uma parcela suficientemente grande da população relevante espera que ele cumpra uma determinada regra em situações de certo tipo), ambas consistindo em crenças sobre generalizações probabilísticas a respeito do comportamento e das atitudes de outras pessoas. Ao enfatizar essa dimensão expectacional, a dissertação identifica uma base explicativa em potencial para obrigações jurídicas e esboça uma agenda de pesquisa mais ampla com o objetivo de aprofundar nossa compreensão sobre o direito.

Palavras-chave: Obrigações jurídicas; Teorias preditivas; Teoria prática de regras; Visão padrão; Positivismo jurídico.

SUMMARY

1. INTRODUCTION

Law is "binding, mandatory, categorical, stringent, strict, compelling"[1]. These are all terms used to express that law is obligatory—that its directives are not merely advisory but apply to all members of society regardless of their will. However, these common assumptions about law warrant further clarification, which is why legal philosophers have delved into this subject since the development of jurisprudence as a distinguished field of study as we know it today. As John Austin already recognized, the foundational elements of a science are the hardest to explain. Its broadest and simplest terms lack concise equivalents, making their definition reliant on cumbersome and lengthy circumlocutions.[2]

This dissertation limits itself to exploring whether and how legal obligations, as expressed in authoritative pronouncements, can guide our behaviour without thereby making a moral claim. The relationship between legal obligations and morality has, of course, been the subject of extensive philosophical inquiry, and my analysis builds on this ongoing debate. It does so by engaging with the most influential discussions on legal obligation, from Bentham to contemporary jurisprudence, while attempting to recover what may have been obscured by their most widespread interpretations. In this spirit, my main goal is to introduce an alternative view of predictive theories, focused on how expectations can generate obligations. I engage with these various bodies of literature, not with the aim of synthesizing them, but rather by selectively drawing from their insights to offer new ways to clarify, define, and discuss in what ways legal obligations guide our behaviour without relying on morality. My goal is to contribute to a deeper understanding of law by advancing arguments that, I hope, will prove valuable in these discussions.

Typically, predictive theories are grouped together as variants of sanction-based accounts.[3] On this familiar picture, authors such as Oliver Wendell Holmes, Austin, and

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[1] In the original context the words refer to legal obligations and duties, not law itself. However, it is not unreasonable to extend the description for law, too, given the way these words are used in ordinary language. PFORDTEN, Dietmar von der. Legal obligation as practical necessity by law. *In:* BERTEA, Stefano (Org.). **Contemporary perspectives on legal obligation**. London New York: Routledge, Taylor & Francis Group, 2021. p. 39.

[2] "The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them concisely. And when we endeavour to define them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions". AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 21.

[3] HACKER, PMS. Sanction theories of duty. *In:* SIMPSON, Alfred William Brian. **Oxford essays in jurisprudence: second series**. Oxford: Clarendon press, 1978. pp. 131-170. p. 131.

Jeremy Bentham are treated as offering different flavours of sanction-based theories of obligation. While each of them posits an analytic connection between the failure to perform an obligatory act and the imposition of some sanction, the character of that connection diverges: for Holmes, the link between act and consequence is predictive and probabilistic; for Bentham, the non-performance of the act supplies a reason or ground for the sanction; for Austin, the connection is imperative, in the sense that the sanction is commanded to follow upon non-performance.[4] Yet this way of grouping them can obscure what is more fundamental. A clearer understanding of their strengths and weaknesses emerges if we shift the emphasis slightly: rather than seeing them as variants of sanction-based theories, we can more accurately view them as distinct forms of predictive theories of law.

Recasting these accounts as species of predictive theories, rather than as variations on a single sanction-based model, is not merely a matter of relabelling; it clarifies what is doing the real explanatory work in each theory. When we classify them under the heading of sanction-based theories, we are led to focus primarily on the role and nature of sanctions, as if the decisive question were how each author conceives the function or structure of punitive responses. But this emphasis can be misleading. What unifies Holmes, Bentham, and Austin more fundamentally is not the presence of sanctions—ubiquitous in almost any legal system—but the idea that the normative significance of a legal directive is explained through a pattern of expectations it establishes about what ought to happen if one acts or fails to act in certain ways. The point of shifting the classificatory frame is therefore methodological: it allows us to isolate the predictive structure that all three theories share, and to examine how each develops that structure differently.

A second methodological point is that this is a work of descriptive jurisprudence. Its purpose is to explain whether and how legal obligations guide our behaviour without making a moral claim. In that sense, it is general, descriptive, and non-evaluative. It seeks to account for legal obligations wherever and whenever they arise, without attempting to justify them or to propose an ideal model of when authoritative pronouncements are

[4] In Hacker's words: "According to one theory the connection is predictive and probabilistic. According to another, the connection is imperatival, i.e. the sanction is commanded in the event of non-performance of the act in question. According to the third view the failure to perform the relevant act is a reason or ground for the sanction." HACKER, PMS. Sanction theories of duty. *In:* SIMPSON, Alfred William Brian. **Oxford essays in jurisprudence: second series**. Oxford: Clarendon press, 1978. pp. 131- . p. 131

morally legitimate. More broadly, I assume that an adequate theory of legal obligations must keep descriptive inquiry distinct from ideal theory, rather than collapsing the two.

Although a direct engagement with the duty to obey the law lies beyond the scope of this work, the relationship between these debates underscores why understanding legal obligations is far from being little more than a playground for theoretical reflection. If legal obligations can be understood as purporting to guide our behaviour without thereby making a moral claim, then the burden of justifying disobedience to legal rules diminishes, making radical forms of disobedience easier to defend. Additionally, if a statement of a legal obligation is binding even when it fails to conform to law's claim of moral legitimacy, we must explain how the law can guide our behaviour, whether and how one can require X to φ without appealing to moral reasons.[5] Therefore, understanding whether legal norms purport to impose moral obligations alongside legal obligations can illuminate central puzzles in jurisprudence and practical reasoning.

This work is organized as follows. The first chapter revisits the familiar opposition between predictive theories of law and the practice theory of rules, not in order to rehearse well-worn criticisms, but to illuminate how different lines of criticism have shaped the debate. I begin by examining the recurrent objections raised against Holmes and Austin, and by showing how HLA Hart sought to transcend sanction-based models and the methodological perspective of the "bad man" through his analysis of the legal point of view. For several decades, Hart's framework shaped the central questions of jurisprudence and set the terms of debate. Yet, as the chapter shows, his account no longer represents the dominant position within contemporary positivism. The service conception of authority advanced by Joseph Raz challenged the core of the practice theory of rules, shifting attention away from the internal point of view and toward the idea that law purports to provide subjects with (moral) reasons for action. Accordingly, the chapter concludes by tracing how Hart's own theory, once introduced as a corrective to predictive accounts, came under pressure from a different direction, one that questioned whether his analysis could adequately explain the normative force of legal directives.

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[5] Broader research is necessary to explore legal non-positivist perspectives on legal obligations, considering their implications. If legal obligations are indeed a subset of moral obligations, we must grapple with whether this implies that the law must always be obeyed and whether violating a legal rule necessarily constitutes an immoral act. If the law establishes strong moral obligations, the burden of justifying disobedience increases, making radical forms of disobedience more challenging to defend. Moreover, the nature of legal obligations impacts the content of the law. If only norms that are morally obligatory can be considered legal norms, then our conception of law within society must be significantly revised. This shift has profound repercussions for discussions about disobedience, as claims of injustice or immorality become intertwined with accusations of illegality.

The second chapter turns to what has become the standard view in contemporary positivism: the belief-based explanation of legal obligation, most prominently developed through Raz's service conception of authority. I begin by examining how this approach seeks to explain the normativity of law by appealing to the idea that authoritative directives provide subjects with content-independent and exclusionary reasons for action. On this account, a legal obligation arises when citizens are justified in believing that compliance with an authoritative directive would better enable them to act on the reasons that already apply to them. Yet the chapter argues that this model faces serious difficulties: it relies on a moralized conception of reasons that blurs the boundary between explanatory and ideal theorizing, and it struggles to remain conceptually coherent while maintaining that one can be bound by the law even when the law fails to satisfy the very conditions under which, according to the theory itself, legal obligations arise. By reconstructing these tensions, the chapter shows why the belief-based explanation, despite its wide acceptance, may not succeed in capturing the phenomenon it aims to illuminate.

In the final chapter, I present an alternative reading of two accounts of predictive theories. According to the theory of legal obligation as fictitious entities, introduced by Jeremy Bentham, to say that someone is under an obligation is not to report a subjective belief or an internal attitude, but to describe a normative situation in which the agent is likely to anticipate some form of sanction or reward depending on their conduct. According to the imperative view, originally developed by Austin, legal obligations build on the expectation of sanction-triggering conduct. Although they were dismissed for being committed to crude behaviourism, I argue that these views emphasise the explanatory potential of expectations structured around patterns of consequences. In anticipating that deviation will be met with particular consequences, agents do not merely respond to an external incentive structure; rather, the self-fulfilling prophecies that individuals formulate about each other's actions constitutes the legal obligation they take themselves to have.

In addressing the central question, this account, like the practice theory and the Razian standard view, also seeks to specify the conditions under which authoritative pronouncements fail to generate legal obligations. Unlike those views, however, I argue that authoritative pronouncements do not give rise to legal obligations when they are not backed by empirical (an individual's beliefs that a sufficiently large portion of the relevant population in fact complies with a given rule in situations of a certain kind) and normative expectations (an individual's beliefs that a sufficiently large portion of the relevant

population expects her to comply with a given rule in situations of a certain kind). While this is necessarily a limited study, I suggest that an expectational account can explain cases of rules that are rarely enforced and frequently violated, as well as the selective enforcement of laws. I then sketch a broader research agenda aimed at deepening our understanding of law.

2. THE RISE AND FALL OF A STRAWMAN AND THE PREDICTIVE THEORY OF LAW

It is difficult to find a figure and a theory more simultaneously admired and criticized than Oliver Wendell Holmes and his predictive theory of law in American jurisprudence.[1] For nearly a century, both he and his theory served as a kind of strawman for what was seen as deeply wrong with American legal thought. Holmes was often invoked as a caricature of a jurisprudence that flirts with moral scepticism and treats law as mere social engineering, a view that, taken to its limits, appears indifferent to ethical concerns, deferential to the victors, and willing to let "the devil take the hindmost."[2]

His well-known (though poorly developed) contribution to a theory of obligations was shaped by his understanding of the role of jurisprudence. Much like a meteorologist anticipates storms by analysing atmospheric data, Holmes envisioned the legal philosopher as a kind of forecaster, not tasked with prescribing what the law ought to be, but with predicting its practical application. In this sense, the legal philosopher, in Holmes's view, predicts "the incidence of the public force through the instrumentality of the courts."[3] Holmes captures this analogy succinctly, stating that "the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system."[4] For Holmes, "The prophecies of what the courts will do in fact […] are what I mean by the law."[5] In this view, law is less about lofty ideals and more about anticipating the tangible actions of courts, a pragmatic forecast grounded in judicial behaviour.

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[1] Despite being widely regarded as a central figure in American law, Holmes was often described as a "cold, harsh, and lonely" individual, marked by personal indifference, ambition, and egotism. Some portrayals emphasize that he was "unable to embrace any substantive values or causes" and far from being a true liberal committed to individual rights. Academically, the contrast is equally striking: his "scholarship does not justify his reputation as America's greatest legal thinker"; his major work has frequently been called overrated, its genuinely remarkable contribution being limited to just a few passages—sometimes summarized as merely "five great paragraphs"—and even the ideas within them were not particularly original. See: REIMANN, Mathias. **Michigan Law Review**. Horrible Holmes, v. 100, n. 6, p. 1676–1689, 2002. Available at: <https://repository.law.umich.edu/mlr/vol100/iss6/24/>.

[2] In Mathias Reimann words, "His jurisprudence shows us how nicely much of modem mainstream American legal thought jives with the attitude that might makes right and that the law does not care if the devil takes the hindmost." REIMANN, Mathias. **Michigan Law Review**. Horrible Holmes, v. 100, n. 6, p. 1676–1689, 2002. Available at: <https://repository.law.umich.edu/mlr/vol100/iss6/24/>. p. 1689.

[3] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 1.

[4] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 1.

[5] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 4.

Given that his idea of jurisprudence is limited to predicting what is most likely to happen based on the conduct of the courts, his conception of legal obligation is largely rooted in the notion that it is like a prophecy: if X φ, then X will face certain consequences.[6] Like a dark cloud signals an impending storm, having a legal obligation, in Holmes's view, is the forecast of potential consequences tied to one's actions—if one is required by law to φ and fails to do so, they will face disadvantages. The dark cloud doesn't cause the rain, nor does stating an obligation imply an "ought", it simply indicates what is likely to happen next. In this sense, the legal obligation is not a command but a practical prediction: if X φ, consequences, such as sanctions or enforcement, is likely to follow.

Holmes was a vocal critic of the use of moral terminology in law, particularly concerning obligations and rights. He goes so far as to suggest that if every word with moral significance were banished from the law, we could gain clarity in our thinking.[7] He criticizes the tendency to fill words like "duty" and "obligation" with moral content, which may make no sense to someone who is only concerned about tangible consequences rather than the moral implications of their behaviour.[8] His motivation for viewing the law from this angle, rather than any other, is that it allows us to isolate the study and understanding of law: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[9]

Whether the caricature of Holmes may well capture his most accurate portrait or not, the fact is that jurisprudence spent far too long beating a dead horse. His theory was the target of a wide range of legal theorists, and one may recall Hart's critique in *The Concept of Law*, where he rejects the predictive theory on the grounds that it inverts the

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[6] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 4.
[7] "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas un- colored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought". HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 7.
[8] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 4.
[9] HOLMES, Oliver Wendell. The Path of the Law. **Harvard Law Review**, v. 10, n. 8, p. 457, 1897. Available at: <https://www.jstor.org/stable/1322028?origin=crossref>. Acesso em: 30 jun. 2023. p. 4.

proper order of legal elements by treating what is merely ancillary as if it were the principal.[10] His methodological commitment with the bad man overstates the importance and place of sanctions, or so it is argued. There are virtually no attempts to develop a charitable reading of Holmes' insights.[11] Also, his theory became the default template against which later predictive accounts were evaluated, as if they all stood or fell with Holmes.[12]

Alongside Holmes, Austin is often identified as a major proponent of a predictive theory of law. And much like Holmes's view, Austin's account of legal obligation has faced significant criticism. Again, as Hart notes, Austin's jurisprudence treats as secondary precisely those elements that are as characteristic of law as the notions of duty, obligation, or sanction—the very elements that, according to Austin himself, any adequate theory must explain. We can summarise Austin's account as the view that legal obligations (or the law itself) are nothing but commands backed by threats. For him, a duty is simply the correlative of a command, and commands "comprises the term *law*"; hence, a command becomes "key to the sciences of jurisprudence and morals."[13]

It is also a familiar objection to Austin's theory that his conception of command, and the central role it plays, obscures the significance of rules that operate without sanctions. His account may successfully explain criminal law and other areas that impose duties. Yet, when combined with his methodological commitment to the perspective of the "bad man," it fails to capture what is distinctive about obligations. They cannot be adequately understood from the standpoint of the bad man, as if obligations were merely pressures to comply motivated by fear of sanctions. Rather, they are typically understood to function as reasons for action, considerations that guide and justify conduct, not merely incentives that threaten non-compliance. In Hart's words:

> The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions

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[10] HART, Herbert Lionel Adolphus; BULLOCH, Penelope A. **The concept of law**. 3. ed., repr. Oxford [u.a]: Clarendon Press, 2012. (Clarendon law series). p. 40.

