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THE STANDARD PICTURE AND ITS DISCONTENTS

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I. Introduction

In this paper, I argue that there is a picture of how law works that most legal theorists are implicitly committed to and take to be common ground. This *Standard Picture* (SP, for short) is generally unacknowledged and unargued for. SP leads to a characteristic set of concerns and problems and yields a distinctive way of thinking about how law is supposed to operate. I suggest that the issue of whether SP is correct is a fundamental one for the philosophy of law, more basic, for example, than the issue that divides legal positivists and anti-positivists, at least as the latter issue is ordinarily understood.

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I presented more or less distant ancestors of this paper at several colloquia and conferences: Columbia University Law and Philosophy Workshop; University of California, San Diego Philosophy Colloquium; University of Michigan Philosophy of Law Conference, 2009; University of Southern California Law and Philosophy Workshop; Symposium on "What Determines the Content of the Law?," American Philosophical Association Pacific Division meeting, 2008; University of Michigan School of Law Faculty Colloquium; University of Texas, Austin School of Law Faculty Colloquium; Stanford-Yale Junior Faculty Forum, Yale University; Southern California Law and Philosophy Group. I am very grateful to participants in these events for the opportunity to present the paper and for helpful comments. For detailed written comments, I'm especially grateful to Joseph Raz, Jeremy Waldron, and their students at Columbia, and to Andrei Marmor, Scott Soames, and their students at USC. I want to thank Larry Solum for valuable comments at the APA symposium. I also owe a special debt to Jules Coleman and Steve Perry, who provided detailed comments at the Stanford-Yale forum.

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The goals of the paper are threefold: 1) to identify and articulate in some detail the Standard Picture; 2) to show that SP is widely held and has important consequences for other debates in the philosophy of law; 3) to show that SP leads to a serious theoretical problem. I emphasize the modesty of these goals in two respects. First, I make no claim to refute SP. Second, I give only the briefest sketch of my own alternative picture. In a sequel to this paper, “Beyond the Standard Picture” (Greenberg 2011), to be published separately for reasons of space, I develop the alternative picture and show that it promises to avoid the theoretical problem I pose for SP. Also, in the sequel, I respond to important objections.

A bit of terminology. The content of the law in a given legal system (at a given time) consists at least of all of the general legal obligations, rights, privileges, and powers that exist in the legal system (at that time). In common usage, the term ‘law’ is ambiguous between, on the one hand, the content of the law and, on the other, the legal system, which includes institutions and practices. Where context will prevent confusion, I will follow this common usage, sometimes using ‘law’ for the content of the law and sometimes for the legal system.

Part II focuses on the Standard Picture. In section 1, I describe the picture and spell out its commitments. Next, in section 2, in order to open the imagination to other possibilities, I briefly sketch two alternative pictures. Finally, in section 3, I offer evidence that SP is widely taken for granted.

Part III raises problems for SP. In section 1, I begin by trying to shake off the idea that SP is obviously true. I look at the way in which we derive the law from statutes

and cases and argue that SP does not fit seamlessly. In sections 2 and 3, I argue on more theoretical grounds that SP is problematic. Finally, I give a brief summary in Part IV.

II. The Standard Picture

1. A Sketch of the Standard Picture

Nowadays it is uncontroversial that law is created by people—more precisely, that the content of the law is in part the result of the actions, decisions, and utterances of people. Paradigmatically, the relevant actions include the enactment of statutes and regulations and the decision of litigated cases. But what exactly is the relation between the law-creating actions and the content of the law? In other words, how do the law-creating actions figure in the full constitutive account of the content of the law?² This may seem a strange and unfamiliar question. Part of the reason it seems strange may be that the answer, at least in outline form, seems so obvious as to go without saying.

As noted in the Introduction, I believe that there's a picture of how law works that is widely taken for granted by legal theorists. More precisely, it is a picture of what constitutively explains the content of the law. Those who take this Standard Picture for granted generally assume that others do so as well. In other words, SP is widely assumed to be common ground. My claim is not that most or indeed any legal theorists explicitly avow SP—in fact, in some cases, it may be in tension with what they would explicitly avow. Rather, the claim is that they are implicitly committed to it, as evidenced for example by what they take to be the problems that need to be solved and by the

² By a “constitutive account”, I mean the kind of elucidation of the fundamental nature of a phenomenon that philosophers have tried to give for a wide variety of phenomena, such as knowledge, justice, convention, personal identity, and meaning. Such a constitutive account or explanation of a phenomenon yields constitutive accounts of the obtaining of particular facts. For example, if knowledge were justified true belief, then John's knowing that zebras have stripes would be constituted by John's having a justified true belief that zebras have stripes. Constitutive explanation is usefully contrasted with causal explanation. A causal explanation of a particular wall's being white might appeal to some workers' having applied white paint to it. By contrast, a constitutive account of the wall's being white might appeal to the fact that the molecules that make up the surface of the wall have certain complex reflectance properties. For more detailed discussion of constitutive accounts, see Greenberg (2005).

assumptions on which their arguments depend. As I will illustrate in section 3 below, those who are implicitly committed to the Standard Picture include both legal positivists and anti-positivists or natural law theorists, though I don't mean to claim that all theorists in either camp accept it. (Given that it is rarely explicitly articulated, it is not always easy to be sure whether a particular theorist accepts the Standard Picture. And, of course, a theorist may presuppose the Standard Picture at some points and not at others.)

In this section, I sketch the Standard Picture. My characterization of the picture will have to be somewhat vague for at least two reasons. First, the picture is a picture—an organizing scheme—rather than a precise doctrine. Second, it is difficult to characterize a view that is not articulated by its adherents and indeed is treated as not a substantive position, but a common starting point too obvious to be acknowledged.

I will first give a very rough sense of SP, and will then attempt to make it more precise. At its simplest, the idea is that the content of the law is the meaning of certain legal texts (or utterances). Thus, for example, leaving aside the role of precedent, nearly all participants in debates over what the Constitution requires take for granted that the question of what the Constitution requires is the question of what the Constitution means. For example, originalists and non-originalists generally take themselves to be debating what the Constitution means. Originalists think that the Constitution means what it originally meant (or what the framers or ratifiers originally meant), and non-originalists dispute this. Both sides generally take for granted that what they are debating is what the Constitution means. Similarly, debates about statutory law tend to assume that the question at issue is the meaning of the relevant statute.

Two qualifications are needed. First, adherents of SP disagree not only over how to determine meaning, but also over what kind of meaning is relevant. For example, it is disputed whether the relevant kind of meaning is the literal meaning of the texts, what the authors or legislators meant, what a reasonable person reading the text would understand, and so on.³ When I talk about the meaning of a legal text or utterance, I mean to remain neutral between such understandings of meaning. As I will elaborate below, SP holds that the content of the law is some kind of ordinary linguistic meaning or mental content, but leaves open exactly which kind.

Second, there are various sources of law that, at least superficially, do not seem to fit SP as well as statutes and constitutions. Custom is often recognized to be a source of law, and there can be a custom without there being a linguistic or mental content that is a candidate for the content of a legal norm. In addition, it is widely believed that every legal system has a rule of recognition, which is constituted by certain practices of judges and other officials. It might be wondered how I can claim that SP is widespread, given that most legal theorists and lawyers accept sources of law that present problems for SP.

As elaborated below, SP allows that there can be other, secondary sources of law in addition to its core model. (The rule of recognition, which is often taken to be an instance of custom, is, I'll argue below, a special case—an exception that is necessitated by the structure of SP itself.) Also, again, SP is a presupposition, rather than an explicitly avowed doctrine. Those who presuppose SP may, at the same time, explicitly accept claims that are inconsistent with it. And finally, there are various ways in which those

³ For discussion, see Greenberg (2010).

who presuppose SP might try to argue that its core model can encompass apparently recalcitrant instances.⁴

I will now try to give a more precise articulation of SP. The Picture derives from a not-specifically-legal model, which we can call the *command paradigm*. According to this paradigm: if Rex, who has the right to be obeyed by subjects A, B, and C, commands them to Φ , then A, B, and C are required or obligated to Φ , and they are obligated to Φ *because Rex said so*. The key point about the command paradigm is that Rex's subjects have an obligation to do what Rex says simply because Rex, who has the right to be obeyed, says so. It is not that there is some more indirect explanation. For example, it is not that Rex's order changes people's expectations in a way that creates an obligation to act in the way that Rex ordered. Or, to take a different example, it is not that because of Rex's order, officials will punish subjects who fail to comply, and *that fact* somehow creates an obligation to act as Rex ordered. (Below I will explicate this idea of Explanatory Directness more precisely.)

In introducing the command paradigm, I wrote of the ruler's *right* to be obeyed and the subjects' *obligation* to obey, without specifying what kind of right and obligation, for example, moral or legal. That is because I intend the command paradigm to be neutral between moral and legal versions. There is a moral version that involves a moral right to be obeyed, and a correlative moral obligation. The Standard Picture of law, by contrast, substitutes legal authority for the moral right to be obeyed and substitutes legal obligation for moral obligation. As we will see, the core idea remains that the obligation is created simply because the authority said so. According to SP, the primary way in

⁴ I discuss custom near the end of this section.

which law is created is by legal authorities issuing pronouncements. Of course, in a sophisticated modern legal system, not everything that an authority pronounces becomes law. Only certain of an authority's pronouncements are 'authoritative,' typically ones that are produced in accordance with specified procedural requirements. (The paradigm case is the enactment of a statute by a legislature.) So the simple notion of what the authority says is replaced with the notion of what is authoritatively pronounced.

The key point, which SP derives from the command paradigm, is that what is authoritatively pronounced becomes a legal norm—or, equivalently, becomes legally valid—simply because it was authoritatively pronounced. The intuitive idea that the legal norm obtains *simply because* it was authoritatively pronounced -- that the making of the authoritative pronouncement *directly* explains the norm's obtaining -- needs to be spelled out with care. In particular, notice two points that an account of the intuitive notion should respect. First, intuitively, to say that a norm obtains simply because it was authoritatively pronounced is not to say that there can be no account of what makes it the case that a pronouncement is authoritative. Second, to say that the norm obtains simply because it was authoritatively pronounced is not to say that its being authoritatively pronounced is modally sufficient for its being a valid legal norm. (Think, for example, of cases in which there is a conflicting norm with higher priority.)

I will explicate the intuitive idea in a three-part thesis:

Explanatory Directness Thesis: In the complete constitutive account of the obtaining of a given legal norm: 1) the authoritativeness of the pronouncement is prior in the order of explanation to the obtaining of the legal norm; 2) the authoritativeness of the pronouncement is independent of the pronouncement's (specific) content and

consequences; 3) there are no explanatory intermediaries between the authoritative pronouncement's being made and the norm's obtaining. I will use the term "Explanatory Directness" for the property that this thesis attributes to an explanation of the obtaining of a legal norm.

The first element is straightforward. The authoritativeness of the pronouncement is not to be explained in terms of its impact on the law. Rather, it has an impact on the law because it is authoritative.

The second element spells out the intuitive idea that the legal impact of a pronouncement is to be explained by its coming from an appropriate source, not by the pronouncement's content or consequences ("because Rex said so"). I say that authoritativeness cannot depend on the *specific* content of a pronouncement in order to allow that authoritativeness may be limited by subject matter.

The third element spells out the notion of Explanatory Directness. An explanatory intermediary between A and B is something that a) is explained (at least in part) by A; and b) explains (at least in part) B. Therefore, to say that the making of an authoritative pronouncement explains a norm's legal validity *without* explanatory intermediaries is to say that the making of an authoritative pronouncement explains a norm's legal validity, and that it does so *not* by explaining something else, which then explains the norm's legal validity. As illustrated above, it is not that the making of the authoritative pronouncement explains the formation of beliefs or expectations or a change in what is morally required, which then plays a role in explaining the norm's being legally valid.⁵

⁵ It might be helpful to consider an analogy to the authority to create promissory obligations. On some accounts, the explanation of why promises create obligations appeals to consequences of promises, for example that they create

The account respects the two intuitive points I noted above. First, the thesis allows that there can be an account of what makes a pronouncement authoritative. For example, such an explanation might appeal to a legal rule (e.g., that statutes passed by both houses of Congress and signed by the president are valid) that is itself ultimately validated by the rule of recognition. As long as the explanation of what makes a pronouncement authoritative does not appeal to the pronouncement's impact on the law, it is consistent with 1). As long as the explanation does not appeal to the pronouncement's content and consequences, it is consistent with 2). And the fact that authoritativeness itself can be explained in no way introduces an explanatory intermediary between the authoritativeness of a pronouncement and its impact on the law. (The explanation of authoritativeness is by definition upstream of the pronouncement's authoritativeness.) So an explanation of what makes pronouncements authoritative is consistent with 3).

Second, the thesis is consistent with the possibility that the making of an authoritative pronouncement is not sufficient for the corresponding norm's being legally valid. When an authoritative pronouncement yields a valid legal norm, part of the constitutive account of the obtaining of the legal norm may be that other necessary conditions are satisfied, for example that there is no conflicting legal norm of higher status. Why is it not the case that such a necessary condition introduces an explanatory intermediary between the making of the authoritative legal pronouncement and the obtaining of the corresponding legal norm? The answer is that the absence of a conflicting legal norm is not such an explanatory intermediary because it is not explained

expectations. On such accounts, promises do not create obligations with Explanatory Directness. On other accounts, the making of the promise has a unmediated normative impact. The explanation of the resulting obligation is not via an explanatory intermediary.

by the making of the authoritative pronouncement. In general, then, the existence of additional necessary conditions is consistent with 3) as long as the satisfaction of those conditions is not itself explained by the making of the authoritative pronouncement. (And the existence of such necessary conditions obviously is not inconsistent with 1) and 2)).

The Explanatory Directness Thesis is an attempt to spell out what many legal philosophers take to be built into the meaning of “legal authority” or “authoritativeness” or at least to be an uncontroversial truth about legal authority.⁶ If one understands “authority” in this way, the thesis will seem trivial. Those who wish to use the term in this way can replace the Explanatory Directness Thesis in the characterization of the Standard Picture with the claim that legal norms obtain in virtue of authoritative pronouncements. (This way of talking runs the risk, however, of making a rather strong thesis sound much less controversial because of an equivocation on “authoritative pronouncement.” For example, in a less loaded sense, a legally authoritative pronouncement is simply one that has a constitutive impact on the content of the law.) I have explained Explanatory Directness with such care in part because leaving these ideas implicit in “authoritativeness” makes it easy to overlook what is being taken for granted.

In the relevant literature, it is often said that commands create reasons that have the property of *content independence*. This means that the reason to do what is commanded does not depend on the content of the command—e.g., on the fact that it requires action that is right or reasonable. How does content independence relate to Explanatory Directness? Although theorists often appeal to content independence to

⁶ I discuss these issues in the Other Evidence subsection of Section II.3. As I explain there, those who take SP for granted will naturally understand legal authoritativeness in this way.

capture the intuitive idea that the subject must do as commanded because Rex said so, content independence is necessary, but not sufficient, for this purpose.⁷ Even if a command has the effect of creating an obligation to do as commanded for a reason independent of the content of the command, it doesn't follow that the explanation is simply that it was so commanded. There might still be explanatory intermediaries—e.g., the explanation might be that *because of the command*—not because of its content—it is fair to do as commanded. The property that is needed is the one I have spelled out in the Explanatory Directness Thesis. Content independence is necessary but not sufficient for Explanatory Directness.⁸

Two other features of SP are natural (though perhaps not inevitable) consequences of Explanatory Directness. The first feature concerns how a pronouncement relates to the legal norm that is created. In the command paradigm, the command creates an obligation to do what is commanded. Similarly, the content of the legal norm is what was pronounced—what we can call *the content* of the pronouncement.

We need to explain the relevant notion of content. Let me distinguish two broad senses of content or meaning. First, we have *linguistic* content. Language enables us reliably and systematically to convey information to others. The information thus

⁷ Some theorists may simply use 'content independence' somewhat misleadingly to mean what I have called Explanatory Directness.

