

## ON LAW'S CLAIM TO AUTHORITY\*

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### 1. INTRODUCTION

In an influential work, Herbert Hart argued that a theory which suppresses the normative component of law “fails to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour.”<sup>1</sup> This is a serious drawback for a theory of law, since an important part of the legal domain has to do with rule-governed behaviour and so may be expressed only by use of such notions as those of norm, obligation, duty, and right. These notions require us to acknowledge the existence of a normative dimension in the legal domain. As a result, the problem of law’s normativity lies at the heart of any comprehensive legal-theoretical project, and “the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task.”<sup>2</sup>

This task is significant indeed, and not just for theoretical reasons: a general theory of legal normativity will have to answer questions such as “what role do legal rules play in practical deliberation?”, “what reasons, if any, does an agent have to obey the law?”, “do these reasons hold even for citizens who disapprove of the legislation in question or think it wrong in principle?”, “when is one justified in disobeying the law?”. These questions concern us not only as legal scholars, but also as responsible citizens. It follows that a theory of law’s normativity is going to impact significantly on our ordinary lives.

This paper looks at a specific aspect of the normative dimension of law, namely at the implications that a legal system’s claim to normativity, or claim to authority, carries for the concept of law. By “law’s claim to normativity,” or “law’s claim to authority,” I mean the contention that a legal system makes to place people under obligations that they would not otherwise have. To put it differently, I will deal with the law’s normative posture, that is, the law’s presenting itself as a body of authoritative standards and requiring all those to whom it applies to acknowledge its authority. A system that lays a claim to authority is therefore asserting that it is an action-guiding institution, for it provides individuals with special reasons for action.

That this claim to action-guidingness exists in all legal systems, at least implicitly, is recognised by all the traditional schools of legal thought (legal realism, legal positivism, and natural law theory). For it is widely accepted that legal systems, even if morally defective, cannot abstain from claiming

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<sup>1</sup> H. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), p.13.

<sup>2</sup> S. Perry, “Hart’s Methodological Positivism” in *Hart’s Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.330.

authority.<sup>3</sup> So, “the idea that the law purports to bind us by exercising authority over us” will have to be regarded “as an element of the concept of law.”<sup>4</sup> A detailed analysis of the claim to authority, then, is an appropriate perspective from which to compare the disparate conceptions of law and test their explicative capacity.

In this paper, first I distinguish the claim to authority from the related question of political obligation. Next, I pass to illustrate briefly the ways the traditional schools of legal thought cope with a legal system's claim to normativity, pointing out as well the main reasons why these traditional approaches are less than satisfactory. Section 4 goes further into these failures with an account by which we are enabled to see the conceptual relationship between the claim to authority and the concept of law, such that no adequate explanation of the claim to normativity can be provided unless an appropriate concept of law is had. In this part of the paper I also show how the concept of law need to be recast to make possible an account of legal systems' claim to authority. In so doing, I introduce the conception of law as an argumentative practice. This view informs the works of Ronald Dworkin and Robert Alexy, but is still in need of an analytical exploration to become a perspicuous concept.

## 2. Law's Claim to Authority and Political Obligation

The question posed by law's claim to authority is closely intertwined with the issue of political obligation. Before submitting law's normative claim to scrutiny, then, it is essential to clearly distinguish it from the question of political obligation and determine the relationships between the two.

The problem of political obligation has been extensively studied by philosophers and legal theorists.<sup>5</sup> We owe it to their effort if we now have a

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<sup>3</sup> This aspect is underlined by Joseph Raz in his statement that “though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority” (J. Raz, *Ethics in the Public Domain* (Oxford, Clarendon, 1994, at p.199). Similar ideas are expressed in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon, 1979) at pp.28-33; G. Postema, “The Normativity of Law” in *Issues in Contemporary Legal Philosophy* (R. Gavison ed., Oxford, Clarendon, 1987, pp.81-104) at pp.92-93; G. Postema, “Jurisprudence as Practical Philosophy” (1998) 4 *Legal Theory* pp.329-357, at p.333; and L. Green, “Law and Obligations” in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds, Oxford, Oxford University Press, 2002, pp.514-547) at p.520. For a dissenting opinion, see K. Einar Himma, “Law's Claim of Legitimate Authority” in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001), pp.271-309.

<sup>4</sup> S. Perry, “Hart's Methodological Positivism” in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.331. See also G. Postema, “Jurisprudence as Practical Philosophy” (1998) 4 *Legal Theory*, pp.329-357, at p.349.

<sup>5</sup> See, for example, R. Wasserstrom, “The Obligation to Obey the Law” (1963) *UCLA Law Review*, pp.790-797; M. Smith, “Is There a Prima Facie Obligation to Obey the Law?” (1973) 82, *Yale Law Journal*, pp.950-976; J. Simmons, *Moral Principles and Political Obligation* (Princeton, Princeton University Press, 1979); K. Greenawalt, *Conflicts of Law and Morality*, (Oxford, Oxford University Press, 1987); N. O'Sullivan, *The Problem of Political Obligation* (New York, Garland,

better understanding of the definition and scope of the notion of political obligation. As a result, today there is a wide agreement over defining political obligation as the presumptive moral duty incumbent on citizens to obey all the directives enacted by the political institutions of the community they inhabit. The problem of political obligation, then, turns on the question whether a legal system can provide ultimate reasons for action so that individuals are morally bound to surrender their personal judgement and to submit themselves to a legal authority or they are entitled to reserve to themselves the final decision as to their conduct.

Different answers have been given to this question. At the risk of oversimplifying a vast bulk of literature, I venture to say that, for all their diversity, the main approaches to the problem of political obligation can be reduced to three fundamental positions.

First, some scholars have claimed that the existence of political obligation is inherent in the very nature of law.<sup>6</sup> On this view, by definition legal systems are institutions which must be obeyed and no system of rules disregarded or treated by its addressees as only partially binding can be considered a legal one. Thus, the existence of a political obligation is taken for granted and does not constitute a problem at all.

