

Law's "inherent moral risk" and the two-way relationship between law and habits

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***Abstract:** By focusing on the qualitative difference between the habits that are capable of generating a legal system and the habits that this system's "division of normative labour" can facilitate, this paper throws new light on the concern at the root of Hart's claim that law is inherently morally risky. Hart's great insight in this respect has been muddled by his attempt to encapsulate the reflexive element inherent in the internal point of view in a (weak) notion of "acceptance". This paper argues that the key risk inherent in the "division of normative labour" enabled by law's institutional structure consists in the fostering of habits that have lost their adaptability and thus their ability to support legal practice.*

Keywords: Habit, ethical agency, habituation, Hart, moral risk, routinisation

"[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop." (G.K. Chesterton, *On tremendous trifles*¹)

We have all been there: to fail to "see" beyond routine appearances and hence grasp the moral salience of a situation is easy. It is made easier still when that situation is structured around a normative framework that defines the roles of its protagonists. That normative framework need not be legal. It may be professional, conventional or otherwise. Yet because of the pervasive reach and specific nature of its institutional structure, a legal framework may well be uniquely conducive to the "rote blindness" described above.

This peril is indirectly related to a concern which Hart formulates differently when he refers to the "risk that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not".² Hart's worry works like this: one of the defining features of established legal orders is that they *can* be sustained on the basis of official acceptance alone, thanks to their institutional structure (thesis 1). Because of this structure, it may well be the case that an established legal system (as opposed to a simpler regime of primary rules) is particularly conducive to a society that is "deplorably sheeplike" -and where the sheep might all end up "in the slaughterhouse"³ (thesis 2). This paper argues that thesis 2 is

¹ (Chesterton, 1955)

² (H. L. A. Hart, 1994, p. 202)

³ (H. L. A. Hart, 1994, p. 117)

correct and deserves greater attention.⁴ This is in part due to the fact that it is muddled by its association with thesis 1, which is unhelpful at best, and not only because of the minimalist way in which Hart defines acceptance.

While “an unreflecting inherited or traditional attitude, or the mere wish to do as others do”⁵ clearly offers little safeguard against the “sheeplike” predicament Hart worries about, one can only make sense of the risk inherent in the emergence of law’s complex institutional structure if one turns upstream, to the complex web of social processes that shape and enable the attitudes encompassed under Hart’s concept of “acceptance”. While considerable work has already been devoted to delineating the ways in which conventional practices may give rise to (legal) norms⁶, far less attention has so far been paid to the patterns of repeated behavior –i.e. habits- that feed such practices, and the dynamic relationship between the two. Instead of being considered as a departure from habit, such practices indeed gain in being seen as a development and refinement of it.⁷

Habits give rise to practices if and only if they are capable of adapting to changing needs and circumstances in light of the purpose they are deemed to serve. That adaptability in turn requires a degree of reflexivity. By throwing light on the full spectrum of habits (from “mere” tics and automated behaviour to full-blown practices) , this paper emphasizes the qualitative difference between the habits that are capable of generating the practices at the heart of a legal system and the habits that this system’s “division of normative labour” is conducive to. Hart’s “thesis 2” is correct because and to the extent that law’s institutional structure does facilitate the development of rigidified habits, i.e. habits that have

⁴ Both Waldron (Waldron, 1999) and Green (Green, 2008) have helped flag up this important aspect of Hart’s theory, but have mostly considered it in the wider context of law’s separability from morality. This paper seeks to refine our understanding of the factors that contribute to the “sheeplike” quality of behavior that is facilitated by (in contrast to that which generates) legal institutions.

⁵ (H. L. A. Hart, 1994, p. 202)

⁶ (Bratman, 1992; Marmor, 2001; Postema, 1982, 1998)

⁷ “[P]ractice should be regarded as an elevation of habit rather than a departure from it” (Alberzart, 2013). See section 1.2

lost their adaptability and hence their ability to generate and support *practices* (conventional or otherwise).

The above argument requires consideration of the relationship between habit and one's meta-ethical understanding of agency, which is the focus of the first part of this paper. If autonomous agency is taken to demand transcending one's phenomenal environment (so as to leave a "safe" distance between that environment and one's normative choices), then habits belong firmly to the province of sociology. They may be of interest to the moral philosopher only to the extent that they constitute a threat to personal autonomy. In large part thanks to the renewed dominance of dualist (and often unacknowledged) meta-ethics within post-WWII jurisprudence, an unspoken assumption is that any effort to account for law's normative force should proceed to demonstrate how law differs from "mere" habits. The latter are not only unequivocally confined to the sphere of "is" (its contingency safely delineated from the sphere of Reason / "oughts"); they are also deemed an obstacle which is overcome only to the extent that some of us at least adopt a critical reflective attitude towards the law. On a naturalist understanding of ethical agency, by contrast, habits not only condition but enable normative choices. As such, they raise a particular challenge for the moral or political philosopher, highlighted in section 1.2: given that slowly acquired habits of evaluation are all we've got to trigger the movement of scrutiny necessary to questioning commonly accepted practices, how does one preserve the possibility of civic responsibility?

It is because of an acute concern to devise a theory of moral development capable of answering the above challenge (a concern that also shaped Hart's theory of law) that Kohlberg felt compelled to adhere to a Kantian framework. Given the parallelism with the factors that led to Hart's own scant developments on habits, Section 1.1 delves into the reasons that led Kohlberg to adopt such a framework despite the fact that it was fundamentally at odds with his pragmatist inclinations. Both authors indeed felt unable to reconcile the "moral task" informing their theory –preventing moral torpor- with a (non-reductive) naturalist methodology (whereby there is no gap between *is* and *ought*). While

Kohlberg adhered instead to a Kantian framework, Hart stuck to an agnostic meta-ethical position⁸ and only considered habits to better oppose them to rule-governed practices. This need not have been so.

The second part of this paper highlights Hart's intellectual affinities for what could have been a (non-reductive) naturalist account of legal normativity, whereby there would be no "gap" between habits as social facts on one hand and social rules on the other: a gap which Hart endeavours to bridge via his notion of acceptance. Section 2.2 then proceeds to show how such a naturalist narrative (highlighting the two-way relationship between habits and law) bolsters Hart's claim that law is inherently conducive to a society that is "deplorably sheeplike" (once this claim is rid of its association with "official acceptance").

Part I: Delving into the nature of habit and its relationship to ethical agency

Habit requires repetition -whether it be repeated movement, or posture, or frame of thought. In the pattern shaped by this repetition, at some point a habit is formed. To try and identify a precise moment in time when a habit is born is doomed to failure, for diminished awareness of the pattern underlying it is key to its emergence (and external observation necessarily comes too late). Now just as this numbing of one's passive sensibility takes root, habit concomitantly buoys up whatever activity underlies it. When I get used to bicycling between cars in the morning rush hour, I not only become less tense when doing so; I also acquire some genuine dexterity.

It is this double effect of habit⁹ which Hume refers to when he emphasizes that "custom increases [sic] all active habits, but diminishes passive, according to the

⁸ See (Delacroix, 2010)

observation of a late eminent philosopher [Butler]”.¹⁰ When they are considered specifically in the moral sphere, the active and passive aspects of habit make it a double-edged sword. While habituation is key to the processes by which we come to acquire a taste for - and our ease in discerning- standards of right and wrong, it is also what can stop us from waking up to the demands of such standards, lulled into a comforting but dangerous sense of routine.