⁸ Raz (1986, 28) tries to spell out what seems to be a very similar idea, as follows:

Saying that the influence of an authoritative utterance is meant to be direct and normative means that a person who accepts the authority of another accepts the soundness of the [sic] arguments of the following form:

Y has authority; Y decreed that X is to do A; Therefore, X ought to do A.

Unfortunately, whether an argument is valid in the relevant sense depends only on whether it is possible for the premises to be true and the conclusion false. The notion of validity (and, consequently, of soundness) therefore cannot capture considerations of explanatory priority and directness. For example, the argument from 'Matthew is a bachelor' to 'Matthew is male' is valid (assuming bachelors are necessarily male), but Matthew's being a bachelor is not part of what makes it the case that Matthew is male. The validity of Raz's argument schema is consistent with it being the case that a person's having authority does not *explain* why others ought to do what he commands (for example, the order of explanation might be the other way around) and with there being explanatory intermediaries between a person's having authority and it being the case that others ought to do what he commands.

conveyed is linguistic content. There are a variety of aspects of linguistic meaning, including semantic content and speaker's meaning. The important point for our purposes is that linguistic contents can be systematically derived through reliable mechanisms, mechanisms which are much studied in philosophy of language and linguistics. Linguistic contents do not include information that particular speakers simply hope that listeners will glean or that particular listeners might happen to come away with.

Second, there is a loose non-linguistic sense of content—more often called 'meaning'—that is roughly equivalent to *significance*, *upshot*, or *consequence*. For example, we might ask the meaning of a recent political development or of an embarrassing situation. Meaning in this sense is not a kind of linguistic (or mental) content at all.

The Standard Picture holds that it is an ordinary linguistic (or mental)⁹ content associated with an authoritative pronouncement that constitutes a legal norm. As I am using the term, "linguistic content" includes both semantic and pragmatic contents. For example, the semantic content of an authoritatively pronounced sentence and what the authority means by the pronouncement of the sentence are both linguistic contents associated with the pronouncement.¹⁰ In my "Language and Law: Who's in Charge?" (2010), I show that, associated with any authoritative pronouncement, there will be multiple candidates for the relevant content -- the one that putatively constitutes a legal

⁹ I include mental contents here since some versions of the Standard Picture hold that the content of the law is constituted by, for example, the contents of certain intentions of legislators. Also some linguistic contents, such as speaker's meaning, are constituted by mental contents. For simplicity, I will usually omit mention of mental content.

¹⁰ Very roughly, a semantic content is information that is linguistically encoded. A pragmatic content is one that a speaker conveys without encoding it, for example by taking advantage of background knowledge that is shared by the speaker and the audience. There is a large and contentious literature on how to draw the distinction. See, for example, Szabo (2005). For present purposes, the distinction will not matter because the criticisms of the Standard Picture that I make in this paper do not depend on any assumptions about whether the relevant contents are semantic or pragmatic. For discussion of the distinction and related criticisms of the Standard Picture, see my (2010).

norm. I argue that the existence of multiple candidates presents problems for the Standard Picture, but in the present paper, I set these problems aside.

The Linguistic Content Thesis is needed to respect the spirit of the command paradigm, as articulated by the Explanatory Directness Thesis. The very point of the command paradigm is that the subjects are obligated to do what Rex tells them to do because he tells them to do it. That is its beautiful simplicity and also, as we'll see, the source of its difficulties. There is of course room for debate about which aspect or part of linguistic content—what Rex said, what he meant, etc.—best captures what he commanded. But if we allow that Rex's command could create an obligation whose content is not (an aspect of) the linguistic content of the command, we have abandoned the command paradigm's simple explanation for the new obligation—'because Rex said so.' The command paradigm has no explanation of how Rex's command creates an obligation with a content that is not what Rex said or meant. (We could of course call the content of the new obligation, which is not something that Rex said or meant, 'the content of Rex's command,' but that would be to preserve the command paradigm in name only.)

We can spell the point out in terms of the Explanatory Directness Thesis. If the content of the legal norm created by an authoritative pronouncement is not the linguistic content of the pronouncement, the explanation of the norm's legal validity cannot be simply that it was said or meant (since, by hypothesis, it wasn't).¹¹ Again, we could call the content of a resulting norm the 'legal content' or 'legal meaning' of the

¹¹ The claim in the text may be a bit too strong. As I elaborate below, the Standard Picture requires that the command paradigm be the primary way in which the content of the law is constituted, but it allows for minor divergences from it. For example, it is within the spirit of the Standard Picture that there are rules that qualify the command paradigm by specifying ways in which the legal norm that is the consequence of an authoritative pronouncement is the result of modifying the pronounced content, for example to take into account circumstances that make the pronounced content impossible to satisfy.

pronouncement, but that would not be to explain the legal validity of the norm, but merely to give a name to what would need to be explained. In the interest of brevity, in the rest of the paper, I'll often write simply 'content' rather than 'linguistic content.'¹²

The second feature of SP that is a natural consequence of Explanatory Directness we can call *Atomism*. As the name suggests, the basic idea of Atomism is that individual legal norms are explanatorily prior to the content of the law as a whole. In other words, we explain why the law has the (total) content that it does by explaining the validity of individual legal norms and then explaining how they are amalgamated, modified, and reconciled to yield the content of the law as a whole. (By contrast, for example, on Dworkin's theory, we explain why the law requires what it does on particular issues by explaining why the law has the total content that it does.)

A few clarifications and qualifications are in order. First, Atomism concerns the constitutive explanation of legal norms, not what is relevant to figuring out what the law is. Atomism therefore is neutral with respect to the *evidentiary* relevance of the content of the law to the content of a particular legal norm. For example, Atomism places no restriction on the degree to which the content of the law may be helpful in ascertaining what the legislature intended in enacting a particular statute.

Second, I explicated the basic idea of Atomism in terms of whether individual legal norms or the total content of the law is prior in the order of explanation. We can define *degrees* of Atomism in terms of how much of the content of the law is prior in the

¹² Suppose it is proposed that the 'legal meaning' of a pronouncement is its meaning in the loose, rather than the linguistic, sense. That is to say that the legal meaning of a pronouncement is its legal significance or its impact on the law. Hence, according to the proposal, SP would be understood as maintaining that an authoritative pronouncement creates a legal norm whose content is the pronouncement's impact on the law. But that amounts to little more than the claim that a pronouncement's impact on the law is its impact on the law. It therefore gives up the attempt to explain the content of the law. (I say 'little more' rather than 'nothing more' because the proposed formulation of SP would still seem to imply Atomism, which is discussed in the text immediately below.)

order of explanation to individual legal norms. Any adherent of SP will presumably accept that the validity of individual legal norms can depend on other legal norms to some extent. To take the most obvious case, any adherent of the standard picture should grant the familiar point that the authoritativeness of a pronouncement may depend on a legal norm (or norms)—the norm that is the source of the authority of the institution that issued the pronouncement. And that norm may exist in virtue of a pronouncement whose authority depends on a further norm. This dependence of the validity of a legal norm on other legal norms does not lead to holism: such a vertical chain of norms may continue to an arbitrary finite length, but must end without an appeal to the content of the law as a whole. As discussed below (section II.3), such an appeal to the content of the law to explain authority would be viciously circular. (I'll say more, immediately below, about how, according to SP, we get from individual legal norms to the content of the law.)¹³

We've just seen that adherents of the standard picture will allow that the explanation of individual legal norms can appeal to legal norms vertically above the norm in question. There are various other ways in which SP could allow that the validity of individual legal norms may depend on other legal norms. Since SP is an implicit picture, I can't be precise about the degree of Atomism. Even in its most relaxed form, Atomism has the minimal content that individual legal norms are explanatorily prior to the total content of the law, and not vice versa.

Finally, I take Atomism to be a less important aspect of SP than Explanatory Directness and Linguistic Content, and I am less confident in my attribution of it.

¹³ Atomism is not the doctrine that the existence of individual legal norms is explanatorily prior to the existence of a legal system (including institutions, practices, and the like), but to the content of the law. As the preceding paragraph makes clear, legal institutions (and even particular legal norms) may be part of the explanation of individual legal norms, which then feature in the explanation of why the law has the (total) content that it does.

It is easy to see why Atomism is a natural (though not a necessary) consequence of Explanatory Directness. If a legal norm exists because an authoritative pronouncement with that content was issued, we do not need to appeal to the content of the law to explain individual legal norms, except to the extent necessary to explain the authoritativeness of pronouncements (which, as noted, cannot necessitate appeal to the content of the law generally.)

One final consequence of Explanatory Directness is that there is a sharp and centrally important distinction between authoritative pronouncements and all other actions by participants in the legal system. Leaving aside for the moment any secondary or peripheral sources of legal norms, only the contents of authoritative pronouncements bear a constitutive relation to the content of the law. Any other aspect of legal practices can bear only an evidentiary relation to the content of the law. That is, the relevance of any other aspect to the content of the law can only be as *evidence* bearing on the interpretation of authoritative pronouncements.

We have articulated the Standard Picture's *Core Model* in Explanatory Directness, Linguistic Content, and Atomism. There is one more important piece of the Standard Picture. SP takes the Core Model to be the *primary*, but not necessarily the exclusive, way in which the content of the law is constituted. The picture is vague about how the constitution of the content of the law may diverge from the Core Model.

First, there may be peripheral ways in which law can be created without the issuance of pronouncements. For example, as noted, many who take SP for granted would accept that custom can be a source of law, despite the obvious difficulty of integrating it smoothly into the model of authoritative pronouncements. I want to set

aside for the moment the special case of the rule of recognition, which I address separately at the end of this section. Also, case law, which is sometimes regarded as a customary source of law, is apparently amenable to being brought within SP because appellate opinions can be treated as authoritative pronouncements. (In section III.1 below, I argue that the decisions of common law courts are a more problematic case for SP than might be supposed.)

Leaving aside these special cases, one possible way in which an adherent of SP might try to reconcile SP with custom as a source of law is simply by regarding it as peripheral -- as such an insignificant departure as not to require revision of the basic picture.¹⁴

When discussing custom, it is important to distinguish between, on the one hand, situations in which the participants understand themselves (in engaging in the relevant behavior) to be following a unique norm – i.e., there is a common or canonical understanding of which norm that is – and, on the other hand, situations in which the participants do not so understand themselves. For clarity, I will use ‘customary rule’ for behavioral regularities of the former kind and ‘ordinary custom’ for behavioral regularities of the latter kind.

There is a possible way for the Standard Picture to extend its core model to account for customary rules as a source of law. The idea is that the common understanding of the norm could substitute for the content of the authoritative

¹⁴ I do not mean to suggest that all who are committed to SP regard custom as a departure from the Core Model. Some may not have considered the issue, and others may assume that the Core Model can be extended or generalized in some straightforward way to encompass the case of custom. As elaborated in the text and the next footnote, however, when there is no common or canonical understanding of which norm is being followed, any account of legal validity cannot be modeled after the explanation of a norm’s being legally valid ‘because Rex said so.’

pronouncement. In the case of ordinary custom, this putative solution is not available.¹⁵

Because the distinction that I have marked with the terms ‘ordinary custom’ and ‘customary rule’ is not always made, is not clear whether ordinary custom would be widely accepted as a source of law.

Second, SP must supplement the Core Model with an account of how we get from individual legal norms to the content of the law. For example, as I’ll discuss below, the Standard Picture needs rules or procedures for resolving conflicts between *prima facie* legal norms. There may, for instance, be rules that give priority to legal norms that are created later in time or are more specific. In addition, SP can allow some limited derivation of legal norms from the norms that are constituted by the contents of authoritative pronouncements.¹⁶ SP can also allow more radical departures, such as

¹⁵ Any account of law must face the problem of how past behavior, practices, decisions, and the like can determine unique norms. For every course of behavior, there are indefinitely many norms with which the behavior is consistent. For discussion, see Greenberg (2004) and Greenberg and Litman (1998). SP gives its adherents what at least seems to be a simple solution (though adherents of SP, perhaps because of this apparent simplicity, rarely address the issue). To the extent that the content of the law is constituted by the contents of authoritative pronouncements, the problem may seem to be solved.

In the case of custom, there is in general no authoritative pronouncement. As noted in the text, I distinguish ordinary customs from customary rules because the latter could possibly be treated by analogy to the Core Model. On my stipulative usage, a behavioral regularity can qualify as an ordinary custom either because the individual participants do not take themselves to be following any norm or because different participants take themselves to be following different norms (and there is no canonical understanding of which norm is being followed). (And of course there can be cases that are hybrids between these two types.) An ordinary custom obviously is not sufficient to constitute what Hart calls “a social rule,” but it may be more than a mere habit or behavioral regularity (since the participants may take themselves to be following rules).

I should note that, in *The Concept of Law*, Hart uses the terms very differently. He seems to use “custom” and “customary rule” interchangeably, and he maintains that customary rules are social rules (1994: 46-48, 58). It follows from his account of social rules that the participants must have a common understanding of the norm that they take themselves to be following (since part of what distinguishes a social rule from a mere habit is that the participants must take the standard to be a guide to conduct, must regard criticism for departing from the standard as warranted, and so on) (Hart 1994: 55-58). Thus, Hart apparently excludes ordinary customs from what he calls “custom” or “customary rule.” Hart does not explicitly address the possibility that different participants might take different norms to be the relevant standard. But his discussion presupposes that there is a unique norm at issue, and it is necessary to his account that there be a common or canonical understanding of the norm, rather than simply different understandings by different participants. If that condition were not satisfied, he would be left without an account of the content of the social rule.

¹⁶ In theory, positivists -- especially those of the inclusive persuasion -- can accept liberal derivation of legal norms from the norms that are authoritatively pronounced. I do not claim, however, that any possible form of positivism is consistent with SP. Second, I argue in section II.3 that many legal theorists, including exclusive positivists, inclusive positivists, and anti-positivists, whatever they explicitly avow, presuppose SP at various points in their work. So I claim that, for example, although in theory inclusive positivists can allow legal norms to be derived by moral

filtering out or modifying absurd or immoral legal norms or even supplementing the law with gap-filling norms.

Since SP is a largely unarticulated picture, rather than an explicitly held view, we cannot say anything precise about how far the Standard Picture tolerates such divergences from the Core Model. The best we can do is to give the vague qualification that the role of authoritative pronouncements must be primary.

The requirement of primariness is partly a point about degree and partly a point about the normal or central case. With respect to degree, the point is that the content of the law cannot be too far from the set of contents of authoritative pronouncements. For example, the requirement would be violated if most of the contents of authoritative pronouncements were filtered out by a moral test. As for the point about the normal case, the idea is that it's part of the nature of law that the Core Model is the standard or normal explanation of the content of the law.

We can now summarize the Standard Picture: the primary way in which law is determined is that the linguistic content of a legally authoritative pronouncement becomes a legal norm simply because it was authoritatively pronounced. Subject to some processing of the legal norms, including the resolution of conflicts between them, the content of the law consists of these legal norms, perhaps along with some other legal norms that are constituted in peripheral ways.

In section II.3, I will offer evidence that SP is widely held. I want to address immediately, however, the worry about the rule of recognition mentioned above. How, it might be asked, can SP be widely held when most contemporary legal philosophers

reasoning, many such theorists take for granted in their arguments, e.g., for indeterminacy, that such derivation must be of limited importance.

believe that there is a rule of recognition that is not the content of an authoritative pronouncement?