Other theorists have been more wary in their approach to political obligation.<sup>7</sup> So, whilst they have accepted the claim that individuals are under a duty to obey the law, they have argued that the reasons why people must obey the law are far from self-evident and we need to engage seriously in the search for the grounds of this duty. Among the principles that, on this view, can justify the obligation to obey the law we find such concepts as the idea of general welfare or common good, the notion of consent, the feeling of gratitude, the principle of fairness, and the duty of justice, to name but a few.

Finally, a more sceptical approach has been endorsed by the scholars who have gone so far as to deny the very existence of political obligation.<sup>8</sup> In a nutshell, the sceptical approach about political obligation assumes that there is no moral reason to act as it is prescribed by legal rules because "the mere receipt of an order backed by force seems, if anything, to give rise to the duty

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1987); C. Gans, *Philosophical Anarchism and Political Disobedience* (Cambridge, Cambridge University Press, 1992); J. Horton, *Political Obligation* (Houndmills, MacMillan, 1992); M. Kramer, *In Defence of Legal Positivism* (Oxford, Oxford University Press, 1999), pp. 254-308 and R. Higgins, *The Moral Limits of Law* (Oxford, Oxford University Press, 2004).

<sup>6</sup> This is the position of T. McPherson, *Political Obligation* (London, Routledge, 1967), p.64, for example.

<sup>7</sup> Cf. H. Hart, "Are There Natural Rights?" (1955) 64 *Philosophical Review*, pp.175-191; J. Rawls, "Legal Obligation and the Duty of Fair Play" in *Law and Philosophy* (S. Hook ed., New York, New York University Press, 1964, pp.3-18); H. Beran, "In Defense of the Consent Theory of Political Obligation and Authority" (1977) 87 *Ethics*, pp.260-271; and G. Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Rowman, 1992).

<sup>8</sup> This view is defended in M. Smith, "Is There a Prima Facie Obligation to Obey the Law?" (1973) 82, *Yale Law Journal*, pp.950-976; R. Wolff, *In Defence of Anarchism* (New York, Harper, 1970); J. Raz, "Authority and Consent" (1981) 67, *Virginia Law Review*, pp.103-131; and J. Simmons, *On the Edge of Anarchism* (Princeton, Princeton, University Press, 1993).

of resisting rather than obeying.”<sup>9</sup> So, on this view, the decision about whether the law should be obeyed on a particular occasion is to be left to the autonomy of each and every individual. This position ties up closely with a strenuous defence of individual autonomy and is grounded on the assumption that the idea of personal autonomy is incompatible with the acknowledgment of a legal authority. Whereas the sceptical stance sits uneasily with the widespread intuition that citizens have political obligations, it is now popular among political philosophers and legal theorists.

I will not take a position on this debate here. Instead I confine myself to remark that my analysis of law's claim to authority makes sense whatever we happen to think about political obligation. For whereas there is an obvious relationship between the question of political obligation and law's claim to normativity – in that both have to do with the idea of authority – political obligation and claim to normativity are somewhat independent and conceptually distinct.

Their conceptual difference can be better appreciated, I believe, when we consider that the notion of political obligation identifies the question of the existence and justification of a duty owed to legal and political institutions. This raises issues of legitimacy, namely, it requires us to justify existence and scope of the coercive power of legal systems. Hence, whether or not the law is in fact authoritative is a question to be discussed in the context of a study of the *force* of law.<sup>10</sup> By contrast, law's claim to authority has to do with the obligations that a legal practice necessarily asserts to generate, not with the duties that are actually owed to the legal practice. Thus, it links up with the *assertion* to have authority rather than with the *existence* of an authority. Clearly, to argue that legal systems necessarily *claim* to have authority is not equivalent to maintain that in fact they *have* (legitimate) authority. Accordingly, the question of legitimacy is not directly at stake when we consider the assertion made by a legal system to be able to obligate citizens. The analysis of legal systems' claim to authority is rather part of a study of the concept of law, *i.e.* is carried out in the context of an investigation over the *grounds* of law.<sup>11</sup>

While a comprehensive philosophical account of law must include both these dimensions – force and grounds – the two questions do not collapse one into another. They run parallel to a large extent instead, and tend to overlap only partially and to a limited degree. It is this conceptual distinction that does not only justify but indeed requires us to discuss the two questions independently. For the same reasons, one can without contradiction deny the existence of a moral obligation to obey the law and argue that a claim to authority is implicit in all legal systems. Law's claim to authority makes sense even if we ascertained that there is no general obligation to obey the legal rules because, in this case too, the notion of authority and obligation

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<sup>9</sup> H. Prichard, *Moral Obligation* (Oxford, Clarendon, 1949), at p.54.

<sup>10</sup> Following Dworkin by “force” of law I mean the “power of any true proposition of law to justify coercion in different sorts of exceptional circumstance.” (R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.110).

<sup>11</sup> The problem of determining the grounds of law consists in establishing the “circumstances in which particular propositions of law should be taken to be sound or true” (R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.110).

would remain central to the legal domain and should be taken into account in explaining the nature of law.

### 3. Traditional Jurisprudence and Claim to Authority

The significance of law's normativity has led legal theorists to put forward different explanations of this notion. All the traditional schools of legal thought have attempted to puzzle out this difficult question. In this section I will sketch the main theories of legal normativity and their account of legal systems' claim to guide action. I will take up in turn legal realism, legal positivism, and natural law theory. This survey will be critical and constructive at the same time: on the one hand I will set out the reasons why these traditional approaches can be considered less than satisfactory; on the other I will lay the groundwork for a treatment of law's claim to normativity that can attack the problems identified in the critical section.

