Ratio Juris. Vol. 22 No. 1 March 2009 (95–109)

Legal Truths and Falsities*

MATTHEW NOAH SMITH

Abstract. This paper has a two-pronged thesis. First, laws should be understood as making factual claims about the moral order. Second, the truth or falsity of these claims depends as much on the content of the law as on whether the lawmaker has political authority. In particular, laws produced by legitimate authorities are successful as laws when they guide subjects' behavior by giving subjects authoritative reasons for action. This paper argues that laws produced by legitimate authorities accomplish this task (i) by being on their own sufficient to change the moral state of affairs, which (ii) thereby generates for people new moral reasons to act that they can read right off of the legislation.

I.

This paper has a two-pronged thesis. First, laws should be understood as making factual claims about the moral order. Second, the truth or falsity of these claims depends as much on the content of the law as on whether the lawmaker has political authority. To put these theses a bit more carefully: When valid law is made, something like a *legality operator* is appended to a string of words. This legality operator has the effect of transforming the text into an assertion about the moral order. Whether this assertion is true depends upon the political authority of the lawmaker: If the lawmaker has political authority, then *ceteris paribus* what the law says about the moral order is true.

I will show that these theses together suggest the following conclusion: Questions about the semantics of legal texts are most at home in fields other than philosophy of law, whilst questions about the truth and falsity of the law are just questions about political morality.

* Thanks are due, as always, to Jules Coleman, who is as generous a mentor and friend as he is a source of philosophical insight and inspiration. Special thanks to the CIRSFID at the University of Bologna who hosted the excellent conference, celebrating Jules Coleman's work, at which this paper was presented, the participants of that conference for their engaging and illuminating comments, and to the editors at *Ratio Juris*.

II.

Consider the United States law against mail fraud:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.[1]

The string of words itself remained the same between the time at which it was written up and approved in the legislature and then, months later, signed by the President (all this occurred in 1872). But, something did change *about* this string of words when the President signed the legislation into law: The string of words became a *legal text* and not just some ramblings about schemes for obtaining money. In virtue of having become valid law, the legality operator was appended before the paragraph above, and so a legal text was born. One question is, then: What happens when a text becomes a legal text?

Following Jules Coleman—and I think here Coleman is really tapping into a fairly common sense understanding of the law—I believe that successfully appending the legality operator requires that subjects read that text in *moral* terms (Coleman 2007). That is, by appending the legality operator in front of a string, that string is to be read as making an assertion about what morality requires of us.

III.

Let us take the following platitude as a starting point: The law aims to make a practical difference in our lives.[2] But the law does not merely aim to shove us around in the way that crowds or cattle prods do. For the law is a form of language, and while some speech acts can shove us around by being loud or unusual, the law is not like that. The law is an interestingly

[1] 18 U.S.C. § 1341.

[2] This is just a more general (and platitudinous version) of Scott Shapiro's "Practical Difference Thesis" (see Shapiro 2000).

pure attempt at making a practical difference through language. For the law consists of linguistic expressions that aim to move us in the paradigmatic way that language moves us, namely, by engaging with us through its content, and only its content. The law aims to make a practical difference in our lives, then, by giving us reasons for action. But, the reasons it aims to give us are not just any old reasons—it aims to give us particular kinds of reasons, namely, *moral* reasons for action.[3] That is, the law does not aim to give us reasons pertaining to what it is efficient to do, or reasons pertaining to what it would be fun to do, but instead reasons pertaining to what we morally *ought* to do.