In the first place, the rule of recognition (and any other basic secondary rule) is, on a Hartian view, plainly exceptional. It is the only legal rule that is not legally valid. It is difficult to formulate its content, and most lawyers would probably not consider it a legal rule. An adherent of SP could reasonably treat the rule of recognition as an exception to the primary way in which legal rules are constituted. (Indeed, although Hart did not take this route, a plausible way to develop a Hartian view is to regard the rule of recognition as not part of the content of the law. To see how arcane the rule of recognition is, notice that, for example, the constitutional requirements for valid legislation in the United States would not be part of the rule of recognition; even the Supremacy Clause is an authoritative pronouncement.)¹⁷

More importantly, it is an exception that is driven by the internal logic of SP. If you start with the idea that the law is constituted by the contents of authoritative pronouncements, you'll immediately see that something other than an authoritative pronouncement has to determine what counts as legally authoritative. In other words, an adherent of SP must answer the question of what constitutes a legal authority and must do so without appealing to an authoritative pronouncement. This creates a conundrum. If legal norms are constituted by the contents of authoritative pronouncements, adherents of SP can't, without circularity, appeal to legal norms in their account of authority. As Scott Shapiro (1998) has argued, Hart's rule of recognition is precisely Hart's attempt to solve the problem. The Standard Picture generates the need for a rule of recognition.

¹⁷ For discussion of the relationship between the rule of recognition and the Constitution, see Greenawalt (1987) and the essays in Adler & Himma, eds. (2009).

So the rule of recognition is not only reasonably treated as an exceptional case, it is a nice example of an exception that proves the rule. (Also, as I noted earlier, there is potentially a way of extending the Core Model to cover the rule of recognition.)

2. Alternatives to the Standard Picture

I suspect that many will believe that SP is obviously true.¹⁸ I'll argue, in section III.1, that that is not the case. At this stage, however, I want merely to open the imagination to a larger space of possibilities and thereby to make clear that at least SP is not trivially true—that there are coherent alternatives. To that end, I will briefly introduce two alternative pictures, Ronald Dworkin's and the one I favor. I discuss Dworkin's picture because his work is extremely influential and well known (though, as explained below, widely misunderstood). I discuss my own picture not only because it is mine, but also because, once we stop taking SP for granted, it is very natural.

Of course, if I am correct that SP is widely taken for granted, the alternatives may well seem obviously false. I emphasize that this section makes no attempt to argue against SP. That is the work of later sections. In addition to showing that SP makes a non-trivial claim, introducing the two alternative pictures will also put us in a better position in the next section to look for evidence that writers hold SP. If we don't know what an alternative to SP could look like, then it is difficult to evaluate what would count as evidence that a writer holds SP as opposed to an alternative.

¹⁸ When I have presented this paper, many members of the audience have said that the Standard Picture is obviously true. Others, however, have claimed that no one holds it!

I begin with Dworkin's picture. According to Dworkin, the content of the law is the set of principles that best justify the past legal and political decisions—'the legal practices'.¹⁹ This is a general picture that will yield different more specific views, depending on how the notion of justification is understood and on what the relevant practices are taken to be. Notice that, on the Dworkinian picture, the content of the law bears a less straightforward relation to the content of legal texts than on SP. The content of legal texts or utterances is an aspect of the practices that the content of the law must justify.

At this point, it might be wondered how SP can be widely taken for granted given how well known Dworkin's work is. If people were aware of an alternative picture, it would seem difficult for them simply to take for granted that SP is common ground (though of course they might continue to adhere to it). The answer is that Dworkin's work in legal philosophy has been widely misunderstood and misrepresented.

I'll suggest below that an important reason that Dworkin has been widely misunderstood is precisely that legal theorists assume that SP is common ground. Readers of Dworkin have misinterpreted him because they take for granted that he adheres to SP.

To explain my own picture, it will help to introduce the notion of a *moral profile*. The moral profile in a particular society consists of all of the moral obligations, powers, permissions, privileges, and so on that obtain in that society. In writing of the moral profile in a given society, I do not mean to suggest any kind of relativism about morality.

¹⁹ As I have explained elsewhere, contrary to a common reading of Dworkin, the dimension of fit is best understood as one aspect of justification, rather than a distinct, non-normative dimension. See Greenberg (2004 pp.195-197, nn.46-47). Also, on Dworkin's view, there is necessarily some vagueness in the initial specification of the legal practices because which practices are the relevant ones is ultimately itself the outcome of interpretation. (1986, 90-93; see also 65-76.)

Even on a highly non-relativistic view of morality, the moral profile varies from society to society and from time to time because the morally relevant circumstances vary. What morality requires in a given situation depends, crucially, on the circumstances.

My picture of law is that, when the law operates as it is supposed to, the content of the law consists of a certain general and enduring part of the moral profile. The relevant part of the moral profile is that which has come to obtain in certain characteristic ways, typically as a result of actions of legal institutions such as the enactment of legislation and the adjudication of cases. Thus, the relation between the content of the law and the content of legal utterances is, roughly speaking, that the content of the law is a certain aspect of the impact of legal utterances (and other actions) on obligations, powers, and so on.

We can use the familiar example of a coordination problem to illustrate the basic idea. It is sometimes important that all or nearly all people act in the same way, though there are several equally good ways to act. Suppose a legislature specifies that everyone should adopt a particular solution. This action by the legislature may well have the effect of making the specified solution more salient than the others. As a result, given the moral reasons for following the solution that most others follow, everyone may now have a moral obligation to adopt the specified solution. In that case, the legislature has changed the moral profile, creating a new moral obligation. On my picture, this new moral obligation counts as a legal obligation because it was created in one of the characteristic ways mentioned above. Notice that, on this picture, the specified solution is a legal obligation *not* merely because legislature pronounced it but roughly because the legislature's pronouncing it had the effect of making it more salient than other solutions,

thereby changing people's moral obligations. (In this example, the content of the resulting legal obligation is the same as it would be on SP, but as I will argue in the sequel to this paper, that will not always be the case, not even when the legislature acts to solve coordination problems.)

I call this picture the *Dependence View* (DV, for short) for reasons that will become clear later. This general picture will yield different, more specific views, depending on the development of notions such as the notion of the characteristic ways in which the legal system affects the moral profile. The foregoing is only an extremely rough and incomplete outline of the picture, for the present point is simply to display alternatives to SP (both in order to show that SP is non-trivial and to help us to see that SP is widespread). One important way in which the outline is incomplete is that it says nothing about what constitutes the content of the law when the law does not operate as it is supposed to. As I discuss in the sequel to this paper (Greenberg, 2011), there are a range of options for developing this aspect of DV. For example, one possibility is that, when the law does not operate as it is supposed to, the content of the law can depart greatly from the relevant part of the moral profile; at the opposite extreme, DV can be developed in a way that allows little or no departure.

In order to understand the Dependence View, it is important to see that the moral profile may include requirements that are not *ex ante* moral norms. Coordination problems are one kind of example. Actions that are morally neutral *ex ante*, such as driving on one side of the road rather than the other, can become morally required because of the consequences of not coordinating with others. Similarly, participation in a morally flawed scheme can become morally required once many others are participating

or are likely to do so. Considerations of fairness and democracy may similarly have the consequence that requirements with apparently no moral content, such as a requirement that one file a particular form, become part of the moral profile. The same is true even for seriously morally flawed requirements. To take a trivial example, in a card game, fairness may require adhering to an agreed-upon method for dividing the stakes in the circumstance that the game is interrupted, even if it is far from the fairest *ex ante* method of division. Thus, the moral profile may come to include both morally neutral and morally flawed (judged *ex ante*) obligations.

On the Dworkinian picture and on DV, all of the main tenets of SP are false. First, on both alternative pictures, authoritative pronouncements do not create legal norms with Explanatory Directness.²⁰ On the Dworkinian picture, a legislative act—the paradigm of an authoritative pronouncement on SP—may have roughly the net effect of adding to the content of the law a norm with the content of the legislation. But if it does so, the explanation will be that the legal practices have been supplemented in a way that alters the set of principles that constitutes the best total justification of those practices—in particular, such that the best justification now includes a norm with the content of the new statute. For reasons roughly of procedural justice (democracy, fairness, protection of expectations), the enactment of a statute will have a tendency to change the best

²⁰ What is the relation between the claim that authoritative pronouncements do not create norms with Explanatory Directness and the claim that there cannot be unjust legal norms? First, the former claim is a claim about the explanation of legal norms, not about their content, though it may have consequences for their content. As illustrated in the text below, when a pronouncement figures in the constitutive explanation of a legal norm that has the same content as the pronouncement, the constitutive explanation will not feature the authoritative pronouncement followed immediately by the legal norm. For example, the authoritativeness of the pronouncement may play no role or there may be explanatory intermediaries between the authoritativeness of the pronouncement and the legal norm.

Second, the former claim is consistent with the possibility of unjust legal norms. For example, depending on the notion of justification, the set of principles that best justify the legal practices might include seriously morally flawed principles. To take a different kind of example, according to Scott Shapiro's (2010) planning theory of law, authoritative pronouncements do not create norms with Explanatory Directness because the content of the law is the content of a plan, which, Shapiro (private communication) confirms, is not constituted by what was authoritatively pronounced. (Thanks to an anonymous referee for a comment that prompted me to clarify this point.)

justification of the legal practices in this direction. But the crucial point is that the explanation of a norm's being part of the law runs through such reasons of justice.

On the Dependence View as well, legislative enactment of a statute may have roughly the net effect of adding to the law a norm with the content of the legislation. But, if it does so, the explanation will be that the enactment changed the relevant circumstances, thus changing what people are morally required or permitted to do. Again, the effect of an enactment on the law lacks Explanatory Directness.

A related point is that, on both alternative pictures, any action by participants in legal practices can have a constitutive impact on the content of the law, and there is no sharp distinction between the way in which, for example, enacting statutes changes the law and the way in which other practices do so.

Another related point is that the linguistic content of pronouncements (decisions, etc.) has no special status. Such linguistic content will simply be one factor, albeit an important one, that affects, on the Dworkinian view, the best justification of the practices, and on DV, the moral profile.

Finally, on both alternative pictures, Atomism is false. There are no criteria of validity in the sense of criteria that apply to individual norms rather than to the content of the law as a whole. On the Dworkinian view, the content of the law is the best justification of all the practices. On any plausible view, such justification is holistic in the sense that it is not derived from the justification of each practice taken individually. Therefore, the content of the law is prior in the order of explanation to individual legal norms. Similarly, on DV, the content of the law is holistically determined because the

effects of a given action by a legal participant on the moral profile depend on all the other actions by legal participants.

I now turn to evidence that SP is widely assumed to be common ground. I think it is fairly obvious that it is, so I will be illustrative rather than comprehensive.

3. Evidence that SP is a widespread implicit commitment

As noted, SP is rarely explicitly articulated.²¹ The most straightforward evidence that SP is widely held is that legal theorists take for granted in their arguments an identification of the content of a legal text with the content of a legal rule or norm. For example, they make points about the content of the text and then conclude, without further argument, that the points obtain with respect to the content of the law.

A prominent example is H.L.A. Hart's famous and extraordinarily influential discussion of open texture and discretion in 'The Separation of Law And Morals' and in *The Concept of Law*. Hart's discussion slips back and forth between claims about statutory language -- for example, that general terms have a core in which their application is clear, and also have open texture -- and corresponding claims about the rules that statutes contribute to the law.

There must be a core of settled *meaning* [to the general words we use to express our intentions that a certain type of behavior be regulated by rules], but there will be, as well, a penumbra of debatable cases in which *words* are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. ... [I]f we are to say that these ranges of facts do or do not fall under existing *rules*, then the classifier must make a decision which is not dictated to him [I]n applying legal *rules*, someone must take the responsibility of deciding that *words* do or do not cover some case in hand with all the practical consequences involved in this decision.²²

²¹ There are a few exceptions. Larry Solum (2008); Andrei Marmor (2008; forthcoming 2010); Scott Soames (2009, Ch.15). These theorists turn to philosophy of language and linguistics to solve problems of legal interpretation. Perhaps they are more explicit than most about holding the Standard Picture in order to motivate this turn. I discuss these efforts in "Language and Law: Who's in Charge?" (2010).

²² Hart (1957, 607) (emphasis added). Similarly, in *The Concept of Law* (1994: 126-127), he argues: 'In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable... At this point, the authoritative general language in which a rule is expressed may guide only in an uncertain way... the sense that the language of the rule will enable us simply to pick out easily recognizable instances, at this point gives way The discretion thus left to [the person called upon to apply the rule] by language may be very wide.'

Legal philosophers whose writings offer similar evidence of presupposing SP, at least at some junctures, are a diverse and prominent group including (to take some haphazardly chosen examples): Larry Alexander and Emily Sherwin (2001); Brian Bix (1993)²³; David Brink (1988); John Gardner (2001; 2006)²⁴; Kent Greenawalt (1992); John Finnis (2000; 1980)²⁵; Andrei Marmor (2005); Michael Moore (2009; 1985; 1981)²⁶, and Frederick Schauer (1996; 2008).

The framing of the positivism/anti-positivism debate

One kind of evidence that SP is a widespread implicit commitment is its role in the framing of the positivist/anti-positivist debate. I'll suggest that SP is assumed—and

²³ Bix (1993: 84-87) comes close to an explicit statement of SP. He takes care to argue for two apparently minor ways in which “the set of legally true propositions” may come apart from “official promulgations.”

²⁴ Gardner formulates the positivism/anti-positivism divide in a way that seems to presuppose the Standard Picture. According to Gardner, legal positivism holds that “law is made up exclusively of norms that have been announced, practiced, invoked, enforced or otherwise engaged with by human beings acting on law’s behalf” (2006, p.220; 2001, p.200). He takes anti-positivism to hold that a norm can be valid in virtue of its moral merit. And he asserts that these two possibilities are exhaustive (2001, p.200).

Assuming, as I discuss below, that a human being’s engaging with a norm in Gardner’s sense necessarily involves someone’s having a mental state with the content of the norm – *thinking* the norm, for short – there is strong evidence that Gardner takes SP for granted. Gardner’s assuming SP would explain why he overlooks the numerous possibilities for what makes a norm part of the law that involve neither moral merit nor figuring in an official’s mental state. For example, a norm could be valid in virtue of being a member of the set of norms that an interpreter would take to be intended by a hypothetical single agent who had made all of the decisions and taken all of the actions of the legal system. Scott Shapiro’s planning account of law is another example. See note 20.

Gardner’s notion of engaging with a norm seems best understood as requiring that there be a mental state with the content of the norm. First, it is difficult to see how it makes sense to say that an official has engaged with a norm, for example by practicing it, if the official does not have a mental state with the norm as its content. What could make it the case that the official has engaged with that norm as opposed to indefinitely many others with which his conduct is consistent? (Indeed, since one can follow a norm while failing to behave consistently with it, the candidate norms include even norms with which the official’s conduct is not consistent.) Second, a closely related point is that even if there is a workable sense in which one engages with norms by “practicing” them without thinking them—perhaps by behaving consistently with them—there will inevitably be numerous competing norms that one simultaneously practices. There is a serious difficulty about what makes it the case that one of the norms, as opposed to all the others, is valid in virtue of such engagement. (See my discussion of custom in Section II.1.) Since Gardner sees no difficulties here, it seems reasonable to assume that he is taking engagement with a norm to involve thinking that norm. (This of course does not require intending to create the relevant legal norm.)

²⁵ Finnis is an interesting case. He seems to accept the Standard Picture, identifying the content of the law with the content of authoritative pronouncements. But he then goes on to claim that such internally valid law is not legally authoritative “in the focal sense” unless it is morally authoritative. (E.g. 1980, pp.27, 268; 2000, pp.1606-1610.)

²⁶ Moore assumes the Standard Picture with respect to statutory and constitutional law, but not case law. (1985, pp.373-376.)

assumed to be common ground—by many, though not all, participants on both sides of that debate. We will be able to see the consequences of these assumptions in the way the debate has proceeded.