#### 3.1. *Legal realism*

The concept of law theorised by legal realism is framed in terms of regularity of compliance and use of punishment for non-compliance: here law is an empirical concept relating to the possibility of coercing people (physically or psychically) to act in certain ways. By endorsing this approach and focusing on such ideas as conformism, coercion, and punishment, legal realism (especially in its pragmatic instrumentalist version) conceives of the law as nothing but "the prophecies of what the courts will do in fact."<sup>12</sup> Thus, "when we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. . . . People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."<sup>13</sup>

The primary concern of legal realists, then, is with predicting what the decision-making institutions are going to do. Accordingly, legal realism emphasises the importance of the social efficacy of rules and regards the authoritative issuance of norms as a relatively marginal dimension of the legal realm. We are thereby required to study the actual behaviour of officials in a given legal system, and not just enacted laws (referred to as "paper rules", or "law in book"). It is only if we know the patterns of behaviour, the convictions, the more or less conscious prejudices, and the underlying evaluative conceptions of judges that we can anticipate the content of judicial decisions in so having a grasp of the "real rules", or "law in action."

On this approach, legal normativity is not seen as an autonomous notion but as a by-product of law's coercive dimension: like legal positivism in its earlier stages, legal realism fleshes out a sanction-based account of legal

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<sup>12</sup> O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.461.

<sup>13</sup> O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.457.

normativity. On this view, the normative nature of law can be explained in terms of the sanction one is likely to suffer for acting or failing to act in a certain way: to be under a legal obligation is nothing but to be likely to incur a sanction provided by the system and imposed under the law. Here, normativity is something factual: it connects up with what people can expect or may suffer from in consequence of their wrongdoings. As Oliver Wendell Holmes puts it, "a legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgement of the court; – and so of a legal right."<sup>14</sup> Legal realists account for normativity, thus, by referring to the imperative and probabilistic elements associated with the existence of a legal system. Normative statements can be reduced to factual propositions indicating the law's likelihood to react against and punish unlawful behaviour. In consequence of this view, to claim that a practice is normative means to assert that the practice possesses the ability to sanction people's unlawful doing, *i.e.* to state in advance that certain conducts will be punished.

These views have recently found a restatement within the law and economics movement. As well as legal realists, the advocates of the law and economics movement claim that the power of a theory can be measured against its capacity to make accurate predictions on how the law influences behaviour. Accordingly, the account of legal normativity originally sketched by the law and economics movement is an internal variation of the sanction-based account.<sup>15</sup> Here, the penalty for non-compliance is seen as an additional cost for the law-breaker and so as a disincentive to disobeying the rules of law. Legal rules, then, are reasons to act in the ways prescribed by a legal system and obedience is an act that, other things being equal, will reduce the costs associated with our social conduct.

By theorising a sanction-based account of law's normativity, legal realism as well as the law and economics movement have intended to expel metaphysical elements from the legal domain. The merits of these demystifying approaches cannot be overstated. The sanction-based account of normativity is hardly satisfactory, however. As Hart observes, "the statement that a person has a legal obligation to do a particular action can be combined without contradiction or absurdity with the statement that it is not likely that in case of disobedience he would suffer by incurring some sanction."<sup>16</sup> The possibility for us not to be detected, thereby escaping a sanction, does not mean that we are under no obligation. It is possible to refer to the notion of a duty even in the absence of penalties. Hence, the likelihood of suffering painful consequences for unlawful behaviour is not a necessary condition of legal normativity: sanction can well reinforce an obligation but it is not constitutive of it. These remarks allow Hart to argue that a sanction-based approach can at best explain our "being obliged," not our "having an obligation."<sup>17</sup> But only the latter, which cannot without distortion be reduced to former, can be associated with the idea of legal

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<sup>14</sup> O. W. Holmes, "The Path of the Law" (1896), 10, *Harvard Law Review*, pp.457-478 at p.458.

<sup>15</sup> Cf. R. Cooter, "Prices and Sanctions" (1984) 84 *Columbia Law Review*, pp.1523-1559.

<sup>16</sup> H. Hart, *Essays on Bentham* (1982, Oxford, Clarendon), at p.135.

<sup>17</sup> H. Hart, *The Concept of Law* (1994, 1<sup>st</sup> ed. 1961, Oxford, Clarendon), at pp.82-83.

normativity. Therefore, the sanction-based approach should be dismissed as an unacceptable form of reductionism.

### 3.2. *Legal positivism*

The inability of the sanction-based approach to account adequately for the normative nature of law has led the sophisticated versions of legal positivism to put forward a rule-based theory of normativity.

The many theories of law that have come under the label “legal positivism” present differences, sometimes significant. But these differences are internal to a single, overarching theoretical perspective, and one cannot help but see that the several versions of legal positivism have some tenets in common. The cluster of ideas around which the positivist concept of law has developed consists in the social fact thesis, the conventionality thesis, and the separability thesis.<sup>18</sup> The social fact thesis makes out the law to be a social artefact, on the reasoning that the law’s existence depends exclusively on social facts, such as the sovereign’s capacity to “receive habitual obedience from the bulk of a given society,”<sup>19</sup> or gain the fact of officials’ accepting a certain kind of rules.<sup>20</sup> The conventionality thesis asserts that the criteria of legal validity are established by a social convention among the officials of a given community. Finally, the separability thesis affirms a conceptual distinction between law and morality: on this view, it is not necessarily true that the criteria of legal validity consist, either partly or entirely, in moral standards. This thesis grounds the positivist concept of law on only two defining elements – due enactment and social efficacy – so that any reference to moral correctness becomes a merely contingent possibility: what is law depends exclusively on what the authorities have enacted and on what is socially efficacious. Legal positivism in essence sees the law as a normative coercive order whose validity does not necessarily rest on moral standards.<sup>21</sup>

From these premises a rule-based theory of normativity is set out. This view has been argued most notably by Hart and has been the reference point for subsequent positivist studies ever since. On this account, law’s authority arises from the fact that a legal system consists in a set of rules of a certain sort. As Leslie Green concisely summarises, for Hart legal rules are social practice-rules, meaning rules that exist insofar as we have before us a “regularity of behaviour, deviations from which are criticized, such criticism is regarded as legitimate, and at least some people treat the regularity as a standard for guiding and appraising behaviour.”<sup>22</sup> The existence of a practice governed by such rules gives rise to obligations in self-identified

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<sup>18</sup> K. Einar Himma, “Inclusive Legal Positivism” in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds., 2002, pp.125-165) at pp.125-126.

