

4-20-2009

## Is There a "Higher Law"? Does It Matter?

Connie S. Rosati

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Jurisprudence Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

---

### Recommended Citation

Connie S. Rosati *Is There a "Higher Law"? Does It Matter?*, 36 Pepp. L. Rev. Iss. 5 (2009)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol36/iss5/13>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Is There a “Higher Law”? Does It Matter?

Connie S. Rosati\*

- I. HIGHER LAW AND MORALITY
- II. HIGHER LAW AND POSITIVE LAW
- III. HIGHER LAW AND LEGAL OBJECTIVITY
- IV. CONCLUDING REMARKS

In his *Letter From a Birmingham Jail (Letter)*, Martin Luther King, Jr. undertook to respond to critics of his activities.<sup>1</sup> As King explained, he (an “outsider,” in the view of his critics) was in Birmingham not solely because he had been invited by an affiliated organization of the Southern Christian Leadership Conference, of which he was then president.<sup>2</sup> “I am in Birmingham,” he declared, “because injustice is here.”<sup>3</sup> Appealing to his Christian faith, he reported that he was “compelled to carry the gospel of freedom beyond my own home town.”<sup>4</sup> He famously went on to explain the justification for the acts of those protesting the segregation laws by distinguishing between “two types of laws.”<sup>5</sup> There are, he wrote, just and unjust laws, and while we have both “a legal [and] a moral responsibility to obey just laws,” we have “a moral responsibility to disobey unjust laws. I would agree with St. Augustine that ‘an unjust law is no law at all.’”<sup>6</sup> What is a just law according to King? It is, he tells us, “a man-made code that

---

\* Associate Professor of Philosophy, University of Arizona; Ph.D. University of Michigan, 1989, J.D. Harvard Law School, 1998. This informal essay is a revised version of brief remarks presented at the “Higher Law” conference held at Pepperdine Law School, February 21–22, 2008. The presentation and this essay were drafted during the 2007–2008 academic year, while I was a visiting scholar at the NIH Bioethics Department. Many thanks to the Department for its support of my research and for providing the opportunity to spend a very stimulating year in a lively intellectual community.

1. MARTIN LUTHER KING, JR., *Letter From a Birmingham Jail*, in *WHY WE CAN'T WAIT 76* (1964), available at <http://www.thekingcenter.org/prog/non/letter.pdf>.

2. *Id.* at 77.

3. *Id.*

4. *Id.*

5. *Id.* at 82.

6. *Id.*

squares with the moral law or the law of God.”<sup>7</sup> Contrariwise, “[a]n unjust law is a code that is out of harmony with the moral law.”<sup>8</sup>

King’s *Letter*, with its allusion to a “higher law,” provides a useful starting point for thinking about the topic of this conference, because it points us toward a tangle of questions that lie behind the apparently simple questions that have been posed for us: “Is there a higher law? Does it matter?”<sup>9</sup> As I shall explain, these questions are ambiguous as between at least three different readings, at least three different things that we might be asking about when we raise questions about the existence and importance of higher law. My aim is to disentangle these readings so that we can better grasp the various questions and issues at stake, and so better appreciate the kind of inquiry we would need to undertake in order to address them. Most of what I shall say draws on ideas all too familiar to scholars who work in jurisprudence, particularly those who work at the intersection of legal and moral philosophy. These ideas may be less familiar, however, and in some ways puzzling, to those who do not, and the lack of familiarity may lead people to conflate distinct questions and issues. It is this problem that I essentially seek to address. So although I do not take myself to be laying any new ground, I hope to be helpfully clearing the ground.

For the bulk of this short essay, I shall mostly concentrate on clarifying how the various questions we might be raising when we inquire about the existence and importance of higher law differ from one another.<sup>10</sup> In closing, though, I shall stress a point that I hope will already have become abundantly clear, namely, that as distinct as these questions are, they are also deeply interrelated. We would therefore do well, as we undertake to answer any of them, to remain mindful of the others and ultimately to aim for a set of answers that is compelling and internally consistent.

---

7. *Id.*

8. *Id.*

9. King, in his *Letter*, did not actually use the expression ‘higher law.’ See *id.* at 76–95. He seemed to favor the expression ‘just law,’ though at one point, in explaining why there is nothing new in the kind of civil disobedience that he advocated, he remarks, “It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a *higher moral law* was at stake.” *Id.* at 84 (emphasis added).

10. I shall distinguish a number of questions, then, but given their complexity, I obviously cannot undertake to address any of them in a brief, informal essay. And, obviously, I cannot even begin to consider or attend to the various questions one might raise about the relationship between specific areas of our positive law and “higher law.” For an essay tracing in great detail the relationship between historical appeals to “higher law” and the development of our Constitution, see EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1928). Thanks to Alan Wertheimer for calling this book to my attention.

