

## Moral Facts cannot Ground Legal Facts if Law is an Institution

Note to readers:

The paper you have is a version accepted for publication with the title 'Inclusive Legal Positivism and the Fallibility of Officials' in a festschrift for Wilfrid Waluchow and is therefore primarily directed at applying the argument against his views. However, while I was writing it, I realized that the central contentions of the argument had a much wider scope and could be applied to any theory that tried to hold both that law is an institution and that moral facts or truths of reason could themselves directly ground legal facts. This would encompass inclusive legal positivism generally, any version of natural law that sees positive law as a human institution, and the moral impact theory of Mark Greenberg. It can therefore be used as an argument in favour of exclusive legal positivism against any of those kinds of theories.

I have already started to present this larger idea to a few audiences and had hoped to have a draft of the new, expanded paper to give you to you. But as it frequently does, life has gotten in the way of my best intentions. The original paper, however, has the essential elements of the argument in what I call there the three realizations: that officials can be mistaken about the necessary conditions for membership in an institution but not the sufficient conditions; that all official decisions of law are applications of the legal validity criteria and hence decisions about the membership of the institution – thereby also fleshing out the membership conditions themselves; and that determinations of lower officials are given the full status of membership within legal systems unless and until a body of superior officials overturns them.

One implication of these realizations about institutions and legal systems is that the dependence of law upon morality must always be mediated by the beliefs and interpretations of officials. Facts of law cannot be directly grounded on truths that are not epistemically accessible and so it is always the beliefs of officials about those facts that are doing all of the truthmaking of legal facts. (Yes, this assumes that moral truths are not directly epistemically accessible, which I think is supported by the fact of widespread moral disagreement and that our moral beliefs include the notion that we can improve them.)

Another implication is that when courts 'correct' the mistakes of prior decisions, they are making changes to the status of those decisions at the point of their corrections and not (as they might claim – though there are good reasons for this fiction) merely uncovering a pre-existing fact about the validity of those prior decisions.

One word of caution is that the language of 'mistake' can be ambiguous. In legal contexts, we might tend to think of official mistakes as mistakes in the application of validity conditions or other more mundane legal principles and therefore that the true state of the law is as it would be without those mistakes present. This is the idea that the officials can be wrong about the state of the law. My argument should be understood to imply that this is not the correct way to describe the situation. There are of course other kinds of mistakes. We also use the word to describe events that are doubtless *faits accomplis*. We might say that lowering the tax on corporations was a mistake or that the invasion of Iraq was a mistake. When we say that these events were mistakes, we are not denying that they happened or that the law changing the tax on corporations or declaring war on Iraq was invalid. So it is still perfectly acceptable to say of mistaken interpretations

of law or even mistaken applications of legal validity criteria that they were mistakes. Indeed, to the extent that these are often regarding the necessary criteria for membership, the realization that officials can be mistaken about the necessary conditions for membership supports this language. But the fact that the mistakes also have the hallmarks of the sufficient criteria about which officials cannot be mistaken means that these mistakes do not deny their results legal validity.

One might be hesitant to say that the result of a mistake in the application of the legal validity criteria can still be legal valid. But the answer to that problem lies in what motivated Hart to understand the rule of recognition as a practice theory rule. If we understand the implications of the realizations about lower court decisions in conjunction with the practice theory for the validity criteria, we understand that all of the officials are trying to track each other's validity decisions resulting in a complex web of constantly changing criteria that nonetheless have a core of very strong agreement.

Only very recently, and partially in response to pushback I'm getting on the difference in the possibility of error for necessary and sufficient conditions for validity, I've begun to think about the way that validity and legitimacy come apart. From a perspective internal to the institution, we generally think that legitimacy follows validity unless there is some moral reason to drive a wedge between them. That is, anything that gets a given legal status in a way that is valid by the law's own procedural lights, is entitled to that status or is justified in being saddled with it. (The times that this comes apart from the internal perspective is when we believe we have good reason to take moral issue with the way that the law has operated on a given occasion.) But from a perspective that is external to the institution (where there are no overriding moral reasons to alter the situation), we can say instead that legitimacy is actually tracking both the sufficient and apparently necessary conditions for validity, while validity itself is only dependent upon the sufficient conditions. As mentioned, this idea is very nascent and a lot more thought has to go into whether it will hold water.

One comment I've already received is that it sounds like I'm defending legal realism more than legal positivism. There is of course a large amount of overlap. But I'm not defending a predictive theory, nor do I make any claims about indeterminacy. I also maintain the notion of judicial mistake that legal realism seems to minimize or deny, but I do argue that our conceptualization of that mistake might not match up with the metaphysical reality.

This note has now stretched on far too long and I don't want to detract from any ideas that might come to you as you read the original paper. Thank you for your invitation and interest in my work.

Since first learning of the dispute, my intuitions have consistently pushed me toward what Wil Waluchow elegantly termed ‘exclusive legal positivism’ (‘ELP’) and away from ‘inclusive legal positivism’ (‘ILP’), championed by him, H L A Hart, and others. Had I learned it from Wil originally, I might have found it more convincing, as I always found Wil’s arguments in its favour to be the most challenging. Many believe that the debate between ILP and ELP has reached an impasse, with the current arguments for each side not being capable of convincing the other. I think that one way out of this situation is to avoid the practical and conceptual arguments that have been the main focus and return to the metaphysical claims at the root of legal positivism. In doing so, we will find a new reason for rejecting ILP that will be hard to resist without rejecting core commitments of legal positivism.

As those familiar with Waluchow’s work will already know, ILP is the belief that it is possible (though not necessary) for a legal system to have a moral criterion among its criteria of legal validity, while ELP is the denial of this claim. That is, ILP says a legal system could make what counts as valid law within that system dependent upon morality in some way, such that a putative law that is unjust or immoral in some specified way will not be legally valid in that system. ELP says legal validity can never be made to depend upon morality.

