

Of Layers and Lawyers

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1. Introduction

How can the law be characterized in a theory of collective intentionality that treats collective intentionality as essentially layered and tries to understand these layers in terms of the structure and the format of the representations involved? And can such a theory of collective intentionality open up new perspectives on the law and shed new light on traditional questions of legal philosophy? As a philosopher of collective intentionality who is new to legal philosophy, I want to begin exploring these questions in this paper. I will try to characterize the law in terms of the layered account of collective intentionality that I have introduced in some earlier writings (Schmitz 2013; 2018). In the light of this account I will then discuss a traditional question in the philosophy of law: the relation between law and morality.

I begin by giving a brief sketch of the layered account in the next section. Collective intentionality should be understood in terms of experiencing and representing others as co-subjects, rather than as objects, of intentional states and acts on different layers or levels. I distinguish the nonconceptual layer of the joint sensory-motor-emotional intentionality of joint attention and joint bodily action, the conceptual level of shared we-mode beliefs, intentions, obligations, values, and so on, and the institutional level characterized through role differentiation, positions taken in role-mode, e.g. as a judge or attorney, and writing and other forms of documentation. In the third section I introduce a set of parameters for representations such as their degree of richness, of context-dependence, of density and differentiation of representational role and of durability and stability, which can be used to more precisely distinguish different layers. I also put forward the hypothesis that these properties are connected and tend to cluster, and that higher levels can only function and determine conditions of satisfaction against lower level ones. In the fourth and final section I critically discuss the sharp positivistic separation of morality and the law according to which whether something is a law is completely independent of its moral merits. I argue that this only seems plausible if we take an observational stance towards the law, but not towards morality. When we treat them the same way, it rather appears that the moral attitudes of the co-subjects of a society will determine

whether and to what extent they will accept its legal order. I conclude by proposing to think of the law as being itself an institutionalized form of morality.

2. Layers of collective intentionality

Let me use a toy example to illustrate the idea of different layers of collective intentionality. Imagine some kids who evolve a game, a practice of kicking a ball around. Let us further imagine, a bit, but hopefully not too artificially, that this only happens at what I will call the “sensory-motor-emotional” level or layer, without yet involving concepts and language. They kick the ball around and respond to each other’s kicking emotionally. In this way the point of the game – if there is such a thing – can be established in their joint interactions, and also what are good and admirable moves, what are rude ones, and so on. Of course, the game can only be roughly delineated in this way. Many things will remain indeterminate. But the players may still develop some sense of what they should do and what not. However, they may still be unable to conceptualize this sense, or may in any case not have done so yet. They may not think, they may not reflect about the game yet. And so their sense of what’s right or wrong in the game may remain tied to the context of actually playing it.

Their understanding of the game and its normativity takes place on the pre-conceptual level. I think we should also take seriously the fact that they have not yet formulated rules for the game. Philosophers (and linguists, psychologists and others) often tend to take for granted that rules would have to be involved in such scenarios, especially when we speak of normativity. Terminologically of course it is quite sensible to assume that normativity should involve the presence of rules. But it is said too easily that rules are being followed “implicitly” and “unconsciously” when they have not yet been formulated. This is at best handwaving: it says that what is going on is in some way like what is going on when rules are being followed, but it does not tell us in which way. Worse yet, talk of unconscious rule following can suggest that we can just subtract consciousness from rules, but leave their intentionality (and causality) unchanged. And it may tempt us to disregard what is actually going on in consciousness at this level of social interaction – our sensory-motor-emotional experience. We often just operate on a sense of what is right or wrong which is manifest in this experience: in our perceptual experience of what others are doing, and our actional and emotional experience of our responses to it. We sense that something is right or wrong, but are often unable to articulate a relevant rule and to conceptualize the situation. I emphasize this because there is a deep-seated tendency in philosophy, but also in psychology, cognitive science and common sense, to conflate the conscious with the conceptual and therefore to disregard non-conceptual forms of

consciousness (for more discussion see Schmitz 2013; 2011).

In light of this we may want to reserve the term “normativity” for competencies that involve the actual use of rules and instead use the term “protonormativity” at the sensory-motor-emotional level. What is crucial though is that, first, even at this level already action-guiding representational states such as having a sense of what’s right or appropriate are in play, and that, second, such states may also have a social and collective dimension. Again, this dimension need not and at this level does not come in through conceptualization. At this level it is just manifest in that we experience others as co-subjects, as members of our group, and that this experience brings with it or triggers dispositions for joint action and a sense of how things are done in this group. We often operate on the basis of such a sense of what is appropriate in certain groups, but not others. There is a sense of how we do various things for various we’s. For example, Alex may play with the ball differently when he plays with Harry and Peter than when he plays with Tom and Terence because these groups have evolved different games. (Of course, this is not to deny the importance of exchange between groups, often mediated through individuals who are members in both.) Experimental data show that from an early age, children are sensitive to the different normative constraint imposed by different co-subjects of joint action. The very same objective stimulus can trigger different action schemata when it comes from different co-subjects, depending on which if any joint activity the co-subjects have been engaged in. For example, in a study by Liebal et al. (2009) one-year old infants, who had been cleaning toys into a basket with an adult, put a toy into the basket when this adult pointed at it. But when a different adult performed the same pointing action, they mostly just handed the toy to him (see also Tomasello (2014, 55) and (Schmitz 2016) for discussion).

