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Is the rule of recognition really a duty-imposing rule?

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According to a persistent assumption in legal philosophy, the social rule at the foundation of a legal system (the Rule of Recognition) serves both an epistemic and a duty-imposing function. Thus, some authors have claimed that it would be a formidable problem for legal philosophy to explain how such social rules can impose duties, and some have taken it upon themselves to show how social practices might just do that. However, I argue that this orthodox assumption about the dual function of rule of recognition is ill-founded. Contrary to the orthodox view, we have no good reasons to ascribe more than an epistemic function to the rule of recognition. Accordingly, the norms deriving immediately from the rule of recognition are no different than those entailed by other epistemic, grammatical or syntactic norms. Consequently, accounts of the normativity of law need not explain how social practices like conventions or plans might impose duties on the officials of a legal system.

Keywords: *Rule of Recognition, legal conventionalism, epistemic rules, duty-imposing rules, HLA Hart*

1 INTRODUCTION

According to a persistent assumption in legal philosophy, the social rule at the foundation of a legal system (the *Rule of Recognition*, or RR) serves both an epistemic and a duty-imposing function. Thus, some authors have claimed that it would be a formidable problem for legal philosophy to explain how such social rules can impose duties, and some have taken it upon themselves to show how social practices might just do that. But despite much recent interest in the nature of the rule of recognition, only rarely have authors in the philosophy of law paused to seriously consider whether this widespread assumption is actually justified; on the few occasions they have, their arguments have often been surprisingly ad hoc. I argue that, on a closer look, their arguments are unconvincing: contrary to the prevailing view, it is not necessary to assume that the rule of recognition would be duty-imposing in order to explain the normative foundation of a legal system. The only practical norms that must derive from this rule are hypothetical imperatives, no different than hypothetical imperatives entailed by epistemic, grammatical or syntactic norms. Consequently, accounts of the normativity of law need not explain how social practices

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like conventions or plans might impose duties – whether they be moral, legal or social – on the officials of the legal system to follow the criteria of the rule of recognition.

In section 2, I briefly recapitulate the philosophical origins of the assumption that the rule of recognition would be a duty-imposing rule and that accounts of law's normativity would therefore need to explain how social practices might generate duties. Since the view that the rule of recognition serves a duty-imposing function has originally been attributed to HLA Hart, section 3 provides a brief but careful exegesis of Hart's influential account of the rule of recognition in *The Concept of Law*. I argue that Hart's discussion in *The Concept of Law* does not imply that the rule of recognition would need to be duty-imposing in addition its epistemic function. In section 4, I consider recent arguments in favour of the view that the foundational rule of a legal system must be duty-imposing and argue that none of them are convincing. I end with a brief consideration of the question whether the rule of recognition could be a power-conferring rule.

Throughout the article, I will use the terms 'rule' and 'norm' interchangeably. When discussing different kinds of rules, I distinguish them according to their function.[1] For the purpose of this article, I want to remain agnostic about what, ultimately, the correct account of social, legal and moral duties would be and instead address each argument that the rule of recognition would be duty-imposing on its own terms. Hart himself tentatively characterized the general idea of obligation as connected with rules, significant social pressure for conformance, securing important aspects of social life, and often conflicting with self-interest;[2] with this general idea, Hart explicitly referred to social, legal as well as moral obligation. While some legal philosophers have followed him in this regard, it is not always clear what conception of duty authors espouse, and often this remains unsaid. Moreover, some authors have taken the assumption that the rule of recognition must be a duty-imposing rule to provide support for anti-positivist views on which the officials have a *moral* duty to apply law, and contemporary positivists take different views on what kind of obligation – for example, quasi-legal or social – the rule of recognition would impose. Therefore, wherever possible, I will also leave open what kind of duty the rule of recognition allegedly imposes and address the specific arguments on their own terms. For the main point of contention is whether *any* duty-imposing function is necessarily part of the rule of recognition, not whether the basis of such a duty would be moral, legal or social; and if there are no convincing reasons for assuming that the

1. A similar distinction is drawn by Eugenio Bulygin, 'On the Rule of Recognition' in Carlos Bernal et al. (eds), *Essays in Legal Philosophy: Eugenio Bulygin* (OUP 2015) 117–23. Bulygin distinguishes between 'rules of conduct', for which he reserves the term 'norm' and which are defined by the presence of a deontic modality (i.e., prescribe, proscribe or permit action), and 'conceptual rules', which include legal definitions ('all people 21 years old or older are "adults"'), the rule of recognition, as well as grammatical and syntactic rules. In Bulygin's terminology, we could say that epistemic rules are a subset of his 'conceptual rules'. For other ways of drawing similar distinctions, see George Henrik von Wright, *Norm and Action: A Logical Enquiry* (Routledge 1963), distinguishing between 'rules', 'directives' and 'proscriptions'; and John Searle, 'How to Derive "Ought" from Is' (1964) 73 Philosophical Review 43 and John Searle, *The Construction of Social Reality* (Free Press 1995), distinguishing between 'constitutive' and 'regulative' rules. Bulygin later came to identify his distinction with Searle's distinction, despite some disagreements with Searle's contention that constitutive rules can simultaneously regulate conduct. Eugenio Bulygin, 'On Norms of Competence' (1992) 11 Law and Philosophy 201.
2. HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 85–87.

rule of recognition must impose obligations of any kind, the question what kind of obligation it would be becomes irrelevant. Finally, when drawing on analogies between the rule of recognition and rules of speech, I do not presuppose any specific view about the normativity of meaning. Whatever view about the normativity of meaning one takes – whether rules of meaning be 'non-normative', 'extrinsically normative' or 'intrinsically normative' – my contention is merely that the rule of recognition need nothing over and above its epistemic function in order to fulfil its role at the foundation of a legal system; and, consequently, a philosophical explanation of the normative foundations of a legal system requires no account of social, moral or legal duties either.

2 THE ORTHODOX ASSUMPTION

According to Hart's influential account in *The Concept of Law* (CL), at the basis of each legal system is a social rule which legal officials use to identify the sources of law, and which exists not because it has been authorized by any higher legal authority, but simply as a matter of social fact.[3] Over the last decades, many of the legal philosophers who have written about the normativity of law have consistently taken the view that this social rule, the *Rule of Recognition* (RR), is duty-imposing. Thus, on the prevailing assumption the RR serves the epistemic function of identifying what counts as law in a specific legal system and also imposes obligations on legal officials to identify law in only the way specified by the rule. To my knowledge, the first legal theorist to express this view was Joseph Raz, in *The Concept of a Legal System*, first published in 1970.[4] Just two years later, Ronald Dworkin argued that it is a formidable problem of legal theory to explain why judges have a duty to apply the criteria set out in the RR, and he rejected Hart's account of the RR (among other reasons) precisely because he thought a social rule could not impose duties.[5] Many legal philosophers have since followed Dworkin's lead and accepted his challenge for legal philosophy to explain how the existence of social practices can impose duties on officials to follow the criteria set out in the RR. For instance, Gerald Postema complained that if we follow Hart's influential account of law, 'we face a philosophical, rather than merely an exegetical, puzzle: How is it that the fact of the behaviour, beliefs, and attitudes of officials generate genuine duties for those officials?'[6] Similarly, Stephen Perry has claimed that 'Hart is content simply to make the observation that officials and perhaps others accept the rule of recognition, meaning they regard it as obligation-imposing. This is to describe the problem of the normativity of law rather than to offer a solution.'[7] And according to Jules Coleman, 'one burden that falls to those who view the rule of recognition as purporting to impose a duty on

