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Not a set of norms or a set of practices

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ABSTRACT
In this paper, we consider the 'eliminativist' character of Hershovitz's non-positivist theory. Focusing on chapter 5 of *Law Is A Moral Practice*, we ask whether Hershovitz's theory takes full advantage of the explanatory advantages of viewing non-positivism in explicitly eliminativist terms.

KEYWORDS
Non-positivism; jurisprudence; eliminativism

1. Introduction

In recent years, there has been a movement towards viewing general jurisprudence in *eliminativist* terms, or at least towards thinking of contemporary non-positivism in those terms. As applied to legal philosophy, an eliminativist method is generally viewed one that eliminates talk of the 'nature' of law,[1] or of law understood in a 'doctrinal' sense,[2] from jurisprudential inquiry. In earlier work, Scott Hershovitz explicitly notes that his brand of non-positivism might be considered a version of eliminativism.[3] In *Law Is A Moral Practice*, Hershovitz backs away from associating his own theory with eliminativism as it has been developed.[4] Nonetheless, his central claim – that law is not a separate domain of normativity to morality – could certainly still be characterised as 'eliminativist' in spirit.

It may be useful, therefore, to consider whether Hershovitz's theory reaps the benefits that eliminativism is supposed to yield. First, we will clarify what an eliminativist approach to jurisprudence entails. We note that there is some ambiguity in whether eliminativism is a methodology that can be adopted by any theory of general jurisprudence, or whether it is a substantive consequence *of* non-positivist theories specifically. This might help explain Hershovitz's ambivalence towards eliminativism. We focus on eliminativism as a substantive consequence of non-positivist theories, rather than a methodological starting point. We ask what explanatory upshots are revealed when we focus on

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[1]Lewis Kornhauser, 'Doing Without the Concept of Law' (NYU School of Law, Public Law Research Paper No. 15–33, 2015) <https://ssrn.com/abstract=2640605>; Hillary Nye, 'Does Law "Exist"? Eliminativism in Legal Philosophy' (2022) 15(1) Washington University Jurisprudence Review 29. See also Nye's contribution to this special issue.

[2]Murphy, who rejects the view, sets out one of the earlier elaborations of eliminativism in law. Liam Murphy, *What Makes Law* (CUP 2014) 77.

[3]Scott Hershovitz, 'The End of Jurisprudence' (2015) 124(4) Yale Law Journal 1160, 1193–94.

[4]Scott Hershovitz, *Law Is A Moral Practice* (HUP 2023) 195.

the eliminativist character of a non-positivist theory like Hershovitz's. We then point to two aspects of Hershovitz's theory that, in our view, fail to take full advantage of the explanatory upshots of this kind of eliminativism. We conclude with some possible paths forward.

2. Eliminativism and non-positivism

In other branches of philosophy, eliminativism is a methodological approach that entails the elimination either of certain *entities*, or the *talk of* those entities. 'Entity eliminativists', according to Irvine and Spevak:

> [C]laim that we should expel a specific entity from the catalogue of entities assumed to exist. This may be a matter of removing a particular individual from our ontology (e.g., Zeus), but it may also involve removing a property (e.g., being phlogisticated), an event (e.g., spontaneous generation), a kind (e.g., ghosts), or a process (e.g., extrasensory perception).[5]

A 'discourse eliminativist', by contrast:

> [s]eeks to rid science of certain ways of talking, thinking, and acting (e.g., talk about, and practices that attempt to investigate, gods, being phlogisticated, spontaneous generation, ghosts, or extrasensory perception).[6]

Legal philosophers engaging with eliminativism have generally stressed a commitment to the discourse variation. Lewis Kornhauser distinguishes between weak, moderately strong and strong forms of eliminativism.[7] Hillary Nye explicitly cautions against the full-throated elimination of entities in legal philosophy, preferring to call for elimination of the *talk* of certain entities.[8]

