THE STANDARD PICTURE AND ITS DISCONTENTS

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The paper is long. For those who have time to read only a portion, I suggest reading part II, section 1 and part III, sections 2-4.

I. Introduction

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

The goals of the paper are fourfold: 1) to identify and articulate in some detail the Standard Picture; 2) to show that SP is widely held and has important consequences for

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other debates in the philosophy of law; 3) to show that SP leads to a serious theoretical problem; 4) to sketch an alternative picture that promises to avoid this problem. I emphasize the modesty of these goals in one respect. I make no claim to refute SP or to fully develop and defend an alternative picture.

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

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

Part III raises problems for SP. In section 1, I begin by trying to shake off the idea that SP is obviously true. I look at the way in which we derive the law from statutes and cases and argue that SP does not fit seamlessly. In sections 2 to 4, I argue on more theoretical grounds that SP is problematic. Finally, in section 5, I respond briefly to two objections.
II. The Standard Picture

1. A Sketch of the Standard Picture

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

As noted in the Introduction, I believe that there’s a picture of the relation between the law-creating actions and utterances and the content of the law that is widely taken for granted by legal practitioners and theorists. Moreover, those who take this Standard Picture for granted generally assume that others do so as well. In other words, SP is widely assumed to be common ground. My claim is not that most or indeed any legal theorists explicitly avow SP—in fact, in some cases, it may be in tension with what they would explicitly avow. Rather, the claim is that they are implicitly committed to it, as evidenced for example by what they take to be the problems that need to be solved and by the assumptions on which their arguments depend.

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

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

In introducing the command paradigm, I discussed the ruler’s *right* to be obeyed and the subjects’ *obligation* to obey, without specifying what kind of right and obligation, for example, moral or legal. That is because I intend the command paradigm to be neutral between moral and legal versions. There is a moral version that involves a moral right to be obeyed, and a correlative moral obligation. The Standard Picture of law, by contrast, substitutes legal authority for the moral right to be obeyed and substitutes legal obligation for moral obligation. As we will see, the core idea remains that the obligation is created simply because the authority said so. According to SP, the primary way in which law is created is by legal authorities issuing pronouncements. Of course, in a sophisticated modern legal system, not everything that an authority pronounces becomes

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2 The Standard Picture does not fit the case of custom well, as some adherents of SP have recognized. I say more about custom toward the end of this section.
law. Only certain of an authority’s pronouncements are ‘authoritative,’ typically ones that are produced in accordance with specified procedural requirements. The paradigm case is the enactment of a statute by a legislature.

The key point, which SP derives from the command paradigm, is that what is authoritatively pronounced becomes a legal norm—or, equivalently, becomes legally valid—simply because it was authoritatively pronounced. This idea was introduced in the case of the command paradigm, but we can spell it out more precisely. The claim is that in the complete explanation of why the legal norm comes into being, there are no explanatory intermediaries between an authoritative pronouncement’s being made and the norm’s being legally valid. That is, as illustrated above, it is not that the pronouncement has some other consequences, perhaps for people’s beliefs or expectations or for what is morally required or permitted, which then explain the norm’s becoming legally valid. I’ll refer to this feature of the Standard Picture as *Explanatory Directness*.³

**Explanatory Directness Thesis:** In the complete explanation of the existence of a legal norm, there are no explanatory intermediaries between an authoritative pronouncement’s being made and the resulting norm’s being legally valid.

In the relevant literature, it is often said that commands create reasons that have the property of *content independence*. This means that the reason to do what was

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³ The point of Explanatory Directness is not that a norm’s being pronounced is necessarily sufficient for its being legally valid. For example, as we will see below, a pronouncement might fail to create a legal norm because there is another conflicting legal norm that trumps it. The point is rather that a pronouncement’s way of creating a norm is not via other consequences of the pronouncement.
commanded does not depend on the content of the command—e.g., on the fact that it requires action that is right or reasonable. How does content independence relate to Explanatory Directness? Although theorists often appeal to content independence to capture the intuitive idea that the subject must do as commanded because Rex said so, content independence is necessary, but not sufficient, for this purpose. Even if a command has the effect of creating an obligation to do as commanded for a reason other than the content of the command, it doesn’t follow that the explanation is simply that it was so commanded. There might still be explanatory intermediaries—e.g., the explanation might be that because of the command—not because of its content—it is fair to do as commanded. The property that is needed is the one I have called Explanatory Directness. To summarize, for a command to create an obligation with Explanatory Directness, it must be the case that there are no explanatory intermediaries; content independence is necessary but not sufficient for this condition to obtain.

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

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

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Some theorists may simply use ‘content independence’ somewhat misleadingly to mean what I have called Explanatory Directness.
including conventional meaning, semantic meaning in a context, and speaker’s meaning.\(^5\)

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

Second, there is a loose non-linguistic sense of content—more often called ‘meaning’—that is roughly equivalent to significance, upshot, or consequence. For example, we might ask the meaning of a recent political development or of an embarrassing situation. Meaning in this sense is not a kind of linguistic (or mental) content at all. The crucial distinction is that linguistic meaning consists in the information that is reliably and systematically conveyed by language. The meaning in the loose sense is not so constrained.

The standard picture holds that it is the linguistic content of an authoritative pronouncement that becomes a legal norm.\(^6\) Call this the Linguistic Content Thesis.

The Linguistic Content Thesis is needed to respect the spirit of the command paradigm, as articulated by the Explanatory Directness Thesis. The very point of the command paradigm is that the subjects are obligated to do what Rex tells them to do.

\(^{5}\) For those familiar with the distinction between the semantic and the pragmatic, contents communicated by both routes count as linguistic contents for our purposes. The distinction between semantics and pragmatics is a technical one, which we need not explore here. Insert citations. Roughly, semantics includes what is stated. Pragmatics allows a speaker systematically to communicate more than what is stated, for example by taking advantage of conversational principles that are assumed to apply in typical conversational contexts. If I utter the sentence ‘someone is outside the door,’ I don’t say anything about whether or not I know who is outside the door. But, in many contexts, because of a principle that requires speakers to include relevant information if they know it, I implicate that I don’t know who is there. For a variety of reasons, pragmatics is not especially relevant in the legal context.

\(^{6}\) The Linguistic Content Thesis is of course consistent with the possibility that words used in authoritative pronouncements may have technical legal meanings. Technical meaning is a kind of linguistic meaning.
because he tells them to do it. That is its beautiful simplicity and also, as we’ll see, the source of its difficulties. There is of course room for debate about which aspect or part of linguistic content—what Rex said, what he meant, etc.—best captures what he commanded. But if we allow that Rex’s command could create an obligation whose content is not (an aspect of) the linguistic content of the command, we have abandoned the command paradigm’s simple explanation for the new obligation—‘because Rex said so.’ The command paradigm has no explanation of how Rex’s command creates an obligation with a content that is not what Rex said or meant. (We could of course call the content of the new obligation, which is not something that Rex said or meant, ‘the content of Rex’s command,’ but that would be to preserve the command model in name only.)

We can spell the point out in terms of the Explanatory Directness Thesis. If the content of the legal norm created by an authoritative pronouncement is not the linguistic content of the pronouncement, the explanation of the norm’s legal validity cannot be simply that it was said or meant (since, by hypothesis, it wasn’t). Again, we could call the content of a resulting norm the ‘legal content’ or ‘legal meaning’ of the pronouncement, but that would not be to explain the legal validity of the norm, but merely to give a name to what would need to be explained. In the interest of brevity, in the rest of the paper, I’ll often write simply ‘content’ rather than ‘linguistic content.’

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7 Suppose it is proposed that the ‘legal meaning’ of a pronouncement is its meaning in the loose, rather than the linguistic, sense. That is to say that the legal meaning of a pronouncement is its legal significance or its impact on the law. Hence, according to the proposal, SP would be understood as maintaining that an authoritative pronouncement creates a legal norm whose content is the pronouncement’s impact on the law. But that amounts to little more than the claim that a pronouncement’s impact on the law is its impact on the law. It therefore gives up the attempt to explain the content of the law. (I say ‘little more’ rather than ‘nothing more’ because the proposed formulation of SP would still seem to imply Atomism, which is discussed in the text immediately below.)
The second feature of SP that is a natural consequence of Explanatory Directness we can call Atomism. As the name suggests, the basic idea of Atomism is that the existence of individual legal norms is explanatorily prior to the existence of the content of the law as a whole.