<sup>19</sup> J. Austin, *The Province of Jurisprudence Determined* (London, Weidenfeld and Nicolson, 1954), at p.221.

<sup>20</sup> H. Hart, *The Concept of Law* (1994, 1<sup>st</sup> ed., 1961, Oxford, Clarendon), at pp.82-91.

<sup>21</sup> H. Kelsen, *Pure Theory of Law* (Berkeley, University of California Press, 1967), at pp.44-50.

<sup>22</sup> L. Green, “Law and Obligations” in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro eds., Oxford, Oxford University Press, 2002, pp.514-547) at p.517.

participants, *i.e.* those who share a special attitude towards the practice. This attitude, or internal point of view, consists in our acceptance of the social practice-rules, that is, in our willingness to regard them as reasons binding us to act in certain ways. In brief, only to the extent that this attitude exists can social practice-rules carry normative (and not only natural) consequences: when law is defined as a set of social practice-rules it can determine people's duties and rights. This being so, the law's claim to authority will be all the more intelligible.

In Hart's explanation, normativity is consequent upon both the existence of a conventional practice and the endorsement of an internal point of view relative to that practice. But it is the second of the two elements that carries the whole of the explicative burden. If we leave the internal point of view out of account, law becomes a mere convention. The existence of a convention will not alone be enough to provide people with obligations. For the convention is a mere fact ("Is") and facts alone are constitutively unable to create duties ("Ought").<sup>23</sup> Conventions can contribute to identify the legal standards in force in a given system, but they cannot play a justificatory role. For the general agreement on behaving in a certain way under given conditions will account for the existence of a (common) habit, not of an obligation.

Furthermore, it has been convincingly remarked by Dworkin, there need not be any convergent social practices for obligations to obtain.<sup>24</sup> We can argue that there is an obligation to act in a certain way also in the absence of a social practice, or even contrary to it. Think of vegetarians, to follow Dworkin's original example. Vegetarians regard the prohibition to eat meat as obligatory. This position makes sense and is fully understandable although we are well aware that in our societies today there is not a convergent social practice in that respect.

Therefore, obligations are conceptually independent from conventions and an account of obligations in terms of conventions is plainly bewildering. Because a convention is not an obligation-imposing entity, a conventionalist theory of law falls short of explaining the binding force, and so the authority, of legal rules. Accordingly, as long as the law is depicted as a merely conventional practice its claim to authority rests unexplained. So we need to move from the external element to the internal point of view in order to explain the authority that law claims to have over its addressees.<sup>25</sup> In other terms, central to Hart's theory of normativity is our attitude towards a social practice (rather than the social practice itself).<sup>26</sup> It is the internal attitude that

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<sup>23</sup> So, Lon Fuller questions the positivist thesis that "an amoral *datum* called law" has the peculiar quality of creating a duty to obey (L. Fuller, "Positivism and the Fidelity of Law – A Reply to Professor Hart" (1958) 71 *Harvard Law Review* pp.630-672, at pp.656-657).

<sup>24</sup> R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at pp.49-58.

<sup>25</sup> For similar critical remarks see L. Green, "The Concept of Law Revisited" (1996) 94 *Michigan Law Review*, pp.1687-1717, at pp.1692-1697.

<sup>26</sup> This is remarked clearly by Perry when he argues that "the essence of Hart's response to the problem of normativity of law is thus to point to the phenomenon of acceptance" (S. Perry, "Hart's Methodological Positivism" in *Hart's Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.332.

promises “to unlock the mysteries of law’s normativity”<sup>27</sup> and hence of the claim to authority, by morphing a mere state of affairs – a social *datum*, of itself unable to give rise to obligations – into a normative practice, *i.e.* an institution entitled to a normative status.

Hart’s account of normativity, sophisticated and interesting though it is, is open to question for at least two reasons. On the one hand, it tends to collapse into a form of subjectivism; on the other hand, it does not explain law’s claim to create obligations for all the citizens.

First, to claim that the normativity of a practice lies in people’s attitude towards a practice is to explain normativity by invoking their disposition to regard the social practice at issue as a justification for their conduct. Thus, on the Hartian approach the normative nature of law stands on a subjective basis: Hart, by making the internal attitude so pivotal, ends up locating normativity in the subjects rather than making it a character of rules. A legal system’s normativity is thus made to depend on people’s attitudes and beliefs, such that the objective dimension of law gets neglected.<sup>28</sup> But the normativity of law is not a subjective notion (to the same extent as it is that of a critical morality, to make one example): it is somewhat objective, and as such partly independent of people’s dispositions.<sup>29</sup> In other terms, following Hart on this commits us to do away with the objective status of legal rules, and yet this objective status is a distinctive feature of the legal domain. Hence, Hart’s account of normativity is inadequate to explain *legal* normativity: an appropriate theory of law’s normativity requires us to go beyond the ambit of people’s subjective states, commitments, and beliefs.

Secondly, Hart’s account – because it relies on the notion of an internal point of view to elucidate normativity – can explain only partially law’s claim to be a normative practice. In particular, if Hart explains why law is normative for self-identified participants – the people who accept, recognise, and are willing to regard the legal system as a normative institution – he is unable to illuminate law’s claim to create special reasons to act for all the members of the group governed. But legal systems claim to be normative in the latter sense, not in the former: they claim to place all (rather than some) citizens under obligations they would not otherwise have. This general claim resists Hart’s explanation of normativity – it does so to the extent that this explanation relies on the internal point of view.