At the next level, patterns and practices are conceptualized and become the object of deliberation, of debate, thought and reflection. Various relevant concepts such as “goal”, “free kick”, “penalty”, “penalty box”, “offside” and so on, will be introduced, and rules will be formulated and negotiated. A name for the game may likewise be introduced, and perhaps various versions of it may begin to be distinguished, as we now distinguish football – what Americans call “soccer” – from American and Australian football. This also means that the co-subjects of these versions – the people who play by their rules – can be identified conceptually – as “footballers” – and not just in the immediate context of joint action, as we just imagined. Relevant concepts also include concepts for various roles within the game – “goalie”, “midfielder”, “striker” etc., but also “referee”. Such concepts will reflect a prior specialization or role differentiation, but they will also tend to promote and further such role differentiation as e.g. when teams are asked who their striker or midfielder is.

One important function of concepts is that they allow us to anticipate scenarios that haven't yet been encountered in practice. In fact, concepts almost force us into this, through the generality of thought that they bring with them and the fact that they tend to be parts of whole systems of concepts. In this way, conceptual thinking is very conducive to creating a whole system of rules for a game that is formulated in terms of interlocking concepts.

So far, I am assuming that we are talking about concepts and rules as passed on in the oral tradition. Another important step occurs when people start to write down rules. This makes it possible for the rules to be much more stable and to be distributed more widely. It is also an important amplifier of the power of conceptual thought. Writing the rules down makes it much easier to systematize them and to make them consistent.

Codifying the rules is not the only important function enabled by writing. Writing also makes various forms of documentation possible: e.g. the referee may be required to write and sign a report of the game; a team to list its players, who in turn may have to be licensed by the league in which they are playing or by some other supervisory body. The committees who run these bodies will document their meetings and the status of its members. The incredibly rich and elaborated institutional structure that we find in contemporary sports organizations such as, for example, the international football body FIFA, is certainly inconceivable without writing and other forms of documentation.

Given this rough sketch of an example of different layers of collective intentionality, where should we say that the law begins here? I've used this example so that certain patterns become discernible without immediately bringing in charged questions associated with central instances of the law and its application. For purposes of this question, our example can be taken in a straightforward and literal as well as in a more metaphorical sense. That is, we may ask: "where does sports law begin?" But we may also ask: "if we find an example of collective intentionality of a structure analogous to what I have described as our second layer, the layer where concept application begins, but in a domain, which is a central domain for the application of legal structures such as, for example, the domain of marriage, would we think of this as sufficient for the existence of a legal system?" That is, if a society has certain concepts concerning marriage and a more or less elaborate system of corresponding rules, some of which may be connected to sanctions, and this system is passed on in the oral tradition and functions in the context of and against the background of the customs, traditions and practices of a people, should we say then that they have a proper legal system concerning marriage?

If we go by the first interpretation of our question, I suppose the answer is that we would speak of sports law only in the context of an elaborate system of sports bodies that certainly

requires writing and other forms of documentation. And some philosophers such as Maurizio Ferraris (2015) have taken a general position in the theory of institutional reality – of which the law certainly is a prime example – according to which institutional reality and even collective intentionality in general depend on documentation. On such a view a legal system would also generally require documentation.

Such a view seems rather radical though. There certainly appear to be e.g. practices of treating something as somebody's property which do not require written documentation of property and perhaps not even a concept of property. Common law marriage would also seem to provide a counterexample. Common law marriages are legally recognized in some jurisdictions without a marriage ceremony and written documentation, solely on the basis of having lived together for a specified amount of time and presenting as man and wife – same-sex relationships are not recognized as common law marriages. Presenting as such surely includes referring to themselves as such with relevant concepts. Similarly, the Gender Recognition Act in the UK enables the legal recognition of the gender of transgender people who have lived in this gender for at least two years and who present themselves accordingly.

One might still try to argue that only the recognition by the authorities of the marriage or gender – which does involve documentation – is a proper legal act. But the claim that a proper legal system requires writing and documentation would be counter to the practice e.g. in anthropology where legal systems are ascribed to many preliterate societies. My aim here though is not to decide this kind of issue and defend a specific definition of the notion of “law”. I believe the boundaries of this concept could be legitimately drawn more narrowly or more widely depending on what one is interested in. My purpose is rather to situate the law in a theory of layers of collective intentionality and to argue that key parameters which can be used to identify such layers in the theory of intentionality and intentional content can also be used to identify the dimensions which are crucial for questions of this kind. That is, I want to show that wherever one may want to draw the line between morality and a legal system, properties of this kind are crucial. Moreover, such properties cannot only be used to define a boundary between legal systems and morality, they can also be used to determine how elaborate and advanced a legal system is. Before I come to this, however, I need to say a bit more about the structure of collective intentionality on these different layers.

