

*Jonathan Crowe\** and *Lucy Agnew\*\**

## LEGAL OBLIGATION AND SOCIAL NORMS

### ABSTRACT

HLA Hart famously argues that legal obligation is best understood by analysing law as a species of social rule. This article engages with recent work in social psychology and norm theory to critically evaluate Hart's theory. We draw on the social intuitionist model of practical decision-making associated with Amos Tversky, Daniel Kahneman and Jonathan Haidt to argue that legal officials rely on holistic intuitive judgements to identify their legal obligations. We then explain the evolution and persistence of legal rules by reference to the theory of social norms offered by Cristina Bicchieri. This way of thinking about legal obligation lends support to Hart's account of law as a social practice. However, it challenges other aspects of his views, such as the idea that the only necessary factor in determining the content of law is its socially recognised sources. It also casts doubt on Hart's claim that legal obligation does not empirically extend beyond legal officials to other members of the community. Hart's account can be adapted to meet these criticisms, but not without undermining its commitment to legal positivism.

### I INTRODUCTION

Legal philosophy today is dominated, for better or worse,<sup>1</sup> by legal positivism — the view that the only necessary factor in determining whether something counts as law is recognition by social sources.<sup>2</sup> A distinction is often drawn in

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\* Professor of Law, Bond University.

\*\* Graduate Lawyer, RBG Lawyers. The authors would like to thank the anonymous reviewers for their detailed and helpful comments.

<sup>1</sup> We say for worse. For further discussion, see Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019); Jonathan Crowe, 'Functions, Validity and the Strong Natural Law Thesis' (2019) 10(2) *Jurisprudence* 237; Jonathan Crowe, 'Metaphysical Foundations of Natural Law Theories' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017); Jonathan Crowe, 'Natural Law Theories' (2016) 11(2) *Philosophy Compass* 91; Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40(3) *Monash University Law Review* 737; Jonathan Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' (2014) 5(1) *Jurisprudence* 109.

<sup>2</sup> Crowe, *Natural Law and the Nature of Law* (n 1) 145–6; Crowe, 'Natural Law Theories' (n 1) 92–3.

this context between inclusive and exclusive legal positivist theories. Inclusive legal positivism holds that social sources are the only *necessary* factor in conferring legal status.<sup>3</sup> In some legal systems, however, the recognised social sources may incorporate moral or other external standards into the test for legal validity.<sup>4</sup> Exclusive legal positivism, on the other hand, holds that the existence and content of law can only ever depend upon social facts.<sup>5</sup> It is therefore necessarily true that the existence and content of law *does not* depend on its substantive content.

Legal positivism's focus on social sources as the only necessary determinant of legal validity is well adapted to explain some important features of the concept of law, such as its jurisdiction-specific nature and propensity to clash with morality and justice. However, it faces the challenge of adequately explaining law's normativity without appealing to necessary moral content. HLA Hart, the most influential legal positivist of the last century — and the leading proponent of inclusive legal positivism, as defined above — sought to explain law's normativity by analysing it as a species of social rule. Legal officials regard law as normatively binding, according to Hart, because they recognise the existence of social pressure to conform with the rule of recognition, which supplies the ultimate test for legal validity.<sup>6</sup>

Hart's theory of law as a species of social rule foreshadows more recent and detailed philosophical work on the nature and origins of social norms.<sup>7</sup> It also resonates to some extent with recent work in social psychology on the role of heuristics in practical decision-making.<sup>8</sup> Our aim in this article is to critically evaluate Hart's account of legal obligation by drawing on these two related bodies of literature. We begin by drawing on the social intuitionist model of practical judgements developed by Amos Tversky, Jonathan Haidt and Daniel Kahneman to deepen Hart's account of the characteristic attitudes of legal officials. We argue that the acceptance of the rule of recognition by legal officials is plausibly understood as reflecting holistic intuitive judgements grounded in heuristics, learned and refined over time.

We then develop this picture further by reference to the theory of social norms outlined by Cristina Bicchieri. We contend that the heuristics used by legal officials to identify their obligations plausibly reflect emergent norms embedded in social practices. These norms represent evolved responses to social coordination problems. Their salience is reinforced by network effects or repeated interactions over time.

<sup>3</sup> See, eg, HLA Hart, *The Concept of Law* (Clarendon Press, 2<sup>nd</sup> ed, 1994) 204, 250–4; Jules L Coleman, *The Practice of Principle* (Oxford University Press, 2001) 67–148; WJ Waluchow, *Inclusive Legal Positivism* (Clarendon Press, 1994).

<sup>4</sup> Hart (n 3) 204, 250.

<sup>5</sup> See, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 37–52; Joseph Raz, *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (Oxford University Press, 1995) 210–237; Scott J Shapiro, 'On Hart's Way Out' (1998) 4(4) *Legal Theory* 469, 497.

<sup>6</sup> Hart (n 3) 114–17.

<sup>7</sup> See Part IV below.

<sup>8</sup> See Part III below.

This way of thinking about legal obligation lends general support to Hart's account of law as a species of social rule. It also helps to address an important challenge facing Hart's theory: its relatively weak account of legal obligation as merely presumptive and lacking any necessary foundation in normative reasons.

A theory of legal obligation grounded in social intuitionism and norm theory, however, also challenges some important features of Hart's account. We conclude by highlighting two of these critical implications. First, the holistic nature of the intuitive judgements discussed by social intuitionists challenges Hart's claim that the only necessary factor in determining the content of law is its sources, not its substance. Second, a theory of social norms based on network effects casts doubt on Hart's claim that legal obligation does not empirically extend beyond legal officials to ordinary citizens. It therefore undercuts his treatment of these groups as distinct hermeneutic communities. Hart's theory, we argue, can be adapted to meet these criticisms, but not without undermining its commitment to legal positivism.

Our reliance on the work of the social intuitionists and Bicchieri, therefore, has a twofold character. These theories, we argue, both augment Hart's view and call it into question. Hart does not directly explain how legal officials identify the content of legal norms while also judging themselves to be bound by them, and nor does he explain how these norms develop and persist over time. Social intuitionism and norm theory help to fill these explanatory gaps. However, the explanatory power offered by these theories puts pressure on central features of Hart's account. The most compelling response to this dilemma, in our view, is to modify Hart's theory to jettison those problematic commitments; this would involve, most notably, abandoning legal positivism. There might perhaps be other plausible ways that Hart's framework could fill the explanatory gaps noted above, while also avoiding these adverse implications. If so, we leave it to others to identify them.

## II HART ON LEGAL OBLIGATION

Early versions of legal positivism sought to explain law's normativity by appealing to a centralised view of legal authority and emphasising the role of coercion. John Austin, widely viewed as the founder of legal positivism,<sup>9</sup> famously defines law as the command of a sovereign, backed up by sanctions.<sup>10</sup> Austin's view of a sovereign is premised on the notion of a single, dominant source of legal authority within a given jurisdiction. The sovereign is defined as the authority to whom everyone habitually renders obedience and who, in turn, habitually obeys nobody.<sup>11</sup> Austin's theory is therefore unable to accommodate less centralised forms of legal order, including those found in international and customary law. These normative orders,

<sup>9</sup> Cf HLA Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined, etc.* (Weidenfeld and Nicolson, 1954) xvi.

<sup>10</sup> Austin (n 9) 9–33.

<sup>11</sup> Ibid 193–4.

according to Austin, are not law ‘strictly so called’; rather, they are forms of ‘positive morality’.<sup>12</sup>

Hart’s theory of law, by contrast, deliberately abandons Austin’s emphasis on the commands of the sovereign in favour of an analysis of law as a system of social rules.<sup>13</sup> Legal rules are distinguished from other social rules (such as rules of morality and etiquette) by reference to an overarching *rule of recognition* that supplies the criteria for legal validity. The rule of recognition is itself a social rule embodied in the practices of legal officials.<sup>14</sup> According to Hart, something counts as law because legal officials acting in accordance with the rule of recognition accept it as having the necessary features to confer legal status upon it.

