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Imperatives, Normativity, and the Law

GREGORY M. SILVERMAN*

The rise of the administrative state was accompanied by an obsession with rules as the fundamental unit of legal analysis. This obsession has prevented legal scholars from transcending the limited conception of law engendered by a key dogma of nineteenth century jurisprudence: the dogma that laws are a species of commands, orders, or imperatives. Unreflective doctrinaire acceptance of this dogma continues to perpetuate a false and misleading approach to the problem of legal normativity and to obscure the foundational role played by principles in the law. As a result, even as we enter the twenty-first century, legal scholars have yet to articulate a legal architectonic that properly situates the normative commitments of a society within a post-modern legal system. The present Article takes a first step towards rectifying this situation.

As the reader will quickly realize, the present Article deploys relatively formal methods of argument grounded in the philosophy of language and theoretical linguistics. Beginning from uncontroversial assumptions about the formal contours of the law and the language in which it is expressed, I argue for a presumably more controversial conclusion about the nature of law. Expressed in a formal idiom, the principal conclusion of this Article is that the wellspring of a law's normativity must be located not in allegedly synonymous imperatives but in deontic statements or principles expressing the normative com-

* Assistant Professor of Law, Seattle University; Bigelow Fellow and Lecturer at Law, University of Chicago Law School. M.A. 1984, J.D. 1987, M. Phil. 1991, Columbia University. The author gratefully acknowledges the support of the Alexander von Humboldt Foundation while the author was a Max Rheinstein Fellow at the Lehrstuhl für Strafrecht, Strafprozessrecht und Rechtsphilosophie at the Universität Erlangen-Nürnberg. For helpful comments, the author would also like to thank Bruce A. Ackerman, B. Sharon Byrd, Richard Craswell, Richard A. Epstein, Richard H. Helmholz, Joachim Hruschka, Jan C. Joerden, Dan Kahan, Martha Nussbaum, John Parry, Charles Parsons, Mark D. Rosen, and Douglas Sylvester.

mitments of the legal system.¹ Expressed in a material idiom, this conclusion can be rephrased as the claim that law *qua* law must have a rational basis: a completely arbitrary law is impossible. What connects these formal and material modes of expression is the recognition that deontic statements, in contrast to imperatives, imply the existence of reasons for acting in the manner prescribed.² Thus, if it can be shown that laws derive their normativity from deontic statements, this is tantamount to proving the existence of reasons underlying them. But enough about method.

An adequate theory of law must offer an account of the normativity of law: an account of how the law guides and directs human behavior. Natural law theorists offer a content-dependent account of the law's normativity: they derive the normativity of law from the normativity of morality. For example, a law describing a particular course of conduct as criminal has normative force because we independently accept a principle that, *ceteris paribus*, committing crimes is wrong. Accordingly, from a natural law perspective, the content of a law must be consistent with the moral bedrock from which it derives its normative force. An important corollary of this view is that an "immoral law" has no normative force and may be disobeyed. Legal positivists reject any necessary connection between law and morality.³ They argue that law is law, and, a fortiori, has normative force, irrespective of its content. Accordingly, the challenge for positivists is to provide an account of legal normativity that is content-independent: an account of the law's normativity that relies only on those features of law unrelated to its substantive content—its form, origin, and the practices of the community to which it applies. Legal positivists responded to this challenge by developing what I shall call the imperativist thesis.⁴

The imperativist thesis is an attempt to account for the law's normativity by construing laws as imperatives.⁵ According to the imperativist thesis, laws have normative force because laws are impera-

1. A *deontic statement* is one whose finite verb is either "ought" or "should." For example, the sentence "*Ceteris paribus*, people ought to keep their promises" expresses a deontic statement.

2. See *infra* Part IV.C.

3. For the *locus classicus* of this debate, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

4. Among the more prominent members of this tradition are Jeremy Bentham (1748-1832), John Austin (1790-1859), Hans Kelsen (1881-1973), and H.L.A. Hart (1907-1992).

5. In this article, I use the word "imperative" as a general term to refer to all imperatival statements including imperatives, orders, and commands.

tives and all imperatives have normative force.⁶ Having accounted for the law's normativity through this reductivist maneuver, legal positivists must nonetheless distinguish imperatives in the service of the law from those serving less illustrious ends. To demarcate the legal use of imperatives, legal positivists turn to the two remaining content-independent features of law, arguing that the law comprises only those imperatives that issue from the sovereign or officials of the legal system and that are generally obeyed.⁷ In this fashion, the normativity of law is explained by reducing it to the normativity of the imperatival mood of natural language. According to legal positivists, any further questions about the normative force of law should be referred to linguists as general questions about language.

The positivist attempt to account for the normativity of law by assimilating law to the imperatival mood was admittedly brilliant. Not only did it purport to offer a content-neutral account of legal normativity, but it demonstrated a fundamental connection between law and language, two defining aspects of our humanity. Moreover, viewing these directives as issuing from the sovereign or officials of the legal system captured a fundamental hierarchical structure through which the coercive power of the state is exercised as well as the social norm that these directives are generally obeyed. When these features of the imperativist thesis are combined with its endorsement in one form or another by such luminaries as Bentham, Austin, Kelsen, and Hart, it is little wonder that the rhetoric of law as imperative or command has been embraced and assimilated by our legal culture. Indeed, the use of this idiom by legal scholars and practitioners alike has become so pervasive that it no longer signals commitment to a particular theoretical program.

Notwithstanding its pervasive use as an idiom in our legal culture, however, the imperativist thesis will not stand scrutiny. The imperativist thesis is a nineteenth century jurisprudential dogma that has long outlived its usefulness and now serves only to impede progress toward a better understanding of the nature and structure of law. It is literally false and cannot be reformulated in a manner that is compatible with two fundamental features of law *qua* law: the ability to support counterfactuals and to refer to past and present acts and events.

These shortcomings demonstrate that laws cannot be construed as

6. See *infra* note 61 and accompanying text.

7. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10-33 (Wilfred E. Rumble ed., 1995) (1832); H.L.A. HART, *THE CONCEPT OF LAW* 113 (2d ed. 1994).

imperatives. Moreover, they strongly suggest that it is time to rid ourselves of the post-New Deal obsession with the concept of law as exclusively a set of rules.⁸ Rules are not and ought not to be the fundamental unit of legal analysis. Rather, the shortcomings of the imperativist thesis suggest that the normativity of law must ultimately be grounded on a set of deontic statements or principles actually accepted by the legal system as expressing its fundamental normative commitments.

Acknowledging the foundational role played by deontic statements accepted by a legal system has several important consequences for contemporary jurisprudence. First, it shows that command theories of law, long favored by positivists, must be rejected: laws are not commands, orders or imperatives. Second, it allows us to avoid the errors committed by theorists such as Ronald Dworkin and Neil MacCormick who attempt to incorporate principles into a positivist framework by deriving them from the existing legal rules. Deontic statements expressing the normative commitments of the legal system ground the rules, not the converse. And third, as already noted, it forces us to recognize that laws *qua* laws must be supported by reasons.

Significantly, acknowledging the role played by deontic statements in the law allows one to achieve a proper understanding of legal normativity without having to resolve the debate between natural lawyers and positivists. Whether we characterize the deontic statements accepted by a legal system as legal principles or moral principles is purely a matter of nomenclature. Moreover, from a logical point of view, the content of such principles is irrelevant: they may express a common understanding of the good life, the religious or moral convictions of a ruling elite, or an eclectic motley of unrelated normative commitments. Indeed, these very considerations suggest that the natural law/positivism debate is largely factitious and artificial.

The important jurisprudential task is not resolving artificial academic debates but correcting the current myopic focus on legal rules that accompanied the rise of the administrative state. Central to achieving this goal is developing a framework in which the progressive insights of nineteenth and twentieth century positivism can combine with the deep collective understanding of law as centered on principle that underlies our long tradition of common law scholarship and commentary.

8. The nomocentric focus on rules that accompanied the rise of the administrative state arose in part because rules were viewed as an important device for controlling and monitoring the wide discretion being delegated to the executive branch by the legislature. A full discussion of this development, however, is beyond the scope of the present Article.

It is exactly such a syncretism that this article advocates. For only with such an approach can we further our understanding of the nature and structure of law as a principled system of normative commitments.

The present essay is divided into five parts. In Part I, I introduce the problem of legal normativity and show how that problem arises in a particular theoretical context, H.L.A. Hart's *The Concept of Law*. In Part II, I set out the solution to this problem offered by legal positivists, highlight various problems with its interpretation, and suggest an alternative way in which positivists might attempt to understand the imperativist thesis using the concept of illocutionary force. In Part III, I identify two criteria for evaluating the imperativist thesis: one involving the referential scope of laws and the other, support for subjunctive and counterfactual conditionals. Applying the first of these criteria, I conclude that the imperativist thesis must be rejected because imperatives cannot refer to all the different kinds of acts to which a law must refer. Applying the second of these criteria, I conclude that the imperativist thesis must be rejected because imperatives do not support subjunctive and counterfactual conditionals. In Part IV, I draw three consequences from the critique of the imperativist thesis presented in Part III: the rejection of command theories of law, the recognition of deontic statements or principles as the source of a law's normativity, and the existence of a jurisprudence of reasons. In Part V, I resolve the problem of legal normativity by showing how a law conveys the normative force of the deontic statements that support it and introduce the metalinguistic approach to law.

I. THE PROBLEM OF NORMATIVITY

In this part, I introduce the problem of legal normativity. Part A offers a characterization of how the problem arises in the law generally, while Part B shows how the problem of normativity arises in a particular theoretical context, H.L.A. Hart's *The Concept of Law*. The choice of Hart's *magnum opus* for this purpose is intended to underscore the degree to which this problem has evaded and perplexed even the best legal minds of the twentieth century.

A. *The Problem Defined*

The social norm that laws are generally obeyed is widely acknowledged and well entrenched in most modern democracies. For a law to be generally obeyed, three conditions must be satisfied: 1) the law must describe a course of conduct; 2) a conditional or categorical preference

that the course of conduct be undertaken or forborne must be understood by those subject to the law; 3) under the appropriate circumstances, a sufficient number of those individuals subject to the law must undertake or forbear the course of conduct. When these three conditions are satisfied, we shall say that the law guides or directs human behavior or, more simply, that the law has normative force. Thus, from the fact that laws are generally obeyed, it follows that laws have normative force.

Laws are generally written in the indicative mood.⁹ Grammatical moods are the systematic changes in a verb's form that mark the manner in which the speaker views the action or state of affairs being described.¹⁰ In English, for example, there are three grammatical moods: the indicative, subjunctive, and imperative. Speakers use the indicative form to indicate that they regard the action or state of affairs to which they refer as a fact, or as in close relations with reality.¹¹ For example, in the sentence

I shall not go if it rains

the speaker expresses the condition in the indicative to indicate that he

9. In this regard, it is worth noting that verb phrases beginning with modal auxiliaries—auxiliary verbs such as *can*, *dare*, *may*, *shall*, *will*, *must*, *ought*—are classified as indicative. See RANDOLPH QUIRK ET AL., A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE § 3.52 (1991); see also GEORGE O. CURME, ENGLISH GRAMMAR § 41.B.4 (1953). While classifying verb phrases that begin with these auxiliaries as indicative, these same authors recognize that they may nonetheless have the force of a subjunctive in some constructions.

To avoid possible confusion, it is worth pausing a moment to note the legal and quasi-legal use of "shall" with a third-person subject. See QUIRK, *supra*, § 4.58, at 229-30. In a legal context, "shall" with a third-person subject describes the intended operation of a legal system or transaction. For example, in a contract for sale, a standard provision might read: "The Seller shall convey to the Buyer . . ." Such a provision describes the manner in which the transaction is intended to work by the parties to the agreement. Similarly, a statutory provision, such as one from a sentencing statute, might read: "The judge shall sentence the defendant to not less than 5 years." Such a provision describes the manner in which the legal system is intended to operate in the relevant circumstances by those who enacted the statute. While there is a sense in which these descriptions are constitutive of the legal system or transaction that they describe, they are nonetheless descriptions. Thus, when a court considers the constitutionality of a statutory provision or the enforceability of a contract clause, they are in fact reviewing the intended operation of the legal system or transaction as described in such provisions.