What sort of talk, then, is being eliminated? Kornhauser suggests that we eliminate talk of a 'doctrinal' concept of law.[9] Roughly, this means that we do without the idea that there is a body of 'law' that exists between the actions of legal institutions and the obligations that obtain in virtue of those actions:

> In the standard model, every decision maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision maker need only undertake a one-step decision procedure: weigh all reasons one has at that step. In this one-step procedure, the agent consults legal materials through which all agents coordinate their activity; these legal materials, however, are not legal norms in the conventional sense.[10]

On this view, we can replace questions about the doctrinal concept of law with questions about, for instance, the normative value of legality, predictive questions about how legal officials will decide cases, questions about 'folk' understandings of law etc.

[5]Elizabeth Irvine and Mark Sprevak, 'Eliminativism about Consciousness' in Uriah Kriegel (ed), *The Oxford Handbook of the Philosophy of Consciousness* (OUP 2020) 349.
[6]ibid.
[7]Roughly, the 'weak' and 'moderately strong' eliminativism map onto 'discourse eliminativism'. 'Weak' holds that we *can* do without talk of certain entities, while moderately strong holds that *it would be better* to do without such talk. 'Strong eliminativism' is the same as 'entity eliminativism'.
[8]Nye (n 1) 53.
[9]Kornhauser (n 1).
[10]ibid 14–15.

Nye refines this approach by focussing on eliminating questions about the *nature* of law. She argues that arguments about the nature of law are intractable because they are insensitive to our experiences: 'No example can make a difference here. The question cannot be resolved by looking at our experience. The theoretical standpoint takes priority and determines how we should categorize particulars'.[11]

There is some ambiguity over whether eliminativism should be considered a methodological approach open to any theory of general jurisprudence or, instead, a substantive position of non-positivism.[12] Nye presents it as the former, she urges both positivists and non-positivists to eliminate talk of the nature of law. This is fine for non-positivism, which can focus on first-order moral questions about legal obligation, which it views as genuine moral obligations. The difficulty, however, with viewing eliminativism as a jurisprudentially neutral methodological approach is that is difficult to see what is left for positivists if talk of the 'nature' of law is eliminated.

Positivism starts with the notion that law has a nature that can be accessed through reflection on our shared understanding of the concept. Non-positivism rejects this starting point, focussing instead on first-order moral accounts of legal practice.[13] In this sense, non-positivism rejects talk of the 'nature' of law, and it rejects the 'doctrinal' concept of law inasmuch as this is taken to refer to a system of norms separate from morality. Positivists may view it as begging the question, however, to stipulate that a substantive non-positivist commitment is a methodological starting point for any theory of general jurisprudence.

Space prohibits us from exploring this issue fully here. Regardless, however, if eliminativism is a methodological approach open to any theory, we can say that it at least restates an important aspect of non-positivist theories. Non-positivists have sought to demonstrate the pleonastic status of a self-subsisting legal realm, whose norms are accessible through conceptual analysis.[14] Mark Greenberg's 'moral impact theory' focuses on the genuine moral obligations that obtain in virtue of the actions of legal institutions.[15] Dworkin's theory, similarly, is best understood as engaged not in a rigidified analysis of the 'nature' of law, but as an explanation of the value of legality, which is understood as a moral test concerning the permissible enforcement of demands against other members of a political community.[16]

[11] Nye (n 1) 40.

[12] Some caution is needed in this context: eliminativist strategies can and have been employed in a neutral, methodological manner with respect to a variety of legal items, e.g. by Kelsen when he proposes to eliminate 'state' or 'legal person' in favour of 'norms'; see Hans Kelsen, *Introduction to the Problems of Legal Theory* (Clarendon Press 1992). Our contention here is with eliminativism about the 'nature of law', as employed within the debate between positivism and anti-positivism. In this respect we argue that eliminativism entails a substantive, non-positivist view.

