

# IN WHAT SENSE IS LAW A MORAL PRACTICE?

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## INTRODUCTION

Scott Hershovitz’s book *Law Is a Moral Practice* contends that law is, well, a moral practice.<sup>1</sup> But what Hershovitz means by that claim is not entirely clear. A modest version of the claim, and one that Hershovitz seems at times to press, is that law can, and often does, impact our moral relationships.<sup>2</sup> Legal events—like enacting a statute or adjudicating a dispute in court—can, and often do, affect what we morally owe each other. That modest version of the claim is true; indeed, it is so uncontroversial that it hardly needs a book-length defense. One assumes that Hershovitz’s main objective lies elsewhere.

There is another, much stronger reading of the claim. Law could be a moral practice in the sense that law is part of morality: Legal norms are a subset of moral norms—legal rights and duties are all moral rights and duties.<sup>3</sup> This stronger claim sometimes goes by the name “the one-system view.” The one-system view has prominent proponents,<sup>4</sup> but it also has many detractors and remains a live topic of debate.<sup>5</sup> I take illustrating and defending the one-system view to be among Hershovitz’s main goals in *Law Is a Moral Practice*, and it is that aspect of the book that I will focus on here.

Hershovitz spreads his argument for the one-system view throughout the book and leaves the argument partly implicit, so reconstructing it takes some work. But it is an important argument and worth considering, not least because it captures a frustration that some feel toward the state of play in general jurisprudence<sup>6</sup>—the branch of philosophy that studies the nature of

1. SCOTT HERSHOVITZ, *LAW IS A MORAL PRACTICE* 10 (2023).

2. *See infra* note 15.

3. *See infra* note 21. I will generally speak in terms of just rights or duties, but I mean the full complement of normative relations, including powers, immunities, etc.

4. For defenses of the one-system view, see, e.g., RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 400–15 (2011); Steven Schaus, *How to Think About Law as Morality: A Comment on Greenberg and Hershovitz*, 124 *YALE L.J.F.* 224, 235 (2015); Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1323 (2014).

5. For criticism of the one-system view, see, e.g., Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 *LEGAL THEORY* 59, 69–76 (2022); Hasan Dindjer, *The New Legal Anti-Positivism*, 26 *LEGAL THEORY* 181, 199–209 (2020); Andrei Marmor, *What’s Left of General Jurisprudence? On Law’s Ontology and Content*, 10 *JURIS.* 151, 168–70 (2019).

6. *See, e.g.*, David Enoch, *Is General Jurisprudence Interesting?*, in *DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE* 65, 65 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019) (“[W]hen it comes to general jurisprudence . . . I always get the feeling that if there is a point, I’m missing it.”).

law, wherever and whenever law exists.<sup>7</sup> We can learn from Hershovitz's argument, even though I will ultimately conclude that the argument is not sound and that we should reject the one-system view.

I should say at the outset that *Law Is a Moral Practice* is a wide-ranging book and there is much in it that is constructive and illuminating. The book, as Hershovitz notes, "is as much about morality as it is about law."<sup>8</sup> It addresses, among other things, the Constitution's moral authority,<sup>9</sup> lawyers' moral expertise,<sup>10</sup> and how social practices impact our moral rights.<sup>11</sup> Hershovitz's treatment of these and other topics is not only well worth reading but also achieves something rare for a work of analytic philosophy—the book is entertaining, conversational, and refreshingly accessible to nonexperts.

In the manner of most book reviews, I will not focus on the parts of the book with which I am sympathetic.<sup>12</sup> Instead, I want to take up the book's titular claim and consider the senses in which that claim is true and those in which it is false or at least controversial. To that end, Part I differentiates several ideas that Hershovitz seems to lump under the slogan "law is a moral practice," one of which is the one-system view. Part II reconstructs Hershovitz's argument for the one-system view, and Parts III through IV examine the argument's premises. Part V offers some brief methodological reflections.

## I. THE CLAIM

What does it mean to say that law is a moral practice?<sup>13</sup> To start, we should be clear about what Hershovitz does *not* mean. He does not mean that law is always morally optimal. We can be morally obligated to follow the law even when the law is morally subpar; a moral obligation to obey the

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7. See generally Andrei Marmor & Alexander Sarch, *The Nature of Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/entries/lawphil-nature/> (overviewing questions in general jurisprudence).

8. HERSHOVITZ, *supra* note 1, at 12.

9. *Id.* at 5–8.

10. *Id.* at 156–159.

11. *Id.* at 36–37.

12. For instance, I am sympathetic to the claim that "lawyers are moral experts, at least for a narrow but important set of moral questions." *Id.* at 156. Not only do lawyers know morally relevant facts about their community's practices, they are also adept at making certain morally relevant arguments or distinctions—e.g., arguments regarding slippery slopes or the distinction between what the law should be and *who* should decide what the law should be. See *id.* at 157. Part of what students learn in law school is this form of moral expertise, and law professors might do well to transparently explain as much to them.

13. By my count, the phrase "law is a moral practice" appears over forty times in Hershovitz's book. *Id.* at 10–14, 18, 24, 27–29, 39, 42–43, 70, 86, 95–96, 103, 114, 166–68, 173–74, 176, 179, 182, 184, 196. Hershovitz also calls the view expressed in the book the "Moral Practice Picture," though it is unclear what ideas he wants to put under that label. *Id.* at 183.

law can be consistent with the law being unjust.<sup>14</sup> For instance, we might be morally obligated to pay a statutorily-enacted income tax because it is the best available mechanism for funding much-needed government services, even if the tax itself is morally problematic—perhaps it taxes the rich too little.

So, what *does* Hershovitz mean? One plausible reading of the phrase “law is a moral practice” is that *law can be and often is morally impactful*: We can and often do use law to adjust what we morally owe each other.<sup>15</sup> This version of the claim is uncontroversial.<sup>16</sup> Legal practices, like enacting statutes or adjudicating disputes in court, provide mechanisms for coordinating conduct, setting expectations, and resolving disagreements over how to live together. In these and other ways, legal practices can and do create new moral rights and duties or render existing moral rights and duties more precise.

At some points in the book, Hershovitz might advance the stronger claim that *law essentially aims to be morally impactful*: Law, by its nature, aims to adjust what we morally owe each other.<sup>17</sup> It would follow that a law that makes no difference to our moral relationships is defective as law. Much as a knife that cannot cut things is a bad knife and a chair that is useless for sitting is a bad chair, a law that makes no difference to our moral relationships is a bad law—not just in the sense that it is morally bad or neutral but also in the sense that it fails to achieve one of law’s essential aims.