10. See CURME, *supra* note 9, § 37, at 54 ("[Grammatical] moods are the changes in the form of the verb to show the various ways in which the action or state is thought of by the speaker.")

11. See *id.* § 37.A, at 54 (The indicative mood "represents something as a fact, or as in close relations with reality, or in interrogative form inquires after a fact.")

or she believes that rain is a very real possibility. By contrast, speakers use the subjunctive form to indicate that they regard the action or state of affairs to which they refer "as merely existent in the mind of the speaker as a desire, wish, volition, plan, conception, [or] thought; sometimes with more or less hope of realization, or, in the case of a statement, with more or less belief"¹² Speakers use the imperative form to express their will: to guide and direct the behavior of others.¹³ Thus, it is in this form that we cast our commands, requests, admonitions, supplications, entreaties, warnings, and prohibitions.¹⁴

Expressed in the indicative mood, laws describe the legal consequences that attach to the satisfaction of certain predicates. Consider, for example, the Model Penal Code. As its name suggests, the Model Penal Code is intended to be a model or exemplar of penal codes. It was drafted over many years by some of the best legal minds of its day. As such, while it may not be the law of any particular jurisdiction, it may be regarded as authoritative as to the form of such a code. The Model Penal Code is divided into two parts. Part I sets forth the general provisions of the Code, while Part II codifies the definition of specific crimes and related matters. In Part I, for example, § 1.04 states that

An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime.¹⁵

In Part II, § 210.1, Criminal Homicide, states that

A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.¹⁶

Thus, reading the two provisions together, we learn that the legal consequence of being guilty of a crime attaches to a person whenever he purposely, knowingly, recklessly, or negligently causes the death of another human being. Significantly, both provisions are written in the indicative and neither, either alone or together, directs a person not to

12. *Id.* § 37.B, at 54.

13. *See id.* § 116, at 249; *see also* QUIRK, *supra* note 9, § 11.24, at 827-28.

14. *See* CURME, *supra* note 9, § 37.C, at 55.

15. MODEL PENAL CODE § 1.04(1) (Proposed Official Draft 1962).

16. *Id.* § 210.1(1). The terms "purposely," "knowingly," "recklessly," and "negligently" are themselves defined in § 202(2) of Part I.

commit a crime. Indeed, although the Code informs us, *inter alia*, that each element of a specific offense must be proved beyond a reasonable doubt,¹⁷ what defenses might be available to a defendant in a criminal prosecution,¹⁸ and that under certain circumstances a judge is authorized to sentence a defendant who has been convicted of a crime,¹⁹ nowhere does it command, direct, entreat, exhort, or implore anyone not to commit crimes. Nor should this be surprising. Laws describe the intended operation of the legal system. As such, laws are descriptions and are properly written in the indicative mood.²⁰

As the preceding example makes clear, while laws written in the indicative mood describe the legal consequences attached to certain predicates, they do not on their face purport to guide or direct the behavior of individuals. If they were drafted to direct human behavior on their face, they would be written in the imperative mood. For example, while a penal code may guide individual behavior indirectly, to do so directly it would have to include imperative statements such as "Don't commit crimes," "Don't commit murder," "Don't commit assault," etc. To prevent any misunderstanding, let me remind the reader that I have already noted that laws are generally obeyed and, therefore, that laws do in fact guide and direct human behavior. My point here is that they do not do so *on their face* or *directly*. To guide or direct individual behavior directly, laws would have to be written in the imperative mood and they are not.

Given that laws are descriptions in the indicative mood, how can we explain the fact that laws are generally obeyed and, *a fortiori*, that they have normative force? This is the problem of the law's normativity. How can apparently descriptive language be normative?²¹

17. *See id.* § 1.12.

18. *See id.* §§ 3.01-4.01.

19. *See id.* § 7.01.

20. Nor is this merely an idiosyncrasy of Anglophone common law jurisdictions. A perusal of the German criminal code demonstrates that the descriptive character of a law is not altered even when the punitive consequences of an act are introduced. For example, in a form common to many of the provisions of the German *Strafgesetzbuch*, § 212 states that "[w]er einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft." § 212 StGB. Neglecting a few of the statutory incidentals, this provision simply asserts that manslaughter is punished. (For those who would prefer a fuller translation, I provide the following: "Whoever kills another human being, without being a murderer, is punished for manslaughter with imprisonment for not less than five years.") The phrase "*ohne Mörder zu sein*" (without being a murderer) is a reference to § 211 of the *Strafgesetzbuch*. *Id.* § 211.

21. This question concerning the law's normativity must not be confused with the question of why one ought to obey the law. The former is a question about the logic of legal statements, while the latter is a question in moral philosophy. Moreover, one must distinguish both

From the perspective of a natural lawyer, this question has a simple answer. Laws have normative force by virtue of their content. Consider once again an example from the criminal law. When a law describes certain behavior as constituting a crime, it is unnecessary to supplement that law with an imperative because people know independently of any law that one ought not to commit crimes. Thus, the criminal law guides or directs human behavior simply by ascribing the concept of crime to certain kinds of behavior. A law containing the descriptive predicate "constitutes a crime" carries normative force because of the shared moral background of the members of the community governed by that law.

This simple answer, however, is not available to legal positivists. As already noted, positivists cannot embrace a content-dependent account of legal normativity because of their commitment to the separation of law and morals. Instead, positivists must develop an account of the law's normativity based upon content-independent features of law. How they attempt to accomplish this end and whether it is successful is considered in Part II.

Before turning to Part II, however, it may be helpful to view the problem of legal normativity in a particular theoretical setting. For this purpose, consider how the problem of legal normativity arises in the *magnum opus* of H.L.A. Hart.

B. *The Problem of Normativity and H.L.A. Hart's The Concept of Law*

We begin from Hart's well-known discussion of the differences between social habits and social rules.²² After observing that social habits and social rules both imply the existence of general group behavior, Hart asks "[w]hat is the difference between saying of a group that they have the habit, e.g., of going to the cinema on Saturday nights, and saying that it is the rule with them that the male head is to be bared on entering a church?"²³ He responds that there are three important differences.

First, when members of a group deviate from the regular course of

of these questions from the empirical inquiry into why most people do in fact obey the law. This latter inquiry is the province of the social sciences such as sociology, psychology, and economics. The present Article is concerned only with the question about the law's normativity.

22. See HART, *supra* note 7, at 52-61.

23. *Id.* at 55.

a social habit, their deviations do not generally occasion any criticism. In contrast, when members of a group deviate from a course of conduct characterized by a social rule, their deviations "are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity, though the forms of criticism and pressure differ with different types of rule."²⁴

Second, not only does deviation from a social rule occasion criticism, but the deviation "is generally accepted as a *good reason* for making it."²⁵ Similarly, when deviations are threatened, demands for compliance are regarded as legitimate and justified.²⁶ Moreover, whether one is making or receiving the criticism or demands is irrelevant—when a social rule is involved, one must acknowledge their legitimacy. In contrast, threatened or actual deviation from the regular course of a group social habit is not viewed as a legitimate reason for criticizing or making demands upon a member of the group.

Third, a social habit is "merely a fact about the observable behaviour of most of the group."²⁷ Thus, for a social habit to exist, the shared or common character of the behavior in question need not be recognized, acknowledged, or intended by any member of the group. "It is enough that each for his part behaves in the way that others also in fact do."²⁸ In contrast, "[a] social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record."²⁹ Accordingly, for a social rule to exist, at least some members of the group "must look upon the behaviour in question as a general standard to be followed by the group as a whole."³⁰

This last difference is the key one between social habits and social rules—social rules have both an internal and external aspect, while social habits have only the latter. Focusing on this dual character of social rules, Hart distinguishes between the internal and external points of view. According to Hart, the external point of view is held by a mere observer who is content simply to record the regularities of the group's observable behavior without accepting its rules.³¹ In contrast, the inter-

24. *Id.*

25. *Id.*

26. *See id.* at 55-56.

27. *Id.* at 56.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See id.* at 89.

nal point of view is held by a member of the group who accepts the group's social rules as standards of behavior and uses them as guides to conduct.³²

Laws, like social rules, have both an internal and external aspect. Nor is this sheer coincidence. For Hart, laws *are* social rules. Specifically, the laws of a legal system are simply those social rules identified by the legal system's rule of recognition.³³ Accordingly, what Hart has revealed about the nature of social rules is equally true of the primary and secondary rules that compose a legal system.³⁴ The violation of a law may occasion criticism. Threatening to violate a law invites demands for compliance. Violating a law is considered a good reason for criticizing the violator. Threatening to violate a law justifies demands that the threatened action be forborne. Recognizing a law as valid requires one to acknowledge the legitimacy of such criticism and demands when received from others. Focusing on the internal aspect of laws, Hart characterizes these myriad features of a group's social practice by saying that a law, like any social rule, "constitutes a standard of behaviour for the group."³⁵

To show how this distinction between the internal and external points of view applies to laws, Hart considers the example of a traffic law. He notes that a person who adopts the external point of view and observes "the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop."³⁶ According to Hart, such

32. See *id.* at 86.

33. A legal system's rule of recognition is a sufficiently rigorous and definite procedure for identifying the legally valid propositions of that legal system. It provides the ultimate criteria for identifying the laws of a particular legal system. See *id.* at 92, 119.

34. One may recall that Hart's central jurisprudential thesis is that law is the union of primary and secondary rules. "Rules of the first type impose duties; rules of the second type confer powers, public or private," that thereby allow for "the creation or variation of duties or obligations." *Id.* at 81. Concerning the primary rules of obligation, Hart views the criminal law as their exemplar. See *id.* at 32-33, 82. Concerning the secondary rules, Hart claims that there are three basic categories or groups: the rule of recognition, the rules of change, and the rules of adjudication. The rule of recognition is discussed *supra* note 33. The rules of change permit the introduction, elimination, and alteration of the primary rules of obligation as well as allow private citizens to order their affairs. See *id.* at 95-96. The rules of adjudication permit orderly and "authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken." *Id.* at 96.

35. *Id.* at 67; see also *id.* at 33 ("Both the power-conferring rules concerning the making of a will and the rule of criminal law prohibiting assault under penalty constitute *standards* by which particular actions may be thus critically appraised. So much is perhaps implied in speaking of them both as rules.").

36. *Id.* at 90.

an external observer is forced to treat "the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come" and thereby misses "a whole dimension of the social life of those whom he is watching."³⁷ In contrast, members of the group viewing the same traffic light from the internal point of view will look upon the red light "not merely [as] a sign that others will stop," but "as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation."³⁸ Thus, regarded from the internal point of view, a person's failure to stop at a red light is a reason to criticize that person for driving illegally and grounds for demanding compliance with that law in the future.

As this example makes clear, a law viewed as a standard of behavior permits the critical appraisal of a person's action as legally right or wrong. Thus, writes Hart, "[b]oth the power-conferring rules concerning the making of a will and the rule of criminal law prohibiting assault under penalty constitute *standards* by which particular actions may be . . . critically appraised"³⁹ and "[i]n both cases actions may be criticized or assessed by reference to the rules as legally the 'right' or 'wrong' thing to do."⁴⁰ Indeed, Hart suggests, so much is "implied in speaking of them both as rules."⁴¹

For a rule to be viewed as a standard of behavior, however, it is not enough that the rule describe a course of conduct. A rule must also convey, either directly or indirectly, a preference that conduct be done or forbore; it must, in other words, be normative.⁴² A mere description of conduct by itself cannot constitute a standard of behavior for a group because the members of that group will not know whether to do or to refrain from doing the conduct described. Some preference toward the conduct must be understood or the rule cannot serve as a

37. *Id.*

38. *Id.*

39. *Id.* at 33.

40. *Id.* at 32-33.

41. *Id.* at 33.

42. Hart recognizes that the normative force of legal rules is greater than that of most non-legal social rules and often rises to the level of obligation. To explain this difference, Hart notes that "[r]ules 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." *Id.* at 86. He further observes that this occurs when "[t]he rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it." *Id.* at 87. According to Hart, therefore, with respect to the normative character of legal and other social rules, there is *at most* a difference of degree, not of kind.

standard of behavior and be used as a guide to conduct.

