/ПРИКАЗИ

Kenneth Einar HIMMA, PhD*

Hershovitz, Scott. 2023. *Law Is a Moral Practice*. Cambridge: Harvard University Press, 256.

Scott Hershovitz's *Law Is a Moral Practice* is concerned to defend two principal theses: the Moral Practice Thesis (MPT) and the Obligation Thesis (OT). According to MPT, the point of law *as such* is to rearrange our moral relationships by imposing *moral* obligations that people would not have if not for law.[1] According to OT, legal obligations are ontologically identical with moral obligations; as he puts the matter, „legal obligations *are* moral obligations" (23, emphasis added), adding, without defense, the peculiar claim that moral obligations are the only „genuine" obligations (23).[2]

* Associate Professor, University of Zagreb Faculty of Law, Croatia, *khimma@gmail.com*, ORCID iD: 0000–0003–2517–6937.

1 Hershovitz also frequently makes unsupported empirical claims about what we typically do. For example, he claims, without any evidence, that „legal practices are tools for adjusting our moral relationships, and *they are typically employed for the purpose of doing so*" (18, emphasis added). It should be clear that he needs a rigorous sociological study to justify this claim – like the ones being done in experimental jurisprudence, an important new area of legal philosophy that is not discussed in the book.

2 Tell someone who has spent their life in prison for murder that there wasn't any genuine legal obligation not to commit murder. As I have spent some time working with inmates in prison as a volunteer, I am pretty sure that will be enough for them to lose confidence in you.

It is important to understand that both of these theses are metaphysical in character, and, as such, purport to be necessary truths about law and morality. But only MPT is clearly conceptual in character. Claims about the point of law „as such" are claims about its conceptual function, which hence count as conceptual in character. In contrast, it is not clear whether OT is a conceptual claim about the relationship between legal and moral obligations. Claims of ontological identity can be conceptual but need not be; the claim that 1 + 1 = 2 asserts an ontological identity that is not true simply in virtue of the way we use the constituent words. Either way, both of these theses should be understood as metaphysical and hence as purporting to be necessarily true.

There are a number of interesting discussions in the book, but the analysis is, as we will see, marred by Hershovitz's failure to consider the existing literature. It bears noting in this connection that the book is intended to reach a more general audience than just academics and is written in a less formal and technical style than is traditional in conceptual jurisprudence. But, even so, the analysis suffers from the book's lack of engagement with the literature. The unfortunate result is that this omission limits the book's utility even for the more general audience that Hershovitz wants to reach.

A second problem has to do with its style. While it has become common for professional philosophers to attempt to reach a broader audience (following the model of Ronald Dworkin's classic *Law's Empire*), it is quite difficult to do this without making some compromises in terms of sophistication, detail, and hence rigor. It feels a little uncharitable to assess this book against the standards that apply to scholarly writing. But Hershovitz is not at all bashful about bashing the rest of us scholars. As will be seen below, he repeatedly dismisses our views as mere „clutter".[3] That he is dismissive of these views as „clutter" suggests that considering them will get in the way of seeing Hershovitz's truth; and that suggestion opens him up to having his views assessed against those academic standards of rigor. As the kids today say, „don't start none; won't be none."

Before proceeding to a brief discussion of each chapter, it would be helpful to make a general observation about MPT and OT. Both these theses are grounded in Hershovitz's view that law and morality are not separate systems, which I will call the One System Thesis (OST). This, as should be clear, is an ontological and hence metaphysical thesis that purports to be necessarily true. As he explains OST:

[3] To be fair, it beats „rubbish." Thank goodness for little blessings.

> [It is] easy to think that law is something other than morality – that it's a separate normative system. But that thought rests on a mistaken picture of morality. Morality is not insulated from the messy details of our lives. It cares about them. Indeed, it tells us what we owe each other in light of them (171).

These remarks are problematic in two conspicuous respects. First, it is silly to assume that *anyone* thinks morality is „insulated from the messy details of our lives": it is obvious that the requirements of criminal law mirror those of morality and hence that there is considerable overlap in their content. Indeed, it seems nearly pathologically uncharitable to attribute this foolishness to even the more general audience Hershovitz wants to reach. Second, and equally problematic, OST does not imply any conceptual claims about the point of law as such – though it clearly implies OT. Alternatively, one could argue, as Dworkin does in *Law's Empire*, that the point of law as such is to morally justify the state's use of its coercive power.[4] This is not to endorse Dworkin's view; it is merely to illustrate the claim that OST logically implies nothing about the point of law as such.

