Book of Abstracts

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Emad Atiq

Legal Positivism & the Moral Origins of Legal Systems

This paper uses legal history to develop a novel challenge for the leading theory of law in contemporary analytic jurisprudence: legal positivism. Positivists maintain that a rule's legality is ultimately determined by jurisdiction-specific social facts—roughly, facts concerning what people have said, done, or intended to do in the jurisdiction. Yet for much of legal history, jurists and other core participants in legal practice prominently attributed a species of universal legality to basic principles of justice. These principles of justice were construed by judges, lawyers, and even laypeople as exhibiting a form of legality that does not depend on jurisdiction-specific social facts. Across a wide range of jurisdictions, the so-called "laws of justice" were thought to apply ex proprio vigore. After cataloging the historical evidence, I consider the explanatory options available to the positivist. Possible explanations of the identified practice as involving either (i) error, (ii) insincerity, or (iii) implicit reliance on social criteria for legality turn out to be unsatisfying. In the end, I argue the most plausible explanation the positivist could give appeals to a shift in the meaning of "law" over time. But no positivist has yet offered a systematic theory of legal reference-shift, and the view entails theoretical costs. I conclude by highlighting the surprising implications for current disagreements of the possibility that legal philosophy has been involved, perhaps unselfconsciously, in a project of conceptual redefinition.

Bartosz Biskup

Taking humour seriously. Jokes and literal meaning

I will argue that to explain some aspects of our humour we should adopt some of the contextualist views on language computation. Accepting this views implies that Borg's argument for the significance of literal meaning in ordinary communication fails.
Recanati states that what is said "is (the semantic content of) the conscious output of the complex train of processing which underlies comprehension" (Recanati 2004). Contrastingly, Borg argues that language understanding consists of consecutive processing from identifying (a) the words, (b) structural properties of the sentence, (c) semantic analysis, and then to (d) grasping what the speaker means (in a given context). Borg's view presupposes that "the

literal meaning, or semantic analysis of a sentence provides the input to analyses of what is communicated by an utterance of that sentence" (Borg 2004).

These two approaches contradict each other. Recanati's argument has a cognitive aspect. According to his account, we do not have cognitive access to the literal meaning, as defined by Borg. That is, in the process of language understanding there is no conscious "deduction" from (a) and (b) to (c) (Borg juxtaposes deduction as process purely semantic with abduction as the process of post- semantic language comprehension).

Borg invokes both empirical and theoretical arguments. One of the empirical ones is an argument from disorders: "there are certain forms of cognitive disorder which seem to disrupt the process of linguistic comprehension at just this point, with grasp of literal meaning apparently being mandatory while grasp of communicated meaning is revealed as truly optional, since the patients in question systematically fail to grasp speaker meaning." (Borg 2004). So, if we want to explain such phenomena, we should adopt the compositionality of language (as a level of language computation on which we can derive the truth value) and the modularity of language and mind (as understood by Fodor). Borg's arguments can be rebutted by 1) undermining modularity, 2) weakening compositionally (stressing the influence of semantic entities on compositional rules), or 3) demonstrating lack of cognitive access to the literal meaning.

In the presentation I will undertake the approach 3). I will present an "argument from a joke",

showing that there is a type of jokes (basing on the tension between speaker meaning and literal meaning), which could not be funny if it were true that the literal meaning is available in the process of language (speech) comprehension.

As an example:

A, B and C are standing in front of a lake. A points toward the water and says:

A: Look! A hippo's head!

B: Oh! It is.

C: It's probably a whole hippo; it's just that the rest of him is under the water.

(Skoczeń 2016)

In this case, Skoczeń argues that "[t]he mechanism that C adopts to produce the joke is to refuse to enrich A's utterance with contextual features. Thus he treats A's literal utterance as a truth evaluable proposition and reacts to it. (...) it makes sense to distinguish a distinct level of literal, lexical meaning". It is supposed to be an argument for the important contribution that literal meaning makes. I do not agree with Skoczeń, the example shows that there is a literal meaning tobe-computed, but the C's statement, to be funny, is taken

by the audience as "unexpected". It supports the claim that although the literal meaning is important as a theoretical tool, it is not available in everyday communication.
I tentatively accept the theory of humour from (Hurley, Dennett, Adams 2011). According to this theory, "humour occurs when
1. an active element in a mental space that has
2. covertly entered that space (for one reason or another), and is
3. taken to be true (i.e., epistemically committed) within that space,
4. is diagnosed to be false in that space — simply in the sense that it is the loser in an epistemic reconciliation process;
5. and (trivially) the discovery is not accompanied by any (strong) negative emotional valence."
In joke 1) we wouldn't be "surprised" by the C's interpretation of A's utterance if we had already consciously computed the literal meaning - "Look! [there is] a hippo's head". The "discovery" of inconsistency amuses us, as "a price" for cognitive effort. Thus, before reading C's utterance, we had not got access to the literal meaning. Our cognitively available interpretation is directly: "Look! There is a hippo['s head]", as a deferred reference. We have taken the default meaning (dereffered reference phrase) to be true and, having discovered inconsistency, we have: either "step back" to literal meaning (in the spirit of Borg) or for the first time conscious computation of literal meaning (in the spirit of Recanati). I will reject the alleged interpretation of minimalists as Borg.

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Piotr Bystranowski

Democratic Judicial Interventionism

Judicial interventionism denotes the disposition of judges to make decisions that are not dictated by clear determinate rules. Such intervention can be *authorized* or *unauthorized* by the legislature. Following the conceptual and empirical distinction between abstract and

concrete judgments, we maintain in this paper that both authorized and unauthorized intervention can be justified on democratic grounds, to the extent that they can be conceptualized as *representing the particular popular judgment*.

Unauthorized judicial intervention takes place when judges decide cases in a way inconsistent with the literal meaning of the applicable legislative rule or contrary to the established legislative intention. This flavour of judicial intervention has been pejoratively called judicial "activism"[1] and has been considered a serious threat to democracy. Unauthorized judicial intervention is widely criticized or even condemned as anti-democratic.

The typical setting for *authorized* judicial intervention is one in which the legislature passes open-ended legal provisions (*standards*), which leave judges with significant discretion as to how to specify them while deciding on a concrete case. Letting judges off the leash on purpose, has raised democratic concerns to a far lesser extent than the unauthorized version of judicial intervention. That is because it is commonly assumed that in the case of authorised judicial intervention judges are guided by the legislature's rationale and they are expected to make decisions similar to those that the legislature would have made had the latter issued a rule.

Regrettably, the behavioral literature has identified an "abstract-concrete effect" which renders this assumption implausible. It is most unlikely that legislatures and courts reason in the same way. Empirical research establishes that individuals have two sets of preferences which can diverge: preferences (or judgements) concerning abstract norms and preferences (or judgments) concerning concrete decisions. For instance, the average person rejects a norm that gives priority to the rescue of "useful" members of society even in cases of emergency. However, if confronted with a concrete emergency, the average person indeed prefers to give priority to the rescue of the more socially-useful person, e.g., a surgeon over an unemployed person.[2] Social scientists have recently documented numerous ways in which abstract and concrete judgements systematically diverge. Given their different perspectives, legislators and judges are likely to employ different types of judgments in their work. Legislators pass general laws, to be applied in the future to yet-unknown cases – this makes them likely to base their decisions on abstract judgments. Judges, in contrast, typically resolve a concrete, possibly vivid and emotionally-engaging dispute between identified parties, making it almost unavoidable to use concrete judgments. If that is the case, then it is not likely that the legislature and judges reason in similar way and, it is most likely that they reach different decisions. Given the differences in the employed type of judgment, judges and legislatures might systematically and fundamentally diverge in their vision of which values and interests a given piece of legislation aims to realise and therefore what to decide. If indeed judges who apply standards make systematically different decisions than legislatures, the decisions made

by judges applying standards lack democratic legitimacy and they are subject to the same critiques addressed against activist decisions.

The abstract-concrete effect thus dries out the traditional source of democratic legitimacy of judicial decisions governed by standards. At the same time, however, it opens a new avenue for justifying (authorized and unauthorized) judicial intervention on purely democratic grounds. The abstract-concrete effect reveales that "the will of the people" is, at times, ambiguous. There is an abstract will and a concrete will which often diverge. The public speaks in two voices: abstract and concrete. While the legislature can only represent the abstract will of the people, the only forum to represent the concrete will of the people are courts. Therefore, by representing the concrete will of the people, courts' interventions (either authorized or unauthorized) can be democratically legitimate; they replicate the concrete preferences of citizens.

Note, however, that we do not claim that all interventionist judgements replicate concrete majoritarian preferences or that the cases in which they replicate concrete judgements are easy to identify. Neither do we claim that representing the concrete judgments of the majority is the only legitimate ground for adopting standards or for judicial interventionism.

We divide the article into three parts. First, we present the traditional debates concerning authorized interventionism (the use of standards) and unauthorized interventionism (judicial activism). We then examine the experimental literature and present the findings concerning the divergence between abstract and concrete judgments. Finally, we present our two-part normative argument: in cases governed by standards, juges are unlikely to reason in the way legislatures do and they are unlikely to made decisions which converge with the preferences of legislatures. Hence, standards are just as democratically problematic as judicial activism. However, judicial intervention – be it authorized or unauthorized – can be more democratic than a system governed by detailed rules and judicial restraint as judges represent the concrete judgements of the people.

Footnotes:

[1] While the term 'judicial activism' is often used as a pejorative, its precise meaning is highly unclear. For the different meanings attributed to this term, see Keenan Kmiec, The Origin and Current Meanings of Judicial Activism 92 California L. Rev. 1441 (2004). We use therefore instead the term unauthorized judicial interventionism and define it in a way that serves the purposes of this Article.

[2] Caviola et al. 2020

Pedro Caballero Elbersci

The explanatory problem of law's normativity: a proposal based on practical attitudes and normative statuses

The aim of this article is to analyse the explanatory problem of law's normativity and to provide a novel solution to it. In a nutshell, this is not a practical problem, but a theoretical problem that consists in distinguishing, explaining and relating two common claims taken as ascertained: that the law is both a matter of facts and a matter of norms. The strategy of this work begins by distinguishing three fundamental problems, which I consider are implicit in the problem of law's normativity: the infinite regress of interpretations, the gerrymandering, and the individual criterion. It continues by offering a satisfactory answer to each of them. It then ends by showing how the explanatory problem of law's normativity can be solved. The solution appeals to three distinctions, four technical notions, and three conditions of adequacy to explain general normativity, which are crucial to distinguish, explain and relate, in an adequate manner, the factual and the normative dimensions of law.

