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Normative monism and radical deflationism

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ABSTRACT

Scott Hershovitz's *Law is a Moral Practice* develops a bold, novel, and comprehensive account of law: the moral practice picture. Its central thesis is that legal relations (rights, duties, powers, etc.) are moral. They are real, full-fledged normative relations, connected to genuine reasons for action, and endowed with robust normativity. Nothing less than ordinary moral relations. The account is compounded with a deflationary view of theories in general jurisprudence and of the debates about them. In this vein, Hershovitz recommends that we move away from theorising about law (understood as a set of legal norms), and focus on the nature of legal relations instead. In this paper, I pursue two interrelated objectives. First, I address Hershovitz's main arguments for the view that legal relations are moral. Second, I take the issue with the asymmetry between the deflationary and inflationary stances he advocates for legal norms and relations, respectively, arguing that this different treatment is unwarranted, because the deflationary stance is, and because this very combination of attitudes is unstable. Properly understood, questions about the nature and determination of legal norms and relations can't but be seen as complementary aspects of a unified legal metaphysics.

KEYWORDS

Law; legal relations; morality; jurisprudence; metaphysics; deflationism

1. Hershovitz's first and second order claims

Scott Hershovitz's *Law is a Moral Practice* develops a bold, novel, comprehensive account of law – 'the moral practice picture' – structured around a number of theses concerning the aim and object of legal practices, as well as the nature and determination of legal properties and relations (rights, obligations, powers, etc.).¹

The starting point is a conception of what legal practices are *for*. Constitutive practices (such as legislation) are aimed at adjusting (creating, modifying, ...) *moral* rights and obligations – what we morally owe each other (18 ff.).² Correlatively, on the epistemic

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¹Scott Hershovitz, *Law is a Moral Practice* (Harvard University Press 2023). All references in brackets are to pages of the book.

²To be sure, lawmaking can misfire, giving rise to no modification of the pre-existing relations at all, or impacting them in radically different ways from how they were intended. But when things go well – and, at least in political systems like ours that have some value, they can go well – their typical effect is to impact our moral profiles.

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side, the rights, duties (etc.) that are at issue in court are moral ones (30 ff.), and competing theories of legal interpretation are construed as providing rival views of how lawmaking practices impact them (56 ff.).

The book's central thesis, then, is that legal relations are moral. Legal rights are not fictitious or make-believe. They are not 'rights' in some second class or *sui generis* sense. They are real, full-fledged normative relations, connected to genuine reasons for action, and endowed with robust normativity. Nothing less than ordinary moral rights.³ As a consequence, lawmaking practices do not determine legal rights on their own. Rather, those depend on morality as well, for in the absence of moral principles and values playing an explanatory role, it would be impossible for social practices to generate genuine normative relations.⁴

The first-order views that make up Hershovitz's account are compounded by second-order claims about the status of views in general jurisprudence and of the debates about them. Traditional inquiries into the nature of law and legal norms are viewed in stark contrast with the project pursued in the book of articulating an account of legal rights.

Towards the former, Hershovitz takes a resolutely deflationary stance, as he is adamant that we should '[shift] our attention away from "the law" – the mythical entity that sits at the centre of lots of misguided jurisprudence' (183), and stop thinking that law is 'something about which we must do metaphysics' (195). Our focus should be on legal rights themselves, rather than on 'law'.

In this paper, I pursue two interrelated objectives. First, I tackle Hershovitz's main arguments for the book's central view that legal relations are moral. Second, I take issue with the asymmetry between the deflationary and inflationary stances he advocates for legal norms and rights respectively, arguing that this different treatment is unwarranted, both because the deflationary stance is, and because this very combination of attitudes is unstable. Properly understood, questions about the nature and determination of legal norms and rights can't but be seen as complementary aspects of a unified legal metaphysics.

2. Normative monism

Hershovitz deploys several arguments for the view that legal relations are moral, which I divide in two categories: arguments from convergence and from absorption.

2.1 Convergence

Arguments from convergence work by highlighting the commonalities between law and morality. This is achieved with a series of moves aimed at pulling morality down on earth

³This thesis is shared by others, including Ronald Dworkin, 'The Model of Rules II' in Ronald Dworkin (ed), *Taking Rights Seriously* (Duckworth 1977); Mark Greenberg 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288.