The book begins with an introduction, which is concerned, in essence, with the question of what makes a rule a rule. The analysis here is organized around a discussion of whether there is a rule in the Hershovitz household that requires his four-year-old son, Hank, to try every food on his plate. During the course of the discussion, Hershovitz rejects the altogether sensible claim that the rule exists because he and his partner made it to govern Hank's conduct at dinner:

> [Hank] knows that both Julie and I think – and act as if – there is such a rule. But he does not think that sufficient to make it the case that there is a rule that requires him to do so. When Hank and I argue over whether he is required to try things on his plate, we are not debating whether he is required according to the rules that I recognize. Rather, we are debating whether he is required to do so, sans qualification. In other words, *Hank and I are having a debate about his actual rights and responsibilities, not the rights and responsibilities that I take him to have* (9, emphasis added).

[4] As Dworkin expresses his view: „The law of a community [...] is the scheme of rights and responsibilities [that] license coercion because they flow from past decisions of the right sort. They are therefore 'legal' rights and responsibilities" (Dworkin 1986, 93). Dworkin also subscribes to OST. See, e.g., Dworkin 2011, 400–415. I am grateful to Thomas Bustamante for the latter reference.

It is a strange conception of morality that entails that a four-year-old boy has a *moral obligation* to try everything on his plate. While Hank is an extremely intelligent child, he is too young to be held *morally* accountable for his behavior because, *at four years of age*, he does not understand the difference between right and wrong and has not yet developed the capacity to reason well enough with moral rules to be bound by them, which is evinced to some extent by the quoted passage above.[5] For this reason, Hank doesn't *yet* have any moral responsibilities or obligations to other people – though he certainly has moral *rights* against other people.[6] Indeed, the most basic point of parenting – apart perhaps from providing the material necessities (which isn't really a matter of *parenting* per se) – is to instill the abilities needed to thrive in a society in which the child will eventually be held both morally and legally accountable for his wrongs and punished (possibly severely) for such wrongs.[7]

Because he overlooks this, Hershovitz misses an opportunity to say something interesting about how children develop a sense of morality. Hank, like every child his age I have ever known, seems to have an inherent resistance to being told what to do by other people. This sense that others lack something like authority to tell us what to do leads naturally to the idea that there are universal norms that govern not only such authority but also define limits on what persons with authority can justifiably demand of other; insofar as these norms are not created by some human authority, they are objective in character. While it is true children initially believe parents have unlimited authority and, later on, that law does, they eventually achieve

[5] The notion of parental authority is a complicated one. When a child is as young as Hank is, it is best thought of as custodial authority that binds other moral agents not to interfere in the parenting of Hank.

[6] Rights correspond to obligations: to say that *P* has a right of some kind against *Q* is to say that *Q* owes an obligation of the same kind to *P*. See, e.g., Thomson 1992; Hohfeld 1917.

[7] Not surprisingly, these utterly uncontentious facts about minors are reflected in the criminal and civil law, which treat minors very differently from adults. In 1899, recognizing that minors are still in the process of developing the relevant capacities, Cook County, Illinois, established the first juvenile court; since then, the legal system in the U.S. has treated minors quite differently from adults (Juvenile Law Center 2019). And there is a limit on how young someone can be to be charged with a crime under even the laws governing minors: the youngest child ever charged with a crime was six years old when the crime was committed; and the predictable reaction to that was justified outrage (Corley 2022). It is a baffling that someone with Hershovitz's education and experience, which includes clerking for Ruth Bader Ginsberg while she was on the U.S. Supreme Court, would overlook such conspicuous features of our moral and legal practices.

a perspective that is distinctively moral in character.[8] This is not to say that there is nothing to be learned from these exchanges. However, I think it would have been helpful to situate those views relative to the various theories of moral development and their bearing on our legal practices as they ground theories of the nature of law. Doing so would have enabled Hershovitz to see some of the limits of what the views of young children can contribute to the discussion on the nature of law.