Hart’s theory of law (unlike Austin’s) is not necessarily incompatible with non-state forms of legal order, such as customary law. Customary legal norms stem from processes that may be accepted as legally binding if they are acknowledged by the secondary rules of the relevant jurisdiction. A similar point applies to norms arising from contracts and other voluntary agreements.<sup>15</sup> The legal force of a contract or marriage, Hart points out, does not come directly from the sovereign (as Austin’s theory might appear to suggest) but rather from the voluntary agreement of the parties, which is then recognised as binding by legal officials.<sup>16</sup> An appropriately inclusive rule of recognition could, in principle, recognise a wide variety of social institutions as legally binding.

Hart uses his critique of Austin’s emphasis on sanctions to make a more fundamental point. He draws a distinction between ‘being obliged’ to do something and ‘having an obligation’ to do it: if someone holds a gun to our heads and tells us to hand over our money, we may be *obliged* to comply, but we would not say we *had an obligation* to do so.<sup>17</sup> Having an obligation requires more than mere compulsion; it implies that we *ought* to behave in a certain way, due to the existence of a binding rule. Hart argues that the existence of law depends upon having obligations, rather than being obliged.<sup>18</sup> This is not a matter of having certain beliefs, motives or reasons, but rather involves recognising the existence of a social rule.<sup>19</sup>

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<sup>12</sup> Ibid 140–1.

<sup>13</sup> Hart (n 3) 56–7.

<sup>14</sup> Ibid 94–5.

<sup>15</sup> Ibid 27–8, 33–4.

<sup>16</sup> Ibid 41, 96.

<sup>17</sup> Ibid 82–91.

<sup>18</sup> Hart does not deny that people are sometimes motivated to follow the law by fear of sanctions. However, he argues that this does not fully capture what people mean when they describe themselves as being bound by the law: *ibid* 57, 115–16.

<sup>19</sup> Ibid 82, 88.

Hart fleshes out the notion of having an obligation by offering a detailed account of social rules. His view of social rules is often described as the *practice theory*.<sup>20</sup> The practice theory defines a social rule in terms of two fundamental components. The first is the existence of a *pattern of conduct* generally followed by members of a social group. The second is a *critical reflective attitude* towards that practice, according to which members of the group both use the practice to guide their own conduct and criticise others who do not conform to it.<sup>21</sup> Hart calls the perspective of someone who has a critical reflective attitude towards social rules the *internal point of view*.<sup>22</sup> We can only adequately grasp the notion of legal obligation — and therefore the concept of law — by taking this perspective into account.<sup>23</sup>

Hart observes that considering the internal point of view allows us to distinguish *social rules* from *social habits*.<sup>24</sup> Social rules are patterns of behaviour in relation to which members of the social group hold a ‘reflective critical attitude’.<sup>25</sup> There are many different patterns of behaviour that fall into this category, including rules of law, morality, grammar and etiquette.<sup>26</sup> Each of these attracts some level of social pressure to conform. Hart illustrates this concept by reference to the rules of a game of chess, noting that players regard these rules not merely as patterns, but as setting a ‘standard for all who play the game’.<sup>27</sup> Social habits, by contrast, are patterns of social behaviour that do not attract a critical reflective attitude. Examples might include mowing the lawn on weekends and going to the cinema on a Saturday night.

Hart goes on to note that social rules can be divided further into those that confer *obligations* and those that do not.<sup>28</sup> We might usefully describe the latter category as mere *conventions*. Obligations differ from conventions, for Hart, in three crucial respects. First, the social pressure to conform with an obligation is more serious than that associated with a convention. Second, obligations are generally viewed as more important than conventions for the maintenance of social order. Finally, it is generally expected that obligations may conflict with self-interest. People are expected to make sacrifices to conform with these obligations. Hart considers that obligations encompass rules of law and morality, whereas conventions include other less serious types of social rules, such as norms of grammar, etiquette and sport.<sup>29</sup>

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<sup>20</sup> Ibid 254–5.

<sup>21</sup> Ibid 57.

<sup>22</sup> Ibid 89.

<sup>23</sup> Hart goes so far as to suggest that all the weaknesses in Austin’s theory boil down to his failure to acknowledge the internal point of view: ibid 83–4, 91.

<sup>24</sup> Ibid 55–7.

<sup>25</sup> Ibid 57.

<sup>26</sup> Ibid 86.

<sup>27</sup> Ibid 56–7.

<sup>28</sup> Ibid 85–7.

<sup>29</sup> Ibid 86.

What, then, sets legal rules apart from other social obligations? Hart's answer revolves around the role of secondary rules and, in particular, the rule of recognition. The rule of recognition identifies the criteria that are regarded by legal officials as conferring the status of law upon a primary rule. It is called the rule of recognition because it enables officials to *recognise* the primary legal rules.<sup>30</sup> The rule of recognition, like other legal standards, is a type of social rule. It depends upon acceptance by those who apply it and, as such, can only be identified and understood by taking account of the internal point of view. The precise rule of recognition in any given legal system is likely to be both vague and complex, since many different people and bodies, including legislatures, judges and other officials, typically have the power to enact legal rules.<sup>31</sup> In principle, however, it enables us to identify the content of law.

### III SOCIAL INTUITIONISM

Hart's theory of law offers a credible account of the nature and origins of social norms in the context of legal institutions. His treatment of this issue, however, leaves some important questions unanswered: how exactly do legal officials identify the content of their legal obligations and simultaneously judge themselves to be bound by them? How do these obligations emerge, evolve and persist over time? Our aim in the following sections is to offer some answers to these questions by drawing on recent work in social psychology and norm theory. We will begin by considering the contribution of social intuitionism, exemplified by the work of Tversky, Kahneman and Haidt,<sup>32</sup> to our understanding of practical decision-making and, in particular, how practical decisions are influenced by the social environment.

It is admittedly beyond the scope of Hart's project to explain the cognitive process by which legal officials identify their legal obligations. However, insofar as he does not address this topic, it leaves an explanatory deficit in his theory. An account of how this occurs would usefully supplement his theory. Social intuitionism plays this role by showing how practical decision-makers rely on judgements that incorporate both factual and normative dimensions. It therefore helps to explain how legal officials not only identify the content of legal rules, but also accept them as binding. However, it then becomes significant to ask whether this account can be integrated with Hart's

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<sup>30</sup> Ibid 94–5.

<sup>31</sup> Ibid 147–54.

<sup>32</sup> See, eg, Amos Tversky and Daniel Kahneman, ‘Judgment Under Uncertainty: Heuristics and Biases’ in Dirk Wendt and Charles Vlek (eds), *Utility, Probability, and Human Decision Making* (Springer, 1975); Jonathan Haidt, ‘The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment’ (2001) 108(4) *Psychological Review* 814 (‘The Emotional Dog and Its Rational Tail’); Jonathan Haidt, “Dialogue Between My Head and My Heart”: Affective Influences on Moral Judgment’ (2002) 13(1) *Psychological Inquiry* 54 (‘Dialogue Between My Head and My Heart’); Jonathan Haidt, ‘The New Synthesis in Moral Psychology’ (2007) 316(5827) *Science* 998; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

overall theory to yield a coherent explanatory picture. We will return to this question in the penultimate section of this article.

The social intuitionist literature mentioned above emphasises the central role of holistic judgements in practical decision-making. This research draws on dual process models of cognition, which distinguish two kinds of thought processes. The first (known as System 1) involves fast, intuitive snap judgements, while the second (System 2) involves controlled, reflective deliberation.<sup>33</sup> A series of experiments conducted by Haidt and his collaborators demonstrates that System 1 processes are central to ethical decision-making.<sup>34</sup> People typically react to ethical dilemmas by first forming snap judgements and then rationalising or modifying these judgements through further reflection. The resulting picture of practical decision-making differs considerably from the traditional idea of a reflective, considered process.

