What's Left of General Jurisprudence?

On law's ontology and content

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If you read articles in general jurisprudence from the last few years, you might come to wonder whether there is anything left of the subject matter worthy of serious philosophical inquiry. Authors often reveal a sense of despair even in their titles, suggesting the need to go beyond this or that traditional debate or, as one of my good friends has recently done, express their personal disinterest in general jurisprudence over many pages.¹ There is a widespread sentiment that the traditional debates about the nature of law have reached a dead end, not worthy of further investigation. I share none of this despair, and in this essay I want to show why. The theme of this paper is that general jurisprudence is in no need of reinvention.

There are at least three main debates about the nature of law, answering to different questions: one is a debate about the ontology of law, the other is about determinates of legal content, and the third is about law's normative or moral, reason giving, aspects. There are many serious philosophical questions left open within each of these three topics, as well as about the relations between them. I will have very little to say in this paper, however, about law's normativity²; my focus will be the ontological debate and some aspects of a theory of legal content.

1. The Ontology of Law

Legal positivism is not a theory about the nature of law. It is a theory, if theory is not too big a word here, focused on the ontological aspect of law, aiming to answer the question of what makes things legal, part of the legal domain, as it were, when they are. It is a question of the general form *What makes an o an F?* where o stands for some

¹ D. Enoch, "Is General Jurisprudence Interesting?"

² My views on the normativity of law I expressed recently in "Norms, Reasons and the Law".

normative or prescriptive content, and F stands for legality, in some relevant sense (yet to be defined). This is a very narrow question, and an answer to it, even if fully successful, would hardly amount to a theory about the nature of law. Law is an incredibly complex social and political institution. It is probably one of the most complex and sophisticated aspects of human culture, and as such, law is many things in many contexts. Raz once claimed that a theory about the nature of law must consist of propositions that are *necessarily* true about the law, and have some explanatory potential.³ Even under this restrictive view of what a theory about the nature of law is, legal positivism would only constitute a fraction of a much larger and presumably rather complicated picture.

So let us focus on the question of what makes it the case that a norm or a requirement or such is part of the law (somewhere at some point in time)? The background against which this ontological question arises is very familiar. We often say things like “It is the law (here and now) that ... such and such”; or that “such and such is legally required”; or that “It had been a legal requirement to φ until a year ago but it no longer is”. We talk about laws as things that exists, in some sense; propositions about what the law is in a given jurisdiction can be true or false. To be sure, we do not need to assume anything as strong as the law of the excluded middle; sometimes there is genuine indeterminacy about whether something is or is not part of the law. Not every proposition about the law being this or that is necessarily either true or false. But most are.

I think that focusing our philosophical attention to this ontological question about what makes things legal, when they are, is something we owe to John Austin.⁴ In any case, I will use Austin’s understanding of the question, and the research project he envisaged about it, as my starting point, aiming to show that there are some important lessons to be learned from it. There are two main ambitions Austin had envisaged: First, he sought to provide a reductive explanation as the answer to the ontological question. He thought that the answer to the question of what makes norms legal, when they are, can be fully articulated in terms of social facts about political sovereignty, people’s conduct and attitudes, and particular events that take place in the world. Second, Austin expected the

³ J. Raz, “Can there be a Theory of Law?”. I am not suggesting that I agree with Raz on this point.

⁴ J. Austin, *The Province of Jurisprudence Determined*. Bentham had views about these issues, but I don’t think that the ontological question was the focus of his legal theory. See Postema, *Bentham and the Common Law Tradition*.

answer to be such that it is capable of explaining how law differs from similar normative domains, such as morality, religion, social customs, etc.,. Thus, Austin aimed to meet two criteria for the adequacy of an answer to the ontological question: reducibility and uniqueness. An account of legality has to be reductive, and it has to show how law is unique relative to other, similar normative domains. Part of what I want to show here is that these two desiderata are not easy to satisfy jointly. I don't think that the project is doomed to fail, far from it, but there are some tensions here that need to be resolved.

Suppose we ask *what makes an object, o , an F ?*, which is to ask, what warrants the predication of F on an o ? What is o , the object, in the legal case? We tend to talk about norms; norms are the kind of things, it is generally assumed, that can be legally valid or not. And that is largely true, but not entirely accurate. Particular instructions, such as "You [a person] do this.." can be legal instructions. Laws do not have to be norms, though they usually are. And then perhaps somewhat looser prescriptive contents, such as general doctrines, even ideologies⁵, may also form part of the law, even if they are difficult to formulate in canonical normative terms. Bearing these reservations in mind, at least for the sake of convenience, we can assume that the question is: what makes norms legal norms? Now the F in question here is a bit more difficult to formulate precisely. For one thing, F is always relative to a particular jurisdiction at a particular time. Norms are legally valid in some legal order or other, at a given time, not in the abstract. Thus the question of what makes an o an F ?, fully articulated, would need to be spelled out in a way that is relative to particular jurisdictions and time. But of course, the philosophical question is not about the specific determinates of legal validity in particular jurisdictions; what we want to know is what makes it the case, generally speaking, that any given norm would form part of the law where and when it does. Which is to say that we understand the predication of F conditionally: If a given norm is part of the law in S_i at t , what has to be true to ground this fact?

So what are the grounding facts of legality? I will not dwell on the details of Austin's answer; what matters is the philosophical ambition, which is to provide the answer reductively, in terms of people's actual modes of conduct, the beliefs and

⁵ For example, I think that it would be difficult to deny that a commitment to Capitalism forms part of US law.

attitudes accompanying them, and particular events that take place. In other words, Austin clearly attempted to reduce the grounds of legality to social facts, facts about what people do, and what they believe, desire, fear, etc.⁶ As I explained elsewhere in some detail, H.L.A. Hart shared the same theoretical ambition. His dispute with Austin was not about the reductive nature of the explanation sought, but about the particular building blocks that Austin had offered. Hart argued that Austin's building blocks are too crude and inadequate to the task.⁷ Nevertheless, Hart clearly shared Austin's theoretical ambition to explain the elements that ground legality by way of reducing them to more foundational truths about people's actual modes of conduct, the beliefs they share about them, and other attitudes that accompany those beliefs. After all, the hallmark of Hart's theory of law is the idea that social rules are at the foundation of law, and that social rules, in turn, can be explained reductively. And, as I argued in the past, with the exception of Kelsen, this project of trying to articulate a reductive explanation of legality is characteristic of the legal positivist tradition.⁸

Before we proceed, however, let me acknowledge a growing sense among philosophers of law these days that there is not much point in proceeding, actually. Trying to answer the ontological question, reductively or not, is just not worth the trouble, they think. Why is that? Because none of it matters, they claim; it would only matter if a proper account of the ontology of law can be shown to bear on some moral difference that the law makes to people's reasons for action. If it makes no moral difference whether legality can be grounded reductively or not, why would anyone bother to argue about it?⁹ And then the same philosophers find support in the fact that sensible legal positivists do not deny that the reducibility of what grounds legality to social facts has not much of a bearing on how to think about the law from a moral point of view. In fact, it has no bearing on any serious moral issue, whether it is the proper attitude of those

⁶ Austin had also sought to provide a reductive explanation of law's normative aspects. In that respect, his project is widely regarded as a spectacular failure. But the truth is that there are some reductive ambitions in Hart's account of law's normativity as well, though clearly the latter is much more sophisticated. This is not an issue I will take up here at all.