*“[E]thics strives to legislate a world in which the good is done fluidly, as a matter of habituation, if not fact, even as it is recognized that the very thing ethics can never be is an acting that is merely habit or matter of fact. Even as ethics seeks to become familiar, it insists on rendering the world unfamiliar. The emergence of ethical obligation both insists on regularity in one’s conduct and resists that regularity”.*¹¹

First highlighted by Aristotle, the role of habituation within the processes by which we come to acquire our pre-reflective “ethical know-how”¹² continues to be the focus of a large -mostly Aristotelian- strand of moral philosophy¹³. The no-less important capacity to break free of habit, by contrast, gets far less attention. Yet living an ethical life demands that we sometimes stand at odds with the usual. Hatley’s quote (above) vividly captures this double edge of habituation: while habits condition the possibility of ethical agency, they can also compromise it.¹⁴

⁹ As it was originally formulated by Bishop Butler: “From these two observations together, that practical habits are formed and strengthened by repeated acts; and that passive impressions, by being repeated upon us, grow weaker; it must follow, that active habits may be gradually forming and strengthening, by a course of acting on such and such motives and excitements, whilst these motives and excitements themselves are, by proportionate degrees, growing less sensible, i.e. are continually less and less sensibly felt, even as the active habits strengthen. And experience confirms this; for active principles, at the very time that they are less lively in perception than they were, are found to be, somehow, wrought more thoroughly into the temper and character, and become more effectual in influencing our practice.” (Butler, 1857, p. 108)

¹⁰ (Hume, 1978, p. 424)

¹¹ (Hatley, McLane, & Diehm, 2006, p. 3)

¹² (DeSouza, 2013)

¹³ And to a lesser extent psychological studies, for habit arguably remains a “blind spot” in empirical studies of moral judgment. For an empirical study focusing on the process of habit formation, see (Lally, Van Jaarsveld, Potts, & Wardle, 2010)

¹⁴ Habituation only becomes a threat to ethical agency when such agency has lost its plasticity, whether it became rigidified by embracing some religious or ideological framework, through emotional trauma or otherwise: see section 1.2.2.

1.1. Growing out of the habitual: Habit v. Reason

Habits constrain us. Because their compelling force typically eludes us¹⁵, they may be seen as a moral menace, surreptitiously compromising our autonomy. In her seminal work on habit¹⁶, Clare Carlisle traces a philosophical thread that links Kant to Kierkegaard and Bergson via less well-known authors such as Maine de Biran and his ambivalent appraisal of what he called the “double law” of habit. The latter is deemed to be the “general cause of our progress on the one hand, of our blindness on the other”.¹⁷ Because habit can eclipse reflective thought, and because reflective thought is deemed (by those authors within the Kantian thread) to condition the exercise of our freedom, habit belongs firmly to the “messy”, causal, space of desires, inclinations and the like.

Now, the metaphor of two spaces which typically underlies negative evaluations of habit is far from casual. In Kant it explicitly structures his assertion of the priority of freedom, “so the space of reasons is the space in which our transcendental freedom operates, in spite of the deterministic course of the rest of our being [including habits].”¹⁸ In line with this dualist framework, theories of ethical development are traditionally structured around a gradual detachment from the emotional and habitual roots of ethical action, celebrating reflective reasoning –typically along Kantian lines- as the culmination of mature agency. Seen from that perspective, what I have called “habituation’s double edge” does

¹⁵ “[O]f all enemies, habit is perhaps the most cunning, and above all it is cunning enough never to let itself be seen, because the person who sees the habit is saved from the habit.” (Kierkegaard, 1995, p. 36)

¹⁶ (Carlisle, 2006, 2010, 2014)

¹⁷ (De Biran, 1929, p. 49) For Carlisle, it is precisely De Biran’s ambivalence that makes his account of habit particularly interesting, as this ambivalence is born out of the tensions underlying his metaphysics’ dualist presuppositions: “*Biran’s whole account of habit is characterised by tensions and inconsistencies that testify to a kind of struggle between reason and habit: on the one hand, there is the insistence on a dualistic psychology, and on the other hand the acknowledged failure clearly to separate activity and passivity, perception and sensation, the voluntary and the involuntary*” (Carlisle, 2010, p. 129).

¹⁸ (Blackburn, 2001, p. 140)

not bite, for it merely translates the necessity to grow out of the habitual through critical reasoning.

Remarkably, Kohlberg's theory manages to be one of the most famous instantiations of that Kantian perspective while at the same time highlighting its problematic dependence on a metaphysical dualism that is radically incompatible with the naturalist methodology Kohlberg was committed to. As such, and because it might be that, just like Hart, Kohlberg's defiance towards the habitual takes its root in the challenge which the widespread, obedient contribution to Nazi crimes posed for post-World-War II political and moral philosophy, the next paragraphs briefly outline the tension inherent in Kohlberg's account.

When Kohlberg developed his theory of moral stages¹⁹ in the 1950s, the dominant, "socialization"²⁰ view claimed that "society is prior to the individual, both chronologically and morally. It is the source of all values, which are eventually reflected in the individual".²¹ The essentially passive role attributed to the individual – seen as a value receptacle – by this socialization view²² worried Kohlberg. Aside from the danger of social stagnation, Kohlberg was acutely aware of the peril inherent in over-emphasising adequate adjustment to socially constituted habits of evaluation. For "to identify morality with conformity is to be forced to take the position that a loyal Nazi was behaving

¹⁹ Kohlberg interviewed a group of 75 American boys aged 10 to 16 every three years for 12 years. These boys were presented with hypothetical moral dilemmas. On the basis of their reasoning about these dilemmas at a given age, Kohlberg determined which "stage of thought" they had reached in relation to a particular moral "aspect". These stages of thought correspond to six wider developmental stages, spread across three levels – a hierarchical structure emulating Piaget's cognitive development scale. The overly cognitive focus of his theory is explicitly acknowledged by Kohlberg, who is keen to emphasise that his "test [of moral stage], which relies entirely on hypothetical dilemmas, is [only] a test of moral reasoning" ((Kohlberg, 1981, p. 35).

²⁰ While proponents of the "socialization" thesis emphasise accommodation of the individual to the values and requirements of society (through conformity and internalisation processes) as a key component of moral development, cognitivists highlight the importance of role-taking equilibration (which involves cognitive processes).

²¹ (Spiro, 1951), p. 20.

²² At least a caricatured version of this socialization view (both sides of the debates have been harmed by over-simplification): Martin Hoffman's theory for instance points out the influence of the developing child's activity (which includes cognitive activity) in socialization.

morally”.²³ Kohlberg’s defining moral maturity²⁴ by reference to the individual’s capacity to “differentiat[e] his self from the rules and expectations of others and defin[e] his values in terms of self-chosen principles”²⁵ is a direct attempt to address this concern.

If Kohlberg had left it at that, his emphasizing the need to cultivate one’s ability to stand back from and challenge socially accepted norms need not have clashed dramatically with his otherwise defiant attitude towards what he called “the Grand Canyon of modern philosophy”²⁶: the gap between is and ought.

Methodologically speaking, Kohlberg is indeed clearly committed to understanding morality as a naturalistic phenomenon quite unlike the noumenal understanding presupposed by a Kantian stand. “By asserting that any conception of what moral judgment ought to be must rest on an adequate conception of what it is”²⁷, Kohlberg seeks to call on the spirit of a pragmatist tradition to which he is clearly attracted²⁸ - yet belies by structuring his model of ethical development on the basis of a strictly Kantian normative stand.²⁹

This normative stand is a source of both tension and misunderstanding within Kohlberg’s works. This tension manifests itself when he insists that “action is not a moral action unless it is generated by moral reasoning and motives”,³⁰ while at the same time acknowledging that “individual moral action usually takes place in a social or group context and that context usually has a profound influence on the moral decision making of individuals” (this acknowledgment manifests itself

²³ (Kohlberg, 1976), p. 3.