People do not usually respond to an ethical dilemma in a purely reflective way by weighing up the different options. Rather, they use System 1 thinking to form a holistic judgement about the case at hand. These judgements are not arbitrary, but are generally based on rough rules of thumb or heuristics that enable us to deal with complex situations in a cognitively efficient way. The soundness of the judgements will then depend on the reliability of the heuristics involved.<sup>35</sup> System 1 thinking, then, is typically the first element of a practical decision. It is not necessarily the end of the process, since decision-makers will often employ System 2 thinking to reflect upon and perhaps modify their conclusions. However, decision-makers nonetheless begin their reflective reasoning with a preconceived sense of the relevant factors and, in many cases, at least a presumptive outcome.<sup>36</sup>

The kinds of intuitive judgements identified by Haidt and his collaborators seem to be irreducibly *holistic*, in that they involve a combination of descriptive and normative factors.<sup>37</sup> People confronted with ethically charged scenarios no doubt make intuitive judgements about the facts: they draw various inferences about what is going on in the situations described (including temporal ordering, causal relations and so on). However, these intuitive assessments also seem to have an intrinsic normative component. It is not that people make a purely factual judgement and then use

<sup>33</sup> See, eg, John A Bargh and Tanya L Chartrand, ‘The Unbearable Automaticity of Being’ (1999) 35(7) *American Psychologist* 462, 463; Shelly Chaiken and Yaakov Trope, *Dual Process Theories in Social Psychology* (Guilford, 1999); Kahneman (n 32).

<sup>34</sup> See, eg, Haidt, ‘The Emotional Dog and Its Rational Tail’ (n 32) 818; Haidt, ‘Dialogue Between My Head and My Heart’ (n 32) 54; Haidt, ‘The New Synthesis in Moral Psychology’ (n 32) 998; Jonathan Haidt, Silvia Helena Koller and Maria G Dias, ‘Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?’ (1993) 65(4) *Journal of Personality and Social Psychology* 613, 626.

<sup>35</sup> Cass Sunstein, ‘Moral Heuristics’ (2005) 28(4) *Behavioral and Brain Sciences* 531, 532.

<sup>36</sup> Haidt, ‘The Emotional Dog and Its Rational Tail’ (n 32) 822–3.

<sup>37</sup> See also Tony Bastick, *Intuition: How We Think and Act* (Wiley, 1982) ch 5.

syllogistic reasoning to conclude that because the conduct involves a particular kind of fact scenario it must be ethically wrong. This would involve a combination of System 1 and System 2 processes. Rather, the evidence suggests that the subject's judgement of wrongness forms part of their initial reaction to the scenario.<sup>38</sup>

The body of research described above offers a potential answer to the question of how legal officials identify their legal obligations. It seems plausible, given the empirical studies conducted by Haidt and others, that the sense of legal obligation experienced by legal officials will be significantly guided by holistic intuitive judgements. These judgements might arise in response to a decision regarding a particular case; alternatively, they could arise in a more abstract way in response to a legal question. Importantly, the holistic nature of such judgements enables us to understand how they can incorporate both a descriptive understanding of the relevant legal rules and a normative sense of their obligatory nature. This sense of obligation, in turn, is plausibly shaped by the surrounding social context.

The empirical work of Haidt and his collaborators aims to show the role of intuition in ethical judgements. However, the same point applies, in principle, to practical decision-making generally. It would be surprising, given the results of these empirical studies, if holistic intuitive judgements did not play a central role in legal decision-making.<sup>39</sup> The limited empirical literature directly examining the pre-reflective dimension of legal determinations bears out this hypothesis. For example, an Israeli study found that judges gave significantly harsher parole decisions just before lunch (when they were hungry and tired) than just after lunch (when they were fed and rested).<sup>40</sup> An earlier study similarly found that sentencing decisions by legal experts were significantly affected by randomised anchors; in that instance, the lengths of the sentences were influenced by dice rolls.<sup>41</sup> These results, if valid, seem to be best explained by the influence of System 1 thinking.<sup>42</sup>

There is empirical literature to suggest that the use of holistic judgements is indicative of high levels of skill among trained experts in a range of fields, including

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<sup>38</sup> Haidt, 'The Emotional Dog and Its Rational Tail' (n 32) 814, 817.

<sup>39</sup> For discussion, see Jonathan Crowe, 'The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model' in Ron Levy et al (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1.

<sup>40</sup> Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences* 6889, 6890.

<sup>41</sup> Birte Englich, Thomas Mussweiler and Fritz Strack, 'Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making' (2006) 32(2) *Personality and Social Psychology Bulletin* 188, 189.

<sup>42</sup> For doubts about the Israeli study, see Keren Weinshall-Margel and John Shepard, 'Overlooked Factors in the Analysis of Parole Decisions' (2011) 108(42) *Proceedings of the National Academy of Sciences* E833.

professional athletes,<sup>43</sup> chess players,<sup>44</sup> dancers,<sup>45</sup> surgeons<sup>46</sup> and writers.<sup>47</sup> The holistic judgements formed by legal officials will likewise be shaped by their training and experiences. This will include both formal legal training — which enables officials to identify the law in a skilled and proficient way — and their inculcation into a particular legal culture. This legal culture might be expected to value adherence to legal rules and therefore impart a robust sense of legal obligation.

We are not suggesting here that legal officials do not engage in significant levels of reflection and deliberation in making their decisions. We also do not deny that legal officials may reflect upon the reasons they have for following or not following the rule of recognition and make a conscious decision whether or not to do so. Our aim is rather to explain Hart's claim that the rule of recognition (and other social rules) produce a sense of obligation or reflective critical attitude in those who are bound by them. This sense of obligation, for Hart, is a product of the internal point of view. The internal point of view, in turn, must be more than a contingent product of the deliberations of individual agents if it is not to be perpetually unstable. It must, it seems, be a perspective that those agents use to evaluate their own actions and those of others, prior to engaging in all-things-considered reasoning about what to do. The social intuitionist framework helps to explain how this might occur.

A concern might be raised at this point as to whether social intuitionism can truly help to explain Hart's account of the attitudes of legal officials.<sup>48</sup> The crucial feature of legal obligation, for Hart, is that legal officials accept the binding character of the rule of recognition.<sup>49</sup> This attitude of acceptance involves identifying the practical reasons officials consider in order to make decisions; it does not determine what courses of action they will decide to take in light of those reasons. It might be thought that the social intuitionist model of practical decision-making only illuminates the latter issue, not the former. However, this concern misunderstands the focus of the social intuitionist account. Social intuitionism potentially applies at both these levels; it posits that both the identification of practical reasons and the application of those reasons to fact scenarios relies upon intuitive judgements. It therefore holds

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<sup>43</sup> See generally Susan A Jackson et al, 'Relationships between Flow, Self-Concept, Psychological Skills and Performance' (2001) 13(2) *Journal of Applied Sport Psychology* 129.

<sup>44</sup> See generally Jerad H Moxley et al, 'The Role of Intuition and Deliberative Thinking in Experts' Superior Tactical Decision-Making' (2012) 124(1) *Cognition* 72.

<sup>45</sup> See generally Kate M Hefferon and Stewart Ollis, "Just Clicks": An Interpretive Phenomenological Analysis of Professional Dancers' Experience of Flow' (2006) 7(2) *Research in Dance Education* 141.

<sup>46</sup> See generally David Alderson, 'Developing Expertise in Surgery' (2010) 32(10) *Medical Teacher* 830.

<sup>47</sup> See generally Susan K Perry, *Writing in Flow: Keys to Enhanced Creativity* (Writer's Digest, 1999).

