I. Can law be naturalized? Legal normativity, moral standards, and political obligation

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I. INTRODUCTION

In the past half century, there have been increasingly sophisticated attempts to naturalize ethics. If that project succeeds—and especially if it fails—might the rule of law still have an intrinsic connection with morality that entails irreducibly moral commitments or, indeed, any commitments that cannot be defended by the use of broadly scientific methods and, in that way, at least, are ‘value free’? This chapter will concentrate on the prospects for legal naturalism—the view that law and legal systems can be accounted for in naturalistic terms—but the discussion will bear on the relation between law and morality as well.

II. LEGAL NORMATIVITY AND REASONS FOR ACTION

One problem in discussing the nature of law is that there is no clear widely accepted definition of ‘law’ to work from. Fortunately, the phenomenon of law itself is so familiar that we can presuppose some level of understanding on the part of serious discussants. It may indeed be uncontroversial that any rule constituting a law that exists in a given society has the property of reason-providingness for representative agents within that society. This point holds for at least one of two notions of a reason for action. One notion is motivational and the other is normative—roughly justificatory. The former may be the only kind of reason for which there is wide agreement that law is reason-providing. The latter is especially difficult to characterize. We cannot even claim that normative reasons are reasons not dependent on self-interest, since self-interest may be understood normatively in terms of what is for the good of the person in question and need not be construed non-normatively in terms of, for instance, what the person reflectively desires. The difference in kinds of reasons corresponds roughly to that between what is in the agent’s interest and what the agent is interested in.

The contrast between the two kinds of reasons goes with a difference between duly constituted laws in a just state and mere governmental enactments. In the former case—if we assume that in a just state there is political obligation on the part of citizens—there are, for appropriately informed citizens, normative reasons, not only of a broadly self-interested kind but also reasons that go with whatever is implicit in political obligation, which may provide non-self-interested reasons to such citizens. Even where laws do provide non-self-interested reasons...
reasons for action, there will normally be (though there need not be) motivational reasons of self-protection—a kind usually agreed to be operative in all normal adult human beings. Self-protection may also provide normative reasons, inasmuch as there is normative reason to avoid one’s suffering or death. This is a kind of reason whose authority does not depend on one’s desires.

If this perspective is sound, then we have one answer to the question whether law can provide normative reasons at all if its only grip on those subject to it is through self-interest. The answer depends, to be sure, on what is in one’s self-interest. If self-interest is understood as normative—say because such things as maintaining health or becoming educated are in one’s interest—then, law can be derivatively normative even if it exists in an unjust state and its provision of reasons to citizens is only through their self-interest. After all, even an unjust state can require behaviour that is plainly necessary for public health or basic education. If, by contrast, self-interest is conceived solely in terms of desire-satisfaction, then whether laws serve this end is contingent on the desires of those in its scope. Even self-preservation is not an a priori necessary element in motivation.

One might think that if law provides even motivational reasons, then it is normative. But merely motivational reasons can come from irrational desires or irrational beliefs or both. So, in principle, it is clearly possible for a society to have laws that motivate by, e.g., evoking irrational superstitious desires. It would not thereby be normative, as opposed to explanatory and perhaps predictive.

It is evident, then, that, for either understanding of self-interest, laws need not serve the self-interest of those living under them (and in that minimal sense being subject to them). If they serve self-interest understood motivationally, they provide motivational reasons; if they serve self-interest understood normatively, they provide normative reasons. In neither case do they provide distinctively legal reasons that are non-derivatively normative. Might law provide those, say if it is enacted by proper procedures followed by a legitimate government?

I have said that a legitimate government is one meriting political obligation, but this is not the place to provide an account of that elusive notion. What can be said here is that even though political obligation is wider than legal obligation, it entails that obligation. Political obligation is consistent with a legal right to criticize even duly constituted laws, but it also implies that one may not take duly constituted laws to have no normative authority. This is a good place to distinguish duly constituted from duly enacted laws, even if the latter implies the former. The latter notion is historical, the former not. Even if we do not assume a kind of consent of the governed to be necessary for political obligation, consent theories help us to see the importance of this distinction. Clearly a society might simply grow into internalizing and, perhaps ultimately, stating and enforcing a law. (I assume that, as with grammar, one can act on a rule even without having formulated it or even being able to do so without something like Socratic assistance.) The latter developments might entail a kind of ‘certification’ of a rule as

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3 I say ‘need not’ because there may be no threat implicit in the framework—assuming this is possible given the existence of laws. A contrast to be developed in this connection is between the existence of the rule of law and a case where there are simply rules recognized by the relevant people as being enforced—or at least ‘in force’, which I take to be slightly weaker.