I haven't space here to defend this claim, but it is one that most positivists from H.L.A. Hart to Joseph Raz to Coleman have endorsed and it is one that Ronald Dworkin endorses as well, although all for varying and mutually incompatible reasons. This is also reflected in the history of the law in the West, which at least since the Roman Era has used morally valenced terms. Thus, in the early twentieth century, in his "Fundamental Legal Conceptions as Applied in Judicial Reasoning," Wesley Hohfeld treats as fundamental to law the *moral* concepts of rights, duties, liberties (or privileges), liabilities, powers, etc. (Hohfeld 1919). That is, Hohfeld unquestioningly treats paradigmatically *moral* concepts as being at the heart of law.[4]

So, the platitude above amounts to the following: The law aims to make a practical difference in our lives by providing moral reasons for acting. The reason why this is a platitude is that it seems to be a *conceptual* feature of the law—i.e., it seems to be part of what makes law law and not something else, like advice or a recipe.[5] We now have an interesting coincidence: My claim that the legality operator requires reading the law as making a claim about what morality requires of us and the platitude that the law aims to give us moral reasons for action. This is no mere coincidence—it is a harmonious convergence.

IV.

Let us call the *legally* relevant content of a legal text the *legal content* of that text. The legal content of a legal text is not simply read off from the literal meaning of the actual legislative sentences (or administrative sentences, or judicial opinions, or what have you). That is, the Gricean

[3] Let us contrast this with other forms of communication, e.g., testimony. Testimony seeks to move us by giving us reasons for believing things, but these are not moral reasons.
[4] There is an interesting historical irony here since what we are treating as distinctively *moral* language has its roots deeply in Roman and Canon law (Skinner 1978 and Tuck 1981).
[5] This suggests one way in which law can fail: it can fail to be understood normatively. In particular, some legislation (or administrative regulation, or judicial opinion) could fail to have even a faintly univocal normative interpretation.

sentence meaning of the legal text is not the same thing as the legal content of the text. But since the law's way of moving us is via language, then surely it is the legal content of the legal text that has practical significance. So, there is almost always space between the sentence meaning of a legal text and the legal content of that text. To see this, consider the following examples:

(a) Don't jaywalk.
(b) No one will jaywalk.
(c) The state hereby declares that jaywalking is no longer an approved activity.
(d) All persons are prohibited from jaywalking.

These four sentences could all be found in a legal text but each has quite a different sentence meaning from the others: The first is a command, the second is a description about the future, the third is a description of the state's attitudes, and the fourth states a rule. But, as everyone easily can discern, this heterogeneity in sentence meanings is not of the first order of *legal* significance, for all four sentences have the same *legal content*, namely, that jaywalking is impermissible. We can see this particularly clearly if we reflect upon the unlikely scenario in which the following sentence is passed as valid legislation:

(e) People jaywalking is a real drag, man.

It, too, would presumably have the same legal content as a–d.

To amplify this point, consider the following example. Suppose a law was passed and the text of the law was the following: Jack loved Jill. But, Jill didn't love Jack back. Jack was terribly upset. Jill cared not. What a cruel woman Jill was! But so go matters of the heart. The natural response to such legislation (or administrative regulation, or judicial opinion) would be to view it as nonsense even though it is a well-formed formula. But suppose we are committed at least to *trying* to make sense of the legal text. And, under normal circumstances, why wouldn't we be so committed? So, how are to make sense of a seemingly crazy legal text? We would treat it as an oracular expression of a pedestrian moral norm. We would do that by translating the text into something that fits a certain question, namely, the question: "How ought I to live?" That is, we would interpret the legal text as having a certain content, namely, content that could answer the question, "How ought I (or we) to live?"

The moral of this is that legal texts, just like fables or parables, have *morals*. In particular, legal texts are to be interpreted as answering a question about how to live.

V.