[11] Of course there are exceptions. See, for example: PERRY, Stephen. Holmes versus Hart. *In:* BURTON, Steven J. **The path of the law and its influence: the legacy of Oliver Wendell Holmes, Jr**. Cambridge: Cambridge university press, 2000. p. 158-197.

[12] And vice-versa. As Stephen Perry puts it, "it is commonly thought that Hart's critique of Austin's theory of law was as devastating for Holmes's theoretical views as is was for Austin's." PERRY, Stephen. Holmes versus Hart. *In:* BURTON, Steven J. **The path of the law and its influence: the legacy of Oliver Wendell Holmes, Jr**. Cambridge: Cambridge university press, 2000. p. 190.

[13] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 21.

> to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.[14]

These flaws expose Austin's theory to another major criticism: it makes normativity entirely dependent on coercive power, implying that one is "obliged" only insofar as one is susceptible to punishment. As Hart famously argued, this collapses the distinction between *having an obligation* and merely being *obliged*. Ultimately, and here Austin stands alongside Holmes, his account does not merely conflate prediction with normativity; it arguably fails to explain the phenomenon of normativity at all. Obligations are not merely states of affairs from which one may predict behaviour. They are standards that guide and justify conduct.

Hart's famous criticisms of predictive theories may have arrived at a pivotal moment. As Neil Duxbury observes, "nothing of great significance happened [in the development of English jurisprudence] from the middle of the nineteenth century to the middle of the twentieth,"[15] that is, between Austin's resignation from University College London in 1832 and Hart's appointment to the Chair of Jurisprudence at Oxford in 1952. With the "fresh start" offered by the practice theory of law, jurisprudence began to flourish once again. The remainder of this chapter is therefore devoted to examining Hart's account of legal obligations, as well as the principal criticisms directed against it.

2.1 The practice theory of legal obligations

Hart once remarked that the "idea of a legitimate response to deviation in the form of demands and pressure for conformity is the central component of obligation."[16] This suggests that what marks an obligation is not simply the fact that deviation is likely to be met with some form of pressure, but that such pressure is viewed as justified, as something that is *authorized* to happen. To make sense of this notion of legitimacy, Hart introduced the idea of the "internal point of view:" the perspective of those who do not treat rules merely as regularities or signals of likely outcomes, but as standards they accept and use in guiding and assessing conduct. From this standpoint, individuals do not merely predict

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[14] HART, Herbert Lionel Adolphus; BULLOCH, Penelope A. **The concept of law**. 2. ed., repr. Oxford [u.a]: Clarendon Press, 2012. (Clarendon law series). p. 84.

[15] DUXBURY, Neil. English Jurisprudence between Austin and Hart. Virginia Law Review, vol. 91, n. 01, mar. 2005, pp. 02-91. Available at: https://virginialawreview.org/articles/english-jurisprudence-between-austin-and-hart/ p.

[16] HART, HLA. Answers to Eight Questions (1988). *In:* DUARTE D'ALMEIDA, Luís; EDWARDS, James; DOLCETTI, Andrea (Orgs.). **Reading HLA Hart's The concept of law**. Oxford, United Kingdom: Hart Publishing, 2013. p. 504.

sanctions or conform for prudential reasons; they treat the rules as binding, and they invoke them to justify actions and criticize deviations.[17]

Legal obligations, in Hart's account, are not merely expressions of external pressure or social regularity, but a particular kind of rule-backed requirement—one that involves the idea that deviation calls for a justified response. In simpler forms of legal or pre-legal social arrangements, this sense of obligation typically arises from rules that are both widely accepted and enforced by strong social pressure. These rules are seen as essential for maintaining cooperation, order, or other valued features of collective life. Importantly, they often require individuals to act against their immediate interests or preferences, and it is precisely this element of constraint or renunciation that gives such rules their obligatory force.

However, in more complex legal systems, obligations are not always grounded in general acceptance or broad-based social pressure.[18] Instead, they derive their normative status from their recognition within a legal structure governed by secondary rules. Statute-type rules, for example, may be valid even if not generally accepted by the population, so long as they are identified by officials as meeting the criteria of the rule of recognition. Their capacity to impose obligations lies in the institutional mechanisms, such as courts and enforcement agencies, that are empowered to treat deviations as wrongs and to respond accordingly. These responses are not merely predictable reactions to deviation but are understood as actions officials are entitled or required to take in light of the rules they accept and apply.[19] What marks them as part of a system of legal obligation is not general agreement among the population, but the fact that officials treat certain rules as standards to be followed and enforced, in accordance with recognized criteria for legal validity. Legal obligations, in this sense, are generated through the operation of an institutional structure in which some rules impose duties and others determine which rules count and how they are to be applied.

What distinguishes these systems is the role played by legal institutions in sustaining obligation. Courts, administrative agencies, and other officials are empowered,

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[17] HART, H. L. A. **The concept of law**. 2nd ed. Oxford : New York: Clarendon Press ; Oxford University Press, 1994. p. 89-90.

[18] HART, HLA. Answers to Eight Questions (1988). *In:* DUARTE D'ALMEIDA, Luís; EDWARDS, James; DOLCETTI, Andrea (Orgs.). **Reading HLA Hart's The concept of law**. Oxford, United Kingdom: Hart Publishing, 2013. p. 504.

[19] As Hart recognised, legal obligations cannot be reduced to predictions since "in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge." HART, Herbert Lionel Adolphus; BULLOCH, Penelope A. **The concept of law**. 3. ed., repr. Oxford [u.a]: Clarendon Press, 2012. (Clarendon law series). p. 85.

sometimes required, to respond to violations not merely as predictable events, but as breaches that warrant a legitimate response. This entitlement to demand conformity, grounded in accepted standards of legal validity, allows for the continuation of legal obligation even in the absence of widespread public acceptance. In this more complex setting, obligation is not the product of shared social norms, but of a rule-governed structure in which some rules impose duties and others determine what counts as a rule of the system in the first place.

In this approach, an act is legally obligatory irrespective of its qualities. Its legal obligatoriness simply turns on whether the act is required by some valid rule according to the criteria of validity of the system.[20] Officials are thus committed to the view that, *because* the law meets accepted criteria of validity, they have *reason* to follow it. Yet, as is often said, all this expresses is that officials accept the criteria of validity, and says nothing about whether non officials have a reason to follow the law or are being themselves obligated.[21] Hart himself stressed this idea when, in *Essays on Bentham*, he argued that officials' statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action.[22]

However, while non-officials' reasons to comply with the law does not derive from their acceptance of the criteria of validity, this does not mean that law does not provide them with reasons for actions. Simply put, in Hart's view, the obligation of an ordinary citizen does not arise directly from their own acceptance of a rule, but from the existence of a social practice that establishes a required pattern of conduct, deviations from which attract serious pressure to conform. What matters is not a general acceptance among citizens but the role of officials in formulating, applying, and endorsing rules that meet the criteria of validity set out by the rule of recognition. Citizens, in this sense,

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[20] "…whether or not an act is legally obligatory does not depend on any qualities of the act itself; rather, it simply turns on whether the act is required by a rule in a system that has certain properties – namely, recognition norms that are accepted by a subclass of the social group and primary norms that are efficacious in regulating behavior." HIMMA, Kenneth Einar. Is the Concept of Obligation Moralized? Law and Philosophy, v. 37, n. 2, p. 203–227, 2018. Available at: http://link.springer.com/10.1007/s10982-017-9311-7. Access on: 18 dec. 2025. p. 211.

[21] As Postema puts it, Hart maintains that "[…] officials, in uttering committed legal judgements, are committed (a) to the view that *because* the law meets accepted criteria of validity *they* have reason to follow it, and (b) to the view that nothing follows from this about the reasons persons who are subject to the law have to comply with it." POSTEMA, Gerald. The Normativity of Law. *In:* HART, H. L. A.; GAVISON, Ruth (Orgs.). **Issues in contemporary legal philosophy: the influence of H.L.A. Hart**. Oxford : New York: Clarendon Press ; Oxford University Press, 1987. p. 88-89.

[22] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 267.

acquire their understanding of the norms at one remove: they receive them second-hand, and yet their attitudes of compliance and acquiescence contribute to sustaining the institutional structure.[23] In a nutshell,

> […] a legal obligation obtains just when and because it follows from a general standard communicated or implicitly endorsed by an agent or institution who is regarded, in the settled practice of judges and other officials, as having the power to place people under obligations by conveying or endorsing standards. The key social practice is therefore a practice of recognition of others' powers to create duties in this way […][24]

Hart's practice theory of rules is, therefore, a theory of obligations.[25] It seeks to explain what it is for an obligation to exist, and how it is possible for someone to be under an obligation irrespective of its own attitudes. While predictive theories first focused on the individual's psychology (that is, one's feelings and attitudes), the practice theory

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[23] At this point, it is worth noting a criticism that I will not have space to examine in depth, but which I would nonetheless like to address briefly. In inferentialist terms it is known as the "problem of the unilateral assessment of normativity." To keep the discussion within the language of analytic legal positivism, I will restate the concern in more familiar terms. The objection is that positivist theories—Hart's included, though Raz's model is the main target—portray officials as occupying a mediating role between the content of the law and the reasons for action available to ordinary citizens. In this light, officials are treated as having authority over the content of legal directives without any corresponding accountability to those subject to them. It is their attitudes alone that determine what the law requires, while citizens and the wider community have no role in shaping or administering that content. This structural separation of *content* and *force*, critics argue, renders the model metaphysically unstable and susceptible to charges of unilateralism. The objection is significant, and it applies both to Raz's strong form of the social source thesis and to weaker Hartian versions that maintain only that the ultimate test of legal validity is a matter of social fact. See: Thomas Bustamante and Thiago Lopes Decat, "Raz's Two-Prong Defect in the Metaphysical Structure of Authority: A Hegelian Inferentialist Analysis". From this perspective, the Brandomian-inspired criticism, when translated into the language of analytic legal positivism, may overstate the dependence of legal obligation on officials' mediating role. Hart's discussion of international law indicates that obligations can exist and function even in the absence of a fully developed rule of recognition or formalized hierarchies of rules. If simple systems can generate normative force without a distinct internal point of view or institutionalized authority to demand compliance, then the asymmetry highlighted is not an inevitable feature of legal systems. Rather, it may reflect the contingent structure of complex domestic systems. In other words, the problem of unilateral assessment—though illuminating when applied to modern institutional contexts—might not generalize to all cases of legal obligation. Hart's own account contains resources to recognize that some obligations derive their force from patterns of social acceptance and regularized responses, rather than exclusively from the authority of officials. In Hart's words: "It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity." HART, H. L. A. **The concept of law**. 2nd ed. Oxford : New York: Clarendon Press ; Oxford University Press, 1994. p. 235.

[24] STAVROPOULOS, Nicolaos. The practice theory. *In:* GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 5**. 1. ed. [s.l.]: Oxford University Press: Oxford, 2024. p. 1-42 Available at: <https://academic.oup.com/book/57969>. Acesso em: 5 set. 2025.p. 9.

[25] I follow Stavropoulos in understanding that albeit its name, the practice theory of rules is a theory which "appeals to rules constituted by social practices in order to explain what it is for an obligation to exist." For a different hypothesis, see: ADAMS, Thomas. Practice Theory in *The Concept of Law*. *In:* GARDNER, John; GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 4**. 1. ed. [s.l.]: Oxford University Press, 2021. Available at: <https://academic.oup.com/book/41136>. Acesso em: 5 set. 2025. p. 1-31. Stavropoulos also address Adam's interpretation in his paper.

chose another target: the group's feelings and attitudes, which function as a reason for an agent, who is part of the group, to feel bound by what the group regards as the standard practice. The practice theory appeals to "no more than ordinary behavioural facts and manifest attitudes towards such facts,"[26] while keeping in mind the normativity of obligation, which is best understood through the concept of the rule of recognition.

2.2. Addressing the practice theory's shortcomings

We can already anticipate some of the shortcomings of the practice theory of law. Even if we grant that Hart's account identifies the structural conditions under which obligations can be said to exist, questions remain about whether such a structure is sufficient to account for the normative implications of treating rules as imposing duties on others. Raz presses precisely this point, noting that any practice involving the recognition and enforcement of rights and duties is, by its very nature, concerned with imposing constraints on the conduct of others. While it may be unproblematic to adopt norms for a variety of reasons, Raz argues that we cannot coherently impose norms on others unless we are prepared to offer some account of the reasons that could justify such impositions.[27] That is, the fact that X has a reason to impose an obligation on Y does not, by itself, give Y a reason to comply, unless one presupposes a moral reason to treat X's interests as authoritative.[28]

On this view, judges who accept the rule of recognition are not merely endorsing a technical rule for identifying valid legal norms; they are also committing themselves to applying rules that impose obligations on others. But if those rules are not accepted by the general population, and if their justification does not rest on shared social norms or internalized attitudes, then the only remaining explanation for their binding character—that is, for the fact that they impose duties or provide normative reasons to those who do not accept them—must invoke moral considerations. In other words, officials either

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[26] STAVROPOULOS, Nicolaos. The practice theory. *In:* GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 5**. 1. ed. [s.l.]: Oxford University Press: Oxford, 2024. p. 1-42. Available at: <https://academic.oup.com/book/57969>. Acesso em: 5 set. 2025. p. 7.

[27] RAZ, Joseph. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123–131, 1984. Available at: <https://academic.oup.com/ojls/article-lookup/doi/10.1093/ojls/4.1.123>. Acesso em: 29 jun. 2023. p. 130.

[28] RAZ, J. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123—131, 1984. p. 130.

accept these rules because they believe they are morally justified, or they act as if they do, without actually endorsing their moral force.[29]

It is in response to this kind of objection that Hart makes a striking claim—namely, that judicial statements concerning a subject's duties "need have nothing directly to do" with that subject's reasons for action.[30] For Raz, this suggests a surprising implication of Hart's view: that duty-imposing laws are not directed at subjects as reasons for action, but function instead as instructions (or perhaps mere permissions) to courts to respond to breaches through sanctions or remedies. This is what Raz refers to as Hart's "sudden Kelsenian twist,"[31] whereby the normativity of duty-imposing laws is displaced from the subject's deliberative standpoint to the institutional mechanisms of enforcement.[32]

In this reading, Hart's position leads to a controversial conclusion. In his response to Raz, he appears to accept that legal and moral duties may belong to two distinct normative domains.[33] His reasoning hinges on rejecting what he calls a "cognitive account of duty"—that is, the view that saying someone has a duty entails the existence of objective reasons for action, reasons that apply regardless of the agent's motivations or preferences. If one accepts this cognitive view, then legal duties would seem to be moral duties, insofar as both would express the same kind of objective normativity. To resist this assimilation, Hart proposes a separation between legal and moral duties—a move that, as he admits, commits him to the idea that there may be two independent "worlds" of objective reasons: one legal, the other moral.[34] The notion of legal obligation,

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[29] RAZ, J. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123-131, 1984. p. 130.