[13] For a clear demarcation of these starting points, see Nicos Stavropoulos, 'Obligations, Interpretivism and the Legal Point of View' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

[14] Different strategies that could each be viewed as eliminativist can and have been adopted. Some appeal to metaphysics to explain how law, being a derivative (or non-fundamental) feature of reality, obtains in virtue of more fundamental moral facts, on which it depends. This approach seeks to disable uncritical preconceptions of law's 'nature' which separate law from the rest of reality and portray it as some *sui generis*, self-referential realm. See Mark Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157; George Pavlakos, 'The Kantian Legal Relation as Radical Non-Positivism' in M Brecher and P-A Hirsch (eds), *Law and Morality in Kant* (CUP forthcoming). Other approaches urge us to forego metaphysical analysis and skip straight to first order moral theory about the value of legality, and the obligations that obtain in virtue of this value operating in particular contexts. Ronald Dworkin, *Justice for Hedgehogs* (HUP 2011); George Letsas, 'How to Argue for Law's Full-Blooded Normativity' in D Plunkett, S Shapiro and K Toh (eds) *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019); Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22(30) Ratio Juris 339; Nye (n 1).

[15] Greenberg, 'The Moral Impact Theory of Law' (2014) 123(5) Yale Law Journal 1288.

[16] Ronald Dworkin, *Law's Empire* (Hart 1986). Nicos Stavropoulos, 'Legal Interpretivism' [2021] Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/>.

Hershovitz's own earlier work has been labelled as 'eliminativist' in spirit. In an influential article, he urges us to do away with the view that there are distinctly 'legal' rights, obligations, powers and privileges, noting that his theory could be viewed as a form of eliminativism.[17] In *Law Is A Moral Practice*, he is more cautious on this point, noting that he does not think that we should abandon talk about 'what the law requires', just that 'we have to be careful in the way we interpret such talk'.[18]

In truth this is fairly consistent with what eliminativist like Nye and Kornhauser advocate. They don't argue that we should, in our ordinary lives, stop talking about what the law requires. They simply argue that we can disambiguate such talk into more specific questions capable of yielding deeper insights about legal practice.

Perhaps Hershovitz's ambivalence here is the result of ambiguity over whether eliminativism is a methodology or a substantive consequence of non-positivism. If the former, it may seem stipulative and question-begging against positivist opponents of his theory. If it's the latter, it may simply be adding unnecessary terminological baggage to his theory, redescribing aspects of non-positivist theory that may not need it.

Whatever the case may be, in *Law Is A Moral Practice* Hershovitz continues and develops his earlier insistence that we disambiguate the different questions we can ask about legal practice and focus on an analysis of the moral difference that law makes. Whether or not general jurisprudence should do without talk of the 'nature' of law, or law as a 'doctrinal' concept of law, Hershovitz's theory can. In this sense, he continues to highlight the eliminativist aspect of contemporary non-positivism.

In the rest of this paper, we focus on the eliminativist character of non-positivism, rather than on eliminativism as a methodology in general jurisprudence. This may strip eliminativism of its original ambition of helping us escape the 'fly bottle', but it may help deepen our understanding of non-positivist theories like Hershovitz's. Focus on the eliminativist aspect of non-positivism can help deflate certain objections to non-positivism.[19] For example, a common line of attack is that contemporary non-positivist theories are either under- or over-inclusive, because they either fail to explain why paradigmatically 'legal' obligations are such, or because they count as 'legal' obligations that clearly are not. Once we remove questions about the 'nature' of law from the picture, the question of whether a certain obligation counts as 'legal' loses its significance.[20] Such 'boundary questions' simply do not matter, from the perspective of an eliminativist-minded non-positivism.[21] This, in our view, is the major upshot of the approach.

