

University of Pennsylvania Carey Law School

## Penn Carey Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Carey Law

---

2019

### Of Law and Other Artificial Normative Systems

Mitchell N. Berman

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Ethics and Political Philosophy Commons](#), [Jurisprudence Commons](#), [Law and Philosophy Commons](#), [Other Philosophy Commons](#), and the [Public Law and Legal Theory Commons](#)

---

#### Repository Citation

Berman, Mitchell N., "Of Law and Other Artificial Normative Systems" (2019). *Faculty Scholarship at Penn Carey Law*. 1923.

[https://scholarship.law.upenn.edu/faculty\\_scholarship/1923](https://scholarship.law.upenn.edu/faculty_scholarship/1923)

This Book Chapter is brought to you for free and open access by Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Carey Law by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

OF LAW AND OTHER ARTIFICIAL NORMATIVE SYSTEMS

Mitchell N. Berman\*

Forthcoming in: *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence*  
(D. Plunkett, S. Shapiro, and K. Toh eds. Oxford University Press)

Draft, September 26, 2017

It is widely believed that a central task of jurisprudence—arguably *the* central task—is to explain what makes it the case that legal norms have the contents that they do, or, in rough equivalence, to explain what renders legal propositions true when they are true. I will call a theory that aims to accomplish this task a ‘constitutive theory’ of law. A constitutive theory would explicate what Ronald Dworkin famously called the ‘grounds of law’,<sup>1</sup> and provide an account as well of the grounding relationship or function. It would explain, in Mark Greenberg’s felicitous phrase, ‘how facts make law’.<sup>2</sup> Jurisprudential schools can thus be distinguished by the constitutive theories they provide. By scholarly tradition, the first cut at classifying theories separates positivism from natural law. Broadly speaking, philosophers from the natural law or non-positivist traditions insist that moral norms have an ineliminable role to play in the constitution of legal norms, whereas positivists maintain either that

---

\* Leon Meltzer Professor of Law, and Professor of Philosophy, the University of Pennsylvania. Email: [mitchberman@law.upenn.edu](mailto:mitchberman@law.upenn.edu). I am indebted to the editors of this volume for inviting me to contribute, and to David Enoch, Mark Greenberg, Scott Hershovitz, Lewis Kornhauser, David Plunkett, Stefan Sciaraffa, and Kevin Toh for extremely helpful comments on previous drafts. I am also grateful to participants at a workshop at the Wharton School, and to Rob Hughes, Stephen Perry, Daniel Singer, Fred Wilmot-Smith, and Daniel Wodak, for very useful feedback and conversations. I apologize to anyone whose contributions I have overlooked.

<sup>1</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), 4.

<sup>2</sup> Mark Greenberg, “How Facts Make Law,” *Legal Theory* 10 (2004): 157-98. I acknowledge that language of constitution and grounding suggests at least a minimal realism about legal norms. I think that’s the dominant view among legal theorists and philosophers of law. Still, I don’t mean to prejudice realism about legal norms. Expressivists about legal norms who accept some standards of correctness need the sort of theory I’m referencing, even if they’d not characterize such a theory as “constitutive.”

moral norms play no such role or that, insofar as they do, that is a consequence of contingent non-moral facts.

Although this is the conventional way to carve up the field, it's not obviously the most illuminating one, surely not for all theoretical purposes. A given inclusive positivist account and a given natural law one might agree on all the features possessed by legal systems with which we are familiar. It's not clear that it will prove most useful to place the two theories on the opposite side of the field's fundamental cleavage solely because some basic feature that the latter treats as conceptually necessary the former views as contingent though practically inevitable. Nor is it clear that all theories that assign *some* necessary role to *some* aspect of morality should be classed together no matter how radically disparate are the roles and the aspects that they pick out.

In this essay, I offer an alternative path of entry into the terrain, one that tries to foreground differences in the basic pictures that theories of law advance, assume, or presuppose about our normative landscape and law's place within it. Here's what I mean. At least on the surface of things, we inhabit a multiplicity of normative systems—law and morality, of course, but also sports and games, prescriptive grammar and fashion, etiquette, religious ritual, families, militaries, corporations, and so on. The multiplicity of normative systems seems a plain fact of our lives.<sup>3</sup> But it is a fact that can be interpreted, or made sense of, in countless ways. Instead of starting by asking whether morality necessarily contributes to legal content, I invite us to adopt a wider-angled perspective on our normative landscape.

I will not offer a taxonomy of ways to make sense of the apparent fact of multiple normative systems. Instead, I will try to make more visible and concrete a commonsensical picture of our

---

<sup>3</sup> Think of Philippa Foot's picture in "Morality as a System of Hypothetical Imperatives," *Philosophical Review* 81 (1972): 305-16., putting aside her controversial views about morality.

normative situation that, I believe, reflects basic positivistic beliefs and presuppositions yet has no obvious champion among leading contemporary legal philosophers and finds itself increasingly under attack. I will call it the 'Standard Positivist Picture.' It is, as I have said, a picture of our normative landscape and law's place within it. For ease of discussion, I'll introduce these two aspects of the view separately, even at the risk of some artificiality.

The picture of 'the normative landscape' tries to vindicate surface appearances: The social world is densely populated by countless normative systems of human construction. The core functions of such systems are to generate and maintain norms—oughts, obligations, powers, rights, prohibitions, and the like. The norms that these constructed or 'artificial' normative systems output are (or may be) substantively independent from each other, and may conflict. Because artificial norms possess only 'thin' or 'formal' normative force, whether you 'really' ought to comply with any system's norms is always an askable question that the system at issue cannot on its own terms resolve. I will call this picture of a multiplicity of independent artificial normative systems, the 'Independent Systems Picture' (ISP). I hope and expect that it will resonate with some readers.

To the ISP, the SPP adds that legal systems comprise a subclass of artificial normative systems and, as such, are characterized by the features that the ISP maintains are generally true of artificial systems. That is, legal systems are (or may be) substantively independent from other normative systems, generate thin or formal norms, and so on. I'll call this understanding of law, inelegantly, 'legal non-exceptionalism'. The SPP conjoins the general picture of the normative landscape that I'm calling the ISP and a particular claim that law and legal systems are, in a relevant sense, non-exceptional.

My ambition in this paper is to shine light on this standard positivist picture and to identify and criticize a slate of arguments for rejecting it. The SPP looks right to me. It forms the backdrop to the

constitutive theory that I advance elsewhere.<sup>4</sup> Yet even if the SPP reflects one common (but far from universal) implicit understanding of our multiple-systems landscape, it remains oddly marginalized, nearly invisible, in the current legal-philosophical debates. That is unfortunate. We should have the ordinary commonsensical positivistic picture more clearly in mind before we abandon it.

\* \* \*

Section 1 introduces and elaborates upon the SPP. The two sections that follow identify and briefly assess challenges to it. Section 2 addresses legal-exceptionalist theories that are possibly compatible with the ISP, but insist that law is in important respects different from (other) artificial normative systems. My goal will not be to disprove the varied theories according to which law—unlike games, fashion, and other artificial systems—is dependent upon morality (conceptually or necessarily), but to highlight how such accounts rest upon ambitious and contested claims about the purpose or nature of law. If the SPP coheres well with the commonsensical understanding of the landscape of artificial normative systems captured by the ISP, we have some reason to resist more sectarian accounts of law’s function.

The arguments canvassed in section 2 attack the SPP at the branch, not the root, for they accept (at least *arguendo*) that the features that I am collectively dubbing the ISP characterize artificial normative systems other than law. But an increasing number of scholars are casting doubt on the ISP even as applied to, say, chess, advancing in its place a view that, following Dworkin, I will call the “One-

---

<sup>4</sup> On the account I call ‘principled positivism’, derivative and reasonably determinate legal norms (‘legal rules’) are constituted by the interaction of normatively fundamental legal norms (‘legal principles’), that are themselves directly grounded in complex social behaviors. I maintain that the central features of this account—that rules are determined by principles, and that principles are normatively fundamental, inevitably plural, and inescapably dynamic—are true not only of legal systems but of all artificial systems of practical normativity. Legal rules are determined by legal principles, fashion rules are determined by fashion principles, baseball rules are determined by baseball principles, and so on. See Mitchell N. Berman, “Our Principled Constitution,” *University of Pennsylvania Law Review* 166 (forthcoming 2018); Mitchell N. Berman & Kevin Toh, “Pluralistic Non-originalism and the Combinability Problem,” *Texas Law Review* 91 (2013): 1739-84.

System Picture” (OSP). Section 3 addresses this more fundamental challenge to the SPP, concentrating on recent work by Scott Hershovitz that represents the most forceful rejection of the ISP to date.

Collectively, the first three sections aim to make salient features of the normative landscape that I believe cohere with widespread background assumptions, even if inchoate, and to cast doubt on several prominent arguments given for rejecting that picture or for endorsing competing accounts. As readers should expect, the SPP bears a distinctly Hartian hue. That said, the SPP is *not* “the Hartian Account.” All in all, I think that it coheres well with *The Concept of Law*. But even if so, it is manifestly inconsistent with some of Hart’s later writings, in particular his final settled position on legal obligations. Section 4 explains Hart’s change of view and defends early Hart against later Hart.

Section 5 draws forth some metanormative lessons. The fundamental implication of the SPP is that law is not meaningfully different, in some or most of the ways that should interest metanormative theorists, from other “artificial” normative systems, and therefore that jurists should work the idea that law is one among a large group of normative systems closer to the center of their thinking, and not attend to this fact only in an ad hoc manner.<sup>5</sup> In particular, I propose that we can make progress on the central jurisprudential task of explaining how legal norms gain their contents (or are what they are) by exploring how the norms of sports and games gain theirs (or are what *they* are).