²⁴ As formalised in his “stages 5 and 6” of moral development, which are also referred to as the “postconventional level”.

²⁵ (Kohlberg, 1976), p. 33. In (Kohlberg, 1973), Kohlberg further refined the definition of his postconventional level as based on a “theory-defining level of discourse,” that is, “defining a moral theory and justifying basic moral terms or principles from a standpoint outside that of a member of a constituted society” (p. 192).

²⁶ (Boyd & Kohlberg, 1973, p. 358)

²⁷ (Kohlberg, 1980, p. 67)

²⁸ Kohlberg often expressed his intellectual indebtedness to Dewey (see among others: (Kohlberg & Mayer, 1972)

²⁹ The highest and rarely attained developmental stage would consist in embracing Kantian ethics.

³⁰ (Kohlberg, 1981, p. 36), p. 36.

in his dedication to developing his so-called “just community” schools, designed specifically to nurture a particular “moral climate”³¹).³²

Given this repeated emphasis on context and his commitment to reforming the group atmosphere that feeds moral judgments, one may wonder, in fact, if Kohlberg was truly at ease with a Kantian account of moral values.³³ I would venture that Kohlberg did not need his Kantian outlook (which did not serve him well) and only adopted it for want of a better answer to the philosophical puzzle that troubled him. His repeated emphasis on the purity of motives as constitutive of moral action indeed suggests that Kohlberg’s Kantian stand has a lot to do with³⁴ its presupposing a clear break between the messy world of habit³⁵ and instincts on the one hand, and the world of reasons on the other.

It is possible, in other words, that Kohlberg endorsed the Kantian model because of its “built-in” call for critical reflection, thus seemingly guaranteeing the possibility to resist what is perceived as the agency-threatening aspect of

³¹ “[T]he unit of effectiveness of education is not the individual but the group. An individual’s moral values are primarily important for society as they contribute to a moral social climate, not as they induce particular pieces of behavior [...] Moral discussion classes [...] are limited, not because they do not focus on moral behavior, but because they have only a limited relation to the “real life” of the school and child” (Quoted on page 20 of (Power, Higgins-D’Alessandro, & Kohlberg, 1989), referring to Lawrence Kohlberg, “Cognitive-Developmental Theory and the Practice of Collective Moral Education,” in *Group Care: An Israeli Approach*, ed. Martin Wolins and Meir Gottesman (New York: Holt, Rinehart & Winston, 1971

³² Referring to the “massacre at My Lai”, where individual American soldiers murdered non-combatant women and children, Kohlberg emphasises the fact that “the My Lai massacre was more a function of the group ‘moral atmosphere’ that prevailed in that place at that time than of the stage of moral development of the individuals present.” ((Kohlberg, 1981, p. 38))

³³ At a descriptive level, one may interpret his first four moral stages as explicitly acknowledging that emotions are essential to everyday moral judgments (empirical studies concede that very few people ever reach the emotionally detached fifth and sixth stages of development): in the first and second stages, people are successively driven by fear of punishment and the prospect of hedonic gains, while in the third they are led by their desire to be liked by others. As for the fourth stage –the type of moral reasoning that is dominant in industrialized societies – Jesse Prinz successfully argues that even the appeal to law and order “may have an emotional undertone” (Prinz, 2007, pp. 33-35).

³⁴ One may speculate on the role played by Kohlberg’s friendship with Habermas and the influence that the latter may have had on both his Kantian framework and his affinities for pragmatism’s methodology (as exemplified in his references to Dewey).

³⁵ Kant indeed deemed habit (understood as mindless, automatic repetition) to be a sign of human enslavement: “An aptitude (habitus) is a facility in acting and a subjective perfection of choice. But not every such facility is a free aptitude (habitus libertatis); for if it is a habit (assuetudo), that is, a uniformity in action that has become a necessity through frequent repetition, it is not one that proceeds from freedom, and therefore not a moral aptitude.” (Kant, I. [1797] (1996) *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press), ms. 6: 407)

habituation. Aside from the fact that such a guarantee is illusory, it also comes at a price, for it leaves one with a poorer conception of agency (see next section), one that is in fact less able to take on the normative challenge that so preoccupied both Hart and Kohlberg: preventing moral torpor – and hence blind obedience to law.

1.2. Finding a way of growing *within* the habitual: developing a (non-reductive) naturalist account of habit

Without habits we would be hopeless. Aside from the practical impossibility of systematically deliberating on every course of action,³⁶ we would also, most importantly, have nothing to base our deliberations upon. For unless we conceive of our values as somehow emanating from divine intuition, Platonic reminiscence or a-priori reflection, our standards of right and wrong cannot but be -for the most part³⁷- the product of slowly acquired habits of evaluation, or what Aristotle describes as a process of “habituation”. Just as individuals come to internalise and value some of the normative practices in which they are immersed as they grow up, so does a society’s normative fabric evolve with gradually accepted, changing practices.

Referring to Aristotle’s account of how ethical character is formed, McDowell describes the process (which he calls “Bildung”) whereby “human beings are intelligibly initiated into this stretch of the space of reasons by ethical upbringing, which instills the appropriate shape into their lives. The resulting habits of thought and action are second nature”.³⁸ Clearly, the “habits of thought and action” McDowell refers to in the above passage must be of a very different kind from those deemed in the previous section to belong firmly to the “messy”,

³⁶ William James emphasises the efficiency of habit, for it “simplifies our movements, makes them accurate, and diminishes fatigue [by reducing] the conscious attention with which our actions are performed.” (James, 1984, p. 12)

³⁷ Slowly acquired habits of evaluation will, from time to time, be the object of revolutionary change. The key is to understand the dynamic that conditions the possibility of such revolutionary change, including, in particular, the conception of agency (both at an individual and collective level) it presupposes.

³⁸ (McDowell, 1996, p. 84)

causal, space of desires, inclinations and the like? Or are they? As this ambiguity can also be found at work in Hart's own reference to habits³⁹, the following section delineates different ways of having a habit: while one finds tics and automated behavior at one end of the spectrum, "intelligent" habits denote the possibility of reflectively maintaining habits that are capable of adapting and evolving in light of the purpose they serve.

1.2.1. Two ways of having a habit? Conceptual ambiguity or opportunity?

The success of McDowell's non-reductive⁴⁰ naturalism⁴¹, its potential to develop a narrative that takes us from human beings with needs and desires ("the sphere of causes") to internalized standards of right and wrong hinges upon a key ambiguity inherent in the concept of habit. Seizing upon this ambiguity, Bill Pollard endeavours to clarify "how the same idea of habit can both occupy the space of causes and, at least potentially, be a constituent of second nature"⁴² by distinguishing between "two ways of having the same habit" (rather than between different kinds of habit⁴³).

Unlike the "way which is available to pre-rational humans and other non-rational animals" the way "available to humans once they have acquired the capacity to act for reasons" involves the capacity to (here I quote McDowell) "contemplate alternatives; [and] step back from the natural impulse and direct critical scrutiny

³⁹ In contrast to Hart's famous commitment to "free the concept of a rule from confusion with the concepts of [...] a habit" (Herbert Lionel Adolphus Hart, 1956, p. 958), Hart once less famously highlighted the "connection between human intelligence, too often portrayed in absolute and splendid isolation, and habit equipment." (H. L. A. Hart, 1952, p. 59)

⁴⁰ See "A naturalism fit for purpose? Explaining our capacity to give ourselves norms, and our drive to change them." for more developments on the kind of naturalism that can support legal theory's ongoing endeavor to account for law's binding force.

