Law Is a Moral Practice
FOR MY TEACHERS,

Billy, Clark, Joseph, John, and Jules
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Law Is a Moral Practice
“I don’t want blueberries.”

“I know, but you have to taste them. That’s the rule in our house—you have to try the food on your plate.”

I’ve had that conversation seven or eight million times, because I have two children and limited parenting skills. With our older son, Rex, the conversation would wrap up rather quickly. Mentioning the rule would settle the matter; he would do as directed, though sometimes I’d have to make airplane noises to make it happen. Hank, however, is another story. He’s the youngest, and he’s a picky eater. He comes by it honestly. I was also a picky eater, and I suspect that if my mother could have programmed Hank, she would have seized the opportunity to take revenge. But there was no need; genetics did her dirty work.

Hank is not impressed by the rule, and his resistance has grown more sophisticated over time. When he was three, he would simply declare his desires. “I don’t want apples,” he’d say, in an increasingly insistent tone of voice, which all too often I made the mistake of matching. I am not intimidating, but at the dinner table, I’m Darth Vader: “Hank, I am your father. Eat your peas or meet your destiny.” Of course, we’d never punish Hank for failing to eat peas. But we would insist that he stay at the table until he took a taste. And we would not offer him any other food until he did. It took a while, but eventually Hank came to understand that his
desires did not trump the rule: he had to try what was on his plate, whether
or not he wanted it.

But that didn’t end Hank’s resistance. Just after he turned four, he hit
on a new strategy. He gave me a reason for refusing to comply.

“I want yogurt.”

“Did you try a tomato?”

“No.”

“Hank, you know you can’t ask for more food until you’ve tried all
the food on your plate.”

“But I don’t need to try a tomato. I already know that I don’t like them.”

That was true. He did know that he didn’t like tomatoes, since we’d
had several showdowns over them already. If he tried one, he would
wince, so that I’d know that tomatoes are, in fact, disgusting, at least to
his tiny taste buds. There was no chance of any other outcome, and we
both knew that. So why go to the trouble?

I ask myself that a lot. One reason is that the evidence suggests that
the more you try something, the more likely you are to like it. We are
also concerned that, if we let Hank choose what to eat on his own, he
would subsist on a diet of yogurt, cheese, and chocolate, with a bit of
bread on the side. (It could be worse, I know, but we think it important
that he eat a plant or two.) So we have reasons to insist that Hank try
tomatoes, even if he knows he doesn’t like them. But, if we are honest,
a large part of the answer has little to do with food. Hank has to learn
that, sometimes, you have to do things you don’t want to do. He has to
learn that, sometimes, you have to defer to others. And he has to learn
what is worth fighting for and what one should simply swallow. (A to-
mato, for instance.) Perhaps most important, he has to learn that you don’t
always get to look behind rules; rigidity is part of the point, since it helps
us to avoid endless litigation over just what, on this occasion, Hank must
eat before he gets yogurt. So even though I was impressed that Hank dis-
cerned a purpose for the rule and realized that it wasn’t applicable in this
case, I nevertheless insisted that he try a tomato.

We did some version of that dance for weeks on end, and from time to
time, still do. But after a couple months, Hank hit on yet another strategy.

“I want yogurt.”

“Did you have a carrot?”
“I don’t want a carrot.”
“Remember, Hank, the rule in our house is that you have to try every­thing on your plate.”
“THAT IS NOT A RULE. THAT IS NOT A RULE IN OUR HOUSE.”
“Yes, it is, Hank.”
“NO, IT IS NOT. THAT IS NOT A RULE.”

We went round on this a few times. I said that it was a rule. Hank said that it wasn’t. But it was clear that was a losing game—or, at least, not a winning one. So I simply informed him that he wasn’t getting yogurt until he tasted a carrot. He stared me down for a while, then grudgingly raised a carrot to his mouth, took the tiniest bite possible, and said, “I tried the carrot.” Realizing I had been defeated, I declared victory and retrieved the yogurt.