Suppose that the statutorily enacted tax imagined above was so burdensome on the poor that it failed to adjust our moral relationships at all (aside from obligating us to petition for reform). On the view just advanced, the statute would be law—would create a legal norm—but would be defective as law. This version of the claim that law is a moral practice is

14. *Id.* at 12.

15. *See id.* at 18 (“When I say that law is a moral practice, I mean just this: legal practices are tools for adjusting our moral relationships, and they are typically employed for the purpose of doing so.”); *id.* at 28 (“[L]egal practices . . . are the sorts of activities that might, in the right circumstances, rearrange people’s moral relationships. That is what I mean when I say that law is a moral practice.”); *id.* at 96 (“To say that law is a moral practice . . . is simply to say that we employ law in an effort to adjust who owes what to whom.”).

16. *Cf.* Brian Leiter, *Law is a Moral Practice*, NOTRE DAME PHILOSOPHICAL REVIEWS (Apr. 2, 2024), <https://ndpr.nd.edu/reviews/law-is-a-moral-practice/> (noting that the claim that law can rearrange moral relationships is “trivially true”); Angelo Ryu, *The Object of Jurisprudence*, 15 JURIS. 164, 166 (2024) (observing that, while law is a moral practice in the sense of rearranging moral relationships, “so are lots of non-legal practices”).

17. It is not clear whether Hershovitz intends to advance this version of the claim that law is a moral practice or not. *See* HERSHOVITZ, *supra* note 1, at 10 (suggesting that “law is a moral practice” in the sense that law is “a practice that aims at creating, extinguishing, enforcing, articulating, arranging, and rearranging our moral rights and responsibilities”).

similar to, and maybe indistinguishable from, claims that others have made before, including that law has a moral aim,<sup>18</sup> that a law's moral merit bears on whether it is a central case of law,<sup>19</sup> and that law is a goodness-fixing or functional kind.<sup>20</sup>

At other points, Hershovitz advances a still stronger version of the claim that law is a moral practice, namely that *law is a branch of morality*: Law and morality form one normative system.<sup>21</sup> Legal rights and duties are all moral rights and duties. We do not ask first what the law is and then whether we morally ought to follow it; rather, what the law is and whether we morally ought to follow it are one and the same inquiry. This claim is often called “the one-system view”<sup>22</sup> and is closely associated with Ronald Dworkin's later work (though he arguably advanced it earlier in his career, too).<sup>23</sup>

The one-system view runs counter to many people's intuitions about law.<sup>24</sup> Return once more to our imagined tax statute. On the one-system view, whatever law the statute makes depends on the moral rights and duties that it generates. The law obligates people to pay the tax only when and insofar as it morally obligates them to do so; it empowers courts to enforce compliance only when and insofar as it morally empowers them to do so; etc. I take defending the one-system view to be among Hershovitz's objectives, and it is that version of the claim that law is a moral practice that I will focus on below.

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18. SCOTT SHAPIRO, *LEGALITY* 213 (2011).

19. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 15–16 (2d ed. 2011).

20. Emad H. Atiq, *Law, the Rule of Law, and Goodness-Fixing Kinds*, in *ENGAGING RAZ* (Kimberley Brownlee, David Enoch & Andrei Marmor eds., forthcoming) (manuscript at 9–10), <https://ssrn.com/abstract=4549540>; Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188, 223 (Robert P. George ed., 1992).

21. See HERSHOVITZ, *supra* note 1, at 26–27 (“My claim in this book is that legal practices are moral practices; the corollary is that legal relationships are moral relationships.”); *id.* at 39 (“[L]awyers are apt to insist that they traffic in law, not morality. They are wrong about that. Law is a moral practice.”); *id.* at 176 (querying whether a separate-systems view allows us to see anything about “law that we can't see if we suppose it's a moral practice”); see also Nina Varsava, *The Moral Practice Picture of Law*, JOTWELL (Jan. 29, 2024), <https://juris.jotwell.com/the-moral-practice-picture-of-law/> (interpreting Hershovitz as making this claim).

22. See *supra* note 4 and accompanying text; see also Jeremy Waldron, *Jurisprudence for Hedgehogs* 8–12 (NYU Sch. Law, Pub. L. Rsch. Paper No. 13-45, 2013), <https://papers.ssrn.com/abstract=2290309> (reconstructing Dworkin's one-system view); Nicos Stavropoulos, *Legal Interpretivism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2021), <https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/> (sketching a theory that asks “in what ways institutional history is morally relevant”).

23. See DWORKIN, *supra* note 4, at 400–15; see also Scott Hershovitz & Steven Schaus, *Dworkin in His Best Light* 2–3 (Univ. Mich. Pub. L. Rsch. Paper No. 24-004, 2023), <https://ssrn.com/abstract=4546048> (“[T]he one-system picture wasn't a twist held back for [Dworkin's] final chapter; it was the story he'd been telling all along.”); Hillary Nye, *The One-System View and Dworkin's Anti-Archimedean Eliminativism*, 40 L. & PHIL. 247, 248 (2021) (“[T]he one-system view is ... a distillation of what [Dworkin] always believed.”).

24. Hershovitz himself recognizes this. See HERSHOVITZ, *supra* note 1, at 10.

Let me mention one other claim in this vicinity, which involves a sort of quietism about some of the questions that legal philosophers have traditionally asked. One could interpret the claim that law is a moral practice as a statement on the proper research agenda for general jurisprudence: Legal philosophers should avoid questions about the metaphysical determinants of law and *ask only how legal practices adjust our moral relationships*. Hershovitz has made something like this claim in prior work,<sup>25</sup> and he seems to repeat it in the present book.<sup>26</sup> We will return to this claim at the end of Part IV.

There are still other plausible ways of interpreting Hershovitz's slogan.<sup>27</sup> *Law Is a Moral Practice* suffers from an unfortunate lack of clarity with respect to its titular thesis. There are points where the book appears to slide freely between (1) the uncontroversial idea that law can be and often is morally impactful and (2) the surprising idea that law is a branch of morality, i.e., the one-system view.<sup>28</sup> It is important to see that these are distinct claims and that the first in no way entails the second. The rest of this Review clarifies and then critically examines the book's argument for the one-system view.