4 Political obligation might be hypothetical: there could be a moment at which a government is established in a normatively acceptable way, but has passed no laws. The people would be (prima facie) obligated to obey such laws as are that government duly passes.
law, but this does not necessitate enactment. Any theory of the nature of law must account for this kind of possibility. Instantaneous creation could also be invoked here: an omnipotent God could duplicate a society just like ours in some other realm; laws would be in force in the full sense, but at the moment of duplication there would be no history of the society, hence no time of enactment. Granted, people would believe, as in normal cases, that the laws they take to be in force have been passed. This would be a mistake, but undetectable. One could say that there is only ‘quasi-obligation’ here, but one need not say this.\footnote{Cf. W. D. Ross (1930), who held that the duty of gratitude is a basis of political obligation. One cannot literally have gratitude for what has not been done, but perhaps Ross could agree that in the scenario imagined one ought to obey the law from a justified sense of gratitude. Compare hallucination: Macbeth did not see the dagger he hallucinated, but a perfect hallucination would justify the same visual beliefs. Similarly, though obeying a law in the ahistorical scenario imagined is not a response to an already established statute, one’s sense of obligation creates a normative obligation in the same way a perfect hallucination may justify believing what it presents.}

This point that legal obligation does not entail normative obligation to obey the law and that the latter does not entail enactment of laws (a historical notion) is neutral on the question (to which I return below) of whether legal authority may be non-derivative. For a case could be made that legitimate governments—and correspondingly, political obligation—must serve the citizens’ interests, normatively understood. If it must, then political obligation could entail the derivative authority of law, based (for instance) on the independent moral obligation to contribute to the interests of citizens, even if it did not entail the non-derivative authority of law.

III. NATURALIZATION AS A THEORETICAL AMBITION

Why should naturalization of law be desirable in the first place? Whatever else naturalism entails, it contrasts with supernaturalism. A main motivation for the view, moreover, is a desire for a framework of inquiry and decision that is independent of theology and, in particular, of actual religions. Given the history of even the Western World alone, one can see how naturalism may serve to provide a basis—and may seem to provide the best basis—for resisting the authority of the clergy. In that aim, many theists can sympathize, since theism by itself does not imply any specific directives concerning the day-to-day conduct of human life, and many theists can abstract from their own specific religious commitments in their role as citizens and, especially, lawmakers for those not of the same religious outlook. This seems a welcome attitude in part because, even if the authority of God is taken to be in itself absolute, one may question the authority of clergy who claim to interpret divine will.

Naturalistic approaches to ethics and politics are also motivated by a desire to conduct human life independently of appeals to intrinsic value or irreducibly normative notions, including that of a non-instrumental reason. Here, however, there are no institutions other than churches (in the non-denominational sense) with such historically influential and culturally prominent claims to truth in such matters. (Other concerns motivating naturalism will be described in Section V.) Nonetheless, there is sufficient disagreement concerning what has intrinsic value—and, especially, how to resolve conflicts among intrinsically good outcomes—to make appeals to the intrinsically good highly controversial or, on some views, unnamable to rational resolution.
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Whatever the motivation for naturalization projects, we can distinguish more than one degree of success. The highest degree is what I’ll call full naturalization. The strongest version of this is conceptual: all concepts are or are analytically reducible to naturalistic ones. The more plausible version is not conceptual but requires property reduction: all properties are either natural or reducible to natural properties. If either condition holds, one might speak of ontological naturalization. Applying this to the philosophy of law, on the strong view in its more plausible forms, a society’s having laws is reducible to its having certain natural properties—presumably sociological and psychological—properties. This is stronger than the view that there is an equivalence between the existence of laws and that of certain sociological and psychological truths. These points will become clearer as we consider various ways one might attempt to naturalize law.

