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In defence of a distinctively legal domain

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ABSTRACT

In *Law as a Moral Practice*, Scott Hershovitz defends the pluralist view that there are many sets of legal norms which we can validly employ for different purposes, none of which qualifies as uniquely legal. He claims, further, that there is no set of moral rights and duties that is distinctly legal either, because the domain of morality is unified. I argue, against Hershovitz, that the existence of different sets of norms within legal practice does not mean that no set is basic, or fundamental. There is arguably one set (the actual moral rights and duties that law re-arranges) which is fundamental, and from which all the other sets are derivative. I argue, moreover, that we have strong deontological reasons to doubt that the domain of morality is unified. If political morality comprises distinct domains, not collapsible to a single moral concern, then the possibility of a distinctively legal domain of morality remains open.

KEYWORDS

Jurisprudence; legal positivism; interpretivism; eliminativism; moral monism

The publication of Scott Hershovitz's much-anticipated book, *Law as a Moral Practice*, is undoubtedly a pivotal moment in the field of Anglo-American jurisprudence. In the last 10 years or so, jurisprudence has sadly suffered the loss of thinkers who, no less through their personality than through their paradigm-shifting work, defined and dominated the field. Hershovitz is part of a very fortunate generation of legal philosophers who were taught and mentored by these towering figures. He was close enough to them personally to benefit first-hand from their intellectual genius, but always critical enough to tread his own path. *Law as a Moral Practice*, Hershovitz's first book in legal theory, continues the tradition of this golden era by taking law seriously as an object of philosophical inquiry. The book is unique in its combination of analytical rigour, sophistication, philosophical imagination, and humour. If anyone ever seriously doubted that jurisprudence is an interesting philosophical subject, I would urge them to order this book on next-day delivery.

As a fellow traveller, I agree with many of the claims that Hershovitz makes in the book. There is, however, one aspect of his account of law as a moral practice that I still find puzzling, and it is his polemic against the idea that there are distinctively legal rights and wrongs. This polemic takes centre-stage in the book, and it is presented

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as an invitation to rethink the field of jurisprudence with a view to liberating it from confusion. I genuinely wonder, however, whether this polemic is necessary and how much it saves us from confusion, rather than risks creating new ones.

Law, Hershovitz claims, is a moral practice in the simple sense that legal practice is, like promising, 'tools for adjusting our moral relationships' (chapter 1, p. 14). He means by this claim that law is intended to make a moral difference by creating new rights and wrongs ('who owes what to whom') and that it routinely succeeds in doing so, even though the created obligations need not be identical to the ones intended and even though some of them should never have been created. He adds that he does not use the word 'practice' in a theory-laden way. A practice, he says 'is something more modest: a repeated action'.

Hershovitz moves on to combine this claim about legal practice with a rejection of conceptual imperialism. Since his seminal article bearing the inspired title 'The End of Jurisprudence', Hershovitz has pressed the line that there are many concepts of law, and we employ them validly for different purposes. In fact, he prefers to avoid talk of 'concepts' of law altogether. There are many legal 'norms', he argues, and a different set is picked out depending on the purposes of a given speaker. He rejects, that is, adjectival imperialism too. There is a set of legal norms (LN1) that is picked out when one is interested in referring to the norms promulgated in a legal practice. There is a different set of legal norms (LN2), picked out when one is interested in referring to the norms enforced in a legal practice. There is yet another set of legal norms, picked out when one is interested in referring to the norms that courts ought to enforce in a legal practice (LN3). And there are many other sets (LN4, LN5 …).[1] None of these sets are co-extensive and all are valid ways of talking according to Hershovitz; there is no such thing as *the* set of legal norms, what we might call LN*. Hershovitz notes, in passing, that if he had to choose, he would go for LN3, which is Ronald Dworkin's position.

The picture that emerges from this account is one where there is one single practice (a repeated action) that we use for the purpose of rearranging our moral relationships, and – within that practice – there are many concepts of law (or sets of legal norms); these are not co-extensive and do not compete with one another. The picture, put simply, is: one practice – many legal concepts. It is this picture that I want to challenge.