## I. HIGHER LAW AND MORALITY

Let us return now to King's *Letter*. King appears to have associated the idea of higher law—or in his words, *just* law—with morality, and by that, he did not mean conventional morality but rather *true* morality. That is to say, he clearly believed that there are moral facts—truths about morality that are, at least in some measure, epistemically accessible to us. A first question one might be asking, then, in asking whether there is a higher law, is whether indeed there are moral facts or truths. Any attempt to answer that question would involve one in a longstanding philosophical debate, and in order to enter fruitfully into that debate, one would need to become well versed in the area of philosophy called “metaethics.” One would also need to acquaint oneself with the array of views classed under the heading of “moral realism,” according to which there are indeed moral facts or truths, as well as with the reasons many have had for rejecting moral realism in favor of one or another version of “anti-realism.”<sup>11</sup>

Suppose that when we ask about the existence of a higher law we are asking about the existence of moral facts or truths. Then the question of whether it matters if there is a higher law becomes the question of whether it matters if there are moral facts or truths. Unsurprisingly, among the questions with respect to which moral realists and anti-realists have disagreed is the question, “Does it matter whether moral realism is true?” Moral realists have endeavored to explain just how the truth of moral

---

11. Given the informal nature of this essay, I can only mention moral realism and anti-realism without making any effort to get into the complexities of the moral realism/anti-realism debate. The interested reader might consult any number of works to get a feel for the competing theories and what is at issue between them. See, e.g., Geoff Sayre-McCord, *Metaethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008), <http://plato.stanford.edu/archives/fall2008/entries/metaethics/>; Chris Gowans, *Moral Relativism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/moral-relativism/>; Richard Joyce, *Moral Anti-Realism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/moral-anti-realism/>; James Lenman, *Moral Naturalism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/naturalism-moral/>; Michael Ridge, *Moral Non-Naturalism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/moral-non-naturalism/>; Geoff Sayre-McCord, *Moral Realism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/moral-realism/>; Walter Sinnott-Armstrong, *Moral Skepticism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/skepticism-moral/>; Mark van Roojen, *Moral Cognitivism vs. Non-Cognitivism*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/moral-cognitivism/>; see also Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, 101 PHIL. REV. 115 (1992); SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* (1993); SIMON BLACKBURN, *SPREADING THE WORD: FOUNDINGS IN THE PHILOSOPHY OF LANGUAGE* (1984); DAVID BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* (1989); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990); GEOFFREY SAYRE-MCCORD, *ESSAYS IN MORAL REALISM* (1986); RUSS SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* (2003); MICHAEL SMITH, *THE MORAL PROBLEM* (1994).

realism makes a difference not only to our moral discourse, which they believe treats moral realism as the “default” position, but also to our attitudes and actions.<sup>12</sup> The truth of moral realism matters, they have sometimes insisted, to our ability to justify what we do—to our ability to see ourselves, in acting morally, as acting for reasons. Were we to become convinced that there are no moral truths, we would cease to see ourselves as having reasons, aside perhaps from instrumental, self-serving reasons, to constrain what we do, let alone to engage in altruistic endeavors.<sup>13</sup> The truth of moral realism, therefore, also matters, they have sometimes suggested, to our motivation to conform our conduct to the dictates of what we suppose to be true morality. We would be far less motivated to do what we did not see ourselves as having reason to do, particularly where the action involved might require some self-sacrifice. For their part, anti-realists have gone to great lengths to argue that, contrary to realist claims, moral discourse and debate would carry on much as they always have, and people would be motivated (or not) to behave “morally” much as they always have, whether or not there are moral “facts” or “truths” in the realist’s sense.<sup>14</sup>

A notable feature of King’s own position, and one that runs against the grain of most contemporary work in philosophical ethics, is his apparent assumption that moral truths have their source in God. As already noted, he describes a just law as man-made law that is in conformity with “the moral law or the law of God.”<sup>15</sup> And he invokes the view of St. Thomas Aquinas, that “[a]n unjust law is a human law that is not rooted in eternal law and natural law.”<sup>16</sup> Yet he also suggests, in a more Kantian, less theological spirit, that “[a]ny law that uplifts human personality is just. Any law that degrades human personality [as the segregation statutes did] is unjust.”<sup>17</sup> Or again, also in a more Kantian spirit, though he invokes the terminology of Martin Buber, he remarks that segregation “substitutes an ‘I-it’ relationship for an ‘I-thou’ relationship and ends up relegating persons to the status of things.”<sup>18</sup> Despite comments like these, King clearly did imagine some relationship between morality and God. His *Letter* does not make clear, however, whether he subscribed in particular to a version of the “Divine

---

12. On the idea of moral realism as a “default” position, see BRINK, *supra* note 11.

13. For general discussion of the question and a defense of the realist position, see Nicholas Sturgeon, *What Difference Does It Make Whether Moral Realism Is True?*, 24 S. J. PHIL. (SUPP.) 115 (1986).

