

For the Columbia University Conference in Tribute to Joseph Raz

“What Does Law Claim?”

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*Preface*

Joseph Raz was my D. Phil. supervisor at Oxford University, as he was for many. Like an even larger number, I attended his classes and listened to his conference presentations. And shared with an even larger number, to this day (including for this paper) I remain a frequent reader of his books and articles, still struggling to understand his views and arguments. And following others who have written about Joseph’s work and legacy, I believe that we best reflect what he was trying to teach through our own persistent questioning, including, indeed, perhaps especially, accepted truths, and certainly not excluding his own positions and arguments. In the present work, my fear is that I have -- once again (I can still hear his quietly critical voice from discussions decades ago in his Balliol College room) -- failed to live up to the standard Joseph wanted all of us to meet. However, with the help of your criticisms and suggestions, I hope to do better.

*I. Introduction*

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One central element of Joseph Raz's writings about the nature of law is his assertion that law necessarily claims moral authority. The present work will begin by critically examining Raz's claim and will then use that topic as a starting point to explore basic questions about the nature of legal obligation. An important part of that exploration will be evaluating the possibility of thinking of legal normativity as *sui generis*, rather than as a type of normativity that needs to be reduced to or translated into some other type of norm or proposition.

In what follows, Part II introduces the topic of law's moral claims, summarizing Raz's views; Part III briefly considers the conceptual problem of ascribing "claims" to law; Part IV discusses whether or how to distinguish the claims of law from those of individual officials; Part V offers the option of law as *sui generis* type of normativity; and Part VI reflects further on the basic question of the normativity of law, before concluding.

## *Part II Overview*

Oliver Wendell Holmes, in his well-known work, "The Path of the Law," argued for the importance of distinguishing law from morals, warning that

"[t]he law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about rights, and duties, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take those words in their moral sense ...."<sup>2</sup>

Holmes was discussing a sort of unintended slippage from legal to moral. Despite Holmes' warnings, there have been and still are many theorists who argue that legal content *should* be – or

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<sup>2</sup> Oliver Wendell Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 459-60 (1897).

*must be* – understood in moral terms, at least as *asserting* moral content. These theorists argue variously that law should be understood as a subset of morality, that law is the moral product of the actions of legal officials,<sup>3</sup> or that law makes moral claims.

Regarding that last alternative, that law makes moral claims, Joseph Raz asserted that “necessarily the law claims to have legitimate authority, and that claim is a moral claim.”<sup>4</sup> Raz elsewhere clarifies by “necessarily” he means that “the claim to authority is part of the nature of law ....”<sup>5</sup> What is the basis for this conclusion? Raz offers the following argument:

The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e. by the institutions of the law. The law’s claim to authority is manifested by the fact that legal institutions are officially designated as ‘authorities’, by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed ....<sup>6</sup>

Raz added: “It [law’s claim] is a moral claim because of its content: it is a claim 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.”<sup>7</sup> Raz elsewhere supports the idea of law’s making a *moral* claim by analyzing the situation in terms of practical reasoning, regarding the

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<sup>3</sup> See, e.g., Mark Greenberg, “The Moral Impact Theory of Law,” 123 *Yale Law Journal* 1288 (2014); see also Scott Hershovitz, “The End of Jurisprudence,” 124 *Yale Law Journal* 1160 (2015).

<sup>4</sup> Joseph Raz, *The Authority of Law* (2<sup>nd</sup> ed., Oxford, 2009), p. 315. The text has a footnote, which states: “My first publication including these points is *Practical Reason and Norms* (2<sup>nd</sup> ed., Oxford, 1999), ch. 5.” *Id.* at 315 n. 6.

<sup>5</sup> Joseph Raz, *Ethics in the Public Domain* (Oxford, 1994), p. 199.

<sup>6</sup> *Id.* at 199-200.

<sup>7</sup> Raz, *The Authority of Law*, *supra* note 4, at 315-16.

way that law affects – or purports to affect –the reasoning of citizens. Raz states: “The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action; i.e. a law is authoritative if its existence is a reason for conforming action and for excluding conflicting considerations.”<sup>8</sup> This connects the understanding of the claims law makes with Raz’s distinctive view that authorities give us “exclusionary reasons”<sup>9</sup> – that under this view, law, in particular, gives us both first-order reasons to act in a certain way and second-order reasons not to respond to certain other (non-legal) first-order reasons.

In another work, Raz offers an intriguing *indirect* argument for why we should view or characterize the statements of legal officials as moral claims.<sup>10</sup> The argument begins by distinguishing the reasons one might give to justify *one’s own* behavior as against the reasons one would give in justifying prescriptions for the behavior of *other people*. For one’s own behavior, one can (and does) offer *either* moral or prudential arguments. However, when prescribing what *other people* should do, such prescriptions are generally based (only) on what

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<sup>8</sup> *Id.* at 29.

One might speculate on the connection, or the differences, between Raz’s argument that law *claims* (legitimate) moral authority and Scott Shapiro’s later argument that law necessarily has moral *aims*. See Scott Shapiro, *Legality* 213-214 (Harvard, 2011). Raz appears at one point to write in passing of something like law’s moral *aims*. See Joseph Raz, *Between Authority and Interpretation* 177 (Oxford, 2009) (“law by its nature has a moral task”); *but see id.* at 374 (“law has no specific function”); *cf.* Shapiro, *Legality, supra*, at 446-447 n. 4 (commenting on Raz’s “moral task” comment); David Plunkett, “Legal Positivism and the Moral Aim Thesis,” 33 *Oxford Journal of Legal Studies* 563, 565-567 (2013) (comparing Shapiro’s and Raz’s views). However, the present work will not be discussing moral *aims*, only moral *claims*.

