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**The Nature of Legal Obligation
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SUMMARY: 1. Introduction – 2. The Nature of Legal Obligation: Question 1: Normativity as a Matter of Choice; – 3.– The Nature of Legal Obligation: Question 2: *Sui Generis*?; 4. Conclusion; – Bibliography.

1. Introduction

In this paper, I want to explore two basic questions about the nature of law and legal obligation. First, to what extent is legal obligation or legal normativity “optional” or a matter of choice? This is an indirect way of exploring the claims scholars have made about law -- and also about the role of the legal scholar. Legal theorists claim that they must “explain the normativity of law,” the way that law gives us reasons for action. I think it worth considering, first, whether – or when – law gives us reasons for action. Hans Kelsen’s legal theory (or at least one reading of it) will be used as a useful starting point for this discussion.

Secondly, the paper will consider to what extent legal obligation is *sui generis*, its own distinctive form of normativity, as contrasted to being a form or subset of moral obligation. To put the point a different way: does a statement like “X has a *legal obligation* to do A” reduce to statements of a different normative form (e.g.,

regarding X's *moral* obligations)¹ ? Here, works by H. L. A. Hart and Mark Greenberg will be the starting points, with Hart exemplifying the idea of law as a distinct form of obligation, and Greenberg portraying law as a subset of morality.

2. The Nature of Legal Obligation – Question 1: Normativity as a Matter of Choice?

Is law generally normative for all citizens, or only for those citizens who so choose? I want to approach this question through the works of Hans Kelsen. Kelsen's legal theory emphasizes the normative and systematic nature of law. Kelsen focuses on David Hume's insight that normative conclusions could not be grounded on non-normative (empirical) premises – no deriving "ought" from "is", that is, no conclusion about what one ought to do can be derived from statements regarding what is the case. Thus, every normative conclusion requires a normative premise, and any normative system

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¹ In other contexts, the question would be whether a statement of legal obligation reduces to a factual claim – e.g., a prediction of what judges and other legal officials will do. That is a different (though still important) debate, for another occasion.

would require a hierarchy leading to a foundational axiom². Validity and authorization can be traced, ultimately to the most basic norm of the system, which, in the case of legal systems, Kelsen calls the *Grundnorm* – the Basic Norm. In Kelsen’s theory of (legal) norms, every “ought” claim implies the (presupposition of the) Basic Norm. As Kelsen notes, the likely content of a legal system’s *Grundnorm* will be something like “act according to the norms of the historically first constitution”³.

Again, I cannot emphasize strongly enough: much of Kelsen’s work, and much of the argument I am presenting here, is grounded on this separation of is and ought, on the inability to derive normative conclusions (like “one ought to do X”) from statements of what is the case or what happened (like “certain legal officials acted in a certain way”). This is a matter we will, necessarily, return to again later in the paper. Under one reading of Kelsen’s work (which I have elaborated at greater length elsewhere⁴), whether citizens

² H. KELSEN, *Introduction to the Problems of Legal Theory* (B. L. Paulson, S.L. Paulson, trans.), Oxford, Clarendon Press, 1992, 55-56. Once one views normative systems as hierarchical structures that are grounded ultimately on a foundational norm that (by definition – as a foundational norm) is not subject to any further (direct) proof, the implications are potentially significant, and potentially skeptical. If the important normative systems of one’s life, like morality, religion, and law, are perhaps grounded on an ultimate norm that cannot be proven, and can be accepted or rejected with seemingly equal legitimacy, then those important guideposts of our life suddenly seem less sturdy. However, these implications must be left to others to discuss, or for other occasions.

³ H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., 56-57

⁴ B.H. BIX, *Kelsen in the U.S.: Still Misunderstood*, in J. TELMAN (ed.), *Hans Kelsen in America – The Anxieties of Non-Influence*, Dordrecht, Springer 2015 (forthcoming); B.H. BIX, *Rules and Normativity in Law*, in T. GIZBERT-STUDNICKI, K. PŁESZKA, M. ARSZKIEWICZ, P. BANAS (eds.), *Problems of Normativity, Rules and Rule Following*, Dordrecht, Springer, 2015, 125-146.

presuppose the Basic Norm for their community's legal system is, in a basic sense, optional⁵. For example, Kelsen notes that anarchists need not, and would not, perceive the actions of legal officials as anything other than “naked power”⁶, like a gangster's order. Kelsen clarifies: “The fact that the basic norm of a positive legal order *may* but *need not* be presupposed means: the relevant interhuman relationships may be, but need not be, interpreted as ‘normative,’ that is, as obligations, authorizations, rights, etc. constituted by objective valid norms. It means further: they can be interpreted without such presupposition (i.e., without the basic norm) as power relations⁷.”