⁴Some of the underlying metaphysical structure is left unspecified. It is clear that the role of legal practices is to determine the legal facts (i.e., the facts about the instantiation of legal rights, obligations, etc.). The role of moral entities, in contrast, is less clear. It could be either to determine, together with law practices, the legal facts themselves, or to determine how legal practices bear on the legal facts (or both). Similarly, the nature of the determination relation at play is also not touched upon. Recent developments in jurisprudence have argued that it should be understood as a relation of metaphysical grounding, though Hershovitz is silent on this issue. See Samuele Chilovi and George Pavlakos, 'Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25 *Legal Theory* 53; Samuele Chilovi, 'Grounding-Based Formulations of Legal Positivism' (2020) 177 *Philosophical Studies* 3283; Samuele Chilovi and George Pavlakos, 'The Explanatory Demands of Grounding in Law' (2022) 103 *Pacific Philosophical Quarterly* 900.

while at the same elevating law towards it, as it were. Together, they make up a cumulative case, whose unifying aim is to soften the oft-perceived contrast that separates these two domains on various fronts.

Many, for instance, take an important difference to be that in the legal case, but not in the moral one, the rights (obligations, etc.) we have and those we ought to have can come apart (we can have legal rights we ought not have, and lack legal rights we ought to have). In response, Hershovitz draws the same distinction in the moral case, a move he motivates with examples: if someone makes a promise they shouldn't have made, this can make it the case that they have an obligation they ought not have (12, 23, 35 ff.).

In similar vein, Hershovitz points out that moral relations, just like legal ones, are determined by descriptive facts (41 ff.). The case of promising is again used to illustrate the point, since one's promissory obligations are typically partly explained by their speech acts (186–187).

The main problem I see with these arguments is that they do little to address what are typically seen as the main differences between legal and moral relations. Morality, many think, necessarily enjoys a robust sort of normativity that the law possesses only contingently. Morality, but not law, always gives robust reasons to act in accordance with it, and plays an overriding role in determining what one ought to do all things considered.

Moreover, although it is true that both legal and moral relations⁵ are determined by descriptive facts, the difference lies in that only the latter are always partly explained by moral principles too. On plausible accounts, for instance, when one promises to φ , this grounds an obligation to φ only in combination with a moral principle connecting the two (roughly, that one ought to keep their promises). And though it is a matter of contention whether moral principles figure in the determination of legal facts, the point is that this is the key question, a question which isn't addressed by the observation that descriptive facts play a role in both cases.

Hershovitz's second strategy of convergence lies with stressing law's moral significance (chapter 1, 86). Legal practices interfere with people's lives in pervasive ways: legal rights and obligations shape and regulate most of our actions, interactions, expectations, and nearly every aspect of our lives. This means, among other things, that the law-making practices that create them are extremely significant. It also means that litigation raises crucial moral questions, since judicial decisions have an enormous impact, both on the parties to the dispute, and usually on other people too.

Again, I think these are all features of law that we should acknowledge. What I dispute is their dialectical significance. The outcome of courtroom disputes, for instance, is morally momentous regardless of the nature of the relations that figure therein. Litigation would still pose moral questions even if the rights debated within it were fictitious or make-believe, simply in virtue of its crucial consequences, and *ditto* for other ways in which legal practices and relations are morally significant. The fact that they are hardly tells us anything about their nature – all it tells us is that they impact life in morally significant ways, and as such can be the object of moral evaluation.

⁵To be more precise, I should say 'facts about the instantiation of legal and moral relations'.

2.2 Intermezzo: judicial reasoning

Chapter II of the book presents examples of morally loaded judicial reasoning, claiming that it has the right shape if the moral practice picture is correct. One way of reading it is as providing a bottom-up argument from adjudication to the correctness of the account, whose streamlined version would run as follows. Attending to adjudicative practices shows that judges and lawyers appeal to moral considerations in order to establish the legal rights of the parties to judicial disputes; other things being equal, it would be better if we could vindicate this aspect of legal practice; the best way of doing so is by taking it at face value and regard such considerations as tracking determinants of the rights in question; since such considerations are about moral facts, this supports the view that legal rights are partly determined by moral facts, which in turn backs the view that legal rights are moral.