<sup>9</sup> Joseph Raz, *Practical Reason and Norms* (2<sup>nd</sup> ed., Oxford, 1999), pp. 178-199 (“Rethinking Exclusionary Reasons”); see also Joseph Raz, “Exclusionary Reasons” (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3933033](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3933033).

<sup>10</sup> Joseph Raz, “Hart on Moral Rights and Legal Duties,” 4 *Oxford Journal of Legal Studies* 123, 130 (1984).

those others (purportedly) have a *moral obligation* to do.<sup>11</sup> Within a legal system, judges and other officials are often telling other people how they must act. Raz comments: when judges “accept a rule [of recognition] which requires them to accept other rules imposing obligations on other people ... [such] a rule ... can only be accepted in good faith for moral reasons.”<sup>12</sup>

By way of overview and summary: Raz offered a series of justifications for the view that law makes moral claims, including: (1) the moral-sounding language law uses; (2) the fact that authorities claim the right to impose *obligations*; (3) that fact that officials claim that citizens should obey the rules; and (4) the role legal rules play in practical reasoning (as protected reasons for acting as the law prescribes).

In evaluating Raz’s views, it may be useful to start first by looking at two threshold questions, (1) Does it make sense to attribute “claims” to law?, and (2) How do we distinguish the claims of “law” from those of individual legal officials?, before reaching a third question: (3) Are law’s claims moral (or “merely” legal)?

### *III. Law “Claiming”*

One sub-topic Raz did not discuss, but which raises an issue on which a number of later commentators -- both critics and supporters of the idea of law’s moral claims -- have written, is whether it makes sense to say that law “claims” (anything). To put the same issue differently, is “law” the sort of entity which can be said to make claims?

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<sup>11</sup> Raz notes that one would justify a prescription for other people’s behavior based on their self-interest only if one believed that they had a moral obligation to serve those interests. *Id.*

<sup>12</sup> *Id.*

The term “law,” in English, is notoriously ambiguous,<sup>13</sup> which can be a burden for English-language legal philosophers trying to be precise in their theorizing. Do we mean the word “law,” the concept “law,” a kind of social practice or social institution, a kind of practical reasoning, a kind of abstract entity, a particular rule, or some combination of these? When Raz asserts that law, by its nature, makes a moral claim, by “law” he almost certainly means a legal system. Raz is not here using the term in a sense either more general or less general than that. On one side, it would not be easy to make sense of a claim that law understood in its most abstract sense, law in general or the concept, “law,” makes a claim. Whatever the complications, to be discussed in a moment, of ascribing the power of claiming to a whole legal system, the difficulties would magnify if one thought of ascribing the power to claim to a general abstract category or concept. At the other extreme, while someone might speak of the way individual rules make claims, such assertions would merely be variations of the assertion that a particular legal system is, or all legal systems are, individually, making claims. Still, one might wonder what it means to assert that a legal system – made up of multiple institutions and many individual legal officials – is “claiming” something, and claiming in some special way (making a *moral* claim).

Some commentators have reacted strongly against characterizing “law” as “claiming,” stating that such characterizations are either category mistakes or unhelpful metaphors. The category mistake argument is that *human beings* claim, but institutions or abstract objects do not. For example, in a discussion responding to Raz and also to Robert Alexy’s argument that law “claims” correctness, Neil MacCormick writes that the idea of law’s claiming was, taken

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<sup>13</sup> In English, “law” has multiple meanings, generally clarified by context. “Law” often refers to individual rules, but sometimes refers generally to a concept or category. See Jules L Coleman & Ori Simchen, ““Law,”” 9 *Legal Theory* 1, 5 (2003) (listing eight related but distinct questions legal philosophers ask about law and “law”).

literally, a category mistake, and, if taken as a metaphor, it is one that is unhelpful and potentially misleading.<sup>14</sup> A legal (normative) system is a state of affairs, and states of affairs do not have intentions, he argues.<sup>15</sup> Any claims – to correctness (for Alexy) or to authority (for Raz) – is “that of the law-maker, not that of the ‘law’.”<sup>16</sup>

Ronald Dworkin’s critique of Raz’s statement that law *claims* moral authority, which Dworkin includes as a sort of supplementary section to a review of a book by Jules Coleman, is similar. Dworkin asserts that stating that law claims makes little sense as a personification of law, and, additionally, he argues, seems also to be contrary to the legal positivist principles Raz elsewhere espouses.<sup>17</sup> Dworkin writes:

If we read Raz's personification in this familiar way, we take him to mean that no proposition of law is true unless it successfully reports an exercise of legitimate authority. But that would imply not that morality cannot be a test for law, as Raz claims, but that it must be a test for law, because, as he recognizes, no exercise of authority is legitimate “if the moral or normative conditions for one's directives being authoritative are absent.”<sup>18</sup>

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<sup>14</sup> Neil MacCormick, 'Why Law Makes No Claims', in George Pavlakos (ed.), *Law, Rights and Discourse* (Hart, 2007), 59-67, at 59. MacCormick cites to Robert Alexy, *Begriff und Geltung des Rechts* (Alber, 1994); Raz, *The Authority of Law*, *supra* note 4; and Joseph Raz, *Ethics in the Public Domain* (Oxford, 1994). MacCormick, *supra*, at 59 n. 1.

<sup>15</sup> MacCormick, “Why Law Makes No Claims,” *supra* note 14, at 60.

<sup>16</sup> *Id.* at 67.

<sup>17</sup> Ronald Dworkin, “Thirty Years On” (reviewing Jules Coleman, *The Practice of Principle*), 115 *Harvard Law Review* 1655, 1665-67 (2002).

