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Sources in Legal Positivist Theories

David Lefkowitz

University of Richmond, dlefkowi@richmond.edu

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(p. 323) Chapter 15 Sources in Legal-Positivist Theories

Law as Necessarily Posited and the Challenge of Customary Law Creation

I. Introduction

The debate about positivism in general legal theory or in the international legal scholarship manifests so many different, if not conflicting, meanings of positivism—even among legal positivists themselves—that the debate about legal positivism has proved almost unfathomable and unintelligible.¹

No other approach to theorizing international law is more closely associated with and dependent upon the development of an account of its sources than is positivism. The explanation for this is a simple and familiar one: if there is any thesis regarding (p. 324) law that we can uncontroversially associate with the label 'legal positivism', it is the view that a norm's status as law, its membership in a legal order or system, is solely a matter of its social source without regard for its merit. Whatever their differences (and as the above epigraph attests, they are many), all legal positivists maintain that law is necessarily posited, made, or created, not discerned in the natural order of things or deduced from principles knowable a priori. What counts as a law-creating act in any given legal system depends on the practice of its legal officials; the sources of law are, in this sense, a contingent or arbitrary matter.

Commitment to even this relatively modest claim brings with it substantial argumentative burdens. Specifically, it requires international legal positivists to offer the following: (a) a defence of the claim that law must have a social source; (b) an argument outlining the possible sources of law—that is, those act-types that can count as positing or creating law; and (c) an argument defending or rejecting the existence of specific sources of law in a specific legal system; e.g. an assessment of the claim that general principles of law serve as a source of international law. Clearly a comprehensive treatment of these issues requires more than a single book chapter, or for that matter a single book. Instead, the present work offers partial treatments of the first two of the argumentative tasks mentioned as incumbent upon international legal positivists.

I begin by considering the case for legal positivism; again, understood as the relatively modest thesis that the existence of law is a matter of its social source, regardless of its merits. Arguments for this thesis are of three types: descriptive (or social scientific), normative (or ethical), and conceptual (or metaphysical). I aim not to adjudicate between these arguments but to demonstrate that what follows for the sources of international law from the commitment to positivism depends to a considerable extent on the specific defence offered for accepting it as an account of the nature of law, including international law. In section III: Customary International Law Creation: Orthodox and Informal Legislation Accounts, I focus specifically on the possibility of customary international law. Though few dispute that custom can, and does serve as a source of international law, there is widespread disagreement regarding the precise mechanism whereby customary legal norms come to exist. If they are to defend custom as a source of international law, positivists owe us a plausible account of how customary rules are made; i.e. what acts count as the positing or making of customary norms, and how they do so. I argue that neither the orthodox account of customary law formation nor those accounts in which judges make law based on a belief in a broad consensus regarding the desirability of there being such a law do so. The former fails to identify an act of positing or creation at all, while the latter is better characterized as informal legislation than as custom formation.² I then (p. 325)

sketch a third approach that characterizes customary norms as elements of a community's normative practice, and custom-formation as normative interpretations of patterns of behaviour that are successfully integrated into that normative practice. This account avoids the chronological paradox in custom formation and accounts for various features commonly associated with custom, such as its binding agents even in the absence of consent. But is it compatible with legal positivism? I offer a preliminary argument for an affirmative answer, focusing particularly on its compatibility with the rationales Hans Kelsen and Joseph Raz offer for legal positivism.

II. Why Positivism?

One approach to defending positivism argues that it fares better than its rivals as a descriptive account of law, or at least law as understood in modern Western societies and by those living in other societies whose education has imbued them with a modern Western understanding of law. Positivism, advocates of this approach contend, accurately reflects the distinctions between law, morality, and policy that officials and subjects of modern Western legal orders draw.³ They point to the commonplace nature of claims to the effect that there ought to be a law as evidence that a norm's merits are not sufficient to render it legal, and to the practice of judges rendering decisions as a matter of law while imploring legislators to change the law as evidence that a norm's demerits are not sufficient to render it illegal.⁴ Furthermore, some maintain that positivism's compatibility with the social scientific study of law's causal contribution to the production of various outcomes strengthens its claim to properly characterize legal validity.⁵ Relatedly, the descriptive case for legal positivism avoids any controversial metaphysical commitments, not least over the existence of an objective and universal morality.⁶

All these claims are contested, of course. For example, some theorists of international law draw on social scientific theory and empirical research to argue that legal validity is at least partly a function of a norm's effectiveness in guiding the conduct (p. 326) of international legal subjects, rather than its social source.⁷ Instead of solidifying positivism as a characterization of law, then, social scientific study may well lead to its supersession. A more fundamental challenge to the descriptive approach to justifying positivism is the claim that it is impossible to identify a pre-theoretical and uncontroversial data set that can serve as a common object of attempts to theorize the nature of law. If these sceptics are right, the argument for positivism will necessarily turn on an argument for why it is better to adopt such an account of the nature of law than any of its rivals. Such arguments take two forms: those that defend positivism on the ground that such an understanding of law best serves the end of advancing justice, and those that maintain that only positivism can account for law's autonomy and authority.