3. Throughout this article, I will focus on Hart's account of the rule of recognition in the main body of the CL, to the exclusion of the postscript which was added in the second edition.
4. Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980) 199.
5. Ronald Dworkin, 'Social Rules and Legal Theory' (1972) 81 Yale Law Journal 855, 858. Although Dworkin does not attribute his interpretation to Raz's influence, it is worth noting that in 'The Model of Rules' (1967) 35 University of Chicago Law Review 14, published five years earlier, Dworkin writes about the RR as if its function were merely epistemic.
6. Gerald Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 The Journal of Legal Studies 165, 171.
7. Stephen Perry, 'Hart's Methodological Positivism' (1998) 4 Legal Theory 427, 466.

officials is to explain how conventional rules can be duty-imposing. This is a serious challenge …'[8] More recently, Scott Shapiro has given this worry a pivotal place in motivating his 'planning theory' of law: 'Hart hasn't so much dispelled the mystery as magnified it. … How does [a duty-imposing rule] come into being simply by being accepted and practiced? This seems like magic.'[9]

If the RR had been supposed to impose duties, then Hart's account of social rules would not have explained how it could do so.[10] And many of those legal theorists who took Dworkin's bait of interpreting the RR as duty-imposing have since tried to explain how social rules might just do this.[11] In this way, discussions of how social rules relate to the RR have become a key aspect of the literature on the normativity of law. Correspondingly, accounts of the normativity of law that leave out the role of the RR risk missing their target. For instance, David Enoch has convincingly argued that explaining the normativity of law calls for the application of a general account of reason-giving to the law. However, Enoch has also suggested that such an account would help exorcise the 'spectre of the normativity of law' – a deep, but allegedly misguided, sense of puzzlement about the normativity of law – which has been haunting jurisprudence. But as far as I can see none of the contemporary authors Enoch cites as being haunted by this spectre are merely, or even primarily, concerned with law's general reason-giving power; instead, they are primarily concerned with

8. Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003) 85.

9. Scott Shapiro, *Legality* (HUP 2011) 95. The original term in the place of the square brackets is 'head-baring rule', which Shapiro uses as an example for a social, duty-imposing rule.

10. In fact, neither Hart's account of the RR nor his discussion of social rules, i.e., the 'practice theory of rules', are meant to do this. Nevertheless, Dworkin criticizes Hart's practice theory of rules for not explaining how facts can create obligations. Dworkin, 'Social Rules and Legal Theory' (n 5). Dworkin here either misunderstood or mischaracterized Hart's account. For the practice theory of rules was meant to provide an account of how we can distinguish between habits or coincidentally converging behavior and rule-following. That is, it was meant to help us detect the phenomenon of rule-following, not explain the reasons (or obligations) people might have for following rules. However, it has been frequently argued that Hart's practice theory of rules is only an imperfect detector since it merely tracks the distinction between habits and rule-following but fails to distinguish between rule-following and generally applicable reasons. See e.g., Leslie Green, 'Positivism and Conventionalism' (1999) 12 Canadian Journal of Law and Jurisprudence 35, 37; Andrei Marmor, 'Legal Conventionalism' (1998) 4 Legal Theory 509, 511–12; Scott Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469, 493. This distinction was first pointed out by GJ Warnock, *The Object of Morality* (Methuen 1971). For a rejoinder to this criticism of Hart see Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (OUP 2003) 251–53.

11. For examples of legal philosophers explicitly endorsing Dworkin's criticism and developing a version of legal conventionalism and 'planning theory' respectively in response, see Postema, 'Coordination and Convention at the Foundation of Law' (n 6) 171 and Scott Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 247–48. Jules Coleman also endorses the Dworkinan line of criticism and develops a conventionalist understanding in response, albeit without explicitly referencing Dworkin. See Coleman, *The Practice of Principle* (n 8) 84–103. Andrei Marmor does not develop his version of legal conventionalism as a direct response to the Dworkinian objection, but arguably indirectly, namely as a response to Hart's suggestions in the *Postscript* and the difficulties of explaining the RR as duty-imposing through a Lewis-inspired account of convention (based on collective action problems). Marmor, 'Legal Conventionalism' (n 10).

how social practices relate to the RR. Since Enoch's (otherwise highly insightful) account does not address how social practices like, for example, conventions could, in his terminology, trigger robust reasons for action, his account cannot exorcise the spectre of the normativity of law unless we also deny that the RR is duty-imposing.[12]

One way to respond to the alleged problem of showing how social rules could impose duties is to revert to moralism a la Dworkin and claim that the function of the RR is fulfilled not by a social rule but by a set of moral principles which impose a range of moral duties on officials. Another way to respond to the alleged problem is to seek refuge in some version of legal 'conventionalism' that explains how social practices can generate the required social obligations.[13] I do not want to offer any in-depth criticism of any of these possible theories (which would go far beyond the scope of this article). For the purpose of the present argument, I merely want to point out that these approaches take it for granted that the Dworkinian line of criticism – namely, that Hart's account in the CL did not show how social rules could impose duties – had to be taken seriously. However, the Dworkinian worry only arises on the assumption that the RR is itself a duty-imposing rule. In the rest of this article, I will argue that this assumption is mistaken – both regarding Hart's own account as well as on independent philosophical grounds.

12. David Enoch, 'Reason-Giving and the Law' in Brian Leiter and Leslie Green (eds), *Oxford Studies in Philosophy of Law: Volume 1* (OUP 2011). Enoch (ibid 1–2) cites Andrei Marmor, 'The Nature of Law' (2008) SEP Fall edition https://plato.stanford.edu/archives/fall2008/entries/lawphil-nature/, Postema, 'Coordination and Convention at the Foundations of Law' (n 6) 171, Coleman, *The Practice of Principle* (n 8) 85 and Green, 'Positivism and Conventionalism' (n 10). Postema explicitly argues that the puzzle is how social rules like the RR can impose duties on the officials. Marmor also explicitly discusses the problem of how social conventions like the RR can give rise to obligations. Coleman also explicitly focuses on the question how social conventions or practices relate to the RR – in particular, how solutions to coordination problems or shared cooperative activities can impose duties. And Green focuses on arguing against conventionalist justifications for authority, taking issue primarily with John Finnis, *Natural Law and Natural Right* (first published 1980, 2nd edn OUP 2011) and Eerik Lagerspetz, *A Conventionalist Theory of Institutions* (Societas Philosophica Finnica 1989). As this recent literature on the normativity of law suggests, an account of the normativity of law need not merely explain the general reason-giving power of law, but also the normativity of a foundational rule which unifies other rules in such a way as to create a legal system.

13. For recent accounts of legal conventionalism see Coleman, *The Practice of Principle* (n 8) 74–102; Marmor, 'Legal Conventionalism' (n 10); Andrei Marmor, *Positive Law and Objective Values* (OUP 2001); Andrei Marmor, 'How Law Is Like Chess' (2006) 12 Legal Theory 347; Postema, 'Coordination and Convention at the Foundations of Law' (n 6); Scott Shapiro, 'Law, Plans, and Practical Reason' (2002) 8 Legal Theory 387; Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11); Shapiro, *Legality* (n 9). Some authors have also maintained that the duties allegedly imposed by the RR can be called 'legal' duties, insofar as the RR can be characterized as both legal and pre-legal, depending on one's definition of the term 'legal'. See e.g., Matthew Kramer, *H.L.A. Hart: The Nature of Law* (Polity Press 2018) 105–07; compare also Hart's remarks on whether or not the RR is properly called a 'legal' or 'pre-legal' rule in *The Concept of Law* (n 2) 111–12. See also John Gardner, *Law as a Leap of Faith* (OUP 2012) 103, where he claims that the RR imposes *legal* duties. However, whether or not we would ultimately want to describe the RR as legal or pre-legal insofar as it belongs to a working legal system, if the RR can fulfil its function in a theory of law without imposing any duties at all (i.e., if it is an epistemic rule), then the question of what kinds of duties legal scholars believe the RR imposes is just as spurious as the assumption that the RR imposes any duties at all.