Each chapter is concerned to justify MPT and OT. Chapter 1 discusses the institution of promise-making to illustrate the claim that legal norms, like the moral norms governing promises, *can* be used to rearrange moral relationships between parties, which is a claim about what is causally, or nomologically, *possible*. While that claim is obviously true, Hershovitz infers two *conceptual* claims from it that, again, purport to express necessary truths about the nature of law: (1) that the point of law as such is to rearrange moral relationships in the relevant respect, and (2) that legal obligations are ontologically identical with moral obligations.[9] The problem is that it is obviously fallacious to infer *conceptual* claims about what is *necessarily* true of law – and, for that matter, necessarily true of *anything else* – from claims about what is *nomologically possible* about even the kind of interest.

Chapter 2 considers a controversy in the theory of constitutional interpretation as a means of articulating that law, by its nature, is a moral practice in the relevant sense (43). It is true, as Hershovitz points out, that disagreements about the principles of constitutional interpretation are often moral in character. However, he claims, implausibly, that the issues dividing Supreme Court Justices concerns the *legality* of various theories of interpretation. The problem is that it is clear that the Supreme Court's decisions establish the law regardless of which such theory the majority employs – a point that even Dworkin, who was perhaps the first to articulate and defend OST, concedes. As Dworkin puts this utterly uncontentious point in *Law's Empire* (20):

---

[8] See, e.g., Kohlberg 1981. Kohlberg's theory has been justifiably criticized on the ground that he focused exclusively on the moral development of boys. Carol Gilligan argued that girls develop an ethic of care that is not captured in Kohlberg's theory (Gilligan 1982). Gilligan's theory has been criticized on a number of grounds. See, e.g., Senchuk 1990.

[9] Either way, it is no surprise that law and morality typically overlap so much in content; both law and morality, after all, are concerned with promoting human well-being by restricting acts that can result in harm. But one obvious difference between the two is that, in every *existing* municipal legal system of which we know, the criminal law, unlike moral norms with roughly the same content, is backed by sanctions that purport to provide a prudential reason to comply, when moral reasons are not likely to induce compliance.

> [The] Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office.[10]

That „last word" establishes the content of the law on the matter and hence pertains to the rule of recognition in the U.S., which affords final authority on the Supreme Court over constitutional decisions. As it is implausible to think any Supreme Court Justice has ever been confused about this, the most plausible interpretation of their disagreements is that those disagreements pertain to what the Justices believe are the correct standards of moral legitimacy, which are concerned, as Dworkin points out, with justifying the use of the state's coercive machinery – and, again, not with the conceptual conditions of legality.[11]

Chapter 3 argues for the claim that *law* does not consist of a set of norms. As Hershovitz condescendingly explains, „the *original sin* among philosophers of law is *the rigid insistence* that this and not that set of norms counts as the law of a community" (83, emphasis added). Although he concedes that legal norms count as law, he believes there are other elements of our legal practices that also count as part of the law:

> The problem comes when someone insists (as some who style themselves „legal realists" are wont to do) that the law just is the set of norms *that are enforced*, and nothing else. That's a problem because it obscures facts that we need to keep in view. For instance, if a cop does ticket someone driving just a mile or two over the limit, courts will not hear his complaint that the law „really" permits him to drive up to ten miles an hour over the limit. That's because the courts aim to apply norms that are authoritative, not the norms that are generally enforced (83, emphasis added).

[10] See, e.g., Himma 2005.

[11] It should be noted that one can consistently hold that morality and law form one system and still distinguish between legitimacy and legality. Some of the rules in this one system govern legitimacy while others govern legality.

There are two conspicuous problems with this discussion. First, it is simply false that courts in the U.S. won't „hear" that complaint. I have had the fines for speeding tickets reduced, or thrown out entirely, by arguing I was only five miles over the limit and doing so not to impede the flow of traffic. Of course, there is no guarantee that a court will do either of those things (though they do them more often than Hershovitz realizes), but that is a different issue. Second, it is silly to think that accepting Hershovitz's suggestion that believing law consists entirely of norms will prevent someone from realizing that cops rarely ticket anyone for speeding unless s/he exceeds the speed limit by more than five miles per hour but would be legally justified in doing so.