I believe Hershovitz is right that we might be interested in different questions regarding law-related *stuff*, for want of a better term, and his examples hammer the point home. But I do not think it follows that there no such thing as *the* concept of law, or distinctively legal rights and duties (LN*). Talk of norms allows Hershovitz to compare different 'sets' as valid and compatible ways of using the word law. But once we put the matter in terms of rights and wrongs, it becomes clear that there is only one *core* or *basic* notion, of which all the other ones are derivative. Why so?

If legal practice is, as Hershovitz claims, a tool to re-arrange our moral relationship then the main issue about that practice is the moral rights and wrongs that are re-

[1]It is not clear whether Hershovitz takes the sequence to be infinite. I suppose that it must be. I might be interested in the legal norms a particular group people *think* are bound by; legal norms a particular group of people *wished* they were bound by ('there should be a law against this'); legal norms promulgated on a Monday (testing the hypothesis that legislators make poor laws after a leisurely weekend); legal norms intended to be created by legislators whose sign is Pisces (testing the hypothesis that these people are very imaginative) and so on and so forth. I am not sure though if this is good news for Hershovitz. If I received a PhD proposal on some of these topics, I would be inclined to tell the applicant that they have applied to the wrong department.

arranged in virtue of it. For isn't that what the practice is about? Every other legal concept in the neighbourhood, in which we might be interested, presupposes it: the way legislators intend to re-arrange the relationship, the way they expressed their plan to re-arrange it, the way officials act as a result of the re-arrangement, and so on and so forth. None of these concepts is the real thing, i.e., the genuine moral rights and duties we have in virtue of legal practice. They are what *fool's gold* is to *gold*. One could be interested in fool's gold for all kinds of purposes, but the whole point is that it is not real gold (it's usually pyrite). And it seems to me that all the sets that Hershovitz identifies as meaningfully distinct presuppose a more central or basic set, namely the moral rights and duties that the practice *in fact* re-arranges. The rights and duties the legislators intended to re-arrange, or are promulgated in sources of law, supervene on the fundamental truth that law in fact has this moral consequence in our political lives. If law was unable to change our moral rights and duties, we would not be able to explain why legislators intend to impact our moral position, or why they promulgate enactments to that effect. By contrast, we *can* explain how law changes our moral position, even when legislators did not intend the change and even when no clear rule was promulgated to that effect.

So, it seems to me wrong to say that there are no distinctively legal norms, if by that we mean that no set of norms is *central* or *basic*. There is a distinctively core set, and all the other ones are derivative, and hence of secondary importance *to* the practice. That looks like a very robust sense of distinctiveness to me.[2]

Moreover, the fact that there is a basic or fundamental set of legal norms is not a theory choice; it is how things are in the world. To be sure, there is no philosophical confusion involved in choosing to be interested in some sets of norms, such as the ones that legislators intended to create, or the ones promulgated in sources. But it is, I think, a confusion to think that all these different sets of norms are on a par, like different parts of a dark room one chooses to illuminate by turning different light switches on. For there would be nothing to illuminate, no sets of any norms, if law did not in fact re-arrange our moral rights and duties.

But the problem I see might be even more serious than that. To continue with the earlier analogy, it is not clear to me that the practice of fool's gold is the same as the practice of gold. I would have to visit different places if I was writing a book on fool's gold than if the book was on gold, talk to different people, examine different materials. The two are, in other words, different practices. Likewise, if I am interested in the way particular legislators, say the drafters of a constitution, intended to re-arrange the moral relationship of the American people, I am not partaking of the same practice as the Mississippi state legislature, Clarence Thomas, and *Jackson's Women Health Organization*. I am doing history, not law. This suggests that the derivative uses of legal 'sets of norms' (LN1, LN2..) fall outside the practice of law that is to do with LN* (the core use). There is, to put it differently, a one-to-one correlation between practices and concepts. Concepts individuate practices, not the other way around. If that is correct, then with respect to the legal practice of re-arranging our moral relationship, which is what legal practice is about