The typical framing of the debate assumes, explicitly or implicitly, that anti-positivists have three options. They can argue that morality has an impact on the content of the law: 1) by filling gaps in (or otherwise supplementing) the law; 2) by playing a ‘safety-valve’ role in modifying the law when the law would otherwise be absurd or extremely unjust; 3) by playing a role in accounting for legal authority.²⁷ To take a very clear recent example, Michael Moore (2007), who is, of course, a natural law theorist, delineates the options in this way.²⁸ According to the first option, in limited circumstances, for example when the law is indeterminate on the issue before a court, norms could qualify as legally valid because they are morally good. On the second option, moral norms could filter out egregious legal norms. On the third option, moral reasons could play a role in explaining why an institution counts as authoritative.²⁹

To see that this familiar way of framing the debate is not neutral, notice that it leaves no room for the two alternatives to SP that we have considered, which are both anti-positivist pictures. On the Dworkinian picture, morality is relevant to the question of

²⁷ I am here glossing over the difference between exclusive and inclusive legal positivists. Against inclusive legal positivists, according to the typical framing of the debate, anti-positivists must argue that one or more of the three roles for morality is at the most basic level of explanation.

²⁸ Moore first offers these possibilities as ways in which morality can be involved in judicial reasoning, and then argues that these are the options for anti-positivists to argue that morality could have an impact on the content of the law. (I omit Moore’s fourth option, “the explicit incorporation of morality by obvious law,” because it is not relevant for our purposes.)

²⁹ The first two options are familiar; for example, as discussed in the text below, they feature in common misunderstandings of Dworkin’s work. The third option is perhaps less so. The historical position according to which the sovereign has legal authority in virtue of a divine right to rule is an example (though one that involves a normative, but not specifically moral property). John Finnis’s position is an interesting contemporary example. According to Finnis, legal authoritativeness in the focal sense necessarily depends on moral authoritativeness, but legal validity in an internal sense does not. ‘[M]ost of our laws would have no moral authority unless they were legally valid, positive laws... Laws that, because of their injustice, are without moral authoritativeness, are not legally authoritative in the focal sense of “authoritative”.’ (2000, p.1610.) See also Finnis (1980, p.27.)

which principles best justify the legal practices. On DV, morality is relevant because the law is a certain part of the moral profile. On neither view does morality fill gaps in the law or play a safety valve role. And on neither view does a pronouncement count as authoritative in virtue of the issuer's satisfying a moral test.

A widespread assumption that SP is common ground would explain the typical framing of the debate. Since SP holds that the law is primarily constituted by the contents of authoritative pronouncements, it allows a role for morality: 1) in determining which pronouncements are authoritative; and 2) in determining the contents of the pronouncements. Also, because SP holds that the law is primarily, but not exclusively, constituted by the contents of authoritative pronouncements, there is room for morality to go beyond these two roles as long as its additional role is sufficiently minor. Aside from the two roles, what possible secondary role remains for morality? The natural thought is that morality could play a role 3) in adding to, filtering out, or refining (or otherwise modifying) the contents of authoritative pronouncements (as long as this role is sufficiently minor).

The second option that SP allows the anti-positivist -- that morality plays a role in determining the content of authoritative pronouncements -- is the least plausible of the three options. The linguistic content of a pronouncement does not depend on moral facts. Therefore, one who assumes that SP is common ground will naturally frame the debate in terms of the other two options. It is notable that the other two options are just the ones that, as we saw above, the typical characterization of the debate affords the anti-positivist.

The second option is not completely absent from the framing of the debate, however. According to a familiar way of understanding Dworkin's theory of law, his

central claim is that in working out the content of authoritative pronouncements, we first select those interpretations that pass a threshold test of fit. From among those candidate interpretations, we select the one that is most morally justified. As indicated above, this is an incorrect interpretation of Dworkin's view.

The present point, however, is that the assumption that SP is common ground explains why Dworkin is so often incorrectly interpreted in the way just described. His more recent work gives a central role to interpretation. And, on his view, it is through interpretation that morality plays a role in determining the content of the law. On SP, the role of interpretation is to determine the content of authoritative pronouncements. Therefore, if one assumes that Dworkin, like everyone else, adheres to SP, the obvious conclusion is that he claims that morality plays a role in ascertaining the content of authoritative pronouncements. Since, as noted, this claim is very implausible, an SP-driven understanding of Dworkin helps to explain why many legal theorists have been baffled by Dworkin's work.

In fact, on Dworkin's view, the law does not consist of the contents of authoritative pronouncements. Accordingly, his invocation of interpretation is not as a way of working out the content of these pronouncements. Instead, interpretation of the practices of a legal system is a way of working out the set of principles that best justify those practices.³⁰

There is another common interpretation of Dworkin's work that is also SP-driven. According to this understanding, Dworkin holds that the law consists of 'the enacted law' or 'the obvious law' supplemented by moral principles. It is again easy to see how this version of Dworkin derives from taking SP to be common ground. Dworkin's famous

³⁰ See note 19.

early article ‘The Model of Rules I’³¹ focused on the way in which courts appeal to principles that have not been enacted. If one assumes that Dworkin adheres to SP, the obvious conclusion is that Dworkin thinks that content of authoritative pronouncements is supplemented by moral principles.

Although SP is consistent with anti-positivism, we can now see how it biases the debate towards positivism or legal realism.³² One who sees the law through the lens of SP will naturally find it difficult to understand why an anti-positivist position would be at all attractive. The anti-positivist options that, given SP, are most naturally taken to be available all suffer from obvious and serious problems. It seems obvious that governments need not be good or justified in order to create law; that what institutions say or mean does not depend on what it would be good for them to say or mean; that there are unjust or otherwise morally imperfect legal requirements; and that nothing is part of the content of the law simply because it is morally good.³³

Moreover, SP encourages the thought that any role for morality in legal matters can be cleanly separated from other issues. If that were right, then in the interest of clarity, why not simply use language in a way that separates moral from non-moral questions? For example, we may well want to make moral evaluations, but it seems only

³¹ Dworkin (1977).

³² One main strand of legal realism shares positivism’s position about what determines the content of the law. It departs from positivism in concluding from that shared position that there is more indeterminacy than positivists accept. Since our focus is on what determines the content of the law, such legal realists are positivists for our purposes.

³³ I don’t mean to endorse the position that the only anti-positivist positions consistent with SP are obviously false. My goal here is not to make a substantive claim, but to provide evidence that SP is widely assumed by illustrating the way in which SP has shaped attitudes. There may be other anti-positivist positions consistent with SP that would not naturally be visible to the adherents of SP, and the positions mentioned in the text are not obviously false. For example, the first of the possible roles for morality could be given a more sophisticated and plausible understanding according to which an institution need not be good or justified in order to create law but must satisfy some other moral condition, such as having a moral function or constitutive aim. Somewhat differently, as Mark Murphy (2003, pp.246-251) has argued, it is not obvious (though it has seemed so to many writers) that the law can include extremely evil requirements, though it certainly can include morally imperfect ones.

to confuse the issues to fail to separate the content of pronouncements from moral evaluation of that content. Frederick Schauer (1996, 43) nicely expresses this thought:

although the positions traditionally described as positivism and as natural law are commonly contrasted, and although the contrast is undoubtedly real in some respects, it turns out that all of those who subscribe to some version of anti-positivism, including but not limited to natural law, have a need for some form of identification of that [the content of certain social directives] which is then subject to moral evaluation. And so long as the alleged anti-positivisms engage in the process of pre-moral identification of legal items, then it turns out that they have accepted the primary positivist premises, premises which are not at all about the proper uses of the word 'law', but which are rather about the desirability and necessity of first locating that which we then wish to evaluate.³⁴

Note that Schauer here explicitly claims that all anti-positivist positions (as well as positivist positions) must take SP as their core.

Schauer's point depends on the assumption that moral and non-moral issues can be clearly separated. On non-SP views, as we've seen, there's no guarantee that morality's role is separable.

Other evidence

We saw that one kind of evidence that SP is widely held is the way in which philosophers of law move back and forth between claims about authoritative texts and claims about legal norms. At a more superficial level, a hint that SP is widely held is the way in which legal practitioners and scholars habitually use terms such as 'statute,' 'provision,' and 'directive' interchangeably with terms such as 'rule,' 'requirement,' and 'norm.'

³⁴ I have omitted a footnote from the quotation.

SP easily explains these habits. According to SP, texts or pronouncements bear an extremely straightforward relation to rules. Each authoritative pronouncement corresponds to a legal norm with the same content, unless some special consideration, such as a conflicting legal norm, comes into play. And in the normal or primary case, there will be an authoritative pronouncement—and therefore a canonical text—for each legal norm. If SP were true, it would therefore be natural, and typically harmless, to use ‘statute’ and the like interchangeably with ‘rule.’

This usage would be peculiar were it not for SP. A statute is either a text or, better, a pronouncement or enactment of a text. By contrast, a rule or requirement is a normative entity; it essentially is, or provides, a particular kind of reason for action. We needn’t try to give an adequate account of what a rule or requirement is to see that it is fundamentally a different sort of thing from a text or an utterance of a text. It is not a linguistic entity at all and need not even have a canonical linguistic formulation.

Roughly speaking, of course, the *content* of a statutory provision or text is (or can be) the right kind of thing to be a rule or requirement. So it might be thought that the explanation of the usage I have pointed to is simply that legal writers are using terms such as ‘statute’, ‘text’, and ‘provision’ as shorthand for their contents. And this is in fact what I am suggesting. But this explanation only makes sense if legal writers take for granted that the content of a statute or text corresponds in a straightforward way to a rule or requirement. It is both strained and highly misleading to refer to sentences (or utterances), whatever their contents, as rules when one does not take there to be a one-to-

one correspondence between sentences and rules. That is why the use of ‘statute’ and ‘rule’ interchangeably is evidence that the Standard Picture is presupposed.³⁵

I don’t mean to place much weight on the evidence of the conflation of ‘statute’ and ‘rule.’ Even on non-SP views, there are reasons why there will tend to be rough correlations between statutory provisions (though perhaps not judicial opinions) and legal requirements. So we can see how even non-SP adherents might fall into a habit of using ‘statute’ and ‘rule’ interchangeably in many contexts. Still, it is notable that even very precise writers do so.³⁶

A more important kind of evidence that SP is widely taken to be common ground is the way in which philosophers of law understand authority and the central role that they give to explaining it. Discussions of practical authority typically focus on the authority to create obligations in others -- what might be called authority over others -- though there are other kinds of practical authority, such as the authority to create immunities, privileges, and powers. I will follow this focus, though my points apply generally to other kinds of authority.

Legal philosophers’ starting point in discussing authority tends to be that for X to have practical authority is for X’s orders to create obligations to act as X ordered (within limits).³⁷ For example, Joseph Raz takes it to be part of the concept of (legitimate) practical authority that subjects ought to do what the authority says because he says so.³⁸

In his *Oxford Handbook of Jurisprudence* entry on ‘Authority,’ Scott Shapiro similarly

³⁵ I do not mean to suggest that legal scholars are confused about the difference between texts and rules. Despite passages that might suggest otherwise, my assumption is that most scholars are well aware of the difference. My suggestion is, rather, that because they assume SP, it seems natural and harmless to them to use the terms interchangeably in the legal context.

³⁶ E.g., Joseph Raz (1999, p.190-193).

³⁷ Authority may be limited, for example, by subject matter. I will usually omit this qualification.

³⁸ Joseph Raz (1994a; 1986, Ch.2-3; 1979, Ch.1).

takes it to be part of the concept of authority that (legitimate) authorities have ‘the power to impose obligations,’ which he understands throughout as the power to impose those obligations that the authority commands or pronounces. In an effort to avoid the paradoxes of authority, Shapiro considers a number of ways in which the concept of authority might be weakened, but he never considers the possibility that an authority might be able to create obligations that diverge from what the authority said or meant.³⁹

Correspondingly, philosophers of law assume that for X to have *legal* authority is for X’s directives to generate legal norms that require action as directed. The crucial point is that they take these propositions not to be substantive theories of how legal authority works, but simply to state what ‘authority’ and ‘legal authority’ mean (or, at least, what authority and legal authority uncontroversially are). In other words, they take these claims to be what needs to be explained by a substantive theory.

Having understood authority in this way, most philosophers of law see the problem of explaining legal authority as the central question of philosophy of law. According to Scott Shapiro (1998, p. 469): ‘In large part, the philosophical project of jurisprudence begins with the observation that the law’s claim to legal authority is actually a deeply paradoxical assertion.’ After explaining the nature of the problem—‘If legal authority can only be created by rules, who makes the rules that create the authority?’—he continues: ‘The history of analytical jurisprudence can usefully be told as a series of attempts to solve this chicken-egg problem’ (1998, 471).

Similarly, Jules Coleman characterizes legal positivism ‘in its broadest sense’ as ‘the view that the possibility of legal authority is to be explained in terms of social facts’ (2003, p. 120). The implicit suggestion is that an anti-positivist position explains legal

³⁹ Scott Shapiro (2002).

authority in a different way. No room is left for a view that is not an attempt to explain legal authority.

Joseph Raz's theory of law is an obvious example of a theory of law that centers around an attempt to explain legal authority. Raz begins with the proposition that law necessarily claims authority, and his theory grows out of the conditions that, he argues, law must meet in order for that proposition to be true.⁴⁰ This argument crucially depends on understanding authority in the way that SP does.

Hart (1994) does not explicitly characterize his theory of law as an attempt to explain legal authority. As mentioned above, however, the centerpiece of his account of law—the practice theory of rules and his deployment of it to explain the rule of recognition—is his answer to the question of legal authority (Shapiro, 1998). Hart motivates his account with criticisms of John Austin, importantly including criticisms of Austin's inability to account for legal authority. Hart concludes that legal authority cannot be explained without appeal to rules. Shapiro (1998, 471-474) points out that this argument leaves Hart with the problem that, if he is to explain legal authority in a non-circular way, he needs an account of rules that does not itself require appeal to legal authority. The practice theory of rules is precisely Hart's solution to this problem.

A widespread commitment to SP explains both the standard understanding of legal authority and the central position given to explaining it. SP's primary explanation of the content of the law is that it is constituted of the linguistic contents of authoritative pronouncements. Hence, SP explains legal content in terms of legal authority plus linguistic content.

⁴⁰ Joseph Raz (1994a; 1979; see also 1986, Ch.2-4).

The notion of the linguistic content of a sentence or utterance raises no problems special to legal theory. Once we have authoritative pronouncements, ascertaining their contents is in principle no different from ascertaining the ordinary linguistic contents of non-legal texts and utterances (though, as for any text or utterance, we may have to take into account features of the context, which in this case would be a legal one).⁴¹ Hence, for an adherent of SP, the central question about law will be the question of legal authority—the question of what makes a pronouncement authoritative.

Moreover, if SP is taken to be obvious common ground, then the problem of explaining authority will be taken to be the problem of explaining SP's conception of authority. In sum, for legal philosophers who take SP to be common ground, the central problem of legal philosophy will be to explain how legal pronouncements create legal norms with Explanatory Directness.

How would things look without SP? We can first note how peculiar it is to understand the concept of authority in the way described above. In an ordinary sense, to have (legitimate) practical authority is simply to have a normative power to create obligations, immunities, privileges, and powers. For example, one might have authority to marry people, to enter into contracts on behalf of a corporation or nation, or to make a will. It does not follow from the fact that Rex has authority, say, to contract on behalf of a corporation that the contract he in fact enters into is, within certain limits, the one that he says he is entering or means to enter. In the ordinary sense, then, to have legal

⁴¹ As Joseph Raz (1994a, p.221) says : “To establish the content of the statute, all one need do is to establish that the enactment took place, and what it says. To do this one needs little more than knowledge of English (including technical legal English), and of the events which took place in Parliament on a few occasions.” I do not mean to claim that *interpreting* an authoritative pronouncement is in principle no different from *interpreting* any nonlinguistic text. My point is that, according to SP, interpreting authoritative pronouncements is simply ascertaining their ordinary linguistic content, and ascertaining the ordinary linguistic content of authoritative pronouncements is no different in principle from ascertaining the *ordinary linguistic content* of other kinds of texts or utterances. There are some nonlinguistic texts, such as novels and poems, whose purposes are very different from those of ordinary communications. Interpreting such texts is not simply a matter of ascertaining their ordinary linguistic contents.

authority involves a power to create legal obligations (immunities, and so on), but it is not an uncontroversial starting point that the obligations created must be precisely the ones that correspond to the content of the authoritative pronouncements or to the authority's intentions.