But, next, in a dazzling non sequitur, Hershovitz argues that H.L.A. Hart shares his view that the law is not just a set of norms, in essence, because Hart rejects the idea that law is inherently coercive in the sense explained above:

> Hart took Holmes to task for his suggestion that the law is just a prediction about what courts will do. Courts appeal to the law, Hart pointed out, to justify the decisions that they make, so the law cannot just be the set of norms they are likely to enforce; a law has to exist independently of its enforcement if it is to play a role in justifying it. Hart offered his own suggestion: the law is the set of rules validated by a rule that judges accept. But that's not what is at issue in court either. What's at issue is the norms that are authoritative (83).[12]

This is simply confused. The disagreement between Hart and those who believe, as I do,[13] that law is inherently coercive does not in any way implicate the truism that the law consists of just the norms that count as legally authoritative. That disagreement between us concerns whether it is a necessary condition for a norm to count as legally *valid* and hence as legally authoritative in some legal system *S* that its enforcement is authorized in *S* for noncompliance. There is nothing in Hart that would justify thinking he denies the law consists entirely of norms – construed, of course, to leave open the possibility that it includes legal principles.

---

[12] On Hershovitz's view, „norms are authoritative, if they are, only in virtue of moral principles that establish their authority" (85) – a claim he makes repeatedly without ever making an argument.

[13] See, e.g., Himma 2020.

Further, he gets Hart's reasoning and position here wrong. Hart rejects Austin's command theory of law principally on the ground that it overlooks the distinction between primary norms and secondary norms; the latter are concerned to define the criteria that a *primary norm* must satisfy to count as legally valid. He gives a number of other arguments rejecting the view that even the primary norms of law are inherently coercive – including the gunman writ large argument and the argument that the primary norms of international law lack sanctions but count as law.[14] But none of these arguments will support drawing any of the interpretive conclusions about Hart's view that Hershovitz attempts to draw here.

Chapter 4 attempts to reconcile the claim that law is a moral practice with the claim that there can be immoral laws. Hershovitz devotes much space to showing how the notion of a moral practice is broad enough to accommodate the existence of immoral laws, which is less in need of defense than any of the principal claims in the book. But he says nothing by way of reconciling the existence of egregiously immoral laws – like the Fugitive Slave Act which required officials to return persons who escaped conditions of slavery to those who create and maintain those conditions – with the much stronger claim that every legal obligation is ontologically identical with a moral obligation.

There is, of course, a great deal of overlap between morality and legality; however, absent exceptional circumstances that do not obtain in the case of the vast majority of immoral laws, an immoral law does not give rise to a moral obligation. It is counterintuitive, to put it quite charitably, to think the Fugitive Slave Act created even a prima facie moral obligation to comply – though it obviously defined a legal obligation to do so. Even in legal systems that are generally just, there is a limit on how wicked a legal norm can be and still generate a moral obligation to comply; no contemporary philosopher of note has ever defended the preposterous claim that we have an absolute moral obligation always to comply with the law.

One can always claim, of course, that immoral norms cannot count as law in the purely descriptive sense of the word that positivism takes itself to explain – and there might be some natural law theorists who hold that strong view. But that is a view that cannot be reconciled either with our ordinary views or with the conceptual or legal practices which ground them.

[14] For criticisms of both arguments, see (Himma, 2020) and (Himma, forthcoming).

Moreover, though it is commonly thought that Finnis and Dworkin take that position, there is good reason to think both would deny this implausibly strong claim.[15]

In any event, the ostensible lesson of Chapter 4, which includes an interesting discussion of Mafia rules and wicked laws, is that „it is important that we maintain a clear-eyed sense of the shortcomings of our legal practices. To do that, we have to treat them as potential sources of obligations and note the ways in which they fall short" (111). Notwithstanding that one might sensibly deny Mafia rules create social obligations, it is a conceptual truism that any mandatory legal norm, no matter how wicked, creates a *legal* obligation. The facially absurd claim that there cannot be a wicked norm that defines something that counts as a *legal* obligation, which *seems* to be Hershovitz's view, needs a defense, apart from the question-begging OST, that it never gets.

Chapter 5 offers an extended discussion of M.B.E. Smith's rejection of the idea that there is even a „prima facie" moral obligation to obey the law. As Hershovitz correctly points out, whether or not we have a moral obligation to obey an immoral law depends on the circumstances; it is clear, after all, that the moral reasons for obeying an immoral law might, in some instances, outweigh the moral reasons for disobeying it. The demands of morality are complicated and often appear to conflict. That is part of what makes it so challenging to live a morally good life.

