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On The Necessary Connection Between Law and Ethics: The Ethical Content of Law

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B.A., Philosophy, Elmhurst College, 2012

A Thesis Submitted to the Graduate School at the University of Missouri – St. Louis  
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*Abstract:* I defend the claim that there is a necessary connection between law and ethics. I do so by analogy with other social rule-based systems, such as capitalism. Most social rule-based systems are (in part) conceptually understood by the collective overall content of their rules. If legal systems, which are also social rule-based systems, are best understood in the same way, then the collective overall content of legal systems' rules tells us how to understand the concept of law. One possibility for the collective overall content of legal systems' rules is ethical content. If so, then there is a necessary connection between law and ethics.

## **Introduction**

Imagine a law was passed that allowed each of us to murder one person a year. Society may persist, but such a law would be unethical. Or imagine a law was made that required that we calculate punishment, in general, in terms of the monetary cost to society. For example, if you murder person *R* and *R* made \$100,000 a year, then the punishment should be proportionate to the cost society will face upon the loss of *R*'s monetary contributions (i.e. *R* held a job that contributed so well to society that it was worth paying such a high salary). Homeless persons do not contribute anything like monetary benefits to society, but we would still want to severely punish those who murder homeless persons.<sup>1</sup> In fact, not only is this a bad result, it seems to be in tension with what we think the purpose of law is: justice or ethics.

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<sup>1</sup> Or consider the possibility of a law allowing for justifications for punishment that allow serious crimes to go nearly unpunished. It has been suggested that we can calculate how much punishment to administer based on the following: 'the harm of the punishment to the criminal must be greater than the expected profit of each offense divided by the perceived probability of punishment' (Schauer & Sinnott-Armstrong 1996: 670). So if the perceived likelihood of punishment is .5 and the perceived benefit of the crime is making \$1000, then you must make the punishment greater than \$2000 (or \$500 if you divide by half, the specifics don't matter). However, if a psychopath murdered someone in order to alleviate boredom for an hour, then there is a low perceived benefit. But we would not want to lower the punishment because of this (nor in any other case of 'irrational' justifications perceived by the criminal). One reason to believe we should keep the punishment high is due to ethical motivations behind the law and that murder is unethical.

The above intuitions have played a role in the debate on whether an unjust law is a law. Historically, these issues have been seen by many as confusion between the law as it is and how it ought to be. Of course, the distinction between law as it is and how it ought to be is compatible with necessary connections between law and ethics. For example, Green (2008: 1050-52) argues law is necessarily ‘justice-apt’ and Gardner (2012a), following Raz and Alexy, argues that law necessarily makes moral claims.<sup>2</sup> Whatever one might think about the necessary connection between law and ethics, in general, there does seem to be something confused about a legal system that allows for justifying punishment in the way noted above and for laws to allow for occasional murder. That is, while they may well be laws if enacted, one might think the society is confused in some way about law. I’ll argue that while the rules in the above scenarios may be laws (if enacted), they still undermine a legal system *as a legal system*, which I explicate throughout this paper.

I’ll argue that there is a necessary connection between the concepts of law and ethics. I will motivate the claim that the concept of social rule-based (or ‘rule-governed’ in Hart’s phrasing) systems are, in part (because there are other necessary features) and necessarily, correctly understood by the collective overall content of their rules.<sup>3</sup> For example, if it were the case that the country’s economic rules were followed they would then guide the economy towards building economic wealth, then that economy is correctly conceptualized as a wealth-increasing system and correctly labeled ‘capitalist’ (assuming other necessary features of capitalist are present, e.g. the means of production

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<sup>2</sup> Shapiro (2011: 391) claims law has an ethical purpose.

<sup>3</sup> ‘Collective’ is used to indicate explicitly that I am talking about all the laws taken together. Without ‘collective’, ‘overall ethical content’ may just refer to individual laws’ overall ethical content.

are held privately). If the rules of the country's economy did not result in an economy that was guided towards building wealth if the rules were followed, we would not correctly conceptualize the economy as wealth-building and labeling that economy as 'capitalist'. We expect this system, and one's like it, to produce certain kinds of results (e.g. building of capital) if the rules are followed.

If law is conceptually understood analogously, then the collective overall content of the rules will provide us with the correct way to partly and necessarily conceptualize law. If the rules have, collectively, overall ethical content, then there is a necessary connection between the concepts of law and ethics. That is, if the rules of the supposed legal system were followed, then they would produce overall ethical behavior. In that case, there is a necessary connection between law and ethics. Or so I will argue. Moreover, since the conceptual understanding of law according to this view is based on the collective overall content of laws themselves, it would seem to be a descriptive view, at least if the analogy holds and the conceptual understandings of the analogous social rule-based systems are descriptive.

A quick note on how I will use the word 'content'. When I speak of the 'content' of rules, I am discussing what kind of code the rules are designed to enforce, what kind of normativity they are meant to govern. Legal rules are norms. For example, to say that the content of a law is ethical is to say that the law, when followed, guides people to act ethically, even if a reading of the law does not obviously indicate its ethical content in the way a law banning murder does. A law may not contain ethical language but still have ethical content since it may, if followed, result in ethical behavior (e.g. procedural laws can be written without ethical language, but still ensure fair trials). A law which bans

murder and allows the state to punish those who break it has ethical content since, if followed, it would produce ethical behavior. On the other hand, a law requiring one to murder has unethical content since, if followed, it results in unethical behavior.

Given that people may not follow a rule, the content of it should not be understood in terms of the actual behavior of people. For example, we may have laws prohibiting theft, but people may steal repeatedly. This does not mean the content of the rule is not ethically good or that it does not prohibit stealing. So, the content of a rule should be understood in terms of the kinds of results it would produce *if* it were followed. We may understand the ethical content of a law as follows:

A law has ethical content iff one must commit an action *Y* in order to comply with a law *X*, where '*Y*' stands in for an ethical behavior.

If '*Y*' designates a good behavior (e.g. refraining from stealing or murder), then *X* has ethically good content, and if not, then *X* does not have ethically good content.

The view I will develop is a sketch. Due to the limitations of a single paper, I cannot fully develop the analogy I will propose, nor provide absolute certainty that law has collective overall ethical content. There are many other issues that merit attention. Instead, I will defend a much more modest thesis that is meant to support the view while providing the scope the thesis has, if true, on related issues. The argument in support of the view supports the following conditional: *if* the analogy is correct, and legal systems' rules have, collectively, overall ethical content, *then* there is a necessary connection between law and ethics. I will not defend the truth of the antecedents, though I will explain why one may hold them. I am instead more interested in explicating the

consequent. That is, the paper is more interested in explaining a view and its implications, rather than asserting its truth. Keep in mind; the collective overall ethical content of the rules of a legal system is a necessary, but not sufficient, condition for there to be a legal system, on this view. Other criteria, such as rules of adjudication and change, are necessary as well.