The normative or ethical case for positivism comprises several distinct arguments. First, some positivists allege that distinguishing between a norm's status as law and its legitimacy or justice can foster a critical attitude toward legal authority and so serve as a check on one way in which power is exercised.⁸ Positivism may also facilitate (morally) better outcomes by forcing legal officials to openly confront and publicly adjudicate conflicts between different moral aims, such as the realization of retributive justice and fidelity to principles of legality in the criminal law.⁹ Debate over the proper course of action in such cases will likely be more fruitful, and perhaps also garner greater de facto legitimacy whatever its resolution, if it is not construed simply as a matter of identifying what the law is. Secondly, by characterizing law as necessarily a product of human creation, positivism may promote efforts to reform particular legal systems. Moreover, the evaluation of calls for reform, or resistance to it, requires a clear understanding of what the law currently is distinct from a judgement of its merits; absent such an understanding reformers and defenders of the status quo may frequently speak past one another.¹⁰ Thirdly, some may defend positivism on pragmatic grounds, arguing that at least in certain (p. 327) environments law can serve as

an effective means to realizing certain desirable ends only if its validity is distinguished from its merits. Benedict Kingsbury argues that this type of normative argument undergirds the orthodox international legal positivism of Lassa Oppenheim.¹¹

A final category of arguments for legal positivism comprises those that defend it on conceptual or metaphysical grounds. For example, orthodox international legal positivism follows from the conjunction of the following claims: (i) States are free and equal (moral) agents; (ii) where international law exists it is necessarily binding, i.e. it necessarily enjoys authority over its subjects, who are under a correlative duty to obey it; and (iii) the authoritative or binding nature of international law can be reconciled with the freedom and equality of States only via their consent to be bound by it. Genuine international law, then, can consist of nothing other than those positive rules to which States have explicitly (in the case of treaties) or implicitly (in the case of custom) agreed to abide. Unlike Oppenheim's normative argument, this defence of positivism does not rest on a hypothesis regarding the conditions for an effective legal order, but is simply a consequence of a proper appreciation of the nature of law and the (moral) standing of States. And since this argument employs conceptual and meta-ethical premises, pointing to its failure to characterize as such various norms generally taken to be international law will not refute it. All three of its premises are suspect, however. For example, while it may be true that as a type of practical authority law necessarily claims legitimacy, it need not follow that law enjoys the authority it claims over all, or even any, of its subjects.¹² Furthermore, consent may be neither necessary nor sufficient to reconcile law's authority over an agent with that agent's status as free and equal. It is not necessary if communitarian claims of membership and identity enjoy a justificatory priority to claims grounded in autonomy, or if respect for other agents' status as free and equal requires submission to a common order of public law. It is not sufficient if, in contrast to consent to the performance of a specific act, consent to authority marks not the exercise of autonomy or self-governance, but its abdication.¹³

Joseph Raz offers a conceptual argument for positivism that takes as its starting point law's self-image as a practical authority. Law necessarily claims a right to its subjects' deference, to their guiding their conduct according to its judgement regarding what they have reason to do or not do, an idea that Raz spells out in terms of law purporting to provide its subjects with content-independent and exclusionary reasons for action.¹⁴ Law is legitimate, its claim to authority justified, (p. 328) if its subjects are more likely to act on the reasons that apply to them by deferring to the law than by acting on their own judgement regarding what they have most reason to do.¹⁵ This condition may not be met, and so law may lack the legitimacy it claims. Nevertheless, the *possibility* of law playing this mediating role between agents and the reasons that apply to them depends on its subjects being able to identify what the law is without deliberating on those reasons. Law's social source(s) make it possible for law to play this mediating role, as they enable agents to identify what the law is by appeal to its origin in some agent's positing, e.g., that X is not to be done. Thus, for Raz positivism follows from the (or our) concept of law and an account of practical rationality; i.e. a metaphysical account of human nature and of reasons.

Kelsen's defence of positivism is grounded in the characterization of law as essentially normative, as necessarily composed of claims or ought-statements, and the metaphysical thesis that fact and value—Is and Ought—are categorically distinct and so irreducible to one another. Given their nature as claims or prescriptions, legal norms exist by virtue of some act of claiming or prescribing; that is, by virtue of being posited. Specifically, norms exist as law by virtue of their creation according to a higher-order norm on law-making, whose existence in turn may depend on its being authored according to a still higher norm on law-making. *Vis-à-vis* legal argument, the making of legal claims and counter-claims, this hierarchy terminates in a historically first constitution. Once this highest-order positive norm is reached it is not possible to justify a legal claim by appeal to some higher-order positive norm. Instead the validity of the historically first constitution follows from it

serving as a necessary presumption for the existence of the legal system in question (i.e. for the validity of all 'lower-order' legal claims). Note, however, that while it is possible only on the supposition of a *Grundnorm*, genuinely legal argument itself consists solely of appeal to norms that count as law by virtue of their source (i.e. their being posited in accordance with valid rules on law-creation), regardless of their merits.

