

## ON EMAD ATIQ'S INCLUSIVE ANTI-POSITIVISM

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THERE ARE well-known instances of morally abhorrent law, like the legal rules of Nazi Germany or apartheid South Africa. According to Emad Atiq, the existence of morally abhorrent legal rules presents an *extensional challenge* to legal anti-positivism.<sup>1</sup> Atiq acknowledges that morally abhorrent legal rules are intuitively legally valid, and yet anti-positivism (which maintains that the legal validity of a rule is partly grounded in that rule's moral merit) cannot explain why. In his paper, "There Are No Easy Counterexamples to Legal Anti-positivism," Atiq puts forward a type of anti-positivism capable of responding to this specific extensional challenge. He calls it Inclusive Anti-positivism (IAP).

IAP "identifies the property of *being law* with the ... normative property of rules (*being normatively well supported to a high enough degree*)."<sup>2</sup> Atiq's reasoning goes like this: we can identify legal rules wherever the subjects of those rules have "broadly normative reasons" to follow them.<sup>3</sup> These broadly normative reasons are grounded in irreducible moral facts and, as such, the legal validity of rules is partly grounded in the existence of moral facts that are not dependent on social facts. Because IAP grounds legal validity in a less restrictive conception of moral facts (we are no longer concerned with the moral merit of the rule in question when determining its legal validity, but whether it is essentially good to follow), IAP is able to account for the legality of morally abhorrent rules while preserving morality as an existence condition of law.

In section I, I point out that IAP presupposes a conceptually necessary connection between law and coercion. In section II, I briefly discuss internal- and external-to-practice appraisals of legal rules. Last, in section III, I touch upon the explanations of legal normativity offered by IAP and some positivists. The point of this response is not to deny Atiq's claim that there can be moral reasons to comply with morally abhorrent law. Rather, its aim is to raise a question: Is IAP's

1 Atiq, "There Are No Easy Counterexamples to Legal Anti-positivism," 3 (hereafter cited as "Counterexamples").

2 Atiq, "Counterexamples," 16.

3 Atiq, "Counterexamples," 13.

central claim about legal validity necessarily at odds with positivism's central claims that law is fundamentally a social institution and that what counts as law ultimately depends on social sources?<sup>4</sup>

## I

Rules are normative. This means that they are action guiding—they serve as reasons for action and as a means to appraise the conduct of others. Take netball: if you want to play netball, then you have reason to comply with the rules of netball. If you do not follow the rules, then others can say that you are playing netball incorrectly and not pick you for their team. The law is taken to be normative because, within a given territory, legal rules typically tell law subjects what they must refrain from doing and how to do things legally (e.g., how to enter into a contract).

Unlike the rules of netball, law's normativity is taken to be unconditional. Law does not say: if you want to be law abiding, then you should not *A*. Rather, it says to everyone within its jurisdiction, regardless of whether they accept the law as an authority, "*Do not A*." This "conditionality" of rules leads to a distinction: that there are two basic senses of normativity.<sup>5</sup> That my daughter, who cannot swim, will drown if she goes into a pool alone is an *objective* reason for her to comply with my rule, "*Do not go swimming alone*." This means that her inability to swim is a reason to "*not swim alone*" that exists even if she thinks that the water is shallow or that she is secretly a mermaid. On the other hand, her belief that she is secretly a mermaid is also a reason for action, but in the *subjective* sense. Despite what objectively may be the case (she cannot swim), she thinks she has reason to go swimming alone (she is secretly a mermaid).

Atiq's General Grounding Claim (GGC) for legal validity asserts: "the rule's legality is grounded in whatever normative reasons there are for agents to follow the rule."<sup>6</sup> So, per IAP, a rule can only be legally valid if there is an *objective* reason for complying with it. According to Atiq, we have objective reasons for complying with a rule whenever the rule in question surpasses a normative threshold that makes it worthy of adoption into the legal system by relevant officials.<sup>7</sup> The normative threshold that marks the difference between legally valid and not legally valid can be surpassed in three situations: (1) if a rule is of a certain moral

4 Sometimes this claim is known as the "Social Thesis" or "Social Fact Thesis." See Himma, "Philosophy of Law"; and Woodbury-Smith, "Inclusive Legal Positivism."

5 For a classic discussion of the two senses in which rules apply, see Foot, "Morality as a System of Hypothetical Imperatives."

6 Atiq, "Counterexamples," 16.

7 Atiq, "Counterexamples," 20–22.

standard; (2) if a rule is an entrenched social convention; or (3) if a rule is a blend of the two.<sup>8</sup> This means there can be rules whose legal validity is rooted in their moral merit, even if they are not conventionally followed. Likewise, there can be rules whose legal validity is grounded in their existence as entrenched social conventions, even if they are morally abhorrent.

IAP, therefore, shifts the focus of anti-positivism away from considerations of a rule's moral merit (the focus of classic anti-positivism) and toward the objective reasons we, as subjects, have for complying with rules, including the morally abhorrent ones. Critically for Atiq, such reasons are *always* moral. Much of his article is devoted to supporting the assertion that weakly moral reasons for action exist, and that self-protection is a weakly moral reason for action.<sup>9</sup> So, if there are weakly moral reasons like self-protection to comply with a morally abhorrent law, then that law can satisfy the GGC for legal validity and IAP is counterexample proof.