## 1. The Standard Positivist Picture

Normativity concerns what people ought to do, believe, feel, and so on. Its central notions include *ought*, *obligation*, *permission*, *power*, *right*, *rule*, *reason*, and *good*. Beyond this vague common

---

<sup>5</sup> For brief defense of my contention that serious engagement with sports can pay dividends for legal theory see my “‘Let ‘em Play’: A Study in the Jurisprudence of Sport,” *Georgetown Law Journal* 99 (2011): 1330-31.

ground, however, almost everything is unclear or disputed. Or so it seems to me. I'd like to avoid committing myself on any contested matters at the outset. Better that they emerge as we proceed.

In lieu of theoretical ground-clearing, let's start with the uncontroversial observation that the norms we encounter, or many of them, appear to belong to systems or collections. Everyone recognizes that our linguistic practices, at least, suggest a multiplicity of normative systems, a system being a set of interconnected component parts that collectively form a complex whole. We routinely deploy normative concepts qualified by descriptive adjectives that signal systems, domains, institutions, or practices. "You are morally obligated to keep your promises"; "it is a principle of law that voluntary agreements will be respected"; "in basketball, a defensive player has a right to maintain his position"; "etiquette prohibits children from addressing their elders unless spoken to"; "the rules of Monopoly permit players to trade properties." We do not always speak this way. But even when we employ normative terms unmodified, a particular normative system or domain is usually implied.

One first step toward making sense of this apparent multiplicity of normative systems is to distinguish artificial normative systems from natural or non-artificial ones. Precision might be hard, and I won't strive for it. That a distinction of some sort can be drawn along these lines seems highly intuitive.<sup>6</sup> To a first pass, systems are 'artificial' if they are, as Kevin Toh puts it, "products of our own making."<sup>7</sup> Sports and games, prescriptive grammar, manners, fashion, ceremony and ritual, are all artificial systems. Presumably, prudence and rationality, if they comprise systems at all, are non-artificial. The chief function of artificial systems of practical normativity is to create and sustain norms

---

<sup>6</sup> Accord Kevin Toh, "Artificial Norms and Interstitial Reasoning" (unpublished ms, dated 10/2011).

<sup>7</sup> Id. To say that a system of normativity is artificial is not to say that its existence is accidental or a matter of chance. Many artificial systems may be inevitable for beings constituted as we are. But even if all people everywhere have, say, games and etiquette, the existence of such systems and the contents of their norms depends upon the actual choices and behaviors of persons.

that are sufficiently salient and determinate to effectively guide people's conduct. Legal positivists, at least, view legal systems as artificial systems of practical normativity.

In this section, I sketch an account or picture of the features or characteristics of artificial normative systems. I do not propose a test or definition. Instead, I offer the following five "hallmarks" or "features" of the picture:

- *Systemic fundamentality*: artificial normative systems are analytically and explanatorily prior to the norms they comprise, and do not depend on other systems for their norm-making power;
- *Ostensible normativity*: the normative force that artificial normative systems confer upon their norms is only 'thin', 'formal', or 'ostensible'; artificial norms do not confer 'real' normative force, and thus are not *really* binding—whatever, exactly, it is for a norm to be *really* binding;
- *Content independence*: the contents of the norms of one system are not necessarily dependent on the norms of other systems;
- *Normative isomorphism*: the basic normative concepts (e.g., right, obligation, ought) share structure and function across normative systems even if they differ in normative force; and
- *Inter-systemic conflict*: norms of artificial systems may conflict with one another and with non-artificial norms.

This section elaborates. I do not claim that each feature is strictly necessary to the picture, that all are comparably important, that no equally or more important features have been overlooked, or that these features could not be derived from a more concise list. It strongly bears emphasis, throughout this essay, that I am trying to convey a fairly general understanding of the normative landscape, not to articulate, let alone to defend, a precise thesis. I'm painting a painting, not building a building.

Before jumping in, let me clarify what I will mean by 'morality,' given the term's notorious ambiguity. I will mean the set of interconnected norms that principally govern our obligations to others—not 'positive' or 'conventional' morality (mores), but norms that comprise a system distinguished by their content or subject matter. This usage contrasts with an alternative according to



which “moral” norms are those with real normative force, regardless of their content. On the second usage, prudence is a subset of morality such that it is accurate, if non-standard, to say that morality directs that you should brush your teeth if that’s what the balance of (genuine) reason directs. My usage does not prejudge whether morality is an artificial or non-artificial system, or whether norms that it supplies have real normative force (see 1.2).

### 1.1. Systemic fundamentality

It is widely accepted that an artificial system is prior to its norms, and is in some sense fundamental. Two distinct aspects of this common idea can be teased apart.

First, the norms of a normative system gain their contents and their normative character—the fact that they *are* norms and bear on what agents ought to do—from the normative system, not vice versa. The normativity of the system has *priority* over the normativity of the system’s discrete norms. This was something upon which both Hart and Kelsen insisted. In her masterful biography of Hart, Nicola Lacey explains that he felt that “the idea of rules valid by reason of their source” was in some sense the “key” to his account of law.<sup>8</sup> In a notebook entry, Hart described as “revelatory” “the notion of a rule binding valid [sic] by virtue of its ‘source’ not content.”<sup>9</sup> Indeed, I am tempted by the thought that artificial and natural normative systems differ precisely in that artificial systems are systems of norm-generation, whereas natural systems are systems of norm-collection. An artificial normative system is a system whose principal functions include the production and maintenance of norms and which is partly composed by the norms that it produces and maintains.

---

<sup>8</sup> Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (New York: Oxford University Press, 2004): 227.

<sup>9</sup> *Id.*

If artificial normative systems are conceptually prior to the norms they sustain, a related but distinct idea is that each normative system stands on its own normative bottom. It gains capacity to invest the norms that it generates and maintains directly from social facts. Artificial normative systems typically do not depend upon any other normative systems of a different type, artificial or natural, for their power to create norms.<sup>10</sup>

How do artificial normative systems gain their norm-making power? Although very much about the story remains to be worked out, I do not myself find the rudiments mysterious. An ordinary person is naturally endowed with the normative power to create oughts, or non-instrumental reasons, for herself. By the same token, she has the normative power to confer such power—the power to make norms *for her*—upon others, be they individuals or institutions. I believe that this is a function of oaths of obedience, for example.

A normative system is a type of institution. It arises and is sustained by persons conferring upon it the power to promulgate norms for its subscribers. One invests a system with normativity, or subscribes to a system already invested with normative power, by taking Hart's 'internal point of view' toward the system and its outputs. This is not to say that a norm  $\phi$  is normative for P if and only if P takes an internal point of view toward  $\phi$ . A norm  $\phi$  of system S can be normative for P just so long as P takes an internal point of view toward the normative outputs of S, i.e., by 'subscribing' to S. Ordinary (committed) normative statements are thus analyzable as containing both a cognitivist and non-cognitivist prong. For example, in making an internal, non-detached statement to the effect that the law prohibits  $\phi$ , the speaker expresses both (a) acceptance of the normativity for herself of the legal system,

---

<sup>10</sup> In a hierarchical arrangement of normative systems belonging to the same class, a subordinate system may gain its normativity from a superordinate system. For example, in a federal political system, the national legal systems might confer normative authority upon the state legal systems. The qualifier 'of a different type' is intended to accommodate cases of this sort.

and (b) a belief that prohibition of  $\phi$  is a norm of that system.<sup>11</sup> In short, people confer normative power upon a system which in turn invests its outputs with normative force. In this way, a normative system possesses normative priority over the norms that constitute the system.

### 1.2. Ostensible normativity.

In what sense are artificial normative systems, or their norms, ‘normative’? What is claimed by “you ought not to end a sentence with a preposition,” or “mixed martial arts fighters are permitted to land elbow blows to opponents’ heads”? Presumably, such claims aren’t that ending a sentence with a preposition is *really* proscribed, or that it is *truly*, or all-things-considered, permitted to elbow others in the face. Such claims could be true, but that’s not what speakers generally mean to assert. To make sense of artificial normative systems, then, requires that we distinguish between norms that are genuinely or truly binding upon us regardless of our desires, and norms that are not.

As David Enoch rightly emphasizes in his contribution to this volume, the distinction, whilst familiar, eludes precise articulation.<sup>12</sup> Instead, authors tend to make heavy use of adjectives and italics. They distinguish “real,” “genuine,” “robust,” “full-blooded,” or “not-merely-claimed-or-supposed” normativity from “formal,” “thin,” “weak,” “apparent,” or “generic” normativity.<sup>13</sup> Although many of these terms would work equally well, I favor a nomenclature that makes clear that the difference is one of kind, not degree. Accordingly, I will call these two flavors or grades of normativity, “real” and

---

<sup>11</sup> Contrast the two-prong analysis attributed to Hart in Kevin Toh, “Hart’s Expressivism and his Benthamite Project,” *Legal Theory* 11 (2005), 75-123: 88, and compare the quasi-expressivist construal proposed in Stephen Finlay & David Plunkett, “Quasi-Expressivism and Statements of Law: A Hartian Theory,” *Oxford Studies in Philosophy of Law* 3 (forthcoming).

<sup>12</sup> David Enoch, “Is General Jurisprudence Interesting?” (ms) The Kantian distinction between “categorical” and “hypothetical” imperatives does not quite mark the distinction we are seeking. See Foot, “Morality as a System,” at 308-9.