I doubt, however, that this is the best way of reading the argument. For one thing, thus interpreted it wouldn't add much to traditional antipositivist arguments,⁶ and would accordingly be open to the usual responses. The uncompromising line that appeals to moral facts are exceptional and only present at the fringe (where social conventions are unsettled), meaning that they are best viewed not as attempts at ascertaining pre-existing law, but rather as disguised ways of making new law.⁷ The conciliatory line that all practitioners' appeals to morality shows is that social conventions incorporate moral criteria of legality.⁸ And so on.

This is obviously not the place to re-evaluate any of these strategies. The main point is that I don't think chapter II is best construed in Dworkin-style, 'bottom up' fashion. At least, not primarily. Rather, what this chapter does is giving us an illustration of how judicial reasoning should look like if the moral practice picture were correct (56). That is, its role is to underscore that if legal rights are moral, then reasoning aimed at figuring out these rights should appeal to moral facts. The view validates the reasoning pattern, rather than the other way around. If so, however, then this means that there must be some further and independent argument in support of the view, to which I now turn.

2.3 Absorption

While the argument from 'absorption', as I shall call it, is never explicitly articulated, I believe it to be the central argument given in favour of the account's main thesis that legal rights are moral.⁹ The argument involves a mix of semantic and substantive

⁶Ronald Dworkin, 'The Model of Rules I' in Ronald Dworkin (ed), *Taking Rights Seriously* (Duckworth 1977).

⁷Brian Leiter, 'Explaining Theoretical Disagreements' (2009) 76 *University of Chicago Law Review* 1215.

⁸Jules Coleman, 'Negative and Positive Positivism' in *Markets, Morals and the Law* (Cambridge University Press, 1988); Herbert Lionel Adolphus Hart, 'Postscript' in Penelope Bulloch and Joseph Raz (eds) *The Concept of Law* (Clarendon Press, 1994).

⁹In addition, Hershovitz also invokes some traditional arguments, but I won't deal with them since I don't think they constitute the most original contribution of the book, and since they've been discussed at length by others. First, he claims that the supposition that legal relations are moral and/or determined by moral facts helps explaining the persistence of disagreement about them in a range of controversial cases (175). Positivists, however, have long emphasized that such disagreements can also be effectively explained by the supposition that they concern either how the case at hand ought morally to be solved in the absence of pre-existing law covering it (Brian Leiter, 'Explaining Theoretical Disagreements' (2009) 76 *University of Chicago Law Review* 1215; Scott Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007) 22–49), or what concept of law we should have (David Plunkett, 'Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute Over Legal Positivism', 22 *Legal Theory* 205). Which explanation is best is an open question, given that taking practitioners' public presentations at face value need not be the best option in contexts where they are incentivized to

premises about the meaning of ‘legal’, ‘moral’, and the scope of the relative domains. The upshot is a sort of moral imperialism, where the entirety of the normative landscape is absorbed into the moral domain. No room is left for nonmoral normative relations of any kind, and therefore none is left for legal nonmoral relations in particular.

In simplest form, it can be stated as follows:¹⁰

LEGAL Legal rights are enforceable rights.¹¹
 MORAL Enforceable rights are real, genuine moral rights.

∴ CENTRAL CLAIM Legal rights are moral rights.

LEGAL is meant to be true by stipulation. Hershovitz points out that we use ‘legal’ in a number of different ways, even when the term is applied to normative relations, and even within philosophical debates about such relations (39). Dworkin uses it to refer to the relations that are enforceable in court, and Hershovitz follows him in doing so (39–40).¹² But others use it to refer to the relations whose source lies in the actions of legal institutions,¹³ or to those that officials are properly concerned with.¹⁴

Hershovitz does not deny that these (and presumably other) uses of ‘legal’ are legitimate: they too denote relations that deserve the label. Rather, he thinks that the meaning he picks out is interesting enough, both at the practical and theoretical level, that his semantic choice is warranted.

