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Philosophy of Law: Reply to Critics

Andrei Marmor*

A reply to critics tends to ensnare the author in a postscript version of the famous preface paradox: you feel under some rational pressure to defend everything you have written in the book,¹ and equally under rational pressure to acknowledge that some of what your critics say is true. Paradoxes are not easy to solve and I will not pretend that I can manage it here. I want to defend the arguments I have made in the book, but I also want to admit some mistakes and acknowledge the need for further clarifications and revisions. I am very grateful to the commentators for spending their time and effort on giving me this opportunity. Their comments raise serious concerns, and I hope to address most of them.

The book forms part of the new *Princeton Foundations of Contemporary Philosophy Series*, edited by Scott Soames. The books in this series are meant to address a wide audience of philosophers and philosophy students who are assumed not to have any particular familiarity with the field the book covers, giving readers a sense of where the some of the main contemporary issues in that discipline lie, and what are the main arguments debated, while also making some original contribution to the field. The books in this series are certainly not meant to be state of the art accounts of the disciplines they cover; the editor urged us to make our own arguments and develop our own thoughts on the subjects we discuss, an encouragement I certainly welcomed. But it was not my intention to offer a new theory of law; I do not have one. Most commentators say that the book is a defense of exclusive legal positivism. I would not really call it that, but given the content of the book, I cannot complain that they mislabel the view. I certainly try to defend a view broadly within the legal positivist tradition. And, as I argue in chapter 4, I do tend to think of inclusive legal positivism as a bit of red herring. But my point in defending a certain version of legal positivism, combining insights and arguments from Kelsen, Hart, and Raz, with some of my previous work on social conventions, is not guided by the objective to defend “exclusive legal positivism”; as if there is a coherent, self-contained, view on the shelf rightly labeled thus, and the book just brings to the debate a collection of arguments in support of it. At least I really hope that this is not how the book is read.

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¹ ANDREI MARMOR, *PHILOSOPHY OF LAW* (2011).

There are two main ideas that guided my arguments in this book: first, the thought that a great deal of the debate about the nature of law in the last century and half or so (at least since Austin²), is best seen as a debate about the possibility of reduction: can the phenomena that we identify as distinctly and characteristically legal be reduced to facts of a nonnormative kind, facts about people's actual patterns of conduct, beliefs, attitudes, dispositions, etc? The second thought that guided the book concerns the distinction between description and evaluation, and here I do try to defend a particular view, propounded by H.L.A. Hart, that we have good reasons to keep a philosophical account of the nature of law or, at least some key aspects of it, separate from moral-political philosophy. The idea is that a satisfactory description of the nature of law, at a general level, can be given without relying on moral-political arguments, arguments about what makes, or would make, law good and worthy of our appreciation. And of course, these two lines of thought are related: if a fully reductive explanation of the nature of law is possible, then we would have shown that the description of what law, in some foundational way, is does not *depend* on what makes law good in a moral, political, or any other sense.

It would be a crude mistake to assume that by purporting to offer a reductive analysis of some of the key aspects of law, aiming to keep description of law's general nature separate from its moral worth, one thus denies that law is inherently good, morally or otherwise. That does not follow of course, and I am glad to see that none of the contributors to this symposium accuses me of the error. Furthermore, I do not deny that there is a great deal about the nature of law we can learn by focusing on its inherent moral values and the moral functions, if you will, that law typically serves in our societies. I think that these possible connections between law's values and the nature of regulation by legal means are best discussed in the context of the rule of law, and I will get to it later (replying to Jeremy Waldron's comments).

Let me say a few more words about the argumentative structure of the book before I get to the comments. The first three chapters aim to establish the case for the plausibility of a reductive explanation of what legality consists in and, in a more qualified way, of law's normativity. I begin by trying to show that Kelsen's theory of law, impressive and insightful in many ways (and legal positivist, for sure), fails in its anti-reductive aspiration, and in ways which actually invite the kind of reductive theory H.L.A. Hart offered. Chapter two outlines an account of the key elements of Hart's theory, showing that the kind of reduction he offered extended, quite explicitly, not only to the explanation of legal validity but to the explanation of the normativity of law as well. And then, in chapter three, I try to show that we need some additions and modifications

² Not Bentham, of course. Bentham's legal positivism formed part of his overall moral theory and its descriptive aspects are heavily influenced by his moral and practical aspirations. Thanks to Jerry Postema's work, we are all very aware of this.

to Hart's theory, some drawn from Raz's insights about the authoritative nature of law and some from my work on conventions, to make Hart's project more plausible and complete. Chapter 4 and, to some extent, chapter 6, offer a defense of the reductive project from some of the main critiques of it, particularly those deployed and inspired by Ronald Dworkin. I think that Dworkin's critique of Hart is best seen as an attempt to show why a reductive explanation of law, in particular, of legal validity, is bound to fail. The main argument in chapter 4, completed in chapter 6, aims to show that this antireductionist critique is not convincing. Sandwiched between these defensive arguments of Chapters 4 and 6, Chapter 5 deals directly with some methodological issues concerning the distinction between description and evaluation in legal philosophy. As we will see below, it is this chapter on method that has attracted the main ire of most commentators.