<sup>18</sup> *Id.* at 1666, quoting Joseph Raz, *Ethics in the Public Domain* (Oxford, 1994), pp. 199-200.

A different sort of response to Raz’s position is that it does not matter what law *claims*, if such a claim is clearly ungrounded (that is, that law is not the sort of practice or institution that could *justifiably* make such a claim). See David Enoch, “Is General Jurisprudence Interesting?,” in David Plunkett, Scott J. Shapiro and Kevin Toh (eds.), *Dimensions of Normativity* (Oxford, 2019), pp. 65-86, at 75.

By contrast, and supporting Raz's position, John Gardner asserts that it is in the nature of legal officials—that it is part of *what it means to be a legal official*—that these individuals make claims in the name of their legal system.<sup>19</sup> Taking a similar view, Robert Alexy (responding to MacCormick's critique, summarized above), concedes that, in a strict sense, claims can only be made by law-makers, not by the law itself. However, Alexy goes on to argue that actors in the legal system – individuals making claims as well as judges adjudicating them – use the notion of law's claiming (in an "objective" sense) in the process of determining what the law requires.<sup>20</sup>

While individual human beings are the usual agents to whom we ascribe claims and similar linguistic actions, we are also now accustomed to seeing claims ascribed to other sorts of entities, including (other) institutions or collectivities. We hear about the claims of governments, unions, corporations, advocacy organizations, and social organizations, just to name some obvious examples. To the extent that we have become comfortable with the ascription of claims to those entities, it is not evident why we should draw the line at not making comparable ascriptions to legal systems. This is not the occasion for developing a full theory of collective or institutional agency.<sup>21</sup> It is sufficient for present purposes that in a number of other contexts we take ascription of views to institutions or groups as *not* being (necessarily) a category mistake and, at least presumptively, being something more than a mere metaphor. For present, I must leave the issue at that, in order to move on to other issues, in particular, the connection between

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<sup>19</sup> John Gardner, *Law as a Leap of Faith* (Oxford, 2012), 33. For a detailed response to Gardner's view, see Luís Duarte D'Almeida and James Edwards, "Some Claims About Law's Claims," 33 *Law and Philosophy* 725 (2014).

<sup>20</sup> Robert Alexy, "Thirteen Replies," in George Pavlakos (ed.), *Law, Rights and Discourse* (Hart, 2007), pp. 333-366, at pp. 334-335.

<sup>21</sup> On that topic, Michael Bratman's recent work would seem an obvious place to start. See, e.g., Michael E. Bratman, *Shared and Institutional Agency* (Oxford, 2022); see also Margaret Gilbert, "A Simple Theory of Acting Together," 8 *Journal of the American Philosophical Association* 399 (2022).



law's claims and the claims of individual officials, and then to the nature of legal normativity generally.

#### *IV. Distinguishing Law's Claims from the Claims of Individual Officials*

As discussed, one common way to understand the assertion that “law” “claims” (something) is to equate that assertion with the statements and decisions of individual legal officials. That move removes some of the strangeness from the characterization; however, it does so at a cost. If the claims of “law” are simply whatever certain legal official state or do, to *which* legal officials are we referring? The seemingly obvious referents would be judges, but there are other legal officials who also seem to make authoritative claims about what the law requires and permits (one notes the cliched declaration of police officers in films and television shows: “Stop, in the name of the law!”) *Many* legal officials claim to be speaking on behalf of the law, or at least give that appearance. Police officers, clerks in the property registry office, officials in administrative agencies, among many others, along with judges, all give prescriptions, prohibitions, and permissions that purport to reflect the view of the legal system. There are complications, however, that make one hesitate to equate the statements and decisions of any and all individual legal officials with those of “the law.”

First, one must of course inquire whether the officers in question were acting in, and within, their legal capacity. Judges or police officers or the heads of administrative agencies making comments during a social dinner after work hours would likely *not* be held to have made claims on law's behalf. However, there are harder cases: for example, consider situations when officials *purport* to act in their legal capacity, but in fact are acting *beyond* or *outside* that capacity – acting *ultra vires*. In such cases, the statements, actions, or decisions, though

technically *ultra vires* under the rules accepted at the time, might nonetheless go on to be treated as valid, and any resulting rule might become settled law. In such situations, whether the officials were speaking “for the law” is not clear at the time of their decision, and may only become clear long after the event in question.

Conversely, a statement or decision made on behalf of the law, even when clearly made by an official in her official capacity and within her delegated powers, may, in due course, be overturned by an official or institution higher in authority. In such cases, the original decision purported to state the law’s views, but the message of the reversing court or officials is that the original decision in fact *mis*-stated law’s position. Both the decisions that are (or might be) *ultra vires* and the decisions that are later overruled raise issues of “legal mistake,” or perhaps even “change in the rule of recognition,” topics of obvious practical and theoretical importance. However, I have no time to consider those issues at any length here.<sup>22</sup>

What this discussion *does* indicate is that, assuming that law claims, the exact content of its claims will sometimes be uncertain, giving the potentially conflicting voices among its officials and the potentially defeasibility of those claims. In general, law’s claims (law’s views on certain matters) cannot be in any simple way be reduced to or equated with the particular views or actions of certain individual legal officials.