The reason I always thought ILP the more difficult position to accept is that, according to legal positivism as I understand it, law is a social fact. Every proposition of law that describes the state of some legal system and has a truth value, gets that truth value from facts about events that took place (or didn’t take place) in the society of which that system is a part. It might have been the fact that a legislature of that society voted in favour of a certain form of words, sometime after that legislature was itself constituted in accord with some other rules accepted socially (or at least by some key segment of society) as setting forth the terms of what is to be given the status of legality for that society. It might have been the pronouncement of a judge

who followed similar rules in coming to occupy an office constituted by similar earlier rules. It might have been the absence of such a vote or pronouncement. But morality is not (merely) a social construct.<sup>1</sup> Assuming morality is something capable of truth, those truths do not depend solely on social events. Slavery is wrong, even for a society that practices it without opposition. And if morality is not something capable of truth, it is even more difficult to see how the truth values of propositions of law can depend upon it. But if law is a social fact and legality is a status that is given by social events (especially where those social events that are the truthmakers of legal propositions are generally understood to be conscious undertakings of people who make those legal truths<sup>2</sup>), it is hard to see how legal validity can depend upon moral truths.<sup>3</sup> While Waluchow and others who adhere to ILP might say that since legal validity is what people make it, there is no reason they cannot make it depend on some kind of moral truth, I hope to show here that this is metaphysically incoherent.

In an earlier work, I detailed what I thought was Waluchow's strongest argument in favour of ILP at the time.<sup>4</sup> It seemed that the debate between ILP and ELP is only really joined if we are talking about the inclusion of a robust moral norm among the criteria of validity, raising the possibility that officials tasked with validity determinations could get those determinations wrong. If instead the moral criterion is understood to be merely one of moral acceptability to officials or the wider community, then the system has simply made legal validity depend upon another empirical fact, which is in principle discoverable. If the moral criterion is understood to be simply the moral judgment of the official tasked with making the determination of validity,

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<sup>1</sup> It is possible that some facets of what is understood to be morally good or bad are merely social constructs. But the way we deploy moral judgments and talk about moral goodness and evil assumes that what makes those judgments right or wrong is not always determined by social beliefs. Those ways of speaking could be mistaken, but in that case it is more likely that our moral judgments are not something capable of being correct or incorrect in the way we deploy them. This, of course, is the subject of a huge and ancient debate far beyond our focus here.

<sup>2</sup> I put aside the question of whether customary law can be understood in this way.

<sup>3</sup> I will assume morality is capable of truth in order to motivate the problem of whether officials can be wrong in situations where legal validity is supposed to depend on that truth.

<sup>4</sup> Kenneth M Ehrenberg, *The Functions of Law* (Oxford University Press 2016), 94-96.

then the system has simply given more guided discretion to that official.<sup>5</sup> But if the moral criterion included among the criteria of legal validity is understood to be one of robust or critical (what Waluchow sometimes calls ‘Platonic’<sup>6</sup>) morality, then the system has apparently imposed a condition on legal validity that is beyond the power of officials to verify or to determine by fiat or personal judgment.<sup>7</sup> If possible, this opens space for all the officials of the system to be mistaken in at least some of their judgments of legal validity. This, in turn, means that legal validity in that system is no longer merely a matter of social fact, since truth values of propositions of legal validity can depend on moral truths, which are not merely social facts.

### 1. The Morality in Waluchow’s ILP

Waluchow wants to split the difference. When the criteria of legal validity include what appears to be a moral criterion, it refers to the wider community’s shared ‘true moral commitments’, where ‘true’ describes the commitment as deeply held and reflected upon, without implying anything metaethical.<sup>8</sup> This splits the difference in that such moral commitments are presumably not beyond epistemic access. They are elements of positive morality and hence empirically discoverable, but are also not merely moral opinions that have not undergone tests for consistency with other moral convictions and depth of belief. The need for such tests Waluchow calls ‘the requirement of reflective equilibrium’ or ‘RRE’.<sup>9</sup>

Much is made of moral disagreement, which would be expected as it is in the places of disagreement over our values that we are likely to spend the most time and energy trying to convince others of the folly of their ways. Not as much attention is paid to the vast swaths of

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<sup>5</sup> See, e.g., Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 Yale LJ 823, 841, 846. Elsewhere Raz calls it a ‘directed power’: Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 242.

<sup>6</sup> W J Waluchow, ‘Constitutional Morality and Bills of Rights’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) 66.

<sup>7</sup> *ibid* 75: ‘Some kind of positive morality is the only source [for judicial decisions requiring moral judgment] consistent with democracy, the rule of law, our epistemic limitations, and so on.’

<sup>8</sup> *ibid* 72.

<sup>9</sup> *ibid* 71-72.

moral agreement among values that are most deeply held. There is a good chance that, if everyone were to apply the test of RRE in a perfectly rational way, most moral disagreements would be resolved as the inconsistencies of certain beliefs with more deeply held convictions are uncovered. Of course, most people are either failing to apply RRE to some or all of their (mere) moral opinions entirely, or are failing to apply it correctly, and it is this that leads to (likely most, but probably not all) moral disagreement.

