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Why Act Legally

by

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A dissertation submitted in partial satisfaction of the
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of the

University of California, Berkeley

Committee in charge:

Professor Christopher Kutz, Chair
Professor Joshua Cohen
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Professor Niko Kolodny

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Abstract

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Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Christopher Kutz, Chair

I argue that existing positions in general jurisprudence raise more questions than they answer about why the law is relevant to what we should do. I then offer an alternative type of theory to explain the simple intuition that we must ordinarily follow the law, unless there's good enough reason not to. On the model I offer, part of the reason to follow legal rules sometimes arises from the fact that they constitute social practices that are integral to human life. Although internal to law, such reasons are nonmoral and can be defeated or outweighed by countervailing moral considerations.

To the late John Gardner (1965-2019).

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Why Act Legally

1. Introduction

At least sometimes, what the law says is relevant to what we should do. But why? Here's one possible answer: what the law says necessarily gives us a reason for action, though at other times, this reason is outweighed or defeated. Here's a second possible answer: at those times, what the law says just happens to be a way of doing something else that we have independent reason to do. Both options have staunch defenders. Both options are plausible, neat, and wrong. My aim here is to present a novel answer.

I shall proceed in the following order: In the next section (Section 1.1), I present and motivate the question and discuss its relation to the problem of legal obligation.

Chapter 2 presents the negative or critical part of this work. There, I first offer to recharacterize the existing positions in general jurisprudence in terms of legal rationalism and legal formalism. I then argue why both options are ultimately less than satisfactory despite appearing plausible (§2.1 and 2.2). Then, I discuss legal eliminativism as an existing but unsatisfactory alternative to legal rationalism and formalism (§2.3). Lastly, I respond to worries about whether resolving the issue with a satisfactory alternative is even worthwhile (2.4).

Chapter 3 presents the positive contribution of this work. There, I first introduce an alternative theory of law's normativity in very broad terms under the heading of the "internal-value theory" and addresses some of its strengths and shortcomings (§ 3.1). I then discuss how the internal-value theory rejects legal formalism and may establish the internalist thesis of legal rationalism (§ 3.2). Thereafter, I discuss how the internal-value theory must be understood as a family of theories or as a theory-type (like legal positivism, legal interpretivism, etc.) and offer a provisional token of the internal-value theory type (§ 3.3). The next two sections further characterize the internal-value theory (§ 3.4) and discuss its affinities and differences to existing positions in general jurisprudence (§ 3.5). The last subsection of this Chapter examines whether the internal-value theory can be extended to support a new version of legal rationalism (§ 3.6).

Chapter 4 briefly tallies up the points by revisiting the idea that accounting for law's normativity is a success criterion of any theory of law. There, I argue that this criterion is best understood as a pre-theoretical datum about legal reasons being in kind weaker than moral reasons (but stronger than non-legal non-moral reasons). I then argue that so understood, this success criterion favors the internal-value theory over existing views.

Chapter 5 briefly concludes.

1.1. Doing as the Law Says: A Puzzle

If I put up a stop sign in front of my home, the sign fails to give drivers a reason to thereby stop, even though they may worry they have such reasons. If, however, there is a law requiring drivers to stop at such a sign, its being *a law* seems (to many) to give drivers a reason to thereby stop. Some scholars take such reason-giving as a defining feature of law.¹ Others regard this as indeed

¹ Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View', *Fordham Law Review* 75 (2006), p. 1173; Gerald J. Postema, 'Coordination and Convention at the Foundations of Law', *The Journal of Legal Studies* 11 (1) (1982), 165–203; Andrei Marmor & Alexander Sarch, 'The Nature of Law', *The Stanford Encyclopedia of Philosophy* (Fall 2019 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/>; Ronald Dworkin, *Taking Rights Seriously* (New York: Duckworth, 1977); Joseph Raz, *Practical Reason and Norms* (London and New York: Hutchinson, 1975).

a feature of all rule-governed social practices.² But why should we abide by the rules of law? After all, many such rules are senseless, contrary to self-interest, or even immoral. And the conditions of legality seem inadequate to render legal rules as exceptions.³

The feature of being reason-giving is often called *normativity*. A rule is thus *normative*, if it provides one with a reason, that is, with a consideration in favor of complying with it.⁴ Framed in these terms, the question we must answer is whether the rules of law are *normative* and if so, why. This is one of the underlying questions in general jurisprudence.⁵ Roughly, this question is about what reasons an agent may have to act in accordance with legal rules. That the law is a system of rules is indisputable. What is disputed is whether and in virtue of what these rules provide agents with reasons for action.⁶

The puzzle about the normativity of law is motivated by many basic intuitions about how the law affects a society's normative landscape. For example, Mina may refrain from the recreational use of Cannabis in her hometown where such use is illegal but indulge in it when she is in Amsterdam where it is legal. Moreover, she may ascribe the disparity in her own behavior to the legality or illegality of the recreational use of Cannabis at home and in Amsterdam. Many of us relate to Mina's example and suppose that most people do as well. Whether this is empirically the case or not, we may wonder what legality or illegality of the recreational use of Cannabis may have to do with how agents do or should behave. Here, several distinct questions can be raised, including questions about an agent's practical reasoning. But the relevant question about law's normativity is how what the law requires affects (or relates to) an agent's reasons for action.⁷

We sometimes struggle in our relationship with the law. On the one hand, most of us despise the rule of people and idealize the rule of law. On the other hand, we are not always comfortable with the law's mandates. Of course, we recognize that law's mandates may sometimes conflict with our own interests or that disobeying them can result in adverse outcomes like fines. But we often take these to be necessary compromises in the service of a greater ideal, namely the rule of law. After all, we all recognize that sometimes acting selflessly is the price of acting justly. Where we truly struggle is when the law's mandates appear to be immoral.

Jurisprudential considerations about immoral, discriminatory, or retroactive laws in the aftermath of Nazi Germany and the Nuremberg trials animated major debates in general

² Margaret Gilbert, *On Social Facts* (New York: Routledge, 1989); Andrei Marmor, 'On Convention,' *Synthese* 107 (1996), 349–371.

³ David Plunkett & Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Theory', *Ethics* 128 (2017), 37–68.

⁴ Thomas Scanlon, *What We Owe to Each Other* (Boston: Harvard University Press, 1998); Raz (1975) *supra* note 1.

⁵ See David Enoch, 'Reason-Giving and The Law', in Leslie Green & Brian Leiter (eds.), *Oxford Studies in Philosophy of Law* (Oxford: Oxford University Press, 2011a); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Marmor & Sarch (2019) *supra* note 1; Postema (1982), *supra* note 1.

⁶ Sometimes, scholars have something else in mind when speaking of law's normativity. See for example, Kathryn Lindeman, 'Legal Metanormativity: Lessons for and from Constitutivist Accounts in the Philosophy of Law', in Plunkett, Shapiro, & Toh. (eds.), *Dimensions of Normativity* (Oxford: Oxford University Press, 2019).

⁷ There are other questions that can be asked. For example, it can be asked how what the law requires affects people's behavior. This is a question about the actual influence of legal requirements on people's behavior and more interesting as an empirical rather than a philosophical question. Alternatively, it can be asked how what the law requires affects what is *rational* for people to do. Though a philosophical question, this question depends on what the requirements for rationality are and therefore implicates a much too broad of a scope to fit squarely under the umbrella of law's normativity.

jurisprudence. These debates were once again revived in the civil rights era in the United States, in an effort to make sense of civil disobedience. With the law's vast scope and the persistence of unjust laws, it is important to understand the responsibilities of citizens and officials, be they beneficiaries, victims, or allies.

During recent Black Lives Matter protests, all the members of the Buffalo Police Department's Emergency Response Team resigned in support of two colleagues who were suspended due to what seemed to many as an immoral action, reportedly, "in disgust because of the treatment of two of their members, who were simply executing orders."⁸ By executing orders, the officers in questions were, of course, disposing their legal duties while enforcing the law itself. The public outrage in response to their action suggests that doing so was no justification or excuse for their immoral action. Those who resigned in support, on the other hand, cited the fact that their colleagues were disposing their legal duties in following orders as nothing short of a full justification. Hence, an intuitive disagreement about whether following legal mandates justifies a violation of moral duties.

Today, our political and social milieu is in need of a reexamination of our relationship with the law. My dissertation is motivated by an aim to disambiguate, on a theoretical level, our moral and legal obligations under unjust, and often discriminatory laws. It specifically argues that legal obligations are inferior to moral obligations and that as a result, one can never hide behind the law to do something immoral. This is in stark contrast to a long tradition which deems legal obligations as moral obligations and obligations under morally unjust laws as moral dilemmas. Although my interest in these questions grew out of personal struggles, the issues about the law's authority and our responsibility to obey or disobey the law affect most of us.

If we are ourselves subjects to such laws, we may be at a loss in terms of understanding our own responsibilities or decisions about what to do. When the subjects of the laws are others, we wonder when and whether they act rightly to follow or defy the law's mandates. These practical issues become more complex if we consider the law's mandates for officials tasked to apply or enforce the law (or when we must ourselves act in such a capacity). Can following a legal mandate as a citizen or applying or enforcing the law as an official ever justify breaking a moral requirement? We are at a loss because intuitions differ.

The problem about legal normativity is closely related to the problems of legal obligation and authority. Legal obligations are legal requirements that the law's subjects are purportedly bound to conform to. A major theme in general jurisprudence is about how such obligations are to be understood. Legal authority creates a purported duty for legal subjects to abide by legal obligations. Another major theme in general jurisprudence is about the grounds and extent of such a duty. The two issues of legal obligation and authority are themselves related, and some theorists like Raz have developed theoretical frameworks to answer both. Moreover, many theorists believe that genuine legal authority is sufficient for the existence of legal obligations (Rawls 1971, 343) or vice versa (Dworkin 1986, 191). If either view is correct, an effective answer to either question may have decisive implications with respect to the other. But both the problem of law's normativity and the correct answer to it may differ from those of legal obligation and authority.

With respect to legal obligation, it is possible that legal rules do not amount to legal obligations in the sense that Kelsen and Bentham thought. Bentham and Kelsen thought that the

⁸ <https://www.theguardian.com/us-news/2020/jun/05/new-york-state-57-police-resign-to-support-officers-fired-for-shoving-75-year-old>

content of every legal system ultimately amounts to duty-imposing rules.⁹ Hart (and Raz), though challenging a reduction of legal systems to duty-imposing rules, still see duty-imposing rules as a constitutive element of legal systems (Hart 1994: 26–49; Raz 1990). More recently, Lesley Green writes that “whether or not all laws impose obligations, they can only be fully *understood* through their relations to those that do,” thus assuming the existence of duty-imposing rules as a fact beyond doubt.¹⁰ But whether we can speak of legal *duties* or duty-imposing laws can itself be put to question. At the same time, showing that legal rules impose no duties does not by itself foreclose the possibility that legal rules create real reasons for actions. It is possible that legal rules turn out to be not reason-giving at all. It is also possible for them to turn out to be normative but not duty-imposing.

The relationship of legal normativity to legal authority is also complicated. On the one hand, at least on one conception, legal authority establishes a general duty to abide by legal rules. Thus, an account of legal authority is sufficient to account for at least one aspect of law’s normativity: where there is legal authority, there will be authoritative reasons to abide by legal rules.¹¹ Such an account may not, however, reveal all that there is to legal normativity. On the other hand, a showing of legal normativity is not sufficient to establish legal authority for two reasons: first, the reason to follow legal rules may fall short of a duty; second, the reason to follow legal rules may not be authoritative (however that notion is specified).

Thus, the question of legal normativity in some respects penetrates and, in some others, bypasses both issues, and should therefore not be conflated with them. This fact notwithstanding, the theoretical contributions to those problems can clarify the issue of law’s normativity and contribute to potential answers to it.

A unique difficulty that arises about legal rules is that we should at least sometimes abide by legal requirements that apply to us. Equally, at least sometimes we shouldn’t. In a central respect, the puzzle about law’s normativity is about what distinguishes these instances.

2. The Two Sides of a Debate and their Shortcomings

Much has been said about what the controversy between legal positivism and anti-positivism in general jurisprudence boils down to. I propose that it boils down to accounting for a simple phenomenological datum: ordinarily, we must follow the law, unless there’s good enough reason not to.

The law plays a large part in our lives and in our thinking. In practical reason, we routinely consider what is permitted or prohibited by the law. We think that what we can do, eat, or wear, is at the very least related to what the law permits. Sometimes, we follow legal rules with little reflection. Often, we also invoke what the law requires or permits as an explanation for our actions or as reasons for our decisions. Sometimes we try to justify our behaviors in terms of

⁹ See Jeremy Bentham, *Of Laws in General*, unpublished manuscript, written circa 1790. Published, Herbert Lionel Adolphus Hart (ed.), (London: Athlone, 1970), where he writes “What is it that every article of law has in common with the rest? It commands and by doing so creates *duties* or, what is another word for the same thing, *obligations*” (294). For a related contemporary view, see J. W. Harris, *Law and Legal Science: An Inquiry into the Concepts: Legal Rule and Legal System* (Oxford: Clarendon Press, 1979), 84–106.

¹⁰ Massimo Renzo & Leslie Green, ‘Legal Obligation and Authority’, *The Stanford Encyclopedia of Philosophy* (Fall 2022 Edition), Edward N. Zalta (ed.), forthcoming URL = <<https://plato.stanford.edu/archives/fall2022/entries/legal-obligation/>>, original italics.

¹¹ On another conception, legal authority is the power to legitimately enforce legal rules. On this conception, where there is authority, there will be reasons to abide by the law relative to enforcement measures exercised by the authority.

what the law permits or requires. Sometimes, we regard the very same kinds of justifications as poor excuses for acting wrongly. Sometimes, we criticize others for not abiding by the law and especially hold those acting in official roles to a higher standard for compliance.

We think we are entitled to live in our house or drive our cars because we are their legal owners. Those of us without real estate remind our landlords of their legal obligation to return our security deposit upon the expiration of our lease. We make more effort to abide by legal contracts than informal promises even when our contracting parties have no recourse to enforce those contracts. We often abide by legal rules even when failing to do so results in no adverse outcome. We hear lay people use the terms “illegal” and “unconstitutional” as synonyms for immoral. We ourselves talk about morally unjust laws and corrupt legal systems; but we talk about them as *especially* egregious phenomena. We think good laws should be enforced.

We moreover have ideals that feature the law or the rule of law. We think that the right form of government is one that embodies the rule of law rather than the rule of people. My proposal is that the debate between legal positivism/ anti-positivism boils down to making sense of these points of pre-theoretical data, all of which can be succinctly expressed in terms of the above intuitive statement, which to repeat, maintains that ordinarily, we must do as the law says, except when there’s good enough reason not to.

This phenomenological datum has a stronger flavor than the question about the normativity of law. The law is normative when it succeeds to give us any reason whatever to abide by it, however weak this may be. But the conditions that we *must* follow the law, or that the reason not to must be good *enough*, suggest the existence of a particularly weighty reason, and perhaps not even just a (weighty) reason but a (weighty) obligation to do as what the law says. Nevertheless, this is a nuance we could return to (I do so in Chapter 4). For now, starting our analysis with the question about the normativity of law must only differ as a matter of methodological preference but shouldn’t change the outcome of our analysis in substance.

The question about the normativity of law starts with the observation that at least sometimes what the law says contributes to what we should do, all things considered. It is this phenomenon that requires explanation.

Two groups of explanations populate the literature. But in order to understand them correctly, we must move past the labels of legal positivism and anti-positivism because these labels are often used to mean very different things.¹² Whatever label they go by, the views in the literature can be divided on the basis of their explanation of the phenomenon that at least sometimes, what the law says contributes to what we should do.

According to one group, call it “legal formalism,” legal rules do change what we have reason to do. But they do so simply by way of manipulating the factual circumstances in a way that triggers some pre-existing reasons. Consider a very mundane way in which someone can change what I have reason to do. Suppose John tampers with the brakes of my car in such a way that driving it is now dangerous for me and others. Consequently, I now have a reason not to drive it. Thus, John changed what I have reason to do; he gave me a reason not to drive my car. But the explanation is perfectly straightforward. I have, say, a reason not to put other people’s lives at risk. By tampering with the brakes of my car, John has made it the case that by driving

¹² In this regard, I follow David Plunkett, ‘Robust Normativity, Morality, and Legal Positivism’ in Plunkett, Shapiro, & Toh (eds.), *Dimensions of Normativity* (Oxford: Oxford University Press, 2019), 105-136, who not only convincingly argues that the dividing lines can be (and have been) drawn in several distinct ways, but also that depending on how the line is drawn, one of legal positivism’s chief contemporary champions, namely Joseph Raz, may turn out to be an anti-positivist!

my car, I will be putting other people's lives at risk. Therefore, I now have a reason not to drive my car.¹³ Legal formalism of course acknowledges that legal rules create formal criteria of evaluation but maintains that the way in which they give reasons is fundamentally no different from the way in which John's tampering with the brakes of my car does. The fact that sometimes I should do what the law says is then no more mysterious than the fact that sometimes I should not drive my car. In each and all such cases, there is a similar sort of story that can be told. The formal criteria in legal rules (this action is legal, that one is not) are either normatively superfluous or do no more than mediating or channeling reasons that already and independently exist.

According to the second group, call it "legal rationalism," all valid legal rules are in virtue of their *legality* (at least *pro tanto*) reasons for action (or attitudes). The idea here is that legal rules create a distinct domain of normativity sans-phrase.¹⁴ Accordingly, to have a reason *just is* (in part) being subject to what the law says. As a result, legal rationalism maintains that what the law says necessarily and directly bears on what we should do, all things considered.

Legal rationalism therefore maintains that the way in which legal rules give reasons is similar to the way that (arguably) moral or epistemic rules are reason giving and thus fundamentally different from the way in which John's tampering with the brakes of my car does. This is not to deny that legal rules never give reasons in the way legal formalism suggests, but only that such reason giving does not exhaust the way that legal rules give reasons. The idea is that legal rules create a reason in addition to whatever other circumstantial reason they may or may not give.

Finally, on legal rationalism, even this unique sort of reasons that legal rules give can be outweighed or defeated by competing considerations, including the unjustness of a particular legal rule or system, in the case of wicked positive law. This explains why there may still be times at which, all things considered, I ought not to do what the law says, despite necessarily having some reason for doing so. The necessary reasons that legal rules give simply tip the balance in favor of abiding, but they don't necessarily become conclusive.¹⁵

Both options make claims about the nature or concept of law and legality, that is, claims about features of legal rules that obtain as a matter of conceptual necessity. Legal formalism maintains that as a matter of conceptual necessity, legal rules, though featuring in normative explanations, never themselves do any of the normative work. All the cases in which they succeed in giving us reasons can be explained ultimately by appeal to reasons that exist independently from what those rules say. Legal rationalism maintains that as a matter of conceptual necessity, legal rules always do at least some of the normative work. Accordingly, both views end up painting all legal rules with the same brush. In binary terms, the normative

¹³ I borrow this helpful example from Ezequiel H. Monti, 'Against triggering accounts of robust reason-giving', *Philosophical Studies* 178 (11) (2021), 3731-3753, who deploys it in a slightly similar context.

¹⁴ By a domain of normativity sans-phrase, I mean a domain of genuine reasons for action. As becomes clear, some legal formalists talk of legal rules as creating a "(distinct) domain of normativity." But such a usage among legal formalists is always qualified in terms of "a distinct domain of *artificial* normativity" or "formal normativity." By "normativity sans-phrase" I mean to clarify that the normativity of the domain that legal rationalists believe legal rules create is not so qualified. I discuss the distinction between formal and unqualified normativity more extensively in the main text in section 2.2 (Legal Formalism).

¹⁵ As should become clear in the more detailed discussion of these two options which follows (in sections 2.1. and 2.2.), the two camps I identify here, namely legal rationalism and legal formalism, do not neatly map onto the legal positivism and anti-positivism camps (with Raz being the most obvious theorist who potentially crisscrosses the two party lines).

valence of legal rules is necessarily 0 *à la* legal formalism and necessarily 1 *à la* legal rationalism.

I will argue that both options fail to correctly explain the phenomenon of our interest (after discussing why they are nevertheless tempting). But that leaves us, as far as I can see, only one other possibility in the logical space for explaining our phenomenon, namely doing so without appeal to the nature or concept of law. That leaves open the option that some legal rules only give reasons in the way that John's tampering with the brakes of my car does, while some other legal rules in addition give reasons in some further way (be that in the way that—arguably—morality or rationality do, or otherwise). In binary terms, according to this third option, some legal rules have a normative valence of 0 while others have a normative valence of 1.

This option naturally raises a question about in virtue of what this difference arises, which gives rise to a host of difficulties. I am not entirely sure that all such difficulties can be solved. My specific proposal will be that the relevant difference arises from what role the legal rules in question play in human life. Some legal rules play merely coordinative roles or serve moral or other external purposes. In these cases, the full extent of their normativity can be explained in line with legal formalism. Some other legal rules, however, constitute (or contribute to constituting) unique values and thus enter into or extend the complex network of human reasons. In these cases, legal formalism fails to capture the full scope of their normativity, for it leaves something important out.

Even if such values do really exist, interesting further questions arise. For instance, whether the values that legal rules constitute can be said to be *legal*, that is, whether the *legality* of the rules that constitute them plays a non-instrumental but constitutive role in the fact that they constitute unique values. In due time, I shall try as best as I can to make such issues explicit and address them when possible. Such details need not worry us yet, however.

At this point, all I wish to claim is that however the details are filled in, and whatever the ultimate merits or flaws of my specific proposal turn out to be, the kind of explanation that we need is one that examines something besides the concept of legality in order to explain legal normativity. For it is precisely this mistake that has caused the current partisan impasse on this issue. And avoiding this mistake is, as far as I can see, the only path toward progress.

Methodologically, the appeal to the nature of legal rules and the pursuit of finding a unifying account for all legal rules arises, I think, from analogizing legality to morality. Legal rationalism is, in effect, the legal analogue to moral rationalism. Moral rationalism itself consists of two sub-theses: first, it entails that *all* moral rules are (or give) reasons. Call this moral rationalism's "universalist thesis." Second, it entails that the reasons that moral rules amount to (or give) are *internal* to morality. Call this moral rationalism's "internalist thesis." Legal rationalism can similarly be spelled out in terms of both a universalist and an internalist thesis about legal rules.

Given that the *nature of morality* is of essential interest to metaethics, both theses about morality are often on offer for the price of one. But the two issues can come apart, both in morality and law. That is to say, it is possible that only some moral or legal rules amount to (or give) reasons that are respectively *internal* to morality or legality. Equally, it is possible that *all*

moral or legal rules are (or give) reasons, but not in a way that is internal to morality or legality, or not in a uniform way.¹⁶

Pursuing each thesis independently may be less interesting to metaethicists, insofar as their interest is the nature of morality as such. Of course, the nature of law as such is an important question in general jurisprudence too. But contemporary views about law's *normativity* pursue both theses, I think, under an explicit or tacit commitment to an analogy of legality to morality or jurisprudence to metaethics.¹⁷ Hence, the existing tendency in the literature to brush all legal rules as internally normative (thus normative in the same way that moral rules are according to moral rationalists) or formally normative (thus normative in the same way that moral rules are according to moral skeptics). Yet, I think that methodologically, it is important to assume nothing and examine each of legal rationalism's theses separately. At the very least this will regiment our discussion and allow us to discern what prong of legal rationalism arguments for and against it really apply to. For as we shall see, some of the arguments against legal rationalism are more devastating for its universalist thesis rather than its internalist thesis.