#### V. *Different Kind of Claims*

Assuming that it makes sense to ascribe claims to law, what kind of claims does law make? What kind of reasons does law give us? Here, we need to take a short digression to more

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<sup>22</sup> See, e.g., Brian H. Bix, “Authority, Reason, and Competence in Issues of Legal Truth,” in Gonzalo Villa-Rosas and Torben Spaak (eds.), *Legal Power and Legal Competence* (forthcoming, Springer, 2023), pp. 247-258.

general topics regarding reasons. According to some theorists, reasons differ in part according to their substantive context.<sup>23</sup> Depending on their origin and justification, there are moral reasons, religious reasons, and legal reasons, and also etiquette reasons and chess reasons, as well as reasons of many other types. There are, as it were, many sorts of normativities, many sorts of “oughts.” These different reasons will inevitably conflict in our lives, and when they do, the agent must decide which (set of) reason(s) to follow. Some commentators urge that many such conflicts will be easy to resolve: because morality gives “real” or “robust” reasons, while etiquette and games generally give only “formal” or “superficial” reasons,<sup>24</sup> if what morality requires conflicts with what etiquette or some board game requires, one must simply do what morality requires.<sup>25</sup> In other cases, though, the conflicts may need a more careful consideration of the number, weight, and kind of reasons on each side of some question: that (e.g.) when we have a moral reason to obey or to disobey the law may be a complex question turning on many factors.<sup>26</sup>

According to some theorists, the discussion of different kinds of reasons is misleading: there are only *reasons*, not sub-divided into categories according to labels. Under this approach, reasons are to be distinguished only according to their strength, and perhaps whether they

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<sup>23</sup> See, e.g., Derek Baker, “The Varieties of Normativity,” in Tristram McPherson and David Plunkett (eds.), *The Routledge Handbook of Metaethics* (Routledge, 2018), pp. 567-581; cf. T. M. Scanlon, *Being Realistic About Reasons* (Oxford, 2014) (arguing for demarcating domains, but generally treating normative reasoning as a single domain).

<sup>24</sup> See, e.g., Tristram McPherson, “Against Quietist Normative Realism,” 154 *Philosophical Studies* 223, 232-233 (2011).

<sup>25</sup> But see Baker, “The Varieties of Normativity,” *supra* note 23, at 577-580 (discussing skepticism about normativity authority).

<sup>26</sup> See, e.g., Raz, *The Authority of Law*, *supra* note 4, at 233-249 (“The Obligation to Obey the Law”).

operate in a first-order or second-order manner.<sup>27</sup> Under this approach, some purported reasons might be dismissed as not “real reasons.” As this paper indicates, I am inclined towards the first perspective, with its plurality of reasons, though I recognize that many other theorists favor the second approach.

It is now common among legal theorists to argue that law *purports to be* some other type of normative claim, or to equate legal obligation with some other normative or factual discourse. For Raz (and others), law makes moral claims; for Mark Greenberg, law is a subset of morality<sup>28</sup>; and, for the American legal realists, law is generally understood as a prediction of official action.<sup>29</sup> This paper suggests an alternative approach, one under which the claims that law makes are not to be equated with or reduced to another form of discourse; rather, they are what they appear to be, and nothing more: simply *legal* claims (just as morality makes “moral claims” and etiquette makes “etiquette claims”).

While the idea that law makes (only) legal claims might, at one level, seem obvious, among legal theorists it will be controversial, and some may view it as obviously mistaken. John Gardner offers what, at first glance, appears to be a simple and ingenious proof that law does *not* make *legal* claims, but must be making claims of some other kind. His analysis begins with the point that claims, *qua* claims, must be fallible – “to make a claim” is to make an assertion (about the world, in some way), which, as an assertion, must be capable of being true or false.

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<sup>27</sup> As David Enoch pointed out to me, Joseph Raz likely falls in this category, and one can also view along these lines in the naturalism of Brian Leiter. See Brian Leiter, “Normativity for Naturalists,” 25 *Philosophical Issues* 64, 69-73 (2015) (arguing against “domain separatism”).

<sup>28</sup> See, e.g., Greenberg, “The Moral Impact Theory of Law,” *supra* note 3.

<sup>29</sup> See, e.g., Holmes, “The Path of the Law,” *supra* note 2, at 460-461; Karl N. Llewellyn, “A Realistic Jurisprudence--The Next Step,” 30 *Columbia Law Review* 431, 437-438, 447-449 (1930)

However, Gardner continues, law cannot be mistaken regarding *legal* claims, so law must be making a claim of some other kind (likely, moral claims).<sup>30</sup>

However, there is a response to Gardner, and it focuses on the key point about fallibility. Consider the analogy of the divine command theory of morality. According to that theory, God's commands simply constitute *what counts as* morally true; morality simply is what God orders, no more and no less. If one adopted this approach, one would not say that God *makes claims* about what is morally true; rather, divine prescriptions *constitute* what is morally true. The analysis of law and legal claims is similar. What the legal system collectively says about some subject, that *constitutes* legal truth (for that legal system). Under this analysis, it would be misleading, or at least unhelpful, to say that law is *claiming* legal truth. However, as discussed above, one *might* offer that description, making a claim about legal truth, for the actions or statements of individual legal officials. Individual legal actors can make mistakes and can be overruled by higher legal officials. It captures something of the "subject to change" (subject to correction, defeasible) nature of any official's action to characterize it as a (mere) claim to legal truth. When we say that the assertions of the legal system as a whole *constitute* legal truth, we mean something like "the relatively settled view of legal officials collectively." This point likely warrants further discussion and will require further clarification, but those, again, must await another occasion.