But beyond pointing out that we might sometimes be morally required to do what is morally wrongful, his reasoning is problematic. Hershovitz argues, among other things, that putting the question in terms of whether we have a moral reason to comply with the law „is misleading [because] it presupposes that we can identify the content of the law independently of ascertaining its moral force" (114).[16]

---

[15] Dworkin concedes, for instance, that there can be wicked law in that purely descriptive usage, which he characterizes as the *preinterpretive* usage of the term *law*: „We need not deny that the Nazi system was an example of law [...] because there is an available sense in which it plainly was law" (Dworkin 1986, 103). His theory in *Law's Empire* is concerned to explicate an „interpretive" use of law that has some morally evaluative content. Similarly, Finnis explicitly accepts the separability thesis as being true of the same descriptive usage of law (Finnis 1996, 203, 204).

[16] I say „comply" here instead of „obey" because I agree with Hershovitz that „obey" connotes that the obligation is owed to some authority. It is true we owe some legal obligations to others, such as an obligation not to murder, breach contracts, or negligently fail to take reasonable care in protecting others; however, there is no obvious central authority to which every legal obligation is owed. Assuming we have a legal obligation owed to the court to comply with court orders, it seems clear

There are two problems with the quoted claim. First, it clearly begs the question against legal positivism. Second, the U.S. Constitution's Fugitive Slave Clause and the statutory Fugitive Slave Act of 1850 are obvious counterexamples to the claim we can't identify the content of the law without considering its moral force, as well as to OT.[17] As a general matter, a statute that prohibits intentionally killing a person for any reason than those permitted by the law itself can be interpreted simply by consulting the statute – when the statute is clear enough to convey reasonable notice of what behaviors are prohibited, as is required of criminal law in the U.S. to satisfy the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Chapter 6 is, for the most part. a sensible discussion of the case of Roy Moore's refusal to conform to the constitutional rule prohibiting the establishment of a state religion, which has been interpreted to preclude displaying religious symbols in courts and legislatures. But this case doesn't need as much discussion as it gets. It is largely uncontentious, even among political conservatives, that the removal of Moore from state office was justified both from the standpoint of legal rules and from the standpoint of moral rules – or, as the matter is commonly put, justified all things considered. But Hershovitz conflates the two issues of justification, asserting without defense that „[the claim] that Moore had a duty to follow the rulings of the federal courts – is a moral claim every bit as much as it is a legal one" (138).

Again, this begs the question against the standard view that law and morality are distinct systems. The standard view is not only more elegant; it is far more intuitive and more in line with our conceptual *and* legal practices. While one might, I suppose, make an argument to the effect these practices

that the obligations created by most criminal and civil laws are not owed to judges, legislators, or members of the executive branch. As Hershovitz helpfully explains the problem: „Smith's question is troublesome for its invocation of obedience. Asking whether we are obligated to obey the law suggests that the primary way in which law makes a moral difference is through the exercise of authority" (116).

[17] The Fugitive Slave Clause provides as follows: „No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." Article 4, Section 2, U.S. Constitution. The Fugitive Slave Act of 1850 was enacted to ensure that southern states complied with the Fugitive Slave Clause.

should be revised (or „reengineered"),[18] Hershovitz makes no such argument – and this is because there is simply no need to talk about such matters in a different way. The standard view does all the work that MPT and OT do but without denying what is a truism, given the way we use the words, that law and morality are separate systems. Adopting OST would require revising much in our conceptual practices without any obvious redeeming social benefits.

Chapter 7 argues for the surprising claim that lawyers have moral expertise whereas philosophers, including moral philosophers, lack it. Moral philosophers should not be thought to have such expertise, on Hershovitz's view, for a variety of reasons, including that the problems they work on are either too general (presumably in the case of ethical theory) or too specific (presumably in the case of applied ethical issues). Though that claim is not obviously absurd, he argues, much less plausibly, that lawyers have moral expertise because they study a wide variety of moral issues:

> If I am right [...] that moral expertise exists, [...] then it follows that lawyers are moral experts, at least for a narrow but important set of moral questions. They are the sorts of questions that lawyers study, in a sustained way, starting in law school and continuing through their careers (156).

The argument that lawyers have moral expertise depends critically, of course, on OST and hence begs the question against the standard view. However, it is worth noting, against OST, that the only courses required of law students that explicitly deal with morality are exclusively concerned with the professional duties that lawyers owe to their clients and to the courts. Every other required course is concerned with the statutes and common law decisions pertaining to that area of law. One can, I suppose, count those latter courses as courses in morality but only if one thinks that statutes and common law *necessarily* establish the content of morality. Putting aside the facial implausibility of that latter claim, it is difficult to reconcile with Hershovitz's view that morality is objective and hence practice-independent in character.