14. This sort of position, I believe, lies behind much of Gibbard’s expressivist theory of normative judgment. See GIBBARD, *supra* note 11.

15. KING, *supra* note 1, at 82.

16. *Id.*

17. *Id.*

18. *Id.*; see also IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L.W. Beck trans., Bobbs-Merrill Co. 1959) (1785) (emphasizing, in elaborating the Second Formulation of the Categorical Imperative, the distinction between persons and things, or “objects of inclination”).

Command Theory," according to which morality just consists in whatever God commands, or whether he viewed God as, instead, the upholder or enforcer or exemplar of moral truths that are as much "free-standing" as truths of logic.<sup>19</sup> On views of the latter sort, to mention just a few examples, morality is grounded in intrinsic values, or it rests on an unconditioned value, or it arises from a counterfactual, intersubjective agreement or consensus.<sup>20</sup> According to the array of theories of a free-standing morality, the normative has its status as normative quite apart from God.

Most moral philosophers, myself included, would regard it as a mistake to think that the existence of moral truths, and so the existence of a higher law, has any crucial connection with God (assuming God exists), let alone with religion.<sup>21</sup> The expression, 'higher law,' by the way, does not figure in theoretical work in metaethics; and no doubt this is largely because of its historical association with religious belief and a "natural law" tradition that links the existence and import of moral truths with the existence of God. To be sure, throughout human history, a great many people have believed that morality comes from God or in some way depends on God. That just means, according to the dominant view among philosophers, that many people have been and continue to be mistaken.

Those familiar with the old "Euthyphro problem," from the Platonic dialogue, *Euthyphro*, will readily see why philosophers have tended to reject the common view that morality has its source in God.<sup>22</sup> Euthyphro is intent on prosecuting his own father for murder, declaring to Socrates that it matters not whether the alleged murderer is a relative or a stranger.<sup>23</sup>

19. Whether King made his views clear elsewhere, I do not know. What matters for my purposes are not King's ultimate, considered views—I am not concerned with exegesis—but the usefulness of his *Letter* for purposes of disambiguating the issues of interest given the topic of this conference.

20. For a classic example of the first sort of view, see G.E. MOORE, *PRINCIPIA ETHICA* (rev. ed. 1993). Kant's view is complex but on some interpretations suggests something like the second picture. See KANT, *supra* note 18. The third idea I mean as a crude way of summarizing the family of broadly constructivist ethical theories. See, e.g., John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515 (1980); cf. David O. Brink, *Rawlsian Constructivism in Moral Theory*, 17 *CAN. J. PHIL.* 71 (1987); THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1998).

21. When I say "most philosophers," my point isn't about numbers. Rather, my point is that at least for the last century, most philosophical work in metaethics, and certainly the work that has had by far the greatest impact on the field, has proceeded on the usually unstated assumption that we need not invoke God in order to understand the nature of morality or its foundations. In this way, moral philosophy largely operates much as do the natural and physical sciences, which proceed on the unstated assumption that God need not figure as a part of our best explanatory and predictive theories about the natural world.

22. See PLATO, *EUTHYPHRO*, in *EUTHYPHRO, APOLOGY, CRITO AND THE DEATH SCENE FROM PHAEDO* 1 (F. J. Church trans., Liberal Arts Press 1948) (n.d.).

23. *Id.* at 3–4.

Socrates asks Euthyphro whether he understands piety so well that he can be confident that in bringing his own father to justice he, Euthyphro, does nothing impious.<sup>24</sup> Euthyphro, as the conversation progresses, offers Socrates the following analysis of piety: “[P]iety is what all the gods love and . . . impiety is what they all hate.”<sup>25</sup> Socrates then asks the critical question, “Do the gods love piety because it is pious, or is it pious because they love it?”<sup>26</sup> He goes on to argue that piety must be loved by the gods *because* it is pious and not pious because they love it; the gods’ love for piety is an *effect* of piety, he argues, not its *essential character*.<sup>27</sup> The problem has been expressed in ways that make the difficulty for the Divine Command Theory more transparent. For example, if torturing infants were wrong solely because God disapproved of it and not because of the existence of moral truths that God knows and answers to, then torturing infants might just as well have been permissible had God’s whims only been different. It does not help to insist that God is supremely good and so would never will the torture of infants, for that is just to concede the point, acknowledging the existence of a standard of goodness which, as it happens, God perfectly meets.<sup>28</sup>