Perhaps I should have felt pleasantly surprised that the commentators did not raise any objections to my main line of argument in the book, either about the characterization of the debates about legality as focusing on the possibility of reduction, or about the main arguments I deployed in defense of a reductive approach. If this was representative of the current state of play, it would not be good news for Dworkin and those inspired by his anti-reductionist line of argument, but the truth is that it may not be good news for me either. My sense is that the preoccupation with the methodological issues, concerning the dependence of description on evaluation, are meant to cast a doubt on the very nature of the project that I have sought to pursue in the book. So I will spend some time here defending my views on these methodological issues, responding to the arguments raised by Lamond, Kopcke Tinture, and Waldron. Timothy Endicott's comments are focused on some issues I discuss in chapter 6, about the relations between language and law, and I will discuss his comments last.

Let me begin with the comments of Grant Lamond, before we get to the methodological issues. There are several issues Lamond raises. First, he complains, and to some extent, rightly so, that I have not given enough attention to law's essentially systematic nature. I do mention in chapter 1 that one of Kelsen's most important insights about the nature of law is the realization that legal norms necessarily come in systems. There are no such things as free floating legal norms; for any given norm to be regarded as legally valid, it has to form part some actual legal system or other. And I suggested that this feature of legal validity has something to do with the fact that legal validity is necessarily tied to space and time: a norm is legally valid only in some jurisdiction that is (or was) practiced somewhere.³ Lamond suggests that legal

³ In my mind, Kelsen muddled his own best insights here by extending them far beyond the legal domain. Kelsen thought that all normative domains, including morality, come in systematic structures, akin to law's, the difference being in the nature of the derivation of norms, dynamic in some cases, such as law and perhaps religion, and "static" in morality. Kelsen's ideas about the systematic nature of morality is highly questionable, but I will not go into this here.

validity just is membership in a legal system. I am not sure that I completely agree with that. I think that Raz was correct to note that the connection between legal validity and membership in a legal system is more tenuous and contingent than that.⁴ But this is not our main disagreement about the importance of law's systematic nature. If I read Lamond correctly, I think that he is much more optimistic than I am about the possibility of articulating a philosophical account, with sufficient level of generality, of law's systematic nature and systematic unity.

Kelsen, of course, attempted to do just that; as I briefly discuss in the book,⁵ Kelsen offered two postulates that together, he thought, provide the necessary and sufficient conditions for the systematic unity of legal systems, both postulates tying the idea of legal validity to a chain of derivation from one basic norm. As it turns out, none of these postulates holds true in all cases, as Raz demonstrated a long time ago,⁶ and I think that we should not be surprised about that. The whole idea that legal systems come in neatly ordered hierarchical structures is fanciful. Legal systems have always been, and certainly are these days, much more muddled than that. This is not a philosophical problem, but a matter of legal and geo-political reality. Nowadays, we witness many legal and political systems that are moving toward partial integration and interdependence (think about the European Union, for one); we see the emergence of various international legal institutions claiming jurisdiction over domestic legal entities (e.g., human rights laws, trade regulation, and even international criminal law); and so on and so forth. But this is not a recent phenomenon. The ideal model of state sovereignty manifest in a unified legal system deriving from a constitution, as Kelsen must have had in mind, was rarely a reality on the ground. For example, think about the legal systems established by colonial powers over centuries of colonial rule. Legal systems established and enforced by colonial powers, sometimes mediated by private or quasi-private entities, were certainly not regarded by those powers as forming part of their own legal system. But they were not entirely separate from them either. Many of the laws for India, Kenya, and Palestine, to mention just a few, were made in the British Colonial Office and, partly at least, administered by British officials on behalf of the Crown. So where was this unified systematic legal order, Kelsen's famous pyramid of norms? Only in the imagination of 19th and early 20th-century jurists, I think.

I know that Lamond is not necessarily endorsing Kelsen's views here.⁷ And I am not sure that he is interested in the unity of legal systems or in their

⁴ See J. RAZ, *THE AUTHORITY OF LAW* (1979), at 119, 149.

⁵ MARMOR, *supra* note 1, at 17–19.

⁶ RAZ, *supra* note 4, at 123–9.

⁷ Lamond alludes to Raz's theory of legal systems based on the idea that legal systems necessarily purport to be normatively supreme and comprehensive. I have actually dealt with this issue in an older book, criticizing some of Raz's ideas in this context. See my *POSITIVE LAW AND OBJECTIVE VALUES* (2001), at 39–42.

hierarchical structure. I think that Lamond is right to bring to our attention that there is a very close connection between the very idea of legal validity and law's systematic nature. I think I have made that explicit (enough? maybe not) in the book. At the end of his comment, Lamond also suggests, however, that any account of the idea of legality "should be in terms of what makes a social practice a legal system, rather than in terms of the nature of the rule of recognition."⁸ But there is no dichotomy here, at least not on my account of the rules of recognition in terms of constitutive conventions. I should not have expected commentators of this book to have read my previous one, but the truth is that in my book on social conventions I explain in some detail why it is a characteristic feature of constitutive conventions (as opposed to coordinative ones) that they come in systems, and contain a certain level of structural complexity of interlocking norms.⁹ So I am not sure that there is much we disagree about here, apart from some matters of emphasis, perhaps.

Lamond's conclusion that paying closer attention to systems of norms draws on a potential ambiguity he detects in the way I defined social conventions, in particular, the condition of compliance-dependent reasons for following a conventional rule. General compliance with a rule, Lamond claims, can either be the *grounds* for following the rule, or only a *condition* on following it. In the former case, the fact that others conform to a social rule is the reason for an agent to follow it too; in the latter case, it is only a reason in the negative sense; whatever reasons one may have for following the rule would not apply or would be defeated if others by and large do not comply as well. Lamond claims that my definition of compliance-dependent reasons for following a rule that is conventional is ambiguous between these two readings. And, he claims, this ambiguity has something to do with the systematic nature of the relevant rules: in systems of rules, as opposed to one-off conventions, general conformity is only a condition for following the rule, not the grounds.