IV. TWO ROUTES TOWARD (FULL) NATURALIZATION OF POSITIVE LAW

Many attempts to understand law may be conceived as motivated by naturalism even if this aim is not articulated as a goal. If we take seriously the legacy of logical positivism, understood in the context of American pragmatism and twentieth-century behaviourism, we can even find attempts to provide conceptual versions of what I have called full naturalization.

Legal Reductionism

Consider first what I propose to call legal reductionism: roughly the view that to say that a society has a law is to say something (descriptive and mainly hypothetical) about the behaviour or potential behaviour of its people. As background, let me begin with the proto-positivism of the influential American pragmatist, C. S. Peirce. In ‘How to Make Our Ideas Clear’ (1878), Peirce presented his ‘pragmatic maxim’: ‘In order to ascertain the meaning of an intellectual conception we should consider what practical consequences might conceivably result by necessity from the truth of that conception; and the sum of these consequences will constitute the entire meaning of the conception.’

Here are two examples. Consider the statement that x is harder than y. Perhaps one’s whole conception of this comparative notion is expressed in the hypothetical ‘If a sharp edge of x is drawn across a flat surface of y, then x scratches y’. In the philosophy of science this position has been called operationalism. The set of conditionals may, of course, be wider. Thus, ‘x is an acid’ might be conceptually equivalent to ‘If blue litmus paper is immersed in x, then it turns red and if a piece of iron is immersed in x, then the iron corrodes, and...’ The list can be long.

I suggest that, in his widely discussed ‘Tu-Tu’ Alf Ross is in effect thinking of legal rules and standards as similarly reducible. Regarding the legal notion of ownership he says, ‘As a technique of presentation this [legal construct] is expressed by stating in one series of rules the facts that “create ownership” and in another series the consequences that “ownership” entails’ (cf. Ross 1957: 820). Operationalistically understood, one ‘rule’ is the conditional

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6 On ‘pragmatic maxim’ see also Chapter 10 in this volume.
7 For critical discussion of Ross’s overall view see Hart (1983). Against Ross’s predictive account of legal validity (on which judicial behaviour is the test of it), Hart says, “[T]he normal central use of “legally valid” is in an internal, normative statement of a certain kind” (1983: 167).
fact that if A provides B with something (e.g., money) that leads B voluntarily to give an object, x, to A, which A voluntarily accepts as equivalent, then A owns x; and another rule is that ‘If some third party C claims x as a belonging, then A may lay claim to x with the approval of B and certain authorities’. This is what has been called a reductivist *intervening variable* view as applied to the legal term ‘ownership’ and other rights-entailing terms: such terms are eliminable in favour of an appropriate use of the relevant conditionals connecting empirically ascertainable sufficient conditions (say for ownership) with other empirically ascertainable necessary conditions (say for claiming the thing owned).

Understanding and knowledge of ownership, on this view, reduce to understanding and knowledge of the relevant conditionals. Many conditional propositions may be needed to capture what constitutes ownership, but (as I understand the paper) even if psychological vocabulary is needed, no normative terms are required.

Might Ross have thought that even psychological terms could be operationalistically reduced? Gilbert Ryle’s *The Concept of Mind* (1949) made a kind of analytical behaviourism seem plausible to many readers. A central thesis of this book is that the mind is the topic not of untestable categorical propositions but of testable hypothetical and semi-hypothetical propositions. Thus although ‘Marta is driving attentively’ has a categorical component, since she is in the process of driving, the psychological predicate ‘attentively’ is understood hypothetically; e.g., ‘attentively’ implies that if a deer ran into her path, then she would apply the brakes.

Clearly behaviourism of this kind is a failure; and in the philosophy of science, operationalism has been plausibly rejected. Consider the concept of an acid. If any definition at all is implied by contemporary chemistry, it is theoretical, e.g., to the effect that an acid is a substance that supplies a positive ion in solution. This characterization is taken to imply hypotheticals and to be implied by them (not necessarily by their converses), but is not considered equivalent to any determinate set of them.