Since legal positivism is compatible with the claim that there is a necessary connection between law and ethics (Gardner 2001: 222-25), the necessary connection proposed here may well be compatible as well. Nevertheless, the necessary connection is problematic for some doctrines typically held by the positivist. Legal positivists view the existence of law as a social fact instituted through convention that can be fully described without the need for any ethical evaluations. As such, they tend to believe, roughly, that (1) the existence of law does not depend on law's (collective overall) ethical content and (2) that whether or not a rule is a valid law does not depend on that rule's ethical content. The view outlined in this paper is inconsistent with (1) and, while not strictly inconsistent with (2), does entail—for the same reason it is inconsistent with (1)—that the collective overall ethical content (or lack thereof) of laws does determine whether or not the rules *are* laws and, so, valid laws.

I will first discuss the analogy between various social rule-based systems. Next, I will motivate the claim that legal systems' rules have, collectively, overall ethical content. I will respond throughout to various complications, such as how the view responds to the issue of legal validity and discuss the implications the view has for law. Ultimately, I provide a plausible and coherent view supporting the claim that there is a

necessary connection between law and ethics based on the collective overall content of legal systems' rules.

### **Social Rule-Based Systems and Concepts**

I next develop what part of the concept of various social rule-based systems is. I argue that part of the concept of social rule-based systems is the collective overall content of their rules. I will then suggest that if legal systems should be understood analogously, then law is (partly and necessarily) understood by the collective overall content of its rules. This will be general and abstract, but, as Hart similarly notes throughout *The Concept of Law*, I am developing a theoretical understanding of how concepts of social rule-based systems are understood and not the details of any one system in particular.

Economic systems are governed by various rules a society adopts, typically referred to as 'economic policy'. Though not exhaustive, some of these policies govern: stabilization, trade, taxes, interest, income, monetary issues such as inflation, economic growth, distribution of wealth and government spending. Given the complexity of the economy it is surprising that we can understand part of the concept of particular societies' economies by the (collective overall) content of their rules. But we can.

We will discuss capitalism. If a society starts creating various rules to govern its economy with the goal of increasing wealth, how would it do so? The society would create various rules which are conducive towards increasing wealth, usually with free and competitive markets, with privately owned means of production, and wage labor (and whatever else is necessary). The rules, if followed, result in increasing wealth. So, when a society has the motivation to create an economy that produces wealth, they create an



economic system which is governed by rules in such a way to do so. Conceptually, this economic system is understood as wealth-building. As such, we would correctly label it 'capitalist'. That is, if followed, the rules build wealth, which is central to a capitalist system, though other criteria (e.g. the means of production are privately owned) are also necessary for an economic system to be capitalist.

The production of wealth, or more generally capital, is necessary for an economic system to be capitalist. Heilbroner (2008: 689) describes the basics of capitalism in the following way: 'money capital (M) [is] exchanged for commodities (C), to be sold for a larger money sum (M')' or 'M-C-M'. This system results in wealth production if followed. Heilbroner goes on to write that M-C-M' 'constitutes a prime *identificatory* element for capitalism as a historical genus' (689, emphases added). Heilbroner further writes:

The attainment of profit is *necessary* for the continuance of capitalism not alone because it replenishes the wherewithal of each individual capitalist (or firm) but because it also demonstrates the continuing validity and vitality of the principle of M-C-M' as the basis on which the formation can be structured. Profit is for capitalism what victory is for a regime organized on military principles, or an increase in the number of adherents for one built on a proselytizing religion. (690, emphasis added)

That is, the accumulation of wealth is necessary for there to be a capitalist economy. This is further reinforced when he writes:

The logic of capitalism ultimately derives from the pressure exerted by the expansive M-C-M' process, but it is useful to divide this overall force into two categories. The first of these concerns the 'internal' changes impressed upon the formation by virtue of its *necessity* to accumulate capital – its metabolic processes, so to speak. (693, emphasis added)

And he continues to say that 'a final attribute of the internal logic of capitalism must also be traced to its *core process of accumulation*' (693, emphasis added). We can see 'capitalism as a 'regime' whose organizing principle is the ceaseless accumulation of capital' (690).

A capitalist economy is necessarily wealth-building. This isn't to say that there cannot be periods of time where wealth isn't increasing (694), but that capitalism is a system where wealth is generally built over time (695). Thus, capitalism's necessary connection to building wealth is a general trend over time and not that wealth is built at every moment of time.

If capitalist economies must themselves produce capital to persist, then a trivial implication is that the collective overall content of its rules is necessarily wealth-building.<sup>4</sup> If a country had an economy in which the means of production are privately owned, but various rules prevented it from being a wealth-building economy (because the rules when followed don't produce wealth), then it's not clear it's a capitalist system since wealth production is necessary to capitalism. If the president of the U.S. declared, for example, the U.S. was capitalist but the collective overall content of the economic

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<sup>4</sup> Note: I make no further claim on whether other social rule-based systems must actually produce certain kinds of results in order to persist. My only claim is that they necessarily have certain kinds of collective overall content to be certain kinds of systems.

rules prevented it from building wealth, we would think the declaration of capitalism came too quick. We would think that due to a lack of wealth production, because of the content of its rules, the economic system—while having many of the features of capitalism, e.g. the means of production are privately owned—is not quite a capitalist system. Conceptually, it's no longer clear it is a capitalist economy; we expect a capitalist economy's rules, when followed, to build capital (wealth). The economy will no longer be capitalist but, if there is still an economy, will instead be a different kind of economy.

I next turn towards a very different sort of social rule-based system: hospital cleaning rules. A hospital creates a set of rules to govern the cleaning habits of their employees. The goal of cleaning is to reduce germs. So, the hospital sets up a set of rules on how to best clean the rooms. The rules, if followed, overall reduce the germs and make the hospital safer. This system is conceptually understood as a germ-reducing system. If so, we would correctly label such a system 'cleaning rules'. If the rules changed such that when followed they did not overall reduce germs any longer, and instead increased the amount of germs, we could no longer correctly label such a system a 'cleaning system'. To do so would be conceptually confused. Thus, the collective overall content for hospital cleaning rules is necessarily germ-reducing content.