Damiano Canale and Giovanni Tuzet

Legislative Intentions and Counterfactuals

In 1889 the New York Court of Appeals had to decide whether Elmer Palmer was entitled to inherit under the will of his grandfather even though Elmer had murdered him to claim his inheritance. The Court admitted that the New York statute of wills, if literally construed, gave the property to the murderer. But the Court also claimed that, if such a case had been present to the minds of the New York legislators "and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it".

The case Riggs v Palmer has become worldwide famous since Ronald Dworkin made use of it to show that legal positivism is defective. According to Dworkin, in particular, Riggs would make it apparent that lawyer and judges often disagree on "the grounds of law", a situation that legal positivism is not able to explain. The debate over the merits of Dworkin's claim for theoretical disagreement is still very lively. Yet, not enough attention has been paid to the way in which Dworkin justifies his claim in relation to Riggs.

At a closer look, it is apparent that the decision of the New York Court of Appeals in Riggs was grounded on an argument from counterfactual intention, that was used to claim that the literal meaning of the statute did not rule the case. Now the question is: Is this argument justified? According to the argument from legislative intention, a judicial decision is justified if it is based on the lawmaker's intention. What about counterfactual intentions? More generally, what are the discursive commitments undertaken by a lawyer or a judge, in an exchange of legal reasons, when using this argumentative tool?
The problem is that different counterfactual intentions might be ascribed to a legislature. It seems likely that the New York legislators did not have the case of murderers in mind at all. But, without further information, from their silence we can infer two different counterfactual statements at least:

(1) if the legislature had considered the case, it would have prohibited a murderer to inherit;
(2) if the legislature had considered the case, it would have permitted a murder to inherit.

How are we to justify the choice of one against the other? We can imagine countless worlds which agree in the feature that the New York legislators considered the murderer case by enacting the statute of wills, and differ in other respects. We can imagine a possible world W1 in which the legislators subscribed to some maxims of the common law (as the maxim "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime") and prohibited a murderer to inherit. But also a possible world W2 in which the legislators permitted a murderer to inherit because, using the argument actually advanced by Judge Gray in his dissenting opinion, a prohibition "would involve the imposition of an additional punishment or penalty" upon the murderer. So, one might think, anything goes with this argument.
We will try to address these issues considering Lewis' theory of counterfactuals and possible worlds in the context of a legal exchange of reasons where what is at stake is the counterfactual intention of a legislature. We will use in particular Lewis' "resemblance" condition between worlds and the idea of "relevant similarity".
We believe that the analysis proposed in the paper sheds some new light on the debate on theoretical disagreement and shows that Dworkin's criticism against legal positivism is more thoughtful and provocative than it is often taken to be.

Michał Dudek

On Social-Legal Facts Distinction

The distinction between social facts and legal facts is one of the more crucial, even fundamental elements in discussions within analytical legal positivist philosophy. Despite its fundamentality it still manages to be put in somewhat new, different light, as relatively recent attempts to look at legal positivism through the lenses of grounding concept clearly show. However, what remains largely the same is the way this distinction is treated. Namely, very often both social and legal facts concepts are used as if they were completely self-evident notions. In turn, in case of attempts at their more careful elaboration, they are usually explicated with extremely brief "handbook" examples. Against this background, the presented paper aims at problematizing the social-legal facts distinction.

For instance, the question arises, whether one can, especially in modern, so-called Western or Global Northern societies, clearly distinguish facts that are legal and facts that are social (and, thus, non-legal or extralegal)? In other words, can members of these populations act without even the slightest, strictly implicit reference to the law, especially when legal regulations in fact "touch" every aspect of human activities? Of course, this idea of the actual indistinguishability of social and legal facts can be easily related to controversies concerning Sein-Sollen distinction, especially when sometimes social facts are identified with "is" and legal facts with "ought".

Even if one would like to stick to this title distinction, the talk in social-legal facts categories seems misleading, especially in the context of recent grounding discussions. Namely, is it really the case that on some social facts there are supposed to emerge basically new entities, legal facts, or perhaps what is at most possible to say is that some entity gains, next to its heretofore default social, some legal aspect? In short, perhaps instead of talking about one entity from one category emerging on the other entity from another category, the passage from "the social" to "the legal" is actually about adding some new features to one and the same entity?

However, one has to remember that the mentioned grounding relation is only one of few discussed, as there is another candidate to properly grasp social-legal facts relationship - supervenience. It also allows to notice some probable, highly controversial assumptions concerning both categories of facts. In the end, the basic formula for legal-social facts supervenience "legal facts cannot change without change of social facts" refers quite clearly to changeability feature of both kinds of facts. Obviously, it provokes a series of questions that ultimately are about the fundamental ontology of social and legal facts. When one can speak

of change of social and legal fact? What is this change? The notion of change assumes also notion of stability. If so, when social and legal facts are stable (do not change)? Or perhaps there is no stability, only a constant flux of change within social realm? Many social scientists would agree with that. Does this somehow alter the understanding of social and legal facts and the supervenience that is supposed to grasp the best the relationship between them?

Similarly, if one wants to still assume social facts and legal facts, then one can and should wonder about the exact characteristics of the former, but this time in the sense of the kinds of entities that are grouped under social facts category. Most crucially, is it the right decision to consider social facts exclusively through human actions, as many, if not the majority of, legal philosophers seem to do? Such anthropocentrism in social facts category leads to exclusion of plethora of entities that are crucial, if nowadays simply indispensable, for social (and legal) life, such as various communication technologies. In short, social facts category seems to omit all the things (literally, things) that create the conditions for human choices and actions. Moreover, one has to also remember that contemporary developed legal systems are more and more often referring in their regulations to non-human entities, such as animals, natural environments and material infrastructures. Sticking to anthropocentric social facts category not only excludes these entities but in effect leads to inadequacy to the contemporary legal systems of the entire framework that utilizes this notion.

The presented paper elaborates on these and other noticeable controversies connected with social-legal facts distinction. Such problematization is needed, especially in the face of frequently treating this distinction as self-evident. However, it is in fact entangled in various "deep" ontological assumptions that should be exposed and carefully discussed, as the presented papers aims to do.

Maciej Dybowski

On determinacy and indeterminacy of the same legal concepts

The first part of the paper examines various ways in which indeterminacy of legal concepts is characterised in the current debate within theory and philosophy of law. In particular, linguistic (semantic and pragmatic) indeterminacy of legal concepts is distinguished from legal indeterminacy, and within linguistic indeterminacy, different types of it (e.g. ambiguity, vagueness, contestability, etc.) are discerned. Other distinctions arise from considering the

sources which generate indeterminacy (e.g. general practices of using a natural language, intentional indeterminacy designed by legislators, accidental indeterminacy resulting from mistakes). An analytic reconstruction of diverse kinds of linguistic indeterminacy of legal concepts sets the stage for identifying the problem emerging from the practice of applying such indeterminate concepts in law.

The second part of the paper singles out the puzzling feature of legal discursive practice consisting of lawyers', and other agents' acting in their legal capacities, dispositions to frame cases in conformity with the concepts and categories of their legal cultures, but also to bring into question the applicability of each legal concept. Even the vaguest legal expressions can be at times treated as certain, determinate and precise (possibly to a degree) while those, otherwise treated as certain, can be at times treated as infinitely vague. It is accepted that since legal concepts or words do not apply themselves but it is the discursive practitioners who apply them to cases, legal concepts are neither indeterminate nor determinate ex-ante or intrinsically. They can only be treated as such in the practice of applying them. The question remains whether there is something peculiar about legal discursive practices which enables their participants to move between determinacy and indeterminacy of the same legal concepts.

The third part of the paper offers an attempt at explaining the puzzling feature of the practices of treating the same legal concepts as determinate or indeterminate on different occasions of applying them. The account of legal discursive practices is developed along the lines inspired by philosophy of Robert Brandom, focusing on abilities which enable the participants of those practices to deal with the above-mentioned feature. Particular attention is paid to discerning the abilities implicit in asserting that a given legal concept is determinate or indeterminate. Such assertings are accounted for in terms of the roles they play in articulating premises or conclusions in practical inferences. Those inferences are in turn accounted for in the broader perspective of acting for legal reasons. In order to escape the risk of the problem of legal concept determinacy being delegated to or reiterated at the level of legal reasons, it will be claimed that the ability to act for legal reasons can accommodate the extravagant feature of the practices of treating the same legal concepts as determinate or indeterminate on different occasions of applying. Such an accomodation is possible in virtue of being embedded in the contingent feature of legal institutional setting which provides for conclusive character of institutional legal procedures.

Maryam Ebrahimi Dinani

Social Institutions and Two Levels of Constitution

The aim of this paper is to introduce a distinction between two types of constitutive rules and to try to show its implications for an account of social reality. Very roughly, the distinction will be between rules which reveal the raison d'être of social institutions and rules which determine the obtaining and functioning of institutional entities. What I want to argue is that the constitution of social institutions should come with a distinction between two levels: at one level, the underlying level, we have what I call 'essential principles', which pertain to the point of social institutions, in abstraction from –that is, [structurally] prior to– their instantiation in a particular institutionalized form and, at a more superficial level, we have what I call 'ascriptive principles', which pertain to the very institutionalization of those entities, give shape to them and determine how institutional statuses obtain.

How I will proceed is the following: I start by passing through speech act theories and games via which I came to the distinction, by reference to two conflated ways of characterizing constitutive rules in speech act theories: the Searlian characterization (Searle J., 1969) and the Williamsonian one (Williamson T., 2000). Therefrom, I introduce the distinction between "ascriptive" vs. "essential" constitutive rules: Ascriptive rules correspond to the Searlian characterization of 'constitutive', and essential rules correspond to the Williamsonian one. I will then generalize the distinction by arguing that essential principles pertain to the relation between social institutions – such as competitive games and marriage – and the underlying values and functions, in view of which they emerge. When these social practices are institutionalized in one form or another – French marriage, chess, etc. –, we pass through ascriptive principles, which determine the instantiation of the practice in a particular form, against the background of its essential rules.

In a second part I try to situate the distinction in two different frameworks of accounting for social and legal institutions: First, an essentialist framework though the work of A. Reinach, and then a conventionalist framework through the work of A. Marmor. According to Reinach (Reinach A. 1983), social and legal entities form a specific ontological category of temporal objects which have their own independent being and are governed by what he calls "essential laws". I aim to situate the distinction between the two types of constitutive rules by reference to the characteristic of Reinachien essential laws: their immediate intelligibility and non-forgettability. I will then compare this "essentialist" account with Marmor's account of social

conventions (Marmor A., 2009), according to which social and legal practices are results of [constitutive] conventions, and he distinguishes between two types of conventions in these domains: surface conventions and deep conventions. I again aim to situate the distinction between the two types of constitutive rules with respect to Marmorian surface and deep conventions. I conclude that in both frameworks, we had better be disposed with the distinction between ascriptive and essential rules, and I further suggest that the distinction would shed light on the displaced locus of some debates on conventionalism about social institutions.