I believe the key to understanding collective intentionality is in terms of co-subjects jointly taking theoretical and practical positions towards the world in a self-aware way (Schmitz 2018). This happens on different layers of collective intentionality which correspond to the three layers I roughly distinguished in the football example.

1. The level of the mode of joint attention and joint (bodily) action. On this level the intentionality of co-subjects is non-conceptual sensory-motor-emotional intentionality. They non-conceptually experience themselves as jointly attending to objects in the world and acting on them. They also experience different kinds of emotional bonds that connect them. I believe that jointness on this and other layers necessarily includes at least a disposition for joint action. That is, what makes joint attention joint cannot be understood in terms of perceptual states and dispositions alone, as some philosophers have tried. Otherwise it cannot be distinguished from mutual observation (see Schmitz 2015 for discussion). There must be an emotional bond, however transient, involved in sharing, which disposes the co-subjects to seek, maintain and re-establish joint attention. Moreover, joint attention is typically geared towards joint action, for which it is an essential prerequisite.

2. The we-mode level of joint intention, shared belief and other conceptual level intentional states. In the we-mode, co-subjects represent states of affairs and other objects in the world from a position of identification with a group and its ethos. The we-mode is best seen as a further modification of an I-consciousness, the modification where this I represents the world from the perspective of a we-subject, in a mode of identification with it. It's important that sometimes positions I take in such a mode of identification with the group may differ from positions I take for myself, as a private person. It's further important that we-mode intentionality can misrepresent. For example, I may be in a mode of we-intending, but if my supposed co-subject has in the meantime abandoned our shared plan, I represent a joint position which does not exist anymore.

3. The institutional level, where individuals and groups take positions in what I call "role-mode", that is, for example, as a judge or as a committee, and at crucial junctures, in a written or otherwise documented form, or at least in a context which essentially employs documentation. "Institution" is here taken in the narrower sense where it refers to an organization. Like we-mode intentionality, role-mode intentionality should be seen as a further modification of I-intentionality, respectively of both I-and we-intentionality, as in such cases as when a we-subject makes a decision in its role as a committee. In such a case, an I-subject represents the world from a perspective of a we that in turn takes up the perspective of a body, which represents the world from a perspective informed by the role of this body in the organization of which it is part. Again, it is crucial that the positions co-subjects take in their roles can be different from the positions they take or would take in different roles or as private people. For example, a judge may acquit somebody she privately thinks is guilty, and a politician may sometimes take a different position as leader of her party than as chancellor of her country.

To briefly address an objection¹: it is true that people already take role-specific positions below the level of institutional reality, where these roles are either merely conceptually or even non-conceptually constituted and represented. For example, a mother will respond to her child as a mother on the basis of a role-specific emotional bond and / or role-specific conceptual level expectations and prescriptions. But it seems to me that the combination of increasing role differentiation and writing / documentation is an especially potent one that justifies thinking of them as being jointly characteristic for the level of institutional reality, and in the next section some reasons why this may be so will emerge. In any case, as I emphasized earlier, the tripartite distinction is more for purposes of rough orientation. More precise characterizations are possible with the help of the parameters / dimensions that I will now introduce. Some of these dimensions I have taken from the literature on nonconceptual content (e.g. Gunther 2003). So, I will sometimes begin with examples from their original domain and then present examples from the domain of collective intentionality in general and the law in particular.

3. Criteria for distinguishing layers

I will begin by introducing the following dimensions / parameters:

- a) richness of content / from concrete to abstract
- b) degree of context dependence
- c) density / gestaltlike character / differentiation of representational role
- d) degree of durability / stability / externalization / standardization

I will then go on to explore some hypotheses concerning relations between these criteria and between layers.

A) Richness of content / concrete to abstract

In the perceptual and actional domain, think about the richness of experience and the fineness of grain in perceptually discriminating shades of red vs. conceptualizing them, or the richness and fineness of grain in experiencing dance movements vs. the conceptual level instructions given by your dance teacher. For the application to collective intentionality and the law, think about the

¹ Thanks to Judith Martens for pressing this objection on several occasions.

richness of experiencing an emotional bond vs. conceptual and institutional representations of this bond. For example, think about experiencing one's mother (as one's mother) in immediate emotional interaction vs. applying the concept "mother" to her (which will be partially shaped through the larger culture one is part of) vs. an official documenting her legal status as your mother in a family registry, or about the emotional reaction to a crime and its perpetrator vs. its representation in the legal language of a court.