[18] Conceptual engineering is concerned with engineering new concepts and reengineering old concepts that need revision because they are problematic in some way. See, e.g., Chalmers 2018. It is crucial to note that this is not just being done by academics; gender concepts are being reengineered both among the academic community and among the general public.

The book concludes with an Appendix that answers „FAQs“,[19] most of which are concerned to situate Hershovitz's views pertaining to positivism, classical natural law theory, and Dworkin's interpretivism. If forced to complain about the Appendix, which is, on my view, the strongest discussion in the book *by far*, I think that many of these questions would have been more helpfully answered in the chapters – and especially in the Introduction.

If one has any doubts that Hershovitz's theses are metaphysical, the Appendix makes clear that he intends his theses as a conceptual claim about the nature of law and morality. Given, for instance, that he pits his MPT against the various conceptual theories of law, it is fair to assume he intends MPT as a claim about the nature of law – that is, as a claim that purports to be necessarily true of law as such – and, moreover, one that is objectively true in the sense that its truth value does not depend at all on what we do with our conceptual or legal practices.

Hershovitz is forced to claim that his theses are objective truths about law because they are utterly detached, as he often delights in boasting, from the views of lawyers, philosophers, and ordinary folks. And, in all fairness, it is not obviously preposterous to think both that there are such objective truths about the nature of law and that we can be mistaken, even collectively, about our views.

However, there are conspicuous limits on how much a theory of the nature of law can conflict with what we do with words and still remain plausible. Claiming we are all mistaken in believing such truisms as that law consists of norms is analogous to claiming, for instance, we are all mistaken in believing the concept of bachelor applies only to human beings. On this weirdly revisionist view, all male dogs would really count as bachelors, regardless of our social practices, because they cannot marry. For this reason, Hershovitz's theory amounts to an error theory of law that – despite having an enhanced burden of proof, like all error theories – is rarely given even minimal support.

Either way, none of the cases that Hershovitz discusses in the chapters provides any support for the claim that legal obligations are ontologically identical with moral obligations because they are all logically consistent with the standard view that they are ontologically distinct, which is implied

[19] It is indicative of the high esteem in which Hershovitz holds himself and his views that he characterizes these questions as „FAQs“ – as if the world is as familiar with his views as it is with, say, social media apps like Facebook and Instagram.

by the claim that law and morality are separate systems. There is simply nothing in the book that provides even a prima facie reason to question the standard view.

There's an easy way to see this; and Hershovitz is aware of the problem. To even get his view off the ground, he must assume objective morality exists. That is not necessarily problematic, given that most of us assume this. But what is problematic is that he links skepticism about the existence of an objective morality to skepticism about the existence of law:

> I won't try to talk you out of your skepticism here. What I will say is that, if you are skeptical about moral claims, you should be skeptical about legal claims too (194).

This is just question-begging nonsense; and it is patently false. Anyone who has ever been charged with a crime or had to defend a civil suit in court *knows* we have a legal system that consists of norms that govern our behavior. Indeed, I doubt one could find any competent adult in the U.S. who does not know we have a system of law. We are as epistemically justified – and obviously so, on any standard of epistemic justification that does not require Cartesian certainty for empirical knowledge – in believing that triviality as we are in believing the claim we need to eat to survive.

What we are not *obviously* justified in believing is that there exists an objective morality – though I share his belief that there is. This is why moral skepticism is a viable position and one commonly seen among students in introductory courses in ethics who struggle to understand, as is sensible, how there could be objective moral truths. Moral skepticism takes two forms – one epistemological and the other ontological. Epistemological moral skepticism is the position that, even if an objective morality exists, we do not have reliable epistemic access to any truths about it.[20] Ontological moral skepticism is the position that there is no objective morality.[21] Again, the point here is not to endorse either form of skepticism, but simply to point out that we lack an obvious argument that would establish the existence *and* knowability of an objective morality.

Far more worrisomely, Hershovitz also assumes that there are objective, and hence mind-independent, truths about *the nature of a kind* – which poses a very different problem than those concerned with the existence of an objective morality. But even if that counterintuitive claim is true, it is

[20] For a general discussion of moral skepticism, see, e.g., Sinnott-Armstrong 2024.