Waluchow argues that where the criteria of legal validity include a moral test of some kind, it means for judges to use the community's 'true moral commitments' to make those decisions. This is because judges have no privileged epistemic access to any objective morality (if such exists), and it would be neither fair nor prudent to have them deciding controversies on the basis of their own mere moral opinions.<sup>10</sup> This claim splits the difference because it sees the moral requirement among the criteria of legal validity as referring to an element of positive morality, but casts that positive morality in a more objective light as 'what most of [the community] *would think* were they more fully to engage RRE and attempt to reconcile their current belief(s) with their (overlapping) true moral commitments.'<sup>11</sup> Since judges are tasked with applying the subset of the community's true moral commitments that are embodied in the community's most basic laws ('the community's constitutional morality' or 'CCM'), it makes even more sense to have experts on the law parse those commitments for maximal consistency and apply them to controversies as they arise.<sup>12</sup> The key about CCM is that, while it is still a part of positive morality, it survives a test for consistency with key and deeply held moral beliefs and so has some characteristics of critical morality: where the criteria of legal validity include a moral

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<sup>10</sup> *ibid* 75. See also Wilfrid J Waluchow, 'Constitutional Rights and the Possibility of Detached Constitutional Interpretation' (2015) 9 *Problema* 23, 34-35.

<sup>11</sup> Waluchow, 'Constitutional Morality and Bills of Rights' (n 6) 75 (emphasis in original).

<sup>12</sup> *ibid* 76-77, 80, 81, and generally Waluchow, 'Constitutional Rights and the Possibility of Detached Constitutional Interpretation' (n 10). See also W J Waluchow, 'Normative Reasoning from a Point of View' in Kenneth Einar Himma, Miodrag Jovanovic, and Bojan Spaic (eds), *Unpacking Normativity* (Hart 2018) 121.

criterion, an authoritative decision-maker can reasonably say that legal norms that do not withstand the RRE are legally invalid *ab initio*.<sup>13</sup>

## 2. ELP Lets Down its Guard

Exclusive legal positivists such as Joseph Raz and Scott Shapiro, have said that an inclusive legal positivist understanding of what happens when a moral criterion is putatively included among the criteria of legal validity would undermine the law's ability to guide behaviour, one of its primary functions. It would undermine law's ability to be an authoritative guide by requiring subjects to check directives against their own moral compasses,<sup>14</sup> or it would undermine law's ability to make a practical difference in what subjects should do since it will be limited to telling them to do what they already should be doing.<sup>15</sup> Since this function is conceptually central to law, a picture of law that would undermine its ability to perform this function in such a fundamental way must be mistaken.

Waluchow's reply to these arguments focuses on their move from the metaphysical problem of reconciling moral truths and social facts to the practical issue of guiding behaviour. Since the attacks on ILP are claims that, if it were true, law would not be capable of performing its behaviour guidance function, they are vulnerable to a claim that law's difficulty in performing that function arises out of the nature of rules and not because of the inclusion of a moral criterion among the criteria of legal validity. Rules need to be general in order to be rules and not mere directives. They must be capable of applying to a wider variety of people and/or situations than a simple order given to an individual on one occasion. But the more general they are, the

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<sup>13</sup> It should be noted that even under ILP, whether legal norms that do not withstand RRE are void when the inconsistency is noticed or void *ab initio*, is itself a choice to be made within the legal system. Hence a jurisprudential theory that aims to capture law wherever it is found should not depend on one choice rather than the other. But a theory that denies certain mistakes render decisions based on those mistakes legally invalid without the intervention of a higher decision-maker will have to explain how systems that choose to treat mistakes as void *ab initio* can do so. We will see later that this can be accomplished by saying the choice is itself the application of legal status and that there are strong metaphysical reasons for saying that the choice to treat the mistake as invalid *ab initio* is a retroactive application of that status declaration.

<sup>14</sup> Raz, *Ethics in the Public Domain* (n 5) 210.

<sup>15</sup> Scott J Shapiro, 'Law, Morality, and the Guidance of Conduct' (2000) 6 *Legal Theory* 127, 129.

more they must rely upon vague terminology to capture the relevant parties and situations, and hence the less they are able to be interpreted by individuals who are unsure whether their situation is covered by the vague terminology. This is precisely why we need officials to make authoritative applications of necessarily open-textured rules to situations where their application is in doubt. But once we countenance the need for official interpretation to settle the law in cases falling into the ‘penumbra of uncertainty’, we are already acknowledging a limit on the law’s ability to perform its guidance function until that determination is made.<sup>16</sup> Hence, the threat to individual behaviour guidance by the inclusion of a moral criterion among the criteria of legal validity is there whether we think of that as making the law depend upon critical morality, Waluchow’s positive but tested ‘community’s constitutional morality’, or if we are only imagining it to increase officials’ discretion. What’s more, it is there even in systems without the moral criterion, a necessary tension at the heart of law. Including that moral criterion is therefore just another choice in how to strike a balance between the demands of generality and authority.

We might imagine the exclusive positivists complaining that the problems they have with ILP don’t arise from the inclusion of a requirement of moral *acceptability* among the criteria of legal validity (which as noted would be empirically discoverable in principle), but rather from the claim that a robust norm of critical morality could be included. But this response is open to the retort that they brought Waluchow’s reply upon themselves by couching their attacks on ILP in practical terms, relying on the difficulties such an inclusion poses for the law’s performance of its behaviour guidance function. Once we have left the realm of the purely metaphysical problem of how a social fact can be made to depend upon something not socially constructed (if we are talking about critical morality), or upon facts that are not entirely socially determined (as might be suggested by the requirement that CCM consists only in those principles that objectively pass RRE) and start complaining that the law can’t do its job when we include a moral criterion

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<sup>16</sup> Wilfrid J Waluchow, ‘Legality, Morality, and the Guiding Function of Law’ in Claire Grant and others (eds), *The Legacy of H.L.A Hart, Legal, Political, and Moral Philosophy* (Oxford University Press 2008) 92-93.



among the criteria of legal validity, Waluchow's reply has sharp teeth: The practical problems are the same whether we imagine the moral criterion to be robust and critical, the community's constitutional morality, or merely to be adding a condition of moral acceptability (either of the official making the determination, or of the wider society).