The truth is that in my view the compliance-dependence of reasons for following conventional rules is of the *condition* kind; and that is so because it would seem to make no sense to regard any kind of general compliance as the main reason for doing something. "I do it because everybody else does" is rarely, if ever, a sensible account of one's reason for action. The fact that others are doing something as well is always just part of the reason for doing it. We do not drive on a particular side of the road just because everybody else does; we drive on one side of the road because we need to avoid collisions, that is, we need to coordinate our driving, and therefore, if people drive on the right, others have reason to do the same.¹⁰

⁸ Grant Lamond, *Legal Systems and the Rule of Recognition: Discussion of Marmor's Philosophy of Law*, in this volume, 12.

⁹ ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* (2009), at 45.

¹⁰ In my definition of compliance dependence of reasons, I state explicitly that general conformity is only part of the reason for following the relevant rule; here is the definition in full: a reason for following a rule R,

There is a difference, however, between two ways in which reasons for doing something depend on the compliance of others, both of them in the *condition* sense Lamond has in mind. As I explained in my book on conventions,¹¹ in some cases the reasons for action, *ex ante*, have very little to do with general conformity, yet general nonconformity might undermine the reason for complying. Consider cases of pollution: we have reasons not to dump pollution into the river; but if the river is hopelessly polluted anyway, because others have not generally complied with the reasons in play, then my reasons not to add some pollution (assuming it makes absolutely no practical difference now) may be lost or undermined; they are no longer operative reasons in this case. This sense in which reasons for action can be undermined by the nonconformity of others is pervasive and applies to many nonconventional cases as well. It is not part of what we mean by the rationale of conventions as arbitrary rules. The arbitrariness of conventions, and the sense in which the reasons for following them are compliance dependent, concern those cases in which, *ex ante*, the reasons for doing something partly depend on others doing the same. That applies to all coordination cases, as well as to constitutive conventions; but for a rule to be arbitrary, and the reasons for following it compliance-dependent in the relevant sense, it has to be the case that *ex ante*, the reasons to do something partly depend on—but only depend, not constituted by—the fact that others are expected to comply as well. I do not quite see, however, how any of this has much to do with the systematic nature of the rules in question. The reasons for action in a given context might be compliance dependent, in the way I defined, whether the rules in question are one-off or systemic. Constitutive conventions, as I mentioned, do have something to do with the systematic nature of the rules, but on this point it seems that Lamond would agree.

I also agree with Lamond that more may need to be said about the question of whether the rules of recognition are legal rules or not. There is some murkiness about this issue that I may have failed to resolve in the book. Lamond claims that my explanation of the normativity of law commits me to the view that the constitutive conventions of recognition are legal rules; but this would seem to sit uneasily with my thesis that law's foundations must come from outside the law, that there has to be something more foundational that grounds our interpretation of certain actions and events in the world as having the kind

is *compliance dependent* if and only if, for a population P in circumstances C—(i) there is a reason for having R, which is also a reason for having at least one other alternative rule, S, *and*, (ii) part of the reason to follow R instead of S (in circumstances C) consists in the fact that R is the rule actually followed by most members of P in circumstances C. In other words, there is a reason for following R if R is generally complied with, and the same reason is a reason for an alternative rule if that alternative is the rule generally complied with. (from *Social Conventions*, p. 11)

¹¹ MARMOR, *supra* note 9, at 10–11.

of legal significance that we attribute to them. Now, Lamond recognizes that the tension here might not be all that deep, and offers the idea of “customary law of the courts” to reconcile the two points.

Lamond does not specify the details of his suggestion here, so I am not sure whether it can avoid the danger of tying an account of what the rules of recognition generally are with particular conventions prevalent in common law systems. In any case, I am not sure that there is a tension in my views, though perhaps some clarification is required. The idea that leads Lamond to the conclusion that commits me to see the rules of recognition as legal rules comes from my explanation of the normativity of law. I have argued, on several occasions,¹² that one should not expect an answer to the question of why judges are bound to follow the rules of recognition of their jurisdiction from the rules themselves. The rules of recognition, just like the rules of games, only constitute and define what the rules of the game are, how to go about playing it. Whether anyone, judges included, has a reason to play the game or not, is a separate issue; the rules of the game cannot prescribe that one ought to play the game. In other words, the rules of recognition, just like rules of games in *this* respect, are normative only in a conditional sense: if you have good reasons to play, the rules determine how to go about playing. But those reasons, as Lamond agrees, must be moral reasons, they are the kind of reasons we consider when we think about our required alliance to law and obligations to comply with it.

Now Lamond rightly claims that this may give the impression that the rules of recognition are, like rules of a game, part and parcel of the game itself, law, in this case. And this, indeed, is not quite accurate. I acknowledge that there is more that needs to be said about this. But I am still not sure that much hangs on the specific question of whether the constitutive rules of recognition are “legal” or not. They are clearly not legal in the sense that they are at the foundations of law, they enable us to recognize certain actions and events as having legal significance to begin with; they can be said to be “legal” in the sense that they constitute the fundamental rules of the game, so to speak, and thus playing the game is partly a matter of following the rules.¹³

Finally, Lamond joins the chorus of critics who complain that my book does not attempt to articulate the values we find in law, and does not ask whether those values are inherent or necessary to law, wherever law can be said to exist. Indeed, this is not a question I have taken up in the book. But the critics’ complaint is not just about an omission of a subject (though, as we shall see, Waldron’s comments largely amount to that); there are many important

¹² MARMOR, *supra* note 1, 82–3, and earlier, in *How Law is Like Chess*, 12 LEG. TH. 347 (2006).