3 HART'S ACCOUNT OF THE RULE OF RECOGNITION

Since Hart's first introduction of the concept of the RR and the subsequent debate initiated by Dworkin's criticism in 1972, the concept has taken on a life of its own. But since discussions of the RR in contemporary philosophy are heavily influenced, in one way or another, by Hart's seminal text and the historical development of the debate, it is helpful to begin any discussion of the RR by getting clear about what Hart's original account of the RR in the CL really says and entails – and what it does not. While some authors have attributed to Hart the view that the RR would be power-conferring, many have attributed to Hart the view that the RR would be duty-imposing. In this section, I show that Hart's account of the RR in the CL strongly emphasizes its epistemic function but simply remains inconclusive about whether or not the RR might also be duty-imposing.

In the CL,[14] Hart surmised that social structures consisting solely of primary rules of obligations might be a viable option for small communities with close ties of kinship and shared beliefs. But in larger societies, such a system of primary rules of obligation only would soon show a deficiency of *uncertainty*. The remedy for this deficiency would be some criterion by which the members of the community can determine which rules are governing their individual behaviour and interactions: the RR.

> The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.[15]

It does not matter how large or small the community, how complex the structure of rules, or what the criteria be.

> [W]hat is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e., as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.[16]

Thus, Hart's initial discussion of the RR emphasizes its epistemic function, namely to provide 'authoritative criteria for identifying primary rules of obligation'.[17] Hart further emphasizes this function when he later adds that 'the rule of recognition of a legal system is like the scoring rule of a game … it is used by officials and players in identifying the particular phases which count towards winning'.[18] Whereas rules of adjudication and rules of change are introduced to remedy the deficiencies of inefficiency and static nature of a regime of only primary rules respectively, the RR is introduced as a remedy for the uncertainty that can occur in large and complex societies. Hence, in less technical language, it might be fair to call it a test rather than a duty- or power-conferring rule.[19]

14. Since the debate about the nature of the RR, and claims that Hart viewed it as duty-imposing, started before the publication of Hart's postscript, I here focus on Hart's original view presented in the first edition of the CL to the exclusion of the postscript.
15. Hart, *The Concept of Law* (n 2) 94, original emphasis.
16. ibid, original emphasis.
17. ibid 100.
18. ibid 102.
19. That Hart's initial account of the RR explains it as a kind of test has also been pointed out by several commentators. See for instance Shapiro, 'What is the Rule of Recognition (and Does

Hart also tells us what it means for the officials to adopt the internal point of view (IPV) towards the RR and other secondary rules. But his remarks on this point are simply inconclusive as to whether the RR would be duty-imposing, power-conferring or a different kind of rule altogether. Although he points out that in no ordinary sense of the word are officials 'obeying' the RR, his reason for this is that they necessarily also adopt the IPV towards the rule, and thus have an attitude of acceptance or allegiance to the rule that people normally need not have when the obey primary rules of obligation or commands.[20] Could this provide some support for the view that he meant to classify the RR as a duty-imposing rule after all? I think it cannot. For the passage in question says the exact same thing about power-conferring rules.

> [The law's] day-to-day existence consists [not merely in following primary rules, but] also in the official creation, the official identification, and the official use and application of law. The relationship with law involved here can be called 'obedience' only if that word is extended so far beyond its normal use as to cease to characterize informatively these operations. In no ordinary sense of 'obey' are legislators obeying rules when, in enacting laws, they conform to the rules conferring their legislative powers, except of course when the rules conferring such powers are reinforced by rules imposing a duty to follow them. Nor, in failing to conform with these rules do they 'disobey' a law, though they may fail to make one. Nor does the word 'obey' describe well what judges do when they apply the system's rule of recognition and recognize a statute as valid law and use it in the determination of disputes. We can of course, if we wish, preserve the simple terminology of 'obedience' … But this last should perhaps have no more serious claims on our attention than the notion of a nephew without an uncle.[21]

> [W]hat is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity. … What makes 'obedience' misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) *need* involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do: he need have no view of what he does as a fulfilment of a standard of behaviour for others of the social group. … He need not, though he may, share the internal point of view accepting the rules as standards for all to whom they apply.[22]

These passages, then, do not give support to the view that the RR would have to be a duty-imposing rule. Moreover, when discussing the deficiencies of social systems consisting solely in primary rules and the remedies of secondary rules, Hart explicitly notes that rules of change and rules of adjudication are (public) *power-conferring* rules.[23] He also repeatedly refers to 'primary rules *of obligation*' when talking about the primary rules in this section. Perhaps, Hart had not made up his mind, or perhaps he had never seriously considered the question of whether the RR would be best classified as

it Exist)?' (n 11) 239; Grant Lamond, 'The Rule of Recognition and the Foundations of a Legal System' in Luis Duarte D'Almeida, James Edwards and Andrea Colcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart 2013) 114–15; and Stephen Perry, 'Where Have All the Powers Gone? Hartian Rules of Recognition, Noncognitivism, and the Constitutional and Jurisprudential Foundations of Law' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 296.

20. Hart, *The Concept of Law* (n 2) 112–15.
21. ibid 112–13.
22. ibid 115, original emphasis.
23. ibid 96–97.

duty-imposing, power-conferring, or different altogether. After all, when Hart was writing the CL it might not have been foreseeable that this question should turn out to be significant.

Nevertheless, over the last decades, several legal philosophers have argued that Hart's account in the CL implies that the RR must be a duty-imposing rule on his view. Thus, some authors have suggested that, on Hart's account, all rules are either duty-imposing or power-conferring.[24] If this was the correct exegesis of the CL, then it would imply that the RR cannot be a merely epistemic rule.[25] However, as a matter of exegesis, it is clear that the CL cannot be read as precluding the possibility of additional kinds of rules. Although Hart's discussion of rules in the CL only explicitly distinguishes between duty-imposing and power-conferring rules,[26] it is also important to keep in mind that Hart discusses the distinction between these two kinds of rules not in a philosophical vacuum but as response to Austin's reduction of legal norms to duty-imposing norms backed by sanctions. There is simply no indication that Hart is offering an exhaustive account of the different types of rules in the CL. Importantly too, in chapter five of the CL, Hart even points out that 'rules of etiquette or correct speech' are *not* duty-imposing, although they are used to criticize people's behaviour.[27] And it would be quite odd to assume that Hart could have meant to suggest that rules of correct speech confer Hohfeldian powers.[28] Moreover, Hart in fact did mention that there are further divisions among legal rules:

> Law can be best understood as a union of these two diverse types [duty-imposing and power-conferring] of rule. This is, accordingly, the main distinction between types of legal rules stressed in this chapter but many other distinctions could and, for some purposes,

