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Journal

UCLA School of Law Public Law & Legal Theory Series, 07(31)

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Publication Date

2007-12-01

UCLA School of Law
Public Law & Legal Theory Research Paper Series
Research Paper No. 07-31

THE PRISM OF RULES

by

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The Prism of Rules

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*[This is a rough and incomplete draft. Rather than completing and publishing the paper with its present structure, I am splitting the material into a number of other papers. But because I have received several requests for the paper (which I have presented in several places), I am making it available online. For an improved discussion of some of the ideas in this paper, especially those concerning the Pronouncement View, see my **The Standard Picture and Its Discontents**, which will be posted on SSRN in December 2007.]*

Most legal theorists, including almost all positivists and many others, take for granted or are implicitly committed to an assumption that is not an official part of positivism. The assumption is that the content of the law is determined by the contents of legally authoritative pronouncements. I call it the *Pronouncement View* (PV, for short). The kind of determination at issue here is constitutive, not epistemic. That is, PV concerns what *makes* the content of the law what it is, not how we ascertain the content of the law.

PV is more of an organizing principle or core idea, than a precise doctrine. I have introduced PV in an unqualified form, but there are a variety of ways in which its claim could be moderated. For example, a qualified version of PV could hold that the contents

¹ I would like to thank Marshall Cohen, Barbara Herman, Pamela Hieronymi, Herb Morris, Scott Shapiro, Seana Shiffrin, and Jeremy Waldron for extremely helpful suggestions. Jules Coleman and Stephen Perry were the referees and commentators for the paper at the 2006 Stanford-Yale Junior Faculty Forum, and I am very grateful for their insightful comments. For opportunities to present the paper and for useful discussion, I am grateful to the participants in the Columbia University Law and Philosophy Colloquium, the Southern California Law and Philosophy Discussion group, the 2006 Stanford-Yale Junior Faculty Forum, and the University of California, San Diego Philosophy Colloquium.

of legally authoritative pronouncements play a central or predominant role in determining the content of the law.

The debate between positivists and anti-positivists is often framed in a way that takes PV for granted. For example, one typical characterization takes the debate to concern whether laws must pass a moral test in order to be valid. The use of “laws” here betrays an assumption that the starting point is legally authoritative pronouncements. Given this starting point, if morality is relevant it will have to be as a way of screening the content of authoritative pronouncements.

I suggest that the issue of whether a PV-based view of law is correct is more fundamental than the issue that divides legal positivists and anti-positivists, at least as the latter issue is commonly understood. For example, one common understanding of the latter issue is that positivists claim, and anti-positivists deny, that the criteria of legal validity – the criteria that determine whether a norm is legally valid – need not include moral facts. As will become clear, however, the picture of law presupposed by this way of framing the debate – according to which candidate norms qualify as legal norms by satisfying criteria of validity – is closely associated with PV and need not be accepted by non-PV-based views of law.

PV leads to a characteristic set of concerns and problems, and yields a distinctive way of thinking about how law is supposed to operate. In this paper, I will offer an alternative to PV, which I call the *Dependence View* (DV, for short). I begin to develop the picture of law that it yields. The discussion throughout is exploratory and tentative. The goal is to sketch the alternative picture and identify problems and possible ways of developing it, not to refute the picture associated with PV.

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.

In the next section, I say more about PV and its status as an implicit commitment. In section 2, I offer and support a hypothesis about the way in which the law is supposed to operate. According to that hypothesis, the law is supposed to ensure that for every legal obligation, there is a moral obligation with the same content. Next, in section 3, I show that PV mandates a particular understanding of that hypothesis. On this familiar understanding, a legal system is supposed to be set up in such a way as to ensure a general moral obligation to obey the law. In section 4, I introduce another way of understanding the hypothesis, one that requires rejecting PV. This leads, in section 5, to the alternative to PV, the Dependence View. In section 6, I explore the picture of law yielded by DV. Finally, in section 7, I give some reasons for thinking that DV is more attractive than PV.

1. The Pronouncement View

I begin by clarifying the Pronouncement View. PV is a view about what determines or explains the content of the law, not about what that content is. In particular, PV is the claim that the contents of authoritative pronouncements make the content of the law what it is. Consequently, a theorist who denies PV can accept that the content of the law is sometimes, often, or always identical to the content of legally authoritative pronouncements. What such a theorist denies is that it is the fact of a content's being authoritatively pronounced that explains that content's being part of the content of the law.

A closely related point is that, according to PV, an authoritative pronouncement has its impact on the law because it was pronounced by an authority, not because of something else, for example, the content of the pronouncement, the reasons why the pronouncement was a good idea, or the effects of the pronouncement.

Another key aspect of PV is that the content of the law is constituted by the *ordinary* semantic or intentional content of (legally) authoritative² pronouncements. (There are different kinds of ordinary content, such as sentence meaning, speaker's meaning, and contents of intentions, beliefs, and other mental states. Different versions of PV may appeal to different kinds of ordinary content or combinations of them.) Thus, PV explains legal content in terms of legal authority plus ordinary content.

² I will use the term "legally authoritative pronouncement" or sometimes "authoritative pronouncement" for pronouncements by legal authorities who may or may not be morally legitimate. That is, on my usage, "authoritative" doesn't imply that the authority is morally legitimate.

The notion of the (ordinary) content of a sentence or utterance raises no problems special to legal theory. Once we have the authoritative pronouncements, ascertaining their contents is in principle no different from ascertaining the 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 will be a legal one). Hence, for an adherent of PV, the central question about law will be the *question of legal authority* – the question of what makes a pronouncement authoritative.

At a first pass, we might think that the content of the law itself provides the answer, for the content of the law defines legal authorities, such as legislatures, and specifies which of their pronouncements are authoritative. But the content of the law cannot be the ultimate answer to the question of authority since, according to PV, the authoritativeness of pronouncements is supposed to explain the content of the law. It would be viciously circular to explain the content of the law in terms of legal authority and then to explain legal authority in terms of the content of the law. The fundamental problem for the PV theorist is to answer the question of authority without circularity. That a theorist takes that problem to be the fundamental one is therefore a good indication that the theorist is an adherent of PV (though it is not conclusive since there could perhaps be other views that also make that question fundamental). For example, the centerpiece of H.L.A. Hart's (1961) account of law – the rule of recognition – is precisely his attempt to answer the question of legal authority in a non-circular way.

My claim is not that most legal theorists explicitly endorse PV. On the contrary, those who hold PV tend not even to notice that it is a substantive view as opposed to an obvious and trivial truth about law. Moreover, as we'll soon see, many theorists

explicitly hold other views that are in tension with PV. My claim, instead, is that most legal theorists are implicitly committed to PV. For example, their arguments, their views about what problems need to be solved, and their understandings of other theorists' views depend on PV.

As I have said, PV is an implicit and somewhat vague way of thinking of law, rather than a precise doctrine. It is the core of many theorists' way of thinking about law. No doubt if confronted with a stark formulation of PV, many theorists would acknowledge that it is not true as stated. But they would think that what is needed are qualifications and refinements, not a fundamentally different picture.

Since PV tends to be taken for granted, rather than treated as a component of a substantive position, it forms a prism through which its adherents view the law. (As I explain in section 6.b., I use the term "rule" for the contents of authoritative pronouncements. Thus, the adherents of PV view the law through "a prism of rules" – the source of my title.) For example, they see their opponents' positions, not just their own, as an attempt to explain legal authority. 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 authority in a different way. No room is left for a view that is not an attempt to explain legal authority. As we will see, however, non-PV-based views can avoid the need to explain legal authority entirely.

PV is by no means limited to positivists. A natural law theorist who maintains that the law is the content of authoritative pronouncements that pass some moral test is fundamentally in the PV camp. Such a theorist, since she gives a constitutive role to morality, departs from an unqualified version of PV. But she still assigns a central role to authoritative pronouncements.