<sup>48</sup> We thank an anonymous reviewer for pressing us to clarify this issue.

<sup>49</sup> Hart (n 3) 114–17.

potential to illuminate how legal officials (as well as ordinary citizens) identify their obligations.

#### IV THE ROLE OF SOCIAL NORMS

Social intuitionism deepens Hart's practice theory by explaining the cognitive process by which legal officials simultaneously identify the content of law and judge themselves to be bound by legal obligations. The role of heuristics in this account further helps to explain how the judgements of officials are shaped by their experiences over time and reinforced by the surrounding legal culture. More needs to be said, however, about how these heuristics are shaped by the social environment and, in particular, from where they derive their normative significance. How is it that legal officials are not only able to identify the content of legal rules, but also judge themselves to be bound by the associated legal obligations?<sup>50</sup> The previous section suggested that these assessments are formed at least partly at a pre-reflective level, but this does not tell us where their content comes from. The present section draws on theories of social norms to offer a response to this question.

The content of the rule of recognition, for Hart, is distinct from the reasons legal officials may have for accepting it as binding. '[W]hat is crucial', he says, 'is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity'.<sup>51</sup> However, this does not mean that all legal officials accept the rule of recognition for the same reasons. Indeed, Hart doubts that this is the case. He suggests that their reasons for doing so may include: 'calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or, the mere wish to do as others do'.<sup>52</sup> The puzzle here, in light of these pluriform motivations, is what, if anything, tends to ensure that legal officials converge upon a common rule, as opposed to making whatever decisions suit them from time to time. It is this question with which we engage in the current section.

##### *A Bicchieri on Social Norms*

Bicchieri's work on social norms offers an account of the coordinating role of norms in social life. Norms, for Bicchieri, have three aspects: motivations for engaging in behaviour, preferences and expectations. These characteristics are not discrete, but rather feed into each other. Motivations for engaging in behaviour can be of two

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<sup>50</sup> Notice that this is a descriptive question, not a normative one. Julie Dickson has argued that Hart does not need to provide an account of why the rule of recognition is backed by normative reasons. We do not engage with that claim here. See Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule? (2007) 27(3) *Oxford Journal of Legal Studies* 373, 398.

<sup>51</sup> Hart (n 3) 115.

<sup>52</sup> Ibid 203.

main kinds: independent or interdependent.<sup>53</sup> Independent motivations give rise to behaviours that are determined by economic or natural reasons, regardless of whether these reasons are also recognised or acted upon by others. Interdependent motivations give rise to behaviours that are a result of other people's actions and opinions bearing upon one's own course of conduct.

Bicchieri's notion of preference builds upon her account of motivations for behaviour. Preferences are dispositions to act in particular ways in specific situations. An example is choosing to drive to work instead of taking the train.<sup>54</sup> Preferences, in the specialised sense set out above, can be distinguished from merely 'liking something better' than something else. As Bicchieri explains:

If I choose a vanilla ice cream instead of a chocolate one, you may infer that I like vanilla better. What you may not know is that I adore chocolate but am allergic to it. So despite liking chocolate more, I prefer (choose) vanilla instead. What preference really means is, in a choice situation, if ... I choose A over B, it must be the case that, all things considered, I prefer A.<sup>55</sup>

Preferences may be individual (like the flavour of ice cream one prefers) or social. Social preferences take into account the 'behaviour, beliefs and outcomes of other people that, presumably, matter to the decision maker'.<sup>56</sup> For example, a person might choose not to consume ice cream when out with friends because they have passionate views about dieting.<sup>57</sup> Preferences can be further divided into two categories: conditional and unconditional. Unconditional preferences are those which are not influenced by knowing how others act in particular situations or of what they approve, and thus are specific to each individual. Conversely, conditional preferences are those which are influenced by how others act.<sup>58</sup> An example of a conditional preference is where a driver will stop on a red light and go on green because they expect others will do so as well.<sup>59</sup> Conditional preferences are therefore always interdependent.

Conditional preferences are, in turn, based on expectations. Expectations are beliefs about what is going to happen next; they therefore presuppose continuity between past and present.<sup>60</sup> They can be either individual or social. Individual expectations are those expectations we have for ourselves, while social expectations are the beliefs we have about other people's behaviour and attitudes. Social expectations

<sup>53</sup> Cristina Bicchieri, *Norms in the Wild: How to Diagnose, Measure and Change Social Norms* (Oxford University Press, 2017) 2.

<sup>54</sup> Ibid 6.

<sup>55</sup> Ibid 6–7 (emphasis omitted).

<sup>56</sup> Ibid 7.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 7–8.

<sup>59</sup> Ibid 11.

<sup>60</sup> Ibid.

involve a reference network: that is, ‘the range of people we care about when making particular decisions’.<sup>61</sup> Social beliefs can be both empirical and normative. An empirical belief is a belief about how other people in our reference network will act in certain situations. An example of this is that, having observed drivers driving on the left hand side of the road in England, we expect that the next time we go to England, the same will occur.<sup>62</sup> A normative belief is a belief that other people regard certain behaviours as praiseworthy, while others are to be avoided. An example of this is the belief that ‘women in [one’s local community] believe that a good mother should abstain from nursing her newborn baby’.<sup>63</sup>

A custom, for Bicchieri, is a norm that an individual conforms to because it conforms to their needs.<sup>64</sup> An example of this is the use of an umbrella when it rains. Since people have similar needs, the habitual action that meets the relevant need (in this case, using an umbrella to keep dry) will become a pattern of behaviour. This pattern is created and sustained by the motivations of actors acting independently. Each individual knows that when it rains, each person in their community will act in a similar way to oneself, but this awareness is not the reason why people engage in the behaviour.<sup>65</sup> Customs involve unconditional preferences because simply expecting other people to behave in a similar way does not influence one’s own actions.<sup>66</sup>

Bicchieri further distinguishes customs from norms, which may be descriptive or social. Descriptive norms are norms that individuals prefer to conform to because they believe most people in their reference network conform to them.<sup>67</sup> These norms sometimes look like customs but differ in the reasons for engaging in the behaviour. In the case of customs, people prefer to engage in a particular behaviour irrespective of what others do. However, in the case of descriptive norms, their preference for conformity is conditional upon observing or believing how others in their reference network act. An example of this is women who wear makeup because they expect other women to do the same. Other examples include the use of traffic lights and language for coordination purposes.<sup>68</sup> Motivations for following descriptive norms are therefore interdependent, based on social preferences and empirical beliefs.

Like descriptive norms, social norms are rules of behaviour that individuals conform to because they believe that most people in their reference network conform to them. Unlike descriptive norms, however, social norms perform a double function because they tell us not only that certain behavioural responses are warranted, but also

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<sup>61</sup> Ibid 14.

<sup>62</sup> Ibid 12.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid 15.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid 16.

<sup>67</sup> Ibid 19.

<sup>68</sup> Ibid 18.

express approval or disapproval of such behaviours.<sup>69</sup> The normative influence in social norms is strong and plays a crucial role in norm adherence. Social norms are always socially conditional (and therefore interdependent) because our ‘preference for obeying them depends upon our expectations of collective compliance’.<sup>70</sup> This does not mean that we necessarily lack good reasons to comply with them, but rather that most people follow them because they know they are generally followed and expect most individuals in their reference network to do so.<sup>71</sup>

The reaction to non-conformity of a social norm may range from slight displeasure to active or extreme punishment. The extent of the social reaction will usually depend on ‘how important or central to life the social norm is, how entrenched it is, and what sort of perceived harm disobedience creates’.<sup>72</sup> Social norms also carry rewards such as ‘liking, appreciation, trust and respect’.<sup>73</sup> Norms which are onerous to follow are usually accompanied by strong negative and positive sanctions.<sup>74</sup> Social norms, because of their normative expectations, may take time to develop.<sup>75</sup> Bicchieri identifies three common conditions for the development of social norms: people must face a collective action problem; the social expectations of the people must collectively change; and people’s actions must be coordinated.<sup>76</sup>

The first element — the existence of a collective action problem — means that there must be either a social dilemma or a tragedy of the commons that calls for a solution. A social dilemma occurs when a course of action is in the best interests of an individual but causes everyone else to be collectively worse off. An example of this is public defecation, because it is convenient for the individual performing the act but not for the other members of a community. A tragedy of the commons, on the other hand, involves a situation where multiple individuals act independently to deplete a shared resource.<sup>77</sup> An example of this is the extraction of groundwater. In both cases, the practice is one that an individual or group of individuals has reason to engage in because it benefits them personally, but is detrimental to the wider community.