The force of the Euthyphro problem was apparently well appreciated by at least one American judge. *Ferguson v. Gies*<sup>29</sup> was a Michigan case decided in 1890, six years before the decision of the United States Supreme Court in *Plessy v. Ferguson*.<sup>30</sup> In *Ferguson*, the Michigan Supreme Court ruled that an 1885 Michigan act precluded separation in public places or conveyances based on race.<sup>31</sup> Consider Judge Morse’s stunning opinion in that case:

This statute exemplifies the changed feeling of our people towards the African race, and places the colored man upon a perfect equality with all others, before the law in this state. Under it, no line can be drawn in the streets, public parks, or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or

---

24. *Id.* at 4.

25. *Id.* at 11.

26. *Id.*

27. *Id.* at 11–13.

28. See John Arthur, *Does Morality Depend on Religion?*, in MORALITY AND MORAL CONTROVERSIES 9 (John Arthur ed., 3rd ed. 1993); JAMES RACHELS, THE ELEMENTS OF MORAL PHILOSOPHY ch. 4 (3d ed. 1999).

29. 46 N.W. 718 (1890). My thanks to Anthony Rosati for the reference to this case.

30. 163 U.S. 537 (1896) (upholding the doctrine of separate but equal).

31. *Ferguson*, 46 N.W. at 721.

conveyances mentioned in this act . . . .

. . . .

The prejudice against association in public places with the negro, which does exist, to some extent, in all communities . . . is unworthy of our race; and it is not for the courts to cater to or temporize with a prejudice which is not only not humane but unreasonable. Nor shall I ever be willing to deny to any man any rights and privileges that belong in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows—for something that he could not help in the first instance, or ever afterwards remove by the best of life and human conduct. And I should have but little respect or love for the Deity if I could for one moment admit that the color was designed by Him to be forever a badge of inferiority, which would authorize the human law to drive the colored man from public places, or give him less rights than the white man enjoys.<sup>32</sup>

I present the Euthyphro problem here not to insist that the matter is settled, although that appears to be the dominant view in moral philosophy. No doubt many believe that they have an answer to the problem, and even some philosophers continue to hold theologically based conceptions of morality. Rather, I present it for two reasons. The most important is that I seek to clarify the content of our first question about the existence of a higher law, namely, that it is a question about the existence of moral truths, *whatever their foundation may be*, and we should not conflate that question with the more specific question of whether moral truths have their source in God. A second reason, however, is simply to mark a critical contrast between the views of someone like King, and of many key historical figures in the law,<sup>33</sup> and the leading views in philosophical ethics. The Euthyphro problem, by the way, is widely thought by philosophers to be fully general and so to bedevil not only divine command theories but a number of other important metaethical theories as well.<sup>34</sup>

Let me emphasize that it is compatible with appreciating the force of the Euthyphro problem to believe not only that God exists and that God is especially concerned with morality but that certain religions accurately

---

32. *Id.* at 720–21 (citation omitted).

33. See STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

34. See SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* 41–43, 51 (raising a version of the “Euthyphro dilemma” as a problem for “all forms of constructivism”).



express moral truths. After all, if God exists, he could just as well “pass along” moral truths as truths about logic, physiology, or any other matter, and he could just as well do it through religion as through any other device, though presumably we would want a plausible explanation of why we should believe that religions, and some but not others, are roughly reliable trackers of moral truths.<sup>35</sup> In any case, the Euthyphro problem fundamentally concerns the foundations of ethics and basic conceptual truths about morality, not questions about the existence or moral nature of God.

Leaving the Divine Command Theory to one side, we might notice that a difficulty appears to arise even for the weaker view that morality depends on God as enforcer, without whom we would fail to be *motivated* to behave as morality requires. To do what we ought out of fear or even love of God is, arguably, not to behave morally at all; to borrow the Kantian lingo, it is to act heteronomously rather than autonomously. We would not be moved to act as we ought because that is what morality requires—we would not be moved to act *for duty's sake*. Rather, we would be moved to act, for example, only (or mostly) out of fear of God's punishment, disapproval, or rejection or out of love of God and a desire to obtain God's favor, perhaps including the rewards of a possible afterlife.<sup>36</sup> Again, it is not clear whether King himself favored something like the weaker view or the stronger view represented by the Divine Command Theory. For present purposes, what matters is that the weaker view implicitly recognizes the distinction between the questions of whether there are moral facts and whether moral facts are God-given.