So, how does this work with legal texts? Recall the story about Jack and Jill. Suppose that was the content of legislation passed by U.S. Congress and then signed by the U.S. President (this is not so bizarre an example: Legal texts infamously contain extraordinarily opaque and bewildering language—language that can make the Jack and Jill legislation seem relatively intelligible). The only way to render intelligible as *law* this legal text would be to draw some sort of moral from it that would be useful in guiding conduct. What are the legislators trying to say to their subjects? Are they trying to say that women are obligated always to love the men who love them? Or, are they saying that women not loving the men who love them is permissible because "so go matters of the heart"? Or, are they saying that men have a right not to love women? Or, is this about some particular people, Jack Doe and Jill Roe, and is it suggesting that Jack is duty-bound to give up his unrequited love? It's hard to know what exactly would make sense of this, and I have no intention of offering a theory of legal content, which is precisely the kind of theory necessary for answering this difficult question. But what is clear is that we are driven, before giving up and assuming that the legislature is filled with madmen, to attempt to make sense of the legislation as having some sort of moral content. (If we do give up and simply assume that the Jack and Jill legislation has no moral, then we will have good reason to doubt whether the Jack and Jill legislation is valid legislation—a legal text—after all.)

This requirement to read a text as having a moral semantics is the product of the legality operator: Texts that are merely texts but do not have the legality operator appended to them do not invite us to read them as telling us how to live. But what about proposed legal texts, which by definition don't have the legality operator appended to them? These are understood "in the moral register," as it were, but they do not have the legality operator attached to them. In order to understand proposed legal texts, we merely *presuppose* that the text is valid law, which is different than accepting for the sake of *practical* reasoning that it is valid law. That is, we presuppose that the legality operator has been appended to the text and that in virtue of that we are to interpret the text in a certain way, which allows us thereby to engage in hypothetical practical deliberation—deliberation that has no immediate impact on our practical deliberations about how to live. That is, reading a text as a *proposed* legal text is somewhat like entertaining a variety of courses of action, as opposed to taking as binding some practical requirement. This is why considering a text as a proposed legal test amounts to asking something like hypothetical questions about morality: Suppose it were required that people φ, suppose it were impermissible for people to ψ, and so on.

Thus, it seems that we *always* need the pretense of the legality operator to properly understand legal texts. Otherwise, legal texts would be in danger of seeming as absurd as assertions made by children playing make-believe if the hearer of those assertions did not go along with the children in presupposing the conditions of make-believe. Suppose a child is pretending that mud pies are actual pies and that a nearby rock is an oven. Suppose you ask the child what she is doing and she says, "I am going to bake this pie in the oven at a million degrees in order to make it ready to eat." This is not a nonsensical statement, but it is absurd . . . *unless one engages in the pretense with the child*. Similarly, if *A*, a lawmaker, says to *B*, a subject: "If you try to defraud someone out of money using the U.S. Mail, you shall be fined under Title 18 or imprisoned not more than 20 years, or both" and *B* does not *assume that what A says has the legality operator in front of it*, then *A*'s speech is quite absurd (how on Earth would B make sense of it?). But if *B* assumes that *A*'s utterance has the legality operator in front of it (i.e., that it is valid law), then *B* ought to interpret *A* as saying, "It is impermissible to try to defraud someone out of money using the U.S. mail, and the state has a right to fine or imprison you for doing so." Regardless of whether this claim is true or false, it is not absurd! On the other hand, if *B* does not presume that *A* is telling *B* the law, then what *A* says is absurd. Of course, the simpler the text, the more likely it could be understood without presupposing that the legality operator has been appended to it. But especially both in states that employ common law jurisprudence and in the contemporary administrative state, very few legal texts take the form of "Mail fraud is not to be done." Rather, they more frequently take the form of the legal text cited above in Section Two (if we are lucky!), and such texts are absurd if their legality is not presupposed (even if just for the sake of argument).