Although I agree with him to an extent, a couple of points deserve attention. First, it should be noticed that the semantic choice in question is not uncontroversial. A traditional positivist line of thought draws precisely on the idea that legal and enforceable rights are not coextensive: courts may at times enforce extra-legal rights, and legal rights need not always be enforceable.

Of course, Hershovitz needn’t be opposed to this idea, given his pluralism about what constitutes ‘legal’ relations. But it is worthwhile that *defining* the subject matter in this way forecloses a substantive dispute on a seemingly interesting issue.

Perhaps, this won’t be worrisome to him, since part of the metaphilosophical point of the book, as we shall see, is that the positivism-antipositivism debate should in a way be radically reformed or left behind. But it may still be a concern to those who have been

present the issue as a matter of discovering pre-existing law, due to the limits of their institutional powers. Relatedly, Hershovitz reminds us of Dworkin’s point that there appear to be determinate requirements in cases where (some) positivist views imply the law is indeterminate (46–67; 78–81). (This happens, for instance, in baby-and-bonnet-style cases, under the supposition that rules of recognition do explanatory work and fail to validate a rule that covers the relevant case). The positivist, however, will agree that there are determinate moral requirements that apply to the case; they will simply reject that such requirements are legal.

¹⁰For the sake of simplicity, I formulate the argument in terms of rights, but the pattern is meant to apply also to the other relations.

¹¹Hershovitz sometimes puts the point in slightly different ways, saying that the rights he is interested in are those that are ‘at issue’ or ‘debated’ in court. These formulations are not equivalent: many rights that are debated or at issue in court eventually turn out not to be enforceable. Moreover, why would one think that there is just one kind of entity that is ‘at issue’ in court? Different questions, each carrying its own kind of relations, could conceivably be at stake. (For instance, one sort of question could be moral, where another could be legal-but-not-moral).

¹²See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011).

¹³Mark Greenberg ‘The Moral Impact Theory of Law’ (2014) 123 Yale Law Journal 1288.

¹⁴Steven Schaus, ‘Law as Morality’ (PhD thesis, University of Michigan 2019).

engaged in that tradition, and who may therefore be less interested in the book's argument as a result.

That said, and turning to the merits of the stipulation, the more important point is that taking 'legal' to *mean* enforceable isn't clearly the most perspicuous way of identifying the relevant subject matter even for those who *are* interested in enforceable rights. Enforceability, it seems to me, is plausibly viewed at best as an *approximation* to the notion we are after – even if what we are after are relations that are typically enforceable – for two reasons.

First, because there is no reason to think that 'legal' rights – in the sense that has been, and should be the subject of philosophical reflection about them – couldn't exist in contexts where there are no courts (or analogous institutions) to enforce them, or where they happened, for whatever practical obstacle, not to be enforceable on occasion. Second, and relatedly, because the property of enforceability appears to be a derivative feature of enforceable relations. If a right is enforceable, it is presumably because it is legal in some prior, independently characterised sense, rather than the other way around.

But let's leave that aside: the second premise is where the real action is. The claim that enforceable rights are real, genuine moral rights is the result of two steps: the semantic choice of using 'morality' to refer to a domain of deontic normative relations (rights, duties, etc.), and the metaphysical view that there is but *one* kind of such relations (i.e., real genuine moral ones).¹⁵

I won't dispute using 'moral' for a domain of genuine deontic relations. What I disagree with is there being just one sort of deontic normative relations (moral relations), a position that we might call 'normative monism'.

Hershovitz acknowledges that this position rules out two prominent alternatives (193). One is that legal rights as perspectival or fictitious.¹⁶ I won't have much to say about this, since I'm also inclined to reject it.¹⁷ The other is what he calls the 'Baskin-Robbins view' (193).¹⁸ This is the view that there are different kinds of deontic relations, which are all equally real and genuine. There are the rights (duties, etc.) of morality, of course, but also of law, games, grammar, (perhaps) fashion, and any other domain where we speak of what people owe each other in a non-make-believe way.

Crucially, according to the Baskin-Robbins view, these kinds of rights are not just real (i.e., nonperspectival), but also genuine: they connect to robust reasons for action, and really tell us what to do. Yet, they somehow come in different 'flavours', constituting different 'normative systems'. They are different *kinds* of rights.