My own view, furthermore, suggests that the internalist prong of legal rationalism is right (with respect to some legal rules) though its universalist prong may turn out wrong. That is to say, on my view, at least many legal rules are (or give) reasons that are *internal* to legality. These reasons cannot be explained, that is, by appeal to reasons that exist independently from them. There are several ways to extend my argument to *all* legal rules, but each requires additional assumptions that are controversial. Thus, at least on my view, though the universalist thesis of legal rationalism can still be defended, it does not enjoy as many plausibility points as legal rationalism's internalist thesis.

Of course, many theorists, especially those that support legal formalism, analogize legal rules not to moral but to various social rules (game rules, fashion rules, club rules, etiquette rules, etc.). Yet, metaethical attachments persist in their aspirations toward universal theses about social rules (hence, legal rules). There is no *a priori* reason to think that all social rules are alike in the relevant respects. But when social rules are thought of merely as the flipside of moral rules, it becomes natural to deny the same two theses of moral rationalism about social (hence, legal) rules that legal rationalism maintains about legal rules.¹⁸ But as I argue, internalism about some non-legal social rules is very likely true but universalism about this is almost certainly false.

I find the analogy of legal rules to various social rules instructive. In fact, like all interesting questions in general jurisprudence, the issues, examinations, and lessons we could learn often extend (at least to some extent) beyond legal rules. However, making claims as a matter of conceptual necessity about social rules are even more implausible than such claims about legal rules. Thus, the way I proceed would be to also examine social rules not with respect to their nature as social but with respect to the role they play in human life. In fact, I shall argue that social rules should, in general, be studied not *qua* isolated rules at all but as systems of rules

¹⁶ This point must be emphasized because some scholars assume legal formalism to be incompatible with legal rationalism's universalist thesis. In a companion paper, Andy Yu and I argue against this assumption, on the basis that it is possible for opting out of legality to be non-optional for reasons that are entirely independent from legality.

¹⁷ For an analogy of jurisprudence to metaethics, see Plunkett & Shapiro (2017) *supra* note 3.

¹⁸ See the discussion on legal non-exceptionalism in Mitchell Berman, 'Of Law and Other Artificial Normative Systems' in Plunkett, Shapiro, & Toh (eds.), *Dimensions of Normativity* (Oxford: Oxford University Press, 2019), 137-164, who describes it as one of four core tenets of legal positivism.

and in relation to a network of social practices they constitute and the reasons to take part in them.

Finally, the analogy of legality to morality generates presumptive expectations that the law should either be normative *in the same way* as morality (*à la* moral rationalists) or be no more than formally normative at all (*à la* moral skeptics).¹⁹ This, too, is an unfortunate dichotomy. On my view, even the legal rules that enjoy the normativity valence of 1 do not amount to (or give) reasons in the exact same way that moral rationalists believe moral rules do. Moral rationalists believe that moral rules give reasons directly. But on my view, legal rules that enjoy the normative valence of 1 rather do so in a roundabout way and by way of constituting social practices that are inherently valuable (i.e., social practices that we should take part in for their own sake).

In short, I find that working outward from even a tacit analogy between legal and moral rules (either to establish the aptness of purported analogues or debunk them) is not particularly helpful in explaining our phenomenon. Instead, we must start with some rubric for how social rules can become reason giving (in a way that legal formalism couldn't account for) in virtue of something that at least analytically only obtains for some legal rules (my own proposal entails a general rubric of reason giving by way of constituting social practices that enrich human life). We must then proceed to attending to legal rules in particular and examine any features that could render them either similar or distinct.

2.1. Legal Rationalism (Strengths and Shortcomings)

Legal rationalism is motivated by the intuition that in many cases, the *right* thing to do is to follow the law, even when doing so is contrary to countervailing reasons. In these sorts of circumstances, what seems to defeat countervailing reasons is the reasons that legal rules give.

For instance, these intuitions suggest that prudential reasons to break the law are often rendered irrelevant to what you should do all things considered, and that they are rendered irrelevant precisely because of the law's mandate to the contrary. Imagine that I told you that I have two business options: one is illegal, but makes big profit while the other is legal, but doesn't make much. You might (just might) think that I should not pick the first, even if there is no chance of me getting caught.

The same sort of intuition sometimes even presents itself vis à vis *moral* reasons to act contrary to what the law says. At least, this seems to have been the intuition of the officers of the Buffalo Police Department's Emergency Response Team, who as discussed above, resigned in support of colleagues who seemingly engaged in an immoral action while disposing of their legal duties.

As also discussed, here intuitions may vary. But even those who think that the mandate of law was not a good justification in this (or this sort of) case may accept that the relevant legal duties create a presumption of obedience, which though not strong enough to justify causing serious injury to an innocent bystander in this case, could justify weaker moral reasons (like being dismissive or even rude towards innocent bystanders). Thus, at least upon first glance, it seems plausible to think of such cases as a delicate balance between competing moral and legal reasons (or obligations).

The same sort of seeming tensions between one's moral and legal duties arises in legal practice. For instance, not long ago, a victim of human trafficking and forced prostitution in Berlin managed to escape the gang that held her captive. The information she revealed to

¹⁹ This expectation is explicit in David Enoch, 'Is General Jurisprudence Interesting?' in Plunkett, Shapiro & Toh (eds.) *Dimensions of Normativity* (Oxford: Oxford University Press, 2019), 65-84.

officials led to the eventual arrest of a high-profile mass-scale human trafficker, who was later convicted in part due to her testimony against him. The human trafficker was represented by a young female public defender who challenged the conviction on due process grounds, quashing the judgment and winning her client a retrial. The victim was called on to testify again in the retrial, but before she had the chance to do so, her dead body was found in a dump. Needless to say, without her testimony, the trafficker was acquitted during the retrial and was set free shortly thereafter.

The public defender presumably had a legal duty (to her client?) to point out the due process violations she noticed in his trial. On other hand, by disposing her duty, she indirectly caused the victim to be murdered, as a result of which a dangerous criminal was also set free. Did the public defender do the right thing? And if so, in virtue of what was disposing her legal duty made right? Put more pointedly, what considerations competed with the many reasons that apparently spoke against disposing her legal duty? The intuition of moral rationalists is that it was reasons that her legal duties gave her simply in virtue of being valid legal duties.²⁰

Similar examples are abundant in scholarship on the ethics of legal representation. Many scholars working in that field unqualifiedly defend what the public defender did. Some scholars even argue that legal duties (even legal permissions) *shield* the people they apply to from moral responsibilities that would otherwise apply to them. Whether these views withstand scrutiny does not concern us here.²¹ Right now, we are only trying to gather pre-theoretical intuitions that seem to motivate legal rationalism. And the intuition here is that the law gives reasons for action that compete with and potentially outweigh countervailing moral reasons.

Finally, we expect judges and officials to follow the law and to do so even when it is contrary to what is right in their private judgment or discretion. The kernel behind the ideal of the rule of law is that governmental officials should not use their private discretion in exercising their powers but follow the law instead. When Donald Trump violated conventions of the Constitution, there was widespread outrage, though these conventions do not have the status of law. Certainly, many more would insist that the President of the United States ought to steer away from acting illegally even when that is contrary to their discretion or private judgment.

Thus, there is a lot of intuition that the law gives important reasons, and that these reasons are often weighty and compete with countervailing reasons of other kinds. This lends itself to a natural explanation of our basic phenomenological datum (that ordinarily, we must follow the law absent good enough reasons not to) in terms of a unique domain of normativity sans-phrase that the law creates.

Of course, the idea that there is reason to do what the law says is not by itself evidence for legal rationalism. It is entirely possible that in all the cases considered, the law gives reasons in the way that John's tampering with my brakes does. What draws the intuitions of moral rationalists is that in all these cases, it further seems that what outweighs considerations in favor of acting contrary to law is not itself *other* (weightier) contingent reasons (moral or otherwise) of the same sort, but reasons of a different sort that are unique to law.

This further intuition that law carries a unique kind of normativity which competes with moral and other kinds of reasons can also be garnered from other aspects of legal practice: in legal settings, moral arguments have often no place. A judge may think that this is a morally bad

²⁰ As becomes clear, legal formalists need not deny that she had real reasons to dispose her legal duties but only insist that these reasons can be ultimately explained in terms of normative facts that are independent from the law.

²¹ I address that question in a companion paper.

law, but say that their hands are tied, that the parliament should change the law, and so forth— notwithstanding the fact that the parties to the current controversy will suffer injustice.

In legal practice, moreover, some degree of substantive error is inevitable. Thus, even if you think that the law follows independent moral criteria, it is inevitable that in any such system, legal actors err and arrive at outcomes that though seemingly correct to them, are actually incorrect according to the independent moral criteria the law is supposed to track. Moreover, legal systems would not function if they permitted resistance to such outcomes. And any theory of law should explain whether and how this is justifiable. Legal rationalists can again explain this straightforwardly: irrespective of the independent justification that accompanies the law's mandate when the outcomes are right, there is always a uniquely legal reason to abide by it. In cases of error, the uniquely legal reason to follow law's mandate justifies acting incorrectly according to law-independent reasons that the law tracks.

Nevertheless, there is bad news for legal rationalism, namely that *all* of the cases above and the intuitions they give rise to can be explained by legal formalism (more on this below). This is problematic for legal rationalism because meta-theoretically, intuitive appeal is not as strong a reason to adopt a theory as parsimony. If legal formalism can succeed in accounting for every instance of legal reason giving, then we must adopt legal formalism, the appearance that these reasons are uniquely legal notwithstanding. This is because, by accounting for all these instances in terms of mundane non-legal reasons, legal formalism renders the postulation of an additional and distinct domain of normativity superfluous. Stated conversely, legal rationalism's postulation of an additional and distinct domain of legal normativity sans-phrase cannot be justified without any explanatory gains. For such a postulation to be justified, it must explain something that legal formalism can't do. That the reasons legal rules give simply *appear* uniquely legal is not evidence of a weakness of legal formalism but can be evidence of its strengths. It can suggest that legal formalism successfully reduces a seemingly mysterious kind of normativity into a more simple and mundane form of it.²²

But there are even bigger problems for legal rationalism. One problem is that it is readily subject to counterexamples. Remember that legal rationalism entails a thesis about what is *necessarily* true of law. But then all that has to be shown to establish its falsehood is one (metaphysically, perhaps even conceptually) possible case where the law—any law—fails to be reason giving (that is not just a case where there are reasons against following the law, but a case where there is no reason for following it whatever).

Of course, legal rationalists may contest that such counterexamples cannot be found in two ways: first, by insisting that examples of corrupt, inconsequential, pointless valid legal rules (drawn from equally corrupt, inefficient, or stupid legal systems) are still internally normative in *virtue* of their legality. Second, by denying that any such examples are law. But we can safely ignore such moves, not only because such versions of legal rationalism are extreme and highly implausible, but also because the claim that law necessarily gives reasons, would not be true pre-theoretically but can only be held after a commitment to legal rationalism.²³

Finally, the problem with many (even weaker) forms of legal rationalism is the failure to offer any story about how positive law is supposed to give rise to a unique domain of normativity. Of course, it is entirely possible that social rules become indispensable in the explanation of what we have most reason to do. Thus, there are normative facts that must be partly explained by social rules. But this much is mutual ground.

²² Enoch (2011a) *supra* note 5, claims no less!

²³ Here I follow Enoch (2011a) *supra* note 5, 25-26.

Legal formalism maintains that normative facts that are partly explained by social rules are ultimately also explained by normative facts that do not depend on social rules. Legal rationalism diverges from formalism in this latter step only, maintaining that some normative facts emerge from social rules (i.e., positive law) all on their own. This naturally raises a question about how this is supposed to work. Absent a metaethical picture that supports it—for instance, a naturalist reduction—it is hard to see how legal rationalism could even get off the ground. Suppose, even, that legal rationalists take a strong natural law position, namely, that if a rule is not moral, it is not law. But even then, what is it that makes those social rules that succeed to be legal rules, legal rules, hence morally binding? Magic?

A demand for a story seems reasonable. But legal rationalism, at least in its existing varieties, doesn't offer one. Instead, it denies the question. It simply says that some social rules are binding in the way that moral rules (according to moral rationalists) are, and thereby obtain the status of law. End of the story. Denying the demand for a story is surely a move that's possible in the logical space. But it is a rather painful one.

You might be thinking that Raz is an exception to what I have just claimed. Raz seems to have maintained legal rationalism by maintaining that legal obligations are genuine obligations. He also certainly held that legal obligations are grounded in social facts alone. In fact, you might further think that Raz saw the challenge facing exclusive legal positivism as lying precisely in the difficulty of explaining how it is possible for legal rules to give genuine reasons while their content is determined exclusively by social sources of law. But, your line of thought goes, he thought that this challenge can be met. And his audacious contributions must be read as precisely the kind of story that I said is reasonable to demand of legal rationalists.²⁴ You might think, then, that I am constructing a *false* dichotomy between the social sources thesis of law and legal rationalism.²⁵

I personally think that the story that Raz offers is meant to support the internalist prong of legal rationalism but not its universalist prong. After all, the conditions of the normative justification thesis need not be met whenever there is law. I also think that Raz explicitly acknowledges this much when conceding that it is not a conceptual necessity for legal obligations to be genuine obligations (maintaining instead that it is only a conceptual necessity for the law to *claim* that they are—and for the law to be *capable* of creating legal obligations that are genuine obligations). Thus, although Raz is certainly one who takes my demand for a story seriously, he is no legal rationalist. It is also precisely for this reason that Raz's story is not susceptible to counter examples in the way that, say, natural law versions of legal rationalism are.

Note further, that I don't think that a story on behalf of legal naturalists *couldn't* be given either. To the contrary, I myself will attempt to offer one such story in the last section of Chapter 3 of this work (§ 3.6). My claim at this stage is that the existing versions of legal rationalism do not offer any such story, though one is needed (as Raz too seems to think so). The story that I will go on to offer, though sharing some structural affinity to Fuller's and Finnis's versions of natural law, is nothing like the existing versions of legal rationalism (in that it finds reasons

²⁴ This is the view that Monti presents in Ezequiel H. Monti, 'On the Moral Impact Theory of Law', *Oxford Journal of Legal Studies* 42 (1) (2022), 298-324 and in Monti, 'Triggering Reason-Giving and Exclusive Legal Positivism', unpublished manuscript, presented at the Oxford Seminars in Jurisprudence (2020).

²⁵ Monti (unpublished) *supra* note 24 cites Joseph Raz, *The Authority of Law* (2nd edn., Oxford: Oxford University Press, 2009), where he writes that "the positivist social thesis...that what is law and what is not is a matter of social fact" (37) is certainly compatible with the view, "usually associated with natural law theories", according to which "a legal duty means a [genuine] duty which one has because the law requires the performance of that action" (39).

internal to law that are *non*-moral, and a kind of reason giving in legal rules that is not like moral reason giving, according to moral rationalists). Nevertheless, as hinted above, I also think that my story (like Raz's) is better suited to support legal rationalism's internalist prong. With respect to its universalist prong, Raz's story has no chance. My story does not make a particularly plausible picture on that front either, but it may remain afloat for a bit longer before drowning.

The lack of a good story (at least until one is found) and susceptibility to counterexamples seem quite devastating for legal rationalism. If there are no options with the same level of explanatory power, it may still make sense to opt for legal rationalism, its shortcomings notwithstanding. But at least with respect to explaining the intuitions expressed above, legal rationalism does not seem to perform any better than legal formalism.

In discussing legal formalism next, I will develop this last point further. Nevertheless, I also point to some further intuitions that legal rationalism *can* better handle than legal formalism. This gives an upper hand to legal rationalism, meaning that the plausibility points that legal rationalism loses here, it may be thought, could be made up for there. However, there will be further bad news for legal rationalism: the kind of positive view that I shall outline in Chapter 3 performs equally well in explaining these additional intuitions too (i.e., where legal formalism falters). Thus, there is a view (or at least, there *will* be a view along the lines outlined in Chapter 3) which has or will have the same level of explanatory power as legal rationalism but does not share its shortcomings, though legal formalism will ultimately prove not to be it. Accordingly, we must reject legal rationalism in the end, not necessarily in favor of legal formalism, but in favor of some other view along the lines of what I outline in Chapter 3.

2.2. Legal Formalism (Strengths and Shortcomings)

By stepping onto the road, a pedestrian gives you a reason to stop.²⁶ Legal formalism maintains that the law gives you reasons for action exclusively in the same way. But what way is that, precisely?

Consider, once again, the very mundane way in which John changes what I have reason to do when he tampers with the brakes of my car. His tampering with my brakes makes it the case that driving my car is now dangerous for me and others. Consequently, I now have a reason not to drive it. Quite straightforwardly, John changed what I have reason to do: he gave me a reason not to drive my car that I did not have before. But nothing is mysterious about how he did so. All along, I have had, say, a reason not to put other people's lives at risk. By tampering with the brakes of my car, John has made it the case that by driving my car I will be putting other people's lives at risk. He changed my reasons by making driving my car a way of endangering other people, which is something I had already reason not to do.²⁷

Note that my reason not to drive is partly explained by a non-normative fact here, namely, that John tampered with my brakes. But the relevance of that non-normative fact in explaining the normative fact that I ought not drive, indispensable as it may be to the story, can itself be ultimately explained by appeal to a normative fact (namely, my reason to not endanger others), which is independent from that non-normative fact (John's tampering with my brakes).

The same sort of story can also explain how by stepping onto the road, a pedestrian gives you a reason to stop. All along, you too have had, say, a similar reason to not put other people's lives at risk. By stepping onto the road, the pedestrian has made it the case that by driving further, you will be putting their life at risk. Therefore, you now have a reason to not drive

²⁶ This example is borrowed from Enoch (2011a), *supra* note 5, whom I will discuss momentarily.

²⁷ As mentioned above, I borrow this example from Monti (2021) *supra* note 13.

further. But only because driving further is now a way of doing something else, namely endangering others, which you have all along had independent reason not to do.

Now, the central claim of legal formalism can be illustrated by way of a similar example. Consider how a stop sign at an intersection gives you reason to stop. The presence of the sign makes it likely that a pedestrian or another driver would carelessly cross the intersection (on the assumption that you would stop). This change in the physical landscape, and the (potential) resultant changes in other people's attitudes, makes it the case that by not stopping at the intersection, you would put other people's lives at risk. But all along, you have had a reason not to put other people's lives at risk. Therefore, the sign gives you a reason to stop. But it does so by making stopping a way of doing something else, ensuring other people's safety, which you have already had independent reason to do.

Once again, the existence of a stop sign at the intersection is indispensable to the explanation of your reason to stop. But the role this non-normative fact plays in your obligation can itself be explained by appeal to a normative fact that is independent of the sign, namely, your reason not to endanger others.

Legal formalism does not merely state that law sometimes gives this sort of reason. This much is common ground. Legal formalism, rather, states that the normativity of legal rules is exhausted by this form of reason giving. In other words, the thesis we must consider is that all instances where the law succeeds in giving reason can be explained in terms of pre-existing reasons that are independent of law. Enoch's triggering model of reason giving is the most sophisticated articulation of legal formalism I am aware of, so I shall concentrate on it. But the discussion here can be easily extended to all versions of legal formalism.²⁸

2.2.1. Enoch's Triggering Model

Enoch defines cases of triggering reason giving as cases in which changes in factual, non-normative, circumstances trigger a pre-existing conditional reason. To explain this model, Enoch offers the example of your neighbourhood grocer who raises the price of milk and thereby gives you a reason to reduce your milk consumption, a reason you did not have before.²⁹ In such a case, the grocer gives you a reason by manipulating "the non-normative circumstances in such a way as to trigger a dormant reason that was there all along, independently of the grocer's actions" (*id.*). The dormant reason in this case would be "a general reason (roughly) to save money" (*id.*). This dormant reason does not depend for its existence on what the grocer does, though she can make it apply simply by manipulating the relevant non-normative circumstances.

Enoch maintains that though there may be several ways in which manipulating the non-normative circumstances could make it the case that a pre-existing reason applies, in "central cases of triggering reason-giving, the triggered reason is a conditional reason" which becomes unconditional when relevant non-normative circumstances change. This is where Enoch presents his example that we considered just above: "by placing his foot on the road, a pedestrian can give a driver a reason to stop, but only because the driver had all along, and independently of the pedestrian's actions, the conditional reason to-stop-should-a-pedestrian-start-crossing. By placing

²⁸ Some others who endorse some such views include Matthew H. Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 2003); Jeffrey Kaplan 'Attitude and The Normativity of Law', *Law and Philosophy*, 36 (2017), 469–493; Nicholas Southwood, 'Laws as Conventional Norms' in Plunkett, Shapiro & Toh (eds.) *Dimensions of Normativity* (Oxford: Oxford University Press, 2019), 23–44; Berman (2019) *supra* note 18, and Plunkett & Shapiro *supra* note 3.

²⁹ Enoch (2011a), *supra* note 5 at 4.

his foot on the road, the pedestrian thus triggers this pre-existing reason, thereby giving the driver a reason to stop.”³⁰

Enoch’s triggering model is itself best understood in terms of an explanation that follows what Schroeder calls the Standard Model,³¹ which can be summarised as follows:

Standard Model: The explanation that A has a reason to ϕ because of a fact F follows the Standard Model if and only if:

- i. It appeals to a reason that A has to do a further action, ψ
- ii. (i) is a reason that A has not just because of F

Let us consider the triggering explanation of our example of stop signs in this light. The triggering explanation appeals to a reason that I have to perform a further action, namely, not putting other people’s lives at risk (i). My reason not to put other people’s lives at risk is a reason that I have not just because the sign is at the intersection (ii). And, finally, the fact that the sign is at the intersection (i.e., the triggering fact) explains why my stopping is a way of not putting other people’s lives at risk (iii).

Enoch acknowledges that it seems “rather undeniable that often, in a decent legal system, when the law requires that you ϕ , you thereby acquire a (real) reason to ϕ ...reasons you would not have had without the law’s requirement, and that you have precisely *because* of the law’s requirement.”³² This suggests that at least in some cases, legal requirements give legal reasons that are (or amount to) genuine reasons. Enoch’s thesis though is that *all* such cases “are cases of triggering reason-giving, cases where the giving of the reason amounts to a manipulation of the non-normative circumstances in a way that triggers a pre-existing conditional reason.”³³

Consider the elegance of this view in explaining the phenomenon we are interested in explaining: at least sometimes, what the law says contributes to what we should do, all things considered. At all such times, doing what the law says (like stopping) is really a way of doing something else you should do anyway (like not endangering others). In each and every such a case, one such a story can be found, the details of which would differ and need not concern us here. And if it isn’t found in some cases? Well, then in those cases, what the law says turns out to not in reality contribute to what we should do, all things considered. In those cases, we can (in fact we must) simply ignore what the law says.

It should be clear that Enoch’s triggering model can very well distinguish cases where we should or shouldn’t follow the law. In the former cases, either the law fails to trigger any reasons or the reasons that it triggers are outweighed or defeated by countervailing reasons. In the latter cases, the law succeeds in triggering some law-independent reason that become conclusive.

Enoch’s triggering model starts with the intuition that just like everything else, some legal rules do and some others do not contribute to what we should do, all things considered. It then argues that what distinguishes each of these cases is some value that has nothing to do with law but exists all along and is triggered by the factual circumstances that the law changes. This is an entirely familiar notion from almost every other aspect of life. You should play this game and not the other one because this one is fun. You should follow this rule of etiquette and not that one because this one is good. You should follow this rule of fashion and not that one because you’ll look handsome. As for the law, you should follow these legal rules and not those others. What

³⁰ Enoch (2011a), *supra* note 5 at 5.