[30] Hart himself acknowledges the apparent tension in his position: "...I am vividly aware that to many it will seem paradoxical, or even a sign of confusion, that at the end of a chapter, a central theme of which is the great importance for the understanding of law of the idea of authoritative reasons for action, I should argue that judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action." See: HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 267.

[31] RAZ, Joseph. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123–131, 1984. Available at: <https://academic.oup.com/ojls/article-lookup/doi/10.1093/ojls/4.1.123>. Acesso em: 29 jun. 2023. p. 131.

[32] RAZ, Joseph. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123–131, 1984. Available at: <https://academic.oup.com/ojls/article-lookup/doi/10.1093/ojls/4.1.123>. Acesso em: 29 jun. 2023. p. 131.

[33] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 267.

[34] As Hart acknowledges, the view that judicial statements of legal duty need not align with the subject's reasons for action may seem counterintuitive or even "extravagant." Still, he maintains that unless the alternative interpretation he proposes—namely, that such statements can be understood independently of the subject's motivations—is shown to be absurd or factually misleading, it should not be dismissed. See: HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in

on this account, would not require moral justification, nor even presume a connection to the kinds of reasons that typically ground moral claims.

In Raz's formulation, Hart sought to reject two theses:[35]

> (1) 'Duty' and 'obligation' mean the same when one talks of legal and of moral duties and obligations:
> (2) Judges who accept the rule of recognition accept or at least pretend to accept that legal obligations are morally binding.
> His argument against the second thesis leads him to reject a third one.
> (3) That a person has a (legal) obligation to perform an act entails that he has a (legal) reason to perform it.

This is how Raz reconstructs the issue. He argues that Hart takes thesis (2)—that judges who accept the rule of recognition accept that legal obligations are morally binding[36]—to imply that such judges must also accept the legitimacy of the legislature. But, according to Raz, this inference is mistaken. A judge may regard the legislature as illegitimate while still believing that its enactments must be followed on moral grounds, for example, to avoid social collapse or civil unrest. Raz then revisits a distinction he has drawn between accepting a rule that governs one's own conduct and accepting a rule that governs others. While self-interested reasons may justify the first kind of acceptance, they cannot ground the second, at least not without assuming that others have a moral duty to promote one's interests. In this sense, sincerely accepting a rule that imposes duties on others seems to require believing that there are moral reasons that justify the rule. Applied to judges, this would suggest that those who accept the rule of recognition, which authorizes rules imposing duties on others, must either accept it for moral reasons or at least pretend to do so.

However, as Raz notes, this conclusion ultimately rests on thesis (3): the idea that having a duty to act entails having a reason to act. While Hart does reject this thesis, he does not deny that legal obligations can provide reasons for action; rather, he rejects the idea that they generate reasons that are independent of the agent's own motivations, preferences, or inclinations. For Hart, to say that a person has a legal obligation is not to

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jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 267.

[35] RAZ, J. Hart on moral rights and legal duties. **Oxford Journal of Legal Studies**, v. 4, n. 1, p. 123—131, 1984. p. 129.

[36] Hart's argument is 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." HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 160.

assert that she has a categorical or morally binding reason to act, but that her action may be properly demanded or exacted under the legal system. In other words, legal duty is tied to institutional authority and the structure of demands, not to reasons that exist independently of the social and legal context.

In contemporary discussions on legal obligation, it is often assumed, perhaps with some justification, that Raz has won the debate. As even critics acknowledge, "Raz's theoretical posture has shaped the central questions of jurisprudence."[37] This is not to say that Hart's account has been abandoned; but defending it has become more difficult, particularly as many contemporary theories of legal obligation within positivism now build upon Raz's framework. At the same time, Razian theory has diversified: there are now various flavours of Razian views, with different theorists emphasizing and reworking distinct parts of his account. Likewise, Hart's framework, though often overshadowed, has not remained static—Hart himself acknowledged its shortcomings.[38] With some help from contemporary jurisprudence, we can better see the practice theory in its best light.

2.3 A "fresh start" in defence of law's distinctiveness

In *Essays on Bentham*, as already discussed, Hart advances the striking hypothesis that there are two independent "worlds" or sets of objective reasons: one moral, the other legal.[39] Following this hypothesis, we are led to the thought that reasons tend to have force within particular normative domains, and that we should not be too quick to assume that reasons in one domain are reducible to, or answerable to, reasons drawn from another. As Brian Bix puts it, one may have "legal reasons" that differ not only from "moral reasons" and "prudential reasons," but also from reasons of "etiquette," "fashion," or even "chess."[40] The normative landscape, on this view, is not a single plane but a patchwork of practices, each generating its own standards of reason and justification.

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[37] DIAMOND, Alma. Law in Society: Defending Hart. **Res Publica**, 2025. Available at: <https://link.springer.com/10.1007/s11158-025-09725-y>. Acesso em: 9 jul. 2025. p. 9.

[38] HART, HLA. Answers to Eight Questions (1988). *In:* DUARTE D'ALMEIDA, Luís; EDWARDS, James; DOLCETTI, Andrea (Orgs.). **Reading HLA Hart's The concept of law**. Oxford, United Kingdom: Hart Publishing, 2013. p. 504. I will delve into this point later.

[39] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 267.

[40] BIX, Brian H. Kelsen, Hart, and legal normativity. **Revus**, n. 34, 2018. Available at: <http://journals.openedition.org/revus/3984>. Acesso em: 29 jun. 2023.

I call this the Domain Autonomy Thesis (DAT), which can be formulated as follows:

> DAT: Legal obligations can be understood as grounded in legal reasons that belong to a distinct normative domain, not reducible to reasons from morality, prudence, etiquette, or any other normative system.

According to DAT, one should not conflate "ought" with morality, since there are multiple kinds of "ought," and correspondingly, multiple sources of reasons for action, not all of which are moral in character.[41]

In this sense, "domain" is to be understood *conceptually*, as a way of talking about the world using a certain set of ideas and standards, rather than as a realm populated by special entities. When we speak of a domain, especially a normative one, we should avoid thinking of it as a separate "realm" made up of special kinds of objects (like numbers in arithmetic or duties in morality). Instead, what makes something a domain is not the kind of object it talks about, but the kind of claims it involves and the concepts it uses.[42] For example, the normative domain isn't about some special category of metaphysical entities called "norms." It's about how we describe or evaluate ordinary things—like people, actions, or decisions—using normative concepts such as reasons, ought, right, or justified. Similarly, while arithmetic seems to be "about numbers," we also use numerical claims to talk about real-world things (e.g. "There are five apples on the table"). So the domain of arithmetic is defined by the kind of concepts and reasoning we use, like number and equality, not by a separate world of objects.

Similarly, a legal domain should be understood not as a special ontological realm populated by legal entities (such as "rights," "duties," or "norms") but as a conceptual domain structured by a distinctive set of concepts, standards, and inferential practices. It is not based on some difference identified in the nature of each domain, but simply "a trivial implication of the claim that obligations consist in a certain shared attitude to some social pattern of action."[43] Just as the domain of arithmetic is marked by the use of

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[41] "We must, I think, beware of thinking in a too simple-minded fashion about the word "ought." [...] The word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral." HART, H. L. A. Positivism and the Separation of Law and Morals. **Harvard Law Review**, v. 71, n. 4, p. 593, 1958. Available at: <https://www.jstor.org/stable/1338225?origin=crossref>. p. 612-613.

[42] "So a domain is better understood in terms of the kind of claims it involves, and hence in terms of concepts that it deals with, such as number, set, physical object, reason, or morally right action." SCANLON, Thomas. **Being realistic about reasons**. Oxford: Oxford University Press, 2014. p. 19.

[43] STAVROPOULOS, Nicolaos. The practice theory. *In:* GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 5**. 1. ed. [s.l.]: Oxford University Press: Oxford, 2024. p. 1-42. Available at: <https://academic.oup.com/book/57969>. Acesso em: 5 set. 2025. p. 11.

numerical concepts and rules of calculation, rather than by a metaphysical commitment to the existence of numbers, so too the legal domain is defined by its own vocabulary and justificatory standards: terms like valid, binding, duty, enforceability, and so on. What makes a judgment legal is not the metaphysical nature of what it refers to, but the framework of reasoning and evaluation it belongs to. Legal claims are not about a special class of objects, but about how to describe and assess actions, institutions, and decisions using legal concepts and according to legal standards. For example, when a court holds that a person is under a legal obligation, it is making a claim within the legal domain, not necessarily asserting that the person has a moral or prudential reason to act, but that their action (or inaction) has a particular legal status under a given legal system.

Thus, to say that law constitutes a distinct normative domain is to say that legal reasoning operates within its own set of norms and criteria of validity, irreducible to those of morality or other normative practices, even if they sometimes overlap in content or application.[44]

It is important to note that, when we speak of the legal domain as a distinct normative domain, we are not making a metaphysical claim about the *existence* of a special class of legal entities or a separate legal reality. Rather, we are adopting a conceptual lens—a way of organizing and discussing certain kinds of claims. As Thomas Scanlon emphasizes, the relevant question about domains is not whether they exist *out there* in some ontological sense, but whether the idea of a domain offers a useful and illuminating framework for analysing specific practices.[45] In this light, asking whether the legal domain "really exists" misses the point. The value of the concept lies in its explanatory role: it helps us make sense of the structure of legal thought, and the standards by which legal claims are assessed. What defines a domain, in this sense, is not a set of entities, but a set of concepts and inferential relations that guide how we talk and reason

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[44] In other words, "the factors that matter to the constitution of obligation are internal to each practice; what happens elsewhere is not germane. The 'separation of law and morals' is not an upshot of some fundamental difference in the nature or normative standing of legal and moral obligations. It's simply a par-icularly well-known implication of the claim that obligations are indi- viduated by underlying patterns of action and attitude. Legal and moral obligations must be distinct just because and to the extent that their social bases are distinct, in precisely the same way that legal obligations and mafia obligations, or obligations to join a queue and promissory obligations, are distinct." STAVROPOULOS, Nicolaos. The practice theory. *In:* GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 5**. 1. ed. [s.l.]: Oxford University Press: Oxford, 2024. p. 1-42. Available at: <https://academic.oup.com/book/57969>. Acesso em: 5 set. 2025. p. 11.

[45] "But the question about domains is not whether they exist but whether they provide a helpful way of discussing certain matters." SCANLON, Thomas. **Being realistic about reasons**. Oxford: Oxford University Press, 2014. p. 23.

about a particular area of life. The legal domain, then, is a way of describing a mode of reasoning that is structured by legal norms, not reducible to moral or prudential considerations, and governed by its own internal standards of correctness and relevance.

This perspective also helps clarify Brian Bix's interpretation of Hart. According to Bix, Hart is not concerned with the ultimate grounding of legal reasons—whether they are moral, prudential, or otherwise. Rather, for Hart, it is sufficient that agents treat legal rules as providing reasons for action. The theorist's task is not to evaluate the normative force of those reasons, but to explain the practice of treating certain statements as obligations within a shared social context. In Bix's words, "we need not be too concerned about what sort of reasons these might be, and whether they are well grounded."[46]

This reading aligns with Hart's broader "practice theory of rules," according to which the existence of legal obligations is a matter of how rules are used and recognized within a community. To say that someone has a legal obligation is to register a contextual connection between the practices of officials and the norms those officials treat as reason-giving.[47] The internal point of view, adopted by participants in the legal system, involves using these norms to guide behaviour, criticize deviation, and justify decisions, regardless of whether those norms would be validated by some moral or prudential test.

But one may ask what to make of the claim that judicial statements about a subject's legal duties "need have nothing directly to do with the subject's reasons for action." Does this mean that legal obligations are not normative at all, or that they are normative only in a diminished sense? One possible reading is that law may function normatively in an attenuated sense, while remaining insulated from the thicker justificatory demands of morality. Thin normativity, some argue, "rests on criteria that

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[46] BIX, Brian H. Kelsen, Hart, and legal normativity. **Revus**, n. 34, 2018. Available at: <http://journals.openedition.org/revus/3984>. There is a misunderstanding in Bix's interpretation of the critiques of Hart regarding the nature of legal reasons. Bix writes: "Along the same lines, one could read Hart as saying that for the person who accepts the law, the sort of reason the law gives is (simply) a legal reason, just as in other contexts people might consider themselves as subject to chess reasons... etiquette reasons, or fashion reasons." This analogy is serviceable up to a point, but Bix follows it with the claim that Hart, or those sympathetic to his view, need not concede that legal reasons must be reducible to moral or prudential ones: "Why should one assume that one has a moral obligation to do as the law says, simply because the law says so?" This move is problematic for two reasons. First, it conflates two distinct questions: (1) whether legal reasons—understood as action-guiding considerations—must be justifiable from the moral point of view (as Raz argues), and (2) whether individuals have a general moral obligation to obey the law because it is the law. These are not the same. Second, the critics such as Raz do not claim that one should assume a general moral obligation to follow the law. Rather, their point is that the normativity of law (and its claim to authority) must ultimately be evaluated or accounted for from the standpoint of practical reason, which includes moral justification. So, dismissing the latter view by denying the former misses the structure of the argument entirely.

[47] DIAMOND, Alma. Law in Society: Defending Hart. **Res Publica**, 2025. Available at: <https://link.springer.com/10.1007/s11158-025-09725-y>. Acesso em: 9 jul. 2025. p. 12.

are entirely different from and independent of sources of genuine normativity" and therefore "a consideration might count as a thick, genuine reason for action, but not as a thin reason (or schmeason), and *vice versa.*"[48]

However, Hart's theory of obligation does not seem to fit this reading. What matters in the practice theory of rules is not whether the normativity of legal obligations is "thin" in comparison to morality, but whether it has the thickness appropriate to its own domain. Here Scanlon's point is instructive: the thickness of an existential claim derives from the structure of the domain in which the claim is made.[49] For physical objects, thickness comes from their spatial and causal interactions; for mathematical entities, it comes from the relations and operations that constitute the mathematical realm. By the same token, the thickness of legal obligations is supplied by the distinctive standpoint agents may take toward the law—the internal point of view. To say that a subject has a legal obligation is not a merely minimal statement; it is to say that she stands within a practice whose participants accept the law as a standard of conduct and criticism, such that non-compliance is understood as a breach calling for response.

From this perspective, the practice theory of rules should not be taken as an admission of explanatory weakness. On the contrary, it provides exactly the kind of thickness the domain requires. To say that a legal obligation does not present itself as a deliberative reason for action is not to say that it lacks normative content. It is to recognise that its normative force lies in how agents, by adopting the internal point of view, accept the law as fixing standards of behaviour—standards that can ground criticism, justification, and response—without the need for each obligation to operate as a reason in their deliberation. A tenant, for instance, need not constantly deliberate about her obligation to pay rent in order to be bound by it. By having adopted the law's standard of conduct, she is already positioned so that failure to pay is intelligibly treated as a breach, criticised by others, and enforceable by institutions.