An emergency room will usually operate with a rule-based system generally called 'triage'. The purpose of triage is to ensure that people with the worst illnesses, injuries and conditions are treated before less severe cases. In order to fulfill this, a system of rules must be put in place. The rules must, when followed, result in the people

with the worst cases of health issues are treated before less significant cases.<sup>5</sup> If the rules fulfill this task if followed, the system will be correctly labeled ‘triage’. Triage systems are conceptually understood as treat-worst-cases-first systems. If the rules fail to treat worst cases first if followed, then it would be incorrect to call this system ‘triage’. For example, if the rules were designed so that cases were determined randomly, then we cannot correctly conceive of the system as a system of triage. Thus, the collective overall content of triage systems is treat-worst-cases-first content.

We can imagine a society with a (representative) democracy. The citizens vote for the candidates who are running for office. The candidate with the majority of votes wins. The system of rules in place for running elections is such that, if followed, they result in people’s votes normatively putting a candidate into office. We would correctly label this society ‘democratic’. But imagine some mischievous politicians who change the rules of elections such that, if followed, the votes no longer put a candidate into office. That is, while people can still vote, the votes have no normative force for who becomes an elected official. Instead, politicians themselves choose their own successors behind the scenes. As such, this society would no longer be democratic. To label this society ‘democratic’, even with the necessary (for democracy) voting in place, is conceptually confused. The collective overall content of the rules running the democracy—those which, if followed, ensure there are elected officials—are necessary for the system to be democratic.

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<sup>5</sup> If someone is untreatable, even if very ill, they may not be treated. ‘Treat-worst-cases-first’ should be understood as treating the worst cases which can be treated first. Emergency rooms, accident scenes, the S.T.A.R.T. model, etc. all have slightly different ways of handling who gets priority and how so (e.g. some divide groups into 4 instead of 3), but they all are in general governed by treating the worst cases that can be treated first.

The collective overall content of the rules of the above social rule-based systems provide certain kinds of results if followed (e.g. capital building and germ reduction). What does this have to do with law? Legal systems are social rule-based systems. If so, they would seem to be analogous to other social rule-based systems in how we should correctly conceptually understand them. So, in such a case, the collective overall content of laws' rules would be one necessary way to correctly conceptually understand law. What is the collective overall content of laws' rules? One answer is ethical content. If law's nature is such to produce a society that is (overall) governed in an ethical way, then this would mean there is a necessary conceptual connection between law and ethics.

When we look at the collective overall content of a society's rules governing their economy, we see that the collective overall content of their rules (in part) tell us the correct label, e.g. 'capitalist'. If a society that was once correctly labeled 'capitalist' no longer has rules that are wealth-building (if followed), then it ceases to be capitalist. When the hospital cleaning rules (if followed) no longer reduced germs, it ceased to be correctly labeled 'cleaning rules'. Analogously, *if* a society's supposed legal system's rules have, collectively, overall ethical content, then it would be correctly labeled 'law' or 'legal system'. Once the collective overall content of the rules are no longer ethical, then it would no longer be proper to label the social rule-based system 'law' or 'legal system'. Or so I will motivate. This view is, then, contra the positivist thesis that the existence of law is independent of ethics. I will argue why we might think there is collective overall ethical content of legal systems in the next section.

The content of each and every rule individually of a society's (supposed) legal system do not need to be ethical. A country can be labeled correctly 'capitalist' even if

some of the rules of the economic policy are not wealth-building. Some rules for a hospital's cleaning rules may not reduce germs, and some may increase them. What matters for our conceptual understanding of these systems are the *collective overall* content of the rules, and not that every rule perfectly fits the correct concept and label.<sup>6</sup> Furthermore, we can distinguish between the *intended results* of a social rule-based system (e.g. building wealth, reducing germs, etc.) and the *means* in which the system utilizes to achieve its necessary results. So, there *may* be some rules that are necessary to fulfill the result of ethical normativity for legal systems that do not have ethical content but this does not show that the overall nature of law is not necessarily connected to ethics; it doesn't show that the rules of the system do not have, collectively, overall ethical content.

One may think we have a ready-made counterexample to the view of this paper. The Nazi regime had a rule-based system—typically considered a legal system—full of rules with unethical content. But this was surely a legal system, one may think. Let's assume the collective overall content of the rules is unethical, which may or may not be the case if we did a full analysis; the rules when followed resulted in overall unethical behavior.

However, this does not necessarily undermine the view since a case needs to be built in favor of the supposed counterexample. And we may be wrong to think that the

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<sup>6</sup> Whether or not a system with rules that have, collectively, overall ethical content does not necessarily imply that it is a system worth having. Collective overall ethical content does not necessarily imply that the system is sufficiently ethical to be a system worth having, that the law is enforced ethically (Raz 1990: 169), or that it used for ethical purposes. This thesis would then be compatible with the claim that legal systems have not 'always, or generally, been a morally valuable institution' and that legal systems have not 'necessarily been so' (Raz 2003: 13). Whether or not a legal system is worth having does not imply that there isn't a necessary connection between law and ethics based on the collective overall ethical content of the laws.

Nazi regime had a legal system. We could be conceptually confused, which people can very well be. For example, small children may see a small dog and call it ‘cat’. These children do not fully understand what it means to be called ‘dog’. A more mundane possibility is that people may fail to have a correct understanding of a concept by not thinking adequately about the issue. Our tendency to call some rule-systems ‘law’ does not mean they really are necessarily law.<sup>7</sup> Since we cannot assume without question-begging that the Nazi regime had a legal system, this matter will require a full analysis at another time. But even if the Nazi’s (supposed) legal system was overall full of rules containing *unethical* content, it does not follow that the view developed in this paper is wrong. It may be that one’s conceptual understanding of law is inaccurate.

An implication of the view: *If* Nazi Germany did not have a legal system for failure to fulfill the (let’s assume) necessary condition of having laws with collective overall ethical content, then there would have been no *legal* reason to not enter Germany prior to the war, whether or not there may have been prudential or ethical reasons to not enter.