It is instructive to compare the case of promising. Like the power involved in practical authority, the power to promise is a power to create obligations. (The obvious difference is that promises create reasons only for the promisor. So the power to promise might be thought of as a kind of authority over oneself.) But it is not an uncontroversial starting point for analysis that a promise creates, within certain limits, an obligation with the ordinary content of the promissory utterance. On some views, for example, what obligation is created depends in part on the expectations that the promise would reasonably be expected to create, and that may depend on factors other than what the promisor says or means.

The kind of legal authority we are concerned with is the legal authority to create law (as opposed to, for example, marriages, contracts, or wills). It does not follow trivially from an institution's having legal authority (in the ordinary sense) to create law that the law that it creates is the law that it says it creates or means to create. We've already seen that there are views of how law is constituted that do not depend on anything like SP's Core Model. On Dworkin's view and on DV, people take actions, including issuing pronouncements, with the intention of creating legal obligations. But the way in which pronouncements affect the content of the law on both pictures is not with Explanatory Directness (or even content independence).⁴² On the ordinary understanding

⁴² It might be objected that an authority who is aware that the obligations that will result from his or her actions may not be the ones that have the contents of his authoritative utterances (or the ones he intends) cannot rationally try to

of legal authority as the power to create legal obligations (though not necessarily with the content that the authority pronounces or intends), Dworkin's view and DV are pictures of how legal authority operates. But if we understand legal authority as most legal philosophers do, Dworkin's view and DV are not pictures of how legal authority operates, but theories of law according to which authority need play no role.⁴³

Here we have strong evidence that SP is widely taken to be common ground. Legal philosophers build SP into the concept of authority, thus equating the problem of how to explain legal content with the problems engendered by SP's conception of how legal content is created.

Of course, nothing depends on who is correct about the meaning of 'authority'. Suppose that most philosophers of law are right that to have authority is to have the right to be obeyed, in just the way spelled out by SP. We can even suppose this to be part of the meaning of 'authority'. In that case, it is a substantive and controversial claim that the creation of legal norms centrally involves authority. On this hypothesis about the meaning of 'authority,' the evidence that SP is widely taken to be common ground is not that philosophers of law build SP into the concept of authority. It is that they take authority to be the central explanandum for a theory of law.

In sum, whether or not it is correct to understand legal authority in a way that builds in SP, the typical understanding of the central problem of legal philosophy is

create law. If the claim is that an authority cannot rationally try to make law unless he or she knows that the resulting obligations will be precisely the ones pronounced or intended, the claim is much too strong. For example, in order for a legislator to be able to try to achieve legislative goals, it is enough that he or she be aware of the general direction of the impact of a legislative act. To take a crude illustration, if one knows that a particular bill will reduce the cost of healthcare, it is not pointless to enact the bill even if one does not know precisely how much it will reduce the cost. (Compare the fact that it is not pointless to hunt with an inaccurate bow and arrow as long as one has some idea of the general direction in which the arrow will travel.)

⁴³ I say "need" rather than "may" because it may be consistent with DV that, under special conditions, legal authorities can create legal norms with Explanatory Directness. See my "Beyond the Standard Picture" (Greenberg 2011).

strong evidence that SP is widely taken to be common ground. For the problem is framed in a way that excludes Dworkin's picture and DV from the playing field at the start.

III. Problems for the Standard Picture

1. Softening up the Standard Picture

This section has the modest goal of showing that SP is not *obviously* true with respect to Anglo-American legal systems. To this end, I look at the way in which lawyers, judges, and law practitioners work out what the law is and point out *prima facie* difficulties for SP. I take it that the actual practice of skilled practitioners is good evidence of the relation between legal texts and the content of the law. By contrast, practitioners are notoriously bad at theorizing their own practice. So we should give little weight to what practitioners say when they put on their philosophy hats. (Roughly, the distinction is between, on the one hand, what practitioners argue to courts and write in judicial opinions and, on the other, what they say in speeches, law review articles, or cocktail party conversation.)

The section is brief for two reasons. First, I discuss closely related points at greater length elsewhere.⁴⁴ Second, there is a methodological problem with evaluating SP in this way. The methods of interpreting constitutions, statutes, and cases are controversial. Therefore, in response to an argument that, for example, statutes are often interpreted in a way that does not correspond to their linguistic content, it can always be

⁴⁴ Greenberg 2004, pp.173-178.

argued that such interpretations of statutes are incorrect. This dialectic, though it helps to show that SP cannot be taken for granted, ultimately leaves us with a stalemate. We need to turn to more theoretical considerations, which is the work of the rest of the paper.

I emphasize that the section is not intended to refute SP, but merely to shake the common idea that it can be taken for granted.

SP seems a very poor fit for the way in which the decisions of appellate courts relate to the content of the law. We can set aside concurring and dissenting opinions and decisions without a majority opinion, which obviously present formidable difficulties for SP. Even in what should be its best case, an opinion signed by a majority of the court, SP does not look good.

As we have emphasized, SP is much stronger than the simple theses that there tend to be legal norms that correspond to the contents of authoritative pronouncements and that much of the content of the law corresponds to the contents of authoritative pronouncements. SP crucially involves a thesis about the explanation of the content of the law—Explanatory Directness.

We can begin, however, by noting that even the two simple theses seem not to accurately characterize the decisions of appellate courts. When we look at what contribution a case makes to the law, it is not a general rule that that contribution must be found in any of the court's statements. It is not statistically or normatively out of line for a case to have an impact on the law that is not articulated in the court's opinion (or, for that matter, in any mental state that accompanied the court's action). For example, the true significance of the case may lie in a distinction that the court did not articulate.

Conversely, it is not unusual for the content of statements in a majority opinion to fail to yield corresponding legal rules. For example, the court's statements may be dicta.

It might be said that subsequent court decisions that recharacterize the impact of earlier cases on the law change the law. My point is not about the impact of subsequent court decisions, however, but about what is involved in ascertaining the legal impact of a judicial decision. Before any subsequent court decision, the task of a lawyer or court that must ascertain the legal impact of a judicial decision (or decisions) is different from, and more complex than, attempting to find out what the court (or courts) authoritatively said or meant. A skilled practitioner's characterization of the legal impact of a judicial decision will often be different from the majority opinion's characterization of the decision. The lawyerly skills involved in, for example, determining what statements are mere dicta, are needed to ascertain what the law is. (To dramatize the point, imagine yourself in the position of a lawyer or judge trying to work out the impact of a past judicial decision.)

As for the real core of SP—Explanatory Directness, Linguistic Content, and Atomism—it should be obvious that they are out of place in the realm of case law. When a statement by a court accurately characterizes the impact of the court's decision on the law, it does not do so because the court's stating it makes it law. It is controversial exactly what contribution appellate decisions make to the law, but on any plausible theory, a case's contribution to the law depends on such issues as which differences between the facts of the case and those of other actual and hypothetical cases are relevant differences; and what rationale would best make sense of a body of decisions that reach different outcomes. There's much room for disagreement, of course, about what is

required to ‘make sense’ of a body of decisions, for example, how much weight is to be given to explaining the courts’ own statements. What is clear is that a court’s statements do not become law because the court issues them—and that general truth is no less applicable when a court’s opinion does correctly characterize its contribution to the law: the explanation of why the court’s characterization is correct is not simply that the court issued the characterization. (For example, on one view, part of the explanation might be that the stated rationale is the narrowest rationale on which the decision can be justified.)

With respect to Atomism, the point is perhaps even more obvious. The legal impact of case law is not obtained by first extracting a legal rule from each case individually and then amalgamating the resulting rules. Rather, the impact of cases on the law is holistic.⁴⁵

Moreover, SP has difficulty accounting for a central feature of judicial opinions—the reasoning. Unless the practice is seriously confused, a court’s statement of its reasoning plays an important role in constituting the content of the law. In fact, the most important part of learning to read appellate opinions is learning to follow the reasoning. But SP has a *prima facie* difficulty in accounting for the role of the court’s statement of its reasoning. SP explains that the contents of authoritative pronouncements become law in accordance with the Explanatory Directness Thesis. The content of a court’s statement of its reasoning would be a peculiar legal norm and, anyway, does not become a legal norm. Whether or not the statement of the reasoning is an authoritative pronouncement, the defender of SP lacks an account of how it contributes to the content of the law.

⁴⁵ In this discussion of the impact of appellate decisions, I have not considered the particularized orders issued by courts. The point of my discussion is to consider the way in which case law constitutes the content of the law. In the sequel to this paper (‘Beyond the Standard Picture’), I argue that particularized orders do not contribute to the content of the law.

In fact, the familiar practice of deriving the law from judicial decisions looks much more like trying to work out the impact of these decisions on the moral profile—on the applicable reasons—than like an attempt to determine what the courts said or meant. All the attention to relevant differences makes perfect sense on the Dependence View because of the fairness of treating like cases alike. And the idea that courts cannot lay down standards that go beyond what is necessary to decide the case is explained by considerations of democracy. In a nutshell, the competing pressures of democracy and fairness have the potential to provide an explanation of the impact of precedents on the law.

Areas of law that are heavily statutory are the obvious home for SP. I'll consider criminal law because that is the area I know best. Many aspects of the way in which criminal statutes relate to the content of the law do not fit smoothly into the Standard Picture. I will first sketch a few examples, and then consider replies that might be made on behalf of SP.

A general principle of the interpretation of criminal statutes is that statutes defining crimes are to be read narrowly. Even assuming that this principle does not require departing from the linguistic content of the statute, but choosing that aspect of linguistic content that is narrowest, it is difficult for SP to explain the principle. SP provides no reason that the determination of which aspect of linguistic content constitutes the law should be different in the case of criminal statutes as opposed to other statutes. By contrast, on DV, for example, the relevance of a statute to the content of the law depends on the moral impact of the enactment of the statute. Because of considerations

of fairness, notice becomes crucial when criminal penalties are at issue. Consequently, the moral impact of a criminal statute is narrower than that of a non-criminal statute.

To take a different kind of example, the criminal law is routinely understood to include mens rea requirements even when none are specified in the relevant statutory provisions. It would be a strain to argue that mens rea requirements are somehow part of the linguistic content of criminal statutes, whatever their wording and whatever the circumstances of their enactment. DV again offers a more promising approach. Statutes cannot have the effect of imposing criminal penalties without mens rea requirements because, in general, it is morally impermissible to impose criminal penalties on blameless actors.

A third kind of case involves state criminal statutes based on the Model Penal Code (MPC). The Model Penal Code is a model criminal statute drafted by members of the American Law Institute. It is accompanied by a commentary in which the authors explain what they intended to achieve in each section. At several points, however, the text of the MPC fails to correspond to what the authors say, in the commentary, that they intended to achieve. Courts often interpret state statutes in accordance with the commentary, rather than the text of the statute. An example is the MPC's provision concerning attempts, section 5.01. Section 5.01 seems explicitly to require that a defendant be aware of circumstance elements of an offense in order to be guilty of an attempt to commit that offense. The commentary says, however, that the drafters intended this language to eliminate a defense of legal impossibility, and that, with respect to circumstance elements of the underlying offense, the provision is intended to require only that the defendant have whatever mens rea is required by the statute creating the

underlying offense. Similarly, the provision concerning incomplete attempts, section 5.01(c), does not seem to treat result elements differently from circumstance elements, but the commentary indicates that with respect to incomplete attempts, the statute is intended to impose different mens rea requirements for result elements and circumstance elements. Courts have regularly interpreted section 5.01 in the way that the Model Penal Code's drafters say it was intended.⁴⁶

Examples could easily be multiplied. Statutes are regularly interpreted in ways that diverge from their ordinary content.

We must pause to consider briefly several possible lines of response on behalf of SP. First, it might be argued that, when a legislature enacts a statute against a well-established background – for example, of an interpretive practice or canon or a common law norm – the legislature can be presumed to have intended that the statute be interpreted in accordance with the relevant practice or norm unless it specifies otherwise. Thus, for example, the defender of SP might argue that, given the common law background, legislatures that enact criminal statutes without specifying mens rea should be understood to have intended mens rea requirements in the situations in which courts have imposed such requirements. Certainly, courts often argue in this way.⁴⁷

A sophisticated version of this kind of argument appeals to speaker's meaning or related notions.⁴⁸ Recent work in philosophy of language and linguistics has developed precise notions of such "pragmatically enriched" communicative contents – contents communicated by the speaker that go beyond the semantic content of the sentence

⁴⁶ See, e.g., *State v. Galan*, 658 P.2d 243 (Ariz.App. 1982). For the commentary, see Model Penal Code and Commentaries, Comments to section 5.01 at 301-304 (1985).

⁴⁷ See, e.g., *Morissette v. United States*, 342 US 246 (1952).

⁴⁸ For recent arguments that appeals to such notions can solve many of the problems of statutory interpretation, see Marmor (2008; forthcoming, 2010); Neale (forthcoming, 2010); Soames (2009). For an early appeal to speaker's meaning, see Miller (1990). I discuss such arguments in Greenberg (2010).

uttered. The basic idea is that such contents are constituted by the contents of certain communicative intentions of the speaker (as opposed, for example, to more general intentions with respect to legal impact). In the example involving state statutes based on section 5.01 of the MPC, for instance, it might be argued that the legislators meant, or intended to communicate, by the words of the provision, that the required mens rea for circumstance elements is only that of the underlying offense.

It has long been established that there are extremely serious problems with approaches that appeal to actual psychological intentions of legislatures or legislators, and I won't rehearse the problems here.⁴⁹ Among other things, there are serious difficulties about who counts as the relevant speaker – “the legislature” – and what would constitute its intentions. For present purposes, I will just point out that, even given generous assumptions about how legislators' attitudes combine to constitute the legislature's intentions, it is wildly implausible, as an empirical matter, that legislators have the intentions that they would need to have in order to accommodate my examples and many similar ones—i.e., intentions that correspond to the way in which the statutes are interpreted.

First, the argument that legislators are aware of the relevant background of interpretive practices and common law norms, and intend that their statutes be interpreted in accordance with that background, is not credible as an empirical claim (though imputing such intentions may be quite sensible as a method for determining the legal impact of statutes).⁵⁰ Many legislators are not lawyers, and few of those who are lawyers

⁴⁹ For powerful discussions of the problems of appeals to actual legislative intentions, see Dworkin (1985); Moore (1981); Solum (2008).

⁵⁰ Miller (1990) argues that the canons of statutory interpretation can be understood as legal versions of Gricean conversational principles. But he makes no effort to argue for the implausible claim that legislatures actually have the necessary intentions. His discussion is better read as a suggestion that the constitutive impact of a statute depends on

are expert in criminal law. Most do not read the full texts of the provisions they vote on. It can't seriously be maintained, for example, that legislators are aware of common law practices concerning when mens rea requirements are presumed and, in light of that awareness, use statutory language without mens rea terms with the intention of imposing mens rea requirements.

The problems are even more serious in the case of the communicative content approach. As I argue in Greenberg (2010), it is implausible that legislators typically have any specific communicative intentions of the kind required by the approach (as opposed to intentions about the general legal impact of a statute), and even when they do, evidence of such intentions is generally not available. Few state legislators have read the commentary to the MPC or, in enacting an attempt statute, have any intention with respect to the mens rea required for circumstance elements of the underlying offense. Certainly, there is no reason to believe that state legislatures, in enacting attempt prohibitions, intend to communicate that the required mens rea for circumstance elements should be the same as that specified by the statute creating the underlying offense, despite the fact that this not what the text of the attempt provision says. And it cannot seriously be maintained that the law professors and judges who drafted the MPC in the early 1960s constitute the relevant authority with respect to state criminal statutes enacted by state legislatures decades later.