⁴¹ Whatever else it is, naturalism involves at least one "lowest common denominator" commitment. Its rejection of any dualist metaphysics involves a claim that "there is no unbridgeable space between what happens in that [natural] order and any other order in heaven or earth, including the order of our own minds" (Blackburn, 2001). On this basis, the challenge which any naturalist account of morality must address consists in understanding how the demands and aspirations we characteristically associate with morality may be understood as outgrowths of our animal (rather than noumenal, or god-like etc.) nature: "there must be no unmoved mover: no intervention of the divine spark, or gifts from unexplained quarters" (Blackburn, 2001).

⁴² (Pollard, 2005, p. 76)

⁴³ As "[a]voiding talk of kinds of habit allows us to see how they can persist throughout the *Bildung* process" (Pollard, 2005, p. 76).

at it”.⁴⁴ Now this emphasis on critical scrutiny and stepping back from natural impulses may sound strangely reminiscent of Kohlberg’s Kantian account of moral development, as discussed in the previous section. The difference –and it is key- lies in what is taken to enable this capacity to step back, i.e. whether the emotional, instinctive and habitual are taken to contribute at all to this ability. The challenge for any naturalist account of moral development consists in explaining how one grows *within*, rather than “*out*” of the habitual.

This challenge is made all the more compelling since a naturalist methodology forbids any reference to some Archimedean point (whether it be Platonic forms, “natural” values or a-priori principles), reference to which could somehow be trusted to wake us to the ignobility of some of our social practices. If all we have to trigger the movement of critical scrutiny (which McDowell refers to in the above quote) are our socially conditioned emotions and “habits of evaluation”, then to nevertheless postulate the capacity to “contemplate alternatives” to the habitual as key to our second nature sounds optimistic at best. What would trigger such contemplation? Emotions? Not if they are themselves dulled by habit: “If habit causes feelings to decline, presumably to the point of expiration, then how is the role of emotional response—whether as a character trait; as the pleasure and pain accompanying virtuous and vicious acts; or as a motivational factor in action—to be accommodated?”.⁴⁵

It is the fear that any movement of critical distancing from our practices becomes unavailable the moment one endorses naturalist premises that has led to Kohlberg’s inability to reconcile his account of moral development with his Deweyan inclinations. The same fear also plays a key role, I argue, in Hart’s meta-ethical agnosticism. Rather than allaying that fear, a pragmatism à la Dewey only shows it to be ill-founded. Far from denying the possibility of critically assessing the beliefs that are felt to be indispensable to our practices, the pragmatist commitment to the primacy of practice simply denies the possibility of criticising these beliefs without first acknowledging one’s foothold in those very practices.

⁴⁴ (McDowell, 1998b, p. 171)

⁴⁵ (Carlisle, 2010, pp. 135-136)

“Consistent pragmatists must base even their most radical critiques not on transcendent grounds but practical affairs; but these affairs are, in some instances at least, precisely what call for criticism. To make our practices the bases and warrants for our critiques appears to render these practices invulnerable to criticism. This is, however, a theoretical illusion, nourished by a theoreticist tradition. For a robust culture of reflexive critique makes of our practices themselves experientially governed (or guided) affairs, ones wherein the pressures of self-criticism and, hence, self-transformation are persistently immanent in these practices.”⁴⁶

1.2.2. What enables us to stand back from habit?

Pollard emphasises the importance of the agent’s “capacity to opt out [of habit] for reasons” but, just like McDowell, does not delve into exactly what underlies this capacity “to adopt strategies to break habits”⁴⁷. His focus is on delineating that subset of habitual actions which can be deemed “rational”: “[t]hat subset will consist of those habitual actions which cohere with the agent’s worldview”.⁴⁸

“And that in turn will be enough to rule out nail-biting and cigarette smoking when they are against the agent’s better judgement. These actions are not justifiable in the right sense”.⁴⁹

But will it be enough to rule out habits generated by frequent repetition of abhorrent practices (that were initially perceived as such)? When societal norms are perverted enough to condone the worst atrocities, an agent’s worldview might well be malleable enough to accommodate –in some cases encourage– habits that one could not possibly deem to be “rational”. The following quote is an excerpt from the diary of Kretschmer, a German pharmacist who joined the

⁴⁶ (Colapietro, 2004, p. 75)

⁴⁷ (Pollard, 2010, p. 79)

⁴⁸ “[T]his world view will consist of her beliefs, interests, projects and preferences, any any other items which disclose how the world is for her.” (Pollard, 2005, p. 80)

⁴⁹ (Pollard, 2005, p. 81)

Nazi party in 1939⁵⁰ and served in a *Sonderkommando* that took part in mass executions⁵¹:

“As I said, I am in a very gloomy mood. I must pull myself out of it. The sight of the dead (including women and children) is not very cheering. But we are fighting this war for the survival or non-survival of our people. [...] We have to eat and drink well because of the nature of our work, as I have described to you in detail. Otherwise we would crack up. [...] If it weren’t for the stupid thoughts about what we are doing in this country, the Einsatz here would be wonderful, since it has put me in a position where I can support you all very well. Since, as I already wrote to you, I consider the last Einsatz to be justified and indeed approve of the consequences it had, the phrase: ‘stupid thoughts’ is not strictly accurate. Rather it is a weakness not to be able to stand the sight of dead people; the best way of overcoming it is to do it more often. Then it becomes a habit.”⁵²

To find oneself in a situation where one can deliberately choose to make a particular type of behaviour habitual (through systematic repetition) is uncommon; particularly so, one would hope, when the behaviour in question amounts to mass murder.⁵³ Kretschmer’s deliberate repetition strategy may or may not succeed in engendering a -murderous- habit. That success will in part be determined by the intensity of the emotions that are to be dulled by repetition. Assuming Kretschmer does contract the desired habit, is he in principle capable of “opting out of it for reasons”? Absolutely. Would these reasons be found in his “worldview”, in the “beliefs, interests, projects and preferences, and any other items which disclose how the world is for [him].”?⁵⁴ Not necessarily. In fact,

⁵⁰ Kretschmer was rejected by the SS for “failure to satisfy requirements during a course on ideology” (Klee et al. 1991, 296, quoted in (Pauer-Studer & Velleman, 2011) on p. 348).

⁵¹ For a wider analysis of the impact of the horrors of the Holocaust on post-WWII legal theory see ...

⁵² (Pauer-Studer & Velleman, 2011)

⁵³ Carlisle notes that Ravaisson gives little thought to the “bad habits” to which our natural inclinations can lead: “he writes of grace but not of sin; of desire for the good but not of perversity” ((Carlisle, 2010, p. 138)

⁵⁴ (Pollard, 2005, p. 80)

given the extent to which the success of the Nazi regime relied upon a deep internalisation of a perverted worldview, it is quite unlikely.

Where, then, does Kretschmer -or anybody who has contracted whatever morally significant habit- find the momentum necessary to stand back and question it? "If I am *nothing but* self, there is no way of transcending myself; if I am *nothing but* habit, there is no way of liberation through my own actions."⁵⁵ Given the ongoing process of conditioning that dynamically shapes the self ("so that each action is a reaction that stretches beyond itself to condition subsequent actions"), Carlisle suggests "a version of Nietzsche's idea of 'eternal recurrence' as a kind of ethical test: do *you* will this action to be repeated indefinitely? Do *you* will this action to become a habit? Do *you* will to become this self?".⁵⁶

The second-person formulation of the above ethical test suggests that it is up to a third person to ask those questions, to *confront* us with the habits we have contracted and the extent to which they are conducive to our idea of self. The more this idea is fixed, rigidified by some abstract model, the more out of reach the words -or mere presence- of others become. For it may well be that, when it comes to awakening us from deeply entrenched habits, "mere" words are no match for the kind of encounter described in radical terms by Levinas⁵⁷ when he refers to the "face of the Other" summoning each and every one of us.⁵⁸

Calling for humility and openness to the unforeseen, Levinas' ethics is built upon empathetic imagination,⁵⁹ a "wisdom that still learns from every new human

⁵⁵ Carlisle 2006, p. 32

⁵⁶ (Carlisle, 2006, p. 29) (my emphasis).