The idea that legal officials claim *legal* truths regarding *legal* obligations, etc., is thus, *contra* Gardner, conceptually coherent, conceptually possible. However, it still requires some explanation. The basic idea, as already indicated, is that law should *not* be understood as making a claim about morality or some other type of discourse, nor should legal propositions be

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<sup>30</sup> See Gardner, *Law as a Leap of Faith*, *supra* note 19, at 133.

understood as simply a shorthand for predictions about empirical matters (like the imposition of sanctions by officials). Rather, law is to be understood as a *sui generis* form of normativity. This is not an entirely novel view; one can find it, or something like it, in scattered comments among figures as central to contemporary legal philosophy as H. L. A. Hart, John Finnis, and Matthew Kramer.<sup>31</sup> As already mentioned, the suggested view is simultaneously seemingly a simple and “common sense” view, and, at the same time (at least in some circles), a radical and strange idea.

One can explain the basic notion in various ways: that what the law provides us with are *legal* reasons (to be contrasted with moral reasons, etiquette reasons, religious reasons, etc.), and that the meaning or explanation of terms like “legal obligation” and “legal right” will come from within legal discourse, from other legal terms and concepts, not from terms and concepts of other normative systems or other areas of discourse<sup>32</sup>.

The alternatives, to reduce or translate legal propositions and claims into a different sort of discourse – moral or factual – have problems, some of them well-known. Earlier parts of the present work have mentioned some of the problems with viewing law as making a moral claim or being some subset of morality. Most obviously, such an equation seems contrary to a foundational observation or experience that law and morality often diverge sharply: law may

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<sup>31</sup> On Hart, see H. L. A. Hart, *Essays on Bentham* (Oxford, 1982), pp. 262-68. And both Raz and Finnis read Hart this way. Raz, ‘Hart on Moral Rights and Legal Duties’, *supra* note 10; John Finnis, *Philosophy of Law* (Oxford, 2011), p. 27 & n. 4 (Finnis also confirmed his view to me in an email message of July 7, 2013). On Finnis, see John Finnis, “Reflections and Responses,” in John Keown & Robert P. George (eds.), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford: Oxford University), pp. 459-584, at pp. 553-556. On Kramer, see Matthew Kramer, *In Defense of Legal Positivism* (Oxford, 1999), pp. 83, 89.

<sup>32</sup> Cf. Scanlon, *Being Realistic About Reasons*, *supra* note 23, at 19 (“the truth values of statements about one domain ... are properly settled by the standards of the domain that they are about.”).

require or authorize immoral actions; morality may require or authorize illegal actions, etc.<sup>33</sup>

And while the matter remains controversial, there are substantial reasons to conclude that there is no presumptive obligation to obey the law (even in a generally just legal system), no other things being equal obligation to do what the law says simply because the law says so.<sup>34</sup>

On the empirical alternative: the idea of reducing legal propositions to, or equating legal propositions with, certain factual descriptions or predictions is well known from the works of the American and Scandinavian legal realists, among others. Oliver Wendell Holmes famously wrote: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>35</sup> Putting aside whether Holmes intended that quotation as a conceptual definition (as contrasted with being just advice to young lawyers take a more worldly attitude), the possibility of understanding law in terms of past, present, or future official actions is an option seriously to be considered; it has been discussed as an important alternative approach to the nature of legal facts by important modern theorists, including Jules Coleman and Brian Leiter and Connie Rosati.<sup>36</sup>

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<sup>33</sup> For a good overview of some of the problems of seeing law as just a subset of morality, see, e.g., Larry Alexander, “In Defense of the Standard Picture: The Basic Challenge,” 34 *Ratio Juris* 187 (2021) (critiquing Mark Greenberg’s views); Bill Watson, “In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot,” 28 *Legal Theory* 59 (2022) (same).

<sup>34</sup> See, e.g., M. B. E. Smith, “Is There a Prima Facie Obligation to Obey the Law?,” 82 *Yale Law Journal* 950-976 (1973); Donald H. Regan, “Law’s Halo,” in Jules Coleman & Ellen Frankel Paul, (eds.), *Philosophy and Law* (Basil Blackwell, 1987), pp. 15-30; Raz, *The Authority of Law*, *supra* note 4, at 245-249. For a good overview of the debate, see Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (Cambridge, 2012).

<sup>35</sup> Holmes, “the Path of the Law,” *supra* note 2, at 460-461; Llewellyn, “A Realistic Jurisprudence--The Next Step,” *supra* note 29, at 437-438, 447-449.

<sup>36</sup> Jules Coleman and Brian Leiter, “Determinacy, Objectivity, and Authority,” 142 *University of Pennsylvania Law Review* 549, 616-620 (1993); Connie S. Rosati, “Some Puzzles About the Objectivity of Law,” 23 *Law and Philosophy* 273, 283-284, 307-311 (2004).

However, equating law with what judges, in particular, or officials generally have decided or are likely to decide is in tension with the common practice (to lawyers and citizens, as well as law professors) of criticizing court decisions – decisions interpreting and applying constitutional provisions and statutes, criticism offered sometimes even when those decisions reflect the view of a majority of legal officials, or, at least, a majority of the highest court in the legal system. That is, our practices reveal that it is conceptually coherent to think that a view about the law is wrong even when it is the view held by a majority of judges (even a majority of the judges on the highest court). And, in general, explaining legal facts or legal claims as being about what legal officials have done, or what they will do, leaves it hard to explain what the judges themselves are doing, or to guide them towards what they *should* be doing. It is quite possible that some lower-court judges may be focused on predicting how the higher courts will decide (what decisions are most likely to be upheld rather than overturned), but that explanation will not be applicable when one is talking about the judges on the highest courts.

As H. L. A. Hart argued, there may be a worldly truth, but also a deep falsity, in saying that the law is simply what the judges say it is. Hart explained his view through a hypothetical game as “scorer’s discretion.” Sports fans who think that their team were harmed by bad officiating might claim that the rule in the game was simply that a goal is scored whenever the referee says that it is, but a game where that was in fact the only rule about scoring would be absurd and senseless.<sup>37</sup> Just as referees purport to be applying standards independent of them, so do judges.

