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Law, Morality, and the One-System View: A Response to T. R. S. Allan

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Abstract: This is a response to a recent article by T. R. S. Allan. Allan makes several insightful observations about law and legal practice. As Allan correctly notes, (i) the moral evaluation of legal rules and institutions is carried out within legal practice and its traditions, and therefore the view that we can come up with practice-independent moral principles to evaluate the law is at least dubious; (ii) legislative enactments require judicial interpretation to determine their meaning and their incorporation within a democratic legal system; and (iii) law fulfils its functions, and allows for impartial resolution of disputes, by establishing public standards of justice that displace private judgments about political morality. In this reply, I suggest that—in contrast to what non-positivists like Allan would argue—each of these observations is either compatible with, or reinforces, a positivist view of law and legal institutions. Arguably, non-positivist views still have an advantage over positivism: they seem to fit easily with most citizens' and officials' judgments about legal obligation. However, positivism can offer an equally direct explanation of those judgments.

Keywords: T. R. S. Allan, one-system view, moral impact theory, legal positivism, legal obligation

I. Introduction

In a recent article,[1] T. R. S. Allan has offered a suggestive account of the relationship between law and morality and, more particularly, of the *one-system view*, according to which law is a branch of political morality.[2] Allan's argument is partly framed as a critique of other recent non-positivist accounts, and particularly of Greenberg's *moral impact theory*.[3] The argument also rests on plausible—yet debatable—interpretations of Dworkin's views and of the larger interpretivist project.

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[1] T. R. S. Allan, "Law as a Branch of Morality: The Unity of Practice and Principle," *The American Journal of Jurisprudence* 65 (2020): 1–17.

[2] See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), Ch. 19.

[3] Mark Greenberg, "The Moral Impact Theory of Law," *The Yale Law Journal* 123 (2014): 1288-1342.

In this reply, I will not directly address Allan's critique of the moral impact theory or his interpretation of Dworkin's view. Instead, I will focus on the more positive aspect of Allan's argument. This aspect can be summarized in Allan's claim that, correctly interpreted, the law of a relatively well-ordered society cannot diverge from morality, and "legal obligation and individual conscience are perfectly aligned."[4] In Allan's words,

> As a legitimate scheme of governance, duly respectful of the equal dignity of persons, the law serves as the measure of justice for the political community. . . . Our moral disagreements take place, for the most part, within the deliberative processes that the law provides or protects, defending rival interpretations of the arrangements we jointly honor. . . . Nothing is placed beyond challenge—all aspects of legal and constitutional doctrine have only provisional authority—but the challenge . . . [draws] on [legal] principles and paradigms likely to elicit general recognition.[5]

The law that is and the law that ought to be are, under this account, the same.[6] Of course, Allan is perfectly aware that people disagree about justice, equality, and so on. But these disagreements, Allan argues, go on within our legal practices. We do not come up with purely extra-legal moral standards that judge our practice from the outside. The evaluative standards arise from our already existing traditions.

I admire Allan's sensitivity to the relevance of legal tradition, and I agree with his reservations about the thought that we can come up with purely practice-independent principles to evaluate the law.[7] However, these observations are—against Allan's project in particular, and the non-positivist project more generally—compatible with (i) the positivist (analytical) claim that law ultimately depends on social fact alone, and (ii) the positivist (normative) claim that we have good moral reasons to keep the concept of law separate from morality.[8]

II. Law, Morality, and Tradition

According to Allan, legality qualifies justice. Law roots our concern with justice in the legal practices and traditions of our specific political community.[9] From this perspective, there is no clear-cut distinction between our actual legal practices and the principles that we use to evaluate them.[10]

[4] Allan, "Law as a Branch of Morality," 12.
[5] Ibid., 5.
[6] See T. R. S. Allan, "Why the Law Is What It Ought to Be," *Jurisprudence*, 2020, 1–23.
[7] Allan, "Law as a Branch of Morality," 2–3.
[8] Neil MacCormick, "A Moralistic Case for A-Moralistic Law," *Valparaiso University Law Review* 20 (1985): 1–42; Liam Murphy, "The Political Question of The Concept of Law," in *Hart's Postscript: Essays on the Postscript to 'The Concept of Law,'* ed. Jules L. Coleman (Oxford: Oxford University Press, 2001), 371-409; Jeremy Waldron, "Normative (or Ethical) Positivism," in ibid., 411-33.
[9] Allan, "Law as a Branch of Morality," 5.
[10] Ibid., 7.