⁵ For a good overview of the different tenable readings of Kelsen's writings on the Basic Norm, see S.L. PAULSON, A ‘Justified Normativity’ Thesis in Hans Kelsen's Pure Theory of Law?: Rejoinders to Robert Alexy and Joseph Raz, in M. KLATT (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, 61-111. I should emphasize that nothing in my argument depends on whether my reading of Kelsen is “right” or “best”; this paper is ultimately about the right way to think about the nature of law, not about the exegetically best understanding of Kelsen's intentions.

⁶ H. KELSEN, *Introduction to the Problems of Legal Theory*, cit., §16, 36. In a later edition of the same text, he clarifies that an anarchist who was also a law professor “could describe positive law as a system of valid norms, without having to approve of this law”. Cf. H. KELSEN *Pure Theory of Law* (Max Knight, trans.), Berkeley, University of California Press, 1967, 218, 82.

⁷ H. KELSEN, *Pure Theory of Law* cit., 218. Kelsen also states: “For the Pure Theory strongly emphasises that the statement that the subjective meaning of the law-creating act is also its objective meaning – the statement, that is, that law has objective validity – is only a *possible* interpretation of that act, not a necessary one”. H. KELSEN, A ‘Realistic’ Theory of Law and the Pure Theory of Law: Remarks on Alf Ross's On Law and Justice, in L. DUARTE D'ALMEIDA, J. GARDNER, L. GREEN (eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law*, Oxford, Hart Publishing, 195-221, 218-219 (emphasis added). Later in the same passage, Kelsen adds, helpfully: “The concept of normative validity is, rather, an

Kelsen emphasizes that in legal cognition one starts with the *facts* of actions by officials and interprets or understands those facts in a normative way (or, to change the metaphor, projects unto those facts a normative understanding)⁸. He speaks about those who perceive official actions as norms, in some places noting, in other places simply implying, that one can also choose *not* to perceive such actions in a normative way. In H. L. A. Hart's terms, it is the difference between an "internal" and "external" view of the actions of officials, and also the difference between "accepting" and not "accepting" the legal system⁹.

As Joseph Raz pointed out, with the help of his idea of "detached normative statements," one can speak of what a normative rule or system requires, without necessarily endorsing or accepting

interpretation; it is an interpretation made possible only by the presupposition of a basic norm," and that such an interpretation is well-grounded "if one presupposes the ... basic norm". H. Kelsen, *A 'Realistic' Theory of Law and the Pure Theory of Law*, cit., 219 (emphasis in original). Elsewhere, Kelsen writes: "This presupposition [of the Basic Norm] is possible but not necessary. [...] Thus the Pure Theory of Law, by ascertaining the basic norm as the logical condition under which a coercive order may be interpreted as valid positive law, furnishes only a conditional, not a categorical, foundation of the validity of positive law." H. Kelsen, *What is the Pure Theory of Law?*, in *Tulane Law Review*, 34/1960, 269-276.

⁸ The perception or interpretation of empirical events in a normative way is not confined to law. For example, some look at the world around them, and see norms of etiquette or norms from a religious system, while others look at the same world and do not see, or perceive, or interpret the world in this normative way.

⁹ H.L.A. HART, *The Concept of Law*, 3rd ed. Oxford, Oxford University Press, 2012, 87-91; see also T. MORAWETZ, *Law as Experience: Theory and the Internal Aspect of Law*, in *SMU Law Review*, 52/1999, 27-66.

that rule or system¹⁰. Thus, someone who is not a vegetarian can say to a vegetarian friend, “you should not eat that (because it has meat in its ingredients),” and a non-believer can say to an Orthodox Jewish friend, “you should not accept that speaking engagement (because it would require you to work on your Sabbath).” Analogously, the (radical) lawyer or (anarchist) scholar can make claims about what one ought to do if one accepted the legal system (viewed the actions of legal officials in a normative way), even if that lawyer or scholar saw the actions of legal officials only in a non-normative way, as mere acts of power¹¹.

Some have explored the question of whether legal normativity is optional by considering the analogy of games. One might say to a person playing chess that she ought not (*e.g.*) to move the bishop a certain way, or that she is required to move her king out of “check”. However, that person could easily have decided simply not to play chess, in which case prescriptions about how she ought to move the bishop or the king would have no application¹². The statement of what one ought to do only makes sense once one has taken up the practice.

However, the game analogy is at best imperfect, and it is important to focus on the ways in which it and other proffered analogies differ from law. If someone said that she was not playing

¹⁰ J. RAZ, *Practical Reason and Norms*, Princeton, Princeton University Press, 1990, 170-177; J. RAZ, *The Authority of Law*, 2nd ed., Oxford, Oxford University Press, 2009, 156-157.