B) Degree of context-dependence

Richness and efficacy of content often (causally) depends on presence of object or co-subject. The full richness of the experience of, say, the colors of a sunset may only be possible in the immediate presence of this sunset, not through memory, though imagination may come close. In CI, many co-subjective relationships depend on face-to-face, sensory-motor-emotional for their establishment and maintenance. Other relationships feel more abstract and official, like for example, most encounters with law enforcement. To maintain relationships with a higher degree of context dependence requires conceptual or even documental forms of representation. For example, the police officer will have an ID as well as other markers of their status such as a uniform, and the population will have a conceptual understanding of what a police officer is and does.

Context has many dimensions and accordingly distance from the context and the degree of independence from it can mean many different things. For example, the degree of context independence may sometimes be fruitfully measured in terms of spatial and temporal distance from a perceptual context. In this way, animal psychologists have studied the context-independence of an elephant's ability to use tools. Would Kandula use a box to stand on to reach fruit in a tree, even if the box had been placed in a different section of the yard, out of view when the elephant was looking up at the tempting food? "Apart from a few large-brained species, such as humans, apes, and dolphins, not many mammals will do this, but Kandula did it without hesitation, fetching the box from great distances" (De Waal 2016, 16; based on Foerder et al. 2011).

When it comes to morality and the law, a crucial dimension of context-independence is the independence of the behavior of upholding norms and defending them against violators from emotional bonds, familial connections and immediate shared interests with the victim. Will I support somebody against a norm violation only when they are a family member, a friend, or a business partner, or will I also support a random person out of an abstract sense of justice and

the allegiance to a much wider community of co-subjects such as a nation, humanity, or even all my conscious co-creatures?

C) Density / gestaltlike character / representational role differentiation

A simple example for the density or gestaltlike character of basic representations is the fact that in visual experience color and shape cannot be represented separately, though they can be separated at the conceptual level in thought. Similarly, in certain monkey warning calls theoretical, mind-to-world direction of fit aspects – “there is a leopard here!” – and practical, world-to-mind direction of fit ones – “Get on the trees!” – are not differentiated. Ruth Millikan, who calls such representations “pushmi-pullyu”-representations, mentions representations of the moral rules or customs of a society such as “No, Johnny, we don’t eat peas with our fingers here” as another example (Millikan 1995). As I shall discuss more extensively later, this also includes some representations of the laws of a society such as “The law says to drive on the left side of the road”.

Moreover, as has often been pointed out, in primitive societies the law itself is not yet differentiated from moral and religious notions. Jürgen Habermas describes such an elementary understanding of justice as follows: “The concept of justice lying at the basis of all forms of conflict resolution is intermingled with mythical interpretations of the world” (Habermas 1988, 264). Habermas further characterizes the corresponding basic gestaltlike understanding of crime as follows:

The severity of the crime is measured by the consequences of the act, not by the intentions of the perpetrator. A sanction has the sense of a compensation for resulting damages, not the punishment of someone guilty of violating a norm. This concretistic representation of justice does not yet permit a clear separation between legal questions and questions of fact. It seems that in those archaic legal processes, normative judgments, the prudent weighing of interests, and statements of fact are intertwined.
(*ibid.*, 265)

So, at this level of understanding, the severity of the crime is not yet differentiated from the damage done. A more differentiated legal system does this by taking into account the perpetrator’s intentions, among other things. Such a system may also evolve a clear separation between a determination of the facts and the determination of their legal consequences, for example by assigning them to different phases of a trial.

This can also be seen as an instance of representational role differentiation. The most basic

form of representational role differentiation is the move from the continuous flow of sensory-motor-emotional experience to the discontinuous propositional structure of language. Language comes in articulated units, sentences, and that is essentially connected to the fact that a sentence consists of elements such as verbs, nouns and adjectives, which have distinct representational roles within it. Such a differentiation of elements with distinct roles cannot yet be found in sensory-motor-emotional experience. The concept of representational role differentiation is wide and applies in many different contexts. To illustrate, the development of different text types such as, in the legal domain, briefs, opinions, and law review articles, is also an instance of representational role differentiation.

D) Degree of durability / stability

Conceptualization, documentation and institutionalization are all about making things more durable and stable so that one is able to manage disruptions and crises. They also enable integration with larger communities. For example, the relationship of a couple may first be solely or primarily based on their immediate sensory-motor-emotional interactions. Then they start to conceptualize it e.g. as love, which integrates it with the conceptual knowledge and expectations of their culture and make promises to each other. If they fight and want to break up, they might be told that there are ups and downs in any relationship. They might remind each other of their promises. If they get married, their relationship gets documented, certified by the institutional structures of the tribe, church or state, which will also tend to serve to protect it and make it more durable.