In the next section, we consider Hershovitz's approach to answering these sorts of critiques. We argue that rather than relying on the obvious explanatory tools that eliminativism offers to deflate the objections, he instead falls back on an idiosyncratic theory of moral obligation to show that his theory can meet the objections. In doing so, he implicitly acknowledges the force of the objection. This risks taking us back to unhelpful

[17]He also seems to view this eliminativism as a methodological approach that is equally open both to positivists and non-positivists, and thus as a way out of the 'fly bottle' of the Hart-Dworkin debate. Scott Hershovitz, 'The End of Jurisprudence' (2015) 124(4) Yale Law Journal 1160, 1193–94.

[18]Hershovitz (n 4) 195.

[19]For an elaboration of these objections, see Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) 26 Legal Theory 181.

[20]Conor Crummey, 'One-System Integrity and the Legal Domain of Morality' (2022) 28(4) Legal Theory 269.

[21]These sorts of boundary questions are the ones that Dworkin critiqued as 'taxonomic positivism' Ronald Dworkin, *Justice in Robes* (HUP 2006) 26–27.

questions about the *true nature* of law, the avoidance of which is one of the major boons of his theory.

3. Hershovitz's theory of moral obligation

One argument levelled against contemporary non-positivism is that it is under-inclusive, because it fails to count paradigmatically *legal* obligations as such.[22] The 'breaking the speed limit at night' example that Hershovitz considers in Chapter 5 of his book is a variation of this argument. As Hershovitz articulates the example, one has an obligation to stop, even where one *ought not* stop as an all-things-considered matter.[23] This example presents an apparent challenge to his theory (and to non-positivist theories generally). Intuitively, so the objection goes, we have a *legal* obligation to stop, but no moral obligation to do so. Thus, conceiving of legal obligations as genuine moral ones seems to leave us without the resources to explain such examples.

Hershovitz's strategy is to put forward a particular understanding of the structure of moral obligation which, he believes, is not vulnerable to the objection. He argues that in the specific example considered: (i) we *do* have a moral obligation to stop; but that (ii) this is consistent with believing that it would not be *wrong*, as an all-things-considered matter, to fail to stop. He says the following:

> […] we can ask two questions about any act: (1) is it wrong? and (2) will anyone be wronged by it? Smith interprets the question whether we have a general prima facie obligation to obey the law to invite the first sort of inquiry. When he rephrases it, he comes out with this: "Is there any society in which mere illegality is a moral reason for an act's being wrong?" No, Smith says, and he's right about that. But we could instead interpret the question to invite the second sort of inquiry. That is, we could understand the question to ask whether illegal acts are wrongs, not whether they are wrong.[24]

And:

> On this way of thinking, obligations are relationships. And […] the fact that a person is, in this sense, obligated to do a thing does not mean that she ought to do it, or even that it would be wrong not to do it. All it means is that not doing it would constitute a wrong to the person to whom she owes the obligation. […] The reason for this is that when you have an obligation, you ought to do what it requires, all else equal. But all else is not always equal. Sometimes, as we've seen, the right thing to do is to wrong someone, as when I default on my debt to pay for my kid's medical care.[25]

There are a couple of moves made in this account of obligation. First, it seems to draw on the kind of 'generalist' account of rights associated with Judith Jarvis Thomson.[26] On this view, the existence of a particular right underdetermines whether one has an obligation to uphold that right. For example, killing in self-defence, on this understanding, violates the right to life of one's attacker, but this right is vulnerable to being outweighed by other moral considerations.

[22]See e.g. Dindjer (n 18).
[23]Similarly, it might be the case that one ought to default (breaching an obligation to the debtor) in order to pay for a child's medical care. Hershovitz (n 4) 121.
[24]Hershovitz (n 4) 122.
[25]ibid 129.
[26]Judith Jarvis Thomson, *The Realm of Rights* (HUP 1992).

This is contrasted with 'specificationism'. The basic idea with specificationism is that the content of a right is not fixed, but rather depends on the context in which that right operates.[27] For example, while the right to life affords normative protection against being killed in most circumstances, specificationism holds that that right affords no such protection to an attacker who is threatening the life of another.[28] With killing in self-defence, on this view, the attacker's right to life is not violated, because the content of that right depends on the context in which it operates, and on the other moral principles in play.