24. Joseph Raz attributes this claim to Hart in *The Concept of a Legal System* (n 4) 199. Similarly, but a bit more ambiguously, Scott Shapiro claims that Hart's framework 'acknowledges' only these two kinds of rules. Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11) 239–40.
25. Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11) 239.
26. Hart, *The Concept of Law* (n 2) 8–10 and 27–33.
27. ibid 86.
28. Hart's claim that rules of speech are not duty-imposing might strike readers as idiosyncratic. For, in the long-standing debate about the normativity of meaning within philosophy of language, many prominent philosophers have defended versions of the view that meaning is 'intrinsically normative' in some way, and thus not conducive to naturalistic explanation (see e.g., Saul A. Kripke, *Wittgenstein on Rules and Private Language* (HUP 1982), Robert B Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (HUP 1994) and John McDowell, *Mind, Value, and Reality* (HUP 1998) 221–62 among others); whereas some have argued that meaning is either 'extrinsically normative' (Paul A Boghossian, 'Is Meaning Normative?' in *Philosophy-Science-Scientific Philosophy. Fifth International Congress of the Society for Analytical Philosophy* (Mentis 2005) 205–18) or non-normative (Anandi Hattiangadi, 'Is Meaning Normative?' (2006) 21 Mind & Language 220). However, it is important to note that the potential 'intrinsic normativity' at stake in the debate about the normativity of meaning is not 'duty-imposing' in Hart's sense. Hart tentatively characterized the general idea of obligation (explicitly referring to social, moral and legal obligation) as connected with rules, significant social pressure for conformance, securing important aspects of social life, and often conflicting with self-interest (*The Concept of Law* (n 2) 85–87) – a notion which has frequently been thought by different authors to require an additional account of conventionalism, planning or morality in the case of the RR. But if the obligation allegedly imposed by the RR were just of the same kind as the 'intrinsic normativity' of meaning, then the normativity of the RR would be a matter for philosophy of language.

> should be drawn …, for further illuminating classifications of laws, reflecting their diverse social functions which is often evidenced by their linguistic form.[29]

Given that the distinction between duty-imposing and power-conferring rules is a distinction in the particular function the rules serve, it would be odd to suppose that this distinction could reasonably have been meant to be exhaustive. The function of duty-imposing rules is to distribute duties and corresponding rights; the function of power-conferring rules is to distribute powers and corresponding liabilities, that is to say, to specify procedures and acts which can alter specific jural relations. Leaving cases like epistemic rules aside for the moment, it would already be implausible to claim that legal systems do not also contain disability-imposing rules or liberty-conferring rules. Anyone who accepts a Hohfeldian analysis of jural relations should conclude that legal systems necessarily contain plenty such rules as well.[30] And the easiest explanation why Hart did not consider these additional rules and their different functions is that none of these rules played a role in his argument against other theories of law.

A more elaborate argument in the contemporary literature in favour of the assumption that on Hart's view the RR would be duty-imposing is the following: (i) according to Hart, it is an existence condition for social rules that those to whom the rules are addressed engage in particular social practices; (ii) Hart's explanation of social rules and their existence conditions in the CL focuses on duty-imposing rules, and Hart does not consider what social practices constitute the existence conditions for power-conferring rules; (iii) the RR is a social, and not a legal, rule; therefore (iv) the RR must be interpreted as a duty-imposing rule.[31] Another version of this argument holds instead of (ii) that: (ii') Hart's account precludes the possibility that power-conferring rules could be social or customary.[32]

In its weaker version, the argument is both a non-sequitur and question-begging. First, the fact that Hart's account of social rules focuses on the explanation of duty-imposing rules does not entail that Hart's account rules out the possibility that power-conferring rules could be social or customary.[33] After all, the CL was not in the business of providing a complete theory, or even an exhaustive account, of social rules.[34] (One might argue that, independently of Hart's account in the CL, the notion of social power-conferring rules is implausible. However, this would be an odd

29. Hart, *The Concept of Law* (n 2) 283.
30. Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16.
31. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 92–93.
32. See Raz, *The Concept of a Legal System* (n 4) 199 and Perry, 'Where Have All the Powers Gone?' (n 19) 299 and 302.
33. Although it has been pointed out repeatedly that Hart's account of social rules focuses on duty-imposing rules, it is not even clear that this is the correct interpretation of Hart's 'practice theory' of rules. On the one hand, Hart does mention duty-imposing rules in his discussion when he references the rule of baring one's head in church and of not moving chess pieces in particular ways (*The Concept of Law* (n 2) 56–57). But on the other hand, Hart also never explicitly mentions that social rules would be duty-imposing, and he even suggests that there are some social rules whose purpose it is to *identify* the legal authorities (*The Concept of Law* (n 2) 58–59), thereby indicating that not all practised social rules are duty-imposing.
34. Nevertheless, it can be readily admitted that it is a shortcoming of Hart's account in the CL that it fails to discuss the practices that might be existence-conditions for social power-conferring rules and the IPV corresponding to such rules. Especially in light of the significance of secondary rules for the existence of a legal system and Hart's criticism of Austin for failing to give enough attention to rules other than duty-imposing, this is an unfortunate omission. This shortcoming of

position to take. Surely different social rules determine what counts as an exercise of genuine promising and what counts as noncommittal small-talk in different cultures. But the rules constituting the practice of promising are also best characterized as power-conferring rules since their exercise alters the parties' normative relations. Indeed, Hart himself pointed out as much when he said – in the context of explaining that power-conferring rules also exist in pre-legal societies – that 'an elementary form of power-conferring rule also underlies the moral institution of a promise.'[35]) Further, even if it were true that Hart's account of social rules would rule out the possibility of social power-conferring rules, this would only entail that the RR is duty-imposing if the distinction between duty- and power-conferring rules was exhaustive – but that just begs the question whether it really is exhaustive.[36] As already mentioned, nothing in Hart's account of the CL itself justifies this assumption. And the assumption that rules which are neither power-conferring nor duty-imposing (like the rules of language) could not be social is wildly implausible. In its alternative version, the argument does not involve a non-sequitur but instead a false premise in addition to being question-begging. As already mentioned, it is just not the case that Hart's account of social rules explicitly precludes the possibility of social or customary power-conferring rules.

Another variation of this type of argument claims that since Hart says that the RR is a public standard for the behaviour of officials, it must be a duty-imposing rule. In other words, since the officials must adopt the IPV towards the rule, and since Hart's explanation of the IPV focuses on duty-imposing rules, the RR must be duty-imposing.[37] Similar criticism applies to this version of the argument: although Hart's discussion of the existence condition of social rules focuses on duty-imposing rules, and thus also on the IPV vis-à-vis duty-imposing rules, this neither entails that there cannot be a version of the IPV that applies to power-conferring rules, nor that there cannot be an IPV that applies to merely epistemic rules.[38] Such a conclusion would be a non-sequitur.

(Besides, what Hart says about the officials' IPV vis-à-vis the RR is, incidentally, in line with the view that the RR is simply an epistemic rule, analogous to rules of language. In the CL, Hart pointed out that to adopt the IPV towards the RR is to adopt a critically reflective attitude, to criticize other officials' divergence from the criteria specified in it, and to take criticism of one's own failure as legitimate in

Hart's account in the CL has also been pointed out by Matthew Kramer, 'Power-Conferring Laws and the Rule of Recognition' (2019) 19 Jerusalem Review of Legal Studies 87, 88–89 and Perry, 'Where Have All the Powers Gone?' (n 19) 308–09.