Allan is right.[11] Until very recently, the idea that moral reflection about legal institutions and rules could be fully carried out independently from law would have been unfamiliar.[12] As Stone argues, when Austin famously argued that the existence of law is independent from its merit,[13] the novelty of his point was not just that law can always be morally evaluated—something natural law theorists were of course aware of. More importantly, Austin's point seemed to be that there is a fully autonomous entity called "morality," which stood independently from law, could be determined without it, and could be called upon for the normative evaluation of law.[14]

The traditional—and, to my mind, correct—position seemed to be that there is no purely extra-legal standpoint from which we can judge law. Law is an ongoing tradition,[15] and traditions are sources of substantive norms, models, linguistic practices, ways of speaking and inhabiting the world that participants adopt as their own perspective towards the world and its evaluation.[16] This makes the idea that participants in ongoing legal practices would be able to determine what morality requires without the influence of law, and that morality could set a self-sufficient blueprint from which we can evaluate law, decide when to follow it, and figure out what to do, doubtful.[17] The picture would make sense in a world where we had a clear sense of the demands of pre-legal morality and a relatively thin set of legal materials and doctrines. But we don't have a clear picture of morality, and instead we find ourselves within legal systems that "present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited."[18] Our moral conceptions are both reflected in law and impacted by it.[19] While we can make theoretical distinctions between critical (or true) morality, positive morality, and legal norms, in actual practice the distinction will always be fuzzy. Moral standards, in particular, will always make their appearance as someone's contingent view, and will be "pursued within a tradition of moral discourse"[20] reflected in our legal institutions and practices.

Similarly, Allan is right about the fact that there are limits to how much guidance morality can offer without recourse to legal standards and principles

[11] See Felipe Jiménez, "Legal Principles, Law, and Tradition" (2020, unpublished manuscript).
[12] Martin Stone, "Legal Positivism as an Idea about Morality," *University of Toronto Law Journal* 61 (2011): 325.
[13] John Austin, *The Province of Jurisprudence Determined* (Indianapolis: Hackett Publishing, 1998), 184.
[14] Stone, "Legal Positivism as an Idea about Morality," 327.
[15] Martin Krygier, "Law as Tradition," *Law and Philosophy* 5 (1986): 237–62. For an insightful exploration of this idea in the context of equity, see Irit Samet, "On Tradition and the Conservation of Equity," *The American Journal of Jurisprudence* 65 (2) (2020): 109-146.
[16] Krygier, 244. See also E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 263.
[17] Tony Honoré, "The Dependence of Morality on Law," *Oxford Journal of Legal Studies* 13 (1993): 1-17.
[18] Robert M. Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983): 6.
[19] Nigel E. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester: Manchester University Press, 1984), 9.
[20] Michael Walzer, *Interpretation and Social Criticism* (Cambridge, MA: Harvard University Press, 1993), 23.

that arise from legal practice.[21] As the natural law notion of *determinatio* conveys,[22] moral reflection cannot generate determinate answers for everything that a legal system needs to settle. More importantly, reflection about the specific questions legal institutions deal with is typically carried out by legal participants within legal institutions, and therefore as part of the history of those institutions.[23] This leads to a certain set of ostensibly moral norms, evaluative attitudes, and ways of thinking about political morality held particularly by those who take part in legal practice and are immersed within its moral vocabulary and the framework of values, habits, and practices cherished by it.[24]