To reiterate, the first question that we might be raising when we ask whether there is a higher law is whether there are moral facts or truths about morality. As I have indicated, that question should not be confused with questions about the existence of God or about God's relationship to a certain possible subset of truths about the world, namely, the moral ones. The only way to attempt to answer this first question is, again, to engage in philosophical inquiry. Of course, philosophers disagree among themselves even about the precise nature of philosophical inquiry and methodology. Philosophers would nearly all agree, however, that philosophical inquiry (and so moral inquiry) is not empirical inquiry as we ordinarily understand it—whether anthropological, historical, psychological, or biological—even

---

35. It does not follow from the fact that God, assuming he exists, *could* render certain religions reliable trackers of moral truths that he *did*.

36. Of course, one could take the following view: Fear and love of our parents may initially prompt moral behavior, but as we mature, we come to value morality and act morally for its own sake. Likewise, fear and love of God may initially prompt moral behavior, but as we mature in our understanding of God and morality, those primitive motives are supplemented by a motivationally sufficient respect for morality. Notice, however, that this would seem to reduce God's motivational role, and the motivation God would provide would not itself be moral motivation but an impetus that may lead to the development of properly moral motivation.

if empirical inquiry is relevant to philosophical and moral inquiry; and it is not theological inquiry.

## II. HIGHER LAW AND POSITIVE LAW

Now sometimes when people ask whether there is a higher law, they do not appear to be interested in the question of whether there are moral truths, at least not directly. Rather, they seem to be interested in the question of the relationship between such moral truths as may exist and our law; in asking whether there is a higher law, they mean to ask about the limits, authority, and binding force of positive law. This suggests a second question about the existence of higher law: Is positive law in some way normatively dependent upon or partially constituted or conditioned by morality?<sup>37</sup>

In King's *Letter*, we find him equivocating between the two classic theories about the relationship between morality and law: natural law theory and legal positivism.<sup>38</sup> On the one hand, King's description of just law as man-made *law* that conforms to morality accords with positivist thinking, which tells us that the question of whether a rule is valid law and the question of whether it is morally acceptable or just are distinct.<sup>39</sup> On the other hand, King's announcement that he concurs with St. Augustine in holding that "an unjust law is no law at all" appears to place him on the side of the natural law theorists, who have traditionally held that it is a necessary condition on an enacted rule's being a *law* that it comport with morality.<sup>40</sup> More precisely, he sides with the natural law theorists assuming that he does

37. I have framed the question in terms of true morality, but of course, we could also frame the question in terms of the conventional morality of a particular society. Also, I have framed the question loosely to allow for a variety of answers as to what connections hold between positive law and morality.

38. In keeping with the informal nature of this essay, my discussion offers just the sketchiest depiction of natural law theory and legal positivism, overlooking a great many complexities. For those not already familiar with the classic works of the natural law/legal positivism debate and who seek useful background, see Leslie Green, *Legal Positivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2008), <http://plato.stanford.edu/archives/fall2008/entries/legal-positivism/>; John Finnis, *Natural Law Theories*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/natural-law-theories/>; Leslie Green, *Legal Obligation and Authority*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/legal-obligation/>; Andrei Marmor, *The Nature of Law*, in *supra*, <http://plato.stanford.edu/archives/fall2008/entries/lawphil-nature/>; see also *infra* notes 39–41.

39. For a classic statement of the positivist view, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593–629 (1958) [hereinafter Hart, *Positivism*]; H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) [hereinafter HART, *CONCEPT OF LAW*].

40. For a classic statement of natural law theory, see ST. THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* (William P. Baumgarth & Richard J. Regan, eds., Hackett Publ'g Co. 1988).

not invoke Augustine's idea merely to express the thought that unjust laws have no legitimate claim on our obedience, a thought with which many a legal positivist would agree.

The debate between legal positivists and natural law theorists has taken many twists and turns over the years, and contemporary scholars actively involved in that debate likely see it as having progressed well beyond the traditional impasse.<sup>41</sup> Those on either side can agree as to certain ways in which the law may be connected to morality and as to certain ways in which judges adjudicating legal questions may properly take morality into account in reaching their decisions. Both can accept, as a contingent matter, that we would not be able to survive in a society that had a system of law that did not include among its legal rules certain basic moral requirements—rules regulating the use of force, rules regulating property, and so on; so any system of law will likely include some moral rules.<sup>42</sup> More generally, as a number of legal philosophers have emphasized, the “obvious law,” as Michael Moore puts it—that which is uncontroversially positive law—may *explicitly incorporate* morality.<sup>43</sup> And it may do so beyond what is strictly necessary for our survival. Moore's illustrations include the following: the incorporation into the Constitution of a right to free speech and the requirement of equal protection, the dependence of liability in the common law of tort on whether a person has behaved “reasonably,” and statutes that instruct judges to award custody of minor children based on the “best interest” of the child.<sup>44</sup> Morality may also come into play, for both positivists and natural law theorists, in “hard cases,” although, for the legal positivist, these are cases in which the law has, so to speak, “run out,” whereas the appeal to morality for a natural law theorist takes place within the law. Where these views may still come apart, to return to the traditional divide, is with respect to the question of whether it is a necessary condition on a rule (or perhaps on a set of rules) counting as law that it comport with morality.<sup>45</sup>