For space considerations, I will not go into a detailed response to any more potential counterexamples. Instead, I will make some general points on the issue and then continue on to other matters. Before deciding on a counterexample to the view outlined in this paper, one must answer a few questions affirmatively in order to fulfill other necessary conditions for a system to be law. The first question is ‘does this supposed legal system pass all the necessary conditions for a system to be legal system

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<sup>7</sup> Hart (2012, Ch. X) makes roughly the same point when discussing international law. I’m not convinced my view of saying that Nazi law is not really law is necessarily any odder than saying that international law isn’t really law. And like Hart, I’m not here to adjudicate how we use words like ‘law’. I’m interested in discussing legal theory.

other than the necessary condition proposed in this paper?’ (e.g. rules of adjudication) and the second is ‘does this supposed legal system pass the criteria of the rule of law?’<sup>8</sup> If the answer to either of these questions is ‘no’, then one’s supposed counterexample fails to be a legal system, and thus, cannot be a counterexample to the view outlined in this paper. If the answer to both of these questions is ‘yes’, then we have a *potential* counterexample. Whether or not the potential counterexample is successful is a complicated matter that will depend on the details of the example. The supporter of the view outlined in this paper has several possible responses. The first is that the supposed counterexample is not a legal system for failure to have a system in which the collective content of the rules are overall ethical (some may take this to be ‘biting the bullet’ but that depends on one’s viewpoint and how plausible the counterexample is). Moreover, since merely assuming the supposed counterexample is a counterexample would amount to little better than begging the question, one has to give a defense on why the purported counterexample is a problem for the supporter of the view in this paper. The supporter could then, second, argue that the supposed counterexample’s defense is wanting.

Legal systems do have laws with ethical content. For example, rules against theft or murder have ethical content. Many rules do not. For example, speed limits regulate how fast we can drive but are not necessarily best understood as good or bad. We may think that the limit is set too high or low but that does not necessarily seem to have anything to do with good or bad, right or wrong. Rules such as these are acceptable on my view. They do not affect the collective overall ethical content of the system since they have no ethical content. I suspect some will think that this may undermine my view

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<sup>8</sup> On whatever account is the correct one, say Fuller’s or Raz’s account. See footnote 9 for details.



that the collective overall content of legal systems' rules is ethical since many laws are this way. But it need not. These laws may be best understood as having a practical aim free of ethical content. Yet, it may be the case that there is a necessary connection between the concepts of law and ethics and a necessary connection between law and practical aims. Though, practical aims may support ethical ones. It is not obvious that laws with practical aims are free of ethical content since they are created with various purposes in mind, such as saving lives. However, this is not the place to discuss such matters. The view is compatible with necessary connections besides those of ethics and for there to be laws free of ethical and unethical content.

Another possibility is that what matters is not that a law's content is ethically *good* overall, but rather if it is ethically *acceptable* or not. The implication of utilizing 'ethical acceptance' is that laws without ethical content may still be considered ethically acceptable. In this case, law requires rules with collective overall ethical-acceptability content. A social rule-based system that has rules with collective overall ethical-acceptability would be, on a similar view, correctly labeled 'law' or 'legal system' and one that does not have such collective overall content would not be correctly labeled 'law' or 'legal system'. The system in this case would be guiding its constituents to act in a way that is ethically acceptable, rather than ethically good.

Putting to the side the possibility that it may be better to frame the view as based on content with 'collective overall ethical acceptability', I'll assume for practical purposes the view that the collective overall content of a legal system's rules is ethical. This is compatible with laws without ethical content, as noted above. But it is also compatible with unethical laws as well. We can imagine a society with a legal system

consisting of a total of 400 laws. A certain number of these laws will have no bearing on its collective overall ethical content. Let's assume this number is 100. Of the 300 leftover laws, 200 may have ethically good content. 100 may have ethically bad content. As we can see, the collective overall content of the laws is ethically good. And so, this social rule-based system would be correctly labeled 'law' or 'legal system', according to the view.

However, simply counting the number of good versus bad laws is not enough to fully understand if a supposed legal system has rules with collective overall ethical content. Different laws may have a different ethical 'weight' to them. To say a law *X* has a higher ethical weight than another law *Y*, is to say that what *X* bans is more heinous than what *Y* bans or that what behavior *X* encourages is ethically superior to what *Y* encourages. For example, a law banning murder has a high ethical weight, while a law requiring the use of seatbelts has a low ethical weight, if at all. An ethical law such as one banning murder significantly outweighs an (let's assume) unethical law that bans the excessive use of salt in potato chips. So, it's possible for a legal system to have a higher quantity of laws with unethical content than one's with ethical content if the system's laws with ethical content have collectively more weight than the one's with unethical content. This system would have rules with collective overall ethical content. We may note further that laws without ethical or unethical content—that is, ethically neutral content—would have no ethical weight to them. Thus, they would not influence the ethical weight of the system, and therefore are compatible with the view.

The view in this paper states that the rules of a legal system must have, collectively, overall ethical content in order to be a legal system. This is analogous to

how the rules of a capitalist society must have its economic rules with collective overall wealth-building content. As noted in the introduction, to say that a rule has ethical content, as I use 'ethical content', is (roughly) that the rule, if followed, produces good behavior, whether or not it uses ethical language, though it may in numerous cases. But what might some of these rules be? Some rules of a legal system which have ethical content include: laws banning murder and theft, laws requiring children to be taken care of (child support, anti-abuse laws), laws requiring animals to be treated humanely, anti-stalking laws, laws banning mutilation and torture, laws ensuring fair treatment at work (e.g. anti-discrimination laws), laws protecting equality in general, due process (fundamental justice), laws protecting privacy and property, laws maintaining standards of living, laws prohibiting lying, deception and libel under various circumstances, etcetera.

Other rules which may have ethical content, but I suspect will be more controversial, include: laws regulating traffic, laws regulating flights, some divorce laws such as spousal support, laws requiring/protecting primary and secondary education, rules avoiding Fuller's eight ways to fail to have a legal system,<sup>9</sup> (some, maybe not all) procedural law, etcetera. Most of these rules discussed between this and last paragraph protect life, liberty, and livelihood and surly life, liberty, and livelihood are goods. In any

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<sup>9</sup> I'm only suggesting that legal systems which avoid Fuller's worries will help support the collective overall ethical content of the rules. I am not suggesting that these rules on their own are sufficient to support a necessary connection between ethics and law, or that evil regimes will or will not have reason to comply with them in order to rule unethically (for more on these issues, see e.g. Kramer 2004a and 2004b; Finnis 2011: 273-74; Raz 1979; Simmonds 2004, 2005, 2006, and 2007; and Stewart 2006).

Fuller (1996: 21) requires the following to avoid failing to create law: there must *be* rules, rules must be available to the public, there shouldn't be retroactive legislation, the rules should not be contradictory and should be understandable, people should be able to follow the rules, the rules shouldn't change very often, and the rules should be enforced as stated (for a similar list as Fuller's see Raz 1979: 214-18).

case, this covers a significant amount of the laws and they do seem to be guiding society towards ethically good (acceptable) behavior. I am not implying that any of these rules are *individually* necessary or sufficient for there to *be* a legal system, nor necessary or sufficient for the system to have, collectively, overall ethical content.