This move allows Hershovitz to define obligations as *relational*, or as 'relationships' in his terms. This suggestion implies something like a split account of morality: there are moral obligations, which are relational, and there is the overall rightness or wrongness of an act, which is decided by weighing up any existing obligations plus other (presumably non-relational?) principles in play. To fail to fulfil an obligation is to *wrong* a person with whom one is in a specific relationship, but to commit such a wrong is not necessarily to act wrongly.

Using this theory of moral obligation, Hershovitz seeks to answer the stop sign problem. In this instance, we owe a genuine moral obligation to the State to stop, but this obligation underdetermines whether we really *ought to* stop as an all-things-considered matter. Legal obligations are genuine moral ones, but they underdetermine the overall rightness or wrongness of an action.

We will not offer a substantive analysis of this view of moral obligation here. We will note, however, that it is idiosyncratic and requires adherents to the broader theory of law as a moral practice to accept controversial conclusions about the structure of morality. First, it requires them to accept a generalist view of moral obligation that is far from ubiquitously accepted.[29] Secondly it seems at odds with the widespread view that the morality of human interaction is relational through and through, and so requires the rejection of these views.[30] Thirdly, it requires the acceptance of the controversial view that legal obligations are relational duties owed *to the State*, rather than, for example, associative obligations owed to fellow members of a political community. Fourthly, the State on this view enjoys the moral standing to punish us even where we have not acted wrongly.[31]

There is, in our view, an easier and more obvious strategy open to Hershovitz to deal with challenges such as the *mala prohibita* examples. This is simply to say that in such examples, it is open to us to say that we have *no legal obligation* to stop at the sign. It is unlikely that this will be the case in reality. There will usually always be the possibility of a pedestrian, or another car, or an onlooker to whom we set a bad example. But suppose we grant that there really are no moral considerations in favour of stopping.[32] We have no legal obligation to stop. What's the big deal in saying that? This is the

[27]Russ Shafer-Landau, 'Specifying Absolute Rights' (1995) 37 Arizona Law Review 209; John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28(1) OJLS 127, 128.

[28]Raz's interest-based theory of rights, by contrast, stands in opposition to specificationism. Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

[29]The unity of value thesis in Dworkin's work is specificationist in spirit, for instance, so adherents of that view may struggle to remain on board at this point.

[30]Prominent exponents of this view are Christine Korsgaard, *Creating the Kingdom of Ends* (CUP 1996) and TM Scanlon, *What We Owe to Each Other* (HUP 1999).

[31]Hershovitz (n 4) 131–32.

[32]Conversely, if it turned out that morality requires us to stop, then we would be under a legal obligation to stop.

sort of argument that we can make if we view legal obligations as genuine moral obligations, because moral obligations are always sensitive to context.[33] We can usually have an obligation to stop at stop signs, but we might not always. It is, or should be, one of the explanatory advantages of theories like Hershovitz's, which highlight and make explicit the eliminativist character of non-positivism, that such explanations remain on the table.

The reason that the example is thought to have force is that it clashes with common intuitions about legal obligations. Everyone thinks we have a *legal* obligation to stop if the sign says so, don't they? No one thinks that legal obligations are context-sensitive, surely? But this objection has force only if we take questions about the *nature* of law to be primitive (not sensitive to explanation); questions that eliminativism rejects. If we are interested in asking questions about the moral value of legality and the genuine moral obligations that obtain in virtue of legal practice, well then of course legal obligations are sensitive to context; of course we might sometimes have to stop and sometimes be free to continue. 'But that's not what law is *really* like' is an objection that Hershovitz's theory should rule out from the beginning, given its insistence on stratifying the different sorts of questions about law that we can ask.

Instead of deflating the objection by drawing on one of the main explanatory upshots of his own theory, Hershovitz accepts the force of the intuition, and seeks to show that his theory is consistent with the objection, by drawing on a controversial theory of moral obligation. This seems to us an unnecessary concession, one that ends up saddling the theory with unnecessary baggage.