⁷ H.L.A. Hart, *The Concept of Law*, chs 2-5.

⁸ See my *Philosophy of Law*, chs 1-3.

⁹ See, for example, S. Herschovitz, "The End of Jurisprudence"; M. Greenberg, "The Moral Impact Theory of Law", and "The Moral Impact Theory, the Dependence View and Natural Law"; D. Enoch, "Is General Jurisprudence Interesting?" and to a lesser extent, J. Waldron "Jurisprudence for Hedgehogs".

entrusted with applying the law or those who are subject to it.¹⁰ But then, critics maintain, if we admit that the ontological debate is morally inert, why should we care about it?

I find this attitude puzzling. Interest, philosophical or other, is in the eye of the beholder. To express lack of interest in a philosophical question is not a premise in a philosophical argument; it is, at best, an autobiographical statement, of the kind one should share with friends over dinner, not in academic publications. Only if you think that the reductive explanation of legality *is meant to be* morally significant that pointing to its lack of moral implication constitutes a relevant critique. But this is a confusion. The reductive explanation that Austin and Hart offered is an answer to an ontological question, not a moral one. The only assumption we have to make here is that law and morality are not identical domains, and that asking what makes certain normative contents distinctly legal is a sensible question to ask.¹¹

The idea of a reductive explanation is to show that a distinct type of phenomenon is actually constituted by, and thus fully explicable in terms of, some other, more foundational type of facts. The main criterion of success for a reductive explanation is its completeness. A reductive explanation is successful only when it provides a complete explanation of the reduced class by the building blocks of the more foundational class. For example, think about the possibility of reduction of the biological to the chemical and physical aspects of the material world. It is not enough to show that chemistry and physics explain a range of biological phenomena. A reduction of biology to chemistry and physics is successful only if it is complete, only when all the biological aspects of the world are fully explicable by the laws of chemistry and physics. And this, of course, is a tall order; reductive explanations are rather ambitious by their nature, and often remain questionable because they are incomplete.

¹⁰ I share the exasperation of colleagues, like John Gardner, having to remind us that traditional legal positivism is not a view about what judges, or anybody else for that matter, ought to do. It is just an ontological theory about the grounding of legality. See, for example, his “Legal Positivism: 5 and ½ Myths”.

¹¹ I am not denying that both Austin and Hart may have expressed various views that give some credence to the critics’ interpretation. As Waldron often reminds us (e.g. in “Normative (or Ethical) Positivism”), Hart clearly expressed the view that coming to see law’s distinctive grounding in social facts and its independence from morality is morally good, enabling us to have a more sober and detached view of the laws we are subject to. Whether Hart is right or wrong about this is rather tangential to the theoretical framework I discuss here.

It is, therefore, not surprising that objections to legal positivism came up by way of showing that an attempt to reduce the grounding elements of legality to social facts is bound to be incomplete. In particular, as many have argued, moral considerations are also in play, always and necessarily so, according to Dworkin, or at least sometimes, as others claimed.¹² I will get back to one aspect of this debate shortly. First, however, we need to say more about the motivation for a reductive explanation, and about the philosophical argument that lies behind it.

One motivation for seeking a reductive explanation stems from a general philosophical outlook: The idea is that whenever an explanation of some phenomena can be given reductively, if the reduction is complete and successful, it is probably the best explanation we can give. I share this view but I am not going to defend it here. In the legal case there is something much more specific to explain the philosophical motivation for grounding legality reductively, namely, the idea that law is, essentially, an artifact. And it is an artifact of a particular kind, which explains why law is whatever people believe it to be. In other words, the artifact nature of law gives the reductive explanation of legality a great deal of support. But for the same reasons that it does, it also makes it more difficult to meet Austin's second desiderata, calling into question our ability to explain how law differs from other, similar types of normative domains.

Saying that law is an artifact is not saying much. Of course it is; laws are created by human beings to serve various purposes; laws are not part of the natural universe, without human creation there would be no laws. But most of the things we use in our daily lives are artifacts, of a tangible or intangible nature. In other words, the category "artifact" is too large and too varied to tell us a great deal about the nature of law.¹³ We need to try to spell out what kind of artifact law is and why would it matter to the ways in

¹² As I explained elsewhere in detail, Dworkin's early critique of Hart (in *Taking Rights Seriously*), is a direct argument against the possibility of reduction of legal validity to social facts. His later work, in *Law's Empire*, takes the critique one step further, aiming to show that reduction fails across the board since law's ontology and content are always a function of interpretative reasoning. See my *Philosophy of Law*, ch 4.

¹³ Brian Leiter ("Legal Positivism about the Artifact Law...") makes a great deal of the fact that law is an artifact, but he tells us very little about the kind of artifact law is. Furthermore, some of Leiter's views about the nature of artifacts I find questionable. I certainly do not share his view that artifacts cannot have essential features. Of course they can. It is an essential feature of fiction, for example, that it involves imaginative cognition, inviting the readers to suspend their beliefs about the truths of its assertions. And it is an essential feature of chairs that they are objects we use to sit on. Essential features are not necessary features. Of course there are chairs one cannot sit on, deviant cases are always possible, and unproblematic as long as we understand the deviation, as such.

which we should seek an answer to the ontological question about legality. So let me give it a shot, briefly, to motivate some philosophical questions in this debate.

An artifact is an object created by humans for some purpose. We can use them for their intended purpose or for other purposes, perhaps not intended; we can modify their uses in various ways. Many of the artifacts we have are intangible: Novels, poems, legends, gods and, generally, narratives, would be prime examples.¹⁴ Stories are created by human beings. They have authors, even if, sometimes, the authors are not known and difficult to individualize (as with legends or myths). What makes stories artifacts is the fact that they are created by humans, with their particular properties or content, if you will. It has been suggested that artifacts are objects deliberately created for some purpose, with that purpose in somebody's mind, as it were. And that is surely correct about most ordinary artifacts we use in our daily lives. But deliberate creation for a purpose is not necessary for an artifact to come into existence as such. Some artifacts may have been created by chance, or later significantly modified by repeated use, without any deliberate design. What is essential for an object to be an artifact, I will assume here, is that it has been created by humans and that it is used by humans, with some regularity, for some typical or designated purpose or other.

I hope we can proceed by assuming that the intentions with which an object is created are not necessarily constitutive of what that object is. We can certainly grant that artifacts, tangible and intangible, come into existence intentionally. They are intentionally created as objects of a certain kind. But it is not always the intention of the original creator of an object that makes it an artifact of a certain kind. Something that was created or otherwise came about as an X, may become a Y-artifact by repeated and widespread Y-uses of it. Creation is sometimes no more than recurrent and widespread intentional use.¹⁵

¹⁴ Sometimes the distinction between the tangible and the intangible is a difficult one to draw. Cinema, and some of the performing arts, like theater, opera, dance, etc, convey contents in ways that are very similar to ordinary fiction, but they also have a tangible aspect that fiction lacks, they require some spacio-temporal performance or instantiation.