[2]Perhaps Hershovitz has in mind a different sense of distinctiveness. In his earlier article, he spoke of distinctive normative 'upshots'. This notion, however, only applies to *real* rights and duties, so it would not be a plausible measure against which to judge non-moral sets of norms, as are the many sets he discusses.

according to Hershovitz, then the conclusion should be that there is *only* one legal concept or set of norms.[3]

I am not sure if I interpret Hershovitz correctly, however, since throughout the book he sometimes talks about 'legal practices' (in plural). Perhaps he agrees with me that there are many different practices (many 'repeated actions'), and not just many legal concepts, or legal sets of norms. Some clarification would be welcome. But if he does endorse the view that concepts individuate practices, then I think it would be helpful to rename his theory *Law as Moral Practices*, or – more accurately – *Law as Practices* since many valid questions one could pursue under the label law (e.g., which norms legislators whose zodiac sign is Pisces intended to create) has no moral purchase whatsoever. Still, the fundamental objection from the distinction between core and derivative concepts of law would remain: there is only one central practice (or concept) of law, the one which generates true moral rights and duties, and all the other ones are either derivative or – worse – trivial (e.g., which legal norms did legislators *wish* existed?). Only one set of norms exists *per* practice. His claim that there is one practice (law) but different concepts, or sets of norms, applicable to it would turn out to be incoherent. I do not, therefore, think that calling legal practice simply 'a repeated action' is as innocent as it first appears.

But what should drive the dismissal of the view that there are distinctively legal rights and duties? What is to be gained by dismissing it? Hershovitz argues that buying into the idea that there are distinctively legal rights, and the failure to realise that there are many valid uses of law, have engendered confusion in jurisprudence. I am not sure what group of people Hershovitz has in mind here, and whether it includes lawyers, judges, and citizens as well as legal philosophers. Clearly, academic philosophers have limited influence in either causing or clarifying confusions about the law amongst lawyers or citizens. But confusion about theoretical and practical issues is also common within academic circles; aiming to debunk it is part of the reason for doing philosophy. Even if it is true that a significant amount of ink has been spilled in jurisprudence by legal philosophers talking past each another, it does not necessarily follow that this is due to a misconceived philosophical view about the nature of law.

Besides, there is a risk in the other direction, in the failure to acknowledge that the genuine rights and duties that legal practice rearranges is *the* core sense of law and everything else is derivative from that. For example, there are valid reasons of intellectual history to inquire into what a group people in Philadelphia had in their mind when drafting a constitution. But we are better off using a different label (intellectual history) to describe that inquiry, as opposed to saying – as Hershovitz does – that there is a valid set of *legal* norms that is captured by that inquiry. I think it is better to say that whatever these people had in their heads has nothing to do with contemporary American law. For one might get confused and think that this historical inquiry into biographical facts is somehow relevant to say, what the law on abortion now is.[4] If rejecting adjectival

[3]This is not the same as saying that there is a finite set of 'norms'; we are only saying that the core meaning of law is to pick out propositions about what rights and wrongs are re-arranged in virtue of the practice. True propositions of law are infinite: e.g., it is the law that there is a right to have an abortion on Tuesday, it is the law that there is a right to an abortion the day after Dobbs was decided and so on and so forth (I owe this point to Nicos Stavropoulos who has made it in conversation).

[4]I sometimes need to do this with my students: I tell them that the essay topic they propose is in history or sociology, not law. They are sometimes inclined to get offended, but I explain to them that there is a pedagogical benefit in what I am saying.

imperialism creates its own risks, and the risk of confusion is symmetrical, then I don't know how much purchase Hershovitz's argument from confusion has. There will be risks of confusion whichever way we talk. What matters is if LN* (the real rights and duties rearranged by legal practice) is the core notion of law. I think it is, and I think Hershovitz does too, at least in some parts of the book. And I fail to see what is to be gained by the polemic against the idea of distinctively legal rights and duties.