Similarly, a familiar way of understanding Dworkin's theory of law places him in that camp. Those who read Dworkin in this way take for granted that the law is the content of authoritative pronouncements. They therefore assume that Dworkin's theory concerns how to divine the content of such pronouncements. According to this version of Dworkin, then, his central claim is that in working out the content of an authoritative pronouncement, we first select those interpretations that pass some threshold test of fit. From among those candidate interpretations, we select the one that is most morally justified.

In my view, this is an incorrect interpretation of Dworkin. He holds that the content of the law consists of the set of principles that best justify the (past and current) legal practices of the legal system.³ On this view, what explains a standard's being part of the law is its role in justifying the legal practices, not its having been authoritatively pronounced. (Which practices are the relevant ones is a matter of pre-theoretical understanding and is subject to later revision in the light of theory; no notion of

³ Citations to *Law's Empire* and *Justice in Robes*.

authoritativeness is involved.⁴) Therefore, Dworkin is not an adherent of PV. The fact that PV is widely taken for granted explains why Dworkin is so often incorrectly interpreted in the way described above.

PV does have a special relationship to legal positivism. Although we can describe PV-based natural law positions like the two just mentioned, one who sees the law through PV will naturally find it difficult to understand why an anti-positivist position would be at all attractive. We may well want to make moral evaluations, but it seems only to confuse the issues to fail to separate the content of pronouncements from moral evaluation of that content. Frederick Schauer 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.”⁵

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

The common misinterpretation of Dworkin described above and the quotation from Schauer illustrate one way in which the issue of whether PV is correct is more fundamental than the positivist/anti-positivist debate: as long as PV is taken for granted, it will be difficult even to understand anti-positivist positions, let alone to see their appeal. In the next section, we take a couple of steps back and begin investigating the relation between law and morality before the point at which PV enters the scene.

⁴ See Dworkin (1986, pp. 90-92).

⁵ Schauer (1996, p. 43) (footnote omitted within quotation).

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

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

I begin with a 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 so that for every legal obligation there is a corresponding moral obligation with the same content (but *not* necessarily so that for every moral obligation, there is a corresponding legal obligation). Let's call the relation between law and morality that is the goal – that there be for every legal obligation a moral obligation with the same content -- *concurrence*, and the hypothesis *the concurrence hypothesis*.

The concurrence hypothesis needs to be qualified and clarified in a number of ways. First, 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.

Second, 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 concurrence 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 concurrence hypothesis is not the claim that it would be good if law operated in such as way as to ensure concurrence. 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 concurrence 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. Some philosophers are likely to understand my hypothesis as making a claim about a function of law.⁶ For example, one might express the proposition that a function of a heart is to pump blood by saying that hearts are supposed to pump blood or that, when they work properly, they pump blood. But the kind of normative claim I have in mind need not be a claim about function, and I intend the hypothesis to make a more general normative claim, leaving open its further specification.

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, chess has built into it a goal – checkmate – that is not a function. Differently again, 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). It would be odd, however, to claim that courage, integrity, and friendship have functions. In general, it can be part of the nature of a type of thing that it have a certain normative property, such as a proper or ideal way of behaving or an end or goal.

Third, there is at least one way of arranging matters so that a legal obligation is matched by a corresponding moral obligation that is meant to be excluded by the

⁶ 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; Moore 1995, pp. 210-213. 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.

hypothesis. Suppose we give citizens very strong prudential reasons for not violating a legal obligation. For example, suppose we threaten them with serious force. One may have a moral obligation to avoid harm to oneself and one's family that is strong enough to outweigh other moral reasons. Therefore, if the threatened force is serious enough, it can create a moral 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. This method of ensuring concurrence 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. (Also, there is a second-order problem with making the moral obligations of the legal officials who are to administer the sanctions concur with their legal obligations.)

The present point, however is more general. The law is supposed to use only particular kinds of ways of arranging concurrence. 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.⁷ A full development of the hypothesis would require me to say more about what is "the right kind of way;" some of what follows 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 concurrence "in a characteristic way."

Having clarified the hypothesis, let me say a little about why it is plausible. First, though, I want to point out that many legal theorists hold something in the neighborhood of the hypothesis, though they would not formulate it in this way. A standard position is

⁷ For reasons that will emerge, I do not want to say 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 concurrence.

that if a legal system has legitimate authority, there is a moral obligation to obey the law.⁸ Given that position, one who holds that legal systems are supposed to have legitimate authority is committed to the concurrence 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 that is the form that the hypothesis takes for adherents of PV.

Now it might be objected that although it is good when a legal system is morally legitimate, it doesn't follow that that is how the legal system is *supposed* to be. Notice, however, that many legal theorists have been unwilling to accept that law is merely the content of the pronouncements of de facto political authorities. I suggest that an inchoate recognition of the hypothesis (or of the proposition that a legal system is supposed to be legitimate, which implies the hypothesis) lies behind this unwillingness. If a legal system is supposed to be legitimate, then although many legal systems may fail to be legitimate, de facto authority cannot be sufficient for a legal system. For a de facto authority need not be one that is supposed to be legitimate. To sum up, the attempt to specify requirements for legal authority that are intermediate between de facto and legitimate authority is an attempt to capture the idea that a legal system is supposed to be legitimate.

I now turn to an intuitive argument for the concurrence hypothesis. We can get at law's relation with morality by contrasting it with other relations that a domain of (putative) reasons could bear to the domain of moral reasons. (I don't mean to claim that all of these relations are ultimately possible or even coherent. But considering them will be helpful.) First, 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

⁸ Cite, e.g. Raz 1986, pp. 23-28.

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.⁹ It is not that etiquette incorporates all moral obligations. 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.

Law, I suggest, differs from etiquette in this respect. The law does not contemplate the possibility of moral exceptions that are not legally specified. 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. 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. Legal obligations are supposed to be all-things-considered obligations, not merely pro tanto obligations that can be trumped by other obligations.

A different idea that one sometimes hears is that a domain of reasons could exist in an independent and parallel domain from moral reasons. Perhaps the Devil is supposed to create and inhabit such a domain – in hell, morality simply doesn't apply. More mundanely, perhaps some games or organizations purport to create reasons that are independent of moral ones in some such way. Within the scope of the game, morality is

⁹ Not all writers agree on this point. Cite to Foot. It doesn't matter whether I'm right about etiquette for present purposes.

suspended. If the game allows deception, for example, then there is nothing wrong with using deception as long as one is within the scope of the game.

Since the domain of morality includes all (genuine) reasons for action, the possibility of reasons that do not interact with moral reasons depends on their being not genuine reasons, but pretend or as-if ones that “apply” only within the scope of the pretense. One pretends that the obligations imposed by the rules of a game (pay \$200 to pass GO) are obligations in order to play the game. And of course it is only a pretense that moral obligations are suspended – one could not for example ignore the fact that making a certain move in the game would be a signal (in real life) to an assassin to shoot one’s opponent.

Legal obligations are supposed to be genuine ones. They are supposed to bind people in all aspects of their lives, and their doing so is not supposed to depend on the subjects’ wanting to participate or adopting a pretense. As genuine obligations, legal obligations cannot avoid interaction with moral reasons, which also apply to people in all aspects of their lives.

In sum, the law is supposed to create genuine and all-things-considered obligations. But such obligations simply *are* moral obligations. To say that all-things-considered one is morally obligated to take some action is to say that, taking into account all relevant reasons, one is obligated to take that action. Morality doesn’t leave room for another kind of genuine, all-thing-considered obligation. (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.)