<sup>13</sup> See, e.g., Tristram McPherson, “Against Quietist Normative Realism,” *Philosophical Studies* 154 (2011): 223-40; David Copp, “Moral Naturalism and Three Grades of Normativity,” in Peter Schaber ed., *Normativity and Naturalism* (Frankfurt: Ontos-Verlag 2004); John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), 134.

“ostensible,” respectively.<sup>14</sup> It is widely thought both that prudence, rationality, and (perhaps) interpersonal morality are all really normative if anything is, and that all artificial normative systems generate only ostensible normativity. I share those judgments.

It is essential to the ISP that whether there are artificial normative systems and, if so, whether we really ought to comply with the norms they generate are distinct questions. It seems to me that skepticism about the ISP is often rooted in the supposition that a putative norm that lacks real normative force is not a norm. On this view, real normative force figures somehow into the existence conditions for norms. The ISP operates upon a different understanding of what it is to be normative. On the notion of normativity that the ISP accepts, it is a truism, and not a reasonably contestable substantive claim, that volleyball, fashion, grammar, and law are normative.

We could stipulate that putative normative systems that do not generate real normativity do not count as normative systems at all and that their outputs are not norms. Such linguistic or conceptual legislation would be revisionary. More importantly, it would make no *substantive* difference. It would only create a need for a new name for what I am calling artificial normative systems (systems that I concede generate only ostensible normativity). Call them, if you’d prefer, ‘shnormative systems’.<sup>15</sup> All that I want to ask and claim about ‘artificial normative systems’ could be asked and claimed about ‘shnormative systems’. Most notably, the central jurisprudential task would not be substantively different: it would be to explain how legal shnorms gain the contents they have.

---

<sup>14</sup> I eschew McPherson’s use of “formal” for what I’m calling “ostensible” because I will use “formal,” to designate a subclass of artificial normative systems (a subclass that includes most legal systems and most sports and games, but not, e.g., fashion or etiquette) that warrants particular attention from jurists. See § 5. That is, on my terminology, it is not the case that all systems that generate only ostensible normativity are formal, although the converse is true: all formal systems generate only ostensible normativity.

<sup>15</sup> Compare David Enoch, “Agency, Shmagency,” *Philosophical Review* 115 (2006): 169-98.

### 1.3. Content independence.

Whether any norm of a normative system S partially determines the content of any norm of a normative system Q is a contingent fact about system Q. This does not mean that systems are closed to each other. Systems can and frequently do incorporate norms of other systems. Precisely because the norms of artificial systems are, in an important sense, “the products of our own making” (which is not to say that they are necessarily within anyone’s conscious or purposive control), it would be extraordinary if our normative systems, albeit distinct, did not overlap and inter-penetrate in thick and complex ways. Surely, as Hart emphasized, legal systems are bound to address certain topics, and to have some morally infused content, given basic truths about the constitution of human beings.<sup>16</sup> That does not undermine the straightforward point that the contents of a system’s norms are generally not dictated or constrained by other systems of norms. The principles of a legal system, for example, are simply that—legal principles. Whether and to what extent they overlap with, or incorporate, moral principles is entirely contingent, even though significant overlap is a near-certainty in systems that enjoy significant popular input.<sup>17</sup>

The suggestion that normative systems are distinct from one another and generate norms that do not necessarily share content, should evoke the ‘separation thesis’ that Hart famously claimed to be definitional of legal positivism.<sup>18</sup> Yet the ISP differs from the separation thesis as canonically formulated—there is “no necessary or conceptual connection” between law and morality in breadth and modesty.

---

<sup>16</sup> See generally Hart, *Concept of Law*, ch. 9.

<sup>17</sup> See Mitchell N. Berman, “For Legal Principles,” in Heidi Hurd ed., *Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander* (Cambridge: CUP, forthcoming 2018).

<sup>18</sup> H.L.A. Hart, “Introduction,” in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: OUP, 1982): 18; “Positivism and the Separation of Law and Morals,” (1958) reprinted in *Essays in Jurisprudence and Philosophy* (Oxford: OUP, 1983): 57 n.25.

First, whereas the separation thesis concerns the relationship (or lack thereof) between law and morality, content independence is a feature of all artificial normative systems. This is a noteworthy difference, not a quibble, because it is a central claim and premise of this essay that, for many or most of their purposes, jurisprudential and metanormative theorists should expand their focus from law and morality alone to the wider domain of practical normativity. Second, to describe normative systems as independent and distinct is to make less extravagant and more precise claims about the systems to which these characterizations apply than the separation thesis (as formulated) claims about law and morality. As leading positivists have urged, the contention that there is ‘no necessary connection’ between law and morality (or between *any* normative system and morality) is implausibly strong partly because *connection* is such a capacious notion.<sup>19</sup> To take a single proffered disproof: in contrast to some things (e.g., Thursday, the color orange), legal norms are necessarily morally evaluable. In saying that normative systems are distinct, I do not contend that normative systems are necessarily ‘unconnected’ (and neither did Hart).<sup>20</sup>

#### 1.4. Normative isomorphism.

Does ‘obligation’ ‘mean the same thing’ in law and morals? Hart struggled with this question throughout his academic life.<sup>21</sup> But of course the answer might depend on what is meant by ‘meaning the same thing’, and Hart did not stick to a clear or consistent interpretation of this phrase, nor did he consistently employ the same vocabulary. The ISP maintains that obligation *does* ‘mean the same thing’ in law and morality in a sense that I will try to clarify.<sup>22</sup> Moreover, generalizing from *obligation* to all

---

<sup>19</sup> See, e.g., Leslie Green, “Positivism and the Inseparability of Law and Morals,” *NYU Law Review* 83 (2008): 1035-1058.

<sup>20</sup> See Gardner, “Legal Positivism: 5 ½ Myths,” in *Law as a Leap of Faith*, at 48-49.

<sup>21</sup> Lacey, *A Life of H.L.A. Hart*, brings this out especially effectively. See esp. pp. 225-29, 249-53, 325, 335-37, 354.

<sup>22</sup> Obviously, the sense will not be that legal and moral obligations have the same normative force. See § 1.2. Normative force is not an aspect of a norm-type’s ‘meaning’. See § 4.

normative concepts, and from law and morality to all normative systems, the ISP maintains that any given norm type (obligation, reason, ought, right, power, etc.) ‘means the same thing’ in any given normative system (interpersonal morality, law, etiquette, cricket, etc.). Call this feature of the ISP *normative isomorphism*.

Normative isomorphism holds that the normative elements that a normative system comprises or generates (rule, power, right, reason) are definable in terms that are invariant across normative systems. If the Razian analysis of obligation as a protected reason is correct, then it applies to legal obligations and moral obligations. If it is part of the relevant concepts that rights correlate with duties, that is true of moral rights and rights in backgammon. If weight is a necessary characteristic of principles, then principles have weight across normative systems. The concepts of rule, right, permission, etc. are graspable in the abstract, detached from the countless normative systems in which tokens of these concepts appear. *Isomorphism* does not maintain that the entire panoply of normative elements occur in every normative system. For example, some systems may contain *oughts*, but no *obligations* at all. Possibly, as Hart suggests, etiquette and grammar are like this.<sup>23</sup> The idea is only that if system S contains any tokens of norm-type T, then those tokens *have the same normative composition and function* in S as they do in any other normative system in which such tokens appear. This is what Hart had in mind, I think, when maintaining that there exist a “general idea of obligation” (and of permission, right, etc.) that is “a necessary preliminary to understanding it in its legal form.”<sup>24</sup>

---

<sup>23</sup> Hart, *Concept of Law*, at 86.

<sup>24</sup> Id. at 85. This is not to say, e.g., that ‘legal obligation’ means the same thing as ‘moral obligation’, but that “obligation” contributes the same meaning to the compound phrases ‘legal obligation’ and ‘moral obligation’.

1.5. Inter-systemic normative conflict.

From *systemic fundamentality* and *content independence*, it follows that a norm of one normative system, S, may conflict with a norm of another system, Q. To be sure, the mere existence of multiple systems does not ensure that normative conflict will be rife. Conflicts can be avoided in at least two ways. First, systems may claim non-overlapping jurisdiction. A ball that touches the boundary line is out of play in gridiron football but in play in association football. Nonetheless, the rules of these two sports do not conflict because they do not simultaneously govern any token event. Second, where normative systems do claim overlapping jurisdiction, conflict is avoided cooperatively if one system claims dominance in cases of (apparent) conflict and the other concedes subordinacy, as is true of national and state or provincial legal systems in a federal system of government. That said, inter-systemic conflict remains possible. It may be, say, that a game requires attire that flouts norms of fashion, or that interpersonal morality prohibits conduct that the law mandates.

That is straightforward.<sup>25</sup> How if at all are inter-systemic normative conflicts resolved? Here are the three most eligible possibilities:

First, *if* any norms possess real normative force, presumably they take precedence over conflicting norms possessed only of ostensible normative force. If interpersonal morality is really normative, and if all artificial norms are only ostensibly normative, then when a moral norm conflicts with a norm of an artificial system, we (really) ought to follow the moral norm.

---

<sup>25</sup> And to keep it simple, the examples I invoked instantiate what I call ‘strong conflict’: system S prohibits  $\phi$ , and system Q prohibits  $\neg\phi$ . A second form of conflict—‘weak inter-systemic conflict’—exploits a distinction between what some legal theorists and deontic logicians call ‘weak’ and ‘strong’ permission, and what I will instead call ‘allowance’ and ‘permission,’ respectively. An allowance is the mere absence of an obligation, duty, or requirement. A permission is something more, though it is hard to say precisely what more is required. Compare, e.g., G.H. von Wright, *Norm and Action: A Logical Inquiry* (London: Routledge, 1963), 86, and Eugenio Bulygin, “Permissive Norms and Normative Systems,” in *Essays in Legal Philosophy* (Oxford: OUP, 2015). Putting details aside, if we accept the likely cogency of *some* allowance/permission distinction, it follows that conflict might arise when one system prohibits what another system permits.