35. Hart, *The Concept of Law* (n 2) 96.

36. There are additional, similar question-begging arguments in the literature. For instance, it has been argued that (i) the legal powers of officials are necessarily conferred on them by power-conferring rules of change and of adjudication; therefore, (ii) to say that the RR is power-conferring is to confuse the RR with either the rules of change or the rules of adjudication; therefore, the RR is duty-imposing. (Raz, *The Authority of Law* (n 31) 93; Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11) 240; Gardner, *Law as a Leap of Faith* (n 13) 103–04). Another argument of this kind holds that (i) the RR can validate customary rules; (ii) customs are not usually created through the exercise of explicit legal authority; therefore (iii) an RR which validates custom cannot be power-conferring; therefore, the RR must be duty-imposing (Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11) 240).

37. Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 19) 114–15.

38. For a tentative analysis of such an IPV see Kramer, 'Power-Conferring Laws and the Rule of Recognition' (n 34) 89–91.

light of this standard; because this description of a 'critically reflective attitude' might easily sound to readers like moral approval of the RR, Hart was also adamant in emphasizing that the IPV did not entail taking the RR to be morally binding. While this description itself still leaves open the (controversial[39]) possibility of thinking about the 'critical evaluative attitude' as implying not a moral but a quasi-legal duty, Hart's description of the IPV also fits perfectly well the attitude that people show towards rules that are not duty-imposing, like rules of grammar, logic or arithmetic. Most competent speakers of American English take a critically reflective attitude towards the rules of standard American usage, just like virtually everyone takes a critically reflective attitude toward the basic rules of arithmetic. However, it would be implausible to take these rules to be *themselves* duty-imposing in anything like Hart's notion of a duty. We often have moral and social obligations to speak one language rather than another, and to communicate as clearly as we can; but this does not yet entail that the rules of, for example, syntax, grammar and pragmatics are themselves imposing these duties. See also my discussion below for further elaboration of this point.[40])

Lastly, assertions that the RR would be a duty-imposing rule are often accompanied by quotations of Hart's characterization of duty-imposing rules in his discussion of the general idea of obligation. There he writes: 'Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.'[41] Since the social pressure on officials to follow the criteria of the RR is usually significant, it is tempting to assume that Hart here implied that the RR is duty-imposing. However, this further implication is not necessarily entailed by Hart's argument. In the paragraph preceding his assertion about social pressure and demand for conformity, Hart writes:

> The statement that someone has or is under and obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligations. 'He ought to have' and 'He had an obligation to' are not always interchangeable expressions, even though they are alike in carrying an implicit reference to existing standards of conduct or are used in drawing conclusions in particular cases from a general rule. Rules of etiquette or correct speech are certainly rules: they are more than convergent habits or regularities of behaviour; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people's behaviour in the characteristic normative vocabulary. 'You ought to take your hat off', 'It is wrong to say "you was"'. But to use in connection with rules of this kind the words 'obligation' or 'duty' would be misleading and not merely stylistically odd. It would misdescribe a social situation; for though the line separating rules of

39. See Richard Holton, 'Positivism and the Internal Point of View' (1998) 17 Law and Philosophy 597.
40. I surmise that as long as legal philosophers take the RR to be duty-imposing, many readers will be tempted to think of the IPV as moral in nature. For it is not immediately obvious what it could mean to speak of a psychological state in which one takes a 'critically reflective' attitude toward a legal-duty-imposing rule and takes criticism of oneself and others as 'legitimate' while also taking the duty-imposing rule to be morally corrupt. (See especially Holton, 'Positivism and the Internal Point of View' (n 39) 597–606 for a discussion of this problem.) By contrast, there seems nothing mysterious about adopting the IPV vis-à-vis epistemic rules like the RR while either remaining agnostic as to their moral status or even judging them morally deficient.
41. Hart, *The Concept of Law* (n 2) 86.

> obligation from others is at points a vague one, yet the main rationale of the distinction is fairly clear. Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.[42]

Hart would have made his point in this passage clearer if, in the last sentence, he had either chosen the term 'whenever' or 'only when' instead of 'when' – 'whenever' indicating a sufficient condition, 'only when' indicating a necessary condition. However, the context of the quote makes clear that the purpose of introducing the observation that duty-imposing rules are generally accompanied by significant social pressure was to point out that not all rules are duty-imposing. This is a quite modest claim for Hart to make, for here he is merely interested in identifying a set of rules that are definitely not duty-imposing, rather than all and only the rules which are duty-imposing. And, plausibly enough, one straightforward indication that a rule is *not* duty-imposing is that it is not accompanied by significant social pressure. But the passage does not attempt to provide the definitive criteria for identifying duty-imposing rules. As Hart points out at the end of this paragraph: 'What is important is that the insistence on importance of seriousness of social pressure behind the rules is the *primary* factor determining whether they are thought of as giving rise to obligations.'[43] Primary, but not definitive or sufficient. This interpretation is also demanded by a minimal principle of interpretive charity. As I discuss in more detail below, it is perfectly possible to be under an obligation – and also under significant social pressure – to follow a rule that is not itself a duty-imposing rule. For instance, one might be under significant social pressure to conform with the rules of standard American usage as opposed to, for example, the rules of Indian Standard English in specific contexts. But it would be premature to conclude from this presence of social pressure and a corresponding obligation that the rules one is obligated to follow *themselves* must all be duty-imposing. Therefore, Hart would have been clearly mistaken if he had suggested that the presence of significant social pressure for conformity with a rule entails the duty-imposing nature of *that very* rule. However, we should not attribute a significant mistake to a philosopher unless this attribution is strictly necessary for making sense of their text.

Thus, Hart's influential account of the RR in the CL emphasized the RR's epistemic function and remains silent about whether the RR might also be duty-imposing. If anything at all, Hart's persistent characterization of the RR in epistemic terms – from its name, his analogy with scoring rules of a game and his introduction of the RR into his theory as remedying the potential deficiency of 'uncertainty' – even suggests that he thought of its epistemic function as its primary or essential function. At least, his omission to talk about another function of the RR, as well as his continued invocation of its epistemic quality, would be surprising if he had believed that its primary function lay elsewhere. In order to see if this would be a philosophically appealing view, the next section considers recent arguments for the position that the RR must be a duty-imposing rule.

42. ibid 85–86. As I noted above, this passage is also a further indication that Hart himself never intended for his distinction between duty-imposing and power-conferring rules to be exhausting, for here he identifies rules as *not* duty-imposing that are also clearly not power-conferring.
43. ibid 87, emphasis added.

4 IS THE RULE OF RECOGNITION REALLY A DUTY-IMPOSING RULE?

While most recent authors take the RR to be a duty-imposing rule,[44] a few have also claimed that it is a power-conferring rule,[45] and yet others have argued that it must be a hybrid duty-imposing and power-conferring rule.[46] To my knowledge, only one legal philosopher has previously suggested that the RR is neither duty-imposing nor power-conferring.[47] Thus, until now most contemporary legal philosophers share the assumption that the RR is duty-imposing, and (as I noted above) this assumption has significantly complicated explanations of the normativity of law. In the remainder of this article, I will go through the arguments that have been offered so far for this position and show why none of them hold up to scrutiny.