## II. THE ARGUMENT

Why accept the one-system view? Hershovitz concedes that he does not “have a knockdown argument against other ways of looking at law.”<sup>29</sup> Instead, he invites us to “take up the idea that law is a moral practice, see how it works, see where it leads, and see how it accommodates the fact that

25. See Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1203 (2015) (“The time has come for jurisprudence to drop the metaphysics and take up morals.”).

26. See HERSHOVITZ, *supra* note 1, at 91 (“At no point do we need an answer to . . . how the set of norms that constitutes the law is itself constituted.”); *id.* at 183 (stating that “the law” is a “mythical entity that sits at the center of lots of misguided jurisprudence”); *id.* at 195 (“[We should not be] misled into thinking that ‘the law’ is something about which we must do metaphysics.”). The quietist claim noted above could be called a version of “eliminativism” about law. See Hillary Nye, *Does Law ‘Exist’? Eliminativism in Legal Philosophy*, 15 WASH. UNIV. JURIS. REV. 29, 31 (2022) (arguing in favor of eliminativism about law); Lewis A. Kornhauser, *Doing without the Concept of Law* 14–15 (NYU Sch. Law, Pub. L. Rsch. Paper No. 15-33), <https://ssrn.com/abstract=2640605> (same).

27. The slogan could also mean that law *essentially claims moral authority*—an idea associated with Joseph Raz. See Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 300–05 (1985). Hershovitz writes: “Raz thinks that law is a moral practice, in the relevant sense,” because Raz believes “that law claims authority over its subjects.” HERSHOVITZ, *supra* note 1, at 184. There is a worry that Hershovitz stretches his slogan so far that it becomes completely trivial; he seems at times to suggest that anyone who believes that law intersects with morality in any way—which is everyone—thinks that law is a moral practice.

28. See HERSHOVITZ, *supra* note 1, at 17–18, 166–67. To be fair, other parts of the book are more careful to distinguish between these claims. See *id.* at 28–29, 42–43, 173.

29. *Id.* at 176.

so many legal practices are morally objectionable.”<sup>30</sup> To some extent, *Law Is a Moral Practice* operates as a proof of concept. The book aims to illustrate how we can use the one-system view to talk about legal issues—to show that we do not *have* to conceive of law and morality as separate systems.<sup>31</sup>

Yet the book is more than just a proof of concept. It also offers an argument for the one-system view, and it is that argument that most interests me. The argument is spread throughout the book and partly implicit. But it is worth unpacking: Even those who disagree with its conclusion can learn something from it about law and philosophical methodology. Here is my best effort to reconstruct it:

1. We use the word “law” to pick out different sets of norms.
2. The sense of “law” that matters for general jurisprudence picks out genuinely authoritative norms that are enforceable in court.
3. Genuinely authoritative norms are all moral norms.
4. Thus, legal norms (in the sense that matters for general jurisprudence) are all moral norms.

Let me quickly talk through this reconstruction of the argument before slowing down to examine its premises individually. Premise 1 concerns how we use the word “law” in conversations about, as Hershovitz puts it, the stuff one “studie[s] in law school.”<sup>32</sup> He proposes that our use of the word in these contexts is flexible.<sup>33</sup> While Premise 1 is not formally necessary to the argument’s conclusion, it motivates the rest of the argument. If Premise 1 were false—if we used the word “law” in just one sense—then there would be no competition for which sense of “law” matters for general jurisprudence.

Premise 2 is the heart of the argument. It asserts that the sense of “law” that matters for general jurisprudence picks out norms that are both genuinely authoritative and enforceable in court.<sup>34</sup> The relevant norms are genuinely authoritative because they concern what people *really* ought to do, not what they merely believe they ought to do.<sup>35</sup> In addition, the relevant norms are those that litigants are morally entitled to enforce in courts or

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30. *Id.*

31. Whether the book succeeds in its proof of concept is debatable. *See* text accompanying *infra* note 99.

32. HERSHOVITZ, *supra* note 1, at 27.

33. *Id.* at 81–84.

34. *Id.* at 84–91.

35. To adopt an idiom that some philosophers employ, genuinely authoritative norms are “robustly” rather than “formally” normative. *E.g.*, David Plunkett, *Robust Normativity, Morality, and Legal Positivism*, in DIMENSIONS OF NORMATIVITY, *supra* note 6, at 105, 108.

similar institutions.<sup>36</sup> They are the sort of norms that could properly move a court or similar institution to enter a judgment in one’s favor.

Hershovitz, by my count, offers three reasons for thinking that the sense of law relevant for general jurisprudence picks out genuinely authoritative norms. The first is descriptive: When lawyers argue over law in court, they are really arguing over genuinely authoritative norms.<sup>37</sup> The second is normative: Lawyers should conceive of law as consisting of genuinely authoritative norms.<sup>38</sup> And the third is theoretical: General jurisprudence would be more fruitful if it focused solely on genuinely authoritative norms.<sup>39</sup> I will address these reasons one by one in Part IV.

Premise 3 completes the argument, but it is stipulative and uninteresting. Hershovitz observes that we use the word “morality,” like the word “law,” in different ways.<sup>40</sup> For purposes of his book, he stipulates that morality concerns “our genuine rights and obligations” and that those genuine rights and obligations come in only one flavor—they are necessarily *moral* rights and obligations.<sup>41</sup> I am happy to accept Premise 3 and will not discuss it further. From Premises 2 and 3, it follows that legal norms (in the sense that matters for general jurisprudence) are all moral norms. That is the one-system view.

The one-system view is a surprising claim. To see why, it helps to consider an example. Suppose that you are driving on an open stretch of road over a flat plain when you reach a stop sign. It is a clear day, and there are no other cars as far as you can see. You are in a rush, and it is morally important that you go quickly (perhaps you are a lawyer running late for a court appearance). You might think: “The law requires me to stop here. But should I stop?” That is, you might think that the law makes a demand on your conduct, and yet wonder whether you morally ought to comply with it.<sup>42</sup>

If the one-system view is right, then that way of thinking is confused because, in discerning what the law demands, you have already answered whether you morally ought to comply with it.<sup>43</sup> Now, there is much that proponents of the one-system view can do to make this conclusion more palatable. They might say that we use heuristics to discern the law, and those

36. HERSHOVITZ, *supra* note 1, at 40.

37. *See infra* Part IV.A.

38. *See infra* Part IV.B.

39. *See infra* Part IV.C.

40. *See* HERSHOVITZ, *supra* note 1, at 21–25.

41. *Id.* at 23.