Second, it could be that normativity is always and only ostensible—for morality as well as for artificial normative systems—and that normative resolution of inter-system conflict is not forthcoming. It could be that, on a given occasion, your legal obligations conflict with your moral obligations, or that what you ought to do from a baseball perspective conflicts with what you ought to do from a fashion perspective, and that, prudence aside, there is nothing more of a normative nature to say. You may face a practical necessity to choose one course of action or the other, but which course you choose is necessarily ungoverned by norm or reason: there's no 'ought' of the matter.

Third, even if all normative systems generate only ostensible normativity, the normative systems that populate the ISP could collectively constitute a super-system that generates rules or principles that adjudicate conflicts between the member systems. This is one way to understand the domain of what is variously termed "all-things-considered ought," "ought, period," or "ought-sans-phrase," even without attributing real normativity to that domain. Put another way, inter-systemic normative conflict might be resolvable from an all-things-considered perspective even if normativity is ostensible all the way down.

In my view, the SPP is compatible with each of these three possibilities, and perhaps others too. The ISP is agnostic about whether real normativity resides anywhere in our normative landscape, and the SPP is not committed to any particular view regarding whether, and how, inter-systemic normative conflict involving law is (normatively) resolved.

## 2. Legal Exceptionalism

Section 1 sketched what I am calling the "Standard Positivist Picture," an account of the normative landscape designed to reflect basic positivist sensibilities. We may parse it into two pieces: a picture of the landscape of artificial normative systems that I am calling the "Independent Systems

Picture,” and a claim that legal systems are artificial systems in the manner that the ISP describes. Accordingly, two paths toward rejecting the SPP can be distinguished. The first broadly accepts the ISP but maintains that legal systems are not artificial, or that they differ from other artificial systems in some or all of the respects I have highlighted. A second path rejects the account of artificial normative systems that the ISP reflects, even as a description of paradigmatic artificial systems as games and fashion. I consider “legal exceptionalist” rejections of the SPP in this section, and more radical rejections of the ISP in section 3.

### 2.1. Arguments from law’s purpose or function.

Many jurisprudential theories deny that one or more hallmarks of the ISP apply to legal systems. It is not always clear, however, that other artificial normative systems fare the same. For example, Dworkin’s view, circa *Law’s Empire*, denies that legal systems respect content independence, on the ground that moral norms or facts are necessarily part of law. But it does not simultaneously maintain that such facts are necessarily part of games or fashion or grammar. Similarly, Mark Greenberg denies that legal norms can ever conflict with moral norms, while accepting that norms of other artificial systems frequently do. These are possible examples of views that reject the SPP without frontally attacking the ISP.

What explains these forms of legal exceptionalism? They stem from an effort to explain what distinguishes the subclass of legal systems from other artificial normative systems. Dworkin argues that law’s purpose or function is to morally justify the use of coercion.<sup>26</sup> And Greenberg contends “that it is part of the nature of law that a legal system is supposed to change our moral obligations in order to improve our moral situation.”<sup>27</sup> Thus, legal exceptionalists can reject the SPP without incurring the cost

---

<sup>26</sup> See, e.g., Dworkin, *Law’s Empire*, at 93.

<sup>27</sup> Mark Greenberg, “The Moral Impact Theory of Law,” *Yale Law Journal* 123 (2014): 1288-1342, 1294.

in “plausibility points”<sup>28</sup> of taking on the ISP by drawing out implications from particular purposes that are supposedly baked into law’s nature.

Defenders of the SPP are likely to endorse sparer conceptions of law’s purpose. In the Postscript, Hart rejected Dworkin’s claim that “the purpose of law is to justify the use of coercion,” observing that positivist theories generally “make[] no claim to identify the point or purpose of law and legal practices as such.” Indeed, he deemed it “quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.”<sup>29</sup>

Kenneth Ehrenberg has commented on this apparent “tension between Hart’s claim that positivists make no claim to identify law’s function and his claim that it is to guide behavior,” concluding that “the best way to square these passages is to say that Hart believed the ‘primary function’ he attributed to law was so thin that nothing much of theoretical value could be derived from it.”<sup>30</sup> While Ehrenberg is right as far as he goes, I’d go further. The function that Hart seems to attribute to law is simply the function common to all artificial normative systems. His claim is that no functions feature in the *differentia* that distinguish legal systems from other members of that larger class.

What then does distinguish legal systems from other artificial normative systems? Although the SPP may be able to accommodate a range of answers, I anticipate that many proponents would distinguish legal systems from their cousins principally in terms of their relationship to a state or other political community. Too briefly: legal systems are artificial normative systems established and maintained by political communities and designed to serve a potentially limitless range of functions, characteristically including those of resolving disputes between community members, and preserving

---

<sup>28</sup> See David Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (New York: Oxford University Press, 2011).

<sup>29</sup> Hart, *Concept of Law*, at 248-49.

<sup>30</sup> Kenneth Ehrenberg, “Functions in Jurisprudential Methodology,” *Philosophy Compass* 8 (2013): 447-56, 454 n.8.

public order and punishing breaches.<sup>31</sup> Legal systems are political communities' normative Swiss-Army knives.

I cannot argue for this sparer account of law's nature or purposes in an already overlong essay that aims not fully to defend the SPP, but only to revive it as a genuine jurisprudential option. I'll merely announce my belief that, insofar as we are seeking *our* concept of law, the SPP will fare well when measured by its fit with pre-theoretical data. Accounts that attribute to law significantly thicker or different essential functions have the feel of theory-driven overlays that can be resisted. This is true not only of anti-positivist theories of law like Dworkin's and Greenberg's, but also of Joseph Raz's exclusive-positivist theory rooted in his contention that law necessarily claims to be a legitimate practical authority, in the sense of mediating between its subjects and the (real) reasons that antecedently apply to them. That is admittedly a contention, not an argument.

## 2.2. Dworkin's One-System Picture and the argument from circularity.

The upshot of section 2.1 is that, if the ISP correctly describes features of most artificial normative systems, rejection of the SPP depends upon claims about the nature or functions of law that are ambitious and controversial. Whilst Dworkin's account (or Greenberg's, or whoever's) could be correct, they should not move us too quickly from a more bare-bones account of law's function or nature that the standard positivist picture embodies. It is perhaps revealing, then, that in his last major

---

<sup>31</sup> In the Postscript, Hart offers a different suggestion: "the distinctive features of law are the provision it makes by secondary rules for the identification, change, and enforcement of its standards and the general claim it makes to priority over other standards." Hart, *Concept of Law*, at 249. This is not promising, for the first supposedly distinguishing feature is common to all "formal" artificial normative systems. See section 5, below. Sports leagues, for example, generate primary rules of conduct and also maintain secondary rules governing change and enforcement.

jurisprudential work, *Justice for Hedgehogs*, Dworkin purported to defeat the SPP on logical grounds, not on contested substantive claims about law's function or nature.<sup>32</sup>

In *Hedgehogs*, Dworkin identified, and rejected, an 'orthodox picture' of the normative landscape in which "[l]aw' and 'morality' describe different collections of norms."<sup>33</sup> Calling this vision 'the two-systems picture', Dworkin argued that it should be rejected in favor of a 'one-system picture' in which law is just 'a part of political morality', not a distinct normative domain with distinct normative upshots.<sup>34</sup> The contention itself was not novel. But Dworkin's argument for it was:

There is a flaw in the two-systems picture. Once we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated. Where shall we turn for an answer to the question whether positivism or interpretivism is a more accurate or otherwise better account of how the two systems relate? Is this a moral question or a legal question? Either choice yields a circular argument with much too short a radius.

Suppose we treat the question as legal. We look to legal material . . . and we ask: What does the correct reading of all that material declare the relationship between law and morality to be? We cannot answer that question without a theory in hand about how to read legal material, and we can't have such a theory until we have already decided what role morality plays in fixing the content of the law. . . .

If we turn to morality for our answer, on the other hand, we beg the question in the opposite direction. We can say: Would it be good for justice if morality played the part in legal analysis that interpretivism claims it does? Or is it actually better for the moral tone of a community if law and morals are kept separate as the positivists insist? These questions certainly make sense . . . . [But] [i]f law and morals are two separate systems, it begs the question to suppose that the best theory of what law is depends on such moral issues. That assumes we have already decided against positivism.<sup>35</sup>

---

<sup>32</sup> See Ronald Dworkin, *Justice for Hedgehogs* (Harvard Belknap, 2011), ch. 19.

<sup>33</sup> *Id.* at 400.

<sup>34</sup> *Id.* at 405.

<sup>35</sup> *Id.* at 402-03.

This long passage represents nearly the entirety of Dworkin's argument against a picture that he acknowledges to be orthodox.<sup>36</sup> Although Dworkin claims that his one-page argument presents 'decisive objections to the two-systems picture',<sup>37</sup> I am skeptical that it scores any points.

Dworkin's argument from circularity is undermined by his initial assumption that, on the two-systems picture, the relationship between law and morality presents a *single* question to which either law or morality must supply the *single* answer. However, as he had explained one page earlier, there are at least two questions here, not one: (1) are citizens or subjects of a legal system morally obligated to obey the law's requirements? (2) are legal norms partly constituted by moral norms?<sup>38</sup> If there are two questions, not one, the possibility arises that law supplies the answer to one and morality answers the other.