Having said that, Hershovitz's argument goes further than this. He argues not only that there are many legal concepts, some of which are the *real* thing (a re-arranged moral relationship) and some of which are fake (e.g., people's intentions, or pronouncements about how to rearrange it). He argues that there also many different sets *within* the real thing, that there are – so to speak – different types of real gold that one could be interested in picking out. He says for instance, that within the moral rights and duties that legal practice re-arranges, there will be different legal sets that one can pick out, depending on one's purposes. Some of them will be the moral rights judges ought to enforce; others will be the moral rights that the President is bound by, even if they are not legally enforceable. There is no point arguing, on his view, about which of these sets is *the* distinctively legal set: they are all real (i.e., bind morally) and they are all distinct for different reasons. So we might as well as drop the word 'law' altogether and attend directly to the relevant moral principles that are applicable.

Hershovitz's argument here draws heavily on the analogy with promising. One could talk about a distinctively *promissory* obligation, but that is just a choice we make to isolate the source of one's obligation (what someone said or led others to expect or rely upon) for a particular purpose. There is no distinctive domain of promissory morality, he argues, because the domain of normativity is unified (footnote 52, page in FAQ). The whole of morality (not just promissory morality) applies to us and to everything we do. If one were to reflect on what, all things considered, one ought to do then there is no point in singling out promissory obligation as privileged or special. It is simply one of the many obligations that have a bearing on what one ought to do, each of which are equally moral in character.

So, the argument goes, within the set of moral rights and obligations that apply to a person at a particular time and place, one could choose to isolate a subset: the duties Alex can enforce in court, or Alex owes to Charlie because of a promise, or Alex owes to Robin because of a negligent action, and so and so forth. But that is a choice in theory, not part of the fabric of our moral universe. There, the whole of morality applies – all its principles, values, and maxims. And hence, according to Hershovitz, legal practice can be isolated to study different normative upshots (e.g., for the judge, or the lawyer, or the citizen, or the legislature), but only as a choice we make. When we say that *qua* a judge Alex ought to do this, we simply illuminate one normative upshot (what rights are enforceable in court) and we suspend a full moral assessment of what others ought to do in virtue of that practice, or what Alex has a duty to do all things considered. Morality does not *really* have a domain to do with the judicial role.

This is how I read Hershovitz's view, at any rate. Now, I think he is right to say that the obligation generated from promissory practices is not special compared to the other principles with which promissory principles inevitably interact. It is not special at all, since it is qualified by other, typically more weighty, moral principles, such as the sanctity of human life for instance. One ought to break a promise to save someone's life. But and

here is my objection, I do not agree that it follows from any of this that morality does not include different normative domains or branches, which have special normative upshots.

To begin with, we should point out that political morality is a separate branch from personal morality and that it only covers certain relationships, the ones we have *qua* citizens or members of a political community. This claim is not just a theory choice, a part of morality I opt to highlight because I am interested in it. It is not epistemic; it is a claim about how morality *is*. And it has normative upshots. Political morality, for instance, triggers certain requirements, such as the requirement that the government refrains from telling citizens what kind of life is good for them. This requirement is not applicable in other branches of morality, such as the morality of family, or friendship relationships. A friend or sibling has every right to tell me that I am wasting my life doing legal philosophy. The domains of personal and political morality are, in other words, not only distinct, but also distinctive.

If that is correct, then we should allow for further subdomains within personal and political morality that are also distinctive. What one ought to do *qua* parent, for instance, may be subject to normative principles that are not applicable to siblings, or friends. Perhaps unconditional love, to use one example, can only ever be a duty applicable to parents. Likewise, within political morality there might be further subdomains where some combination of applicable moral principles is unique. Consider, for example, the difference between what one owes fellow citizens and what one owes distant foreigners. The common-sense view that there is a difference in the scope and stringency between these two sets of duties captures something of fundamental moral significance. It is not an accident that the two dominant moral traditions, deontology and consequentialism, take a radically different view about how to explain this difference, or whether to accept it in the first place.[5] The deontological view is that morality is broken down in separate domains, whose distinctness is not instrumental or practical, but the result of the unique combination of principles that apply therein. Thomas Nagel aptly observes that 'there is no single level of full moral concern, because morality is essentially multi-layered'.[6]