³¹ Mark Schroeder, ‘Cudworth and normative explanations’, *Journal of Ethics and Social Philosophy*, 1(3) (2005), 11.

³² Enoch (2011a) *supra* note 5 at 26, original emphasis.

³³ Enoch (2011a) *supra* note 5 at 27.

explains this disparity is not any different. Some legal rules variously serve coordinative, moral, or prudential purposes and you should follow them for those reasons (when they are not defeated or outweighed by countervailing reasons). Some other (actual or hypothetical) legal rules are stupid, immoral, or pointless and you have no reason to follow them.

This model is attractive because it can account for all of moral, prudential, and coordinative functions that various legal rules serve. It can also account for why certain laws are better broken or disobeyed. More importantly, the explanation it offers is elegant and readily relatable: why did you stop at the stop sign? Because pedestrians were crossing; why did you then run the next one? Because no one was crossing.

Note that the triggering model can accommodate all the intuitions that motivate legal rationalism. First, legal rationalism is motivated by the idea that ordinarily, laws should be obeyed absent good reason to the contrary. Indeed, the triggering model makes legal formalism compatible with what we may call a weak “universalist thesis” of legal rationalism, which we can roughly define as the thesis that almost all legal rules are reason giving. Though, the triggering model explicitly rejects the “internal thesis” of legal rationalism, which, for some legal rationalists, is legal rationalism’s more important prong.

The triggering thesis is also compatible with the following intuitions that motivate legal rationalism: the idea that the reason to obey the law, when there is such reason, is quite weighty (much weightier than reasons to obey, say, etiquette rules, when there are such reasons); the idea that legal officials should follow the law; and the idea that non-legal reasons should not bear on legal decisions; that judges for instance, should not use moral reasons or personal discretion but should instead strictly follow the law, and so forth. For each of these cases, a unique story must be told, but the structure of the explanation for all such cases is unified.

2.2.2. Controversial Assumptions of the Triggering Theory

Despite its elegance, the triggering theory rests on assumptions that are too controversial. The triggering theory assumes that there is a domain of real normativity, or ought- sans- phrase, that governs or guides our actions, which is triggered by formal norms, which are norms that do not themselves belong to it. Buried here is a highly controversial assumption. Helping itself to this much may, at first, not appear dooming for the view. However, by helping itself to this much, the triggering theory displaces rather than solves the metanormative question about legal reason giving. Let me unpack why.

Consider our question once more: sometimes legal rules contribute to what we should do, all things considered. The question is, in virtue of what? We might think of this question as a metanormative question with respect to legal rules that is the analogue to a metaethical inquiry that asks the same of moral rules. The only difference is that the metalegal question, if you will, is posed with respect to specific legal rules, whereas the metaethical question is posed with respect to moral rules generally.

Triggering theory assumes moral rationalism (or rationalism with respect to some other normative domain, what we call it, is not important). Thus, a mysterious form of normativity is ascribed to morality (or some such a domain) and the task of explaining it falls on the shoulder of metaethicists. Once that is done, we know, the explanation of legal normativity would be straightforward in terms of triggered moral reasons. But this, we might object, only displaces the task of explaining a mysterious form of normativity from the legal domain to the moral domain.

If Enoch is allowed to assume moral rationalism and task metaethicists to solve that problematic question, why could I not assume off the bat rationalism about some subset of legal rules (those I think are genuinely reason giving), and then task metaethicists to solve the problem

right at the particular level of the legal subdomain? Why, in other words, assume that the metaethical question must be placed at the level of general moral rules rather than the level of particular legal rules? Put differently, why could I not say that the specific legal rules I am considering are reason giving in the exact same mysterious way that the principles of morality are normative on Enoch's account?

Note that this is not a point about universalism and particularism but one about metaphysical grounding. Enoch is a universalist himself, so on his account, there are abstract moral principles that ground concrete legal rules. But the triggering model could very well be stated in particularist terms as well. Assume that we allow Enoch to retreat to a particularist position then. Now, for each specific legal rule that is reason giving, there is a specific moral rule that grounds its normativity. This moral rule is the normative fact that is, on Enoch's picture, independent from the legal rule and ultimately explains why it features in our normative explanation. But the idea that *this* is a normative element and *that* a descriptive one is simply postulated. Whatever the merits of the descriptive-normative distinction, we have no *a priori* reason to think that this is how legal and non-legal facts map to descriptive and normative phenomena. It is entirely possible to think that legal facts already have normative elements built in them.

Enoch assumes that legal phenomena are purely descriptive. This assumption leaves no room in the logical space for them to play a normative role besides appeal to some further but independent normative phenomenon. But the assumption that legal phenomena are purely descriptive, or that the other phenomena that purportedly ground them are purely normative, are just that: assumptions.

The only argument Enoch offers for this way of carving how the stuff in the world map onto the metaphysical descriptive-normative distinction is based on two linguistic intuitions. First, he observes that many people tend to think that moral rules are real norms, but not so about legal rules. The evidence he offers for that claim is the following linguistic intuition: asking something along the lines of "I agree there is a moral norm that says I must ϕ but do I thereby have a reason to ϕ ?" sounds contradictory to most ears in a way that asking something along the lines of "I agree there is a legal norm that says I must ϕ but do I thereby have a reason to ϕ ?" does not.³⁴ Second, and relatedly, Enoch observes that:

Law (and its cognates) is a natural- language word, and we have linguistic and other intuitions about it. Presumably, it captures the concept *law*, about which we are asking questions when we're doing general jurisprudence. And pre-theoretically, when I tell you that this- or- that law— while valid— is morally corrupt, you don't hear a contradiction. When I describe a historical or counterfactual example of a stupid legal system, you are happy to think of it as a legal system, though a stupid one. *So does everyone else*. Therefore, such a legal norm and such a legal system are conceptually possible. It's not clear, of course, what conditions *are* needed for a system to qualify as legal (perhaps it has to be the union of primary and secondary rules; perhaps it has to be enforced by an Austinian sovereign;...) but not being stupid or wrong— sufficiently stupid or wrong so that its correctness conditions do not match real, counting- in- favor- of reasons— are not so needed. Of course, we could engage in linguistic legislation, forbidding the application of the word to any systems that do not guarantee full-

³⁴ See Enoch (2019) *supra* note 19 at 73.

blooded normativity. But it is hard to see how such linguistic legislation can help, or be the source of philosophical interest.³⁵

But this sort of argument is far from conclusive.

First, it is not evident whether what sounds contradictory or not to many people or any sort of linguistic intuitions bears on the issue at all. Enoch is, of course, aware of this; but he argues that although this argument is not conclusive, it still amounts to some evidence.³⁶ But the argument does not hold water even if we granted this point to Enoch. Because even if such evidence bears on the issue, contrary evidence of the same sort is readily available: at the very least, legal rationalists believe that legal rules are real norms, and they do hear a contradiction in asking something like “I agree there is a legal norm that says I must ϕ but do I thereby have a reason to ϕ ?”. Even if no good arguments can be made for legal rationalism, its long tradition suggests that enough people can be found who hear a contradiction there to make the issue controversial.

The problem with Enoch’s argument, therefore, is not quite that these intuitions are not conclusive, but the assumption that his intuitions are universally shared. This is more readily discernable in his discussion of the second intuition, when he writes that not just you and me but *everyone else* would be happy to imagine legal norms or legal systems that are not reason giving. But once again, given the long tradition of natural law, we can readily think of linguistic communities that would not be happy to think of such legal norms or systems. That is to say, not everyone shares Enoch’s linguistic intuitions. If there is enough linguistic intuition that pull the other way, the matter remains controversial. And raising the controversy does not require engaging in linguistic legislation at all.

Enoch’s arguments are targeted at legal rationalism. My aim here is not to vindicate legal rationalism from them.³⁷ My aim here is instead to show that the triggering view is subject to the same sort of critique. Enoch’s critique is in essence a demand for an explanation that I too claimed legal rationalism owes us (for holding that legal reasons are genuine reasons). In virtue of what? We may reasonably ask. My point is that if Enoch gets to ask this of legal rationalists about legal rules, I get to ask the same of him about the triggered normative elements that are to explain the normative relevance of legal rules. Conversely, if Enoch gets to hire a metaethicist to answer the mysterious part in *his* account, then legal rationalists should also get to hire a *metalegalist* to answer the mysterious part of their account.

At this point, you might think that the normativity of morality is different because if morality is normative, it is necessarily so. But we have already acknowledged that even if some legal rules are reason giving, normativity cannot be a necessary feature of law or legality. This is true. But nothing of significance follows from it. The only thing that follows from it is that the triggering view can switch between moral universalism and particularism. That is to say, Enoch can hire either a particularist metaethicist or a universalist one. If moral rationalism is proven to be true at the level of principles, then the normativity of both moral and legal rules can be explained in terms of triggering moral principles. But if moral rationalism is proven to be true at the level of particulars, then the normativity of both moral principles and legal rules can be explained in terms of triggering moral rules. In both cases, the triggering model can offer a cross-domain explanation: normativity flows across the normative domain to the non-normative domain. But, the idea goes, we have agreed that legal rationalism couldn’t be true at the level of

³⁵ Enoch (2019) *supra* note 19 at 75-76 (some italics are added).

³⁶ Enoch (2019) *supra* note 19 at 76, n. 33.

³⁷ Though I undertake this mission in a companion paper together with Andy Yu.

universalism, because even if legal rules are true norms, they will be true norms sometimes, and this means that they are not generalizable in terms of true abstract legal principles.

True as all this may be, nothing of substance that could save the triggering model follows. Solving the particularist *metalegal* question is all we need to explain everything that triggering explains: the normativity of legal rules will be direct (by assumption), in the way that either moral principles or rules are directly normative (by assumption) on the triggering account. Moral rules can in turn be normative by triggering corresponding legal norms. And given that moral rules can be generalized in terms of principles (given they always amount to some valid legal rule or another), general abstract moral principles will also be normative.

But wait, what of the contentious possibility that moral rules don't always match up with legal rules? On the challenge's view, rather than refuting legal rationalism, this would suggest something like moral formalism (or moral skepticism). On Enoch's picture, remember, the sans-phrase normativity of morality is presupposed and the existence of immoral legal rules is offered as proof that law cannot be necessarily normative, hence not normative sans-phrase (with the assumption that sans-phrase entails necessity). The challenger's picture goes in the opposite direction to accommodate moral formalism: first, the sans-phrase normativity of legality is presupposed, then the existence of illegal moral rules is offered as proof that morality cannot be necessarily normative, hence not normative sans-phrase.

In short, even if we assume that there is a domain of real normativity, or of ought- sans-phrase, it would be an open question as to what phenomena in the real world map onto it. Triggering model simply makes a choice among several options. But that choice is too controversial to allow the triggering model to do what it purports to do. If making the choice is up for grabs, then at least two other options make an equally attractive (and mysterious) picture: 1) legal phenomena map onto the domain of pure norms 2) both legal and moral phenomena map onto that domain. But the choice is not up for grabs. And Enoch's own critique of legal rationalism proves this much. We are interested to know in virtue of what some legal rules are reason giving. The triggering model displaces rather than answering the question.

2.2.3. What Legal Formalism Cannot Account for

In the previous section, I argued that the triggering theory relies on assumptions that are too controversial to allow it to do the necessary explanatory work. Here, I want to argue that in addition, something important, albeit small, is left out of the picture in the triggering explanation of the reason giving of some social rules.

Recall that one of the major appeals of legal formalism is legal non-exceptionalism, or the idea that the way that legal rules give reasons is shared by a host of other phenomena. This legal rule is reason giving because following it is a way of doing something else that you should do anyway. That other legal rule is not reason giving because following it is not a way of doing something else that you should do. Legal reason giving is explained by some story that appeals to reasons or values that are external to the law.

In this section, I argue that this kind of explanation of reason giving leaves something important out of the picture when applied to game rules. The upshot will be that at least for some games, there is reason to play them (hence follow their constitutive rules) that the triggering model cannot account for. Because these reasons cannot be accounted for by stories that appeal to external values, I call them *internal* reasons. But as I discuss below, this name is not meant to beg any question with respect to what I shall go on to say about the internalism prong of legal rationalism. The idea that the name "internal reasons" is meant to capture is simply that the relevant reasons are non-triggered reasons. The existence of internal reasons proves the

inadequacy of the triggering model (or formalism in general) for explaining the normativity of social rules. It shows that a unified account about the normativity of social rules—of the kind that legal rationalism and formalism offer for legal rules—must be false.

The next question will be whether this inadequacy extends to the reason giving of *legal* rules. I argue that it does. Indeed, I argue that even if the existence of internal reasons to play games can be doubted, their existence to participate in some social practices that are (partly) constituted by legal rules cannot be doubted. This suggests that legal formalism misses something important about the way that legal rules give reasons.

To start, consider the triggering explanation of the reasons, say, to play basketball. The specifics of the explanation need not concern us here. What is important is the general form this explanation will take: you would have reason to play basketball because it is a fun social activity, it is good exercise, it manifests athletic excellence, or some such value. Note, then, quite how poor of an explanation that is for an answer to the question: why play basketball? Of course, all of what the triggering account offers may be true reasons to play basketball. But it is doubtful that this list would *exhaust* the reasons to play basketball. Often, when we get together to play basketball, it is not merely the case that we were looking for some entertaining social activity and that basketball would do. It is rather the case that we gather because we want to specifically play basketball. The question then will be why play basketball and not do some other entertaining social activity that is equally good exercise, that manifests athletic excellence, and so forth. Presumably, countless other team sports would do.

To see the force of this intuition, suppose that there is an additional cost to playing basketball over, say, football. And suppose that the two sports are on a par, in the sense that both are equally fun, equally good exercise, equally social, and so forth. On the triggering view, I would have no more reason to pick one over the other. Nevertheless, it seems quite rational for me to incur more expenditure (say, travel a further distance) to play basketball over football. The natural justification for incurring this extra expenditure is my preference for a value that is, in kind, specific to basketball. If you tried to accuse me of being irrational for traveling farther to play basketball, pointing out that I could just play football next door instead, I would be reasonable in responding that these are not at all the same things. I need not contest that football is *less* fun, or some such thing. What suffices for me to claim is that the two are not interchangeable. This suggests that there is some value that basketball manifests that uniquely counts in favor of playing basketball.

If there is a basketball specific kind of fun, call it basketball-fun, it means that there may very well be reasons to play basketball that are distinct from reasons to play football; that I may reasonably decide to play basketball even if I am considering playing both for fun; and even if it is not clear that overall I have more reasons to play basketball over football (because football-specific fun may be just as valuable as basketball-specific fun). But then, basketball-fun is a reason for playing basketball that the triggering model of reason giving could not account for.

The same point can be put in terms of the claim that triggered reasons to play a specific game at a specific time under-specify the game in question. If I start with basketball and seek its reasons, the triggering model will give me an impressive and plausible list of reasons. But if I work back from that list, I do not necessarily end with basketball. To end with basketball, I must add an extra element to that list, namely, that playing basketball is basketball-fun, which is a sort of fun that playing no other game is.

The triggering theorist may try to accommodate this objection by conceding that all of us have reason to have basketball-fun, football-fun, and all the other specific sorts of fun that I

would postulate for certain specific games. The reason to play basketball has to do with participating in a fun social activity, exercising, etc., and it also has to do with the value of basketball-fun, the triggering theory may say. But he would insist that that reason is also triggered when we play basketball. In other words, the triggering theorist would concede that basketball-fun is not general, it is specific to basketball, but insist that this does not mean that it is not triggered.

But such a response cannot save the triggering view: for if this reason to play basketball is *that* specific, then describing it as a triggered reason will have no theoretical payoff. Recall that the force behind the triggering model is that it purports to explain mysterious forms of reason giving in terms of mundane phenomena. It promises to show that though it looks like we have a mysterious reason to play basketball, in reality, playing basketball is a way of doing something else (exercising) for which we have non-mysterious reasons. But switching to the sort of extreme particularism in the above response leaves the mysteriousness of basketball reason giving intact.

Put differently, the triggering model distinguishes between triggering reason giving and a more direct and more special (mysterious, if you will) kind of reason giving. The pre-existing normative phenomena or triggered reasons (my reason not to endanger others) that are said to ultimately explain the socially constructed and formally normative phenomena (stop-signs) are supposed to directly bear on what we should do, all things considered. Unlike legal rules, that are purportedly reason giving contingently (i.e., in virtue of triggering purely normative phenomena), purely normative phenomena are themselves reason giving as a matter of necessity. What this normativity consist of is of course a matter of debate (though the normal candidates are the usual suspects: morality, rationality, and so forth). But it is this sort of normativity that is supposed to explain socially constructed and formally normative phenomena like basketball rules.

Of course, no question can be begged here. It is entirely possible that it turns out that these usual suspects are also not necessarily reason giving. But whether morality, rationality, or any such suspect is necessarily reason giving is beside the point. The point is that we are after a particular sense of normativity, one that according to moral rationalists, morality has (and one, that according to legal rationalists, legality has). It is the kind of normativity that oughts-sans-phrase have. And as we saw in the previous section, the triggering theory appeals to a norm of this sort to explain the role that purportedly non-normative facts (or merely formally normative facts), such as basketball rules, play in normative explanations.

The rules of basketball, the story must go, do not do any normative work. The normative work must be done by a normative phenomenon independent of basketball rules. So, the triggering theory cannot accommodate the idea that basketball manifests a unique kind of fun, because then the normative phenomenon (or the triggered reason) will constitutively depend on the rules of basketball.

And note further that if basketball-fun exists, then the rules of basketball are not contingently but necessarily reason giving, because they necessarily constitute a value. And in light of this value, we have necessarily a reason to play basketball, hence, necessarily a reason to follow its rules. These steps may be metaphysically distinct, but the necessity relation is preserved from one step to the next. And if the rules of basketball are necessarily reason-giving, then it is not clear what their difference will be between them and the purported triggered normative phenomena that are to explain instances of reason giving in the triggering sense.

In short, the triggering view presupposes a distinction between formal norms and robust norms and explains the normativity of the former in terms of the latter. The distinction itself is made in terms of necessary reason-giving-ness. And it turns out that the former kind of norms are also necessarily reason-giving. So, either the distinction between formal norms and robust norms breaks down, in which case, basketball rules are just the same kind of rules as morality, according to moral rationalists. Or the distinction between triggering and not-triggering reason giving breaks down, in which case, basketball rules are reason giving in the same way that moral rules are reason giving according to moral rationalists. Or there is some reason in favor of playing basketball, hence following its rules, that the triggering view cannot explain.

Put more succinctly, retreating to the extreme particularist view does not save the triggering reason, because even if basketball-fun is the triggered normative fact, it is a normative fact entirely grounded in descriptive phenomena (basketball rules).

This finding is significant on its own, because all practice-qualified rules, such as game rules, are almost universally taken to fall on the *formally normative* side of the formal/full-blooded distinction, common in analytic jurisprudence.³⁸ On this distinction, “formal normativity” is a thin notion of normativity that is, in Enoch’s words, “present whenever there are any relevant criteria of correctness at all.”³⁹ To capture the idea that formal normativity “can be had for relatively cheap,” Enoch notes:

Set up a game—no one is allowed to step on the lines— and immediately some actions are correct (stepping between the lines) and some aren’t (stepping on the lines)... This kind of normativity is very, very common— whenever people talk of any kind of rule or standard, whenever they engage in games, or practices, or take part in institutions, there are some correctness conditions.⁴⁰

Formal normativity can thus be entirely understood in terms of the mere existence of rules, whether or not they are in any way related to what we should do. The distinction then contrasts the mere existence of rules with “full-blooded normativity,” which in the words of Plunkett & Shapiro, is a “thicker notion of normativity” that “many take to be at the heart of ethics, as well as epistemology,” and one invoked when “we ask not just how an agent’s actions stand in relation to a given set of norms she just happens to care about, but rather what she should really do, all things considered.”⁴¹

³⁸ This finding is also significant because it challenges Enoch’s triggering only hypothesis or TOH. David Enoch ‘Giving Practical Reasons’, *Philosopher’s Imprint*, 11: 4 (2011b), 1-21, presents TOH by arguing that there is “no plausible room in logical space for robust reason-giving that is not an instance of triggering reason giving” (9). Note that this is not just a claim about *legal* reason giving but all instances of reason giving whatever. Monti (2021) *supra* note 13 rejects Enoch’s TOH by arguing that the triggering theory faces difficulties in explaining how promises, requests and authoritative commands give reasons. If my argument here is right, it shows that TOH can also be rejected on the basis that the triggering theory faces difficulties even in explaining how practice-qualified reasons give reasons. This further significance is by no means small. However, it is tangential to my main purposes here. Consider that legal formalists need not share Enoch’s TOH. All they need is to narrowly adopt Enoch’s TOH with respect to practice-qualified reasons. I therefore limit my discussion in the main text to the rejection of this latter narrower thesis that legal formalists must adopt.

³⁹ Enoch (2019) *supra* note 19 at 69. For a similar discussion, see Plunkett & Shapiro (2017) *supra* note 3. In using the term “formal normativity,” the literature follows Tristram McPherson, ‘Against Quietist Normative Realism’, *Philosophical Studies*, 154 (2011), 223– 240; Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011) uses “normativity in the rule-implying sense” for the same phenomenon. Some others, for instance Berman (2019) *supra* note 18, use “artificial normativity” for the same.

⁴⁰ *Id.*

⁴¹ Plunkett & Shapiro (2017: 48). Parfit (2011) *supra* note 39 calls this “normativity in the reason-implying sense.” Others in the literature sometimes call it “robust normativity.”

If it turns out that, as I have argued, basketball rules necessarily give us a reason—albeit a weak *pro tanto* reason—to abide by them, then it seems that at least some game rules can fall on the full-blooded side of the distinction. This is because the kernel of the distinction appears to be that unlike formally normative phenomena, full-bloodedly normative phenomena connect with reasons for action as a matter of *necessity*. For surely the rules that an agent happens to care about can also, at least sometimes, be relevant to what she should do, all things considered.

An example Enoch provides can be instructive: if you think that morality’s normativity is full-blooded, then you think—with moral rationalists—that moral rules *necessarily* pick out what contributes to what we should do, all things considered.⁴² But if you think fashion’s normativity is formal, then you think—with triggering theorists—that having a “fashion-reason to never wear white after Labor Day... leaves it entirely open whether you have any reason to avoid wearing white after Labor Day.”⁴³ On your view, it would be this necessary connection between moral rules and reasons for action that distinguishes them from formally normative rules.

The connection between the triggering accounts of practice-qualified reason giving and the belief that practice-qualified rules are formally normative is readily discernable in Enoch’s next sentence: “one is tempted to say— [the rule not to wear white after Labor Day] is a part of the fashion game, but it is of course entirely open whether you have a reason— a real, sans-phrase, counting-in-favor-of reason— to play the fashion game at all.”⁴⁴ The tacit idea here is of course that you may indeed have a reason to play the fashion game, but only insofar as playing the fashion game is a way of doing something else (say, doing well at a job interview), which you have independent reason to do.