Thus, the claim that legal obligations are genuine reasons for action on their own domain is not a concession to minimalism, but a clarification of their domain-specific mode of normativity. They are as thick as they need to be, because they make sense of how agents can orient themselves to law through the internal point of view, how breaches

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[48] SCHNEIDER, Alice. Thin and super-thin legal normativity. **Jurisprudence**, p. 1–16, 2024. Available at: <https://www.tandfonline.com/doi/full/10.1080/20403313.2024.2430055>. p. 2.

[49] "The relevant idea of "thickness" is thus domain-specific. It is not provided by some further idea of meta-physical reality over and above the properties just mentioned." SCANLON, Thomas. **Being realistic about reasons**. Oxford: Oxford University Press, 2014. p. 28.

can be criticised, and how obligations can structure practices of enforcement and response. A proper account of legal obligations, therefore, must resist the temptation either to inflate them with moral content that the domain does not warrant or to deflate them into mere predictions of coercion. Their thickness is exactly that of the legal world itself: a stance agents can take toward law, by which its standards become intelligible as reasons for criticism, even when they do not present themselves as deliberative reasons in the agent's every choice.

Therefore, to describe an obligation as legal is to situate it within this domain, to measure it by standards of validity, bindingness, and enforceability, and to acknowledge the role of the internal point of view in sustaining those standards. The thesis is not metaphysical but conceptual: it identifies the resources of a domain of reasoning, one in which the point of adopting a rule as binding is to provide participants with criteria for appraisal and justification within a legal practice. Once it is recognised that what counts as a reason need not be a special kind of entity but may consist in ordinary facts, one can see that the fact that one's conduct is subject to criticism or sanction within the legal framework provides a reason, in the relevant sense, to act in accordance with the law.[50] And that is all there is need to it: "no more and certainly no less"[51], since "there is no further ingredient that genuine obligations have but legal obligations so understood lack. Their social credentials are exactly the right ones. As obligations go, legal obligations are as good as it gets."[52] Perhaps Hart himself did not put it that way.[53] That, however, is a different matter altogether.

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[50] "The things that can be reasons are not a special kind of entity but ordinary facts, in many cases facts about the natural world." SCANLON, Thomas. **Being realistic about reasons**. Oxford: Oxford University Press, 2014. p. 30.

[51] SCANLON, Thomas. **Being realistic about reasons**. Oxford: Oxford University Press, 2014. p. 28.

[52] STAVROPOULOS, Nicolaos. The practice theory. *In:* GREEN, Leslie; LEITER, Brian (Orgs.). **Oxford Studies in Philosophy of Law Volume 5**. 1. ed. [s.l.]: Oxford University Press: Oxford, 2024. p. 1-42. Available at: <https://academic.oup.com/book/57969>. Acesso em: 5 set. 2025. p. 10.

[53] In his *Answers to Eight Questions,* Hart acknowledged that his theory of obligation, as set out in *The Concept of Law*, needed to be rewritten: "There are certainly parts of *The Concept of Law* which I recognise need to be corrected and re-written. I am, I regret to say, a somewhat careless writer, and there are a number of instances in my books where I have expressed my views inaccurately, ambiguously or too vaguely. Most of these failures in my exposition concern relatively minor points of detail, but there are some topics of major importance where my exposition is not only confused but incomplete and inconsistent. The most important of these topics is that of legal obligation." In my analysis, I have sought to identify and present Hart's revised position. Although it is for the reader to examine it in detail, the core of Hart's reconsideration is that "Even in the case of a simple regime of custom-type rules, what is necessary to constitute the obligation-imposing rules is not merely that they should in fact be supported by a general demand for conformity and social pressure, but that it should be generally accepted that these are legitimate responses to deviations in the sense that they are permitted, if not required, by the system. Such demands and pressures will not be merely predictable consequences of deviations, but normative consequences, because they are legitimate in this sense. I now think that this idea of a legitimate response to deviation in

Before crowning the practice theory of law, however, we should take a step back and consider Raz's objection, according to which accepting a rule that imposes duties on others seems to presuppose the belief that there are moral reasons that justify the rule. Addressing this objection requires understanding Raz's conception of authority, since his critique of Hart rests on a particular account of how legal directives can claim to guide action. This "moralized view" of legal obligations has become the dominant position in contemporary jurisprudence and understanding why is therefore essential.

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the form of demands and pressure for conformity is the central component of obligation." HART, HLA. Answers to Eight Questions (1988). *In:* DUARTE D'ALMEIDA, Luís; EDWARDS, James; DOLCETTI, Andrea (Orgs.). **Reading HLA Hart's The concept of law**. Oxford, United Kingdom: Hart Publishing, 2013. p. 504.

3. THE MAKING OF A STANDARD VIEW

When disregarding sanction-based theories of legal obligations such as predictive theories Raz made two central observations: first, that sanctions can indeed function as reasons for compliance—they are often effective in influencing behaviour. Second, and more importantly, that this behavioural effectiveness cannot account for the distinctive normative force of legal obligations. When laws are cast as mandatory norms, they are presented not merely as incentives or pressures, but as operative reasons for action. In Raz's terminology, such reasons are not merely first-order reasons, but exclusionary reasons: they are meant to displace or pre-empt other considerations that might otherwise bear on the agent's deliberation. But the fact that a rule is backed by a sanction never amounts to an exclusionary reason. Sanctions may explain conformity, but they cannot justify it in the relevant normative sense. In his words, "It explains one way in which laws are reasons. But it fails to explain in what way they are norms."[1]

In Razian terms, to say that someone is under an obligation is not merely to say that there are pressures or incentives bearing upon their behaviour. It is to say that the person *ought* to act in a certain way, and that this "ought" is grounded in a reason with a particular structure and status within the person's deliberation. Obligations, on this view, are not merely reasons among others. They purport to be exclusionary reasons—reasons that tell the agent not only what to do but to disregard certain competing reasons for doing otherwise. If that is right, then Raz's point is decisive: a threat of sanction, however effective in securing conformity, cannot by itself generate an obligation. For the threat operates by adding a reason to the balance (a reason to avoid punishment), whereas obligations operate by shaping the balance—indeed, by excluding certain considerations from the balance altogether. The sanction, therefore, lacks the normative structure required of an obligation. It may cause people to do what the law demands, but it does not thereby *oblige* them to do so.[2]

Moreover, *contra* Hart, to *oblige* someone to do as one wishes is to make a normative claim upon them, which already assumes the existence of a justificatory framework in which that claim can be intelligible to them as a reason. In this sense, it is hard to see how one could sincerely endorse a rule that imposes duties on others without, at some level, believing that there are moral considerations that justify the imposition.

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[1] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 162.
[2] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999.

The very intelligibility of the demand, as one that the other ought to recognise, seems to depend on the idea that the duty tracks reasons the other could, in principle, be brought to acknowledge. That is, "If we in fact are imposing legal obligations upon one another, the only explanation for that fact about our practices can be that we believe that there are moral reasons which justify us in doing so."[3] That, it seems, puts us squarely back in the domain of morality. And once we are there, it is hard to see a way out.

This chapter begins by examining Raz's idea of reasons and its role in explaining legal obligations.

3.1 Rules as reasons: the exclusionary character of mandatory norms

We engage in countless actions over the course of a single day: waking up, preparing coffee, answering e-mails, writing, attending meetings, and so on. Each of these actions is typically the outcome of a process of weighing reasons. I wake up at 9 a.m. because I enjoy staying in bed as long as possible, but not longer, since doing so would undermine the completion of the tasks I had planned for the morning. If I were to extend my time in bed, I might have to forgo my morning coffee, and the prospect of missing that coffee functions as a reason for me to get up. This simple scenario exemplifies the structure of practical reasoning, understood as the process by which agents deliberate about what to do. Practical reasoning consists in being responsive to considerations that count in favour of or against particular actions. In this example, the enjoyment of resting longer provides one reason to stay in bed, while the desire to pursue my plans supplies a countervailing reason to rise. Recently, however, I introduced a rule for myself: I will wake up one hour earlier each day to work on my dissertation. Once this rule is in place, the fact that I have the rule becomes a reason for waking up earlier.

Desires and rules, however, are not the same kind of reasons; in fact, "The main problem of understanding rules is to see what sort of reasons rules are, and how they differ from other reasons."[4] One important feature they share, nevertheless, is that both are operative reasons. Operative reasons are those in virtue of which belief in their existence entails adopting the corresponding practical attitude. My desire to remain in bed and my rule to wake up earlier both illustrate this point. To simply have a desire is a

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[3] DIAMOND, Alma. Law in Society: Defending Hart. **Res Publica**, 2025. Available at: <https://link.springer.com/10.1007/s11158-025-09725-y>. Acesso em: 9 jul. 2025. p. 9.
[4] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 51.

psychological state, but once I believe that I have this desire, I am already committed to treating it as a reason to act in a certain way. The same holds for the rule: believing that I am bound by it already commits me to regarding it as a reason to get out of bed at 8 a.m. In both cases, the belief that such reasons exist brings with it a practical critical attitude, which is why they count as operative reasons. Now suppose I reason as follows: *I have adopted a rule to wake at 8 a.m.; following this rule requires getting out of bed now; therefore, I ought to get up.* Believing the conclusion entails a practical stance—the recognition that I have a reason to rise. But, as Raz notes, this practical commitment does not arise magically at the level of the conclusion. It is already present in my belief in one of the premises: namely, the premise that I have adopted a rule to wake at 8 a.m. To believe that such a rule exists is not a neutral, descriptive belief, but one that necessarily involves the practical critical attitude—the recognition that it provides me with a reason for action.

By contrast, the auxiliary premise ("getting out of bed now is required to follow the rule") merely identifies the act through which the operative reason is realized. Auxiliary reasons do not themselves generate the practical stance; rather, they operate parasitically on operative reasons, transmitting or modulating their force. Some auxiliary reasons are identifying reasons, which serve to specify the action that realizes an operative reason. If my desire is to help a friend, the fact that lending him money will help him identifies a particular way of acting on that operative reason. Other auxiliary reasons are strength-affecting reasons, whose role is to determine the relative weight of operative reasons in contexts of conflict. If I can help my friend either by lending him money or by introducing him to someone, strength-affecting considerations—such as the magnitude of benefit each action would produce—enable me to determine which reason is more compelling. Thus, while desires, interests, and rules all qualify as operative reasons, auxiliary reasons are of a different order. Their function is not to generate the practical point of view, but to channel, specify, or weigh the reasons that already do so.[5]

Prior to having this rule, my decision each morning depended on balancing the attractions of staying in bed against the benefits of coffee or productivity. Now, by contrast, the rule itself governs what I do: treating it as a rule typically means that I set aside such competing considerations and simply get up at 8 a.m. Philosophers often distinguish between first-order and second-order reasons to account for the way we

[5] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 34-35.

reason. First-order reasons are direct considerations that count in favour of or against an action—for instance, the enjoyment of staying in bed after 8 a.m. or the prospect of having coffee and completing planned tasks. Second-order reasons, by contrast, are reasons about reasons: they determine which first-order reasons should be acted upon and which should be excluded from deliberation. When I introduce the rule that I must wake up at 8 a.m. to work on my dissertation, the rule does not simply add another first-order reason to the balance. Rather, it operates as a second-order reason of the kind that Raz describes as exclusionary. It instructs me not to deliberate on the attractions of staying in bed or the benefits of another cup of coffee, but instead to exclude such considerations altogether. This illustrates the point that second-order reasons are not competitors in the same field as first-order reasons. Their distinctive role is to regulate the field itself by determining which reasons may be considered in the first place. To construe them as adding additional weight to the favoured option would be to misunderstand their function and risk the problem of double counting: it is to count, at the level of action, both the underlying reasons that justify the rule and the rule itself, even though the latter merely replaces the former in practical reasoning rather than adding to them.[6]

What about the law? Just as my self-imposed rule, legal rules provide us with exclusionary reasons.[7] Yet they are not merely exclusionary reasons, but what Raz called "protected reasons": a "combination of a reason to perform the act one has undertaken to perform, or the one required by the rule, and an exclusionary reason not to act for certain reasons (for or against that act)."[8] Because of their exclusionary character, legal rules are *mandatory norms*, as opposed to mere power-conferring and permissive ones. We will not concern ourselves here with power-conferring or permissive rules, but we must at least indicate why they are not our focus and how they differ from mandatory norms. Power-conferring and permissive norms differ from mandatory norms in that they are not by themselves complete reasons for action.[9] Their normative force lies in the capacity they have to guide behaviour by determining, identifying, and characterizing what counts

[6] "When considering the weight or strength of the reasons for an action, the reasons for the rule cannot be added to the rule itself as additional reasons. We must count one or the other but not both. Authoritative directives are often rules, and even when they are not, because they lack the required generality, the same reasoning applies to them. Either the directive or the reasons for holding it to be binding should be counted but not both. To do otherwise is to be guilty of double counting." RAZ, Joseph. **The morality of freedom**. Oxford: Clarendon press, 1990. p. 58.

[7] "Since rules are objects and only facts are reasons rules are not, strictly speaking, reasons. The fact that there is a rule that p is a reason and not the rule that p itself." RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 51.

[8] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 191.

[9] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 106.

in which situation, for example whether "X count as φ". To illustrate, unlike the mandatory rule that I wake up at 8 a.m., a power-conferring rule would be something like: to know whether I have complied with the rule, I should always look at my phone alarm. Likewise, what counts as waking up at 8 is not waking at 8:05, but precisely at 8:00. These rules do not by themselves require me to wake up, but they determine the standards and procedures by which compliance with the mandatory rule is identified.

Typically, law provides us with reasons that show the prescribed act is one which those subject to the rule have good reason to perform, reasons that defeat other countervailing reasons. Consider, for example, that a traffic light prescribes stopping at a red signal. Pedestrians and drivers might have independent reasons to stop—such as avoiding collisions or preserving their own safety—even if the traffic light had not turned red. Yet, in addition to these reasons, further reasons arise from the fact that the light has authoritatively prescribed the action: the effectiveness of traffic regulation, the predictability of public order, and the credibility of the system as a whole would be undermined if individuals acted otherwise. Thus, in deciding whether to stop, those subject to a traffic light no longer need to weigh their private reasons for or against stopping; rather, they must recognize the independent weight of the reason given by the traffic light itself.

It is another characteristic of the protected reasons provided by law that we are better off relying on them than if we had to reconsider our reasons each time. Take, for example, my self-imposed rule to wake up at 8 a.m. If I were to deliberate anew every morning about whether to stay in bed longer or get up earlier, I would continually face the same conflicting reasons: the desire to remain in bed versus the need to write my dissertation. The point of having the rule is precisely to remove this recurrent balancing of first-order reasons. By treating the rule as decisive, I no longer deliberate about whether to follow it, but simply wake up at 8 a.m. The benefits of the rule are secured only if I rely on it as a rule, rather than substituting my own judgment each time. In this sense, the rule operates analogously to legal rules: its function is not to add weight to one side of the scale but to replace deliberation with a protected reason that secures coordination and consistency.[10]

It is not the case that, for something to count as a rule, no one can ever examine the justification for the rule itself. From time to time, I reconsider why I have to wake up

[10] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 193.

at 8 a.m. and whether I actually have reasons to follow that rule. However, "If I re-examine the rule on every occasion to which it applies […] then it is not a rule which I have adopted."[11] Raz distinguishes four elements in every mandatory norm: "the deontic operator; the norm subjects, namely the persons required to behave in a certain way; the norm act, namely the action which is required of them; and the conditions of application, namely the circumstances in which they are required to perform the norm action."[12] Mandatory norms, in sum, are different from other kinds of reasons in that they combine an exclusionary reason—a reason to not act for other reasons—with a protected first-order reason to perform the norm act when the conditions of application obtain.