Furthermore, suppose *B* assumes that what *A* is doing is *merely* telling him what the law says and not telling him that mail fraud is impermissible and that he is liable to certain punishment if B commits mail fraud. In such an instance, *B* will have misunderstood *A*. For, it is one thing to tell someone what the law says; it's quite another thing to tell someone what is permissible and what others have a right to do to one in light of one's actions. Suppose *B* says to *A*: "So you are just letting me know the law?" *A*'s response is quite naturally, "Well, in a sense, but what I am really telling you is that mail fraud is forbidden and that if you do it, you will be liable to penalty!" It only makes sense for *B* to interpret *A* as telling him what the law says (i.e., for *B* to make a *de dicto* interpretation of *A*) only if both *A* and *B* are presuming that *A*'s utterance should be understood in a *de dicto* fashion: "The law says that *p*."[6] But if that's what *A* means, then

[6] Or, perhaps, *A* might say "φ-ing is illegal." But, of course, if that is the sentence that constitutes a legal text, then the text must be understood as "φ-ing is impermissible."

why wouldn't he just say it? After all, what he said was, "Mail fraud is impermissible and you are liable to be fined or imprisoned if you do it!" Is it appropriate to understand the mud-pie baking child's utterance in a *de dicto* fashion? If so, then the child is saying, "I am hereby pretending that I am going to bake this pile of mud in that rock at a very high pretend temperature so as to pretend to make the pile of mud edible." But that is precisely *not* what the child is saying. She is saying that she is going to bake the pie in the oven at a million degrees in order to make it ready to eat. (It just so happens that what she says is false, but that's the nature of pretense!) In short, the most natural and charitable way to understand legal texts is to read them with the legality operator in front of them, which requires interpreting them as assertions about *how one ought to live*.

VI.

Is treating a text as an answer to the question, "How ought I (or we) to live?" something unusual or distinctive to legal texts? Of course not: Human beings look for morals in almost every story we tell and hear. For example, we find morals both in Herodotus and in *The Simpsons*. It is the rare piece of text that does not invite *some kind of* moral interpretation when presented. When it does not, we say that it is "pure entertainment" (or "pure trash"). But this rare exception of "pure entertainment" proves the rule I am asserting exists. So, in general, we can't help *but* to see morals in stories. So, there is nothing particularly unique *to law* in that it ought to be interpreted as having what Coleman calls a "moral semantics." *Pace* Coleman, then, there is nothing *uniquely* puzzling about the fact that the law, insofar as it is a matter of social facts, should be read as giving moral directives about how to live, for almost all communicative endeavors, which are just matters of social fact themselves, can be read as giving moral directives about how to live. In short, if it's a mystery how social facts make it the case that law should be understood morally, then it's a mystery how social facts make it the case that the *Simpsons*, or Bob Dylan's song "Like a Rolling Stone," or Herodotus' *Histories* have a moral reading.

In short, there is nothing uniquely mysterious about what Coleman has called the redescription thesis, i.e., the thesis that the content of legal texts must be redescribed into moral terms. For, the default is that every human text can be read, and often is read, in moral terms. The only difference between law and other discursive forms is that, in almost all cases other than law, we can coherently distinguish "story" from "message," or the literal meaning of the text from the point being made about how to live. But this may not be the case when it comes to law. For example, we can understand the story Herodotus tells about the Persian invasion of Greece without understanding the moral to be drawn from it (namely, that all empires eventually fall when they overreach their natural boundaries).

And we can discern the story of a *Simpsons* episode (e.g., about Homer winning a doughnut lottery) without picking up on the message of the episode (e.g., that loving your family is more important than simple hedonistic pleasures like eating doughnuts). That is, we can understand the story *purely* as a story without even realizing that it might have a moral, much less actually identifying the moral of the story. But we cannot understand a legal text *purely* as a story without looking for its moral. That would lead us right back to the absurdity described above (i.e., it would be like treating the utterances of the child playing make-believe as if the child were *not* playing make-believe, which would make the child's utterances absurd or even nonsensical).