The ISP suggests just that. Question (1) is the traditional problem of 'political obligation'. It is for morality to answer. The dominant contemporary philosophical opinion is that there is no moral (or 'real') obligation to obey the law, as such, but the ISP can accommodate either answer.

Question (2) presents either a first-order legal question, or a meta-legal question, depending upon how it's understood. It is a meta-legal, or jurisprudential, question, if it asks whether it is necessary, possible, or impossible for the norms of a legal system to be partly constituted by the norms of morality. Or, if we believe that it is possible, but not necessary, for the norms of a legal system to be

---

<sup>36</sup> I say "nearly" because Dworkin does speculate that the "logical difficulty" he identifies—namely, that the two-systems picture "poses a question that cannot be answered other than by assuming an answer from the start"—explains the "turn in Anglo-American jurisprudence . . . to the surprising idea that the puzzle about law and morals is neither a legal nor a moral problem but instead a *conceptual* one." *Id.* at 403. I will not examine his (highly condensed) arguments for the conclusion that this "supposed escape from the circularity problem is no escape at all," *id.* at 404, because, as I argue in text, the supposed circularity problem is no problem at all.

<sup>37</sup> Dworkin, *Justice for Hedgehogs*, 410.

<sup>38</sup> See *id.* at 401.

partly constituted by the norms of morality, we might be asking whether the norms of *this* legal system are partially so constituted. That is a legal question.

So a proponent of the SPP can supply distinct answers to the two questions that Dworkin raises but mistakenly reduces to one. To repeat: the question of political obligation is answered by morality; the jurisdiction-general question of how moral norms can possibly contribute to the content of legal norms is a meta-legal question; and the regime-specific question of how the legal norms of a given legal system are constituted is a legal question. These are answers to the *jurisdictional* questions regarding which domain answers a substantive question, and not to the *merits* questions (1) whether and under what circumstances legal obligations are morally obligatory, or (2) whether moral considerations bear constitutively on the contents of legal norms. They confront no flaws of circularity.

To be sure, moral considerations could bear constitutively on the contents of legal norms in that all legal obligations, properly so called, are moral obligations, and that, as a consequence, people are morally obligated to obey the law. That is Dworkin's view, as well as Greenberg's. I am unpersuaded, though I cannot take them on in this chapter. The important point at present is that the case for Dworkin's "interpretivist" theory of law, or for Greenberg's "moral impact theory of law," or for other views in the vicinity, depends upon controversial claims about law's nature or function. If the SPP is mistaken, on this reasoning, that would not be due to any argumentative circularity, as Dworkin claims. Rather, the ISP's infirmity would arise as the product, not an argumentative ground, of the conclusion that interpretivism, or the moral impact theory, or what-have-you, is correct. And whatever might be said of the arguments that would deliver interpretivism, and related accounts of law, that they traverse a short arc is not among them. Dworkin might have sound substantive arguments against the SPP, but he has not shown that a picture in which law and morality are independent is logically defective.

### 3. One-System Pictures

Prescind now from Dworkin's circularity-based argument for the OSP to the picture itself. If we start by thinking of the normative landscape as a whole, rather than law and morality alone, Dworkin's rejection of a "two-systems picture" and concomitant embrace of a "one-system picture" becomes ambiguous. On one interpretation, the putatively distinct systems of law and morality constitute one system, but this single system fits within a landscape populated by *other* normative systems (sports, fashion, etc.) that are independent from that one system and from each other. The second interpretation recognizes just a single system of practical normativity: all systems of practical normativity, not only law, constitute branches of a single normative system.

Of legal philosophers writing within a Dworkinian tradition, Mark Greenberg steers in the first direction. Like Dworkin, Greenberg maintains that "legal obligations are a certain subset of moral obligations."<sup>39</sup> But his arguments rest on claims about law's particular function and therefore have no obvious implications for other artificial normative systems. Scott Hershovitz takes the second route. For Hershovitz, as for Dworkin and Greenberg, "legal obligations just are moral obligations generated by legal practice."<sup>40</sup> But the same holds for obligations generated by any other normative system. A's golf obligations—what golf rules require of A—are what A morally ought to do given all relevant facts, including facts about what participants expect of each other and about what makes the joint activity "go better," as by contributing more to human flourishing.

A *true* one-system picture (a picture that is more Hershovitz than Greenberg) flatly rejects core elements of the ISP. Most conspicuously, because the obligation created by *any* system is a moral

---

<sup>39</sup> Greenberg, "Moral Impact Theory," at 1290.

<sup>40</sup> Scott Hershovitz, "The End of Jurisprudence," *Yale Law Journal* 124 (2015): 1160-1204, 1192.



obligation, inter-systemic normative conflict is impossible.<sup>41</sup> On the OSP, not even baseball or fashion issues norms that lack genuine normative force and are substantively independent from the dictates of morality.

### 3.1. The argument from practicality.

The core argument against the ISP starts from the premise that, ultimately, what we care about is what we ought to do—not what we ought to do from a legal, or a tennis, or a fashion perspective, but what we *really* ought to do. Therefore, we have no practical need ever to ask what the law provides. Rather, we need only ask how the various non-normative facts that constitute legal-normative facts (whatever those facts, and the constitution relationship, may be) bear on what we (really) ought to do. Call this the argument from practicality. It recommends that we adopt a one-step decision protocol (asking ourselves what we really ought to do) in lieu of a two-step protocol that first asks what some salient artificial normative system requires and only then asks what we really should do. Recent proponents of a one-step protocol, or of some variant of the practicality-based objection to the ISP, include Jeremy Waldron and Lewis Kornhauser, in addition to Hershovitz.<sup>42</sup>

The argument from practicality does not threaten the SPP. First, it assumes that there is a domain of real normativity, or of ought-sans-phrase, that governs or guides our actions. This is highly controversial, and I have said that the SPP is agnostic. Second, even assuming real normativity, nothing in this line of argument supports an error-theoretical conclusion about the outputs of artificial

---

<sup>41</sup> Hershovitz can be read to contend otherwise, for he allows that legal and moral obligations “can conflict, sometimes in terrible ways.” Hershovitz, “End of Jurisprudence,” at 1187. Understandably, Enoch finds this passage puzzling, for it seems inconsistent with the thrust of the OSP. Enoch, “Is General Jurisprudence Interesting?” at 14 n.25. But the type of conflict Hershovitz has in mind is simply the conflict that can arise between *any* pro tanto moral obligations. See Hershovitz, “End of Jurisprudence,” at 1189. Hershovitz denies that an agent can have a genuine legal obligation that isn’t even a pro tanto moral obligation.

<sup>42</sup> See Jeremy Waldron, “Jurisprudence for Hedgehogs” (unpublished ms., Sept. 23, 2013), at 14-16; Hershovitz, “End of Jurisprudence,” at 1193-95; Lewis A. Kornhauser, “Doing Without the Concept of Law” (unpublished ms, August 3, 2015), at 15.

normative systems. That is, the (supposed) fact that we don't *need* artificial normative facts does not establish that we don't *have* them. Our social world contains countless things that we don't need and may lack value for us.

Beyond that, artificial norms can make real normative differences. Suppose that A promises her father to "always obey the rules of basketball." The standard view is that, by making this promise, A puts herself under a moral obligation to obey all basketball rules. Exactly why a voluntary promise has that moral upshot is controversial. But for present purposes we can help ourselves to the assumption that A has such a moral obligation without bothering with the details. It would seem to follow that whether A comports with her moral obligation will be a function of ordinary facts about her behavior combined with normative facts about what the rules of basketball prohibit. This assumes that there are such normative facts.

An opponent of the ISP might propose that we construe A's promise <to obey the rules of basketball> as a promise <to do what the rulebook says>. Yet this would be entirely revisionist, for it might not be that the norms of a practice are entirely determined by the communicative contents of provisions in an authoritative text. Consider intentional fouls in professional basketball committed by the losing team near game's end in order to stop the clock. Not only the semantic content, but also the full communicative content, of the relevant provision in the official NBA rulebook provides that such conduct is prohibited.<sup>43</sup> But most basketball insiders believe that it is permitted—not just morally, but in terms of basketball's own norms, rightly understood. Indeed, the nominal prohibition is not merely a normative permission, it's a *power*. The fouling team has a valid complaint if the referee refuses to whistle the play dead. This would not be so if some communicative content of the text of the basketball rulebook determined (or mirrored) the content of the basketball rule.

---

<sup>43</sup> "A player shall not hold, push, charge into, impede the progress of an opponent . . ." NBA Rule 12B, Section I(a).

Or, to switch sports, consider Major League Baseball Rule 3.09, which, in relevant part, reads: ‘Players of opposing teams shall not fraternize at any time while in uniform’. Yet opposing players fraternize while in uniform routinely (as during pregame batting practice) without anybody believing that this violates an applicable norm. Of course, this conventional understanding among baseball players could be mistaken but it seems probable that they are right, possibly because the normative system that is associated with Major League Baseball includes a principle of desuetude, even though such a principle does not correspond to the communicative content of any provision within the rulebook.

The case of promising to obey rules of a game thus suggests that there are rules of a game and that such rules do not necessarily set forth moral obligations. Now, people rarely promise to obey the rules of a game. But the lesson I aim to draw is not *limited* to cases of promising. We might think that participants often make *commitments* to obey the rules, where commitments have more lenient existence conditions than promises and different moral upshots. Your commitment to play by the rules is intelligible only on the assumption that there are rules to commit to, and your commitment can make a moral difference to your situation only if the rules are not already moral obligations for you.