Earlier, I thought that the ELP reply that the problem with ILP arises from the inclusion of a robust moral requirement (rather than one of moral acceptability) was still the most convincing; I didn't fully appreciate the extent to which couching the ELP attacks in law's functionality (and hence making it a practical problem) undermines the force of the metaphysical intuition that there is a tension between saying law is a social fact and yet that its validity can depend upon something not a social fact (or at least not empirically demonstrable). So, let's grant for the moment that Waluchow's argument against the practical versions of the ELP arguments is successful and return to that metaphysical tension.

### 3. Official Mistake and the Case for ILP

One way to capture the metaphysical tension is to talk about the possibility and legal status of mistakes on the part of officials. If we include a criterion among the criteria of validity that is beyond epistemic access or empirical verification, we are introducing the possibility that all legal officials of a given community could be wrong about the validity of a legal norm or the truth of a legal proposition. Whether we are talking about critical morality or a community's constitutional morality that has met the requirement of reflective equilibrium (a test that judges can fail to implement correctly, or the result of which they can fail to understand), judgments deploying that moral criterion can be wrong.

Now, one might suppose that this state of affairs is impossible if the criteria of validity are, following Hart, set by the practice of officials simply making their validity determinations.<sup>17</sup> If

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<sup>17</sup> H L A Hart, *The Concept of Law* (Penelope A Bulloch and Joseph Raz eds, 2nd edn., first published 1961, Clarendon Press 1994) 110, 255.

the criteria of validity are simply reflections of what the officials are saying is valid, then there doesn't seem to be any way that all of the officials could be wrong, just as the declaration of an umpire or referee in many sports determines the validity of a given play. It would seem that their determinations are *constitutive* of legal validity. The criteria are distillations of those decisions, an articulation of the rules they seem to follow in making their decisions. A departure from the apparent rules made by an official in a linchpin role (such as a constitutional judge) would be, in the first instance, a reason to re-examine one's articulation of the rules, rather than grounds for criticism of the official.<sup>18</sup>

But this supposition would overlook a key fact about the way the practice of officials sets the validity criteria. If the officials themselves are using a standard to make their judgments, then it seems more faithful to say that the standard they are using is a part of the validity criteria, even if their judgments are determinate of validity within the system. That is, if a rational judge would admit to having made a mistake if shown that her judgment was inconsistent with the standard with which she was trying to accord (notwithstanding the fact that the system still treats her judgment as dispositive), then it would make more sense to include that standard among the criteria of validity.<sup>19</sup> Hence, while the validity criteria are a reflection of what the officials are using to make their determinations, it still makes sense to say that an official can make a mistake where her decision is not in accord with the criteria she is attempting to apply. On the other hand, if we want to say that a given decision is setting the validity criteria in that others are bound to adjust their decision-making to that decision, even if the official herself would have thought it wrong, then it might not make as much sense to say that decision is capable of being mistaken. So the decision-maker's attempt to track and reflect an articulatable standard is a

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<sup>18</sup> Of course, if you are yourself occupying a similar linchpin role and had a longstanding articulation of the validity rules that you had been following yourself, the departure by your colleague would likely still be grounds for criticism. But for those examining the situation from the outside or occupying non-linchpin roles from which the system requires deference to decisions by those in the linchpin roles, a departure would be *prima facie* a reason to question one's understanding of the rules.

<sup>19</sup> If we are trying to track her practice, and her practice is to attempt to adhere to a standard in making her determinations, then her practice is what allows us to include the standard among the criteria of validity.

reason in favour of including that standard among the criteria of validity, while the finality of the decision (even if inconsistent with that standard) is a reason against including it. Since the finality of the mistaken decision is something that could vary among legal systems as well as the level of the court, this appears to be a point in favour of ILP.

Under any positivist interpretation, legal validity is a kind of status that is socially constructed. In some legal systems, it is understood to attach to any product of legislation or official legal decision-making where specified officials (their offices another form of status) follow the correct procedures. In others, further requirements (perhaps with content restrictions) are added onto the merely procedural ones. In either kind of system, legal validity is understood as bona fide membership in the legal system and therefore to carry whatever normativity the system would give to its members. As a result of this, it is certainly possible for legal officials to be ignorant of certain facts that would determine legal status, or for them otherwise to make mistakes about the truth of propositions of law. Consider the following example.<sup>20</sup> In most countries, what gets the status of legal tender is fixed by law. Generally, currency notes must be made of specified materials and in a specific design. Additionally, they must be made in a specified place and by specified people (officeholders). Hence, if I were to make an exact molecular copy of a banknote, except also give it a unique serial number, it would be indistinguishable from a legally valid banknote but would still be counterfeit. Even the highest legal official can certainly be mistaken about the correct legal status of this banknote.<sup>21</sup>

We might, however, imagine another kind of mistake. This would not be a mistake about the application of legal status to a putative member made based on the membership condition rules that specify which features it must possess in order to be bona fide. Rather, imagine a mistake

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<sup>20</sup> Discussed at Ehrenberg (n 4) 36.

<sup>21</sup> This assumes that the law specifying the requirements for legal tender does not contain a clause stating that official determinations of the legal status of specimens trumps the possession of specified characteristics. But since this clause clearly does not exist in all legal systems, the possibility of this kind of error would still appear to be a point in favour of ILP.

about the constitutive rules of legal status themselves. Notwithstanding Ronald Dworkin's argument that many legal disputes are disputes over what we are here calling the membership (or validity) conditions for law (an argument positivists reject),<sup>22</sup> most legal positivists don't really make metaphysical room for any serious mistakes of this second kind among key officials. The question is whether an official's validity determinations using an apparent moral requirement is more like the mistake about the molecular counterfeit or more like the mistake about the constitutive rules of legal validity themselves. If it is the latter, then we would have to see if it is conceptually possible for a legal positivist to accept this kind of mistake, and what that says about the truth of ILP.