As noted earlier, however, legal rules are rarely, if ever, normative on their face. A typical legal rule describes and classifies a kind of behavior; it does not expressly prescribe or prohibit that behavior.⁴³ Consider, for example, one of Hart's own examples drafted along the lines of a provision from the Model Penal Code:

wearing a hat in church constitutes a hattering.⁴⁴

On its face, this imaginary rule does not appear to be normative. It is written in the indicative mood; it is not an imperative; and it does not involve the use of a deontic modal verb such as "should" or "ought."⁴⁵ But unless some preference is understood, this rule cannot constitute a standard of behavior for the group that accepts it. Hart sometimes writes as if this problem can be overcome so long as the members of the group adopt the proper attitude toward the conduct described. For example, Hart writes that "there is involved in the existence of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard."⁴⁶ He stresses the latter: "What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard . . ."⁴⁷ But focusing on the attitude of a group's members will not solve the problem.

Given that the members of the group must have the proper attitude,

43. While Hart recognizes that some legal rules may have a sanction attached to their violation, he views the existence of such a sanction as an analytically separate matter unrelated to the internal or normative aspect of the rule. "In the case of a rule of criminal law," Hart writes, "we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it." *Id.* at 34. Nonetheless, he continues, "[w]e can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it was designed to maintain." *Id.* at 35. See also *id.* at 10-11, 81-82, 86.

44. The term 'hattering' is, of course, a nonce word.

45. If it is normative, therefore, it will be so by virtue of its content—a source of normativity barred to Hart because of his commitment to the separation of law and morals. Since the subject of the rule is merely the description of a course of conduct, the matter turns on the meaning of "hattering" and its normative significance in a particular group's culture. It may be that a hattering is such a grave and serious taboo or crime, that merely classifying a kind of behavior as a hattering is sufficient for members of the group to stop doing it. It may be, however, that a hattering is regarded as so wondrous and good, that as soon as the rule is promulgated, everyone begins wearing their hats to church. Or finally, the term may be without any normative significance whatsoever; it may be purely descriptive or simply meaningless. In this latter case, presumably, the members of the group would not modify their behavior at all. In the first two cases, the rule would be normative; in the third case, it would not.

46. *Id.* at 85.

47. *Id.* at 57.

which attitude is the proper one? Should the members of the group wear their hats in church or not? Unless a preference regarding this conduct is understood, the matter cannot be resolved and the rule cannot serve as a common standard for the group. Nor can Hart appeal to the entrenched group practice itself to resolve this difficulty. On the one hand, it would be logically circular since it is the normativity of the law that presumably accounts for the practice in the first place or for its transformation from social habit into social rule. On the other, it would fail to explain the normativity of new legislation and regulation where no entrenched group practice exists. Accordingly, rather than explaining a law's normativity, Hart's view of legal rules as standards of behavior presupposes it.

Here, then, Hart encounters the problem of normativity. Hart's theory requires that all laws be normative. Laws, however, appear on their face to be purely descriptive. How can such apparently descriptive language be normative?

Hart does not confront this problem. Indeed, it is unclear whether he even perceives it. Nonetheless, if Hart's concept of law is to be generally defensible, then some account of a law's normativity must be forthcoming. In this respect, Hart may have more at stake in the imperativist thesis than is at first apparent. Like other legal positivists, Hart cannot countenance an account of legal normativity that explains the normative significance of a law by reference to its content. To be acceptable, an account must trace a law's normativity to its content-independent features. Accordingly, construing primary rules as categorical imperatives and secondary rules as hypothetical imperatives may be his most palatable alternative. We turn then to consider whether the imperativist thesis can be maintained by Hart or any other legal positivist.

II. THE IMPERATIVIST THESIS

This part introduces and explains the imperativist thesis. Part II.A offers a brief discussion of legal positivists who have endorsed the imperativist thesis in various forms and explains how the thesis may be presented as a solution to the problem of legal normativity. Part II.B highlights various problems with its interpretation. And Part II.C, responding to these problems, suggests an alternative way in which legal positivists might attempt to understand the imperativist thesis using the concept of illocutionary force.

A. *The Thesis Presented*

As already noted, many legal positivists have attempted to develop a content-independent account of legal normativity by construing laws as imperatives.⁴⁸ John Austin is one of the best known legal positivists to have argued that all laws are imperatives. Writing in the first half of the nineteenth century, Austin argued that laws are coercive commands given by the sovereign to her subjects. According to Austin, "every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior . . . to a person or persons in a state of subjection to its author."⁴⁹ Austin could not be clearer on this point: "laws or rules, properly so called, are a *species* of commands."⁵⁰ He notes, moreover, that "since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two."⁵¹

Hans Kelsen, a well-known positivist whose most important works date from the first half of the twentieth century, also embraced a form of the imperativist thesis. In contrast to Austin, however, Kelsen held that laws were commands directed to the officials of the legal system.⁵² "The situation when a rule of law 'stipulates,' 'provides for,' or 'pre-

48. While not all legal positivists have recognized the problem and adopted this strategy for its solution, for ease of exposition I shall avoid constant qualification with respect to this point and speak generally of legal positivists. For a discussion of the principal legal positivists who have endorsed some version of the imperativist thesis, see *infra* notes 49-60 and accompanying text.

49. AUSTIN, *supra* note 7, at 118.

50. *Id.* at 21.

51. *Id.* at 21.

52. For example, Kelsen writes:

When the legislator forbids theft, he may, for instance, first define the concept of theft in a number of sentences which form an article of a statute, and then stipulate the sanction in another sentence, which may be part of another article of the same statute or even part of an entirely different statute. Often the latter sentence does not have the linguistic form of an imperative or an 'ought' sentence but the form of a prediction of a future event. The legislator frequently makes use of the future tense, saying that a thief "will be" punished in such and such a way. . . . The phrase "will be punished" does not imply the prediction of a future event—the legislator is no prophet—but an "imperative" or "command," these terms taken in a figurative sense. What the norm-creating authority means is that the sanction "ought" to be executed against the thief, when the conditions of that sanction are fulfilled.

HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 45 (Anders Wedberg trans., 1945). When Kelsen states that the terms "imperative" and "command" should be taken in a "figurative sense," he means that they do not imply a will in the psychological sense. See *id.* at 35; see also *infra* notes 53-55 and accompanying text.

scribes' a certain human conduct is in fact quite similar to the situation when one individual wants another individual to behave in such-and-such a way and expresses this will in the form of a command."⁵³ "The only difference," he continues, "is that when we say that a certain human conduct is 'stipulated,' 'provided for,' or 'prescribed, by a rule of law, we are employing an abstraction which eliminates the psychological act of will which is expressed by a command."⁵⁴ In other words, "[i]f the rule of law is a command, it is, so to speak, a de-psychologized command, a command which does not imply a 'will' in a psychological sense of the term."⁵⁵ Although Kelsen clearly held that these "de-psychologized" commands were directed at the officials of the legal system, he sometimes wrote as if the law directed commands to ordinary citizens as well.⁵⁶

H.L.A. Hart also appears to accept a form of the imperativist thesis. Hart criticizes both Austin and Kelsen for holding that *all* laws are imperatives.⁵⁷ According to Hart, the conception of law as orders backed by threats cannot account for the existence of "power-conferring rules."⁵⁸ As already noted, however, although Hart ably shows that such rules cannot be assimilated to orders backed by threats, it is unclear whether he would or should object to viewing them as hypothetical imperatives.⁵⁹ In any case, even Hart appears to accept the claim that at least *some* laws (i.e., duty-imposing rules) can be construed as imperatives. In his discussion of theories that attempt to assimilate all laws to orders backed by threats, he notes that "the criminal law and all other laws which impose duties . . . already conform to the simple model of coercive orders."⁶⁰

53. KELSEN, *supra* note 52, at 35.

54. *Id.*

55. *Id.*

56. *See, e.g.*, HANS KELSEN, *THE PURE THEORY OF LAW* 35 (Max Knight trans., 1970) ("That the law is characterized as a 'coercive order' does not mean—as is sometimes asserted—that it 'enforces' the legal, that is, the commanded, behavior. This behavior is not enforced by the coercive act, because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded, manner."). *See also id.* at 50 ("A behavior may be regarded as legally commanded . . . only if the contrary behavior is made the condition of a coercive act directed at the individual thus behaving.").

57. *See* HART, *supra* note 7, at 18-48.

58. Power-conferring rules can be private or public. Private power-conferring rules enable "individuals to mould their legal relations with others by contracts, wills, marriages, &c." *Id.* at 28. Public power-conferring rules enable officials of the legal system to alter the law and adjudicate disputes that arise thereunder. *See id.* at 41-42.

59. *See id.* at 28; *see also supra* Part I.B.

60. HART, *supra* note 7, at 40-41.

Construing laws as a subset of imperatives, legal positivists offer in effect the following explanation of legal normativity:

All imperatives have normative force.
 All laws are imperatives.
 Therefore,
 All laws have normative force.

Note that from the perspective of the legal positivists, at this point the burden of providing an explanation of the normativity of imperatives shifts to theoretical linguists. While legal positivists must, of course, defend their identification of laws with a class of imperatives, they need not explain how imperatives themselves have normative force.⁶¹

B. *Interpretative Problems with the Imperativist Thesis*

Irrespective of how theoretical linguists explain or justify the premise that all imperatives have normative force, the major problem with this explanation of legal normativity is that the second premise is literally false—it is not the case that all laws are imperatives. As we have already seen, most laws are written in the indicative mood.

How then are we to understand the legal positivists' claim that laws are imperatives? Or more to the point, how can the legal positivists justify construing laws as imperatives? Traditionally, legal positivists who have embraced the imperativist thesis have stated that laws are imperatives that issue from the sovereign or officials of the legal system and that are generally obeyed. But neither of these content-inde-

61. This shift in the responsibility for providing the remaining details of a complete analysis, however, does not mean that legal positivists are out of the woods. It is quite possible that the explanation offered by linguists will nonetheless cause problems for the positivist. For example, let us assume that various theoretical linguists attempt to explain the normativity of imperatives by pointing out that the imperativ mood is used to express the will of the speaker and that the normative force of an imperative can be traced to an act of willing by the speaker who utters it. Under such a theory, the imperativ utterance merely mediates the normative force that has its wellspring in an act of willing. In other words, the use of the imperativ mood might be said to indicate the speaker's will much as the subjunctive mood is said to express a speaker's doubt or desire, or the indicative mood to state what the speaker considers a matter of fact. Needless to say, if such a theory became the accepted explanation of an imperative's normative force, then the legal positivist would have to accommodate it by positing a sovereign will or, at the very least, a sovereign act of willing—a deeply problematic assertion once one recalls that the people, not their representatives, are sovereign in most modern constitutional democracies. Whether one is sufficiently wedded to legal positivism to tolerate such metaphysical awkwardness, however, may be set to one side as nothing in the remainder of the argument turns on a legal positivist biting such bullets.

pendent features of a law appears to justify construing it as an imperative.

Clearly, the origin of a law does not support its construal as an imperative. The sovereign or officials of a legal system may utter statements in each of the three grammatical moods. Moreover, it is likely that the majority of their utterances are in the indicative. Nor are imperatives the only form of normative statements the sovereign or officials of the legal system might use: they could also express themselves using deontic statements. Indeed, the only special relation that can be discerned between a law's provenance and the grammatical mood under which it should be construed is that the sovereign or officials of the legal system express the laws they promulgate in the indicative mood—hardly a reason for construing them as imperatives.

Nor does the social norm that laws are generally obeyed support the identification of laws with imperatives. Indeed, rather than supporting any particular solution to the problem of legal normativity, it is from the existence of this social norm that the problem arises. If most people did not obey the law, we would not view the law as guiding or directing human behavior and, a fortiori, as having normative force. In other words, but for the fact that laws are generally obeyed, we would not be asking how an apparently descriptive statement can be normative.