**Legal Psychologism**

Rejection of behaviourism leaves open that the domain of the psychology may still be fully naturalistic. Perhaps, then, law can be naturalized by appeal to a combination of behavioral and psychological properties while escaping the narrow reductionism apparently present in Alf Ross’s view.

In the work of Leon Petrażycki, as described by Bartosz Brożek’s (2010) account of it, we find a view that might be reconstructed along the following lines:

*A version of legal psychologism:* For a society S to have a law L is for a suitable proportion of S’s people to have motivating, emotionally engaged convictions whose content is that a given kind of behavior is required—roughly, mandated under a rule—by some appropriate governmental authority.

This does not entail any particular historical condition, such as enactment; nor does it entail either anyone’s following or breaking the law or that there is any punishment for breaking it. But the normal realization of such a condition would involve all of that as well as the existence of a huge proportion of approving articulations of the rule by those who recognize it, as where it is invoked to justify, demand, or punish behaviour.

Perhaps Petrażycki would want a requirement, at least for ‘operative’ laws as opposed to laws existing merely ‘on the books’, that they be affirmed, even if not originated, by a suit-
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able governmental body. But the idea underlying legal psychologism is that the existence of a law in a society is a complex social dispositional property of its populace and need have no particular origin, official formulation (especially in writing), endorsement, or behavioural manifestation. Here we might use the kind of duplication test for social property possession, one that applies to the properties of individuals as well. If by some strange event a duplicate world were created, exactly like the one in question in every natural property, the same laws would be in force even though, at the moment of duplication, there would be no history and need be no enactments.

The psychologistic view seems to me superior to the behaviouristic view since it does not attempt to reduce intentionality to any behavioural properties and, in that way, can do justice to the kind of thinking that goes with taking behaviour to be subject to law whether or not anyone acts in a way that implies recognition of law. Such legal notions as property, then, are understood in the context of both behaviour and attitudes; ownership is not merely an intervening variable that is eliminable in favour of a set of conditional propositions linking one kind of behaviour to another. However, the psychologistic view is unable to distinguish between a society’s behaving as if there were a law and there being a law, nor can it distinguish between the former and the society’s obeying a law.

Legal Positivism

If we understand legal positivism in the minimal way in which H.L.A. Hart described it—the view ‘that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality’ (1961: 181), then both attempts at full naturalization are positivistic. This is not to suggest that they succeed in full naturalization. A logical separation of law and morality does not entail naturalism of any major kind.

Neither the operationalistic nor the psychologistic view succeeds in a conceptual reduction. Alf Ross’s view is not plausible unless intentionalistic conceptions are brought in, and even when they are, some of them must surely be normative, as where an exchange of goods for money must be considered to be in some way proper if the supplier is to be expected to behave as if there remained no claim on the goods. More explicitly, even for legal positivism, the existence of laws implies that at least those who lay them down and enforce them take them to have proper and improper conditions of enforcement and must recognize the relevance—as opposed to the truth—of citizens’ complaints of unjust enforcement. This is obvious where there is what deserves to be called a rule of law in a society; but I think it is also needed to distinguish arbitrary power from unreasonable laws, not ordained toward the ‘common good’ as understood in some normative sense that implies the existence of intrinsic goods or at least normative reasons.

No substantive morality is implied by Ross’s view, then, but normative notions involving application and enforcement are required. Thus, even if legal positivism holds, the existence of law requires what we might call applicational normativity. There must be standards for determining whether a person comes under a law, obeys it, invokes it (and not some other rule or directive) in self-explanation, or self-defence, or punishment, etc. The choice of criteria here is normative at least in resting on judgments of appropriateness; and evidential norms are also implicit in determining whether the criteria apply. This is not a substantive moral normativity, though it apparently does presuppose commitment to epistemological norms; it would apply
even to John Austin’s view that laws are commands backed by threats, regardless of what is commanded.

Quite apart from this applicational normativity, however, the concept of property, and correspondingly the concept of legality, is open in a way that prevents full reduction to some finite set of conditional propositions. The concept of ownership of property, for instance, does not foreclose the number or variety of ways a legal system might expand, on the one hand, the genetic sufficient conditions for ownership and, on the other, the consequential attribution or defence conditions that go with achieving ownership.