Several conclusions may be drawn from even this brief overview of the range of different arguments for positivism. First, what follows from the adoption of legal positivism depends to some extent on a theorist's reasons for doing so. Those who defend orthodox legal positivism on normative or conceptual grounds, for example, must either deny the possibility of any source of international law other than treaty and (perhaps) custom, or argue—implausibly, in my view—that every act of law-making by treaty organizations is ultimately consent-based because it is traceable to States' consent to the organizations' creation. In contrast, theorists (p. 329) like Kelsen or those who argue for positivism on the ground that it will spur a beneficial critical attitude to law can acknowledge the possibility that treaty organizations enjoy law-making authority without having to trace every exercise of that authority back to State consent. Similarly, positivists may also divide on the question of whether global administrative law qualifies as (international) law properly so-called, with the answer turning at least in part on the rationale for adopting a positivist understanding of law.¹⁶ A second, related, implication is that attempts to disprove positivism need to be carefully tailored to specific arguments offered in defence of that thesis. Consider the claim that we will do better overall at advancing justice by denying the legality of egregiously evil norms than by granting their legality but contesting their legitimacy. If true, it provides a compelling objection to the normative argument for positivism, but it in no way weakens either Raz's or Kelsen's arguments for it. Finally, attention to the specific rationales for positivism may contribute to the elaboration of different criteria for assessing or ranking possible sources of international law. For example, we might employ Raz's account of law's legitimacy to defend the superiority of multilateral treaties to custom on the grounds that the superior information gathering and deliberative qualities of the former method make it more likely that the resulting law successfully mediates between international legal subjects and the reasons that apply to them.¹⁷ Or we might reach the same conclusion regarding the superiority of treaty over custom on the basis of a normative argument for positivism that emphasizes the contribution it makes to the rule of law.¹⁸

Clearly much more needs to be said in defence of legal positivism. Rather than do so here, however, I propose to shift the focus of discussion to the second of the three argumentative tasks I identified at the outset as incumbent upon the legal positivist, namely the identification of the possible sources of law. Specifically, I turn in the remainder of this chapter to a consideration of what is widely viewed to be not only a possible but an actual source of international law, namely custom. My aim is twofold: first, to defend the superiority of a normative practice account of custom and custom-formation to both the orthodox and informal legislation accounts, and secondly, to present a preliminary argument for its compatibility with certain versions of legal positivism.

(p. 330) III. Customary International Law Creation: Orthodox and Informal Legislation Accounts

On what is commonly labelled the orthodox view, customary international law (CIL) consists in the union of two elements: *usus*, or State practice, and *opinio juris*, understood as 'the belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.¹⁹ Specific norms of CIL exist by virtue of the prevalence of these two elements among States, i.e. by virtue of most States either engaging in the practice in the belief that it has a particular legal valence or, in the case of allegedly conflicting practice, denying its performance or the characterization of the conduct in question as an instance of the practice with this particular legal valence. Perhaps the least controversial claim that might

be made on behalf of the orthodox account of custom is that the presence of both elements provides compelling *evidence* for the existence of a norm of CIL.²⁰

Disagreement quickly follows, however, with some theorists and legal officials arguing that one or the other of these two elements suffices for the identification of a norm of CIL, at least in certain circumstances or vis-à-vis norms with certain content. Matters become even more complicated when attention shifts from the epistemological question of identifying norms of CIL to the ontological question of creating new norms of CIL. The orthodox account seemingly confronts a paradox as it holds that to create a new norm of CIL mandating some practice States must act in the belief that international law already requires the practice in question. Yet until the process of customary law formation plays out successfully, that belief will be false. To avoid the conclusion that this chronological paradox renders the creation of CIL impossible, advocates of the orthodox view argue that it can be (and (p. 331) is) undertaken on the basis of a false belief regarding the legal status of the practice in question.²¹

Some critics reject the orthodox account of custom formation as implausible, while others reject it on the grounds that it conflicts with a fundamental requirement of legitimacy, namely that law be created transparently.²² For legal positivists, however, the most serious shortcoming with the orthodox account of custom formation concerns the absence within it of any act of positing or norm creation.²³ The fact that States believe that a legal norm exists that requires them to behave in certain ways, even when conjoined with the fact that States generally behave in those ways, does not suffice to make it the case that the legal norm actually exists. Beliefs are facts (i.e. claims that A believes F are claims about how the world is), but one cannot derive an Ought, such as the normative claim constituted by a specific customary rule, from an Is. A widespread belief in the legal valence of some type of conduct may suffice to justify a descriptive or predictive claim. From a standpoint within the normative practice of giving legal reasons to justify or critique conduct, however, the mere fact that a certain act type is believed to be legally required does not provide the kind of claim needed to substantiate the assertion that subjects of that legal system *should* perform acts of that type.