It might be suggested, next, that legislatures simply have very general intentions, for example that the interpretation of a statute be left to the standard methods used by the courts or that a statute be interpreted in the way, whatever that is, that its drafter intended.

the intentions that we would impute to a rational single agent who had uttered the statutory text. Analogues of Gricean principles are thus being used not as methods of ascertaining the actual intentions of legislatures, but, in a non-Gricean way, as norms for imputing intentions.

One problem is that it is probably not even true that legislators typically have such intentions. But, however that may be, this suggestion could not provide much support for SP. It is at best a hollow victory for SP if the content of the law is not constituted by the specific contents of authoritative pronouncements, but this fact is consistent with or even dictated by the very general intentions of authorities.

Finally, in a similar vein, the defender of SP might drop the appeal to the intentions of legislators and argue that SP could account for the examples by appealing to (the linguistic content of) authoritative pronouncements that specify how criminal statutes are to be interpreted or by appealing to other norms, perhaps of conventional morality, used by the courts to interpret criminal statutes.⁵¹ My response is similar to my response to the suggestion that legislatures intend that courts employ standard methods of interpretation. First, in many cases there will not be authoritative pronouncements with the relevant content. Certainly, the development of mens rea requirements is not best explained by an authoritative pronouncement. Second, more importantly, if SP is correct, the content of a criminal statute is constituted by the ordinary linguistic content of the statute. It not a point in SP's favor that courts follow norms of interpretation, whatever their source, that require criminal statutes to be interpreted in ways that depart from their ordinary linguistic content. It would be a major setback for the defender of SP to fall back to the position that although the legal norms contributed by statutes are *not* constituted by the ordinary linguistic contents of the statutes, this is consistent with SP because there are higher-level authoritative pronouncements, or, worse, norms with other sources, that require that statutes not be interpreted in accordance with their ordinary

⁵¹ Thanks to the editors of the volume for raising this objection.

linguistic content. Once again, my point is not that my examples show that SP is false (much less that DV is true), but merely that the defender of SP has work to do.

We have been considering ways in which the content of a statute and a corresponding legal norm can come apart. On any plausible picture of the law, however, the content of a statute will typically correspond relatively closely to the content of the law. For example, as mentioned in section II.2, because of reasons of democracy and fairness, the moral impact of a statute will often be closely related to its content. Therefore, DV will typically have the consequence that the net effect of a statute will be roughly a legal norm with the content of the statute. (In the sequel to this paper, 'Beyond the Standard Picture,' I'll discuss reasons why the moral impact of a statute can diverge from its linguistic content.) The crucial claim that distinguishes SP is that the content of the law depends on the content of statutes (and other authoritative pronouncements) with Explanatory Directness.

As a result, the problem for SP is more serious than we have so far recognized. Once we have seen instances in which the content of the law diverges from the content of statutes, we can no longer assume that SP is the correct explanation of the law even in cases where the content of the statute and the content of the law correspond closely.

Consider an analogy from medicine. In many cases, bulging discs do not correspond neatly to back pain. For example, we find bulging discs in people without pain. We therefore need a more complex explanation than one that claims simply that bulging discs produce back pain. If we find a patient who has a bulging disc and pain, it would be a mistake to assume a simple causal relation, given that the same disc problem causes no pain in others. Analogously, once we have seen that a statute does not ensure a

norm with the statute's linguistic content—e.g., because of the principle of interpreting criminal statutes narrowly, because of the requirement of mens rea—when we do find a case of approximate correspondence between the content of a statute and the content of the law, we cannot assume SP's simple explanation.

2. A hypothesis about the way in which the law is supposed to operate

In this and the following section, I raise a problem for the Standard Picture. Here is a quick preview of the way the argument will go. First, I offer a hypothesis about how the legal system is supposed to operate, in particular about how legal obligations are supposed to relate to moral obligations. The rough idea is that there is something defective about a legal system to the extent that it creates legal obligations that it is all-things-considered permissible to violate. I hope that this hypothesis, though perhaps unfamiliar, will be relatively uncontroversial. I next argue that SP makes it highly problematic for legal systems in contemporary nation states to operate as they are supposed to. The basic problem is that SP requires a general obligation to obey the law in order for legal systems to operate as they are supposed to. But there is a widespread consensus that the conditions for such an obligation can rarely if ever be satisfied by the governments of contemporary nations. Finally, in the sequel to this paper, 'Beyond the Standard Picture,' I show that abandoning SP has the potential for legal systems to operate as they are supposed to without satisfying the conditions for a general moral obligation to obey the law.

A legal system creates legal obligations, powers, immunities, privileges, and so on. This much is banal. More interesting is the question of how the legal realm relates to the realm of reasons generally and to the moral realm, for example how legal obligations relate to all-things-considered obligations and to moral obligations. (For simplicity, I will mostly focus on obligations.)

In the next subsection, I will offer a hypothesis about the answer to this question, but before doing so, I need to discuss the relation between all-things-considered obligations and all-things-considered *moral* obligations. The upshot of the discussion will be that for our purposes, any gap between the two will not matter. Those who accept that conclusion already can skip the next subsection, moving directly to the discussion of my hypothesis.

All-things-considered obligations versus all-things-considered moral obligations

First, I take it to be obvious that all-things-considered moral obligations are (or at least imply) all-things-considered obligations tout court. It's fundamental to the nature of morality that if, all-things-considered, one is morally required to take some action, it cannot be the case that other reasons make it permissible not to take the action. All-things-considered moral obligations trump other considerations.⁵² For example, if one is all-things-considered morally required in a particular situation to attempt to rescue a baby, it can't be the case that that obligation is somehow outweighed by prudential considerations. The point is *not* that moral reasons always trump other kinds of reasons. Prudential reasons can, for example, prevent one from having an all-things-considered

⁵² The view stated in the text is the standard view, though some deny it, e.g. Philippa Foot (1978, Chs.11 & 13).

moral obligation in the first place. If it would cost Astrid too much to help Bruno, then despite strong reasons why she should help him, she may not have an all-things-considered moral obligation to help him. Rather, to say that someone has an all-things-considered moral obligation is to say that one's other, non-moral reasons have already been taken into account. (It is in part because all-things-considered moral obligations trump other considerations, that whether one has an all-things-considered moral obligation must depend on all the relevant reasons that bear on the situation.)

What about the other way around? Are all-things-considered obligations necessarily moral obligations? Again, it is important to distinguish reasons and obligations. On a plausible view, an action may be supported by the all-things-considered balance of reasons without being obligatory. Suppose there are several morally permissible options. One of them may be favored over the others by the balance of reasons because, for example, there are prudential or aesthetic reasons that support it. (Note that it doesn't follow from the proposition that prudential or aesthetic reasons may play this role that they have no impact on what is morally permissible or obligatory.) This kind of example shows that the action that is supported by the all-things-considered balance of reasons need not be all-things-considered morally obligatory. Our question, however, is whether all-things-considered *obligatory* actions need not be all-things-considered morally obligatory.

It might be claimed that prudential obligations are an example of non-moral obligations. In support of this claim, it might be argued that prudential obligations can conflict with moral ones. As noted earlier, prudential reasons can generate moral obligations—for example, one may be morally obligated in some circumstances to avoid

serious harm to oneself or one's family. In contrast with moral obligations that are generated by prudential reasons, it is somewhat odd to talk of merely prudential *obligations* at all. But suppose we grant that there are prudential obligations. That one has a prudential obligation is certainly not sufficient for one to have an all-things-considered obligation (contrast moral obligations in this respect). For an obligation to be all things considered, morality must be taken into account.

It might be suggested that in a situation where more than one action is morally permissible, serious enough prudential (or even aesthetic) reasons—whether or not those reasons are properly considered to yield prudential obligations—could create an all-things-considered obligation to take a particular action. (For our purposes, it won't matter whether such prudential reasons are, or yield, prudential obligations or not, so we can set that question aside.) A preliminary point is that, in order for this suggestion to be at all plausible, the reasons in question would have to be very strong or serious. Otherwise, we would simply have the familiar situation described above in which, all-things-considered one has reasons, but not an obligation, to take one of the morally permissible actions.

My own tentative view about the suggestion is that, if the prudential or other reasons are strong enough to yield an all-things-considered obligation, then one has a moral obligation. That is roughly because I take a very catholic view of the domain of morality: in particular, I think that morality obligates one to act on serious enough prudential reasons.

But for the purposes of this paper, not much turns on this point. The case in dispute—a putative all-things-considered obligation (without a moral obligation) that

comes about because of serious enough prudential reasons—is not relevant in the present context. The reason is that, as we’ll discuss below, the way in which the law is supposed to generate an obligation for a person to act is not by giving the person extremely strong prudential reasons, in particular by threatening that person with sanctions (though the threat of sanctions against others may make their cooperation more likely and thereby give a person a moral obligation to cooperate that she would otherwise not have). One manifestation of the problem is that it would not be morally permissible to apply serious sanctions to someone for doing what is, by hypothesis, morally permissible (and is only ruled out by the balance of reasons because of the threat of sanctions). For our purposes, therefore, the potential gap between all-things-considered obligations and moral obligations will not matter. If the law is supposed to create all-things-considered obligations, it is supposed to create all-things-considered moral obligations. I therefore will not generally distinguish carefully between all-things-considered obligations and all-things-considered moral obligations. Also, for brevity, I’ll write ‘moral obligation’ rather than ‘all-things-considered moral obligation’ unless the discussion concerns the distinction between *pro tanto* and all-things-considered moral obligations. Readers who resist the conclusions of this section may substitute ‘all-things-considered obligation’ for ‘moral obligation’ throughout.

The bindingness hypothesis

I can now offer my hypothesis about the relation between legal obligations and moral obligations. The hypothesis, very roughly, is that a legal system is supposed to operate by arranging matters in such a way as to reliably ensure that its legal obligations are all-things-considered morally binding (or, equivalently, that a legal system is defective to the extent that it does not so operate). Slightly more precisely, a legal system is supposed to operate by arranging matters in such a way as to reliably ensure that, for every legal obligation, there is an all things considered moral obligation with the same content—but *not* necessarily so that for every moral obligation, there is a corresponding legal obligation. For example, if, in a particular legal system, there is an obligation to pay tax on one's income in accordance with a certain scheme, the legal system has failed to operate properly if it is morally permissible not to pay the income tax. (But it is no failure of the legal system if there are moral obligations—perhaps to rescue people when it can be done without too much risk to oneself, or not to lie to one's friends—without any corresponding legal obligations.)

An intuitive way of putting the point is that the law is supposed to be binding, where that means genuinely binding all things considered—not just legally binding (which the law trivially is). Let's call the relation between law and morality that the law is supposed to ensure—that there be for every legal obligation a moral obligation with the same content—*bindingness*, and the hypothesis *the bindingness hypothesis*.

(An alternative version of the hypothesis that would serve my purposes as well focuses on a legal system's having a reliable *capacity* to ensure bindingness, rather than actually ensuring it. According to the alternative hypothesis: a legal system is defective to the extent that it lacks a reliable capacity to ensure that, for every legal obligation,

there is an all things considered moral obligation with the same content. Having such a capacity is consistent with there being legal obligations that are not binding, since there may be interfering factors in particular cases. Therefore, one can believe the alternative hypothesis without believing the original version. The intuitive idea is that there is an inherent tension in a legal system that has no capacity to ensure that its obligations are as it must treat them as being. Readers who find this version more plausible can substitute it throughout.)⁵³

Before we turn to its plausibility, the bindingness hypothesis needs to be clarified and qualified in several ways. First, since many legal obligations have apparently morally neutral content -- for example, they require people to follow morally arbitrary procedures -- it might be wondered how there could be moral obligations with the same content. A preliminary point is that (as emphasized in the previous section), all-things-considered moral obligations are not relevantly different from all-things-considered obligations, so readers who get stuck on the term “moral” can simply leave it out. More importantly, the obligations in question are not the moral obligations that obtain in advance of the relevant actions of the legal system, but those that obtain in virtue of those actions. As noted above (in Section II.2), because of reasons such as democracy,

⁵³ Scott Herschovitz, A.J. Julius, and others have raised the question whether I should rely on a version of the hypothesis that is weaker than the original hypothesis in a different way from the alternative version just described. Roughly, the hypothesis would be that a legal system is defective to the extent that there are legal obligations that it is not morally permissible to enforce. My tentative position is that there is not much distance between this hypothesis and the original one because in general it is not morally permissible to coerce someone to take a particular action (or to sanction him for not taking it) if it is morally permissible for him not to. (See Dworkin (1986, p.191): “though obligation is not a sufficient condition for coercion, it is close to a necessary one.”) It is crucial to this point that, as noted in the text, the relevant issue is not ex ante moral permissibility, but moral permissibility taking into account the relevant legal obligations and actions of legal institutions. If, even taking into account a legal obligation to Φ , it remains morally permissible for someone not to Φ , it will in general be morally impermissible to sanction him or her for not Φ ing.) Although I will not argue it here, I think that the basic argument retains its force given the version of the hypothesis discussed in this footnote. I hope to address the issues more fully in the sequel to this paper.

fairness, and the importance of coordinating certain kinds of behavior, the moral obligations that exist after the relevant actions have been taken can include both obligations to perform actions that would in advance be morally neutral and obligations to perform actions that would in advance be morally flawed.

Second, it is important to understand that the hypothesis is different from, and much weaker than, the claim that a legal system is supposed to be legitimate or the claim that there is supposed to be a general moral obligation to obey the law. One way to see this is to note that a highly illegitimate government could achieve bindingness simply by creating only legal obligations that duplicated already existing moral obligations. As we will see, however, presupposing SP makes it seem that a general moral obligation to obey the law is necessary to ensure bindingness if a legal system tries to do more than duplicate existing moral obligations. If we reject SP, however, a different way to ensure bindingness becomes visible. In the next subsection (*The Plausibility of the Bindingness Hypothesis*), I clarify the relation between legitimacy and bindingness.

Third, as I intend the hypothesis, it purports to identify an essential property of law. It purports not merely to say something true or even necessarily true about law, but to say something about law's nature. Shortly, I will turn to the methodological implications of framing the hypothesis in this way. I'll suggest that readers who find themselves resistant to the hypothesis can take it, at least provisionally, in a weaker way—as a hypothesis not about what is essential to law, but about what is essential to a theoretically interesting subset of legal systems, including the US and UK and many other contemporary legal systems.

Fourth, the property that is hypothesized to be essential to law is a normative property. I have formulated the hypothesis using the notion of how law is *supposed to* operate. I don't mean to insist on precisely this formulation. There are a variety of normative notions that would yield different versions of the bindingness hypothesis. I will not much pursue the differences between them in this paper. One alternative, for example, would be that law is the sort of thing that works in a certain way when it works *properly* or *ideally*. Another alternative would be that law *purports* to work in a certain way, where the notion of purporting is normative rather than psychological.

Notice that it is not uncommon to characterize the relation between two things in normative terms. For example, many philosophers have held that the best understanding of the relation between belief and truth is that beliefs are defective when they are not true, that the constitutive aim of belief is truth, or that the standard of correctness for beliefs is truth.

We can tie together the point that the hypothesis attributes a normative property to law with the point that the hypothesis makes a claim about what is essential to law. The bindingness hypothesis is not the claim that it would be good if law operated in such a way as to ensure bindingness. That would be a normative claim about law, but it would not be a normative claim about the essence of law. In contrast, the hypothesis is that law, by its nature, is supposed to operate in a certain way—that bindingness is proper for law. We can illustrate the point with the example of belief. The claim that it would be good if our beliefs made us happy is plausibly true. But unlike the claim that beliefs aim at truth, the former claim does not purport to tell us anything about the nature of belief.