42. For discussion of the same hypothetical, see *id.* at 127–32.

43. *Id.* at 115.

heuristics sometimes fail us.<sup>44</sup> Or they might distinguish between *pro tanto* and all-things-considered legal-moral obligations.<sup>45</sup> My point is only that there is something about the one-system view that is at least a little unintuitive.

### III. FIRST PREMISE

Hershovitz asserts that we use the word “law” to pick out at least eight sets of norms associated with a community’s legal practices: (1) “the norms that are expressed in legal materials;” (2) those “that are accepted by legal officials;” (3) those “that are accepted by laypeople;” (4) those “that are enforced by legal officials;” (5) those that are “validated by a rule that legal officials accept;” (6) those “that are followed by legal officials;” (7) those “that are followed by laypeople;” and (8) those “that are [genuinely] authoritative.”<sup>46</sup> Hershovitz says that the final set of norms has “the best claim” to being law but allows that we can sensibly speak of law in all these ways.<sup>47</sup>

Myself, I am not sure that we use the word “law” in all these ways. I agree with Hershovitz that our talk of law is flexible, but I would carve up the terrain differently than he does. We use the word “law” to refer to different types of objects. Sometimes, we use it to refer to legal texts, like statutes or regulations (e.g., “the Civil Rights Act of 1964 is the law”). Sometimes, we use it to refer to individual legal norms (e.g., “the law forbids discrimination on the basis of sex”). And sometimes, we use it to refer to entire normative systems (e.g., “courts should uphold the law of the United States”).

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44. See Mark Greenberg, *The Moral Impact Theory, The Dependence View and Natural Law*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 275, 310–11 (George Duke & Robert P. George eds., 2017) (suggesting that, even if social facts determine legal content at a surface level, the moral impact theory is true at a more fundamental level).

45. See Schaus, *supra* note 4, at 231 (trying to reconcile the one-system view with the intuition that “we can face conflicts between legal obligations and other obligations where the right thing to do is to fulfill our non-legal obligations”). By “*pro tanto*,” I mean that there is some reason to act or not act, but other countervailing reasons can outweigh that reason. See Maria Alvarez, *Reasons for Action: Justification, Motivation, Explanation*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/archives/win2017/entries/reasons-just-vs-expl/>.

46. HERSHOVITZ, *supra* note 1, at 81–82.

47. *Id.* at 82–83.

Looking at “law” in the sense of individual legal norms, we can further distinguish three sets of such norms. First, there are *source-based norms*, i.e., norms whose existence and content depend solely on their source in descriptive facts about what people say, do, etc. These norms are content-independent: The reason for complying with them, if there is a reason, stems not from their content (what they require or permit) but from their source in a text or custom.<sup>48</sup> We can identify these norms and figure out how to comply with them without having to exercise independent judgment about what anyone ought to do.<sup>49</sup>

A second set comprises *norms of legal reasoning*. It includes the first set plus whatever moral norms the first set makes relevant to adjudicating legal disputes. Take the Fourteenth Amendment, which forbids states from depriving “any person of life, liberty, or property, without due process of law.”<sup>50</sup> Assume that “due process” refers to a moral right to due process and *not* to whatever right people at the time of ratification associated with that phrase.<sup>51</sup> It follows that the Clause creates a source-based norm forbidding deprivations of life, liberty, or property in contravention of a moral right.

Since applying that source-based norm requires reference to a moral right, the source-based norm cannot, by itself, answer whether any state action is unconstitutional. The source-based norm makes the moral right relevant to the Clause’s application; it “incorporates” the moral right into a broader set of norms governing legal disputes.<sup>52</sup> (Or, if we want to be precise, the source-based norm does not claim to exclude the moral right from adjudicators’ deliberations.<sup>53</sup>) Both the source-based norm and the incorporated moral right come within the set of norms that I call “norms of legal reasoning.”<sup>54</sup>

The third set is *norms of legitimate adjudication*—the norms that adjudicators morally may rely upon to resolve disputes over what the law

48. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1988) (discussing content-independence); H.L.A. HART, *ESSAYS ON BENTHAM* 254 (1982) (same).

49. In Razian terms, this kind of norm is capable of giving “protected reasons” for action. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 17–18 (2009) (discussing protected reasons).

50. U.S. CONST. amend. XIV.

51. Cf. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7 (1996) (suggesting that certain clauses of the Constitution “refer to abstract moral principles and incorporate these by reference”).

52. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 126 (2001).

53. The moral right to due process bears on judges’ decisions regardless of the Due Process Clause, so it is technically wrong to say that the Clause makes the right relevant to their deliberations and better to say that the Clause does not claim to exclude the right from their deliberations. See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 202 (2009).

54. Cf. Frederick Schauer, *On the Relationship Between Law and Legal Reasoning*, in *NEW ESSAYS ON THE NATURE OF LEGAL REASONING* 5, 12 (Mark McBride & James Penner eds., 2023) (discussing the relationship between source-based norms and legal reasoning).

requires. This third set might contain more, fewer, or different norms than the second set. Some source-based norms may be so reprehensible that adjudicators morally may not rely upon them.<sup>55</sup> And some norms of legitimate adjudication might not be incorporated into the norms of legal reasoning.<sup>56</sup> Norms of legitimate adjudication are at least in the near vicinity of what Hershovitz means by norms that are genuinely authoritative and enforceable in court.

The takeaway is that lawyers can use the word “law” to refer to multiple, overlapping sets of norms without linguistic confusion. Think of how lawyers talk of cases pending before the Supreme Court. I suspect that many lawyers would say that the law runs out and fails to resolve nearly all such cases.<sup>57</sup> Yet the same lawyers, once they get heated, are liable to insist that the Court often gets the law wrong.<sup>58</sup> That is not because they hold conflicting beliefs; it is because they are slipping from talking of law in one sense (source-based norms) to talking of law in another sense (the second or third set of norms).

In sum, while I doubt that we use the word “law” in all the ways that Hershovitz lists, I agree with his broader point that our talk of law is flexible and can pick out different sets of norms. That flexibility is all the more apparent when we consider not just how lawyers talk today but how they talked in centuries past. Lawyers before the twentieth century apparently took certain moral norms (“natural law”) to be part of the law of every jurisdiction regardless of local practice.<sup>59</sup> Those lawyers, I suspect, were

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55. To use a common example, think of the source-based norm derived from the Fugitive Slave Act, 9 Stat. 462 (1850) (repealed 1864) (requiring state officials to cooperate in the capture of enslaved persons who escaped their captivity).