4. Legal practices and legal relations

A second issue with the overall account of law as a moral practice that comes to the fore in Chapter 5 is the focus on the 'moral consequences of legal practices'. This invites the question: what counts as a legal practice? The implication is that there is a specific kind of practice – a legal one – and if a practice belongs to this set, it deserves our attention when we are thinking normatively about legal practice. Consider again Hershovitz's account of legal obligations as wrongs that we commit against the State. The danger is that we collapse further into the boundary questions about what counts as 'legal'; just now we talk about practices instead of obligations.

We think that Hershovitz's account has the resources to escape this problem, but more detail needs to be added. We would like to help tighten the argument not so much by pursuing the obvious question of 'what counts as a legal practice?', but rather by exploring the different question: 'who cares?' In other words, we suggest that the move should not be just away from thinking about 'what is law' and towards thinking about 'what are the moral consequences of *legal practices*', because 'legal practices' is still pregnant with that 'what is law' question. If we unpack it, what we are really interested in are specific kinds of moral relations between persons.

The key eliminativist move in this context is to resist the idea that such relations among the interacting parties acquire legal significance *because* they are picked out by some antecedent criterion of legality, which obtains independently of the relation.

[33]Crummey (n 20) 276–81.

Rather, legal relations are *morally* distinct in some way that we would be justified in grouping them as 'legal', but the label 'legal' isn't terribly significant except as a classifier of moral distinctness. To that extent, 'legal relations' escape 'subsumption' under an explanation in terms of more fundamental legal entities, such as legal rules or practices (because, this is the radical claim, there are none!).[34]

But contemporary positivism and some versions of non-positivism both assume that legal obligations enjoy explanatory priority over legal relations. In other words that legal obligations explain the existence of legal relations, rather than the other way around. On the positivist picture, law practices explain legal obligations and those obligations make it the case that legal relations obtain. On several contemporary non-positivist pictures, legal relations similarly cannot obtain independently of law practices.[35] On those pictures, law practices and moral principles or facts together explain the existence of legal rights and obligations. Either understanding of the role of law practices forecloses the obtaining of legal relations independently of such law practices, and therefore leaves relations no role to play in the explanation of legal obligations, suggesting instead that any explanation of the latter necessarily rests on facts about law practices. The question 'what counts as a legal practice' – the sort of question that eliminativism is supposed to help us avoid - becomes all-important.

A better strategy for a fully-fledged eliminativist account of law, we suggest, is to provide an account of legal obligation which starts with legal relations. When bringing together our conclusions from this and the previous part, it seems that Hershovitz's eliminativist strategy could benefit from a clearer picture of the normative relationships that generate legal obligations. Given that the 'relational' element in legal relations cannot, on pain of a vicious circle, be grounded in more fundamental legal materials, it should be developed at the level of moral principle. A possibility might be to point at some general, structural moral principle which subjects interactions between persons to interpersonal demands ('what we owe to each other'), which in turn become the source of legal obligation *qua* relational moral obligation.[36] Although the precise formulation of the relevant principle may remain open for now, the proof of its existence can be safely discerned: it is the conclusion of an abductive argument that purports to explain current practice and our knowledge of legal obligations (on many of which there is widespread agreement).

Combined with the points developed in the previous section, our suggestion is that Hershovitz steer away from the idiosyncratic view of moral obligation discussed in that previous section, and extend his relational account to all moral obligation, in a manner that desists appeal to specifically legal facts or practices for the explanation of

[34]We have argued for this point elsewhere by developing distinct but related strategies; see Crummey (n 20), and Pavlakos (n 14).

[35]The authors differ on which versions of non-positivism are vulnerable to this criticism, if the premises of the criticism are accepted. We needn't get too deep in the internecine weeds at present. Sufficed to note that some versions of non-positivism seem vulnerable. Greenberg's moral impact theory, for example, defines legal obligations as obligations that obtain in virtue of the actions of legal institutions (in other words legal practices). It seems to follow from that theory that the question of what counts as a legal *practice* comes prior any question about what kinds of moral relations are constituted by that practice, see (n 35).