A first influential argument for the position that the RR is duty-imposing in addition to its epistemic function runs as follows: Assume that, at least in easy cases, judges justify their decisions by reference to a set of legal norms. If the judge justifies their decision by norm n, then presumably they must also be able to justify norm n in light of norm n_{+1}, and so on just until they reach the constitution. But then, how does the judge justify her reliance on the constitution? Presumably, the judge will do so by

44. Coleman, *The Practice of Principle* (n 8) 77 and 84; Dworkin, 'Social Rules and Legal Theory' (n 5) 858–62; Gardner, *Law as a Leap of Faith* (n 13) 103–05; Leslie Green, 'Introduction' to HLA Hart, *The Concept of Law* (3rd edn OUP 2012) xxiii; Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 19) 114–17; Neil MacCormick, *H.L.A. Hart* (Stanford University Press 2008) 21; Perry, 'Where Have All the Powers Gone?' (n 19) 296 and 305–06; Perry, 'Hart's Methodological Positivism' (n 7) 446–50; Postema, 'Coordination and Convention at the Foundations of Law' (n 6) 171; Raz, *The Authority of Law* (n 31) 92–93; Shapiro, 'What is the Rule of Recognition (and Does it Exist)?' (n 11) 239–40; Shapiro, *Legality* (n 9) 85 and 93. Some passages in Larry Alexander and Frederick Schauer, 'Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance' in Matthew Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 179 also suggest this view, but it is not clear whether they believe the RR to be a duty-imposing rule, or whether they merely assert that the officials take themselves to have a duty to follow the RR where that duty need not necessarily be imposed by the RR.

45. Lon Fuller, *The Morality of Law* (Yale University Press 1969) 137; Marmor, 'Legal Conventionalism' (n 10) 510; Wilfrid Waluchow, 'Hart, Legal Rules and Palm Tree Justice' (1985) 4 Law and Philosophy 41, 43.

46. Kramer, 'Power-Conferring Laws and the Rule of Recognition' (n 34) and potentially Andrei Marmor who has both claimed that the RR is power-conferring in 'Legal Conventionalism' (n 10) 510 and suggested that the RR is duty-imposing in a way analogous to rules of games in 'How Law Is Like Chess' (n 13) 350–51.

47. Bulygin, 'On the Rule of Recognition' (n 1) first published 1976 as 'Sobre la regla de reconocimiento'. More recently, Jules Coleman has claimed, en passant, that '[s]ome commentators have noted that because the rule of recognition simply states what the criteria of legality are, it should be thought of as neither power-conferring nor duty-imposing'. And, surprisingly, he adds: 'Joseph Raz, for example, adopts what we might call a "semantic" conception of the rule of recognition. … He is committed, as well, to the view that these criteria constitute a "test" of legality – criteria of membership in the category "law". He does not, however, treat the statement of these criteria as a regulative rule that purports to govern anyone's behavior. In that sense, he treats the rule of recognition as having a semantic character only.' Coleman, *The Practice of Principle* (n 8) 84–85. Unfortunately, Coleman does not cite any of the mysterious commentators who are said to have held that the RR is neither duty-imposing nor power-conferring, nor does he provide a citation for the claims he attributes to Raz (who has repeatedly claimed that the RR is duty-imposing).

appealing to a duty to apply or follow the law of the land, which also means following the highest law of the land, that is to say, the constitution. But what gives the judge that duty? At this point, only the RR is left; hence the RR must impose a duty on the judge to apply the norms that are identified as law by the RR, for example, the constitution.[48] Note that according to this kind of argument, the duty imposed by the RR is a duty to apply the norms that are identified as law by the RR. Thus, according to this argument the RR serves both an epistemic and a duty-imposing function: it sets out the criteria for legal validity and also imposes a duty to apply the norms that are thus specified.

Judges generally take themselves to have an obligation to apply the norms that are identified as law by the RR of their jurisdiction;[49] we might also assume that at least in some legal regimes, judges really do have such an obligation (leaving open, for the time being, what kind of duty that would be – whether legal, moral or social). But even if we grant this assumption, why should we therefore conclude that these duties that officials often take themselves to have would themselves be imposed by the RR? In other words, if officials generally take themselves to have an obligation to follow the RR (i.e., apply the norms identified by the RR) of their jurisdiction, why should this imply that the RR is duty-imposing? After all, it is clearly not the case that a duty to follow particular rules must necessarily derive from those very rules. In many social contexts, when I talk to a colleague I ought to speak to them in English rather than, say, German; thus, I have a duty to apply the rules of standard American usage. However, it would be absurd to assume that such obligations to talk to a colleague in English rather than German are imposed by the rules of standard American usage. The duty in question is imposed by the social context, not by the rules of American usage that I am obligated to follow. And it would be counterintuitive, at the very least, to assume that social obligations about what language to speak in which situation are essential to a philosophical explanation of the normativity of, for example, rules of grammar and syntax. Judges may have a whole variety of duties to follow the law of their jurisdiction: for instance, they may have legal duties imposed on them by specific laws or conventional rules determining the appropriate conduct in their office; they might have an additional legal duty in light of their oath of office; and in reasonably just legal systems they might have a moral duty in light of broader moral and political considerations. But none of these potential (and potentially coexisting) duties need be imposed by the RR itself.[50] Consequently, this first kind of argument is not enough to establish that the RR has to be a duty-imposing rule; to conclude this would be a non-sequitur.

For the purpose of the present argument, I want to remain agnostic about whether and when exactly judges in fact have any of these potentially coexisting duties. I merely want to point out that even if we assume that judges have a duty (or duties) to follow the law of their jurisdiction, this assumption by itself does not establish that the RR would be a duty-imposing rule. Consequently, we do not need to explain the specific duties that officials may have to follow the RR in order to explain the nature of the normativity of law. Of course, these duties that judges might have to follow the

48. Dworkin, 'Social Rules and Legal Theory' (n 5) 857–58.
49. Judges reportedly even do so in paradigmatically unjust regimes. See Herline Pauer-Studer and David J Velleman, *Konrad Morgen. The Conscience of a Nazi Judge* (Palgrave Macmillain 2015) and Inga Markovits, *Imperfect Justice: An East-West German Diary* (Clarendon Press 1995).
50. For a similar claim see also Bulygin, 'On the Rule of Recognition' (n 1) 123.

law of their jurisdiction would be interesting too, but their explanation would pertain to political philosophy more generally, and presumably would be part of explaining what makes legal systems effective in the long run rather than a philosophical explanation of the normativity of law – just like explanations of social obligations to speak one language rather than another might be highly interesting, but would be an unnecessary addition to philosophical accounts of the normativity of meaning.

So, what might tempt someone to think that in the case of judges a potential duty to follow the RR would have to derive from the RR itself? Perhaps, the reasoning that led authors like Dworkin down the path of this argument involves a confusion of the 'justification' that occurs when judges 'justify' their decision in a case in light of norms of the system with the 'justification' that occurs when judges justify their own behaviour to themselves and others. In the former case, the justification by definition is justification in light of the norms of the particular system; in the latter case, the justification need *not* necessarily be a justification in light of norms of the system.[51] But the argument might continue that there is an infinite regress in the justification of the former type, and that this regress must be stopped by the latter kind of justification at some point (e.g. at the point where judges have an alleged moral obligation to apply certain kinds of rules and principles). However, once we keep the relevant distinction between kinds of 'justification' in mind, it is difficult to see how the latter kind of justification could possibly function as a stop to the alleged infinite regress in the former kind. If the former kind of 'justification' is justification from the law's point of view, then the fact that, for example, the constitution counts as law in light of an epistemic norm (the RR) is enough and no infinite regress looms – no need to posit any additional duties on the part of judges to act on the law. By contrast, if the former kind of 'justification' is moral justification then the argument illegitimately presumes that all legal justification must ultimately be moral justification. Whatever the merits of such a view, it seems obvious that it would be a non-starter for an argument that the RR must be duty-imposing. At best, if some argument successfully established that all legal justification must ultimately be moral justification then it might arguably also imply that the RR would have to be duty-imposing; but one cannot just presume that all legal justification is moral justification in order to argue that the RR is duty-imposing.