### **The Ethical Content of Legal Systems' Laws**

In this section, I discuss why one may believe the collective overall content of legal systems' rules is ethical. It is possible that the collective overall content of legal systems' rules may be something other than ethical, but I focus on ethical content here since it's a plausible option and the literature helps support the claim. The motivation for social rule-based systems can help inform us what the collective overall content of the rules are. When people create a system, such as a capitalist economy or hospital cleaning rules, they have a goal that the rules are meant to guide people and their means towards. So, when people decide that wealth is their goal, they will try to create rules which help produce this wealth. If cleanliness is the goal, people will try to create rules which help guide behavior towards cleanliness. So, it is reasonable to think that the motivation people have when creating a social rule-based system tend towards creating rules that fulfill the nature of the motivation. Though, it may not be necessarily true, for example if people fail to understand what kinds of rules are needed for their goals.

If I can give reason to think that people are interested in creating a system (purportedly a legal system) that guides people's behavior in ethical ways—or otherwise want laws that have ethical content—then this provides grounds for thinking that law has collective overall ethical content. If law has collective overall ethical content, then law

would be guiding society to act ethically.<sup>10</sup> Of course, we shouldn't confuse purposes with the content. For example, though capitalist economic rules may be motivated by ethical concerns, the collective overall content of such a system's rules is clearly not ethical content. Moreover, a capitalist economy may contingently produce good results, but it is not necessary; a capitalist economy necessarily has rules that produce, if followed, capital. We shouldn't confuse the motivation(s) for a system, or contingent results, with the necessary content of the rules themselves, even if the motivation gives good reason to understand what the collective overall content will likely be. Nevertheless, the motivation for a system gives good grounds for a *prima facie* justification of the collective overall content of a system.

The idea that people create societies for the purposes of some good can be found as early in philosophy as Aristotle (and, possibly, Plato's *Republic*<sup>11</sup>). Aristotle writes that

Observation shows us, first, that every *polis* is a species of association, and secondly, that all associations are instituted for the purpose of attaining some good—for all men do all their acts with a view to achieving something which is, in their view, a good.<sup>12</sup> (*Politics* I.1: 1252a1)

Aristotle wasn't talking about law specifically, however, his view is that people create *many* associations, i.e. 'all associations', towards something that is, in some sense, good.

Law will plausibly fit into this view since law is a sort of association. Even if not, it's not

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<sup>10</sup> One may think that if the motivation for law is ethical, then there is a necessary conceptual connection between law and ethics, and so, in Simmond's phrasing, law may be a 'moral idea'. I won't pursue this possibility in this paper.

<sup>11</sup> Thanks to Jon McGinnis for pointing this out.

<sup>12</sup> Cited in Finnis 1985: 76.

implausible to think Aristotle would be sympathetic to the view that law is created for a good. 'Good' is ambiguous and can mean many different things. Nevertheless, one good is ethics and, if so, we would have prima facie reason to believe ethics is a motivator for the creation of law.

More recently, Hart has suggested that law is motivated by ethical considerations. Here is one instance of this:

Thus, it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.<sup>13</sup> (Hart 2012: 185)

If one is motivated by ethical considerations to create law, it's unlikely one will fail to make (at least some) rules which do have ethical content. I'll turn to this next.

At the inception of a legal system certain rules need to be created. Hart calls this the 'minimum content of natural law'. As Hart notes, 'given survival as an aim, law and morals should include specific content' (Hart 2012: 193). This specific content, which Hart believes is the result of 'obvious truisms about human nature', namely the need for survival, are rules that 'contain in some form restrictions on the free use of violence, theft, and deception' (91, similar and broader points are noted on 172 and chapter IX, especially pages 193-200).<sup>14</sup> The free use of violence, theft, and deception are bad.

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<sup>13</sup> I will briefly discuss the implications of moral anti-realism, and, thus, conventional morality, later in the paper.

<sup>14</sup> Finnis (2003) concludes that laws that ban such things are needed for moral reasons.

Laws forbidding them are good. It would be difficult to believe otherwise. We may also note that nearly all societies see life as a good which should be preserved (Finnis 2011: 82-83), which these kinds of laws help ensure the preservation thereof. These laws have ethical content.

If legal systems must have this sort of content at the inception of them, then it's unlikely any actual legal system began with rules that were collectively overall unethical, especially if law's purpose is ethical.<sup>15</sup> Once the legal system is in place, it would be correctly labeled 'law', assuming it passes all other necessary criteria to be law. Since the collective overall content of the rules is ethical, 'law' would be necessarily connected with ethics, assuming the analogy holds. We could of course conceive of the rules' content becoming (collectively) overall unethical over time, but the view can accommodate this. Let's look again at an earlier analogy. Following a rule-based system for cleaning initially reduces germs. Once the rules are changed and following them results in overall increasing the amount of germs it would no longer be correct to label the system 'cleaning system'. Similarly, legal systems begin with rules with collective overall ethical content. Once, over time, the rules have collective overall unethical content, it would no longer be correct to label the system 'law'.

As Green succinctly notes in the introduction to *The Concept of Law*, Hart endorses the claim 'it is not just a contingent matter that law and morality both regulate human conduct', that the purpose of law is ethical in nature, and that there is a connection between law and justice (in Hart 2012: xxxiii-xxxiv). The idea that the purpose of law is to guide behavior in an ethical manner, that we must consider ethics for law to be action

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<sup>15</sup> Shapiro (2011: 391) claims law has ethical goals.

guiding, or for an ethical end is not new. So far, I've been discussing how the ethical purpose for law helps give reason to think that the rules of legal systems have, collectively, overall ethical content. One complication for this view, noted by Green, is that while the purpose of law may be for ethical normativity that does not necessarily mean the system fulfills that purpose (xxxv). But on this paper's view, legal systems *may* necessarily do so. On this view, legal systems only exist while the collective content of their rules are overall ethical, beginning at the inception of the legal system. Once the collective overall content of the rules fail to be ethical content, it's no longer correctly called a legal system. (Though, as noted in footnote 6, the collective overall content may be ethical for a legal system, but may not be ethical enough to warrant judging the system as worth having.)