¹³ There is a similar issue that I discuss in the book (MARMOR, *supra* note 1, at 56), but it is only in the vicinity, not exactly the concern raised by Lamond.

questions about the law and its relation to morality I have not discussed. There is an argument here, and it aims to show that the kind of reductionist project I have tried to substantiate is not going to work. Here is the argument: suppose we assume, plausibly, that law has some moral purposes and functions inherent in it; suppose we assume that the moral (and perhaps other kinds of similar) functions are pretty fundamental to what law does in our societies, at least under some “pure” “paradigmatic” or “idealized” conditions. Then, the argument goes, “one of the criteria for being a legal system is possessing this moral function. If that were the case, it would not seem to be possible to give a ‘detached’ account of the nature of law, i.e., on that does not invoke substantive moral values.”¹⁴

Let me unpack this argument in some detail, because it seems to be shared, though in slightly different versions, by Waldron and Tinture as well. It forms a major part of their critique too. There are, it seems to me, at least three points worth clarifying about the argument in question: first, we need to unpack the idea of what is meant by “criteria for being a legal system.” Second, we need to unpack the distinction, and a distinction there is, between invoking moral concepts and moral ideas in an explanation of the nature of law, and relying on moral arguments to reach conclusions about what the law is, which is the thesis I deny. Finally, I would like to say something about the kind of constraints that are imposed by different kinds of social explanations.

When legal philosophers ask the famous question “What is law”?, there are, of course, rather different questions they can have in mind. There is one crucial ambiguity about this question, however, that seems to me to be at the root of some misunderstandings here. If we ask ourselves what are the main features we associate with law, what are the essential or characteristic features of a legal order, then law’s moral and political functions and aspirations would certainly have to be part of the answer. An intelligent creature, say, a visiting alien, who does not understand what a moral problem is, or what is a moral dilemma, would have a very hard time understanding what law in our societies is, what it is there for, and of course, what is it good for, if and to the extent that it is good. Understanding how law is related to morality and moral problems we face must be, no doubt, part of an understanding of what is law and what makes it the kind of social institution we have, and why. (This is a point I have acknowledged explicitly in the book.¹⁵) But there is another way of understanding the famous What is law? question, and this is the target of the reductive analysis Hart has offered. Here the question focuses on what make us interpret certain actions and events that take place in the world as having the particular kind of legal significance we attribute to them? Or, put differently, what can possibly ground our distinctions between legal and nonlegal norms (or decrees

¹⁴ Lammond, *supra* note 8, at 5.

¹⁵ MARMOR, *supra* note 1, at *e.g.*, p. 113.

or principles or whatever)? When somebody says, “It is the law that . . .”, what makes it the case that such an assertion is true (or false, as the case may be)? This is a question about the grounds of legality, or legal validity, not about the essential or characteristic features of a legal system. And, as I try to show in the first chapters of the book, one major debate in jurisprudence, a debate with a long and distinguished history, is precisely about the plausibility of a reductive explanation as an answer to this question about the grounds of legality. Austin and Hart thought that it is possible, Kelsen and Dworkin (for very different reasons, of course) thought that it is hopeless.

Now, if the argument under consideration aims to show that these two issues cannot be separated, that any understanding of the grounds of legality is bound to depend on one’s answer to the question of what are the main features of a legal system, then I would like to see the details. For such an argument to cast a doubt on my general thesis, however, it would have to be shown that there is something about the very nature of law, as the kind of institution that it is, that prevents a reductive explanation of legality from being true. This is, indeed, the line of thought that Dworkin has taken and I answer it in the book.¹⁶

Generally speaking, however, I am very skeptical about forging too tight a connection between views about the values inherent in law and any plausible account of the grounds of legal validity, and for the following simple reason: arguments about what the law *ought* to be, from a moral or other evaluative point of view, can only get you to conclusions about what the law, well, ought to be. They cannot get you to conclusions about what the law, or anything else for that matter, is. That is a simple logical point. Now, if we understand the grounds of legality as an articulation of the conditions that make us attribute legal significance to certain facts or events in the world, the only way in which legality could possibly depend on moral values inherent in law is by interpreting legality itself, at least partly, as a moral-evaluative condition. But as I argue in the book, this makes very little sense. Perhaps some people, judges included, may think that legality is partly a matter of moral soundness; still, legality would depend on what they think and believe, not on the relevant moral truths. In short, I am quite convinced that the argument I raised against Dworkin’s anti-reductionism about legal validity easily generalizes.

But what about the explanation I offer of law’s normativity? Tinture claims that my own explanation, based on Raz’s theory of authority, shows that no plausible account of law’s normativity can be given without resting on

¹⁶ In a way, John Finnis takes the opposite line, arguing that law’s essentially moral features rationalize and support the factual grounding of the criteria of legality. It may have been a serious omission on my part not to discuss Finnis’s theory in the book. Tinture’s comments suggest, however, that if I had only adopted Finnis’s version of natural law, I could have retained most of my arguments and the conclusions I draw from them. That is nice to know. Generally speaking, my disagreement with Finnis is mostly about substantive moral issues and moral world view, not about jurisprudence.

“fully-fledged moral judgments.” She says that on my own view, “legal obligation – and so beliefs of those who take the legal point of view – can be ‘made sense’ of by understanding that the law (truly) is in a position to serve as practical authority And that, consequently, there can (truly) ‘be an obligation because the law says so’.”¹⁷ And then, Tinture claims, this account of law’s normative aspect cannot sit easily with my arguments in chapter 5, where I claim that the core content of legal positivism does not depend on moral arguments.

