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DOES LAW MATTER?

Implicit in almost all of legal philosophy is the belief that law matters. But is that belief sound, and, if it is, then why, when, where, and how does law matter? Thus, exploring the conceptual, normative, and empirical dimensions of the proposition that law matters represents a cluster of questions that, if not the most important questions in legal philosophy, are certainly among the most important.

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1. PREFACE

This essay responds to the charge to identify the most important question in legal philosophy. In responding to this assignment, there is a temptation to equate the most important question with the question that I myself work on. I want to resist this temptation, and thus to describe as the most important question something that I genuinely believe to be the most important question, only a small corner of which is something, for reasons of time, talent, and training, that characterizes my own scholarly efforts. In addition, I will avoid using the word "theory." I don't have a theory of law, and I am not sure that many others have one either. It seems often better to use the word "account," because an account of law seems more amenable to offering something that accounts for some aspect of some of law, and most often that is the best we can do. I have considerable sympathy, therefore, for Oliver Wendell Holmes's observation that "I care nothing for the systems. – only the insights." (Holmes 1953, 300). Perhaps the best that most of us can do is to offer smaller and interstitial insights or suggestions, and in any event that is all I seek to do here, and in all of my academic work. And here I will maintain that the most important question in legal philosophy, or at least one very important question in legal philosophy, is "Does law matter?," and I will suggest here four different aspects of this question.

2. ON THE ONTOLOGY OF LAW

If we are concerned with the question, "Does law matter?," the first question is just what law is, such that it might or might not matter. It is impossible to ask the question about whether law matters without some conception of what it is that could or could not matter. To a significant extent this is a conceptual question about the concept of law, but there is a difference between the idea of a conceptual question, on the one hand, and the methods we might employ to answer that conceptual question.

One method of answering a conceptual question is to sit in our armchairs and speculate, presumably informed by the experiences and observations of the speculator. But although this is a common method of thinking about what a word means or what some concept means, it is by no means the only one. Consider, for example, Kenneth Himma's recent work on coercion, a project with which I have considerable sympathy.[1] And that sympathy extends not

[1] Especially Himma (2020), which builds on some of Himma's earlier work.

only to Himma's general conclusions,[2] but also, and most relevantly here, to Himma's methodology. Methodologically, Himma makes clear that if we are trying to determine what some culture's concept of law actually is, we must look at what members of that culture say, what they believe, how they act, and so on. This is a non-introspective empirical inquiry, and emphasizes that the introspection of only one member of that culture – the author, or the theorist – is hardly the most satisfactory approach to determining what a culture, as a whole, thinks, or believes, or understands. In other words, saying that something is a conceptual question, and recognizing that conceptual clarification might be necessary at the beginning of an inquiry, is not necessarily to say that the answer to that question can come entirely or even substantially from abstract non-empirical speculation or introspection.

Methodological observations aside, the reason that addressing the question "What is law?" is important for addressing the question "Does law matter?" is that the latter question is more or less interesting depending on how broad our understanding of law is. If we have an understanding of law that resembles Ronald Dworkin's, for example, such that the boundaries between law, morality, and political theory are somewhere between permeable and non-existent,[3] then "Does law matter?" becomes almost tautologically true. And the more an affirmative answer to that question approaches being tautologically true, then the less interesting it becomes. If law is everywhere and everything, if there is no discrete "thing" that is law, then "Does law matter?" is hardly sensible.[4] On the other hand, if we adopt[5] a narrower

[2] My substantive sympathy is best embodied in Schauer (2015).

[3] This is of course a gross oversimplification of Dworkin's views as developed in, most importantly, *Taking Rights Seriously* (1977), *Law's Empire* (1986), and *Justice in Robes* (2006), and it ignores Dworkin's theoretically interesting but descriptively erroneous view that questions of policy are not for courts and not part of law. Nevertheless, it is roughly accurate to describe Dworkin's view of the domain (or empire) of law as a capacious one, and certainly as resisting the idea that either morality or a society's political principles are external to that domain.

[4] Such a capacious understanding of law, although not demanded by so-called inclusive legal positivism, is at least permitted by it. See Waluchow (1994); Himma (2002, 125–165). And to the extent that inclusive legal positivism allows the realm of law to include anything and everything, it allows an understanding of "Does law matter?" that, in turn, produces an answer that is both affirmative and uninteresting.