All this talk of exclusionary reasons presupposes that rules, more specifically legal rules, are not merely reasons for action, but norms. This is intended to distinguish and justify the appeal of explaining legal rules in terms of exclusionary reasons rather than in some other way such as sanctions. Yet, as we noted at the beginning of the chapter, it remains an open question *how* rules count as norms and what exactly is meant by calling them so. This is the subject of the next subsection.

3.2 Rules as norms: the belief-based explanation, the legal point of view and the challenges of the standard view

For laws to be norms, people must believe that they are valid reasons for action. This thesis lies at the core of the belief-based explanation of law's normativity, or, in other words, of law as norms. In Raz's version of a belief-based account, it is not required that every person believes that legal rules are valid reasons for action. Raz adopts a more modest view: it is sufficient that at least some people believe that laws are valid reasons for action. For instance, it is necessary that the courts follow the law: "Judges, acting as judges, act on the belief that laws are valid reasons for action. [...] they hold laws to be exclusionary reasons in that they disregard all non-legal reasons except where allowed by law to act on non-legal reasons."[13] By so acting, judges thus adopt the legal point of view, by which I mean they do not merely conform to the law; they follow legal norms and

[11] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 72.
[12] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 50.
[13] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 171. While law's existence requires that officials believe the law provides valid reasons for action, this believe may be false. See: LYONS, David. Comment: David Lyons. *In:* HART, H. L. A.; GAVISON, Ruth (Orgs.). **Issues in contemporary legal philosophy: the influence of H.L.A. Hart**. Oxford : New York: Clarendon Press ; Oxford University Press, 1987. pp. 114-126. p. 124.

legally recognized norms as norms, and they also accept them as exclusionary reasons for disregarding those conflicting reasons that the norms exclude.[14]

The legal point of view of a legal system S "consists of the norms of S and any other reasons on which the norm subjects of S are required by the norms of S to act."[15] In sum, while not all citizens are required to adopt the legal point of view, judges must embrace it themselves. Moreover, they are obliged to regard ordinary citizens as if they were ideal law-abiding subjects and to evaluate their conduct accordingly. All this depends on the fact that at least some people believe in the validity of legal rules and follow them. This explains the widespread use of statements framed in terms of what the law requires. Even those who do not personally endorse the law have a practical interest in knowing what it demands. As a result, they often make normative statements from a standpoint they do not themselves accept as valid. How can we account for that?

When officials apply rules of law, they express their internal acceptance of what the law requires. Therefore, when a judge applies a legal rule, she makes "committed statements," which expresses the belief that either she or others have reason to comply voluntarily with the rules. As David Lyons puts it, "Such committed judgements have something like moral force."[16] They entail the belief that laws constitute valid reasons for action.

The belief-based explanation distinguishes between two kinds of normative statements in order to address the problem of the normativity of law (understood as the problem of explaining the use of normative language in describing the law or legal situations):

> Internal or committed statements: made by those who accept the validity of the legal point of view; such statements assert what valid reasons for action exist.
>
> External statements: statements about people's beliefs and attitudes toward norms.

Raz adds a third kind of statement, those made to describe one's legal situation, as illustrated above. These statements are called *statements made from the legal point of view*, that is,

> statements made on the assumption that something is the case, for example, that a certain scientific theory is valid, which are not conditionals of which the assumption is the antecedent, nor do they presuppose that the theory is true.

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[14] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 171.
[15] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 171.
[16] LYONS, David. Comment: David Lyons. *In:* HART, H. L. A.; GAVISON, Ruth (Orgs.). **Issues in contemporary legal philosophy: the influence of H.L.A. Hart**. Oxford : New York: Clarendon Press ; Oxford University Press, 1987. pp. 114-126. p. 121.

> We could say that they state what is the case from the point of view of the theory or on the assumption of the theory.[17]

This is the picture we have so far. I first stated that law are norms in the sense that legal rules are valid reasons for actions. To say that laws are norms is to qualify and define the nature of the facts which are reasons. This qualification defines the character of the reasons without by itself explaining their normative force. Sentences like "A ought to pay £80 income tax" illustrate the difficulty: they are often used not merely to indicate what action A has reason to perform, but to describe A's legal situation. To make this explicit, one typically adds phrases such as "A is required by law to…" or "According to the law, he ought to…", which clarify that the statement is about legal obligations rather than the reasons themselves. This means that simply qualifying a reason as 'legal' tells us nothing about its normative force. Stating that a reason arises from the law identifies its source, but it does not explain why the reason is sufficiently binding to require action. The fact that a reason is legal does not automatically show that it ought to be followed, nor does it indicate how it interacts with competing reasons. In other words, labelling a reason as legal classifies its type but does not by itself account for its force as a reason for action. It still does not explain what it means to say that laws are norms.

Not all legal statements generate obligations. Only those statements that meet two conditions can properly be said to impose obligations: (i) they must be issued by an authority that satisfies the *normal justification thesis*, that is, an authority whose directives can help subjects better comply with the reasons that already apply to them; and (ii) the directives must function as exclusionary reasons, pre-empting certain first-order considerations and guiding action by requiring subjects to treat the directive itself as a decisive reason for compliance. In this sense, determining which legal statements genuinely create obligations amounts to clarifying how rules count as norms, and, more importantly, what exactly is meant in calling them norms. To treat a rule as a norm is not merely to recognize it as a behavioural regularity or a social convention, but to acknowledge that it purports to guide action authoritatively—that it claims the ability to function as a reason for action by directing conduct and, at times, excluding competing considerations.

From this it follows that not every statement purporting to impose a legal obligation is capable of actually generating one, for the capacity to function as a reason

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[17] RAZ, Joseph. **Practical reason and norms**. Repr. Oxford: Oxford University Press, 1999. p. 175.

for action presupposes that the issuing authority can, through its directives, assist the subject in conforming more closely to the requirements of reason than she otherwise would. On this view, authority occupies a mediating position between the subjects and the reasons already applicable to them. Only where the authority supplies reasons that apply to those subject to the directives, and that are pertinent to the circumstances covered by them, can its claim to legitimacy be sustained and its directives be regarded as valid statements of legal obligation. This is the *service conception of authority*.[18]

In *Authority and justification*, however, Raz argues that the service conception of authority "is not that authoritative determinations are binding only if they correctly reflect the reasons on which they depend. […] there is no point in having authorities unless their determinations are binding even if mistaken."[19] If authoritative directives are treated as binding even when they fail to supply reasons for action, then whatever *binding* means in Raz's framework cannot be equated with reason-giving. What is the point, then, in defending that legal obligations are imposed only when the service conception is satisfied if we are *bound* by legal directives even when it is not? More specifically, do we gain in conceptual clarity when we argue that one can be *bound* even when the law fails to provide reasons for action?

One might argue that for a directive to count as binding simply means stating the fact that, within a legal system, it is treated as one that ought to be followed, and that deviations from it attract criticism or sanction. But treating a directive as something that ought to be followed and that deviations from it attract criticism or the imposition of sanction is not exactly the sufficient conditions to the establishment of a legal obligation? It is my position that it is so. As I will argue more directly in the next chapter, it is in fact a theoretical virtue of a descriptive theory that it can explain how a directive may still be called "binding" even when it does not guide action by mediating reasons that would leave citizens in a better position, but instead operates through the pressures and expectations embedded in a social practice. This, and nothing more, is what a descriptive theory needs to say in order to account for how legal obligations work. There is no point in overstating the moral reason-giving character of legal directives.

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[18] RAZ, Joseph. Authority, Law, and Morality. RAZ, Joseph. **Ethics in the Public Domain: Essays in the Morality of Law and Politics**. [s.l.]: Oxford University Press, 1996. p. 214.
[19] RAZ, Joseph. Authority and justification. *In:* RAZ, Joseph (Org.). **Authority**. 1. publ. New York: New York Univ. Press, 1990. (Readings in social and political theory). pp. 115-141. p. 126.

I must stress that Raz himself argues that the dependence thesis—according to which authoritative directives must rest on reasons that already apply to their subjects and that are relevant to the circumstances the directives address—is "a moral thesis about the way authorities should use their powers."[20] That is also true of the normal justification thesis. Both are part of an attempt to describe an *ideal* exercise of authority, even though "Reality has a way of falling short of the ideal."[21]

The point, then, is straightforward. If an authority can bind us even when it fails to provide (moral) reasons for action, there is no purpose within a descriptive theory in appealing to the service conception. Unless we are content to turn the issue into a merely verbal dispute about labels, we have no reason to accept the idea that authority can "bind" without guiding us by (moral) reasons. If "binding" simply means that a certain pattern of behaviour is demanded within a practice, and that deviations from it attract criticism or sanction, then the only theoretical work left for the service conception is to insist that the relevant reasons must be moral ones. Once we abandon this unnecessary constraint, however, the picture becomes much simpler: bindingness always implies reasons for action, but those reasons need not be moral. They may be institutional, practice-based, or role-dependent. In that case, Raz's elaborate apparatus for distinguishing binding directives from the mere operation of coercive power loses its descriptive value, and the service conception becomes, at best, an ideal-theoretical account of when authority would be morally justified—not an account of how authority actually functions within legal practice.

Since their publication, Raz's works have been the subject of extensive discussion. Although his views now constitute a dominant position within contemporary jurisprudence, they face a number of persistent criticisms, particularly with respect to the service conception of authority and the account of exclusionary reasons.[22] In this work, however, I decided to concentrate only with the arguments against his idea according to which the requirements of legal obligations are interest-independent, therefore reasons-

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[20] RAZ, Joseph. Authority and justification. *In:* RAZ, Joseph (Org.). **Authority**. 1. publ. New York: New York Univ. Press, 1990. (Readings in social and political theory). pp. 115-141.

[21] RAZ, Joseph. Authority and justification. *In:* RAZ, Joseph (Org.). **Authority**. 1. publ. New York: New York Univ. Press, pp. 115-141, 1990. (Readings in social and political theory). p. 126.

[22] See: RAZ, Joseph, The Problem of Authority: Revisiting the Service Conception. **Minnesota Law Review,** v. 90, pp. 1003-1044, 2006. Available at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1809&context=faculty_scholarship. Access on: 18 dec. 2025. HERSHOVITZ, Scott. The Role of Authority. **Philosopher's Imprint** v. 11, n. 7, pp. 1-19, 2011; RAZ, J. Exclusionary reasons. **SSRN Electronic Journal**, 2021. Available at: https://www.ssrn.com/abstract=3933033. Access on: 18 dec. 2025.

for-action affirmed by official pronouncements must be moral reasons. Raz's theory claims that whenever officials assert that people *ought* to act in a certain way, they are implicitly asserting that those people *have reasons* to act accordingly. But mere interests, especially the interests of those issuing the directive, cannot justify such prescriptions. For a statement about how others ought to behave to be valid, it must appeal to reasons that are either moral or tied to the addressee's own interests.[23]

I am not the first to argue that Raz's overstates the role of morality in his account of legal obligations. Matthew Kramer, in restating the Hart-Raz debate, follows Hart in that a defence of legal positivism "necessitates a partial rejection of Raz's reason-focused analysis of legal norms."[24] Kramer rejects Raz's view by claiming that it makes a mistake in arguing that legal norms are invariably prescriptions that purport to offer justificatory reasons. Though they may indeed take the form of prescriptions, they may likewise appear as bare imperatives—that is, directives which do not purport to offer any justificatory reasons. Thus, legal obligations, being the requirements imposed by duty-creating legal norms, may rest solely, or even exclusively, upon the interests of those officials who issue and enforce them. In such cases, the addressees of the norms possess neither moral reasons nor prudential reasons (apart from the fear of sanction) to comply with the purported requirements. Accordingly, the existence of a legal obligation cannot be taken to entail the presence of moral reasons for action. Moreover, officials within an oppressive regime often invoke legal duties simply to reinforce incentives for compliance. Their references to obligation may serve not to justify their decisions as fair, but to signal that disobedience will be met with punishment. Even if explanations of official decisions are integral to a functioning legal system, nothing compels those explanations to take the form of moral justifications. Again, they may instead operate as stark imperatives, designed to secure obedience, not to assert moral legitimacy. That such explanations are conceptually intelligible is enough to undermine the thesis that the assertion of legal duties necessarily entails the affirmation of moral reasons.

The difficulties with this belief-based account of norms (and, by extension, of legal obligations) can thus be stated. Explaining when legal obligations are binding is all that a descriptive theory is required to do. Raz's account, by tying reason-giving to the

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[23] KRAMER, Matthew H. **In defense of legal positivism: law without trimmings**. Reprint. Oxford: Oxford Univ. Press, 2007. p. 82-83.
[24] KRAMER, Matthew H. **In defense of legal positivism: law without trimmings**. Reprint. Oxford: Oxford Univ. Press, 2007. p. 84.

provision of moral reasons, crosses the boundary between descriptive and ideal theory, leaving both in an unstable position. We gain no conceptual clarity from the claim that legal obligations arise only when the law supplies subjects with moral reasons for action, while simultaneously insisting that we remain bound by legal directives even when they supply no such reasons. A more candid view is preferable: whether or not we should act on the reasons generated by—even mistaken—legal directives is ultimately a moral question. The existence of legal obligations, however, is not. Legal rules provide legal obligations within a practice regardless of their success in meeting the legitimacy claim; it is up to us, as moral agents, to determine whether those institutional reasons ought to be treated as moral reasons for action.

It is now time to consider a candidate theory of legal obligations that can succeed where both the practice theory and the standard view fall short. Some of its features can be traced to earlier predictive accounts, such as Bentham's, while others may be drawn from a more charitable interpretation of Austin's imperative theory. This is the subject of the next chapter.

4. THE ROOTS OF AN EXPECTATIONAL ACCOUNT OF LEGAL OBLIGATIONS

Having examined, in the preceding chapters, the principal attempts to explain legal obligations through the practice theory of law and through the standard, belief-based model of authority, we are now in a position to step back and assess what these inquiries collectively reveal. Each theory illuminates something important, yet each leaves unresolved tensions at the very point where legal obligations should be most clearly understood. Rather than treating these shortcomings as mere defects, it is useful to regard them as instructive: they mark the boundaries of what these approaches can achieve and indicate where a more adequate account must diverge. The task that follows, then, is to take stock of what these theories have taught us, both in their insights and in their limitations, and to consider how a more satisfactory explanation might be constructed from what they leave incomplete.