As a parent, I was frustrated, and more with myself than Hank. As a philosopher, I was amused. Hank had unwittingly raised a central ques­tion in jurisprudence. I said there was a rule in our house that requires Hank to try everything on his plate. Hank denied it. Who was right? I was, I think. But then, I would. And Hank thought that he was right too. To know who was right, we’d need to know something other than what Hank and I thought. And, no, adding his mother, Julie, to the mix would not help. She’s on my side. But she could be wrong too, and sure enough, that was Hank’s view. It didn’t matter what we said, or how many times we said it, Hank simply would not accept that there was a rule in our house that required him to try everything on his plate.

Was there such a rule? I’m pretty sure there was. Indeed, I’m pretty sure there still is. But why? What makes it the case that a rule in our house requires that Hank try the food on his plate? Is it just that I said so? Or that my wife did? Or that we agreed? Hank said the opposite. Why doesn’t what he said count? Why, for that matter, does what any of us say count? How is it that we can make rules? Questions like these have absorbed philosophers of law for decades, even though few of them have met Hank.

Why do I think there’s a rule in our house that requires Hank to try everything on his plate? Because I said so. But, of course, Hank said the
opposite, so that’s not an adequate answer. Perhaps what I say counts because I back it up with force. I insist that Hank stay at the table until he’s tried everything on his plate; if he tried to leave, I’d restrain him, or return him. But that won’t work either, for at least two reasons. First, Hank punishes me almost as effectively as I punish him. He drags things out, says that he’s taken a bite when he hasn’t, wails, and tries to wear down my resolve. Sometimes, he succeeds. More often, I do. But it hardly seems like the question whether Hank is required, by rule, to try the things on his plate depends on who wins this tug-of-war. The question whether the rule is enforced depends on that; the question whether it’s in force doesn’t. Second, and more important, I restrain Hank because he is required to try everything on his plate. The rule is the justification for the restraint, so it must exist independently of its enforcement.3

So why does what I say count? Perhaps there is a rule that says that what I say counts. I have never made such a rule, and it is difficult to see how I could. If what I say doesn’t count, I can’t make it count by saying it does. So what I say has to count independent of what I have to say about it, if it is to count at all. Happily, there are reasons to think that what I say does count. I am, after all, Hank’s parent, and parents, we might suppose, have the right to set the rules of their house, at least within limits. They do not have this right because they say they do. Rather, they have this right because it is necessary for them to discharge their responsibilities. Among other things, I have an obligation to keep Hank healthy and raise him such that, in the not-so-distant future, he will be capable of fending for himself. Rules, we might think, are an indispensable aid to that, so the right to set rules travels with the responsibilities parents owe to their children.

There’s a lot more to say about parental authority. The fact that many children have two parents complicates the picture, as does the fact that, as children grow up, they can take on ever more responsibility for themselves. But I think the picture presented roughly right. That is, I think that Hank is required to try everything on his plate because I set that rule. And I think that I have the right to set that rule, not because of anything that I said or did, but simply because morality assigns me that right, as an adjunct to the responsibilities it assigns me to care for my children. In contrast, what Hank says does not count, because he is a
child, and morality does not grant him the power to reject the rules that I set—at least, not yet.

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What does all this have to do with law? Well, when lawyers go to court, they often argue about the rules. They are not, of course, arguing about the rules of our house. Rather, they are arguing about the rules of law, and the rights and obligations that people have in virtue of them. Sometimes, these disputes are similar to the one that Hank and I had: someone has said there is a rule, and the question is whether their say-so counts. On several occasions, the Federal Communications Commission (FCC) attempted to establish a rule barring internet service providers from treating traffic on their networks differently depending on its source. (This is the net-neutrality rule.) Some of the companies that would have been subject to the rule sued, arguing that the FCC did not have the authority to impose it. And twice, courts agreed.4 Eventually, the FCC adjusted the rule, and a court upheld its authority to impose the new version.5

The details of those disputes were more complicated than the conflict I had with Hank. They turned on the text of statutes, which establish the FCC and grant it authority to issue rules. Everyone in those disputes took it for granted that what the statutes said mattered. But sometimes that is in dispute. Congress may attempt to establish a rule, but those subject to it may protest that it lacks the authority to do so. For instance, in the Affordable Care Act, Congress mandated that people maintain health insurance or face a fine for their failure to do so. Some people who would have been subject to the mandate said that Congress lacked the authority to impose it. The question turned on whether, in attempting to impose the mandate, Congress was acting within the powers granted to it by the Constitution. The Supreme Court said that the mandate was not a proper exercise of Congress’s power under the Commerce Clause, as the government had urged. But it nevertheless held that Congress had the authority to impose the mandate as part of its power to levy taxes, since the fines could be construed as a kind of tax.6