Because of this, defenders of the one-system view might be right when they suggest that legal and moral reasoning by legal participants, such as judges, are part of the same activity. Yet the reason for this is that moral reasoning about law starts, from the outset, from legal and doctrinal categories provided by legal traditions. Confronted with a moral problem that demands a legal resolution, the judge (and the lawyer) will resort to her knowledge of legal doctrines and categories to make sense of the problem and resolve it. Legal categories and doctrines, from this perspective, are not a constraint on moral reasoning but a guide.[25]

Note, however, that all of this can be said without making any substantive moral judgment about legal practice and its value. Legal practices, like other traditions, can be morally corrupt or at least inadequate. Allan's correct observation about the inseparability of law and ostensibly moral principles in practice is entirely compatible with the view that law is ultimately grounded in social facts and that, as Austin argued, law's existence as a social institution is independent from its merit.[26] While Allan's observation that "legal practice . . . is usually our best guide to what political morality . . . demands"[27] is correct, it is perfectly compatible with legal positivism and does little to support a non-positivist view—whether Allan's or Greenberg's.

The reason for this is that law accords to the past an authority that critical moral reflection does not.[28] From the perspective of moral reflection, we can never be bound to honor the past just because it is the past.[29] We will use the law as a guide to moral reflection. Inevitably, we must rely on our existing practices as a guide to what morality might genuinely require. And perhaps our own practices might sometimes defer to legal participants' moral judgments.[30] Yet

[21] Allan, "Law as a Branch of Morality," 9, 16.
[22] On the idea of *determinatio*, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 284–89; Honoré, "The Dependence of Morality on Law," 2–4.
[23] See Walzer, *Interpretation and Social Criticism*, 21.
[24] Jessie Allen, "Doctrinal Reasoning as a Disruptive Practice," *Journal of Law and Courts* 6 (2018): 222; Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981), 206.
[25] Francisco J. Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017), 164.
[26] Austin, *The Province of Jurisprudence Determined*, 157.
[27] Allan, "Law as a Branch of Morality," 5.
[28] Anthony T. Kronman, "Precedent and Tradition," *Yale Law Journal* 99 (1990): 1034.
[29] Ibid., 1037.
[30] See Joseph Raz, "Incorporation by Law," *Legal Theory* 10 (2004): 1–17.

whether our legally influenced moral reflection and legal participants' moral deliberations get things morally right will be, as the positivist tradition has long argued, a contingent matter.

Moreover, Allan's correct observation about the continuity between legal and ostensibly moral reflection is compatible with a variety of approaches to adjudication. There is nothing in the continuity between legal and moral discourse that necessarily entails that an interpretivist approach is correct. Whether the correct approach to adjudication of particular cases ought to incorporate all the ostensibly moral values and evaluative attitudes that are part of the legal tradition, broadly construed, as opposed to narrowly focus on legal reasons derived from authoritative sources, is an open question.

Still, perhaps the strengths of non-positivist accounts might be clearer from a normative standpoint. Assuming, as the one-system view holds, that questions of legal determination depend on moral considerations, perhaps moral considerations show the advantages of the non-positivist view over legal positivism. I turn to such considerations in the next two sections.

III. The Bearing of Morality on Law: Democracy[31]

Allan argues that judicial interpretation is not a threat to democratic authority, because legislative enactments must be integrated within a larger "corpus of law."[32] The judicial interpretive process, from this perspective, "secures the conditions of democracy: it provides the means whereby legislation can be incorporated into law, advancing the public good … without damage to the constitutional framework."[33]

The idea here seems to start from the familiar and plausible notion that legislative enactments do not settle their own upshots. The determination of the legal content derived from legislation is distinct from the brute fact of enactment and the semantic meaning of the enacted texts.[34] Incorporating democratic enactments within the legal system requires more than judges acting as "the mouth that pronounces the words of the law."[35]

[31] In this section, I summarize an argument made at length in Felipe Jiménez, *Dworkinian Positivism* (unpublished manuscript, 2021).

[32] Allan, "Law as a Branch of Morality," 15.

[33] Ibid.