We can therefore conclude that the positivist approach is inadequate and partial: it cannot be said to clarify the concept of legal normativity in any significant way and, accordingly, it can at best provide “the beginning, but

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<sup>27</sup> G. Postema, “Jurisprudence as Practical Philosophy” (1998) 4 *Legal Theory* pp.329-357, at p.335.

<sup>28</sup> This point has been convincingly made by N. Stavropoulos, *Objectivity in Law* (Oxford, Clarendon, 1996) at pp.55-61. There Stavropoulos mentions the risk, inherent in Hart’s approach, of missing the objective dimension of law.

<sup>29</sup> The objective dimension of law has recently attracted the attention of several legal theorists. For an overview of this debate, the reader can refer to the essays in B. Leiter (ed.), *Objectivity in Law and Morals* (Cambridge, Cambridge University Press, 2001).

only the beginning of one possible philosophical analysis of the concept of legal obligation” – not a comprehensive insight into it.<sup>30</sup>

### 3.3 *Natural law theory*

The difficulties inherent in the positivist stance might induce us to reevaluate the approach set out by the natural law theory. The concept of law embraced by natural law theorists is based on the belief that a definition of law must incorporate the notion of material correctness. It follows that the law must take in and fulfil the ideal of justice, understood to be a component of morality. In maintaining that some standards of morality should enter into the definition of law, natural law theorists accept the connection thesis, *i.e.* the claim that there is a conceptual, or necessary, connection between law and morality. Stated otherwise, if a norm is to be a legal norm, it will have to pass an ethical test: *moral* validity is a necessary condition of *legal* validity. They therefore articulate an “ethical” concept of law.

By incorporating an evaluative element into the definition of law, natural law theorists are well positioned to explain legal systems’ claim to guide action. When law is defined as a valuable practice, rather than a mere social convention provided with sanctions, its claim to normativity is fully understandable because values can, as a matter of principle, create obligations. Thus, the naturalist explanation of legal systems’ claim to authority is straightforward and immediate. In short, the naturalist argument has the following structure: since law is a practice that instantiates values, and values are entities capable of grounding a claim to guide action, law’s claim to normativity presents nothing like a conundrum.

Now, if these fundamental assumptions of natural law theory do not come in the way of explaining law’s claim to authority, other related and likewise essential features of natural law theory are more problematic. According to the naturalist approach, the law provides people with reasons to act in certain ways only to the extent that it incorporates basic values, universal and self-evident. Legal systems are viewed as concrete, specific, and historically determined instantiations of such universal standards: only to the extent that legal systems embody universal values and protect basic goods can they be considered valuable (and, then, entitled to claim authority over their citizens). Law’s normativity is explicable only to the extent that a legal system incorporates pre-existent universal standards and does not veer away from them.

The general cast of this representation of legal systems is amiss. In this, natural law theories end up predetermining the range of goods worthy of being fostered under a legal system, thereby making legal values a *numerus*

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<sup>30</sup> S. Perry, “Hart’s Methodological Positivism” in *Hart’s Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354) at p.335. As Perry observes, a complete analysis of the notion of normativity will have “to tell us why and under what conditions the mere fact of general conformity to a pattern of conduct can help to create a reason for action, amounting to an obligation, for individuals to conform their own conduct to the pattern” (S. Perry, “Hart’s Methodological Positivism” in *Hart’s Postscript* (J. Coleman ed., Oxford, Oxford University Press, 2001, pp.311-354, at p.335). Which is something that legal positivism fails to do.

*clausus* and in effect placing a quota on their number.<sup>31</sup> But this contradicts dramatically the well-grounded conception of legal systems as institutions open to an indefinite range of needs and evaluations: the law does not instantiate a given model of life, framed by a given selection of values, but is free to embody the most variable contents and to incorporate the values and goods that get actual recognition over time among social groups.

Hence, while we should reject the view that “any kind of content might be law,”<sup>32</sup> it would be wrong, on the other hand, to delimit in advance the legal possibilities in so a radical a way as natural law theories do. The requisite that law should come in the service of basic human needs must be understood as a limit to the possibility for a system to be simultaneously existing and unjust in the extreme,<sup>33</sup> but it does not justify setting up rigidly the substantive contents of law: legal systems are mainly shaped by the models of life endorsed by their members. These models can be heterogeneous and are often incommensurable. Far from being settled once and for all, the values instantiated by legal systems are embedded in history and in social relationships: they are not fixed entities out there to be discovered, as natural law theories maintain, but are rather created, or at least they get continuously redefined and reshaped by social groups in different historical periods and in different cultures. Hence, natural law theories are off-course in their attempt to establish in advance legal values and goods: a legal theory must give wide scope to needs in constant change, since legal contents and goods do not exist prior to, but only by way of, positive law. So we will have to account for legal practices on a conception of law operating without predetermined values and goods. Which natural law theory does not do.<sup>34</sup>

These general shortcomings of natural law theory reverberate on, and hence disqualify, its conception of normativity. It therefore becomes impossible for us to accept the accompanying explanation of law’s claim to authority: an overall miscast conception of law can only beget a bewildering picture of normativity and a mystifying explanation of law’s claim to make obligations and duties binding upon people at large.

#### 4. Claim to Authority and the Concept of Law Revised

In the foregoing I have attested a failure, providing different reasons why the traditional schools of legal thought fail to explain adequately a legal system’s claim to authority. But this failure is instructive: there is much to learn from it, for it enables us to lay the basis for a truer account of law’s normativity,

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<sup>31</sup> For a definition of law in this vein, see J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) at pp.276-277.

<sup>32</sup> H. Kelsen, *Pure Theory of Law* (Berkeley, University of California Press, 1967), at p.198.