Heshovitz puts forward three main objections to this view (193–194). First, that the fragmentation of the normative landscape it sustains is needlessly complicated, as we can 'make sense of all our talk about rights and obligations' without positing it. Second, that it raises questions about the individuation of the different normative domains that aren't clearly answerable. Third, that it's unclear what could be the deep metaphysical divide among kinds it presupposes, if they are all equally genuine.

¹⁵This, in a way, makes the stipulation in LEGAL moot for the purposes of the argument, since it's not just enforceable rights, but *all* rights, that are taken to be genuine moral rights. So the argument might as well have been based on the premises that *legal rights are real rights*, and that real rights are moral rights.

¹⁶See, e.g., Scott J. Shapiro, *Legality* (Harvard University Press 2011).

¹⁷For discussion, see Samuele Chilovi and Daniel Wodak, 'On the (In)Significance of Hume's Law' (2022) 179 *Philosophical Studies* 633.

¹⁸This view is defended by Jules Coleman, *The Practice of Principle* (Oxford University Press 2001).

I do not find the first two objections especially persuasive. On the first point, I think that we need to countenance all the distinctions there are – no more and no less. Ideological parsimony isn't a virtue if it obscures differences in reality, so the issue turns on whether there's enough evidence for distinguishing different normative kinds. And, as I'll suggest in a moment, I believe that there is.

Regarding the second point, I fail to see any asymmetry between monism and pluralism in that regard, as they seem to raise the same issues and to be met with the same challenges. For it's not as if normative monism doesn't allow for different categories of relations: it too acknowledges the commonsense distinction between, say, the rules of morality, chess and grammar. In fact, even law, on Hershovitz's view, can't be *identified* with morality, since it is a subset of it. So the challenge of specifying identity criteria for these categories – of explaining what makes a rule a rule of, say, chess as opposed to law or grammar – will be a challenge for everyone.¹⁹

The last point is the crucial one, and I agree with it. Why bother positing different kinds of relations if they are all equally 'genuine', if they all possess the same normative force? The better alternative, I would have thought, is to think that such different kinds differ precisely with regard to the sort of normativity they possess. Moral relations are 'genuine', to use Hershovitz's term of choice: they are connected to robust reasons for action, which bear a special weight in determining how one ought to act all things considered. Other kinds of relations, by contrast, needn't be like this. They are real, to be sure, but they enjoy a weaker normative status, associated to a lesser weight in the balance of reasons.²⁰ (Or, if they do have strong normative weight, it is contingent upon morality endowing it on them).

For instance, it is intuitive to think that if one's game obligations conflict with one's moral obligations, the latter should normally prevail. Game obligations *are* real, and *do* give rise to reasons for action, it's just that they are not dispositive of what one ought to do all things considered, and tend to count less than moral ones in the balance.

Hershovitz would presumably reply that our game obligations are moral obligation, and that moral obligations can conflict with one another. This is surely a line one can take. But the main point I am making is dialectical. My aim is not to show that normative pluralism is correct, but rather to highlight just how much of the dialectical burden for CENTRAL CLAIM is carried by normative monism, a highly controversial yet largely undefended assumption throughout the book.²¹

¹⁹As Hershovitz points out, we sometimes categorize rules and relations according to their sources, or to the areas of life they affect, and so on. The point is that there is no asymmetry between normative pluralism and monism here.

²⁰This is sometimes put in terms of normative systems being 'artificial' or 'ostensible' Mitchell N. Berman, 'Of Law and Other Artificial Normative Systems' in David Plunkett, Scott Shapiro, and Kevin Toh (eds), *Dimensions of Normativity* (Oxford University Press 2019), or in terms of the normativity involved being formal or conventional Daniel Wodak, 'Mere Formalities: Fictional Normativity and Normative Authority' (2019) 49 *Canadian Journal of Philosophy* 1. 'Formal'/'artificial' normativity is meant to contrast with the 'robust' or 'authoritative' normativity that is had by other sorts of norms and normative relations (see Tristram McPherson, 'Authoritatively Normative Concepts' (2018) 13 *Oxford Studies in Metaethics* 253; Tristram McPherson and David Plunkett, 'Conceptual Ethics and the Methodology of Normative Inquiry' in Alexis Burgess, Herman Cappelen, and David Plunkett (eds), *Conceptual Ethics and Conceptual Engineering* (Oxford University Press 2020); David Plunkett, 'Normative Roles, Conceptual Variance, and Ardent Realism about Normativity' (2020) 63 *Inquiry: An Interdisciplinary Journal of Philosophy* 509).