According to another argument, the RR must be duty-imposing because otherwise the officials of that legal system would be free to identify any norms whatsoever as the laws of the system. As Matthew Kramer has put this point, 'Were the Rule of Recognition not duty-imposing, the officials in a legal regime would be legally at liberty to identify any norms at all as the laws of their system.'[52] There are two ways in which this argument might be understood. First, the claim might simply be a version of the former argument, namely that officials are under a duty to apply the law rather than to apply, say, religious norms, and that therefore the RR must be considered as duty-imposing. In this case, the discussion of the previous section applies again. One would need to say more about why the duties of officials to follow the RR need be

51. Andrei Marmor has made a similar point, arguing that questions concerning a moral obligation to participate in a practice is distinct from questions about the practice-related reasons to follow the norms of the practice. See Marmor, 'Legal Conventionalism' (n 10) 530 and Andrei Marmor, *Social Conventions. From Language to Law* (Princeton University Press 2009) 167–68.
52. Matthew Kramer, 'In Defense of Hart' (2013) 19 Legal Theory 370, 379. See also Kramer, *H.L.A. Hart* (n 13) 83 and Kramer, 'Power-Conferring Laws and the Rule of Recognition' (n 34) 94.

imposed by the RR itself. The mere fact that officials generally take themselves to have such a duty is not enough.

Alternatively, the claim might be that the duty imposed by the RR would be a duty to identify law only by means of the criteria set out in the RR; that is, the claim might be that unless the RR was duty-imposing it could not authoritatively specify the sources of law. In other words, unless the RR was duty-imposing it could not fulfil its epistemic function (regardless of whether anyone has a duty to identify law). However, this claim would rest on an unmotivated worry. In order to see why this is so, consider what kind of duties could accompany the RR. There could be D_1, a duty not to identify law by any other means than those specified in the RR; and D_2, a duty not to intend to identify law by any other means than those specified in the RR.[53] Now, D_1 is clearly superfluous. For since the rule in question itself describes which acts count as acts of identifying law, duty D_1 would forbid you to do something that by definition of that very rule you are unable to do. And on a closer look, D_2 turns out to be similarly superfluous. D_2 would not so much prohibit actions as it would prohibit mere intentions regardless of the particular nature of the action. But recall that the point of the epistemic rule was to specify the only possible means to attain a particular end. Thus, D_2 would prohibit the intention to identify law without intending the only means by which one could identify law. In other words, D_2 would simply reiterate the principle that who wills the end also wills the means. Thus, both D_1 and D_2 are superfluous for explaining why judges are not free to identify any norms they want as law. Given that both D_1 and D_2 are superfluous for such an explanation, it would be unnecessary for a theory of law to explain them; and on methodological grounds it would be highly undesirable to introduce unnecessary elements into a theory of law.[54]

Lastly, Jules Coleman has argued that if one does not treat the RR as duty-imposing, then one must still explain why, and when, judges 'are obligated (or have reason) to apply the criteria of validity' specified in the RR, and how the fact that other judges apply particular criteria can be a reason for applying these criteria oneself.[55] If the proposed task is to explain how and when judges have *justifying* reasons to apply law, the best place to look for an explanation is in the fact that judges might have moral reasons to identify law in reasonably just legal systems. Indeed, judges usually (and mistakenly) take themselves to have such justifying reasons even in paradigmatically unjust legal systems.[56] However, as I already explained above, such justifying reasons need not imply that the RR itself is duty-imposing. If, on the other hand, the task is to explain why and when judges have *motivating* reasons to apply the criteria set out in the RR, the discussion of epistemic rules above suggests a ready answer: any petty motive may suffice for people to choose to identify law. As we have seen, officials are not free to identify any rule whatever as a valid rule of their legal system because

53. We can leave aside the broader duty (D_3) 'to identify law rather than e.g., religious or aesthetic norms' for this would be a duty like the one mentioned above which was analogous to my duty to apply the rules of standard American usage. And we have already rejected the thought that such a duty would need be imposed by the RR itself.

54. Compare also Hart's remarks about legal limitations on legislative authority. Hart, *The Concept of Law* (n 2) 69–70.

55. Coleman, *The Practice of Principle* (n 8) 85.

56. As already noted above (n 49), historical evidence suggests that even in paradigmatically unjust legal systems and terror regimes, officials tend to have a moralistic self-image and believe themselves to be under a moral obligation to apply the law of their jurisdiction.

of the epistemic function of the RR: *if* you want to identify law, *this* is how you can do it, and no way else. The RR tells us how we can identify what counts as law in a given jurisdiction – but, for the purpose of explaining the nature of the RR, whether we want to do it, and whether we should do it, is simply irrelevant.[57]

Before concluding this section, it is worth noting two explicit objections to the view that the RR is a merely epistemic rule. First, Grant Lamond has suggested that the RR cannot be merely a guide for which rules count as legal rules because it also serves a constitutive function. As he puts it in his interpretation of Hart's account: 'the language of "Recognition" and "identification" is not entirely apt: what the rule of recognition does is to *constitute* the rules as rules of the system, that is, it *makes* them rules of the system'.[58] In this observation, Lamond is clearly on point: the RR has a metaphysical import, it helps *make* rules into legal rules. But does this not make the idea of the RR as merely epistemic into a non-starter? Haven't I just admitted that the RR serves a metaphysical function? and thus, committed a category mistake?

As a preliminary, the description quoted above requires a small caveat: the RR does not *by itself* make rules into legal rules. Being identified by the RR as belonging to the respective system is a necessary but not sufficient requirement for being a legal rule. Another necessary requirement is that the respective system be efficacious, albeit not necessarily the individual rule. (And note, besides, that this second requirement of largescale efficacy is not satisfied by a duty imposed on officials to follow the RR.[59]) Thus, the question is how the RR fulfils its role of helping to make rules into legal rules; and one possible answer is: through its epistemic function. Indeed, the idea that epistemic and linguistic rules play an important part in constituting social reality enjoys widespread popularity in philosophy. And on the Hartian view of law, the epistemic rule practised by the officials of the legal system makes rules into rules of the relevant system by identifying them. In other words, a rule x counts as a legal rule because there is an epistemic rule practised by a sufficiently large group of people who take rules of type x to count as rules of the system. In this way, law is a system of interrelated norms. A rule belongs to an efficacious legal system if and only if it is identified (directly or indirectly) by the criteria of the RR as belonging to this system.

Why, then, does Lamond claim that the RR cannot be a merely epistemic rule? There would have to be some constitutive function of the RR that could only be fulfilled by a duty-imposing one. So, what is this constitutive function that could only be fulfilled by a duty-imposing rule? In his subsequent discussion, it becomes clear that Lamond conceives of this constitutive function of the RR as its normative import:

> Although this [the view of the RR as merely epistemic] is a possible understanding of the rule of recognition, it does not accord with what Hart says about the rule of recognition, in

57. For a similar argument, albeit in a different context (a defence of complete legal norms and their force to 'authorize' or 'empower'), see Christoph Kletzer, *The Idea of a Pure Theory of Law* (Hart 2018) 59–60.

58. Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 19) 114–15, original emphasis.

59. For recent discussions of the requirement of efficacy see Gerald Postema, 'Conformity, Custom, and Congruence: Rethinking the Efficacy of Law' in Matthew Kramer, Claire Grant, Ben Colburn and Anthony Hatzistavrou (eds), *The Legacy of H.L.A. Hart. Legal, Political, and Moral Philosophy* (OUP 2008) 45, Thomas Adams, 'The Efficacy Condition' (2019) 25 Legal Theory 225 and Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 19).