It might be objected that prudential obligations are an example of non-moral obligations, as witnessed by the fact that they 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. The key point is that prudential reasons, if they generate all-things-considered obligations, generate moral obligations. In sum, if there is such a thing as a merely prudential obligation (as opposed to a prudential reason), it is not an all-things-considered obligation.¹⁰

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

¹⁰ The view I have taken in the text does not allow that of several morally permissible actions, one could be all-things-considered *obligatory*, though it does allow that one could be favored by the balance of reasons. But I'm not sure that much turns on this point. Readers who maintain that there are all-things-considered obligations that are not moral obligations can substitute "all-things-considered obligation" for "moral obligation" throughout. For example, the revised concurrence hypothesis would be that a legal system is supposed to operate by arranging matters so that for every legal obligation there is a corresponding all-things-considered obligation with the same content (but *not* necessarily so that for every all-things-considered obligation, there is a corresponding legal obligation).

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). If we add that legal obligations are supposed to be binding, then we are very close to the concurrence hypothesis.

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 concurrence (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 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 concurrence 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 not X is not a necessary truth about law.

3. Achieving concurrence through morality-law dependence

In this section, we follow where the concurrence hypothesis takes us. In particular, we will see that the Pronouncement View dictates a particular way of understanding the concurrence hypothesis.

The concurrence 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 since what is changed is more than obligations), I will often talk of changing a *moral profile*, where the moral profile of a person or group of people at a time consists of the moral obligations, powers, rights, and so on of that person or group at that time.

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.

Some legal theorists take epistemic tasks to be at least an important part of what law is supposed to do.¹¹ But on the views of such theorists, law does much more than replicate pre-existing moral obligations. For example, in many kinds of cases, morality plausibly is relatively indeterminate. In this kind of situation, the law may make the obligations more specific or concrete. Similarly, the law can solve coordination problems. It is sometimes important that all or most people act in the same way, though there are several equally good ways. The law can require one of these ways. Notice that in both kinds of cases, the legal obligations are different from the moral obligations that existed before the legal system acted.¹²

¹¹ Cite Raz, Alexander.

¹² See, .e.g., Raz 1986, pp. 30-31.

It might be thought that in claiming that the law is supposed to operate by creating legal obligations (and concurrent moral ones) that are different in content from the moral obligations before the law acts, I am taking issue with Joseph Raz's important theory of authority. But, as Raz has made clear, there is no disagreement on this point. For example, Raz is explicit that "Parliament, of course, is not limited to the enactment of laws where there is a prior obligation on the subjects to behave in the required way" (1986, 44).¹³

It should be obvious 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

¹³ Raz characterizes the function of authority as that of mediating between subjects and the reasons that apply to them. According to Raz, "all authoritative directives should be based on reasons which already independently apply to the subjects of the directives." (1986, 47). And the normal way to establish that an authority is legitimate is to show "that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding." (1986, 53). One might draw from such claims the conclusion that Raz holds that what the law requires should not be different from what morality required before the legal system acted. But, as Raz has emphasized (1986, pp. 30, 48-53), this would be a mistake. To say that an authority should act on dependent reasons is not to say that the authority should direct its subjects to do only what they were already obligated to do.

In responding to the objection that on his view, authority should make no difference to what his subjects ought to do, Raz points out three different ways in which authorities are not limited to directing their subjects to do what they are already obligated to do (1986, 48-51). I have already mentioned such cases in the previous paragraph. For present purposes, we can take prisoner's dilemma situations as illustrative. Raz points out that, "while people have reason to act in a certain way, given the situation they are in, they also have reason to change the situation, though they are unable to do so by themselves (1986, 51). What is important for present purposes is that the fact that the people in question "have reason to change the situation" by no means establishes that the legal obligation that can solve the dilemma must simply be an obligation that replicates the pre-existing moral obligation. To the contrary, people in a prisoner's dilemma may well be morally permitted to defect and indeed have most reason to do so. Let's stipulate that that is so in a particular case. The legal obligation that solves the dilemma requires them to cooperate. It is true, as Raz points out, that the people already had *some* reason to change the situation, but that is very far from saying that they already were morally required to cooperate, which is false.

– as we will discuss below – but it is a role that involves more than identifying pre-existing moral obligations. We should therefore reject the first approach.

On the second approach, law changes our moral obligations, while somehow arranging matters so that there is concurrence between our legal obligations and 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 concurrence could be achieved (as well as a variety of more or less complex hybrid or intermediate possibilities). Either morality could track the content of the law, or the content of the law could track morality.

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-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.

Notice that PV makes the morality-law direction of (constitutive) dependence the only feasible one. PV entails that the content of the law depends only on the content of

the authority's pronouncements. Therefore, the content of the law cannot depend on morality. For the content of a pronouncement is not (constitutively) dependent on what morality requires.

It might be thought that PV could allow a law-morality direction of constitutive dependence through the notion of legal authority. Suppose that in order to 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 PV do not so maintain.

In sum, as long as we take PV for granted, the only way in which concurrence could be achieved would be by arranging matters so that citizens have a moral obligation to obey legally authoritative pronouncements (because they are issued by the authorities, not because of their content). Thus, PV makes central the question of under what conditions citizens have a moral obligation to obey legally authoritative pronouncements.

4. Achieving concurrence through law-morality dependence

In contrast, if we do not assume PV, we open up the opposite direction of constitutive dependence – the law-morality direction. The picture that I want to explore involves this direction of dependence. Notice that if the content of the law depends on

the content of morality, then in order to change the content of the law, the legal system must change the moral profile. How, on this approach, can the law change our moral profile? It cannot do so by changing the content of the law, on pain of vicious circularity. A change in moral obligations must be brought about directly – by acting on the circumstances that, in combination with the most fundamental moral truths, determine our moral obligations.

It will be helpful at this point to introduce examples of how the legal system could, at least if it operated as it is supposed to, change our moral profile. These general kinds of examples will be relatively familiar. The crucial difference is that we are now considering how the legal system can change our moral profile not via a moral obligation to obey the law. Actions, decisions, and pronouncements of legal institutions can change the field on which morality operates, thus altering the moral profile without the intermediary of the content of the law.

First, the establishment of a legal system can make it morally impermissible to use violence. Without a legal system, it will be morally permissible for people to use violence against others who harm or threaten to harm them or their families. Once a legal system effectively maintains security and punishes wrongdoers, it may become morally impermissible for citizens to use violence, except in a very narrow range of circumstances (for example, when a serious imminent harm to a person can only be prevented through violence).

Second, a legal system can create moral obligations to participate in schemes for the public good, for example by paying taxes. Without a legal system, people may have reason to want such schemes. But there will typically be no moral obligation to give any

particular amount of money or other resources to any particular scheme. For one thing, many different possible schemes are likely morally permissible. Nothing determines which possible scheme is the one that people should participate in. As Raz argues, the reason there is no reason to pay the money before the tax law is passed may be the lack of “machinery for collecting and distributing the money” rather than the lack of an “authority-imposed duty to pay it.” (1986, 45). If this is right, it is the creating of the option by setting up the collection and distribution machinery, not the pronouncement of the obligation to pay, that creates the obligation to pay taxes.

A related point is that if there is no reasonable expectation that others will contribute to a particular scheme, then there is no moral requirement that a particular person should contribute. In general one person’s contribution will be worthless without the contributions of many others. But if once a well-constituted government decides on a particular scheme, there may be strong reasons of justice to participate in the scheme. The threat of punishment can help as well. If one knows that the threat of punishment will ensure that others will participate, then one has reasons of fairness to participate.

The critical point is that what is needed for the legal system to be able to perform in such ways is not that justice, fairness, and other moral reasons generate an obligation to obey all pronouncements of a legal authority. What is needed is that actions of legal institutions be able to change the moral profile by changing the consequences of people’s actions and the options available to them.