⁵⁷ "To approach the Other in conversation is to welcome his expression, in which at each instant he overflows the idea a thought would carry away from it. It is therefore to receive from the Other beyond the capacity of the I, which means exactly: to have the idea of infinity. But this also means: to be taught. The relation with the Other, or Conversation, is a non-allergic relation, an ethical relation; but inasmuch as it is welcomed this conversation is a teaching. Teaching is not reducible to maieutics; it comes from the exterior and brings me more than I contain. In its non-violent transitivity the very epiphany of the face is produced." (Levinas, 1969, p. 51)

⁵⁸ When it comes to awakening us from habits, such encounters may be metaphorical. It may be facilitated by a piece of art, or the reading of a great novel.

⁵⁹ Kearney defines empathetic imagination as the ability to be receptive to the other: "can we be responsible for the other if we are not first receptive to the other?...if we can't hear its call, if we cannot empathize?" (Kearney, 1998), p. 232.

face”.⁶⁰ As it would take this paper too far afield to discuss Levinas’ work or the extent to which empathy⁶¹ and imagination⁶² respectively impact on (and are conditioned by) the operation of habit, I shall focus instead on the suggestion that plasticity is key to mature moral agency.⁶³ Underlying this suggestion is the following thesis: there are indeed two ways of having a habit. One that is rigidified (and hence pathological) while the other has managed to preserve the very plasticity that enabled the birth of a habit in the first place.

William James’s definition of plasticity as “the possession of a structure weak enough to yield to an influence, but strong enough not to yield all at once”⁶⁴ highlights the extent to which a habit cannot remain such and be systematically open to change all at once:

*“If we were simply receptive to change, without limit, then we would be incapable of habit. Each new action or experience would transform us, so that we would have no character or integrity to call our own. We would be empty, entirely subject to circumstance, blown hither and thither by the winds of change”.*⁶⁵

⁶⁰ In contrast, consider de Tocqueville’s vision of democracy engendering a “crowd of men, all alike and equal, turned in upon themselves in a restless search for those petty, vulgar pleasures with which they fill their souls. Each of them, living apart, is almost unaware of the destiny of all the rest. His children and personal friends are for him the whole of the human race; as for the remainder of his fellow citizens, he stands alongside them but does not see them; he touches them without feeling them; he exists only in himself and for himself; if he still retains his family circle, at any rate he may be said to have lost his country.” (de Tocqueville, 2003, p. 805)

⁶¹ For the purpose of understanding our capacity to stand back from habit a distinction between imagination widely defined as “the capacity to imagine a different state of affairs or different ways of interacting with people” and empathy (Husserl’s *Einfühlung* or Smith’s “sympathy”) is helpful for they constitute distinct routes to moral change.

⁶² In Part II of his *Ethics*, Spinoza discusses at length what he deems to be the constitutive relationship between imagination and habit (and the extent to which, according to him, they lead us astray).

⁶³ In line with von Humboldt’s own views on moral development: “Even the most free and self-reliant of men is hindered in his development, when set in a monotonous situation. [...] But man has it in his power to avoid this one-sidedness, by attempting to unite the distinct and generally separately exercised faculties of his nature, by bringing into spontaneous cooperation, at each period of his life, the dying sparks of one activity, and those which the future will kindle, and endeavouring to increase and diversify the powers with which he works” (von Humboldt, 1969, pp. 1220-1226 (loc.))

⁶⁴ (James, 1984, p. 126)

⁶⁵ (Carlisle, 2014, p. 21)

It is precisely that fear of being “blown about” by the contingent circumstances life throws at us that underlies the appeal that some overarching religious, ideological or moral discourses have for many of us. Because they bypass the need to articulate what it is about us, constantly evolving human beings, that calls for doing things in a particular way, the dualist presuppositions underlying such discourses afford a fixed framework that defines the self’s relationship to others. This fixed relationship in turn encourages the rigidification of the habits that are constitutive of that relationship, including the habits of thought and action that underlie a legal system. That the latter is enabled by -and enables- *our* habits is forgotten. Instead of coming to terms with the contingency -and responsibility- inherent in its being a social artifact, law is presented as a necessity (natural or otherwise), thus minimising the impact of criticisms and calls for change.

Hart expresses precisely this concern (even though he does not frame it in terms of habits –see next section) when he highlights a fundamental point of intersection between Bentham and Marx, who both:

“agreed on two fundamental points which are relevant to my present theme: first, that their tasks as social thinkers were to clear men’s minds as to the true character of human society, and, secondly, that human society and its legal structure which had worked so much human misery, had been protected from criticism by myths, mysteries and illusions, not all of them intentionally generated, yet all of them profitable to interested parties. [...] For both of them such mystery was made possible by the failure on the part of ordinary men to realise that the forms of law and human society were at bottom merely human artefacts, not natural necessities but things actually made by men⁶⁶, and hence things which could be unmade and remade.⁶⁷”

⁶⁶ Ref to contrast with Arendt’s distinction between the “artefacts” produced by the *homo faber* and political action.

⁶⁷ (H. Hart, 1973, p. 6)

When Hart bemoans the fact that an established legal system is particularly conducive to a society that is “deplorably sheeplike” -and where the sheep might all end up “in the slaughterhouse”⁶⁸, he is referring to a concern expressed in significantly different terms from those used in the above quote. For it is not so much the progressive disregard for the responsibility (and possibilities) entailed by the fact that law is “unmade and remade” by us that Hart has in mind, but rather the disenfranchisement made possible by the fact that, in an established legal system, only “officials” need *accept* the Rule of Recognition. This shift is unfortunate in that it drives attention away from the complex social processes that bring (and keep) our norms in existence.

Part 2: From legal institutions to political monotony and rigidified habits

It is the possible (and likely) grass-roots alienation from the increasingly “officialised” norm-making and norm-sustaining processes that marks a significant shift from the “simple form of society” to an established legal system. Habits necessarily underlie those norm-generating processes. Could Hart’s insistence on instead analysing the risk concomitant with the “step into the legal world” in terms of narrowed down *acceptance* have anything to do with the fact that analysis of the other side of the coin – diminished *input* into those officially accepted norms- demands a “descent” into the sphere of habits?

The aim of the previous section was to highlight the extent to which one’s understanding of habit reflects one’s meta-ethical understanding of agency. If autonomy is taken to require transcending one’s causal environment (so as to leave a “safe” distance between that environment and one’s normative choices), then habits belong firmly to the province of sociology. They may be of interest to the moral or political philosopher only to the extent that they constitute a threat to personal autonomy. On a naturalist understanding of ethical agency, by

⁶⁸(H. L. A. Hart, 1994, p. 117)

contrast, habits not only condition but enable normative choices. As such, they raise a considerable challenge for the moral or political philosopher: given that slowly acquired habits of evaluation - “all the whirl of organism Wittgenstein calls ‘forms of life’”⁶⁹- are all we’ve got to trigger the movement of scrutiny necessary to questioning commonly accepted practices, how does one preserve the possibility of civic responsibility?

Both Kohlberg and Hart openly acknowledged the fostering of such civic responsibility as a “moral task” guiding their theory. Significantly though, both authors felt unable to reconcile that concern with a (non-reductive) naturalist methodology (whereby there is no gap between *is* and *ought*). While Kohlberg adhered instead to a Kantian framework, Hart stuck to an agnostic meta-ethical position⁷⁰ and only considered habits to better oppose them to rule-governed practices. This need not have been so.