Thus stated, Atomism needs to be qualified. It is a familiar point that the authoritativeness of a pronouncement may depend on a legal norm (or norms)—the norm that is the source of the authority of the institution that issued the pronouncement. And that norm may be created by a pronouncement whose authority depends on a further norm. Such a vertical chain of norms may continue to an arbitrary finite length, but must end without an appeal to the content of the law as a whole. As we’ll see below (section II.3), such an appeal to the content of the law to explain authority would be viciously circular. Therefore, the proper formulation of Atomism holds that, in the explanation of why the law has the total content it does, we appeal to individual legal norms; but in the explanation of an individual legal norm, we do not appeal to the content of the law, except to individual legal norms vertically above the norm in question. (We’ll say more immediately below about how, according to SP, we get from individual legal norms to the content of the law.)

It is easy to see why Atomism is a natural consequence of Explanatory Directness. If a legal norm exists because an authoritative pronouncement with that content was issued, we do not need to appeal to the content of the law to explain individual legal norms, except to the extent necessary to explain the authoritativeness of pronouncements (which, as noted, cannot necessitate appeal to the content of the law generally.)
As we’ll discuss in section II.3 below, Atomism is built into the familiar talk of ‘criteria of validity.’ The way the term is standardly used presupposes that criteria of validity apply to legal norms one by one.

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

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

First, there may be peripheral ways in which law can be created without the issuance of pronouncements. For example, many who take SP for granted would accept that custom can be a source of law, despite the obvious difficulty of integrating it smoothly into the model of authoritative pronouncements.\(^8\) Since custom is a marginal

\(^8\) Citation to Raz
source of law, one way of accommodating it is simply to regard it as peripheral—as such an insignificant departure as not to require revision of the basic picture.\footnote{I do not mean to suggest that all who are committed to SP regard custom as a departure from their core picture. Some may not have considered the issue, and others may assume that the command paradigm can be extended or generalized in some straightforward way to encompass the case of custom. In fact, any such attempt to extend the paradigm to custom encounters the severe problem that any custom is consistent with indefinitely many norms. Because custom need not involve an agent’s pronouncing or thinking a norm’s content, there can be no explanation of which of the indefinitely many norms becomes law that is appropriately analogous to the explanation of a norm’s being law ‘because Rex said so.’}

Second, SP must supplement the command paradigm with an account of how we get from the content of individual legal norms to the content of the law. For example, as I’ll discuss below, the standard picture certainly will need rules for resolving conflicts between prima facie legal norms. For example, there may be rules that give priority to legal norms that are created later in time or are more specific. SP might also allow more radical departures, such as filtering out or modifying absurd or immoral legal norms or even supplementing the law with gap-filling norms.

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

The requirement of primariness is partly a point about degree and partly a point about the normal or central case. With respect to degree, the point is that the content of the law cannot be too far from the set of contents of authoritative pronouncements. For example, the requirement would be violated if most of the contents of authoritative pronouncements were filtered out by a moral test. As for the point about the normal case, the idea is that it’s part of the nature of law that the command paradigm is the standard or normal explanation of the content of the law.
We can now summarize the Standard Picture: the primary way in which law is determined is that the linguistic content of a legally authoritative pronouncement becomes a legal norm simply because it was authoritatively pronounced. Subject to some processing of the legal norms, including the resolution of conflicts between them, the content of the law consists of these legal norms, perhaps along with some other legal norms that are constituted in peripheral ways.

2. Alternatives to the Standard Picture

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

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

I begin with Dworkin’s picture. According to Dworkin, the content of the law is the set of principles that best justify the legal and political history—‘the legal practices’. This is a general picture that will yield different more specific views, depending on how the notion of justification is understood and on what the relevant practices are taken to be.

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

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

To explain my own picture, it will help to introduce the notion of a moral profile. The moral profile in a particular society consists of all of the moral obligations, powers, permissions, privileges, and so on that obtain in that society. In writing of the moral profile in a given society, I do not mean to suggest any kind of relativism about morality. Even on a highly non-relativistic view of morality, the moral profile varies from society to society and from time to time because the morally relevant circumstances vary. What morality requires in a given situation depends, crucially, on the circumstances.
My picture of law is that, when the law operates as it is supposed to, the content of the law consists of a certain general and enduring part of the moral profile. The relevant part of the moral profile is that which has come to obtain in certain characteristic ways, typically as a result of actions of legal institutions such as the enactment of legislation and the adjudication of cases.

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

I call this picture the Dependence View (DV, for short) for reasons that will become clear later. This general picture will yield different, more specific views, depending on the development of notions such as the notion of the characteristic ways in
which the legal system affects the moral profile. The foregoing is only an extremely
rough and incomplete outline of the picture, for the present point is simply to display
alternatives to SP (both in order to show that SP is non-trivial and to help us to see that
SP is widespread).

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

On the Dependence View as well, legislative enactment of a statute may have
roughly the net effect of adding to the law a norm with the content of the legislation. But,
if it does so, the explanation will be that the enactment changed the relevant
circumstances, thus changing what people are morally required or permitted to do.
Again, the effect of an enactment on the law lacks Explanatory Directness.
A related point is that, on both alternative pictures, any action by participants in legal practices can have a constitutive impact on the content of the law, and there is no sharp distinction between the way in which, for example, enacting statutes changes the law and the way in which other practices do so.

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

Finally, on both alternative pictures, Atomism is false. There are no criteria of validity in the sense of criteria that apply one-by-one to individual norms. On the Dworkinian view, the content of the law is the best justification of all the practices. On any plausible view, such justification is holistic in the sense that it is not derived from the justification of each practice taken individually. Therefore, the content of the law is prior in the order of explanation to individual legal norms. Similarly, on DV, the content of the law is holistically determined because the effects of a given action by a legal participant on the moral profile depend on all the other actions by legal participants.

I now turn to evidence that SP is widely assumed to be common ground. I think it is fairly obvious that it is, so I will be brief.
3. Evidence that SP is a widespread implicit commitment

The framing of the positivism/anti-positivism debate

One kind of evidence that SP is a widespread implicit commitment is its role in the framing of the positivist/anti-positivist debate. I’ll suggest that SP is assumed—and assumed to be common ground—by many, though not all, participants in that debate. We will be able to see the consequences of these assumptions in the way the debate has proceeded.

A neutral formulation of the debate is that positivists hold, and anti-positivists deny, that, at the most fundamental level, the constitutive explanation of the content of the law cannot depend on moral facts. As we’ll see shortly, typical formulations of the debate are not neutral. We need to begin by seeing that SP allows three options for an anti-positivist. Since SP holds that the law is primarily constituted by the contents of authoritative pronouncements, it allows a role for morality: 1) to determine which pronouncements are authoritative; 2) to determine the content of the pronouncements; or 3) to filter, refine, or supplement those contents. Let’s consider these three options in more detail.

First, morality can enter into the determination of what makes a person or institution an authority. One classical kind of natural law position—that law is the command of a divine sovereign—is a simple example. A different example is a view according to which what makes an institution a legal authority is that it is morally legitimate.
Second, moral considerations could enter into the interpretation of the content of authoritative pronouncements.

Third, morality could enter at the ‘last’ stage envisioned by SP—the stage that take us from the contents of authoritative pronouncements to the content of the law. For example, a moral filter might be applied to reject norms that fall below some threshold of injustice. Or moral principles might supplement the content of authoritative pronouncements as needed to fill gaps in the law.

It is notable that one or more of these three roles for morality are what is contemplated by typical ways of framing the positivist/anti-positivist debate.

For example, perhaps the most common way of characterizing that debate is that positivists claim, and anti-positivists deny, that the criteria of legal validity do not include moral criteria. As noted above, the way in which the term ‘criteria of validity’ is ordinarily used presupposes that norms have to meet the test of validity one by one, a presupposition that, we have seen, non-SP pictures may reject. More importantly, this characterization of the debate allows morality to play the first and third of the roles permitted by SP. (Moral criteria of validity could be criteria that must be satisfied by either the issuer of a pronouncement or the content of a pronouncement.)