Áron Fábián

Non Liquet as Implication

My paper explores the problem of non liquet, i.e. the decision a court renders if it believes that there is no legal answer to the particular case. In the past, this problem has mostly been analysed from the point of view of either deontic logic or the ontology of law, both of which have yielded only limited solutions.
I propose a new framework based on the‘communication model’ of law proposed by Andrei Marmor, building on Gricean pragmatics. I argue that non liquet is best understood as the flouting of the maxim of quantity (saying less than what is expected in the given conversational situation). Thus, courts use non liquet as a way to imply that the separation of powers in the particular case, for whatever reason, requires the legislature, and not the courts to decide the question. These findings may have broader implications vis-à-vis both the ‘communication model’ of law and the question of legal normativity.

Carsten Heidemann and Monika Zalewska

Grounding Theory and Hans Kelsen’s neo-Kantian Theory of Law

Kelsen's neo-Kantian theory of law makes ample use of grounding-theoretical vocabulary. This vocabulary is, however, not further elaborated by Kelsen. We attempt to apply present-day grounding theory to diverse conceptions of the Pure Theory (as contained in Kelsen's writings between 1920 and 1934) to see whether it can explain them and/or render them

more coherent. The outcome is that, although some relations depicted by Kelsen may be reconstructed as grounding relations, the explanatory value of this reconstruction does possibly not justify the intellectual price one has to pay by accepting the metaphysical insinuations of grounding theory.

Maciej Juzaszek

Empirical studies on moral luck and collective beliefs on moral and legal responsibility

According to the classical approach to the moral/legal luck paradox, there is a fundamental inconsistency between moral intuitions which ground the judgments of moral responsibility. On the one hand, the control intuition says we are responsible only for what is under our control and thus moral/legal luck does not exist. The opposite one – the moral/legal luck intuition - suggests that we are often correctly held morally responsible for something that is beyond our control and therefore moral/legal luck exists. Most of the authors believe that these intuitions are incompatible and offer various explanations of the paradox. Some deny the existence of moral/legal luck and indicate that the control intuition should be the basis for judgments about moral and legal responsibility (e.g. Michael J. Zimmermann). Some argue that moral/legal luck is inevitable (or even desirable) and the control intuition is not so important (e.g. Margaret Urban Walker). Eventually, some try to reconcile both intuitions, claiming e.g. that they refer to different types of responsibility: the control intuition influences judgments about blame and the moral/legal luck intuitions judgements about punishment (e.g. David Enoch & Andrei Marmor).

In recent years, however, there are more and more researchers (mainly psychologists and experimental philosophers) claiming that the key to making progress in the problem of moral/legal luck lies in empirical work on the origins and credibility of the thought processes behind intuitions. The majority of them tend to use empirical arguments to undermine the moral/legal luck intuition. Darren Domsky claims that it is based on the selfish bias and the optimistic bias, which is why we need to finally toss the rotten thing out. Andrew Khoury (or recently Markus Kneer and Izabela Skoczeń) also rejects it, this time because it is caused by the hindsight bias. Neil Levy presents a debunking argument against the moral/legal luck intuition. He claims that it is based on our sensitivity to consequences, which evolved as a proxy to sensitivity to bad intentions (because of the correlation between causing and

intending harm) but nowadays is mistakenly treated as an independent source for blame. Eduard Machery and Markus Kneer argue that the moral/legal luck intuition does not really occur in cases of wrongness, blame, and permissibility judgments, only in cases of punishment judgments. Victor Kumar, on the other hand, uses an aetiological explanation to defend the moral/legal luck intuition. He even creates a new term – vindication, based on the idea that moral progress tends to occur when people carry out successful 'experiments in living' […]. Thus, when a moral change is progressive, the justification for it is usually reflected in its aetiology. Justin Martin and Fiery Cushman argue that the moral/legal luck intuition concerning punishment may be an evolutionary adaptation with a pedagogical sense.

These empirical approaches meet strong criticism from the authors who believe that the paradox of moral/legal luck is, of course, descriptively interesting but from the normative point of view cannot be reduced to psychological intuitions and cognitive biases. It requires philosophical arguments. There are a few objections to the positions mentioned in the previous paragraph. First, there is still a very limited amount of data and many arguments only pretend to be 'scientific', while in fact, they are mere speculations. Second, as we can see, all the research concern the moral/legal luck intuition, however, almost no one has worked on cognitive grounds for the control intuition. Third, almost all authors (except Kumar, but still to a very limited extent) investigate only cases of resultant luck but completely ignore the other kinds of moral/legal luck, which make their hypotheses very fragmentary. Fourth, even if they work on resultant luck, they take into account only one of its types, concerning negligence, but overlook the influence of luck on deliberate attempts or post factum moral justification of accomplished actions.

In the paper I would like to examine whether (and if so, how) present empirical studies can enrich the discussion on moral and legal luck if we assume that moral and legal responsibility and social institutions grounded in the collective beliefs.

Lorenz Kaehler

Is law an abstract object?

Law is frequently understood as an abstract object. This enables one to distinguish legal norms from norm creating acts. Whereas norm creating acts are events occurring at a

particular place and at a particular time, the norm itself is not confined to one time and place, although it might refer to them. It can and usually is valid at other places as well and remains so, long after it was created. Another way to capture this difference between norms and norm creating acts is that the latter have physical properties which the former lack. In this regard norms resemble numbers, stories, and theories, all of which also do not have physical properties like mass, space, and time. Therefore, these objects are frequently conceived of as abstract. Especially for numbers and concepts like colour or shape it seems, at least at first glance, plausible that they are abstractions from particular things. Black would be the property that all black things share, square the property shared by all square things, etc. But can the same be said about law? Is law indeed an abstract object and, if so, what would this mean precisely?

The paper shall address these questions and cast into doubt that the concept of abstractness is suitable to characterise the ontological status of law. Although the paper shares the thesis that law is categorically distinct from material things and events and resembles in this regard numbers, stories, and ideas in general, it denies that this difference is the same as between abstractness and concreteness. Otherwise norms as the main elements of law would have to be understood as abstractions from more particular things. But in contrast to concepts such as black, which can be related to particular black things, there are no particular entities the abstraction of which would be a legal norm.

One might apply norms to particular circumstances and obtain thereby particular norms. In this manner one might reduce abstract norms to more particular norms, like if one explains a norm prohibiting black uniforms with the help of particular norms prohibiting particular black uniforms. But thereby one would only reduce one kind of norms to another kind of norms, but not account for the abstractness of a norm in general. Even the particular norms would still be norms. In this regard the relationship between black things and the concept of black differs from the relationship between a general norm prohibiting all black uniforms to a particular norm prohibiting specific ones. In the latter case one deals with the same category of entities, i.e. norms, whereas in the former case one deals with physical things on the one hand and an abstract concept for them on the other.

Also by analysing particular norms it becomes doubtful that they can in general be characterized as abstract. There are, for sure, many quite abstract legal concepts like fault or action and quite abstract norms such as "Killing is prohibited." etc. But even statutory law might contain as well concrete norms by mentioning names for particular people or places, for instance when Brussel is declared to be the seat of the Council of the European Union. Administrative orders and court rulings have such a concrete character by referring to particular persons and things. So it seems that the difference between norms and material

entities is distinct from the difference between abstract and concrete entities. Otherwise there could not be concrete norms.

Can law still be understood as abstract? This would presuppose that one could define abstractness in a way that it captures the difference between law and material things but still holds for norms mentioning particular names and places. To define "abstract" as "immaterial" would not be sufficient because there are entities such as events which are immaterial and still to be distinguished from legal norms. Besides, it would be misleading to understand law as abstract only because it is immaterial. In terms of metaphysical parsimony there would be no reasons to have besides immateriality the concept abstractness, if no additional property would be necessary for it.

The same can be said about normativity. This concept is crucial to understand norms, but has nevertheless to be distinguished from abstractness. There are abstract non-normative entities like numbers. Therefore, abstract entities are not automatically normative. Similarly, there can be concrete normative propositions like an order demanding a particular person to carry out a particular act. Such propositions are, at least at first glance, concrete and nevertheless normative in kind. Thus normativity and abstractness have to be distinguished as well.

These arguments shall be elaborated in the paper and support the thesis that the widespread assumption that law is an abstract object does not hold. Furthermore, the paper will argue that instead it is preferable to understand it as ontologically ideal. This concept makes better clear that law lacks materiality and resembles in its ontological status ideas.

Joanna Klimczyk

A Discourse-friendly approach to weak and strong necessity modals

In my presentation I sketch an alternative account of the difference between SNM and WNM, which is based on rejection of the well-honed view, saying that the necessity expressed by SNM is "strong" and the necessity expressed by WNM is "weak". On my proposal, the difference between these two kinds of modality is to be better construed in terms of clarity and vagueness of the considerations that these modals are sensitive to. In a nutshell, so-called "strong necessity modals" are "strong" because the normative parameter the modal is sensitive to is evident, which is not so in case of the so-called "weak necessity modals".

Palle Leth

What Is Utterance Accountability?

What's the speaker S's responsibility for her utterance U? Is S responsible for what she meant to say or for what the hearer H took her to say, for what's explicitly stated only or also for what's implicitly conveyed? We sometimes hold S responsible for the consequences of U, yet there's no consensus on what utterance accountability really amounts to. Layperson intuitions differ and seldom lead to definite judgments. The tendencies in philosophy of language and legal practice go in different directions.

Courts often set out to establish what they label the objective meaning of U (e.g. Theron 2018), which they usually understand as what H reasonably takes U to convey and which may include all sorts of pragmatic meaning (Burger 1973, Durant 1996, Green 2001, Robertson & Nicol 2002, Shuy 2009, Quinn 2015). If the case is treated as a crimen iniuria, S's intention should also be established. In many cases though S's intention is just taken for granted or S is imputed an indifference intent (e.g. Gaibie 2012).

Philosophers usually take S to be accountable only for what she explicitly commits herself to. What is said (linguistic meaning plus what's required for truth-evaluation) is taken to be decisive (Grice 1967). Conventional meaning is objective and so are contextual values mandated by linguistic meaning. In contrast, implicitly conveyed meaning comes into existence on account of H's making sense of U in the context at hand. It depends on H's subjective and defeasible assumptions about S's intention. S can always deny having meant whatever she didn't explicitly state and thereby, according to standard accounts, shift responsibility onto H and avoid liability (Soames 2008, Camp 2008, Saul 2012).