[36]It is not our aim to come across as too iconoclastic here: the history of moral and legal philosophy abounds with references and accounts of such structural principles, often grouped together under the heading of 'external freedom'. A classic instance of such an account is offered by Immanuel Kant, 'The Metaphysics of Morals' in M Gregor (ed), *The Cambridge Edition of the Works of Immanuel Kant*: *Practical Philosophy* (CUP 1996).

legal obligation. In this picture, a rich variety of interactions among persons can trigger moral relationships which become the source of the moral obligations that describe our legal rights and duties. 'Relationality', as the valuable element for the explanation of legal obligation identified by Hershovitz, attaches to a wide range of interactions, when they are viewed in the light of an abstract structural principle about what we owe to each other.[37] What that structural principle is, and what the resulting legal relation would look like, should be the focus of non-positivist theories. On this outlook, any practice that has the effect of adjusting or developing these relational moral obligations would count as legal.

5. Conclusion: from 'the moral difference that law makes' to 'the legal difference that morality makes'

Another way of putting the point developed above is this: the real question that Hershovitz's theory seeks to orient jurisprudence towards is not 'what is the moral difference that law makes?', but rather 'what is the legal difference that morality makes?' In other words, what is morally distinct about legal practice (as distinct from practice*s*)?

Hershovitz[38] critiques Smith for seeking a monist view of the difference law makes, and we get the impression that he sees it as a virtue of his theory that it accounts for all the various impacts law can have on our obligations. But we wonder if this leads him to miss what is *morally distinct* about law. Or rather, he thinks that nothing really is morally distinct about law, which is itself an answer to that question, but it seems to us that there is a *general* way in which law makes a moral difference. And again we miss this if we focus on practices, because we think what is distinctive about law is the particular kind of practice, and then we look at all the moral differences those practices can make. Whereas we want to suggest that we start from the opposite direction; i.e., we start from the specific kind of moral relation, and then we say that any practice that develops that relation is a *legal* one.

More broadly, we want to suggest that the question about the moral difference that law makes is wanting as a starting point for a thoroughly eliminativist strategy. This question has been often regarded as a test for the viability of non-positivist accounts of law, but we suspect that it might actually end up leading them astray in conceding too much to positivism. For, the question assumes that there is something like a legal practice, which can be individuated independently of any background moral considerations, and then proceeds to assign value to it, usually by gauging its effects/impact on the pre-existing background moral relations. Circularity problems aside, the implied dialectic is directly in conflict with the eliminativist tenet that no reference to legal entities is needed to explain legal obligation.

Conversely, with an eye to taking eliminativism to its natural conclusion, we want to encourage Hershovitz away from his current framing of looking at 'the ways in which particular legal practices affect our obligations' and think instead about the particular

[37] An example of such a structural principle is Kant's Universal Principle of Right which sets out conditions of external freedom: 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law', see Kant (n 37) 6:230. For a contemporary version of Kantian non-positivism, see Pavlakos (n 14).

[38] Hershovitz (n 4) 113.

kinds of relations that constitute those obligations. This would suggest a replacement of the question about law's moral difference, with its inverse one: about the *legal* difference our moral relations make in the landscape of our social interactions and practices. On this outlook, among the plurality of social habits and practices, certain ones are 'selected' by relationships that instantiate values of integrity and independence or generate otherwise conditions of external freedom in interpersonal contexts. The selection obtains in virtue of the fact that such practices develop and implement those moral relations and the obligations engendered by them. It is such practices, that lie downstream of moral relations, are best characterised as legal. An additional advantage of this picture is that it combines a *monist* account of moral relations with a *pluralist* account of legal practice, as encompassing any social practice that can develop the relevant moral relations.

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