Tinture is quite aware of the distinction I draw between invoking moral concepts and moral ideas in an explanation of the nature of law, and relying on moral arguments to reach conclusions about what legality is, and what the normativity of law consists in. The main thrust of her comment, I take it, is to argue that the distinction is not tenable. I suspect, however, that Tinture’s argument confuses a theory of practical reasons with substantive moral judgments and evaluations. Here is how I understand the argument:

- (1) Any plausible account of law’s normativity must invoke reasons for action; it must explain how committed participants, those who endorse the legal or internal point of view, can regard law’s directives as giving them reasons for action.
- (2) There are two ways to account for such reasons: either by reporting on the relevant people’s *beliefs* about reasons, or by articulating the real/true/objective reasons in play.
- (3) If we confine the account of law’s normativity to a report on people’s beliefs about reasons (as I claim that Hart has done), we are left with no real explanation of what could possibly make law (truly) normative, reason giving, as it were.
- (4) If we offer an explanation of law’s normativity in terms of real/true/objective reasons for action (as Tinture claims that I do, at least in chapter 3), we are inevitably in the business of offering a moral theory, “testing the soundness of the relevant reasons” (which is what I deny in chapter 5).¹⁸

My main reaction to this argument is that the conditional in (4) is false, and mostly because the dichotomy assumed in (2) is overly simplistic. When we offer an explanation of people’s reasons for action, we can do much more than just report on their beliefs, without getting to the point of “testing the soundness of the relevant reasons” from a moral or ethical point of view. That was precisely my critical point against Hart’s (and Kelsen’s) parsimonious account of legal normativity. Simply put, a theory of practical reason in a given field is often about structure, not substance. My own characterization of social conventions, to give one example, says something about the structure of how conventions figure in our

¹⁷ MARIS KÖPCKE TINTURÉ, *Method and Substance in Marmor’s Philosophy of Law*, in this volume, 4.

¹⁸ *Id.*

practical reason; it says something about what kind of reasons can rationalize complying with conventional norms, and it says it in terms of objective reasons for action (as Tinture rightly notes here and elsewhere¹⁹), but I do not think that it says anything about substance; it does not tell us anything about any given convention whether it is good, worth following, justified or morally required or such. Perhaps (or, rather, hopefully) my account of the practical reason of conventions entails some constraints on what *kind of* considerations and reasons would count as relevant to the justification of particular conventions; but that is a far cry from moral justification. And there is, of course, nothing new about this—countless analyses in terms of practical reasons do just that: they point to connections and structures of practical reasoning without engaging in any substantive moral or ethical evaluations or judgments.²⁰

Now perhaps you might agree with the general point I make here, but still think that the particular account of the normativity of law I offered in the book relies on moral evaluations of the kind I deny, at least in chapter 5. Perhaps, but I do not think that just by relying on Raz's idea that law is, essentially, an authoritative institution, and that any account of laws normative character must accommodate law's *inevitable claim* to be authoritatively binding, carries me, or anyone else, to the point of "testing the soundness of the relevant reasons," as Tinture claims. Raz's view says something about the kind of claims law makes on its subjects, and the kind of reasons that would be relevant to the appraisal of the soundness of those claims on particular occasions. By telling us how reasons to comply with the law, or the sense in which we could regard laws as binding, are structurally related to moral values, one has not offered anything that can be called a moral theory of law's normativity.

Tinture also argues, however, that I have not quite made the case for my endorsement of Raz's thesis about law's essentially authoritative nature. She may be right about that. I find Raz's core insight, that law is, essentially, an authoritative institution, a very powerful intuition. It is difficult to prove such intuitions; how would one go about it? Perhaps by imagining a social-political institution, similar to law in all respects except that it would make no claim to be authoritative in any sense whatsoever, and then ask ourselves whether we would recognize such an institution as legal or not. I do not see how we would; but then again we would be appealing to our intuitions. Let me mention, however, that my argument in the book does not depend on the details of Raz's theory of practical authority. In fact, in a later publication, I offer an alternative to Raz's service conception, based on the idea that practical

¹⁹ M. Kopcke Tinture, *Positive Law's Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 189 (2011).

²⁰ To put this point crudely, I do not think that my analysis of conventions would generate different reactions by Kantians as opposed to Utilitarians or Aristotelians. Moral arguments and substantive moral views just do not figure in that explanation, even though the explanation directs us to the structure of practical reasons that are in play.

authorities are essentially institutional in nature.²¹ I hope that my argument about the institutional conception of authority also makes it a bit clearer why law is essentially authoritative.