The next section (2.1) highlights Hart’s intellectual affinities for what could have been a (non-reductive) naturalist account of legal normativity, whereby there would be no “gap” between habits as social facts on one hand and social rules on the other: a gap which Hart endeavours to bridge via his notion of acceptance. Section 2.2 then proceeds to show how such a naturalist narrative (highlighting the two-way relationship between habits and law) bolsters Hart’s claim that law is inherently conducive to a society that is “deplorably sheeplike” (once this claim is rid of its association with “official acceptance”).

2.1. Hart’s intellectual affinities for a (non-reductive) naturalist account of legal normativity.

Far from assuming that habits are not worthy of philosophical inquiry, Hart notes in a book review published in 1952:

⁶⁹ (McDowell, 1998a, pp. 206-207)

⁷⁰ See (Delacroix, 2010)

“What makes behavior intelligent (or stupid) is its relation to the agent's needs or purpose.[...] For the purpose of his analysis Mr. Holloway [...] exhibits the intelligent response not as a sharp break from habit but as a development and refinement of it. Few philosophers, I think, could fail to benefit from this examination of the intelligent versus stupid dichotomy and of the connection between human intelligence, too often portrayed in absolute and splendid isolation, and habit equipment.”⁷¹

The Concept of Law's scant developments on habit (and its relationship to law's normative force) may have proceeded in part from didactic concerns: to admit that habits can be had with some degree of reflexivity might have muddled the otherwise rather neat distinction between rule and habit thanks to the internal point of view. It may also have had a lot to do with Hart's efforts to dispel Austin's "habit of obedience" framework and "free the concept of a rule from confusion with the concepts of a *command* or a *habit*".⁷² Beyond (and behind) these factors, I believe Hart may have been in the grip of a meta-ethical dilemma⁷³ that just did not allow for a naturalist account of normativity – despite his otherwise clear inclinations in that direction.

A non-reductive naturalist account of legal normativity needs to go from human beings with needs, desires and –most importantly - habits to a fully-fledged normative framework (one expressed in "oughts", "musts" and "shoulds") without any "intervention of the divine spark, or gifts from unexplained quarters".⁷⁴ Hart was almost there -had he allowed himself to delve further into the relationship between the practices that are constitutive of social norms and the habits that necessarily underlie them. There were at least two familiar intellectual paths available to him.

⁷¹ (H. L. A. Hart, 1952, p. 59)

⁷² (Herbert Lionel Adolphus Hart, 1956, p. 958)

⁷³ For a full account of Hart's meta-ethical dilemma (leading to his agnostic position), see (Delacroix, 2010)

⁷⁴ (Blackburn, 2001)

2.1.1 The Wittgensteinian take on “custom”

Given his explicit reliance on Wittgenstein’s *Philosophical Investigations*, Hart could have chosen to expand upon the latter’s reference to “custom” as a way of explaining how the causal processes constitutive of habit get to acquire the significance they do when they evolve into rule-following practices:

“Then can whatever I do be brought into accord with the rule?” --- Let me ask this: what has the expression of a rule –say a sign-post – got to do with my actions? What sort of connection is there here? Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react.

But this is only to give a causal connexion, only to explain how it has come about that we now go by the sign-post; not what this going-by-the-sign really consists in. On the contrary, I have further indicated that a person goes by a signpost only in so far as there exists a regular use of sign-posts, a custom.”⁷⁵

Wittgenstein’s focus is to show that rule-following’s “bedrock” is “simply what we do”: “If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do’.”⁷⁶ This upstream focus, going from rule-following practices back to causal connections, means that Wittgenstein is not particularly preoccupied with the factors that enable *changes* in rule-following practices. Yet that is arguably the most tricky aspect of naturalist accounts of rule-following (see section 1.2.2). For one needs to articulate the degree of reflexivity⁷⁷ needed for such changes, without betraying the key naturalist insight: that any such reflexivity is necessarily embedded in, and conditioned by, the “bedrock” of causal connections that are constitutive of “custom” (here Bourdieu’s endeavor to differentiate the “habitus”

⁷⁵ (Wittgenstein, 1958, p. para. 198)

⁷⁶ (Wittgenstein, 1958, p. 217)

⁷⁷ In his “Wittgenstein on rules: the phantom menace”, Scott Hershovitz reminds us that “Wittgenstein does not show that all rule-following is unreflective, just that some cases are, cases like the ones he highlights where reasons run out.” (Hershovitz, 2002, p. 630)

of social groups according to the degree of reflexivity they foster⁷⁸ would have been particularly relevant).

2.1.2 The Weberian narrative

Alternatively, Hart could have developed a narrative along Weberian lines (even if he denied it, we know that Hart carefully read Weber's *Economy and Society*⁷⁹). The key challenge would then consist in articulating a narrative that builds upon Weber's typology of social relationships. Such a narrative would set forth a continuum from forms of social relationship based on "usage" (*Brauch*) and "custom" (*Sitte*)⁸⁰, via what Weber calls "conventions", all the way to a legal order, as a convention backed by a group of people deemed to have the duty (and legitimacy) to apply sanctions against those who transgress the law. A distinctive feature of the latter consists in the fact that "the subjective attitudes of the participating individuals are directed towards the belief in a *legitimate order*".⁸¹ With striking similarities to Hart's internal point of view, Weber illustrates the latter attitudes with the following example:

"[W]hen a civil servant appears in his office daily at a fixed time, he does not act only on the basis of custom or self-interest which he could disregard if he wanted to; as a rule, his action is also determined by the validity of an order

⁷⁸ "focusing [...] on the degree to which different habitus equip agents with the capacity to swivel on the history that has made them by reflexively monitoring and adjusting its force" (Bennett, Dodsworth, Noble, Poovey, & Watkins, 2013, pp. 11-12)

⁷⁹ In her biography of H.L.A Hart, Nicola Lacey highlights Hart's apparent (but unacknowledged) indebtedness to Weber's sociology: "Yet there is an interesting question here about the influence of sociological thought on Herbert's work. On one occasion, John Finnis consulted one of Herbert's volumes of Max Weber and found it heavily annotated (as was the case with most of the books which Herbert read closely). Finnis later asked him on two separate occasions about Weber's influence on his account of the 'internal aspect of rules'. Herbert denied that any such influence existed, ascribing the origins of the idea instead to Peter Winch's *The Idea of a Social Science*. Finnis felt unable to respond to his denial by saying that he had seen the counter-evidence in his copy. The volume which Finnis saw, *Max Weber on Law in Economy and Society*, is now in the library of Hebrew University in Jerusalem, to which Herbert left his library of over 900 books. Herbert's annotations suggest strongly that there was a Weberian undertow in *The Concept of Law*." (Lacey, 2004)

⁸⁰ A uniformity in social action is a usage "in so far as the probability of its existence within a group is based on nothing but actual practice" (Weber, 1978, pp. vol.1, p. 29). A custom is a usage which has been established for a long time.