Unable to justify the imperativist thesis on the basis of a law's provenance or the practices of the community to which it applies, legal positivists might appeal to a law's grammatical or logical form.⁶² Such

62. By "grammatical form," I mean the syntactic surface structure of a sentence. Every sentence has a grammatical form. It is this syntactic structure that children learn to parse in grade school by classifying its various parts as nouns, verbs, adjectives, adverbs, prepositions, phrases, and clauses. See NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 16-18 (1965); JOHN LYONS, INTRODUCTION TO THEORETICAL LINGUISTICS 247-49 (1968).

By "logical form," I mean the semantic representation or underlying logical structure of a sentence. The logical structure of a sentence, imperatival or not, is determined by the logical particles and quantifiers which it contains. In English, logical particles are expressed by words like "and," "or," "not," "without," "neither," "nor," "if," "then," "only if," "but," "unless," "if and only if." Quantifiers are expressed by words like "all," "some," "a," "the," "none," "nobody," "everyone," "a few," "most," "at least one" and so on. Which logical particles and quantifiers a statement contains is determined in part by the actual words out of which the sentence expressing it is composed and in part by context and convention. Thus, for example, the English word "or" may indicate an inclusive or exclusive disjunction. An inclusive disjunction states that one or both of the disjuncts are true or satisfy the relevant predicate. An exclusive disjunction states that one but not both of the disjuncts is true or satisfies the relevant predicate. Depending on how the English word "or" is read, the logical structure of the sentence differs. Nonetheless, the reading given to the word "or" is not completely arbitrary: often the correct or intended interpretation is determined by context or convention. Thus,

a strategy, however, is also ineffective. Both laws and imperatives may be found in the full panoply of grammatical and logical forms. Accordingly, there is no inference that can be made that a law should be construed as an imperative by virtue of such formal attributes.

In addition to its syntactic and semantic structure, a law *qua* linguistic utterance also has a pragmatic dimension. Every linguistic act or utterance occurs in a context. This context determines in part the manner in which the linguistic act or utterance should be understood.⁶³ Accordingly, the general characteristics of those contexts in which a law is uttered or otherwise used may be regarded as a third content-independent feature of a law's form. Unlike a law's syntactic or semantic structure, this aspect of a law's form holds great promise for making sense of a legal positivist's claim that laws should be construed as imperatives.

C. *Illocutionary Force and the Imperativist Thesis*

Describing the context in which a sentence is used is a complex undertaking. An adequate account would need to describe, *inter alia*, the speaker, his or her audience, the physical and social setting, the background knowledge of both the speaker and the members of the

on October 31, when children utter the traditional Halloween phrase "Trick or Treat," the goblin- and ghost-fearing adults normally interpret this disjunction as exclusive. On other days of the year, however, the English "or" is generally given its inclusive interpretation. The logical particles contained in a particular sentence indicate the way in which that statement is composed out of more basic statements. The quantifiers inform us of the number of individuals or objects to which the relevant predicates are meant to apply. The logical structure of sentences is studied in formal or model-theoretic semantics. See EMMON BACH, *INFORMAL LECTURES ON FORMAL SEMANTICS* i, 1-17 (1989); RICHARD MONTAGUE, *FORMAL PHILOSOPHY, SELECTED PAPERS OF RICHARD MONTAGUE* 188-270 (Richmond H. Thomason ed., 1974).

As transformational linguists have demonstrated, two sentences with the same grammatical form may have different logical structures. Thus, for example, consider the two sentences:

John is eager to please

and

John is easy to please.

Both sentences have the same grammatical form: noun, copula, adjective, infinitive. See JOHN T. GRINDER & SUZETTE HADEN ELGIN, *GUIDE TO TRANSFORMATIONAL GRAMMAR* 10 (1973). Nonetheless, they have very different logical structures: in the first, "John" refers to the logical subject of the sentence, while in the second it refers to the logical object. The failure of a sentence's grammatical form to uniquely determine its logical structure leaves the correct formulation of the latter open to controversy. See Wilfrid Hodges, *Elementary Predicate Logic*, in 1 *HANDBOOK OF PHILOSOPHICAL LOGIC, ELEMENTS OF CLASSICAL LOGIC* 1, 34 (D. Gabbay & F. Guenther eds., 1983).

63. The area of linguistics that studies the use of language in particular contexts is called pragmatics. See GEOFFREY N. LEECH, *PRINCIPLES OF PRAGMATICS* (1983).

audience, the goals of the speaker, the act of uttering the sentence, and the utterance itself.⁶⁴ While there is at present no consensus on the form that such a description should take, the scholars working in this area of linguistics do agree that one can isolate that aspect of an utterance's meaning that is contributed or determined by the context: they call this aspect of an utterance's meaning its *illocutionary force*.⁶⁵

The illocutionary force of an utterance identifies the type of linguistic act that the speaker is performing. This linguistic act is usually called a *speech act* or an *illocutionary act*.⁶⁶ Thus, when a person utters a statement with the illocutionary force of a request, that person performs the illocutionary act of making a request. When a person's utterance has the illocutionary force of an order or command, that person engages in the illocutionary act of ordering or commanding. Thus the context determines the illocutionary force of an utterance and, a fortiori, the illocutionary act that one performs by making that utterance.

To see how this works, consider some examples of performative utterances. As lawyers are especially aware, a sentence is often uttered in order to accomplish a particular kind of act. Thus, in the appropriate circumstances, a person's utterance is properly characterized not simply as expressing the linguistic meaning of what is said, but as taking an oath, bequeathing property, forming a contract, or getting married.⁶⁷ An utterance that is also the performance of such an act is

64. See *id.* at 13-15.

65. See *id.* The concept of illocutionary force was introduced by the twentieth century philosopher John L. Austin. See JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975) [hereinafter AUSTIN, WORDS]. Strawson employs the concept of illocutionary force as the third in his series of the "progressively richer senses of the phrase 'the meaning of what was said.'" P.F. Strawson, *Austin and "Locutionary Meaning,"* in ESSAYS ON J.L. AUSTIN 46 (Isiah Berlin et al. eds., 1973). Summarizing its import, Strawson writes:

Even if we know the [linguistic-cum-referential] meaning of what was said, it by no means follows that we have complete knowledge of *how what was said was meant* or of *all that was meant by what was said*. We may not know, for example, how what was said was intended to be taken or understood. We may know that the words "Don't go yet" were addressed to such-and-such a person at such-and-such a time; and yet not know whether they were meant as a request, as an entreaty, as a command, as advice, or merely as a piece of conventional politeness. This is the dimension of meaning studied by Austin under the title of "illocutionary force."

Id. at 48. For a definition of "linguistic-cum-referential meaning," see *infra* note 66.

66. See LEECH, *supra* note 62, at 13-15; see also JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

67. On the concept of linguistic meaning, see Strawson, *supra* note 64, at 46. In that essay, Strawson distinguishes a series of "progressively richer senses of the phrase 'the meaning of what was said'" in which the linguistic meaning is the first. The linguistic meaning of a

called a *performative utterance*.⁶⁸ It is a kind of utterance through which one not only says something, but does something as well. Thus, for example, in the appropriate circumstances when I utter the words "I take this woman to be my lawfully wedded wife," I am not merely saying that I take this woman to be my lawfully wedded wife, I am actually marrying her.

While common in the law, performative utterances are not the exclusive province of the lawyer—christening a ship and baptizing a baby as well as making a bet and bidding at cards are only a few of the many kinds of performative acts without overt legal significance. Performative utterances, whether carrying legal significance or not, are acts by virtue of the existence of a non-linguistic convention.⁶⁹ Without this convention, the particular utterance would not count as the kind of act it is. Thus, for example, I enter the state of matrimony in uttering the appropriate words under the required circumstances by virtue of a convention that forms part of our matrimonial law. A priest baptizes a person in uttering certain words by virtue of an immutable conven-

sentence is that meaning of the sentence which can be grasped by anyone with an adequate knowledge of the language in which it is expressed. Assuming neither syntactic nor semantic ambiguities that render it equivocal, no knowledge of the context such as the speaker's identity or the occasion for its utterance is necessary. One need only know the meaning of each of the words that compose it. Strawson distinguishes between the linguistic meaning of what was said and its linguistic-cum-referential meaning. In contrast to its linguistic meaning, the linguistic-cum-referential meaning of what is said includes the reference of pronouns and indexicals (words such as "here" and "now" whose utterance determines their reference). For present purposes, so fine-grained a distinction is unnecessary. Accordingly, the reader may assume that linguistic meaning of what is said includes the reference of pronouns and indexicals even though, strictly speaking, this involves non-linguistic knowledge about the context.

68. Like the concept of "illocutionary force," the phrase "performative utterance" has its origin in the writings of John L. Austin. See, e.g., AUSTIN, *WORDS*, *supra* note 65. Austin was not unaware of the importance of performative utterances in the law. Thus, he wrote:

[T]hese kinds of utterances are the ones that we call *performative* utterances. This is rather an ugly word, and a new word, but there seems to be no word already in existence to do the job. The nearest approach that I can think of is the word "operative," as used by lawyers. Lawyers when talking about legal instruments will distinguish between the preamble, which recites the circumstances in which a transaction is effected, and on the other hand the operative part—the part of it which actually performs the legal act which it is the purpose of the instrument to perform. So the word "operative" is very near to what we want. . . . However, the word "operative" has other uses, and it seems preferable to have a word specially designed for the use we want.

JOHN L. AUSTIN, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 233, 235-36 (2d ed. 1970).

69. Warnock, for example, notes the following: "What distinguishes performative utterances . . . is not that . . . they are a special sort of saying, but that, whatever sort of saying they may be, there are conventions in virtue of which that saying counts as doing." Geoffrey J. Warnock, *Some Types of Performative Utterance*, in *ESSAYS ON J.L. AUSTIN*, *supra* note 65, at 69, 73.

tion set forth by Jesus in *Matthew 29:19* and given overt legal significance under the canon law of the Catholic Church. In uttering the words "Three no trump," I make a bid by virtue of a convention which forms part of the rules of bridge. And finally, I christen a ship in uttering the appropriate words by virtue of a particular social convention about naming ships. As these examples suggest, non-linguistic conventions upon which performative utterances depend are "operative" across a vast range of our linguistic life and imbue many of our utterances with meaning and significance that far exceed their mere linguistic meaning.

An especially interesting consequence of the conventional character of performative utterances is that what is done need not be said. In uttering the words "Three no trump," I make a bid even though I do not say that I make a bid. In reciting the appropriate words during my wedding, I marry my wife even though I do not say that I marry my wife. Similarly, when two people verbally exchange promises in a legally operative way, they form a contract even if they do not say that they form a contract. Saying what one is doing is not excluded by a performative utterance, it is simply not required.⁷⁰ One consequence of this is that "any sort of saying whatever—even an otherwise perfectly senseless one—could in principle, were there to exist the appropriate convention, count as or constitute doing something."⁷¹

Although any kind of utterance can be a performative utterance provided only that the appropriate non-linguistic convention exists, the same is not true of other kinds of utterances that constitute acts. Consider utterances in which "the speaker explicitly indicates something that he is doing in speaking by incorporating the word *for* what he is doing *in* what he says."⁷² Because what is done is explicitly said, Austin called this kind of utterance an *explicit performative*.⁷³ Thus, for example, an utterance of the sentence

I promise to make your favorite chocolate cake for dessert

70. Thus, some performative utterances do say what it is one does in saying what is said. For example, *ceteris paribus*, when one person says to another "I accept your offer," then under the law of contract (specifically, the non-linguistic convention of offer and acceptance) she accepts the offer in saying that she accepts the offer. As already noted in the text, however, this is not necessary.

71. Warnock, *supra* note 68, at 73.

72. *Id.* at 78.

73. See AUSTIN, WORDS, *supra* note 65, at 32.

is an explicit performative because the word for what I am doing in uttering this sentence (that is, the word "to promise") is actually incorporated in it: in uttering this sentence I not only promise to make your favorite chocolate cake for dessert, but I explicitly indicate that I promise to do so.