¹⁵ A nice example is the incorporation of traditional African masks to the Western art world in the early decades of the 20th century. African masks were not originally created as works of art, at least not as the concept of art has been understood in the West. But once influential artists in Europe started to regard African masks artistically, and started exhibiting them as such, they have become works of art, that is, regardless of the actual intentions and purposes of those who created them. Things like this happen not

Generally speaking, though exceptions are possible, artifacts exist, and persist, when there is a population or a community that treats them as such. Chairs are the kind of artifacts they are because we use them for something, to sit on, mostly. Imagine a world in which there are chair-shaped objects, but nobody uses them (nor ever has used them) for sitting on or, let us assume, for anything at all. They are just there, scattered around. In that world there are no chairs, only chair-like objects. And the same goes for intangible artifacts. A song is an anthem when it's used as such by a certain population, a legend is the kind of fiction it is when a population treats (or has treated) it in certain ways, and fiction, quite generally, is enabled by our practice of engaging in imaginative cognition, suspending belief in the truth of what we are invited to envisage or imagine.

Most of the artifacts we encounter are compound, by which I mean that they are artifacts within artifacts. Think about a painting or a sculpture exhibited in an art museum. The painting is an artifact, of course, but so is the museum. Thus a painting exhibited in a museum is an artifact within an artifact, but not only in a spacial sense. An art museum is an institution with certain features created by humans for certain purposes, serving various functions. When a painting is exhibited in a museum, the exhibition, in the context of a museum, gives the painting certain meaning and function that it might not otherwise have. And this is not something that is confined to tangible artifacts, like objects of art. Sometimes it's a mix of the tangible with the intangible; a computer program is an intangible artifact that operates on a tangible one. Printed books and more generally, writing, convey contents, as intangible artifacts, by physical means, means that are themselves artifacts. So I hope you can see that there are many kinds of compound artifacts.

There is a particular kind of compound artifact, however, that is relevant to law. In many cases social conventions shape the ways of creating artifacts of a certain kind. There are conventions, for example, about what counts as a realistic novel, or as epic poetry, and those conventions would shape and guide ways in which authors create a novel or write an epic poem and, of course, the ways in which we read them. There are conventions about symbolism that would shape the ways in which directions in space are

infrequently. (I am aware of the fact that I hereby contradict something I wrote many years ago, about this particular example, embarrassingly. See my *Interpretation and Legal Theory*, 82-83.)

indicated, and thus signs made, etc. In previous work I argued that there are conventions about what counts as a competitive game, and they would shape ways in which we invent and play structured competitive games, how we react to them, etc.¹⁶ If conventions are also artifacts, as I think they are, then these would all be examples of compound artifacts.

I am assuming that there is not much I need to say by way of establishing that conventions are (intangible) artifacts. Conventions meet all the conditions about artifacts we mentioned above; they are created by humans for particular purposes, their persistence and contents depend on the ways in which they are actually used, and metaphysically speaking, their existence is a function of what users make of them. Now it is true, of course, that conventions are rarely created in a deliberate manner to serve as conventions; conventions tend to emerge in an organic, often slow and invisible manner, evolving in ways that are difficult to retrace with any great accuracy, even in retrospect. But as I mentioned before, this is often true about artifacts, even tangible ones.

Law is not just a compound artifact, more importantly, it is an artifact of the kind that shares some important features with fiction; they are both compound *expressive* artifacts. And that is so, because in both cases, as in some others, the *saying so makes it so*. Fiction is created by telling a story, that is, by expressing sentences in a natural language. And notice that the story told is constitutive of the truths in it. If the fiction asserts that the moon is green, then the moon is green, in the fiction.¹⁷ Law is created by performative speech acts. And those speech acts constitute what the law is, they constitute what is true in the law. There are limits to this, of course, and I will discuss some of them in the next section. Furthermore, I do not mean to exclude the possibility that there may be other things that contribute to legal contents, even moral considerations, if you insist. But that is true of fiction as well; many things can contribute to ways in which we understand and interpret fiction, besides what the fiction says or implicates. In both cases, however, the story has to have been told by someone for there to be a story that we can think of and interpret in various ways.

¹⁶ See my *Social Conventions*, 59-61.

¹⁷ Assuming, of course, that there is nothing else said or implicated in the story that might contradict it. All this is much more complicated, of course, and I have dealt with some of these complications in "Law as Authoritative Fiction".

Law is created in myriad ways at different levels. Legal rights, obligations and powers can be created, modified and abolished at individual levels, at group levels and generally, at the level that applies across an entire jurisdiction. In all these cases, the creation or modification of the law is done by speech acts. In previous work I argued, at some length, that the enactment of a law, by democratic institutions or otherwise, is a collective speech act.¹⁸ We can add to it, however, by noticing the multitude ways in which institutional performative speech acts modify the law. Judicial decisions can create or modify the law by the court's holding that the law is this or that; Contractual obligations are formed by speech acts, that is, by one making an offer and the other accepting it; official acts with legal ramifications are carried out by regulations and instructions, and so on and so forth. All over the spectrum we create and modify the law by performative speech acts. And most of these performative speech acts, including enactment of laws, are of the institutional kind; there are rules or conventions in the background stipulating that A's saying "S" in context C counts as doing Y. Which, of course, is what makes the law a compound artifact, and a rather complex one at that.

I wouldn't claim to have established these last few points, about law being a compound expressive artifact, at sufficient level of detail. I have done that elsewhere.¹⁹ But my purpose here is mostly illustrative. Suppose that the law is an expressive artifact, similar to fiction, structured games, and similar cultural creations. Even if the details are somewhat vague and in need to completion, we can already see how such an account lends considerable support to the reductive explanation of legality that has been initiated by Austin and Hart. If law is an expressive artifact, like fiction, then the law is, by and large, what people who use it believe it to be. Generally speaking, the ways in which we use artifacts, especially of the expressive kind, and the attitudes we have about them, are constitutive of what the artifact is. Which is to say that the grounding of artifacts lend themselves to reductive explanations; if an X is constituted by what a given population takes X to mean, then the collective understandings and attitudes of the relevant population are sufficient to ground the existence of X.

¹⁸ See my *The Language of Law*, ch 1

¹⁹ "Law as Authoritative Fiction".

But now you may wonder whether this commits us to the view that people, by which I mean the population that creates and uses the artifact in question, cannot be mistaken about what the artifact is? The answer is complex. Certain types of mistake about the nature of artifacts are not possible. We, that is, all of us, can be mistaken or partially ignorant about the true nature of the reference of natural kinds; but we cannot be mistaken about the reference of artifacts.²⁰ Chairs, as artifacts of a certain type, are what we make of them. But there are certain ontological mistakes we can make even about chairs. Suppose that there is a population that believes chairs to be the gift of the gods, taught to humans by the Carpenter God Prometheus*, and then they have an elaborate story about it. Well, we would think that they are wrong about this. Similarly, if people believed that their laws are manifestations of God's will, they might be wrong about it. But they cannot be mistaken about what the laws themselves are. So there are certain mistakes about the ontology of artifacts, of all kinds, that entire populations can make. What they cannot be mistaken about, however, is about what the artifact itself is.

In other words, we need to draw a distinction here between the possibility of widespread errors about the constitutive features or contents of an artifact, and its ontology. People may think that something created by humans is not really an artifact but something out there that they somehow discovered. That is a fairly common mistake, if you think, for example, about the number of deities cultures have created over the millennia.²¹ But notice that even when people erroneously think that an artifact is an entity that exists independently of their own creation, they cannot be fundamentally mistaken about the main features or content of the artifact in question. Zeus did not exist, ontologically speaking, even when ancient Greeks thought that he is very real; but it makes very little sense to suggest that Zeus (for the Greeks, at least) was not really the chief Olympian deity. The features of the artifact Zeus are those, and only those, which are told by the stories about him. There is nothing more to it. The main features of products of our culture and imagination cannot be discovered to have features previously

²⁰ I'm talking about types, not tokens here. One can always err about features of a particular token of a type.