In fact, if we look at the law *as law* (or at least *as the law for us*), there is *only* the moral, and no story. That is to say, there is nothing to the law *but* the moral story. To say that the only available proper reading of a law *as law* is the moral one is to say that all the other readings are either not readings of the law as *law* but are instead readings of the law as something else. For example, the law might be read as evidence of certain cultural biases, or as a story (in the way some read certain parts of *Leviticus*), or as a particularly pungent example of a certain linguistic tradition. But these would not be readings of the law *as law*. As an analogy, consider looking at a statue and seeing only the material and the marks of production but not what the statue is *of*. Suppose one saw only bronze, patina, marks, and a rotund shape, but not Balzac. Suppose one saw only marble, smoothness, and shape, but not David. It is possible to do this with art and continue to see it as *art*, but one clearly will miss a great deal about the artwork if one does this (and it is only in the past century or so that it became possible to do this with art and continue to see it as art). But the loss is total when it comes to the law. For if one sees in law only a string of words, but does not see the law in terms of giving a moral—an answer to the question of how one ought to live—then one simply fails to see law *tout court*. Instead, one sees only a text. Furthermore, if one reads legal texts only for a certain literary style, or only for grammatical errors, or for clues to certain cultural biases, one might learn something about the *lawmakers'* capacity to use language (e.g., perhaps they are poor stylists or have an even worse grasp of the rules of English grammar), but one learns nothing about the practical guidance that the law aims to provide. In sum, then, one must read the legal text as answering the question, "How ought I to live?" We can express this in the following slogan: The law is all moral and no story.[7]

If there is a puzzle here, then, this is it, i.e., the fact that the law is all moral and no story while most other texts can be read for both a story and a moral. But this is not obviously a particularly deep puzzle, as far as I can

[7] I do not take a stand on whether a story is all story and no moral, since it is an open question if one saw *only* the moral of a story. One might ask, "What happened to the story?"

tell. And it certainly is not any different than the puzzles associated with figuring out how social facts can require a moral semantics for interpreting a *Simpsons* episode or a play by Sophocles.

VII.

Since legal texts are answers to the question, "Morally speaking, how ought I to live?" they must be understood as assertions about what morality requires. That is, legal texts are assertions about the moral facts. If the "legal assertion" about what morality requires is true, then the legal text has identified moral reasons for action. But, does this mean that the legal text is little more than a source of evidence about what to believe about what morality requires? If so, that would violate the platitude that the law aims to make practical difference in our lives (since the law would aim only to make an epistemic difference in our lives). So, it must be the case that legal texts do not *merely* make assertions about what morality requires; instead they *create* the moral requirements.

This suggests that legal texts are not assertions, but are instead performatives. As a result, I must revise my analysis so as to avoid this or give up my theory. I am happy to revise, as it does not seem to be the case that the *legal text* makes the moral requirement; rather it is the *making* of the law that makes the moral requirement that the legal text describes. That is, it is the successful appending of the legality operator to a text (i.e., successful legislation) that *both* generates the moral requirement *and* makes the text an assertion (and not just a presupposition, as the text would be prior to its being successfully passed into law) that there is such a moral requirement. If by "law" we mean the legal text itself, then the *law* does not directly determine moral requirements. But if by "law" we mean *both* the legal text *and* the act of appending the legality operator to that text—in the same way that "promise" can mean both the sentence expressing a promise and a promise made—then the *law* does something amazing: It *both* creates moral facts and asserts that they exist.

From here on, though, when I write of the law, I am referring to the first way of understanding the law—the law just is a legal text (i.e., valid legislation). Given this gloss, laws don't create moral facts, but legislation does; laws only *describe* moral facts. And, if we say, as I do below, that the law grounds moral reasons for action, I am speaking elliptically and mean "*that some law that has been legislated (and not repealed)* grounds moral reasons for action."

VIII.

A puzzle immediately arises: Can't there be laws that fail to ground moral reasons for action that are still *valid* laws? This is just to appeal

to one version of the infamous Separability Thesis to press the account I give here. My answer is: Indeed, the law can fail to ground moral reasons for action but still be valid law. For there is one final piece of the puzzle I have not yet mentioned: the political authority of the lawmaker.