The reason this second kind of mistake appears impossible has to do with the nature of institutions (of which municipal legal systems are a clear example<sup>23</sup>). Institutions are social arrangements for the creation and assignment of statuses to people, events, objects, or even ideas and other abstractions, where those statuses are understood to carry powers to alter people's reasons for action.<sup>24</sup> They are created self-consciously and so the acceptance of the conditions specified as sufficient for creation of the institution make it the case that those conditions are sufficient for its creation.<sup>25</sup> Since the existence of the institution depends on the collective acceptance and recognition by a specific set of people, it is their belief that those conditions have obtained that makes it the case that the institution exists. Hence, *as a group*, they cannot be wrong about whether conditions sufficient for the institution to exist have obtained.<sup>26</sup>

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<sup>22</sup> Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 5-7, 42-43. See also Dennis M Patterson, 'Theoretical Disagreement, Legal Positivism, and Interpretation' (2018) 31 *Ratio Juris* 260, esp at 267-68, noting the need for legal positivists to account for the relationship between the rule that specifies the legal validity criteria and the rule's role in adjudication.

<sup>23</sup> *Pace* Neil MacCormick, 'Law as Institutional Fact' (1974) 90 *Law Quarterly Review* 102, 105.

<sup>24</sup> Ehrenberg (n 4) 32-34, citing Amie L Thomasson, 'Realism and Human Kinds' (2003) 67 *Philosophy and Phenomenological Research* 580, and John R Searle, *The Construction of Social Reality* (Free Press 1995).

<sup>25</sup> Thomasson (n 24) 588-90. See also Ehrenberg (n 4) 172.

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[I]nstitutional kinds do not exist independently of our knowing something about them. ... [I]n the case of institutional kinds those principles we accept regarding sufficient conditions for the existence of these entities must be true. We are guaranteed freedom from complete ignorance and are preserved from error in many of our beliefs regarding the nature of institutional entities

The criteria of legal validity are constitutive of a legal system's institutionality in that they specify what gets the status of 'legally valid' and to carry the normativity that the system attaches to its members. They are the institution's membership conditions. To meet them is sufficient for membership within the legal system. Saying that the key officials, as a group, cannot be mistaken about their identity might appear to be another major point in favour of inclusive legal positivism. After all, if the officials all believe that the criteria include a moral requirement, or that a putative member (legal norm or application of a legal rule) is rationally consistent with the community's deeply held moral commitments, it would seem that belief cannot be mistaken. We are seeing that the officials cannot be wrong about the constitutive rules, even if they can be wrong about the empirical question of whether the rules have been met. So we appear to have a huge disjunctive point in ILP's favour: if an official mistake in the application of a moral criterion is akin to a mistake about whether a given specimen of currency is bona fide, then ILP is correct in saying that the moral criterion is a part of the validity criteria for the system and that judges can get it wrong. If, instead, an official 'mistake' in the application of a moral criterion is more like a 'mistake' about what the validity criteria are, then officials' collective belief about the presence of that moral criterion makes it the case that the system has that moral criterion among its validity criteria. The fact that this mistake is impossible entails that ILP is correct, or so it would seem.

#### 4. A Deeper Metaphysical Case for ELP

As tempting as this argument for ILP is, however, it runs the risk of treating a necessary condition as if it were a sufficient one. The criteria of validity include enabling conditions that are usually procedural (e.g., anything passing a majority vote in Parliament), and also may include criteria that perform gatekeeping functions (e.g., may not be inconsistent with the written

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precisely because the principles accepted play a stipulative role in constituting the nature of the kind.  
Thomasson (n 24) 590.

Constitution). While some enabling conditions may function both as sufficient and necessary conditions, I will be focusing on their role as sufficient conditions and so will refer to them as such. The gatekeeping criteria, however, function only as necessary conditions.<sup>27</sup>

Remember that an understanding of institutions tells us that it is only conditions functioning as sufficient for membership in the institution about which the relevant officials cannot be mistaken as a group. To see why it is only the sufficient conditions about which the officials cannot be universally in error, consider a necessary condition the satisfaction of which we can have no direct knowledge: God must approve of the law for it to be valid. If God does not exist, then of course none of the laws are approved by God and hence none would be valid by this condition. If God does exist, no one knows for sure which (if any) laws God approves of, and hence officials can be massively and universally in error in their beliefs about which are approved. In neither situation are we tempted to say that there is no legal system present because of this criterion or the failure to apply it correctly.<sup>28</sup> So either there is universal error about the presence of this condition among the criteria of validity, or there is universal error in its application; those errors are perfectly possible and do not threaten the existence of the legal system. Rather, it is reliance upon beliefs in the constitutiveness and satisfaction of the *sufficient* conditions for membership that give the legal system its institutional existence. Hence, it is only about those that there cannot be universal error among the officials.<sup>29</sup>

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<sup>27</sup> I thank Simon Palmer for alerting me to the need for this clarification.