²¹ Ontological mistakes in the other direction seem to be much rarer. It is difficult to think of an example where natural kinds are mistakenly thought to be artifacts. (Perhaps some realists about mathematics may attribute such a mistake to their opponents. I am not sure.)

hidden from us, as it were, waiting to be discovered.²² There is something very similar, and not unrelated, about possibilities of errors concerning social conventions. People, by which I mean communities or populations, can be mistaken about the conventional nature of some norms they follow; they may think that the norms are not conventional, where in fact they are. But they cannot be mistaken about the content of their conventions.²³

I hope we can agree that seeing law as a compound (very complexly compound), expressive artifact, and a reductive explanation of what makes norms legal, are mutually supportive. We have not said enough to establish either one, and I will not attempt to accomplish the task here. On the contrary, I want to flag two difficulties with this picture of the ontology of law: one concerns Austin's uniqueness desideratum and the other concerns the interpretative challenge. I don't think that either one is fatal to the legal positivist ontology of law, but both are worth serious consideration.

Admittedly, none of what we said thus far helps to meet Austin's uniqueness desideratum; even if law is, as I claim, an expressive artifact lending itself, at least in principle, to a reductive explanation of its ontology, we have not provided any tools to explain what makes law different from other, similar, normative domains, which may also be expressive artifacts, very similar to law, like religion, etiquette, structured games, various customs, and numerous other conventional practices. Perhaps the distinction between law and morality becomes clear enough, depending on one's meta-ethics. Morality may not be an artifact at all, or if it is, in some sense, it might not be an expressive type of artifact, where saying so makes it so, in any meaningful sense. But again, that depends on one's meta-ethics.

One might be tempted to think that law's uniqueness consists in its functions. There are a number of functions law serves in society that make it the kind of institution or practice it is, and this may be enough to explain what makes legality unique and distinct from other normative domains. But I seriously doubt this. True enough, at least from an historical perspective, law has some functions that are essential to, perhaps even constitutive of, what we understand the law to be, and the kind of things we expect it to

²² We may come to discover things about ourselves, that is, the human mind and psychology etc., by learning more about our cultural creations, but that is something else entirely. Then we are talking about natural objects, not artifacts.

²³ See my *Social Conventions: from language to law*, pp. 5-6.

accomplish. Law is there to provide peaceful resolution to interpersonal conflicts; law is there to set boundaries to personal space and safety, to determine what is mine and what is yours, it is there to facilitate commerce and other kinds of economic activities, to set up structures of political authority, and so on and so forth. The list gets longer and longer as we progress in time from law's earlier origins to its contemporary reach. But none of these functions is all that unique to law, and overall, the set of functions we can associate with law is too large and too diverse to make legality distinct from many other social practices and institutions we have.

Others have been tempted to see law's uniqueness in its coercive powers.²⁴ There is a lot to be said in favor of this view. Law is, essentially, a coercive institution, and at least in terms of scale and reach, far beyond any other. Furthermore, law's coercive power fits nicely with its jurisdictional constraints. Necessarily one can only have jurisdiction at any given time relative to some population. Authoritative powers are always relative to those who are subject to the normative powers in question, which is to say, confined to the people who participate voluntarily, or not, as in the legal case, in the social practice that grants the authority the powers it has. But in the legal domain, normative powers meet brute power; legal authority is the kind of authority that is backed by force, brute force, I mean, and that tends to make legal authority territorial. The exercise of brute power over people, especially on larger scale and over some extended period of time, tends to be very closely associated with control over territory. Which is to say that legal jurisdiction is, practically speaking, almost invariably territorial. And indeed, territorial boundaries are often quite vivid. By crossing a line, literally speaking, that is, you can cross to a different legal regime, sometimes dramatically different. As I explained elsewhere, I don't think that the jurisdictional aspect of law is all that unique to it, other expressive artifacts, such as religions, and even games, may exhibit similar aspects.²⁵ What is unique to law, however, as an expressive artifact that purports to exercise practical authority over people, is its close connection to, or even dependence on, brute force. Law is the kind of expressive artifact, maybe the only kind, that is forced on us by brute power. Law and political sovereignty are difficult to separate.

²⁴ Dworkin seems to share this view, that law's coercive aspect is unique, but unique in the way in which it ties law to justification of coercion on the basis of past political decisions.

²⁵ See my "Law as Authoritative Fiction".

Law's essentially coercive aspect and its close ties to political sovereignty lend some support to the view, espoused by Austin and somewhat differently by Kelsen, that ties the uniqueness of the legal domain to consist of norms backed by force. Hart and Raz were more skeptical about this view, and to some extent, rightly so. For one thing, the domain of international law would seem to be a huge exception to this view that ties law's essential features to coercive powers. Most of international law is not coercive, at least not in any significant way. And this seems like too big an exception to bracket, as it were. Furthermore, though it's undeniably true that domestic law is, by and large, coercive, and its coercive aspects are very closely tied to political sovereignty, law also serves many functions that do not depend on its coercive enforcement capacities.²⁶

At this point you may come to doubt that there is much of a point in trying to satisfy Austin's uniqueness desideratum. As long as we can provide a reductive explanation of legality, why would it matter that our explanation can also capture those elements that distinguish law from other, similar, normative domains? Perhaps, theoretically speaking, it just doesn't matter. Tempting as this view might be, it cannot be entirely correct. After all, we seek an ontological grounding of what makes things legal, when they are. The fact that we can provide the answers in terms of facts about people's conduct and attitudes would not be sufficient to show that it is legality that we managed to ground; perhaps we grounded a much wider category of objects, including law but also including, pretty much, all other expressive artifacts. After all, religion, games, certain forms of art, customary practices, etc., are also reducible to what people do and what they believe about it.

Let me try to put the challenge more schematically. The question was *What makes an o an F?* The answer that emerged so far is that an o is an F when o has been created by people and widely used as an F-type. And as I tried to show, this makes the grounding amenable to a reductive explanation. But we still have not answered the question what are F-types? Compare this to similar grounding questions, such as, what makes this

²⁶ Some people seem to think that the uniqueness desideratum can be met by expressing law's coercive aspect in terms of enforceability in courts: norms are legal, on this view, if they are the kind of norms that are enforceable in a court of law. There are two problems with this view. First, it is circular: We need laws, many laws, to establish courts, as the kind of institutions they are, and their respective powers of enforcement. One cannot ground legality on factors that depend on a legal framework. Second, the view is not even accurate as a matter of legal facts, since there are some legal norms which are not enforceable in courts. But the first point is more important.

object a chair or, what makes this story a piece of fiction? The answer in all these cases is that they were created or at least widely used as objects of the relevant type. But what is the type? What makes something fiction, as opposed to history, gossip, or poetry? Without saying something about the nature of the F-type, we have not quite provided the grounding we seek. In particular, for a reductive account of the grounding there has to be a reductive explanation available that accounts for the relevant F-type. Is there such an explanation available?