Enoch warns that articulating the distinction in terms of a necessary relation to reason implying wouldn’t be without difficulties, noting also that “unfortunately it’s not easy to characterize [the full-blooded] kind of normativity” and the name “full-blooded normativity” works rather as “a placeholder.”⁴⁵ Nevertheless, he regards the distinction as fundamental, and suggests that a rough delineation of full-blooded normativity as the “kind of normativity morality has according to moral rationalists” should suffice for our purposes.⁴⁶

Nevertheless, necessity seems to be of utmost importance in the distinction, given that according to moral rationalists, morality *is* normative as a matter of necessity. Consider again Enoch’s example of the fashion-game: clearly, sometimes when the rules of fashion prohibit a certain action, you have a real reason to avoid it. Thus, even one who rejected moral rationalism and maintained that moral rules are but formally normative could accept that they are *sometimes* or *often* normative.

Thus, problems with the exact articulation of the formal/full-blooded distinction and possible proposals to overcome them need not worry us here. What’s important is that my claim that game rules can be necessarily reason giving suggests that they may very well fall on its full-blooded side, unless that distinction can be reformulated in some other way, without relying on necessity and without collapsing the normativity that fashion has according to fashion skeptics with the normativity that morality has according to moral rationalists.

⁴² Moral rationalism is roughly the claim that morality is necessarily tied to rationality, perhaps so that there’s always a reason to act morally. Neither me nor Enoch want to suggest that moral rationalism is obvious or uncontroversial. For discussion, see Enoch (2019) *supra* note 19 at 70 and the references there.

⁴³ Enoch (2019) *supra* note 19 at 70.

⁴⁴ Enoch (2019) *supra* note 19 at 70.

⁴⁵ Enoch (2019) *supra* note 19 at 70.

⁴⁶ Enoch (2019) *supra* note 19 at 71.

2.2.4. Optimistically Rejecting Legal Formalism

At this point, you might accept the above shortcomings of legal formalism as genuine shortcomings but think that it still remains the most plausible options, chiefly because it can almost explain everything that needs explanation with very little resources. You might also think that the shortcomings aren't devastating. Perhaps this is a necessary cost, since it may not be possible to come up with a view that has all these strengths and no such shortcoming. The idea being that if there was one such a theory, it would be a better theory, but there simply couldn't be one. I am optimistic, however, and I tend to suspect that such an alternative to legal formalism can be formulated. So, I shall proceed on the basis of that suspicion in Chapter 3.

My strategy there will be to start with a bare bones account of what this alternative theory may be like. To that end, I shall start with accounting for what goes missing in the triggering view. Thus, I shall start from the intuitive idea that certain games like basketball have a unique value, and try to build up a theory of legal reason giving on that basis.

I will argue that if such a theory succeeds, it will have the same explanatory power as legal formalism. Nevertheless, it may not succeed, or it may be subject to other objections. Thus, whether it should be ultimately adopted must be settled based on how its overall plausibility matches up to the overall plausibility of legal formalism. In other words, working out the details of an account that starts from the postulation of basketball-fun will have its own challenges; for all that it captures, it too may leave some other things out. When tallying up plausibility points, it may turn out that the costs to my account prove to be even more devastating than the above shortcomings are to legal formalism. But we should not give up before even trying.

2.3. Eliminativism: An Existing Alternative to the Debate (And Its Shortcomings)

In recent years, several contributors to the field have proposed legal eliminativism as an attractive option out of the existing impasse created by the positivism anti-positivism debate.⁴⁷ Legal eliminativism, as the label suggests, urges us to eliminate legality out of our normative picture.

The chief question that must occupy us, according to legal eliminativism, is how legal facts (i.e., the content of legal rules) affect what we should do, all things considered. But this can always be done by directly referring to underlying non-legal facts that ground legal facts. Thus, the story goes, we can dispense with legal facts themselves in our explanations.

One way of understanding the question of legal normativity is to acknowledge that the law necessarily gives *legal* reasons—in an entirely non-unique way that any practice can generate that-practice-related reasons (e.g., the rules of chess generating chess-reasons)—but ask whether the practice-qualified reasons are (or amount to) real, genuine, non-qualified reasons.⁴⁸ Here, we must distinguish between the claim that the law gives *legal* reasons for action and the claim that the law gives (genuine, unqualified) reasons for action. The positions that I have discussed thus far take the claim that the law necessarily gives *legal* reasons for action as true.

⁴⁷ Jeremy Waldron, 'Jurisprudence for Hedgehogs', NYU School of Law, Public Law Research Paper No. 13–45 (2013) available at <https://ssrn.com/abstract=2290309>, 14–16; Scott Hershovitz, 'The End of Jurisprudence', *The Yale Law Journal* 124 (2015), 1193–1195; Lewis Kornhauser, 'Doing Without the Concept of Law', NYU School of Law, Public Law Research Paper No. 15–33 (2015) available at <https://ssrn.com/abstract=2640605>, 15; and Hillary Nye, 'Does Law "Exist"?'', unpublished manuscript, presented at the Oxford Jurisprudence Discussion Group (2017). Nye 'The One-System View and Dworkin's Anti-Archimedean Eliminativism' *Law and Philosophy* 40 (3) (2021), 247–276 also argues for understanding Dworkin as having held the same view.

⁴⁸ For discussion, see Berman (2019) *supra* note 18, who also takes this thesis as an essential tenet of legal positivism. Enoch (2011a) *supra* note 5 at 17–19 maintains that the question of legal normativity can be posed in terms of the relation of legal reasons to real reasons.

The idea here is that whenever the law requires that you ϕ , you thereby have a *legal* reason to ϕ .⁴⁹ The relevant question in these positions is whether you thereby have also a genuine or unqualified reason to ϕ .

Legal rationalism maintains that you do, because it maintains that *legal* reasons are as matter of conceptual necessity, genuine reasons. To have a genuine reason, the view goes, just is (partly) to have a *legal* reason. Legal formalism maintains that there is a gap between the two: Enoch presents this point as follows:

I understand, one may ask, that I have a chess-reason not to move my king into a checked position, but do I have a reason to do so? I understand that I have an honor-related reason to challenge him to a duel, but do I really have a reason to do so? But similar questions may arise with regard to legal reasons as well. I understand, one may ask, that I have a legal reason to follow my officer's order, but do I really have a reason—a real, normative, justifying reason—to do so?

On Enoch's view, the inference that "A has a legal reason to ϕ ; therefore, A has a reason to ϕ " is just as invalid as the inference "A has a machismo-honor reason to ϕ ; therefore, A has a reason to ϕ ."⁵⁰ The debate then is about what relation, if any, holds between legal reasons and genuine reasons.

Eliminativism rejects the very idea that there are such things as distinctively practice-qualified, hence legal reasons. It holds instead that legal rules just as machismo-honor rules are normatively "superfluous."⁵¹ Whether such rules "apply" to an agent or not, what she should do is determined by weighing actual normative reasons that apply to her. Whether or not we then call some of these normative facts (mixed in with some other social facts) "legal reasons" or "machismo-honor reasons" or some such will make no difference to that calculus, hence what she should do. Given that in all cases, the only relevant question is ultimately what she should do, we should drop talk of legal reasons, hence legal normativity altogether.

In binary terms, Eliminativism also ascribes the normative valence of 0 to legal rules, and in this respect substantially overlaps with formalism in its answer to the question of legal normativity. It explains the reasons that apply to law's subjects by appeal to law-independent facts. Because it does not even postulate an additional domain of practice-qualified normativity, it enjoys even more parsimony points than legal formalism. But it assumes too little to entirely capture the normative relevance of legal rules, and in that respect, it is too reductive, or too parsimonious, if you will.⁵²

⁴⁹ Notice that here the talk is of *legal* reasons, rather than moral reasons, or indeed the most general, unqualified, real, rationality-reasons.

⁵⁰ Enoch (2011a) *supra* note 5 at 17.

⁵¹ Herskovitz (2015) *supra* note 47 at 1184.

⁵² For another critical discussion of eliminativism, see Hasan Dindjer, 'The New Legal Anti-Positivism', *Legal Theory*, 26 (2020) 181–213, though his discussion is targeted at both eliminativism and Greenberg's moral impact theory' (for which, see Mark Greenberg, 'The Moral Impact Theory of Law', *Yale Law Journal*, 123: 5 (2014), 1288–1342.). According to both eliminativism and Greenberg's moral impact theory, legal norms do not depend on moral norms but are themselves a subset of moral norms (a subset that stands in some special relation to legal institutions). According to both views, rather than constituting distinct normative domains, law and morality constitute one normative domain. On Greenberg's view, however, legality does not drop out of the normative picture, because the subset of moral norms that other views call "legal" must be ultimately explained in terms of law's particular function. According to eliminativism, however, legality drops out of the picture. For instance, in his defense of eliminativism, Herskovitz (2015) *supra* note 47, maintains that legal obligations are moral obligations that are "generated by legal practice" (1192) but argues that we can explain their moral force can be ultimately explained without any reference to the legal practice. My discussion in the main text of this section is about the

Recall that legal formalism does not deny that the law can be normatively relevant, meaning that its directives can sometimes make a normative difference or what the law says matters rationally. In Enoch's words, "For instance, if there is some agent A, and some action ϕ , and some set of circumstances C, such that independently of the law (or of a specific valid legal norm) A does not have a reason to ϕ in C, but given the law, A does have a reason to ϕ in C, then the law makes a normative difference in this case."⁵³ What legal formalists deny is that anything interesting follows from this, given that "*this* much is pretty much true of everything else."⁵⁴ To this effect, legal formalists also concede that legal facts may be indispensable in our normative explanations, that is, in describing what we should do, all things considered. But their role is indirect, in the sense that they explain just why what the law says matters in terms of normative facts that are themselves independent of the law (which is really the point stated in (iii) of the Standard Model).

Eliminativism urges us to dispense with all these further moves, because it rejects the idea that what the law says makes a normative difference. Recast in terms of Enoch's formalization stated above, according to eliminativism, if there is some agent A, and some action ϕ , and some set of circumstances C, such that independently of the law (or of a specific valid legal norm) A does not have a reason to ϕ in C, she will not have a reason to ϕ in C given the law either. Conversely, if she has a reason to ϕ in C given the law, then she would have had said reason independently of the law (or of a specific valid legal norm) too.

Consider a hypothetical that Herskovitz presents to build his case on: while playing a game of chess, you pick up a pawn in your left hand and place it back on the board with your right. Your opponent objects. Citing a provision in the FIDE rulebook that says that "[e]ach move must be made with one hand only," she charges you with an illegal move—that is, a move that the rules prohibit. However, says Herskovitz, "we need to know more about the context of the game" in order to determine whether your opponent's objection is sound. "If you're playing in a FIDE-sanctioned tournament, for example, then you are presumably obligated to follow the rules." But "[t]he picture looks rather different if you are playing a casual game with a friend." In that case, he concludes, "FIDE's adoption of a rule requiring players to make moves with one hand only has no normative consequences for [you]." Herskovitz's point is that in either case, it is entirely possible to ascertain what you should or should not do, all things considered, by examining the relevant underlying facts that are independent of what the rules say. In the same way, he maintains, what one should do can be ascertained in light of underlying non-legal facts alone, whether or not these also create a category of distinctively-legal facts. If we can reason from the relevant underlying non-legal facts to what we should do, all things considered, the idea goes, we can dispense with appeals to any legal intermediaries.

An analogy may help illuminate the difference between formalism and eliminativism. For instance, you may think that elementary physics explains everything. Nevertheless, you need not think that chemistry or biology lose all their explanatory power. To the contrary, you may think there are mid-level explanations that are really important, or more enlightening, and so forth.

shortcomings of dropping legality from the picture. Dindjer's discussion is about the shortcomings of regarding legal norms not simply as dependent on moral norms but as moral norms themselves. He argues that this strategy does not render tenable conclusions about legal content. Specifically, he argues that it faces two shortcomings: 1) it cannot account for certain kinds of systematic divergence between legal and moral norms and 2) in attempting to demarcate legal obligations within morality, it implies an under- or over-inclusive set of legal norms, or both.

⁵³ Enoch (2019) *supra* note 19 at 74.

⁵⁴ Enoch (2019) *supra* note 19 at 75.

Similarly, legal formalism maintains that ultimately, law's normativity can be explained in terms of more basic normative phenomena. The idea is that law won't be part of the analogue to elementary physics, but it does not entirely drop out of the normative picture. To the contrary, there will be explanations in which the law plays a crucial role. And it is precisely for this reason that legal formalism can accommodate all the intuitions that motivate legal rationalism. Eliminativism, on the other hand, claims that chemistry and biology drop out of the normative picture, in the sense that no explanation would be enhanced by referring to such mid-level phenomena—that such mid-level phenomena don't even exist. They are just sub-domains of elementary physics.

As I mentioned, the problem with such a proposal is that it is too reductive. Berman and Asgeirsson rightly criticize eliminativism along these lines,⁵⁵ but I think there are even more fundamental issues with it. Berman, himself a legal formalist, criticizes eliminativism by arguing that although game rules are no more than formally normative, they “can make real normative difference,” and are therefore not superfluous. To this end, Berman argues that committing to play a game by the rules for instance, “is intelligible only on the assumption that there are rules to commit to, and your commitment can make a moral difference to your situation only if the rules are not already moral obligations for you.”⁵⁶ Moreover, whether an agent comports with her commitment “will be a function of ordinary facts about her behavior combined with normative facts about what the rules [of the game] prohibit.”⁵⁷ This assumes that the rules exist, that they are (albeit in a formal sense) *normative* facts, and that they do make a normative difference (in a reason giving sense).

Asgeirsson criticizes eliminativism from a deeper theoretical vantage, arguing that it is in effect a substantive view about conventional rules. His theoretical work is done first with respect to promising. He argues that whether promising is a metaphysically robust category with normative upshots depends on what view of promising you take. On expectation- and convention-based views, he notes, the normative difference that promising makes can be explained by appeal merely to the underlying facts (i.e., the attitudes, sayings, and doings) that constitute the convention of promising but without positing a social ontology to which the relevant attitudes, sayings, and doings may give rise.⁵⁸ On normative powers views, however, on which “the power of promises is ‘self-contained’ and ‘basic,’ ... a promise is directly binding.”⁵⁹ In explaining the normative features of promises, such views, Asgeirsson notes, “appeal to some basic interest specific to promising” such that part of their full explanation will have to include the fact that the specific “doing/saying such-and-such constitutes a promise.”⁶⁰ On these views, “morality *necessitates*, as it were, the normative power of promising,” and as such, they relate “promising to a special kind of basic interest, as a matter of essence” and thereby presuppose “an

⁵⁵ Berman (2019) *supra* note 18, Hrafn Asgeirsson, ‘Jurisprudence Without Metaphysics’ unpublished manuscript, presented at the Oxford Seminars in Jurisprudence 2022 Conference (2022).

⁵⁶ Berman (2019) *supra* note 18 at 153.

⁵⁷ Berman (2019) *supra* note 18 at 152. See also his discussion there for why this commitment cannot be construed in terms of a commitment <to do what the rule book says>.

⁵⁸ Asgeirsson (2022) *supra* note 55 at 19-20, citing David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986).

⁵⁹ Asgeirsson (2022) *supra* note 55 at 20, citing Seana Shiffrin, ‘Promising, Intimate Relationships and Conventionalism’, *Philosophical Review*, 177: 4 (2008), 481–524 and David Owens, *Shaping the Normative Landscape* (Oxford University Press, 2012).

⁶⁰ *Id.*

account of what promises are, *as such*.”⁶¹ Asgeirsson concludes then that whereas some views of how promising makes a normative difference can dispense with the metaphysics of promising, other views cannot. Whether doing metaphysics of promising is necessary for explaining how promises change what we should do is therefore a contentious matter.

Asgeirsson’s argument in a nutshell is that—just as with promising—“it varies between normative theories whether, and to what extent, we have to appeal metaphysical theorizing about legal facts in explaining the normative upshots of the relevant practices.”⁶² This much shows that dispensing with metaphysical inquiry, *à la* eliminativism is only plausible, after presupposing metaphysically reductive normative theories of conventional phenomena that are contentious themselves.⁶³ More pointedly for our discussion here, eliminativism would fail to capture some of the normative upshots of conventional phenomena like legal norms, if it turns out that they (at least partly) make a normative difference directly (i.e., in the way that promises make a normative difference on normative powers views).

I find both challenges against eliminativism compelling. In addition, I think eliminativism depicts an overly simplified normative landscape. Consider games once more. One key question we are grappling with is whether the Hohfeldian phenomena internal to the game have normative relevance outside of the game, and if so, in virtue of what. However, that question is settled however, it is clear that we can distinguish between the Hohfeldian landscape inside the game and the one outside.⁶⁴ Inside a game of chess for instance, certain Hohfeldian relationships obtain between the players. Each player can do a select number of moves depending on whose turn it is, what pieces she and her opponent in turn have, and the respective formation of each player’s pieces. Whatever upshots this has for the two players’ Hohfeldian relationships outside, neither domain of Hohfeldian relationships can be confused with yet another set of Hohfeldian relationships that obtain between each and every of the pieces. My pawn, in virtue of being a pawn and not, say, a bishop, can only move in certain ways. But, in addition, it may or may not be able to move the ways it can normally move (say, one step forward) at certain moments in the game, because the position it would normally move to may happen to be occupied by a different piece (say, my own bishop).⁶⁵

Some questions of law turn out to be about the normative powers of legal instruments. Of course, once it is determined what a piece can or cannot do, this will affect what a player can or cannot do. This all depends, however, on the constitutive relationships of the Hohfeldian domains at every level. But this shows that what I can or cannot do outside the game (take home a prize) depends on what I can or cannot do inside the game (take your queen) which itself depends on what each of my pieces can or cannot do (place my rook at D6) at any given moment.

⁶¹ *Id.*

⁶² *Id.* at 21.

⁶³ On his own view, we may have moral reasons to have laws that are normative, which not only settle questions of what we should do but also act as exclusionary reasons.

⁶⁴ And here, I have an ally in Berman (2019) *supra* note 18.

⁶⁵ As I argue in a companion paper, eliminativism can be understood as an instance of a broader reductivist trend in social ontology and legal philosophy which, following Hohfeld, aims to reduce metaphysical phenomena (property, law, money, corporations, etc.) into normative relations between people (“a bundle of rights”). In that paper, I argue that the conflation of the normative powers of a player outside the game with either or both of 1) her normative powers inside the game and 2) her pawn’s normative powers not only threatens eliminativism but also other instances in that trend. I then argue that of pain of such conflations, we must carefully distinguish between phenomena that are best understood as a bundle of rights (like citizenship) and those that must be instead understood as metaphysical entities with features that affect Hohfeldian relations between people (like legal persons).

Both Berman and Asgeirsson think that if we keep tally of all the Hohfeldian relations, the sum or convergence does not boil down to the Hohfeldian relations that the players would have *vis à vis* one another outside of the game and in its absence. This is what Berman means when he writes that artificial norms (the Hohfeldian relations internal to the game, both between pieces and players) “make a real normative difference” (change the player’s relations outside the game). Dindjer concurs.⁶⁶ And I tend to agree: if the players decide that the loser buys the winner coffee, who owes whom the coffee cannot be determined by appeal to any more basic facts than the rules, events, and outcome of the game.

But for the sake of the argument, suppose, along with eliminativists, that the Hohfeldian relations between the players outside the game would have been identical in both the presence and absence of the game. That is to say, in the presence of the game, the convergence or sum of all the Hohfeldian relations in the subdomains that the game carves boil down to the Hohfeldian relations that the players would have had absent the game. Whether we have them as players of a game or not, person A is the one who owes person B the coffee. Still, the normative relations between the two persons we are considering would be distinct. In the case where they are players to a game, their Hohfeldian relation is richly textured, and though ultimately, player A must buy the coffee for player B, this is the convergence of various relations in Hohfeldian subfields. But when the two persons are not players to a game, their relations are not textured in the same way. It still remains true that person A must buy the coffee for person B, but as a lower-level game-independent normative fact. This is not a distinction without a difference.

Importantly, our phenomenology of both playing games and encountering the law is one of a richly textured normative landscape, which maps on to the experience of the persons who are players of a game. Of course, the eliminativist can still either say that our phenomenology of a textured Hohfeldian landscape with various subfields is mistaken or accept this phenomenology without lending it any normative upshot.⁶⁷ I think, however, that this phenomenology shows something essential about human life and civilization. Importantly, I think human life would be both seriously impoverished and completely alien if its normative landscape were void of richly textured subfields. Thus, I think for the kinds of beings that we are, it is essential for us to create rules that constitute higher order metaphysical phenomena such as chess and complicate our Hohfeldian relationships in the way that chess subfields complicate them. I elaborate on this point in Chapter 3.

2.4. Is General Jurisprudence Interesting?

In a recent paper, Enoch argues that “the comparison between metaethics and general jurisprudence does not reflect well on the philosophical interest of the latter.”⁶⁸ I take this claim to be a direct response to Plunkett & Shapiro’s proposal that general jurisprudence is to legal discourse what metaethics is to ethical discourse and can be equally categorized as a particular instance of metanormative inquiry more generally.⁶⁹ Plunkett & Shapiro’s motivation, I think, is to reignite interest in a field that appears both at an impasse and losing momentum, by reimagining its purpose and boundaries. For Enoch, the field is better left to die rather than revived.

⁶⁶ Dindjer (2020) *supra* note 52.

⁶⁷ Denying the existence of distinctively legal or (basketball) rules would amount to the former, but a weaker version of eliminativism can grant the latter as an epiphenomenal phenomenon.

⁶⁸ Enoch (2019) *supra* note 19 at 66.

⁶⁹ Plunkett & Shapiro (2017) *supra* note 3.

Enoch maintains that what makes metaethics interesting is at least in part, due to two specific features of morality. First, morality is at least potentially full-bloodedly normative, that is, moral rationalism may at least potentially prove true. Second, moral properties and facts—and perhaps (full- bloodedly) normative properties and facts more generally—are at least potentially response-independent, meaning that at least potentially they do not constitutively depend, as a part of their nature, on the response of observers or judges. In short, both whether moral rationalism is true and whether moral properties are response-independent are live philosophical issues. Moreover, Enoch takes it to be clear that for many metaethical views, accommodating these features of morality, or the appearance thereof, is a major metaethical desideratum.

Enoch then argues that jurisprudence is much less philosophically interesting than metaethics, because 1) it is about legal discourse, which on his view only involves “normativity in a thinner, merely formal sense”⁷⁰ and 2) legal properties are decidedly response-dependent, meaning whether or not a norm is legally valid is constitutively dependent on human responses and practices.⁷¹ And since law differs from morality in these two key respects, his argument goes, jurisprudence conceived as an instance of metanormative inquiry is not nearly as interesting as metaethics.

Despite his provocative title (“Is General Jurisprudence Interesting?”) and claim that “general jurisprudence is not that interesting,”⁷² Enoch proposes some alternative ways of understanding general jurisprudence (that is, *not* understood as a metanormative discourse) that *are* interesting. His thesis, then, is best understood as a call to divest resources from Oxford-style general jurisprudence (i.e., the project of which the wars over positivism are a major part) and invest those resources in other—more philosophically interesting—questions about the law, including those that while falling under the rubric of jurisprudence or legal philosophy make an important part of moral and political philosophy.

In this section, I will argue that *pace* Enoch, jurisprudence is interesting, perhaps even *more* interesting than metaethics, even when understood as an instance of metanormative inquiry (*à la* Plunkett and Shapiro). I will grant it to Enoch that law is decidedly response-dependent. That the normativity of law is formal rather than full-blooded is a premise that Enoch takes to be obviously true, and one that at least Plunkett & Shapiro readily grant.⁷³ Yet, as we saw, this premise is *not* obviously true. And as we saw, all Enoch offers in its support are inconclusive intuitions. For Enoch, the idea that law is more than formally normative is a nonstarter. For many others, the conclusion that law is formally normative is a *reductio*.