Let us now take stock of the developing picture. The legal system is a system that is supposed to change the moral profile. It does so by changing the relevant circumstances: by doing things that create new options, alter the consequences of

actions, and so on. The legal institutions' actions may include issuing pronouncements. Pronouncements have no special status, however, since they are only one way, and in general not a particularly good way, of changing the moral profile. Moreover, when pronouncements are used, what is relevant is their effect on the moral profile. Their content will of course be highly relevant to their effect on the moral profile, but their effect will depend on many other factors as well. For example, their effect will depend on the nature and status of the body that issued the pronouncement and the expectations that the pronouncements generate.

On the picture I am developing, pronouncements by legal institutions affect the moral profile by affecting the balance of ordinary first-order reasons. According to a well-known kind of view, however, the pronouncements of legitimate authorities create content-independent reasons for acting as the pronouncement prescribes. Moreover, on some such views, such pronouncements exclude or otherwise pre-empt first-order reasons. I do not attempt to show that such views are incorrect, though, if they are correct, they would obviously have an important impact on the way in which pronouncements can affect the moral profile. My project in this paper is very different. Theories of authority of the sort just mentioned are controversial. And, at best, the conditions that would generate a general obligation to obey the pronouncements of authority are rarely satisfied. It therefore seems worthwhile to explore a picture of law that does not rely on such conditions in order for law to operate as it is supposed to.

What would be the point of having a system for changing the moral profile? The answer is that it is often the case that although the balance of reasons now requires one thing (or morality permits or requires one thing), it would be better if circumstances were

different so that the balance of reasons required something different (or so that morality permitted or required something different). In the first example discussed above, although without the legal system we may have good reason to use violence, it would be a better state of affairs if we did not have reason to use violence; indeed if violence was morally impermissible. In the second example, without the legal system, the balance of reasons supports defection for everyone. Law changes that balance of reasons so that everyone now has most reason to cooperate. As a result everyone is better off than they would have been had they done what was favored by the (ex ante) balance of reasons. In sum, law is supposed to bring about a better balance of reasons.

5. The Dependence View

We now come to a crucial juncture. On our developing picture, what is the counterpart to PV? In other words, what constitutes the content of the law, if not the content of authoritative pronouncements? A natural first proposal is that, when the legal system operates as it is supposed to, the content of the law will be constituted by the new moral profile – the one the legal institution's actions have brought about. This proposal obviously ensures the truth of the concurrence hypothesis. If, when the law operates as it is supposed to, the content of the law is constituted by the new moral profile, then there cannot be a legal obligation without a moral one.

The Dependence View (*initial proposal*): When the legal system operates as it is supposed to, the content of the law is constituted by the enduring and general part of the

moral profile that obtains in virtue of¹⁴ the relevant actions of the legal institutions. (I call it the “Dependence View,” or *DV* for short, because it holds, roughly speaking, that the content of the law depends on the content of morality.)

The point of the qualification “enduring and general” is to exclude aspects of the moral profile that are the result of idiosyncratic situations of particular individuals (or perhaps of more general but ephemeral situations, such as emergencies). For one thing, the law is by its nature general. For another, our intuitive understanding of the way in which legal institutions are supposed to affect the moral profile excludes effects on the moral profile that are the consequence of special features of an individual’s situation. The “enduring and general” qualification may, however, be rendered superfluous by further developments in *DV*. (In particular, it seems likely that once we isolate the aspects of the moral profile that the legal system is supposed to produce or that are produced in the right sort of way, we will have excluded effects on the moral profile that are specific to particular individuals or passing circumstances.) In what follows, I’ll often omit the qualification in the interest of brevity.

The proposal as it stands is obviously incomplete. It says nothing about what constitutes the content of the law when the legal system does not operate as it is supposed to. Even if legal and moral obligations concur when the law operates properly, it may fail

¹⁴ Why the phrase “in virtue of”? In some cases, though less commonly than one might expect, the actions of the legal system will (or would under ideal conditions) create legal and moral obligations that are identical in content to pre-existing moral obligations. In that case, the moral obligation is over-determined, and would have obtained even if the legal institutions had not acted. Even though legal institutions are not the but-for cause of the relevant moral obligation (under ideal conditions), the obligations still obtain in virtue of the actions of the legal institutions and therefore still count as part of the content of the law. In other words, “in virtue of” expresses a kind of responsibility that is not to be understood counterfactually.

to do so. Indeed, we know that law often requires actions that are not morally required and even that are morally prohibited.

There are two fundamentally different approaches that could be adopted to complete the proposal. The first approach starts from the core idea that law is supposed to operate by taking actions that produce a new moral profile. A natural way of developing this idea holds that the content of the law is constitutively determined by the moral profile that the (actual) actions of the legal institutions were *supposed* to yield.

The second approach relies on the actual moral profile, but takes the tack of restricting the parts of that moral profile that are relevant. A rough version of this approach would hold that the content of the law is constitutively determined by the enduring and general aspects of the moral profile that are produced in the right sort of way – the *legally proper* way. The hopes of this approach depend on developing a theory of the legally proper way. I discuss the two approaches in turn.

5.a. *The target profile approach*

The key to the first approach is the idea of the moral profile that the actions were supposed to yield. Let's call this moral profile *the target profile*. There are a number of options for developing the idea of the target profile. The option I'll consider here is that the target profile could be understood in terms of a counterfactual – as the moral profile that *would* have been produced by the actual actions of the legal institutions under ideal conditions. Different understandings of what constitutes ideal conditions would yield

different versions of this first option. We can now formulate a revised version of the proposal.

The Dependence View (*ideal-conditions version*): The content of the law is constituted by that part of the moral profile that would have obtained in virtue of the relevant actions of the legal institutions under ideal conditions.

Two fundamental problems would need to be addressed in order to develop and defend a viable ideal-conditions version of DV. First, DV refers to “the relevant actions of the legal institutions.” So it is necessary to say which institutions (and which actions) are the relevant ones. Second, DV relies on certain ideal conditions of ideal legitimacy. We need an account of such conditions. I address each of these problems in turn. In the present paper, I will be able to do little more than sketch the general outlines of the problems and some possible ways to address them.

In providing an account of legal institutions, DV obviously cannot appeal to the content of the law, or at least not straightforwardly. For the content of the law depends on which institutions are the relevant ones.

Adherents of PV face an analogous set of problems. They must give an account of what a legal authority is (and which actions of authorities are the official or authoritative ones). And they must do so without appealing to the content of the law. In fact, the history of legal positivism can be seen as a series of attempts to explain what counts as a legal authority without appealing to legal rules.¹⁵

On the picture I am developing, the key idea is that law is supposed to produce concurrence by changing the moral profile. So the first thing to say about legal

¹⁵ The passage quoted from Shapiro in the Introduction makes a good case with respect to legal positivism, if not with respect to all of philosophy of law.

institutions is that they are institutions that are supposed to change the moral profile, or that have the point or function of doing so. If it is in the nature of a legal system to operate in a certain way, then it must be in the nature of legal institutions to operate in that way. Hence it is at least a necessary condition for being a legal institution that an institution be one that is supposed to change the moral profile.

How, in practice, can we tell what an institution is supposed to do? This is a different question from the one that DV needs to answer -- the theoretical question of what a legal institution is. It might in some cases be difficult in practice to tell what an institution is supposed to do, even though there is a determinate fact of the matter. (It also might in some cases be indeterminate.) It may require complex theorizing. In practice, however, it is typically not difficult to identify legal institutions. And, in fact, we typically identify them roughly through an understanding of what they are supposed to do.

It may be that we also need to have an efficaciousness condition. Perhaps a legal institution must be one that not only has the function of changing the moral profile but is capable of doing so. If an institution has no de facto power – if, for example, no one pays any attention to it -- it may be incapable of changing the moral profile in the ways characteristic of legal institutions. So, for example, a prerequisite for an institution's being a legal one may be that officials who resolve disputes must in fact be guided by, what, by their lights, the effect of the institution on the moral profile would be, under ideal conditions.