¹¹ When one says that one can *choose* to view the (legal) actions of officials normatively or not, it is important to note that this does not mean that this “choice” is always or necessarily a *conscious* choice. The reference to “choice” indicates primarily that there is an option; one could do (or think) otherwise.

¹² Cf. A. MARMOR, *Law in the Age of Pluralism*, Oxford, Oxford University Press, 2007, 153-181, comparing law and chess.

chess and did not want to play in the future, it would be clear that “chess rules” and “chess reasons” would not apply to her. By contrast, consider etiquette: someone might reasonably insist that its rules and reasons apply even to those people who insist that they “accept” or “participate in” etiquette¹³. As for religion, our ideas about voluntariness of affiliation have changed significantly over time. On one hand, in many societies today, including most so-called “Western” countries, the normative rules of a particular religion are not thought to be binding on those who are not (self-identified) members of that religious group. However, the way we think about religion today is far different from the way people thought about it in the past. As Jacques Barzun pointed out, “in earlier times people rarely thought of themselves as ‘having’ or ‘belonging to’ a religion. ... Everybody ‘had’ a soul, but did not ‘have a God,’ for God and all that pertained to Him was simply what is, just as today nobody has ‘a physics’; there is only one and it is automatically taken to be the transcript of reality”¹⁴. And similarly, true believers even today (especially in countries in which fundamentalist views significant social and political influence) perceive the dictates of their religion not as something chosen, but as “the Truth,” binding on all. We certainly *say* that the law of a country “applies” to its citizens (and often non-citizens resident in the country) whether those individuals “accept” the law or not. By this, we mean in part that if those individuals act contrary to law’s prescriptions, they may be subjected to sanctions. However, while law’s *coercion* may be inescapable, its *normativity* is not. And while law may *claim* normative status, the position of this paper is that law only has this normative status *as a*

¹³ P. FOOT, *Virtues and Vices*, Oxford, Basil Blackwell, 1978, 160.

¹⁴ J. BARZUN, *From Dawn to Decadence: 500 Years of Western Cultural Life, 1500 to the Present*, New York 2000, 24.

*general matter*¹⁵ for those citizens who so choose. It may seem absurd to claim that citizens do not (in a sense) have “legal obligations” – even as regards legal systems that are efficacious and are generally just – unless and until those citizens have (in a sense) so chosen. However, I think that the conclusion seems less absurd when one focuses on the problem of deriving “ought” from “is,” and the need to posit or presuppose foundational axioms for the validity of any normative system – including, or especially, legal systems.

3. *The Nature of Legal Obligation: Question 2: Sui Generis?*

A question that relates to the optional status of legal normativity, but which is nonetheless a distinct inquiry, is whether legal normativity is *sui generis*, or whether, instead, it is best thought of as a kind of moral obligation.

For this inquiry, it might be useful to start with a basic question: What does it mean to say that there is *a valid legal obligation*? The immediate and simple answer is that this means that there is an obligation that derives from the legal materials, from a particular legal system. This is (trivially) true, but it only pushes the question back one step. What is *the nature* of this legal obligation? A growing number of theorists – from a variety of perspectives and jurisprudential “schools” – assert or assume (but rarely argue at any length for) that legal obligations are a kind of moral obligation.

Some have argued that the reason (or one reason, among many) that law should be understood as a kind of morality, or a subset of morality, is that law uses moral terminology: right, duty,

¹⁵ As will be discussed in the next section, individual legal rules can affect our *moral* duties by triggering existing moral obligations.

permission, etc.¹⁶. As already discussed in the first part of this paper, law undoubtedly is, or purports to be, normative: to inform citizens what they should do, what they should not do, what they are authorized to do, and what they are empowered to do. However, the difficulty with an argument based on purportedly moral language is that these terms are not exclusive to morality, but most can be found with any of a large number of normative practices, including games and language use.

A different line of argument has come from theorists like Mark Greenberg, who argue that law is basically a subset of morality. One thing that is said to motivate or justify this approach is the complicated relationship between the actions of (legal) officials and the resulting legal rules. As Greenberg has pointed out in a number of publications¹⁷ the relationship between what a legislature enacts and the rule(s) that are added to the legal system is not as direct or as straight-forward as what most non-lawyers (and likely many lawyers and judges, too) suspect. An enactment may be rendered invalid by its inconsistency with a constitutional provision, or its meaning may be affected by efforts to incorporate it with existing adjoining or overlapping statutes, but be affected with existing common law case-law, etc. However, while the observation about the effect (or lack thereof) of legislation on the list of legal rules may warrant a more

¹⁶ N.E. SIMMONDS, *Value, Practice, and Idea*, in J. KEOWN, R.P. GEORGE (eds.), *Reason, Morality, and Law: The Philosophy of John Finnis*, Oxford: Oxford University Press, 2013, 311-326, 317-318.