Enoch’s argumentative move with respect to the purported interestingness of metaethics and uninterestingness of jurisprudence is the same as his move with respect to the truth or falsity of legal rationalism. As we saw earlier (in 2.2.2), he offers no argument why morality is full-bloodedly normative, besides the fact that many people take it to be so. Equally, he offers no argument about why metaethics is interesting, besides the fact that many people take morality to be full-bloodedly normative (or at least find whether it is to be an interesting question). This is an attempt to not go Millian:

One is tempted to go Millian, and say that a topic is interesting if people— certainly, intelligent, well- informed, virtuous people— find interest in it. And judging by this standard, it cannot be denied that general jurisprudence is fascinating. I will not go

⁷⁰ Enoch (2019) *supra* note 19 at 67.

⁷¹ Enoch (2019) *supra* note 19 at 80.

⁷² Enoch (2019) *supra* note 19 at 65.

⁷³ Plunkett & Shapiro (2017) *supra* note 3.

Millian here, though, because I believe that even intelligent, well informed, and virtuous philosophers may be mistaken in what they take an interest in. It's not impossible for many such philosophers to take interest in something that doesn't merit interest, that is not genuinely interesting.

But as we saw (again in 2.2.2) observing that many people find morality but not law to be full-bloodedly normative doesn't show any reason to think that morality is indeed full-bloodedly normative, but law is not. The same observation also does not show that metaethics is philosophically interesting, but jurisprudence is not.

As I also discussed above (again in 2.2.2), there are as many legal rationalists as there are moral rationalists and there are moral skeptics. Why then, we could ask, are examples of illegal moral rules not enough to make it obvious that there can be some moral rules that requires you to ϕ , yet you don't have a reason to ϕ ? On one hand, this observation may suggest that metaethics is just as boring, or, conversely, that jurisprudence is just as interesting. On the other hand, and based on the same flawed reasoning as Enoch's, this observation could turn Enoch's conclusion on its head, suggesting that it is instead jurisprudence that is philosophically interesting and metaethics that isn't. Because obviously, the argument would go, given the conceptual existence of some illegal and stupid moral rule, morality is not full-bloodedly normative. Yet, there are many people, who think that the law *is* full-bloodedly normative (among them positivists like Raz, Dworkinians like Greenberg, and natural law theorists) or that the question is at the very least controversial. *Therefore*—the same flawed reasoning would conclude—metaethics is obviously not as interesting, or interesting in the same way, that jurisprudence is interesting.

The deeper upshot of my discussion in 2.2.2 was this though: questions about the normativity of the law, or in fact any normative domain whatever, is as difficult or easy as morality. The same moves can be made regarding each, and none has explanatory priority over the others. It may be that law is normative in virtue of moral rules. But it may very well be that moral rules are normative in virtue of legal rules. It may be that they are all dependent on rationality. It may also be that rationality is dependent on one of them. The same moves can be made to defend x-rationalism (moral rationalism), the same error-theoretical moves can be made in response, the same non-naturalism challenges, the same cognitivist/ non-cognitivist views can be explained. They are all parallels. If there is cross-domain explanation, we have no idea in which direction normatively flows, or which of the phenomena are robust and which formal, and the norms of which domain metaphysically ground the norms of the other.

These observations already tip the balance of presumption in favor of the interestingness of jurisprudence. Nevertheless, for jurisprudence (conceived as metalegal discourse) to be as interesting as metaethics, what must be at least contentiously true isn't legal rationalism, but only that law is more than merely formally normative. What makes jurisprudence *more* interesting than metaethics is precisely the possibility that it may be more than formally normative combined with the fact that it is decidedly response-dependent.

The metanormative theory of a domain, like law, that is decidedly response-dependent, yet potentially more than formally normative, is more interesting than a domain that is both potentially response-independent and more than formally normative. This is because the fact that a domain which is decidedly response-independent is more than formally normative wouldn't be that surprising.

This conclusion directly contradicts Enoch's assertion that "the obvious fact that legal validity is response-dependent places an upper bound on how interesting jurisprudence is—an

upper bound that places it far below metaethics.”⁷⁴ Not only in this way is law much more interesting than metaethics, it may be able to contribute to it.⁷⁵ A successful account of normativity that does turn on whether its domain is response-dependent or independent will surely be useful in explaining the normativity of morality, regardless of how questions about morality's response-dependence are ultimately resolved.

What makes jurisprudence interesting, therefore, is that response-dependence, rather than defeating it being more than formally normative, may be not only compatible with but also a contributing cause to it being more-than-formal normative. The same point can be put as follows: we are not sure about what grounds morality's normativity; it could be God, nature, or something else, but morality is likely normative because its rules are not human made. On the other hand, legal discourse is normative despite being human made, maybe precisely because it is human made. The philosophical puzzle that that kind of normativity gives rise to is at least what captures my interest in jurisprudence. And I think I have in this at least one ally in Raz.

As discussed earlier, Raz seems to have maintained that at least most of the time, if not as matter of conceptual necessity, legal reasons are real reasons. As a staunch exclusive legal positivist, Raz also maintained that legal obligations are grounded in social facts alone, which really amounts to accepting the idea that legal properties are response-dependent. But he saw a philosophical challenge arising from the combination of these commitments: how could it be that a domain of response-*dependent* norms is more than formally normative, he asked. This puzzle is philosophically interesting, and in my view more interesting than metaethics, because it aims to explain how *human made* phenomena can ground genuine norms.

Let me put the point in another way. The rules of etiquette, fashion, and law are all socially constructed. Yet, one of them is not like the other. Most ordinary people, when they say that such and such a thing (fashion, gender, etc.) is a social construct, they mean we can go ahead and ignore its rules. Not so with law. When ordinary people say that law is a social construct, they seem to point to the puzzle that Raz sets out to solve. They say that the law is socially constructed and yet think that we have genuine reasons to obey it. In so talking and thinking, they point us to a phenomenon that is normative not despite being socially constructed but probably *because* it is so. They are pointing us to a possibility of there being a form of normativity that arises *from* socially constructed phenomena.

Ordinary people would find Enoch's skeptical position extremely odd. As observed earlier, ordinary people even use the words illegal (even unconstitutional) and immoral interchangeably. So, the “everyone else” who Enoch presents as allies are not ordinary people but philosophy professors (and I venture to speculate, they are happy to go along with the assertion that law is formally normative only in the classroom. In the real world, when state officials break the law, they get behind the loudest megaphone they can find to seriously—and

⁷⁴ Enoch (2019) *supra* note 19 at 82.

⁷⁵ Contributing to other parts of philosophy seem to be a criteria of interestingness for Enoch (2019) *supra* note 19: “If we think of general jurisprudence— or of parts within it— as roughly analogous to metaethics, jurisprudence is just nowhere nearly as interesting. The law is not full-bloodedly normative; it is just another, in no relevant way special, instance of formal normativity; some kind of response-dependence view about it is the *obvious* way to go, and we have yet to see any interesting implications from jurisprudence to other areas, including to normative legal theory” (84).

almost morally—criticize said officials for violations of constitutional conventions, let alone law. Gustav Radbruch comes to mind as a prominent example⁷⁶).

Of course, none of this is conclusive. I am partly guilty of intuition pumping of the kind I said Enoch is not allowed to do. But there is a slight difference here: if we are genuinely interested in conceptual analysis of that phenomena that ordinary people live with, we must start from the ground up, and start with ordinary people's intuitions about the law. And I think that if we did so, we will end up with the same intuitions that Raz started with, namely, that law is but a social construct, yet, it is different from other social constructs, and importantly, it is different with respect to its normativity.

Finally, and this is related, the puzzle about jurisprudence is much harder than, say, the puzzle about the possibility of a naturalist reduction in metaethics. This is because, as we observed above, moral rules—and the rules of whatever other domain that is often taken to be full-bloodedly normative—are all in the same boat: either all are full-bloodedly normative or none are. Either a natural reduction explains the normativity of all of them, or none at all. And so forth. But things are more complicated about law. First, it is entirely possible, in fact likely, that though response-dependence plays an important role in their normativity, their legality doesn't play any such role. Second, many legal rules will likely be reason giving in a triggering sense, and perhaps only in a triggering sense. Finally, as I discuss towards the end of this work, it may turn out that legal rules give non-triggered reasons in a plurality of ways, such that none by itself exhausts the normativity of law. All these possibilities complicate the metanormative picture as it applies to legality, make jurisprudence philosophically interesting, and call for further study.

I must make two concessions before closing. First, that the triggering view, and legal formalism generally, is extremely powerful in explaining this very puzzle and precisely by offering an elegant account of why legal rules appear to be more than formally normative. Legal formalism does not deny this appearance, but it gives an elegant reduction of it in terms of more familiar kinds of reason giving. It does not deny that we are dealing with a mysterious phenomenon but offers an explanation for it in non-mysterious terms. Moreover, legal formalism can easily accommodate the intuition that legal reasons are much more serious or severe than etiquette, fashion, or gender rules. It can thus easily accommodate for the intuition that I could go ahead and ignore the latter sorts of rules but could not ignore legal rules. It explains these intuitions by arguing that the kinds of reasons that law triggers are fundamentally different, or stronger, or there are more of them, than the kinds of reasons that other formally normative discourses trigger. But if legal formalism is worth our attention, it is precisely because it offers an elegant solution to an interesting philosophical question.

Second, Enoch is right that thus far, there has been no plausible competing account to legal formalism. This legitimately supports the suspicion that perhaps legal formalism is the way to go, and once *that* is done, then general jurisprudence will be uninteresting, because it will have been settled. The only problem with Enoch's conclusion is that it jumps from the fact that no good defense of 'law is more than formally normative view' has been offered to the belief that such a defense couldn't be offered. Put differently, it seems (at least to some) that what lies at the heart of jurisprudence is a mysterious kind of normativity. Enoch is right that we have not been able to capture what kind of normativity that is, that the kind of explanations that philosophers have offered as potentially grounding that kind of normativity all fail. Yet, this does not at all indicate that the phenomenon does not exist, either metaphysically or conceptually. All

⁷⁶ And here, I am citing Radbruch as someone who switched stances from legal formalism to legal rationalism (rather than someone who switched from legal positivism to natural law).

it shows is that attempts to explain it or finding its causal forces or grounding features have thus far failed. Jumping to the conclusion that the phenomenon does not exist will evade rather than solve our puzzle.⁷⁷ But this requires jumping to the conclusion, even if the jump is somewhat legitimately motivated by successive failures in the field. In Chapter 3, I want to renew the hope that the problem can be solved rather than evaded. Thus, in some ways, the aspiration of the current work is less about proposing a knockout new theory of legal normativity than dispelling the thought that nothing interesting can be said about it. But even if my competing account to legal formalism fails, general jurisprudence remains interesting, so long as legal formalism itself remains contentious.

3. An Internal-value theory of Legal Normativity

My motivation for presenting a new theory is that something, maybe something small, gets lost in legal formalism, and in general in theories that give a unified account of a host of normative phenomena. As we saw in the previous Chapter, the triggering view cannot tell me why I may want to play basketball over football. On the triggering view, the reasons I have to play football and basketball are the same. The totality of reasons I have to play basketball are that it is a fun social activity and also a good way to exercise, and so forth. So, too, with football. But as we saw, if I work backwards from triggered reasons to the activity, I end up with more than one activity. Thus, the triggering view seems to reduce the totality of the reason to play basketball to something that doesn't entirely capture the phenomenon of wanting to play it. Another way of putting that point is this: it seems that some of the reasons I have to play basketball are not also reasons to play football, but reasons to play basketball for its own sake.

So, it seems that there is a specific kind of fun that is to be had in playing basketball that is not to be had in playing some other game. There is, of course, fun in playing football too. But the idea here is that, even though the two are in some sense on a par, and may even compete in my deliberative reasoning—because I have to decide which one I am going to play—they are still phenomenologically distinct. This fact, recall, justifies why someone may be willing to pay an extra cost (say, driving an extra mile) to play basketball rather than football, even if it is not clear that they're going to have more fun playing basketball. For what is clear is only that they are going to have a basketball kind of fun, which they would not be having if they didn't drive the extra mile.

The idea that there is a basketball specific kind of fun seems to ring true not just in this specific context but in general when we think about the relations between particular and universal values. My proposal is to start from here, that is, from a place where the resources of legal formalism run short, and try to build up an account of reason giving, first for game rules, or practice-dependent rules, and then eventually for the law. The most natural way to do this is to suppose that games like football and basketball, as well as many other games that we play, in addition to whatever other point they serve, each constitute a good or value that is unique to that practice, i.e., it is practice-dependent (hereafter "internal"). Since this value will not be available to someone playing some other game, it readily explains why we may have preferences for one game over another, even if they trigger identical triggered values. If there is such a value for playing a game, then there is a weak pro tanto reason (hereafter "internal reason") to play that specific game, which the triggering view cannot account for. Such a reason, if it really exists, may be the building block of a theory of the normativity of social phenomena.

⁷⁷ Evading the problem (by denying its existence) is the stated aim of Enoch (2011a) *supra* note 5.

One worry about this strategy may be that it finds too many unique values in the world or reasons in favor of too many activities. This worry is sometimes called the explosion of reasons objection. But this objection will only be devastating for a view that ascribes a unique value for any game whatever, because that implies us having a reason to play any activity type that someone legislates as a game. The objection will be devastating simply because not every activity type could be valuable in that way. For instance, one could legislate a game consisting of competitively counting the blades of grass. It seems quite implausible to think that in virtue of that legislation, now everyone has a reason—albeit a weak *pro tanto* reason—to play that “game.”

But if a distinction can be made between particular instances that are of value and those that are not, the explosion of reasons objection can be sufficiently mitigated. Sticking with games for now, we can distinguish between games to which the phenomenology of a specific kind of fun applies, like football, and those to which that phenomenology does not apply, like counting the blades of grass. Call the former kind of games “fun games,” and the latter kind “neutral games.” The criterion for whether a game *G* is a fun game is whether there is such a thing as *G*-fun. *G*-fun is a familiar phenomenological phenomenon, so we can take its presence or absence in any game as a fundamental criterion to distinguish games, even though, any specific case is potentially controversial.

The explosion of reasons objection would have been devastating to the strategy that I propose, if it necessitated that we postulate an internal reason to play any activity type that could be legislated as a game. But with the distinction between fun and neutral games, the strategy does not necessitate this. So, we can safely set aside the explosion of reasons objection from the start.

Nevertheless, note that with taking this strategy, we will end up with many more *pro tanto* reasons in the world that meet the eye. Consider that although you don’t have an internal reason to play any activity type that someone legislates as a game, if someone legislated a *fun* game, even if in a remote time or place, even if you have never heard of it or will have no occasion to play it, you will still have an internal reason (albeit a weak one) to play it. This will be true, even in the likely case that you never discern the internal reason to play that game given that 1) it is very weak and 2) you are likely preoccupied with much stronger countervailing reasons not to play that game.

You may still think that ending up with very many reasons that we don’t usually discern will also cost our theory too many plausibility points. In other words, you may think that even a “moderate” or controlled explosion of reasons that the strategy requires renders implausible whatever theory that follows it. But although some plausibility points will be lost, I think that such a loss will not be so grave to be devastating to our theory (and in this, I have at least one ally in Schroeder).⁷⁸ Moreover, I think that there are some plausibility points that this controlled explosion of reasons can gain back, because despite what I just discussed in terms of 1) and 2), we often do recognize the existence of small *pro tanto* reasons to play even the kinds of remote games we considered when their existence is brought to our attention. At least, we act on the presumption that although we tend to not notice the reasons for them, we will recognize their existence once they are brought to our attention.

For example, consider that we often ask others whether they have played the games we like to play, games they may have never played or even heard of. Thus, I may ask whether you’ve ever played Go, and if not, tell you that you really should try it. In this sort of

⁷⁸ Mark Schroeder, *Slaves of the Passions*, (Oxford University Press, 2007).

conversation, what I am often interested to know is not whether you've had fun in life (or enriched your life with any of the other values that triggering theory ascribes to playing Go) but whether you have experienced what I phenomenology take to be a specific kind of fun that is unique to Go. And in suggesting that you should play it, I am citing Go-fun as a pro tanto reason for you to play Go, acting under the presumption that my recommendation has a chance of making you recognize Go-fun as an internal reason. What I presume is that you will think of Go as a fun game, as one that would in addition to enriching your life with triggered reasons, would uniquely enrich it in a way that playing other games won't. I won't presume that you will now go on and play it. All I presume is that you will now recognize a pro tanto reason for doing so.

Note, moreover, that this kind of exchange is quite common even with regards to rare, foreign, long forgotten, or brand new games, and true generally of games that we or others have never heard of or may have no real occasion to play. Thus, phenomenologically, it is quite relatable to think that internal values of this kind are all around us. even though we tend to discern very few of them. And this, I think, is a strength of my strategy which may win back some of the plausibility points that it may lose due to a "moderate" or controlled explosion of reasons.

If there is G-fun, then we have a pro tanto reason to play G. Because playing G entails following its constitutive rules, we will have a pro tanto reasons to (at least by and large) follow G-rules. Moreover, G-rules are necessarily reason giving, though not in the same way that moral rules are reason giving according to moral rationalists. Instead, they are necessarily reason giving in a roundabout way, that is, by way of constitutively contributing to a value that is unique to the social practice(s) they constitute. They are necessarily reason giving because it is in the very nature of G-rules that they constitute game G, which manifests a unique value.

As we saw earlier, this finding is significant on its own, because it allows us to explain how social rules may be reason giving without postulating or appealing to a domain of sans-phrase oughts (like moral rationalism). Conversely, it allows us to see how a normative fact can be entirely grounded in social facts and in virtue of the role that the relevant social fact plays in human life. The question now is whether legal rules constitute such a value.

Put differently: we have thus far distinguished between two kinds of games, the kind whose values the triggering view exhausts (counting grass), and the kind whose values the triggering view doesn't exhaust (unless in a vacuous way, as discussed in Chapter 2). So now the question is what kind of game legal rules constitute.

The literature often talks of "the legal game" and asks whether we have any reason to play it. The problem is that unlike basketball, we have no intuition about "the legal game" even though we have some reliable intuitions about legal rules. This is because legal rules don't quite constitute "the legal game." Instead, they may constitute, say, the political "game" and perhaps also a multiplicity of other "games" like property, employment, contract, voting, marriage, and the list goes on (note that we've now started using the term "game" loosely, to roughly mean rule-constituted social practices). And we have reliable intuitions about these games, which say—I think—that at least many of them manifest unique values in addition to whatever other moral or instrumental (including coordinative) purposes they serve. Thus, we may have reason to play many games that legal rules constitute, hence, reasons to follow legal rules.

Such an account solves the problem we started with. Recall the puzzle was that some legal rules are reason giving and some aren't. The above account explains this phenomenon and does so in a way that is an alternative to both legal formalism and legal rationalism.

Recall that legal formalism and legal rationalism respectively ascribe the normative valence of 0 and 1 to all legal rules. Legal formalism explains the cases that we should do as legal rules say by appeal to contingent reasons for doing so. Legal rationalism explains the cases that we shouldn't do as legal rules say by appeal to contingent reasons for not doing so (countervailing or defeating reasons).

On the account above (or the “internal-value theory,” if you will), we ought to distinguish between two classes of legal rules based on their social function: those that constitute fun games and those that don't. The former have the normative valence of 1 (though they are reason giving in the basketball kind of way rather than the morality kind of way). The latter class of rules have the normative valence of 0 (and they are only reason giving in the triggering way). This yields four (rather than two) possible explanations: Sometimes we must heed what the law says *either* because the relevant legal rules are reason giving in an internal/non-triggering way *or* because they give reasons in the triggering only sense (or both). Sometimes we need not heed what the law says *either* because there are no reasons to do so *or* because contingent countervailing reasons outweigh the reasons there are to do so (be these triggered reasons, internal reasons, or both).

The internal-value theory then rejects both trends in the literature, though it finds a grain of truth in both. Legal rationalists believe that all legal rules, whether they make fun games or not, are reason giving in a non-triggering sense. Legal formalists believe that all legal rules, whether they make fun games or not, are only reasoning giving in the triggering sense. According to the internal-value theory, some legal rules give reasons only in a triggering sense and some give reasons in the non-triggering sense. The internal-value theory sort of accepts both explanations in part,⁷⁹ but rejects the idea that what these explanations claim applies to all legal rules and as a matter of necessity. Moreover, the internal-value theory rejects both trends in their methodology by rejecting the presupposition that the phenomenon of our interest must be resolved by appeal to necessary or conceptual features of legality. It holds instead that the phenomenon lends itself to a piecemeal solution, in which some legal rules are more-than-formally normative while some others aren't, not in virtue of their legality but in virtue of something else, such as what role they play in human life.

3.1. Skepticism

I have said that some legal rules constitute fun games, and some others do not, and that in virtue of the fun that the fun games manifest, their constitutive rules become necessarily reason giving. But return to games: it is not clear that following all of basketball's rules is necessary in order to have basketball-fun.

Consider Hershovitz's hypothetical that we examined in the previous chapter, in which while playing a game of chess, you pick up a pawn in your left hand and place it back on the board with your right. Your opponent objects. Citing a provision in the FIDE rulebook that says that “[e]ach move must be made with one hand only,”⁸⁰ she charges you with an illegal move—that is, a move that the rules prohibit. However, says Hershovitz, “we need to know more about the context of the game” in order to determine whether your opponent's objection is sound. “If you're playing in a FIDE-sanctioned tournament, for example, then you are presumably

⁷⁹ I say “sort of” because as we saw, the internal-value theory's explanation of law's non-triggering reason giving is different from legal rationalism's explanation of law's non-triggering reason giving (on the internal-value theory, law's non-triggering reason giving is in a roundabout G-fun kind of way as opposed to a more direct morality kind of way).

⁸⁰ World Chess Federation 1988, § 4.1.

obligated to follow the rules.”⁸¹ But “[t]he picture looks rather different if you are playing a casual game with a friend.” In that case, he concludes, “FIDE’s adoption of a rule requiring players to make moves with one hand only has no normative consequences for [you].”⁸² Hershovitz’s point is that a player’s moral obligation to her opponent—supposing for the sake of argument that one arises in the game’s context—does not depend on what chess rules say and can be entirely determined without reference to them.

Hershovitz presents this argument in the service of his eliminativist project, which I addressed in the previous chapter. The relevance of this problem to my current discussion is that it can be adapted as a skeptical challenge against the internal-value theory. I have not claimed that the rules of chess morally oblige us. But I have claimed that in virtue of chess-fun, we have reason to follow chess rules. Recast as an objection to my stance, Hershovitz’s point will be that the value of chess is equally realizable in a game that is FIDE-sanctioned and one that is not. In a friendly game of chess, it seems, chess fun can be had without regard for at least some chess rules. If this were so, then we can simply skip some of the rules to our liking, while still playing the game. And in fact, this seems to be precisely what we do when we play games. Worse yet for my view: sometimes we customize games given our circumstances, thereby leaving out some of the rules or legislating new ones, precisely because doing so would make the game under the relevant circumstances *more* fun (and perhaps more G-fun). For Hershovitz, mutual expectations in a game gives rise to something like a moral obligation, and he tries to show that whatever these obligations are, they do not map on following a specific set of rules. My account does not rely on mutual expectations but instead on the pursuit of a kind of fun. It seems devastating for my view if pursuing this sort of fun does not map onto following a specific set of rules, or worse yet, if the pursuit of this fun requires breaking rather than following some of the rules in that set.