Furthermore, the argument from practicality is infirm even putting promises and commitments aside. For insofar as it seeks to cause trouble for the ISP, the argument rests upon a heroic conception of the human condition and of human capacities that defenders of the ISP may fairly reject as implausible. Suppose, again, that all we really should care about is what we really ought to do. Making this determination is frequently hard, and the felt need to undertake the effort, and to accomplish it successfully, can be stressful, even paralyzing. We may find that we navigate the world more successfully and happily by voluntarily subscribing, as it were, to diverse systems of norms that output directives for particular contexts. Doing so does not require that we abdicate responsibility to reason morally. It’s not that we must subject ourselves slavishly to the normative outputs of diverse (artificial)

normative systems, but only that we have prudential reason to follow these artificial norms ordinarily, proceeding to the second step of the two-step protocol—consulting other (real) reasons that might weigh against the norms of the system we are first consulting—*only when there are unusual grounds to do so*. This was Hart’s view about judging: Judges not only follow their legal obligations in each case,

but are committed in advance in the sense that they have a settled disposition to do this without considering the merits of so doing in each case . . . . So although the judge is in this sense committed to following the rules his view of the moral merits of doing so . . . is irrelevant. His view of the merits may be favourable or unfavourable, or simple absent, or, without dereliction of his duty as a judge, he may have formed no view of the moral merits.<sup>44</sup>

Compare Daniel Kahneman’s account of the two systems involved in ordinary mental processing: the fast, intuitive and emotional System 1, and the slow, deliberative and more logical System 2.<sup>45</sup> As Kahneman explains, human beings do not and could not consistently kick decisions up to System 2. I’m making a similar claim about the considerations we consult when we are already operating from within the second of these psychological systems. When operating within a domain that we take to be governed by one or another artificial normative system, we ordinarily engage with the norms that that system delivers, and then consult the norms of morality (or real reasons) only when a particular reason to do so impinges upon our deliberative field. Whatever those impinging reasons consist of, my key point is simply that agents who subscribe to multiple systems (almost everybody) do not engage in a “two-step process” in the routine case—and that’s okay. It’s fun to play baseball. It’s easier to gain the potential benefits that the practice offers by acting on a general disposition to follow its rules, which is to take the baseball rules as normative for you. A two-step decision procedure in which we reach the second step only occasionally has real-life benefits for organisms constituted as we are.

---

<sup>44</sup> Hart, *Essays on Bentham*, at 158-59.

<sup>45</sup> Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

3.2. Hershovitz's argument from games.

That is my response to the argument from practicality. Before closing this section, however, let us tarry a little longer over Hershovitz's argument, for of all recent jurisprudential writings, his is the most sustained and forceful attack on the ISP. As I have emphasized, more explicitly than Dworkin, and in contrast to Greenberg, Hershovitz challenges a picture of our landscape that recognizes *any* truly independent and distinct normative systems. Yet more significantly, Hershovitz's argumentative strategy is to bolster the OSP precisely by broadening our focus from legal systems in particular to the fuller normative landscape. He argues that expanding our attention from law alone to other purportedly normative domains (chiefly games) *bolsters* the OSP's plausibility and thereby allows us to *inter* the central jurisprudential question of how legal norms gain the contents that they have—hence his article's provocative title: "The End of Jurisprudence."<sup>46</sup> I argue, in contrast, that consideration of sports and games substantially *diminishes* the OSP's plausibility. And I further propose that careful attention to sports and games will facilitate progress in *accomplishing* (not avoiding) this basic task for legal philosophy. Because Hershovitz and I start from nearly identical premises to reach nearly opposite conclusions, it may be revealing to identify just where we part ways.

Hershovitz's article is long and subtle. I cannot address it all. I will focus on the portion that deals most squarely with games. In his chief hypothetical, Hershovitz imagines that, while playing a game of chess, you pick up a pawn in your left hand and place it back on the board with your right. Your opponent objects. Citing a provision in the FIDE rulebook that says that "[e]ach move must be made with one hand only,"<sup>47</sup> she charges you with an illegal move—that is, a move that the rules prohibit.

---

<sup>46</sup> See also Hershovitz, "End of Jurisprudence," at 1194 (explaining, as "a welcome consequence" of his version of legal eliminativism, that "[i]f we deny that legal practices give rise to a distinctively legal domain of normativity . . . we relieve ourselves of the burden of explaining just what that domain is and how its content is constituted").

<sup>47</sup> Laws of Chess, FIDE § 4.1.

However, says Hershovitz, “we need to know more about the context of the game” in order to determine whether your opponent’s objection is sound. “If you’re playing in a FIDE-sanctioned tournament, for example, then you are presumably obligated to follow the rules.”<sup>48</sup> But “[t]he picture looks rather different if you are playing a casual game with a friend.” In that case, he concludes, “FIDE’s adoption of a rule requiring players to make moves with one hand only has no normative consequences for [you].”<sup>49</sup>

So far, we are in agreement. An inhabitant of the ISP might explain things as follows. ‘Chess’ is not a single undifferentiated normative system, but a tightly knit family of systems that are unified by a large number of constitutive and regulative rules but that also exhibit some degree of diversity. This is familiar. Although we usually speak of basketball, for instance, as though it were a single game governed by a single set of rules, the rules that govern play in the NBA are not identical to those that govern in the WNBA, the NCAA, in international basketball competitions, or in pickup ball. Similarly, we commonly reference ‘American tort law’, or ‘Anglophone tort law’, while knowing that the rules vary across jurisdictions. In the same way, ‘the rules of chess’ is a slight misnomer, and the rules that govern a particular token game will depend upon which member system of the chess game family the game in question is a token. A proponent of the ISP has no difficulty concluding, with Hershovitz, that “[a] casual game of chess seems more apt to be governed by the widely known rules of chess than it does by FIDE’s more complete set of rules, absent an antecedent agreement about what rules are in play.”

---

<sup>48</sup> Hershovitz, “End of Jurisprudence,” at 1183. By “obligated” here, Hershovitz means *morally* obligated. He is therefore assuming that your voluntary participation in the tournament puts you under a moral obligation to obey the FIDE rules. I think that more needs to be said to establish that you are in fact morally obligated to follow the FIDE rules, but I also suspect that Hershovitz would agree. Although there will no doubt be controversial cases at the margins, I accept that a set of conditions could be articulated the satisfaction of which would, according to most observers, put a participant in a FIDE-sanctioned tournament under at least a pro tanto moral obligation to comply with the FIDE rules.

<sup>49</sup> *Id.*

Of course, what the rules of casual, friendly chess are may be significantly less determinate, and less easily ascertained, than what the rules of FIDE-sanctioned chess matches are. That's why it is useful for authorities in a normative system to "write the rules down," even if doing so may not perfectly fix the contents of the rules. It's also why, when folks play a game that they intend not to be governed by the entire panoply of rules formally promulgated by an official organization, they often specify the rules to govern particular situations. When acquaintances play a casual game of pool, for example, they often expressly agree at the outset on the rules to govern scratches and other fouls.

In short, I take Hershovitz's example to illustrate that our normative universe is even more complicated and densely populated than one might otherwise suppose, for there is not a single normative system denominated chess, or baseball, or basketball, but potentially a multiplicity of systems under each label. But he draws a different lesson—that "we can navigate these situations [involving disputes that arise in the course of game play] just fine without supposing that the FIDE rules give rise to a non-moral FIDE obligation to make each move with one hand only . . . [or] that the FIDE rules give rise to their own distinct domain of normativity."<sup>50</sup> Now we have parted ways. On the ISP, there *is* a non-moral FIDE obligation to make each move with one hand only." And the FIDE rules *do* make out a distinct normative domain.<sup>51</sup> It's just that casual, friendly chess (call it 'CFC') is also a normative domain, and it happens to be false that there is a non-moral *CFC* obligation to make each move with one hand only.

Importantly, Hershovitz does not fully deny this. He doesn't say that there are no such things as FIDE rules or CFC rules, where rules are norms that possess only ostensible normative force ('shnorms' if you must). He just says that we can manage fine without attending to them, that talk of such entities is

---

<sup>50</sup> Id. at 1184.

<sup>51</sup> I would not, however, describe this domain, as Hershovitz does, as involving "a new sort of normativity." Id. The sort of normativity at issue is ordinary 'ostensible' normativity.

“superfluous.”<sup>52</sup> But talk of artificial norms is not superfluous; we cannot navigate nearly as well when we do without. Suppose that players in a casual game of 8-ball have failed to take the common precaution of clarifying rules in advance. Player A has table scratched and Player B makes to remove the cue ball, noting that the penalty allows her to place it anywhere on the table. A disagrees.

Acknowledging that that’s the prescribed penalty in games governed by rules promulgated by official bodies such as the World Pool-Billiard Association (WPA), A maintains that casual rules, or “American pub rules,” provide that the only penalty for table scratches is loss of turn, the cue to be played where it is, and that they should be playing under those rules. We can envision the conversation between A and B going in many directions. They may disagree (or not) about what WPA rules provide. They may disagree (or not) about what American pub rules are, or about what local rule or house rules are. They may disagree (or not) about whether they should follow this or that set of rules, either for the remainder of the game, or in this initial disputed instance. But of one thing we can be reasonably sure: A and B will not find it convenient to abandon all talk of what this or that set of rules “are” or “provide.”