These functions are also enabled by the durability and stability of the relevant representational states, acts and artefacts. Written language and documentation are more durable and more easily repeatable and shareable than spoken language, which explains their importance for the process of institutionalization.

To these parameters let me add two more, which one would not ordinarily think of as being about representations, but which do essentially involve them and are essentially connected to the other parameters. The first is the differentiation of institutions themselves, e.g. the already mentioned separation of the legal sphere from morality and religion, or the differentiation of the legal sphere into sacred and secular law or criminal and civil law. The second is the attendant differentiation of institutional roles, which creates an ever increasing number of specialists. So instead of the mediators in some tribal societies we now have judges, attorneys, clerks, jurors, and so on.

A central hypothesis of my version of a layered account is that the parameters described all tend to cluster and thus correlate with one another. Let me try to make this plausible with the following brief narrative. We first react to moral infractions in an immediate, context-dependent and concrete way, notably through emotionally charged responses such as so-called reactive attitudes (Strawson 1962). Such representations are also dense and gestaltlike, because they are responsive to many features, without separating and singling them out for attention. What upset me so much about this behavior, why did it seem such a betrayal? It may take a lot of reflection to conceptualize the situation – even assuming we already have relevant concepts at our disposal. When we do have appropriate moral concepts, the gathering of knowledge of instances, which may deviate from the central, prototypical ones in different ways and the striving for systematization will lead to further differentiation of our conceptual apparatus. For example, was it theft, or robbery, homicide or murder? And once the legal sphere becomes more clearly separated from others and institutional roles are further differentiated, this will further accelerate conceptual development. More and more specialists can focus on it and will produce ever more abstract and elaborate conceptual frameworks. Documentation and writing make the legal order and legal statuses much more durable and context-independent and further enhance legal reflection, which is built through centuries through consideration and systematization of ever more cases, also leading through a proliferation of different forms of legal texts, thus increasing representational role differentiation.

It is a central assumption of a layered account that such diachronic phylogenetic structures are also reflected in the synchronic structure of the mind, mediated through the extent in which ontogeny recapitulates at least some stages of phylogeny. In trying to capture this layered structure, I think we need to strike a balance. On the one hand, layers are really separate from another, that is, they have a certain degree of autonomy. This is also necessary if they are to fulfill their function of creating order and stability and managing disruption and crises created at the lower, more volatile layers. (Recall our couple and their fight.) This is especially true for the law. On the other hand, higher layers also depend on lower ones. They can only function against the background of lower level capacities. To illustrate this dialectic of autonomy and dependence, consider what is usually called the belief independence of perception (Evans 1982), but which also might be called the autonomy of belief. I form the belief that the lines in the Müller-Lyer illusion are of equal length even though perceptually they persistently appear to differ in length. At the same time my capacity to form beliefs about the world and to think about it depends on my capacity to perceive it. Normally I accept the deliverances of my senses, and I can only ascribe illusions to myself on the basis of other perceptions – like when I take a ruler to

the Müller-Lyer lines (Schmitz 2019). And generally, my conceptual thoughts can only determine conditions of satisfaction against the background of lower-level, non-conceptual capacities (Schmitz 2012).

In the next and final section of this paper I will argue that this kind of relationship also holds between the legal system of a society and the moral attitudes of its members. The law has a certain degree of autonomy relative to these attitudes, but it is not completely independent of them either. Not every law will be consistent with the moral and other attitudes of all or even a majority of its members. Some laws are introduced against the will of a significant part of the population, others may lose the support of the people over the course of their existence because moral attitudes have changed. (One interesting manifestation of this is that laws will cease to be enforced and applied even though they remain on the books, like laws against sodomy and oral sex in some US states.) But it still remains true that the legal system of a society, like its institutional reality as a whole, depends on the acceptance of its members, and I think it is safe to assume that moral attitudes play an essential role in determining this acceptance. This will also be true regardless of where exactly we draw the line between morality and law. E.g. what degree of separation between the legal and religious sphere is required for us to speak of the legal system of a collective? As I said earlier, it is not obvious where this line should be drawn, but wherever we draw it, we will find that legal rules only function against the background of lower level attitudes.

Just like intentional states and acts in general, legal statutes also only determine conditions of satisfaction against the background of lower level capacities. To see this, consider the fact that they are often formulated using abstract concepts which cannot determine their conditions of application independently of common sense, including common sense moral attitudes. This point has been especially stressed by the tradition of legal realism, but it is also made by the great legal positivist H.L. Hart, who uses the example of a legal rule that forbids to take a vehicle into the public park: “Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not?” (Hart 1958, 607). Or, we might add, what about scooters and the electric scooters that have recently become popular, but did not even exist when this rule was written? The law is typically written based on a gestaltlike apprehension of central cases, where many relevant properties cluster. But when we move to what Hart calls the “penumbra” of less central cases, these often can only be decided based on some understanding of what “the law ought to be” (ibid.: 608), and as Hart acknowledges, this means that uncodified, broadly moral considerations will be involved.