Lawmakers can have two kinds of authority: They have *legal* authority to append the legality operator to texts, and they can have the *political* authority such that when they append the legality operator to a text, they can change the moral state of affairs. Legal authority is a necessary condition for making texts into legal texts and so for making texts into answers to the question, "How ought I to live?" Political authority is a necessary (and sometimes sufficient) condition for one's appending the legality operator before a text to have the force of shaping the moral order in a certain predictable way, namely, by making the law's answer to the question "How ought I to live" a moral fact. If the lawmaker lacks political authority, then the law *fails* to give moral reasons, but it should still be read as an assertion about what is morally required. That is, if the lawmaker lacks political authority, then the lawmaker makes laws that assert falsehoods (unless they accidentally pick out independent moral facts), which just means that the lawmaker asserts that there are moral requirements which in fact don't exist. There is nothing mysterious about this: People make false assertions about morality all the time.

Laws on this picture are "moral assertions" that can be true or false by *directly making* their content true or false. What determines whether law has the power to do this is whether the lawmaker is authoritative. As a result, the content of the law is not, "Let there be light" which makes it such that there is light. The law just says, "There is light" and, if the lawmaker has political authority, then, lo, there is light. If this sounds odd, it's because it is odd: Like a voluntarist God, lawmakers with political authority can make moral changes simply by making assertions about morality (consequently, certain Euthyphro-style arguments can easily be raised). Contrast this, on the other hand, with promising. Promises are neither true nor false; they are only valid or invalid. When *A* promises *B* to φ, *A*'s utterance is not to be interpreted as a claim about what is permissible or obligatory. Rather, it is a performative that amounts to the undertaking of an obligation. *A*'s utterance "*A* is duty-bound to *B* to φ" is quite a different beast from *A*'s utterance "I, *A*, promise you, *B*, to φ." Furthermore, suppose *A* promises B to kill 20 innocent people for fun. This does not make *A*'s promise *false*; it just makes *A*'s promise *invalid*. As a consequence, the proposition "*A* is duty-bound to *B* to kill 20 innocent people for fun" is false. Truth and falsity here tracks validity and invalidity. The law, though, is not quite like this. If a law prohibiting jaywalking is not produced by a political authority, then it is false, but so long as the lawmaker has *legal* authority, the law is still valid.

We can conclude that in one sense there is no special mystery to law, since whether a law is valid is simply a matter of social facts—namely, the social practices of legislation and the contingent relationship of the erstwhile lawmaker and her actions to those social practices. But this question about the way social practices determine social norms and the relationship between individuals and their actions to those norms applies to many things having *nothing* to do with the law. For example, consider literary authorship. Only J.K. Rowling has the authority to create and alter Harry Potter's story. For example, only Rowling has the authority to make it the case that Harry has, unbeknownst to him, a sister named "Princess Leia." Someone else could write a story about Harry Potter in which he has a sister named "Princess Leia," but, as a matter of social practice, no one would accept this as a valid addition to Potter's life story. But this is just a feature of the social practices associated with novel-writing. It could just as well be the case that others may have the authority to shape Harry Potter's story. And so it is in many cases. For example, so long as copyright restrictions are not violated, almost anyone has the authority to shape the story of characters created in a film by making sequels (although certain social norms probably militate that the sequels meet certain conditions, like certain continuity requirements). And this is due to social practices, as well. As a result, there is nothing *uniquely* mysterious about why it is that only some people have the legal authority to append the legality operator to a sentence.

On the other hand, we can identify a puzzle that is unique to law. I am pushing for the use of truth and falsity as appropriate predicates in law and as distinct from the question of the validity or invalidity of law. There are, I am arguing, no puzzles distinctive to law regarding the latter set of predicates. But, with respect to the former set of predicates—truth and falsity in law—there is a distinctive set of puzzles. For it is only appropriate to deploy these predicates with respect to the law in contexts associated with the *political authority* of the lawmaker, and in particular only with respect to the bizarre capacity to generate moral requirements simply by saying that such requirements exist. So, unique to *legal* philosophy are traditional questions of political authority (and, to a certain degree, how moral properties can be response-dependent, i.e., how moral properties can be dependent entirely upon the psychological attitudes of lawmakers).