## *VI. Accounting for Normativity*

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<sup>37</sup> H. L. A. Hart, *The Concept of Law* (3<sup>rd</sup> ed., Oxford, 2012), pp. 141-147.



In a commentary on an earlier piece which had offered similar views, Connie Rosati raises questions about whether H. L. A. Hart (and/or the *sui generis* legal normativity position I attributed to him) adequately explains the normativity of law. Rosati, refers to my attributing the *sui generis* position to Hart, and comments: “we seem to learn from [Hart] only what it is for officials (and some others) to *treat* the law as normative.... not what it is for law itself to *be* normative.”<sup>38</sup> Here, Rosati is focusing on a much-discussed problem in Hart’s analysis. Hart had importantly and (in the view of most readers) persuasively criticized the earlier command theory of law, presented by John Austin,<sup>39</sup> as being little more than the “gunman situation writ large.”<sup>40</sup> In his book, *The Concept of Law*, Hart urges theorists to incorporate the perspective of those who accept the law, who view the law as giving them reasons for action.<sup>41</sup> However, as John Finnis and others have pointed out, this leaves the normativity of law at an unhelpful distance; the theorist is *observing* that some legal subjects are treating the prescriptions of legal officials in a normative manner, but Hart precludes the theorist from inquiring further, as to *why* the subjects are doing so, or whether they are *justified* in doing so.<sup>42</sup> Finnis argued that we

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<sup>38</sup> Connie S. Rosati, “Bix on the Normativity of Law,” 37 *Revus* 69, 71 (2019). On this subject, Michael Moore offers that “Hart was only doing a sociology of ethics when he analysed obligation in general and legal obligation in particular. He was not doing ethics itself, because on his view of law’s normativity, none needed doing in order to ascertain whether a system of rules possessed sufficient ‘normativity’ to be a legal system.” Michael S. Moore, *Educating Oneself in Public* (Oxford, 2000), p. 8 (footnote omitted).

<sup>39</sup> See, e.g., John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble, ed., Cambridge, 1995) (1832).

<sup>40</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals,” 71 *Harvard Law Review* 593, 603 (1958).

<sup>41</sup> Hart, *The Concept of Law*, *supra* note 37, at pp. 55-58, 82-91.

<sup>42</sup> See, e.g. Hart, *The Concept of Law*, *supra* note 37, at 203 (noting that subjects’ acceptance of the law need not be based on moral reasons, but “may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”).

should not just incorporate the view of subjects who view the law as giving them reasons for action; we should also inquire whether they *are right to do so*.<sup>43</sup>

Returning to Rosati's critique, if the question is whether Hart's view – or my view – adequately explains law's normativity, the natural focus turns to what law's normativity (and its explanation) entails. The threshold difficulty is that what it is for law “to *be* normative” is itself far from clear,<sup>44</sup> and is highly contested.<sup>45</sup> This touches on matters that have been central to this paper throughout: there are various ways in which law is, or is seen to be, or purports to be, normative, and normative both in the sense of action-guiding and in the (different but overlapping) sense of evaluative. Some would point to the way that law attempts to guide citizen behavior and, also, in both applying and following the law, the behavior of officials. Additionally, law uses the moral-sounding language of duty, right, and permission.

David Enoch has argued that there is no special sort of normativity that a theory of law needs to explain, nothing different than the “formal” normativity comparable to what one finds in etiquette or fashion, and the fact that law has great significance in our lives does not change that. He writes:

I agree that the law is especially important in many ways. I also agree ... that the

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<sup>43</sup> See, e.g., John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> ed., Oxford, 2011), pp. 3-22.

<sup>44</sup> See generally Ralph Wedgwood, “The Unity of Normativity,” in Daniel Star (ed.), *The Oxford Handbook of Reasons and Normativity* (Oxford, 2018), pp. 23-45 (offering an overview of the different senses of “normativity” in the philosophical literature).

<sup>45</sup> As Rosati herself noted in an earlier work, and many other prominent theorists observe as well. See Rosati, “Some Puzzles About the Objectivity of Law,” *supra* note 36, at 296-298, 311-313; see also, e.g., Enoch, “Is General Jurisprudence Interesting?,” *supra* note 18, at 69; Frederick Schauer, “On the Alleged Problem of Legal Normativity,” in Nicoletta Bersier Ladavac, Christoph Bezemek and Frederick Schauer (eds.), *The Normative Force of the Factual* (Springer, 2019), pp. 171-180; see generally Andrei Marmor and Alexander Sarch, “The Nature of Law” (2019), § 1.2 (“The Normativity of Law”), in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/lawphil-nature/>.

law's importance merits interest in it, philosophical among others. But the law is not special or significant *in ways that are relevant to formal normativity*. If the law is special, that is because it is powerful .... [This is not] related in an interesting way to the law's having correctness conditions. Vis-à-vis its formal normativity, the law is not special.<sup>46</sup>

As Rosati points out, it is common to compare law to a quite different normative enterprise, games like chess.<sup>47</sup> As she observes, with chess one can speak about standards which determine what counts as playing the game, as well as the objectives of the games and what counts as winning the game. The prudential, moral or other reasons for or against playing the game at all are independent of (separate from) the norms of chess.<sup>48</sup> Thus, there is a kind of normativity *within* a practice – what constitutes the practice, the criteria of success or excellence for participants, etc. – but this leaves open the possibility (a) of not taking up the practice at all; and (b) relatedly, judging the value of taking up the practice, in general, or by a particular person at a particular time. Where a legal system is effective, one may be unable to escape its threatened coercion and other factors that may enter into prudential calculations, but that still differs from the questions raised earlier in this paper about law's claims, and, more recently, about the nature of legal normativity.