56. It is hard to give a clear example of a norm of legitimate adjudication that is not a norm of legal reasoning. But some possible examples include a norm that judges should strive for coherence in the law or a norm that no one should profit by his own wrong (at least on the first occasion that a court decides to rely on that norm).

57. We are, as the saying goes, “all realists now.” Stephen Nayak-Young, *Delimiting the Proper Bounds of the New Legal Realism*, 12 INT’L J. CONST. L. 1008, 1017 n.34 (2014) (collecting uses of the saying). I take the saying to mean that lawyers today all agree that the law (in the sense of source-based norms) fails to give determinate direction in some cases.

58. Similarly, Hershovitz recounts conversations about whether the President can pardon himself—where his interlocutors vacillated between saying that the law is not clear and that there is a right answer. Cf. HERSHOVITZ, *supra* note 1, at 91–93.

59. See generally STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021) (discussing the historical use of natural law in legal practice); R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* (2015) (same). For valuable discussion of how this history bears on the positivism-antipositivism debate, see generally Emad H. Atiq, *Legal Positivism and the Moral Origins of Legal Systems*, 36 CAN. J.L. & JURIS. 37 (2023).

less prone to thinking of law in the sense of source-based norms than we are today.<sup>60</sup>

Which sense of “law” matters for general jurisprudence? Hershovitz proposes that legal philosophers should attend to law in the sense of genuinely authoritative norms that are enforceable in court. I will address his reasons for that proposal shortly. But we can also push back on the question itself: We can adopt a more permissive stance toward what merits jurisprudential attention. The fact that we pair the word “law” with multiple, related concepts might make all those concepts worth analyzing. In that respect, Hershovitz perhaps fails to bring this first premise to its most natural conclusion.

To be fair, Hershovitz seems at points to take such a permissive attitude (if that is his intent, then my disagreement with him may just boil down to when and how often we speak of law in one sense versus another).<sup>61</sup> Yet that permissive attitude is in tension with much of what he says in the book, including that “the law” is a “mythical entity,” that there is nothing “called ‘the law,’ understood as a separate normative system,” and that other theories of law are “false when it comes to the set of norms that is contested in court.”<sup>62</sup> So I will proceed on the assumption that he wishes to identify a sense of law with which general jurisprudence ought, at least primarily, to be concerned.

#### IV. SECOND PREMISE

Recall the second premise in my reconstruction of Hershovitz’s argument: The sense of “law” that matters for general jurisprudence picks out genuinely authoritative norms that are enforceable in court. Hershovitz makes three points supporting this premise: A descriptive point about what lawyers are arguing about when they argue in court; a normative point about how lawyers should conceive of law; and a theoretical point about how general jurisprudence can be most fruitful. While each point gets something right, I will argue that none adequately supports the second premise.

60. Perhaps that is because lawyers today have so much more source-based law available to them, given improvements in case reporting, the trend toward codification, and the rise of the modern administrative state. See Bill Watson, *The Decline of Natural Law and the Rise of Exclusive Positivism*, 75 SMU L. REV. F. 174, 184–86 (2022).

61. See HERSHOVITZ, *supra* note 1, at 83 (“I’m tempted to say that 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.”); *id.* at 84–85 (stating that positivism is true of certain sets of norms).

62. *Id.* at 85, 183, 195.

### A. *Descriptive Support*

Hershovitz writes: “[W]hen lawyers go to court, they contest the moral rights and responsibilities of the parties, such that every legal argument is, in a way, a moral argument.”<sup>63</sup> I take him to mean that lawyers in court are *not* contesting a distinctly legal type of rights or responsibilities that could potentially diverge from the parties’ moral rights and responsibilities. That is a strong claim. What is the evidence for it? Hershovitz’s clearest defense of the claim comes in the “Frequently Asked Questions” (FAQs) at the back of the book. The relevant question-and-answer is worth reproducing in full:

*You didn’t offer an argument for your central claim. Why should I think that the legal claims advanced in court are moral claims?*

The legal claims advanced in court are claims about who owes what to whom—they are (depending on the case) claims about what defendants owe plaintiffs, what courts owe plaintiffs, what defendants owe the state, and so on. Moreover, the rights claimed in courts are claimed as genuine—they are meant to move the court to action. Indeed, they are frequently intended to warrant significant interference in others’ lives. That makes them moral claims, given the way I’m using the term. Remember, morality, as I’ve construed it here, is the domain of rights, wrongs, and the reasons that relate to them.<sup>64</sup>

Everything in the quoted answer is true but also beside the point: Parties in court do argue over who owes what to whom, and they do intend for their arguments to move judges to rule in their favor. Judges are humans and, like all humans, morality governs their conduct.<sup>65</sup> They do not get to bypass morality simply because they have donned their robes (though their official role modulates *how* morality bears on their conduct<sup>66</sup>). When judges decide cases, they should, and presumably do, care about what morality requires of them. And for that reason, lawyers should care too.

So, Hershovitz is right that parties in court claim that judges morally should rule in their favor, and he is right that judges must make inescapably moral decisions. The trouble is that he rushes to conclude that parties are *only* arguing over what judges morally should do. Yet nothing rules out the

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63. *Id.* at 10.

64. *Id.* at 192.

65. RAZ, *supra* note 53, at 183.

66. *Cf.* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 292–95 (2023) (discussing role morality with respect to the Supreme Court).

possibility that parties are arguing, first and foremost, over distinctly legal (source-based) rights that, in turn, bear on what judges morally should do. Litigants may be assuming that a court will usually take itself to be morally obligated to enforce these distinctly legal rights, whatever they may be.

Thus, the answer to the FAQ quoted above is consistent with the view that lawyers in court are *not* arguing over distinctly legal rights, but it is also consistent with the view that lawyers in court *are* arguing over distinctly legal rights. Hershovitz gives little reason to think that the former characterization is better than the latter.<sup>67</sup> To the contrary, he admits that “lawyers are accustomed to distinguishing law from morality.”<sup>68</sup> That popular intuition weighs heavily against the one-system view. It would be odd if lawyers thought that they were arguing over distinctly legal rights when in fact they were not.<sup>69</sup>

Moreover, focusing on lawyers’ behavior in litigation is distorting. Litigation is just one facet of legal practice and is arguably not the most important.<sup>70</sup> Nearly all our interactions with the law happen outside of court: The law touches on many aspects of our lives (where we live, how we work, etc.), but we seldom find ourselves enmeshed in litigation. Lawmakers generally create law with the goal of guiding people’s conduct, not of prompting them to go to court. Litigation represents a failure: The law has failed to provide adequate guidance, and now an authoritative decisionmaker must step in.