Note that I couldn’t retreat to saying that for the relevant value (G-fun) to materialize, though breaking some rules will be possible, the rules must be by and large followed. For although this may be true, it leaves it entirely open for a skeptic to pick and choose the rules she wants to break. Today, she plays by one subset of the rules, breaking those she has (say, self-interested) reasons to break today. Tomorrow, she plays by another subset, breaking some other rules she has reasons to break tomorrow. And eventually, she breaks all the rules she wants to break, while at all times playing by and large by the rules.

I can mitigate the force of the objection by retreating to a slightly different position, namely, that some rules are of paramount importance to constituting G-fun. For instance, I could say that in tennis, though the rule against foot faults is not of paramount importance to constituting tennis-fun, the rule that differentiates between in and out is of paramount importance. With respect to the law, I can say that for instance constitutional law of a legal system, or some other “play by the rules” kind of rules, or some important principles of common law in common law jurisdiction have such an importance to, say, the game of politics. Similarly, for each of the other games that legal rules constitute, I can say that there is a set of rules that are of such importance. Thus, the skeptic, I can claim, can only break (or switch around breaking) rules (or laws) that are peripheral to any specific game (or play minimal roles in constituting the relevant G-fun). Nevertheless, this response at best mitigates the objection.⁸³

⁸¹ Hershovitz (2015) *supra* note 47 at 1183.

⁸² Hershovitz (2015) *supra* note 47 at 1183.

⁸³ One possible way to extend this response would be to say that the peripheral rules are reason giving for fairness considerations internal to the game. For instance, with respect to tennis, the rules that delineate in and out must be followed for tennis-fun to materialize, but once we enter the game of tennis, fairness considerations set in due to its

Berman considers the same hypothetical but offers that: “‘Chess’ is not a single undifferentiated normative system, but a tightly knit family of systems that are unified by a large number of constitutive and regulative rules but that also exhibit some degree of diversity. This is familiar.”⁸⁴ In Berman’s view, “chess” or “basketball” are “slight misnomers” for a family of games.⁸⁵ The same, Berman adds, goes with law: “Similarly, we commonly reference ‘American tort law,’ or ‘Anglophone tort law,’ while knowing that the rules vary across Jurisdictions” concluding with Hershovitz, that “[a] casual game of chess seems more apt to be governed by the widely known rules of chess than it does by FIDE’s more complete set of rules, absent an antecedent agreement about what rules are in play.”⁸⁶ Berman’s discussion of this hypothetical is in the service of his critique of Hershovitz’s eliminativist project, as discussed in Chapter 2.

At first, it may appear that Berman’s picture can help me, because it may look like I could something along the following lines: even though you and I may decide to play a friendly game of chess, we have some independent reason to play a FIDE-sanctioned game. After all, each game has its own internal value. So, though we may decide to leave out some FIDE rules, we do so in favor of the value in a friendly game of chess over the value of a FIDE-sanctioned game that we forgo. But I think this line of defense is doomed. Because intuitively, the value internal to a friendly game of chess seems to be identical to the value internal to a FIDE-sanctioned game. It is presumably for this very reason that we think of the two as members of *the same family*, for which “chess” is a slight misnomer.

In reality, therefore, Berman’s picture is of no help. Indeed, it amounts to the same kind of skeptical challenge against my view. The only difference is that on his picture, the skeptic switches to various members of the family of games, for which “chess” or “basketball” are slight misnomers. Today, she plays *shmarriage*₁, tomorrow *shmarriage*₂, depending on which rules of “Marriage” she wishes to break. What’s important is that the value of Marriage is embodied in *shmarriage*_{i-n} and so, although she plays a different member of the Marriage family, and so eventually she breaks all of the family’s rules, she gains the value that unifies its members.

Note that Berman’s picture readily allows me to distinguish core and peripheral rules, given that he concedes that *shmarriage*_{i-n}, are unified by *a large number* of constitutive and regulative rules, which is presumably why they all constitute the same family with presumably the same unique value (Marriage-fun). Nevertheless, the fact that they “exhibit some degree of diversity” is as we saw enough to allow the skeptic to break at least many rules by switching between the various members of the family of games.

Even if we are all playing basketball, there could be a skeptic among us who is not playing by the rules, at least not by our rules. She is playing by a changing subset of the rules (changing based on which rules she will have eventual self-interested reason to follow or break). She is playing basketball*, if you will. She draws the same value out of her participation as we

competitive nature, and these considerations then make the rule against foot faults normative. If pursued, something of promise may come about from this path. But I have reservations. Consider a case in which you and I are playing a friendly game of tennis and you are by far a better player than I am. In such a situation, we may decide to enforce the rule against foot faults for you but not for me to give me some advantage. Here, making the game unfair seems to be in the service of achieving tennis fun, which given the circumstances, couldn’t be achieved in a fair game between you and me.

⁸⁴ Berman (2019) *supra* note 18 at 154-55.

⁸⁵ Berman (2019) *supra* note 18 at 155.

⁸⁶ Berman (2019) *supra* note 18 at 155, citing Hershovitz (2015) *supra* note 47 at 1183.

do of ours. But she follows the rules whenever they are to her advantage but doesn't when they are to her disadvantage.

And it is not as though she is breaking rules she should follow; at least on Berman's and Herschovitz's view, she really doesn't have a reason to follow the rules she decides to not follow, because in the relevant moment, she opts to play a neighboring member of the game family instead. Thereby, she switches to playing a different game than the one we are playing. Though the rules of the two games substantially overlap, the game she plays simply lacks the one or two rules that she will (eventually) decide to not follow.

Note, of course, that you and I may also break a rule or two. We may simply play the game badly, or we may conclude that though we have a reason to follow this or that rule, we have even more reason to break them (say, out of self-interest). We may decide to cheat, in other words. Alternatively, we may even decide to become rebels, out of the joy of breaking the rules! Still, there would be a difference between us and the skeptic. When we see reasons against following a rule, we weigh them against our reason to follow it and may decide that it is outweighed. Whereas we have a reason to play by the rule we decide not to follow, a reason that may nevertheless be outweighed, the skeptic doesn't have a reason to follow such rules at all. It isn't that her reasons are outweighed by countervailing reasons. When she sees reasons against following a rule, she simply opts out of our game and into a similar enough game that simply lacks that rule. By doing so, she will no longer have any reason to follow the relevant rule. Unlike us, she won't be cheating (though she may appear to us to be cheating, because we assume she is playing our game).⁸⁷

As we saw, this is a difference of substance. Whereas for me and you, in virtue of us playing basketball, the relevant rule has the normative valence of 1, for her, in virtue of playing basketball*, the relevant rule has the normative valence of 0, because the relevant rule simply isn't a rule of basketball*. So much then for the internal-value theory of normativity.

The force of this objection shouldn't be underestimated. However, I think it can be addressed. Note that the skeptic's stance is only plausible in isolated games, that is, where what happens in one game has no effect in any other contexts. For instance, whether you score in baseball has no effect on whether you also score in basketball. And a skeptic who plays baseball* and basketball* can get the relevant values as anyone who plays baseball and basketball. Many games that legal rules constitute are similarly isolated. For example, whether you are playing the game of stopping at stop signs or not has no effect on what happens in other games. No further institutional upshots follow.

But this is not the case for many other games that legal rules constitute. First, consider that many of the same legal rules constitute a variety of fun games. Some rules are arguably constitutive of every fun legal game (examples include the rules of criminal or tort law, rules of standing, statutory interpretation, and so forth). Thus, the reasons to follow any specific rule are often not provided by just one fun game but by a host of fun games that it partly constitutes.

Second, and more importantly, most fun legal games form a tightly interconnected network. As a result, the Hohfeldian relations that obtain in one game have upshots for those that obtain in another. For instance, whether you sold your property (one game) will affect how much you ought to pay in taxes (another game). Similarly, the institutional changes of any such move within one game has institutional implications in other games too. For instance, whether you are

⁸⁷ Perhaps she is freeriding. But discussion in the main text shows that nothing seems to prohibit freeriding either. The only reasons to play are to secure G-fun and whatever other triggered reasons there are. And it seems, that the skeptic can secure these by freeriding.

fired from your job (one game) will have implications for whether you are entitled to unemployment benefits (a different game) or have a cause of action in tort law (yet a third game).

Playing a game consists in exercising its powers or making moves that change the Hohfeldian relations that are internal to the game (changing where your opponent can or cannot place her pawn). Sometimes this brings about institutional events (checks or checkmates). In a network of interconnected games that are constituted by legal rules, changing the Hohfeldian field internal to one game amounts to also changing the Hohfeldian field internal to another, events in one game amount to also events in another, and institutional upshots of one move will have institutional upshots in another.

Now, suppose that basketball and chess were interconnected in such a way, such that an event in basketball could bring about an event in chess. Note, however, that an event in basketball* couldn't bring about the same event in chess. By switching to basketball* then, the skeptic must opt out of chess too, or forgo the further implications of her actions in chess. Because the family of the closely related games to basketball that the skeptic wants to play are not connected to chess, her moves in them won't have the same institutional upshots. Given that all of institutional reality (at least in a single jurisdiction) is interconnected with legal rules, our skeptic will have to opt out of the rest of institutional reality when she opts out of the legal game G and into G*. This is too heavy of a price.

Consider what the skeptic gains in return: all she gains is the power to refuse to follow the rules of G while insisting that she has no reason to follow them (because she opted into still G*). I too, remember, can refuse to follow the rules of G. Our only difference is that I must acknowledge that I do have a reason to follow them. By our stipulation, she and I both gain G-fun. Now consider what she loses when compared to me: she forgoes the fun of all the games that G is connected to. I don't forgo anything.

Put differently, we can respond to the skeptic by saying that although you have no reason arising from G-fun to follow the G rules you don't want to follow, you have reason arising from the fun of G-connected games to follow them. Of course, the skeptic is not rationally obliged to accept the values of G-connected games.⁸⁸ But in rejecting them she would be completely alien to us.⁸⁹

I think this response effectively addresses the worry about skepticism and freeriding. But more abstractly, it also puts us in a position to see why considering the normativity of legal rules in isolation seems to lend plausibility to eliminativism and legal formalism. Most of the examples they rely on (such as traffic rules) are not just examples of neutral legal games but also examples in which legal rules are examined in artificial contexts, in which following them or not has no institutional significance beyond the fact the particular rules are themselves obeyed or disobeyed. Once we consider the broader social and institutional contexts of legal rules, however, and the interconnected network of games that they often form, we will see that in many cases, the institutional impact of following certain legal rules will be more significant than merely whether they were themselves followed or not. Whether some rules are followed or not can mean whether a will was executed, a marriage formed, a vote cast, and these institutional upshots can have further downstream impacts in more than one way and in more than one game.

⁸⁸ C.f. Philippa Foot, 'Morality as a System of Hypothetical Imperatives', *Philosophical Review* 81 (1972), 305-16.

⁸⁹ C.f. Samuel Scheffler, 'Moral Scepticism and Ideals of the Person', *Monist*, 62: 3 (1979), *The Concept of a Person in Ethical Theory*, 288-303, who when writing about the moral skeptic, notes: "a person who truly lacked all such concerns would be alien to us in fundamental respects" (293).

Playing will-making* may be just as will-making-fun as will-making but it requires opting out of a host of other fun games that are interconnected to will-making. And this fact is obscured when we only consider that no such costs arise whether one plays stop-at-the-light or stop-at-the-light*.

3.2. Getting to Legal Rationalism's Internalist Prong

What I have thus far said suggests that there is a kind of normativity attached to some social rules that constitute fun games. This doesn't yet say anything about the normativity of "the law" *per se*, because though some fun games are (in part) constituted by legal rules, they may not be appropriately called *legal* games, because the *legality* of the rules that constitute them may play no more than an instrumental role in their constitution.

For instance, you may think that marriage is not a legal game but a religious game. Of course, you could still accept that the existence of some legal rules or following them is necessary for there to be marriage, but you can insist that this is not the right sense of necessity. Having had breakfast may also be necessary for there to be marriage, but this necessity is instrumental rather than constitutive. And you might think that the relation of legal rules to marriage is also like this. So, we must account for both possibilities here: in one scenario, at least some of the games that legal rules constitute are *legal* games, in the sense that the legality of the rules in question is constitutive of the game (though each specific instance may be controversial). In the other scenario, none will be legal games in the relevant sense. Only in the first case, the internalist prong of legal internalism will be true. In the second scenario, we will still have marriage, voting, employment... internalism, just as we have basketball internalism. But we won't have legal internalism.

I suspect that legality is constitutively relevant to the sorts of fun games we've been considering for three reasons: 1. If you want a societal level game such that everyone can participate in virtue of just being a person; if you want games that we can all compete in or play together, then you need to have societal level rules, rule makers, and umpires. And perhaps the *law* is nothing but the rules of a bunch of societal level games of this kind. In other words, the word law is nothing more than a name we give to the constitutive rules of such games.

2. legal rules create games that we don't merely play but inhabit. When we play chess, we don't see the destiny of a chess piece as one of our own. Even when we play basketball, though we in our person take a role equivalent to that of a chess-piece in basketball, we still do so for the time being and for the limited purposes of the game. But when we play games that are constituted by law, we share the destiny of the player of the relevant game, we see other players not as players in a game but as the people in our lives, and the game as (partly) constitutive of what we regard and remember as our life. Perhaps then, life is nothing but a series of games we play that are constituted by legal rules. The ability to inhabit such games may partly have to do with their societal scope and partly with the legality of the rules that make them. My thought here is that legal rules constitute the institutional substrate for such games but creating institutional entities like deeds, contracts, wills, bank accounts, and so forth and various powers, moves, and events that connect them to us and each other. They make up the game environment for us to inhabit.

3. legal rules create the "political game." You can challenge the local examples above in two ways: either by a story according to which legal rules are only instrumentally necessary. Or a story in which they don't constitute a unique value like basketball. But you must agree, that there's a specific kind of value in politics and that law is not merely instrumentally useful in playing politics but it plays a role in constituting it. I'm not sure if this is right, but this offers a

non-exclusive alternative to the way that the potential internal value of diverse games like marriage could make legal rules non-instrumentally reason giving.

The three reasons above offer different ways that legal rules may be reason giving and somewhat support the idea that the reasons to follow them may not just be internal to the game that legal rules create but also constitutively related to their legality.

Nevertheless, it seems to me that you can agree that features like societal scope or the creation of games we can inhabit are essential to legal rules and to the games they constitute but deny that these features are essential to law or legality of the rules. In other words, you may insist that non-legal rules of societal scope can also create both such games and their environment. House rules, club rules, or company policies, may be examples of non-legal rules that you could cite. These, arguably, also make games that we inhabit. And if not, their only difference with the rules of games that I have granted we do inhabit is their more limited scope. If this is your view, I can get on board, because it does not make a substantive difference whether we call societal analogues to company policies “law” or something else. It also doesn’t matter substantively whether we call their normativity “legal” normativity or something else.

Recall that I have readily granted that basketball rules are normative in the same way. And it is clear that company policies, if they create fun games, will be normative in the same way. I have appealed to some exceptional features of legal rules to show that they are less susceptible to skepticism. Nevertheless, I have granted that the kind of normativity that law has is a particular instance of a wider phenomenon. In this section, I highlighted some further particular features of legal rules and their normativity, namely their scope.

A further and similar difference of legal rules to company policies is their primacy or depth in the social fabric. The idea here is that companywide policies presuppose societal wide legal rules, in the sense that they must not contradict with them, they can rely on their enforcement, and so forth (or at the very least a subset of society rules, like the rules of contract, fraud, standing, and so forth). Company policies must also presuppose that in times of conflict, legal rules trump. And so forth. But we do not need to worry about whether societal rules are one and the same thing as *legal* rules or extensionally identical to the law.

What’s important is that we have now found that some social rules, including some legal rules, are necessarily normative in virtue of constituting social practices that manifest unique values due to the role they play in human life. This much decidedly refutes legal formalism and departs substantially from existing versions of legal rationalism. Now if you think that everything I said about the normativity of the relevant legal rules can be properly (i.e., non-instrumentally) called “legal normativity,” then we will have a new formulation of the internalist prong of legal rationalism. But I grant that you might think otherwise.

To summarize, I offered two reasons to think that legality is constitutive of the various games that are constituted by legal rules. I also suggested that legality may be constitutive of the game of politics. If via either route, you grant me that legality is of essence, then we can say that the reason to follow at least some legal rules is internal to law. This would establish the internalist prong of legal rationalism. But if you don’t grant me either, I can still say that the reason to follow at least some legal rules is grounded in the practice-dependent value of the social games they constitute. This refutes legal formalism.

Before ending though, I must discuss one last point: you may think that G-fun is not an internal value to law (or even basketball) in the same sense that the value of morality is internal to morality. Obviously, if moral rationalism is true, what makes opting out of the moral game non-optional is created by moral rules themselves. But it is clear that what legislatures, judges,

and other legal actors do doesn't create G-fun in the same way. What legal actors do does gives rise to a reason to play the game, but we can distinguish between giving rise to a value and creating it, and you might think that internalism requires the latter. But as I said at the outset, there will be differences between morality and law, and these differences should not upset us. Legal rules, even if they are more-than-formally normative, are not reason giving in the same way that moral rules are. And though there may be some similarities, we should not expect exact parallels—equally, though there will be differences, we should not expect exact opposites either.

More fundamentally, you might think that a reason to *opt in* cannot be a reason *internal* to a game. After all, a reason to opt in must reach the people outside the practice, where they are. But to do so, it couldn't be a reason that only people inside can experience.⁹⁰ If you think this defeats the internalism in legal internalism, my response is as before. If you think this shows something more devastating about the existence of G-fun, then note that as an analytical matter I can grant everything you say, but argue that *we* are already inside, because we are born into the network. Thus, for us, though G-fun may not be a reason to opt in, it is certain a reason against opting out.

3.3. Finding a Token of the Internal-Value Theory Type

Thus far, I relied on the phenomenological intuition that some games like basketball are fun in a specific way and speculated that the same is perhaps also true of some “games”—here used loosely to mean rule-constituted social practices—that are partly constituted by legal rules. I appealed to the parallel intuition about these, namely that it seems we have reason to play “games” like marriage, employment, voting, and so forth quite independently from whatever instrumental purpose they happen to serve or not. The intuition here is that we have a reason to play them for their own sake, that is, a reason to play them that is independent from whatever triggered-reasons we may also have for or against doing so. In essence, I claimed that though marriage may not be any more fun than some other game, it makes sense to play it even at an extra cost because it manifests marriage-fun, which is a unique value.⁹¹

One question that may legitimately arise is in virtue of what some games are fun while others aren't. Remember that the triggering theory claims that on purely metaphysical grounds, if a game gives reasons (as opposed to one that does not), there must be an explanation for that and such explanation will be in terms of reasons that are independent of the game. This is a move that I rejected in postulating G-fun. But then, so long as I allow for games that do and do not have their versions of G-fun, then the question about what distinguishes them makes sense.

One possible way to proceed would be to reject this question and deny that a further story needs to be told. On such a path, I could say that the only systematic difference between fun games and neutral games is that one is fun and the other one isn't. That is a possible move, but recall that I criticized legal rationalism for making a similar move.

A second way would be to say that although there is a story in virtue of which each fun game becomes fun, that story is different in each case. This line of response seems more plausible to me, and it would be also perfectly in line with the idea that the value in each fun game is specific to that game. This would be to deny the existence of a unified story in virtue of which all fun games become fun. It would be to say that there isn't a unified feature that all fun games have, and all neutral games lack. Rather, every fun game has a unique feature and there is a unique story that explains it. And the story in each and every case would be internal.

⁹⁰ I thank Kenneth Ehrenberg for pressing me in discussion to clarify this point.

⁹¹ I also discussed why you may think that marriage is not a *legal* game. But if you think marriage is not even at least partly constituted by legal rules, pick your favorite example of a game that is.

If we take this second path, we must acknowledge that all else being equal, a theory like the triggering theory has advantages in so far as it does give a general story of when the rules of practices are reason giving. Per the triggering theory too, the particular explanation for each case differs, but all the explanations would be in terms of game-independent values, and so, they all follow a general structure that the theory provides. According to the internal-value theory, the stories would be different, but they would also be each in terms of a particular value that is internal to each fun game.

A third option for the fun theorist would be to rise to the challenge of offering a general or unified story in virtue of which, fun games become fun.

The final option would be to take a path in between the second and third options, that is, to offer a general story that describes a unifying feature of many but not all fun games (or several general stories that each describe a unifying feature of a class of fun games, whether exhaustively or not).

Whatever choice we make will lead to specifying the idea of G-fun further. But we must acknowledge that G-fun can be specified in a variety of ways and in line with any of the choices above. This means that a family of distinct views can fit within the rubric we're going to work within. In other words, what I've thus far called "the internal-value theory"—that is, the bare bones idea that some legal rules constitute some value and thereby become more-than-formally reason giving in a roundabout way—is actually a type of theory of law's normativity (like legal rationalism, legal positivism, etc.). The choices we make about how to further specify G-fun will be ways of offering tokens of the internal-value theory type.

In what follows, I will move toward such a token by taking a path along in between the second and third options (and in line with the last) and try to offer a general story that describes a unifying feature of many but likely not all fun games. I am not myself sure if this would make the best token of the internal-value theory. Thus, one may reject what I will go on to say here on the basis that these details could be filled differently, thereby rejecting the token while still adopting the type theory that I offer. I shall think that such a move can make progress in the field just as much, if not more. Nevertheless, what follows is my attempt.

The general story I plan to tell relies on the fact that every human society creates games and that their existence seems essential to human flourishing. Thus far, I have offered two ways of distinguishing between games: more recently between games we play and inhabit and earlier between fun and neutral games. Here, I want to start by proposing yet a third distinction: between minimal and spirited games.

Minimal games are such that excelling in them merely requires following their rules. In contrast, excelling in spirited games requires more than merely following their rules. As examples, fashion, etiquette, and counting the blade of grass are all minimal games. One can play them by merely following their rules. But chess is a spirited game, because there is more to excelling in it than following its rules.

Note that the rules that constitute spirited games give rise to emergent or higher-level metaphysical phenomena. The rules of chess for instance, create things like chess pieces, chess boards, chess moves, and so forth. Absent the rules, what's there in the world are only miniature sculptures, checkered boards, and 'pushing around miniature sculptures on a checkered board.' It is the rules that create chess pieces, chess boards, and chess moves out of these pre-existing phenomena. Chess rules also create chess events, meaning that things like getting checked or losing a rook can take place in the world that the rules create. No such events would occur in the world when people are merely pushing around miniature sculptures on a checkered board, even

if their behavior take the exact same patterns of the behaviors of two people during a game of chess. And finally, it is chess rules that create what Hohfeldian relationship obtain between chess pieces and players.⁹²

Another way of stating the same distinction is this: describing the activity type that the rules of minimal games create as *games* is redundant. For it is no more to playing such games than to following their rules. For instance, though following fashion rules can be described as playing the game of fashion, so describing that activity type seems redundant. There is nothing in saying that “Sam is playing the fashion game” that is absent in saying “Sam is following fashion rules.” Not so with spirited games, because there is an emergent activity type that the description of the behavior as playing a game captures. Thus, what the description ‘playing basketball’ captures is a higher level or emergent activity type that though constitute by following the rules of basketball isn’t merely doing so. Accordingly, we can say that if describing the relevant activity type as a “game” is non-redundant, that is, if there is an emergent kind of activity type, such that participating in that activity type is not merely a matter of following its rules but that it is constituted by those rules, then the relevant game is spirited.