[5] I want to say something about both "we" and "adopt" in "we adopt." With respect to the latter, it presupposes that a concept of law is something that can be chosen by a society, community, etc. How a society understands the non-natural-kind institutions of that society or of the world is a matter of choice and not of natural necessity. See Schauer (2021, 61–78). As to "we," those theorists who have recognized that a concept of law is something that a society chooses or adopts, including both Lon Fuller and (early) H.L.A. Hart (as explained and supported

conception of law, for example (and only as one example) one somewhat closer to that offered by excusive legal positivism,[6] or perhaps (as another example) one allowed but not demanded by inclusive legal positivism, then we can ask a somewhat more sensible question. More specifically, if, as exclusive positivism maintains, law is only a subset of legitimate reasons for action or reasons for decision, or only a subset of accepted social sources, then we can sensibly ask the question about whether that subset makes a difference to behavior or makes a difference to the decisions of some group of decision-makers. All of which is to say that asking the question "Does law matter?" requires conceptual work at the outset to determine just what it is that might, or might not, matter to decisions or to actions.

3. HOW MIGHT LAW MATTER?

The second question, the one to be addressed after having done the just-described conceptual work, is "How could it matter?". That is, under what circumstances might the subset of social sources that we understand as law make a difference to human reasoning and human decision-making. A few examples will make this idea clearer. Consider, for example, some of the recent work of Mark Greenberg, and the similar earlier work by Donald Regan.[7] For both Greenberg and Regan, law does not so much create reasons for action or decision as it operates *on* already extant reasons for action or decision. Thus, when Regan discusses what he labels as "indicator rules," or when he understands law as having an indicative function, he offers an explanation of how law could make a difference, by pointing out – indicating – to us the reasons we already have, but whose recognition might have escaped our consideration. Under this view, the fact of law, or the fact of law prescribing this or that action or decision, does not create new reason for action or decision, and does not operate entirely independently, but makes

in Schauer, *ibid.*) cannot plausibly be understood as doing anything other than engaging in the kind of prescriptive scholarship that characterizes, for example, most of moral philosophy. Just as John Rawls cannot plausibly or charitably be read as claiming that moral philosophers have a direct impact on social organization, so too cannot Fuller or Hart be plausibly read as claiming that either individual legal philosophers or legal philosophers in the aggregate have a direct effect on the creation and understanding of social institutions, including legal institutions. They claimed, to the contrary, that it would be better (or worse) if society understood law in such-and-such a way, but said close to nothing about the role of legal philosophers *qua* legal philosophers in bringing about such a state of affairs.

[6] See Marmor (2001); Raz (2004, 1–17); Shapiro (2009, 326–338).

[7] See Greenberg (2016, 1932–1979); Regan (1990, 3–28).

a difference nevertheless by exposing and making salient in a decisional process those reasons we might otherwise have ignored. Law is under this view not a reason itself but operates on other reasons.

This explanation of Regan's view, and, *mutatis mutandis*, Greenberg's, is offered only as an example of just *how* law might matter. And there are other possibilities. Raz's service conception of authority, and thus his service conception of legal authority, is a hypothesis (Raz would describe it in stronger terms) about how law might matter. It might matter, according to Raz, by assisting us in making the decisions that in theory we would like to make but that in practice we have difficulty in making (Raz 2006, 1003–1044). And for a very different conception of how law might matter, consider much of the writing of the Scandinavian Realist Vilhem Lundstedt (1956). For Lundstedt, law's importance lay in its ability to influence and perhaps even determine the moral views of a population. With his fellow Scandinavian Realists, Lundstedt did not believe that morality had any kind of ontological reality, but he believed that people had moral views nonetheless, and that those moral views were often influenced by what the law permitted and what the law prohibited. This fundamentally empirical view about law's influence on moral beliefs may or may not be correct,[8] generally or at particular times and places, but it is another example of *how* law might make a difference.