<sup>33</sup> R. Alexy, *The Argument from Injustice* (Oxford, Clarendon, 2002, or. ed., 1992), at pp.40-68.

<sup>34</sup> Similar considerations have led Jürgen Habermas to conclude that natural law is no longer an option today (J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, 1996, or. ed., 1992) at p.199). While Habermas’ conclusion can appear excessive, it does point out the place where the natural law account of the working of contemporary legal systems falls short.

letting us as well to appreciate the close relationship that holds between this claim and the concept of law.

There can be extracted from the analysis just made one factor that is common to the failings noted. The root cause behind the failure of the traditional explanation of normativity (and of law's claim to authority) can be expressed thus. Each of the traditional schools bases its account of normativity on only one foundational element: the sanction, the internal point of view, or the notion of a universal value. But by appealing to one element to clarify a phenomenon as complex as that of legal normativity we lapse into a form of reductionism and, hence, wind up with an over-simple theory. So what the failures in question teach us is that if we are to account for law's normativity and for legal systems' claim to guide action, we need an integrated approach, an approach that brings to bear more than just one basic element.

It falls outside the scope of this study to delineate a general theory of legal normativity. I will only venture to say here that an institution must satisfy at least three conditions to present itself as normative: social efficacy, practicality and worthiness. It is the combination of these elements – rather than a single notion – that gives us the key to a legal system's claim to authority, or so I argue. A brief statement of these three elements will be a way forward in explaining an institution's claim to normativity.

Social efficacy is the first condition to be met if an institution's normative claim is to make sense. A neglected institution that claims to guide people's conduct will only be doing some wishful thinking: a claim of this sort, if understandable at all, is practically meaningless and unworthy to be taken into serious consideration. An institution's claim to be normative requires in practice, if not logically, that the institution be socially efficacious beyond a minimum level. Its claim will be totally irrelevant otherwise.

Second, there is (at least implicit) in the claim to authority a practical requirement: a legal system purporting to guide conduct will have to create reasons to act and not (or not only at least) reasons to believe. The former are indisputably practical reasons as opposed to the latter, which are theoretical reasons. Hence, a normative body which purports to guide people's conduct necessarily presents a practical dimension, too.

Finally, no claim to normativity can provide people with special reasons to act in certain ways unless the institution making this claim puts out valuable directives. Only a valuable practice can guide action, since "practices that are pointless, or inconsistent in principle with other requirements of morality, do not impose duties."<sup>35</sup> If a practice is not even conceivably justifiable, it will be conceptually unable to impose obligations. So the value in taking this or that course of action must be manifest in the concept of an institution claiming to be normative.<sup>36</sup>

Consider now what these general remarks entail for the law. To hold that law necessarily lays a claim to authority is to defend the thesis that law has to

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<sup>35</sup> R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at p.57.

<sup>36</sup> This relationship between the notion of "having a point" and that of legal normativity is discussed by N. Stavropoulos, *Objectivity in Law* (Oxford, Clarendon, 1996) at pp.59-61.

be an effective and valuable institution whose nature is practical. The analysis of a legal system's claim to authority forces us to define the law in terms of a composite set of factors, meaning as a balanced combination of social efficacy, practicality and worthiness. The very idea of law stands affected here. In recognising the necessary existence of law's claim to normativity we delineate a specific concept of law, essential to which are the three mentioned aspects of efficacy, practicality, and worthiness.

These remarks have some direct implications on legal theory and practice. First, they point to the necessary connection that holds between normativity and the concept of law: just as our notion of normativity will find its way into our theory of the nature of law, so this theory must be tested by looking at how it affects the concept of normativity. It can be argued in consequence that the traditional concepts of law, like their accounts of legal normativity, are (in different measure and to a different extent) inadequate in their failure to take into consideration the multiple dimensions of a legal system. Hence, the traditional approaches to law need to be replaced with a more integral and comprehensive theory. This is the first consequence (one in the negative) to follow when we consider the claim to authority to be an essential feature of legal systems.

The second conceptual consequence to follow from the recognition that the claim to normativity is an essential feature of law is in the positive. It connects up with the observation that there is a given practice, within legal systems, which undeniably presents the three features just mentioned: the practice in question is argumentation, and its importance cannot be overstated.<sup>37</sup> When argumentation takes place in an institutional context (as within the framework of a legal system), it presents the three dimensions essential to an account of the claim to authority.

Let us consider judicial reasoning, for example. Judicial reasoning is efficacious, meaning that officials, legal practitioners, theorists of law and citizens pay specific attention to it (or at least they do so in a well-functioning legal system) and take it into account (not necessarily uncritically) in the way they model their behaviour. There is, secondly, a practical aim in judicial reasoning, given its purpose to guide the conduct of its addressees – the parties involved directly in a court decision, on the one hand; and the wider audience of specialists and the public at large, on the

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<sup>37</sup> Here "argumentation," and the largely synonymous term "reasoning," designates a number of practices that vary considerably and yet are conceptually connected. Examples are ascertaining, systematising, interpreting, weighing, applying, and justifying legal norms; settling conflicts between directives encased in the same legal order; following precedents; constructing statutes; and providing a legal classification of facts. The conceptual connection is that these activities are all forms of deliberative reasoning, and as such are not entirely rule-bound forms of argumentation. For a similar use of "argumentation" and "reasoning," see R. Dworkin, *Law's Empire* (London, Fontana, 1986) at p.VI; R. Alexy, *A Theory of Legal Argumentation* (Oxford, Clarendon, 1989 or. ed., 1978) at pp.231-232; and N. MacCormick, "Donoghue v Stevenson and Legal Reasoning", in *Donoghue v Stevenson and the Modern Law of Negligence* (P. Burns ed., Vancouver, Continuing Legal Education of British Columbia, 1991, pp.191-213) at p.211; and N. MacCormick, "Argumentation and Interpretation in Law" (1993) 6 *Ratio Juris*, pp.16-29 at p.16.

other. Finally, as much as judicial justification may be discretionary to some extent, it is neither arbitrary nor irrational. Legal reasoning must follow given forms and rational criteria if it is to be legitimate and have wide appeal: in no form does legal argumentation depend entirely on pure acts of will, since it cannot be given course to without rational tools. Judicial reasoning is thus an inherently rational practice, and so a valuable practice. In summary, we have here something that incorporates every element central to an explanation of the claim to authority.