Let me say a little more about the kind of normative property I have in mind. One kind of claim that an object or kind is supposed to have a certain property, or is defective to the extent that it does not, is a claim about its function.⁵⁴ For example, if one says that hearts are supposed to pump blood or that, when they work properly, they pump blood, one may be claiming that the function of the heart is to pump blood. But claims about what something is supposed to do need not be claims about function. They seem to be a broader class of normative claim that includes (certain) function claims as a proper subset.

Consider some examples of related normative claims that are not, or need not be, claims about function. We have already encountered the example of the claim that beliefs aim at truth. Similarly, one might maintain that arguments are such that, when they operate properly, the truth of the premises guarantees the truth of the conclusion. Such claims might be made as claims about a function of beliefs or arguments, but they need not be. To take a different kind of case, consider the idea that courage, integrity, and friendship are such that when they operate properly they produce human goods (though they do not always do so). Despite the plausibility of this idea, it would be odd to claim that courage, integrity, and friendship have functions. In general, only certain kinds of things -- paradigmatically artifacts and biological organs -- have functions, but it can be part of the nature of something that does not have a function that it is supposed to have a certain property or is defective to the extent that it does not.

⁵⁴ Philosophers use the term 'function' in a variety of ways. On some uses, to say that a function of X is to Φ is to merely to say that X Φ s or that it would be good for X to Φ . See, e.g., Raz, 1979. That X Φ s is neither a normative claim, nor a claim about X's nature. That it would be good for X to Φ is a normative claim, but not a claim about X's nature. As I use the term, however, to say that a function of X is to Φ is to say that it is part of the nature of X that it is *for* Φ ing. It is therefore a way of spelling out X's nature in normative terms.

Why do I emphasize that claims about what law is supposed to do need not be claims about the function of law? The main reason is that the claim that law has a function or functions is non-obvious, controversial, and not necessary to my argument. I'm much more confident that law, like arguments or friendship, can be defective, than that it has a function. And this kind of claim is sufficient for my argument. In addition, as I point out next, even if law has a function or functions, the bindingness hypothesis seems more naturally to characterize a constraint on law than a function of law.

Fifth, I do not mean to suggest that the law's only or most important end or goal is to ensure bindingness. That would be a bizarre claim. Rather, according to the bindingness hypothesis, whatever ends law has, whatever its functions are, it is supposed to pursue those ends and perform those functions while ensuring bindingness. Indeed, though we can regard the achievement of bindingness as *a* goal, it is more naturally understood as a method of, and constraint on, the law's pursuing other goals: the law is supposed to pursue its goals by creating binding obligations (or powers to create such obligations, etc.). (As noted, bindingness can be achieved simply by enacting no legal obligations that are not already moral obligations.) For example, whether you think that law has the function of promoting the public good, of constraining the use of government coercion, or of planning, it is plausible that it is defective if it creates legal obligations that are not binding. Even if you think that law has no function, but for example serves different functions in different societies, it still seems that law is defective if it creates obligations that are not binding.⁵⁵

⁵⁵ Note that the law's having certain moral functions, for example the function of solving moral problems, would help to explain why bindingness is a constraint on law. The constraint would be justified in terms of the value whose pursuit it constrains. But constraints need not be justified in this way. Thanks to an anonymous Oxford University Press referee for suggesting that I say more about this point.

Sixth, and finally: there is at least one way of arranging matters so that a legal obligation is matched by a corresponding moral or all-things-considered obligation that is meant to be excluded by the hypothesis. (Here the potential gap between moral and all-things-considered obligations may come into play.) Suppose we give citizens very strong prudential reasons for not violating a legal obligation. For example, suppose we threaten them with serious force. In some circumstances, one may have reasons to avoid harm to oneself and one's family that are strong enough to outweigh any moral reasons that favor violating the legal obligation. Therefore, if the threatened force is serious enough, it can create an all-things-considered obligation with the same content as the legal one, and this can happen even if the legal obligation is to act in a way that would, other things being equal, be morally wrong. (As discussed above, we can leave open the question of whether such all-things-considered obligations necessarily are or imply all-things-considered moral obligations.)

This method of ensuring bindingness obviously couldn't work across the board. For example, there are some things that one morally may not do regardless of the consequences to yourself or your family. Therefore, one cannot be all-things-considered obligated to do such things.

More fundamentally, this method of ensuring bindingness would involve imposing serious sanctions on people for conduct that would be morally permissible if it were not for the threatened sanctions. It is generally morally impermissible to impose sanctions in such circumstances, so this cannot be how the legal system is supposed to ensure bindingness. A manifestation of the problem is that it will be impossible to make the all-things-considered obligations of the legal officials who are to administer the

sanctions consonant with their legal obligations. Therefore, the method will not succeed in achieving bindingness.

The more general point is that law is supposed to use only particular kinds of ways of arranging bindingness. As we will see, however, it would be wrong to say that the right kind of way excludes any use of sanctions. Closer to the truth would be that the law is supposed to give actors reasons that are not merely prudential ones.⁵⁶ A full development of the hypothesis would require me to say more about what is ‘the right kind of way;’ the sequel to this paper, ‘Beyond the Standard Picture,’ will address the issue. To save words, I will generally omit the qualification explained in this paragraph or will simply say that the law is supposed to ensure bindingness ‘in a characteristic way.’

The plausibility of the bindingness hypothesis

In this section, I suggest that many legal theorists hold something in the neighborhood of the bindingness hypothesis (though they would not formulate it as I do); that Joseph Raz’s influential view that the law necessarily claims legitimate authority strongly supports the hypothesis; that the hypothesis offers an attractive explanation of how legal systems differ from the systematic exercise of brute power; and that the hypothesis is intuitively plausible. I don’t purport to give a real argument for the

⁵⁶ For reasons that will emerge in the sequel to this paper, ‘Beyond the Standard Picture,’ I do not want to say that the point is that the mere existence of the legal obligation, as opposed to for example the threat of a sanction, is supposed to ensure bindingness.

hypothesis, though I hope that, in light of these points, it will be relatively uncontroversial.

First, a standard position is that if a legal system has legitimate authority, there is a moral obligation to obey the law.⁵⁷ Given that position, one who accepts that legal systems are supposed to have legitimate authority is committed to the bindingness hypothesis. (Similarly, one who accepts that legal systems are defective to the extent that there is no general moral obligation to obey the law is committed to the bindingness hypothesis.) As will become clear, the hypothesis is more general than the idea that law is supposed to have legitimate authority (and the form of the hypothesis that I will explore does not involve the notion of authority at all). But, as I'll argue below, that is the form that the hypothesis takes for adherents of SP. (In a nutshell, the reason is that, given SP, the only way bindingness can be ensured is for a legal system to have legitimate authority).

Now it might be objected that, although it is good when the legal system is morally legitimate, it doesn't follow that that is how legal systems are supposed to be. Legal theorists, however, have generally been unwilling to accept that law is merely the content of the pronouncements of individuals or bodies that have brute power. There seems to be a weighty or important difference between legal systems and brute power. I suggest that an inchoate recognition of the bindingness hypothesis (or of the proposition that a legal system is supposed to be legitimate, which implies the hypothesis) lies behind the sense that law is importantly different from brute power. If a legal system is supposed to be legitimate, then, although many legal systems may fail to be legitimate, a

⁵⁷ See, for example, Raz (1986, pp.23-28) who argues for this position. For examples of theorists who reject the position, see William Edmundson (1998); Rolf Sartorius (1981); Ladenson (1980).

band of thugs cannot constitute a legal system without altering itself in a fundamental way.

Many philosophers accept Joseph Raz's position that an essential feature of law is that it claims to have legitimate authority. It may be objected that this feature already marks an important difference between law and brute power, so the bindingness hypothesis is unnecessary.⁵⁸ I want to make two points about this potential objection. First, Mark Murphy has compellingly argued that there is something defective about law if it does not have what it, by its nature, must claim to have. "Because [by essentially claiming legitimate authority] it holds itself to this standard, it can rightly be treated as a *defect* in law if it fails to be authoritative." If Murphy is right, Raz's view entails that law that is not authoritative is defective, which entails the bindingness hypothesis.

Second—and this is just an intuitive consideration—the property of claiming legitimacy is too easy to come by to provide an important difference between brute power and law. As a pre-theoretical matter, it seems that an institution's coming to claim something, even sincerely, is too superficial a change to effect a weighty or important difference. For example, law is characteristically comprehensive, in the sense that it claims authority to regulate any aspect of human behavior,⁵⁹ while brute force typically is not. But a band of thugs that seizes power can, without fundamentally changing itself, acquire this feature. Similarly, without what is intuitively a fundamental change, a group of thugs can claim legitimacy, and do so (surprisingly easily, history suggests) sincerely.⁶⁰ To the extent that those who accept that law necessarily claims authority take

⁵⁸ Thanks to Brian Leiter for raising this objection.

⁵⁹ See Raz (1999, pp.150-151).

⁶⁰ Raz (1994, pp.216-17) argues that, in order to claim authority, law must meet certain non-moral conditions for having authority. '[I]n the normal case, the fact that the law claims authority for itself shows that it is capable of having authority.' In part, his argument is that legal officials and institutions 'cannot be systematically confused' about

this feature to mark a weighty difference between legal systems and brute power, the condition that law is supposed to be legitimate is a better candidate (of course, this argument is far from conclusive – among other things, there are other possible candidates).

Furthermore, it is easy to see how philosophers could mistake the idea that law essentially claims authority for the idea that law is supposed to have authority, especially in light of the common philosophical tendency to substitute nonnormative properties for normative ones. In general, the fact that an institution, by its nature, claims to have a particular property and the fact that it is supposed to have that property will tend to go together. For example, if an institution is supposed to have a particular property, that would explain why it claims to have it. So an institution's claiming to have a property is evidence that it is supposed to have that property. Also, that an institution claims to have a property could, depending on how the claim comes about, help to make it the case that the institution is supposed to have the property. (Compare: that marriage vows state that the parties take each other "until death do us part" is evidence that, and may also help to make it the case that, marriage is supposed to last as long as both parties live.) Finally, Murphy's argument can be generalized to show that the fact that an institution by its nature claims to have a particular property entails that it is supposed to have that property.

the concept of authority because 'it is what it is in part as a result of the claims and conceptions of legal institutions' (p.217). In the first place, the conditions that Raz claims a legal system must have in order to claim authority are relatively easy for a group of thugs to meet (see pp.218-19). Moreover, though I cannot argue it here, Raz greatly underestimates our ability to be wrong about any of our concepts. See, e.g., Greenberg (2009; MS). At any rate, the point for present purposes is that agents who are *not* legal officials or institutions can easily claim authority, so the argument that legal officials and institutions can't be systematically confused about the concept of authority is not to the point.

I now want to offer an intuition pump in support of the bindingness hypothesis. The idea is to elicit our intuitions about law's relation to morality (and ultimately to all-things-considered obligations) by contrasting it with a different relation that a domain of (putative) reasons could bear to moral reasons.

A domain of reasons could be, by its own lights, subordinate to moral reasons. Norms of etiquette or of a university might be examples. In my view, the norms of etiquette contemplate that they are subordinate to morality, so that etiquette does not require that one do something morally wrong to avoid a faux pas.⁶¹ It is not that etiquette takes into account or incorporates all moral reasons. Rather, even when etiquette's standards apply by their own terms, it is understood that they have force only to the extent that is morally permissible. One piece of evidence for this proposition is that specifications of the norms of etiquette do not include specific exceptions for cases in which moral reasons might conflict. For example, the rules about sending thank you notes do not include an exception for cases in which fairness considerations militate the other way. No such specifications of exceptions are needed since rules of etiquette, in general, are subordinate to morality. (Of course, that a rule of etiquette would be violated can be a morally relevant consideration, for example, because it would lead to hurt feelings.)

Law, I suggest, differs from etiquette in not regarding itself as subordinate to morality. One piece of evidence is that the law does include specific morally-based exceptions to otherwise applicable legal norms. Perhaps the most obvious examples are

⁶¹ Not all writers agree on this point. E.g. Philippa Foot, 1978, Ch.13. It doesn't matter whether I'm right about etiquette for present purposes. The point is just to clarify the claim about the legal domain by means of a plausible contrast. If one disagrees about etiquette, one can use a different domain, perhaps the rules of a family or club, as the appropriate contrast.

justification defenses, such as self-defense, protection of others, and necessity, in criminal law. Another is the principle that unconscionable contracts are not enforceable. If the law generally regarded itself as subordinate to morality, no such exceptions would be necessary.

Quite aside from such evidence, it seems obvious that the law does not treat legal obligations as generally subordinate to morality.⁶² It is not legally accepted, for example, that, as a general matter, moral obligations trump legal obligations. Once legal obligations are established, the law enforces them—including with coercion—regardless of moral or other reasons. This is to treat them as all-things-considered binding.

Of course, the law treats morality as relevant in various ways to questions that the law and legal officials must address. On some views, the content of the law—and thus what legal obligations one has—may depend on moral reasons. And on some views, when the content of the law does not cover a particular case, a judge may be legally permitted or even required to decide the case on the basis of moral reasons that are not part of the content of the law. But if one has a legal obligation, the law does not countenance that one avoid that obligation on the basis of moral reasons that are not part of the content of the law. One who is accused of breaching a legal obligation cannot concede the applicability of the relevant legal standards, but argue to the court that he is not liable because what he did was morally permissible. In brief, the law does not contemplate that it is subordinate to morality. Nor does the law contemplate that it is subordinate to any other domain. By the law's lights, at least, legal obligations are all-

⁶² Joseph Raz (1979, p.31) makes a similar point: "But in all legal systems the recognition given by law to such non-legal reasons is limited and is itself strictly regulated by law: non-legal reasons do not justify deviation from a legal requirement except if such justification is allowed by a specific legal doctrine."

things-considered obligations, not merely pro tanto obligations that can be trumped by other obligations.⁶³

The foregoing is merely an intuition pump. It could be rejected, for example by claiming that law's treating its obligations as all-things-considered binding is merely an accidental, not an essential, feature of law. If, however, it is accepted that the law, by its nature, treats legal obligations as all-things-considered binding, it is hard to avoid the conclusion that the law is defective to the extent that there are legal obligations that are not all-things-considered binding. Even more obviously, the law is defective to the extent that it lacks the *capacity* to ensure that legal obligations are all-things-considered binding (as the alternative version of the bindingness hypothesis holds). We discussed above considerations supporting an inference from the proposition that law (by its nature) *claims* authority to the conclusion that law is supposed to have authority. Similar considerations even more strongly support the inference from the way that law, by its nature, *treats* legal obligations to the way that law is supposed to be.

An essential property of law or merely of a theoretically interesting subset of legal systems?

Now, some may object that we call systems 'legal systems' even when there is no attempt to ensure bindingness (and no other reason to think that the system is supposed to do so)—when, for example, force alone is used to create reasons for complying. In the

⁶³ As discussed above, for our purposes, such obligations have to be all-things-considered moral obligations. Joseph Raz (2004, pp.6-7) offers a related argument. He points out that legal obligations are, at least in part, man-made. But any principles that allow people to interfere in important ways in others' lives are moral principles. So legal reasons derive whatever force they have from morality. Possibly unlike prudential reasons, they have no independent source of normativity. Therefore, Raz concludes, legal obligations are binding 'only if moral principles of legitimacy make them so binding' (2004, p.6). That is, legal obligations are binding only if they are morally binding.

first place, whether we would ordinarily call certain systems ‘legal’ is not decisive with respect to the theoretical question of what law is and therefore what counts as law. I’ve already tried to make the hypothesis seem plausible on intuitive grounds. What really matters is the theoretical or explanatory power of the hypothesis. So we should reserve judgment until we see where the hypothesis takes us.

In the end, though, I am not especially interested in the issue of what counts as law. As already mentioned, I therefore suggest that those who strongly resist the bindingness hypothesis take the hypothesis at least provisionally to concern not all legal systems, but only a theoretically interesting subset of legal systems, which includes the legal systems of the US and UK as well as many other contemporary and historical nations.