[34] Mark Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication," in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames (Oxford: Oxford University Press, 2011), 217–56. On the distinction between legal content and communicative content, see Edwin W. Patterson, "The Interpretation and Construction of Contracts," *Columbia Law Review* 64 (1964): 833–35; Lawrence B. Solum, "The Interpretation-Construction Distinction," *Constitutional Commentary* 27 (2010): 95–118; Lawrence B. Solum, "Communicative Content and Legal Content," *Notre Dame Law Review* 89 (2013): 479–520; Peter M. Tiersma, "The Ambiguity of Interpretation: Distinguishing Interpretation from Construction," *Washington University Law Review* 73 (1995): 1097.

[35] Charles de Secondat Baron de Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 163.

Allan takes this one step further. He argues that determining the meaning—and not just the legal upshots—of legislative enactments requires a moralized interpretive process.[36] Yet Allan's correct observation that even the determination of the meaning of enactments requires *interpretation* is insufficient to ground the conclusion that judges engaged in that task ought to be *interpretivist* judges, in Dworkin's and Allan's sense. The gap between communicative and legal content entails that there is always an open question about how that gap ought to be bridged. And perhaps the question about how to settle even communicative content is also open, and ought to be answered on the basis of broader normative concerns. An interpretivist decision procedure that asks how an enacted statute fits with the principles of political morality already embedded in the legal tradition and settles its meaning and impact by reference to those principles is one potential answer. But whether it is the right answer from the perspective of democratic considerations is unclear.

In democratic systems, legislation is an instrument of governance through deliberate rules enacted by elected representatives.[37] Democrats are typically concerned with the procedures that take place before the enactment of formal laws.[38] Yet early positivists were acutely aware of the fragility of democratic governance *after* enactment. Bentham—though not always an adherent of democracy[39]—was concerned with the power of judges and their use of natural law arguments to trump democratic enactments.[40] His fear was that *Judge & Co.* would undermine the possibility of governance through enacted law.[41] A positivist view empowers those with formal lawmaking powers at the expense of interpreters.

Moreover, because positivism sees questions about the ascertainment of the content of law as entirely contingent on social facts such as enactment, a positivist approach might give more control to enacting institutions—and, in the case of democracy, to democratically elected legislatures. A source-based account of legal content is less prone to allow the second-guessing of democratically enacted law from the standpoint of its (alleged) inconsistency with principles of political morality that, according to the interpreter, underlie legal practice.[42] It gives force to democratic concerns about the source of the rules that govern social life.[43] Respect to democracy as a form of political decision-making is, in the positivist framework, reinterpreted as respect to democratic authority in the process of legal interpretation.[44]

[36] Allan, "Law as a Branch of Morality," 4-5.
[37] Tom D. Campbell, *The Legal Theory of Ethical Positivism* (London: Routledge, 2016), 7.
[38] Jeremy Waldron, "Can There Be a Democratic Jurisprudence?," *Emory Law Journal* 58 (2009): 688.
[39] H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982), 66–71.
[40] Ronald Dworkin, "Thirty Years On," *Harvard Law Review* 115 (2002): 1677.
[41] Fernando Atria, *La Forma Del Derecho* (Madrid: Marcial Pons, 2016), 64.
[42] Waldron, "Can There Be a Democratic Jurisprudence?," 698.
[43] Ibid., 690.
[44] Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 381.

Just to avoid giving the wrong impression, I am aware that many of the claims I made in the two previous paragraphs are controversial—and much more would be needed to offer a fully articulated argument in support of them. But I want to suggest that, at least, there is a good argument to be made on behalf of positivism as a plausible candidate for the concept of law we ought to have given democratic considerations. Moreover, even if we might disagree about that suggestion, the disagreement shows the following. Even if Allan is right that considerations of political morality bear on our general approach to determining the meaning and the legal impact of legislative enactments, those considerations might recommend a non-interpretivist procedure to make that determination. Which approach is all things considered recommended by democratic considerations will turn on institutional, political, and empirical considerations, rather than on general, abstract jurisprudential observations about the gap between legislative enactment, communicative content, and legal content.