Why did it matter what the Constitution said? Again, everyone involved took it for granted that it did, though they disagreed about just
what the Constitution authorized Congress to do. But why? Does the Constitution matter because courts say it does? Or because the people who drafted the Constitution thought it did? These answers suffer from the same sort of problems that my saying that what I say matters does. The courts, after all, are creatures of the Constitution. And the Framers could hardly confer authority on themselves by claiming it. If the Constitution matters, it must matter for reasons independent of the fact that its creators or creatures say it matters.

Is there a moral argument that could establish the authority of the Constitution, in the way that a moral argument establishes the authority of the rules that Julie and I adopt for our house? That strikes many people as a more dubious proposition. The men—and they were all men—who drafted the Constitution had many talents. But many of them were also slaveholders, and the document they produced not only countenanced slavery, it was written to preserve it. If the Constitution has authority, it does not rest on the superlative character of the rules themselves or the people who made them. Both were—and in the case of the rules, still are—seriously defective.

Are there any other arguments that could establish the authority of the Constitution? Many people would like to claim democratic authority for it, including those who drafted it. That aspiration is on display in the preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.7

But the Constitution was not drafted by the People; it was drafted by people who appointed themselves to the task. There was a public ratification process, but the People were not a party to that either. Only white men with property participated. If the People had actually played a part in the adoption of the Constitution, then it might be plausible to say that it once had democratic authority. But we would still have to contend with the fact that the People now are rather different from the People then,
and not just demographically. We face different challenges, so it’s not clear why decisions made long ago should govern the way we live today.

All that said, I think there is a moral argument for thinking that the Constitution matters—for thinking that we should care what it says, even though we have little reason to defer to the people who drafted it or the process by which it became ours. We disagree about how we ought to live, and we need ways of resolving that disagreement so that we can live together. The rules set out in the Constitution are the best way that we have of resolving that conflict. They are not, to be sure, the best we can imagine, and we ought to patch them up as best we can. But while we work on that, we have reasons to respect the Constitution. The alternative is not just conflict, but chaos, since many of the challenges of living together are, at least in part, coordination problems. The Constitution’s authority rests on the fact that many of us are willing to defer to it. It also rests on the fact that, as things stand now, we have no prospect of agreeing on anything better, even though it is easy to imagine better constitutions.

This argument does not just tell us that the Constitution matters; it also tells us something about how it matters—and what else matters with it. If the authority of the Constitution rested on the personal authority of the people who drafted it, then we might have reason to defer to their views about how its rules should be applied. But the argument I have given suggests that we should care more about settled understandings, even if they depart from the views of those who drafted the document. For instance, the text of the First Amendment suggests that its guarantee of free speech is good only against Congress (“Congress shall make no law . . . abridging the freedom of speech”). But it has long been understood to restrict judges and executive branch officials too. The argument also suggests that we should defer to the litany of traditions that are constitutional—in that they constitute the processes by which we resolve our disagreements about how to live—even though they are not reflected in the text of the Constitution. For instance, the Dormant Commerce Clause restricts states’ ability to interfere with interstate commerce. It is not actually a clause in the Constitution, since the text says nothing about state power to interfere with interstate commerce. But tradition gives us a reason to apply Dormant Commerce Clause doctrine nonetheless.
There’s lots more to say about all this, and constitutional lawyers have said lots of it. I won’t delve any deeper here. I simply want to say that the question why and how the Constitution matters—or why and how a statute matters—or why and how a court decision matters—is the same sort of question as why and how what I say matters when I set rules for our house. To know why and how what I say matters, we need a moral argument. And to know why and how what the Constitution, Congress, or the courts say matters, we need a moral argument too.