So the charge of superfluity does not stick. And I find it revealing that Hershovitz doesn’t rest his case on it: “we shouldn’t avoid this sort of talk just because it is superfluous. We should avoid it because it risks a great deal of confusion.” To see why, Hershovitz asks us now to suppose that the chess game we have been imagining does occur during a FIDE-sanctioned competition. “[E]ven in those circumstances,” he observes,

it is possible that play is not governed by the standards expressed in the FIDE rules. Instead, play may be governed by the standards that FIDE intended to adopt, which may or may not have been fully or accurately captured in the text that its officials had in front of them when they voted. Or it may be that play is governed by the standards that would best serve the purposes that FIDE had when it adopted the text, even if those standards are slightly different than the standards reflected in the text. Or it may be that some combination of these things is true, depending on the phase of play or the context of the match. This should all feel familiar, as these possibilities are also at play

---

<sup>52</sup> Id.



in debates over statutory interpretation. And here, just as there, the question which standards govern is a question about the normative significance of a set of social facts.<sup>53</sup>

All that Hershovitz says here is right and important. But it does not undermine the ISP. To the contrary, it suggests that the common notion that rules of a normative system are necessarily fully constituted by the communicative content (or by *a* communicative content) of utterances in a rulebook is much too naïve.<sup>54</sup> (This is why I said a few paragraphs ago that transcribing ‘rules’ “may not perfectly fix” their contents.) It further suggests, as a consequence, that it remains to discover what determinants *do* give the norms of artificial normative systems the contents that they have. And that, I have been emphasizing, is widely viewed as a principal task of general jurisprudence. Hershovitz counsels legal philosophers to abandon this task out of concern that *their* taking artificial norms seriously risks nourishing *others’* mistaken belief that those artificial norms must be whatever an authoritative text expresses.<sup>55</sup> *That* is the confusion that acceptance of the ISP risks. I think that risk is slight, and, in any event, that the strong medicine Hershovitz recommends is a cure worse than the disease. The fact to which Hershovitz rightly points—that norms of a game might differ, even in formal, official, competitive contexts, from what authoritative texts say—only reinforces the need for jurists to explain how the norms of artificial normative systems (e.g., municipal legal systems, games) are constituted. It does not entail that there are no such norms, or that legal philosophers should assume them away.

---

<sup>53</sup> Hershovitz, “End of Jurisprudence,” at 1184-85.

<sup>54</sup> See generally, e.g., Mark Greenberg, “The Standard Picture and Its Discontents,” *Oxford Studies in Philosophy of Law* 1 (2011): 39-106; Mitchell N. Berman, “The Tragedy of Justice Scalia,” *Michigan Law Review* 115 (2017): 783-808. For elaboration on the parenthetical, see Mark Greenberg, “Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication,” in *Philosophical Foundations of Language in the Law* 217 (Andrei Marmor & Scott Soames eds. 2011).

<sup>55</sup> Hershovitz, “End of Jurisprudence,” at 1186.

#### 4. A Change of Hart

Thus far I have tried to foreground, and modestly sharpen, a sense of our normative situation that I claim to constitute the ‘standard positivist picture’. I have also claimed that the picture too often lies dimly in the background of our thinking and wants for explicit defense. Why, if the picture is as intuitive and commonsensical as I claim, is it no more vivid and robustly defended in the jurisprudential literature? Part of the answer, I suspect, is that, although the SPP coheres well with *The Concept of Law*, Hart disavowed key elements of the picture in later work. Moreover, he did so in response to pressures exerted by his student and fellow positivist, Joseph Raz. This section identifies and explains Hart’s change in view, and argues that it was a wrong turn.

In “Legal Duty and Obligation,” a chapter in his 1982 volume *Essays on Bentham*, Hart advanced an arrestingly new account of legal obligation.<sup>56</sup> Rejecting ‘a cognitive interpretation of legal duties in terms of objective reasons’, Hart proposed a non-cognitivist interpretation in which ‘to say that an individual has a legal obligation to act in a certain way is to say that such action may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action’.<sup>57</sup> Hart reaffirmed this position in a 1987 interview with the Spanish-language journal *Doxa*, stating: ‘I now think that this idea of a legitimate response to deviation in the form of demands and pressure for conformity is the central component of obligation’. Acknowledging that this is a ‘new account’, he nonetheless insisted that ‘it is still compatible with the views which I have always held and

---

<sup>56</sup> For a helpful discussion, though reaching conclusions I reject, see Matthew H. Kramer, “Requirements, Reasons, and Raz: Legal Positivism and Legal Duties,” *Ethics* 109 (1999): 375-407.

<sup>57</sup> “Legal Duty and Obligation,” in *Essays on Bentham*: 159-60. This was a revision of an essay first published in 1966, in Italian.

which most of my critics reject that the concept of legal obligation is morally neutral and that legal and moral obligations are conceptually distinct'.<sup>58</sup>

It is true that Hart's 'final, modified position on the nature of legal obligation and its relationship to moral obligation'<sup>59</sup> preserves the core positivist idea that 'legal obligation is morally neutral'. But it is hard to square with the view of legal obligation that he had set forth in *The Concept of Law*. There he had made clear that the primary function of legal obligations, as with other types of primary legal norms, is to guide the conduct of *those to whom the obligation applies*. Yet Hart's revised view turns the citizen's legal obligation to  $\phi$  into a liability condition to be subjected to criticism or sanction for failing to  $\phi$ , provoking Raz to object that 'this sudden Kelsenian twist to Hart's view of legal duties implies that duty-imposing laws are instructions (or perhaps merely permissions) to courts to apply sanctions or remedies against people who are guilty of breach of duty'.<sup>60</sup> If Hart's final view maintains the core idea that 'legal obligation' and 'moral obligation' are conceptually distinct, it renders obscure what makes the former a type of *obligation*. The obligatoriness—even the oughtness—of legal obligation is lost.

What explains this striking change? Hart's own answer was that he had realized that it was impossible to jointly maintain three discrete theses: (1) "that 'obligation' and 'duty' have the same meaning in legal and moral contexts";<sup>61</sup> (2) "that legal and moral duties [are] conceptually independent"; and (3) that judgments about moral duties express beliefs that the duty holder has 'objective' reasons for action "in the sense that they exist independently of his subjective motivation."<sup>62</sup>

---

<sup>58</sup> Excerpts from the interview, in English, are presented in Lacey, *A Life of H.L.A. Hart*, 354.

<sup>59</sup> This is Lacey's characterization, *id.*, not Hart's own.

<sup>60</sup> Joseph Raz, "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies* 4 (1984), 123-31, 131.

<sup>61</sup> "Legal Duty and Obligation," at 147.

<sup>62</sup> "Commands and Authoritative Legal Reasons," in *Essays on Bentham*, at 266-67.

In combination, these premises “would involve the extravagant hypothesis that there were two independent ‘worlds’ or sets of objective reasons, one legal and the other moral.”<sup>63</sup> Hart thought that the solution was to abandon the first premise and replace it with his novel “Kelsenian” interpretation of statements of legal obligation.

Putting aside whether Hart’s proposal solved the problem he identified, it’s unclear why he saw a problem in need of solving. I have claimed (§ 1) that what Hart describes as ‘conceptual independence’ (the essence of which I have captured by *systemic fundamentality* and *content independence*) fits entirely comfortably with his same-meaning thesis (captured by *normative isomorphism*). And positivists may accept that the norms inhabiting these independent domains are ‘objective’ in Hart’s sense of being independent of a purported duty-holder’s subjective motivation. As Philippa Foot observed, rules of artificial normative systems do ‘not *fail to apply* to someone who has his own good reasons for ignoring [them], or who simply does not care about what, from the point of view of [that system], he should do.’<sup>64</sup> I think, therefore, that Hart’s own analysis of the problem misses something of importance. What troubled Hart was the possibility of distinct sets of *reasons*, and the reason that this troubled him was Razian.<sup>65</sup>

Earlier and only in passing, I noted worries about Raz’s contention that law necessarily claims to be a practical authority. (§ 2.1) Here I’ll focus on Raz’s general views about normativity. Raz maintains that all normativity starts with reasons: “The normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons.”<sup>66</sup> Reasons are the basic normative concept: they are

---

<sup>63</sup> Id. at 267.

<sup>64</sup> Foot, “Hypothetical Imperatives,” at 308.

<sup>65</sup> For a distinct but broadly compatible account, see Kevin Toh, “Raz on Detachment, Acceptance and Describability,” *Oxford Journal of Legal Studies* 27 (2007): 403-27, esp. 414-20.

<sup>66</sup> Raz, “Explaining Normativity: On Rationality and the Justification of Reason,” *Ratio* 12 (1999): 354-379, 354.

not reducible to any more basic normative element, and they constitute the building blocks for any more complex normative elements (obligations, rights, etc.). Reasons also possess “real” normative force (§ 1.2); there are no merely ‘ostensible’ reasons. Influenced by this account of normativity, Hart worried that cognitivist analyses of claims about legal obligations must be claims either about moral obligations (as Dworkin maintained) or about law’s *claims* about moral obligations (as Raz contended). Disliking both options, Hart defended his non-cognitivist analysis as the best among three alternatives, all of which he clearly found suboptimal.<sup>67</sup>

Hart was right to have qualms. On the Razian view, normativity concerns reasons, and reasons are real; therefore, for a system to be ‘normative’ (as law plainly is), it must be, in some fashion, concerned with our (real) reasons. John Gardner, operating from within this Razian paradigm, is led to conclude that the game of Monopoly claims that its “obligations, permissions, rights, powers, and liabilities” have real normative force, that they capture what its players really ought to do.<sup>68</sup> That’s a striking conclusion, but not plainly wrong on Razian premises, for Monopoly too is (in some sense) normative. The ISP resists Gardner’s conclusion about Monopoly by maintaining that artificial normative systems, as such, need not concern themselves at all with what we ‘really’ ought to do. Hart’s mistake, then, was to conflate the question of whether a reason—or, if you prefer, a ‘shmeason’<sup>69</sup>—is objective or subjective with the separate question of whether it has genuine normative force. We can have the trio of theses Hart rightly wanted—cognitivism, systemic non-dependence, and normative isomorphism—if we detach normative force from the ‘meaning’ that norm-types share across normative systems.