Regarding legal psychologism, here we find no pretence of doing without intentionality and even normative concepts. Here, then, the most that can be claimed is that the theory makes understanding law possible without the ontological non-naturalism that goes with countenancing normative properties.

V. CRITERIAL NATURALIZATION

The kinds of considerations that have emerged suggest that even if a critical (legal) positivist view is correct in providing an account of the nature of a minimal legal system without presupposing substantive moral standards, it cannot be conceptually naturalistic. Conceptual naturalization of the apparently required kind, however—full naturalization—could fail even if ontological naturalism succeeded. Might the latter succeed? One might think so, given that at least one major condition for its success is widely thought to hold. I refer to criterial naturalism, the view that there must be naturalistic criteria, in a special sense, for the existence of law.

Suppose, as is consistent with this view, that we take law as genuinely normative in providing normative reasons. This is not necessarily a natural law view but incorporates that as one account of legal normativity. Might we still hope to naturalize?

Here I find it fruitful to consider a view of Wojciech Załuski (2009). As Brożek puts it, Załuski:

claims that legal norms are emergent entities which supervene on the regularities of social behavior and the acceptance of those regularities as the patterns of obligatory behavior…. He justifies it [the claim] by pointing out that (1) law does not boil down to sole regularities of behavior; (2) nor it is the sole acceptance of certain patterns of behavior as obligatory; (3) nor it is a simple sum of the two. As an emergent entity, legal norms: (1) are based on some lower-level entities (regular social behavior, specific mental states) but are not reducible to them; (2) display downward-causation (law can influence the lower-level entities); and (3) are ontologically different from the lower-level entities (2010: 79-80).

As I understand the view, its core idea may be reconstructed as:

Supervenience naturalism: the view that a law, L, existing in a society, S, is a statement of required behavior such that (1) a suitably large segment of S’s people accepts some statement of L as authoritative and behave accordingly, (2) this acceptance is causally efficacious in their behavior, and (3) for any two societies, if they are exactly alike (a) psychologically (at least approbationally) and (b) behaviorally, then they are legally identical.

Brożek notes (plausibly in my judgment) that even if this view allows for legal norms to have normative power as constituting, in effect, moral norms, there is a possibility ‘that law’s nor-
maturity is *sui generis*, or that it is reducible to the normativity of the rules of rationality (as in the case of Petrażycki’s conception)’ (2010: 80). I would add that the supervenience view does not imply naturalization even if the relevant lower-level entities are all natural. Even if a type of property F is *grounded in* another type G (a relation that, in part because it is explanatory, is stronger than supervenience), it does not follow that if the latter type is naturalistic, the former is also. Consider the normative property of being obligated to help a child, which, as belonging to an act one can perform, may be grounded in one’s being the only person who can easily save a (normal) child from drowning. The existence of this grounding relation provides no good reason to infer that obligatoriness (even obligatoriness-to-endangered-children) is a natural property.

A naturalistic reduction project need not deny this point. To see one direction that an ontological reduction might take, consider that for W. D. Ross (1930) and many other philosophers, there are natural grounds of obligatoriness, including hedonic considerations, such as pain as a basis of obligations of avoidance, promises as bases of obligations to do the promised deed, avoiding lies as obligatory upon agents generally, and other descriptively identifiable states of affairs. Given these and other natural grounds of reasons for action, it may be plausible to claim that such normative properties as obligatoriness and intrinsic goodness are reducible to *disjunctive* properties. Being obligatory, for example, might be the property (of an act) of *either* having been promised or being a reducing of suffering or an avoidance of lying or …, and so forth for all the types of basic obligation-making grounds. But are there disjunctive properties, as opposed to disjunctive ascriptions of properties? And can we complete the list of partially reducing properties satisfactorily? Both prospects appear sufficiently dim to make it reasonable to place the burden of proof on those who are attracted to the view.8

Suppose, however, that one could parley practical criteria of flourishing, hence of a government’s working ‘for’ the people, into a full naturalization of even the property of a government’s ordaining laws for the common good (some utilitarians might take this collective hedonic property to be a matter of pleasure and pain pluralistically understood). This version of naturalization the ordaining of laws might still leave open whether law is intrinsically moral at the level of the natural properties that moral properties reduce to. It would also leave open many central questions in the philosophy of law. I believe, then, that by this route we succeed at most in anchoring law in the natural world, not in showing either the concept of law or the property of legality to be natural.