A number of theorists argue that in the case of customary law formation *opinio juris* should be understood not as the belief that a customary legal norm C already exists, but that it should exist.²⁴ This change alone does not address the gap between belief and norm creation, however.²⁵ One solution is to treat CIL as judge-made law, with judicial pronouncements of customary legal norms playing a role analogous to the signing and ratification of treaties.²⁶ In both cases a process of deliberation and negotiation among States regarding the desirability of a new legal norm culminates with the positing of an agreement; in the case of treaties, by States themselves, while (p. 332) in the case of 'custom', by judges attempting to discern as best they can the legal valence (a majority of) States think it desirable to attach to some practice. The key point is that a broad consensus on the desirability of some conduct being subject to a customary legal norm does not suffice to make it so; rather, that outcome obtains only once a judge declares the existence of the customary legal norm in question.

I do not deny that international law can be, and perhaps sometimes is, created via the process just described. And clearly such a process is compatible with the positivist thesis that norms qualify as law solely because of their social source. However, I contend that judge-made law is better conceived as a type of informal legislation than as an account of customary law formation. The judicial legislation model of law-creation fails to capture the phenomenology of argument by appeal to customary norm, a phenomenology to which, for all its faults, the orthodox account remains true. Drawing on recent work by Gerald Postema, I now defend an account of custom and custom formation that remains true to the phenomenology of argument by appeal to customary rules while both avoiding the

shortcomings of the orthodox account and drawing a categorical distinction between custom and legislation (whether by courts or legislative assemblies).

IV. The Normative Practice Account of Custom and Custom Formation

Custom, Postema writes, exists only if it is ‘instantiated in the behavior of the people allegedly governed by it’.²⁷ While custom is essentially a matter of what members of a community do, what they do cannot be grasped independently of the normative standards that inform their understanding of what they are doing.²⁸ Rather:

Instances of behavior exhibit a custom-relevant regularity only when viewed as deeds—that is, as socially meaningful. And we can uncover this meaning only from within the practice.²⁹

Why can the meaning that constitutes a pattern of behaviour as deeds only be accessed from within the practice; that is, from the standpoint of a competent participant in it? The answer is that the meaning of what participants do is cashed out (p. 333) in terms of a normative practice of holding themselves and one another responsible for their conduct. This involves judging certain performances as appropriate or correct and others as mistaken; acting in accordance with these judgements when the occasion arises; challenging conduct that falls short of these judgements; and recognizing appeals to these judgements as either vindicating action or providing valid criticism of it.³⁰ The categorization of behaviour as the exercise or violation of a right, as permissible or obligatory, as respectful or rude, courageous or brazen, etc., is an understanding or interpretation agents arrive at as a result of being enmeshed in a particular, concrete, and historically situated ‘network of reason-seeking, reason-giving, and reason-using’.³¹

Custom, then, is not the product of some alchemical combination of *usus* and *opinio juris*, of objective behaviour and some subjective mental state. Rather, customs are a normative characterization and categorization of specific patterns of behaviour, an interpretation of those patterns as having a specific normative valence, which members of a group or community employ to hold one another responsible. Customs are realized in such practices; that is their mode of existence, and as a result they cannot be reduced to a conjunction of individual acts and/or beliefs.

The process of custom formation is an interpretive activity, one that takes as its object not words but acts. It involves the attribution of a specific social meaning to a specific pattern of behaviour constituted by the actions of members of the community. Justification proceeds by way of convincing other members of the community that a specific elaboration of a customary norm captures or reflects a way of valuing to which the community’s members are already committed; i.e. one already implicit in, or a ‘natural’ extension of, their existing normative practice. It takes place within the community’s practices of challenge and response. Within that practice, the explicit formulation of the customary norm may be novel, in the sense that a given occasion of challenge or response may be the first one in which an agent spells out a rule with some specific content that he takes to be part of the community’s normative practice. However, we should not confuse the first explicit formulation of the customary norm with its origin, since what an agent does in appealing to a customary norm for justificatory or critical purposes is to argue on the basis of a norm he takes to already exist latent in the community’s practices.³² Success in the deployment of a customary norm to justify or criticize an agent’s conduct is (p. 334) entirely a matter of its integration into the community’s practices of holding themselves and one another responsible; that is, their use of it in private deliberation and public argument. This is the sense in which, as Postema writes, ‘the activity of the practice, not any articulated account of it, nor theoretical reconstruction of it’, is authoritative.³³ What matters is how community

members actually go on, which specific forms of reason-seeking, reason-giving, and reason-using actually get taken up among members of the community.