---

41. The famous Hart–Fuller debate provides a feel for the natural law/legal positivism debate at a relatively early stage. See Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697 (1956); Hart, *Positivism*, *supra* note 39; Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); HART, CONCEPT OF LAW, *supra* note 39; H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281 (1965) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)); LON L. FULLER, THE MORALITY OF LAW 187–242 (rev. ed. 1969).

42. See, e.g., HART, CONCEPT OF LAW, *supra* note 39.

43. Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523 (2007). *But see infra* note 46.

44. Moore, *supra* note 43, at 1527–28.

45. I say “may” come apart for two reasons. First, some might still wish to defend a traditional natural law theory. Second, even if we should conclude that natural law theory is false—that it is not a necessary condition on the legal validity of rules that they comport with morality—some may wish to defend under the label “natural law theory” views which envision a tighter connection between law and morality than most legal positivists believe exists. For a possible example of the latter, see

Whether fitting with the requirements of morality is a necessary condition on a rule's counting as law is, of course, a difficult philosophical question; so is the more general question of the various ways in which law and morality might be related. As a consequence, our second question about higher law can also be addressed only by engaging in philosophical inquiry; and that inquiry must be grounded in a firm understanding of the evolving natural law/legal positivism debate. Efforts to address the question fruitfully may also require familiarity with such diverse areas of philosophy as political theory, action theory, metaethics, metaphysics, and the philosophy of language.

Does it matter whether positive law is in some way dependent upon or partly constituted or conditioned by morality? How we answer the second question certainly bears on how we understand the rule of law and the role of judges, and so on how we develop our theories of adjudication. If, for example, rules can count as valid law only if they also comport with morality, then adhering to positive "law" will not be sufficient for assuring the rule of law; and the efforts of judges to follow the law in deciding cases will require that they attend not only to precedent and legislatively enacted rules, for example, but also to the requirements of morality. At a deeper level, though, whether and how it matters depends on whether moral realism is true and whether it matters if moral realism is true. Of course, even if moral realism is true and even if that matters, a residual difficulty would remain for either legal positivism or natural law theory, though perhaps especially for natural law theory.<sup>46</sup> For even if there is a true morality, we cannot always be confident that we have accurately determined what morality requires. Thus, we can expect that moral and, hence, legal disagreement will be a persistent and manifest feature of life, at least in any society that protects freedom of thought and expression.

---

Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

46. It is a difficulty for legal positivism in one of two ways. First, "inclusive" legal positivism allows that positive law may incorporate moral rules, and so the epistemic and attendant difficulties would emerge in judges' efforts to interpret and apply the law. Second, even for "exclusive" legal positivism, which does not allow that positive law may incorporate moral rules, judges may, in "hard cases," turn to morality to reach a decision, and here, again, epistemic and attendant difficulties would emerge. On the distinction between inclusive and exclusive legal positivism, see, for example, W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

### III. HIGHER LAW AND LEGAL OBJECTIVITY

A final question that we might be asking when we ask about the existence of a higher law does not directly concern either the existence of moral truths or the relationship between any such truths and the positive law. The letter of invitation for this conference included the following remark: "At the beginning of the Twentieth Century, Oliver Wendell Holmes ridiculed the notion of a higher law as 'that brooding omnipresence in the sky.'" We might better identify our final question and distinguish it from the previous two if we look closely at what Holmes said.

First, Holmes did not refer to the notion of a higher law as a brooding omnipresence, rather he rejected a certain picture of the *common law* which, in his pejorative terms, depicted it as a "brooding omnipresence in the sky."<sup>47</sup> In rejecting this picture, he did not mean to reject the common law as authoritatively recognized in particular states. Rather, accepting as among his starting points that "there is no common law of the United States," he rejected a view of the common law as "authoritative law" that issues from no political authority whatsoever.<sup>48</sup> The sentence that begins with the famous clause "[t]he common law is not a brooding omnipresence in the sky" continues on to describe it as "the articulate voice of some sovereign or quasi-sovereign that can be identified."<sup>49</sup> It is always, he tells us, the law of some state.<sup>50</sup>

In light of these remarks, as well as Holmes's more general jurisprudential ideas, he is perhaps best understood as follows.<sup>51</sup> Holmes's target was not higher law in the sense of moral truths in general or God-given moral truths in particular, though he may have been both a moral anti-realist and an opponent of any theologically based moral theory.<sup>52</sup> Nor was his target, at least not immediately, any particular view about the relationship between law and morality. Rather, his target was a particular view, or family of views, about the objectivity of law—about the nature of legal facts, facts about what the law requires, forbids, or permits. According to the view he apparently rejects, legal facts exist (or can exist) wholly independent of, and so entirely apart from, the authoritative issuances of any legal body, whether legislature or court.<sup>53</sup> Such a picture of legal

---

47. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

48. *See id.* at 221–23.