¹⁷ M. GREENBERG, *The Standard Picture and its Discontents*, in L. GREEN, B. LEITER (eds.), *Oxford Studies in Philosophy of Law*, vol. I, Oxford, Oxford University Press, 2011, 39-106; M. GREENBERG, *The Moral Impact Theory of Law*, in *Yale Law Journal*, 123/2014, 1288-1342.

nuanced understanding of the nature of legal norms, it is not enough, on its own, to justify equating legal and moral obligation.

In thinking about the nature of legal obligation, it is useful to return to the H. L. A. Hart's legal theory. Hart, like Kelsen, emphasized the normativity of law in his criticism of earlier legal theorists (particularly John Austin), and in the development of his own, more hermeneutic theory of law. Hart argued that Austin's command theory did not sufficiently distinguish a community acting out of fear, the "gunman situation writ large"¹⁸ from a community where the officials and at least some portion of the citizens "accepted" the law as giving them reasons for action – what Hart called "the internal point of view."

As part of the legal positivist separation of law and morality that he advocated, Hart is careful (a) not to claim that citizens *must* accept the law as giving them reasons for action (he does not even discuss the circumstances under which citizens *should* do so); and (b) he offers a broad and open-ended set of reasons for why citizens *might* accept the law as giving them reasons for action. Hart writes that a citizen "may obey it [the law] for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so"¹⁹. And later: "[A]dherence to law may not be motivated by it [moral obligation], but by calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others"²⁰.

The question still remains for Hart: what is the nature of this normativity of or in law? The law prescribes behavior – to act in

¹⁸ H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *Harvard Law Review*, 71/1958, 593-629, 603.

¹⁹ H.L.A. HART, *The Concept of Law*, 3rd ed., Oxford, Oxford University Press, 2012, 114.

²⁰ H.L.A. HART, *The Concept of Law*, cit., 232.

certain ways, and to avoid acting in other ways – and also empowers citizens to use legal institutions and processes for their own purposes (through wills, contracts, incorporation, and the like). If under a Hartian analysis someone accepts the legal system as giving reasons for action, what kind of reasons are those? Is there any alternative to understanding these reasons as moral reasons?

As noted, people often obey the law for purely prudential reasons: to avoid the financial penalties, potential loss of liberty, or public humiliation that can come from being adjudicated as a law-breaker. However, recall that Hart's critique of Austin's command theory is that for many people law is more than (that phrase again) the "gunman situation writ large" – that a perception of (legal) obligation can frequently be something different from merely feeling obliged (coerced)²¹. Hart clearly intends an understanding of legal normativity where legal reasons are something distinct from (mere) prudential reasons.

So if for Hart legal obligation (legal reasons for action) are not to be equated with either moral or prudential reasons, what is left? Many commentators interpret Hart as treating law as a sui generis form of normativity, a form of normativity distinct from all others; there is certainly support for this position in his writings.²²

²¹ H.L.A. HART, *The Concept of Law*, cit., 82-91.

²² See, e.g., H.L.A. HART, *Essays on Bentham: Jurisprudence and Political Theory*. Oxford: Clarendon Press, 1982, 262-268; cf. J. FINNIS, *Philosophy of Law: Collected Essays: Volume IV*, Oxford, Oxford University Press., 2011, 248-256; K. E. HIMMA, *A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens*, in W. WALUCHOW, S. SCIARAFFA (eds.), *Philosophical Foundations of the Nature of Law*, Oxford: Oxford University Press, 2013, 152-182. Hart stated that "legal right and legal duty [have] meanings which are not laden with any ... connection [to morality]". H.L.A. HART *Essays on Bentham*, cit., 263. It should be noted that in this section, with Hart, as

As mentioned, Hart, as legal positivist, does not explore whether there are good moral reasons for accepting a particular legal system (or all legal systems) as giving reasons for action. Analogously, Hart does not explore in any length what kind of reasons people might think that the law gives them. It is sufficient for Hart that some people treat the law as giving reasons for action; this is a fact for which the descriptive or conceptual theorist should attempt to account. As Hart sees it, it is not for the theorist of law to be too concerned about what sort of reasons these might be, and whether they are well grounded. Elsewhere (as part of his debate with Lon Fuller), Hart emphasizes that one should not confuse “ought” with morality – that there were many forms of “ought,” many sorts of reasons for action²³.