The normative practice account of custom reveals that the shortcoming in the orthodox account lies not with its claim that the creation of a new customary norm requires that community members already believe themselves to be bound by the norm in question. Rather, the orthodox account errs in maintaining that such characterizations must be false, a conclusion drawn from the mistaken belief that specific customary norms come to exist by virtue of most members of a given community believing that they do. Consider the second of these two claims. On the normative practice account, specific customs exist in a given community because its members use them to challenge and respond, and interpretations of the patterns of behaviour in which members of the community are engaged succeed or fail in terms of their acceptance as challenges and responses. It may be true that customary norm C is a customary norm of this community, and members of the community may believe it is, but the truth of the later claim does not account for the truth of the former. Rather, the normative practice composed in part of norm C warrants the belief by members of the community (and others) that customary norm C exists as a norm of their community. In short, use of the norm warrants belief in its existence, rather than belief in the norm's existence warranting its use.³⁴

What, then, should we make of a customary norm C the first time, or number of times, members of a given community explicitly formulate it to challenge acts performed by other members, or to respond to challenges to acts they themselves performed? Integration into a community's practice of holding agents responsible may not, and perhaps often will not, occur immediately upon the first public formulation and use of a putative customary norm.³⁵ Rather, customary norm C may be integrated into the community's normative practices only after an extended process of challenge and response. As part of that process members of the community will often work through alternative interpretations of their interactions. This will likely involve accepting or rejecting the use of rival putative customary norms to (p. 335) justify and criticize one another, competing efforts to read different social meanings into the pattern of behaviour picked out by C (or, more likely, a similar but not identical pattern of behaviour). It may also involve reflection on some of the ramifications the putative customary norm has for other customary norms members of the community currently employ. While that process is ongoing, it will be difficult to ascertain from an observer's standpoint whether customary norm C exists in, or is a customary norm of, this community; i.e. whether a statement to that effect is true or false. However, members of the community who employ the norm to justify or criticize conduct will take themselves to make true claims, meaning ones they take to accurately reflect an understanding of what is permissible, obligatory, respectful, etc., already present in the community's way of life. Whether those norms really do so turns on how the process of challenge and response plays out. If customary norm C is integrated into the community's normative practices, if it becomes widely used by members of the community to hold one another (and themselves) responsible, then even the first agent who competently employs the norm to defend himself or criticize another makes a true claim, while those who deny the norm are mistaken. Conversely, if customary norm C is not integrated into the community's normative practices, then those who employ it in an attempt to justify or criticize do so mistakenly; in some respects they have a false understanding of the community's normative practices, of the social meaning that the community 'reads in' the pattern of behaviour partly constitutive of its members' interactions with one another. As noted above, what is determinative is the practice itself, how the process of challenge and

response really plays out, not any member's or even all the members' articulation of the norm.

Contrary to the orthodox account of *opinio juris*, 'early employers' of a customary norm that achieves uptake in any given community believe correctly that the norm to which they advert already exists as a norm of their community. This point is crucial; interpretive disputes over what members of the community are doing—over the normative valence of one or another pattern of behaviour in which members of the community engage—are disputes over how things are, not how they should be. Challenges and responses employing a putative customary norm assert that a given pattern of behaviour already has a certain normative valence within the community, albeit one heretofore inchoate or incompletely spelled out. Its successful integration into the community's normative practices simply constitutes acceptance of this claim by the bulk of the community's members.

Dissatisfaction with this view may be attributable to the following belief: if there is a fact of the matter regarding C's existence as a customary norm of a given community, then it ought to be possible for members of that community (and perhaps external observers as well) to ascertain it without having to wait to see if members of the community are successful or unsuccessful in using it for justification and criticism. This belief rests on two mistaken assumptions, however. First, it misconstrues customary norms as objects of intellectual apprehension (p. 336) when they are really components of a practical skill. The only way to test one's skill in navigating interactions with other members of the community according to the community's norms is to deploy them to hold oneself and others responsible, since only one's success or failure in doing so reveals how well one grasps (or knows, in a practical sense) the community's customary norms.³⁶ Secondly, the inference from disagreement to the absence of any correct answer regarding a customary norm's status in a given community gives an unwarranted priority to epistemology over ontology.³⁷

The advantages of the normative practice account of custom are not limited to avoiding the so-called chronological paradox. For example, it accounts for the fact that customary norms typically bind all members of a given community regardless of whether they consent to those norms, or even could consent to them. Customary norms bind agents by virtue of their being participants in the normative practice those norms constitute; they bind agents by virtue of their membership in the community, simultaneously constituting them as members of the community (i.e. as juridical persons, bearers of rights and responsibilities) and constituting the community of which they are members. Indeed, the normative practice account clarifies why even agents who object to 'evolving' customs are nevertheless bound by those norms if they become integrated into the community's practices of challenge and response.³⁸ The normative practice account also sheds light on custom's reform. Given that customs exist by virtue of being practiced, the creation of a new norm sometimes requires conduct at odds with an existing one, or perhaps more accurately, with what some members of the community take to be an existing customary norm. Since patterns of behaviour are always subject to multiple interpretations, they can be simultaneously construed as norm-violative and as contributions to the development or recognition of a new customary norm.³⁹ A community member who attempts to reform one or more of its customary norms will concede that his conduct conflicts with what some other members of the community take its normative valence to be. But he will also contest their (perhaps implicit) claim to have correctly formulated the social meaning of such conduct, in effect charging them with a failure to be properly attuned to the ways in which the community's understanding of its own normative practices has changed.