[21] *Ibid*.

simply not clear how any ordinary mortal could have epistemic access to the nature of a kind as it is determined independently of anything we do down here with language. However, even if there are God's-eye truths about the nature of law,[22] discerning them would require a God's-eye perspective that none of us can plausibly claim to have. Given that Hershovitz so often rejects conceptual claims about law, which positivists and anti-positivists accept as truisms about the nature of law, he seems to think (and sometimes insinuates as much) that he has more reliable epistemic access to the nature of a kind, as determined independently of our conceptual practices than the rest of us do; it seems clear that he cannot reject so many claims that are accepted by both academics and layperson if he is concerned with how the nature of law is determined by our conceptual practices.

One can, of course, sensibly be skeptical about much having to do with law. One can, for instance, justifiably be skeptical about the contentious claim that there are always right answers in the law for hard cases, as well as about the conflicting claim that the law does not always provide right answers to hard cases. One can even be justifiably skeptical of the idea that there are any right answers at all to even easy cases.

What one cannot be sensibly skeptical about is the claim that law exists – regardless of whether morality is objective. Because Hershovitz falsely conflates law and morality, he is forced to equate moral and legal skepticism; whatever benefits this might yield, which are never explained, conflating moral and legal skepticism comes at the prohibitive cost of having to deny claims that count as truisms given the way we use the words – for no apparent reason and to no evident advantage.

Hershovitz's view that the point of law as such is to rearrange our moral relationships is also strikingly implausible. Far more plausible is the claim that its point is to prevent enough violence to enable us to live together in comparative peace so that we can benefit from social cooperation – i.e., to keep us out of a Hobbesian state of nature; after all, every legal system in human history has criminalized violence and backed those prohibitions with stiff sanctions. We might, I suppose, sometimes use law simply to rearrange our moral relationships, though that is not something I have ever done, or even seen done, and is certainly not true of criminal law and the contempt

[22] While the problem is analogous to the problem of explaining how beings like us have access to objective *moral* truths (assuming there are such truths), it strikes me as more difficult. One might reject the claim there are objective moral truths, but that claim is coherent. It is hard to make sense of how there could be such objective truths about the nature of things.

sanction that backs court orders. However, law cannot do this – or, for that matter, anything else it is intended or contrived to do – without at least minimally keeping the peace.

The claim that the basic point of law is to keep the peace might be contentious among anglophone conceptual jurisprudents but not among normative political philosophers who do legitimacy theory – including Dworkin. And the reason for the latter is not difficult to see: one need only look to what is happening in Haiti after the fall of the government to see why political philosophers almost universally accept this claim. As CNN described the tragic horrifying situation as it began unfolding recently in Haiti:

> For three weeks, Haiti's capital has been trapped in a gory cycle that far exceeds the kidnapping and gang violence for which it was already known. An insurgent league of heavily armed gangs is waging war on the city itself, seeking new territory and targeting police and state institutions. Scared and angry, vigilante groups are blocking off their neighborhoods with felled trees and chains, killing and burning outsiders suspected of gang membership. It's the only way, they say, to defend themselves. Human remains are lying in the streets, yet the multinational security mission long touted by Haiti's neighbors as a game-changer for its gang problem is nowhere to be found (Stephens Hu *et al.* 2024).

In essence, this amount to the war of all against all that Hobbes predicted will happen in any anarchic condition. It is true that Haiti differs from more affluent nations in that it has struggled with brutal, life-threatening poverty throughout the course of its history. However, it would be hubris to think we in more affluent nations could dismantle the coercive machinery of the law without deteriorating into a state-of-nature scenario like this.

It might take us a little longer to descend into such profoundly harmful chaos. But, given human nature and our material circumstances, as they will be increasingly impacted – and in frighteningly negative ways – by artificial intelligence and climate change, it is plausible to surmise that eventually such chaos would find its way into even the most placid suburbs. The idea that the basic point of law is to rearrange our moral relationships is preposterously optimistic about our ability to get along in a world of increasingly acute material scarcity where we must compete for everything – including romantic companionship. We can't even get along on Instagram – and neither AI nor climate change has eliminated jobs or career prospects of large segments of the population...yet!

There is one consistently irritating feature of the book that warrants a comment before I close this out. Hershovitz is unable to content himself with just expressing his disagreement with existing theories of law. Instead he feels an inexplicable need to dismiss them with an almost Trumpian arrogance and glee; as Trump absurdly boasted at the 2016 Republican National Convention, „I alone can fix it" (Applebaum 2016).