IV. The Bearing of Morality on Law: Justice, Disagreement, and Integrity

Allan argues that, in the process of identifying the meaning of legal enactments, interpreters rely on moral convictions that are themselves "filtered through principles and presumptions supported by existing law."[45] Justice "is secured, in detail, by the discipline of internal coherence: it is not a quality external to legal practice viewed merely as social fact."[46] Sorted through this practice-based moral filter, wicked enactments are either not law at all or subject to reinterpretation through general principles of law and justice.[47] These judgments of justice are not to be made "from a purely external viewpoint," but rather from a perspective that is internal to legal practice.[48] That internal perspective is committed to the Dworkinian notion of integrity,[49] and aims to ensure that the "public conception of justice" enshrined in law supersedes private judgments of justice.[50]

In this process, Allan argues, law sees itself not as subordinate to morality but as providing autonomous, genuinely binding reasons for action.[51] We treat litigants justly by resolving disputes in accordance to these public legal standards, which are "the measure of justice for the community."[52] Law is not obeyed in preference to justice, because in practice legal reasons replace private notions of justice as the basis for resolving disputes between equal citizens.[53]

Allan gets most of this, again, right. Contemporary social life is characterized by pervasive disagreement about justice. At the same time, we need determinate

[45] Allan, "Law as a Branch of Morality," 4.
[46] Ibid., 4.
[47] Ibid., 4.
[48] Ibid.
[49] Ibid., 5.
[50] Ibid.
[51] Ibid., 6.
[52] Ibid., 10.
[53] Ibid., 12.

and impartial solutions about the rules governing social interaction. Positive law aims to reach these solutions despite the underlying disagreement. Yet to achieve this goal, law must avoid replicating our fundamental moral and political disagreements. The problem that positive law solves, under this argument, is that moral truth—even *political*, not metaphysical, moral truth—never appears *in propria persona*, but always as someone's controversial view.[54] Law, as Allan writes, ought to displace private notions of justice in order to allow for coordinated behavior in conditions of equality.

Yet, for the purpose of achieving coordinated solutions despite widespread disagreement, a view of legal facts that sees them as substantively connected to morality, and the process for ascertaining them as partly moral, is badly suited. A Hobbesian approach, which sees the legal system as autonomous, with its own criteria of justice,[55] seems better suited. That approach highlights the distinction between judgments about the moral standing of a rule and its legal validity. While we ideally want law to be just, wise, efficient, etc., we first need it to act as a framework for decision-making that allows for coordinated social interaction.[56] Thus, the process of ascertaining legal facts ought to isolate, rather than replicate, our underlying disagreements.[57]

According to Dworkin, integrity requires the state to "act on a single, coherent set of principles even when its citizens are divided about . . . justice."[58] Integrity demands a coherent shared framework, so that coordination and the exercise of coercion operate, as much as possible, under a consistent set of standards.[59] But it is not clear whether a moral reading of the legal framework helps the cause of integrity. Under moralized approaches to legal reasoning, the interpreter is asked to become a "Hercules"[60] who identifies the principles that best justify the legal system and tests legal materials against those principles. However, in politically diverse and heterogeneous societies people disagree about political morality. Law's integrity depends on its ability to overcome this moral disagreement and coordinate behavior under a unified framework that does not simply replicate our disagreements.[61] There is a certain self-defeating character about Dworkinian interpretivism here: under conditions of political disagreement, integrity is undermined by a protestant approach to ascertaining the content of law, under which each citizen has to figure out by herself the principles of political morality that underlie and justify the law of her community.[62]

[54] Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), 111.
[55] Martin Loughlin, "The Political Jurisprudence of Thomas Hobbes," in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2012), 11. But see David Dyzenhaus, "Hobbes on the Authority of Law," in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2012), 186–209.
[56] Gerald Postema, "Law's Autonomy and Public Practical Reason," in *The Autonomy of Law: Essays on Legal Positivism*, ed. Robert P. George (Oxford: Oxford University Press, 1999), 79–80.
[57] Postema, 91.
[58] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 166.
[59] Ibid., 400.
[60] Ibid., 239–40.
[61] Jeremy Waldron, "Kant's Legal Positivism," *Harvard Law Review* 109 (1996): 1540.
[62] Dworkin, *Law's Empire*, 413.