Waldron's comments also target chapter 5, but from a slightly different angle. In fact, from an angle that I have very little to disagree with. The main argument Waldron advances here is that there are two ways in which legal philosophy can be regarded as a normative, moral-political kind, of philosophy, and that my arguments in chapter 5 cannot be taken to have refuted either. I agree with that; they were not meant to refute the relevance of moral political philosophy to law in the ways Waldron suggests here. One possibility Waldron dwells on concerns the idea that words like "law" or "legal system" or "legality" are partly evaluative terms, that these are "thick evaluative terms"; therefore, explaining what these words mean or stand for necessarily involves some moral concepts and moral evaluations.²² I certainly agree that in some contexts of speech, when people use such expression as "... this is the law!" or "it's not legal...", and such, some evaluative content is meant to be expressed. In other words, it is certainly true that in many uses of the word "law", the proposition asserted conveys or implicates some evaluative content. Whether this is the case in most uses of the word I seriously doubt, but that is not very important for now. The question is what would this linguistic fact have to do with what legal philosophy is about? Waldron attributes to me the view that "theoretical analysis of law is only about concepts," and anticipates that my objection to his suggestion would purport to rely on the distinction between the meaning of words and concepts or conceptual analysis. Nothing would be farther from the truth about my views, but perhaps Waldron had no reason to know that. In a recent article entitled "Farewell to Conceptual Analysis (in Jurisprudence),"²³ I argue in some detail that analytical legal philosophy is ill conceived as conceptual analysis, that even Hart's theory had very little to do with analysis of concepts (the title of his book notwithstanding), and that in any case, there is no deep or significant distinction between meaning of words and concepts. In short, I clearly deny the view Waldron attributes to me here, but again, he may have had no reason to be aware of that.²⁴

But in any case, I am not sure what follows from these linguistic facts about possible or even common uses of the word law and related words or concepts.

²¹ See my *An Institutional Conception of Authority*, 39 PHILOS. PUBLIC AFF. 274 (2011). The argument in this article significantly departs from what I say about authority in the book, but it does not contradict anything in it. My institutional alternative to Raz's service conception concedes that at a high level of generality, the insight of the service conception is sound.

²² Waldron may not have had the opportunity to see this, but in a recent article, David Enoch and Kevin Toh develop this idea in some detail. I happen to disagree with much of their analysis, but that is not quite relevant for our discussion here. See D. Enoch & K. Toh, *Legal as a Thick Concept*, in *THE NATURE OF LAW: CONTEMPORARY PERSPECTIVES* 257 (Wil Waluchow & Stefan Sciaraffa, eds., 2013).

²³ *THE NATURE OF LAW: CONTEMPORARY PERSPECTIVES* 209 (Wil Waluchow & Stefan Sciaraffa, eds., 2013).

²⁴ I should state for the record that this is not a change of heart after the book; nowhere in the book do I suggest, or even hint, that I regard the enterprise as a form of conceptual analysis.

Since I have expressed my detailed objections to conceptual analysis in jurisprudence elsewhere, I will not repeat my arguments here. Nor does it seem to be central to Waldron's comment to insist that the ordinary meanings and linguistic uses of the word "law" would carry us very far in legal philosophy. I think that Waldron just tried to anticipate an objection I would have made, but it is not one that I would.

The second, and main thrust of Waldron's comment is to show that (i) a theory about *the rule of law* and its values would have to be an essential part of any complete theory about the nature of law, and (ii) that there is no way of offering any plausible account of the rule of law without doing, partly, moral-political philosophy. The simple answer I have here is that I agree with both of these points, certainly the second. I have argued in some detail (though not mainly in the article Waldron refers to here²⁵) that the rule of law is, indeed, a moral-political ideal, and I presented an argument purporting to show that the rule of law is valuable not only in the negative sense that Raz famously argued for. And even in the article Waldron cites here, I argue against the purely functional conception of the rule of law that Hart and Raz advocated, making the same point that Waldron does, that there is something morally politically good in being ruled by law and that there is something morally good about the particular ways in which law can guide our conduct.²⁶ My point in that article that "too much of a good thing might be bad sometimes" is not presented as moral skepticism about the values of the rule of law; it only makes the point that legalism can be excessive sometimes, and the particular virtues of being ruled by law, such as publicity, prospective application etc, are never quite costless, morally and otherwise. In short, I do not think that Waldron and I have very different views about the rule of law and its moral-political dimensions.²⁷

Waldron spends some time in his comment promoting the idea that legal philosophy would be impoverished and incomplete if it did not pay sufficient attention to the rule of law and similar moral and political dimensions of legal institutions. He admits that there are also some descriptive aspects of law that may not depend on moral and political arguments about the values inherent in law and the moral virtues of being ruled by law. But he urges us to pay attention to the things that clearly interest him, as if it is our professional duty: "The legal

²⁵ Waldron refers to my article on *The Rule of Law and Its Limits*, 23 LAW & PHILOS. 1 (2004); the paper I refer to here is called *The Ideal of the Rule of Law*, in BLACKWELL COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 666 (D. Patterson, ed., 2d ed. 2010).

²⁶ Waldron reminds us at some point that guiding conduct is never, by itself, an objective of the law; law guides people's conduct for a purpose, guiding conduct is always a means, not the end. I must confess that I do not think that anyone was really confused about this, it is just a convenient short-cut we have come accustomed to use. But Waldron is right that philosophical writing should be more pedantic than that.

²⁷ Waldron suggest at some point that I "might deny that 'the rule of law' is an appraisive concept" and goes on to defend the view that it is. But I certainly do not deny it, on the contrary. I *say* that it is. What I deny is that *legal validity* is an appraisive concept. Legal validity is a phase-sortal concept, norms are either legally valid, or not, or sometimes it may be indeterminate that they are, or not. See pp. 133-4.

philosopher certainly has the task of explicating the functions that law serves and explaining why serving these functions is widely regarded as a good thing.”²⁸ I am not particularly inclined to recommend research agendas to anyone, but I do not object to this one either. As Waldron acknowledges, I have taken that task seriously and tried to make my contribution to explicating some of laws functions and their moral values, elsewhere, not in this book, though.