4. DOES LAW MATTER?

It is one thing to examine how law might make a difference – how it might matter. But the third question, which follows on the second, is whether law *does* make a difference. Does law actually matter. Importantly, this third question is not the same as the second. Even if we can identify how law might matter, it remains to be seen whether it actually does.[9] Although we have, since Hume, worried about the fallacy of deriving ought from is, a common pathology in much legal scholarship is the tendency of deriving is from ought. Legal scholars, especially those with limited empirical sensibilities or skills, often think it is sufficient to point out what can or might happen. But equally important is what does happen, and what does happen does

[8] Although Lundstedt shares with many American constitutionalists the view that what law and the courts do is causal of public opinion about what is right and what is wrong, there have been influential dissenters, perhaps most notably Rosenberg (2008).

[9] See Schauer (2016, 350–359).

not necessarily flow from what can happen. And here, with respect to the question of whether law actually does matter, we find ourselves in the middle of the American Legal Realist research program. The American Legal Realists were not themselves fancy legal theorists, although the knowledge of legal philosophy by people like Karl Llewellyn and even Jerome Frank is often underestimated or caricatured. But whatever their knowledge of legal theory, they nevertheless presupposed that that there was a subset of the universe of social sources, and that this subset was what we could label as law. But although they recognized that the traditional assumption was that this subset – the subset we call legal sources – actually mattered to legal decision-making, especially by judges (and, derivatively, lawyers), they insisted on two things. One, that the degree of influence on judicial decision-making by traditional legal sources (statutes, judicial opinions, etc.) was an empirical question. And, second, that those sources, especially in common law legal systems, had much less influence than was (and remains) commonly believed. More precisely, most of the American Legal Realists believed that conventional legal sources, the kinds of things published by legal publishers and that one would find in something labeled as a law library, had less of a causal effect on judicial decisions and legal outcomes than the traditional view believed.[10] And thus perhaps the best answer we can give to the question whether law *does* matter is – sometimes, but less than we might think.

5. SHOULD LAW MATTER?

Finally, we have the normative question: Apart from how law might matter, and apart from whether it does matter, is the question whether it should matter. There are, of course, both ordinary people and legal theorists who argue that law should not matter. In legal theory, these are the philosophical anarchists, although that unfortunate label suggests people lurking around government buildings at night and planting bombs. But philosophical anarchists, people like John Simmons and Robert Paul Wolff, are nothing of

[10] In a more modern version, systematic work by American political scientists on the decisions of United States Supreme Court justices confirms the suspicions of the Realists, and supports the conclusion that the pre-legal or extra-legal political and moral attitudes of the justices have much more of an effect on the votes of those justices in litigated cases than do precedents, text, history, or any of the other formal sources of constitutional doctrine. See, for example, Brenner, Spaeth (1995); Segal, Spaeth (2004).

the sort.[11] They believe that there is a *moral* duty to do the right thing, but they do not believe that obeying the law *qua* law is one of our moral duties. In other words, they do not believe that the existence of law or the existence of legal prescription matters to our moral obligations. For the anarchists, the mere fact that some legislature, some court, or some king happens to have said something – even with all of the trappings that legal positivists would associate with making law properly so called – should have no effect on what we actually *should* do.

Of course, there are dissenters from the anarchists. From Socrates in the *Crito* to John Locke to John Rawls, among countless others, theorists of legal obligation have argued that for reasons of social contract, or reciprocity, or gratitude, or fair play, in fact have an obligation to follow the prescriptions of political and legal authorities just because of their status. And more recently, Gerald Postema, among others, has found the roots of legal obligation in the virtues of social coordination and cooperation (Postema 1982, 165–203).[12] Of course this is not the occasion to resolve this debate, but it is nevertheless worth noting that the decidedly non-empirical question of whether law should matter is the natural conclusion of a progression that starts with conceptual clarification, goes from that to the question of how law could matter, from there to the empirical question of whether law does matter, and finally to the question of whether law should matter. These are plausibly among the most important questions of legal philosophy, and taken together, might well be the single most important question of all.

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[11] See Simmons (1979); Wolff (1970); Smith (1973, 950–976). A valuable overview of the issues and the literature is Edmundson (2004, 215–259).

[12] Compare the more skeptical Green (1983, 299–324).

[5] Edmundson, William. 2004. State of the Art: The Duty to Obey the Law. *Legal Theory* 10: 215–259.

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