As a moment's reflection will demonstrate, explicit performatives are quite common and include acts of advising, suggesting, requesting, ordering, rebuking, begging, recommending, and entreating—to name only a few. Although, unlike performative utterances, explicit performatives do not depend upon non-linguistic conventions, they do depend upon conventions: one recognizes an explicit performative as an act of a particular kind by virtue of the meaning of its main verb. Accordingly, if I desire to perform an act of requesting, for example, while at the same time explicitly indicating my performance of it, then I must make an explicit performative which incorporates a performative verb of requesting as its main verb. If it did not incorporate a performative verb, then it would not be an act of requesting that expressly indicates its own character. For this reason, explicit performatives are tied to linguistic conventions (i.e., the meanings of performative verbs).⁷⁴ Accordingly, unlike performatives that depend on non-linguistic conventions, senseless sayings are *dicta non grata*.

When we make an explicit performative, we desire not only to perform an illocutionary act of a particular kind, but to explicitly indicate our performance of it as well. Nonetheless, these two aspects of an explicit performative are not inextricably bound—each of these aspects can be accomplished separately. For example, although I can perform an act of requesting in uttering the sentence

I request that you pass the salt,

I can also perform it in uttering the simpler sentence

Pass the salt.

In the first case, I use an explicit performative and my act of requesting is explicitly indicated.⁷⁵ In the second case, I forego an explicit

74. In this regard, it is worth noting the common legal use of the adverb "hereby" to indicate the performative use of the verb that it modifies. See QUIRK, *supra* note 9, § 11.3, at 805.

75. Moreover, just as we can make a request without explicitly indicating it, so can we explicitly indicate a request without thereby making one, as in the sentence "Then I asked her

performative by using an imperative and my act is not explicitly indicated. Nonetheless, in both cases I make a request in uttering the relevant sentence. Accordingly, this example demonstrates that an explicit performative is actually two acts—an act of indicating what one does and an act of doing that which is indicated. Moreover, it shows that these two acts can be accomplished separately. It follows that the illocutionary force that makes an explicit performative an act of a particular kind (e.g., an act of requesting) is not tied to the meaning of its main verb but may be present even when the performative utterance is not an explicit one.

The illocutionary force by virtue of which explicit performatives and imperatival utterances are illocutionary acts of a particular kind is independent not only of an utterance's main verb but of all the words that compose it. Indeed, the illocutionary force of an utterance is even independent of its grammatical mood. This independence may be demonstrated by juxtaposing the following pair of examples to the pair of requests presented in the preceding paragraph. Assume that my previous request for the salt has been ignored. No longer Mr. Nice Guy, I decide to order that the salt be passed. To carry out this decision, I can either make an explicit performative such as

I order you to pass the salt,

or utter a simple command such as

Pass the salt.

A quick comparison of these demands with the previous requests shows that neither a sentence's grammatical mood nor the words which compose it determine the kind of act that its utterance is. The two explicit performatives have the same grammatical mood (indicative), while the two imperatives have not only the same grammatical mood (imperative) but exactly the same words as well. Nonetheless, the two explicit performatives like the two imperatives are different kinds of illocutionary acts.

While the illocutionary force of an utterance does not depend upon the grammatical mood or the words of the sentence uttered, it is nevertheless true that particular types of illocutionary force and, a fortiori, particular kinds of illocutionary acts, are typically associated with par-

ticular kinds of sentences.⁷⁶ For example, acts of inquiry are typically associated with questions, while requests, orders, and commands are typically associated with imperatives.⁷⁷

Notwithstanding these associations, however, sentences of different kinds (e.g., questions, statements, imperatives, and exclamations) may convey an illocutionary force typically associated with sentences of another kind.⁷⁸ For example, although orders and commands are typically associated with the utterance of imperatives, the illocutionary force of an order or command may also be conveyed by a declarative statement, as in

I'd 'love a cup of TEA.⁷⁹

In such cases, the sentence uttered "retains its normal semantic status but is at the same time indirectly used to perform another type of illocutionary act."⁸⁰

The example in the preceding paragraph provides the key to understanding the legal positivists' thesis that all laws are imperatives. At the very least, the legal positivists appear to be claiming that although laws are usually expressed as declarative statements, they nevertheless convey an illocutionary force typically associated with imperatives. This claim, however, even if true, can hardly be a sufficient explication of the imperativist thesis. As we have already seen, a declarative statement can convey the illocutionary force of an imperative without being one. Moreover, it does not explain why a law would have such an illocutionary force. Rather, the legal positivists must be understood as saying something stronger about the relationship between laws and imperatives—they must be understood as asserting a thesis about the nature of law. Accordingly, the imperativist thesis is most plausibly understood as the claim that necessarily, every law can be restated as an imperative with the same illocutionary force.⁸¹

76. *See id.*

77. *See id.*

78. *See id.*

79. *Id.* § 11.2, at 804.

80. *Id.* § 11.3, at 805.

81. The sentential adverb "necessarily" prevents one from construing the claim as an accidental generalization. Presumably, the legal positivists are not claiming that as a matter of contingent fact, it just happens to be the case that all laws up until now can be restated as imperatives with the same illocutionary force but that tomorrow we might discover a law that cannot be restated as such an imperative. Rather, they appear to be claiming that a law by its very nature can be restated in this manner.

Under this interpretation of the imperativist thesis, if an utterance cannot be restated as an imperative with the same illocutionary force, then the statement uttered is not a law. If this view of the nature of law is correct, one must be able to restate a law as either a categorical or hypothetical imperative.⁸² For example, under this interpretation of the imperativist thesis, a duty-imposing rule such as section 210.1(1) of the Model Penal Code could presumably be restated as a categorical imperative such as

Don't purposely, knowingly, recklessly, or negligently cause the death of another human being.

Similarly, a power-conferring rule such as the provision of a typical wills statute that requires two witnesses for a legally valid will could presumably be restated as a hypothetical imperative such as

If you want to create a legally enforceable will, cause the document to be witnessed by two adults who do not take under the will.

But how do we know that such imperatives actually do restate the laws that they purport to restate? Or, more simply, that laws, in this sense, exist? What, in other words, are the criteria by which we can assess the truth of the imperativist thesis.

It should also be noted that given the frequency with which legal positivists refer to orders and commands in their canonical writings, it is fair to assume that on their view, a law conveys the illocutionary force of an order or command. Nonetheless, in the arguments that follow nothing turns on the specific illocutionary force that a law is taken to convey. For this reason, I have kept the reference general.

82. A *hypothetical imperative* is an imperative in which the act that one is directed to do or to refrain from doing is conditioned on the realization of some antecedent state of affairs. For example, "If it rains, meet me under the canopy." A *categorical imperative* is one in which the act is not so conditioned. For example, "Meet me under the canopy." The *locus classicus* of the distinction between categorical and hypothetical imperatives is IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN (1785), translated as FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Macmillan Pub. Co. 2d ed. 1959).

A law imposes a legal effect or consequence on a type of act or state of affairs. As one cannot perform a legal effect, the focus of an imperatival restatement of a law would presumably be the act or state of affairs upon which the law imposes legal significance. Under such a view, the imperative would direct that one do or refrain from doing (bring about or prevent from being brought about) the act (state of affairs) that triggers the legal effect or consequence. In the case of a power-conferring rule, this directive would presumably be conditioned on an individual's desire to bring about or prevent the particular legal effect imposed by the law, while in the case of a duty-imposing rule such a condition would presumably be irrelevant. On the distinction between power-conferring rules and duty-imposing rules, see *supra* note 58.

Clearly, if one utterance is the restatement of another, then the two utterances should have the same meaning and content.⁸³ Accordingly, one should be able to use them interchangeably and the two utterances should bear the same semantic and pragmatic relations to other utterances. More specifically, if an imperative actually restates a particular law, then one should be able to use that imperative instead of the law that it restates in any legal context, discussion, or analysis. Moreover, if a particular law supports other possible utterances, then an imperative that restates this law should also support these possible utterances. Accordingly, if no purported imperatival restatement of a law can pass these rudimentary tests, then the imperativist thesis must be rejected. We turn now to consider how these criteria can be made practicable in a context of legal discourse.

III. CRITIQUING THE IMPERATIVIST THESIS

This part undertakes a critique of the imperativist thesis. Part III.A identifies two criteria for evaluating the imperativist thesis—one involving the referential scope of laws and the other, support for subjunctive and counterfactual conditionals. Part III.B applies the first of these criteria and concludes that the imperativist thesis must be rejected because imperatives cannot refer to all the different kinds of acts to which a law must refer. Part III.C applies the second of these criteria and concludes that the imperativist thesis must be rejected because imperatives do not support subjunctive and counterfactual conditionals.

A. *Two Criteria for Assessing the Imperativist Thesis*

In this section, we consider three paradigmatic contexts in which laws are used: legal counseling, legal education, and adjudication. By juxtaposing these exemplary contexts, we isolate various essential characteristics that any formulation and, a fortiori, any restatement of a law must have in order to be used in such contexts. These characteristics are then articulated as two necessary conditions that any formulation or restatement of a law must satisfy.

We use laws to evaluate different kinds of acts and states of affairs.

83. It is worth pointing out that we cannot simply require that a law and the imperative that purports to restate it be logically equivalent. For two statements to be logically equivalent, they must each be truth-value bearing. Even if one believed that laws had truth-values, it is clear that imperatives do not. See DIANE BLAKEMORE, *SEMANTIC CONSTRAINTS ON RELEVANCE 2* (1987).

Laws are used when we formulate plans for the future by considering the legal significance of possible future actions. Laws are also used to evaluate the legal effects of acts and events in the recent and remote past. Legal historians and scholars may employ the laws of an *ancien regime* to consider whether certain acts in their historical context were proper or not. An attorney may use a law of his jurisdiction to consider the legality of an act or event that occurred only that morning. Judges also use laws to evaluate the legal significance of past and future actions as well as present actions that are ongoing.⁸⁴ Indeed, law professors even use laws to consider the legal significance of acts that never happened.

The contexts in which we use laws are rich and varied. If every law can be restated as an imperative without any loss of meaning, then the contexts in which we can use such legal imperatives must be equally diverse. Thus, one way in which to assess the imperativist thesis is to consider various paradigmatic legal contexts and identify characteristics that an imperatival restatement of a law would require to be used in them. If imperatives that purport to restate laws have these characteristics, then to this extent, the imperativist thesis would be confirmed. If they failed to have all of these required properties, then it would be refuted. It is precisely this strategy for assessing the imperativist thesis that will occupy us for the remainder of this paper.

Legal counseling is one of the principal contexts in which laws are used. The typical scenario is one in which a private citizen or employee of a corporation contacts an attorney to seek his or her guidance on legal issues raised by some personal or commercial matter. For example, imagine a businessman who, contemplating a particular securities transaction, visits his attorney to obtain her opinion regarding its legality. After the businessman sketches his plans, the following exchange takes place:

Client: So what do you think? Would there be any trouble if I were to handle it in this way?

Attorney: Well, there certainly could be. I'm afraid that if you were to do it the way you've described, there would be a technical violation of the Securities Exchange Act. Accordingly, I advise

84. The legal status of proposed future actions could be considered in a declaratory judgment action, while the legal significance of a present ongoing action could be determined in a motion for a preliminary injunction.

you to

Focusing on the actual use of language in this exchange, we note that a subjunctive conditional has been used by both client and attorney.⁸⁵ The client has used a subjunctive conditional to inquire about the legal consequences of a possible course of action, while the attorney has used one to state those consequences.

One can also imagine a counseling context in which the attorney doubts that her client is being completely truthful. While the attorney may believe it best not to ask about the details of this matter directly, she may still believe that she ought to apprise her client of his legal situation if her worst suspicions are realized. In such a situation, an attorney would naturally use subjunctive and counterfactual conditionals to discuss the legal significance of her client's possible present and prior acts.⁸⁶

Another important context in which laws are used is legal education. In the law school classroom, actual cases, hypothetical variations, and possible future scenarios are all used to explore the scope and application of a legal system's laws. Consider, for example, a law professor's use of contrary-to-fact hypotheticals. Imagine that a professor of law has just stated the facts and holding of an actual case. In order

85. A *subjunctive conditional* is one whose antecedent contains a condition whose fulfillment is contrary to expectation or assumption, as in

If President Carter were to seek the Democratic nomination in 2000, he probably would not receive it.

See QUIRK, *supra* note 9, § 15.35, at 1091-92.

86. A *counterfactual conditional* is a conditional whose antecedent expresses a condition which is contrary to fact, as in

If President Bush had been reelected president in 1992, then he would not have been eligible to run in 1996.