The two alternatives to SP that we have considered are both anti-positivist pictures, but the roles that the alternative pictures give to morality are not among the three options contemplated by SP. On the Dworkinian picture, morality is relevant to the question of the best justification of the legal practices. On DV, morality is relevant because the law is a certain part of the moral profile. On neither view does a norm have to pass some threshold level of moral goodness in order to qualify as legally valid. Also,
on neither view does a pronouncement count as authoritative in virtue of the issuer’s satisfying a moral test.

The widespread assumption that SP is common ground offers a simple explanation of the typical framing of the debate. The second option that SP allows the anti-positivist—that morality plays a role in determining the content of authoritative pronouncements—is the least plausible of the three options. The linguistic content of a pronouncement does not depend on moral facts. Therefore, one who assumes that SP is common ground will naturally frame the debate in terms of the other two options.

The second option is not completely absent from the framing of the debate, however. According to a familiar way of understanding Dworkin’s theory of law, his central claim is that in working out the content of authoritative pronouncements, we first select those interpretations that pass a threshold test of fit. From among those candidate interpretations, we select the one that is most morally justified. As indicated above, this is an incorrect interpretation of Dworkin’s view.

The present point, however, is that the assumption that SP is common ground explains why Dworkin is so often incorrectly interpreted in the way just described. His more recent work gives a central role to interpretation. And, on his view, it is through interpretation that morality plays a role in determining the content of the law. On SP, the role of interpretation is to determine the content of authoritative pronouncements. Therefore, if one assumes that Dworkin, like everyone else, adheres to SP, the obvious conclusion is that he claims that morality plays a role in ascertaining the content of authoritative pronouncements. Since, as noted, this claim is very implausible, SP-driven understanding of Dworkin helps to explain why many legal theorists have been baffled
by Dworkin’s work. In fact, on Dworkin’s view, the law does not consist in the contents of authoritative pronouncements. Accordingly, his invocation of interpretation is not as a way of working out the content of these pronouncements. Instead, interpretation of the practices of a legal system is a way of working out the set of principles that best justify those practices.\(^{10}\)

There is another common interpretation of Dworkin’s work that is also SP-driven. According to this understanding, Dworkin holds that the law consists of ‘the enacted law’ supplemented by moral principles. It is again easy to see how this version of Dworkin derives from taking SP to be common ground. Dworkin’s famous early article ‘The Model of Rules I’\(^{11}\) focused on the way in which courts appeal to principles that have not been enacted. If one assumes that Dworkin adheres to SP, the obvious conclusion is that Dworkin thinks that content of authoritative pronouncements is supplemented by moral principles.

Although SP is consistent with anti-positivism, we can now see how it biases the debate towards positivism or legal realism. (One main strand of legal realism shares positivism’s position about what determines the content of the law. It departs from positivism in concluding from that shared position that there is more indeterminacy than positivists accept. Since our focus is on what determines the content of the law, such legal realists are positivists for our purposes.) One who sees the law through the lens of SP will naturally find it difficult to understand why an anti-positivist position would be at all attractive. The three anti-positivist options consistent with SP all suffer from obvious and extremely serious problems. It seems obvious that governments need not be morally

\(^{10}\) Note on how the fit as threshold idea is intended just as a heuristic and is not best understanding of Dworkin.

\(^{11}\) Citation to Dworkin.
legitimate in order to create law; that what institutions say or mean does not depend on what it would be good for them to say or mean; that there are unjust or otherwise morally imperfect legal requirements; and that nothing is part of the content of the law simply because it is morally good.

Moreover, SP encourages the thought that any role for morality in legal matters can be cleanly separated from other issues. If that were right, then in the interest of clarity, why not simply use language in a way that separates moral from non-moral questions? For example, we may well want to make moral evaluations, but it seems only to confuse the issues to fail to separate the content of pronouncements from moral evaluation of that content. Frederick Schauer (1996, 43) nicely expresses this thought:

> although the positions traditionally described as positivism and as natural law are commonly contrasted, and although the contrast is undoubtedly real in some respects, it turns out that all of those who subscribe to some version of anti-positivism, including but not limited to natural law, have a need for some form of identification of that [the content of certain social directives] which is then subject to moral evaluation. And so long as the alleged anti-positivisms engage in the process of pre-moral identification of legal items, then it turns out that they have accepted the primary positivist premises, premises which are not at all about the proper uses of the word ‘law’, but which are rather about the desirability and necessity of first locating that which we then wish to evaluate.\(^\text{12}\)

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

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

\(^{12}\) I have omitted a footnote from the quotation.
Other evidence

We have seen one kind of evidence for the hypothesis that SP is assumed to be common ground. That hypothesis explains the typical framing of the positivism/anti-positivism debate, including common misinterpretations of Dworkin, and the difficulty that many positivists and legal realists have in even seeing the appeal of opposing positions. We now turn to other kinds of evidence of SP.

At the most superficial level, one hint that SP is widely held is the way in which texts and utterances of texts are commonly conflation with rules, standards, or norms. Legal practitioners and scholars habitually use terms such as ‘statute,’ ‘provision,’ and ‘directive’ interchangeably with terms such as ‘rule,’ ‘requirement,’ and ‘norm.’

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

We should pause to note how peculiar this usage would be were it not for SP. A statute (provision, directive) is either a text or, better, a pronouncement, utterance, or other production of a text. By contrast, a rule (norm, requirement) is a distinctive type of abstract object that provides (or is supposed to provide) reasons for acting in a certain

13 Insert citations.
way. We needn’t try to give an adequate account of what a rule is to see that it is fundamentally a different sort of thing from a text or an utterance of a text.\footnote{I do not mean to suggest that legal scholars are actually confused about the difference between texts and rules. Rather, my suggestion is that they understand the difference but, because they assume SP, it seems to them that using the terms interchangeably in the legal context is harmless.}

It might be objected that there is an obvious explanation that makes no appeal to SP. The conflation of texts and rules is just an instance of the familiar tendency to confuse symbols with what they stand for—the notorious use/mention confusion. Philosophers (and others) can get into terrible muddles by inadvertently confusing the use of a symbol (to talk about what the symbol refers to) with a mention of a symbol (to talk about the symbol itself). In ordinary contexts, however, it is often harmless to talk of symbols when we mean to talk about their referents. For example, it is often harmless to move back and forth between talk about numerals and numbers or between talk about words and their referents. People often say ‘the number two’ when they mean the numeral. Hence, the objection continues, when legal writers talk interchangeably of statutes and rules, they are simply engaging in an instance of the same practice.

This supposed objection is no objection at all. The implicit premise of the objection is that statutes bear (approximately) the relation to rules that numerals bear to numbers or words bear to their referents. But—and this is my point—a commitment to SP is the best explanation of why anyone would believe that implicit premise. If one assumes SP, one will take the relation between, on the one hand, statutes, regulations, and judicial decisions and, on the other, legal norms to be very similar to the relation between numerals and numbers. And, just as the objection proposes, this would therefore explain why one would use ‘statute’ and ‘rule’ interchangeably. By contrast, without SP, it cannot be assumed, even in the standard case, that there is a one-to-one correspondence...
between, on the one hand, statutory provisions and judicial decisions and, on the other, legal rules. Notice how strained it sounds to refer to a provision as a rule or requirement when one does not take there to be a neat one-to-one correspondence. For example, consider the suggestion that there is a rule or requirement that the United States guarantee to every state a Republican form of government.

I don’t mean to place much weight on the evidence of the conflation of ‘statute’ and ‘rule.’ Even on non-SP views, there are reasons why there will tend to be rough correlations between statutory provisions (though perhaps not judicial decisions) and legal requirements. So we can see how even non-SP adherents might fall into a habit of using ‘statute’ and ‘rule’ interchangeably in many contexts. Still, it is notable that even very precise writers do so.\textsuperscript{15}

A more important kind of evidence that SP is widely taken to be common ground is the way in which philosophers of law understand authority and the central role that they give to explaining it.

Legal philosophers’ starting point in discussing authority tends to be that for X to have practical authority is for X’s orders to create obligations to act as X ordered. For example, Joseph Raz takes it to be part of the concept of (legitimate) practical authority that subjects ought to do what the authority says because he says so.\textsuperscript{16} In his Oxford Handbook of Jurisprudence entry on ‘Authority,’ Scott Shapiro similarly takes it to be part of the concept of authority that (legitimate) authorities have ‘the power to impose obligations,’ which he understand throughout as the power to impose those obligations that the authority commands or pronounces. In an effort to avoid the paradoxes of

\textsuperscript{15} Cite to Finnis’s and Raz’s use of ‘directives’.