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<sup>69</sup> Ibid 30.

<sup>70</sup> Ibid 33.

<sup>71</sup> Ibid 33–4.

<sup>72</sup> Ibid 36.

<sup>73</sup> Ibid 38.

<sup>74</sup> Ibid 38–9.

<sup>75</sup> Ibid 118.

<sup>76</sup> Ibid 111. Bicchieri also discusses a fourth condition, ‘shared reasons for change’: at 106. However, this condition mostly arises in the process of norm abandonment and change. We have therefore omitted it from the current discussion, which is concerned predominantly with norm emergence. The requirement of ‘shared reasons’ in the case of norm emergence can largely be encapsulated in the notion of a ‘collective action problem’, since the reason for solving the collective action problem could be considered the ‘shared reasons’ behind the emergence of the norm.

<sup>77</sup> Ibid 113.

In order to solve these collective action problems, members of the community need to cooperate with each other. Norms thus emerge to motivate such cooperation. There are many historical examples of cooperation emerging when individuals repeatedly interact with each other. Stewart Macaulay, for example, studies the relationship between automobile makers and their part suppliers and finds that these interactions are largely regulated by informal norms as opposed to positive law.<sup>78</sup> Participants in the study stated that demanding legal contracts would signal a lack of trust, therefore potentially damaging a good relationship.<sup>79</sup> The idea that norms arise through repeated interaction between individuals is borrowed from the folk theorem in game theory.<sup>80</sup> Bryan Druzin has likewise argued on the basis of the folk theorem that formal law should, in areas where there is repeated interaction between individuals, be scaled back to allow local norms to organise behaviour.<sup>81</sup>

Bicchieri argues that the second condition of norm emergence — that there be a change in social expectations — is typically achieved through formal or informal punishment. This is because applying sanctions to punish what is deemed as ‘wrong’ behaviour helps to produce and entrench normative expectations.<sup>82</sup> Once normative expectations are in place, empirical expectations follow because people observe widespread compliance with the rule. While these normative expectations are developing, negative sanctions are necessary to induce people to follow the norm. Over time, however, the sanctions become progressively less important as people internalise the norm and the new pattern of behaviour becomes habitual.<sup>83</sup>

The last condition of norm change according to Bicchieri’s theory is that people’s actions must be coordinated. The key to coordinating action for social norms lies in coordinated beliefs. Coordinated beliefs mean that ‘what each of us expects others to do corresponds to what they actually do.’<sup>84</sup> Coordinated beliefs are challenging to achieve. One way to do so is through public reports:

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<sup>78</sup> Stewart Macaulay, ‘Non-Contractual Relations in Business: A Preliminary Study’ (1963) 28(1) *American Sociological Review* 55, 60.

<sup>79</sup> Ibid 58–9.

<sup>80</sup> Bryan Druzin, ‘Social Norms as a Substitute for Law’ (2016) 79(1) *Albany Law Review* 67, 67.

<sup>81</sup> Ibid 75.

<sup>82</sup> Bicchieri (n 53) 117.

<sup>83</sup> Ibid. This process of changing empirical expectations by changing normative expectations through punishment is exemplified by institutional theorist Elinor Ostrom’s study of Nepalese communities solving the collective action problem of over-irrigation: Elinor Ostrom, ‘Design Principles of Robust Property-Rights Institutions: What Have We Learned?’ in Gregory K Ingram and Yu-Hung Hong (eds), *Property Rights and Land Policies* (Lincoln Institute of Land Policy, 2009) 25.

<sup>84</sup> ‘This is [a] well known theory in game theory’: Bicchieri (n 53) 110. ‘In order to coordinate actions, people must have correct beliefs about other people’s expected behavior. In a game, if players’ beliefs about each other are correct, their actions will be coordinated best replies to such beliefs’: at 141.

Think of conserving municipal water ... by being informed that collective water consumption is steadily diminishing, one can reasonably infer that an adequate proportion of one's neighbours are actively curbing their consumption, and thus one's conserving actions will not be in vain. In this example ... the information conveyed [in the report] would have effectively changed (and coordinated) people's expectations, resulting in coordinated action.<sup>85</sup>

Another means of coordinating action, we propose, is through repeated interaction of individuals over time, as described by the folk theorem discussed above. We propose that through repeated interaction with others, an individual comes to observe that others do what we expect them to, and thus we are more likely to believe that our efforts are not wasted and that our 'good' actions will be reciprocated. We use this information about the way in which others have acted to infer that they will act this way in the future — and therefore to guide our expectations of how we should act, which in turn results in coordinated behaviour.

Bicchieri's theory suggests that the emergence of social norms typically involves the three conditions discussed above. We have seen that when a collective action problem arises, this potentially gives rise to the emergence of a new norm through a change in normative expectations about the behaviour which, in turn, leads to a change in empirical expectations through coordinated social action. This coordination can be achieved through mechanisms such as public reports or the repeated interaction of individuals over time, as described by the folk theorem.

### B *Explaining Legal Obligation*

We suggested earlier in this article that social intuitionist theories of practical decision-making provide partial answers to some questions raised by Hart's account of legal obligation. Specifically, social intuitionism explains how legal officials may simultaneously identify the content of law and consider themselves to be bound by it. This account, however, raises further questions as to where legal norms come from and why legal officials consistently regard them as binding. Bicchieri's theory of social norms helps illuminate these issues. Legal norms, her theory suggests, arise in response to collective action problems, which prompt a change in social expectations and are reinforced through network effects.

Hart's account of legal obligation revolves around the rule of recognition. The rule of recognition is a kind of social rule; this means, for Hart, that it involves 'a combination of regular conduct with a distinctive attitude to that conduct as a standard'.<sup>86</sup> The attitude in question cannot be reduced to 'feelings of compulsion or pressure'.<sup>87</sup> Rather, it is the attitude of a person who considers themselves bound by a rule. The rule of recognition, for Hart, therefore 'must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something

<sup>85</sup> Ibid 110.

<sup>86</sup> Hart (n 3) 85.

<sup>87</sup> Ibid 88.

which each judge merely obeys for [their] part only'.<sup>88</sup> Otherwise, 'the characteristic unity and continuity of a legal system would have disappeared'.<sup>89</sup> The puzzle that Bicchieri's theory helps to address concerns how such a common rule emerges and persists among legal officials over time, given their diverse individual motivations.

Hart's account of legal obligation is an attempt to explain the rule-following behaviour of legal officials. Legal officials face a collective action problem in relation to the need for consistent and predictable outcomes in legal decisions. The mere need to make decisions is not in and of itself a collective action problem, because it could be accomplished by individual officials making decisions on an ad hoc basis. However, this approach (as Lon Fuller famously explained) would undermine the purpose of law, because it would not enable the law's subjects to use it to order their conduct.<sup>90</sup> Making legal decisions in accordance with the rule of law, understood as requiring consistent and predictable outcomes, therefore presents a collective action problem for officials. This problem can be resolved by officials adopting shared norms of conduct to coordinate their decision-making behaviour.