49. *Id.* at 222.

50. *Id.*

51. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

52. It would obviously go beyond the purposes of this essay to try to examine Holmes's writings in order to figure out what his more general metaethical views might have been. Never having explored Holmes's writings with an eye to such matters, I advance no claims here regarding his views.

53. For discussion of competing pictures of the nature of legal facts and their relative strengths

objectivity—of the nature of legal facts—might equate legal facts with facts about morality or with some subset of such facts, but it need not. Perhaps as a historical matter, many have treated as roughly the same, or at least as importantly related, the notions of higher law (as understood in the “natural law” tradition) and of the common law,<sup>54</sup> and perhaps Holmes even had some such idea in mind when he criticized the idea of the common law as a brooding omnipresence. Still, his remarks arguably suggest a more general target.

The final question one might have in mind, then, in asking whether there is a higher law is whether there are legal facts, and in particular, whether there are legal facts that are in some measure independent of the decisions of judges.<sup>55</sup> Higher law, if it exists, is just whatever is truly the law—whatever the law truly requires, forbids, or permits—where that is not simply a matter of actual judicial decisions. In his *Letter*, at least on one possible reading, King supposed that legal facts are to some degree independent of extant judicial opinions, and they are partly independent precisely because they are partly constituted by facts about the requirements of justice.<sup>56</sup> As a

and weaknesses, see Connie S. Rosati, *Some Puzzles About the Objectivity of Law*, 23 *LAW & PHIL.* 273 (2004). See also Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 *U. PA. L. REV.* 549 (1993), reprinted in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 203 (Andrei Marmor ed., 1995). The view that is arguably Holmes’s target is roughly what Coleman and Leiter call “strong objectivity” about law.

54. See CORWIN, *supra* note 10; SMITH, *supra* note 33, at 45–64 (discussing the classical view that the common law is *evidence* of transcendent law, ultimately deriving from God). Smith suggests that our contemporary legal practice and talk seem to presuppose the classical view of law, despite widespread rejection of its underlying ontology. See SMITH, *supra* note 33, at 45. I agree that our legal practice and talk seem to presuppose the existence of objective legal facts, but I do not believe that they presuppose the classical view of law, or even something close to the classical view. To put the point more generally, I believe that our legal discourse and practice may presuppose the existence of legal facts but that they do not presuppose any particular metaphysical picture of those facts. In this way, legal discourse and practice operate much like moral discourse and practice, which arguably presuppose the existence of moral facts without presupposing the truth of any particular metaethical theory. Of course, at the time Holmes was writing, the classical view might have been the only metaphysical picture of law on offer. For that reason, his actual intended target may have been the classical view. My point is that whatever he may have intended, the best understanding of his ideas treats them as having a more general target. In any case, I mean to emphasize in distinguishing this final question about higher law from the first and second, that we should not make the mistake of confusing the question of whether there are independent legal facts with the question of whether the classical view of law is true. We should not confuse these questions any more than we should confuse the question of whether moral realism is true with the question of whether a particular version of moral realism (such as traditional natural law theory) is true.

55. I limit my discussion of the objectivity of law to questions about independence of law from the decisions of judges, but obviously a fuller treatment would consider statutory law, and so on.

56. See KING, *supra* note 1, at 82.

consequence, civil disobedience—willful and open violation of “the law”—can manifest fidelity to law.<sup>57</sup> Of course, extremely difficult questions exist in the philosophy of law about the constitution of legal facts, about how we would have epistemic access to these facts, and about the degree of independence they can have and still be normative. The critical point is that questions about the objectivity of law should not be confused with questions about moral realism or about the relationship between law and morality. There could be objective facts about the law, legal facts that are in some measure independent of the actual decisions of judges—higher law in this thin sense—even on a strict, positivistic conception of law coupled with an anti-realist metaethics.

Our efforts to address the third question, and so to make progress in resolving an array of puzzles about the objectivity of law, will, once again, require distinctively philosophical inquiry. And like our efforts to address the first and second questions, that inquiry would best be undertaken with a firm grasp of areas of philosophy beyond philosophy of law proper. Or better, it would best be undertaken with a broad view of what the philosophy of law may encompass.