Full naturalization of law, then, seems a failure, but in any case, there is no question that there are naturalistic criteria—prominently including intentional properties—for what constitutes a law, in the sense of a legal rule that is in force. This requires certain intentions (perhaps just conditional ones) on the part of certain persons in the society, e.g., those intentions that go with recognition and with invoking the rule in justifying behavior. The view here might be criterial naturalism: the concept of law is anchored in the natural world in the sense that (1) there are naturalistic sufficient conditions for a law’s being in force, (2) naturalistic necessary conditions for this (though no single condition need be necessary and sufficient), and (3) some

8 Is there a property of being *either* a typescript or a jet plane? Trivially there is if being a property of something is nothing more than being *true of* it. At that rate, negation will generate infinitely many properties that one might say do no descriptive work, as with the statement that human beings are not infinite numbers. For a detailed case against countenancing see P. Audi (2013).
naturalistic necessary or sufficient conditions are, conceptually, partly constitutive of what it is to be a law.9

VI. WHY SHOULD LEGAL THEORY NEED NATURALIZATION?

There are at least four kinds of grounds that appear to support the desirability of naturalizing law. Some concern the authority of law; others the administration of it; still others the unification of our conception of law with our worldview; and some with elements in modern and certainly contemporary philosophy.

If the existence of a legal system is not ascertainable by common sense and scientific observations, one might think it is not an objective matter at all. This leads at least to a tendency to reject a natural law view, since on that view whether a rule is a genuine law may be ascertainable only on the basis of a sound moral judgment concerning its having a proper connection to morality. Without arguing the matter here, I see no reason to think that objectivity requires any more than the existence of accessible natural grounds for normative properties, nor, given this, does knowledge of the existence of law require more than common sense and scientific observation. Suppose, as seems to be the case, there are naturalistic sufficient conditions for prima facie (and thus pro tanto) obligations, say lies, broken promises, and killings as yielding negative obligations, and painful illnesses and educational restrictions of women as yielding positive obligations of beneficence. Natural facts of these sorts can provide criterial grounds— even if not strictly entailing grounds—for taking a system of governmental requirements to count as laws.

One might object that grounds may provide only sufficient conditions for what they ground, which may enable us to frame objective criteria for affirming that certain rules are laws, yet necessary conditions are needed to rule out false claims that certain other rules are laws. But nothing in the notion of a ground rules out its being both necessary and sufficient; and, in any case, where a phenomenon is grounded at all in the relevant sense, it is necessary that at least one of its grounds obtain. It is true that natural law theory construes, as partly moral, judgments regarding whether there is law. But I cannot see that this must impair objectivity, especially given the modest criterial legal naturalism I am taking as plausible; and in any case I am supposing that the natural law theory is not the only plausible normative account of law.

A further consideration is that naturalism may seem to promise commensurability where we would otherwise not have it, and that is crucial for the administration of the law. How, for instance, do we determine how serious a crime is or whether two kinds of punishment are comparably severe or two offenders equally morally responsible? Here some utilitarians, with Bentham as an inspiration perhaps, have sought to achieve commensurability, but it seems doubtful that they have succeeded.10 If the more pluralistic, non-hierarchical conception of

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9 The naturalistic noncognitivist’s resort here—what we can’t pacify we kill—would be to naturalize by taking linguistic and behavioural tendencies to define normativity. I do not find this plausible. We cannot do this by just appealing to how certain words are used, and we apparently cannot select the right constraints on their use without making irreducibly normative commitments.

10 John Stuart Mill in Chapter 2 of his *Utilitarianism* tried to quantify both pleasure and pain and the weighting of quality against quantity in relation to pleasure. It seems plain that genuine ratio measurement is not achievable along the lines he describes.
morality I favour is correct, there are prospects for commensuration. But must we suppose that incommensurability implies subjectivity? I think not, but it must be admitted that, where practical wisdom is needed, the charge of subjectivity will be almost irresistible by those who disagree with judgments claimed to come from it.