What if a society's purposes for law are many (or that people *believe* there are many purposes, see Finnis 2011: 4)? Even if law has many purposes beyond ethics, that does not mean we should cease to conceptualize a necessary connection between law and ethics based on the collective overall ethical content of the rules. The view holds that the collective overall content of the laws themselves (partly) determine the concept of law and not that the purpose for law does. So, while the purpose of law can help us identify the collective overall content of laws it does not necessarily tell us how we ought to conceptualize law. For example, there may be many purposes for an economic system labeled 'capitalist' but that does not mean we would cease to have a capitalist economy just because of the many purposes it may have. This is because the collective overall content of the economic rules partly determines what kind of economy the society has.



Furthermore, purposes may come apart from the collective overall content of rules and therefore how to conceptualize a social rule-based system. We can imagine people creating rules with the intent to create a capitalist economy but instead, due to the collective overall content of the rules and who own the means of production, fail to do so, however unlikely this may seem. We shouldn't confuse the purpose for systems with the conceptual understanding of them even if purposes help us identify the correct conceptual understanding of the systems. Ultimately, it's the collective overall content of a social rule-based system's rules that is necessary to correctly conceptualize the system, according to the view in this paper.<sup>16</sup>

Few would deny the importance of ethical considerations for adjudication<sup>17</sup> or when creating, applying, and enforcing laws.<sup>18</sup> These kinds of ethical considerations are compatible with positive law theory<sup>19</sup> and natural law theory explicitly advocates for their importance (e.g. Finnis 2003, 2011; and in some ways, though not a naturalist, Dworkin

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<sup>16</sup> It's not clear if the view in this paper is a functional kind view of law. A necessary connection between law and ethics based on the collective overall content of the rules only requires that law has certain necessary *content*, not a particular end, contra the functional kind view's requirement of a 'distinctive end that law serves' (Moore 2000: 328). The collective overall ethical content of law has the effect that law, if followed, guides society's behavior in accordance with ethics. I'm fine with the claim that the ethical content of law is ethical content simpliciter, especially since ethics in general is an interest to law's constituents and that (at least likely) no particular ethical content is necessary or sufficient, but we can also invoke Finnis's view of the common good. As Moore (2000: 321) succinctly summarizes that view: '(1) the good of co-ordinating conflicting individual goods for mutual benefit, (2) the good of co-ordinating individual goods when doing so has intrinsic merit (as in play), and (3) the good of co-ordinating when that realizes the goods of friendship and love'. (Or the content may be justice-guiding.) Whether or not the common good or ethically guided behavior simpliciter constitute an end for the view in this paper is unclear since content is understood in terms of the results of rules *if* they're followed, and not that they must achieve a particular end. And unlike the functional kind view (Moore 2000: 295, 300, 303-304), the view here allows that there can be unjust, unethical laws. If the view developed in this paper is a functional kind view of law, it would likely be due to the assumption that law is analogous to the other social rule-based systems discussed and that those systems are functional kinds.

<sup>17</sup> Gardner (2012c: 268) argues that there is a necessary connection between adjudication and justice. Finnis (2011: 179) concurs.

<sup>18</sup> As Gardner (2012b: 190) puts it: 'there are moral norms governing [legal practice's] conduct'.

<sup>19</sup> Green (2008: 1050-52) believes law is necessarily 'justice-apt'; Orrego (2007) notes the variety of ways positivists accept the importance of ethical considerations in law, concluding—perhaps surprisingly—that the (supposed) positivist theories reviewed by him are in fact natural law theories.

1986). Ethical considerations are abundant and always a consideration for the lawyer, the law maker, the judge, and those who have to decide whether not to follow the law. I am not noting this to suggest that the importance of ethical considerations for laws necessarily establishes a necessary connection between law and ethics in regard to the collective overall content of law's rules on its own. Rather, I am noting it to point that if ethical considerations are always so important to the participants within a legal system, then we should expect that the content of the legal system's rules to be, collectively, likely overall ethical as well since their interests are embedded within their actions in the system. They have a strong interest in creating laws with ethical content. We then have reason to believe many laws do in fact have ethical content.

There are many functions of law. Some them are, or may be, (1) 'preventing and encouraging behavior', (2) 'providing facilities for private arrangements', (3) 'providing services and redistributing goods', (4) 'settling unregulated disputes', (5) 'procedures for changing the law', and (6) 'procedures for enforcing the law' (Raz 1979: Ch. 9, 176).

The purpose of this list isn't to debate whether it is exhaustive or mistaken. Rather, these are plausible candidates for some of the functions of law. These functions, and so *rules* which regulate them, will not only result in regulating behavior but will also seem to result in people acting ethically *if* other rules have, collectively, overall ethical content. That is, if legal systems have, collectively, overall ethical content, then these functions will help reinforce ethical normativity. They do so not because these functions themselves are on the face of it ethical in nature, though they may be, but because these functions help ensure that people act in the ethical manner the laws regulate. While these functions are not sufficient on their own to support a necessary connection between ethics

and law, they help ensure that the laws these functions regulate guide behavior in an ethical manner if those laws have ethical content. So, these functions *reinforce* or *support* the ethical content of the laws.<sup>20</sup> In doing so, the rules regulating the functions of law would seem to have ethical content since they themselves regulate good behavior, though indirectly by supporting laws with ethical content.

### **Legal Validity**

I will focus on Hart's view of legal validity given his works importance on the field and the literature, and my general sympathies with it.<sup>21</sup> The (ultimate) rule of recognition provides the criterion (criteria) for identifying which rules properly count as laws for particular legal systems (by belonging to that system) and, so, for a rule to be a valid law (103-6). In a simple society, the rule of recognition may be a list of rules the society's constituents regularly follow, or, in a more complex society, the rule of recognition may be that the rules were created by a specific law-making group (94-95). As Hart notes, it is possible for a legal system to utilize ethical criteria as part of its rule of recognition (though some, such as Raz and Gardner, disagree), which Hart notes that the U.S. may be such a case (204), but it's not necessary for the rule of recognition to utilize ethical criteria. I agree that laws do not need to (individually) pass a criterion of ethicality in order to be legally valid, nor do I disagree that laws are created by human persons. This

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<sup>20</sup> To say that functions play a role in supporting the content of the rules isn't to say that the functions are necessary or sufficient for a necessary connection between law and ethics for the view in this paper. Moreover, if the collective overall content of the rules is no longer ethical, then these functions may still exist in some sense, there just would no longer be law, according to the view in this paper. A similar point can be made about the rule of law in Fuller's sense, which may allow the possibility for Fuller's desiderata to exist in some sense when the collective overall content is no longer ethical as many, such as Kramer, insist. The rule of law may be used for evil ends. Again, there would just no longer be law according to the view in this paper even in that case, assuming the collective overall content is no longer ethical, which it would seem likely to be if people use law for evil purposes.