IX.

In sum, by identifying two distinct phenomena—how appending the legality operator to a text requires that text to be read as making moral assertions and how legitimate political authority makes it so that

lawmaking directly determines moral requirements—we have cleared the ground to ask two different questions:

(1) Why is it that appending the legality operator recommends that a text be read as making a moral assertion?
(2) Why is it that having legitimate political authority allows one to directly change the moral landscape simply by appending the legality operator in front of some text?

The second question is an age-old question in political philosophy. It is the question of how the law can be a source of content-independent reasons for action, a question that can be understood as follows: How can the exercise of mere *legal* authority (i.e., the authority to append the legality operator to a text) so directly shape the moral fabric of the world? Answering this question is well beyond any discussion here. But I believe that putting it in this form renders quite clearly how bizarre political authority is: Why believe that anyone, simply by exercising their legal authority to append a certain operator to some text, can change the moral landscape so directly? Thus, we must be certain to distinguish the first question about the semantics of legal texts from age-old questions about political authority. Furthermore, certain political positions, such as skepticism about political authority, should not ground skepticism about the moral semantics of the law. That is, one can both be a skeptic about political authority and accept the thesis that the essence of *legal* authority is the authority to require interpreting any sentence as an answer to the question, "Morally speaking, how ought I/we to live?" The skeptic about political authority would simply take it that the lawmaker, by exercising her legal authority, cannot thereby make her answer true (although she can give the correct answer in just the same way that *anyone* can give the correct answer, namely, by, accidentally or not, saying what is true).

The first question, on the other hand, is not altogether that unique to law. It is simply one question among many about how language works, and in particular, how different speakers can have different kinds of authority to control the meaning of what they say—depending upon who's talking (or writing, etc.), how they are speaking, and the conditions under which they speak, how their speech is to be interpreted and how much it is within their authority to control how interpretation changes. This has become platitudinous in linguistics and it is as applicable a platitude in the case of the enacting of legal texts as it is in everyday speech acts. On the other hand, this does not diminish the complexity of the puzzles Coleman raises under the heading of the "moral semantics claim." It is only to recommend bringing the study of these questions into the philosophical and linguistic mainstream—something that Coleman, more than any living philosopher, has both advocated and accomplished.

X.

Before concluding, I consider the following objection.

Some might argue that the platitude about the law's practical significance is the following: *The fact that the law says that p is what gives us a reason, if any reason at all, for action*. If this is the right way to construe the platitude with which we began, then I am in trouble. To see why, consider a law against jaywalking. According to the new platitude, it's the fact that the law says that jaywalking is impermissible that gives us a reason for action and not *that jaywalking is impermissible* that provides us with the reason for action. My argument, though, rests on the claim that the law purports to give us practical reasons simply in virtue of the content of the law and not in virtue of the law *being the law*. That is, my argument relies on the claim that a legal text stipulates that jaywalking is impermissible aims to *ground* the impermissibility of jaywalking, and it is only this latter fact that in turn gives us a reason not to jaywalk. It is precisely this "*de re*" nature of the practical importance of the law (i.e., the practical importance of the law consists in the way in which it aims to point directly at the moral facts) that makes it an answer to the question, "How ought I to live?" But if we see ourselves as required only to reason in a *de dicto* fashion (I ought to live in such-and-such a way because the law says that *p*) and not in a *de re* fashion (I ought to live in such-and-such a way because *p*), then my argument will thereby begin to come apart at the seams.