Notice that even if we restrict attention to a subset of legal systems, we can still derive conclusions about law generally. For if some proposition X is true for that subset, it follows that X is possible for law, i.e., that the negation of X is not a necessary truth about law.

3. The Standard Picture and the bindingness hypothesis

In this section, we will explore how the Standard Picture interacts with the bindingness hypothesis. In particular, SP dictates a particular way in which bindingness has to be achieved, through a general moral obligation to obey the law. Since such a moral obligation is highly problematic in the circumstances of contemporary nation

states, SP has the consequence that legal systems cannot generally operate as they are supposed to.

The bindingness hypothesis, to recap, is that law is supposed to operate by arranging matters so that for every legal obligation, there is a moral obligation with the same content. How is this to be accomplished? Let us distinguish between two very different approaches. First, there is a very straightforward approach. What morality requires could be left untouched, and the law could be made to require what morality already requires.

Second, the legal system could change what morality requires, while at the same time arranging matters so that the law requires what morality (newly) requires. The two approaches would seem to be exhaustive: either what morality requires is left unchanged or it is not.

Before turning to the first approach, I want to address one possible source of confusion. It might be wondered how what morality requires could be altered. On the picture I assume here the most fundamental moral truths are necessary truths, and thus cannot be changed. These fundamental moral truths in combination with contingent circumstances, yield more specific, contingent moral truths. It is these more specific moral truths that can be changed. As we will see shortly, there are in fact two importantly different ways in which a legal system could change such moral truths. Because it is peculiar to talk of changing morality or moral truths (and because what is changed is more than obligations), I will often use the term *moral profile*, introduced above.

Let us now turn to the first approach according to which the law simply replicates what morality already requires. Perhaps contrary to superficial appearances, this approach would not make the law pointless. Although law would not affect what is required of its subjects, it could serve a particular epistemic role, that of informing its subjects of what is morally required of them.

It should be obvious, however, that if law were supposed to do nothing but replicate already existing moral obligations, most of what contemporary legal systems do would be beyond the proper province of the law. It may be that law has a significant epistemic role to play, but it is a role that involves more than identifying pre-existing moral obligations.⁶⁴ We should therefore reject the first approach. I will, for the rest of the paper, assume that the first approach is not a relevant option.

On the second approach, law changes our moral obligations, while somehow arranging matters so that our legal obligations have the same content as our (new) moral obligations. As Plato in effect pointed out in the *Euthyphro*, however, there are at least two fundamentally different ways in which two sets of requirements can non-accidentally coincide. Either set of requirements could depend constitutively on the other. In the present case, there are two different ways in which bindingness could be achieved (as well as a variety of more or less complex hybrid or intermediate possibilities, which I'll ignore for simplicity). Either morality could track the content of the law, or the content of the law could track morality.⁶⁵

⁶⁴ Some legal theorists take epistemic tasks to be at least an important part of what law is supposed to do. On the views of such theorists, however, law does much more than replicate pre-existing moral obligations. E.g., Alexander and Sherwin (2001), Raz (1986, Ch.3).

⁶⁵ I want to mention two other apparent options, which, I'll suggest, are not really independent possibilities. First, the content of the law could track, not morality, but the factors on which morality depends. Notice that, in order for this option to ensure bindingness, it would not be enough for law to depend on the factors on which morality depends, but to depend on those factors in just the same way as morality. Perhaps there's a metaphysical difference between the

It is usually assumed that in order for legal obligations to be matched by corresponding moral obligations, something would have to generate a general moral obligation to obey the law. For example, consent, fair play, or the duty to support just institutions are familiar candidates to generate such an obligation. On this kind of account, morality is thought to track the law. Because of, say, consent, morality comes to require whatever law requires (within limits). Call this the *morality-on-law* direction of dependence (since morality tracks the law). Assuming this direction of dependence, we can see how the law is supposed to change morality: the law changes morality simply by creating legal obligations that were not previously moral obligations. Given an obligation to obey the law, the law tows morality behind it.

SP makes the morality-on-law direction of (constitutive) dependence the only feasible one. We saw that SP allows for three ways in which the content of the law could depend on the content of morality: 1) legal authoritativeness might depend on moral facts; 2) the content of authoritative pronouncements might depend on morality; 3) at the margins, morality might provide a way of screening out some putative legal norms or a way of filling gaps in the law. None of the three options provides a promising way of achieving bindingness.

First, it might be thought that SP could allow a law-on-morality direction of constitutive dependence through the notion of legal authority. Suppose that in order to

law's depending on morality and the law's depending directly on the factors on which morality depends (in exactly the same way as morality depends on them). But for our purposes, nothing turns on the difference. For example, the reasoning that would be involved in working out what the law is would be exactly the same in either case. Throughout, when I write about the law's depending on morality, I mean to be neutral with respect to whether the law depends on morality or on whether it depends on the factors on which morality depends.

The second option is that morality could track what the law depends on. Again, to ensure bindingness, morality would have to depend on what the law depends on in exactly the same way. Unless this is just a version of the first option, this is tantamount for our purposes to morality's tracking the law. For, again, we won't need to distinguish between morality's requiring what it does because the law so requires and morality's requiring what it does because that is what is determined by the factors on which law depends (in the way that law depends on them).

qualify as a legal authority, an institution had to meet some moral standard, so that, for example, only morally justified institutions could be legal authorities. In that case, there would be a constitutive dependence of the content of the law on some moral facts—facts about which institutions are justified. But it would not follow that for every legal obligation there would be a moral obligation with the same content. Moreover, it is not plausible that moral justification is a prerequisite for being a legal authority, and most adherents of SP do not so maintain.

The second option is not worth addressing because it is not true that the linguistic content of a pronouncement depends constitutively on moral facts.

The third option gives to morality a role that is inadequate to ensure bindingness because morality is allowed to play only a marginal role. A moral filter could ensure bindingness only by filtering out all putative legal norms that imposed obligations that it is morally permissible not to comply with. This would be a far cry from the marginal role of screening out extremely unjust laws. And a gap-filling role for morality would do nothing to ensure bindingness with respect to legal standards that were constituted by the contents of authoritative pronouncements. Also, it is not plausible that a standard is part of the content of the law merely because it is a moral standard.

In sum, as long as we take SP for granted, the only way in which bindingness can be reliably achieved is by arranging matters so that citizens have a moral obligation to obey legally authoritative pronouncements. Thus, SP makes central the question of under what conditions citizens have a moral obligation to obey legally authoritative pronouncements.

Theorists have devoted a great deal of attention to this question. It is usually framed as the question of under what conditions a legal authority is morally legitimate, which is understood in SP's way as the question of under what conditions the authority has a right to be obeyed.⁶⁶

There is a widespread consensus that these conditions can rarely be satisfied in the circumstances of contemporary nation states. The different putative sources of legitimacy, such as consent, the duty of fair play, and the duty to support just institutions, are all subject to familiar and devastating problems.

With respect to consent, most citizens have not in fact explicitly consented to the government. The relevant consent therefore would need to be tacit or implicit content. For example, it might be suggested that, by not leaving the country, citizens have consented to obey the legal authorities. In order for an action or omission to constitute consent, however, one needs to have a reasonable alternative. Such an alternative is not available in the circumstances of contemporary nation states and could not be made available without extraordinary change.

Similarly, arguments based on fair play run into serious difficulties because fair play does not require one to do one's part in a scheme from which one has benefited unless one had a reasonable opportunity of declining the benefits. Moreover, such

⁶⁶ As noted above (note 57), some writers have challenged the link between moral legitimacy and a right to be obeyed. But such challenges are peripheral to the problem that I am raising for SP. As I argued above, since SP holds that the content of the law is primarily constituted by the content of legally authoritative pronouncements, what SP needs, in order for bindingness to be reliably guaranteed, is for citizens to have a moral obligation to obey legally authoritative pronouncements. Whether such a moral obligation is necessarily tied to the moral legitimacy of the government is a separate question on which SP is neutral. Since many theorists think that a moral obligation to obey authoritative pronouncements does not come apart from moral legitimacy, they take the question of under what conditions citizens have a moral obligation to obey the law to be the question of under what conditions the government is legitimate. If the two come apart, however, the question can simply be formulated in terms of a moral obligation to obey the law. The problem that I pose for SP remains the same.

arguments from fair play encounter problems with showing that all citizens have benefited because it is unclear against what baseline benefits should be calculated.

This is not the place for a review of the literature. For our purposes, it suffices that SP has the consequence that bindingness can only be ensured under conditions that by widespread consensus can rarely if ever be fulfilled. SP therefore makes it difficult to see how a legal system can operate as it is supposed to.

Since Raz's theory of authority is well known and widely influential, it might be instructive to consider the implications of that theory for the problem that SP faces. We can schematize Raz's theory in two steps. First, Raz points out that under certain conditions an agent will better conform to the balance of applicable reasons in some subject area in the long run by following the directives of another person or institution than by attempting to comply with the balance of reasons directly. This will be the case, for example, when the person issuing the directives has expertise about the relevant subject area or when the person is well positioned to solve coordination problems.

Second, Raz claims that, under such conditions, the person or institution is a legitimate authority for the agent in question with respect to the relevant subject area, and the agent is therefore obligated to obey the authority's directives.

I want to make two points about Raz's view. First, by Raz's own account, it will rarely if ever be the case that a government satisfies Raz's conditions for legitimate authority for all its citizens for all subject areas. As Raz puts it, 'the extent of government authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people.'⁶⁷ On Raz's view, the government's authority will be piecemeal, varying from subject to subject and

⁶⁷ Raz, 1986, p.80.

from person to person, and even depending on ‘reasons which are in part a matter for individual decision and temperament,’⁶⁸ such as a person’s willingness to take the time and effort needed to decide wisely. Moreover, since legitimate authority will be piecemeal, there will not be a single question of whether an authority is legitimate, but a vast number of more specific questions. Raz’s theory therefore makes it difficult to know when the government has authority over someone, and thus whether the government can ensure bindingness.

The second step of Raz’s argument depends, as he acknowledges, on a highly revisionary view of reasons.⁶⁹ According to this view, what one should do, all things considered, is not necessarily what one has most reason to do. Rather, one should follow strategies that in the long run best promote conformity to reasons. The crucial and highly counterintuitive claim is that one should follow such strategies *even when they require action that is inconsistent with what the balance of first-order reasons requires*. Without this claim, no conclusion about legitimacy or a moral obligation to obey would follow from the fact that, by obeying, one could in the long run better conform to applicable reasons.

The upshot, for our purposes, is that, in order to achieve merely piecemeal authority, Raz has to resort to a revisionary and controversial view of reasons. Piecemeal authority would not even be adequate to ensure bindingness. Our discussion of Raz’s theory therefore reinforces the degree to which, given SP, it would be difficult for a legal system to ensure bindingness.⁷⁰

⁶⁸ Raz, 1986, p.100.

⁶⁹ Raz, 1979, p.27. See also Raz, 1999.

⁷⁰ I am grateful to Scott Shapiro for helpful discussion of the issues addressed in the last few paragraphs.

Stepping back, we can see that the source of the difficulty is very simple. If the bindingness hypothesis is correct, a legal system is supposed to operate in a way that ensures that legal obligations will be morally binding. But issuing pronouncements is in general a poor way to create moral obligations. Hence, it is unsurprising that SP makes it highly problematic for the law to operate as it is supposed to. In other words, given that issuing pronouncements is in general a poor way to create moral obligations, the bindingness hypothesis gives us serious reason to doubt SP.

It might be objected that there is a way in which, even without a general moral obligation to obey the law, a legal system could, given SP, achieve bindingness. According to SP, a legal system can change the content of the *law* only by issuing pronouncements (setting aside peripheral sources of law). But a legal system has diverse tools for changing the moral profile. For example, it can create new options, ensure the cooperation of other people, set precedents for the resolution of disputes, and so on. Therefore, the objector argues, a legal system can combine such methods with appropriate pronouncements to achieve bindingness in a pronouncement-by-pronouncement way.

It will be easier to understand how this objection is supposed to work after we have considered how bindingness is achieved according to an alternative to SP. I will therefore address this objection in the sequel to this paper (Greenberg, 2011). Roughly speaking, I argue that, given the great complexity and unpredictability of morally relevant circumstances, the content of moral obligations that the legal system brings about will almost invariably diverge from the content of the authoritative pronouncements.

IV. Conclusion

In this paper, I have undertaken several tasks. First, I articulated with some precision a picture of what makes legal propositions true—a picture that, I claim, is widely taken to be common ground. The central idea, standardly taken to be built into the meaning of ‘authoritative’, is that, in the primary case, a norm is legally valid simply in virtue of its being authoritatively pronounced. Drawing on notions of explanatory priority and immediacy, I attempted to give more precise articulation to this idea than has previously been given. I also articulated another important piece of the Standard Picture that is generally assumed to be part of authoritativeness, but rarely articulated. It is taken for granted that the contribution that an authoritative pronouncement makes to the content of the law is an obligation with the content of the pronouncement.

Second, I provided evidence that the Standard Picture is widely presupposed and widely assumed to be common ground. I argued that various features of the contemporary scene in the philosophy of law, such as what questions are taken to be important and how debates are framed, are what would be expected if SP were taken for granted (but not otherwise). The focus on the explanation of legal authority and the framing of the positivist/anti-positivist debate were prime exhibits. The evidence also included the way in which legal theorists habitually move back and forth, without argument or comment, between claims about the language of authoritative legal texts and claims about the content of the law; and the specific way in which non-SP positions, such as Dworkin’s, are widely misunderstood.

Third, I tried in several ways to show that the Standard Picture is a substantive position, not something that can be taken for granted. Simply articulating the elements of

the Standard Picture, rather than leaving them implicit, helps to make clear that it is not a trivial starting point, not, for example, merely part of the data about authoritativeness that any theory must explain. I also sketched two alternative non-SP pictures. Next, I showed that SP biases the positivist/anti-positivist debate because of the unattractiveness of the anti-positivist options that, given SP, are most naturally taken to be available. Moreover, I argued that SP does not fit the data of our legal practices seamlessly. At very least, some work needs to be done on behalf of SP in order to account for the way in which lawyers and judges work out what the law is from judicial decisions, statutes, and other materials.

Fourth, I introduced a hypothesis about the nature of law, and tried to show that it is attractive and plausible, as well as close to what many legal theorists already accept. According to the hypothesis, law is defective to the extent that it creates legal obligations that it is morally permissible to violate. The law treats legal obligations as all-things-considered binding, among other things by using coercion to enforce those obligations. From there, it is a small step to the idea that the law is defective to the extent that it creates legal obligations that are not all-things-considered binding. A fundamental feature of the law is at odds with reality: the law treats obligations that are not all things considered binding as if they were. Perhaps worse, the law fails to meet its own standards.

Finally, I argue that the Standard Picture makes it difficult to see how law -- at least in contemporary legal systems -- could avoid being defective. The law's primary way of creating legal obligations -- by authoritative pronouncements with Explanatory Directness -- is, in general, a poor way of creating binding obligations. According to SP,

the law is primarily constituted of the contents of authoritative pronouncements, yet a legal system cannot in general ensure that those contents are binding. Thus, if SP is true, law is, by its nature, doomed to be defective.

This paper is preliminary in several ways. It does not purport to refute the Standard Picture, but only to raise some doubts about its obviousness. (In work in progress, I attack the Standard Picture more directly.⁷¹) The present paper also does not do much to develop my alternative to the Standard Picture, which is needed if the Standard Picture is to be displaced. In a sequel to this paper, ‘Beyond the Standard Picture,’ I will develop that alternative and show that, if it is true, legal systems can reliably ensure that legal obligations are binding.⁷² I will also answer several important objections, including the objection that, if SP is not true, the law will be unable to serve the important function of settling disagreements, and the objection that, even if SP is true, a legal system can ensure bindingness without a general moral obligation to obey the law.

⁷¹ Greenberg (2010).

⁷² Greenberg (2011).

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