The second problem for an ideal-conditions version of DV is to give an account of the relevant ideal conditions. If the legal system is supposed to change our moral

obligations in certain characteristic ways, ideal conditions are ones under which the legal system or government is best positioned to change moral obligations in those ways. For example, ideal conditions will be ones under which the government is best positioned to make violence by private citizens morally impermissible, to make commitments that bind all of its citizens, to set up arrangements in such a way that fairness will require all to participate, and so on. In more familiar terms, ideal conditions are what we would ordinarily think of as conditions under which the government or legal system is maximally legitimate.¹⁶

It might be objected that understanding ideal conditions in this way is covertly to adopt PV. According to this objection, under conditions of ideal legitimacy, citizens would be morally obligated to obey legally authoritative pronouncements. Therefore, DV implies that the content of the law is constituted by the content of the pronouncements of the legal authorities. This objection begs the question against DV by taking for granted the understanding of legitimacy associated with PV -- that ideal conditions are conditions under which citizens are morally obligated to obey legally authoritative pronouncements.

We can now offer an intuitive way of understanding DV. It is natural to think that any legal system presupposes its own legitimacy. One way to make this idea more precise is this: for a legal system to presuppose its own legitimacy is for it to treat as

¹⁶ Notice that, on pain of vicious circularity, the account cannot be that ideal conditions are ones under which citizens have a moral obligation to obey the law. For DV gives an account of the content of the law in terms of what citizens would have a moral obligation to do if conditions were ideal. Given DV, it will be of course be true that citizens will have a moral obligation to obey the laws of an ideally constituted government -- after all, if conditions are ideal, moral obligations are constitutive of legal ones. But this cannot be an account of what it is for conditions to be ideal.

actual the moral profile that would obtain if the system were perfectly legitimate. So DV can be seen as a way of spelling out what it means for the law to presuppose its own legitimacy.

A legal system treats the actions of its legislature and other law-making institutions as having the effect on moral obligations, powers, rights, and so on that those actions would have had if the legal system were ideally legitimate. The content of the law is constituted by this as-if moral profile. Of course, if a legal system is in fact ideally legitimate, then the actual moral profile (after the law-making institutions have acted) will concur with the as-if moral profile. It will do so because the condition of ideal legitimacy is not counterfactual, but actual.

An obvious problem for the ideal-conditions version of DV is that political morality may not give a unique specification of ideal conditions. There are plausibly many different ways in which institutions could be arranged in a maximally legitimate way.

A second problem is that even if there were an unique ideal arrangement, it might be indeterminate how to understand the counterfactual condition that a particular non-ideally legitimate government be ideally legitimate. For example, in the counterfactual condition, which of the various actual institutions corresponds to each of the possibly very different institutions of the ideally legitimate government?

One possible type of solution to both problems is that when the legal system is not fully legitimate, the counterfactual condition of ideal legitimacy is to be understood by the particular legal system's own lights. That is, when the legal system fails to operate as it is supposed to, the content of the law is constituted by the moral profile that would

have obtained in virtue of the relevant actions of the legal institutions if the legal system had been ideally legitimate *in light of the principles of justice embodied in the legal system itself*.

What does it mean to talk of the principles of justice embodied in the legal system itself? One kind of answer draws on Ronald Dworkin's theory of law. In particular, according to this approach, the relevant principles of justice are those best justify the structural political arrangements of the system. According to the understanding of Dworkin that I rely on here, the question of which principles best justify certain actual arrangements is a normative, in fact, a moral one. It involves questions of procedural justice – what Dworkin calls “fit” – for a system whose actual arrangements had little relation to its principles would be highly procedurally unjust. And it involves questions of substantive justice – what Dworkin calls “justification” – for how well the principles can justify depends in part on their content. Both dimensions are aspects or components of justice, and how much each dimension matters is itself a moral question.

If we developed DV in this way, we would hold that the principles that best justify the structural arrangements of the legal system define the counterfactual condition of ideal legitimacy. The content of the law, when the legal system fails to operate as it is supposed to, is constituted by that part of the moral profile that would obtain under that counterfactual condition in virtue of the actions of the legal institutions.

The appeal to the particular legal system's own conception of legitimacy is one response to the worry that when conditions are not ideal, it is indeterminate what the moral profile would have been under ideal conditions. A different kind of response to this worry appeals to a next-best solution or approximation when conditions are not ideal.

The fundamental idea of DV is that when the legal system operates as it is supposed to, the content of the law is that part of the moral profile that obtains in virtue of the actions of legal institutions. We can hold onto that idea, while maintaining that, when the legal system does not operate as it is supposed to, the content of the law is given by some approximation to what the effect on the moral profile was supposed to be. For example, the approximation for non-ideal conditions could be the moral profile that was intended by the legal institutions. A particularly interesting possibility is that the approximation could be the moral profile that is the one that is announced by the legal institutions. On this possibility, PV would turn out to be a special case of DV: when the legal system fails to operate as it is supposed to, the content of the law is what the legal authorities announce it to be.

An entirely different route would be to understand the target profile in normative terms without appealing to counterfactual ideal conditions. An example of this option would be that the moral profile is the one that it is the function of the actions of the legal institution to produce. I won't attempt to develop such a non-counterfactual approach here.

5.b. The “legally proper way” approach

We have been discussing the approach to developing DV that depends on taking the content of the law to be constituted by the target moral profile – the moral profile that the actions of the legal system were supposed to produce. I turn now to the second

approach, the one that holds that the content of the law is constituted by the enduring and general aspects of the (actual) moral profile that are produced in the legally proper way.

I can't offer anything like an adequate theory of legally proper ways of changing the moral profile. But we have an intuitive understanding of what counts as the right and wrong sort of way. I'll draw on that understanding to say a little about the prospects for this version of DV.

We've already discussed some examples of the right sort of way. By ensuring security and punishing wrongdoers, governments can make it morally impermissible for citizens to use force in most situations. When people face coordination problems, legal systems can create reasons to act in a particular way by making that way salient.

Similarly, when people face prisoner's dilemmas, governments can create reasons to cooperate simply by making it likely that others will cooperate. By creating collective mechanisms of various sorts, for example for collecting and distributing tax money, governments can channel pre-existing moral forces, in effect creating new specific moral obligations. And well-constituted governments can harness democratic and fairness values so as to create reasons for citizens to participate in government created schemes.

What are examples of the wrong sort of way? Here is the clearest kind of case. Suppose a government persecutes a particular minority group. This persecution may include directives to harm members of that group or to deny them benefits. Such government actions are likely to have the effect on the moral profile of producing a duty to protect or rescue the minority group. Call this general way of changing the moral profile – by making the moral situation worse in a way that creates an obligation to compensate for the bad government action – *paradoxical*. Paradoxical changes in the

moral profile are intuitively not the sort that legal systems are supposed to generate. Moreover, if we don't exclude such changes in the moral profile, DV will have counterintuitive consequences. For instance, the imagined government persecution would produce a legal duty to protect the minority group.

The example suggests that a necessary condition on legally proper ways of changing the moral profile is that the effect on the moral profile not be a compensation for government action that makes the moral situation worse. This condition is not ad hoc. On the DV-based picture, the point of having a legal system is to change the moral situation for the better. This explains why changes in the moral profile that compensate for government bad action are not legally proper.

If we exclude paradoxical changes in the moral profile, to what extent does (this version of) DV still have counterintuitive consequences? DV does have the consequence that government directives prescribing that members of the minority group be harmed will not succeed in creating legal duties of the specified sort. The government actions will not create moral obligations to harm members of the minority group. For some, this consequence will be a bullet that DV has to bite. Others will consider it a mark in DV's favor. For it explains the "natural law" intuitions that many share according to which the content of the law cannot include evil obligations. Indeed, DV can help to explain the more precise intuition that there can be legal obligations with morally imperfect content, but not with strongly evil content. The legal system may well produce a moral profile that is less than ideal. But there are some obligations that cannot become part of the moral profile.