What remains, perhaps, genuinely in disagreement between us is the same point I discussed in relation to Tinture’s comment, that is, the distinction between an account of law’s normativity given in terms of articulating the structure of practical reasons that apply to authoritative directives, which I argue that is needed, and a substantive moral-political account that is, in my mind, just an optional addition, as it were. I think that Waldron shares the view, expressed in Tinture’s comment, that any explanation of what makes law the kind of normative system that it is must be based on some moral-political philosophy about what makes law good and would give us moral-political reasons to follow. I remain unconvinced, for the reasons I mentioned above.

I would like to add a general comment about different kinds of philosophical explanations and the kinds of constraints they entail, hoping that we can make a bit more progress in this debate. Some philosophers assume, or take it as their working assumption, that the kind of philosophical explanation we offer in legal theory must be essentially interpretative; that is, it must provide an account of law’s nature and its normative character in ways that the law’s subjects could come to recognize as their own. People should be able to recognize, at least upon reflection, how the philosophical explanation offered rationalizes the practice for them, and makes sense for them why they would regard the practice valuable. Such explanations are expected to have a moment when participants in the practice could say, “ahha!, so now I see why I am doing this” or why it is good, or such.

This is fine; as a methodological aspiration, interpretative theories of law or any other social practice make a lot of sense. It is certainly very valuable to have the kind of explanation that would allow for an “ahha” moment, rationalizing the practice for those who engage in it, at least up to a point. It is, in fact, a great deal of what we do in political philosophy, as Waldron demonstrates with his discussion of democracy. But I seriously doubt that this kind of constraint, that participants in a practice you aim to explain should be able to recognize as their own, rationalizing the practice for them, has general application to social explanations of a philosophical kind. In fact, I think that some reductive explanations clearly violate it, and in ways which should not make us worried about it. Elsewhere I gave the example of Marx’s reductive explanation of religion as a form of false consciousness: clearly it is not the kind of explanation that could rationalize for religious people the practices they engage in and

²⁸ Jeremy Waldron, *Arguing about the Normativity of Jurisprudence: Comments on Andrei Marmor’s Philosophy of Law*, in this volume, 9.

the beliefs they have about them.²⁹ There is no “ahha” moment here, at least not for those who want to remain religious. Yet nobody would claim, I hope, that Marx’s explanation of religion fails for this reason alone. And I think that the point generalizes to many other reductive explanations, including, I think, in legal philosophy. Explaining the normative aspect of law does not have to end with good news, it does not have to end with an “ahha” moment for law’s subjects. More needs to be said about this, of course, but I will leave the details for another occasion.

Timothy Endicott raises two objections to my analysis in chapter 6. First, he argues that I have misconceived the relations between indeterminacy of communicated content and the need for interpretation. Second, he argues that the doubts I raised about the reliability of conversational maxims in statutory interpretation are not well founded, and that in any case, the relevant legal actors should be guided by a strong cooperative principle. Let me say from the outset that I find Endicott’s doubts and questions about my analysis of the strategic nature of legal conversation quite understandable. I have many answers, but I cannot give them here. The suggestions I have made in chapter 6 about the pragmatic aspects that are unique to the kind of strategic discourse we find in law were very sketchy and incomplete. They were just allusions to other work on this topic I have been doing at that time, which has now morphed into a book, *The Language of Law*, where I discuss these issues at much greater lengths and detail.³⁰

I should also say from the outset that I find Endicott’s first objection a bit puzzling, not to say mystifying. Here is what we agree on: we seem to share the view that interpretation is, generally speaking, an exception to the standard or ordinary understanding of an instance of communication. This is not to deny that there is often (most often, actually) some inference that hearers need to draw from words uttered by a speaker in a given context to the content that was actually conveyed by the speaker on that occasion of speech. In other words, in most instances of ordinary conversations, the content communicated by the speaker, asserted, implicated or presupposed, is pragmatically enriched content. And this normally involves an inferential process from semantic content, contextual background, and some normative assumptions about the type of speech the parties are engaged in. Endicott agrees with me that we can call this inferential process interpretation if we like, but that there would be very little theoretical payoff in doing so. In particular, it would not be the kind of interpretation we have in mind when we speak about contexts of interpretation where some reasons are called for, and can normally be given, to understand the utterance or the text one way rather than another. And then we could say that one understanding of the text is better than another, more appropriate to

²⁹ See my “Farewell to Conceptual Analysis (in Jurisprudence)”, at 226–7.

³⁰ A. MARMOR, *THE LANGUAGE OF LAW* (2014), mostly Chapters 1, 2, 4, and 5.

the task, or better serves some relevant value or purpose. And this is the second point Endicott seems to agree with: we both share the view that interpretation, in this second and substantive sense, is a matter of giving reasons for the preference of one reading/understanding over another. Let me quote this point of agreement, it will turn out to be important. Endicott says, and I agree, that “Interpretation is needed when arguments can be made in favor of differing conclusions as to the meaning of a communicative act.”³¹

So what is it that Endicott objects to? He objects to my statement that interpretation is called for when there is some *indeterminacy* in the content of the law. But here I am already a bit puzzled: indeterminacy of communicated content relative to some particular issue/question just *is* the need to come up with some reasons for favoring one understanding over another. So what is the objection here? As far as I can tell, the objection rests on the claim that when “an interpreter succeeds in finding good legal reason to ascribe one meaning rather than another to the law,” then there is no indeterminacy and no need for interpretation.³² And this, Endicott claims, is The Problem:

The Problem: the task of legal interpretation is to identify reasons for a conclusion as to the content of the law. Insofar as the content of the law is indeterminate, there are no reasons that require one conclusion. So while interpretation may be a way of identifying an indeterminacy in the law, it cannot resolve an indeterminacy. So, contrary to what Marmor says, indeterminacy in the law cannot give rise to a need for interpretation.