What then are layers? Talking about layers of intentionality is a way of talking about relations between representational states, acts and artefacts such that higher level representations emerge later in phylogeny and ontogeny than lower level representations and depend on them for their functioning. However this dependence is holistic – not every belief is based on a perceptual state, though the capacity to form beliefs generally depends on perceptual capacities – and allows for a certain degree of autonomy, so that there can even be conflicts between layers, as when my belief overrides my perceptual experience, or my legal thinking in my role as a judge overrides my gut feeling, even my belief, that the defendant is guilty, and I still acquit her, say because the evidence that moves me personally is legally inadmissible. And as I have argued, the representations on different layers can be order in terms of degrees of such parameters as concreteness, context-dependence, density and representational role differentiation, and durability and stability.

4. The law as institutionalized morality

So far, I have approached the issue of the relation between morality and law in what one might think of as a broadly naturalistic, perhaps even positivistic spirit. That is, I have looked at law as a social practice, and though I did not try to draw a sharp boundary, I have tried to describe (some of) the parameters which may turn a (merely) moral practice into a legal one, as when it gets further developed, differentiated, codified and enforced by specialists. I have also claimed though that higher-level representations such as legal ones can only function effectively and determine conditions of satisfactions against the background of lower-level ones such as moral attitudes. While, as we have noted, at least the last point is also accepted by a legal positivist such as Hart, the resulting picture seems to be in tension with the positivist account of the relation between morality and law. In this last section I therefore want to explore traditional issues about this relation further in light of the account of collective intentionality that I have sketched. As we shall see, not only the layered aspect will be important for this, but also the emphasis on the distinction between representing others as co-subjects vs. representing them as merely as objects.

I take the core claim of legal positivism to be that whether something is law does not depend on its merits – where by “merits” we mean moral merits – but on its sources, the social structures and processes that have originated it and maintain its existence, its being in force (e.g. Gardner 2001; Green and Adams 2019). Legal positivism rejects both the ideas of the natural law tradition that something could be law ‘naturally’, without a proper social, institutional context, and that something properly situated in such a context could fail to be law. So, whether something is part of the law is the question whether a certain social fact obtains.

Accordingly, when people express their opposition to certain prescriptions by saying that they are not, or not really, law, the positivist will think that they express this (typically morally motivated) opposition in a confused way. They are mixing up the question whether a certain social fact obtains with the question of whether it should obtain. So, they fail to properly separate law and morality. We have to recognize that – unfortunately – the law is not always just and morally right.

This is certainly true, but does it establish the separation of law and morality that positivism requires? Obviously, this depends on what kind of separation positivism requires, and different philosophers will give different answers to that. I believe that we should not be transfixed by labels such as “positivism”. In what follows I will argue from the point of view of the layered account that law and morality still remain essentially connected. In fact, I will suggest that the best way to think of the law is as being itself an institutionalized form of morality (where morality is taken in a broad sense which includes mores, conventional ways of doing things). This view will combine positivist with not-so-positivist sounding claims, and I will leave it to the reader to decide how, if at all, it should be labelled.

While it is often pointed out that laws can be immoral, the corresponding observation about morality is much less often made. That is, while it has become routine to acknowledge that laws can be unjust, the claim that morals can be immoral may still sound paradoxical to some. But just as I can criticize a law as unjust on the basis of moral ideas and even as illegal because it violates other laws, so I can criticize a moral code as immoral on the basis of my own, different moral code. Of course, when calling a person (or action) immoral, people sometimes mean that they are not sufficiently governed by a moral code, or even that they lack one entirely. However, the latter claim is hardly, if ever, true. It’s much more often the case that we are too outraged by moralities different from ours to even recognize and understand them as such. In our (genuine or faked) outrage, we fail to recognize the morality and thus the humanity of others.

The reason I emphasize that moral codes can be criticized as immoral just as laws can be, is that we must be careful not to confound the distinction between morality and law with the distinction between two different perspectives that we can take towards both, namely the perspective of the observer or theoretician with the perspective of the participant or, to put it in the terms I have been using, the co-subject. When we consider the law as philosophers of law, we naturally take a theoretical perspective or position as observers. When we then judge, or imagine judging, a law to be immoral, it is tempting to do so from the point of view of one’s personal morality, or of one’s morality as a member, a co-subject of a group one identifies with, without taking a corresponding theoretical perspective on this morality. That is, while one

considers the law as an object of theoretical inquiry, a domain of social facts, morality is here construed subjectively in the sense that it is part of the apparatus with which we investigate this domain of facts, rather than as itself an object of inquiry.