Recently theorists have argued that assertions need not be made only via semantic meaning (Borg 2017, García-Carpintero s.a., Viebahn 2017) and that false implicatures may be lies (Meibauer 2011). Theorists have also paid increasing attention to the fact that communication isn't always collaborative (Grice 1967) but may also be conflictual (Lee & Pinker 2010, Asher & Lascarides 2013). It's pointed out that some implicatures are only very implausibly denied (Pinker et al. 2008, Sternau et al. 2016). Still many theorists think that it's somehow in the nature of implicatures to be deniable (Fricker 2012, Camp 2018, Stokke 2018, Weissman & Terkourafi 2019).

In this paper I'll propose a conception of utterance accountability based on the assumption that this notion shouldn't be abstracted from the situation where it's at issue (cf. Strawson 1962). The issue of S's accountability arises in the context of H's holding S responsible for U, therefore S's accountability depends essentially on H's interpretation of U. This doesn't mean

that H can hold S responsible for any interpretation of U. H's interpretation shouldn't result from incompetence or inattentiveness. H must have good reasons for her interpretation; it should ultimately correspond to what any reasonable hearer would have taken U to convey in the circumstances at hand. From H's claim's being that she had the best reasons to take U the way she did, there are two notable consequences.

First, S's actual intention is irrelevant. Accountability isn't a matter of what S herself meant to commit herself to (pace Dummett 1986); it's the epistemic warrantability of H's interpretation which is at issue. H has no direct access to S's mind; what the most reasonable interpretation is depends solely on the cues available to H. An interpretation which doesn't match S's actual intention might well be the most reasonable interpretation of U, in so far as it's the best hypothesis about S's intention. Thus S can't avoid liability simply by claiming that

her intention was in fact different from what H took it to be, as some philosophers suggest (Camp 2008, Stokke 2018). S might of course set out to enforce her intended meaning, but then she must argue there were cues which H ought to have considered when interpreting U.

Second, the semantics/pragmatics distinction isn't decisive. Because the question isn't how things were conveyed, but what H had good reasons to assume was conveyed, implicitly conveyed meaning can't be dismissed a priori. This isn't to say that literal meaning isn't important nor to deny that in many cases it'll be more difficult for H to argue that an implicit component enters into the most reasonable interpretation. But it can't be excluded in principle that U wasn't most reasonably taken to convey something beyond semantic meaning; whether it's so depends on an all-things-considered judgment where linguistic meaning and various contextual factors take equal part. Hence, it's not sufficient for S to point out that the semantic meaning of U doesn't include the meaning H took U to convey in order to avoid liability. S might thus be held responsible also for implicatures and innuendos, provided they were reasonably inferred by H.

One might object that S' s accountability can' t depend on H' s merely subjective interpretation, even if epistemically warranted, but requires a robust, factual and objective notion of utterance meaning (Kotátko 1998, Fricker 2012). It seems however that holding S responsible merely for what's said also crucially depends on H's assumptions. S held responsible for the literal and directly stated meaning of U might always contend that she didn't speak seriously and such a claim can hardly be refuted. If H wants to hold S responsible at all, she can't but invoke her good reasons for taking U the way she did.

If this conception of utterance accountability is accurate, the philosophical idea that S is responsible only for what she explicitly commits herself to seems unfounded. Communicating by means of implicatures doesn't amount to shifting responsibility onto H and avoiding

liability. This conception of utterance accountability is in line with court room practice, where we often find good specimens of careful reasoning as to what constitutes the most reasonable interpretation of an utterance according to the specific circumstances of the individual case. However, there's no reason to label this the objective meaning of U. Also, the practice of imputing intentions seems dispensable.

Ira Lindsay

Convention, Social Trust, and Legal Interpretation

This paper argues that the conventional nature of law and the importance of trust between actors within the legal system has important implications for theories of statutory interpretation. Governance by law is a conventional practice. By this I mean that following the law, as opposed to acting on one's best non-legal reasons, is a convention. Government officials, including judges, civil servants, legislators, and government lawyers, are charged with interpreting and applying the law in a great range of situations in which they have some discretion as to how to act. Rule by law (rather than by personal command, decree or whim), requires that they attach a great deal of importance to what the law tells them. Conscientious officials should prefer to follow the law, even at some cost to their other aims. But they are unlikely to do so unless they believe that other actors who might have differing moral or political views will also follow the law. In part this is because if one's political rivals do not follow the law, it is hard not to feel unfairly disadvantaged if one follows the law at some cost to one's own normative principles or material interests. In part this is because law cannot perform its coordinating function if legal officials ignore the law when they find it convenient to do so and so there is little point to being a lone law-abiding official.

If this analysis is correct, we should expect social trust to play a large causal role in creating and maintaining rule by law. Conventional practices are subject to multiple equilibria. In a high trust environment, officials might go to great lengths to faithfully interpret and apply the law even when doing so does not result in their preferred outcome. In a low trust environment, officials might pay lip service to the law but largely ignore it to the extent that they can do so without being sanctioned. Frequent, serious violations of law by officials undermine trust and encourage others to ignore the law. Since any political system has a limited ability to monitor and sanction its officials, legal systems with low trust between officials will tend to degenerate. Similarly, disagreements between legal officials about the

content or proper application of the law will tend to undermine the trust between officials that enables the system to function effectively.

The importance of trust between legal actors provides strong reasons to prefer legal methods that increase agreement about the content and proper application of the law independently of any epistemic considerations. This insight has significant import for both legal interpretation and institutional design. Methodologies for legal interpretation should be chosen in part on the basis of how much agreement about the content and application of the law they generate between different interpreters. There is long-running debate between textualists and purposivists over methodology in statutory interpretation. Textualists tend to favour interpretive methodologies that require that interpreters consider only the statutory text whereas purposivists favour broader inquiry in the aims of the statute that may involve consideration of other materials such as legislative history. People interpreting legal texts rely on intuitive judgments (moral, legal or otherwise). A crucial question for any given domain of law is the extent to which actors within a legal system converge in their intuitive judgments. My argument yields an argument in favour of textualist methodology in areas of law (e.g. constitutional law) in which pervasive moral disagreement generates stark differences in legal intuitions. But it counsels adoption of purposivist methodologies in areas of law in which there is wide convergence in judgment about the underlying normative issues (e.g. provisions of the tax code should be understood, whenever possible, in such a way that tax treatment reflects economic substance). In other words, formalistic interpretative methods are useful for increasing trust when legal actors do not agree on background principles, but may actually decrease legal certainty in areas in which there is broad agreement on the moral considerations at stake. The result is a modest relativism about interpretive method.

A second strategy to conserve trust in the legal system is to focus legal rules on procedural matters and delegate controversial normative judgments to decision makers with somewhat narrow institutional roles. In contrast to the controversial theory of legal interpretation advanced above, the preference for procedural over substantive rules is reflected in many features of common law legal systems. For example, a wide range of questions in civil and criminal trials are delegated to unaccountable juries whereas appeals courts are largely restricted to ruling on procedural matters. This division of labour has rather peculiar epistemic consequences, but does make sense from the perspective of focusing judges' attention on legal questions in which there is likely to be broad agreement on most underlying normative principles. Similarly, while judicial review of administrative action focuses heavily on procedural questions, administrative agencies are given considerable discretion to make substantive decisions so long as they follow the proper procedures.

The observation that law is conventional, although not uncontroversial, is commonplace. What this paper attempts to do is to show that the conventional natural of governance by law and the consequent importance of trust between actors within the legal system have substantive implications for legal method and institutional design. Seeing legal interpretation as aimed at securing agreement on the law and its proper application between parties with differing interests and aims gives us reason to take a domain specific approach to legal interpretation and to prefer law focused on procedure rather than substance.

Guido Löhr

Legal and social commitments

I argue that interpersonal or directed legal commitments and entitlements (the obligation to drive on the right side of the lane, to pay taxes, the right to choose a place to live) can be understood as a subclass of social commitments. A legal commitment is thus of the same general kind of commitment that arise when making a promise or assertion (Austin, 1975; Searle, 1983; Brandom, 1994; Geurts, 2019). Legal commitments are social commitments that are usually grounded in written legal rules, conventions or cases (as in case law).

That legal commitments are grounded in social facts is not new. For example, one might argue that our legal system is grounded in an agreement. The novelty of my account is that I propose a theory of social commitments, and commitments in general, that offers a unified picture of how law fits with other normative phenomena and how legal norms differ from moral norms. From this basic theory of commitments, I can derive a justification for following the law as well as how law relates to morality. Finally, I can derive a justification for the linguistic interpretation of laws.

2 Social commitments

A social commitment arises e.g., when making a promise. If I promise you to invite you for dinner and you accept, I am thereby socially committed to pay the bill. A social commitment is distinguished from rational and moral commitments (Gilbert, 2018) by two features: a) it is a three-place relation as opposed to a two-place relation that necessarily involves at least one other person. Second, social commitments are grounded not in norms of rationality, but in social facts, including social norms. Formally, we can describe a social commitments as

Ca,b(p), i.e., a stands in a commitment relation with b, such that a is committed to making p true.

Social commitments, unlike rational and moral commitments, are essentially a transfer of social entitlements. These are not natural rights. Entitlements only come into existence once we are in a social context with a shared goal. A person living outside of a social context has neither social rights nor commitments. Thus, if I promise you to invite you for dinner, I transfer a social right to you to sanction me in the adequate way if I do not keep my promise. This makes a commitment essentially a reduction of the set of action we are socially entitled to in a given context c. What motivates us to behave in socially accepted ways is the fear to be sanctioned as well as the attempt to reduce the entitlements of others over us.

Social commitments can arise by means of promises, conventions, threats, orders, or assertions. Some of these promises, assertions or conventions happen in a legal context. They fit to our prototypical picture of what makes something legal. Nothing else makes a legal norm different from other conventions. Legal constraints are not interestingly different from other social constraints. Social commitments lead to the possibility of being sanctioned. My account also shows why we should follow the law and why laws sometimes lose their coercive power, namely when they are no longer taken to contribute to a shared goal.

As non-legal social commitments, legal commitments have to be embedded in a social context with a shared goal. Genuine social commitments cannot arise unless there is a shared goal. Thus, imagine a context in which the shard goal is to have a nice lunch together. I can promise to jump up and down, but unless this action contributes to the goal of having a nice lunch together, I will most likely not be committed to jumping up and down and other people will not be entitled to sanction me if I do not keep my promise. Most likely, jumping up and down is detrimental to our shared goal. Thus, even if I promise the action, I will not be entitled to keep it (and I was not entitled to make the promise).

3 Legal obligations

Understanding directed legal commitments as social commitments explains a number of properties of legal commitments. First, it gives legal commitments a place in a broader social discourse that is independently plausible. Second, it explains how legal commitments arise and what their purpose is. Their purpose is essentially to restrict the set of actions that a person is entitled to given a shared goal. Third, it explains how legal commitments can come

in conflict. While it is not clear how rational commitments can conflict, social commitments can often come in conflict (Geurts, 2019). I can promise to Jane to invite her for dinner at 7 and also promise Jenny to go skiing with her at 7. Conflicting social commitments create dilemmas. Either way, Jenny and Jane will require some form of compensation from me. Legal commitments can come into conflict too. In such a case, the more important or more general law will usually be the one that trumps the more specific.