A situation in which legal officials make decisions on an ad hoc basis would be a kind of social dilemma because it would serve the interests or preferences of the official at the expense of the rule of law. The solution to this problem comes in the form of a norm created by the expectations that legal officials impose on each other. Legal officials will apply common rules in reaching decisions because they expect other officials to follow the same rules, leading to consistent outcomes. The normativity of these rule-following behaviours comes from the social pressure officials exert on each other to conform with them. Consistent application of the generally accepted rules will earn an official the appreciation, trust and respect of their peers, while failure to apply the rules in a way that is consistent with the understandings of other officials may earn opprobrium, distrust or, in an extreme case, formal sanctions.

Several authors have questioned whether Hart's concept of the rule of recognition is correctly understood as solving a social coordination problem. The two main objections to this idea, which have primarily been advanced in the context of David Lewis's account of conventions,<sup>91</sup> are that the rule of recognition is not arbitrary and the coordination problem in question does not exist antecedent to the institutions that solve it.<sup>92</sup> These features mean that Hart's rule of recognition does not strictly meet Lewis's definition of a convention.<sup>93</sup> However, they do not pose any inherent problem for regarding the rule of recognition as a social norm. There is no reason why social

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<sup>88</sup> Ibid 116.

<sup>89</sup> Ibid.

<sup>90</sup> See Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39.

<sup>91</sup> David K Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969).

<sup>92</sup> See, eg, Dickson (n 50) 390; Coleman (n 3) 94–5; Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001) 11–12; Scott J Shapiro, 'Law, Plans, and Practical Reason' (2002) 8(4) *Legal Theory* 387, 392–4.

<sup>93</sup> Lewis (n 91) 58.

norms must be arbitrary to solve a collective action problem in Bicchieri's sense. Indeed, they are unlikely to be arbitrary because they will be grounded in existing social preferences and beliefs, for the reasons discussed previously.

The main point is that actors follow the norm at least partly because they expect others to do so. It seems hard to deny that legal officials are at least partly guided in their choice of sources of law by what sources they expect other legal officials to apply. If they were oblivious to this, it would be difficult to explain why the rule of recognition exhibits any coherence at all. Scott Shapiro argues that '[i]f most officials suddenly abandoned the *United States Constitution*, this would not lead all others to similar action'.<sup>94</sup> However, this unlikely and extreme hypothetical example does not defeat the more modest claim that legal officials generally follow the rule of recognition (which is not, in any case, identical to a written constitution) at least partly because they expect other legal officials to do so. They need not do this with the conscious aim of solving a collective action problem; indeed, we have suggested that their sense of obligation will typically be formed at an intuitive level.

There is also no inherent reason why social norms must solve a problem that exists prior to the institutions that give rise to the norm. The players in a game of chess face a collective action problem insofar as they require stable rules in order to enjoy a satisfying game. This problem is not one that existed prior to the creation of the game of chess,<sup>95</sup> but it is no less a collective action problem for that. Legal institutions will often arise initially as expressions of social power relations, but once these institutions are created they give rise to a collective need for consistent rules, presuming they are to be used to order social conduct. This collective action problem can be solved by the legal officials adopting shared norms about how to identify the rules to be followed in their decisions. The fact that the problem solved by these norms did not exist in any pure form before legal institutions came into being does not undermine the account offered above. Indeed, it gives explanatory context for both the emergence of the norms in question and the precise form they take.

Bicchieri's theory of norm change suggests that negative sanctions play an important role in altering social expectations, although these sanctions become less important over time as the new norm takes hold. Public information campaigns can also be critical because people need to believe that their actions are not isolated or futile. Alternatively, as we proposed in the previous section, network effects can also play this role. Repeated interactions will reassure people that their norm-following behaviour is reciprocated. This account, when applied to legal officials, suggests that in new legal systems (or following regime change) negative sanctions may be required to induce legal officials to apply the new rules. However, in long-established and stable legal systems, these inducements are likely to be less important. The rule-following behaviour of officials in such systems will be robust and well-established. It can be sustained by internalised expectations and network effects, rather than depending upon the threat of sanctions against those who do not comply.

<sup>94</sup> Shapiro (n 92) 393.

<sup>95</sup> Cf Andrei Marmor, 'How Law is Like Chess' (2006) 12(4) *Legal Theory* 347.

## V IMPLICATIONS FOR HART'S THEORY

The account of rule-following behaviour of legal officials we outlined in this article is consistent with Hart's schematic account of legal normativity as involving a pattern of conduct along with a critical reflective attitude, guided by the overarching standard expressed in the rule of recognition. However, it adds detail to Hart's account on the critical questions of how legal officials identify the content and force of legal norms, as well as where these norms come from. The account offered here therefore provides a useful supplement to Hart's theory. At the same time, we also suggest that the theory challenges Hart's view in two important ways. The first concerns Hart's legal positivist claim that the only necessary factor in identifying the content of law is its sources, not its substance. The second concerns Hart's claim that the notion of legal obligation, as he understands it, does not empirically extend beyond legal officials to include other members of the community.

### A *The Content of Legal Obligations*

Let us turn to the first point. Hart, as we have seen, argues that legal officials identify the content of law in accordance with a rule of recognition. The rule of recognition is itself a social rule that officials follow because they have an obligation to do so. The content of this rule, for Hart, is supplied by authoritative social sources (such as legislation, judicial decisions and social customs), although some legal systems may incorporate moral standards into this overarching rule.<sup>96</sup> Hart's account of the rule of recognition, in this way, lays the foundations for his defence of legal positivism. The content of law, for Hart, is a matter of examining the content of the relevant social rules. It does not depend on any necessary moral test, apart from the very minimal (and not overtly moral) requirements imposed by what he terms the 'minimum content of natural law'.<sup>97</sup>

Morality does, of course, play a potential role in Hart's theory in a range of other respects. The rule of recognition is a social fact that identifies the criteria for legal validity. However, as Hart makes clear, it might be accepted by legal officials for moral (as well as non-moral) reasons.<sup>98</sup> Furthermore, according to Hart's inclusive legal positivist outlook, the rule of recognition might incorporate moral norms among the standards for identifying valid law.<sup>99</sup> It is also consistent with judicial reliance on moral principles in deciding certain kinds of cases.<sup>100</sup> Nonetheless, Hart insists there is no inherent moral component to the test for legal validity.<sup>101</sup>

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<sup>96</sup> Hart (n 3) 269.

<sup>97</sup> See *ibid* 193–200.

<sup>98</sup> *Ibid* 203.

<sup>99</sup> *Ibid* 204. See generally: at 250–4.

<sup>100</sup> *Ibid* 204–5.

<sup>101</sup> *Ibid* 202–3.

The account of legal obligation given in this article, however, challenges Hart's theory in two interlocking ways. First, as we have seen, Hart's account leaves open the question of how exactly legal officials identify legal rules and simultaneously judge themselves to be bound by them. We have suggested that social intuitionism offers a plausible answer to this question. However, social intuitionism indicates that legal officials identify the content and force of law as part of holistic normative judgements. It is not the case that legal officials first identify the content of law and then judge themselves bound by it; rather, officials make a holistic judgement about what they ought to do that incorporates relevant legal standards.

These judgements, however, will also be influenced by other factors, including the facts of specific cases, as well as their moral and social context.<sup>102</sup> It is not plausible, in light of this picture, to maintain that the judgements legal officials make about their legal obligations may be based purely on authoritative social sources. The judgements that give the social sources their normativity occur in a wider moral and social context, meaning that the normativity in question is never solely legal in character. Experienced legal officials are likely to internalise the rule of recognition and use it consistently as a guide to their decisions. However, both the content of the rule (particularly in marginal cases) and the sense of obligation it provokes will inevitably be influenced by normative factors beyond the positive legal framework.