One recurring example of this, as noted above is that he insists on using the word *clutter* to describe the entire history of contemporary legal philosophy:

> My plan in this book is to cut past some of the *clutter*, so as to provide a concise account of the idea that law is a moral practice. That means that, for the most part, I won't engage these philosophers or the many others who have made important contributions to the debate (11, emphasis added).

and

> I haven't yet used any of the labels that pervade philosophical discussions about law: positivism, natural law, realism, and the like. I will have a lot to say about them later on, but they are part of the *clutter* that I want to cut past. The positions these labels name presuppose particular ways of thinking about the problems in jurisprudence – ways that can be counterproductive (15, emphasis added).[23]

But, far and away, the most offensive remark that Hershovitz makes in the book comes in the context of a discussion of Antonin Scalia's textualism and is directed at positivi*sts*, the people – rather than at positiv*ism*, the theory: „Hart's partisans sometimes suggest that lawyers, like Scalia, insist that there is law, even where there are no shared tests for identifying it, simply in the hopes of hoodwinking people" (49). This is not just false and disrespectful. It is astoundingly unprofessional – and Hershovitz should know better.

While there are a number of interesting discussions in *Law is a Moral Practice*, the book is marred by Hershovitz's tone, unsound reasoning, and assumptions. To be as candid in assessing the book as he is in assessing any view he disagrees with, its most basic problem is Hershovitz's outsized ego. If he had gone into writing this book with even the slightest inkling of humility

[23] It should be noted that he never gives an example about how these „ways of thinking" can be „counterproductive."

or fallibility, the book would have been much better. Although he would still have a steep hill to climb defending OST, MPT, and OT, he would not missed so many opportunities to defend these claims because he would not have dismissed the rest of us and might have learned something important about how play this game in a civilized way.

REFERENCES

[1] Applebaum, Yoni. 2016. I Alone Can Fix It. *The Atlantic*, July 21. *https://www.theatlantic.com/politics/archive/2016/07/trump-rnc-speech-alone-fix-it/492557/*, last visited August 27, 2024.

[2] Chalmers, David. 2018. What is Conceptual Engineering and What Should it Be? *https://philarchive.org/archive/CHAWIC-3v2*, last visited August 27, 2024.

[3] Corley, Cheryl. 2022. In some states, your 6-year-old child can be arrested. Advocates want that to change. *NPR*, May 2. *https://www.npr.org/2022/05/02/1093313589/states-juvenile-minimum-age-arrested-advocates-change*, last visited August 27, 2024.

[4] Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.

[5] Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge: Harvard University Press.

[6] Finnis, John. 1996. The Truth in Legal Positivism. 174–188. *The Autonomy of Law*, edited by Robert P. George. Oxford: Clarendon Press.

[7] Gilligan, Carol. 1982. *In a Different Voice*. Cambridge: Harvard University Press.

[8] Himma, Kenneth Einar. 2005. Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism. *Law and Philosophy* 44: 1–45.

[9] Himma, Kenneth Einar. 2020. *Coercion and the Nature of Law*. Oxford: Oxford University Press.

[10] Himma, Kenneth Einar. Forthcoming. *The Nature of Law.* Cambridge Elements Series. Cambridge, UK: Cambridge University Press.

[11] Hohfeld, Wesley Newcombe. 8/1917. Fundamental Legal Conceptions. *Yale Law Journal* 26.

[12] Juvenile Law Center. 2019. Youth in the Justice System: An Overview. *https://jlc.org/youth-justice-system-overview*, last visited August 27, 2024.

[13] Kohlberg, Lawrence. 1981. *The Philosophy of Moral Development*. New York: Harper & Row.

[14] Senchuk, Dennis M. 1990. Listening to a different voice: A feminist critique of Gilligan. *Studies in Philosophy and Education* 10.

[15] Sinnott-Armstrong, Walter. 2024. Moral Skepticism. *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman. *https://plato.stanford.edu/entries/skepticism-moral/*, last visited August 27, 2024.

[16] Stephens Hu, Caitlin, David Culver, Harold Isaac, Evelio Contreras. 2024. Carnage on the streets of Port-Au-Prince as world stalls on a promised intervention for Haiti. *CNN*, March 22. *https://amp.cnn.com/cnn/2024/03/21/americas/haiti-council-gang-intl-latam*, last visited August 27, 2024.

[17] Thomson, Judith Jarvis. 1992. *The Realm of Rights*. Cambridge: Harvard University Press.