Yet another incentive toward naturalism is the unification of our worldview. Clearly, we normally trust perception, and we rely on natural science for much that is important in our lives. Why should we have to recognize an order of properties not subject to scientific inquiry like almost everything else—indeed properties, apparently not even fully in the causal order? Here the ‘almost’ is telling. Mathematics is indispensable for scientific inquiry yet far from being self-evidently naturalizable. We apparently have in pure mathematics both non-natural, non-causal properties as it is and also substantive a priori propositions.

Related to the unification idea is what might be called philosophical ‘ideology’. One wonders whether Alf Ross, like his positivist predecessors, might be influenced by it. Here we might think of Sellars’ striking remark that ‘Science is the measure of all things, of what is that it is, and of what is not that it is not.’ (Sellars 1963: 173). A related strategy is Brian Leiter’s ‘replacement naturalism’, as opposed to the reductive varieties. The goal of the former is ‘description or explanation’ (Leiter 2007: 35); and ‘Jurisprudence—or, more precisely, the theory of adjudication—is “naturalized” because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology)... for essentially Quinean reasons: because the foundational account of adjudication is a failure’ (ibid.: 40). It seems to me that, given naturalistic criteria for application of normative terms—and certainly for legal terms, we do not need replacement in order to achieve objectivity—at least on the assumption that we do not demand more precision than is possible for the subject matter.

VII. CONCLUSION: THE INESCAPABILITY OF NORMATIVE JUDGMENT

Is there any way to attribute to law a distinctive kind of normativity without imposing substantive normative commitments, such as serving the common good? Earlier I suggested that the distinction between even tyrannical law with no substantive content constraints and a rule of whim masquerading as statute requires applicational normativity. This is a broadly epistemic requirement, however, and does not entail legal moralism. It has no implications about what kind of substantive content, if any, genuine laws must have. What it does show, however, is that full naturalization of law seems out of reach—at least if such naturalization is not possible for ethics and epistemology conceived more generally. Here I have suggested that one plausible route—by disjunctive analysis—is not successful.

Suppose, however, we consider legitimate governments. These are not easily defined, but where they exist we may take it that laws duly enacted or sustained by them have some measure of normative authority, in the sense that there are normative (if defeasible) reasons for citizens (indeed also non-citizen residents) to obey them. What we have left open is that, apart from applicational normativity (which is mainly epistemic), the normative authority of

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11 For an account of incommensurability and how it differs from incomparability see Chang 1998; for critical extensive discussion of Chang’s view see Boot 2017.
12 Discussion and critique of Leiter are provided in Torben Spaak’s review article (see Spaak 2008).
law is derivative, in some complicated way, from that of morality itself. If legal normativity goes with reasons for action in the two ways indicated, that would not imply essential moral content—as opposed to the contingent necessity of definite content given the need to serve the common good—but normativity that is derivative from moral considerations is not the only significant kind of normativity that might be intrinsic to law.

We have also seen how the guiding aims of a government may bear on the authority of its laws. Suppose, for instance, that a government devotes itself to reducing poverty, eliminating disease, resolving disputes, and enhancing the educational level of the public. These notions can be characterized criterially in non-moral terms, even though the clear cases of achieving them are realization of grounds of intrinsic goods or at least of good treatment of persons. Realizing goods, so described, may be plausibly thought to entail such intrinsic goods as pleasure and reduction of pain, even though these need not be described in such axiological terms. This is a point easily missed by proponents of legal positivism, but it is essential to appreciating the difference between a society governed by arbitrary fiat and one that has rules deserving to be considered law.

There is, then, a sense in which law can be viewed as designed to promote the common good where that is seen in terms of non-moral grounds of the good. Eliminating diseases, at least those afflicting the body, protecting people from attacks on their person, and teaching basic literacy and mathematical skills are goods, but they may be characterized, if not uncontroversially, then in non-normative and certainly non-moral terms. These points provide for a naturalistic route to both identification and even criticism of law, but they do not promise to lead to its full naturalization.13

REFERENCES


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