Perhaps, in a society with greater substantive agreement about justice, integrity and Dworkinian interpretation could coexist. But there is still a problem here. If the interpreters with political or institutional salience agree, then their dominant interpretation would crowd out other voices and other views and undermine pluralism.[63] Assuming integrity is valuable, the only way in which law can speak with one voice, while respecting moral pluralism and ideological diversity, is for that voice to resist the language of moral ideals. Integrity can only be consistent with pluralism if law is conceived of in less moralized terms. Integrity might require, under this argument, an institutional arrangement that does not directly attempt to answer questions of political morality.[64] Integrity can only help us achieve justice if law displaces the quest for justice,[65] something that a positivist view is better suited to deliver than a non-positivist approach.

V. A Potential Problem: A Duty to Obey?

There is still a question that Allan—or, more broadly, the non-positivist—might want to ask about positivism.[66] Part of the appeal of one-system views, including Allan's, is that they provide a relatively direct account of law's normativity: legal obligations are just the moral obligations that arise out of legal practice.[67] According to Greenberg, for instance, legal obligations are a subset of moral obligations—those generated by the actions of legal institutions.[68]

The account fits comfortably with the fact that most citizens and—especially—legal officials see their legal obligations in reasonably well-ordered societies as real obligations that give them genuine reasons for action.[69] Moreover, a familiar way to state the content of the law as it applies to an individual's behavior is by making a facially normative statement,[70] such as: "under the law of X, A is under an obligation to φ."[71]

The non-positivist might argue that positivism has a harder time accommodating individuals' moral judgments and linguistic practices about legal normativity. For positivism, whether law is morally binding is a contingent matter.[72] If

[63] Andrei Marmor, "Integrity in Law's Empire" (unpublished manuscript, 2019), 13.
[64] Lewis Kornhauser, "Reconceptualizing the Concept of Law: An Achievement Concept of Law" (unpublished manuscript, 2020), 30–31.
[65] Gerald J. Postema, "Integrity: Justice in Workclothes," *Iowa Law Review* 82 (1997): 835.
[66] In the following argument, I am assuming that there is in fact a problem that "the normativity of law" raises for positivism. Not everyone agrees. See Luís Duarte d'Almeida, "Legal Statements and Normative Language," *Law and Philosophy* 30 (2011): 167–99; David Enoch, "Reason-Giving and the Law," in *Oxford Studies in Philosophy of Law*, ed. Leslie Green and Brian Leiter (Oxford: Oxford University Press, 2011), 1–38; Frederick Schauer, "On the Alleged Problem of Legal Normativity," in *The Normative Force of the Factual: Legal Philosophy Between Is and Ought*, ed. Nicoletta Bersier Ladavac, Christoph Bezemek, and Frederick Schauer, (New York: Springer International Publishing, 2019), 171–80.
[67] Scott Hershovitz, "The End of Jurisprudence," *The Yale Law Journal* 124 (2015): 1192.
[68] Greenberg, "The Moral Impact Theory of Law," 1290.
[69] Allan, "Law as a Branch of Morality," 11.
[70] Hart, *Essays on Bentham*, 144–45.
[71] Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), 170. For critical analysis, see Duarte d'Almeida, "Legal Statements and Normative Language."

law is perceived as binding then this is a fact to be taken into account by legal theory, as in Hart's notion of the internal point of view.[73] But this strategy leaves open the question of whether law is genuinely binding. This positivist strategy can seem puzzling for those operating within legal institutions. Law traffics in the language of duty and obligation and that language is taken seriously by many individuals. How can this be consistent with the claim that law is just a matter of social fact?[74]