²¹In defence of CENTRAL CLAIM, Hershovitz also asserts that legal rights are 'claimed as genuine' by legal practitioners (192). But it is unobvious that practitioners master or employ the notion of a 'genuine' right, a notion that is highly theoretical in character, and whose meaning and status is unclear within philosophy itself.

To see how central normative monism is to the overall account, notice that it plays a key role in motivating claims about legal practice too. As we've seen, a recurrent theme is that moral relations lie at the heart of legal practices: the target of constitutive (lawmaking), as well as epistemic (interpretive) practices is to adjust and ascertain moral rights.

Interestingly, Hershovitz seems to think that these claims, unlike his other claims about the nature of legal rights, '[cannot] be denied' (42–43). Yet the main motivation behind them is that the objects of legal practices are *rights (simpliciter)*, or what we owe each other (*simpliciter*). And this, as we've seen, is far from obvious.

What is obvious is that the object of legal practices are normative relations of *some* sort (most obviously, of a legal sort, one might have thought). But to think that a normative relation being moral follows from the mere fact that it is normative is to rely on the dubious assumption that the only type of normative relations are moral ones.

Thus, the account's claims about the nature of the practice rely on normative monism as much as the claims about the nature of the rights they are about do. Both are close to undeniable once normative monism is in the background, but highly controversial without it.

3. Radical deflationism

In this section, I take issue with the central second-order claim of the book. Hershovitz defends a thoroughgoing form of deflationism with respect to debates about the metaphysics (the nature and determination) of law, claiming that they are misguided and in need of radical reform. This stands in sharp contrast to the stance he takes towards questions of legal relations, as indeed much of the book is devoted to defending metaphysical theses about them. Somehow, the former are defective in ways that the latter aren't.

In the remainder of the paper, I challenge this asymmetry. My case is in two parts. First, I argue that questions about law can be framed in ways that admit of genuine and fruitful discussion. Second, I point to the tension inherent to combining deflationist attitudes toward law with inflationist views of legal rights.

Before we begin, let me cast aside one interpretation of the relevant contrast that I think should be discarded. At some points (183), the alternative to dealing with traditional questions in general jurisprudence is presented as concerning the impact that legal practices have on our *moral* rights and obligations.

I think that this way of framing the issue would both be unhelpful and extensionally inadequate with respect to the intended target. First off, everyone should agree that legal practices impact our moral relations, regardless of whether they think that legal relations are moral. Presumably, I have a moral obligation to gather information about the local politics of Madrid, register to vote, and vote. Why? Because it's the city where I live, and because the relevant legal norms – which in turn are determined by the local legal practices – allow me to do so.²²

²²In addition to being explained by legal and descriptive facts, the moral obligation in question is also plausibly partly explained by moral principles of political participation that require that I partake in political processes that affect my political community.

Thus, it should be uncontroversial that legal practices can partly ground moral obligations. Moreover, the example also makes clear that (at least) some of the moral obligations grounded in legal practices aren't legal. That is to say, the legal relations grounded in legal practices aren't co-extensive with the moral relations grounded in legal practices *even if one thinks that legal relations are moral*. Indeed, the uncontroversial fact that legal practices ground moral relations sheds no light on the question whether legal relations are moral. They are just two separate matters.

Of course, this isn't to say that focusing on the impact that legal practices have on our moral relations is illegitimate. This question is as worthy of attention as any question regarding what the moral requirements in a given area are, and how they are generated. It's just that it is a question in applied ethics, and so it is no alternative to what general jurisprudence has been concerned with, as rather a different topic altogether.

The proposal under consideration should rather be characterised as recommending to shift the attention away from law and towards *legal* rights, urging us to inquire into their nature and determinants. Let us now turn to examining it.