Thus far I have described the normative practice account as a theory of custom; is it *ipso facto* a theory of customary international law? Elsewhere I argue that we should distinguish between the creation of a customary norm and that norm's legal (p. 337) validity.⁴⁰ The latter property, I contend, follows from the practice of officials in a legal system recognizing that customary norm as law. This is a contingent practice, however; it may extend only to

some of a community's customary norms, as I contend is the case for the customary norms that govern States' international relations. Moreover, some legal systems may not recognize custom as a source of law at all. If so, a complete theory of CIL requires both an account of custom and an account of how custom becomes law. What the arguments in this section demonstrate, though, is that many of the alleged theoretical challenges to customary international law are really challenges to custom per se, independent of its being recognized as law.

V. Positivism and the Normative Practice Account of Custom and Custom Formation

Whatever its virtues, positivists may question the compatibility of the normative practice account of custom and custom formation with their own commitment to the view that norms count as law only by virtue of their social source, regardless of their merits. In the space remaining I make an initial effort to assuage such worries, focusing particularly on Kelsen's and Raz's respective arguments for positivism.

Kelsen maintains that law must be the product of an act of willing or positing. Given such an understanding, we may struggle to make sense of customary international law, which 'seems to be unintentional, undirected, and unwilled human activity'.⁴¹ Kelsen's solution is to characterize *opinio juris* as a collective act of will; specifically an act of collectively willing that members of a given community ought to behave as they have been behaving. How should we understand the idea of collective willing here? I suggest we do so in terms of the normative practice account of custom and custom formation described above. That account enables us to explain the collective aspect of custom formation to which Kelsen rightly points, since a customary norm exists in any given community only if it is integrated into that community's practice of holding people responsible. Furthermore, it reflects how customary norms are *created* or *made* by members of the community through a process of challenge and response in which social meaning is read into or used to cognize their interactions with one another. True, on the normative practice (p. 338) account of custom formation novel attempts to explicitly formulate norms perceived as latent in the community's existing practices are not conceived of as the intentional willing or positing of a new norm. But Kelsen, at least, does not appear to equate the willing necessary for the existence of a positive norm with legislation. Rather, he claims that 'custom is, just like a legislative act, a mode for *creating* law'.⁴² Indeed, once we distinguish custom from legislation as a means for creating norms, and characterize the former in terms of the normative practice account, we can see that custom is not only willed but also intentional and directed. Customary norms arise because of agents directing normative claims at one another with the intention that the targets of those claims guide their conduct according to the norm referenced in the claim (i.e. the challenge or response). The perception that customary norms are the product of a process that is neither intentional nor directed rests on the assumption that acts of willing or positing norms must be legislative.

Finally, the normative practice account explains custom's normativity without falling foul of the Is-Ought distinction that figures centrally in Kelsen's theory of law. The justification for a customary norm (an Ought) requiring some act-type is not found in the fact (an Is) that members of a given community perform, or have long performed, that act. Nor is that fact rendered normative by another fact, namely the belief that members of the community ought to perform tokens of that act-type. Rather, the very cognition of a certain behaviour as an act of some type or other, e.g. as obligatory or permissible, is normative. Thus, when a member of a given community challenges another's performance of a certain act, or responds to such a challenge, with the claim 'that's not how we do it around here', that is not a descriptive claim regarding the sort of behaviour that might be observed or predicted,

but a normative claim that implicitly references the social meaning read into that behaviour that renders it not to be done.

Recall that Raz argues that law must be positive if it is to be authoritative; that is, if it is to be capable of mediating between agents and the reasons that apply to them. The key question, then, is whether on the normative practice account of custom it is possible for agents to guide their conduct according to a customary rule without reflecting on the reasons for having that rule. It might be thought that this question must be answered in the negative on the ground that members of a given community must interpret their interactions with other members of the community in order to identify the customary norms that bind them. This is false. Members of a community frequently learn its customary rules through instruction by other members recognized as enjoying significant mastery of its normative practices in light of their successful participation in them over a lengthy period of time.⁴³ In the case of (p. 339) customary international law, this takes the form of experienced international lawyers educating new members of that field as well as other legal officials, corporate officers, etc.⁴⁴ Nor need testimony and instruction be personal; the public promulgation of customary rules as well as their codification can also play a part. In all these cases members of the relevant community, e.g. the legal officials whose conduct constitutes the international acts of the States in which they occupy offices, will be able to identify what the rules are without recourse to the reasons on the basis of which those who created the rules did so. Moreover, since the ability to successfully navigate a community's normative practices is a practical skill, those who have developed it to a high degree will often succeed in identifying its customary norms without recourse to expert testimony or codification. None of this is to deny that agents may sometimes be uncertain or mistaken regarding the normative valence custom attaches to a specific pattern of behaviour. Nor is it at odds with the claim that uncertainty and the incidence of mistakes are likely to intensify rapidly as the social, natural, and technological environment in which members of a community interact becomes increasingly complex and dynamic. However, these points merely indicate the limits of rule-guided behaviour in general and customary rule-guided behaviour particularly. As long as customary rules can sometimes be learned and reliably (if not infallibly) deployed by community members to navigate their interactions with one another, the normative practice account is consistent with Raz's argument for positivism.