Along the same lines, one could read Hart as saying that for the person who accepts the law, the sort of reason the law gives is a *legal* reason, just as those who make other choices might consider themselves as subject to *chess* reasons (while playing that game – e.g., reasons within the game for moving the bishop diagonally rather than otherwise, and to this square rather than another one), *etiquette* reasons, *fashion* reasons, etc.. There is, to be sure, something a little strange about this line of analysis – one can understand the force of the objection that “legal reasons” should reduce *either* to prudential reasons, on one hand, *or* moral reasons, on the other. However, it is not clear that Hart, or a modern follower of his approach, needs to

in the prior section, with Kelsen, it is not crucial for my purposes that my reading of those theorists is the only tenable one, that it is the best one, or that it is the right one. What is important are the merits of the ultimate arguments, whether they are fairly attributable to those other theorists or not.

²³ H.L.A. HART, *Positivism and the Separation of Law and Morals*, cit., 612-614.

concede this point. Why should one assume that one has a *moral* obligation to do as the law says, simply because the law says so? While it may once have been the accepted view that just legal systems create such general moral obligations to obey their enactments, many theorists today have offered strong arguments against such a general obligation²⁴. The alternative view is that law *sometimes* creates moral obligations, and that this is a case-by-case analysis, relative to the individual citizen, the particular legal rule, and the coordination problems or expertise claims that may be involved²⁵. Also, some theorists have added, there are good reasons to avoid constructing one's theory of the nature of law around the view that law generally does create, should create, or even claims to create moral obligations²⁶.

²⁴ E.g., M.B.E. SMITH, *Is There a Prima Facie Obligation to Obey the Law?*, in *Yale Law Journal*, 82/1973, 950-976; J. RAZ, *Ethics in the Public Domain*, Oxford, Clarendon Press, 1994, 325-338; W.A. EDMUNDSON, *State of the Art: The Duty to Obey the Law*," in *Legal Theory*, 10/2004, 215-259.

²⁵ J. RAZ, *Ethics in the Public Domain*, cit., 325-338; D. ENOCH, *Reason-Giving and the Law*, in L. GREEN, B. LEITER (eds.), *Oxford Studies in Philosophy of Law*, vol. I, Oxford, Oxford University Press, 2011, 1-38.

²⁶ F. SCHAUER, *Positivism Through Thick and Thin*, in B. BIX (ed.), *Analyzing Law: New Essays in Legal Theory*, Oxford, Clarendon Press, 1998, 65-78. Even Finnis states: "very strictly speaking, the law does not claim to be morally obligatory" and law "does not ... make a moral claim". J. FINNIS, *Reflections and Responses*, in J. KEOWN, R. P. GEORGE (eds.), *Reason, Morality, and Law: The Philosophy of John Finnis*, Oxford: Oxford University Press, 2013, 459-584, 553, 554. Finnis clarifies that this reflects in part the fact that even in the central case of law, any "moral obligation created and imposed by law is defeasible, and defeasible not only by injustice in its making or content but also by competing moral responsibilities of particular subjects on particular occasions [...]". J. FINNIS, *Reflections and Responses*, cit., 555. He elaborates: "[T]o hold that the law claims to be morally obligatory *non-defeasibly* ... would be to hold that the law – even in

Even John Finnis, the foremost theorist working today within the Natural Law tradition, rejects the idea that law makes moral claims, and accepts the view that law creates only “indefeasible legal obligations”²⁷ which are then slotted into a flow of general practical reasoning – by good citizens in terms of the common good ... by careerists in the law in terms of what must be done or omitted to promote their own advancement towards wealth or office, and by disaffected or criminally opportunistic citizens in terms of what they themselves need in order to get by without undesired consequences (punishment and the like)²⁸.

Similarly, for those who accept the law as giving them reasons for action, why should we assume that these reasons are moral reasons? For example, with etiquette or chess, we understand how a practice can give reasons that are not moral reasons. Perhaps law similarly gives reasons that are not *moral* reasons, but are merely *legal* reasons.

To tie this part of the paper with the first part, when do legal systems create legal obligations? Is there any connection with citizens’ choices or decisions? One analysis appears in a recent work by Kenneth Einar Himma (where he is offering a reading of Hart’s legal theory)²⁹. Under this analysis, *a legal system* exists when officials accept the foundational rules of the system, but questions remain open about citizens’ obligations. Himma argues that theories of legal obligation should track the usual understandings and practices of legal officials and citizens, or face a strong burden of

the central case of law – embodies a moral error, and asserts (albeit implicitly) a moral falsehood”. J. FINNIS, *Reflections and Responses*, cit., 554-555.