A central difficulty for the practice theory arises from its commitment to the idea that law is merely one normative practice among many. On this view, the normativity of law is of a type shared with practices as diverse as etiquette, chess, or club rules; each domain is said to possess its own internal standards and its own sense in which its directives are binding. But once this picture of normativity is adopted, the theory owes us an account of why legal obligations stand apart from these other domains in the way we ordinarily and intuitively acknowledge. After all, rules of etiquette and rules of chess do not purport to exclude competing considerations or claim priority when they conflict with moral or prudential reasons; legal rules, by contrast, typically do. In this respect, Raz was right to insist that legal obligations are exclusionary: they are meant to displace certain competing considerations in deliberation, not merely to coexist with them. The practice theory cannot easily explain why law, unlike the other normative practices it groups alongside it, is presented and experienced as uniquely authoritative, why its directives are taken to settle what is to be done rather than simply to guide behaviour within a voluntary activity. Without such an explanation, the theory collapses important distinctions and leaves unexplained why legal normativity is not on a conceptual par with the normativity of games or social rituals, even though its own framework seems committed to treating them as structurally identical.

The standard view faces a different, though equally pressing, difficulty. It holds that legal obligations arise only when the law satisfies the conditions of the service

conception—namely, when it provides subjects with reasons for action that improve their conformity with the reasons that already apply to them. Yet Raz also insists that authoritative directives remain binding even when they fail to supply such reasons and even when they rest on mistaken judgments. If so, whatever "bindingness" amounts to in his framework cannot be identified with the provision of (moral) reasons for action. But then the appeal to the service conception seems methodologically idle: if we are bound by legal directives regardless of whether they satisfy its conditions, it is unclear what explanatory work the service conception is doing. The standard theory thus risks oscillating between an idealized picture of law as a moral guide and a descriptive picture in which bindingness persists without moral reason-giving, leaving the phenomenon it aims to explain in an unresolved tension.

Both approaches therefore struggle to articulate a clear and descriptively adequate account of how legal obligations actually guide behaviour. These limitations indicate the need for a different framework.

In this chapter, my aim is to develop a distinct account of legal obligations by drawing on a more charitable reading of two predictive models of legal obligation—Bentham's account and the Austinian imperative theory of law. A closer look at their arguments reveals an overlooked insight: expectations structured around stable patterns of consequences are not normatively irrelevant; they help illuminate how legal obligations can guide conduct even in the absence of any claim to moral legitimacy. I do not intend to defend either author's theory in its original form, nor to revive their models as complete explanations of legal normativity. Rather, I take their work to contain the roots of what I call the *expectational account*, an approach that explains how authoritative pronouncements guide behaviour by generating predictable expectations within a rule-governed system. Where their theories prove inadequate, I am prepared to depart from them and develop the view independently, retaining only the core insight that expectations can play a genuine explanatory role in legal obligation.

4.1 Legal obligations as fictitious entities

Legal obligations occupy a foundational role in our understanding of the legal phenomena, "the root out of which all these other fictitious entities take their rise

emerge."[1] In his work, Bentham argued that legal obligations are a "fictitious entity" and categorized legal phenomena into "effects"—such as obligation, right, exemption, power, privilege, possession, and property—and "causes", including command, prohibition, punishment, pardon, and judgment. At the core of this framework lies the notion that obligations are shaped by pleasure and pain, primarily pain, derived from sanctions, which function as the mechanisms through which obligations guide individual actions and establish the foundational structure of legal relations.

In this context, "fictitious entities" refers to constructs of the human mind that, while lacking real existence, play a crucial role in our understanding of the world and are grounded in empirical elements. While fictitious entities have no "real" existence, it plays an indispensable role in our thought, occupying an "essential place by virtue of the relationship they bear to real entities and their participation in the world that they populate—a role determined by the universal need of human beings to understand their world and survive and flourish in it."[2] More specifically, fictitious entities are names, and as clarified by Piero Tarantino, Bentham himself specified that the expression "fictitious entity" is simply a shorthand for the phrase "name of a fictitious entity," meaning a name that lacks empirical reference and exists only conceptually.[3] However, they are not merely make-believe; rather, they are essential to thought and discourse, even though outside our minds, fictitious entities do not exist, and their meaning is purely linguistic, as they are introduced for the purposes of discourse and incorporated into sentences where they function as nouns.[4]

An example may help illustrate this point. The expression "average man" does not refer to any particular person or thing, yet it makes perfect sense when used in context, as in the sentence, "In America, the height of the average man is X."[5] This statement means that the total height of all adult men in America, divided by their number, results in X. We use expressions like these, which at first glance appear to name real entities in

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[1] "Obligation is the root out of which all these other fictitious entities take their rise". BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 264.

[2] POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 6.

[3] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 51.

[4] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 51.

[5] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 129.

the world but, in fact, do not. Nevertheless, such expressions are employed to make claims about real things in the world, and these claims not only make sense but are often true.[6]

The challenge lies in making fictitious entities intelligible. Just as we cannot explain what the "average man" is through a straightforward definition ("the average man is..."), Bentham argued that we cannot explain obligations using the traditional *per genus et differentiam* method, since fictitious entities lack a higher genus.[7] The definition *per genus et differentiam* can elucidate terms by identifying a genus to which the term belongs and specifying the properties that differentiate it from other species within the same genus, serving as an effective method for clarifying and refining the use of many terms or concepts in both ordinary language and the sciences.[8] However, fictitious entities are insusceptible of a definition which depends on it having a superior genus of which they can properly be regarded as a species. As Hart understands it, what Bentham means is that in the case of fictitious entities, there is no higher genus that does not itself require as much definition or analysis as the fictitious entity whose definition or analysis is being sought.[9]

Since the traditional methods are unable to explain fictitious entities like legal obligation, Bentham developed one of his main contributions to legal philosophy, which is his method of analysis called the exposition by "paraphrasis."[10] Instead of linking a

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[6] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 129.

[7] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336.

[8] POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 18.

[9] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 130. Hart seems to agree with Bentham's critique: "This form of definition (*per genus et differentiam*) which we see in the simple case of the triangle or elephant is the simplest and to some of the most satisfying, because it gives us a form of words which can always be substituted for the word defined. But it is not always available nor, when it is available, always not satisfied. Chief among these is that there should be a wider family of things or genus, about the character of which we are clear, and within which the definition locates what it defines; for plainly a definition which tells us that something is a member of a family cannot help us if we have only vague or confused ideas as to the character of the family. It is this requirement that in the case of law renders this form of definition useless, for here there is no familiar well-understood general category of which law is a member". HART, Herbert Lionel Adolphus; BULLOCH, Penelope A. **The concept of law.** 2. ed., repr. Oxford [u.a]: Clarendon Press, 1998. (Clarendon law series). p. 15.

[10] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 334.
POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 3.

fictitious entity to a higher genus within a "scale of logical subalternation,"[11] as the method of definition does, paraphrasis involves tracing the fictitious entity back to a real entity, independent of any linguistic or ontological classification.[12] This method is grounded in the theoretical principles (endorsed by Bentham) that our ideas originate from sensory experience and that achieving clarity and precision requires tracing these ideas back to the sensible objects from which they derive.[13] The term paraphrasis refers to a form of explanation that involves transforming a proposition about a fictitious entity into a proposition about a real entity, making the latter the subject of the statement.[14] The purpose of paraphrasis is to clarify the nature and origin of a fictitious idea by tracing its "genealogy", that is, by searching for the justification or basis for the use of the fictitious term.[15]

This method has two stages: in the first, the term to be explained is contextualized within a sentence—an intelligible statement that can be either true or false, depending on the circumstances in which it is used.[16] The focus is not on the fictitious entity alone, such as the term "obligations", but on a complete sentence in which it is embedded. This stage is named "phraseoplerosis," the activity of filling out the phrase.[17] As Postema understands it, this stage of paraphrastic definition "is a direct expression of Bentham's core doctrine of meaning: the proposition is the basic unit of meaning. No single word has meaning except as part of a meaningful and truth-expressive, or at least truth-apt, proposition or sentence."[18] The second stage involves "translating" the sentence into one or more propositions until the term referring to a fictitious entity disappears, leaving only references to real entities.[19]

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[11] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 334.
[12] TARANTINO, Piero. **Philosophy, obligation, and law**: Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 97.
[13] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 97.
[14] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 334.
[15] POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 19.
[16] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. p. 130.
[17] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 334.
[18] POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 19.
[19] As Postema explains it, "This "translation" must meet the following three conditions: (1) the expounding sentence must use names of real entities in the subject position—or in the case of a series or chain of such definitions, it must bottom out in a sentence using names of real entities; (2) the expounding sentence must

The most instructive example for understanding and explaining paraphrasis is provided by the group of ethical fictitious entities, more specifically obligations, and other elements dependent on obligation (such as rights and advantages analogous to rights).[20] These fictitious entities share a common real source: sensation, understood in its broader sense to encompass not only perception but also perception regarded as producing pain, pleasure, or both.[21] In Bentham's system of ethics, pain and pleasure are considered as equivalent to "loss of pleasure" and "exemption from pain".[22] Pain and pleasure, in turn, derive from several sanctions, which can be political or legal, based on the authority that imposes them.[23] As Tarantino explains it,

> Pleasure and pain are the only real entities from which ethical fictitious entities receive their meaning and truth. All ethical notions are thus traced back to the same normative source, lying in experience. Because of this constitutive relation between psychical and physical entities, one may say that ethics, as a product of the human mind, depends on sensibility or, more precisely, on the physiological structure of human beings.
> […] Ethics is an artificial construction of the human mind, based on empirical elements, which, by being real, are its sources.[24]

The relation between the fictitious entity of obligation and the real entities of pain and pleasure is elucidated in the following manner: "An obligation (viz. the obligation of conducting himself in a certain manner), is incumbent on a man, (i.e. is spoken of as incumbent on a man) in so far as, in the event of his failing to conduct himself in that manner, pain, or loss of pleasure, is considered as about to be experienced by him."[25] To

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be "an exact equivalent" of the expounded sentence (BL Add MSS 29, 809.9; see UC 69.221), they must "express the same import" (B iii. 594n); and (3) the real entity selected for this purpose must be that one "which alone" when embedded in a proposition of equivalent import, "is suited to the purpose" (TSA 74)". POSTEMA, Gerald J. **Utility, publicity, and law:** essays on Bentham's moral and legal philosophy. Oxford: Oxford University press, 2019. p. 20. This process is made clear with the example provided.

[20] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336. TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 99.

[21] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336.

[22] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336. TARANTINO, Piero. **Philosophy, obligation, and law**: Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 99.

[23] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 337. TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 98.

[24] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 99.

[25] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336.

prepare it for exposition in the form of paraphrasis, the concept is presented as the subject of a proposition, supplemented by the necessary components to form a fictitious proposition. These components include: (1) the predicate, incumbent on a man, and (2) the copula, is. Together with the subject, obligation, they create the fictitious proposition to be explained through paraphrasis: An obligation is incumbent on a man. The foundation of the explanation provided through paraphrasis lies in the concept of eventual sensation, conveyed by the terms representing the opposing modes of sensation—namely, pain and pleasure—along with their respective equivalents, and the identification of the event whose occurrence is believed to trigger such sensation (i.e., failure to conform to a prescription.)[26] However, Bentham does not finish his example, leaving his paraphrased sentence open, without presenting it as a conclusion to his methodological considerations.[27] He does make it clear, however, that pain and pleasure are the "only true and intelligible source of obligation—from the only true and intelligible explanation of its nature, as thus indicated."[28] In conclusion, Bentham argues that pleasure and pain are the genuine sources from which the human mind constructs a fictitious framework of practical principles, behavioural standards, and moral values that guide actions, without which the practical realm lacks meaning and truth.[29]

4.2 Revisiting the fictitious entities account of obligation

Having outlined the main contours of Bentham's theory through an exegetical approach, I now turn to a more interpretative reconstruction of his account. This involves foregrounding certain philosophical assumptions that emerge from the structure of his account of obligation, assumptions that reveal a conception of normativity neither reducible to mere mental states nor committed to crude behaviourism. Instead, they invite us to understand obligation as a functional category, grounded in human psychology and

[26] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 336-337. TARANTINO, Piero. **Philosophy, obligation, and law**: Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 101.
[27] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 101.
[28] BENTHAM, Jeremy. **The Works of Jeremy Bentham, vol. 8** (Chrestomathia, Essays on Logic and Grammar, Tracts on Poor Laws, Tracts on Spanish Affairs) [1843]. [s.l.]: John Bowring, 2011. p. 337.
[29] TARANTINO, Piero. **Philosophy, obligation, and law:** Bentham's ontology of normativity. London New York: Routledge, Taylor & Francis Group, 2018. (Routledge research in constitutional law). p. 102.

shaped by social mechanisms, a view that preserves the objectivity of normative assessment while locating its roots in human experience.

According to Hart's interpretation, Bentham understands there to be "a common element determining the meaning of obligation in both legal and moral contexts," and that "the differences do not affect the meaning of obligation but constitute different species of obligation reflecting the different standards used in determining what acts are obligatory."[30] In this sense, the differences between legal and moral obligations, on Bentham's account, do not lie in the concept of obligation itself, but rather in the standards by which we determine what counts as obligatory. That is, while moral and legal obligations are grounded in different normative sources, such as utility, custom, or authoritative pronouncements, they are nonetheless instances of the same basic normative structure. Each represents a distinct *species* of obligation, distinguished by the criteria used to identify which acts are required, but unified by a common underlying meaning: that an individual is bound to act in a certain way under threat of some form of sanction or disapproval, whether legal or moral.

More importantly, however, on Bentham's view, is that pleasure and pain are the genuine sources from which all practical principles, including legal and moral standards, are ultimately derived. This suggests that what underlies both legal and moral obligation is not merely a shared structure or function, but a deeper, unified normative foundation, namely, the psychological realities of pleasure and pain. If that is correct, then Bentham's view cannot be straightforwardly assimilated to the idea that legal and moral obligations are distinct species differentiated by their normative sources, such as authority or custom. Rather, these sources themselves are secondary, derivative from a more fundamental source of normativity. From this perspective, legal and moral obligations are best understood as distinct manifestations of a single normative mechanism grounded in human psychology, not as separate kinds of obligation governed by entirely different standards. In that case, the so-called "common element" that determines the meaning of obligation is not simply a functional core shared across domains, but the very fact that all obligations, legal or moral, ultimately derive their normative force from the same underlying source. That is, the common element that unifies all obligations is not merely

[30] HART, H. L. A. Legal Duty and Obligation. *In*: HART, H. L. A. **Essays on Bentham**: studies in jurisprudence and political theory. Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1982. pp. 127-161. pp. 127-128.

structural or functional, a matter of how rules operate, but metaphysical: all obligations ultimately derive their normative content and force from the same psychological realities.