Enter the following normative claim: a life without spirited games that we can inhabit is seriously impoverished and entirely alien. If this is right, having societal-level rules that constitute spirited games everyone can inhabit is essential to human flourishing (and as you’ve likely guessed from my discussion above, my next move will be that the law is nothing but the name we give to the collection of such rules, but more on that later).

I think that this claim is intuitively plausible. But one way of arguing for it in line with what has been said so far would be to show that the phenomenology of a unique kind of fun necessarily attaches to spirited games, that is to say, if a game is spirited, then it is fun.

We can start by observing that if a game is spirited, then there is nothing else that feels quite like playing it. This is because the phenomenology of playing that game cannot be broken down to the phenomenology of the sum of the activities it consists of. For instance, compare triathlon and basketball as examples of minimal and spirited games in turn. What it feels to play triathlon is what it feels to swim, cycle, and run. But presumably there is more to what it feels like playing basketball than what it feels to run, dribble, throw a ball through hoops, and so forth.

Another way of getting to the same point is this: for playing it to have a unique phenomenology, there must be an “it” that can be differentiated (metaphysically and phenomenologically) from the parts that constitute it. The rules of minimal games don’t create an “it” as such. They create criteria of evaluation with respect to various forms of activity types but don’t create any *new* activity types, besides the activity type of following the said evaluative criteria. The rules of spirited games on the other hand, create activity types in more than this minimal way. Thus, whereas the activity type of playing triathlon just is the activity type of running, swimming, and cycling according to triathlon rules, the activity type of playing basketball is something more than running, dribbling, and throwing a ball through hoops according to basketball rules (just as playing chess, or for that matter castling in chess, is more than moving miniature sculptures on a table according to chess rules).

⁹² In a companion paper, I argue that for Searle, giving rise to such emergent phenomena is what distinguishes what he calls constitutive rules from regulative rules. My usage departs from Searle’s and follows the common way in which the word “constitutive rules” is used in the general jurisprudence literature. In this more common usage, “constitutive rules” refers to any set of rules that constitutes an activity type, regardless of whether they give rise to emergent or higher level phenomena.

At this point, you may grant me that there's nothing else that feels quite like playing an spirited game, but question whether this specific and unique kind of feeling is also a kind of value. There is a gap here than needs to be bridged. My intuition is that given the sort of being we are, inhabiting many games of this sort, thus populating our lives with specific feelings of various spirited games constitutes an essential sort of value for us.

The reason for this is that spirited games have a meaning-making function, they create institutional upshots of our behaviors, which play important roles in making a meaningful narrative out of our lives. This much is true, I think, of both games we play and inhabit, but much more seriously in the case of the latter.

Starting with games we play, compare two scenarios. In the first, I am sitting over there having fun, pushing around miniature sculptures on a table with my friends. In the second, I am playing chess. In both cases, I am behaving in the same way. But in the second one, there is a further story that can be told about what I am doing, there is a meaning to what I am doing that isn't there in the first, what I do counts as some emergent phenomenon that the further story or meaning captures. The further story enters the narrative of my life and makes further sense of it. I can say not only that I had fun but that I played chess! I can ask you whether you have ever played chess and tell you that you should if you have not. And in doing so, I would be asking you more than whether you have ever behaved in a way that was fun. I would be asking whether you have behaved in a way that could be narrated in the same way as my behavior can be narrated, whether your behavior counts as an emergent phenomenon that my behavior counts as, and whether the further stories of that parts of our lives spent on fun are (at least partly) overlapping or divergent (in the case that say, you have only ever played basketball for fun but never chess).

It is the similarities and differences in these stories that allows us to make unique life narratives though we basically behave in identical ways (wake up, eat, exert physical force on objects, make noises, have fun, etc.) It is the existence of countless games and our selective participation in them that create various life choices for us and make life colorful and exciting.

Now moving to the games that we inhabit rather than play. As I mentioned, one difference here is that we regard the fate of the player as our own. In these games, we are the protagonists, what happens to these players is literally the narrative of our own lives. In a game of chess, we don't see ourselves as sharing the fate of our pawn. Even when we play basketball, though we take the role of a basketball-piece with our own person, we don't see the fate of the player as our own any more than within the confines of the game. Even in a solo game like wrestling, where I occupy the role of the only player with my person, and even though it would literally be my person who loses or wins, this winning or losing is within the confines of the game's meaning as a game. The winning or losing enters my life narratives in a practice-qualified way. But the games we inhabit are different in the way that we experience our fate within them in an unqualified way. We don't experience occupying the role of a player to the game of college, marriage, politics, and so forth. We experience doing so as occupying our own role. The fate of the player of the game in our college career or in our marriage is our own fate. Their story therefore enters our life in an unqualified way too. Their story makes up an episode of our life's narrative.

So, experiencing the unique way that a spirited game feels is a way that we make sense of our lives and give meaning to a small set of repeated, ordinary, and shared forms of behavior. Part of what makes the lives of the kinds of creatures we are meaningful and fulfilling for us is that it involves creating and participating in games, and especially those that we inhabit. What

we do and what happens to us count as the things featured in the narratives we tell of our lives in virtue of the rules of such games.

To put this point differently, the fact about human life is that pre-institutionally, we behave in very limited and nearly identical ways. But once we create spirited games of all kinds, we get to choose the lives we want to live because participating in each game feels unique. And we get to choose to live more or less *unique* lives because there are many games to choose from. For it is only by way of this variety of games I get to vote by raising my hand while you get to put yourself in a queue to ask a question by raising yours.

If this is all true, then we can say that playing a spirited game doesn't just feel unique, but that the unique way it feels is a particular kind of value, like G-fun, which consists in the fact that it gives meaning to the otherwise meaningless behavior we exhibit while playing it. This makes good my earlier normative claim that a life without spirited games that we can inhabit (and more generally without spirited games) is seriously impoverished and alien. From here, we can give a general story about what makes *spirited* games fun games: it is in virtue of a meaning making function that they play for human life.

As I expressed earlier, it is not clear whether this kind of story can give us an account of what makes all fun games fun. For that, it must be the case that all and only spirited games are fun. It would certainly be interesting if this turns out to be the case. As an empirical matter, it seems to me that many spirited games are fun, and many fun games are spirited (though each example of a minimal game is potentially controversial). But showing that they are one and the same requires also showing that being spirited is necessary for being fun. To test this, we must examine whether we can take the steps I took above in reverse: the unique feature of a fun game is that the phenomenology of a unique kind of fun applies to it. But if the fun game can be broken down to its constitutive parts, then presumably how it feels like to play it will be how it feels to play its constitutive parts together. Therefore, the fun game cannot be broken down to its constitutive parts. Hence, there must be more to the fun game than the sum of its constitutive parts. Its constitutive parts, in other words, must create an "it." Therefore, the fun game must be spirited. This argument is quite ambitious in its own right, and we need not commit to it on this occasion. We can be content in saying that at least some fun games, and specifically some fun legal games, are fun in the unique way that they are fun in virtue of the meaning that they give to behaviors that playing them requires exhibiting.

This gives us a provisional token of the internal-value theory type. This is all tentative, of course, and whether the details of this token can be plausibly filled in worries me too. But I nevertheless find it attractive because it posits a unique and important role for law in human life and explains the inevitability of its evolution in human civilization. Though this may be, one could reject this token but still adopt the internal-value theory by giving different contents to G-fun. On such competing token theories, it will turn out that legal rules don't constitute any sort of meaning-making value but create another kind of G-fun. And that's fine too.

3.3.1. Legal Exceptionalism in the Token Theory

Legal rules constitute countless spirited games we inhabit, that is, complex social practices that have emergent significance beyond regulating human behavior. The rules that count my behavior as a vote do not merely regulate my behavior, they create a collective institution, in which a certain behavior in the right institutional context amounts to an institutional "move," like voting. And participating in that institution is valuable quite independently from whatever instrumental purpose voting may serve for me, likely in virtue of the institutional significance it will give to the behavior that "playing it" requires.

Legal rules are also different from non-legal game-rules in that they create a substrate for higher level phenomena that can be infinitely expanded. In other words, many legal games can themselves constitute even higher-level emergent practices, or meta-games, if you will. Those in turn can create meta-meta-games and so forth. For instance, certain legal rules create private property and contract. These in turn, along with perhaps some other legal rules, create employment, rentals, and sales. These in turn, along with perhaps yet some other legal rules, create credit cards, stock markets, and investment banking. And so forth. In this way, legal rules are not merely constitutive but also *generative* of games, and specifically of games we inhabit. Thus, if there is one sense in which we can speak of “the law game,” it is the sense in which legal rules constitute a generative social practice that serves as building blocks for many more higher-order social practices (games). And it is playing “the law game” in that sense which makes it possible for us to live a life that consists in inhabiting countless widespread and intersubjective games.

On this last point, compare Searle on language as a social practice that is generative of all other social practices. On Searle’s view, language is a necessary social practice for the existence of all other social practices. Thus, it is necessary for the noise or symbols I make to create words and sentences of say, the English language. Only then is it possible to attach further institutional (or practice-relative) significance to my behaviors; such that for instance the words I utter, or the ink-drawing I make on a paper, count as a promise, and that the promise can for instance count as a legally enforceable contract, and that a particular legally enforceable contract in certain further institutional settings counts as a marriage, and so forth. On my account, “the law game” is a mid-level social practice rather than a basic one, and its existence is not necessary for all other social practices, but it is generative in exactly the same way that language is generative on Searle’s account.

3.3.2. Advantages of the Token Theory over Eliminativism

At the end of Chapter 2, I maintained that our phenomenology of both playing games and encountering the law is one of a richly textured normative landscape, one that is divided into Hohfeldian subfields that proliferate games and other social practices, Hohfeldian relations which may—thus granting that this further point is controversial—affect what we should do, all things considered. I briefly said that this provides an objection to legal eliminativism because one problem with that view is that it makes the lives of two people playing basketball as identical to the lives of two other people not playing any games at all, so long as the same Hohfeldian relationships obtain between them outside of those games. And in doing so, it fails to capture the phenomenology of the relevant people.

In light of the token internal-value theory offered above, I can perhaps say that eliminativism not only fails to account for people’s phenomenology but something essential that is true of their lives. Because this further discussion shows that we not only feel like living different and possibly unique lives but likely really do. Thus, the rich and distinct texture of our normative relations with others that the eliminativist picture leaves out is not redundant but part of a reality that is essential to our live and understanding them. Accordingly, even if the institutional world made no difference to our normative relations outside, it affects how we understand our lives, our actions, and our relations to one another. But understanding these are important to normative theorizing. Thus, in setting out to ignore these internal normative relations, eliminativism lose more than resources for only metaphysical theorizing.

3.4. Characterizing the Internal-Value Theory Further

Now that all my cards are on the table, let me put things a bit differently: you might think that institutions are a good thing. Of course, you won't have to deny that there can be good or bad institutions. You only need to maintain that having an institution is at least in some respect better than having none. Granted, some institutions may be so bad that even though having them is in some respect better than none, all things considered, it would be better to not have them.

Such a view rings to me as somewhat true but also somewhat radical. So here is the same sort of view, somewhat tempered: you might think that collectively, the institutions that the law creates give rise to some value. This only commits you to the view that having such institutions collectively is in some sense better than having no law. Of course, you won't have to deny that some such institutions may be so vicious that all things considered, it would have been better to not have them (either individually or even collectively). Nevertheless, in such cases, the value that such institutions collectively create does not disappear but is merely outweighed by competing considerations, including the viciousness of some particular institutions or the emergent viciousness of them collectively.

This sort of view has been proposed by theorists across the positivism/anti-positivism spectrum including Dworkin, Finnis, Fuller, Waldron, and Gardner.⁹³ But all such views have two major differences with the internal-value theory. First, they insist that the value that legal institutions collectively create has to do with conceptually necessary features of law. One motivation of the internal-value theory is to reject this as both a substantive and methodological move. To see whether a rule or a set of rules play such roles as creating certain values for human life, we need not look at how it is conceptually classified (as law, etiquette, basketball, or whatever), nor can we extend any such role we find to all rules that fall under that conceptual classification. Not all rules within a classification will play the same—the classifications track something else (if anything at all).

Second, on all accounts the value that legal institutions collectively create is arguably *triggered*, but insofar as this value is sometimes postulated as a *moral* value, non-positivists sometimes thought they could claim the view as belonging to their camp.⁹⁴ From the ground up, the internal-value theory postulates a value that is *non-triggered*. This last point needs further unpacking: on all existing accounts, the value that legal institutions create has to do with things that we'd like to do or have pre-institutionally: we want to have mutual respect, non-domination, democracy, or alternatively, reliable coordinated or collective, division of labor and so forth. All of these values exist quite independently of the law, even if the only way to materialize them may have to be *via* the law. Legal institutions just become instrumental in realizing the values. Triggering theory therefore will have no problem in accounting for all of them.

Motivated by strong phenomenological intuitions about games, the internal-value theory starts with the postulation that at least certain institutions (legal or otherwise) *constitute* certain

⁹³ Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', *Harvard Law Review* 71:4 (1958), 630-672; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 2011); John Gardner, 'Nearly Natural Law', *The American Journal of Jurisprudence*, 52: 1 (2007), 1–23; Jeremy Waldron, 'Kant's Legal Positivism', *Harvard Law Review*, 109: 7 (1996), 1535-1566. Asgeirsson, somewhat of a self-identified positivist, argues for something along the same lines in a forthcoming book.

⁹⁴ Whether they are justified in their claims depends on how positivism or anti-positivism are specified. Plunkett (2019) *supra* note 12, especially in discussing Raz, suggests that at least on some specification of anti-positivism, the move may be of merit.

forms of value, just as basketball constitutes G-fun. This value is in addition to whatever pre-institutional value the institutions serve (or are designed to serve).

It is not entirely clear when such values are created and in virtue of what features of the relevant institutions. The existence of the value in every concrete case may also be controversial.⁹⁵ Moreover, even when it is clear that such values do come about, specifying them further will be controversial, even with respect to simple institutions like basketball. But these need not worry us because more than one specification may be possible. Some specifications will be no doubt more plausible than others. We may also think that some specifications are more apt for certain rules or contexts and others are more apt for others. But given that these specifications are not mutually exclusive, we may also think that they collectively exhaust legal normativity. The only thing we must be careful about is to make sure that in further specifying G-fun, we do not conflate it with pre-institutional values.

It may of course also turn out that no specification proves plausible whatever, in which case, the fun theorist will be forced to reject the demand for further specification of G-fun and retreat to either option 1 or 2 above.

Move on now to my token account. My idea that the value that legal institutions create has to do with meaning making makes it likely a non-moral value. And the fact that this sort of meaning-making is constitutively tied to particular institutions likely makes the relevant value non-triggered in line with the requirement of the internal-value theory. This last point needs further unpacking.

The value I have in mind is not pre-institutional because if I want to take your queen in a game of chess, it is not only because I have a pre-institutional desire to have fun, but also out of the desire to have chess-specific fun. As I discussed (in discussing the shortcomings of the triggering theory, chess-specific *can* of course be characterized as a triggered, hence pre-institutional desire but only in a vacuous way that puts pressure on the very distinction between pre-institutional and institutional values.

I also said that part of the reason to want to play chess is because playing triathlon all our lives would be not as fulfilling. Similarly, I said that we want to live in a society that has legal institutions, not merely because we have pre-institutional (moral or coordinative) needs and goals that legal institutions serve, but also because life without a substrate to play complex games we can collectively inhabit is seriously impoverished and alien. Here too, I appealed to a pre-institutional reason to have law. But note that in both cases, the appeal is to a pre-institution need to play some games for their own sake, that is a pre-institutional need to have institutional values.

Thus, the token theory is kind of complicated in appealing to the following three kinds of reasons to play by the rules: pre-institutional (hence triggered), institutional (basketball-fun, hence non-triggered), and pre-institutional need to pursue institutional values (triggered but on the assumption that playing spirited games are essential given human nature).

3.5. Is the Internal-Value Theory or its Token (Quasi) Natural Law? What About the Role of Human Nature?

I have said very little about what kind of reasons we have to follow the law under the internal-value theory. All I said was that we have non-triggered reasons because I think that's all that

⁹⁵ The existence of G-fun can of course be challenged wholesale. But this amounts to asserting that the phenomenological challenge to legal formalism is mistaken or that legal formalism does not leave out anything of the sort I claimed it does. As I discussed in the main text, it is also possible to think that though legal formalism does leave G-fun out, it is still overall more plausible than the internal-value theory.

matters. I also intentionally avoided common labels for the various competing views on legal normativity that I discussed, because there is more than one way of specifying how these labels should be understood.⁹⁶ But at this stage, it may be helpful to clarify where the internal-value theory falls on some of these dimensions and what affinity it has with existing views that characteristically define our common labels.

First, it may seem that the internal-value theory is in the tradition of natural law. But aside from appealing to a weak conception of human nature in the specific token I presented, the internal-value theory rejects natural law because it rejects there being a *moral duty* to obey by legal rules. On the internal-value theory, one has only a (likely) non-moral and defeasible reason to follow legal rules. As I have argued above, natural lawyers like Fuller and Finnis may find my view as an acceptable compromised position, but their own view is that we have a moral obligation to follow legal rules. Nevertheless, one might argue that an appeal to human nature is sufficient to render any theory (hence my token theory) a version of natural law. I think nothing of further substance follows from this kind of classification but adhering or not to some naming conventions.

Furthermore, given that my token theory is about enriching human life, one might think that the reasons it postulates for following legal rules are prudential reasons. I am not sure what more follows if they are. But, and here things get more interesting, you might also think that I must follow the rules in my part for you to also be able to pursue G-fun, and that there are second-personal reasons to play by the rules in addition to prudential reasons. If second-personal reasons are necessarily moral reasons, then the internal-value theory may have some affinity with (some parts of) both Dworkin and Rawls (although the kind of moral reasons they had in mind were likely triggered through and through).

The internal-value theory (or at least the token of it that I offered) therefore shares certain features with natural law and other anti-positivist accounts. But it also outright rejects some versions of the latter, including Greenberg's moral impact theory.

On the other hand, the internal-value theory shares some features with some versions of legal positivism. For example, in *Legality*, Shapiro defines legal positivism as any theory that considers law as a social ontological phenomenon (though on this definition, Dworkin in *Law's Empire* should be considered a positivist). The internal-value theory also depicts law as a social ontological phenomenon.

Lesley Green defines legal positivism as any theory that considers the conditions of legality in the sources rather than merits of law. On the internal-value theory whether a practice is a *legal* practice depends on its sources, but whether its rules are more-than-formally normative depend on their merits (understood in terms of relevant features of the particular practice they constitute).

A similar way distinguishing positivism from anti-positivism has to do with whether legal obligations are content independent or content dependent. On the internal-value theory, only legal rules that are constitutive of certain legal practices are more than formally normative and they will be so irrespective of their contents. However, whether a legal rule is constitutive of such practices depends on its content (and potentially the content of other rules).

Finally, a more recent way of drawing the party positivism/anti-positivism lines based on whether legal rules are grounded in normative or (entirely) non-normative facts.⁹⁷ I think on the

⁹⁶ Plunkett (2019) *supra* note 12 discusses some of the distinct ways that the labels can be understood.

⁹⁷ For discussion, see Plunkett (2019) *supra* note 12 and the references there.

internal-value theory, legal rules are (partially) grounded in *normative* (social) facts (hence the Razian puzzle I discussed in the last section of the previous Chapter).⁹⁸

3.6. Getting to Legal Rationalism's Universalist Prong Too

In section 3.2., I argued that there are two potential ways of ascribing the reason to follow legal rules to their legality: the uniqueness of legal games in that they are societal and the possibility that legal games constitute the political game. Remember that though I argued these in the alternative, they are not mutually exclusive, meaning that they both can be true. In this section I want to test and see whether these can be the basis of defending legal rationalism's universal prong.

Note that the universal prong of legal rationalism can be defended in its own right and independently of its internalist prong. I flagged this matter in Chapter 2, but it is worth repeating. The universal prong of legal rationalism says only that all legal rules are reason giving. This much can be true even if all legal rules turn out to be reason giving only in the triggering sense. Moreover, since we have given up on the idea that legal rules are reason giving in a unified way, the universal prong of legal rationalism may be defended by appeal to various kinds of reason giving. In other words, if it turns that some legal rules are reason giving in a triggering sense, some others in an internal G-fun kind of way, and some others in some other ways such that one way or another, every legal rule turns out to be reason giving, legal rationalism's universalist prong turns out to be true.

The challenge I am proposing for this section is to extend what I have said about the legal internalism of some legal rules to all of them. This path leads to emerging version(s) of legal rationalism, but it requires biting some bullets, which though not devastating, will cost them significant plausibility points. What may end up making this emerging version or versions of legal rationalism nevertheless attractive, is its (or their) independence from the truth of anything like moral rationalism (*à la* interpretivists like Greenberg) or its legal analogue (*à la* natural law theorists like Fuller and Finnis).

We have already conceded that not all games that are constituted by legal rules are fun. There are, in other words, actual or conceptual games partly constituted by legal rules that we have no internal reason to play. Nevertheless, this does not show that we have no reason to follow their constitutive rules. Because for a rule to not be reason giving in line with the internal-value theory, it is not enough for it to constitute a neutral game. What must be true of it is that it doesn't constitute any fun game whatsoever. I suspect that finding such rules is much harder than many theorists seem to think.

Enoch, for instance, writes with confidence that examples of such legal rules are readily available. All one needs to look for are particularly stupid or immoral rules in particularly stupid or immoral legal systems. But it is possible that even in particularly stupid or immoral legal systems, legal rules create many fun games. Especially, if what I have said in the previous two sections is true, then part of what it is to be a legal system is to be the constitutive rules of various societal level games that we inhabit, and an important feature of these games is that they are spirited. In other words, if the rules or the system of rules don't make any spirited games that we can inhabit, then they are not legal rules or legal systems. If they do, then they create a unique metaphysical phenomenon to which the phenomenology of a unique experience (likely) applies, an experience, which at least on some conception of human nature, make them better alternatives to no legal rules/systems, though a worse alternative to better ones.

⁹⁸ See Plunkett (2019) *supra* note 12, especially his discussion of Raz.

I have thus far spoken of marriage as an example of a fun game that is in part constituted by legal rules. But now consider abusive marriage, which is a stupid and immoral game also partly constituted by legal reasons. Nevertheless, if what I have said thus far is true, it would be a fun game. This is not to say that we will have all things-considered reason to play it. What it means is that we have some reason to play it, even though this may be overwhelmingly outweighed by countervailing reasons, including its very own stupidity or immorality. This shows that the constitutive rules of many immoral or stupid games may still be necessarily reason giving, even though their reason may be outweighed, or even may be *necessarily* outweighed.

So given that wicked law still creates a textured social ontology and fun games that people could inhabit and enrich their lives with, it is a better alternative than no law (though a worse alternative to better law), we must acknowledge two things: 1) the suffering of those who are excluded from participation in the institutional reality that it creates and 2) the heroism of those who opt out in resistance.

Discriminatory legal systems that deny a class of people the option to opt into the various institutions that they create are egregious precisely for this reason and because participation is of some value. Of course, the physical abuse and persecution that discriminatory legal systems may perpetuate cause further injury that their victims also suffer. But being forced to occupy a space outside the institutional reality created by the law is in and of itself an injustice that these victims suffer (which is independent of and in addition to the injustice of having to live outside of law's rights protection).