4 Interpreting Laws

Understanding legal obligations as social obligations grounded in a hierarchy of shared goals allows us to say something interesting on how to interpret law. Often legal texts are highly context-dependent and require interpretation. This problem relates to recent progress in philosophy of language on context-dependence of ordinary language (Recanati, 2010). I argue that how to best interpret a context-dependent sentence like "John cut the grass" depends on the shared goal that the utterance aimed to make a contribution to. If the goal is to have a tidy lawn, then we ought to interpret the utterance as John cut the grass in the way appropriate to reach the goal. I argue that this practice is already in place in many legal systems.

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Ismael Martinez Torres

Persistent Disagreements in Law: A Functionalist Approach

Persistent disagreements can be generally described as jurisdiction-specific disagreements among legal practitioners over the content of the law, despite factual agreement. Legal philosophers have adopted a particular view to characterize the relation involved by such disagreements. According to this view, persistent disagreements involve an incompatibility between two pieces of information (about the content of the law in a particular jurisdiction at a particular time), each of which is said to be the content of a doxastic attitude held by an individual. I will refer to this characterization of persistent disagreement as 'the content view'.

In this paper, I pursue two aims. First, I aim to advance an objection against the content view. My argument for this purpose is twofold. On the one hand, I argue that individuals can hold two attitudes whose contents are incompatible without engaging in persistent disagreement. On the other, I argue that two people can engage in persistent disagreement without there being any incompatibility between the contents of the attitudes they hold. Put briefly, I argue that incompatibility between the contents of attitudes is neither sufficient nor necessary for persistent disagreement.

My second aim is to suggest a new account of the relation involved by persistent disagreement in legal practice. According to this account, persistent disagreement is best understood as a relation between the function of the attitudes individuals hold. More precisely, my claim is that two people engage in a persistent disagreement when, despite their agreement about every relevant empirical issue, they hold two attitudes towards the content of the law (in a particular jurisdiction at a particular time) that couldn't serve their functions successfully at the same time if they were part of the same (functional) system.

Szymon Mazurkiewicz

Explanation in metaphysics – insights from legal philosophy

In the paper I will argue that the model of explanation in metaphysics should not be based on the model of explanation developed in the philosophy of science or on an analogical one for metaphysics, especially I will argue that providing general laws is not necessary for the proper explanation in metaphysics. I will argue for this claim on the basis of two accounts within legal philosophy aiming to explain certain legal phenomena. The first one is the reading of the legal positivism Social Source Thesis in light of the relation of metaphysical grounding (Gizbert-Studnicki, 2015, 2016, 2021; Chilovi, Pavlakos, 2019), the second one refers to the philosophy of human rights.

In the first part, I will briefly present the model of explanation developed in the philosophy of science. This model, with all differences proposed among various specific proposals, in the most general account consists of explanandum – a sentence about the phenomenon which is explained and explanans – the class of sentences accounting for explaining the explanandum, while explanans must include initial conditions and general laws. The sentences describing initial conditions and general laws must entail the sentences describing explanandum. There are several conditions that general laws must satisfy (universal, simple, absolute, stable, etc.).

In the second part, I will present two accounts of explanation of legal phenomena: the legal positivism explanation of legal facts with referring to the relation of metaphysical grounding holding between legal facts and social facts as well as the proposal for explanation of human rights and human dignity by referring to human nature understood as in evolutionary psychology and the relation of metaphysical grounding holding between these entities. I will argue that these accounts provide explanation of the debated phenomena.

The problem that arises is that these accounts do not refer to any general laws, therefore they are not based on the well-founded model of explanation developed in the philosophy of science. On the other hand, these seem to be correct explanations, e.g. the legal positivism account properly explains the existence of legal facts by referring to social facts. Hence, it is either that there is another model of explanation in metaphysics that is different than the one developed in the philosophy of science, or these accounts of explanation are not correct in the light of the fully-fledged philosophical explanation (cf. Janik, 2019). Moreover, following the latter, as the relation of metaphysical grounding is proposed to hold between the phenomena debated by these accounts, which is considered to involve explanation, some

may argue that grounding actually do not have any explanatory force if it fails to provide the explanation as developed in the philosophy of science (cf. Janik, 2019).

I will argue for the former, namely that there is another model of explanation in metaphysics that is different than the one developed in the philosophy of science (cf. Maurin, 2019). In particular, I will argue that providing any general laws is not required for the correct explanation of metaphysical phenomena (like legal facts or human dignity). Instead, what is required is a thorough justification for why and how phenomena that are explained (e.g. legal facts) hold due to certain other phenomena (e.g. social facts). I will argue against the view requiring to propose certain "metaphysical laws" as analogues to general, natural laws from the philosophy of science model. First, they either would not meet certain conditions that general laws in science meet or would be so general that they would lose explanatory force for particular phenomena. Second, even if such laws might be postulated, sentences describing them are better understood as the justification for why and how certain phenomena exist rather than as a highly controversial category of metaphysical laws.

My claim is that despite the fact that general laws cannot be proposed in metaphysical accounts of explanation, this does not undermine the proper character in terms of conditions of explanation. Consequently, the explanatory character of the relation of metaphysical grounding is defended since, if accompanied with a thorough justification and not just a bare claim that "A is grounded in B", the reference to this relation forms a step in justifying why and how certain phenomena holds due to the existence of certain underlying phenomena. If using the language of metaphysical grounding, the phenomena that are explained (let's call them A) are explanandum, the phenomena that are argued to be their foundations (let's call them B) are analogical to initial conditions from the philosophy of science model, while instead of general laws a thorough justification of why and how A holds in virtue of B is required.

Joanna Odrowąż-Sypniewska and Bartosz Szyler

Philosophers' minimal content in legal interpretation

One of the bones of contention in the debate between contextualists and semantic minimalists is the existence and explanatory role of minimal propositions. Minimal propositions are supposed to be minimal truth-evaluable contents semantically expressed by utterances of well-formed declarative sentences. As the chief minimalist Emma Borg puts it, minimal content of a sentence "is exhausted by the words and structure its surface shows it

to contain" (2017: 1). Minimalists argue that sentences like "Jill is ready" express minimal propositions that that there is something (whatever) for which Jill is ready. They acknowledge that such propositions do not correspond to the intuitive contents of such utterances (i.e. to what is said, which in this case is that Jill is ready for some particular, conversationally specified, thing), but insist that they nevertheless play an important role in communication. Contextualists on the other hand argue that there are no minimal contents and even if there were, they would be explanatorily redundant. Thus, e.g. Recanati claims that minimal proposition "has no psychological reality and need not be entertained or represented at any point in the process of understanding the sentence" (2004: 64).

In her recent paper Borg tries to defend the notion of minimal content by arguing that it is needed for a feasible understanding of what is said. She agrees that minimal content cannot be equated with what is said and claims that "what is said" is best understood as "a socio-linguistic notion, arising from the relation of language to social norms and cultural expectations" (2017: 8) Borg distinguishes four different features that might be seen as fixing what is said, depending on the kind of socio-linguistic purpose in which we are interested and claims that two of them, namely (i) strict and (ii) conversational judgments of a speaker's liability or culpability for content, are the most feasible. In everyday conversations it is usually the conversational liability that is important, but in some contexts – and in particular in legal contexts – the strict linguistic liability comes to the fore. And, according to Borg, strict linguistic liability – on which many rules employed in legal interpretation depend – relies on minimal content. Borg mentions two of three UK rules of statutory interpretation (i.e. the Plain Meaning Rule and the Golden Rule) and claims that they depend on minimal semantic content of legal statements. She also mentions Smith vs. US (1993), in which the verdict depended upon the Supreme Court's view on what "using a firearm during and in relation to any crime of violence or drug trafficking" means. Smith tried to trade a firearm for drugs but did not use the gun as a weapon. In the Supreme Court opinion one may read: "§924(c)(1)'s plain language imposes no requirement that a firearm be "used" as a weapon, but applies to any use of a gun that facilitates in any manner the commission of a drug offense". Borg's aim is not to support or argue against the Supreme Court decision, but her point is "that we cannot even make sense of the Supreme Court judgment unless we admit a propositional content for the statue independent of rich pragmatic adjustment" (2019: 15).

In our paper we'll attempt to throw some doubt upon the claim that it is minimal content that is important in legal interpretation. Firstly, the central importance of literal meaning (which, according to Borg, should be explained in terms of minimal content) for legal interpretation is not at all uncontroversial. It has been noted by legal theorists (see Tobor

2010) that the role of so-called "literal interpretation" and rules such as Plain Meaning Rule is sometimes overestimated. A judge cannot determine whether to classify some house as a "small residential building" basing her ruling only on semantic intuition, even if she uses literal interpretation as one of the arguments to justify her ruling. At least part of the applications of literal interpretation could be perceived as a smokescreen used to support functional or teleological reasons.

Secondly, we'll argue is that even in legal contexts the interpretators look for the most reasonable rather than the minimal content (see Leth 2019). We'll briefly go through some of the cases in which the meaning of a legal text was a matter of discussion with the hope of demonstrating that such cases cannot be seen as a proof that minimal content is needed. Linguists that act as Amici Curiae (2018) say that their aim is to "identify the ordinary, expected, and intended meaning" (p. 6), and it seems that such meaning may not be the minimal, literal, meaning of the expressions used. For instance, even in the above mentioned Smith vs. US case it might be argued that the "ordinary, expected, and intended" meaning of "using a firearm" is using it as a weapon (e.g. Justice Ginsburg argued that such a meaning is "consistent with normal usage"; see also Watson vs. US (2007)). If this is so, then the interpretation that the judges are after is not the minimal content in the semantic minimalist sense, but rather the intended or most reasonable, content, which might or might not be (minimally) enriched depending on the circumstances. Moreover, deliberations over the meaning might be taken to show that there is no content that is the minimal content, for they demonstrate that there are several possibilities available and one has to choose the most reasonable one.

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Temi Ogunye

Are norms necessarily normative?

INTRODUCTION

In Explaining Norms, Geoffrey Brennan, Lina Erikson, Robert E. Goodin, and Nicholas Southwood define norms as clusters of normative attitudes (plus knowledge of those attitudes) possessed by at least 50% of the relevant population. Thus, in Brennan et al's view, norms are necessarily normative; their existence depends on the presence of widespread normative attitudes. My aim in this paper is to cast doubt on this claim and to defend an alternative account instead. In particular, I want to suggest that a more plausible conception of norms would draw on and integrate two theories Brennan et al reject or revise on the way to developing their own account of norms. These theories are provided by Cristina Bicchieri and H. L. A. Hart.