Some will resist what I just said. They might think the moral argument I offered mistaken. They might deny that the Constitution has authority or insist that its authority rests on its ratification or the moral character of the men who drafted it. The constitutional law literature is chock-full of people who take these views, and many others besides. There is, however, another way of resisting what I just said. Instead of engaging on the question whether the Constitution has moral authority, some will want to deny that the question has any relevance at all when we attempt to ascertain what the Constitution requires.

These folks might tell us that the rules of law are the rules that are applied, which we can identify without engaging in moral argument. If courts apply the Dormant Commerce Clause, then it’s a rule of law, whether or not we can identify any reason to comply with it. This is like saying that the rules of the house are the rules that I enforce, and it has just the same problem. Courts take the Dormant Commerce Clause to justify the decisions they make in its name. It couldn’t play that role if the Dormant Commerce Clause was just whatever courts happened to do in its name.

There is, however, another way to resist the view that we need to engage in moral argument to figure out what the Constitution requires. Some think that there is a rule that establishes which rules are rules of law and which are not. But they deny that this rule is a moral rule. H. L. A. Hart made a view like this famous. He argued that every legal system has a rule of recognition, which identifies other rules in the system. But the rule of recognition is not a moral rule. Rather, it’s a rule that’s constituted by a shared social practice. Judges apply the rule of recognition
when they decide cases, and their applying it—and demanding that others do so—gives it a kind of existence that is independent of the moral merits of the rule. This view is more sophisticated than the last because it allows rules to justify the decisions that courts make in their name. If the rule of recognition picks out the Dormant Commerce Clause as a rule of law, then it exists independently of its enforcement, and enforcement can be justified by reference to the rule—at least, up to a point. If the rule of recognition is not justified, then enforcement might not be either. The only justification that is guaranteed is justification relative to the rule of recognition.

There are lots of problems with this view. Here, I will mention just one, and once again, Hank can help. Why is there a rule in our house that requires Hank to try everything on his plate? Hart might say that my wife and I share a rule of recognition. We agree, perhaps, that the rules of the house are whatever we say they are. Relative to that rule of recognition, there is a rule that requires Hank to try everything on his plate. But Hank isn’t denying that. He knows that both Julie and I think—and act as if—there is such a rule. But he does not think that sufficient to make it the case that there is a rule that requires him to do so. When Hank and I argue over whether he is required to try things on his plate, we are not debating whether he is required according to the rules that I recognize. Rather, we are debating whether he is required to do so, sans qualification. In other words, Hank and I are having a debate about his actual rights and responsibilities, not the rights and responsibilities that I take him to have.

What happens in court? Do lawyers argue over the rights and responsibilities that litigants have relative to a rule of recognition? Or do they argue about the rights and responsibilities that the litigants have, sans qualification?

Hart’s claim—that lawyers in court argue over rights and responsibilities relative to a rule of recognition—has been highly influential. But it’s just one instance of a broader idea: that law is something other than morality. Different philosophers offer different takes on what law is, how it comes to be, and how it works. Hart says that law is a system of rules,
picked out by a rule of recognition. Scott Shapiro offers a competing view; he says that law is a set of plans, made pursuant to a master plan for planning. Those are different ideas, but they share something in common. They construe law as a self-contained normative system, separate from morality. We won’t take sides in the conflict between Hart, Shapiro, or anyone else who has a similar theory of law. But we should restate our question about what happens in court, so that it’s less tied to Hart’s particular variant of the separate-systems view. With that in mind, we’ll ask: Do lawyers in court contest the rights and obligations that litigants have according to a self-contained normative system, separate from morality? Or do they argue about rights and obligations of the ordinary moral sort?

Here’s an argument for the separate-systems view. In many places, the law is morally pernicious. In antebellum America, for instance, legal institutions recognized a right on the part of some to enslave others. That right couldn’t possibly be a moral one. (Slavery is morally abhorrent.) And that suggests that legal rights are not rights of the ordinary moral sort. They belong, it seems, to a separate normative system, whose content may or may not match up with morality. This is by far the dominant view among philosophers of law. And I suspect it would be a common view among practicing lawyers and laypeople too, if they considered the question. The law is often morally objectionable, and sometimes worse than that. The best way to make sense of its shortfalls, it seems, is to suppose that the law is something other than morality—a separate system of rights and obligations, which we create through our legal practices.