Hence, an adequate concept of law, one by which we can explain a legal system's claim to authority, should be couched in the idea of argumentation. A conception of law as an argumentative practice seems particularly appropriate because, on this basis, we can recognise the practical nature and moral value of law without leaving out of account its social dimension. We can explain law's claim to authority to the extent that we understand law as the product of argumentation and argumentation as a rational enterprise. Hence, only a comprehensive approach based on the recognition of the centrality and ubiquity of legal reasoning can adequately explain law's claim to provide special reasons to act.

While I believe that it is a main challenge for jurisprudence today to work out in detail a similar concept of law and its implications on both legal theory and practice, I also believe that important steps in this direction have already been made by the theorists who have paid specific attention to the nature and role of reasoning in law.<sup>38</sup> For putting forward a fully-fledged conception of law as an argumentative practice has been the not-yet-accomplished target of a leading group of legal theorists since the 1980s.<sup>39</sup>

In my view, the most well-rounded of these redefinitions of the concept of law are Alexy's and Dworkin's. To make due allowance for the conceptual scope of reasoning, Alexy has redefined law as a "system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and, finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness."<sup>40</sup> With this definition Alexy makes the concept of law consist, not only of rules, but also of principles, arguments, applicative procedures, and a claim to correctness. All these elements tie in closely with argumentative procedures. Thus, in his

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<sup>38</sup> In particular I refer to A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht, Reidel, 1987); R. Alexy, *A Theory of Legal Argumentation* (Oxford, Clarendon, 1989 or. ed., 1978); A. Peczenik, *On Law and Reason* (Dordrecht, Reidel, 1989); and N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon, 1994, or. ed., 1978).

<sup>39</sup> This research programme has been expressly set out in A. Aarnio, R. Alexy, and A. Peczenik, "The Foundation of Legal Reasoning" (1981) 21 *Rechtstheorie*, pp.133-158, 259-273 and 423-448, at pp.131-136).

<sup>40</sup> R. Alexy, *The Argument from Injustice* (Oxford, Clarendon, 2002, or. ed., 1992), at p.127.

redefinition Alexy presents us with a concept of law that takes seriously into account the role of argumentation.

In a similar vein, Dworkin writes that “law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is”.<sup>41</sup> Here, law is made out to be primarily a practice: “law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law’s empire is defined by attitude, not territory or power or process. . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense.”<sup>42</sup> In this way, Dworkin puts interpretive reasoning at the centre of his theoretical interests and hints at a redefinition of law based on the notion of argumentation.

This is not to say, however, that Alexy and Dworkin have a fully-fledged and perspicuous concept of law as an argumentative practice. Their redefinitions fail to break radically enough with traditional jurisprudence. So they tend to uncritically follow the research priorities and main issues set out by the traditional schools of legal thought. In this way, they fall short of ascribing to argumentation the pivotal role it plays in the legal domain.

This much is evidenced paradigmatically in what Alexy has to say about the concept of the basic norm and the traditional canons of legal interpretation: he substantially accepts both, amending them but slightly. As for the basic norm, he finds the concept to be theoretically useful still, once its contents, as Kelsen sets them out, are reformulated to account for the conceptual connection between law and morality. As for the traditional canons of legal interpretation, Alexy sets these canons in a broader normative framework, that of discourse theory, but without questioning any of them.

Likewise Dworkin does not push through far enough into a coherent argumentative turn, since his potentially innovative statement that law is an interpretive enterprise is couched in a framework where the strong version of the right-answer thesis is upheld.<sup>43</sup> This thesis presupposes a conception of reasoning as something by which we come to know something objectively. Hence, on Dworkin’s view, arguing correctly is not any different conceptually from knowing truthfully, in that both activities are in large measure descriptive and independent from the subjects carrying them out. This standpoint – beside being theoretically ungrounded, as MacCormick rightly observes – defeats the innovative import introduced with the

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<sup>41</sup> R. Dworkin, *Law’s Empire* (London, Fontana, 1986) at p.410

<sup>42</sup> R. Dworkin, *Law’s Empire* (London, Fontana, 1986) at p.413.

<sup>43</sup> The strong version of the right-answer thesis consists in the idea that for every legal case there exists one correct solution, which judges and lawyers can discover by rational inquiry. This is a two-part thesis: (1) contemporary legal systems are developed enough to provide for one solution (nothing less and nothing more than that) to each question arising within them; (2) legal scholars and practitioners are in a condition to always ferret out this solution by bringing to bear their professional expertise and rational capabilities, since the right-answer is hidden in law and only needs to be uncovered. For an introduction to the main versions of the right-answer thesis, see A. Aarnio, *The Rational as Reasonable. A Treatise on Legal Justification* (Dordrecht, Reidel, 1987) at pp.158-161.

definition of law as an argumentative practice.<sup>44</sup> This last thesis, if coherently developed, asks us to shift from the idea of law as an objective entity, fully defined and out there only to be comprehended, to an idea of law as an unsettled practice which consists in evaluating reasons and confronting arguments. In this process, the right solution is not *discovered* and *described*, as Dworkin would have it, but *shaped* and *reconstructed*. In other words, law should be considered more akin to an exercise of rational criticism than to an act of knowledge.