Finally, the central role that the normative practice of custom assigns to interpretation in the creation of new customary norms poses no threat to the positivist's account of what makes norms legal. True, the normative interpretation of some pattern of behaviour necessarily rests on an appeal to some value or values, some perhaps implicit purpose or end best served by understanding that pattern of behaviour as obligatory, permissible, etc. But in that respect it differs in no way from the typical process of legislation, formal or informal. Furthermore, on the normative practice account interpretation alone does not create a customary norm, nor does the success of any given interpretation rest on its being the objectively best (moral) construction of the community's existing normative practice. Rather, an interpretation of a pattern of behaviour succeeds as custom formation if, and only if it is integrated into the community's practices of holding themselves and one another responsible. That is the 'social fact' that constitutes the existence of customary norms.

In this chapter I have considered legal positivism as a conceptual claim regarding law, and so international law; specifically, the claim that the existence of law is a matter of its social source, regardless of its merits.⁴⁵ Arguments offered in defence (p. 340) of this claim can be categorized as descriptive, normative, and conceptual, from which it follows that the success of any particular criticism of legal positivism as an accurate characterization of (international) law depends on the specific type of defence offered for that characterization. In addition to arguing for the claim that law is necessarily a social fact, legal positivists should, and often do strive to give an account of the possible sources of law; i.e. the types of action that can generate law. Providing a theoretically satisfying positivist account of

- ³ H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994); Brian Leiter, 'Why Legal Positivism (Again)?', University of Chicago, Public Law Working paper No. 442 (2013), <<http://www.law.uchicago.edu/academics/publiclaw/index.html>>, accessed 25 June 2016; Leslie Green, 'Legal Positivism', in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Fall 2009 edn), <<http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/>>, accessed 25 June 2016.
- ⁴ That is, frequent reliance on the distinction between *lex lata* and *lex ferenda* is taken to provide evidence of its existence.
- ⁵ Leiter, 'Why Legal Positivism', p. 12.
- ⁶ See e.g., Hart, *The Concept of Law*, pp. 253–4.
- ⁷ See e.g., Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', *Columbia Journal of Transnational Law* 39 (2000): 19–74; Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources', *Iowa Law Review* 93 (2007): 65–129.
- ⁸ See Hart, *The Concept of Law*, p. 210.
- ⁹ 'If inroads have to be made on this principle [*nulla poena sine lege*] in order to avert something held to be a greater evil than its sacrifice, it is vital that the issues at stake be clearly identified. A case of retroactive punishment should not be made to look like an ordinary case of punishment for an act illegal at the time.' Hart, *The Concept of Law*, pp. 211–12. Compare the majority opinion in the *Tadić* case, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72, Appeals Chamber (2 October 1995), with the explicit discussion of the conflict between retributive justice and legality in the operation of international criminal law in Larry May, *Crimes against Humanity* (Cambridge: Cambridge University Press, 2009), pp. 207–11; David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 569–88, 581–7.
- ¹⁰ D'Aspremont, *Formalism*, pp. 34–5.
- ¹¹ Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power, and Lassa Oppenheim's Positive International Law', *European Journal of International Law* 13 (2002): 401–36, 433–4 (italics added). See also Prosper Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law* 77 (1983): 413–42.
- ¹² See the discussion of Joseph Raz below.
- ¹³ See Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* 90 (2006): 1003–44, 1038–40.
- ¹⁴ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
- ¹⁵ This is only a rough characterization of Raz's normal justification thesis, but it suffices for my purposes here.
- ¹⁶ Compare Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law', *European Journal of International Law* 20 (2009): 23–57, and Alexander Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', *European Journal of International Law* 20 (2010): 985–95.
- ¹⁷ See David Lefkowitz, 'Legitimacy of International Law', in David Held and Pietro Maffettone, eds, *Global Political Theory* (London: Polity, 2016), 98–116.
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18 D'Aspremont, *Formalism*, pp. 35–6.

19 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 44, para. 77.