\textsuperscript{16} Insert citation.
authority, Shapiro considers a number of ways in which the concept of authority might be weakened, but he never considers the possibility that an authority might be able to create obligations other than simply by commanding.¹⁷

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

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

Similarly, Jules Coleman characterizes legal positivism ‘in its broadest sense’ as ‘the view that the possibility of legal authority is to be explained in terms of social facts’ (2003, p. 120). The implicit suggestion is that an anti-positivist position explains legal authority in a different way. No room is left for a view that is not an attempt to explain legal authority.

¹⁷ Insert citation.
H.L.A. Hart’s (1961) theory of law is an example of a theory of law that centers around an attempt to explain legal authority. The centerpiece of his account of law—the practice theory of rules—is precisely his attempt to answer the question of legal authority in a non-circular way.

Joseph Raz’s theory is another obvious example. Raz begins with the proposition that law necessarily claims authority, and his theory grows out of the conditions that, he argues, law must meet in order for that proposition to be true. This argument crucially depends on understanding authority in the way that SP does.

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

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

Moreover, if SP is taken to be obvious common ground, then the problem of explaining authority will be taken to be the problem of explaining SP’s conception of authority. In sum, for legal philosophers who take SP to be common ground, the central

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18 Insert citation to Raz.
problem of legal philosophy will be to explain how legal pronouncements create legal norms with Explanatory Directness.

How would things look without SP? We can first note how peculiar it is to understand the concept of authority in the way described above. In an ordinary sense, to have (legitimate) authority is simply to be entitled to do something that involves exercising some kind of control or power. For example, one might have authority to enter into a contract on someone else’s behalf, to marry people, or to design a building. It doesn’t follow from the fact that Rex has authority, say, to design a building that the building he in fact designs is the one that he says he is designing or means to design. In the same sense, to have legal authority is simply to be legally entitled to do something that involves exercising some kind of control or power.

The kind of legal authority we are concerned with is the legal authority to create law. It does not follow from an institution’s having legal authority (in the ordinary sense) to create law that the law that it creates is the law that it says it creates or means to create. We’ve already seen that there are views of how law is created that do not depend on anything like the command paradigm. On Dworkin’s view and on DV, people create legal obligations and they even do so by, among other things, issuing pronouncements. But the way in which a pronouncement creates law on both pictures is not with Explanatory Directness (or even content independence). On the ordinary understanding of legal authority as the power to create legal obligations (permissions, powers, and so on), Dworkin’s view and DV are pictures of how legal authority operates. But if we understand legal authority as most legal philosophers do, Dworkin’s view and DV are not
pictures of how legal authority operates, but theories of law on which authority need play no role.

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

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

In sum, whether or not it is correct to understand legal authority in a way that builds in SP, the typical understanding of the central problem of legal philosophy is strong evidence that SP is widely taken to be common ground. For the problem is framed in a way that excludes Dworkin’s picture and DV from the playing field at the start.
III. Problems for the Standard Picture

1. Softening up the Standard Picture

This brief section has the modest goal of showing that SP is not obviously true with respect to Anglo-American legal systems. To this end, I look at the way in which lawyers, judges, and law practitioners work out what the law is and point out prima facie difficulties for SP. The section is very brief for two reasons. First, I discuss closely related points at much greater length elsewhere. Second, there is a methodological problem with evaluating SP in this way. The methods of interpreting constitutions, statutes, and cases are controversial. Therefore, in response to an argument that, for example, statutes are often interpreted in a way that does not correspond to their linguistic content, it can always be argued that such interpretations of statutes are incorrect. This dialectic, though it helps to show that SP cannot be taken for granted, ultimately leaves us with a stalemate. We need to turn to arguments on more theoretical grounds, which is the work of the rest of the paper.

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

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

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

We can begin, however, by noting that even the two simple theses seem not to
accurately characterize the decisions of appellate courts. When we look at what
contribution a case makes to the law it is not typically true that that contribution is found
in any of the courts’ statements. There is nothing statistically or normatively out of line
for a case to have an impact on the law that is not articulated in the court’s opinion (or,
for that matter, in any mental state that accompanied the court’s action). The true
significance of the case may lie in a distinction that the court did not articulate.
Conversely, it is not unusual for the content of statements in a majority opinion to fail to
yield corresponding legal rules. For example, the court’s statements may be dicta.

As for the real core of SP—Explanatory Directness, linguistic content, and
Atomism—it should be obvious that they are out of place in the realm of case law. When
a statement by a court accurately characterizes the impact of the court’s decision on the
law, it does not do so because the court’s stating it makes it law. It is controversial
exactly what contribution appellate decisions make to the law, but on any plausible
theory, a case’s contribution to the law depends on such issues as which differences
between the facts of the case and those of other actual and hypothetical cases are relevant
differences; what rationale would best make sense of a body of decisions that reach
different outcomes. There’s much room for disagreement, of course, about what is
required to ‘make sense’ of a body of decisions, for example, how much weight is to be
given to explaining the court’s actual statements. What is clear is that a court’s
statements do not become law because the court issues them—and that general truth is no
less applicable when a court’s opinion does correctly characterize its contribution to the
law: the explanation of why the court’s characterization is correct is not simply that the
court issued the characterization.

As for Atomism, the point is perhaps even more obvious. The legal impact of
case law is not obtained by first extracting a legal rule from each case individually and
then amalgamating the resulting rules through some process of filtering, supplementing,
and resolving conflicts. Rather, the impact of cases on the law is determined
holistically. ²⁰

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

Areas of law that are heavily statutory are the obvious home for SP. I’ll consider
criminal law because that is the area I know best. Many aspects of the way in which

²⁰ In this discussion of the impact of appellate decisions, I have not considered the particularized orders
issued by courts. The point of my discussion is to consider the way in which case law constitutes the
content of the law. As I argue in section III.5 below, particularized orders do not contribute to the content
of the law because they are not general.
criminal statutes relate to the content of the law do not fit smoothly into the Standard Picture.

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

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

A very different kind of example comes from sophisticated legal theory. According to the idea of acoustic separation, in some areas, there can be two standards, one directed at the courts and another at the general public. For example, the law of
statutory rape may require primary actors not to engage in sexual relations with children (without precise specification of an age threshold), but may require judges to impose criminal penalties only on those who engage in sexual relations with children under a specified age. Since there is only one relevant statutory provision, SP lacks resources to explain the existence of two different standards. Again, DV has the potential for a smooth explanation. The same action of a legislature may have very different moral impacts on ordinary citizens and on judges because of their different circumstances.

Thus far, I have ignored the role of court decisions in statutory areas. In fact, even in heavily statutory areas, court decisions often play a constitutive role. This fact interferes with SP’s view of the relation between statutes and the content of the law. First, when there are court decisions that have a constitutive impact on the relevant law, it is not true that the linguistic content of a statute straightforwardly constitutes a legal norm. The defender of SP may respond that the content of the statute does not become a legal norm because the judicial decisions change the law. This explanation is too facile, however. First, judicial decisions interpreting statutes typically purport to be ascertaining what the law is, not making new law. It is possible of course that they are wrong, but for present purposes, the point is that SP’s story must be complicated to explain why courts make the alleged mistake. Second, if judicial decisions are making law, then in many cases they are making law that conflicts with the authoritative pronouncements of the legislature. On SP, this situation would call for the resolution of a conflict between legal norms, and it is not at all clear that a court-made norm would trump the legislative norm. In fact, however, when courts interpret statutes in ways that are inconsistent with the
statutes’ linguistic content, lawyers and judges do not treat the situation as one of conflicting legal norms at all.

We have been considering ways in which the content of a statute and a corresponding legal norm can come apart. On any plausible picture of the law, however, the content of a statute will typically correspond relatively closely to the content of the law. For example, as mentioned in section II.2, because of reasons of democracy and fairness, the moral impact of a statute will often be closely related to its content. Therefore, DV will typically have the consequence that the net effect of a statute will be roughly a legal norm with the content of the statute. (In sections III.4-5, I’ll discuss some reasons why the moral impact of a statute can diverge from its linguistic content.) The crucial claim that distinguishes SP is that the content of the law depends on the content of statutes (and other authoritative pronouncements) with Explanatory Directness.