> particular on its acceptance as a common public standard for official behaviour. This suggests that the rule of recognition is a duty-imposing rule: it not only provides the criteria for the identification of the rules of the system. But imposes a duty on officials to use those criteria in identifying the laws of the system.[60]

Thus, on Lamond's view, the constitutive function of the RR is its provision of a 'common public standard for official behaviour'. And if the provision of such a normative standard could not be achieved by an epistemic rule but only by a duty 'to follow and apply the rules it [the RR] identifies',[61] as Lamond suggests, then we would have our category mistake.

However, we must not presuppose gratuitously that the provision of a public standard for behaviour could only be achieved by a duty-imposing rule – no matter how common this assumption has been. As I have argued above, the assumption that the RR must be duty-imposing in order to provide such a standard for official behaviour is unwarranted. Even without imposing a duty to identify *law*, or a duty to identify law only by means of the RR, the epistemic requirements of the RR (and the potential failure to have identified law) provide a 'common public standard' for law-identifying officials by defining what counts as successful identification of the rules of the respective system. If law-identifying officials fail to comply with the requirements of the RR, they have failed to identify law – whatever their motivation for identifying (or not-identifying) law may be. Thus, just like rules of, for example, meaning, grammar, logic and arithmetic can provide public standards for criticism without themselves imposing duties, so epistemic rules can impose standards without imposing duties. Moreover, if Lamond's conception of the RR's constitutive function were only meant to refer to the fact that 'judges have reason to apply the criteria of validity specified in the RR', then the response to Jules Coleman's objection above would apply.

A second (and similar) objection to the view that the RR is a merely epistemic rule is that this would essentially make the RR into a list; but, so Stephen Perry has argued, lists are not rules and therefore do not have any normative character at all.[62] Now, it is true that duty-imposing rules have a *different* normative character from epistemic rules. After all, the normativity of the former is a matter of practical reason whereas the normativity of the latter belongs to theoretical reason. But as we saw, even epistemic rules, just like rules of speech, are practically significant insofar as they provide the content for potential hypothetical imperatives. As long as officials makes it their end to identify law, the 'list' will be highly significant. (Besides: as Hart himself noted

60. Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 19) 114–15.
61. ibid 115.
62. Perry, 'Where Have All the Powers Gone?' (n 19) 296. A similar thought seems to be implicit in some of Joseph Raz's criticism of Hart's 'practice theory'. Raz argues that the practice theory "deprives rules of their normative character. We have already mentioned that a rule is a reason *for action*. The fact that rules are normally stated by using normative terms (and in trying to refute the practice theory I am arguing, among other things, that it can only be stated in such terms) indicates that they are operative reasons. A practice as such is not necessarily a reason *for action.*" Joseph Raz, *Practical Reason and Norms* (OUP 1999) 56, emphases added. However, as Raz himself admits, rules are not actually reasons: facts are reasons, and there can be facts that there are rules. And as I suggested above, the fact that there is an epistemic rule according to which x, y, z counts as law can be a reason for action insofar as it provides the content for potential hypothetical imperatives.

in the CL, a RR in a less complex legal system might really just be a list.[63]) We should not assume that the 'normative character' of rules (i.e. their reason-giving capacity) can only consist in generating what has been called *robust*-triggering or constitutive reasons for action.[64] It is plausible that almost any natural or social phenomenon can trigger preexisting normative reasons for action; and if that is true, then it follows that 'lists' or epistemic rules like the RR can trigger normative reasons for action like any other social phenomena.

5 IS THE RULE OF RECOGNITION A POWER-CONFERRING RULE?

So far, I have argued that we have no good reason for assuming that the RR would be a duty-imposing rule, in addition to its epistemic function. But one may ask: does this not leave open the possibility that the RR is a power-conferring rule? After all, the arguments in sections 3 and 4 above are all compatible with the view that the RR is power-conferring. Moreover, there is an obvious affinity between epistemic rules and power-conferring rules. For instance, in the case of rules conferring powers to create wills, these rules determine what counts as the creation of a valid will. By determining what counts as a valid will, these rules thus specify the means necessary for everyone who wants to create a valid will. And the same goes for the rules conferring powers on parliament to enact law. These rules specify what kind of thing is a law passed by parliament, and what is not. Furthermore, the argument for the superfluidity of duties for restricting the alleged liberty to identify any norm whatsoever as a legal norm above works just as well for power-conferring rules as for epistemic rules: if one exchanges the RR with the rules for creating a valid will, one gets an equally valid argument for the position that power-conferring rules do not need corresponding duties in order to fulfil their function.

The reason for this affinity, I take it, is that power-conferring rules appear to be a subset of epistemic rules. Power-conferring rules give some agent or agents the legal power to change people's jural relations by some act, and one of the possible epistemic functions that a rule can fulfil is determine which acts count as changing people's jural relations.[65] The rules specifying what counts as a valid will, for instance, empower some people by identifying certain actions as creating legally valid wills. But not all epistemic rules do so empower agents.

Therefore, could it not be that some RRs are at least partially power-conferring? We might think they are; for instance, one might think of *Marbury v Madison*[66] as indicating that the RR of the United States confers powers on the judiciary. Alternatively, we might think that legal rules, contained for example in judgments or custom, confer powers on some actors, and that the RR merely identifies those power-conferring rules as law. I personally do not believe that the RR is a power-conferring rule; however, for the purpose of the present argument, I do not see what, if anything, would turn on whether we answer the question in the affirmative or in the negative. For if power-conferring rules are in fact a subset of epistemic rules then we may plausibly assume that they can be explained in much the same way as other epistemic rules.

63. Hart, *The Concept of Law* (n 2) 94–95.
64. See Enoch, 'Reason-Giving and the Law' (n 12) 1–14.
65. For a similar characterization of power-conferring rules see Bulygin, 'On Norms of Competence' (n 1) 207–11.
66. 5 U.S. 137, 138 (1803).

(Although I believe that this is a plausible assumption, and is in line with existing literature on the nature of power-conferring rules,[67] a full defence of this assumption would go far beyond the scope of this article.) Moreover, as just argued above, power-conferring rules can be explained without recourse to corresponding duties. And that alone would be enough to show that there is no need for accounts of legal conventionalism that try to explain how social practices might impose duties.

6 CONCLUDING REMARKS

Joseph Raz reports that Hart eventually adopted the view that the RR would be a duty-imposing rule,[68] and some of Hart's remarks in his *Essays on Bentham* can potentially be read in this way.[69] If so, that should not have been Hart's view. Because so far, there are no convincing arguments in the literature for the assumption that the RR would be duty-imposing in addition to its epistemic function. And surely, it would be methodologically unserious to complicate our assumptions about law to fit our *idées fixes*. Therefore, the burden of proof must be reversed: rather than making an assumption that significantly complicates our theories of law, the default position must be that the RR is merely epistemic as long as no better argument for the old assumption is put forward. Thus, the Dworkinian worry that it would be a formidable problem for legal philosophy to explain why officials have duties to apply the norms identified by the RR was spurious all along. And consequently, explanations of the normativity of law need not occupy themselves with social practices like conventions or plans in order to explain how a social rule like the RR could itself impose duties (whether they be legal, moral or social) – there simply is no such duty that needs explaining.

67. For a detailed discussion of the nature of power-conferring rules see especially Bulygin, 'On Norms of Competence' (n 1).
68. Raz, *The Concept of a Legal System* (n 4) 199.
69. HLA Hart, *Essays on Bentham* (OUP 1982) 156 and 160.