The main motivation behind the deflationist stance is rooted in a form of pluralism about 'law'. The idea is that, even when the term is used to refer to legal norms, it is wrong to suppose that it picks out a unique set of such norms. Rather, there are many sets of norms associated with legal practices, and they all deserve the label. These include the norms expressed in legal materials, those that are accepted or enforced by officials, those that are followed by citizens, those that are authoritative in a moral sense, and more (82).

Because these can all be legitimately called law, questions concerning 'what determines the content of the law', or 'what makes something a member of the set of legal norms' are seriously defective and misleading (72). Their 'original sin' is to assume that there is a unique set that can be properly called law, whereas many can be (71, 83).

Once we see this, we can see how debates about the nature and grounds of law dissipate and are easily resolved. Positivist views are obviously true of some sets (e.g., the accepted norms) while antipositivist views are true of others (e.g., the authoritative ones). The upshot is that if one wishes to theorise about 'law', they should make it clear what set they are talking about. But, better still would be if they moved on and focused on the nature and determination of legal rights instead.

The first point I want to make is that one can agree with Hershovitz's pluralist premises without accepting his deflationist conclusion. 'Law' is ambiguous along multiple dimensions and, even when its use is restricted to legal norms, I agree that in common usage it can be used to refer to norms of different kinds. This, however, doesn't mean that debates about the nature and grounds of law are misguided, nor that questions about legal content and norms need to be misleading.

Rather, the conditions to properly address such questions are exactly the same as those that apply to legal rights. Genuine debates in both areas require participants to share a common subject matter (which needs to be characterised in a way that doesn't beg the question against either side), and it's unclear why in the case 'law' or 'legal norms' these conditions should be any more difficult to meet than in the case of 'legal rights'.

That pluralism needn't lead to deflationism is evidenced by the fact that Hershovitz himself is a pluralist about 'legal rights', as we've seen, without of course being a deflationist with regard to the associated questions. Still, perhaps what motivates the

different attitudes is that the kind of pluralism he advocates for norms is stronger than the one he adopts for rights. Remember that in the case of norms, he maintains that there are different sets of norms associated with legal practices that can be called 'legal' or 'law'. This includes norms that are grounded in morality, but also norms that aren't. In the case of 'legal rights', by contrast, no corresponding suggestion is made. Rather, the idea there is that all legal relations are moral (simply because, as we've seen, all normative relations are), so it's not as if we should countenance a correspondingly permissive range of 'legal' rights.

In response to this way of motivating the asymmetry, let me make two comments. First, even if it turned out that variety in norms was greater than variety in relations, this would not by itself justify a different treatment. This point is well illustrated by Hershovitz's own discussion of what he calls 'the problem with legal positivism'. Although Hershovitz thinks that 'law' can be used in many ways – some of which denote positivist norms – this does not prevent him from making claims about the nature and determinants of legal norms that are both interesting and controversial, such that it's an open question whether positivism or antipositivism is true of them.

Unsurprisingly, his argument starts in the same way as his previous arguments about legal rights – that is, by specifying how 'law' is being used. His semantic choice is to focus on the norms that are 'at issue' in court (83). I think the choice of words is somewhat infelicitous, given that there is no reason to assume that there be a single set of norms that are at issue in court.²³ Overall, it's probably safer to assume that talk of norms 'at issue in court' is shorthand for the norms that are 'enforceable', given the proximity between the two concepts and given that it would be odd, in the context of the book, to use 'legal' in different ways when talking about norms and rights.²⁴

The argument then is that that *these* norms are necessarily 'authoritative':²⁵ they are genuine moral norms, connected to robust reasons for action and grounded in moral facts. From this, he concludes that antipositivism is true of them whereas positivism is false, a conclusion that is rightly regarded as contentious and in need of explicit defence.

I do not find this argument especially convincing, for various reasons.²⁶ But the main point I want to make is that even a radical form of pluralism about law is no obstacle to making such claims or engaging with positivists on such issues.

²³See fn. 11.

²⁴This means that the semantic choice is disputable on the grounds outlined before (see sect. 2.3).

²⁵The choice of word here is presumably meant to feature as the analogue for norms to what 'genuine' was for rights.