Equally, those who are allowed to live within the institutional reality created by discriminatory legal systems, still have a reason to do so, which is to say, they have reason to play at least certain games created by those laws and all the rules that they presuppose. In virtue of the discriminatory nature of these institutions, however, those not excluded may have moral reasons to resist, change, or rebel against the system or some of its specific rules. But doing so in line with such moral reasons comes at a cost, beyond those that the triggering theory can account for. Stepping down from one's institutional role, quitting one's job or position of power, pushing for legal and social change, and lastly civil disobedience and rebelling against wicked law all come at costs that are related to opting out of institutional reality and missing out on G-fun sort of values that fall outside of the triggering account.

Of course, there may be triggering reasons such as legal sanctions for all of the above too, but such sanctions do not exhaust the costs. And of course, some sanctions may be precisely designed to deny their targets the G-fun sort of value, just as they deny persecuted classes of the same. Exiling and stripping people from their citizenship may be examples of such legal sanctions. But the existence of such sanctions attests to the value of opting in and to the impoverishment that results in lives of those who are denied from it.

Moreover, recall the network of interconnected games that are legally constituted. In such a network, opting in or out of one game amounts to opting in or out of the entire network. Not only because the Hohfeldian relations in one domain affect those of others, but also because various games within the network are constituted by mostly the same legal rules. So, even if we find a game that is truly not fun, its constitutive rules may still constitute a variety of other games. All it takes for these rules to be normative is that one such game is fun.

Moreover, many of the games that legal rules constitute, and those that we inhabit, presuppose a vast number of legal rules, though they may not be themselves constitutive of those games or constitutive legal rules at all. Consider the rules of contract, standing, statutory

interpretation, tort law, criminal law, and the list goes on. In other words, even when some rule is not itself constitutive of a fun game, playing a fun game may still require following it. In virtue of these relations, the normative valence of these rules also turns to 1.

Ultimately, something like this seems to happen: we are committed to one thing that is tightly related to some other thing, and the reason to have one bundles up with the reason to have another in such a way that gives rise to a network of inter-related reasons.

In addition to this network, there is the political game, which itself implicates many legal rules. Nevertheless, as I noted in the above discussion of skepticism, it is not clear whether playing this game necessitates following all of its rules. Following precisely which legal rules is necessary for realizing the good of playing the political game is itself an interesting and contentious question. Nevertheless, this game too likely implicates many legal rules.

Given just how many legal rules are turned on by a single fun legal game and the possibility that there are many fun legal games, it won't be entirely implausible to think that the totality of the rules that are normative in a basketball kind of way may encompass the legal domain in its entirety. Hence, it is not entirely implausible to think that the internal-value theory also switches on legal rationalism's universalist thesis.

At any rate, in light of the internal-value theory, finding examples of legal rules we have no reason to follow are much harder than Enoch assumes. Nevertheless, their existence cannot be ruled out with anything we have said. Some of the most difficult examples for the internal-value theory to account for are legal rules that don't constitute any games and seem quite isolated from the others (such as rules that name a certain highway or make a certain holiday).

At this point, three options remain open: first would be to stop here but distinguish between weak and strong versions of legal rationalism's universalist thesis. The weak universalist thesis maintains no more than what we have shown. This can be accommodated both by the internal-value theory and legal formalism. For remember that Enoch can also accommodate the fact that we have reason to follow most legal rules (though on his view, their reason giving is of course only in the triggering sense). The strong thesis is refuted by both.

Before moving on to the second and third options, it is worth noting that there is good motivation for interpreting legal rationalism's universalist thesis weakly. As discussed in Chapter 2, the existing varieties of legal rationalism appeal to the nature or concept of law, so they have no choice but a strong universalist thesis. Nevertheless, what they try to make sense of is only that most legal rules are most of the time reason giving. In other words, though the debate became about the nature of law, this may have been inadvertent, because all the examples that animated the debate were real cases that even a weak version of legal rationalism can accommodate. It is my suspicion that when Fuller for instance talks of fidelity to the law, he does not have in mind an analytical position that is falsifiable with one counter example, but instead something like a weak universalist claim. Insofar as the internal-value theory shows that for all practical purposes, and in cases that actually matter, we have non-triggered reasons to follow the law, I think it provides an acceptable compromise for someone like Fuller.

In other words, even though legal formalism can account for the idea that most of the time we have reason to obey most laws, it will still make legal rationalists like Fuller or Finnis uncomfortable, for at least two reasons: first because legal formalism does not create a general presumption in favor of obeying the law and it doesn't take account of their intuition that we should still obey the law even absent instrumental or prudential reasons, or even in the presence of countervailing triggering reasons, including reasons against our self-interests. Second, legal rationalists have the intuition that despite all its contingent shortcomings, following legal rules is

tightly related to certain forms of value, or that law plays an important role in our lives, and a role that is perhaps no less important than that of morality. The internal-value theory, however, accommodates legal rationalists in both respects. And so, I suspect that legal rationalists like Fuller or Finnis might find the internal-value theory appealing.

If you share the intuitions of legal rationalists but you are not sure whether the internal-value theory works for you, this would be my pitch: if you think that legal rules are normative as a matter of necessity and in virtue of being legal rules, then you will find my view unsatisfactory. But if you maintain that we have a reason to follow most legal rules most of the time and that said reason holds even when no triggered reasons are present (or worse yet, when countervailing triggered reasons are present), but you are still happy to allow that something like this isn't necessarily true about *every* legal rule (actual or conceptual), then you could adopt the internal-value theory and call yourself a weak legal rationalist.

The second option is to stick to the strong reading of the universalist thesis and try and to show that the internal-value theory necessarily implicates every legal rule, one way or another. I can think of two possible ways to do this. One would be to claim something about the domain of law on the basis that many of its members are normative. Here, we may, for instance, think that law's categoricity plays a role. Another way would be to claim that legal rules do not merely demand to be followed themselves, but that the rules of their domain be followed. I think following these paths is possible, but it requires biting many controversial bullets.

Finally, the third option would be for legal rationalists to only use the internal-value theory to refute some objections to legal rationalism without adopting it as their own. The internal-value theory at least refutes arguments against legal rationalism that purport to show that no internal reason giving is possible for practice-qualified rules generally. The internal-value theory refutes them because it provides basketball rules as a counter example. And legal rationalists may want to appeal to the internal-value theory to this extent only. The internal-value theory does not refute other objections against legal rationalism, but perhaps legal rationalists can pursue some other avenues to address those.

I myself refrain from pursuing either of the second and third options on this occasion, because as of yet, I don't think they will have any more explanatory power than the sort of weak legal rationalism I just discussed. That is to say, I don't think that strong legal rationalism (by way of the internal-value theory or otherwise) can recover the plausibility points it will have lost along either of the two ways. Nevertheless, it may be worth testing this intuition on a different occasion.

4. Law's Normativity as a Success Criterion

It has been said that accounting for law's normativity is a success criterion for any theory of law. But as we saw, what exactly law's normativity amounts to is itself controversial. On one hand, in addition to various natural law theorists, people like Dworkin, Raz, and Kelsen maintain that what needs to be accounted for is law's *moral* normativity.⁹⁹ On the other hand most contemporary theorists working in the positivist tradition, including Kramer, Plunkett & Shapiro, Enoch, Berman, Southwood, and Kaplan maintain that what needs to be accounted for is law's

⁹⁹ Dworkin (1977) *supra* note at 48, 57. Raz (2009) *supra* note 25, 148–151). Raz calls this conception of the normativity of law 'the justification view of legal validity' (153), which he credits to Kelsen. The justification Raz has in mind is moral justification. See also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), 216, where Raz emphasizes that legal authority is moral authority, but that a legal system need not have such authority to be legal—it merely needs to claim to have it and be capable of having it.

formal normativity. This leaves it unclear as to what exactly about the law needs to be accounted for, no less as a success criterion for any theory of law.

What are we then to make of the idea that accounting for law's normativity is a success criterion for theories of law? Kaplan (and to some degree Enoch) proposes that we should just jettison the idea.¹⁰⁰ Noting that law's normativity is often taken as "a pretheoretical datum: a relatively uncontroversial feature of law that rules out all theories of law that fail to account for it," (469) Kaplan rejects this idea by retorting that the law is perhaps only normative in "the minimalist sense of being constituted by social rules" (483).¹⁰¹ I think however, that the idea should not be jettisoned. Instead, it should be understood as one way of making sense of the phenomenological datum I said is at the heart of the positivism/anti-positivism debate, namely the intuition that we must follow the law, unless there's good enough reason not to.

At the start of this work, I condensed a rather diverse array of phenomenological data into a succinct intuitive claim at the risk of oversimplifying the matter because I thought this is all we needed to get started. As a result, my discussion of legal formalism, legal rationalism, and the internal-value theory as competing explanations of the phenomenon of our interest has also been quite schematic. We are now at a place where we can give more content to the pre-theoretical phenomenological data. Once we do that, we can get a better flavor of what this success criterion is supposed to be.

The formulation of the success criterion is sometimes traced back to Hart's critique of Austin.¹⁰² Most contributors to the field think that Hart's critique of Austin succeeds. So, it seems clear that whatever the normativity of law is, Austin's theory couldn't account for it. But this by itself does not make clear what else a theory must explain under the heading of law's normativity.

Importantly, what Hart took to be law's normativity is itself unclear. That is to say, it is not clear what Hart had in mind, when he criticized Austin. Kaplan, Southwood, and Berman all think that what Hart thought Austin could not account for was law's *formal* normativity (Kaplan and Berman also argue that if what's to be explained is law's formal normativity, then Hart's own account meets it). But, as Enoch rightly points out, if this is what Hart thought needs accounting for, it can hardly create a success criterion for a theory of law, given that just about anything can be formally normative.¹⁰³ Moreover, not everyone interprets Hart in that way. At least Raz and Fuller read Hart as subscribing to a view, according to which legal rules are more

¹⁰⁰ Kaplan (2017) *supra* note 28; Enoch (2011a) *supra* note 5.

¹⁰¹ Kaplan (2017) *supra* note 28, adding: "for Hart, law is normative in the sense that it is rule-governed. Law is a system of rules, like boxing or etiquette. This is not to say that law is a game or that law is a system of etiquette. There are many important differences... there is more to law than what we find in games or etiquette. But there is not more to the *normativity* of law" (484, original italics).

¹⁰² For discussion, see Kaplan (2017) *supra* note 28 and the references there.

¹⁰³ Enoch (2011a) *supra* note 5.

than formally normative, though not *morally* normative.¹⁰⁴ But if this is what Hart thought, then clearly his own account does not account for it.¹⁰⁵

We should not go too far into the exegesis of Hart though. What's important for our discussion isn't what Hart thought or what his account succeeds or fails at showing. What's important for us is rather the fact that Hart's critique of Austin doesn't help in articulating the upper limits that the success criterion of accounting for law's normativity purportedly places on theories of law. In other words, it doesn't show what else a theory must show to pass the test. All it shows is that if it shows only as much as Austin's theory shows, then it too will fail it.

Hart thought Austin's theory fails in four respects to account for law's normativity: first, it renders unintelligible many familiar references to duties in the absence of sanctions, for example, the duty of the highest courts to apply the law. Second, it depicts the law as indifferent between abiding the law or breaking it and accepting sanctions; thus between people, on the one hand, murdering and being jailed, and on the other hand not murdering at all. But Hart overserved that "You have an obligation not to murder" cannot merely mean "If you murder you will be punished," for "The right to disobey the law is not obtainable by the payment of a penalty or a license fee."¹⁰⁶ Third, it could not account for the fact that subjects also want to be *guided by* their duties—whether in order to fulfil them or deliberately to infringe them—or for the fact that the law is equally there for the confused in addition to the bad actor. Fourth, it failed to make sense of the fact that officials invoke the law as *justification* for the punishment.

These four aspects of Hart's critique could set the floor of what any theory of law should take account of. For example, a theory of law, according to which the highest courts would not have any duty to apply the law would fare just as badly as Austin's. So too a theory of law that depicts it as indifferent between abiding the law or breaking it and accepting contingent consequences it may have. And so forth.

Obviously legal rationalism straightforwardly passes the test in these regards. But so does legal formalism, though this may not be immediately visible. Importantly, some language in Enoch may be misleading. For instance, Enoch writes:

Suppose we live under a stupid, inefficient, often morally corrupt legal system (surely, it's at least possible that there are such systems), and that I'm about to perform an action that violates some stupid, inefficient, morally corrupt but legally valid rule (surely, the existence of this too is possible). You then tell me "Don't do *that*! It's illegal!," and I respond with "I see that it's illegal, but what is it to me? Why should I play the legal game (within this jurisdiction, at least)?"

This response doesn't sound to me even initially odd. It doesn't sound at all more

¹⁰⁴ For discussion of Raz, see Berman (2019) *supra* note 18. Berman thinks that Raz actually changed Hart's view on the matter, such that although in his earlier writing, Hart subscribed to no more than legal formalism, in his later writing (and under Raz's influence), he slightly changed his own view. I think that the fact that Fuller understood Hart's view in this way is clear from the fact that he takes Hart to endorse the idea of 'fidelity to law' though rejecting a moral reason to obey the law. What Fuller seems to have thought then is that Hart maintains that there is reason to follow the law, but such reasons are non-moral. For the record, I too read Hart along similar lines and as having thought that there are non-moral non-triggered reasons to follow the law. But that view is too similar to the internal-value theory, and I don't want to count Hart as on my team on this occasion, lest you think I am appealing to his authority.

¹⁰⁵ See Kaplan (2017) *supra* note 28 and the references there.

¹⁰⁶ *Francome v. Mirror Group Newspapers Ltd.* [1984] 2 All ER 408 at 412.

problematic then “Sure, I see that fashion requires that I don’t wear white after Labor Day, but what is *that* to me? Why should I play the fashion game?”¹⁰⁷

Upon first look, this sort of language may suggest a denial of Hart’s success criteria, for instance, as a denial that judges of high courts have any reason to apply the law (and so forth). But we should take care to interpret Enoch carefully: for his point here is not that such reasons don’t exist. His point is that though such reasons often do exist, they are necessarily triggered. Legal formalism then can easily accommodate all four aspects of Hart’s critique. It would only insist that the explanation in every instance is by appeal to normative facts that are independent from the law.

Finally, the internal-value theory passes the test just as easily and as straightforwardly as legal rationalism. So, on Hart’s criteria against Austin, all three contenders perform equally well.

What next entered the field (that we can now categorize under the banner of law’s normativity) were diverse historical cases and hypotheticals that gave rise to competing intuitions which animated the initial rounds of debates against Hart. If there was a success criterion here, it was about how well each theory fares in accommodating the items on that list as compared to competitors. These diverse cases could be distilled in terms of two further desiderata that seemed somewhat contradictory: on the one hand, any theory of law had to be compatible with adherence to the rule of law as a political ideal; on the other hand, it had to equally allow for the possibility of wicked law and explain how phenomena like judicial activism or civil disobedience were nevertheless justifiable. In other words, it had to make room for the law to be at once both fallible and (at least for the most part) practically authoritative.

Much ink has been spilled about these issues and how well various views within positivism or anti-positivism fares in these respects. For the most part, the literature (of at least up until ten or so years ago) operates under the following false dilemma: positivism performs well with respect to accounting for wicked law but falters with respect to adherence to the rule of law as an ideal; anti-positivism performs well with respect to adherence to the rule of law but falters with respect to accounting for the possibility of wicked law.¹⁰⁸ I hope it is clear from my earlier discussion why this dilemma is false: whatever party a view belongs to, it is either a version of legal rationalism (including weak legal rationalism, like Raz) or legal formalism. Yet, both legal formalism and legal rationalism are perfectly capable of accounting for both the possibility of wicked law and the importance of the rule of law as an ideal. As we saw, their explanations of these phenomena couldn’t be more different—they are binary opposites; one giving legal rules the normative valence of zero, the other the normative valence of one. But they are equally capable of accounting for both phenomena. The internal-value theory offers a more tempered explanation that avoids both extremes. But it still doesn’t gain an upper hand against them in these respects either.

There is one more nuance to the idea of law’s normativity that the debates about wicked law highlight however, namely how legal reasons match up against countervailing reasons. One initial shared intuition was that legal reasons (whether they are moral, or triggered, or what have you) are of unusually high magnitude as compared to reasons to follow other social rules. Meaning that for breaking the law to be justifiable even on moral grounds, the moral stakes must be rather high.

¹⁰⁷ Enoch (2019) *supra* note at 73, italics in the original, internal notes omitted.

¹⁰⁸ To my knowledge, the first piece ever that systematically addressed the falsity of (the first prong of) this dilemma is Enoch (2011a) *supra* note 5.

On one hand, the ideal of the rule of law suggests that ordinarily, even weak legal reasons outweigh strong prudential reasons. What the idea of wicked law showed was that legal reasons aren't infallible either. Thus, even though legal reasons are (at least often) genuine reasons (whether in the triggering way, the moral way, or something else), they can be outweighed by countervailing *moral* reasons. Of course, the ideal of the rule of law puts constraints here too, meaning that to defeat strong legal reasons trivial moral reasons are not quite sufficient either. Nevertheless, sufficiently strong countervailing moral reasons can defeat genuine reasons to do as the law says.

But the shared intuition wasn't merely about the magnitude of legal reasons. It was instead about the comparative strength of legal and non-legal reasons of the same magnitude. Thus, part of the shared intuition was that to be sufficiently strong, countervailing moral reasons needed not be as great in their magnitude as the legal reasons they defeat. Put succinctly, the shared intuition was that legal reasons, though they (at least often) amount to real reasons (in whichever way) that are *in kind* weaker than moral reasons (but stronger than prudential reasons).

Accounting for this further intuition too therefore, we might think, was part of the success criterion. So articulated, part of the success criterion is that a theory of law must ascribe *the right shade of* normativity to law.

So articulated, this aspect of the success criterion overwhelming sides with the internal-value theory over legal rationalism and formalism. For consider that both legal rationalism and legal formalism, attribute the same shade of normativity to legal norms as they do to *moral* norms. Let me unpack these in turn, starting with legal rationalism.

On some versions of legal rationalism (like Greenberg's moral impact theory), legal obligations just are moral obligations. Raz shares this view. On other versions of legal rationalism, like natural law, there are moral duties to abide by legal reasons. On all such views then, when legal reasons are up against countervailing moral or prudential reasons, they can only be defeated by magnitude. This flouts both desiderata, namely the joint intuition that we need countervailing prudential reasons of much higher magnitude or moral reasons of rather smaller magnitude to defeat legal reasons.

Turning to legal formalism, we see that despite its radical differences with legal rationalism, it performs just as poorly with respect the success criterion so articulated. For remember, on legal formalism, the reasons to follow the law, though triggered, belong to a domain of oughts-sans-phrase. This is the same domain that the norms of morality belong to according to moral rationalists (and if moral skepticism is true, then it is the same domain that the norms of morality trigger). Accordingly, on legal formalism, if you have both a legal reason to ϕ that does amount to a real reason to ϕ (by way of triggering) and a moral reason of the same magnitude not to ϕ , then your moral reason does not defeat your reason to ϕ . This flouts the intuitive consensus that even a moral norm of a smaller magnitude should suffice to defeat it. Put differently, according to legal formalism, though you may have a moral reason not to ϕ , if this moral reason is a tiny bit smaller in magnitude than your triggered legal reason to ϕ , you should still go ahead and ϕ .

For the record, eliminativism performs just as poorly as well. For it too gives considers the reasons to do as the law says as moral reasons, except it denies that said moral reasons create a distinct domain of "legal norms."

Of course, Raz, legal formalism, and eliminativism all can tell elaborated stories about why in the relevant cases, their respective views track the *real balance of reasons*, despite

appearance to the contrary. But remember that what was thought to be intuitively clear was that this is simply not true about law. We can of course imagine the law as mapping up to what various theories claim, but this would be revisionary, if no real cases of law seem to phenomenologically match. Straightforwardly, when doing practical reason, it seems almost always true that a countervailing moral reason should defeat a legal reason, even if the relevant legal reason amounts to a genuine reason of the same magnitude. Of course, we cannot confuse the phenomenology of practical reason with normativity. But the phenomenology offers intuitive evidence about normativity. In particular, it provides about the shade of law's normativity. This evidence is obviously not conclusive, but it tilts the balance in favor of the internal-value theory.

The internal-value theory, on the other hand, captures the shade of law's normativity exactly right. On the internal-value theory, at least most legal rules most of the time amount to (or give) reasons. First, such legal reasons are presumptively pre-emptive (i.e., ordinarily replace the private assessment of relevant reasons to obey rules considered in isolation) because they are categorical and practice-wide.¹⁰⁹ But they are not authoritative (they are not all things considered, nor are they indefeasible). They are strong enough (both in kind and magnitude) to outweigh ordinary nonmoral countervailing reasons. But in kind weaker than countervailing moral reasons. Thus, on the internal-value theory, agents may defect on their legal duties in light of countervailing moral reasons; but officials can ordinarily justify punishing people for breaking law out of self-interested reasons. Put differently, they bind both private agents and officials to follow the law short of a sufficiently strong (often) moral reasons to the contrary. More importantly, on the internal-value theory, officials can justify punishing people for sufficiently *morally* egregious behavior that is permitted by (wicked) law, though doing so may be in violation of the limited reach of retroactive criminal law. This, remember, is a key point of contention in the Hart-Fuller debate that the internal-value theory can easily address.¹¹⁰ In short, the internal-value theory offers a balanced account, one that locates the normativity of law in a sweet spot between the two extremes of legal formalism and current varieties of legal rationalism.

5. Conclusion

In a major way, this work was motivated by small nuances that legal formalism fails to account for. It's possible that these nuances are too small to be worth pursuing. It is also possible that the price any competing theory that captures them must pay proves too high. That seems to be so, in the case of legal rationalism for instance. Nevertheless, I regarded the search for such an alternative worthwhile.

¹⁰⁹ The rules are pre-emptive in a non-Razian sense: because the justification happens at the level of practice rather than each move. Maybe a single move within a practice appears immoral or senseless but in the grand scheme of the practice, this move makes sense; the justification of the practice asks whether in the grand scheme of all things, a practice is better with such a rule or without it, or whether a practice with such a rule is better than one without it. Thus, considerations about whether to follow specific legal rules are pre-empted; other considerations will arise and persist however, such as whether I should opt in this or another practice and whether I should revise it or let it be. The result is the reason to follow legal rules will be protected from circumstantial reasons analysis or potential reasons against following particular rules considered in isolation. For further discussion of the sense in which a practice's constitutive rules preclude us from reconsidering each of its rules in isolation, see Tamar Schapiro, 'Compliance, Complicity and the Nature of Nonideal Conditions', *Journal of Philosophy* 100: 7 (2003), 329-355; John Rawls, 'Two Concepts of Rules', *The Philosophical Review* (1955).

¹¹⁰ See generally H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71: 4 (1958) and Fuller (1958) *supra* note 93.

I then started from what legal formalism cannot capture to sketch out a provisional account under the heading of the “internal-value theory.” In doing so, I also tried to make explicit what I thought were legitimate worries about whether something like G-fun exists, whether it exists in the case of legal games, and whether legality has anything to do with it. In many ways then, a full explication and defense of the internal-value theory remains work in progress. Nevertheless, I argued that if these worries can be overcome, we will have a theory of legal normativity that not only passes a minimum threshold of plausibility, but also performs better than legal formalism and rationalism in important respects.

In addition to ascribing the right shade of normativity to law, such a theory is attractive because it acknowledges how the law is itself a generative social practice that like language serves as a building block for an infinite number of more complex and higher-order social practices. It also posits a unique and important role for law in human life and explains the inevitability of its evolution in human civilization.

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