What about the *failure* of the government to take the right course of action? For example, suppose the government fails to take action to prevent damage to the environment by private parties. Or suppose the government fails to provide adequate welfare benefits. On the face of it, such cases are less problematic for DV than cases of affirmatively bad government action because the consequence of government omissions is simply to leave pre-existing moral duties in place. Since those duties do not obtain in virtue of government action, DV implies that they are not legal duties. And that is the intuitively correct result.

It might be argued that once the government has sufficiently regulated an area, this simple analysis fails. Against the background of thorough government regulation, government failure to take action is, in effect, an affirmative bad action. This argument presents no special problem for DV. To the extent that the argument is correct, such cases can be treated like the case of paradoxical effects on the moral profile by government bad action.

The more serious issue is whether DV will have the consequence that governments that fall well short of being ideally legitimate will fail to generate much of the content of law that we ordinarily take them to generate. Exploring this issue thoroughly would involve substantive moral inquiry into what changes in the moral profile are plausibly generated by the law-making activities of imperfectly legitimate governments. Instead, I want to make three points that suggest that the consequences of DV will be less counter-intuitive than one might initially imagine.

First, the relevant conception of legitimacy is not the one appropriate to PV – that the government must be constituted in a way that yields a general moral obligation to

obey the law. Rather, the issue is the extent to which, for example, undemocratically constituted governments are able to change the moral profile.

Second, many ways in which governments can change the moral profile do not depend heavily on government legitimacy. We've already mentioned the examples of solving coordination problems and prisoner's dilemmas and of making private violence impermissible because unnecessary. In another common kind of situation, there is a pre-existing moral obligation that is relatively indeterminate. Making such moral obligations more specific doesn't seem to require government legitimacy. We gave the example of tax laws above. It may be the pre-existing moral reasons and the specific mechanism that the government creates, not, for example, democratic values, that do the main work here. There is an interesting parallel here to the way in which in making a particular solution to a coordination problem salient can be sufficient to create an obligation to comply with that solution.

To take a somewhat different kind of case, suppose an undemocratically constituted government gives notice of how it defines a variety of *malum in se* crimes and how it will punish them. Given the great moral importance of advance notice of criminal punishment, it is morally impermissible without such government action to punish perpetrators of these crimes. Such government action can make it morally permissible for government officials to punish in the specified way.

Third, even if a legal system fails to generate exactly the changes in the moral profile that its officials intended (or that correspond to its authoritative pronouncements), it may succeed in generating related changes in the moral profile. The greater the degree of legitimacy that a government has, the more that it can draw on values such as

democracy and fairness, and hence the more it may be successful in changing the moral profile in the way it intends. But less legitimate governments will still affect the moral profile, though the impact may be harder to assess.

This consequence may be a mark in DV's favor. For the actual process of discovering the content of the law can be subtle and complex. As we'll see in section 7 below, at least in the U.S. legal system, the process of working out what the law is does not seem to be limited to determining which are the authoritative pronouncements and then integrating their contents. The process that courts engage in when attempting to discover the law is not far from what would be expected if they were trying to work out the actual changes in the moral profile effected by the legal institutions.

6. The law according to DV

In this section, we turn to the picture of law that DV yields.

6.a. Ascertaining the content of the law requires moral reasoning

First, according to DV, the content of the law depends constitutively on a moral profile, whether actual or counterfactual. Therefore, ascertaining what the content of the law is will, at bottom, require moral reasoning. It doesn't follow that everyone will always have to engage in moral reasoning to work out what the law is. Many people can rely on experts. Moreover, there will be predictable ways in which law practices would

change the moral profile under ideal conditions (or in which law practices change the moral profile in the legally proper way). So experts will often be able to rely on their understanding of those predictable ways, and therefore will not have to work from scratch every time. But there will always be the possibility that moral reasoning will be needed.

The comparison with PV is instructive. According to PV, the content of the law depends constitutively on the content of authoritative pronouncements. Unless the authoritative pronouncements use moral terms, it is therefore not necessary to engage in moral reasoning to ascertain the content of the law.

Some adherents of PV –exclusive positivists – hold something much stronger. They hold that nothing can count as law if it is necessary to engage in moral reasoning in order to discover its content. Joseph Raz is the most influential advocate of such a view. He argues that the law must purport to have authority, and that it cannot do so unless it is capable of doing so (Raz, 1986, XX). But, on the view of authority that Raz develops, nothing can be capable of serving as an authority if those subject to it must consult the underlying reasons that apply to an issue in order to ascertain the authority's decision on that issue. Even if Raz's view of what is required for something to purport to have authority is correct, it has no impact on DV. For DV gives no role to legal authority in Raz's sense.

It might be objected that the role that DV gives to moral reasoning is incompatible with a fundamental, perhaps the fundamental, purpose of law – that of settling disagreements and avoiding “moral war.” Human beings, even within a particular nation, have large disagreements over what morality permits and requires. Law is supposed to provide a mechanism for settling these disagreements. If PV were correct, then we can

see how law will serve this settlement function. People are more likely to agree about which pronouncements are authoritative and what their content is than about what is morally right or wrong. But if figuring out what the law requires involves working out a moral profile, then law does not help with the settlement function.

The main answer to this objection is that what is needed to for law to settle moral disagreement is for a legal system to have a mechanism for generating specific orders (directed at particular individuals) that are backed up with force. As we know from our own legal system, the content of the law is often highly controversial. Specific orders end disagreement in a peaceful way.

It might be thought that the content of specific orders straightforwardly becomes part of the content of the law, and hence that such orders present the best case for PV's model of what constitutes the content of the law. On this line of thought, appealing to such orders is an important concession to PV. There is, however, a simple argument that suggests that orders do not become part of the content of the law. Like any judicial decision, specific orders can be can be legally incorrect, as evaluated *ex ante*. Unlike some judicial decisions, specific orders have no precedential force. But if they have no precedential force, they don't change the law. It follows that it is possible for specific orders to be incorrect, even when evaluated *ex post*. That possibility shows that PV is not correct with respect to orders. This conclusion is in line with the idea that the content of the law is fundamentally general. For what it's worth, it also fits ordinary legal discourse well. It's at very least peculiar to say that the law of New York includes the requirement that I pay 45 dollars to John Smith.

There's a slightly different, more concessive tack that a defender of DV could take. Whether we say that specific orders are part of the content of the law or not, they are clearly a special, limiting case – the far end of a spectrum. So one could retreat to the position that because of the overwhelming moral importance of not having endless disputes, PV here approximates the truth as a special case of DV. According to this position, it is because of the general truth of DV that PV approximates the truth with respect to orders. That is, there are often powerful moral reasons to give binding force to specific orders of a government that has de facto authority.

DV has additional resources for addressing the problem of moral disagreement. For example, it will often be easier to work out how the legal system was supposed to affect, or how it has affected, the moral profile than to work out the ex ante content of morality. And ordinary citizens can rely on experts.

6.b. The rule-less structure of the content of the law

Second, on DV, the structure of legal content will be like the structure of morality. This point is best explained by contrast with PV.

PV dictates surprisingly much of one's picture of the law. According to PV, the content of the law consists of the contents of authoritative pronouncements. It follows that the content of the law consists of many discrete contents. Let's use the term "rule" for the content of an authoritative pronouncement. (As we will see, this terminology is not merely stipulative.) It immediately follows that every rule is posited, and that every rule has a canonical formulation – the language of the authoritative pronouncement.