⁸¹ (Giddens, 1971, p. 154)

(viz., the civil service rules), which he fulfills partly because disobedience would be disadvantageous to him but also because its violation would be abhorrent to his sense of duty (of course, in varying degrees)”⁸²

Far from a one-way evolutionary story that would identify forms of social order based on usage or custom as “primitive”, such a narrative would remain true to Weber’s insights only if it managed to articulate the dynamic relationship between each form of social order.⁸³ In particular, Giddens highlights the fact that a legal order not only builds upon usage and custom, but also facilitates the emergence of new forms of usage and custom:

“There is no clear empirical line between usage and custom, and what Weber calls ‘convention’. Conformity is not, in this case, a matter of the voluntary disposition of the individual. [...] The empirical relationship between custom, convention and law is an intimate one. Even the hold of sheer usage may be very strong. Those who frame laws to cover conduct which was formerly merely ‘usual’ frequently discover that very little additional conformity to the prescription in question is attained. However, usage and custom do in most cases provide the origin of rules which become laws. The reverse also occurs, although less frequently: the introduction of a new law may eventuate in new modes of habitual conduct.”⁸⁴

The next section will focus on this “reverse” movement, and consider the extent to which the division of normative labour enabled by law’s institutional structure may be said to facilitate the development of habits that are of a very different kind than those in which a legal system originates.

2.2. Laws’ inherent moral risk and the types of habits law may foster

⁸² (Weber, 1978, pp. vol. 1, p. 31)

⁸³ In most empirical cases, elements from each form of social order will not only co-exist but “dynamically” facilitate (or hinder) their respective development.

⁸⁴ (Giddens, 1971, p. 155)

“Without law, social order requires considerable buy-in from the general population: The people are regulated by norms that are more or less accepted. [...] With the emergence of law, however, people are also regulated by norms that meet officials' criteria of validity and are enforced by specialized agencies. This division of labor can alienate people from the most important rules that govern their lives - rules that threaten to become remote, technical, and arcane. That is one more reason why the rule of law is not an unqualified human good: It is in the nature of law to pose such risks, and the rule of law cannot eliminate them.”⁸⁵

Building upon Hart's own analysis of the “risks” concomitant with the emergence of institutionalized rules⁸⁶, Leslie Green proceeds to argue that the moral import of such risks (inherent in the very nature of law) disproves Hart's separability thesis.⁸⁷ Perhaps because of his focus on the latter, Green does not dwell on how exactly people get “alienated [...] from the most important rules that govern their lives”, save for referring to Hart's own (unfortunate) phrasing in terms of acceptance: “where there is a union of primary and secondary rules [...] the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone”⁸⁸ (in a pre-legal society, by contrast, *acceptance* of the rules has to be widespread).

In his “Is law morally risky? Alienation, acceptance and Hart's concept of law”⁸⁹, Wilkinson voices doubts as to “whether widespread acceptance can be said to *preclude* the vice of alienation, if acceptance is given no further specification”.⁹⁰ Given the minimalist way in which Hart defines it (acceptance may be based on

⁸⁵ (Green, 2008, p. 1058)

⁸⁶ “The step from the simple form of society [...] into the legal world [...] brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty and efficiency, and these are immense; the cost is the risk that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not” (H. L. A. Hart, 1994, p. 202)

⁸⁷ As it “marks a connection between law and morality of a reverse kind” (Green, 2008, p. 1054)

⁸⁸ (H. L. A. Hart, 1994, p. 117)

⁸⁹ (Wilkinson, 2010)

⁹⁰ (Wilkinson, 2010, p. 451)

“an unreflecting inherited or traditional attitude, or the mere wish to do as others do”⁹¹), acceptance is certainly no safeguard against the “sheeplike” predicament Hart worries about. To make sense of the type of engagement that may make a “slaughterhouse” ending less likely, one must look elsewhere.

Hart indirectly gestures towards such engagement when he bemoans “the failure on the part of ordinary men to realise that the forms of law and human society were at bottom merely human artefacts, not natural necessities but things actually made by men, and hence things which could be unmade and remade”.⁹² Could it be that the emergence of institutionalized rules, with the division of normative labour it entails, lessens our awareness of – and perceived need to partake in – the context of social interaction that brings and keeps those norms in existence? If so, how, and through what mechanism?

At this stage the distinction between different ways of having a habit developed in section 1.2.1 becomes key. For it may well be that what is distinctively alienating about a legal regime is not so much the possibility of non-acceptance, but rather the way in which it is conducive to the development of rigid habits. Unlike the goal-oriented (hence adaptable) habits that give rise to legal practice⁹³, the rigid habits which are facilitated by the emergence of a legal system are formed on the back of the latter’s insitutionalised adaptation to change. With a legal system come “secondary rules” establishing how legal change may occur. Relinquishing responsibility for this key aspect of “normative labour” comes at a price, for it is all too tempting to relax and enjoy the benefits of institutional authority (rather than actively partake in it).

Raz vividly captures those benefits in his “service conception of authority”: when law succeeds in its claim to authority, it is supposed to give us reasons for action that replace the set of dependent reasons, and thus simplify our practical reasoning. Freeing the individual from the task of balancing a complex set of

⁹¹ (H. L. A. Hart, 1994, p. 202)

⁹² (H. Hart, 1973, p. 6)

⁹³ “[P]ractice should be regarded as an elevation of habit rather than a departure from it” (Albertzart, 2013).

reasons⁹⁴, law is to mediate between its subjects and the reasons that apply to them.⁹⁵ To a large extent the efficiency of a legal system depends on such “demobilisation” of practical reasoning - and its concomitant fostering of habituated behavior. But of course there is another side to Raz’s theory. Law’s claim to authority is to succeed only if it is deemed legitimate. So we are not meant to relax for too long. We are supposed to keep checking⁹⁶ that law still has a “sufficiently high normal justification score”⁹⁷, i.e. that it does better enable us to comply with the demands of “right reason”.⁹⁸ In so doing, the hope is that we may, to use Wilkinson’s phrase, “reclaim law’s authority”.⁹⁹

The worry is that, in practice, fewer and fewer of us will bother; that more and more of us will surrender to the comfort of demobilised practical reasoning. If trusting in legal institutions to have figured out the right course of action in particular circumstances was initially a choice, that trust can become so habitual as to forget itself – and the possibility of an alternative.

In a pre-legal world, by contrast, people are regulated by norms that “have no particular origin in the enactment of an individual or an institution”¹⁰⁰: they find their origin in a pattern of collective behavior which acquires particular

⁹⁴ A task for which the individual may lack information or expertise.

⁹⁵ “The advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurrence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination” (Raz, 1986, p. 58)

⁹⁶ “[T]he thesis allows maximum flexibility in determining the scope of authority. It all depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question [. . .] The test is as explained before: does following the authority’s instructions improve conformity with reason? For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications” (Raz, 1986, pp. 73-74)

⁹⁷ (Mian, 2002, p. 107)

⁹⁸ “In such cases conformity with the underlying reasons is secured by complying with the rule, or rather a better degree of conformity than can otherwise be achieved is so obtained. This can justify complying with the rule even when it requires action which the underlying reasons do not. Such compliance may still be the best strategy to maximise conformity with the underlying reasons” (Raz, 1990, p. 194)

⁹⁹ “Contrary to Raz’s image of law as an official authority, in the modern democratic order we are all implicit ‘mouthpieces’ of the law, an insistence on which might begin to inculcate a sense of legal and social responsibility and perhaps in more radical guise, a social purpose, to reclaim law’s authority.” (Wilkinson, 2010, p. 462)

¹⁰⁰ (Marmor, 2001), 194

significance in light of the purpose it has come to be associated with. While it is habitual in nature, that pattern of behavior cannot give rise to the kind of practice¹⁰¹ constitutive of a legal system unless it is capable of adapting to changing aspirations. In the absence of a “secondary rule” establishing how legal change occurs, the latter can only happen organically. People don’t “accept” but rather “live by”¹⁰² the norms they need to foster a better way of living together. That aspiration in turn generates a practice whose perceived social value may call for its institutionalisation.¹⁰³