I think there is, and it's rather simple: The F-type is constituted by social conventions. There are social conventions determining what counts as fiction and what counts as poetry (of this or that type) and there are social conventions, deep conventions as I have argued in the past, about what counts as legal in this or that society. In other words, I am suggesting here that conventionalism is needed to complete an account of the ontological grounding of legality, which is, essentially, what H.L.A. Hart had offered in correction of Austin's account. And I think that the conventional foundations of law satisfy Austin's uniqueness desideratum. Just as the distinction between what counts as soccer and what counts as football can be accounted for on grounds of the different conventions constituting these different games, conventions ground different social practices, including the practices we call legal. Since I have defended this view at considerable lengths in previous work, I will not labor it further here.²⁷ But I do want to consider a serious challenge to it, one which calls into question any attempt to ground legality reductively.

So this is the general idea: when we consider a grounding question of the type *what makes an o an F?* we would normally expect the answer to depend on the relevant properties of *o* and the properties of *F*. But there are some cases in which an answer to the question of whether an *o* is an *F* or not depends on what it is about *F* that *we value, appreciate, or otherwise care about*. Most critics of legal positivism rely precisely on this point to make their case that a reductive explanation of the grounds of legality is not possible. But before we get to law, let's look at the most obvious example where this challenge finds its home, that is, in the realm of works of art.

²⁷ See my *Social Conventions* and *Philosophy of Law*, ch 6.

Some time ago I visited with a friend, who happens to be a distinguished art historian, the art exhibit at the Dia Beacon gallery in NY. Among the displays we saw a work entitled “Leaning Mirror”²⁸ which consisted of a double sided mirror stuck in a pile of sand (and yes, it was leaning). That was it; an ordinary pile of sand with a mirror stuck in it. I told my friend that this is ridiculous, it is not a work of art. It is definitely a work of art, my friend objected, though perhaps not a very good one at that. So there we are: is this a work of art? Is this object a work of art? You can see the various arguments one can deploy in both directions here. I tried to argue that a work of art needs to demonstrate some talent or special skills required to create it. My friend replied that artistic talent might consist in the artist’s ability to see something others haven’t, not necessarily to do something that others cannot readily accomplish. And so on and so forth, we kept arguing for a while. But of course our arguments were very closely entangled with our views about the values of art, and what we thought that makes art worthy of our appreciation; different evaluative views about the nature of art yield different answers to the question of whether the object in front of us, the “Leaning Mirror”, is a work of art or not.

I hope you can see that if a similar dialectic applies to law as well, the reductive explanation of legality is in trouble. After all, it is precisely the point of legal positivism’s critics that views about what makes law valuable, and reasons, in particular, moral reasons, for appreciating various aspects of law, partly determine what counts as legal. And if that is so, then the kind of reductive grounding of legality we explored above is not likely to succeed.

Let me return to one of the arguments about the “Leaning Mirror” I’ve had with my friend. So here is what I told him; if one held the view that institutional recognition, instantiated by exhibit in museums and art galleries, supported by art dealership markets, etc., is constitutive of what is a work of art, then of course the “Leaning Mirror” is a work of art. But we immediately agreed (though perhaps too quickly?) that this would be a misguided view about the nature of art. When curators pick an object to exhibit in an art gallery they pick it because they think that it is a work of art; they would not think that it becomes art because they exhibit it in the gallery. But this is precisely the point at which the analogy between law and art becomes questionable. In the legal case, institutional

²⁸ Robert Smithson, “Leaning Mirror”, 1969.

recognition is constitutive of what is a legal norm. Legislatures do not enact something because they think that it is law already; they make it law by enacting it. Similarly, when judges and other officials interpret the law or apply it in novel ways, their engagement with the relevant norm is what makes it law. So at least in this crucial respect, law is very much unlike art.

This seems right, as far as it goes. But it may not go far enough. The argument assumes that institutional recognition is constitutive of legality; which is true, but not something we can just presuppose at this point. After all, the relevant institutions we have in mind, such as the legislature and the judiciary, are themselves legal entities, they are created by laws. So we need to go deeper than that; we need to show where exactly the analogy between law and art breaks down, if it does? Or else, we need to show that even in the case of art, the grounding of objects as objects of art can be accounted for reductively, along the lines suggested by conventionalism. As strange as it may sound, I think that both rejoinders are available; they are not mutually exclusive.

Let's begin with the relevant difference between law and art: The attribution of artistic qualities to an artifact is not value-neutral; to view something as art is also to view it in some positive light, something we would have reasons to appreciate or to value in some respect. And notice that this would still hold even if you think that the object you classify as art is not a successful exemplar, namely, that it's not good art. Which is partly what explains why an argument about whether a particular object is, or is not, a work of art is a sensible kind of argument. It is a sensible argument precisely because we think that even if the object is not good art, it being art endows it with some value, something that we appreciate. But this point does not hold about the law. To say that "X is legal" or that "X is part of the law" somewhere or other, does not commit the speaker to any positive evaluation of X. Capital punishment is part of the law in the US these days, it is legal. I'm not sure that there is anything good about it. At least, by expressing the proposition that capital punishment forms part of the law here I do not express anything that commits me to a value judgment, not even pro tanto. I just say what the law is, as I could have said what a rule of baseball is, without having any views about the value of baseball.

Some legal philosophers push back at this point. They say that there is something inherently good in legality, per se, and therefore, just like in the case of art, by saying that something is legal we do imply, and necessarily so, that there is something good in it, at least pro tanto. We may think, for example, that the values inherent in the rule of law provide the evaluative dimension here.²⁹ If it is generally speaking better to be guided by law than by other alternatives, then perhaps there is some inherent value in legality, per se. Maybe so, but we need to proceed with great caution here. It is difficult to make this connection to hold a-contextually or, necessarily, as it were. When we think about a legal regime that is by and large decent and just, then yes, it makes sense to assume that legality, per se, is valuable in some respects. But some legal regimes are so profoundly corrupt and immoral that any attribution of legality might imply the opposite. More importantly, even in reasonably decent legal regimes, the legalization of a practice that is morally questionable might be worse than keeping the law out of it. Legalizing some practice that amounts to wrongful discrimination, for example, tends to make things worse, not better. So even if there is something to be said for the values of legality, per se, it is not something that holds necessarily, and if and when it does hold, it is relative to moral context. In other words, it may well be true that law is, generally speaking, a good thing to have, and perhaps on many accounts; but it certainly does not follow from this that in classifying something as part of the law one also assumes that there is something good in that.

None of this was meant to be conclusive. The point of my previous remarks was to caution against assuming too close an analogy between art and law. In particular, I think that it's plausible to maintain that when we hold something to be a work of art, we express some appreciation of this fact, we look favorably at the fact that the object is a work of art. But when we hold something to be part of the law, no such appreciation is necessarily implicated. However, even if you resist the distinction, there is another avenue worth pursuing.

Returning to my example of *The Leaning Mirror*, remember that the argument I had with my friend about whether this object is a work of art or not, is an argument we had on the basis of certain assumptions. In particular, we assumed that the question we

²⁹ See, for example, J. Waldron, "Arguing about the Normativity of Jurisprudence..."

try to answer would not be settled by whether the work *counts as* a work of art or not; we assumed that it does. In a way, the argument was about the question of whether it *should count* as art or not. But if we focus on the question of *What makes it the case that o counts as an F in S* (where S stands for some population or society), then the argument looks very different. In particular, if we assume that the relevant *F* is an expressive artifact, the answer can be given reductively, in terms of the relevant practices and collective attitudes prevailing in S with respect to objects of type *F*. Whether the question of what makes objects count as a work of art in a given society is one that is philosophically interesting or not is something I am willing to leave open. But in the legal case, that is precisely the question that is relevant.