Taking this perspective, it seems obvious that the existence of laws and legal facts must be completely separate from their moral merits, because it is certainly independent of whether the theoretician morally approves of a law, legal act or legal system, especially when we consider the laws of societies far removed in space, time and moral outlook, as we will tend to in such contexts. But the real question of course is whether the existence of laws in a society can be independent of the moral attitudes of the members, the co-subjects, of that society. For example, the Jim Crow laws in the US existed even though we now regard them as profoundly immoral. But could they have been the law of the land at the time if the attitude of the population then had been as it is now? That already looks like a rather implausible claim.

The corresponding general thesis in the philosophy of institutional reality is that institutional facts – of which legal facts are a species – are, as, John Searle put it in his seminal book *The Construction of Social Reality* (Searle 1995) observer- or belief-dependent or observer-relative, in contrast to ordinary facts, which of course are belief-independent. I think that Searle is right that institutional reality in general and legal reality is mind-dependent, that its existence depends on the collective acceptance of the society whose institutional reality it is. But we can't think of acceptance here as a mere theoretical attitude, a belief that something is the case. If all members of a given society, including the legal officials, only had relevant beliefs about the relevant states of affairs, if they knew what the others were doing, what their roles are, who they had been appointed by, and so on, but were practically and morally indifferent or even hostile towards these arrangements, I don't think we could say that these laws were really the legal system of that society.

Acceptance in the relevant sense must include practical attitudes. To accept the order of a society, whether moral or legal, is not merely to have beliefs that people have certain roles etc. including even beliefs that others believe this as well: it must include a recognition of this order as legitimate and binding. And this in turn must mean at least some disposition to comply with that order, to defend it and to have other pro-attitudes such as approval towards it. Therefore, the collective attitudes that are constitutive of legal reality can't only be attitudes of belief, at least if by belief we mean a purely theoretical, mind-to-world direction of fit attitude. (It is presumably for reasons of this kind that in his later work Searle often speaks of the intentionality- or participation-relativity of institutional reality rather than of its observer-relativity or belief-dependence (e.g. 2010, 17).)

I suggest that a basic kind of attitude among those that are constitutive of legal reality are the already mentioned pushmi-pullyu representations, representational acts or states that essentially contain mind-to-world and world-to-mind direction of fit aspects, though in an as yet not clearly differentiated form, like in Millikan's example "No, Johnny, we don't eat peas with our fingers here". A typical utterance of a sentence like this is not a mere description of the customs of a group, but has prescriptive force. It's a way of telling Johnny that he should not eat peas with his fingers either. "The law says that we must stop at the junction" will normally be meant and understood in just the same way. So, our basic way of relating to the law is one that acknowledges it as a reality, but at the same time recognizes it as something that has prescriptive force over our actions, with these two aspects not yet being clearly differentiated. The clear separation of description and prescription and thus the representation of legal facts as mere facts belongs to a higher level of understanding. This level is not as such constitutive of the existence of legal facts. It is rather a level on which we reflect on these facts as entities that exist independently of us as observers. But at that same level we also have to recognize that these facts do not exist independently of the attitudes of the co-subjects of this society, and that these attitudes have an irreducibly practical aspect, so that they represent the law not as a mere fact, but as somethings to be respected and followed, at least generally and under normal conditions.

This way of accounting for institutional reality is importantly different from Searle's superficially similar account in terms of his notion of a declaration, which (also) is supposed to have both directions of fit. The crucial difference is that on Searle's account the declaration both makes it the case that a state of affairs is a fact and represents it as a fact. That is, the very same representational act is supposed to have world-to-mind and mind-to-world direction of fit with regard to the same state of affairs. But it is highly questionable whether the very same representation can both create a fact and represent it as being the case at the same time (cf. Laitinen 2014 for criticism). This idea is in tension with realism. In contrast, the Millikanian account more modestly only claims that pushmi-pullyu representations represent a state of affairs as having prescriptive force with regard to other states of affairs, respectively actions. There is nothing mysterious about that. It is grounded in the fact that we perceive situations so as to immediately mandate certain actions, in basic cases even without clearly differentiating description and prescription. It is also grounded in the well-known tendency of humans, especially children, to imitate the actions of their fellow creatures, in particular members of their own group and be guided by them. The respect for the law of one's group is a higher-level manifestation of the same basic tendency, because the law is a codification, a more context-independent way of representing ways of behaving that are to be imitated, respectively that are

prohibited.

Another way of making what is essentially the same point is to say that groups exist in virtue of subjects identifying with the other group members, their co-subjects. Already at the sensory-motor-emotional level this means, as argued earlier, that jointness cannot be reduced to perceiving the same things and being mutually aware of that, but must include an emotional identification with the other, imitative tendencies and at least a disposition for joint action. Analogously, at the conceptual level of we-mode intentionality, co-subjects must not only share beliefs and be aware of that, but must identify with what Raimo Tuomela calls the “group ethos” (e.g. Tuomela 2013). At the institutional level this means that being a member of communities ranging from tribes to nation-states or even supra-national units such as the EU requires a certain level of identification with these units and that also means an identification with their goals. This is not only, but particularly true for those who have official roles within those institutional contexts. For them, it means that the role-constituting intentionality I call “role mode”-intentionality cannot consist merely in beliefs about that institutional structure, the role one has been appointed to, and so on. There must be at least some degree of identification with the ethos and the goals of the relevant institution. In role mode, the subject takes theoretical and practical positions towards the world from the vantage point of the role, that is, shaped through the ethos of the organization and the function of the role within it.

