Questions for Jules Coleman

A. We had two questions concerning the formulation of the main challenge about the normativity of law that you want to answer in this essay:

(1). In one of the formulations of the problem you posit in this paper, you say that the challenge for legal positivism is ...“how can law, which... is fixed by social facts alone, issue in moral directives or reasons for acting?” Is this basically the question of how to derive an “ought” from a set of “is” premises? (And do you assume here that Hume’s is/ought fallacy is, indeed, a fallacy?)

(2). We were not quite sure why you claim that there is a theoretical advantage to focusing our attention to legal content as opposed to legal validity, especially when it turns out, on your own explanation of the normativity of law, that it crucially depends on “attaching the property legality/illegality to a proposition expressing a directive...”. In other words, isn’t it the challenge of explaining law’s normativity that legality matters?

B. If we understand correctly, your main answer to the question about the normativity of law consists of two theses: First, that law must be assumed to purport to give us moral reasons for action; second, that the explanation of how law purports to give us such moral reasons, is by way of a re-description of legal contents as moral requirements. We have a number of questions about both of these points:

(1). Why do you think that law necessarily purports to give us moral reasons for action? Could it not be the case that the law sometimes aims to guide action on grounds that are not necessarily moral? (e.g. professional expertise, coordination, bureaucratic efficiency, etc.) And what would be the relevant moral component of power conferring norms?

(2). It was not entirely clear to us whether you claim that the re-description of legal content as moral requirement constitutes a moral reason for action, or whether it only changes the kind of reason, from legal to moral? --

(a) If it is the former option, then it is not clear how the differences in the description of a directive or its content, could make a difference in reasons for action. A reason for action is basically a fact that counts in favor of doing something. The possible different descriptions of the fact would seem to have no bearing on the ways in which the relevant fact constitutes a reason.

(To explain our point: consider the gun-man situation; what gives the victim a reason to hand over his money to the gun-man is the fact that unless he does so, he
may be killed, and the fact that he would rather live without the money than die for it, etc.); the philosophical point that there are several possible true descriptions of this event seems to have no bearing on the explication of what the victim’s reason for action is. The reason is constituted by the relevant facts, not by their apt description.

(b) If what you mean by the moral semantics thesis, however, is that the possibility of re-description amounts only to the possibility of reclassifying a legal reason for action as a moral one, then the question is: why would it matter that a reason for action can be described as a moral one, that is, unless the reason is, in fact, a moral reason? In other words, why does the classification matter in terms of practical reasons?

(c) According to either option (a or b), it is not entirely clear to us how the re-description mechanism explains the sense in which legal directives constitute a content-independent reason for action. The fact that the law prescribes an action would count in favor of doing it because legal content can be re-described as moral requirement? The possibility of re-description would seem to explain why we may have a moral reason to do what the law requires, not that legality, per se, makes a practical difference.

(3). On the possibility of “misfire”: You suggest that we must account for the fact that not every re-description of a directive as a moral requirement is warranted. We were wondering what would constitute the relevant constraints?

(a) If the constraint on re-descriptions consists in the moral content of the legal directive, then your thesis amounts to the claim that the law provides a moral reason for action when the reason it provides is morally sound; presumably, this is not what you meant, right? If, on the other hand, the constraints on the possibility of re-description do not derive from the actual content of the directive, what are they?

(b) You suggest at the end of the paper that Raz’s notion of a point of view, or detached normative statements, might be the key to the answer here. We were not sure that we understand your suggestion. Either it is the case that any legal requirement can be construed, or re-described, as a moral one, in which case there is no room for “misfires”, or it cannot; if the latter, then we need some account of what would be the relevant criteria or constraints; what would make a re-description unwarranted? How does the fact that we can distinguish between a legal and a moral point of view, and the fact that we can speak and argue as if we morally endorse a legal point of view without actually endorsing it, answer this question?

C. We had a few questions about the first part of the paper where you suggest some formulations about the possible relations between legal content and moral facts:

(1). In formulating the main thesis of exclusive legal positivism in terms of legal content, you claim that it is committed to the idea that “Necessarily, moral facts cannot contribute to legal content...”. We were wondering whether this formulation is not too strong? Exclusive positivism might be the following view: for any given
legal content, X, [the truth is that] X is the law because somebody [viz, a legal authority] says that it is, and not because X is morally (or otherwise) required. This would seem to be consistent with the (plausible) thesis that moral facts can have a causal contribution to legal content; or, even that legal content necessarily purports or aims to track moral requirements.

(2). In formulating the non-positivist views in terms of legal content you say that LE Dworkin, and natural law, are committed to the thesis that “Necessarily, moral facts contribute to legal content.”

The formulation, however, seems to be ambiguous: in one sense, it could mean that for each and every putative legal norm, necessarily legal content is partly determined by moral facts. This would seem to be Dworkin’s view in LE. Second, it could mean that for the content of the law in general, it is necessarily the case that part of it is determined by moral facts, which is the view in Dworkin’s MOR I. And then, natural law seems to hold neither of these positions.

Also, in a related formulation [towards the end of the paper], your interpretation of natural law seems to suggest that according to natural law, “the property of legality ... could not attach to the directive at all unless it were already the case that it is wrong to commit.....” – this would entail that for natural law, putative legal directives are legally valid if and only if they are of the mala per se kind. Is this a plausible interpretation of natural law?