<sup>28</sup> Lest it be thought that the theological example is doing something suspicious, take a more mundane necessary condition: 'all laws must be signed by the Queen to be valid'. The officials can be wrong either about the presence of this condition among the criteria of validity (where she signs no laws and yet the officials believe and treat many enactments as valid law), or about its satisfaction (where she has neglected to sign a given enactment and it is still treated as valid law, though there we are more likely to say that such treatment is the mistake). But where it is understood to be a sufficient condition, we cannot be wrong in saying that it is *enough* for her to sign the bill (that has met all other jointly sufficient conditions) for it to be a valid member of the system. It might be thought that the theological example would create problems for sufficient conditions as well since if the criterion was 'anything God approves of is law', everyone could apparently be mistaken about that condition or what God approves of. The point, however, is that officials are protected from massive error in their beliefs about what the sufficient conditions apply to, since it is those very beliefs that result in the institutional status being assigned to its members. Hence whatever they believe God approves of is legally valid as a result of that belief. See Michael Giudice, *Understanding the Nature of Law* (Edward Elgar 2015) 118-20 (arguing recognition of officials is constitutive of legal validity).

<sup>29</sup> See Thomasson (n 24) 590.

Some might be tempted by their memories of learning the contrapositive in first order logic to reply that all necessary conditions are negations of sufficient conditions for the negation of the other condition. Hence a criterion performing a gatekeeper function understood here as a necessary condition can be expressed as a sufficient condition for exclusion. That is, saying the law must pass a given test of morality to be legally valid is logically equivalent to saying failure to pass the test is sufficient for legal *invalidity*. But either way it is expressed, the moral test is still a criterion for exclusion, and it is the criteria for *inclusion* (which we might also think of as enabling conditions) that are doing the metaphysical heavy lifting (as specifying what is sufficient for membership) in the assigning of institutional status.

Therefore, metaphysically speaking, there's nothing wrong with the ELP retort that all officials can be mistaken in their belief in a moral requirement among the criteria of legal validity, since that requirement would function as a necessary condition. Yes, it's a kind of error theory, in that it says that all officials can be mistaken. However, it's a theory that not only explains the error and how it is possible, but even how it might be perfectly understandable in those systems that putatively adopt a moral criterion. Mistaken beliefs in the existence or application of necessary conditions are not necessarily misguided; there may be very good reason for the belief in, and (attempted) application of moral criteria as necessary for legal validity by officials in some systems. But those necessary conditions are not *constitutive* of legal validity the way the sufficient conditions are.<sup>30</sup>

Let us take stock for a moment. ILP introduces the possibility of officials being wrong in their validity determinations in a way that appears to be more than just an empirical error. Whether this is in the application of 'Platonic' morality or in a decision that a given piece of

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<sup>30</sup> One might take the argument of this paper to offer instead a way to obviate the entire debate between ILP and ELP. It appears to show a way that ELP can admit ILP's claim that moral criteria can be included among the criteria of validity, so long as they are correctly understood as necessary but not sufficient conditions. But as such an admission would be a pyrrhic victory for ILP in that it comes at the cost of denying any constitutive role to such moral criteria in setting legal validity, it seems more correct to understand this as a win for ELP.

legislation is inconsistent with a community's constitutional morality because it is not rationally possible to reconcile it with that CCM via reflective equilibrium, these are not empirically verifiable mistakes. We have seen that there are notionally two kinds of mistakes that we might think officials can make with regard to validity determinations: They can be wrong in the application of their agreed-upon validity criteria to a given instance (exemplified by the molecular counterfeit); or they can be wrong in what the validity criteria are themselves. However, we have also seen that there are some conceptual problems with this second kind of error. In general, errors about the identity or satisfaction of conditions sufficient for membership in the legal system (legal validity) cannot be endemic among key officials, although errors about the identity or satisfaction of necessary conditions are possible and possibly widespread.

In discussing this second kind of error that appears impossible, I have said what is precluded is massive or universal error among key officials about the sufficient constitutive rules for legal validity. But of course, what we are usually talking about in the application of these criteria is the decision of one official or a small number. Plus, even if we do say that the moral criterion among the criteria of legal validity is a necessary condition in that it is performing a gatekeeping function, we might again appear to be saying that ILP is correct in that it is possible for the official making the determination to make a mistake in its application. As the moral criteria appear to be necessary conditions and the error of one official is not endemic, these considerations do not at first appear to pose any difficulty for ILP.

To see how these considerations do pose a difficulty for ILP, we must drill down a bit further into the nature of these decisions and their place within the legal system. There are two characteristics of official legal decisions that are important to note here. The first is that just about every legal decision that is not merely a determination of what non-legal facts obtained is a



decision about legal validity.<sup>31</sup> If we imagine an adversarial system, with each side presenting an opposing argument over the state or application of the law, the official's acceptance of one side is holding that side's legal argument to be valid and the opposing side's invalid. Even in a completely non-adversarial system, we can imagine that officials will have interpretive options before them, among which they must choose one to recognize as legally valid, while rejecting the others as legally invalid.<sup>32</sup> The other important characteristic to note is that the system will treat those decisions as legally binding (i.e., legally valid and carrying whatever normativity the legal system endows them with) unless and until a court of greater authority (if one exists) strikes them down.<sup>33</sup> Every official (including those on that higher court) will treat the decision as sufficient for the validity of its holding until higher officials consider and invalidate it in their official capacity when called upon to do so (not ignoring that this might be done *sua sponte*).<sup>34</sup> So even if her decision is mistaken on the criteria she is attempting to track and she would admit as much, the institutional fact is that the decision is legally valid until modified since the bulk of officials cannot be mistaken in the identity or application of the conditions sufficient for legal validity. Hence the nature of the institution is to give the decision the status that comes with full validity until it is overturned. So even in systems where the overturned decision is understood to

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<sup>31</sup> This is not meant to imply that they are all hard cases or that they require an exercise of discretion. But every legal holding is an official declaration that one of a list of competing applications of law is legally valid, while its competing options are not.