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

Consider an analogy from medicine. In many cases, bulging discs do not correspond neatly to back pain. For example, we find bulging discs in people without pain. We therefore need a more complex explanation than one that claims simply that bulging discs produce back pain. If we find a patient who has a bulging disc and pain, it would be a mistake to assume a simple causal relation, given that the same disc problem causes no pain in others. Analogously, once we have seen that a statute does not ensure a
norm with the statute’s linguistic content—e.g., because of the principle of interpreting
criminal statutes narrowly, because of the requirement of mens rea, or because of
acoustic separation—when we do find a case of approximate correspondence between the
content of a statute and the content of the law, we cannot assume SP’s simple
explanation.

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

In this and the following two sections, I raise a problem for the Standard Picture.
Here is a quick preview of the way the argument will go. First, I offer a hypothesis about
how the legal system is supposed to operate, in particular about how legal obligations are
supposed to relate to moral obligations. The rough idea is that there is something
defective about a legal system to the extent that it creates legal obligations that it is
morally permissible to violate. I hope that this hypothesis, though perhaps unfamiliar,
will be relatively uncontroversial. I next argue that SP makes it highly problematic for
legal systems in contemporary nation states to operate as they are supposed to. The basic
problem is that SP requires a general obligation to obey the law in order for legal systems
to operate as they are supposed to. But there is a widespread consensus that the
conditions for such an obligation can rarely if ever be satisfied by the governments of
contemporary nations. Finally, I briefly sketch how abandoning SP has the potential for
legal systems to operate as they are supposed to without satisfying the conditions for a
general moral obligation to obey the law.
A legal system creates legal obligations, powers, rights, privileges, and so on. This much is banal. More interesting is the question of how the legal realm relates to the realm of reasons generally and to the moral realm, for example how legal obligations relate to all-things-considered obligations and to moral obligations. (For simplicity, I will mostly focus on obligations.)

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

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

First, I take it to be obvious that all-things-considered moral obligations are (or at least imply) all-things-considered obligations tout court. It’s fundamental to the nature of morality that if, all-things-considered, one is morally required to take some action, it cannot be the case that other reasons make it permissible not to take the action. All-things-considered moral obligations trump other considerations.\(^{21}\) For example, if one is all-things-considered morally required in a particular situation to attempt to rescue a baby, it can’t be the case that that obligation is somehow outweighed by prudential considerations. The point is not that moral reasons always trump other kinds of reasons. Prudential reasons can, for example, prevent one from having an all-things-considered

\(^{21}\) The view stated in the text is the standard view, though some deny it. Citations to Foot, Williams, Slote.
moral obligation in the first place. If it would cost Astrid too much to help Bruno, then
despite strong reasons why she should help him, she may not have an all-things-
considered moral obligation to help him. Rather, to say that someone has an all-thing-
considered moral obligation is to say that one’s other, non-moral reasons have already
been taken into account. (It is in part because all-things-considered moral obligations
trump other considerations, that whether one has an all-things-considered moral
obligation must depend on all the relevant reasons that bear on the situation.)

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

It might be claimed that prudential obligations are an example of non-moral
obligations. In support of this claim, it might be argued that prudential obligations can
conflict with moral ones. As noted earlier, prudential reasons can generate moral
obligations—for example, one may be morally obligated in some circumstances to avoid
serious harm to oneself or one’s family. In contrast with moral obligations that are generated by prudential reasons, it is somewhat odd to talk of merely prudential obligations at all. But suppose we grant that there are prudential obligations. That one has a prudential obligation is certainly not sufficient for one to have an all-things-considered obligation (contrast moral obligations in this respect). For an obligation to be all things considered, morality must be taken into account.

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

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

But for the purposes of this paper, not much turns on this point. The case in dispute—a putative all-things-considered obligation without a moral obligation that
comes about because of serious enough prudential reasons—is not relevant in the present context. The reason is that, as we’ll discuss below, the way in which the law is supposed to generate an obligation for a person to act is not by giving the person extremely strong prudential reasons, in particular by threatening that person with sanctions (though the threat of sanctions against others may make their cooperation more likely and thereby give a person a moral obligation to cooperate that she would otherwise not have). One manifestation of the problem is that it would not be morally permissible to apply serious sanctions to someone for doing what is, by hypothesis, morally permissible (and is only ruled out by the balance of reasons because of the threat of sanctions). For our purposes, therefore, the potential gap between all-things-considered obligations and moral obligations will not matter. If the law is supposed to create all-things-considered obligations, it is supposed to create all-things-considered moral obligations. I therefore will not generally distinguish carefully between all-things-considered obligations and all-things-considered moral obligations. Also, for brevity, I’ll write ‘moral obligation’ rather than ‘all-things-considered moral obligation’ unless the discussion concerns the distinction between pro tanto and all-things-considered moral obligations.

The concurrence hypothesis

I can now offer my hypothesis about the relation between legal obligations and moral obligations. The hypothesis, very roughly, is that a legal system is supposed to operate by arranging matters in such a way as to ensure that for every legal obligation there is a corresponding moral obligation with the same content (but not necessarily so
that for every moral obligation, there is a corresponding legal obligation). For example, if in a particular legal system, there is an obligation to pay tax on one’s income in accordance with a certain scheme, the legal system has failed to operate properly if it is morally permissible not to pay the income tax. (But it is no failure of the legal system if there are moral obligations—perhaps not to lie to one’s friends or to rescue people when it can be done without too much risk to oneself—without any corresponding legal obligations.) An intuitive way of putting the point is the law is supposed to be binding, where that means genuinely binding all things considered—not just legally binding (which the law trivially is). Let’s call the relation between law and morality that the law is supposed to ensure—that there be for every legal obligation a moral obligation with the same content—**concurrence**, and the hypothesis the concurrence hypothesis.

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

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

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

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

Let me say a little more about the kind of normative property I have in mind. Some philosophers are likely to understand my hypothesis as making a claim about a function of law. For example, one might express the proposition that a function of a

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22 Philosophers use the term ‘function’ in a variety of ways. On some uses, to say that a function of X is to Φ is to merely to say that X Φs or that it would be good for X to Φ. See, e.g., Raz, 1979; Moore 1995, pp.
heart is to pump blood by saying that hearts are supposed to pump blood or that, when they work properly, they pump blood. But the kind of normative claim I have in mind need not be a claim about function, and I intend the hypothesis to make a more general normative claim, leaving open its further specification.

Consider some examples of related normative claims that are not, or need not be, claims about function. We have already encountered the example of the claim that beliefs aim at truth. Similarly, one might maintain that arguments are such that, when they operate properly, the truth of the premises guarantees the truth of the conclusion. Such claims might be made as claims about a function of beliefs or arguments, but they need not be. To take a different kind of case, chess has built into it a goal—checkmate—that is not a function. Differently again, consider the idea that courage, integrity, and friendship are such that when they operate properly they produce human goods (though they do not always do so). It would be odd, however, to claim that courage, integrity, and friendship have functions. In general, it can be part of the nature of a type of thing that it have a certain normative property, such as a proper or ideal way of behaving or an end or goal.

Third, I do not mean to suggest that the law’s only or most important end or goal is to ensure concurrence. That would be a bizarre claim. Rather, according to the hypothesis, whatever ends law has, whatever its functions are, it is supposed to pursue those ends and perform those functions while ensuring concurrence. Indeed, though we can regard the achievement of concurrence as a goal, it is more naturally understood as a

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210-213. That X Φs is neither a normative claim, nor a claim about X’s nature. That it would be good for X to Φ is a normative claim, but not a claim about X’s nature. As I use the term, however, to say that a function of X is to Φ is to say that it is part of the nature of X that it is for Φing. It is therefore a way of spelling out X’s nature in normative terms.
method of, and constraint on, the law’s pursuing other goals: the law is supposed to pursue its goals by creating binding obligations (or powers to create such obligations, etc.).