That’s an intuitive picture. And I feel tugged toward it, sometimes. But I think it’s mistaken. There’s a better way to understand law and its relationship to morality. Indeed, my aim in this book is to persuade you that, when lawyers go to court, they contest the moral rights and responsibilities of the parties, such that every legal argument is, in a way, a moral argument. Indeed, the central idea in this book is that law is a moral practice—a practice that aims at creating, extinguishing, enforcing, articulating, arranging, and rearranging our moral rights and responsibilities—and that court is a place we go to resolve conflict about them. This book is an invitation to try that view out, to see how it works, to see where it leads—and to see (among other things) what it has to say about morally objectionable laws, like the ones that underwrote slavery. (Here’s a hint:
the fact that legal institutions recognize a right doesn’t ensure that it exists. Legal institutions can be mistaken, just as individuals can. The fact that I believe you have a right doesn’t guarantee that you do, even if I treat you like you have that right.)

I’m not the first person to hold a view like this. Ronald Dworkin did, both early in his career and late, though in the middle he may have gone on a misadventure. Mark Greenberg, Steven Schaus, Nicos Stavropoulos, and Jeremy Waldron have also defended versions of the view that I will develop, and my work is deeply influenced by theirs. In a different way, it bears the mark of the many who would—and will—disagree with it: Hart and Shapiro, to be sure, but also Jules Coleman, John Gardner, and Joseph Raz, among others. The ideas in this book also reflect the influence of philosophers who write about adjacent issues, especially, but not only, Seana Shiffrin and Judith Jarvis Thomson.

Debates in jurisprudence are difficult. The arguments are intricate because the issues are hard. My plan in this book is to cut past some of the clutter, so as to provide a concise account of the idea that law is a moral practice. That means that, for the most part, I won’t engage these philosophers or the many others who have made important contributions to the debate. Or at least, I won’t do that in the main text. (Hart and Dworkin will get more of a hearing than the others, but even they won’t get much.) There’s more in the notes. And at the back of the book, you’ll find an appendix with frequently asked questions (FAQs). There, I’ll say more about the relationship between the view on offer here and prominent alternatives.

But my aim is not to prove any particular theory of law wrong. I won’t offer you an inescapable argument that Hart, Shapiro, or anyone else is mistaken about what law is. I think there are good arguments against the dominant views in jurisprudence. Indeed, I’ve developed some of them myself. And I’ll share some criticisms along the way, but only when necessary to move the ideas in this book forward. I see little reason to litigate old disputes. Instead, I want to explore a view that’s underexplored and mostly misunderstood. I want to show the appeal of the idea that law is a moral practice.

To see that appeal, we’ll have to correct two misimpressions about morality, which are rarely made explicit but lurk in the background of
lots of bad jurisprudence. First, many people imagine that morality is insulated from our activities—that we don’t control what it requires—that it’s independent of us. There’s truth in that. We don’t have complete control over morality. (For example, there’s nothing we could do to make slavery morally permissible.) But there’s lots we can do to shape morality’s demands. And many legal practices, I’ll argue, aim to do just that.

Related, but different: many people believe that morality requires whatever it ought to require—that morality is, by its own lights, perfect—that there’s no space from within morality to critique the demands it makes on us. And they take that to be a reason to reject the idea that legal rights are moral rights. The law, after all, is clearly subject to moral critique. We often lack legal rights that we ought to have. Or have legal rights that we shouldn’t. But it turns out, that’s true of morality too. Often, we lack moral rights that we ought to have. Or have moral rights we shouldn’t. Once you appreciate that fact, it’s much easier to make sense of the idea that legal rights are moral rights.

I’ll say more about all this later. (And I’ll identify further mistakes about morality that undermine our efforts to understand law.) For now, I just want to make clear that this book is as much about morality as it is about law. I hope to persuade you that morality is more complex than is commonly supposed—and that it contains within it lots that we do under the banner of law. Indeed, at points I will invite you to consider legal cases from a purely moral perspective—to ask what the right answer would be if the judge wanted to do nothing other than make the decision that would be morally justified. And I’ll show you that answering that question typically requires us to trace the same path that legal reasoning takes, to the point that we ought to doubt that there is any gap between the two.