In her commentary, Rosati presses me to be more responsive to the question “whether law itself is normative and what its normativity consists in,” suggesting that this might be explored through (e.g.) these more specific inquiries: “(1) do officials (and some citizens) see or

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<sup>46</sup> Enoch, “Is General Jurisprudence Interesting?,” *supra* note 18, at 78.

<sup>47</sup> See Rosati, “Bix on the Normativity of Law,” *supra* note 38, at 71; see, e.g., Andrei Marmor, “How Law is Like Chess,” 12 *Legal Theory* 347 (2006).

<sup>48</sup> Rosati, “Bix on the Normativity of Law,” *supra* note 38, at 71.

view the law as giving them reasons?; (2) what sorts of reasons do they view the law as giving them?; (3) does the law actually give them reasons?; and (4) what sorts of reasons does it actually give them?”<sup>49</sup> Rosati encourages a focus either on the reasons subjects *perceive* the law as giving them, or on the reasons the law *actually provides*.

As regards the first, what reasons people *perceive* the law as giving them, I see that as a question more for psychology and sociology,<sup>50</sup> though, of course, with some implications for legal philosophy. For example, Frederick Schauer argues that H. L. A. Hart was wrong to build his theory of the nature of law around those who accept the law (take the “internal point of view”), given that most people obey the law for prudential reasons, to avoid sanctions.<sup>51</sup>

My answer to what reasons law actually gives would be similar to that offered by John Finnis, when he was pressed to give content to the concept of “legally obligatory.” Because of its relevance, I quote Finnis’s response at some length:

[T]he law implicitly deploys and holds out the schema of practical reasoning ... [such] that it makes no reference to ‘the common good’ but just to an unspecified need for all the law’s subjects to be law-abiding. That need in turn can be explicated ... by good citizens in terms of the common good, by ‘good citizens’ (uncritical servants of the regime) in terms of the sustaining of the regime, 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). In all these specimens of practical reasoning, the law slots into the relevant schema and

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<sup>49</sup> See Rosati, “Bix on the Normativity of Law,” *supra* note 38, at 71.

<sup>50</sup> See, e.g., Tom R. Tyler, *Why People Obey the Law* (Princeton, 2006).

<sup>51</sup> See Frederick Schauer, *The Force of Law* (Harvard, 2015).

therefore intelligibly “holds out its principles and rules as a (non-optional) standard for comparing options and ranking them as obligatory, permissible, or impermissible ... and so forth.” That is “the place it claims in our deliberations”. When [*Natural Law and Natural Rights*] predicates of these non-optional standards is that they are “legally obligatory in the legal sense”, a sense in which their obligatoriness is (deemed) invariant, conclusive, non-feasible, peremptory – as distinct from “legally obligatory in the moral sense”, a sense in which their obligatoriness is presumptive, defeasible, and so forth. ... [W]hatever the practical reasoning into which it slots, the law’s schema for practically understanding the legal obligations that the law claims to articulate and impose is one and the same – practical but not *in itself, as such*, moral, though (in the central case): always *apt* for a moral reading by the morally concerned subjects, yet far from empty of guidance, as non-optional, for those uninterested in moral concerns.<sup>52</sup>

Some readers might find it interesting that an author who was critical of H. L. A. Hart for accepting a variety of motivations for subjects’ taking up an internal point of view towards law<sup>53</sup> seems content to incorporate into his understanding of “legally obligatory” a variety of motivations for the use of law within practical reasoning. Finnis’s view appears to be that the central case or focal meaning of law *need not be* one of moral claims or even the consistent (defeasible) creation of new moral reasons.

The position being suggested by the present work is that legal obligation should *not* be understood as a general (robust, moral) obligation, which differs from other moral obligations

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<sup>52</sup> Finnis, “Reflections and Responses,” *supra* note 31, at 555-556 (ellipses after “impermissible” in original), quoting John Finnis, *Reasons for Action* (Oxford 2011), p. 233; and citing John Finnis, *Natural Law and Natural Rights*, *supra* note 43, at. 314-320.

<sup>53</sup> Finnis, *Natural Law and Natural Rights*, *supra* note 43, at 11-18.

only in that its origin is in the actions and products of legal officials.<sup>54</sup> Rather, legal obligation is a different type of obligation, creating different sorts of reasons.

Hart writes in *The Concept of Law* that law's "existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory."<sup>55</sup> Those inclined to view law as making moral claims and creating moral reasons, and want to cite Hart in support of that view, will emphasize the "obligatory" in that sentence; those who prefer an alternative understanding may emphasize the ambiguous qualifier, "in some sense." Of course, determining the meaning of such stray sentences may be important to understanding Hart's intentions, and how they may have changed between *The Concept of Law* and certain portions of *Essays on Bentham*. In the latter, Hart writes:

"[J]udges, in speaking of the subject's legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is 'owed' by the subject, that is, may legally be demanded or exacted from him.

Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statement of the subject's legal duty.<sup>56</sup>

However, the primary task of the present work is not Hart exegesis, but rather exploring the tenability of a particular view of legal normativity and legal obligation, regardless of whether (or in which text(s)) it reflects Hart's views.

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<sup>54</sup> I am grateful to Michael Moore for pressing for this clarification.

<sup>55</sup> Hart, *The Concept of Law*, *supra* note 37, at 6 (emphasis in original).

<sup>56</sup> Hart, *Essays on Bentham*, *supra* note 31, at 266.