The positivist view is simply that legal norms do not settle what we ought to do. The *oughts* of legal statements are not necessarily genuine *oughts*—although they will be perceived as such by those who adopt an internal point of view towards the legal system's directives. The aim of these legal *ought* statements and of their characterization as normative is simply to describe the role that legal norms play in the practical reasoning of individuals who take law as a guide for action.[75] In Razian terms, one can adopt a *detached* attitude towards these legal statements. Assuming this attitude, the lawyer can claim that a certain action is prohibited without that entailing that she endorses the law's prohibition.[76]

These positions are perfectly plausible, as far as they go. Still, non-positivists might claim that their account has an important advantage: it directly vindicates the facial meaning of legal *ought* statements, because it argues that legal obligation is a type of moral obligation, and statements of legal obligation are statements of moral obligation. Positivism's insistence on the distinction between legal reasons and genuine reasons for action, by contrast, leads quite easily to the conclusion that there is no general obligation to obey the law.[77] If that is correct, it might be tempting to think that, for positivism, those who have a respectful attitude towards law and its rules are simply mistaken or alienated.[78] The non-positivist, by contrast, seems to vindicate the attitudes of such citizens.

However, this would be too quick. In a somewhat cryptic paragraph, Raz writes:

> [R]espect is itself a reason for action. Those who respect the law have reasons which others have not. These are expressive reasons. They express ... respect for the law in obeying it, in respecting institutions and symbols connected with it, and in avoiding questioning it on every occasion.[79]

[72] Jules L. Coleman, "Rules and Social Facts," *Harvard Journal of Law & Public Policy* 14 (1991): 707.

[73] H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994), 89–92.

[74] As Allan writes, "there cannot be a general obligation to obey the law if the law may have any content, being dependent on officially authoritative pronouncement. Familiar attempts to locate a basis for such a general obligation in consent or fair play are not persuasive. If, then, we adhere to the standard picture, we cannot explain how law is supposed to be morally binding as our practice apparently assumes." Allan, "Law as a Branch of Morality," 6.

[75] Articulating this interpretation of Hart, Murphy, "The Political Question of The Concept of Law," 378.

[76] Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2d ed. (Oxford: Oxford University Press, 2009), 303–12. *See also* John Gardner, "Nearly Natural Law," in *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), 160.

[77] For the argument, Raz, *The Authority of Law*, chap. 12; M.B.E. Smith, "Is There a Prima Facie Obligation to Obey the Law?," *The Yale Law Journal* 82 (1973): 950–976.

[78] Raz, *The Authority of Law*, 252.

If this idea is correct, adopting an attitude of respect towards law generates reasons for action. If I respect law, then, I have a reason for acting in certain ways—more specifically, to act in the ways prescribed by law. There is something a little bit mysterious about this suggestion. How can the fact that I adopt a certain attitude that I could perfectly not adopt change the moral reasons I have? According to Gardner, the structure is similar to the case of reasons that arise out of friendship. If I am a someone's friend, then this gives me reasons (say, reasons to care intensely about their wellbeing, reasons to be particularly careful about hurting their feelings, etc.) that I would not otherwise have.[80] Something similar might be happening with respect for law, according to Raz.[81] Just like being a friend gives us reasons to do what we would otherwise have no reason to do, being respectful towards law might also be able to generate these reasons.[82]

I am not sure the language of *respect* is particularly apt in this context. Perhaps we should replace it with the idea of *commitment*. Respect might give me reasons, but the reasons are easily outweighed. There is also something quite impersonal about the idea of respect. I can respect your religion even though I believe it is false. Can I similarly respect the law even though I believe it is unjust or illegitimate? Perhaps, but if that is the case then the non-positivist seems to be right that positivism cannot provide a straightforward account of most citizens' and legal officials' attitudes towards law. A commitment, on the other hand, is personal. *I* am committed to certain things: relationships, professional projects, etc.[83] Commitments give agents reasons to adopt certain attitudes and to engage in certain activities that would be otherwise supererogatory or strange.[84] Similarly, a commitment to law gives us, as agents, genuine reasons to do as the law requires, reasons that we would otherwise not have (we might still have *other* reasons to do what the law requires, of course). Importantly, our commitment might not be based on good moral reasons. But this is beside the point. Just like other normative phenomena, such as promises, can ground obligations even though there was no good reason for making the promise in the first place, a commitment can generate reasons to act in certain ways even if the commitment is not based on correct reasons.[85] Importantly, if we are committed to law for the wrong reasons then this is something morally problematic, since it would mean we are deceived or alienated. Being bound by promises we made for wrong reasons can also be problematic. But this fact is compatible with commitments and promises generating genuine reasons for action.[86]