The multi-layered character of morality is manifested in our common-sense approach to obligation. We typically ask what one ought to do as a friend, parent, teacher, or doctor. Teachers, for instance, ought not to direct the conduct of students for purposes other than education, even if students were to agree. These subdomains of morality are sometimes referred to as obligations of social *role* or *status*.[7] It would be a mistake to treat these obligations as simply the choice to highlight a particular moral principle in an otherwise unified domain. They are unlike promissory obligations, which is the example Hershovitz uses. Being a promissor is hardly a social role. It is a single principle that applies to everyone, be they friends, colleagues, compatriots, or strangers. By contrast, being a parent, a doctor, or a teacher picks out enduring social interactions that are morally salient and are governed by a distinct combination of moral principles. I

[5]Contrast, for example, John Rawls's *Law of Peoples* (Harvard University Press 2001) with Peter Singer's, *The Life You Can Save* (Random House 2009).

[6]Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy and Public Affairs 132.

[7]See George Letsas, 'Offences Against Status' (2023) Oxford Journal of Legal Studies. In an earlier article, Hershovitz put forward a role-based account of authority. See Scott Hershovitz, 'The Role of Authority' (2011) 11 (7) Philosophers' Imprint. This account however is absent in *Law as a Moral Practice*.

do not mean to suggest that these roles necessarily attract principles that are not applicable in other domains; nor that they generate obligations that are never, or almost never, defeated. What I mean, instead, is that each of these social roles appeals to our moral faculties as a distinct and unified moral concern that pertains to a unique social interaction. This is why conflicts between different roles appear to us so tragic. The decision to betray a friend in order to benefit one's child is very much unlike the standard cases where the promissory principle is qualified or overridden.

I do not know whether Hershovitz's claim that the domain of morality is unified is a meant to be a gesture towards a monistic account of morality, of the kind that utilitarianism and other consequentialist theories hold. But I think that his account in any case neglects an important sense in which morality is *not* unified. And if political morality has its own subdomains (just like personal and interpersonal morality does), then we are confronted with the obvious possibility that law picks out a distinct domain of moral concern. What could this domain be?

It seems to me obvious that it relates to the role, or status, of a citizen. The police typically arrest people in the name of a particular state and states typically correspond to political communities. These communities comprise citizens who interact with one another directly or indirectly. This interaction takes the form of exercising legal rights, i.e., rights that, if breached or interfered with, citizens can go to court and get them enforced with the help of the state. And this, in turn, makes the role or status of a judge pivotal. It is a status that is inextricable linked to that of citizen. Indeed, it is doubtful whether we can talk about rights and duties of citizenship in a society that lacks courts or that shows manifest disregard for the value of the Rule of Law. There is no space here of course to elaborate on this status-based approach to the normative domain of law.[8] Clearly the rights and duties that a citizen may enforce in court do not exhaust all the rights and duties one owes fellow citizens. Nevertheless, the view that the ethics of citizenship, and the closely connected ethics of the judicial role, are constitutive of legal practice requires serious consideration. It is not just one concern, out of many, that is pertinent in legal practice, loosely identified as a 'repeated action'.

If the citizenship-based view has any merits, as I believe it does, it means that jurisprudence should move in the direction of fleshing out the ethics of these social roles (citizen and judge) and away from general theories of normativity, or 'grounding'. This, in my view, is the best reading of Dworkin's own theory. It is reflected int the fact that it was crucial for Dworkin to tell a complex and rich story about associative obligations, i.e., the obligations one owes *qua* a member of a political community that uses coercion in the name of every citizen. The normative link between legality and citizenship pre-occupied Dworkin heavily, much more than the debate he had with Hart and other positivists about the connection between law and morality, or the difference between rules and principles.[9]

I worry that Hershovitz's debunking approach towards the idea of a distinctively legal domain might prove pernicious. By multiplying the normative questions that one could

[8] I have developed this argument further in George Letsas, 'How to Argue for Law's Full-Blooded Normativity' in Plunkett et al. (eds), *Dimensions of Normativity* (OUP 2019), chapter 8.