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

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

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

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

The plausibility of the concurrence hypothesis

Having clarified the hypothesis, let me say a little about why it is plausible. First, though, I want to point out that many legal theorists hold something in the neighborhood of the hypothesis, though they would not formulate it in this way. A standard position is that if a legal system has legitimate authority, there is a moral obligation to obey the law. Given that position, one who accepts that legal systems are supposed to have legitimate authority is committed to the concurrence hypothesis. As will become clear,
the hypothesis is more general than the idea that law is supposed to have legitimate
authority (and the form of the hypothesis that I will explore does not involve the notion of
authority at all). But, as I’ll argue below, that is the form that the hypothesis takes for
adherents of SP. (In a nutshell, the reason is that, given SP, the only way concurrence
can be ensured is for a legal system to have legitimate authority. Therefore, if you hold
SP, in order to accept the concurrence hypothesis, you have to accept the idea that law is
supposed to have legitimate authority.)

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

I now turn to an intuitive argument for the concurrence hypothesis. We can get at
law’s relation with morality by contrasting it with a different relation that a domain of
(putative) reasons could bear to the domain of moral reasons. A domain of reasons could
be, by its own lights, subordinate to moral reasons. Norms of etiquette or of a university
might be examples. In my view, the norms of etiquette contemplate that they are subordinate to morality, so that etiquette does not require that one do something morally wrong to avoid a faux pas.\footnote{Not all writers agree on this point. Cite to Foot. It doesn’t matter whether I’m right about etiquette for present purposes. The point is just to clarify the claim about the legal domain by means of a plausible contrast. If one disagrees about etiquette, one can use a different domain, perhaps the rules of a family or club, as the appropriate contrast.} It is not that etiquette incorporates all moral obligations. Rather, even when etiquette’s standards apply by their own terms, it is understood that they have force only to the extent that is morally permissible. One piece of evidence of this is that specifications of the norms of etiquette do not include specific exceptions for cases in which moral reasons might conflict. For example, the rules about sending thank you notes do not specify an exception for cases in which fairness considerations militate the other way. No such specifications of exceptions are needed since all rules of etiquette are subordinate to morality.

Law, I suggest, differs from etiquette in not regarding itself as subordinate to morality. One piece of evidence is that the law does include specific morally-based exceptions to otherwise applicable legal norms. Perhaps the most obvious example is the necessity doctrine in criminal law. Another is the principle that unconscionable contracts are not enforceable. By the principle that underlies the canon of \textit{expressio unius}, that the law includes some such exceptions supports the proposition that the law does not generally accept moral exceptions.

At any rate, this proposition seems clearly correct—quite aside from the foregoing argument. On some views, the content of the law—and thus what legal obligations one has—may depend on moral reasons. And on some views, when the content of the law does not cover a particular case, a judge may be legally permitted or even required to
decide the case on the basis of moral reasons that are not part of the content of the law. But if one has a legal obligation, the law does not countenance that one avoid that obligation on the basis of moral reasons that are not part of the content of the law. One who is accused of breaching a legal obligation cannot concede the applicability of the relevant legal standards, but argue to the court that he is not liable because what he did was morally permissible (though moral considerations may be relevant to the applicability of the legal standards). In brief, the law does not contemplate that it is subordinate to morality. Nor does the law contemplate that it is subordinate to any other domain. Legal obligations are supposed to be all-things-considered obligations, not merely pro tanto obligations that can be trumped by other obligations.

As discussed above, for our purposes, such obligations have to be all-things-considered moral obligations.

Joseph Raz (2004, pp. 6-7) offers a related argument. He points out that legal obligations are, at least in part, man-made. But any principles that allow people to interfere in important ways in others’ lives are moral principles. So legal reasons derive whatever force they have from morality. Possibly unlike prudential reasons, they have no independent source of normativity. Therefore, Raz concludes, legal obligations are binding ‘only if moral principles of legitimacy make them so binding’ (2004, p. 6). That is, legal obligations are binding only if they are morally binding. If we add that legal obligations are supposed to be binding, then we are very close to the concurrence hypothesis.
An essential property of law or merely of a theoretically interesting subset of legal systems?

Now, some may object that we call systems ‘legal systems’ even when there is no attempt to ensure concurrence (and no other reason to think that the system is supposed to do so)—when, for example, force alone is used to create reasons for complying. In the first place, whether we would ordinarily call certain systems ‘legal’ is not decisive with respect to the theoretical question of what law is and therefore what counts as law. I’ve already tried to make the hypothesis seem plausible on intuitive grounds. What really matters is the theoretical or explanatory power of the hypothesis. So we should reserve judgment until we see where the hypothesis takes us.

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

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

In this section, we will explore how the Standard Picture interacts with the concurrence hypothesis. In particular, SP dictates a particular way in which concurrence has to be achieved, through a general moral obligation to obey the law. Since such a moral obligation is highly problematic in the circumstances of contemporary nation states, SP has the consequence that legal systems cannot generally operate as they are supposed to.

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

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

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

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

It should be obvious, however, that if law were supposed to do nothing but replicate already existing moral obligations, most of what contemporary legal systems do would be beyond the proper province of the law. It may be that law has a significant epistemic role to play, but it is a role that involves more than identifying pre-existing moral obligations. We should therefore reject the first approach.

On the second approach, law changes our moral obligations, while somehow arranging matters so that there is concurrence between our legal obligations and our (new) moral obligations. As Plato in effect pointed out in the Euthyphro, however, there are at least two fundamentally different ways in which two sets of requirements can non-accidentally coincide. Either set of requirements could depend constitutively on the other. In the present case, there are two different ways in which concurrence could be

[26] Some legal theorists take epistemic tasks to be at least an important part of what law is supposed to do. On the views of such theorists, however, law does much more than replicate pre-existing moral obligations. Cite Raz, Alexander.
achieved (as well as a variety of more or less complex hybrid or intermediate possibilities, which I’ll ignore for simplicity). Either morality could track the content of the law, or the content of the law could track morality.\footnote{I want to mention two other apparent options, which, I’ll suggest, are not really independent possibilities. First, the content of the law could track, not morality, but the factors on which morality depends. Notice that, in order for this option to ensure concurrence, it would not be enough for law to depend on the factors on which morality depends, but to depend on those factors in just the same way as morality. Perhaps there’s a metaphysical difference between the law’s depending on morality and the law’s depending directly on the factors on which morality depends (in exactly the same way as morality depends on them). But for our purposes, nothing turns on the difference. For example, the reasoning that would be involved in working out what the law is would be exactly the same in either case. Throughout, when I write about the law’s depending on morality, I mean to be neutral with respect to whether the law depends on morality or on whether it depends on the factors on which morality depends.}

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

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

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

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

The third option gives to morality a role that is inadequate to ensure concurrence because morality is only allowed to play a marginal role. A moral filter could ensure concurrence only by filtering all putative legal norms that imposed obligations that it is morally permissible not to comply with. This would be a far cry from the marginal role of screening out extremely unjust laws. And a gap-filling role for morality would do nothing to ensure concurrence with respect to legal standards that were constituted by the contents of authoritative pronouncements. Also, it is not plausible that a standard is part of the content of the law merely because it is a moral standard.
In sum, as long as we take SP for granted, the only way in which concurrence can be reliably achieved is by arranging matters so that citizens have a moral obligation to obey legally authoritative pronouncements. Thus, SP makes central the question of under what conditions citizens have a moral obligation to obey legally authoritative pronouncements.

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

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

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

Similarly, arguments based on fair play run into serious difficulties because fair play does not require one to do one’s part in a scheme from which one has benefited unless one had a reasonable opportunity of declining the benefits. Moreover, such
arguments from fair play encounter problems with showing that all citizens have benefited because it is unclear against what baseline benefits should be calculated.

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

It might be wondered whether Raz’s well known theory of authority offers help to SP. We can schematize Raz’s theory in two steps. First, Raz points out that under certain conditions an agent will better conform to the balance of applicable reasons in some subject area in the long run by following the directives of another person or institution than by attempting to comply with the balance of reasons directly. This will be the case, for example, when the person issuing the directives has expertise about the relevant subject area or when the person is well positioned to solve coordination problems.

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

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

On Raz’s view, the government’s authority will be piecemeal, varying from subject to subject and

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28 Raz, Morality of Freedom, p.80.
from person to person, and even depending on ‘reasons which are in part a matter for individual decision and temperament,’\textsuperscript{29} such as a person’s willingness to take the time and effort needed to decide wisely. Moreover, since legitimate authority will be piecemeal, there will not be a single question of whether an authority is legitimate, but a vast number of more specific questions. Raz’s theory therefore makes it difficult to know when the government has authority over someone, and thus whether the government can ensure concurrence.