It is not a problem for Hart's theory that judges and other legal officials sometimes consider moral principles in reaching their decisions. Indeed, he explicitly recognises that this will occur in various circumstances, including where the rule of recognition incorporates moral standards or where the 'open texture of law' demands it.<sup>103</sup> It is, however, a problem for his view if legal obligation necessarily has a moral component. Our suggestion, in this respect, is that the holistic nature of intuitive judgements makes it impossible to distinguish legal and moral senses of obligation in the way Hart's theory proposes. Social intuitionism provides a plausible account of how legal officials identify the rule of recognition and accept it as binding, but it entails that the process of doing so will necessarily be influenced by moral factors, as well as other components of the broader social and cultural environment.

<sup>102</sup> See also Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42(1) *University of New South Wales Law Journal* 91 ('The Narrative Model of Constitutional Implications'); Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40(1) *Statute Law Review* 75; Jonathan Crowe, 'Pre-Reflective Law' in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan, 2011) 103; Jonathan Crowe, 'Levinasian Ethics and the Concept of Law' in Desmond Manderson (ed), *Essays on Levinas and Law: A Mosaic* (Palgrave Macmillan, 2009) 39.

<sup>103</sup> Hart (n 3) 204.

To take an example that one of us has discussed in detail elsewhere,<sup>104</sup> suppose the legislature passes the ‘Eldest Child Act’, commanding all parents to kill their eldest child immediately or pay a nominal fine. Further suppose that this legislation suffers from some procedural irregularity that places it within the penumbra of the rule of recognition. It is therefore not immediately obvious whether it is legally valid or not. Is it credible to maintain that the judgements legal officials make about the legal validity and binding nature of such a statute will not be influenced by their awareness of its moral repugnance and insufficiency as a rational guide for action? If the rule of recognition itself is the product of holistic intuitive judgements, then the content and force of the rule cannot be divorced from its moral and social environment.

This result is further supported by Bicchieri’s theory of social norms. The process of identifying and following social norms, on Bicchieri’s account, does not primarily involve interpreting legal documents and materials. Rather, it involves interpreting the behaviour of other actors, working out what they are expected to do and what their attitudes are towards various courses of action.<sup>105</sup> It is, in other words, a hermeneutic process. However, it is practically inconceivable that such a hermeneutic interpretation of the actions and attitudes of legal officials, particularly when carried out on an intuitive level, will consistently separate legal factors from other normative components. The sense legal officials have of what other officials are likely to do and believe will be influenced by their understandings of the moral, social and cultural values of those officials, as well as the positive law. The question of what a legal official expects others to do and believe — and what others expect the official to do and believe — will therefore not depend solely on legal sources.

It might be said that, on the account offered above, the rule of recognition is still a matter of social fact, because its content depends on interpreting the actions and beliefs of legal decision-makers. However, this is true only to the extent that the actions and beliefs of the legal officials are taken to be independent of other kinds of normative facts, such as facts about moral or prudential reasons. An interpretation of what others are likely to do and believe involves constructing a working theory of what motivational reasons they have, which will often involve asking what normative reasons they have (given the plausible assumption that people generally seek to act for reasons).<sup>106</sup>

It is relevant here to return to Hart’s concept of the internal point of view. The internal point of view is the perspective of ‘a member of the group which accepts and uses [the rules] as guides to conduct’.<sup>107</sup> It contrasts with the external point of view, which

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<sup>104</sup> See Crowe, *Natural Law and the Nature of Law* (n 1) 176; Crowe, ‘Functions, Validity and the Strong Natural Law Thesis’ (n 1) 242–3; Crowe, ‘Law as an Artifact Kind’ (n 1) 753. For discussion of a related example, see Crowe, ‘Levinasian Ethics and the Concept of Law’ (n 102) 48–9.

<sup>105</sup> Bicchieri (n 53) 33–4.

<sup>106</sup> See generally Crowe, *Natural Law and the Nature of Law* (n 1) ch 3.

<sup>107</sup> Hart (n 3) 89.

is the standpoint of ‘an observer who does not [themselves] accept [the rules]’.<sup>108</sup> Legal officials, Hart says, must adopt the internal point of view with regard to the rule of recognition.<sup>109</sup> The internal point of view has a hermeneutic component, insofar as it involves recognising and accepting shared social rules. However, Bicchieri’s theory shows us that identifying and accepting the rule of recognition as a social norm involves assessing the likelihood that other group members will comply with it. This, in turn, involves engaging with their motivational and normative reasons. These factors cannot be excluded, as the ‘Eldest Child Act’ case shows.

If Person A believes that Person B has strong moral or prudential reason to  $\Phi$ , then Person A generally has at least a presumptive reason to believe that B will  $\Phi$ . At the very least, A’s belief about B’s reasons is a relevant factor for A to consider in working out what B will do, unless A has reason to believe that B is oblivious to the reasons in question. People typically assume that others will not murder or assault them, not merely because social norms proscribe these kinds of behaviour, but because others have strong moral and prudential reason not to do so. It follows from this that the normative reasons legal officials have cannot be irrelevant to predicting their likely actions and expectations.<sup>110</sup> However, if that is so, then the content of legal obligations cannot be solely a matter of social sources.

### B *The Scope of Legal Obligations*

We turn now to our second challenge to Hart’s theory. Hart’s account of the rule of recognition places heavy emphasis on the practices of legal officials. The rule of recognition, for Hart, depends on what would be regarded as authoritative legal sources not by members of the general public, but by the officials tasked with administering and enforcing the rules.<sup>111</sup> Hart doubts whether the normative practices of the community at large would be widespread and coherent enough to yield a determinate set of criteria for legal validity.<sup>112</sup> However, the account of legal obligation offered in this article casts doubt on this argument in two ways. First, it suggests that the legal obligations accepted by legal officials are likely to be less homogenous than Hart assumes. Second, it explains how members of the community at large could come to hold a sense of legal obligation at least roughly analogous to that held by the officials. Hart’s distinction between the two domains is therefore undermined.

Why does Hart think legal officials could possess a coherent sense of legal obligation but ordinary citizens could not? His comments on the issue are brief and elusive. However, he seems to think that legal officials are likely to converge on a ‘shared and unified’ understanding of the rule of recognition, whereas ordinary members

<sup>108</sup> Ibid.

<sup>109</sup> Ibid 116.

<sup>110</sup> See also Crowe, ‘The Narrative Model of Constitutional Implications’ (n 102) 103–6.

<sup>111</sup> Hart (n 3) 113–15.

<sup>112</sup> Ibid 114–15. Cf Crowe, *Natural Law and the Nature of Law* (n 1) ch 8.

of the public are not.<sup>113</sup> The first part of this assumption — that legal officials can converge on a common understanding of the rule of recognition — appears related to Hart's view that the content of legal obligation is supplied by social sources (and, in particular, authoritative legal sources). It seems reasonable to think that legal officials in a given jurisdiction will have a coherent understanding of what the authoritative legal sources are — even if, on Hart's account, they may have diverse reasons for abiding by them.<sup>114</sup> However, the account of legal obligation in this article shows that this picture is more complex than it may at first appear.

Legal obligation, as Hart recognises, is not solely a matter of legal officials interpreting the law.<sup>115</sup> It is, rather, a matter of legal officials interpreting the actions and beliefs of other officials. It is likely to be the case that this process of interpretation yields a picture of legal obligation in which the positive sources of law play a central role. However, the conception of rule-following behaviour that constitutes the relevant sense of obligation is unlikely to be wholly determined by those sources. It is tempting to assume that legal obligation, as a species of social norm, simply follows the positive law, but it would be more accurate to view the positive law as providing an arena within which such obligations are formed.<sup>116</sup>

Rule-following behaviour by legal officials is a complex social practice. Like social norms generally, its content can be captured in the formula 'perform action  $\Phi$  in situation X'. However, the meaning of 'action  $\Phi$ ' in this context will not simply equate to 'apply rule Y'. It will, rather, involve applying rule Y in accordance with method Z, where Z encompasses the methods used by the relevant community to interpret and apply the relevant rule. Furthermore, the specification of 'situation X' may be quite fine-grained, particularly when the role of holistic case-based judgements is taken into consideration. This complexity does not necessarily undermine Hart's claim that legal officials in a given jurisdiction can converge on a consistent understanding of legal obligation. However, it does mean that legal officials may well diverge in their precise conceptions of that obligation and that sub-groups are likely to exist that participate in distinctive sub-practices within the general norm.