Although this understanding might initially appear to "psychologize" the concept of obligation, and thus be vulnerable to the familiar criticisms levelled against similar approaches, such a reading would be overly reductive. Bentham's account does not rest on the claim that obligations are merely subjective or reducible to personal mental states. Rather, it involves a more complex view, in which psychological realities such as pleasure and pain function as the universal grounds from which normative structures are built. As Postema notes, Bentham distinguishes between mere custom, which involves repeated patterns of action without reference to future conduct, and legal obligation, which only arises with the introduction of law and, crucially, the mechanism of punishment.[31] In Bentham's view, it is precisely the anticipation of consequences, particularly pain, that marks the transition from mere regularity to obligation.[32]

From this perspective, to say that someone is under an obligation is not to report a subjective belief or an internal attitude, but to describe a normative situation in which the agent is likely to anticipate some form of sanction or reward depending on their conduct. This anticipatory structure is what gives obligations their normative grip and explains why they can guide and evaluate action. Thus, Bentham's theory is not committed to a crude behaviourism, nor does it reduce normativity to mental states. Rather, it invites us to understand obligation as a functional category, grounded in our psychology and shaped by social mechanisms, a move that preserves the objectivity of normative assessment while locating its roots in human experience.

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[31] POSTEMA, Gerald J. **Bentham and the common law tradition**. 2nd edition. Oxford, GB: Oxford University Press, 2019. (Clarendon law series). p. 217.

[32] This interpretation departs from Hart's critique of Bentham's conception of obligations as fictitious entities and his assessment of its shortcomings: "All that there is, over and above the clear ascertainable facts of group behaviour and predictable reaction to deviation, are our own powerful 'feelings' of compulsion to behave in accordance with the rule and to act against those who do not. We do not recognize these feelings for what they are but imagine that there is something external, some invisible part of the fabric of the universe guiding and controlling us in these activities. We are here in the realm of fiction, with which it is said the law has always been connected. It is only because we adopt this fiction that we can talk solemnly of the government 'of laws not men'. This type of criticism, whatever the merits of its positive contentions, at least calls for further elucidation of the distinction between social rules and mere convergent habits of behaviour." HART, Herbert Lionel Adolphus; BULLOCH, Penelope A. **The concept of law**. 2. ed., repr. Oxford [u.a]: Clarendon Press, 1998. (Clarendon law series). p. 12.

Perhaps this interpretation is too charitable to Bentham's view. Still, it is one way of making the sense of his theory,[33] as it opens the door to a more precise understanding of legal obligations. We should now turn to Austin's imperative account.

4.3 The province of legal obligations

The centrality of commands to Austin's well-known theory of law is beyond question. However, debates regarding their role as a "key to the sciences of jurisprudence and morals"[34] may have overshadowed his perspective on legal obligations and the explanatory function they serve within his concept of law. Significant contributions to our subject can be found in The Province of Jurisprudence Determined, and these merit elucidation.

While command is undeniably central to Austin's theory of law, it would be misleading to claim that it obfuscates other essential aspects of law that warrant theoretical exploration. On the contrary, command occupies a pivotal role in Austin's framework *because* it illuminates concepts that often remain unexplained (particularly during his time,) such as duty, obligation, and the binding nature of law—concepts implicitly conveyed through the issuance of an order.[35] Understanding the nature of a command serves as the foundation for explaining the other elements of law. However, to fully comprehend what constitutes a command, it is essential to revisit some of Austin's often-overlooked theoretical commitments.

In addressing the use of the term "law" in metaphorical or figurative contexts—such as the "laws" governing the motion of inanimate objects or the growth and decay of plants —, Austin highlights a deeper point about the nature of law and the intelligibility of a command. As he argues, in the absence of intelligence—or where intelligence is so limited that it cannot be termed reason—the possibility of law operating meaningfully is absent.[36] Reason, being the faculty that enables individuals to comprehend the purpose

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[33] For another view, see: WODAK, Daniel. What Does 'Legal Obligation' Mean? Pacific Philosophical Quarterly, v. 99, n. 4, p. 790—816, 2018. Available at: <https://onlinelibrary.wiley.com/doi/10.1111/papq.12230>. Acesso em: 29 jun. 2023.

[34] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 21.

[35] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 22.

[36] "For where *intelligence* is not, or where it is too bounded to take the name of reason, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain". AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political

and implications of a law, is the essential link between the existence of a directive and the capacity for compliance. Without the ability to reason, there is no understanding of the normative force of law; that is, no grasp of why one ought to act or refrain from acting in a particular way.

Moreover, reasoning enables individuals to align their will with the directives of the law. The willingness to comply, driven by an understanding of duty, presupposes the capacity to recognize and evaluate the purpose of a given rule. Thus, reason functions not only as the medium through which the law's purpose is apprehended but also as the mechanism that transforms an external directive into an internalized sense of obligation. Without reason, directives cannot engender the mental states, such as belief in the necessity of compliance or fear of consequences, that form the basis of duty. In essence, reasoning bridges the gap between a command and the capacity for compliance, allowing the law to exert its normative force.

This brings us to Austin's notion of command. If you possess both the ability and the willingness to inflict harm on me should I fail to comply with your expressed wish, that expression constitutes a command.[37] This definition, central to Austin's theory, identifies two key elements: the wish (a desire for a specific action or inaction) and the willingness to enforce it through harm. Corresponding to this is the correlative effect on the subject, which includes the anticipation or fear of harm—no matter how slight the probability of its occurrence[38]—and the resulting motivation to act (or refrain from acting) to satisfy the expressed wish. Command and legal obligations are in this conception correlative terms, "the meaning denoted by each being implied or supposed by the other."[39] Where there is a command, there is a legal obligation; where there is a

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thought). p. 20. This passage prompts consideration about whether Hart's critique of the imperative theory truly acknowledges Austin's contributions. A more charitable interpretation of Austin might illuminate the dimension and role of reason that underpins his theory, potentially revealing implications for his concepts of habits and obedience.

[37] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 21.

[38] Austin argued that neither the severity of the potential harm nor the likelihood of its occurrence is relevant to the issue at hand. As long as there is even the slightest chance of facing the smallest harm, the expression of a wish constitutes a command and, consequently, imposes a duty. AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 23.

[39] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 22.

legal obligation, there is a command. He who disobeys a command is subject to a sanction, or "an enforcement of obedience."[40]

In Austin's framework, failing to comply with a command entails the risk of being subjected to an evil, always characterized as a sanction. This concept of "failing" to comply only makes sense in light of the capacity for reasoning. It is through reason that individuals come to understand a directive as something that not only describes what might happen but tells them what they *ought* to do (if they assume that even the small probability of being subject to an evil is to be avoided). In this sense, reason makes it possible for rules to function as standards of conduct rather than as mere signals of expected behaviour or potential consequences. This explains why expectations structured around patterns of consequence are not normatively irrelevant. They form part of the background against which individuals make decisions about how to act, and they do so not merely by coercion, but by structuring what counts as a response to the situation. To say that a person is under a legal obligation, then, is not only to say that there is a command backed by force, but that the person can reasonably be expected to factor the consequences of disobedience into their deliberation and to treat the rule as a practical reason, even if only a prudential one.

When we say that even the smallest anticipation of harm "structures what counts as a response to the situation," we are pointing to a very ordinary practical fact: people adjust their conduct in light of how they expect others, and especially officials, to react. A rule backed by a sanction does not merely describe what might happen; it helps determine which courses of action are intelligible or appropriate given that expectation. In Austin's terms, the rule tells you that if you do X, then Y (a sanction) ought to follow. Once you can reason about that connection, it becomes part of the practical field within which you deliberate. The question becomes: Do I still pursue X, given that Y is the response the system is committed to? In this way, the rule does not operate as an empty threat or a bare predictive forecast. It functions as a guide by reconfiguring the landscape of options, marking some actions as ones that call for an official response and thereby placing them in a distinct practical category. The anticipated harm gives the rule a kind of grip—not because it alters your values or secures your moral assent, but because it shapes the structure of the choices before you. The expectation of a sanction (even an informal one) becomes a reason to modify your behaviour in virtue of the position the

[40] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 22.

rule occupies within the practice, not in virtue of any moral justification it carries. Thus, even if you do not morally endorse the rule or regard it as fair, you still register it as a directive that identifies certain conduct as liable to an adverse response. And that is enough for it to shape the deliberative situation you face. The rule guides action not by persuading you of its moral correctness, but by locating your prospective conduct within a pattern of institutional or informal consequences.

Thus, while often regarded as overly simplistic, Austin's theory offers a more nuanced analytical framework than is commonly acknowledged. Importantly, although the sanction incurred for disobedience is frequently referred to as punishment, Austin emphasizes that punishment constitutes only one class of sanctions.[41] Unfortunately, Austin does not elaborate extensively on what distinguishes punishment from other forms of sanctions, leaving this aspect of his theory somewhat underexplained.[42]

4.4 Towards an expectational account of legal obligations

There is still much to be examined in how Austin and Holmes conceptualize obligation. For now, it is enough to note that, although imperative and predictive accounts of law are often dismissed for relying too heavily on the threat of punishment or the anticipation of harm,[43] this feature should not be too hastily regarded as a shortcoming.

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[41] AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 22.

[42] When discussing the "class of sanction" in his other lectures, he does not address the same issue. For comparison: AUSTIN, John; RUMBLE, Wilfrid E. **The province of jurisprudence determined**. Cambridge; New York, NY: Cambridge University Press, 1995. (Cambridge texts in the history of political thought). p. 154. Setting this fact aside, if we were to interpret Austin's theory consistently, suggesting that an enforcement of obedience does not necessarily imply punishment, this could warrant a reconsideration of Hart's critique of Austin, which does not seem to acknowledge this possibility. It could be argued that Austin's theory is capable of accounting not only for criminal law but also for contract and tort law.

[43] As Hart famously argued, "If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the, working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign* that people will behave in certain ways, as clouds are a *sign* that rain will come". HART, H. L. A. **The concept of law**. 2nd ed. Oxford : New York: Clarendon Press ; Oxford University Press, 1994. p. 89-90. This has often been taken to undermine the plausibility of theories that rely on predictive or coercive elements, such as those of Austin or Holmes. However, this framing may be too restrictive. It is at least conceivable—and, in fact, something Hart himself acknowledges—that the existence of legal obligations does not depend on widespread acceptance of rules from the internal point of view. Hart concedes that in a complex legal system, it may suffice that only officials adopt this internal perspective, while the broader population remains largely compliant for non-

These views capture an important aspect of legal practice: (i) that some individuals comply with legal norms not out of a sense of duty, but due to prudential calculations; (ii) that the possibility of being subject to sanctions, while perhaps not the essence of a rule, plays a central role in how legal obligations function—particularly when we cannot be sure that the agent is acting out of a sense of duty rather than fear of punishment and (iii) that expectations structured around patterns of consequence are not normatively irrelevant.

I must emphasise that when I say that expectations structured around patterns of consequence are not normatively irrelevant, I mean that they can help explain how legal obligations guide conduct even in the absence of moral endorsement. A directive backed by a sanction is not merely a threat; it functions as a generalization about how certain forms of conduct are treated within a legal system. The agent capable of reasoning is able to grasp this structure and adjust their behaviour accordingly, not because they agree with the rule, but because they recognize that a certain outcome (such as punishment or loss) is likely to follow. In this sense, the normative force of the rule does not depend on moral justification but on the practical intelligibility of its consequences. It becomes reasonable, from the agent's point of view, to take the rule into account when deciding what to do because the expectation of a response gives the rule practical weight in deliberation.

As others have noted, rules operate not by establishing fixed causal connections, but by relying on probabilistic generalizations—that is, patterns in which a particular consequence tends to occur more frequently when certain conditions are present.[44] That is, rules reflect regularities in which particular consequences tend to follow certain kinds of behaviour more often than not. The point is not that the consequence follows deterministically, but that it is more likely to follow given the relevant behaviour. A rule prohibiting dogs in restaurants, for example, is not based on the claim that all dogs will cause disruption, but on the belief that allowing dogs increases the probability of such

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normative or prudential reasons. In such cases, legal obligations may still be said to exist, even in the absence of internalization by ordinary citizens. This possibility opens space for a conception of obligation that accommodates imperative and predictive insights without reducing normativity to mere regularities of behaviour. HART, H. L. A. **The concept of law**. 2nd ed. Oxford : New York: Clarendon Press ; Oxford University Press, 1994. p. 117.

[44] "To say that a relation of probabilistic causation exists between a property and a consequence is not to say that the occurence of the property is necessarily followed by the occurrence of the consequence, nor is it to say that the occurrence of the consequence requires occurrence of the property. It is to say only that the incidence of the consequence will be higher in a population possessing the property than it is in an otherwise identical population in which the property is absent." SCHAUER, Frederick F. **Playing by the rules: a** philosophical examination of rule-based decision-making in law and in life. Repr. 2002. Oxford: Clarendon Press, 2002. (Clarendon law series). p. 29.

disruptions. The rule thus builds on a generalization: that "dogness," as Frederick Schauer puts it, probabilistically causes disorderly behaviour. This form of generalization is not merely descriptive; it underlies the rationale for the rule's existence.

Legal obligations, in turn, also build on probabilistic generalizations, not about the behaviour the rule is aimed at preventing, but about the likely response to noncompliance. To say that someone is under a legal obligation is not simply to state that the law requires φ, but to say that failure to comply is likely, to some degree, to trigger a sanction or an informal response. It is this likelihood, not its certainty, that informs the agent's deliberation. In this way, the legal obligation functions by generating an expectation that deviation will be met with consequences, and this expectation becomes part of the agent's practical reasoning. These consequences need not take the form of state-imposed, institutionalized sanctions. They may also arise from peers exerting pressure for conformity, through reactions ranging from "gossip to open censure, ostracism, or dishonor for the transgressor."[45] This probabilistic structure, these "self-fulfilling prophecies that individuals formulate about each other's actions" is what allows a legal obligation to present itself as a reason for action. It also supports the view that, despite their limitations, imperative theories capture a genuine feature of how legal obligations operate—namely, that legal obligations build on the expectation of sanction-triggering conduct.

The reconsideration of predictive theories, particularly Bentham's account and the imperative theory associated with Austin, reveals a neglected path in contemporary debates about legal obligation. Without endorsing their theories in full, the insights extracted from them suggest a genuine alternative to the two dominant frameworks in jurisprudence, the practice theory of rules and the standard, Razian view. What these earlier accounts make visible is the explanatory potential of expectations structured around patterns of consequences. In anticipating that deviation will be met with particular consequences, agents do not merely respond to an external incentive structure; rather, the expectation itself constitutes the legal obligation they take themselves to have. They rest on our shared beliefs that others generally comply with them and that they, in turn, expect us to do the same. That expectation is perceived as justified in the further sense that others are entitled to require me to φ, just as I am entitled to require the same of them. This expectational dimension of legal obligation opens a promising research agenda. If

[45] BICCHIERI, Cristina. **The grammar of society:** the nature and dynamics of social norms. New York: Cambridge University Press, 2006. p. 8

expectations play this role in practical reasoning, then a clearer account of what expectations are and how they function is required.

A significant body of philosophical and game-theoretic literature views social rules and the resulting obligations as endogenous products of individuals' interactions, fundamentally sustained by shared beliefs and expectations. In this framework, the existence of an obligation or norm is conceptually inseparable from the cluster of expectations that support it. In the social sciences, this approach contrasts sharply with theories that treat norms as purely exogenous variables enforced solely through external sanctions.