But we ought not to reason in this *de dicto* fashion. If we do not reason *de re*, we will not be able to determine what, if any, reason the law gives us. For if we reason *de dicto*, it remains unclear what sort of role the consideration that the law says that *p* is supposed to play in our practical deliberations. It may turn out that the fact that, for example, the law says that jaywalking is prohibited speaks in *favor* of jaywalking, say, when you wish to demonstrate to your friends that you are not afraid of breaking the law but you do not want to break a particularly significant law. So if we read the practical import of the law in a *de dicto* manner, then it turns out that the law *qua* law hasn't on its own any *transparent* practical import whatsoever! There would be no way to determine ahead of time and for anyone other than oneself at the present moment what the fact that the law says that *p* requires. Again, here's why: If we must read the practical import of the law in a *de dicto* manner, then, for any person, *A*, the practical significance of the fact that some law, *L*, says that *p* depends upon *A*'s subjective motivational set, *S*. As *S* changes, *A* will see that *L* says that *p* as providing grounds for different courses of action. In principle, then, that *L* says that *p* can be a reason for *anything or nothing regardless of the content of p* so long as *S* has a certain content. But that would require completely abandoning our platitude that the law has practical significance. And surely we need better reasons for abandoning this platitude than just a

hunch that we reason in a *de dicto* fashion when it comes to the law. As I've just shown, this is pretty unlikely. That the law says that jaywalking is impermissible is a source of a reason not to jaywalk, if it is a source of any reasons at all. Why? Because, if the lawmaker has political authority, then legislating a law saying that jaywalking is impermissible *makes* jaywalking impermissible. And, jaywalking being impermissible is transparently a reason not to jaywalk.

In the case of the *de re* reading of the practical requirements of the law, on the other hand, what the law requires is transparent. For the law just points to the impermissibility of jaywalking: If one understands the law, one thereby understands what the law requires, namely, that one not jaywalk. If one understands that jaywalking is impermissible, then one not only has a reason for action, one has a reason for action that carries its practical import right there on its face: It's a reason that counts *against* jaywalking and there can be no confusion about that. If one must think a further thought about the fact that the law prohibits jaywalking, then a rather turbid space has opened up— a space in which one asks, "What is the connection between the law saying that jaywalking is impermissible and jaywalking being impermissible?" At this point, one's vision of what one has reason to do in virtue of the law becomes unclear.

Of course, if the lawmaker lacks political authority, then the law says that jaywalking is impermissible, but that is, all things being equal, *false*. Only at this point would it be appropriate to give the *de dicto* reading of the practical significance of the law. But there is no obvious reason to *begin* with the assumption that the lawmaker always lacks political authority. Furthermore, if we are asking questions about more than just the political morality of law—i.e., how to understand what laws say and how to understand what lawmakers are doing and trying to do when they make laws—then we should not begin with the assumption that the lawmaker always lacks political authority. In fact, I submit that the only way in which we can fully appreciate the enormity of the task of showing that lawmakers *could* have political authority is to seek to understand the law as distinct from questions of political authority. What I have argued here, though, is that in order to do this, we must bring philosophy of language, philosophy of mind, literary theory, sociology, and other disciplines that deal with the relationship between discourse, social practices, interpretation, and meaning into our much of our thinking about the law.

Department of Philosophy
Yale University
P.O. Box 208306
New Haven, CT 06520-8306
U.S.A.
E-mail: matthew.noah.smith@yale.edu

References

Coleman, Jules. 2007. Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence. *Oxford Journal of Legal Studies* 27: 581–608.
Hohfeld, Wesley Newcomb. 1919. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Ed. W.W. Cook. New Haven, Conn.: Yale University Press.
Shapiro, Scott. 2000. Law, Morality, and the Guidance of Conduct. *Legal Theory* 6: 127–70.
Skinner, Quentin. 1978. *The Foundations of Modern Political Thought: Volumes I and II*. Cambridge: Cambridge University Press.
Tuck, Richard. 1981. *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press.