I. BRENNAN ET AL ON NORMS

Bicchieri's theory of social norms is one of the most well-developed accounts of norms in the literature. She defines a social norm as a rule that people prefer to comply with on the condition that: a) they believe that most others in their reference network comply with the rule, and b) they believe that most others in their reference network believe they ought to comply with the rule (Bicchieri 2006, 2017). Brennan et al object to Bicchieri's account of social norms because it implies that norms can exist in the absence of widespread normative attitudes that correspond to the norm. Instead, Brennan et al define norms as clusters of normative attitudes (plus knowledge of those attitudes) possessed by at least 50% of the relevant population (Brennan et al 2012).

One important distinction Brennan et al draw is between formal and non-formal norms. Inspired by Hart's distinction between primary and secondary rules (Hart 2012), Brennan et al argue that the difference between formal and non-formal norms is that the former are part of networks that contain secondary rules about how the rules of their respective networks are identified, created, modified, applied, interpreted, and enforced, while the latter are not. The paradigmatic example of a formal norm is a law. A problem with Hart's account of legal norms, in Brennan et al's view, is that it allows that normative attitudes may be limited to the officials of the legal system. Brennan et al believe that this "amounts to nothing short of giving up on the normativity of formal norms" (Brennan et al 2012:48). Instead, Brennan et al argue that, for formal norms such as laws to exist, most of the community must have

normative attitudes that correspond to the basic, fundamental rules of the system. They must judge that "the state is entitled to make law, to change law, to apply law and interpret law, and to enforce law" (Brennan et al 2012:49).

II. DEFENDING BICCHIERI ON SOCIAL NORMS

Brennan et al object to Bicchieri's account of social norms because it generates the counterintuitive result that a norm can exist in the absence of normative attitudes that correspond to it. But the features of Bicchieri's account that generate what Brennan et al regard as counterintuitive results also have considerable explanatory advantages. In particular, I demonstrate that Bicchieri's account of social norms allows us to make sense of situations in which compliance with social norms emerges and decays.

Moreover, the counterintuitive nature of Bicchieri's account is tempered if we distinguish between three kinds of social norms, all of which fall under Bicchieri's definition but differ from each other in important ways. I call these robust, fragile, and latent social norms.

III. THE NORMATIVITY TRILEMMA

Brennan et al in effect build a de facto or sociological authority condition into the definition of a legal system. I argue that this condition generates the deeply counterintuitive implication that South Africa under Apartheid did not have a legal system and, despite appearances to the contrary, black South Africans living under Apartheid were not oppressed by law. In fact, by treating sociological authority as an existence condition for law, Brennan et al rule out the possibility that legal systems might be tools of a distinctive kind of injustice: the exercise of governance over a population that does not identify with or endorse it. Call this the injustice of alien rule.

This means we must choose between insisting that widespread normative attitudes must be present for a norm to exist and so alien rule is not possible, or that alien rule is possible and so widespread normative attitudes are not necessary for a norm to exist. I suggest we embrace the latter, which incorporates (but is not coextensive with) Hart's view.

IV. INTEGRATING BICCHIERI AND HART

Hart argues that legal systems are constituted by primary rules which are generally complied with by citizens and secondary rules which are accepted and generally complied with by officials. The secondary rules empower officials to create, modify, apply, interpret, and enforce the law. I argue that we should conceive of the secondary rules that officials comply

with as social norms as Bicchieri defines them. This suggestion is unproblematic when it comes to what I have labelled robust social norms, which are complied with and characterised by the presence of normative attitudes.

However, my suggestion constitutes an amendment to Hart's theory because Bicchieri's definition of a social norm includes rules that are not complied with and rules that do not have normative attitudes corresponding to them. Nevertheless, I argue that my suggestion allows us to better capture nonstandard cases of legal systems which Hart himself also wants to capture. One implication of this suggestion is that a legal system can exist when even the officials of the system lack normative attitudes which correspond to the basic, fundamental rules of the system.

V. CONCLUSION

The upshot of the argument of this paper is that a norm's existence does not depend on the presence of normative attitudes, even amongst officials. In other words, norms are not necessarily normative.

Herlinde Pauer-Studer

A Normative Argument for the Separation of Law and Morality

The issue of how to understand the relation between law and morality has divided legal theorists: Legal positivists hold that there is no necessary connection between law and morality. The validity of legal norms and statutes does not depend on their fulfilling standards of morality. Proponents of a natural law theory, however, claim that legal systems which violate basic demands of morality and justice cannot qualify as genuine law. They are, as John Finnis puts it, "peripheral" and "watered-down versions" of the central cases of law. According to natural lawyers, proper law exceeds at meeting standards of justice and is oriented towards realizing the common good. While legal positivists consider law and morality as distinct normative spheres (the so-called separability-thesis), natural law theorists think it essential that law and morality are internally connected.

A test case for these divergent approaches to law has been the existence of evil legal systems. Positivism, as critics maintain, cannot say more about such systems except that they disqualify morally. Since positivists read "legal validity" in a descriptive sense (legally valid

norms are actually given legal norms, i.e., norms that are de facto in force), they seem to lack the resources for criticizing wicked law on legal grounds. Natural law theorists, on the other hand, assuming that viable law is internally linked to morality, tend to question the validity of wicked legal systems altogether. However, as their positivist opponents object (rightfully in my mind), such a critique can merely probe the legitimacy of wicked law, but not its being actually in force, exercising authority over its subjects.

The purpose of my talk is to assess this controversy by taking a closer look on one notorious evil legal system: National Socialist law. I will focus particularly on how legal theorists who aligned with the Nazi regime conceived the relation between law and morality. My thesis is that the call for a unification of law and morality, as it is common in NS legal theory, supports a separation of law and morality on normative grounds. To draw a line between law and morality is, as the experience with National Socialism vividly shows, indispensable for setting limits to state power. However, such a normative argument for keeping law and morality apart does not deny any connection between the two spheres. Rather, the example of National Socialist law invites us to find a way of translating our historical and moral insights about the structure and working of an evil legal system into normative requirements concerning the form of law. Such formal requirements which are situated between law and morality and constitute a crucial part of the rule of law, allow us to criticize and reject bad and wicked law not only on moral, but also on legal grounds.

My talk is structured in the following way: After outlining the Nazi legal theorists' unification of law and "morality", I discuss, by drawing on Kant's legal philosophy, how their view strengthened the state's power over citizens, curbing individual's inner freedom. I will then make a new attempt of fleshing out the relation between morality and law, namely by reading well-known conditions concerning the form of law such as promulgation, generality, intelligibility, clarity, transparency, consistency, and reliability as normative requirements that stand between morality and law. This way we can acknowledge the importance of morality for the construction and assessment of legal norms without giving up the necessary separation of the two spheres with respect to their guiding principles and scope. One might object that the mentioned formal normative requirements (promulgation, generality, intelligibility, reliability, etc.) merely amount to a "thin" conception of the rule of law, unable to capture, let alone remedy, the gross immoral failures of a legal system as the National Socialist one. In contrast, I try to show that the outlined formal conditions of the rule of law are quite strong: they allow us to locate the legal deficiencies of some particularly disastrous regulations in National Socialism. My conclusion is that a closer look at the ideologically motivated moralization of law in National Socialism, meant to disguise the legal system's deep distortions, should prompt us to leave a central part of the controversy between legal

positivists and natural law theorists behind. The proposed way of fleshing out the connection between law and morality, namely in terms of intermediate normative requirements concerning the form legal norms must take, pays tribute to legal positivism's claim that law and morality amount to distinct normative spheres, while equally taking seriously natural law theorists' argument that grossly immoral law tends to be also legally deficient.

Ralf Poscher

Meaning and Legal Meaning

Intentionalism as an approach to meaning and interpretation has made considerable inroads into legal theory and more specifically legal hermeneutics. It holds that the meaning of an utterance is determined by the communicative intentions that an utterer connected with the utterance. It has considerable philosophical credentials as it does not only provide a plausible account of meaning but also of interpretation that aligns itself with other forms of empirical explanations. It delivers an account of meaning and interpretation that "causes no ripples in the smooth waters of science" (M. Moore).

In law intentionalist theories of meaning seem to be a natural starting point from a normative perspective, too. When we wish to assign legal significance to utterances, the kind of intentions that the utterer connected with her utterance also seem normatively important. This is true in cases in which an utterance is the object of a legal regulation as in tort or libel law, as well as in cases in which the utterance aims at the creation of law such as legislative utterances or utterances in the context of contract formation. It seems legitimate to hold somebody accountable for her intentions, and it seems natural to tie the legitimation of the law to the intentions of those in whom the law has vested the powers to create it – be it the legal power to create contractual obligations or the power to legislate. How else would we justify the binding force of our contingent statutory laws if not by the regulatory intentions of those we elected or otherwise legitimated to make them? Thus, intentionalism has been enlisted in support of positions that focus on so-called subjective methods of interpretation such as certain originalist positions in constitutional interpretation and it has been at the forefront of efforts to reestablish legislative intent as a theoretically viable concept.

However, scholars in the hermeneutic tradition have always insisted that there is more to legal hermeneutics than interpretation in this intentional sense. Already in the first half of the 19th century, Friedrich Carl von Savigny and Francis Lieber stressed that legal construction must supplement the law when the intentions of the legislator have run out. Scholars of contract law have picked up on Lieber's idea and distinguished between the meaning of an utterance, its legal meaning, and its legal effect.

According to Samuel Williston, both legal interpretation and legal construction are concerned only "with the legal meaning of the contract, not with its legal effect after that meaning has been discovered."[1] For Williston, legal effect "comes into play after interpretation and construction have finished their work."[2] Legal effect determines whether an utterance succeeds in changing the status quo of legal rights and obligations. "Interpretation is not a determination of the legal effect of language. When properly interpreted it may have no legal effect, as in the case of an agreement for a penalty; or may have a legal effect differing from that in terms agreed upon, as in the case of a common-law mortgage."[3] Even if the meaning of a legal utterance is properly interpreted and constructed, it might fail to change rights and duties in the way the meaning of the utterance might suggest. The distinctions between interpretation and construction and legal meaning and legal effect have also been taken up by constitutional law scholars like Lawrence Solum and Randy Barnett who define constitutional construction as the operation that determines the legal effect of a constitutional clause.