The second step of Raz’s argument depends, as he acknowledges, on a highly revisionary view of reasons.\textsuperscript{30} According to this view, what one should do, all things considered, is not necessarily what one has most reason to do. Rather, one should follow strategies that in the long run best promote conformity to reasons. The crucial and highly counterintuitive claim is that one should follow such strategies \textit{even when they require action that is inconsistent with what the balance of reason requires}. Without this claim, no conclusion about legitimacy or a moral obligation to obey would follow from the fact that, by obeying, one could in the long run better conform to applicable reasons.

The upshot, for our purposes, is that, in order to achieve merely piecemeal authority, Raz has to resort to a revisionary and controversial view of reasons. Piecemeal authority would not even be adequate to ensure concurrence. Our discussion of Raz’s theory therefore reinforces the degree to which, given SP, it would be difficult for a legal system to ensure concurrence.\textsuperscript{31}

Stepping back, we can see that the source of the difficulty is very simple. If the concurrence hypothesis is correct, a legal system is supposed to operate in a way that

\textsuperscript{29} Raz, Morality of Freedom, p.100.
\textsuperscript{30} Raz, Practical Reasons and Norms, XX.
\textsuperscript{31} I am grateful to Scott Shapiro for helpful discussion of the issues addressed in the last few paragraphs.
ensures that legal obligations will be morally binding. But issuing pronouncements is in
general a poor way to create moral obligations. Hence, it is unsurprising that SP makes it
highly problematic for the law to operate as it is supposed to. In other words, given that
issuing pronouncements is in general a poor way to create moral obligations, the
concurrence hypothesis gives us serious reason to doubt SP.

It might be objected that even if a legal system cannot avail itself of a general
moral obligation to obey the law, thus ensuring concurrence across the board, it could
nevertheless attempt to achieve concurrence in a pronouncement-by-pronouncement way.
It will be easier to understand how this objection is supposed to work after we have
considered how concurrence is achieved according to an alternative to SP. I therefore
postpone development and discussion of the objection to section III.5 below.

4. Abandoning SP: achieving concurrence through law-on-morality dependence

We now turn to the question of how an alternative to SP can fare better. In this
section, I briefly outline how a legal system can reliably ensure concurrence without
satisfying the conditions for a general moral obligation to obey authoritative
pronouncements.

If we do not assume SP, we open up the opposite direction of constitutive
dependence—the law-on-morality direction. The picture that I want to sketch involves
this direction of dependence. The core idea is that, when the law operates as it is
supposed to, concurrence is ensured because the content of the law tracks the content of
morality. In that case, in order to change the content of the law, the legal system must
change the moral profile. How, on this approach, can the law change our moral profile? It cannot do so by changing the content of the law, on pain of vicious circularity. A change in moral obligations must be brought about directly—by changing the circumstances that, in combination with the most fundamental moral truths, determine our moral obligations.

In section II.2, I gave the example of a government’s solving a coordination problem. It will be helpful at this point to introduce more examples of how the legal system could, at least if it operated as it is supposed to, change our moral profile. These general kinds of examples will be relatively familiar. The crucial difference is that we are now considering not how there can be a right to be obeyed, but how the legal system can change our moral profile directly, not via an authority with a right to be obeyed. Actions, decisions, and pronouncements of legal institutions can change the field on which morality operates, thus altering the moral profile without the intermediary of the content of the law.

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

Second, a legal system can create moral obligations to participate in schemes for the public good, for example by paying taxes. Without a legal system, people may have
reason to want such schemes. But there will typically be no moral obligation to give any particular amount of money or other resources to any particular scheme. For one thing, many different possible schemes are likely morally permissible. Nothing determines which possible scheme is the one that people should participate in. As Raz argues, the reason there is no reason to pay the money before the tax law is passed may be the lack of ‘machinery for collecting and distributing the money’ rather than the lack of an ‘authority-imposed duty to pay it.’ (1986, 45). If this is right, it is the creating of the option by setting up the collection and distribution machinery, not the pronouncement of the obligation to pay, that creates the obligation to pay taxes.

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

The adjudication of cases, especially at the appellate level, is another way in which legal systems change the moral profile directly. Because considerations of fairness support treating like cases alike, and because, depending on the legal system’s practices, judicial decisions may generate expectations, the decision of cases can have a general and enduring impact on the moral profile. As noted above, this impact is complicated in part because democratic values militate against courts’ being able to create standards that go beyond what is necessary for principled resolution of disputes that come before them.
Consequently, working out the moral impact of judicial decisions requires careful attention to relevant differences between the facts of decided cases, even differences not articulated by the courts. (As discussed in section III.1, the way in which, in our legal system, we derive the law from appellate decisions looks a lot like an attempt to work out the impact of those decisions on the moral profile.)

The examples that I have just offered depend on a variety of kinds of action by government officials, rather than mere pronouncements, to alter the moral profile. It might be wondered how, on the picture we are considering, the legal system can get officials to act. Authoritative pronouncements aimed at officials are an important part of the story here. Unlike ordinary citizens, government officials will typically have a moral obligation to obey authoritative pronouncements. (The moral obligation of officials is overdetermined. They have explicitly consented to the government, have voluntarily assumed an obligation to carry out the instructions of their superiors, and have indisputably accepted benefits that they could easily have declined.) Therefore, the legal system can typically generate moral obligations of government officials simply by commanding them. The upshot is that a legal system can use authoritative pronouncements directed at government officials to get those officials to take actions that then change the moral profile for ordinary citizens directly (not via a moral obligation to obey pronouncements).

Furthermore, many officials do not need to be specifically instructed how to act in order to take actions that appropriately change the moral profile. The action of courts in common law areas is an excellent example. Courts decide cases, thereby affecting the
moral profile directly, without being instructed how to decide the cases. Similarly, executive officials take a wide range of actions without specific instructions.

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

Let us now take stock of the developing picture. The legal system is a system that is supposed to change the moral profile. It does so by changing the relevant circumstances: by doing things that create new options, alter the consequences of actions, set precedents for how disputes should be resolved, and so on. The legal institutions’ actions may include issuing pronouncements. Pronouncements have no special status, however, since they are only one way, and in general not a particularly good way, of changing the moral profile. Moreover, when pronouncements are used, what is relevant is their effect on the moral profile. Their content will of course be highly relevant to their effect on the moral profile, but their effect will depend on many other factors as well. For example, their effect will depend on the nature and status of the body that issued the pronouncement and the expectations that the pronouncements generate.

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

On our developing picture, what is the counterpart to SP? In other words, what constitutes the content of the law, if not the content of authoritative pronouncements? A natural first proposal is that, when the legal system operates as it is supposed to, the content of the law will be constituted by the new moral obligations (strictly speaking, the new moral profile)—the ones the legal institution’s actions have brought about. This proposal obviously ensures the truth of the concurrence hypothesis. If, when the law operates as it is supposed to, the content of the law is constituted by the new moral profile, then, unless the law fails to operate as it is supposed to, there cannot be a legal obligation without a moral one.

**The Dependence View (initial proposal):** When the legal system operates as it is supposed to, the content of the law is constituted by the enduring and general part of the moral profile that obtains in virtue of the relevant actions of the legal institutions. (I

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32 Why the phrase “in virtue of”? In some cases, though less commonly than one might expect, the actions of the legal system will (or would under ideal conditions) create legal and moral obligations that are identical in content to pre-existing moral obligations. In that case, the moral obligation is over-determined, and would have obtained even if the legal institutions had not acted. Even though legal institutions are not
call it the ‘Dependence View,’ or $DV$ for short, because it holds, roughly speaking, that the content of the law depends on the content of morality.

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

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

There are two fundamentally different approaches that could be adopted to complete the proposal. The first approach starts from the core idea that law is supposed to operate by taking actions that produce a new moral profile. A natural way of

the but-for cause of the relevant moral obligation (under ideal conditions), the obligations still obtain in virtue of the actions of the legal institutions and therefore still count as part of the content of the law. In other words, ‘in virtue of’ expresses a kind of responsibility that is not to be understood counterfactually.
developing this idea holds that the content of the law is constitutively determined by the
moral profile that the (actual) actions of the legal institutions were *supposed* to yield.