There are two points that baffle me about Endicott’s argument here: first, I do not understand why would it be the case that the indeterminacy of some communicated content relative to some question or problem entails that reasons cannot be given to prefer one reading over another? It seems to me that it is exactly the other way around: we need reasons to go one way or another precisely because the content communicated, as far as we can figure, does not determine, by itself, which way to go. The second point that baffles me is Endicott’s assumption that if a reason to prefer one reading over another is found, then the presumed indeterminacy vanishes, it is not there anymore. This point seems to involve a confusion between reasons favoring some option rather than another and conclusive reasons for favoring it; and it mysteriously assumes that if a solution to a problem has been found, there must not have been a problem to begin with. Only unresolved or unresolvable problems are problems? Surely Endicott would not make either one of these mistakes, which leaves me, as I said, a bit baffled here.

I am happy to demonstrate my perplexity by using Endicott’s own example of the case *Garner v Burr*, concerning the question of whether a chicken coop

³¹ Timothy Endicott, *Interpretation and Indeterminacy: Comments on Andrei Marmor’s Philosophy of Law*, in this volume, 7.

³² *Id.* at 3.

fitted on iron wheels is a “vehicle” or not. Here is my simple read of the case: a chicken coop fitted with iron wheels is a borderline case of “vehicle”; from a linguistic perspective, it can go either way. When the law says that “vehicles must be fitted with pneumatic tires,” it is semantically indeterminate whether Mr Burr’s chicken coop on wheels is a “vehicle” or not. Semantically, it is a borderline case of a vague term. Thus in this legal case, reasons should be given to prefer one option over another. And indeed, reasons were given in the case. I do not know what reasons the Magistrate gave for their decision to acquit, but presumably they must have had some ideas about the importance of fair warning in penal cases, the idea that it might be stretching language a bit too far to say that any heavy object you put on wheels becomes a vehicle, and so on. And then we know that the Court of Appeals disagreed, and gave reasons which were based on the presumed purpose of the law, namely, the purpose of avoiding causing damage to the asphalt roads. One can easily see good reasons pulling in both directions here, though I tend to agree with Endicott that the Appeal’s court reasoning was eminently sensible in this case. But I am really not sure what leads Endicott to assert that “If the Lord Chief Justice’s interpretation was good, then there was no indeterminacy in the law in respect of its application to this case. Properly understood (properly interpreted), the law made it an offence to do what Burr had done.” Once again, two mistakes are glaring here: finding a solution to a problem does not normally mean that there was no problem to begin with; and finding a good reason to read the law one way rather than another, even if the reason is really a good one, does not mean that reasons for a different decision vanish as if they have never existed. Reasons offered by dissenting judges are often very good reasons, legal reasons, that is, even if you think that the majority got it right.

Finally, let me say just a few words on the second issue that Endicott discusses in his comments, concerning my views about the strategic nature of legal discourse, and the relative unreliability of implicated content in such contexts. My views on the maxims of conversation in contexts of less than fully cooperative discourse were never meant as a criticism or Grice and the framework he articulated. Grice took the model of a fully cooperative discourse, where parties are engaged in a truthful exchange of information, as a kind of ideal model, and drew some important conclusions about the maxims of conversation that apply in such contexts and the ways in which hearers can grasp implicated content. Grice was quite aware of the fact that not all ordinary conversations are of this kind, and he was aware of the fact that some modifications would be needed in other cases.³³ He has never articulated, however, what those modifications would be, and he has not considered the type of conversations I focus on, that I call strategic, where parties to the conversation try to gain some advantage by implicating more (or less) than they would have been willing to

³³ P. GRICE, *STUDIES IN THE WAY OF WORDS* (1989), at 24–37.

make explicit; and then hearers would often want to refrain from acknowledging uptake beyond what was explicitly said or asserted.

I have never held the simplistic view Endicott seems to attribute to me that conversations can either be “ordinary,” in which case, they are fully cooperative, or “strategic,” in which they are not. That would obviously be much too simplistic and generally false. For one, there are many ordinary conversations in which parties are totally cooperative without engaging in a truthful exchange of information; polite conversations are typically of that nature. And of course, as I say very explicitly, even very strategic conversations are partly cooperative. Without some level of cooperation it is difficult to imagine any kind of conversation taking place. The maxim of relevance, for instance, cannot be flouted entirely, while still having a conversation, that is. So there are many assumptions in the views Endicott attributes to me that are just not the kind of assumptions I make. The interested reader can find all these details in my book on *The Language of Law*, and I will not attempt to summarize the arguments here. Where I find myself in genuine disagreement with Endicott, however, is mostly about the normative, moral-political aspect of the requisite cooperation between courts and legislatures in the ongoing discourse between them. Endicott clearly thinks that the more cooperative this discourse is, the better. And I am not so sure. There is a great deal to be said in favor of the idea that courts and legislatures should deal with each other at arms-lengths, and somewhat suspicious of each other. Together they make the law of the land, but this togetherness, so to speak, does not have to be all that intimate. Each represents different perspective and different interests, and some back and forth, even strategic maneuvering between legislatures and the courts, is not such a bad thing. Making law is politics, and political power is better when divided. Now perhaps you might think I only say this because I have lived too long in the United States, and there is a sense in which this might be relevant. American courts are probably more overtly strategic in their dealings with Congress (and vice versa) than their British counterparts. But perhaps British courts are just more polite, and no doubt, often more subtle. Subtle strategy is still strategy, though.