Alexy's and Dworkin's proposals are therefore open to challenge at several places. In directing my attention to them, hence, far from calling for a wholesale acceptance, I urge for developing more radically what is only hinted at therein. By pursuing this direction coherently, we will see that reasoning not only comes into play at specific stages in the development of a legal system, but is also a defining feature of the law as a whole. Otherwise said, law consists, in the main, of argumentative activities which take place at different levels and are carried out by different subjects. This view entails a change in the notion of law itself: the underlying argumentative processes need to be regarded as making up the bare bones of the very concept of law. So the law does not emerge on the sole basis of social facts (like social conventions and political practices), as legal positivists and realists wrongly assume, nor does it emerge on the sole basis of moral considerations, as natural law theorists mistakenly believe. The structures and contents of law depend rather on the interpretative practices that take place in a given social setting. Unlike many other social phenomena, argumentative and interpretive practices consist in a complex intermingling of facts and values. Since, on this view, the law enjoins interpretation, and interpretation is essentially evaluative, the legal domain necessarily incorporates a critical moral component, and the legal validity of directives always depends on moral considerations. Evaluative considerations, then – especially in the form of a distinctive value or purpose imposed on a practice – are inherent in the concept of law, and hence are constitutive of it. Accordingly, describing what the law is will make it necessary to establish what the law should be. For the law consists not only of a set of norms, but also of the justification of settled norms, and justification can neither be equated with social facts nor be entirely captured by conventions. In due course, this transformation of the concept of law will make a legal system's claim to authority fully explicable.

## 5. CONCLUSION

In this study, I have focused on a specific dimension of legal normativity, namely, legal systems' claim to guide people's conduct and give them reasons for action that they would not otherwise have. I have argued that the traditional accounts of this claim are hardly satisfactory: legal realism puts forward a sanction-based theory of normativity that fails to explain the notion of someone having an obligation and so cannot come to terms with law's claim to authority; sophisticated versions of legal positivism give us a rule-based account of normativity that ends up making of a subjective state –

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<sup>44</sup> N. MacCormick, *Legal Right and Social Democracy* (Oxford, Clarendon, 1984) at p.130.

the internal point of view – the locus of normativity, a method by which we cannot elucidate the objective character of legal obligation; finally, natural law theory bases the idea of legal normativity on the definition of law as a set of universal values fixed in advance and independently of concrete historical societies, but this view is hardly tenable. The inadequacies of the traditional accounts of law's claim to authority suggest that we should approach the issue on a different theoretical ground. I have argued that an appropriate notion of normativity comes from a simultaneous consideration of a set of elements, rather than just one. These elements combine into a fuller account of legal normativity, making it necessary to view the legal enterprise as an interplay of empirical, practical, and evaluative features. We have something of this kind taking shape, but only just do so, in the definition of the legal domain limned in the writings of some leading legal argumentation theorists. In defining law as an argumentative practice they recognise explicitly that an adequate comprehensive concept of law must of necessity incorporate empirical, practical, and evaluative dimensions. This way, and contrary to what is possible with the traditional schools of legal thought, the concept of law as an argumentative practice can explain in an appropriate manner a legal system's claim to authority.

In a nutshell, throughout this paper I have defended the thesis that recognising the claim to normativity as an essential feature of legal systems carries with it the need to redefine the concept of law in a non-traditional way central to which is the notion of argumentation. But this radical revision of the concept of law, needed to account for the legal system's normative posture, is only the beginning rather than the end of the story: this transformation of the concept of law opens up a completely new research programme for legal theorists, calling on them to redirect the focus of jurisprudence and flesh out a fully-fledged argumentative concept of law. Only so will we arrive at a comprehensive theory with which to understand current legal systems and attack the problems attendant on them.

Whereas in this paper I have confined myself to submit the idea of legal normativity to scrutiny and so to contribute to the studies of this specific problem, I have also (indirectly) aimed at attesting the value of a philosophical approach to legal questions. The practical nature of legal normativity does not marginalise the theoretical approach to the issue. For the practical dimensions of law's normativity and claim to authority can be fully appreciated only if we analyse them with the aid of theoretical tools.

These remarks suggest a more general point, namely, that the need to establish a dialogue between theory and practice cannot result in a retreat from the philosophical perspective. Resorting to an a-theoretical approach to legal questions in general, and to the questions that impact directly on legal practice in particular, can appear a convenient move. It will enable legal practitioners to break away from a field that they justifiably find arduous and challenging as it requires a specific knowledge and a peculiar mindset. The specific knowledge is provided by legal education only to a limited degree nowadays and the philosophical mindset is understandably not necessarily the one more common among lawyers. But escaping from theoretical thinking, tempting as it may appear today, would be disastrous. It will lead legal practitioners to conceive of their role as that of blindly applying pre-existing rules rather than that of deciding highly sensitive questions arising within an exceedingly debatable and intricate practice. In so it would be

jeopardised the very idea of the rule of law, an idea “far more complex and intelligent” than the notion of law as a system of standards enacted beforehand and there simply to be applied by decision-making institutions.<sup>45</sup>

Further, moving away from philosophy would have as an unavoidable consequence the result of impoverishing the analytical tools at disposal of legal profession. Abstract as it may be, legal philosophy provides practitioners with a specific and peculiar standpoint from which to observe the law's domain. In providing this additional perspective legal philosophy enriches, expands and deepens our understanding of legal systems, their essential traits and their basic problems. Far from evading the concreteness of legal practice, then, by conducting their analysis at a high level of abstraction, theorists provide legal profession with an alternative way of looking at concrete legal questions. The value of theoretical studies, thus, lies also in their power to analyse legal problems from a different angle. This in turn enables us to grasp the multiple dimensions of each legal issue and appreciate the complexity of legal practice. Therefore, practitioners can significantly profit from philosophical writings, even when these works may seem too abstract to have an immediate and direct impact on more specific legal debates.

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<sup>45</sup> R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978), at p.222.