The second approach relies on the actual moral profile, but takes the tack of
restricting the parts of that moral profile that are relevant. A rough version of this
approach would hold that the content of the law is constitutively determined by the
enduring and general aspects of the moral profile that are produced in the right sort of
way—the *legally proper* way. The hopes of this approach depend on developing a theory
of the legally proper way. I am sympathetic to this second option, so I will develop it
very briefly.

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

We’ve already discussed some examples of the right sort of way. By ensuring
security and punishing wrongdoers, governments can make it morally impermissible for
citizens to use force in most situations. When people face coordination problems, legal
systems can create reasons to act in a particular way by making that way salient.
Similarly, when people face prisoner’s dilemmas, governments can create reasons to
cooperate simply by making it likely that others will cooperate. By creating collective
mechanisms of various sorts, for example for collecting and distributing tax money,
governments can channel pre-existing moral forces, in effect creating new specific moral
obligations. And well-constituted governments can harness democratic and fairness
values so as to create reasons for citizens to participate in government created schemes.
What are examples of the wrong sort of way? Here is the clearest kind of case. Suppose a government persecutes a particular minority group. This persecution may include directives to harm members of that group or to deny them benefits. Such government actions are likely to have the effect on the moral profile of producing a duty to protect or rescue the minority group. Call this general way of changing the moral profile – by making the moral situation worse in a way that creates an obligation to compensate for the bad government action – *paradoxical*. Paradoxical changes in the moral profile are intuitively not the sort that legal systems are supposed to generate. Moreover, if we don’t exclude such changes in the moral profile, DV will have counterintuitive consequences. For instance, the imagined government persecution would produce a legal duty to protect the minority group.

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

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

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

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

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

First, the relevant conception of legitimacy is not the one appropriate to SP – that the government must be constituted in a way that yields a general moral obligation to obey the law. Rather, the issue is the extent to which, for example, undemocratically constituted governments are able to change the moral profile.

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

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

Third, even if a legal system fails to generate exactly the changes in the moral profile that its officials intended (or that correspond to its authoritative pronouncements), it may succeed in generating related changes in the moral profile. The greater the degree of legitimacy that a government has, the more that it can draw on values such as democracy and fairness, and hence the more it may be successful in changing the moral profile in the way it intends. But less legitimate governments will still affect the moral profile, though the impact may be harder to assess.

This consequence may be a mark in DV’s favor. For the actual process of discovering the content of the law can be subtle and complex. As I argued in section III.1, at least in the U.S. legal system, the process of working out what the law is does not seem to be limited to determining which are the authoritative pronouncements and then integrating their contents. The process that courts engage in when attempting to discover the law is not far from what would be expected if they were trying to work out the actual changes in the moral profile effected by the legal institutions.

We can begin by noting that this version of DV guarantees concurrence in all circumstances because it makes the content of the law track some part of the actual moral profile in all circumstances. The problem for this version of DV will be whether, as a consequence of this feature, it has unacceptably counterintuitive implications for what the law is. It is beyond the scope of the present paper to offer and defend a full-blown alternative to SP. The point of this brief sketch was just to give a sense of how alternatives to SP can be developed.
5. Two objections

In the last section, we saw how, given DV, a legal system can ensure concurrence without meeting the conditions for a general obligation to obey the law. The legal system uses a variety of methods to change the moral profile directly, rather than through a change in the content of the law. And concurrence is ensured because the law tracks these changes in the moral profile.

I want to conclude by responding to two objections. First, I address the objection, briefly raised above, that SP could allow for concurrence to be achieved in a pronouncement-by-pronouncement way.

Let me elaborate this suggestion. I have sometimes talked as though SP has the consequence that a legal system can use only authoritative pronouncements to change the moral profile. Strictly speaking, this is not correct. Given SP, a legal system can change the content of the law only by issuing pronouncements (setting aside peripheral sources of law). But a legal system can change the moral profile in all of the ways that it can do so according to DV. For example, it can create new options, ensure the cooperation of other people, set precedents for the resolution of disputes, and so on. Therefore, the objector argues, a legal system can combine such methods with appropriate pronouncements to achieve concurrence in a pronouncement-by-pronouncement way.

The problem is that, on SP, a legal system that uses such methods of changing the moral profile will lack a reliable mechanism for ensuring concurrence. In general,
concurrency will be achieved only if the actions that change the moral profile are accompanied by pronouncements whose contents precisely mirror the changes in the moral profile. Given the great complexity and unpredictability of morally relevant circumstances and the subtlety of moral reasoning, it is difficult to see how a legal system will be able reliably and precisely to predict the effects of its actions on the moral profile. But without such predictions, a legal system will not be able to issue pronouncements that precisely correspond to the moral profile, and therefore, given SP, will not be able to ensure concurrence.

We can bring out the problem by considering the most promising kind of cases for SP. In certain special situations, even without a general moral obligation to obey legal authorities, authoritative pronouncements can be effective at generating moral obligations that correspond closely to the content of the pronouncements. The best example, discussed in section II.2, is a situation in which there is a coordination problem. When it is very important that everyone or nearly everyone adopt the same solution to a problem, but it does not matter which solution, the issuance of an authoritative pronouncement can create a moral obligation to adopt the solution specified by the pronouncer. This use of pronouncements to create obligations does not depend on the government’s having a right to be obeyed, but simply on the government’s being able to make a particular solution salient.

The reason that coordination problems present the most promising case for SP is that, by hypothesis, no solution is superior on the merits. As a result, there is a decent chance that the solution pronounced by the authority will become morally obligatory. Even in this most promising case for SP, concurrence will often fail. The legal obligation
will simply be the one that is pronounced. But the moral obligation will often diverge to some extent from the one that was pronounced. The moral obligation will be to adopt that solution that the greatest number of others adopt. For a variety of reasons, the effect of a government pronouncement will often be that a majority or plurality will adopt a solution that is somewhat different from the one the government pronounces. For example, pre-existing customs, basic features of human psychology, misunderstandings, influential bits of legislative history, court decisions, or changes in relevant circumstances that were not predictable when the pronouncement was issued may have the effect that in practice the adopted solution is somewhat different from the pronounced one.

Discussions of coordination problems often use very simple examples, such as whether traffic should drive on the right or the left, in which there are only two possible solutions. In real life, there is often a multitude of solutions, some of which differ from one another only in small details. Consider, for example, a situation in which it is important for health or safety reasons that a certain industry use uniform practices, and in which there are many possible sets of practices to choose between. Suppose that a government agency issues complex regulations specifying a code of practice for the industry. Suppose further that regulation of the industry relies heavily on self-enforcement. For the kinds of reasons mentioned above—past practice in the industry, new technological developments not predictable when the regulations were issued, or misunderstandings of the regulations by a particularly influential company or by government inspectors—the effect of the new regulations may be a convergence on a solution that diverges somewhat from the solution specified by the regulations.
Moreover, in a typical real life situation, the problem may not be a pure coordination problem, but rather one in which some solutions are superior to others on the merits, though what matters most is having uniform solution. The fact that a solution that is a close relative of the one specified by the regulations is better on the merits is another factor that could push the industry towards the variant solution.

As we move to uses of pronouncements that are less effective than solutions to coordination problems at creating obligations whose contents correspond to that of the pronouncements, the kind of problem just described is exacerbated. It would require a legislature of superhuman skill, prescience, and moral sophistication to capture in its pronouncements the exact effect on the moral profile that its pronouncements and the actions of other government officials will have. Similar observations apply to judges. The consequence is that without a moral obligation to obey the law, concurrence will generally fail to be achieved. By contrast, given DV, the government need not predict the precise effect of its actions on the moral profile in order the ensure concurrence. For example, if the effect of a court decision or statute is somewhat different from what was pronounced—from the content of the opinion or statute—the content of the law tracks the moral profile rather than the content of the pronouncement.

The second objection is that the role that DV gives to moral reasoning is incompatible with a fundamental, perhaps the fundamental, purpose of law – that of settling disagreements and avoiding ‘moral war.’ Human beings, even within a particular nation, have large disagreements over what morality permits and requires. Law is supposed to provide a mechanism for settling these disagreements. If SP were correct, then we can see how law will serve this settlement function. People are more likely to
agree about which pronouncements are authoritative and what their content is than about what is morally right or wrong. But if figuring out what the law requires involves working out a moral profile, then law does not help with the settlement function.

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

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

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

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

IV. Conclusion

[To be written]