<sup>21</sup> Though Hart's view of validity and the rule of recognition isn't without some controversy (e.g. Raz 1979: ch. 8; Shapiro 2011, which Kramer (2014) responds to), my response will be of general interest.

isn't problematic for the view I have outlined since the questions 'how are laws validated?' and 'is there a necessary connection between law and ethics?' are distinguishable questions.<sup>22</sup>

However, this does not mean that the view being developed does not have anything important to say about what counts as law. As noted before, when a social rule-based system correctly labeled 'law' on this view starts to have laws that have, collectively, overall unethical content, it would fail to be a legal system. What this implies is that there are ethical standards that the rules *as a whole* must fulfill in order to be properly called 'laws'. The standard is that they must have, collectively, overall ethical content, even though no particular law, or maybe only a few (the 'minimum content' thesis), may need to have ethical content. So, while ethical criteria are not necessary for a particular rule to be a valid law, the collective overall ethical content of the social rule-based system's rules is necessary for the rules to *be* laws. So, ethics would then seem to play what we may say is an indirect role in validating rules as laws. An ultimate rule of recognition may be necessary for a rule to be a valid law, but if so, it would not be sufficient on the view here since the system must have collective overall ethical content, as well.

A complication is that it is unclear at what point a particular system's rules are collectively overall unethical, and so whether or not there is a legal system, and thus laws. This implies a vagueness as to when there are or aren't laws. There is, however, on nearly any view some lack of precision on exactly when a system is a legal system or

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<sup>22</sup> Similarly, Gardner (2001: 224) and Finnis (2003: 127) note that we can separate the questions of 'is this really a law?' and 'what is law?'. Positivism focuses on the former question of validity, while natural law is more focused on the latter; one may answer the former with a positivist answer, while still holding a natural law theorist's answer to the latter with consistency.

not since any criteria given may only provide us with a ‘central case’ of law, i.e. one where it is clear that there is a legal system (Finnis 2011: 276-81). But nevertheless there may be ‘non-central cases’ which may lack some of the criteria but which still seem to be largely law. This may imply for my view that some (possible) legal systems have what we might label ‘quasi-laws’ or laws in which their validity comes in degrees. Even so, it’s not clear this is problematic since vagueness in general does not necessarily provide reason to think a distinction isn’t legitimate (e.g. the difference between a living and dead organism, whether or not a country is or isn’t capitalist, etc.).

Let’s turn to natural law and validity. The view should be placed in comparison to what natural law theories have generally said about validity. Murphy (2003) distinguishes several kinds of readings of natural law: the ‘strong reading’ and the ‘weak reading’.<sup>23</sup> The strong reading says that any rule that fails to provide reason for compliance fails to be a law because law’s nature is such that it provides reason for compliance (244). The weak reading says that law is a *kind* in which providing reason for compliance is a feature, and so, *particular* laws which fail to have this feature are defective (253). An analogy to make this clearer: It’s a feature of the kind ‘lion’ to have sharp teeth for hunting, and so, a lion without teeth is a defective lion. A broken phone is a phone, though it is defective as a phone. Neither reading represents the view developed in this paper. According to the view in this paper, no particular laws fail to be law individually for failing to live up to certain principles of reasonableness for compliance in contrast to the strong reading, nor does my view say any particular laws are defective laws, as in the weak reading. All the view states is that when there are legal systems, and

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<sup>23</sup> I ignore the uninteresting ‘moral reading’.

so laws, the collective content of the system's rules are overall ethical and, if not, then there is no legal system and, so, no laws.<sup>24</sup>

### **Moral Anti-Realism**

One advantage of legal positivism is that it can accommodate moral anti-realism, the view that there are no objective moral truths, since laws are validated in terms of social facts, rather than (objective) moral facts. Though positivists can accept the utilization of ethical thinking for various purposes such as adjudication, they are not committed to moral realism for such purposes.<sup>25</sup> On the other hand, natural law is generally perceived as holding, or requiring (Moore 2000: 295), moral realism, and thus an extravagant metaphysics (at least by some naturalists' standards).

How does the view outlined in this paper respond to the possibility that moral anti-realism is true? If it is true, does that undermine the view? Not necessarily, though it might need some amendment. The view could be made compatible with the claim that there is a connection between the *concepts* of law and ethics, and not there is a necessary connection between the truth or reality of ethics and law, whatever that may mean. For there to be a necessary connection between the concepts of law and ethics does not require moral realism to be true; it's compatible with moral anti-realism. We can conceive of morality as an idea. We all do conceive of, say, murder as an immoral act and conceive of a law banning murder as ethically good; whether or not murder is

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<sup>24</sup> This seems to be what makes my view here descriptive in contrast to most natural law theories (more on this later). Though, Murphy (2003: 264) thinks that explaining how a law can be defective, under the weak reading, is necessary for a complete descriptive account of law.

<sup>25</sup> Of course, positivism is a theory of how laws are validated (Gardner 2001: 199-201). A positivist could hold that there are necessary connections between law and ethics on other theoretical issues besides legal validity. As Green (2003: section 4.3) notes: 'no legal philosopher can be *only* a legal positivist'.

objectively wrong is a further matter. A version of the view can accommodate a necessary conceptual connection between the concepts of law and ethics alongside moral anti-realism.

It is perfectly coherent to conceive of a necessary connection between correctly labeling a society capitalistic and that their economy's rules (if followed) build wealth. That is, let's say that if the economy's rules, if followed, don't build wealth, it would never be correct to label that particular economy 'capitalist'. It makes little sense to ask if there is an objective truth about the economy building wealth. The rules which guide an economy towards wealth are overall understood conceptually (i.e. wealth-building). Concepts need not be either true or false. A concept, wealth-building, forms the basis of our concept or idea about the nature of capitalism. There may be a necessary connection between capitalism and wealth-building but we need not ask the further question if wealth production is objectively true or not. Wealth is conventional. Likewise, all the view needs to claim is that there is a necessary connection between the concepts of (conventional) ethics and law. It does not make sense to ask if there is a fact of the matter about ethics where 'ethics' here should be understood as a (conventional) concept in the way wealth-building is. The view need not make any claim about the nature of ethics itself beyond it as a concept. Since laws that ban murder are conceived of as ethically good, correctly so given what 'murder' and 'good' mean, an anti-realist approach to ethics is largely compatible with the view outlined in this paper. Whether or not it's plausible is a further matter beyond the scope of this paper.<sup>26</sup>

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<sup>26</sup> For example, if relativism is correct, this might entail that a legal system like ours and ones like the Nazis' are both law relative to each society's moral code (their concepts of ethics) if their legal systems

## Descriptive Methodology

Hart (2012: 240) writes: ‘my account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law’. So, Hart believes he can describe the general structure of legal systems qua legal systems without resorting to any claims about the ethical import law has, or should have, nor whether or not one is obligated to follow the law (or a law). Though some do not believe legal theory can be done descriptively in this way (e.g. Finnis 2011), I am not here to debate such an issue. I’m interested in whether the view sketched in this paper fulfills the criteria Hart has provided.