The question remains, what sorts of reasons does law give us under the suggested approach, an approach of *sui generis* legal normativity. And the proposed answer is, in quite abstract terms, the same sort of reason one gets from etiquette, fashion, a social club or a board game. Legal reasons generally carry more motivational weight for most people most of the time, compared to those of etiquette or fashion, but that is because, at least in generally effective legal systems, the threat of legal sanctions (and, occasionally, of legal rewards) evokes prudential reasons for outward compliance. And those prudential reasons are generally motivationally stronger than the social pressure brought to bear by etiquette or fashion.

As Joseph Raz points out, law sometimes does sometimes give moral reasons, due its being a salient coordinator or because of the greater expertise of the lawmakers; and as David Enoch points out, law may sometimes trigger our existing moral duties.<sup>57</sup> But beyond those situations, law may “obligate” – to quote Michael Moore – “only in the Pickwickian sense that law gives rise to liability to sanctions and that liability induces habits of obedience in citizens and perhaps even beliefs of legitimacy.”<sup>58</sup> At the same time, to say that legal normativity is *sui generis* is to insist that legal obligation is not fully equivalent with facts about past, present, or future official action, and that one can sensibly speak about having a legal right or legal duty even if enforcement through courts or other officials is not available.

In all, the view of law as a *sui generis* form of normativity – a formal normativity comparable to other normative practices, like etiquette, fashion, social clubs, and board games – seems sustainable, and explains many practices and attitudes better than viewing law as a subset

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<sup>57</sup> Joseph Raz, *The Morality of Freedom* (Oxford, 1986), pp. 75-80, 97-105; Raz, *The Authority of Law*, *supra* note 4, at 245-249; David Enoch, “Reason-Giving and the Law,” *Oxford Studies in Philosophy of Law*, vol. 1 (Leslie Green & Brian Leiter, eds., Oxford: Oxford University Press, 2011), pp. 1-38.

<sup>58</sup> Moore, *Educating Oneself in Public*, *supra* note 38, at 5.

of morality or as making moral claims, on the other hand, or viewing law as a prediction of official action, on the other hand.

There is one other alternative viewpoint to note, even if this is not the occasion to explore that viewpoint at great length. It is a middle position now associated, in different ways, with David Dyzenhaus and, in a prior generation, Lon Fuller.<sup>59</sup> Both Dyzenhaus and Fuller argue, in distinct but overlapping ways, that law has its own internal morality. Each author asserts that there is a morality *within* law, beyond what standards might be imposed from “outside,” from (conventional, non-legal) morality.<sup>60</sup> For those two theorists, the value of “legality” is both distinctive and morally positive. However, in considering such views, we should also keep in mind those theorists who portray “legality” as distinctive but less clearly positive attribute. As Leslie Green and Thomas Adams write: “A [musical] fugue may be at its best when it has all the virtues of fugacity; but law is not best when it excels in legality; law must also be just. A society may therefore suffer not only from too little of the rule of law, but also from too much of it.”<sup>61</sup> And consider also the famous words of Grant Gilmore:

“Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust

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<sup>59</sup> David Dyzenhaus, *The Long Arc of Legality* (Cambridge, 2022); Lon L. Fuller, *The Morality of Law* (rev. ed., Yale, 1969).

<sup>60</sup> For Fuller, while the “inner morality of law” derives from law as a distinct form of social ordering, the morality created differs from conventional morality by its source, not its nature. By contrast, Dyzenhaus’s view of the morality internal to law is grounded on a distinctive “pragmatist account of moral inquiry.” Dyzenhaus, *The Long Arc of Legality*, *supra* note 59, at 368.

<sup>61</sup> Leslie Green and Thomas Adams, “Legal Positivism” (2019), in Edward N. Zalta, *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/legal-positivism/>, § 4.2.



law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”<sup>62</sup>

From Green and Adams and Gilmore, one gets a sketch of legality as being of significance, but of uncertain and perhaps fluctuating moral weight.

### *Conclusion*

For Raz, law, by its nature, claims to be a moral authority, though, as he argued elsewhere, law often fails to justify that claim. There is an obvious attraction to Raz’s position: it seems to make sense of legal officials’ telling us what to do, and many individuals’ seeming to believe that they should do what the law says, just because the law says so, even without consideration of sanctions.

This work has considered, albeit briefly, why some theorists are troubled by the assertion that law claims – that it claims anything – troubled, because law may not seem to be the sort of thing that should be said to be making claims. This concern should not be lightly dismissed, but it was also pointed out that we attribute claims or actions to other abstract or collective bodies, so perhaps the idea of law’s claims should not trouble us unduly.

The challenge raised in the present paper has been focused more on the attitude that legal propositions must be understood in terms either of morality, on the one hand, or empirical predictions of official action, on the other hand. The alternative presented here to Raz’s view, that law purports to be making moral claims, is one in which law is seen as a *sui generis* form of normativity. Legal rules create “*legal obligations*” and give us “*legal reasons*” to act or not act in

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<sup>62</sup> Grant Gilmore, *The Ages of American Law* (Yale, 1977), pp. 110-111. For some additional cautionary notes about (the rule of) law, see Morton J. Horwitz, “The Rule of Law: An Unqualified Human Good?,” 86 *Yale Law Journal* 561 (1977).

specified ways. This alternative faces its own set of challenges, to be sure: can it be part of an adequate explanation of legal guidance, where citizens sometimes (often?) act as they do because the law says so, and where judges impose significant sanctions on parties who act contrary to law. Legal obligations, of course, may be just the shorthand of powerful groups imposing their will on the less powerful, but that view is not persuasive to everyone, and certainly not to all legal officials -- or to all legal theorists.