Of course, it is still possible that somebody takes up such a role who does not identify with it and its ethos – for example, think of a spy, who only pretends to. Similarly, obviously not all co-subjects of a given collective will agree with all of its laws. We are here trying to explain the normal, proper functioning of laws and layers. As I have emphasized, these institutions are made for durability. They are generally able to survive laws and lawyers that do nothing or very little to promote justice and the common good. However, there will be a point where the institutional structure collapses, or is abandoned, when the disconnect between its rules and its officials and the moral and other attitudes of the rest of the population becomes too severe. The collapse of the East Bloc countries in the *annus mirabilis* 1989 is only one of the latest and most spectacular of many instances of this kind of phenomenon. Moreover, as we discussed, even in its normal functioning the law depends on moral thinking to determine its application to the penumbra of non-central cases.

While it is thus true that not all laws of a society have to agree with the outlook of all of its co-subjects, the existence of the legal system as a whole still depends on their acceptance. And this in turn means that it will depend on their moral attitudes, which will surely essentially contribute to determining this acceptance. I conclude that while the existence of a specific law or

other specific legal facts is independent of their moral merits in the eyes of a mere observer, this cannot be said of the existence of the legal system as a whole in relation to the members or co-subjects of the relevant society. If these members cease to accept it, it will become idle and void and at same point will cease to be their law. Therefore, what the law of a society is, does ultimately depend on its moral merits in the eyes of the members of the society.

Once we clarify that the dependence of the legal system on lower level moral attitudes is holistic, I confess that to me it seems to be sort of obvious – how could the acceptance of a legal order not at least also be shaped by moral concerns? But is there anything that we could say to convince a skeptic?² First, to block a possible misunderstanding, let me emphasize that quite often people are mere objects of legal systems. For example, an occupying force may impose legal statuses on the occupied population. But as long as they do not accept the occupying force, they would not be co-subjects of the relevant society and thus not a counterexample to my claim. (Of course, precise boundaries between acceptance and mere domination are hard to draw, but this does not mean either that this distinction is not vital, or that acceptance is not morally motivated.) Second, the question of the acceptance of legal and institutional structure is a political question and we have a lot of evidence that political attitudes are connected with moral attitudes. For example, in the present political situation proponents of the social justice movement – which is obviously a morally motivated movement – will tend to sympathize with left-wing parties, while adherents of more traditional, religiously shaped forms of morality will tend to sympathize with right-wing parties. Jonathan Haidt (2012) has collected an impressive body of evidence that in the US Democrats and Republicans have importantly different moral outlooks along similar lines.

It may be objected that this only shows that partisan politics are connected to moral outlook, while what we really need is evidence that moral outlook is connected to attitudes shared across party lines such as acceptance of the legal and institutional structure. But it still supports the notion that political attitudes are generally connected to moral ones. Further evidence is provided by the fact that the political and legal culture of a country generally reflects its moral and intellectual culture. For example, the culture in Anglophone countries tends towards empiricism and a winner-takes-all mindset, and this is reflected in their common law tradition and their political system.

It seems to me that therefore any satisfactory account of the law must explain both how the emergence of a legal system is a very important step that can transform a society and that it remains essentially connected to the moral attitudes of its members even if it is not consonant

² Thanks to Miguel Garcia and Amin Ebrahimi Afrouzi for prompting me to say more on this.

with them at every point. I want to conclude by suggesting that the best way to do this may be by thinking of the law itself as consisting of institutionalized, codified moral rules. Again, this claim is independent of where exactly we may want to draw the boundary between (non-legal) morality and law for certain theoretical or practical purposes and accordingly of whether we interpret institutions broadly so as to include all customs and traditions, or more narrowly as referring to organizational structures, as I did in the tripartite distinction between layers introduced above. In fact, it seems to me that the very fact that it is not obvious where this boundary should be drawn, which degree of context-independence, systematicity of conceptualization, codification and documentation, separation from other spheres and role differentiation is required for a practice to count as a proper legal system, itself supports the idea that law is continuous with and itself an institutionalized form of morality, similar to how science is continuous with common sense observation and knowledge and an institutionalized form of it. There is nothing magical that happens to a moral rule when it is codified and enforced by a sphere of specialists that completely changes its character, just like a piece of knowledge still remains knowledge when it becomes scientific knowledge. This is quite consistent with how the rule of law can transform a society, just like science can.³

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