Accordingly, even if Hershovitz were right that the claims that lawyers advance in court are simply moral claims, it still would not be clear that the sense of “law” that matters to general jurisprudence refers to only genuinely

67. Hershovitz uses Dworkin’s argument from theoretical disagreement to motivate his assertion that the claims advanced in court are moral claims. See HERSHOVITZ, *supra* note 1, at 48–49, 175. But his discussion of theoretical disagreement is superficial and fails to engage with the recent flood of literature on the subject. For an overview of that literature, see Bill Watson, *How to Answer Dworkin’s Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials*, 36 CAN. J.L. & JURIS. 215, 216 & nn.5–6 (2023). Moreover, Hershovitz does not say why the one-system view better accounts for (purported) theoretical disagreements than other, less drastic responses. See, e.g., Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules* 16 (Univ. Penn. L. Sch. Pub. L. Rsch. Paper No. 22-03, 2022), <https://ssrn.com/abstract=4003631> (addressing theoretical disagreement); SHAPIRO, *supra* note 18, at 381–84 (same).

68. HERSHOVITZ, *supra* note 1, at 18.

69. To be fair, Hershovitz offers an explanation for this confusion: He thinks that judges and lawyers have a simplistic understanding of morality; if they came to appreciate the nuances of how legal practices bear on moral rights and duties, then they would see that they were arguing over moral rights and duties all along. See *id.*

70. See Bill Watson, *Explaining Legal Agreement*, 14 JURIS. 221 (2023) (arguing that there is broad and pervasive agreement on what the law is); Leslie Green, *Introduction* to H.L.A. HART, *THE CONCEPT OF LAW* xxvi (Penelope A. Bulloch & Joseph Raz eds., 3rd ed. 2012) (“[I]t would be misleading to develop a general theory of law by looking only, or mainly, at the work of appellate courts, or indeed any courts.”).

authoritative norms. We should be attentive to how lawyers think and talk about law in different contexts, and how they think and talk about law outside of court is less amenable to the one-system view. Theorizing about law should start with our common, everyday interactions with the law outside of court; focusing on how lawyers argue in court starts in the wrong place.<sup>71</sup>

### B. Normative Support

Hershovitz, in a chapter on “asshole lawyers,” proposes that lawyers *should* adopt the one-system view: “[T]here is a risk in seeing law and morality as separate normative systems. The risk is that lawyers will cease to see themselves as part of a moral enterprise—and then cease to see themselves as subject to moral constraint. Law is a moral practice.”<sup>72</sup> That is, lawyers should regard legal norms as a subset of moral norms because doing so will help them better see how morality constrains their professional activities—the advice they give to clients, the litigation tactics they employ, etc.<sup>73</sup>

That is an interesting idea. We might meet Hershovitz halfway and agree that urging lawyers to attend closely to how legal practices adjust moral rights and duties would discourage them from overzealous advocacy or gamesmanship.<sup>74</sup> I am skeptical, however, that going further and urging lawyers to *conceive of law as part of morality* would accomplish more (or that lawyers would listen to the urgings of philosophers anyway<sup>75</sup>). There are also countervailing reasons why lawyers should conceive of law and morality as separate systems—reasons that Hershovitz does not fully address.<sup>76</sup>

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71. Cf. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1247 (2009) (“[W]hen the most striking feature about legal systems is the existence of massive agreement about what the law is, then any satisfactory theory has to do a good job making sense of that to be credible.”).

72. HERSHOVITZ, *supra* note 1, at 166–67.

73. Hershovitz argues that adopting the one-system view is instrumentally valuable in other ways too; he says that a contrary view “paints an impoverished picture of the role morality plays within our legal practices” and obscures how “legal practices shape our [moral] rights and responsibilities.” *Id.* at 174–75. I have trouble understanding him here. Separating law from morality does not involve denying that morality plays a large role in legal practices, nor does it impede us from seeing how legal practices adjust moral relationships.

74. Cf. Edith Beerdsen, *Gamesmanship in Litigation* (July 27, 2023) (unpublished manuscript) (on file with author) (analyzing courts’ responses to “gamesmanship” in litigation).

75. Cf. Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1101 (2008) (expressing doubt that “the urging of theorists might change the usage of ‘law’”).

76. See Felipe Jiménez, *Legal Positivism for Legal Officials*, 36 CAN. J.L. JURIS. 359, 366–77 (2023) (arguing that “there are powerful reasons for legal officials to adopt [positivism]”); see also Frederick Schauer, *Normative Legal Positivism*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 61, 64–74 (Torben Spaak and Patricia Mindus eds., 2021) (overviewing arguments that positivism is instrumentally valuable).

Regardless, the crucial point for our purposes is that how lawyers should conceive of law may tell us *a* sense of “law” that matters for general jurisprudence, but it does not tell us *the* sense of “law” that matters. That is because the normative project of analyzing which concept of law we should employ is not in competition with the descriptive project of analyzing which concept or concepts of law we do employ. Of course, if it turns out that the descriptive project is nonsensical or a waste of time, then we ought to abandon it. But we have seen no argument to that effect—at least not yet.

### C. *Theoretical Support*

Hershovitz seems at points to contend that the most theoretically fruitful path forward for general jurisprudence would be to ignore some of the questions that have traditionally occupied legal philosophers and focus instead on how legal practices adjust our moral relationships.<sup>77</sup> Perhaps surprisingly, we have made it nearly to the end of this Review without introducing the labels “positivism” and “antipositivism.” Hershovitz finds these labels unhelpful,<sup>78</sup> and I (in some moods) am inclined to agree with him. Still, it is worth pausing to say something about the positivism-antipositivism debate now.

At a high level, the debate concerns the relationship between law and morality. But as with many philosophical debates, participants disagree over what exactly is at stake and how to differentiate the main camps. On one framing, the debate is about the criteria of legal validity (the criteria that identify and validate a jurisdiction’s legal norms):<sup>79</sup> Are those criteria necessarily non-moral? Is a norm’s legality necessarily independent of its moral merit? Another currently popular framing of the debate uses metaphysical grounding:<sup>80</sup> Are legal facts necessarily grounded in just non-moral facts?

There are three main camps: exclusive positivism, inclusive positivism, and antipositivism. We might define *exclusive positivism* as holding that a

77. *Supra* note 26.

78. HERSHOVITZ, *supra* note 1, at 15, 72.

79. *E.g.*, John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 201 (2001); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 143 (1982).