Does it matter whether there is a higher law in the sense at stake in this third question? It matters to our understanding of the rule of law, and arguably, to whether the rule of law can exist in any meaningful sense. If the law was just whatever judges decided, then judges themselves would not—indeed, could not—be following the law in reaching their decisions; they could not be guided by the law in their decision-making. Under such circumstances, the ideal of the rule of law would be without much force. If, on the other hand, independent legal facts existed, then judges could, in principle, aim to follow the law—to determine what the law really is and what it really requires by way of disposition of a case. Under these circumstances, we could meaningfully speak about the rule of law. Of course, the foregoing remarks bear on the general importance of whether there is a higher law in the sense at issue in our third question. But the full import of the existence of legal facts would depend on the precise nature of those facts, and in particular, on whether those facts are partly constituted by moral facts. Notice, for example, that if legal facts were partly constituted by moral facts, then finding out the legal facts might well settle what to do in a way that finding out the legal facts would not settle what to do, if those

---

57. See KING, *supra* note 1, at 83–84 (“In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”).

facts were not partly constituted by moral facts and so could come into conflict with morality.

#### IV. CONCLUDING REMARKS

To summarize, in asking whether there is a higher law, we might be asking at least three distinct questions. First, are there moral facts—is one or another version of moral realism true? Second, is the law, *qua law*, dependent upon or partly constituted or conditioned by morality? (And if so, in what way: incidentally, as a matter of the content of particular legal systems, or conceptually, as a necessary condition on a rule or set of rules being law at all?) Finally, are there legal facts that exist in some measure apart from, and that function as “higher” than, the standing law as reflected in extant and currently authoritative judicial decisions? The import of affirmative answers to these questions depends, in brief, on such things as whether and how the truth of moral realism and the rule of law matter.

Having emphasized the differences among these questions, I want to stress, in closing, a point that should by now be obvious: however distinct they may be, they are nevertheless deeply interrelated. Notice, for example, that certain ways of answering the second question presuppose a positive answer to both the first and third questions. Some who have talked in terms of higher law have presumably been most interested in whether legal facts are themselves, at least in part, also moral facts. And insofar as they are led to answer the second question affirmatively, they presuppose the existence of both moral facts and legal facts. More concretely, they might take the view, for example, that there are legal facts about what constitutes equal protection and that these legal facts are (partly) a matter of the moral facts about what equal protection truly requires. Or they might take the view that there are legal facts about what the legal right of freedom of speech encompasses and that these are (partly) a matter of the moral facts about the scope of the moral right to freedom of speech. Either of these more specific views involves a positive answer to the second question and so to the other two.

Likewise, certain ways of answering the first question restrict how one can answer the second and third questions. Those who accept anti-realist views in ethics, for example, can answer the third question affirmatively, but they must answer the second question negatively. More precisely, they must offer a flatly negative answer, which denies that law depends upon or is partly constituted or conditioned by morality. No necessary connection exists between law and morality, and no contingent connections exist



either—how could they when there is no “true morality”? But they might, in addition, advance a kind of “error theory.”<sup>58</sup> That is to say, they might allow that our legal practice and discourse perhaps do presuppose that law is dependent upon or partly constituted or conditioned by morality, but insofar as they do, our legal practice and discourse are in error because there are no moral facts.<sup>59</sup> Finally, they might also allow for various connections between positive law and *conventional* morality. Any such allowance, of course, would simply highlight their rejection of the kind of higher law that moral realists insist is needed to ground moral criticism of the positive law—criticism of the sort King’s *Letter* so eloquently provided.<sup>60</sup>

As we undertake to answer any of the questions explored herein, we must obviously keep in mind their distinctness. Otherwise, we risk conflating issues and reaching inappropriate conclusions. At the same time, if we are to avoid inconsistency and oversimplification, we must bear in mind the deep connections between the three questions and aim for a coherent set of answers to them. That the questions would be so deeply interconnected should, in the end, come as no surprise. Our concepts of law and morality are of two overarching systems of normative regulation, each of which has been said to claim a kind of objectivity and overriding authority. We will therefore naturally wonder how these systems are related to one another and whether either has the kind of objectivity and authority it claims. It is this, I have been suggesting, that we are essentially wondering about when we inquire about the existence and importance of higher law.

---

58. On the idea of an “error theory” in ethics, see J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977).

59. This quick description overlooks the various ways in which contemporary anti-realists have tried to make room for talk of “moral facts” and “moral truth.” Let me simply register here that far more nuanced positions may be available to the anti-realist than the one I sketched. *See supra* note 11.

60. Here, too, anti-realists would disagree.