The practices of legal officials, viewed from this perspective, appear more analogous to those of the general community than Hart's discussion suggests. Hart seems to think that the relatively small size of the community of legal officials makes it more likely to converge on a coherent sense of legal obligation than the community at large. However, this conjecture is not supported by a detailed account of how legal obligations emerge and are sustained over time. We have suggested that the emergence and persistence of legal obligations depend crucially upon network effects, supplemented by other mechanisms, such as negative sanctions and relevant information sharing

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<sup>113</sup> Hart (n 3) 115.

<sup>114</sup> Ibid 203.

<sup>115</sup> Ibid 89.

<sup>116</sup> For a discussion on the 'arena', see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990) 216.

within the relevant group. The nature of network effects is such that their effectiveness depends not so much on the size of the group as the frequency and consistency of interactions between its members.<sup>117</sup> A relatively large group may nonetheless form robust social norms, provided that its members interact regularly in ways that consistently manifest the relevant actions and attitudes. It is not necessary, of course, that every member of the group interact with every other, but merely that there is sufficient overlap between networks to produce uniform practices.

A large society with a well-developed and stable legal system may therefore converge over time on a relatively coherent and consistent idea of legal obligation. This sense of legal obligation will reflect a complex social practice and will therefore exhibit some dynamism and local variation. It will be unlikely to correspond exactly to the content of positive law, but will rather depend upon what we might call the ‘folk law’: the law as popularly understood within the community.<sup>118</sup> It might be expected to track roughly the positive law in its most salient requirements, particularly if sanctions are regularly applied to reinforce this. However, its content is also likely to be influenced by moral and prudential considerations independent of the law, for reasons analogous to those canvassed in the previous section.

The complexity and consequent variation of this social practice should not prevent it from being described as legal obligation, particularly given what we have said above about complexity and variation in the practices of legal officials. It may indeed be the case that legal officials have a different understanding of legal obligation than the community at large, but this merely reflects their different role within the legal system. The question of which of these understandings of legal obligation is more salient for the concept of law is an important one that we cannot settle here.<sup>119</sup> Hart’s decision to emphasise the understanding of legal officials cannot, however, be straightforwardly justified on empirical grounds alone.

It is possible that Hart might have welcomed this conclusion. He claims that ‘[i]n an extreme case the internal point of view with its characteristic normative use of legal language … might be confined to the official world’, but then goes on to bemoan that such a society ‘might be deplorably sheeplike; the sheep might end in the slaughterhouse’.<sup>120</sup> The discussion above suggests that, contrary to Hart’s fears, such a situation is empirically unlikely. He might well find this conclusion reassuring. In other respects, however, the view of legal obligation developed previously has less benign implications for Hart’s broader theory. For example, Hart’s analysis of law as the union of primary and secondary rules rests on the claim that ‘only a small community closely knit by ties of kinship, common sentiment, and belief … could

<sup>117</sup> Druzin (n 80) 77–81.

<sup>118</sup> See Jonathan Crowe et al, ‘Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution’ (2018) 40(3) *Sydney Law Review* 319.

<sup>119</sup> For discussion, see Jonathan Crowe, ‘Functions, Context and Constitutional Values’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart, 2018) 61.

<sup>120</sup> Hart (n 3) 117.

live successfully' under primary rules.<sup>121</sup> This empirical claim, which Hart regards as 'plain',<sup>122</sup> seems less obvious in light of the account of social norms elaborated above.

## VI CONCLUSION

We have argued in this article that Hart's well-known theory of legal obligation can usefully be supplemented and extended by drawing on recent work in social psychology and norm theory. Hart's theory, while insightful and explanatorily powerful, leaves some critical questions unanswered. These include questions about how legal officials identify the content of legal norms while at the same time judging themselves to be bound by them, and how these norms emerge and are sustained over time. We have argued that these questions can be at least partially answered by drawing on the social intuitionism of Tversky, Haidt and Kahneman, along with the theory of social norms developed by Bicchieri. These theories support the general picture of legal norms developed by Hart, while supplementing his relatively schematic view of the emergence and operation of legal normativity.

At the same time, however, the theory of legal norms outlined in this article challenges Hart's view in two critical respects. First, Hart contends that the only necessary factor in determining the content of law is its socially recognised sources, not its substantive requirements. However, social intuitionism indicates that legal officials identify the content and force of law as part of holistic normative judgements, while Bicchieri's norm theory shows that this process involves interpreting the behaviour of other officials, as well as legal materials. Second, Hart claims that legal obligation, understood as involving acceptance of the internal point of view with respect to the rule of recognition, is empirically confined to legal officials. However, the role of network effects in perpetuating social norms casts doubt on this argument, at least in well-established and stable legal systems.

Our focus in this article has been on the implications of our account of social norms for Hart's theory of legal obligation. However, the theory advanced here has wider implications. We will conclude by mentioning three of them. First, the dependence of legal norms on social norms means that the two categories necessarily bleed together.<sup>123</sup> Legal officials necessarily take account of social norms in reaching their legal judgments. This suggests there is no clear and consistent distinction between the norms applied by legal officials and broader social processes of norm creation. Legal judgment, including the interpretation of legal materials, has an intrinsic social and cultural component. This challenges views of legal interpretation that

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<sup>121</sup> Ibid 92.

<sup>122</sup> Ibid.

<sup>123</sup> We thank an anonymous reviewer for prompting us to address this point.

focus myopically on the literal or originally intended meanings of legal texts.<sup>124</sup> It also undercuts Hart's view of legal systems as 'Janus-faced' entities involving two distinct and contrasting interpretive communities — namely, ordinary citizens and legal officials.<sup>125</sup>

Second, we have noted that the rule-following behaviour of legal officials rests on their interpretation of the actions and expectations of other officials, at least as much as the formal content of the legal rules. This explains why legal officials, as a social group, tend to have a conservative view of law that resists exogenous change. Legislative amendments do not always produce immediate changes in the courtroom.<sup>126</sup> This can be explained by the fact that the decision-making behaviour of legal officials will only change where their shared norms of conduct change — and this will only happen where they expect a general shift in the behaviour of their peers. The decision-making of legal officials is, in this sense, somewhat insulated from the effects of legal reform. A time lag may sometimes occur between changes in the positive law and changed outcomes in the courtroom and other decision-making arenas.

This finding will be comforting to those who think sudden shifts in the legal framework pose a threat to stability and the rule of law. However, this dynamic has a third implication: a breakdown in acceptance of the rule-following norm by legal officials can lead to a corresponding breakdown in the rule of law, regardless of what the positive law may provide. Legal officials who do not expect each other to follow the legal norms consistently or who do not impose social sanctions for not doing so can cause the collapse of legal obligation among those officials. This internal consensus, once lost, may be difficult to reimpose without some recourse to formal sanctions. The rule of law, on this account, is robust against exogenous influences — but it is also vulnerable to endogenous erosion. This observation carries considerable importance given current events in the world today.

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<sup>124</sup> Cf Crowe, *Natural Law and the Nature of Law* (n 1) 196–240; Crowe, 'Pre-Reflective Law' (n 102) 116–19; Crowe, 'The Narrative Model of Constitutional Implications' (n 102).

<sup>125</sup> Hart (n 3) 117.

<sup>126</sup> For a recent example concerning changes to Tasmanian rape law, see Helen M Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 199–204.