<sup>32</sup> While these descriptions are using adjudication as a model for legal decisions, the non-adversarial analysis can also be applied to legislative decisions where the legislator believes herself to be constrained by pre-existing legal decisions or standards. Where the legislator is unconstrained (as in absolute monarchies, dictatorships, and systems adopting a Diceyan conception of parliamentary sovereignty (see A V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Liberty Fund 1982) 3-4)), the legislative decision itself is considered fully constitutive of legal validity and hence not capable of mistakes in its application.

<sup>33</sup> This point is easily confused for Shapiro's notion of a 'general presumption of validity' Scott J Shapiro, *Legality* (Harvard University Press 2011) 202-03 that is enjoyed by legal decisions. But it should be distinguished, as I believe my point here is more fundamental and can help explain (if not supplant) his. Shapiro's presumption refers only to courts of superior jurisdiction and is only focused on the enforcement of decisions of lower officials. Since Shapiro is using this idea to underpin his claim that 'the law is a self-certifying planning organization', he is only concerned with the practical implications of the lower court decisions on enforcement for the execution of legal plans. It is therefore sufficient for him to understand it as a mere presumption. But we will see that the institutional metaphysics of law provide strong reasons for saying that it applies to all official legal decisions, not just for purposes of enforcement (but more broadly to determine what carries legal normativity), and that it is not a mere presumption rebuttable by a higher court--but rather a constitutive declaration that is alterable by a higher court.

<sup>34</sup> Michael Giudice makes a similar point in 'The Regular Practice of Morality in Law' (2008) 21 Ratio Juris 94, 103.

be invalid *ab initio*, that must be a retroactive invalidation.<sup>35</sup> This fact is a metaphysical truth that follows from the nature of institutions since the official treatment of the decision as legally valid prior to its being overturned is constitutive of its legal validity.<sup>36</sup>

To put this point in more Hartian terms, since the rule of recognition is a practice theory rule and judges making validity decisions are constitutive of the rule of recognition (in that these decisions are themselves the practices that form the rule of recognition), they cannot be making empirical mistakes (like the counterfeit money example) when they make a validity determination. Those decisions are afforded the status of legally valid by the institutional rules themselves. Where these decisions depart from the practices of the majority of other key officials, we must wait for another declaration to alter the institutional status of legal validity. Since these statuses are entirely socially constructed, whether to adhere to strictly linear time in the nature and operation of these statuses is a decision to be made by the institutional actors and designers. Hence, it is possible for the system to treat departing decisions as void *ab initio*, just as it is also possible for the system to treat departing decisions as void only from the moment they are declared to be inconsistent with the prevailing validity practices. But metaphysically speaking, since the institution treats the official's decision as the final word until a court of higher jurisdiction declares it to be a mistake, a legal positivist accepting the social fact thesis and that law is a kind of institution should say that legal validity is fixed by the declaration of officials and not by consistency with a perceived set of gatekeeping necessary conditions.

The fact that a decision by one official is treated by the rest as sufficient for membership in this way and that every decision about a legal argument or application is also a validity determination solves the apparent problems for ELP. While a single official might be using her

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<sup>35</sup> In further support of this point see Giudice, *Understanding the Nature of Law* (n 28) 129-31 (quoting Peter Hogg, *Constitutional Law of Canada* (4<sup>th</sup> edn, Carswell 1997) 801, 922).

<sup>36</sup> It is true that non-officials might ignore the decision if they expect that it will be overturned. But even the fact that some instances of ignoring the decision are designed as test-cases to give higher courts the opportunity to overturn it (where the procedural rules of their system do not allow the higher court to invalidate lower court decisions *sua sponte*) attests to the fact that the system treats the decision as valid until the higher court overturns it.

understanding of a moral criterion as a necessary condition (and hence one she could be wrong about in its presence or application), her office (understood as a status that carries authority within the system) is treated as a sufficient condition for her decision's membership in the legal system by the rest of the officials.<sup>37</sup> They can't be wrong about that since their treatment of her decision as a sufficient condition is constitutive of it being that. So, while her decision in application of a moral criterion can be mistaken by her own lights, and it is unproblematic for her (or everyone) to believe in a moral criterion functioning as a necessary condition among the criteria of validity, it is the sufficient conditions for legal validity that do all the work and those are made true and constitutive of legal validity by general official consensus of belief and treatment. Hence the only way out for ILP would be to deny the institutional nature of law, a rather tall order, or to raise some other objection to this analysis of institutions.

One might think these considerations could be embraced by ILP as a feature and not a bug. The moral criteria are functioning as gatekeepers or necessary conditions and hence are criteria the application of which officials can get wrong. This seems to be consistent with the ILP belief that the criteria of validity can have elements that are beyond epistemic access or require the application of consistency tests that the official can get wrong. We seem to have made space for official error in the application of the criteria of legal validity, which is what the introduction of moral criteria would have done. The problem is that by saying officials can be wrong in the application *or presence* of these gatekeeping conditions, we are saying that they are not really constitutive of legal validity anymore. Once the authority of a single official's office is recognized as sufficient for the legal validity of her determinations, a mistake in the application of a

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<sup>37</sup> In some systems, some or all decisions may not be treated as valid until a higher court decides upon their validity. In such cases, the argument simply applies at the higher level. Even if the lower court in such situations is attempting to track a moral principle directly, the legal status that carries normativity doesn't attach until the higher court rules. So, it is the higher court's ruling that is a sufficient condition, while any moral principles they are attempting to track are again necessary conditions about which they can be mistaken. The recognition that lower court decisions might not be treated as valid in some systems until a higher court decides is a strong point against the generality of Shapiro's 'presumption of validity' mentioned in n 33, while not posing any problem for the considerations here. On the difficulties this presents for Shapiro, see Kenneth M Ehrenberg, 'Law as Plan and Artefact' (2016) 7 Jurisprudence 325, 335-40.

gatekeeping condition becomes functionally equivalent to a mistake in the very presence of that gatekeeping condition. We're saying that there's no real difference between her misapplying a moral requirement and her being wrong about there being a moral requirement – which is to say, it's irrelevant to legal validity beyond her choice about how to apply it. But that is what ELP has been saying all along: supposed moral criteria among the criteria of legal validity function at best as a guide to legal decision-making (as a directed power), and at worst simply to enhance official discretion, but are not constitutive of legal validity in any way.