Both distinctions challenge a purely intentionalist approach to legal hermeneutics. Furthermore, in the debate on "interpretative choice" the intentionalist account of legal hermeneutics has been contested. Cass Sunstein again insisted that the "choice among plausible accounts of interpretation requires people to resort to their own arguments, external to the text, typically in the form of claims about what will make a constitutional order better rather than worse".[4] For the law, the communicative intentions of the utterers do not seem to be decisive. Legal meaning may supersede meaning in the intentionalist sense and legal effect does not necessarily seem to be determined by it either. To understand the role of an intentionalist account of meaning for legal hermeneutics it must be set not only into relation to semantic meaning but also to legal construction, legal meaning, and legal effect. The talk explores the complex and dialectic relation between meaning in the intentionalist account and legal meaning. It will highlight on the one side the theoretical and normative merits of the intentionalist account of meaning, but on the other side the ways in which legal meaning necessarily has to go beyond meaning in an intentionalist sense.

However, this opposition is dialectical since we can only make sense of the ways in which legal meaning goes beyond meaning in the intentionalist sense, when we reconstruct legal meaning within the structure of the intentionalist framework. Intentionalism thus not only help us to understand the very concepts of meaning and interpretation but also the ways in which legal meaning necessarily has to go beyond them.

Footnotes:
[1] {Williston 1920 #2831: § 602, p. 1161}.
[2] Ibid.
[3] Williston, RESTATEMENT OF CONTRACTS §§ 226 cmt. c (1932).
[4] C. R. Sunstein, Formalism in Constitutional Theory (2016), at p. 27.

Pablo Rapetti

A Critique of Strong Anti-Archimedeanism: Metaethics, Conceptual Jurisprudence and Legal Disagreements

This paper is divided into two parts. In the first one I distinguish between weak and strong Anti-Archimedeanisms, the latter being the thesis that metaethics, just as any other discipline attempting to work out a second-order conceptual, metaphysical (semantic, etc.) non-committed discourse about the first-order discourse composing normative practices, is conceptually impossible or otherwise incoherent. In particular, I deal with Ronald Dworkin's famous exposition of the thesis. I argue that strong Anti-Archimedeanism constitutes an untenable philosophical stance, therefore making logical space for the practice of disciplines such as metaethics –conceived as ethically neutral. And, concurrently, conceptual jurisprudence.
In the second part of the article, I attempt to show two things: on the one hand, that Dworkin's widely discussed "challenge of disagreements" to legal positivism (which is precisely an instantiation of conceptual jurisprudence) is founded on strong Anti-Archimedeanism; on the other hand, that having rejected strong Anti-Archimedeanism we should consequently reject the challenge as a serious challenge to positivism. This move, of course, does not thereby imply that accounting for legal disagreements is not an important jurisprudential task.

Alessio Sardo

The Game of Legislation: A Positivist Account of Rational Law-Making

According to a widely shared view in contemporary legal theory, legislation can be understood as a planning orchestration based on shared intentions, which can be explained through an expansion of Michael Bratman's philosophical model for share cooperative activities (SCA). This account has been endorsed by the leading legal theorists Scott Shapiro and Richard Ekins and criticized by John Gardner. The present essay explores an alternative model for legislation: in stark contrast with this widely shared view, it will be argued that rational legislation is best understood as a strategic interaction, phrased in terms of a parsimonious, semi-formal version of game theory. Rational law-making is not merely a matter of sharing intentions and beliefs for the common good of the citizens, for it involves a sophisticated process of bargaining, negotiating, and voting, which takes place within a framework of imperfect competition and unreliable behavior.

Game theory provides a pervasive framework for a non-elementary rational reconstruction and explanation of social phenomena involving multiagent coordination. Explaining rational legislation in terms of game theory has several advantages: it yields a critical conception of the relations between legislation and politics; it provides a formal and complete representation of the social interactions among the agents of a legislature; finally, it has a higher predictive power.

The game-theoretic model focuses on the essential and minimal features of law-making, which are individual actions and behavior. Law-making itself is conceived as a form of behavior. The element of coordination is still present: in fact, game theory presupposes that the interaction between the agents of a legislature results in the form of strategic coordination: a combination of possible individual actions generates coordination as a social outcome. Players can be framed either as individual selfish maximizers –"bad men", if we want to rely on O.W. Holmes suggestive metaphor– or as altruistic individuals ready to sacrifice their welfare for the team.

I begin by summarizing the dominant view in legal theory, with a particular focus on the endorsement of Bratman's notion of shared intention (Section II). What will emerge from the discussion is that the dominant view offers an idyllic portrait of legislation. Then, in Section III, I sketch out the main elements of the alternative account based on game theory. Section IV deals with the rational methods for solving coordination puzzles: it will be argued that the Nash Equilibrium, backward induction, domination, conventions, and focal points are the

main standards for the rational solution of a coordination puzzle. Sections V and VI analyze two examples of legislative games that are highly problematic for the standard view: defections and coalitions. Finally, Section VII offers brief comments on the significant advantages of the game-theoretic model. The higher aim of the current essay is to extrapolate from game-theory qua economic analysis of rational strategic interactions the fundamental hidden structures of rational law-making and to reduce the gap between legal theory and economic analysis of legal phenomena.

Natalia Scavuzzo

Pragmatic Contextualism beyond Eclectic and Skeptical Theories of Legal Interpretation

This essay concerns itself with theories of legal interpretation. In legal theory, there is traditionally a debate between competing theories of legal interpretation. Among them, we find cognitive theories of legal interpretation, which assume that the interpreter discovers the meaning that precedes the interpretation; skeptical theories, which emphasize the role of the interpreter in attributing meaning to legal provisions; and eclectic theories, which highlight the distinction between easy and hard cases. On this occasion, this paper explores a particular form of pragmatic contextualism that can explain how legal meaning came to be and how our discursive agency is responsible for its stability and change.

Mateusz Stępień

Law as a tool or machine

The discussions on the law as a kind of artifact becoming more and more popular in legal theory and philosophy of law. A recent book entitled law as an Artifact, edited by L. Burazin, K. H. Himma, C. Roversi, summarizes the current state of arts in this respect. But frankly, discussion on the law as a societal artifact has been held for at least two centuries in the West. For example, a broad Marxian tradition of conceptualizing law tends to demonstrate the changing nature and scope of the "artificiality" of law. In such a perspective, the ontological question on the nature of the law is reduced to more sociological insight on

how the "nature" of the law has been changing due to some social processes external to the legal realm.

The presented paper, which refers both to those classical discussions and findings presented by current law as artifact movement, aims to falsify the thesis that legal change could be adequately characterized as a transition from "law as a tool" toward the "law as a machine". Such a thesis could be easily reconstructed from the writings of plenty of legal thinkers such as J. H. Merryman, K. Hayakawa, R. Posner. This thesis mirrors the more general idea, developed in philosophy, social anthropology, and sociology, on the transition from the use of "tools" by people toward the use of "machines".

On the one hand, the presented analysis benefits from the conceptual analysis developed within the law as artifact movement, especially when dealing with such notions as "tool", "machine". On the other hand, the overall perspective is macro-sociological one; that is, it is founded on the approach which takes the changes of law into account. In general, such a mixed approach allows combining those two scientific traditions.

In order to falsify the above-mentioned thesis, the paper begins with the basic differentiation between "tools" and "machines" and then "law as a tool" and "law as a machine". The paper argues that in this context, to date, the authors dealing with these issues have not methodically considered differences in the scope of (1) the dependence of the operation of law on other factors (the smaller, the object under consideration is closer to "machine"), (2) the concentration of necessary skills for using the law (the smaller, the object under consideration is closer to "machine"), (3) the personalized character of using the law, including space for the creativity in this respect (the smaller, the object under consideration is closer to "machine"), (4) the stability and predictability of legal operations (the greater, the object under consideration is closer to "machine"). From such an angle, the crucial point of differentiation between "tools" and "machines" is the role of the skills, which are relatively stable characteristics of human beings involved in utilizing the law. This is a starting point for theoretical analysis on the role and character skills play in the functioning of law in present megasocieties. Such inquiry leads to pinpointing several processes such as: hybridization of skills (where non-legal skills are mixed with those developed and dedicated to the legal stuff), transfer of skills (where the skills developed and initially dedicated to the non-legal operations are fruitfully utilized in the legal realm), integration of skills (where the different types of skills, formed in non-legal and legal environments, are functionally combined), particularization of skills (where certain skills can be developed only by a very

small portion of the population). All this leads to emphasize that skills still are necessary for the functioning of legal systems, besides the fact that their role, character, and working have undergone enormous changes.

Jonathan Turner

Are legal obligations real?

A crazy question, surely? After all, legal obligations are not figments of our imagination, and law is not some kind of fever dream. But consider Scott Shapiro's charge that Hart never dealt with Hume's problem – how to derive an 'ought' from an 'is'. Hart tried to explain how a legal system could be a system of norms – of 'ought' statements – by reference to empirical facts about the practices of legal officials. He tried to show, in other words, how law could give us reasons for action by invoking only facts about social behaviour. This cannot work, argues Shapiro, because there are two quite distinct domains of inquiry here. Facts about social behaviour ground legal validity, but they cannot also ground legal normativity: to suggest otherwise would be to ignore Hume's dictum.

One positivist reply acknowledges that real oughts can't be derived from normatively inert facts, but adds that legal oughts are not real oughts. Shapiro has interpreted Hart as suggesting that we could explain how mere social facts could yield real obligations, whereas in fact he only sought to explain how they could yield – well, what exactly? An increasingly popular response to this question distinguishes between real obligations, and obligations that are fake, or fictional, or 'ostensible only'. Moral obligations tend to get put in the first category; legal obligations invariably find themselves in the second. This, I argue, is a mistake.

The idea that legal obligations are not real obligations arises from a desire to do justice to two intuitions. The Legal Normativity Thesis says that legal obligations are not normative in the same sense (whatever that may be) that moral obligations are normative. Whereas the Moral Competition Thesis says that the law claims – or, if you prefer, judges claim – that the law is normative in precisely the sense that morality is normative.

The problems start with the association of moral normativity with real normativity. Then the argument proceeds as follows:

(1) Moral obligations manifest real normativity (equivalently, moral obligations are real obligations, or moral obligations are really normative).
(2) Legal obligations manifest some form of normativity (=are normative), but
(3) legal obligations do not manifest the same form of normativity as moral obligations.
Therefore,
(4) legal obligations manifest some form of normativity that is not real (=are not really normative, or are not real obligations).

If legal obligations are not real obligations, what are they? Here it is the Moral Competition Thesis that leads us in the direction of saying that they are 'ostensible only'. The Moral Competition Thesis says that law purports to embody precisely the same normativity as morality does. But since we know (the Legal Normativity Thesis) that it does not, the natural way to deny that legal obligations are real – while doing justice to the Moral Competition Thesis – is to say that legal obligations are fake obligations, or fictional obligations, or ostensible only obligations. Call that the Ostensible Only Thesis.