The trouble is that legal institutions – because of the division of normative labour they enable- encourage a shift towards widespread passivity, or what one may deem a “leisurely” attitude¹⁰⁴ towards our norm-making (and norm-sustaining) practices. de Tocqueville anticipates this shift in his prescient analysis of America’s nascent democracy:

“Thus, the ruling power, having taken each citizen one by one into its powerful grasp and having molded him to its own liking, spreads its arms over the whole of society, covering the surface of social life with a network

¹⁰¹ “[N]othing... keeps our practices in line except the reactions and responses we learn in learning them.” (McDowell, 1998a)

¹⁰² Waldron reminds us of the non-propositional character of this “constitutive know-how” “for it reflects the fact that at this stage of social development rules have no presence in society apart from their being practiced and their having a shared normativity -their ‘internal aspect’- in the minds and actions of those who practice them” (Waldron, 1999, p. 177)

¹⁰³ It is beyond the scope of this article to delve into the debate relating to the best way of characterising the nature of such practices, conventional or otherwise: While Shapiro (Shapiro, 2002) expands upon Bratman’s “shared cooperative activity” concept, Andrei Marmor (Marmor, 2001), for his part rejects the idea that conventionalism necessarily relies on the concept of coordination problems and constructs an alternative model of “constitutive conventions”, arising out of some general practical concerns leading to the adoption of a partly autonomous conventional practice. Gerald Postema (Postema, 1995) decisively distances himself from the game-theoretic model (to which he referred initially) when he introduces his “constructive conventionalism”, emphasising the importance of moral and political concerns on the part of the people involved in establishing conventional rules (and in particular conventional rules of recognition).

¹⁰⁴ “It [the immense and protective power that stands above men] provides their security, anticipates and guarantees their needs, supplies their pleasures, directs their principal concerns, manages their industry, regulates their estates, divides their inheritances. Why can it not remove from them entirely the bother of thinking and the troubles of life? Thus, it reduces daily the value and frequency of the exercise of free choice; it restricts the activity of free will within a narrower range and gradually removes autonomy itself from each citizen.” (de Tocqueville, 2003, pp. 805-806)

of petty, complicated, detailed, and uniform rules through which even the most original minds and the most energetic of spirits cannot reach the light in order to rise above the crowd. It does not break men's wills but it does soften, bend, and control them; rarely does it force men to act but it constantly opposes what actions they perform; it does not destroy the start of anything but it stands in its way; it does not tyrannize but it inhibits, represses, drains, snuffs out, dulls so much effort that finally it reduces each nation to nothing more than a flock of timid and hardworking animals with the government as shepherd".¹⁰⁵

Leslie Green has a wonderfully naturalist way of summing things up: "A bit like unstable isotopes, political institutions have standard patterns of decay that are explained by the nature of the thing that is decaying".¹⁰⁶ Hart's insight (in line with de Tocqueville's and von Humboldt's¹⁰⁷) was to highlight the extent to which legal institutions are inherently conducive to what he called "sheeplike" behavior. Had he delved further into the mutually enabling relationship between law and habit, he might have been able to substantiate this insight in a way in which his reference to the possibility of non-acceptance could not. Despite his affinities for a non-reductive, naturalist account of legal normativity, Hart's insistence on instead analyzing the "step into the legal world" by reference to an overly cognitive notion of "acceptance" betrays the appeal of an entrenched dualist and intellectualised conception of agency¹⁰⁸ (which may find its roots in concerns that are not dissimilar to Kohlberg's - see section 1).

¹⁰⁵ (de Tocqueville, 2003, p. 806)

¹⁰⁶ (Green, 2008, p. 1057)

¹⁰⁷ "[T]he evil results of a too extensive solicitude on the part of the State, are still more strikingly shown in the suppression of all active energy, and the necessary deterioration of the moral character.[...] The man who is often led, easily becomes disposed willingly to sacrifice what remains of his capacity for spontaneous action. He fancies himself released from an anxiety which he sees transferred to other hands, and seems to himself to do" (von Humboldt, 1969, p. 1402 (loc.))

¹⁰⁸ For a candid, contemporary, formulation of such a dualist framework applied to Hart's internal point of view, see: "[A]n explanation of the internal viewpoint in terms of a volitional component together with evidence of the usage of rules cannot warrant bindingness and freedom, since an agent that is immersed in the usage of rules and follows the reasons for actions expressed in those rules because they accept or endorse the practice cannot be said to be exercising their reflective nature and freedom. [...] [P]ractices are too thin to bind the agent's free will. How can an agent be obliged simply because there is a practice?" (Rodriguez-Blanco, 2007, p. 13)

3. Conclusion

Without habits we would not be capable of ethical agency. Not just because we need to rely on habits to free the mind and remain available to emerging challenges¹⁰⁹, but also because without habits we would not be able to call any norms or standards our own (in fact, some would say that without habits we would not be able to speak of “ourselves” at all¹¹⁰). Given that our ethical sensitivity is thoroughly conditioned by the environment that shapes it, one cannot help but worry about the extent to which one can ever be the self one wants to be:

“How is freedom possible for a self that is no more than a habit? Is creativity, the capacity for newness, an illusion conjured by language (which itself requires repetition), or does it really belong to the self? More to the point, can I ever be the way I want to be?”¹¹¹

Section 1 proposed a detour via Kohlberg’s account not only because of the internal tension introduced by his answer to that worry (and the resemblance it bears to Hart’s own concern)¹¹², but also because the dualist presuppositions underlying the Kantian framework he endorsed turn out -given the rigidity they induce- to be the greatest threat to the vigilant ethical agency he so keenly sought to preserve. For the latter is compromised by habit only when it is inhabited by a self that has lost its capacity to let the words and presence of the Other reach it: whether it is because of the moral certainties afforded by some flight of abstraction¹¹³, some emotional trauma, or otherwise.

¹⁰⁹ “Whilst habituation involves a dulling of our awareness of some things, it may also *enhance* our awareness of other things. Following habituation, one can make more sensitive discriminations among the circumstances and objects that characteristically go with the habit in question. We achieve an enhanced awareness of what is unusual, or perhaps unique, about the present situation.” (Pollard, 2010, p. 78)

¹¹⁰ “Isn’t this the answer to the question ‘what are we?’ We are habits, nothing but habits – the habit of saying ‘I’. Perhaps there is no more striking answer to the problem of the self.” (Deleuze, 1991, p. x)

¹¹¹ (Carlisle, 2006, p. 31)

¹¹² A Kantian framework is fundamentally at odds with his naturalist commitments.

¹¹³ In a separate paper I discuss the challenge raised by Eichmann’s quoting Kant’s categorical imperative when explaining his “principled” approach to the massacre he facilitated (...)

Now one may reformulate the normative challenge underlying any naturalist understanding of ethical agency: what is needed is to find ways of growing *within* (rather than *out of*) the habitual. Translated to a collective scale and a legal context, the challenge -put succinctly- is for the habituated behavior enabled by legal institutions to retain the plasticity that conditions its continued ability to support and generate legal *practice* -rather than the political monotony and technical routines¹¹⁴ which can so easily masquerade as practice.

This paper's highlighting the myriad ways habits can be "had" -and the important qualitative difference between the habits that are generated by legal institutions and the habits capable of giving rise to such institutions- was meant to bolster Hart's insights as to the moral risk inherent in a legal system's institutional structure. Yet jurisprudence as it is traditionally defined can only go so far. An abstract understanding of the "division of normative labour" enabled by legal institutions does not allow us to make out the exact way in which such institutions generate habits. To grasp the latter, jurists would do well to "dip" deeper into sociological studies – lest we all become "like sheep".

¹¹⁴ "[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policeman, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it" (Chesterton, 1955)

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