See *id.* As Palmer notes, strictly speaking,

it is misleading to see all [hypothetical conditionals with past reference] as counterfactual. Clearly they often are, as in

If John had come, Mary would have left.

This would normally suggest that John did not come, and that Mary did not leave. But it does not necessarily do so: it could be used where the speaker simply does not know whether John came or not; it need not refer to what is known not to be true, but only to what is indicated as unknown.

FRANK R. PALMER, *MOOD AND MODALITY* 191 (Cambridge Univ. Press 1986). In this article, the phrase "counterfactual conditional" will be understood as synonymous with the phrase "hypothetical conditional with past reference" and, a fortiori, to refer both to genuine contrary-to-fact conditionals as well as to those conditionals that express what is merely unknown. For a more detailed characterization of hypothetical conditionals, see *id.*

to instruct her students on the scope of the relevant legal holding, she desires to show her class how variations in the facts would have affected the legal outcome. Proceeding socratically, she poses the following counterfactual question:

If the plaintiff had done x instead of y, then what would have been the legal outcome?

Not only does she need to use this construction to achieve her didactic ends, but any student responding to this question would also have to use a counterfactual formulation. Moreover, if the class continued to then consider whether in light of this holding some future course of action would be advisable, then teacher and student alike would have to embrace the use of subjunctive conditionals. Thus, here too, subjunctive and counterfactual conditionals have an important use.

Our first two examples show very clearly that laws must support subjunctive and counterfactual conditionals. They are essential to both legal education and legal practice. If laws did not support subjunctive and counterfactual conditionals, we could not determine the legal significance of possible future actions or contrary-to-fact past actions. Moreover, we could not evaluate the legal significance of present or prior actions about whose occurrence we are uncertain.

Nor should it surprise us that laws must support subjunctive and counterfactual conditionals. It appears to be a characteristic that all laws have in common; whether we are referring to the laws of a legal system, the laws of a theoretical science, the laws of mathematics or logic, or any other kind of law, they all support subjunctive and counterfactual conditionals. Indeed, I suspect the statement that laws support subjunctive and counterfactual conditionals is analytic. Its predicate is contained in its subject. It is simply part of what we mean when we call something a law.

The third paradigmatic context in which laws are used is adjudication. In a trial court, the fact finder determines what acts actually occurred and then evaluates their legal significance under the laws identified as relevant by the judge. In an appellate court, the facts are taken as given and then their legal effect is determined under the relevant law. In both cases, judges eschew subjunctive and counterfactual statements and express the legal significance of the facts with language in the indicative mood. Consider, for example, a criminal trial brought under subsection 210.1(1) of the Model Penal Code. This provision states:

A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.⁸⁷

When commenced under this statute, the charge or "hypothesis" of the prosecutor must be that the defendant is guilty of criminal homicide. The factual issue that must be decided, therefore, is whether the defendant purposely, knowingly, recklessly, or negligently caused the death of another human being. Let us assume that the prosecutor establishes beyond all doubt that the defendant actually did commit the proscribed act and, therefore, that the court accepts the statement that

the defendant purposely, knowingly, recklessly, or negligently caused the death of another human being.

At this point, the court must show that the relevant law applies to the act committed. Significantly, it can accomplish this task only by using statements in the indicative mood. In order to show that the law refers to and has within its scope the act actually committed, the court must substitute a tensed description of that act for the antecedent of subsection 210.1(1) and a definite description of the defendant for the phrase "a person" in its consequent.⁸⁸

The defendant is guilty of criminal homicide if the defendant purposely, knowingly, recklessly, or negligently caused the death of another human being.

It is important to recognize that this substitution is neither trivial nor transparent. We have moved from a tenseless and modally neutral antecedent to one that is tensed and carries an existential commitment to the act described.⁸⁹ Nonetheless, with these substitutions made, the

87. MODEL PENAL CODE § 210.1(1) (Proposed Official Draft 1962).

88. A *definite description* is a description that uniquely refers to a person, object, or event. See Bertrand Russell, *On Denoting*, 14 MIND 479 (1905), reprinted in BERTRAND RUSSELL, LOGIC AND KNOWLEDGE 41 (Robert Charles Marsh ed., 1971). Of course, the court could also substitute the defendant's name or other rigid designator with the same reference. See Saul Kripke, *Naming and Necessity*, in SEMANTICS OF NATURAL LANGUAGE 253 (Donald Davidson & Gilbert Harman eds., 2d ed. 1972), separately published as SAUL KRIPKE, NAMING AND NECESSITY (1980).

89. The antecedent in the canonical formulation of a law is modally neutral in the sense that it does not imply the possibility, actuality, or necessity of the kinds of acts described. Moreover, it has no existential import: a law does not presuppose the actual commission of the kinds of acts to which it attaches legal consequences. If it did, then in the case of a proscription, it would require its own violation. Imagine, for example, a murder statute that required the commission of a murder in order to proscribe it! To avoid this result, therefore, a law

court can now use its statement of the facts, together with the rule of inference known as *modus ponens*, to detach the consequent and accept the conclusion that

the defendant is guilty of criminal homicide.⁹⁰

In this fashion, the court applies the relevant law to the facts and accepts the appropriate legal conclusion.

As this example demonstrates, laws must include within their scope acts that are actually committed. If laws could not refer or apply to actual acts, then adjudication would not be possible. While the finder of fact could determine that a particular act actually occurred, we would still be left in a quandary over the legal consequences of this act unless the relevant law could be applied to it. To infer a verdict, the relevant law must be applied to the actual act committed and the consequent of that law detached. Unless this is possible, neither a verdict, nor the judgment that rests upon it, can be achieved.

Of course, the need for laws to refer to actual acts is also evident in the contexts of legal counseling and legal education. If laws did not apply to actual acts, then how could an attorney advise her client on the legal consequences of his past and present activities? How could a law professor explain the holding of an actual case?

The preceding examples and discussion suggest that a law must be able to express the legal consequences of both actual and hypothetical acts.⁹¹ If a law could only express the consequences of actual acts, then a murder statute would require the commission of a murder in order to proscribe it. If a law could only express the legal consequences of hypothetical acts, then a proven murderer could not be convicted. Because a law must express the legal consequences of both actual and hypothetical acts, it must be modally neutral or unrestricted. Accordingly, the canonical formulation of a law characterizes the relevant acts

must be able to express the legal consequences of acts without the assumption that these acts are ever committed.

90. *Modus ponens* is the rule of deductive inference which states that, from the premise
if *p*, then *q*

and

p,

one may infer

q.

See WESLEY C. SALMON, LOGIC 25-26 (Elizabeth Beardsley et al. eds., 3d ed. 1984).

91. In this Article, I use the phrase "hypothetical acts" to refer to acts that are possible but not actual.

in a modally neutral way; it simply describes the kinds of acts to which the legal consequences are attached, disregarding the modal categories of actuality, possibility, and necessity. As a result, laws are understood to apply to both actual and hypothetical acts.

Focusing on the distinction between actual and hypothetical acts also allows us to state more clearly the relation between the canonical formulation of a law and the subjunctive and counterfactual conditionals that it supports. Frequently in legal discourse, one desires or needs to emphasize the hypothetical character of an act to which one is applying a law. At these times, one uses subjunctive or counterfactual conditionals supported by that law. If one is referring to the legal consequences of an act that may yet happen, though it is contrary to expectation or assumption, then one uses a subjunctive conditional. If one is referring to the legal consequences of an act that never occurred, then one uses a counterfactual conditional. In either case, the only difference between the canonical formulation of a law and the subjunctive and counterfactual conditionals that it supports is the restricted reference of the latter to hypothetical acts within the scope of the particular law. Accordingly, laws support subjunctive and counterfactual conditionals because the latter are simply restricted versions of the former.

We are now in a position to articulate two criteria that may be used to assess the imperativist thesis. These criteria are necessary conditions on any formulation or restatement of a law. First, any formulation or restatement of a law must support subjunctive and counterfactual conditionals. Second, any formulation or restatement of a law must be able to refer to both actual acts and hypothetical past, present, and future acts. If the imperatives that purport to restate laws do not satisfy these two criteria, then the imperativist thesis must be rejected as false. Armed with these two criteria, we now turn to consider whether the imperativist thesis can be maintained.

B. *Assessing the Imperativist Thesis: The Problem of Limited Reference*

In this section, we consider whether imperatives can refer to both actual and hypothetical acts. First, we argue that imperatives cannot refer to actual acts. Next, we argue that although imperatives can refer to hypothetical future acts, they cannot refer to hypothetical past or present acts. For these reasons, we conclude that the imperativist thesis must be rejected.

Any formulation or restatement of a law must be able to refer to

both actual and hypothetical acts.⁹² An imperative, however, cannot refer to actual acts. An actual act, by virtue of its actuality, must have already occurred in the past or be currently occurring in the present. An imperative, however, can only refer to acts in the immediate or remote future.⁹³ While imperatival utterances such as

Come tomorrow

or

Come next year

are perfectly acceptable to a native speaker of English, expressions such as

*Come yesterday

or

*Be coming now

are rejected as unacceptable.⁹⁴ The reason why the reference of imperatives is restricted to the future is not difficult to discern. A language develops its grammatical forms and expressive possibilities in response to the different needs and requirements of those who use it. An imperative is used in order to direct a person to act.⁹⁵ Necessarily, however, there is never a need to direct a person to do something in the past, nor to do in the present what she is already doing.⁹⁶ Accordingly, imperatives never developed tense distinctions and their reference is limited to acts that may or may not occur in the future.

For similar reasons, imperatives cannot refer to hypothetical past and present acts. As we noted in the preceding section, laws must in-

92. See *supra* notes 85-90 and accompanying text.

93. See QUIRK, *supra* note 9, § 11.24, at 827-28 ("The imperative verb lacks tense distinction[s] . . . Imperatives refer to a situation in the immediate or more remote future and are therefore incompatible with time adverbials that refer to a time period in the past or that have habitual reference: *Come yesterday, *Usually drive your car."); see also C. L. HAMBLIN, IMPERATIVES 125 (1987) ("Retrospective *should*-statements and strictly present ones occur regularly where the corresponding imperatives would be impossible."). On the use of the asterisk in linguistics, see *infra* note 94.

94. In linguistics, an asterisk (*) preceding a sentence indicates that the sentence would be rejected as unacceptable by a native speaker of that language.

95. See QUIRK, *supra* note 9, § 11.2, at 803-04 (Imperatives "are primarily used to instruct somebody to do something."); § 11.24, at 827 ("Imperatives are restricted to predications that allow a dynamic interpretation, hence the incongruity of *Need a car, *Be old, *Sound louder.").

96. It is important to remember that when one directs a person to *continue doing* what she is currently doing, one is directing that person to do an act in the future, for to continue to do an act is always to continue to do it in the future.

clude within their scope present acts that while not impossible are contrary to expectation or assumption, as well as past contrary-to-fact acts—possible past acts that never occurred. Imperatives, however, can refer neither to present acts, nor to past acts.⁹⁷ Accordingly, an imperative cannot embrace the full variety of hypothetical acts to which a law may be applied.

As the foregoing makes clear, imperatives can refer neither to actual acts, nor to hypothetical past or present acts. Any formulation or restatement of a law, however, must be able to refer to both actual acts and hypothetical past, present, and future acts. Accordingly, an imperative cannot be used to restate a law with the same illocutionary force, and the imperativist thesis must be rejected. We turn now to consider whether imperatives can support subjunctive and counterfactual conditionals.

C. *Assessing Legal Imperativism: The Problem of Counterfactual Support*

In this section, we consider whether imperatives can support subjunctive and counterfactual conditionals. First, we argue that laws, unlike imperatives, support subjunctive and counterfactual conditionals because laws are omnitemporal, while imperatives have only future reference. Second, we show that the same conclusion is reached when we interpret subjunctive and counterfactual conditionals as metalinguistic rules of inference. Third, we note that yet another reason imperatives fail to support subjunctive and counterfactual conditionals is their inability to condition the consequence of any act. For each of these reasons, therefore, we conclude that the imperativist thesis must be rejected.