80. *E.g.*, Samuele Chilovi, *Grounding-Based Formulations of Legal Positivism*, 177 PHIL. STUDS. 3283, 3286 (2020); David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139, 153 (2012). Some scholars have pushed back on this “grounding turn” in general jurisprudence. *See generally* Mathieu Carpentier, *Against “Legal Facts”* (Apr. 11, 2024), <https://ssrn.com/abstract=4790880>; Brian Leiter, *Critical Remarks on Shapiro’s Legality and the “Grounding Turn” in Recent Jurisprudence* (Sept. 16, 2020), <https://ssrn.com/abstract=3700513>; Dennis Patterson & Bosko Tripkovic, *The Promise and Limits of Grounding in Law*, 29 LEGAL THEORY 202 (2023).

norm's legality necessarily does not depend on its moral merit; *inclusive positivism* as holding that a norm's legality may depend on its moral merit if non-moral facts make it so; and *antipositivism* as holding that a norm's legality necessarily does depend on its moral merit.<sup>81</sup> These camps parallel the three sets of norms discussed above: Exclusive positivism describes the first (source-based norms); inclusive positivism describes the second (norms of legal reasoning); and some versions of antipositivism describe the third (norms of legitimate adjudication).

Perhaps Hershovitz is saying that these camps are asking the wrong question: Legal philosophers should forget about legal validity or the metaphysical grounds of legal facts and focus instead on how legal practices adjust moral relationships. Why think that? One reason could be a perceived lack of progress in the positivism-antipositivism debate.<sup>82</sup> But that, by itself, cannot be reason enough. The debate moves no more slowly than other debates in philosophy. Impatience with its progress says more about one's temperament than it does about what anyone else's research agenda should be.

Another reason could be that the debate is hopelessly intractable. Maybe Hershovitz takes the first premise—that “law” can pick out different sets of norms—to show that participants in the debate are talking past one another.<sup>83</sup> To some extent, that may be true. Yet the proper inference to draw would *not* be that we should stop caring about the validity or grounds of law but that we should be clear about *which sense* of law we are analyzing the validity or grounds of. Even if positivists and antipositivists all get something right, that does not make the questions they are asking less worth pursuing.

There is a tension in Hershovitz's thought in this regard. He strongly insists that there is nothing “called ‘the law,’ understood as a separate normative system.”<sup>84</sup> Yet he admits that we can sensibly talk of legal norms in a positivist sense; indeed, he says that he may be a positivist himself for limited purposes, like determining whether a norm is part of the law of this or that jurisdiction (e.g., the United States or Canada).<sup>85</sup> I cannot reconcile these positions: Either talk of legal norms in a positivist sense is confused

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81. See Andrei Marmor, *Exclusive Legal Positivism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 104, 110–16 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2004) (discussing exclusive positivism and versions of inclusive positivism); Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J.L. STUD. 683, 689 (2006) (discussing versions of antipositivism).

82. See HERSHOVITZ, *supra* note 1, at 15.

83. See *id.* at 93, 183.

84. *Id.* at 195; see also Hershovitz, *supra* note 25, at 1193 (denying “the existence of . . . a distinctively legal domain of normativity, or quasi-normativity”).

85. HERSHOVITZ, *supra* note 1, at 114, 179–80.

(because it refers to nothing) or there is a separate normative system called “the law.”

I suspect that Hershovitz’s actual motivation for ignoring certain jurisprudential questions is that he thinks they distract us from what really matters, namely how legal practices adjust moral relationships and how courts should adjudicate disputes. Of course, those things do matter. But they are not all that matters: Understanding law in the sense of source-based norms matters too, and not just because it offers a clearer window onto the things that Hershovitz cares about.<sup>86</sup> Understanding source-based norms is valuable in its own right because those norms are part of the social world in which we live.<sup>87</sup>

#### V. ON METHODOLOGY

As I hinted above, Hershovitz may fail to bring the first premise to its most natural conclusion.<sup>88</sup> The word “law” is polysemous: It has multiple, closely related senses.<sup>89</sup> General jurisprudence is not an exercise in lexicography; it is not just a matter of tracing word usage in a linguistic community to arrive at dictionary-type definitions.<sup>90</sup> But general jurisprudence does have to take ordinary and well-informed usage of the word “law” as a starting point. If we use “law” in multiple senses in the relevant contexts, then general jurisprudence should, *prima facie*, consider law in all those senses.

Once we account for this flexibility in how we talk about law, what remains of the positivism-antipositivism debate? Some, and perhaps much, of the debate may dissipate upon disambiguating the different concepts at issue. Yet the debate does not entirely go away because there remains room to argue over which concept of law best satisfies various theoretical or practical desiderata—which concept is most theoretically or practically

86. Cf. Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, 105 B.U. L. REV. (forthcoming 2025) (arguing that a Hartian version of positivism can clarify where our real disagreements over legal interpretation lie).

87. See Raz, *supra* note 27, at 322 (“It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.”).

88. I am grateful for conversations with Emad Atiq and with Benjamin Eidelson that have greatly influenced my thinking on general jurisprudence’s methodological question.

89. On polysemy, see, e.g., ANDREI MARMOR, *THE LANGUAGE OF LAW* 120–22 (2014); Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 221–24 (2021).

90. See BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 177 (2007).

desirable.<sup>91</sup> In any event, the questions that positivists and antipositivists ask about legal validity or the grounds of legal facts still remain worth asking.

There is considerable debate over the proper mode and object of analysis for general jurisprudence,<sup>92</sup> and I cannot fully address those issues here. I will only propose that one task for general jurisprudence involves a modest form of conceptual analysis.<sup>93</sup> The goal, roughly put, is to clarify and systematize our shared understanding of law, relying on intuitions about law's essential features and what counts as law.<sup>94</sup> Since that shared understanding is messy, any useful analysis must impose more order than there is—aiming for theoretical desiderata of explanatory adequacy, consistency, simplicity, etc.

Scholars who accept roughly this framing of general jurisprudence's task often speak of “our concept of law” (singular),<sup>95</sup> but we are better off thinking in terms of our concepts of law (plural).<sup>96</sup> Differentiating these concepts, tracing their connections to other nearby concepts, and mapping how lawyers use them is one way that general jurisprudence offers insight into ourselves and our practices.<sup>97</sup> Thus, some questions to ask are: What the essential features of law are on each concept of law, how these concepts interrelate, and how they relate to nearby concepts of authority, discretion, jurisdiction, and so on.