The most important insight of legal positivism, I think, is the idea that *whatever counts as law in a given society is law in that society*. And more generally, that there is nothing more to what law is, in terms of its ontological grounding, than that which counts as law where and when it does so count. Legal positivism asks you to think about the ontology of law in same the way an atheist would account for the ontology of religion. Whatever people believe about their religion and practice accordingly just is that religion; there is nothing more to it, at least as far as ontological grounding is concerned. Of course in both cases, there is much more to say about the nature of the practice. Law, like religion and similar practices is an extremely complex and compound artifact, and there is great deal more we can say about its essential features, things that may be necessarily true about it, and so and so forth. I don't think that legal positivism, per se, is committed to any particular views about any of these issues. It is only a view about the ontological grounding of legality. And then the basic idea is that legality just is whatever people take it to be. To be sure, none of this entails that legal content can be just any content whatsoever. As I explain in the next section, there are various constraints on what legal content can be and what constitutes legal content. In any case, there is more to ontology than the issue of grounding, and there is certainly more to the essential features of law than ontology.

2. Legal Content.

Suppose that we have a satisfactory account of what makes norms legal when they are. Suppose it is a reductionist account along the lines I have tried to outline above. Still, many questions are left open about the various determinants of the content of laws in particular cases. Can legal content be anything at all? If there are some constraints on what the law can prescribe, what does it show about the nature of law? But before we get to any of these issues, a few misunderstandings must be flagged and one or two issues put aside.

There is a well known and ongoing debate about the role of interpretation in determining legal content. According to a view, sometimes called interpretivism, every single conclusion about the content of the law, even those that may seem straightforward and unproblematic, is a result of some interpretative reasoning. Interpretation pervades all understanding of what the law on this or that is; whenever you say that the law is such and such, you have reached a conclusion on the basis of some interpretation or other.³⁰ According to the opposite view, interpretation is only an exception to the ordinary understanding of what the law (or anything else for that matter) says or implicates. Grasping the communicated content of an expression and interpreting it are two different things. Interpretation is called for only when something about the content of the expression relative to circumstances or context is not entirely clear. Now, the debate here is not just a matter of labeling, far from it. According to Dworkin's views about the nature of interpretation, that I largely share, evaluative considerations figure in any interpretative reasoning. Therefore, if Dworkin is right that any conclusion about what legal content of this or that is, is a result of some interpretation or other, then it follows that legal content depends on evaluative considerations all the way down.

Admittedly, if this view is correct, it might cast a serious doubt over the possibility of grounding the ontology of law reductively, along the lines we explored in the previous section. Since I have spent many years and several books on arguing against this view about the ubiquity of interpretation, I will spare the present readers from more

³⁰ See, for example, S Fish, "Working in the Chain Gang..."; R. Dworkin, *Law's Empire*; and, though somewhat differently, N. Stavropoulos, "Obligations, Interpretivism, and the Legal Point of View".

of the same.³¹ I will just set this issue aside here. But I do want to flag one serious misunderstanding about the nature of the view that I strove to defend all these years. Mark Greenberg may not be the only one who misunderstands such views as tying the determinants of legal contents exclusively to linguistic considerations, and then confusing it with something similar to what US jurists call Textualism, which, we both agree, is rather implausible.³² So let me state clearly what it is that I'm going to assume here. Laws are, by and large, though not always and not necessarily, products of acts of communication. Legislatures and high court judges (at least in common law systems) get to determine the vast majority of laws in our domestic systems. They do this by communicating; that is, by expressing the normative content they intend to convey in natural language, saying that the law is (or is going to be from now on) this or that. The asserted content of these acts of communication and their respective implications and presuppositions just are the contents legal authorities convey, and therefore, they are what the law is. So yes, in this respect, ordinary linguistic factors, determining what counts as asserted content and under what conditions, and what counts as content implicated or presupposed, etc., must be part of any plausible account of legal content.³³

But this communicative aspect of law neither entails nor presupposes two important things. First, it does not assume that the law can develop and legal contents enriched only by deliberate acts of communication. Ways in which laws are applied in practice over time, local customs and traditions, doctrinal understandings of various legal regulatory regimes, and sometimes even deeply entrenched ideologies, can also shape ways in which laws develop and legal contents understood. Acts of legislation and judicial precedents are paradigmatic ways of making law. And those are, indeed, speech acts whereby the relevant legal authorities deliberately make law by saying what it is, by expressing its content. However, laws are also shaped in many other ways, and there is nothing in the communicative model, as Greenberg calls it, to rule them out.

Secondly, and one would have hoped obviously so, the content that has actually been communicated by a legal authority may not be clear or determinate enough to settle the particular legal question faced by the parties concerned. And that's precisely why

³¹ See, for example, my *Interpretation and Legal Theory; Philosophy of Law*.

³² See for example, Greenberg "Legislation as Communication?"

³³ I defended all this in much greater detail in my *The Language of Law*, ch 1

interpretation is called for. But notice that on this view, interpretation is not just another way of trying to figure out what it is that the authority had communicated; it is way of expanding the law to cover new cases, namely, it is a partly creative reasoning, adding something to the content of the law that had not been there prior to the interpretative conclusions. And then, of course, when the legal interpretation is authoritative, its communicated content constitutes new law.

Finally, I hope we can regard it as uncontroversial that even if (or when) judges have a moral obligation to apply the law, the obligation to do so can be defeated in some cases; a moral obligation to set the law aside and render a decision contrary to the relevant legal content applying to the case may well be the overriding obligation in some cases.

So these are a few points I mentioned only to put them aside. For the rest of this essay I want to focus on two other aspects of the relations between morality and legal content: First, there is the question of whether legal content can be anything at all? Or are there certain constraints, in particular moral constraints, on what the law can possibly prescribe? Second, I want to consider the suggestion, articulated by Greenberg and Hershovitz in recent years, that legal content just is the moral difference law makes to people's reason for action.

So, can the law prescribe anything at all? In one sense, obviously not. The law cannot prescribe that which makes absolutely no sense; I mean literally no sense. The law cannot stipulate that circles have three angles. But perhaps there is a more subtle version of this truism which is a bit more interesting. Let me explore this from the vantage point of legal fictionalism. According to fictionalism about the law, law, like fiction, is one of those domains in which *the saying so makes it so*. These are contexts in which saying or asserting that something is the case, makes it true that *it is* the case, in the context demarcated by a prefix of the form "According to F" or "In F", where F stands for a closed prefixed context. Closed prefixed contexts are those in which the truth value of statements in that context are functions of things said or asserted about them.³⁴ In other words, a statement is true in a fictional story X if the fiction says that its true in X. As I

³⁴ The idea of a closed prefixed context and many of the missing details here I explained in my "Law as Authoritative Fiction".

mentioned earlier, if a fiction asserts that the moon is green, then the moon is green, in that fiction. Similarly, if the law in Si prescribes that “A ought to φ in C”, then it is true that (legally) A ought to φ in C, in Si. Of course ‘A ought to φ in C’ may not be true all things considered, and it may not be true in a different jurisdiction. Now, the limited point I want to make here is that even in fiction there are certain constraints on what can be said. Since fiction is premised on our imaginative cognition, limits on imaginability, so to speak, may limit the kind of things fictions can assert. If fictional texts says something like this: “the delightful heart warming torture of this innocent child....”, one might wonder if the story really said anything at all. Or one would wonder, was it torture or was it delightful? Can’t be both. As one would wonder, is it a circle or a triangle?, can’t be both.³⁵

Similar constraints apply to assertability in law. For one thing, since the legal context is essentially prescriptive, laws cannot prescribe that which is simply descriptive. A law asserting that “ $2+2=4$ ” is not prescribing anything. A law purporting to determine that “Darwin’s theory of evolution is false”, is not making it the case that Darwin’s theory is false, even in the law. (Though the law may determine various prescriptive contents in the vicinity, by making it the case that Darwin’s theory cannot be taught in schools, or that it is an offense to say that Darwin’s theory is true, and things like that. But these are prescriptive contents, not descriptive.)