There are at least three views that emphasise the role of expectations in practical reasoning.[46] The first approach is that a rule or obligation arises as the equilibrium of a strategic interaction. Such equilibria are sustained by the consistency of the participants' beliefs about one another's actions, so that each agent's conformity is supported by the expectation that others will likewise conform. Once this structure is in place, the rule is not explained solely by immediate self-interest, but also by a presumptive reason to act in accordance with others' preferences, insofar as those preferences generate a well-grounded empirical expectation of conformity.[47] What explains the existence and persistence of the rule, therefore, is the interplay between belief, expectation, and coordinated action: obligations emerge where shared beliefs become self-fulfilling and thereby determine what counts, for each agent, as the appropriate course of conduct within the interaction.

A related view claims that the binding force of a social obligation, especially in situations where conformity runs against an agent's immediate self-interest, is explained

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[46] BICCHIERI, Cristina; MULDOON, Ryan; SONTUOSO, Alessandro. Social Norms. *In:* ZALTA, Edward N. NODELMAN, Uri (eds.) **The Stanford Encyclopedia of Philosophy** (Winter 2023 Edition). Available at: <https://plato.stanford.edu/archives/win2023/entries/social-norms/>. Access on: 18 dec. 2025.

[47] As David Lewis puts it, we can solve coordination problems by "acting on our concordant expectations about each other's actions", and "we may acquire those expectations, or correct or corroborate whatever expectations we already have by putting ourselves in the other fellow's shoes, to the best of our ability." How the agent will act depends on what he thinks others expect him to do. Others' expectations, in turn, take into account that he will act based on what he takes them to expect of him. Lewis' explain that "If I know what you believe about the matters of fact that determine the likely effects of your alternative actions, and if I know your preferences among possible outcomes and I know that you possess a modicum of practical rationality, then I can replicate your practical reasoning to figure out what you will probably do, so that I can act appropriately." Taking to its limits, my reasoning "may have to include an attempt to replicate your attempt to replicate my attempt to replicate your attempt to replicate my reasoning." LEWIS, David K. **Convention**: a philosophical study. Nachdr. Oxford: Blackwell, 2011. p. 27-28.

by the interaction between expectations and conditional preferences for compliance.[48] On this view, adherence to a norm depends on the presence of two interrelated kinds of belief: first-order beliefs about whether a sufficiently large portion of the relevant group in fact conforms to the rule, and second-order beliefs about whether that group expects the individual to conform.[49] When these beliefs are jointly present, they trigger a conditional preference to comply, so that the agent's motivation to conform arises only under those conditions. The effect is to reshape the strategic environment: what would otherwise be a conflict between individual advantage and collective regularity comes to resemble a coordination problem in which conformity becomes the most reasonable course of action. Compliance, on this account, is thus explained by the conjunction of conditional preferences and the structure of shared expectations.

The third approach holds that compliance with social obligations cannot be fully explained by external incentives such as sanctions, reputational concerns, or monitoring. Instead, its force lies in the internal power of expectations themselves. Agents are disposed to avoid actions that would frustrate others' reasonable expectations, and this aversion operates as a belief-dependent form of motivation rather than as a response to anticipated external consequences. More recent work develops this insight by showing that, particularly in the absence of social or material enforcement, compliance is driven by the perceived legitimacy of others' normative expectations—by the sense that those expectations make a justified claim on one's conduct.[50] What motivates compliance, on this view, is not merely the anticipation that others predict one will act in a certain way, but the recognition that they expect one to do so and take themselves to be entitled to that expectation. This acknowledgement of legitimacy explains how costly norms can be sustained even when neither punishment nor reputational gain is at stake.

Together with the insights provided by predictive theories, the game-theoretic literature helps explain why the expectational dimension should be treated as a central element in accounting for legal obligations. On my view, legal obligations are not merely

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[48] SUGDEN, Robert. The Motivating Power of Expectations. *In*: NIDA-RÜMELIN, Julian; SPOHN, Wolfgang (Orgs.). **Rationality, Rules, and Structure.** Dordrecht: Springer Netherlands, 2000, p. 103–129. Available at: <http://link.springer.com/10.1007/978-94-015-9616-9_7>. Access on: 18 dec. 2025.

[49] Empirical expectations correspond to first-order beliefs about others' behavior. Normative expectations correspond to second-order beliefs about others' normative attitudes toward one's behavior (including expectations of approval or disapproval). BICCHIERI, Cristina. **The grammar of society**: the nature and dynamics of social norms. New York: Cambridge University Press, 2006. p. 11.

[50] ANDRIGHETTO, Giulia; GRIECO, Daniela; TUMMOLINI, Luca. Perceived legitimacy of normative expectations motivates compliance with social norms when nobody is watching. **Frontiers in Psychology**, v. 6, 2015. Available at: http://journal.frontiersin.org/Article/10.3389/fpsyg.2015.01413/abstract. Access on: 18 dec. 2025.

(or directly) explained by the existence of an authoritative pronouncement. Like the theories advanced by Hart and Raz, I maintain that not all authoritative pronouncements generate legal obligations, and that any adequate theory must explain why this is so. An expectational account holds that a valid rule can generate legal obligations only if supported by empirical and normative expectations. Empirical expectations are an individual's beliefs that a sufficiently large portion of the relevant population in fact complies with a given rule in situations of a certain kind. In other words, a person has empirical expectations when she believes that others will actually follow the rule when the relevant circumstances arise. Normative expectations are an individual's beliefs that a sufficiently large portion of the relevant population expects her to comply with a given rule in situations of a certain kind. In other words, a person has normative expectations when she believes that others think she ought to follow the rule under the relevant circumstances. More importantly for legal obligations, these normative expectations are accompanied by sanctions, even though they are not necessarily state-imposed. Normative expectations with sanctions are an individual's beliefs that a sufficiently large portion of the relevant population expects her to comply with a given rule in situations of a certain kind, prefers that she comply, and may respond negatively, by imposing some form of sanction, if she fails to do so.[51] When there is no belief that a sufficiently large subset of the population will conform to a valid rule in a given situation (first-order beliefs about others' behaviour), and no belief that a sufficiently large subset of the population expects one to conform to that rule (second-order beliefs about others' normative attitudes toward one's behaviour), even a valid legal rule that predicts sanctions in case of violation will be unable to create obligations.

Those expectations, as they operate in social life, are often rooted less in elaborate moral reasoning than in relatively basic emotional dispositions. The mechanism described by Robert Sugden's Resentment Hypothesis captures this dynamic: people are disposed to resent those who frustrate shared expectations and, conversely, to avoid becoming the target of such resentment themselves.[52] Compliance, in this sense, is frequently anchored

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[51] BICCHIERI, Cristina. **The grammar of society**: the nature and dynamics of social norms. New York: Cambridge University Press, 2006. p. 11.

[52] SUGDEN, Robert. The Motivating Power of Expectations. *In*: NIDA-RÜMELIN, Julian; SPOHN, Wolfgang (Orgs.). **Rationality, Rules, and Structure.** Dordrecht: Springer Netherlands, 2000, p. 103–129. Available at: <http://link.springer.com/10.1007/978-94-015-9616-9_7>. Access on: 18 dec. 2025. In The Resentment Hypothesis can be described as the disposition to resent those who frustrate shared expectations, together with an aversion to becoming the target of others' resentment when one does the same.

in affective responses such as resentment, disapproval, aversion to social reproach, rather than in reasoned moral endorsement.

To say that expectations are often rooted in relatively basic emotional dispositions does not amount to reducing them to those dispositions. A belief that others will resent deviation, or that one will be subject to disapproval, is not identical to the feeling of resentment itself. The expectation is a structured cognitive attitude, it represents how others are likely to act or react. Its psychological origins do not exhaust its conceptual character. Nor does the fact that such expectations may arise from affective sources deprive them of normative significance. Normative expectations, in particular, involve the belief that others regard one as required to act in a certain way and may respond critically to deviation. That belief has a genuinely normative structure, since it concerns what one is expected to do and how one's conduct will be evaluated. The roots of that expectation, whether moral conviction, resentment, prejudice, or habit, do not alter its normative content. In this sense, explaining the emergence of expectations in terms of basic emotional mechanisms does not undermine their normative role. It merely clarifies how they come to exist. Their capacity to function as reasons within practical deliberation depends not on the nobility of their origins, but on the fact that agents take them to structure what is required, permitted, or sanctionable within a given social context. This helps clarify why empirical and normative expectations are morally neutral. Neither type of expectation, as such, presupposes that the underlying rule is morally justified. The expectations may be shaped by moral preferences, but they may equally arise from prejudice, habit, fear, indifference, or strategic calculation. Their explanatory role in accounting for legal obligations does not depend on their moral pedigree.

Once legal obligations are understood in these expectational terms, phenomena such as so-called phantom laws[53] become easier to explain. A rule may remain formally valid within a legal system yet fail to generate obligations if the relevant empirical and normative expectations are absent. Where people do not believe that others will comply, or do not expect noncompliance to trigger adverse reactions, the rule lacks the expectational background necessary to function as a practical constraint. Its formal existence alone is insufficient. The same framework also accounts for selective

[53] Phantom laws are rules that are rarely enforced and frequently violated, such as rules prohibiting jaywalking. WYLIE, Jordan; GANTMAN, Ana. Doesn't everybody jaywalk? On codified rules that are seldom followed and selectively punished. **Cognition**, v. 231, p. 105323, 2023. Available at: <https://linkinghub.elsevier.com/retrieve/pii/S0010027722003122>. Access on: 18 dec. 2025.

enforcement. In some legal systems, empirical and normative expectations attach unevenly across social groups. Members of one group may be widely expected to comply with a rule and to face sanctions in case of deviation, while members of another group are not. As a result, the former are effectively treated as bound by the rule, whereas the latter are not, despite identical formal validity. The difference lies not in the moral status of the individuals or in the intrinsic moral force of the rule, but in the distribution of shared expectations regarding compliance and sanctioning. In this way, the uneven generation of legal obligations, across rules or across persons, can be explained without appealing to moral evaluation.

5. CONCLUSION

The objections I have raised against the practice theory and the standard view are familiar in the literature. Those who already endorse either position may reasonably regard these difficulties as already resolved. A defender of the standard view, for instance, might coherently maintain that the law can sometimes fail to provide reasons for action while nonetheless remaining binding, and might further argue that what I describe as a confusion between ideal and descriptive theorizing is, in fact, a central strength of the account rather than a defect. After all, they may argue, the view succeeds in capturing cases in which the law is so unjust and so unresponsive to our reasons that it fails altogether to provide reasons for action, leaving only the prospect of compliance through sheer force. I think, however, that it is a mistake to draw a sharp distinction between something's being a legal obligation and its being binding. Such a distinction does not reflect how we ordinarily use expressions like "one is legally obliged to φ" or "one is bound by law to φ," which are typically treated as interchangeable in both legal and everyday discourse.

Supporters of the practice theory, by contrast, may respond that I have raised no genuine difficulty at all: on their view, law's distinctiveness does not lie in its making any moral claim. They may readily accept that law is simply one more practice that, in the appropriate circumstances, gives us reasons for action, much as chess gives us reasons when we are playing a game, and so on. I do think, however, that they owe us an explanation for adopting such a counterintuitive view.

I began this work by noting that predictive theories are typically (and not without reason) associated with behaviourism and sanction-based accounts, and that, after a period of wide acceptance in the Anglophone world, they came to serve as a major straw man—a convenient punching bag—in jurisprudence. I argued that, for the purposes of this work, sanction-based theories should be understood as one species of predictive theory, rather than predictive theories being a subset of sanction-based views, as is more commonly assumed. When we shift our focus from sanction to predictions about each other's behaviour, we come to see how much explanatory work expectations do in accounting for legal obligations.

This reorientation makes it possible to understand more clearly the role expectations play in generating legal obligations, and how it has its roots in predictive theories. Without endorsing those theories in full, their insights reveal a neglected

alternative to both the practice theory of rules and the standard Razian view. Together with the insights offered by the game-theoretic literature, we can see how legal obligations are based on rules backed by empirical and normative expectations, both of which consist in beliefs about probabilistic generalizations concerning other people's behaviour and attitudes.

It is, of course, too early to say whether an expectational account can fully meet the challenges raised against both the practice theory and the standard view. However, it is useful to indicate, in broad terms, how an expectation-based account could explain the phenomenon of legal obligation without reproducing the difficulties that beset earlier theories. First, it does not presuppose the counterintuitive view that law is merely one social practice among others, like chess or etiquette, each generating its own reasons for action. Also, although legal, moral, and conventional obligations ultimately draw on the same underlying psychological sources, the difference between them is not one of degree. What distinguishes legal obligation is the distinctive way in which expectations are organized so that they structure agents' practical reasoning in a way that ordinary social practices cannot.

Second, an expectational account has a descriptive ambition in a way that the standard view does not. By detaching the notion of bindingness from the idea of moral justification, it avoids collapsing an account of how legal authority actually operates into an idealized theory of when authority would be morally legitimate. If a legal directive is treated as binding within a practice whenever non-compliance is taken to warrant criticism, sanction, or institutional response, then bindingness already implies the existence of reasons for action, but not necessarily moral ones. Those reasons may be institutional, role-based, or practice-dependent. Once this is acknowledged, there is no need to appeal, within a descriptive theory, to Raz's service conception of authority. The service conception may retain its place as a moral theory of legitimate authority, but it no longer does explanatory work in an account of how legal obligations function in actual legal systems.

Of course, much remains to be clarified: which expectations are relevant, whose expectations matter, and whether all expectations (empirical and normative) count in the same way. In this sense, the proposal is best understood not as a finished theory but as a research agenda. Its promise lies precisely in its capacity to illuminate the distinctive place of law among normative practices. Law is plainly different from chess or etiquette, and this difference may be explained, at least in part, by the kinds of expectations it

generates and sustains: we expect the law to structure the most significant aspects of our lives, to settle disputes with finality, and, at crucial moments, to speak to questions that are deeply entangled with our moral outlook. At the same time, an expectational framework offers resources for explaining how legal obligations can guide conduct without conceptually resting on a moral claim.

What follows, then, is an attempt to carry this agenda forward. The next step is not to settle, once and for all, the nature of legal obligation, but to map the conceptual space in which an expectational account can do the explanatory work. This requires a closer examination of different kinds of expectations, empirical, normative, individual, and collective, and of the mechanisms through which they acquire practical significance in legal contexts. It also calls for a more precise account of how expectations are generated, and undermined by legal institutions, and of how they interact with probabilities, sanctions, and authoritative pronouncements. It is also plausible that normative expectations underlie what Hart identified as the central feature of legal obligation—namely, the pressure for conformity—and that the internal point of view may be explicable, at least in significant part, in expectational terms. Whether such a reconstruction can be carried through in a fully systematic way remains a matter for further investigation.

My aim in this work was to introduce an alternative account of legal obligation grounded in insights drawn from predictive theories, while freeing those insights from the limitations that led such theories to be dismissed as crude or behaviouristic. Whether this account ultimately proves superior to the approaches I have criticized is a question for future work. At the very least, I hope to have shown that this debate in legal theory remains open and worth renewed attention.

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