The Ostensible Only Thesis cannot make sense of some central cases of successful law-making. Let's grant that I have a moral obligation to help others in my society. In order to enable me better to discharge that duty, the government raises taxes. Now I have an obligation to pay £n in tax (assuming n is a just amount). A legal obligation or a moral obligation? Well, both. The legal obligation is an obligation within the law; the moral obligation is an obligation within morality. Then in what sense is the legal obligation not a real obligation? What has happened here seems to be just what the enactment of the taxation law was meant to make happen: it has created a (real) obligation to pay £n in taxes. But if the enactment has achieved precisely what it was supposed to achieve – it has created a moral obligation to pay £n by means of creating an obligation within the law to pay £n – then there is no sense in which the legal obligation is fake, or ostensible only. It is not holding itself out as being something that it is not.

The appeal of the Ostensible Only Thesis is strengthened by some considerations derived from a positivist perspective (which I share) on law. Positivists believe that legal obligations are institutional creations. They are the product of artifice. It is tempting, then, to distinguish artificial obligations from real ones. But this is not a sound distinction. A better antagonist for 'artificial' is natural. Things are either made by humans, or they are not. We withhold the label 'real' from what is artificial only when there is some pretence that it is natural. A café's artificial flowers are supposed to be taken – at first glance at least – for the

real thing, i.e. natural flowers. But an artificial reef is not supposed to be taken for a coral reef. Legal obligations could never be real obligations in the sense of natural (non-artificial) obligations. But nor do they aspire to be. The law does aspire to create real obligations in the sense of moral obligations, and sometimes it succeeds in doing so.

What then of the Moral Competition Thesis? What does it mean to say that the law claims that the law is normative in precisely the sense that morality is normative? What it does not mean is that the law claims that its obligations have the same origin as moral obligations. Judges are not trying to fool us into thinking that obligations with their origin in law are really obligations with their origin in morality (or morality alone) – how could that be? They are telling us that, once created, legal obligations compete with moral obligations. Artificial light is just as real as starlight. It is created in a bulb using electricity rather than out in space using nuclear fusion. But it still competes with starlight in the night sky.

Wibren van der Burg

From Ethical Analysis to Legal Reform: Methodological Reflections on Ethical Transplants in Pluralist Contexts

This article discusses the problem of how academic researchers can go from ethical normative judgments to recommendations for law reform. Ethical analysis, especially in fields of applied ethics, often results in recommendations for legal reform. For example, that the law on euthanasia, soft drugs should be changed or that we should reform the tax structure. Though law and ethics look similar in many respects, they are also different. Therefore, the results of ethical analysis cannot simply be transplanted into a legal context. There has been little methodological reflection on how ethical insights can be incorporated into law. Of course, there have been studies on whether and how moral norms should be incorporated into criminal law; examples are the continuing discussions inspired by the Hart-Devlin debate. Similarly, there have been various sociological studies about the effects and side-effects of legally enforcing morality. However, each of these provide only part of the story. Moreover, most of these approaches only discuss morality as the starting point – rather than ethical analysis – and criminal law as the subfield of law, rather than all subfields of law.
In this article, I will provide a systematic methodological framework involving how to go from ethical normative judgments to recommendations for law reform. With a variation on Watson's notion of legal transplants, this may be called ethical transplants: transplanting

ethical normative judgments into legislation. It is an analytical inventory of the issues that need to be addressed, but not a substantive normative theory. As such, it may be especially helpful for Ph.D. students and beginning researchers working in interdisciplinary projects in which ethical and legal analysis are combined.

I distinguish three stages in the process from ethics to law: translation, transformation, and incorporation. Translation from ethics into legal scholarship is problematic because of the various differences between law and morality, and between the corresponding academic disciplines of legal scholarship and ethics. One of these differences is that moral language and legal language, although sharing a common etymological background, have partly diverged. Ethics and law can therefore be regarded as related dialects. We need to translate the dialect of ethics into the legal dialect.

Transformation is the process in which ethical theories and categories are transformed into theories and categories that are relevant and useful in a legal context. Ethical theories are often only indirectly relevant. For example, the claim that persons in a Rawlsian original position would choose an almost equal distribution of income is not a direct argument for the radical reform of current labour law. This example illustrates two issues that we should take into account in transformation: ethical pluralism and the focus on ideal theory. The fact of ethical pluralism may require a process of ethical triangulation. This implies that a certain topic is analysed from the perspective of various traditions. If a certain bill were to be justified in a utilitarian, a Kantian, and a Christian perspective, that might provide a presumption that it is ethically justified. This presumption is based on an overlapping consensus between the major ethical traditions.

The most complex step is that of incorporation: the ethical judgment has to be integrated into the legal order. In order to fully justify recommendations, we need to factor in at least three clusters of issues. The first cluster consists of legal issues to do with the distinct characteristics of a legal order or a specific legal subfield. Apart from general, and according to some authors, universal characteristics, there are also many characteristics that are specific for a legal order, or even for a specific subfield within a legal order. Therefore, we must also understand those specific characteristics. I discuss the various characteristics that have been suggested in the literature.

The second cluster concerns empirical issues that deal with concerns like side-effects, costs, and popular support. I only briefly discuss these issues, as they have been extensively discussed in the social sciences.

The third cluster consists of normative issues, such as the justifications for legal moralism, the limits of government power, the balancing of rights, and liberal democracy. Most of the philosophical literature on the legal enforcement of morals focuses on the normative issues.

My aim is to broaden the perspective and show that this is only one relevant issue and that we should address legal and empirical issues as well.
A recurrent theme in this essay is that we need to have an eye for variation and pluralism. Ethical theories often have universalist aims, and they abstract from concrete contexts. Examples are Rawls' original position and his theory for a nearly just society. However, law is highly contextual and variable. For example, the meaning of property in the Common Law tradition differs from that in the Civil Law tradition. Even within one legal order there is variation: in criminal law, responsibility means something different than in tort law, and the burden of proof is also different in both fields. One cannot simply argue that because Rawls' theory would imply a high minimum wage, we must introduce this into the legal order of the United States, let alone of Brazil. There is too much variation in context here, and therefore we need to analyse carefully the various steps that have to be taken. Variation and pluralism are not restricted to law; both moral pluralism in society and the ethical pluralism of competing ethical theories pose additional challenges for ethical transplants.

Trevor Wedman

The Non-Naturalist View of Legal Realism - Toward a Social Ontological Account of the Law

The contribution will explore how common law adjudication is based on the normativity inherent in social practices. In doing so, the paper argues against Legal Naturalism and highlights the importance of a social ontological approach to the law.

Mateusz Zeifert

From the open texture to prototype theory – analytic philosophy meets cognitive linguistics

The notion of open texture was introduced to legal theory by the prominent Oxford legal philosopher, Herbert L.A. Hart. According to his theory, every legal term has a solid core of meaning that covers most typical factual situations and a penumbra where borderline cases may arise. Hart used this notion to explain the inevitable difficulties of legal interpretation

and the role of judges, and to argue against two extreme positions in the tradition of legal thought, namely legal formalism and rule-skepticism (Hart 1958, 1961).

Prototype theory is a theory of categorization originating from the work of American psychologist, Eleanor Rosch. In the 1970s Rosch published a series of experiment-based articles in which she called into question the so-called classical approach to human categorization, based on the notion of criterial features (or necessary and sufficientconditions). According to Rosch, such an approach is insufficient, meaning that at least some types of conceptual categories are organized around the best, or the most representative example, called "the prototype". Membership of a category is established on the basis of similarity to the prototype, rather than by satisfying a set of criterial features (Rosch 1978). Rosch's ideas were quickly taken up by linguists unsatisfied with the then-prevailing transformative-generative paradigm, including Charles Fillmore, George Lakoff, Ronald Langacker, and others. Prototype theory thus became one of the cornerstones of a new (and highly successful) approach labeled Cognitive Linguistics (Lakof 1987).

Despite obvious differences in scientific context and terminology, betweenopen texture theory and prototype theory there appear to be many non-trivial similarities: Firstly, the are similarities in the structure of concept postulated in both theories. Hart's distinction between "core" and "penumbra" clearly corresponds to the distinction between "centre" and "periphery" of a category as understood in prototype theory. Secondly, both theories use the notion of the most representative example. Hart labeled it "plain case", "standard case", "paradigm case", "clear case", etc., whereas Rosch introduced the term "prototype". Thirdly, both theories render the process of linguistic categorization in a very similar way. Both Hart and Rosch explicitly reject the idea of criterial features (or sufficient and necessary conditions).Instead, they both deem similarity to the most representative example as a basis of categorization. Also, they both acknowledge that non-prototypical members of a categorymay not sharea single common feature, and instead may be connected to others by virtue of "family resemblance".

In summary, Hart's theory seems to anticipate all four main characteristics of prototype theory, as identified in later literature (Geerearts 1989), namely:
1)prototypical categories cannot be defined by means of a single set of criterial (necessary and sufficient) features;
2)prototypical categories' structure takes a form of a radial set of clustered and overlapping meanings ("family resemblance");

3)prototypical categories exhibit degrees of category membership which means that not every member of a category is equally representative;
4)prototypical categories are blurred at the edges, which means that they do not have rigid boundaries.

These similarities are significant and intriguing.Their proper evaluation, though, requires careful identification of historical and philosophical background of both theories. The term "open texture" did not originate from legal context. It was actually borrowed by Hart from the work of his Oxford colleague, Friedrich Waismann. For Waismann, open texture (or the porosity of concepts) was a feature of all empirical statements. He used it as an argument against a certain view of linguistic meaning associated with logical positivism, namely a view that meaning was a function of verifiability. According to him a complete definition of an empirical term can never be created, because there is always a possibility that we did not consider all the relevant factors of a factual situation (Waismann 1951). It is important to note, that some cognitive linguists (Fillmore 1975) also pointed to Waismann's idea as a source of inspiration.

Prototype theory, on the other hand, draws heavily fromlate Ludwig Wittgenstein's idea of "family resemblance", namely the notion that the structure of categoriesmay takethe form of a radial set of clustered and overlapping meanings (Wittgenstein 1953). As was already mentioned, Hart also directly referred to Wittgenstein and utilized the notion of "family resemblance" in his theory (Hart 1958).

Full mapping of relations between both theories requires also a brief examination of similar ideas of some other prominent analytic philosophers, including John L. Austin, John Searle, and Hilary Putnam. Only then will it be possible to determine whether Hart's theory can be viewed as an anticipation of prototype theory and what consequences it bears for legal theory.

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Invariantist, Contextualist, and Relativist Accounts of Gender Terms

In recent philosophy of language, ameliorative projects aim to provide meanings of "loaded terms", in conformity with certain social, moral, and political ideals. Far from having only a philosophical significance, such projects can bring about societal changes – for example, by changing laws, policies and, ultimately, people's behavior.