²⁷ J. FINNIS, *Reflections and Responses*, cit., 553-556.

²⁸ J. FINNIS, *Reflections and Responses*, cit., 555.

²⁹ K. E. HIMMA, *A Comprehensive Hartian Theory of Legal Obligation*, cit., *passim*.

justifying deviation from those usual understandings and practices. Himma is concerned in particular with the conventional understanding that the law creates (legal) obligations for all citizens – regardless of whether those citizens accept the law or not. Himma’s argues that a legal system creates legal obligations for its citizens when the citizens *acquiesce* to the system of norms – a passive acceptance of the norms combined with a willingness to conform generally to those norms – and this is combined with coercive enforcement of the norms. The difficulty with this analysis is that it is not clear that it leaves any independent content to the claim that citizens have a legal obligation, other than the fact that they are in a functioning legal system. Returning again to the point of the first part of the paper, we need to remember the gap between the descriptive (perhaps sociological) fact of an “efficacious” legal system, and any *normative* reading of that descriptive fact.

Returning to the question of law and morality: It has become common for legal theorists to claim a close connection between law and morality³⁰. And in this category I include not only the traditional natural law theorists, some of whom offer a moral test for what counts as valid law, but also Robert Alexy, who argues that all legal systems claim (moral) “correctness”³¹, and Joseph Raz, who argues that law, by its nature, claims moral authority (though Raz is also

³⁰ J. RAZ, *Ethics in the Public Domain* cit., 325-338; L. GREEN, *Legal Positivism*, in E.N. ZALTA (ed.), *Stanford Encyclopedia of Philosophy*, in plato.stanford.edu/entries/legal-positivism, 2003, 14-17; R. ALEXY, *The Argument from Injustice* (B.L. Paulson, S.L. Paulson, trans.), Oxford, Oxford University Press, 2002.

³¹ see, e.g. R. ALEXY, *The Argument from Injustice*, cit., 34-39

quick to note that he thinks that legal systems' claims to moral authority are usually mistaken)³².

This purported connection between law and morality is often presented in contrast to older theories that emphasized power and sanction: for John Austin, law is essentially the command of a sovereign, where “command” means that the sovereign is willing and able to impose a sanction if the directive is not followed³³. For some theorists, the existence of a sanction is essential to law, even if a sovereign is not. Robert Cover argued that “[l]egal interpretation is either played out on the field of pain and death or it is something less (or more) than law”³⁴. Similarly, Frederick Schauer has maintained that even if coercion is not “essential” or “necessary” to law – in the sense that one can imagine a system that was “legal” that lacked coercion – in the real world, legal systems are always associated with coercion, and this is important for understanding law and legal systems³⁵.

Why should one assume that law makes moral claims (let alone that law by its nature *always* makes such claims)? As with all claims regarding the relationship of law and morality, the difficulty is that both terms in the equation – “law” and “morality” – are hard to define, and all likely definitions will be controversial. As

³² see J. RAZ, *Ethics in the Public Domain* cit., 199-204.

³³ Such theories, especially Austin's, were also distinctive for reducing law to or equating law with factual descriptions (like a habit of obedience, and an ability and willingness to impose a sanction). Most theorists view the effort to reduce law to the factual rather than the normative as doomed to failure, but that is a debate for another day.

³⁴ R.M. COVER, *Violence and the Word*, in *Yale Law Journal*, 95/1986, 1601-1629, 1606-1607.

³⁵ F. SCHAUER, *The Force of Law*, Cambridge (Mass), Harvard University Press, 2015.

already mentioned, Hart pointed out a similar objection when responding to Lon Fuller in their famous debate in the *Harvard Law Review*. Fuller had argued that legal interpretation often displays no sharp separation between “is” and “ought,” with statutes (and other legal texts, like contracts and wills) often being interpreted not only according to the clear meaning of the text, but also in line with the lawmaker’s or drafter’s purpose³⁶. Hart responded that there were many kinds of “ought,” and many of these forms of normative reasoning had little to do with morality³⁷. Nazi Germany had its own demonic objectives, which judges could further by interpreting statutes one way rather than another; this is an “ought,” but not one we would likely call truly “moral.” At a more mundane level, one could well imagine statutes that either sought to promote corporate profit-making or treated corporate avarice as an evil to be fought; in both cases, a judge could apply the statute in ways that furthered either of those (contrary) purposes (one’s moral or political beliefs will determine which one of those views one considers moral, and which one not). Hart’s own example was of the failed poisoner who states with regret that he should have used a second dose, reminding us again that normative language is appropriate whenever one speaks of a purpose, however immoral or amoral the objective.