It might be pointed out that these considerations only apply to the second kind of mistake, over the criteria of validity themselves, which legal positivism already has trouble accommodating (for good reason if it wishes to embrace an institutional theory of law). There's still the first kind of mistake exemplified by the molecular counterfeit currency note. Furthermore, I have noted above that my claim that all official legal determinations are also determinations of legal validity only applies where the determination is not merely about non-legal facts. So, if the official making a mistake in applying the community's constitutional morality is making a mistake about merely non-legal facts, then it would be possible for there to be facts about legal validity under those non-legal facts that are subject to universal mistake, just as all officials could be mistaken about the legal validity of a given piece of currency.

There are two reasons this solution does not work to save ILP. First, it is difficult to understand a decision about whether a given legal norm is consistent with the community's constitutional morality (consisting in its deeply held moral commitments that have passed the test of the requirement of reflective equilibrium) as being akin to a determination about whether or not some non-legal fact obtains, which is understood to be a criterion for some application of law. It is manifestly a decision about whether the putative legal norm is legally valid and hence a direct application of the criteria of legal validity (among which Waluchow holds we find the requirement for consistency with the community's constitutional morality in those systems that

have chosen to include such a requirement). Even if we are to say that the characteristic of the putative legal norm that determines whether or not it is consistent with the CCM is a non-legal fact, it is not a decision about whether some aspect of statutory law has been triggered by that non-legal fact (as in the case of the molecular counterfeit). Rather, it is a direct determination of legal validity for that norm, which will be treated as sufficient for legal validity by the community of legal officials unless and until overturned. Approaching this first point from the other direction, whether a given decision is consistent with the CCM in a system requiring that consistency for legal validity to attach is, *ex hypothesi*, a legal (rather than a non-legal) fact according to ILP. (Recall, that this was part of Waluchow's justification for having these decisions made by judges.) Hence, adherents of ILP could not rely on the mistake being about a non-legal fact to avoid the problem.

Second, I may have been unnecessarily pulling my punches when I excluded determinations of merely non-legal facts from the analysis. After all, even those determinations of merely non-legal facts are determinations of what facts obtain for the purposes of attaching legal status. Once again, such decisions are treated as sufficient for legal validity until overturned by a superior official. Returning to the example of the molecular counterfeit, it makes perfect sense to say that the specimen is a counterfeit and that all treatment of it as bona fide is in error, since we are applying the necessary conditions of valid currency to exclude the counterfeit specimen. But once we apply any sufficient conditions to say that it is valid (perhaps the Chief Central Banker officially stipulating that the specimen meets all non-legal requirements), the situation changes. The legally determined non-legal facts may be at odds with reality, but it is those legally determined facts that now carry the relevant legal status. We have a conflict between a sufficient condition that assigns it the status of legally valid, and a necessary condition that excludes it – in which case the sufficient condition always wins.

The options open to ILP as a result of these considerations appear to be slim: Adherents could deny that law is an institution, which would be a tall order since institutional theory captures what legal positivists want to say about the nature of law so well. Adherents could deny some of the particular understandings of institutions that I give here. But that would also be difficult, as it is clear that official acceptance and treatment of members as carrying the normative status imparted by the institutions is sufficient for membership and having that normative status. And it is this realization that lies at the heart of legal positivists' understanding of basic validity rules. The other option would be to say that official mistake can render decisions invalid without the intercession of any holdings to that effect. But that would appear to suggest that legal validity itself is no longer entirely a matter of social fact and opens the decidedly anti-positivist possibility that all the valid laws of a given legal system go unrecognized by any official, or that every law treated as valid by officials in the system is actually invalid.<sup>38</sup>

## 5. Conclusion

We have seen that ILP is inconsistent with the institutional nature of law, which seems to be a core commitment of legal positivism. As an institution, the official recognition of conditions sufficient for legal validity cannot be fundamentally mistaken as that recognition is constitutive of the institution's membership conditions (which serve as the criteria of legal validity). ILP's claim that a given legal system can include a moral criterion (whether positive, positive but meeting the RRE, or 'Platonic') among its criteria of legal validity is invariably including the moral criterion as a necessary condition performing a gatekeeping function. But any mistake about the presence or application of necessary (gatekeeping) conditions has no effect on legal validity where the sufficient (enabling) conditions are recognized as present. So, even if officials are sincerely attempting to apply a moral criterion that they agree is necessary for legal validity, their recognition of some social fact (such as a single authoritative pronouncement) as sufficient

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<sup>38</sup> A similar critique of ILP is levelled by Giudice, *Understanding the Nature of Law* (n 28) 117.

for validity will always trump that moral criterion. Even their belief in and application of that moral criterion as a necessary condition for validity does not render it a truly necessary condition, since it cannot be necessary where a sufficient condition of social fact has been met. Hence, from an external perspective examining the metaphysics of law, a moral criterion cannot serve as a necessary condition among the criteria of validity. Waluchow's understanding of ILP might be a more accurate reflection of the internal perspective of officials, what they believe to be the conditions required for legal validity in systems that appear to embrace a moral criterion. But this analysis has shown that internal perspective to be metaphysically inaccurate, while offering a glimpse of why the official picture does not match the deeper reality of law.