If you’re already inclined to think that law is a moral practice, that’s terrific. I hope the chapters that follow will deepen your appreciation of the idea and solidify your sense that it’s true. If you’re on the fence (or so new to these issues that you have no views at all), even better. I hope to persuade you that law is a moral practice. But if you’re inclined in the other direction—if you’re already mounting your defense of the idea that law and morality are separate normative systems—then I’ve got a favor
to ask. Suspend your disbelief, and immerse yourself in the idea that law is a moral practice. I hope that you’ll come to see the appeal of the view. But even if I don’t persuade you that it’s true, I hope to show that many of the reasons people resist the view simply aren’t sufficient. For instance, the manifest immorality of many laws and legal systems doesn’t at all undercut the idea that law is a moral practice. By the end of the book, I hope you’ll ask: Are there any reasons to suppose that law and morality are separate normative systems? What does that view allow us to appreciate about law that we can’t see if we suppose it’s a moral practice? I’m open-minded, but I don’t think there’s an answer to those questions. And by the end of the book, I hope you won’t either.

Why should we care whether law is a moral practice? Why should we care whether the rights lawyers assert in court are moral rights? It is hard to overstate the importance of law in our lives. As the Due Process Clause reminds us, law deprives people of life, liberty, and property. Indeed, there’s nearly no aspect of our lives that law does not touch. It determines who lives and dies, who is rich and poor, who can marry whom—and much, much more. To see ourselves clearly, we need to see law clearly.

We have another reason to care: we disagree about law. Often we disagree about what the law should be; that is part of what we contest through our politics. But we also disagree about what the law is; that is part of what we contest in court. Since law plays such a central role in our lives, we should aim to understand those disagreements. Are they, as I will contend, moral disagreements? Or do they have a different character? Seeing that they are moral disagreements, I will suggest, helps us to understand why they run so deep. And it helps us to understand the role that law plays in managing moral conflict.

Finally, there is a long tradition of distancing law from morality, and not just among philosophers. Lawyers are apt to say that they traffic in law, not morality, and to insist that the two are importantly different. I think that’s a mistake, and I want to encourage lawyers to see what they do differently. At the end of this book, I’ll argue that well-trained lawyers have a kind of moral expertise. But I think that lawyers could exercise
better moral judgment than they do, and if they came to see the legal enterprise as a moral enterprise, they might just be better stewards of it.

Let me sketch the plan for the book, so that you have a sense of where we are headed. We will return to the questions that Hank raised—What makes something a rule of the house? Or a rule of law?—but we’re going to set rules aside for a moment, as I think jurisprudence has suffered from its obsession with them. In Chapter 1, I’m going to develop the idea that law is a moral practice—a practice that aims at creating, extinguishing, enforcing, articulating, arranging, and rearranging our rights and responsibilities. I’ll also argue that litigation poses moral questions, and I’ll try to isolate the moral questions that we contest in court from the ones that we don’t. In Chapter 2, I’ll further illustrate the idea that litigation poses moral questions, asking just what is in dispute when lawyers contest the proper interpretation of a statute in court. I’ll argue that those disputes are best seen as conflicts about the moral significance of acts of legislation.

In Chapter 3, we will return to rules. We will take up the idea that the law is a set of norms, like the rules of our house. I will argue that this picture—which has shaped our thinking about law for several decades—is misleading. Rules, and other sorts of norms, play an important part in legal practice. But it’s not helpful to imagine that our legal practices generate a single set of norms—called the law—that holds the answer to all legal questions. Moreover, I will suggest that once we see that there are many sets of norms we might call law, we can also see that many traditional views in jurisprudence say something that is true of one of those sets. The trouble comes from pushing the other sets offstage.

In Chapter 4, we will confront the central worry that people have about linking law and morality. Laws can be arbitrary, stupid, or just plain evil. We will see that this fact—which is undeniable—is not a barrier to thinking that law is a moral practice. Indeed, seeing that law is a moral practice will allow us to think in a more sophisticated way about the moral significance of bad legal practices. In Chapter 5, we will take up an ancient question: whether people are obligated to obey the law. I will argue that recent conversation about this question misses
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