All laws are omnitemporal: the relation that they assert between their subject and predicate or their antecedent and consequent is asserted as true in the past, the present, and the future.⁹⁸ For example, the physical law that salt is soluble asserts that whenever salt is placed in water, it dissolves and that this has been true in the past, continues to be true in the present, and will continue to be true in the future. Similarly, the human law that

97. See *supra* notes 92-95 and accompanying text.

98. See ERNEST NAGEL, *THE STRUCTURE OF SCIENCE, PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* 50 (Harcourt, Brace & World, Inc. 1961).

[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being⁹⁹

asserts that whenever a person purposely, knowingly, recklessly, or negligently causes the death of another human being, that person is guilty of criminal homicide and that this has been true in the past, continues to be true in the present, and will continue to be true in the future, provided only that the act take place within the law's jurisdiction while the law is in force.¹⁰⁰

Since all laws are omnitemporal, accepting a law at time t is equivalent to accepting a set of tensed statements relative to t concerning the possible acts or states of affairs within the scope of that law. For example, accepting subsection 210.1(1) of the Model Penal Code at time t , where t is a moment during which that law is in force, is equivalent to accepting the set of tensed statements relative to t about the actual and hypothetical acts within the scope of that law. This set would include tensed statements about actual acts such as the past tense statement

if a person purposely, knowingly, recklessly, or negligently caused the death of another human being, then that person was guilty of criminal homicide,

and the present tense statement,

if a person purposely, knowingly, recklessly, or negligently causes the death of another human being, then that person is guilty of criminal homicide,

as well as tensed statements about hypothetical acts such as the past tense statements,

if a person purposely, knowingly, recklessly, or negligently had caused the death of another human being, then that person would be guilty of criminal homicide,

99. MODEL PENAL CODE § 210.1(1) (Proposed Official Draft 1962).

100. Although like all human creations, human laws are temporally bounded, within this interval they are genuinely omnitemporal. It is worth noting that on current cosmogonic assumptions, natural laws are also temporally bounded in this fashion.

and

if a person purposely, knowingly, recklessly, or negligently were to cause the death of another human being, then that person would be guilty of criminal homicide,

and the future tense statement,

if in the future a person purposely, knowingly, recklessly, or negligently causes the death of another human being, then that person will be guilty of criminal homicide.¹⁰¹

Conditionals about hypothetical acts or states of affairs in the past tense are called hypothetical conditionals.¹⁰² Every hypothetical conditional is

101. Note that the future tense of an English conditional requires a nonmodal finite verb in the present tense in the antecedent and a future auxiliary verb in the consequent. To indicate the future reference of the antecedent, one must use a temporal adverb.

102. From a grammatical point of view, conditionals may be divided into two mutually exclusive and exhaustive categories: (1) those conditionals whose antecedent expresses a condition but leaves open the question of its fulfillment or nonfulfillment, and (2) those conditionals whose antecedent expresses a condition and "conveys the speaker's belief that the condition will not be fulfilled (for future conditions), is not fulfilled (for present conditions), or was not fulfilled (for past conditions)" QUIRK, *supra* note 9, § 15.35, at 1091. The conditionals of the former class are said to have antecedents that express open conditions, while the conditionals of the latter class are said to have antecedents which express hypothetical conditions. *See id.* Open conditions are also called "real," "factual," or "neutral" conditions, while hypothetical conditions are sometimes referred to as "closed," "unreal," "rejected," "nonfactual," "counterfactual," or "marked conditions." *Id.* § 15.35n.[a], at 1092. Accordingly, we shall call conditionals of the former class *open conditionals* and conditionals of the latter class *hypothetical conditionals*.

Hypothetical conditionals may be distinguished from open conditionals in two ways. First, the finite verbs in the antecedent and consequent of a hypothetical conditional are always placed in the same past tense: the hypothetical past or past perfective. *See id.* §§ 14.23, 15.35, at 1010, 1091. These past tenses are used to express "what is contrary to the belief or expectation of the speaker." *Id.* § 4.16, at 188. The hypothetical past suggests "the nonoccurrence of some state or event in the present or future," while the hypothetical past perfective implies the nonoccurrence of some state or event in the past. *Id.* *See also id.* § 14.23, at 1010 ("[T]he hypothetical meaning is more absolute in the past, and amounts to an implied rejection of the condition; whereas with present and future reference the meaning may be merely one of negative expectation or assumption, the positive not being ruled out completely."). Accordingly, the same past tense in both the antecedent and consequent is strong evidence that one is confronted with a hypothetical conditional. To be certain that one is confronted with a hypothetical conditional, however, one must also consider the finite verb in the consequent. In the consequent of a hypothetical conditional, the finite verb is always a modal verb. *See id.* This is the second way in which hypothetical conditionals differ from open conditionals: the past tense form of a modal verb indicates the speaker's belief in the nonfactual or improbable character of the proposition expressed by the consequent. *See PALMER, supra* note 86, at 191-

either a subjunctive or counterfactual conditional.

Expressly recognizing the equivalence between a law with omnitemporal reference and a set of tensed statements permits us to explain in completely formal terms why a law supports subjunctive and counterfactual conditionals. A set of statements logically implies each member of that set. A law is equivalent to a set of statements that includes statements about hypothetical acts in the past tense, that is, subjunctive and counterfactual conditionals.¹⁰³ Thus, a law supports subjunctive and counterfactual conditionals because it logically entails them. If we accept a law, we must accept the subjunctive and counterfactual conditionals that it implies.

Imperatives, by contrast, are not omnitemporal. As already noted, imperatives have only future reference. They have no past tense.¹⁰⁴ As a result, imperatives are not equivalent to a set of tensed statements that includes statements about hypothetical acts in the past tense, that is, subjunctive and counterfactual conditionals. It follows that imperatives do not logically imply subjunctive and counterfactual conditionals and, therefore, do not support them. Since laws support subjunctive and counterfactual conditionals and imperatives do not, the imperativist thesis must be rejected as false.

This conclusion is also reached by construing subjunctive and counterfactual conditionals as metalinguistic statements or rules of inference. Under this interpretation, a subjunctive or counterfactual conditional is "an implicit *metalinguistic* statement . . . asserting that the indicative form of its consequent clause follows logically from the indicative form of its antecedent clause, when the latter is conjoined with some law and the requisite initial conditions for the law."¹⁰⁵ On this view, a law supports a subjunctive or counterfactual conditional only if the law and the indicative form of the conditional's antecedent logically implies the indicative form of its consequent. For example, subsection 210.1(1) of the Model Penal Code supports the counterfactual conditional

if a person purposely, knowingly, recklessly, or negligently had

92, 195. Thus, when the finite verb in the antecedent and consequent are in the same past tense and the finite verb in the consequent is a modal verb, then the conditional is hypothetical.

103. See *supra* notes 100-02 and accompanying text.

104. See *supra* notes 92-96 and accompanying text.

105. NAGEL, *supra* note 98, at 72. A *metalinguistic statement* is "a statement about *other* statements, and in particular about the logical relations of these other statements." *Id.*

caused the death of another human being, then that person would be guilty of criminal homicide,

because the indicative form of the counterfactual's antecedent,

a person purposely, knowingly, recklessly, or negligently causes the death of another human being,

together with the law

[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being¹⁰⁶

logically implies the indicative form of the counterfactual's consequent:

that person is guilty of criminal homicide.

Accordingly, an imperative supports a subjunctive and counterfactual conditional only if it too together with the indicative form of such a conditional's antecedent logically implies the indicative form of the conditional's consequent. This, however, is clearly not the case. Consider, for example, an imperative purporting to restate subsection 210.1(1) of the Model Penal Code:

Don't purposely, knowingly, recklessly, or negligently cause the death of another human being.

This imperative together with the indicative form of the above counterfactual's antecedent clearly does not logically imply its consequent. An analogous example could easily be given for subjunctive conditionals. Thus, imperatives do not support subjunctive or counterfactual conditionals and, a fortiori, the imperativist thesis must be rejected as false.

As the preceding example makes clear, another aspect of a law related to its ability to support a subjunctive or counterfactual conditional is its underlying conditional structure. Every law can be restated as a conditional whose antecedent describes the kind of act to which it attaches legal significance and whose consequent describes the legal

106. MODEL PENAL CODE § 210.1(1) (Proposed Official Draft 1962).

state of affairs that results when one does that kind of act. At a minimum, therefore, an imperative purporting to restate a law must not only refer to the kind of act to which that law attaches legal significance but also to the legal state of affairs that results when one does such an act.

This requirement causes an additional difficulty for defenders of the imperativist thesis. While a categorical imperative that purports to restate a law clearly refers to the kind of act given legal significance by that law, it does not appear to refer to the legal state of affairs that results when one does such an act. Consider, once again, a categorical imperative purporting to restate subsection 210.1(1) of the Model Penal Code:

Don't purposely, knowingly, recklessly, or negligently cause the death of another human being.

This imperative appears simply to prohibit a person from doing a particular kind of act. The prohibition is not conditioned on any act or state of affairs, nor does it suggest that complying or failing to comply with this prohibition has any legal significance. Indeed, the legal consequence under subsection 210.1(1) of doing that which is prohibited is completely omitted. If a categorical imperative directing one to do or refrain from doing a particular kind of act, however, does not even mention the legal significance of doing that kind of act, it is difficult to see how that imperative could logically imply the subjunctive and counterfactual conditionals supported by the law that it purports to restate. Moreover, insofar as a hypothetical imperative is basically a categorical imperative whose normative force is triggered by the realization of some antecedent condition, it too would appear to suffer from this difficulty. On the one hand, if and when its antecedent condition is realized, a hypothetical imperative becomes equivalent to an unconditioned categorical imperative and inherits the problems with the latter. On the other, if its antecedent condition is never realized, then the potential normative force of a hypothetical imperative remains dormant. In either case, it follows that either imperatives do not support subjunctive and counterfactual conditionals or laws cannot be restated as imperatives with the same illocutionary force or both. For these reasons as well, therefore, the imperativist thesis must be rejected.

IV. CONSEQUENCES OF THE CRITIQUE

In this part, three consequences that flow from our critique of the imperativist thesis are explored. Part IV.A notes that command theories

of law must be rejected. Part IV.B argues that deontic statements accepted by the legal system must be accepted as the source of a law's normativity and, a fortiori, that attempts by legal scholars such as Ronald Dworkin and Neil MacCormick to integrate principles into a positivist framework by deriving them from the existing legal rules must be rejected as erroneous. Finally, Part IV.C observes that since laws derive their normativity from deontic statements, every law, by its very nature, must have a rational basis.

A. *Rejecting Command Theories of Law*

If the arguments in this article are successful, then the imperativist thesis does not solve the problem of legal normativity. The normativity of law cannot be explained by claiming that every law can be restated as an imperative with the same illocutionary force. It fails as a solution to this problem because, on the one hand, imperatives do not support subjunctive and counterfactual conditionals and, on the other, their referential scope is too limited.

If this is correct, then no laws are imperatives and all forms of the command theory of law are false. *Pace* Bentham and Austin, laws are not the commands of the sovereign. *Pace* Kelsen, laws are not a series of orders directed to the officials of the legal system. And *pace* Hart, duty-imposing laws cannot be viewed as orders backed by threats. Nor can power-conferring laws be construed as hypothetical imperatives. Another solution to the normativity of law must be found.

B. *The Primacy of Principles*

The failure of the imperativist thesis carries with it an important corollary. If the normativity of law cannot be explained by reducing laws to imperatives and if the only statements with normative force other than imperatives are deontic statements, then the normativity of law must ultimately be grounded on deontic statements accepted by the legal system. How we characterize these statements is less important than appreciating the foundational role that they play in grounding the normativity of law. Such deontic statements must be regarded as the fundamental unit of legal analysis. Their content determines the scope and force of the law, irrespective of whether they are called legal or moral principles or of whether such statements express a common understanding of the good life, the religious or moral convictions of a ruling elite, or an eclectic motley of unrelated normative commitments.