The content of the law therefore consists of many discrete rules. Now there will be issues about how the rules fit together. PV itself does not resolve such issues, so any PV-based theory of law will have to provide for their resolution. Most obviously, to the extent that some rules are incompatible with others, there will need to be some procedure by which such incompatibilities are resolved to yield the ultimate content of the law. For example, there could be a principle that later rules invalidate or cancel earlier ones to the extent they are incompatible.

Notice, however, that the issue of how the rules fit together to make up the content of the law is explanatorily downstream of the existence and content of the rules. A rule exists in virtue of the issuance of an authoritative pronouncement. Its content is given by the content of the pronouncement. The resolution procedures don't determine the rules' content; they take that content as given and determine whether, or to what extent the rule is valid. The content of the law is explained by the rules, plus the resolution procedures. The foregoing explicates a sense in which, according to PV, the law is anti-holistic: the content of the law as a whole is made up of and explained by rules that cover particular issues.

PV is suggestive for the epistemology of law. (I say suggestive rather than determinative because the epistemology of a domain need not track its metaphysical structure.) In deciding what the law is with respect to a particular issue or case, PV suggests, the first step will be to discover whether a rule applies. This may require doing more than finding an authoritative pronouncement that covers the case. Various legal materials may be relevant to ascertaining the content of the pronouncement. But those

materials will be relevant only as an evidentiary matter – that is, only to the extent that they help to reveal the content of the pronouncement.

Once it is determined that a rule covers the case, then presumptively the case is decided. Of course, it will be necessary to check whether there is any other incompatible rule. This use of other legal materials will have the purpose not of discovering the content of the rule, but of discovering whether one of the conflict resolution procedures needs to be applied.

PV sets up a characteristic dilemma. As many have pointed out, the content of an authoritative pronouncement will inevitably be over- or under-inclusive with respect to the reasons governing the matters that the pronouncement covers. Therefore, once it is discovered that a rule applies, the question can arise whether, in the particular instance, the decision-maker should depart from the rule. Suppose that departures were allowed whenever the decision-maker thought the balance of reasons supported a result different from that required by the rule. In that case, rules would serve no, or little,¹⁷ function. For they would be followed only when the decision-maker would have reached the same result without the rule. If decision-makers are not to depart from the rule whenever they think the balance of reasons supports a different result, then they will face the question of when they should do so.

This dilemma for decision-makers raises a related question for legal theorists who are adherents of PV. If rules make a difference only when they require something

¹⁷ It is not quite right to say that rules would serve no function. For there could be cases in which the decision-maker was not sure what the balance of reasons required. If the decision-maker departs from the rule only when he or she believes the rule requires something different from the balance of reasons, then the rule would serve to create a default outcome when the decision-maker was not sure what the balance of reasons required.

different from the balance of reasons, then why have rules at all? Legal theorists have devoted a great deal of attention to answering this question.

The structure of morality is very different. Standards of morality don't derive from pronouncements of any kind. Moreover, they cannot be given a canonical formulation. The reason they cannot be given canonical form is the same as the reason that rules will always be over- or under-inclusive. Any attempt to give them a canonical formulation will inevitably get the content wrong.

We can, of course, give verbal expression to moral truths. Examples include "one should keep one's promises," or "one should not cause avoidable suffering." Such formulations have at least two impeccable uses. On the first use, they are merely heuristic devices, simple reminders or guides to a more complex reality. Morality is not built up out of such rules of thumb; rather, they derive from and are explained by what morality requires.

On the second use, such formulations state *pro tanto* moral truths. In the sense in which PV implies that law is anti-holistic, morality is completely holistic. It is not made up of discrete standards or norms, covering different issues or subject matters, which get combined to form the content of morality. Rather, what morality requires on any particular issue depends on the content of morality as a whole. This is why it is so difficult to state in non-moral terms what is morally required without using an explicit or implicit "other things being equal" or "*pro tanto*" qualification. An example of a moral principle with an explicit qualification: it is wrong to cause suffering, other things being equal. An example of a principle with an implicit qualification: it is wrong to cause suffering for fun (that it is "for fun" excludes any other possible reason). More generally,

we can state true moral principles by using moral terms, for they build in the holism of morality: it is wrong to murder (that it is *murder* implies that there is no justification).

This is not to deny that there are distinct moral values, such as fairness, loyalty, compassion, and so on, which may conflict. But the conflict between such values is not, like the conflict between incompatible rules, a question of which one is valid and which ones are not. Rather, the different values are reasons that all apply to exactly the extent that they are relevant. What morality requires is the upshot of the different reasons. We can talk of discrete moral requirements, but they are explanatorily downstream of what morality requires. They are simply a statement of the outcome, not part of the explanation of the content of morality.

As a result of morality's structure, it has no parallel to the dilemma of whether to depart from a rule. Since what morality requires on any particular issue is simply the outcome of all the relevant moral considerations, there's no possibility that the underlying considerations could support a different outcome.

DV implies that law has the structure of morality. For according to DV, the content of the law is (part of) the actual or counterfactual content of morality. Therefore, assuming the view just described about the structure of morality, DV implies that legal norms, like moral norms, cannot be truly stated in non-legal/non-moral terms without implicit or explicit *pro tanto* or *ceteris paribus* qualifications. Of course, we can also state rules of thumb that may be useful for heuristic or educational purposes. And so the dilemma of whether to depart from a rule when the balance of relevant considerations supports doing so cannot arise. It cannot arise because legal norms, like moral norms, are

pro tanto norms. Of course, this is not to deny that when the law does not operate as it is supposed to, there can be moral reasons to depart from what the law requires.

DV therefore suggests that the epistemology of law will be like the epistemology of morality (to the extent that the epistemology of law tracks its metaphysical structure). There will not be two separate questions of what the rules are and whether to depart from them. Rather, working out what the law requires will involve taking into account all the relevant considerations. Of course, as a convenience, we may summarize a conclusion in a particular formulation, though any such formulation will necessarily be imperfect. (And similarly we can give verbal expression to particular values. But the utterance used will have no independent force. It is just a way of conveying which value we have in mind. The relevance of that value will be whatever relevance it has.) Subsequently, when a new case or issues arises, it may be helpful to begin from such summaries. But the question will not be whether to depart from such a summary or rule of thumb, but whether it was an accurate summary of the relevant considerations – what the law really requires. This is very much how courts approach decisions in previous cases.

As an aside, I suggest that the different perspectives offered by PV and DV reveal the real insight in the neighborhood of Ronald Dworkin's well-known distinction between rules and principles. According to Dworkin, rules are posited legal standards that have a canonical formulation and apply in an all-or-nothing fashion. Principles are legal standards that are not posited, lack a canonical formulation, and have a dimension of weight. Dworkin made the point in the context of a debate with Hart over whether legal standards must have a pedigree. He argued that there are standards in addition to rules. And some positivists have naturally responded by claiming that standards that

have the dimension of weight could be incorporated by a rule of recognition. My suggestion is that the real issue is more fundamental. If DV is true, then there are no legal rules.

6.c. Authority

If the law is the content of legally authoritative pronouncements, the notion of legal authority is the central legal notion. As noted, when PV holds that law is the content of authoritative pronouncements the notion of content is an ordinary, not a special legal, notion of content. Working out the content of authoritative directives is like working out the content of any utterance. The distinctively legal issues have to do with what constitutes a legal authority.

On DV's picture of law, what happens to the notion of legal authority? If pronouncements by authorities were the only or a specially important way to change the moral profile, then the notion of authority would have great importance on CV. On the face of it, however, pronouncements would seem to be not even a particularly good way of changing the moral profile (apart from the indirect route that changes the moral profile through a moral obligation to obey the pronouncements of authorities). And their moral upshot is not generally the content of the pronouncement.

[The rest of this section is omitted.]