A more interesting question here is whether law’s essentially prescriptive nature ties it to some moral claims? In particular, can laws prescribe that which they also express to be immoral or unjust? Can the law say something like this: “Doing φ in context C is morally wrong, all things considered, and therefore A’s ought to φ in C”? Or “It is unjust to φ in C, but φ -ing in C is hereby legally required”. These kinds of laws would not seem to make any sense, right? But it is far from clear why, and not even entirely clear that the point holds across the board. The problems here are very similar to those ensuing from Lon Fuller’s famous account of the requirements of the rule of law. As Fuller nicely showed, the very prescriptive, action guiding function of law prevents it

³⁵ On the limits of assertability in fiction there is considerable literature. For a good summary of the various views and further references, see Nils-Hennes Stear, “Imaginative and Fictionality Failure: A Normative Approach”.

from purporting to prescribe that which cannot possibly guide people's conduct.³⁶ For example, laws would fail, as laws, if they purport to guide their subjects to do that which simply cannot be done or, that which had been done already and cannot be undone. But though largely true, this is not entirely correct³⁷. The rationale, and sometimes even justified instances of retroactive punitive measures attest to the fact that there might be a point or some value in prescriptions that are impossible to comply with; they may serve some educational or symbolic values, for example. And as some political philosophers have argued, it might be justified, even for the law, to require people in some cases to be more virtuous than that which is rendered feasible by human nature.³⁸ But then again, I think that Fuller was by and large correct to maintain that there are limits to the kind of content laws can prescribe, and those limits derive from the nature of law as an action guiding practice.

Some philosophers, however, make a stronger, and thus perhaps a more interesting claim here. Both Raz and Alexy share the view that the law necessarily claims *morally legitimate* authority. Alexy seems to derive this conclusion from what he takes to be a conceptual truth about the nature of law.³⁹ Raz derives it from the nature of practical authorities. Practical authorities, in general, must claim to be legitimate authorities. And since law is, essentially, practical authority, it must *claim* to be a legitimate one.⁴⁰ I would assume that Raz is correct to maintain that some claim to legitimacy is an essential aspect of any authoritative directive. If I tell you, authoritatively, what to do, I must assume that I have the relevant standing, that is, the power to do so, in some normative sense of power. But do I have to assume, in making an authoritative demand, that I am morally justified in making that demand? Is it the case that every authoritative instruction presupposes a claim to moral legitimacy? This I am far from sure about. In other words, I think that Raz is quite right to maintain that practical authorities must make a claim to their legitimacy; but I am not sure that this notion of legitimacy is necessarily a moral one.

³⁶ L Fuller, *The Morality of Law*.

³⁷ As Fuller himself recognized; *ibid* at..

³⁸ See e.g. D Estlund, "Utopophobia".

³⁹ Alexy, *The Argument from Injustice: A Reply to Legal Positivism*.

⁴⁰ Raz, "Authority, Law, and Morality".

Consider, for example, some official who has the legal power to order you to do something, and she issues that order in her official capacity. And yet, while doing so, she can also say, “Look, dear citizen, I have this legal power, I don’t like it, I think that morally speaking, nobody should have this power and I wish I haven’t had it, but there you go, I exercise the power and order you to do it.” In response you would think that this is not a counter-example. It is *the law*, as a practical authority, that must make a claim to its moral legitimacy, not necessarily the officials acting on law’s behalf. But then the obvious worry is that the Raz-Alexy view entails a problematic personification of law, as if the law is the kind of entity that can make claims in abstraction from agents acting on its behalf. And this would be a strange position for Raz to hold, given the fact that he argued, and correctly so to my mind, that law’s authoritative nature shows that only those who can make a claim to be practical authorities can be legal authorities, which means that only human beings, who can make various claims on our reasons for action, are genuine sources of legal demands.⁴¹ The authority of law, at the end of the day, is the authority of people, of human beings, telling other people what to do.⁴²

There is, however, a different, and much more radical way to cash out the idea that legal content is necessarily tied up with morality, recently articulated by Mark Greenberg⁴³ and Scott Hershovitz⁴⁴. According to this view, legal content *just is* the moral difference that law makes to people’s reasons for action. The moral obligations that stem from various legal actions or institutional decisions are the legal obligations law imposes. As Greenberg puts it: “The content of the law is that part of the moral profile

⁴¹ Raz, *ibid*... The idea that only human beings, or rational agents, can make claims on our reasons for action might strike some moral philosophers as questionable. After all, we often speak about morality (or justice or fairness) making claims on our reasons for action. But this is not a serious worry. When we talk about morality or justice or decency and things like that, “making a claim on our reasons for action”, we are not necessarily in the business of personifying morality. It’s only a mode of expression, equivalent to saying that there are moral reasons to do this or that, or that there reasons of justice, fairness or decency that apply to us. No personification required to make sense of such locutions. But when we say that the law, distinct from particular legal authorities, makes various claims on us, it is very difficult to see how to make sense of it without assuming a rather questionable personification of law.

⁴² I agree with Gardner (“How Law Claims, What Law Claims”) that there is a considerable difference between ascribing to the law a claim to the moral legitimacy of its authority, which is what Raz claims, and law’s alleged claim to moral correctness, which is the view Alexy maintains. The latter is much less plausible and easily refuted by counter-examples. I am somewhat less optimistic than Gardner, however, about the possibility of avoiding the personification problem. Generally speaking, however, there’s not much in Gardner’s article that I disagree with.

⁴³ Greenberg, “The Moral Impact Theory...”, 1323.

⁴⁴ S. Hershovitz, “The End of Jurisprudence”.

created by the actions of legal institutions in the legally proper way". The upshot of Greenberg's view, if I understand it correctly, is that there is no gap between the prescriptive content of laws and their moral impact, or the moral reasons for action laws entail. I must confess to having a hard time making sense of this idea because Greenberg tells us very little about the ontology of law. How can we know what impact X has on Y without knowing how X differs from Y? More specifically, when we are told that the content of X is the impact it has on Y, we need to understand, at the very least, the difference between X and X's content. I can say that the content of a box is the stuff that's in it, only because we can clearly distinguish between the box and its contents. So what is the box here, laws without legal contents?

I am trying to be charitable here, but it is not easy. Suppose we can somehow distinguish between laws and their contents; and we want to understand the idea that law's content just is the moral difference it makes to its subjects' reasons for action. What would that mean, really? Suppose, for example, that I come to learn that according to Talmudic law, a promise to gift your daughter to wed someone is legally binding, subject to compensation in case of breach. Are we being told here that the content of this Talmudic law is the moral obligation to abide by your promise to wed your daughter to a person of your choosing? So if the truth is that there is no such moral obligation whatsoever, the law has no content? Or is it some kind of negative content, we know what the law requires by understanding the moral obligation to flout it? And again, what is the "it" here? Law as form with no content? For law, or anything else of the sort, to have a moral impact, it must first have some content, some prescriptive proposition we can understand, at least basically or roughly.