Natural law theories tend to deny Hart’s descriptive methodology.<sup>27</sup> But it would seem the theory developed here does not deny descriptive methodology. While I do claim there are rules with ethical content, I do not state whether or not it is good that we have those laws (though it is), whether we should have them or not (though maybe we should).<sup>28</sup> Instead, my claim is that legal systems have laws with collective overall ethical content, which informs us of the necessary connection between law and ethics. The argument developed in this paper does not attempt to justify the existence of legal systems or particular rules as good or not, nor would it seem that by explaining how the collective overall content of the rules informs the nature of law do I fail to be ethically neutral in any interesting sense. That is, while I may recognize particular laws as having

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have rules which are collectively overall ethically in line with the corresponding society’s moral code, an odd, but coherent, view.

<sup>27</sup> See Langlinas and Leiter (forthcoming) for an overview of legal theory’s methodological issues.

<sup>28</sup> Here’s an example of a potential law with ethical content but which, for various reasons, we would not want to posit: it is an offense to cheat on your boyfriend or girlfriend. Interestingly, it may not be *good* to create such a law, though this may just be a prudential concern.



ethical content, I do not thereby necessarily fail to be ethically neutral in attempting to *describe* the nature of law and laws, whether or not there is a necessary connection between law and ethics. It might be that a correct description of law requires recognizing that there is a necessary connection between law and ethics based in collective overall ethical content.

### **A Counter-Argument**

Earlier in the paper I stated that we should (partly) conceptualize economies by the collective overall content of their rules. I discussed the economic system called ‘capitalism’. There is a general feature of a society, the economy, and that feature has multiple kinds (e.g. capitalism and socialism). And those kinds are understood in different conceptual ways. One might argue that we should understand legal systems in an analogous way. That is, there is a feature of a society called ‘legal system’ of which there are multiple kinds: one with rules with collective overall ethical content are one kind of legal system and another kind are legal systems that do not have rules with collective overall ethical content. Call the former ‘ethicalist’ and the latter ‘non-ethicalist’.

It would seem, then, that like how there are many kinds of economies there may be many kinds of legal systems. If so, an ethicalist legal system would persist until the collective overall ethical content of the rules ceases to be; a non-ethicalist legal system would persist only as long as the collective overall content of the rules is not ethical. This seems to imply that once a system is not ethicalist, we would have a different kind of legal system. There would remain a legal system but it would not be the same legal

system in the same way that when an economy switches from a capitalist one to a socialist one it ceases to be the same economy. This is interesting. It would imply that there is a kind of legal system which is necessarily ethical in nature since the persistence of it would depend on the collective overall ethical content of the rules.

However, if this is correct, it would pose a problem for the view developed throughout this paper since it would no longer be inconsistent with the positivist claims that the existence of law does not depend on the collective overall ethical content of the laws and that laws can be valid in spite of having collective overall unethical content. This is so, because even if a kind of legal system is necessarily ethical in nature (ethicalist), this does not imply that all kinds are (non-ethicalist). There are economic systems and then there are kinds of economic systems; there are legal systems and then there are kinds of legal systems.

There is a way for the proponent of the view in this paper to respond to this objection. When it came to hospital triage system there were not many kinds of triage systems, in the sense that all of them require that worst cases are treated first. If the system failed to govern the order of cases seen by worst to less worse, then it was not a triage system. So, some social rule-based systems do not have many kinds. So, the existence of law can be argued to operate in the same way. This possibility can be reinforced by a further consideration. As many have pointed out before (e.g. Finnis 2011: 24, XII.4; Hart 2012: 208; Murphy 2003: 253-4), a single law which is defective as law—that is, a law which is heinous enough so that it cannot be reasonably followed or applied—would fail to be normative. Imagine a whole (supposed) legal system that consists of overall defective rules in this way. This would seem to be the non-ethicalist

system. If people have no reason to follow, and so don't follow, the rules of the system by and large, it's not clear we should think of it as a legal system since legal systems are *normative* systems (which isn't to say that law must be coercive). The non-ethicalist system would not seem to be *law*.<sup>29</sup> Both the ethicalist and non-ethicalist systems are rule-based systems in some sense but it's not clear they're both legal systems, nor even that the non-ethicalist system is a *social* system given its failure to guide people's behaviors. Though it's somewhat controversial if the rule of law can or can't be separated from law's existence,<sup>30</sup> it is a plausible response which supports the coherence of the view outlined in this paper.<sup>31</sup>

## Conclusion

I have developed a view of the necessary connection between law and ethics which is plausible and coherent. On this view, legal systems, in order to be correctly labeled 'legal system' or 'law', must contain rules that have, collectively, overall ethical content. Once the rules do not overall fulfill this nature, the system fails to be law. I have drawn an analogy between legal systems and other social rule-based systems and utilized a motivation for law, ethics, in order to justify this necessary connection between the concepts of law and ethics. Though I have not argued for the truth of the view, I have argued that if the view is correct, the view is descriptive, compatible with moral anti-

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<sup>29</sup> Simmonds (2005: 63-4; 2007: 46) makes a similar point, concluding that 'law rules to the extent that it exists as law'. See Hart (2012: 103-4) as well.

<sup>30</sup> See Raz (1979: 212-14) and Simmonds (2005: 63-66; 2007: 46-56) for discussion. For recent related discussion on whether the rule of law—in Fuller's, Kramer's, and Simmond's sense—can be used for unethical ends, see the work of Kramer (2004a, 2004b), Simmonds (2004, 2005, 2006, 2007), and Stewart (2006).

<sup>31</sup> We can also take the anti-realist approach where the necessary connection is between law and conventional ethics. More specifically, law necessarily has rules with collective overall conventional ethical content. A holder of this can respond that what some might perceive as a non-ethicalist system is ethicalist relative to the society it belongs to and, so, there is only one kind of legal system for every society: ethicalist.

realism, and has important implications on when a rule-based system purported to be law is, in fact, law.

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