The advantage of the approach discussed in this article – that the normativity of law is a matter that individuals choose, assume, or presuppose (or not) – is that it accounts for the normative nature of

³⁶ L.L. FULLER, *Positivism and Fidelity to Law – A Reply to Professor Hart*, in *Harvard Law Review*, 71/1958, 630-672, 661-669.

³⁷ H.L.A. HART, *Positivism and the Separation of Law and Morals*, cit., 612-614.

law, at least in a thin way, without the requirement of substantial metaphysical assumptions or controversial moral claims³⁸.

To take a naïve position for just a moment: we all know the difference between law and morality. We do not confuse the two. Law is made up of the rules the government promulgates – many of them guiding behavior directly through imposing sanctions on actions the government wishes to discourage, and other rules affecting behavior in more subtle ways by imposing selective tax benefits or payments due, or by offering legal enforcement to certain contracts, trusts, wills, and so on. Morality, by contrast, involves the rules and principles for how one should live one’s life³⁹. For those for whom morality is a secular matter, morality is not tied to any institution, and the only sanctions are those that come from the reproach of one’s peers or from self-reproach. For those who have a more religious approach to moral matters, law and morality may seem similar in some ways: there may be institutions which clarify what that religion’s morality requires, moral rules may be thought to be the directives of a law-giver, in this case a divine law-giver, and the believer may think that there are punishments for transgression, in this world or in a world to come. At the same time, sharp differences remain: religious morality purports to show us time-less truths, while legal rules are always relative to a particular system that is tied to a

³⁸ None of this is to deny the important point made by many natural law theorists (and some legal positivists), that one important aspect of legal rules and legal reasoning is the way law operates as or within a form of practical reasoning, the reasoning both citizens and legal officials use to determine what how to act.

³⁹ Of course, there are also differences of focus, in that a legal system necessarily focuses primarily on “externals” – how one acts, rather than on the virtue or error of our thoughts and feelings. At the same time, this difference can be overstated, as the law *does* concern itself with “internals” to an extent, as when it punishes *intentional* or *malicious* actions more than accidental/negligent actions.

time and a place, and legal rules are changed by the fallible choices of fallible law-makers. Consider the same comparison from a different, more analytical direction: when a legal system says “do X” or “don’t do Y,” the basic meaning is that certain things are to be done or not done, because authorized officials have so declared. By contrast, when the same prescriptions (“do X,” “don’t do Y”) are moral, the understanding is that individuals have reasons to do or not do certain things, and that those reasons having no necessary connection to any (non-divine) speaker or official.

As part of Leslie Green’s analysis that “[n]ecessarily, law makes moral claims on its subjects” (part of his list of ways in which he states that there are necessary connections between law and morality, contrary to some understandings of legal positivism’s “separability thesis”⁴⁰, Green explains that law “make[s] categorical demands” upon citizens, and that these demands require citizens “to act without regard to our individual self-interest but in the interests of other individuals,” and that these criteria together constitute “moral demands”⁴¹. I do not find this definition of morality (or this characterization of law’s demands) persuasive. Even putting aside, for the moment, Hart’s essential point that law does not merely command, it also empowers⁴², legal rules do not make the same sort of (implied or express) claims as do moral rules: they do not, as moral rules do, (purport to) reflect universal and unchanging moral truths, nor do they always purport to be integral aspects of the Good, as moral rules do.

Joseph Raz offers a somewhat different explanation of why he believes that law’s claim to authority is a moral claim: “it is a claim

⁴⁰ L. GREEN, *Legal Positivism*, cit., 14-17.

⁴¹ L. GREEN, *Legal Positivism*, cit., 16.

⁴² H.L.A. HART, *The Concept of Law*, cit., 27-33; H.L.A. HART, *Positivism and the Separation of Law and Morals*, cit., 604-606.

which includes the assertion of a right to grant rights and impose duties in matters affecting basic aspects of people's life and their interactions with one another"⁴³. I am not sure that this will go much further towards persuading those not already persuaded that law's claims are moral claims. Many normative systems, including those of etiquette and even fashion, seem to involve claims of "rights to grant rights and impose duties." And while it is true that law, like morality, covers "basic aspects of people's life and their interactions with one another," this does not seem sufficient to turn claims on behalf of law into moral claims.

I do not mean this to be a dispute about the proper way to define morality; in any event, such disputes are unlikely to get far beyond one person's "that seems right to me" evoking "but it does not seem right to me" by another. I think it is sufficient to the perspective I am trying to elaborate that few of us confuse morality and law. We may be inclined to overestimate the moral merits of the law, but we still do not confuse the two. Who besides a strong believer in a Sharia legal system thinks that law is essentially an instantiation of morality, grounded in divine command or otherwise?⁴⁴ It is true that the early Common Law judges in England (and commentators on the Common Law from that period) sometimes cited "Reason" with a capital "R" as the justification for why the Common Law rules were the way they

⁴³ J. RAZ, *The Authority of Law*, cit., 315-316.