---

<sup>67</sup> See “Commands and Authoritative Legal Reasons,” at 267-68, for his manifest lack of enthusiasm for his own proposal.

<sup>68</sup> Gardner, “How Law Claims, What Law Claims,” in *Law as a Leap of Faith*, at 136.

<sup>69</sup> See McPherson, “Against Quietest Normative Realism”, at 233.

## 5. Implications

Suppose that the SPP is broadly correct: we live enmeshed in an overlapping multiplicity of distinct normative systems, many of which are artificial and that we choose to inhabit. We have powers and disabilities, liabilities and immunities, privileges, rights, and duties furnished by morality, law, family, games, etiquette, and so on. It is not an existence condition of an artificial norm that it possesses real normative force. In this final section, I offer four suggestions regarding possible lessons for metanormative investigations of law.

First, on many topics that have traditionally occupied the field, jurists should broaden their focus. If legal systems constitute a subclass of artificial normative system, jurists will sometimes learn more by looking carefully at artificial normative systems generally.

Second, as I have emphasized from the start, a principal task for jurisprudence remains to explain how legal norms have the contents that they do. Our need for such an explanation cannot be elided by observing that artificial systems generate norms with only ostensible normative force and that what we want to know at the end of the day is what we really should do.

Third, this makes jurisprudence important *if* different accounts of what gives legal norms their contents have at least some different first-order legal implications. Do they? That's a common view.<sup>70</sup> David Enoch casts doubts, however, in his contribution to this volume. Consider a putative or apparent legal norm that is morally unjust. Different jurisprudential accounts might generate different answers to the question of what the law does require. But what we really care about, Enoch says (echoing proponents of the one-step protocol, § 3.1), is what a judge should do. Because that is ultimately a

---

<sup>70</sup> See, e.g., Scott J. Shapiro, *Legality* (Cambridge: Harvard University Press, 2011): 25.

moral question (or a question about ought-sans-phrase), the same answer should obtain regardless of how we answer the legal question: either (depending upon the details), the law requires other than it superficially appears to require, and comports with justice, in which case the judge should enforce it; or what the law requires is unjust, in which case the judge should not enforce it.<sup>71</sup>

I find Enoch's doubts about whether positions in jurisprudence have first-order implications misplaced, for two reasons. First, even if judges (really) should care only about what they (really) should do, whether that is all they *do* care about is an empirical question. If a nontrivial number of judges try to follow the law, then what they will do will be shaped by what they take the law to be, which will be partly a function of the account of the determination of legal norms that they accept, consciously or not. Second and independently, Enoch overlooks cases in which different constitutive theories yield different legal norms both of which (or all of which) are morally allowable.<sup>72</sup> A judge will often find herself within a sea of moral allowability: ruling for plaintiff or for defendant would each be morally permissible (in fact, or as far as the judge can discern), and the critical question confronting the judge is: what does the law provide? What it provides is partly a function of general truths about how norms of that particular legal system are constituted. And truths about how the legal norms of that jurisdiction are constituted will be partly a function of, or at least must be consistent with, yet more general truths about how norms of legal systems as a group are or can be constituted. Thus, different jurisprudential theories—that is, different accounts of how the norms of legal norms are constituted—will generate different views about what the system's norms provide, which will in turn generate different conclusions about what the judge should do.

---

<sup>71</sup> Enoch, "Is General Jurisprudence Interesting?" at 29.

<sup>72</sup> See *supra* note 26.

Fourth, notwithstanding my first observation, it need not be that *all* normative systems are comparably illuminating for the metanormative study of law. At this point a typology of systems of practical normativity would be useful. Without any pretense of exhaustiveness,<sup>73</sup> here are six dimensions on which normative systems vary: (1) systems can be ‘artificial’ (depending upon actual human practices) or ‘non-artificial’ (practice-independent); (2) systems can generate ‘real’ normativity or only ‘ostensible’ normativity; (3) systems can be ‘formal’ (involving norm-creating texts) or ‘informal’ (lacking them); (4) systems can be ‘institutional’ in authorizing particular persons or assemblages to perform particular tasks, such as to change or enforce norms and to adjudicate alleged violations, or ‘non-institutional’; (5) systems can be ‘limited’ in the behaviors or areas of life that they purport to govern, or ‘comprehensive’; and (6) systems can be ‘consensual’—i.e., issue norms that purport only to govern persons who voluntarily subject themselves to the system’s jurisdiction—or ‘extra-consensual’—purporting to govern persons regardless of their consent.

Law and interpersonal morality are like each other, and unlike many or most other systems of practical normativity, with respect to the latter two dimensions: they are comprehensive and extra-consensual. I suspect that these two features lead many jurists to believe that, among all normative systems, morality is the most useful or illuminating comparison for the metanormative study of law. On the other hand, law is unlike morality, and like many sports and games<sup>74</sup> on the four other dimensions noted: law and games are artificial, ostensible, formal, and institutional. Morality (on most accounts) is none of these things. There are reasons to believe that formality and institutionalization are two especially important dimensions for purposes of understanding the grounds and grounding of law.

---

<sup>73</sup> For a different take, see Raz, *Practical Reason and Norms*, at 107-23.

<sup>74</sup> Exactly what games and sports are, and what the relationship between the two is, are controversial matters. See my “Sport as a Thick Cluster Concept,” in Hurka ed. (OUP forthcoming). A rough pre-theoretical sense of sports and games is good enough for now.



If so, formal and institutionalized sports and games will be especially fertile sources for jurisprudential investigations.

The importance of formality should be obvious. Formal normative systems contain authoritative formally promulgated texts. Law, rugby, and Clue are formal systems; morality, fashion, and etiquette are informal. The communicative contents of authoritative texts have some constitutive role to play in the determination of a formal system's norms. But the suggestion that the communicative contents of a legal system's authoritative texts necessarily *fully* determine the law of that system is heterodox and wildly implausible.<sup>75</sup> It likely follows that legal norms are constituted by some combination or interplay of semantic facts and other facts, possibly including facts about historical practices and moral principles. Informal normative systems cannot shed light on this complex determination relationship; other formal normative systems potentially can. Think of the famous 'pine tar incident' from a 1983 baseball game between the New York Yankees and the Kansas City Royals.<sup>76</sup>

Although most formal normative systems are institutional and most institutional normative systems are formal, institutionalization is a distinct characteristic of distinct significance. Some skeptics of the ISP claim support for their views from the apparent fact that the various participants in a legal system are frequently not governed by the same set of norms. The driver of a motor vehicle might be subject to a legal prohibition against traveling faster than 65 mph, while a traffic cop might be subject to a legal directive to allow driving as fast as 75 mph. Or Congress might have legal power to regulate intrastate activity only if the activity substantially affects interstate commerce, while courts are legally enjoined to uphold legislation so long as they determine that Congress *could rationally conclude* that the

---

<sup>75</sup> See supra note 51.

<sup>76</sup> The incident is described and discussed in Hershovitz, "The End of Jurisprudence," at 1185 n.49; Berman, "Our Principled Constitution."

activity being regulated substantially affects interstate commerce. Kornhauser concludes, on the basis of examples like these, that

It is not clear that there is a single norm that we might call the law that governs the decision of each of the agents [that make up the legal system]. The separation of governance tasks and the complex institutional relations make it unlikely that we can usefully distill a single norm from the web of decisions that individual public officials make.<sup>77</sup>

That is a conceivable lesson: possibly, legal systems direct members of the public to comply with (or conform to) a set of norms that differ somewhat from the norms that govern one class of government agents (say, executive officers), which differ as well from the norms that govern another class of government agents (say, judicial officers), and so on: there is no commonality to these divergent sets of norms. An alternative explanation is that differently situated agents are subject to different norms *regarding how they are to engage with a single norm*. On this latter view, a legal system can consist of a welter of *norms about norms*: primary norms that regulate the behavior or the system's subjects as well as secondary norms that regulate how enforcers (e.g., police officers) are to enforce those primary norms, and how adjudicators (e.g., judges) are to adjudicate claimed violations of those primary norms. Just to identify these distinct possibilities suggests that, in order to understand how norms of legal systems are constituted, jurists might need, as well, to excavate the normative structure or architecture of legal systems. There is a substantial, and growing, legal-theoretic literature on just this subject.<sup>78</sup> And on this topic, once again, other normative systems that have a complex *institutional* structure may prove a source of useful insights, analogies, and contrasting cases that informal normative systems cannot similarly provide due to their comparatively flat institutional configuration.

---

<sup>77</sup> Kornhauser, at 17; see also, e.g., Hershovitz, "End of Jurisprudence," at 1202-03.

<sup>78</sup> See, for an entry into it, my "Constitutional Decision Rules," *Virginia Law Review* 90 (2004): 1-160.

Jurisprudes have many tools in their toolbox. Among the small handful of analytic strategies that he identifies, Scott Shapiro recommends the effort “to stimulate thought through the heavy use of comparisons on the premise that examining institutions and practices that are similar, but not identical, to law, such as games, organized crime, religion, corporations, clubs, etiquette, popular morality, and so forth, will better equip us to appreciate the distinctive aspects of law itself.”<sup>79</sup> I am suggesting that philosophers of law zoom out from law to other normative systems to better understand, not what is distinctive about law, but what isn’t.

---

<sup>79</sup> Shapiro, *Legality*, at 19. Shapiro calls this the “Comparative Strategy.” I’d use that term for the strategy I am proposing and rename the approach Shapiro identifies the “Contrastive Strategy.” Jurisprudes should help themselves to both.