I find it best to reserve the word “law” for source-based norms. On this way of speaking, incorporated moral norms are not law, even though they factor into legal reasoning, and norms of legitimate adjudication need not

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91. For important and insightful discussion along these lines, see EMAD ATIQ, CONTEMPORARY NON-POSITIVISM (forthcoming).

92. See generally Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117 (2004) (overviewing methodological issues in general jurisprudence).

93. See FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS 42–44 (1998) (describing “modest” conceptual analysis); Plunkett, *supra* note 80, at 181–88 (applying Jackson-style conceptual analysis to general jurisprudence). I assume that concepts are word meanings. See Eric Margolis & Stephen Laurence, *Concepts*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2023), <https://plato.stanford.edu/archives/fall2023/entries/concepts/> (outlining different views of concepts).

94. This framing naturally raises the question of *whose* concept to analyze—*e.g.*, lawyers versus laypeople, present versus past communities, or global versus more parochial communities. We need not take a position here, but presumably, the answer will largely depend on whose concept is most theoretically fruitful and ripe for analysis.

95. *E.g.*, SHAPIRO, *supra* note 18, at 16; RAZ, *supra* note 53, at 31–32.

96. See Nye, *supra* note 26, at 56 (“Conceptual pluralism makes sense with respect to law . . .”); Murphy, *supra* note 75, at 1093–94 (suggesting “that ‘law’ is ambiguous among several different meanings corresponding to distinct concepts”); see also David Plunkett & Daniel Wodak, *The Disunity of Legal Reality*, 28 LEGAL THEORY 235, 236 (2022) (noting that jurisprudential theses may be “true of one part of legal reality . . . but not another”).

97. Cf. RAZ, *supra* note 53, at 31 (“In large measure what we study when we study the nature of law is the nature of our own self-understanding.”).

be law, even though courts are morally required to follow them.<sup>98</sup> The benefit of talking this way is that it better demarcates the border between issues that the law claims to remove from adjudicators' discretion and issues over which the law invites them to exercise discretion. This is likely the sense of "law" that we have in mind when we contrast law with "politics."

At the same time, we should not let our attachment to speaking of law in a certain way impede us from understanding what others are trying to say. With that lesson in mind, let us briefly return to the one-system view. The one-system view is trivially true of law in the sense of legitimate norms of adjudication (norms that morally bear on adjudicating legal disputes). But once we recognize that there are other sensible ways of talking about law that are ripe for philosophical analysis, the one-system view loses its bite. Why should general jurisprudence limit its focus to just this one set of norms?

Indeed, analyzing solely legitimate norms of adjudication presents a distorted picture of our practices. We reason toward what courts morally should do in stages, starting with source-based norms, then possibly adverting to incorporated moral norms, and finally making an all-things-considered judgment about what the court should do. Skipping over the initial stages of that process is misleading. Fully explicating our shared understanding of law requires an account of source-based norms, and once that account is in place, we are in a better position to explain norms of legitimate adjudication.

I am not even sure that it is possible to skip straight to asking what a court morally ought to do. Proponents of the one-system view insist that what the law is depends on how legal practices adjust moral relationships by coordinating conduct, setting expectations, etc. But it seems that we need to know how those practices make source-based norms before we can discern how they impact moral relationships. What are people coordinating their conduct or setting expectations around? The one-system view seems to presuppose the existence of source-based norms, while declining to explicate them.<sup>99</sup>

Hershovitz closes the book by asking rhetorically: "Are there any reasons to suppose that law and morality are separate normative systems?"<sup>100</sup> Of course, there are. Lawyers are accustomed to differentiating

98. Cf. Schauer, *supra* note 54, at 20–21 (arguing that exclusive positivism sees law and legal reasoning as distinct, while inclusive positivism and antipositivism see law and legal reasoning as coextensive); RAZ, *supra* note 53, at 376 (stating that law, but not legal reasoning, is autonomous from morality).

99. For a critique along these lines, see Marmor, *supra* note 5, at 168.

100. HERSHOVITZ, *supra* note 1, at 176.

law from morality, and we regularly talk about law that way.<sup>101</sup> A separate-systems view also explains many aspects of legal practice, such as why we distinguish between judges' legal skills and moral beliefs or between judges applying existing law and making new law.<sup>102</sup> And while I have not argued as much here, there are also strong normative reasons for adopting a separate-systems view.<sup>103</sup>

### CONCLUSION

Is law a moral practice? It depends on what you mean. Law is morally evaluable: It is the sort of thing that we can assess as morally good or bad. Law can also be morally impactful: Legal practices can alter what we morally owe each other. In addition, lawyers' work sometimes involves making moral arguments: Lawyers regularly appeal in litigation to justice or to the positive or negative consequences of ruling a certain way. Lawyers also ask judges to make inescapably moral decisions: Judges' decisions are subject to the demands of not just law but morality too.

Those are some ways in which virtually everyone would agree that law is a moral practice, but there are also other, more contestable ways in which law may intersect with morality. Perhaps law and morality necessarily overlap to a very significant extent: Perhaps any legal system must have many norms that effectively restate moral norms. Or maybe law necessarily makes moral claims—necessarily purports to tell us what we morally ought to do. Or maybe law necessarily aims to be morally impactful, such that any law that fails to adjust our moral relationships is defective as law.

A more surprising claim than any of these is the one-system view: Legal norms just are moral norms. That is a conceptual or metaphysical claim. But there is also a nearby theoretical claim: General jurisprudence should drop its preoccupation with legality and proceed *as if* legal norms just are moral norms. Ultimately, to say that “law is a moral practice” is not very helpful even as a slogan; the phrase obfuscates more than it clarifies. Rather than argue over whether law is or is not a moral practice, we would do better to analyze specific claims, like the claims I just listed, on their own terms.

All that said, there is much in Hershovitz's book that is worth pondering over. One of the book's more significant contributions is its close attention to the flexibility with which we speak of law. We use the word “law” to pick

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101. *Id.* at 10.

102. Watson, *supra* note 60, at 182.

103. See Jiménez, *supra* note 76, at 369 (“[E]ven if [positivism] only changed the terms of description, it would have the virtue of clearly differentiating between situations where legal officials are arguing or resolving disputes by applying pre-existing authoritative sources of law and situations where they do so by resorting to moral considerations.”).

out various overlapping sets of norms. Hershovitz seems to infer from that flexibility that legal philosophers should not care about law as such but only insofar as it affects our moral relationships. But that inference does not follow. General jurisprudence should be concerned with understanding law in all these senses, and there remains more work to do in that regard.