Here's a simple analogy. Suppose somebody suggests that the prescriptive content of a recipe for baking a cake is the impact it has on my reasons for mixing the various ingredients in certain ways, then putting them in the oven, etc. Can anyone come to know those reasons without first understanding what the recipe says? I would have thought that first we need to grasp the content of the recipe, we need to understand what it says, and then we can think about reasons it may give us to do this or that. To say that the content of the recipe just is the impact it has on my reasons for action makes no sense to me. I

can only understand the impact of the instructions in the recipe on my reasons for action if I understand the instructions.

Perhaps I am missing something. Perhaps the idea is that laws do have propositional contents irrespective of their impact on moral reasons for action, but their *legal content* is only the moral difference that they make. But this sounds like labeling legislation. There are two things in play here: the propositional content of a legal directive and the impact the directive has, in the particular context in which it is meant to apply, on the subjects' moral reasons for action. To suggest, as Greenberg does, that only the latter is "the legal content" of the directive sounds to me like labeling by decree. If laws have propositional contents then it is their legal content; whether that legal content makes any difference to somebody's moral reason for action is a separate issue. You can call that issue whatever you want, but it would not show that we cannot understand what a law requires without first figuring out what moral impact it really has.

Suppose that there is a university directive requiring me to report any allegation of sexual misconduct, no matter how light or unsubstantiated, even if the allegation is disclosed to me under conditions of strict confidentiality. Suppose that I happen to be in a position whereby I promised a student total confidentiality, and consequently the student discloses something that strikes both of us as a very mild and inconsequential sexual misconduct. But again, suppose that the student, fully aware of the borderline nature of the misconduct in question, is very keen on keeping the complaint confidential. So now I am really torn about my moral obligation; should I follow the law and convey the student's allegation to the authorities, thereby breaking my promise to the student or, judging the very mild and confidential nature of the allegation, try to handle it by myself, without reporting it? Since this is a case in which I am really not sure about the moral impact of the university regulation, does it mean that I am somehow not sure about its legal content? I think that it is exactly the other way around; precisely because I understand the legal content of the regulation perfectly well that I have a moral dilemma here.

Though neither Greenberg nor Hershovitz offer us a detailed argument in support of their revisionist views on legal contents, both seem to suggest that their views have the theoretical advantage of allowing us to make some progress in understanding the nature

of law without being tied down by the age old debates about the ontology of legality. If we understand the idea of legal content in terms of the moral impact of laws and ways in which laws make a difference to our moral reasons for action, we can avoid trying to settle all the thorny debates about what counts as law and what makes norms legal, when they are. But I am somewhat mystified by how this theoretical advantage is supposed to work. To suggest that the content of laws is their moral impact would require, at the very least, some account of *what laws are* so that they can possibly have some discrete impact on moral reasons for action.⁴⁵

Be this as it may, I hope I have said enough to show that our philosophical interest in understanding what laws are and what makes them what they are, is not necessarily driven by practical moral considerations. Like any other ontological question about grounding, it is an attempt to understand what makes things what they are. We would want to understand what law is even if we bracket our interest in law's moral implications. And then, at least from this ontological perspective, a theory of legal content is required to complete the picture. In fact, as we have seen earlier, difficulties about the interpretative nature and possible value dependence of legal content, is precisely the main challenge facing a reductionist account of legal ontology. My own view, as I tried to indicate here, is that these challenges can be met. But we cannot hope to meet theoretical challenges by grouching about intellectual fatigue. General jurisprudence needs more patience, and attention to details, not reinvention.⁴⁶

⁴⁵ A point recognized, but not fully developed by Greenberg; he does allude to “actions of legal institutions” and “legally proper way”, without realizing, however, that if we can work out what legal institutions are and what are legally proper ways, we would also have to work out what legal, as opposed to moral, contents of laws are.

⁴⁶ I am grateful to the participants of the legal theory workshop at Surrey University for helpful comments on an earlier draft.

REFERENCES

- R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, 2010)
- J. Austin, *The Province of Jurisprudence Determined* (London, 1832)
- R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1977)
- *Law's Empire* (Harvard, 1986)
- D. Enoch, "Is General Jurisprudence Interesting?" (Posted on SSRN, 2015)
- D. Estlund, "Utopophobia" *Philosophy & Public Affairs*, (2014), 113.
- S. Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism", in W.J.T. Mitchell, (ed.), *The Politics of Interpretation*, (Chicago, 1983), 271.
- L. Fuller, *The Morality of Law*, (Yale, 1969)
- J. Gardner, "Legal Positivism: 5 and ½ Myths", *American Journal of Jurisprudence*: Vol. 46 : Iss. 1 , Article 12
- "How Law Claims, What Law Claims" in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, 2012)
- M. Greenberg, "The Moral Impact Theory of Law", *Yale L.J.*, (2014), 1290.
- "The Moral Impact Theory, the Dependence View and Natural Law", *The Cambridge Companion to Natural Law Jurisprudence*, (Cambridge, 2017), 275.
- "Legislation as Communication?" in Marmor & Soames (eds.), *Philosophical Foundations of Language in the Law*, (Oxford, 2011), ch 10.
- H.L.A. Hart, *The Concept of Law* (Oxford, 1961, 2nd ed. 1994).
- S. Hershovitz, "The End of Jurisprudence", *124 Yale L.J.*, (2015)
- B. Leiter, "Legal Positivism about the Artifact Law: A Retrospective Assessment", forthcoming in L. Burazin et al. (eds.), *Law as Artifact* (Oxford, 2018) (Posted on SSRN 2017)
- A. Marmor, "Norms, Reasons and the Law", forthcoming in K. Himma et al eds, *Unpacking Normativity* (Hart Pub., 2018)
- "Law as Authoritative Fiction" forthcoming in *Law & Philosophy* (2018)
- *The Language of Law* (Oxford, 2014)
- *Philosophy of Law* (Princeton, 2011)
- *Social Conventions* (Princeton, 2009)

- *Interpretation and Legal Theory* (Revised 2nd ed., Hart Pub., 2005)
- G. Postema, *Bentham and the Common Law Tradition* (Oxford, 1986)
- J. Raz, "Can there be a Theory of Law?" in *Between Authority & Interpretation* (Oxford, 2009), ch 2.
- "Authority, Law, and Morality" *The Monist* 68 (1985), 295
- N. Stavropoulos, "Obligations, Interpretivism, and the Legal Point of View", in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (2012), ch 6.
- Nils-Hennes Stear, "Imaginative and Fictionality Failure: A Normative Approach" (2015).
- J. Waldron, "Jurisprudence for Hedgehogs" (July 5, 2013). NYU School of Law." *Public Law Research Paper* 13-45 (2013).
- "Arguing about the Normativity of Jurisprudence: comments on Andrei Marmor's Philosophy of Law" *Jerusalem Review of Legal Studies*, Volume 10, Issue 1, 1 December 2014, Pages 81–92.
- "Normative (or Ethical) Positivism" in J. Coleman (ed.), *Hart's Postscript* (Oxford, 2001), 410.