The idea of commitment as the ground of a moral duty to obey the law provides a straightforward positivist explanation for most citizens' and officials'

[79] Ibid., 259.
[80] John Gardner, "Law as a Leap of Faith," in *Law as a Leap of Faith*, 5–6.
[81] Raz, *The Authority of Law*, 259.
[82] Gardner, "Law as a Leap of Faith," 12.
[83] Ruth Chang, "Commitments, Reasons, and the Will," in *Oxford Studies in Metaethics, Volume 8*, ed. Russ Shafer-Landau (Oxford: Oxford University Press, 2013), 77.
[84] Ibid., 74.
[85] See Gardner, "Law as a Leap of Faith," 12–13.
[86] I leave aside, for now, questions about the weight and defeasibility of these reasons.

views about law's bindingness, and for how these citizens and officials might actually have a duty to obey the law. It also explains why citizens in general might have less of a duty than legal officials.[87] After all, the latter—but not the former—are situated in an institutional position that makes the existence of a commitment to law quite likely (or even necessary, given oaths and other professional requirements). The view can also explain why those who benefit the most from legal ordering might have genuine reasons for acting as law tells them to, while others—those who suffer injustice and abuse through law—might lack any sort of similar reason.

If this is correct, two upshots follow. First, whether law generates genuine obligations is, as the positivist tradition argues, a contingent question, one that depends on the attitudes and, more specifically, commitments of the relevant population. The reasons underlying those commitments will in part depend, as Allan correctly notes, on the legal practice's own evaluative attitudes, standards on correctness, and habits. Second, the stability of governance through law requires enough people to adopt these attitudes and commitments towards law. Unless we are willing to engage in a form of Government-house utilitarianism and deceive citizens so that they commit to law on the basis of a mistaken or alienated allegiance,[88] this means that a stable legal regime ought to be valuable, just, and so on. In the circumstances of politics, amidst disagreement and within a democratic system, this might require, as I have argued, a legal regime that looks like the positivist rather than the non-positivist picture.

VI. Conclusion

T. R. S. Allan's contribution is right about several things. First, as he argues, the standards of moral evaluation that we bring to bear on legal institutions are themselves partly generated by those institutions. Law and morality are never crisply separated in the actual ongoing historical traditions of legal practice. Second, he is entirely right when he notes that there is a gap between the brute fact of legislative enactment and its meaning, and that incorporating democratic enactments within law requires interpretation. Third, Allan correctly notes that part of the moral value of law and legal institutions is that they allow us to coordinate action and resolve disputes in impartial ways by establishing public standards of correctness that supersede private judgments of justice.

Nevertheless, the first claim is compatible with the analytical positivist view of law that sees it as ultimately dependent on social and historical facts. The second and third claims strengthen, as I have argued, the normative positivist claim about the political virtue of a less moralized approach for ascertaining law than Dworkinian interpretivism or other non-positivist procedures.

[87] As argued by Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014).

[88] Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985), 108–10.

I have also argued that, despite the appearances, positivism can provide—through the notion of commitment—a relatively direct and straightforward explanation of the normativity of law which fits comfortably with the fact that, at least in well-ordered societies, most citizens and officials see legal obligations as genuine obligations.

Whatever the merits of Allan's account as a non-positivist view vis-à-vis Greenberg's moral impact theory, its central insights are entirely compatible with, and in some cases reinforce, a positivist view of law.