⁴⁴ One might add Immanuel Kant, on one reading of his "Doctrine of Right". I. KANT, *The Metaphysics of Morals* (1797), (M. Gregor, ed.). Cambridge, Cambridge University Press, 1996; see also A. RIPSTEIN, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge (Mass.) Harvard University Press, 2009. I am grateful to Micha Glaeser for pointing this out.

were⁴⁵, but even legal figures from that period did not conflate or confuse law with morality. For example, in English (and later American) Common Law, there was no legal obligation to rescue another, however easy and low-risk the rescue might be⁴⁶, and there was no legal obligation to keep one's promises (only those promises that were supported by "consideration" – that is, that were part of an exchange). In these, and many other cases, the Common Law judges distinguished what individuals had a moral obligation to do and what their (Common Law) legal obligation was.

While I think most people do not conflate law and morality, some very able theorists seem to be advocating just such a merger. For example, Mark Greenberg argues that "when the law operates as it is supposed to, the content of the law consists of a certain general and enduring part of the moral profile"⁴⁷. This claim seems related to, but is in fact distinct from, the views of traditional natural law theorists (like John Finnis), who argue that human law, when consistent with the natural law, can frequently change our moral reasons for action. Greenberg is going further, by arguing that law is in fact (part of) morality.

Greenberg's way of using the label "law" in his works thus differs sharply, not merely from the views of legal theorists caught up with "the Standard Picture"⁴⁸ but also from the way of speaking of both legal practitioners (lawyers, prosecutors, judges, etc.) and

⁴⁵ Those same judges also frequently characterized their actions as declaring existing law, while modern observers would describe their decisions as making new law or modifying existing law.

⁴⁶ E.J. WEINRIB, *The Case for a Duty to Rescue*, in *Yale Law Journal*, 80/1980, 247-293, 247.

⁴⁷ M. GREENBERG, *The Standard Picture and its Discontents*, cit., 57; see also GREENBERG, *The Moral Impact Theory of Law*, cit., *passim*.

⁴⁸ M. GREENBERG, *The Standard Picture and its Discontents*, cit., *passim*.

citizens who are not legal practitioners. This deviation from conventional ways of speaking leads immediately to the question: Is Greenberg claiming that we have all been mistaken about the nature of law, and he is correcting a significant and collective error (one that would be both widespread and lasting many centuries)? Or is his claim different: that if we were to look at our practices more carefully and reflectively, we would see that the Moral Impact Theory⁴⁹ more accurately reflects what we have really meant all along when we have spoken about “law”? Either position would entail a difficult burden of proof, and Greenberg has yet to produce the necessary argument(s).

An approach put forward by David Enoch explains a way of understanding the connection between law and morality that does not require us to think of the law as making a moral claim or as being some sort of subset of morality. Enoch’s argument is the legal enactments and other actions by legal officials can act as “triggering reasons,” giving us reasons to act under the moral reasons for action that we already had⁵⁰. This parallels a more common observation that law may make more articulate or determinate our general obligations: for example, where our obligation to drive safely means driving on one particular side of the road and below a specified speed because the law makes that choice, and supporting the basic needs of society and helping the poor means paying a set percentage of one’s income to a government fund as taxes again because of the choices of legal officials. Legal rules sometimes – not all legal rules, and not all the time – work effectively as salient solutions to coordination problems, and to make more determinate otherwise vague moral obligations.

⁴⁹ M. GREENBERG, *The Moral Impact Theory of Law*, cit., *passim*.

⁵⁰ D. ENOCH, *Reason-Giving and the Law*, cit., *passim*.

1. Conclusion

This paper has offered controversial positions on two central questions of legal theory: first, that the *normativity* of law depends on the choice of citizens; and second, that legal normativity is *sui generis* and not merely a form of or subset of morality⁵¹. Ultimately what is at stake in these topics is the nature of law, the connection between law and morality, and the nature and grounding of obligation. These are obviously large issues, and one should not assume that any discussion will resolve them suddenly or to everyone's satisfaction. It is enough if the present reflections add something to a long-standing discussion that needs to be continued.

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⁵¹ As noted, both positions can be traced back to earlier theorists: the first derives from Hans Kelsen's works, and the second from H. L. A. Hart's works. I do not mention these eminent names to hide behind their authority – though I do not mind if their stature at least prevents a quick dismissal of these views as simply absurd.

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