[9] In fact, it is more accurate to say that there was never actually any such debate between Dworkin and Hart, as Nicos Stavropoulos has convincingly argued. See Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130 (8) Harvard Law Review.

be interested in when the word 'law' is used, we risk losing sight of the serious moral concern that is posed by the juridical nature of our relationship with fellow citizens. Consider the question of whether there is a constitutional right to abortion, which the US Supreme Court revisited recently in *Dobbs*. In assessing the merits of the Court's decision, it is crucial to begin by emphasising that the role of the judge is to be bound by the value of legality and the Rule of Law. This immediately implies a distinctive mode of judicial reasoning and a narrow set of relevant considerations and materials upon which the Court may ground its decisions. If, by contrast, we say, with Hershovitz, that the whole of morality applied to what the US Supreme Court had to decide in *Dobbs*, then we frame the inquiry in a very different way. The starting point is that there is nothing special about the fact the Court, in its reasoning, has already recognised robust rights to privacy that must be extended to women's choice to have an abortion. The principles found in the Court's case law on privacy rights would compete with a number of other considerations, including consequentialist ones. It might be the case, for instance, that a gradual recognition of abortion rights by state legislatures or courts (under the state constitution) would in the long run be more stable than a US Supreme Court ruling, benefiting more women down the line. The Court might then be led to ignore the extent to which abortion rights are already protected in its case-law. And that, I think, would result in a very distorted view of the role of the judge and, in turn, more erroneous judgments.

But I do not mean this argument as purely instrumental. My point is not that if we use the word 'law' to refer only to legally enforceable rights, better moral outcomes will be produced in this or that sphere of practical reason. My point is that the concept of law shapes and guides the moral reasoning of the judge and the citizen in a non-redundant way, just like it does with all obligations of role. Imagine how confused and impoverished our moral life would be if, instead of reflecting on what one owes as a *friend*, we were to reflect on how the whole of morality applies to what one owes people with whom one has a certain number of shared experiences and mutual affection.[10] I believe something analogous is the case with the concept of law. In plays a non-redundant role when we decide how we ought to behave towards other fellow citizens as a matter of private law, and whether to sue for tort or breach of contract. It does the same when police officers decide how to exercise their powers of arrest and when courts decide which litigant party has a right to win. The phrase, 'in the name of the law', is not merely a symbolic ritual, a phrase that state authorities use contingently and could do away with.[11] It cannot be adequately replaced with the phrase 'in the name of the whole of morality as it applies here'. I am not the only one to voice this concern. David Dyzenhaus has also recently criticised the turn in jurisprudence towards so-called legal eliminativism,

[10]Even that reductive formulation of friendship would be inaccurate. One would have to exclude family members, to refer to capture the practice of friendship. And then one would have to give a reductive account of family roles. I do not think that a wholly reductive account of different moral practices, relying solely on general moral principles, could succeed.

[11]In Fritz Lang's masterpiece film 'M', a group of criminals decide to go after a child murderer, when the police prove unable to arrest him. Instead of handing him over to the authorities, however, the criminals decide to try him themselves, going through the motions of granting him procedural rights of fair trial. The murderer objects that they have no right to try him, and he demands to be handed over to the police. When the authorities intercept the trial, the camera zooms in on a hand placed on the murderer's shoulder as a police officer is heard uttering the phrase 'in the name of the law'.

seeking to revive the importance of the value of legality, as the central issue in jurisprudence.[12] I agree with Dyzenhaus that such a turn, if indeed there is one, is a mistake.

The main motivation of *Law as a Moral Practice* is both noble and compelling. It seeks to show that morality calls all the shots, a task it carries out admirably and persuasively. My main disagreement has been that it does not follow from the fact that morality calls all the shots, that the domain of morality is unified. Hershovitz believes that it is. But if he is wrong about that, and if moral domains are distinct and special, then it matters hugely which one of them, properly understood, is law.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[12]David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press 2022) chapter 1.