20 See e.g., the draft conclusions on the identification of customary international law in the second and third reports prepared on behalf of the International Law Commission (ILC): ILC, Second Report on the Identification of Customary International Law by Michael Wood, Special Rapporteur, 22 May 2014, UN Doc. A/CN.4/672; ILC, Third Report on the Identification of Customary International Law by Michael Wood, Special Rapporteur, 27 March 2015, UN Doc. A/CN.4/682. Note that in 2013 the ILC changed the title (and so the scope) of this project from 'formation and evidence of customary international law' to 'identification of customary international law'. My primary concern in what follows is with the ontological question suggested by the original title, i.e. customary international law's mode of existence, creation, and extinction, and only secondarily and indirectly with the epistemic question of how to identify CIL.

21 See, originally, François Gény, *Méthode d'interprétation et sources en droit privé positif*, 2nd edn (Paris: F. Pichon et Durand-Auzias, 1919), pp. 367–71.

22 See e.g., Michael Byers, *Custom, Power, and the Power of Rules* (Cambridge: Cambridge University Press, 1999), p. 131; John Tasioulas, 'Customary International Law and the Quest for Global Justice', in Amanda Perreau-Saussine and James B. Murphy, eds, *The Nature of Customary Law: Legal, Historical, and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2009), 307–35, 321.

23 See Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London: Routledge, 2011), pp. 82–5; Emmanuel Voyiakis, 'Customary International Law and the Place of Normative Considerations', *American Journal of Jurisprudence* 55 (2010): 163–200, 166, 183.

24 See e.g., Raphael M. Walden, 'The Subjective Element in the Formation of Customary International Law', *Israel Law Review* 12 (1977): 344–64; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 238–45; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), pp. 112–21.

25 As Finnis notes, if the inference from the belief that it is desirable that some pattern of behaviour be subject to an authoritative rule to the conclusion that such a rule exists 'is not to be a mere *non sequitur*, [the argument] must have a suppressed practical premise'. Finnis, *Natural Law*, p. 243.

26 See e.g., Curtis Bradley, 'The Chronological Paradox, State Preferences, and *Opinio Juris*', draft on file with author.

27 Gerald J. Postema, 'Custom, Normative Practice, and the Law', *Duke Law Journal* 62 (2012): 707–38, 715.

28 'Members of a community' because custom constitutes the original common life of a given community, that which simultaneously constitutes the community and makes individuals members of it.

29 Postema, 'Custom, Normative Practice, and the Law', p. 715. See also Voyiakis, 'Customary International Law', pp. 180–5.

30 Postema, 'Custom, Normative Practice, and the Law', p. 724. See also Postema, 'Custom in International Law: A Normative Practice Account', in Perreau-Saussine and Murphy, eds, *The Nature of Customary Law*, 279–306, 288.

- 31** Postema, 'Custom, Normative Practice, and the Law', pp. 716-17.
- 32** This is one of several points at which the normative practice account of custom appears quite similar to Savigny's depiction of custom as an indicator of positive law, by which he means the consensus on proper conduct that exists in the consciousness of the *Volk*. See Friedrich Karl von Savigny, *System of the Modern Roman Law*, trans. William Holloway (Westport: Hyperion Press, 1979). Tracing the affinities and differences between the two accounts lies beyond the scope of this chapter.
- 33** Postema, 'Custom, Normative Practice, and the Law', p. 728.
- 34** See *ibid.*, p. 730.
- 35** The normative practice account does not rule out the possibility of 'instant custom', however. The social meaning read into patterns of behaviour by members of a given community may sometimes shift in concert, so that the first time that meaning is explicitly formulated to justify some conduct it is immediately accepted by other members of the community; i.e. immediately recognized as better capturing their understanding of what is permissible, obligatory, etc., than does a norm explicitly formulated sometime in the past.
- 36** See Postema, 'Custom in International Law', pp. 290-1.
- 37** See Voyiakis, 'Customary International Law', pp. 164-5.
- 38** The claim in the text does not deny the possibility of a norm that entitles those who persistently object to (certain) customary norms to not be subject to them. Rather, it only indicates why neither the absence of consent nor objection per se undermines the authority of a customary norm over an actor if that norm is integrated into the community's normative practices.
- 39** For a similar argument, see Kammerhofer, *Uncertainty*, p. 75.
- 40** David Lefkowitz, '(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach', *Canadian Journal of Law and Jurisprudence* 21 (2008): 129-48.
- 41** Kammerhofer, *Uncertainty*, p. 82.
- 42** Hans Kelsen, *General Theory of Norms*, trans. Michael Hartney (Oxford: Clarendon Press, 1991). See also Kammerhofer: '[a] better reading of the Pure Theory's customary theory is that the will that subjects of law ought to observe the factual pattern has become a collective, but not a "legislative" will'. Kammerhofer, *Uncertainty*, p. 84.
- 43** See Postema, 'Custom in International Law', p. 286.
- 44** Consider this in the light of Article 38 (1) (d) of the Statute of the International Court of Justice (San Francisco, 26 June 1945, 33 UNTS 993).
- 45** Or, for that matter, the merits of the normative social order it regulates, and so partly constitutes.
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