²⁶Most of the reasons Hershovitz gives for the claim that enforceable norms are necessarily authoritative parallel those given for the view that legal rights are moral. He points out: that the norms on which court decisions are based are morally significant, in that they interfere with life in pervasive ways; that there can be determinate requirements even in the absence of norms validated by a rule of recognition (46–67; 78–81); that antipositivism helps explaining persistent disagreement about law (175). For criticism of these arguments, see fn. 9. To this, he adds two further arguments. First, that courts use norms to 'justify' conclusions about the rights of individuals (86). I agree with this observation, but object that it fails to support antipositivism, since the notion of 'justification' here is broadly logical or epistemic, rather than moral. (Norms justify rights in the mundane sense that they figure in premises of arguments whose conclusions are about the rights of particular individuals). Second, contra Hartian positivism in particular, Hershovitz objects that courts do not look for Hartian norms (norms validated by a rule of recognition) when deciding cases. So Hartian norms are not what's at issue in court. Again, I concede the starting point, but dispute its significance. Hartian positivism doesn't require that judges look for rules of recognition and then use them to identify valid norms. Rather, rules of recognition are what we get when we look at whatever method judges use for deciding cases. In other words, Hartian positivism makes no prediction on what method judges should use to ascertain or apply the law. Rather, it takes any such method as a datum to construct a collective convention (if any) in abstraction from it.

That said, I also think that another reason why the asymmetry between questions of legal norms and relations is unjustified is that the underlying difference in pluralism is. For, given a plausible picture of how legal explanation works, the role of legal norms is to *explain* legal rights. When a particular individual stands in a legal relation (right, obligation, etc.), this is typically in virtue of possessing some other features, and in virtue of there being some norm according to which someone with those features stands in that relation.²⁷ But if this is so, one would expect multiplicity in norms to carry a corresponding multiplicity of relations. If, say, according to the accepted norms Fs have a right to φ , then any particular F does have a right to φ in virtue of those very norms. One may of course wish to *ignore* such rights, since most of the time they will be uninteresting – just as one will ignore the corresponding norms. But that doesn't mean that they don't exist.

On what grounds might Hershovitz resist this thought? As far as I can see, his deflationism is based neither on the idea that legal norms don't exist, nor that they are explanatorily inert. Quite to the contrary, he is happy to grant that legal norms do exist – the whole discussion presupposes this – and, with a few exceptions,²⁸ he also seems to think that rights are explained by norms.

As he himself puts it, norms are central to courtroom disputes (71). Courtroom disputes are typically centred around norms: *these* are the primary object of interest, as lawyers argue about their content, and judges use them as premises in the explanation of conclusions about particular persons' rights. Their reasoning goes from general norms to particular rights, which should really be no surprise if norms *explain* rights, and are therefore the more fundamental unit.

If so, why then think that 'legal norms' can refer to a vast variety of norms, some of them moral and others not, whereas 'legal rights' cannot? Why should 'legal' admit of a wider variety of interpretations when applied to one than the other? I see no reason for this, aside from adherence to monism about normative relations, which is anyway independently dubious, both in itself and (even more so) when combined with pluralism about norms.

What seems plausible is rather that abundance in norms be accompanied by an abundance of relations. Which, as Hershovitz himself has taught us, constitutes no problem at all to engaging in interesting and fruitful debates on such matters, since abundance in existence can easily be reconciled with a limited range of objects worth focusing on. One just needs to make clear what those objects are, so that metaphysical issues about them can be tackled in the appropriate way. Questions about legal norms and relations can then be treated for what they are – as complementary aspects of a unified inquiry about the metaphysics of 'law', properly understood.

In conclusion, I think that we can accept Hershovitz's pluralism about 'law' – understood as referring to different kinds of legal norms – think that these are associated with the different kinds of legal relations that such norms explain, and still be able to raise and tackle interesting and significant questions about the metaphysics of both.

²⁷ Advocates of this picture include Gideon Rosen, 'Ground by Law' (2017) 27 *Philosophical Issues* 279; David Enoch, 'How Principles Ground' (2019) 14 *Oxford Studies in Metaethics* 1.

²⁸ Such as the common law, where he argues that there can be rights without norms (90–91).

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