Recognizing the foundational role of such deontic statements also

forces us to recognize that the approach to principles offered by contemporary legal scholars such as Ronald Dworkin and Neil MacCormick cannot succeed.¹⁰⁷ Attempting to integrate principles into the positivist framework, both Dworkin and MacCormick identify principles relevant to the law by reference to existing legal rules.¹⁰⁸ For both, such principles are merely rationalizations of the existing body of rules, purporting to articulate in a systematic fashion the normative commitments already implicit in the rules.¹⁰⁹ Accordingly, on their view it appears that the legal rules ground the principles rather than the principles grounding the rules.

Dworkin attempts to explain his view of the relationship between legal rules and principles by positing "a lawyer of superhuman skill, learning, patience and acumen."¹¹⁰ Dworkin calls this lawyer Hercules and assumes that he is a judge "in some representative American jurisdiction."¹¹¹ According to Dworkin, Hercules is able to "construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well."¹¹² Using this device of a fictional superhuman judge, Dworkin argues that the principles relevant to the law are simply those principles that would form part of the scheme constructed by Hercules.

Similarly, Neil MacCormick argues that "[t]he principles of a legal system are the conceptualized general norms whereby its functionaries rationalize the rules that belong to the system in virtue of criteria internally observed [i.e., a rule of recognition]."¹¹³ In this fashion, MacCormick maintains that legal principles are indirectly related to a legal system's rule of recognition.¹¹⁴ "[R]ules of law are so in virtue of their pedigree," while "principles of law are so because of their function in relation to those rules, that is, the function which those who use them as rationalizations of the rules thus ascribe to them."¹¹⁵

This approach to understanding principles relevant to the law suf-

107. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1984); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

108. See DWORKIN, *supra* note 107, at 116-17; MACCORMICK, *supra* note 107, at 233.

109. See MACCORMICK, *supra* note 107, at 232-33.

110. DWORKIN, *supra* note 107, at 105.

111. *Id.*

112. *Id.* at 116-17.

113. MACCORMICK, *supra* note 107, at 155. For the definition of "rule of recognition," see *supra* note 33.

114. See MACCORMICK, *supra* note 107, at 233.

115. *Id.*

fers from at least two significant problems, one practical, the other logical. On the practical side, theories adopting this approach are simply incapable of application—they are impracticable. As Dworkin stresses, identifying the relevant principles on this approach would require superhuman ability. On the logical side, there is the deeply problematic fact, acknowledged by MacCormick, that no body of existing legal rules entails a unique set of principles—whether the ratiocinator is Hercules or some other immortal.¹¹⁶ Thus, under the theories of both Dworkin and MacCormick not only is it physically impossible to assemble a set of principles that rationalize the existing law, but even if one could, it would be a logical fallacy to infer that these principles were the *actual* deontic statements accepted by the legal system as expressing its underlying normative commitments.

Even if we overlook these more obvious problems, however, this kind of “rules-first” jurisprudential approach to principles and, a fortiori, legal normativity must still be rejected. Such theories presuppose the normativity of legal rules but cannot explain it. As a result of their misguided and myopic focus on rules as the fundamental unit of legal analysis, such theories simply fail to take seriously the role played by deontic statements in a modern legal system.¹¹⁷

MacCormick recognizes this problem and bites the bullet, thereby acknowledging that on his approach principles cannot be used to explain the normativity of legal rules.¹¹⁸ While Dworkin does not expressly address this problem, he can do no better. For both, the essential difficulty is that before one can identify a set of principles that would justify the rules comprising a legal system, one must know the scope and force of those rules. It is universally acknowledged, however, that one cannot determine from the language of a rule alone whether it should be given a broad or narrow reading. To divine the proper scope and force of a rule, one must perforce look to the values and policies expressed in the principles that support that rule. In other words, in order to derive the principles relevant to the law from the existing legal rules, one must already know these principles. Accordingly, Dworkin’s account of legal principles is either superfluous or false.

This argument can be rephrased as an explicit *reductio ad absurdum*.

116. See *id.* at 234-35.

117. For further discussion of problems with this approach to integrating principles into the positivist framework, see Gregory M. Silverman, Note, *Dualistic Legal Phenomena and the Limitations of Positivism*, 86 COLUM. L. REV. 823 (1986).

118. See MACCORMICK, *supra* note 107, at 235-36.

dum of Dworkin's position. As such, it can be schematized as follows:

- 1) Prior to his analysis, Hercules does *not* know the principles relevant to the law.
- 2) Hercules derives the principles relevant to the law from the existing legal rules.
- 3) If Hercules derives the principles relevant to the law from the existing legal rules, then Hercules can derive the principles relevant to the law from the existing legal rules.
- 4) Hercules can derive the principles relevant to the law from the existing legal rules only if prior to his analysis, Hercules knows the scope and force of the existing legal rules.
- 5) Prior to his analysis, Hercules knows the scope and force of the existing legal rules only if prior to his analysis, Hercules knows the principles relevant to the law.

Therefore,

Prior to his analysis, Hercules *knows* the principles relevant to the law.

This conclusion, however, contradicts the first premise. Thus, Dworkin's theory leads to contradiction and must be rejected.

Rejecting command theories of law and recognizing the primacy of principles does not prevent us from acknowledging that deontic statements supporting laws may also support the assertability of certain imperatives. Indeed, the possibility of such support goes a long way toward explaining how the imperativist thesis could have been taken so seriously in the first place: since deontic statements can support both laws and imperatives, there appeared to be a correspondence between the two. As we have seen, however, such a purported correspondence will not bear scrutiny and signifies neither identity nor equivalence. Thus, while we may allow that a deontic statement such as

One ought not to kill

may support the assertability of the imperative

Don't kill,

it does not follow that the law prohibiting murder is either identical or equivalent to this imperative.

C. *A Jurisprudence of Reasons*

Recognizing that laws derive their normativity from deontic statements allows us to show that every law ultimately rests on a rational foundation: a law by its very nature must be supported by reasons and cannot be wholly arbitrary. While we may not always be able to identify these reasons, such reasons must exist. Explaining this third consequence of our critique is the task of the present section.

Although both deontic statements and imperatives are normative, the source of their normativity is not the same: unlike an imperative, the normative force of a deontic statement is derived from its content. A deontic statement is normative by virtue of what it asserts: although it does not explicitly direct one to take a particular action, it does state that there is a reason for doing so. Thus, all other things being equal, accepting a deontic statement, leads a person to act because she accepts that there is a reason for doing so.

In contrast, an imperatival utterance directs one to act in a particular way without stating that a reason exists for doing so. Unlike a deontic statement, an imperative simply summons a person to act, but does not actually assert anything. C. L. Hamblin characterizes this difference in the following example: "If I say to you,

We should have some exercise before dinner,

what I say is not yet compelling as an imperative actually summoning you to get up from your armchair. Something like,

Come on, then; let's

is necessary for that."¹¹⁹ In this example, the first statement asserts the existence of a reason for exercising before dinner. Although this reason is not stated expressly, the reader should have no difficulty in imagining some likely candidates: to work up an appetite, to improve one's health, or simply because one has promised to do so. In contrast, the second statement merely summons the other to participate in this exercise, without considering whether a reason can be given for this participation. As R. M. Hare notes, an essential difference between deontic ("ought") statements and imperatives is that "[p]lain imperatives

119. HAMBLIN, *supra* note 93, at 123.

do not have to have reasons or grounds . . . but 'ought'-judgements, strictly speaking, would be being misused if the demand for reasons or grounds were thought of as out of place."¹²⁰

A second but related difference between deontic statements and imperatives concerns the way in which they can be used. Recognizing that deontic statements assert the existence of reasons for acting, while imperatives do not, Hare "distinguish[es] 'ought'-judgements from ordinary imperatives in respect of universalizability."¹²¹ Deontic statements are universalizable because the reasons that justify a deontic statement in one case would also justify similar deontic statements in similar cases. Imperatives, in contrast, are not universalizable because they need not be supported by reasons that would require similar imperatives on similar occasions. As Hare notes, "[i]f when the squad gets to the end of the parade-ground, the serjeant says 'Left wheel,' this does not commit him (on pain of being accused of having changed his mind) to giving the same order, rather than 'Right wheel,' on similar occasions in the future."¹²² In contrast, "[i]f, in a tactical exercise, the instructor says 'The situation being what it is, you ought to attack on the left,' he will have changed his mind if, the next time this same exercise is gone through with a new group of cadets, he says 'The situation being what it is, you ought to attack on the right.'"¹²³ Accordingly, deontic statements and imperatives cannot be used interchangeably: the use of a deontic statement involves a commitment on the part of the speaker to the use of similar deontic statements in similar situations, while the use of an imperative does not. Not only do deontic statements presuppose reasons for doing the act prescribed, but those reasons must be universalizable.

The consequences of these differences between deontic statements and imperatives are of the first importance for jurisprudence. If every law derives its normative force from deontic statements and if deontic statements are supported by reasons for doing the acts that they prescribe, then every law can ultimately be traced to a set of reasons that support it. In other words, every law rests on a rational foundation. Moreover, insofar as the reasons that support deontic statements must be universalizable, so too is the rational foundation that supports each law. Thus do we discern the logical origins of the doctrine of precedent and a jurisprudence of reasons.

120. R. M. HARE, FREEDOM AND REASON 36-37 (1963).

121. *Id.* at 36.

122. *Id.*

123. *Id.*

V. RESOLVING THE PROBLEM OF LEGAL NORMATIVITY

In the last section, we noted that every law rests on a rational foundation, the support of which is mediated by deontic statements expressing the normative commitments of the legal system. We have yet to explain, however, how laws convey or focus the normativity of those statements. We now set in place this final piece to our puzzle of legal normativity.

For any given law, a complete solution to the problem of its normativity requires that we answer two questions: which deontic statements *actually* ground that particular law and how is the normative force of these deontic statements conveyed to it? Certainly, the answer to the first question will vary with the particular law under consideration. Nonetheless, in all cases, identifying these principles will require a form of legal scholarship no longer popular in the postmodern period—the sensitive case-by-case analysis of the underlying principles of a law. The answer to the second question, however, will not vary, but to answer it we must move beyond positivism and natural law to a new understanding of law as metalinguistic.

On a metalinguistic theory of law, a law is a rule of inference. It asserts that from the statement contained in its antecedent and the relevant set of deontic statements, together with any initial and boundary conditions, one may infer the deontic expression of its consequent. For example, subsection 210.1(1) of the Model Penal Code asserts that from the statement that a person has purposely, knowingly, recklessly, or negligently caused the death of another human being and the set of relevant deontic statements, one may infer the statement that that person ought to be held liable for criminal homicide. The law's antecedent and the set of relevant deontic statements logically implies the deontic expression of the law's consequent. Thus, by accepting a statement as a law, I commit myself to accepting, whenever its antecedent is realized, the deontic expression of its consequent. It is in this fashion that an apparently descriptive statement can have normative force and the problem of legal normativity is solved.

Recognizing the need for deontic statements to explain the normativity of law does not resolve the natural law/positivism debate, but it does show why in an important sense that debate has become irrelevant. Whether we call such statements legal principles or moral principles is purely a matter of nomenclature. In neither case is the importance of deontic statements for understanding the nature and operation of law affected. Moreover, once we identify the deontic statements that currently ground a particular legal rule, why should we care

whether the same principles ground a similar law in some unrelated and distant jurisdiction or even whether our own jurisdiction will still endorse these principles in the distant future? From a jurisprudential point of view, we shouldn't. In all of these cases, the form and function of such deontic statements remains the same.

Jurisprudence should focus on understanding the nature and function of law. Absolutist solutions to legal penumbras impede such understanding. Circumstances change, people grow, law evolves. The fundamental progressive insight of nineteenth and twentieth century positivism is that the content of law is independent of its form. The former is variable, the latter constant. This is as true of the principles that ground legal rules as it is of the legal rules themselves. It is time, therefore, to divorce the needed inquiry into the logical role played by principles in a proper understanding of law from ideological posturing about the content and metaphysical character of such principles.

A metalinguistic approach to law moves us toward this goal: clarifying the relationship between legal rules and principles, while placing neither in the unchanging firmament of Nature. For too long, positivists have been wary of principles: either ignoring them completely or making them epiphenomenal parasites on the backs of rules. From a metalinguistic perspective, such trepidation is unnecessary and need no longer impede our pursuing a principled understanding of the nature and structure of law. But the further elaboration of a metalinguistic theory of law is a project for another day.