7. PV and DV compared

In this section, I give some reasons for thinking that the DV's picture of the law is more attractive than that of the PV. I begin with reasons for thinking that PV is false in our legal system. I then turn to the more general question of which picture of law gives a more plausible and attractive picture of what law is supposed to accomplish.

7.a. PV is far from obviously true in our own legal system

I have elsewhere argued that PV, at least in unqualified form, is far from obviously true with respect to the U.S. (and U.K.) legal system.¹⁸ I won't repeat that argument here, but will point out some of the ways in which the U.S. legal system poses difficulties for PV. To the extent that some adherents of PV are motivated by Anglo-American legal systems, it will be useful to point out the problems that PV faces in such systems. The section is not intended to refute PV, but merely to shake the common idea that an unqualified version of PV can be taken for granted.

We need to begin by taking a more precise version of PV. Here is one way of making PV more precise. On this version, PV is really the conjunction of two claims, a sufficiency claim and a necessity claim. The sufficiency claim is that *all* of the contents of pronouncements issued by authorities are part of the content of the law. In other words, being the content of an authoritative command is sufficient for a proposition to be part of the content of the law. The necessity claim is that law is *nothing more than* the content of authoritative commands. In other words, being the content of an authoritative

¹⁸ Greenberg 2004, pp. 173-178.

command is necessary for a proposition to be part of the content of the law. Obviously, adherents of PV could offer weaker and more refined versions of the view. The present goal is to remove any tendency to assume that an unqualified version of PV is obviously true, and in the process to raise difficulties that a more refined version would have to address.

In the U.S. legal system, many statements that are issued by legal institutions acting in their official capacities do not become part of the law. And many actions, decisions, practices, or other things that constitutively affect the content of the law do not do so by contributing the content of any statement.

On the face of it, the decisions of appellate courts are a counter-example to both the sufficiency and necessity claims. With respect to sufficiency, courts announce many standards that do not become part of the law. It is controversial exactly what contribution an appellate decision makes to the content of the law, but it is certainly not the content of all the statements made by the court in its opinion.

The sufficiency claim cannot be defended by identifying one class of statements in judicial decisions the content of which necessarily becomes part of the law. For there is no non-question-begging way to identify such a class of statements.¹⁹ That is, there is no property that such statements share other than the property of becoming part of the law.

The necessity claim is also threatened by judicial decisions. For judicial decisions play a role in making the law what it is, but not by contributing the content of some

¹⁹ If a desperate defense of the sufficiency claim is attempted by excluding judicial decisions from the category of authoritative commands, the necessity claim is abandoned. Judicial decisions plainly play a role in making the content of the law what it is. Consider, to take the clearest case, purely common law areas.

statements. For example, the best justification of the result reached by the court may have an effect on the content of the law, even if that justification is not articulated in any statement by the court.

There are many other examples. With respect to the sufficiency point, consider announcements of law in committee reports and on the floor of Congress and in concurring (judicial) opinions. The defender of PV will try to maintain that these announcements of law are not authoritative. The announcements are, however, made by law-making actors acting in their official capacities. The defender of PV will therefore have some work to do to develop a non-question-begging understanding of authoritativeness that excludes the relevant announcement of law. The crucial point, however, is that what these institutions do in these capacities does affect the content of the law. Thus, if we say that announcements of law in committee reports are not authoritative pronouncements because they fail to satisfy certain process requirements, e.g., passage by both houses of the legislature, this makes it more difficult to defend the necessity point.

More importantly, it is not possible for the defender of PV to draw a principled distinction between legislative and judicial law. In heavily statutory areas, court decisions often play a constitutive role. And the mere potential for them to do so in any area is a problem for PV. That it is possible for the content of legislation not to become part of the content of the law – because of the role of judicial decisions – raises doubt about the claim that the fact of pronouncement is what is doing the explanatory work. A more complex explanation is needed even in cases where the content of legislation happens to be identical to the content of the law. Consider an analogy. If some people

have back pain and herniated disks, we might be tempted to say that herniated disks are the explanation. But if we find cases of herniated disks without back pain, we ought to be worried about the adequacy of the explanation.

The defender of the PV may try to retreat to the claim that all the ostensible counterexamples, including legislative history and judicial opinions, are not authoritative commands, and that they are relevant to the content of the law merely because they are *evidence* of the content of authoritative commands, such as statutory provisions. The gambit, in sum, is to protect the necessity claim by arguing that apparent counterexamples do not have a constitutive impact on the content of the law.

In the first place, it is obviously false that the impact of majority opinions on the content of the law is purely evidentiary. It is probably false for concurring and dissenting opinions as well. And it is certainly not uncontroversial that the force of all other relevant items is evidentiary. For example, it is an interesting theoretical question what contribution to the content of the law is made by a preamble to a statute or by legislative findings in a statute. And it is controversial whether legislative history has evidentiary or constitutive force.²⁰

One argument for PV that I have sometimes encountered is that bearers of content must be sentences or statements. So when we attribute content to the law, we must be attributing content to sentences or statements. This objection is fundamentally confused.

First, it is not true that the only possible bearers of content are sentences or statements. For example, on many views of mental content, whole persons or non-syntactically structured physical states of persons are the bearers of mental content. Analogously, the bearers of legal content may be whole legal systems or decisions or

²⁰ See, e.g., Dworkin, 1986, 342-47.

other actions of legal institutions. To take a different sort of example, we often conceive of morality as having content, though it is certainly not obvious that there is anything that deserves to be called a bearers of that content. On the view that I will be sketching in this paper, the content of the law will be more like the content of morality than like the content of a sentence.

Second, even if the bearers of content were sentences, it would not follow that PV is true. PV maintains that the only constitutive determinant of the content of the law is the ordinary linguistic content of commands or other statements. But, in general the content of a bearer of content depends constitutively on factors other than the ordinary linguistic content of the bearer of content. Indeed, this proposition has to be true on pain of regress. It certainly is not the case that the content of a person's mental states consists of the contents of the person's statements, or some subset of them. (In fact, perhaps the dominant view is that the meaning of a person's utterances depends in part on the content of the person's mental states.) And it would be circular to claim that the content of a person's statements is constitutively determined by the contents of the person's statements, or some subset of them. On Donald Davidson's well-known view, to take an example, the content of beliefs and desires (as well as of sentences) depend constitutively on a person's actual and counterfactual behavior. And on language of thought views, which do accept that the bearers of content are sentence-like entities, the content of those entities is typically held to be constitutively dependent on relations to other mental symbols or on relations to objects and properties in the external world.

I have said enough to establish that PV is far from obvious in our own legal system. It is worth emphasizing again that one who denies PV need not claim that the

contents of statements by legal officials or institutions are not relevant to the content of the law. On any plausible position, they will be relevant. But, first, things that are not the contents of statements can be (constitutively) relevant as well. Second, there is no single, non-question-begging notion of an authority acting in his or her official capacity such that if a statement is uttered by an authority acting in official capacity, then they become part of content of law and if statement is not so uttered that it has no impact on content of law. Statements made by different kinds of institutions and by the same institutions acting in different capacities can bear on the content of the law in different ways. Even different statements by the same institution acting in same capacity can matter in different ways. Finally, when statements do matter to the content of the law, they don't always simply add their content to others.

7.b. Comparison of PV and DV

[Section omitted. In this section, I try to show, to put it crudely, that the law according to DV has much more flexibility than the law according to PV. The conditions under which legal institutions are well constituted to alter the moral profile directly are far easier to satisfy than the conditions under which pronouncements of authorities constitute content-independent reasons. And the direct way of changing the moral profile is far less theoretically problematic. Moreover, DV can take advantage of many of the ways in which pronouncements are good at changing the moral profile. For example, as others have pointed out, the aptness of pronouncements for solving coordination problems and

prisoner's dilemmas does not depend on pronouncements' constituting content-independent reasons.]