Let us grant Atiq's GGC, that what makes a morally abhorrent rule legally valid is that it is socially entrenched to such a degree that its subjects have objective moral reason(s) to comply with it. Is it the case that this conception of legal validity is actually *anti-positivist* in that it is not ultimately grounded in social facts? The answer here must be no.

Consider Nazi Germany. According to Atiq, while there were overwhelmingly strong moral reasons for its subjects to reject and subvert Nazi Germany's laws, there was also at least one weakly moral reason to comply with them: the good of self-protection.<sup>10</sup> Because of this weakly moral reason to comply with Nazi law, Nazi law was "good to follow to some degree."<sup>11</sup>

What does it take for Nazi law to be "good to follow to some degree"? According to Atiq, it is when "deviating from conventionally embraced rules renders individuals vulnerable to sanction."<sup>12</sup> He later writes that the "moral reason to follow a conventionally embraced rule might be partly grounded in nonmoral facts, like the rule's conventionality. But it is also grounded in a pure moral fact: the moral principle that *if following a rule promotes your interests*, then there is some moral reason to follow it."<sup>13</sup>

Here I want to point out that there can be a difference between complying

8 Atiq, "Counterexamples," 15–16. Throughout the discussion, when I refer to morality I am invoking a sense of ideal morality.

9 Atiq, "Counterexamples," 6–8.

10 Atiq, "Counterexamples," 6–8.

11 Atiq, "Counterexamples," 9.

12 Atiq, "Counterexamples," 6.

13 Atiq, "Counterexamples," 13, emphasis added.

with a law for self-protection (e.g., behaving legally because otherwise one would be liable to sanction) and complying with a law for the promotion of one's interests. Consider a law (valid in accordance with its sources) requiring that I throw rocks at unwed mothers. Further consider that this law is conventionally practiced. In the absence of institutionalized sanctions, not complying with this law would, at worst, decrease foot traffic to my business and suppress my interest in having lots of money. Now others who prioritize having lots of money above their neighbor's health may disagree, but it is hard to see how I could have even a weakly moral reason to comply with that law when the worst I would face for refusing to cast stones upon certain persons is a reduction in my wealth.

However, if the legal system backed this law with serious sanctions and my noncompliance meant that the state would seize my business and detain my husband, my children, and myself in labor camps, *then* it seems like I could have a weakly moral reason to comply with the law, as such compliance is about promoting my interests in survival and protecting my family. Indeed, this was how Nazis were able to create Jewish police collaborators in their ghettos: by appealing to our innate drive to protect ourselves and our families.

Atiq's metaethical theorizing may check out. Self-protection may be an objective, weakly moral reason for complying with morally abhorrent rules. However, it seems to lead IAP into a conundrum. Following IAP, one can only appeal to self-protection as a moral reason for complying with morally abhorrent rules if certain nonmoral social facts obtain, like institutionalized sanctions. If that is correct, then the legal validity of morally abhorrent rules, per IAP, ultimately hangs on contingent social facts—specifically, whether the legal system backs such rules with serious sanctions. Atiq has, it seems, developed an anti-positivist command theory of law. Atiq may wonder how significant this observation is, given there are not, at least to my knowledge, any instances of morally abhorrent law that are not backed by sanctions. However, if IAP is meant to include a concept of legal validity in general (like positivism does), then it is an observation that needs consideration.

## II

Atiq writes: "If inclusive anti-positivism . . . is true, it remains possible for a judge to comply with her legal duties while striking down morally abhorrent laws for conflict with other laws that are morally optimal even if weakly conventional."<sup>14</sup> As an example, Atiq discusses the moral rule requiring respect for human dignity. Such a rule has "enough morally going for it" that it meets the normative

<sup>14</sup> Atiq, "Counterexamples," 22.

threshold for legal validity in Nazi Germany.<sup>15</sup> Atiq goes on to write: “Had [a rule requiring respect for human dignity] been recognized as law by Nazi jurists, there might have been greater official resistance against the Third Reich.”<sup>16</sup>

The idea here is that any of the Nazi jurists could have criticized Nazi law for being inconsistent with the rule requiring respect for human dignity for all (which, per IAP, is legally valid because it is of a certain moral standard) and still be complying with their legal duty to interpret and apply the law.<sup>17</sup> However, none of them did and the IAP claim that there was a legally valid rule requiring respect for human dignity for all in Nazi Germany strikes me as being at odds with the same intuitions Atiq relies upon when he appeals to the legal validity of morally abhorrent rules. Atiq writes that denying that the Nazis had law is counterintuitive.<sup>18</sup> How is it not similarly counterintuitive to claim that Nazis had a legal rule requiring respect for human dignity for all? The moral rule requiring respect for human dignity was not a legally valid rule in Nazi Germany for the simple reason that it was never recognized as such by any relevant legal official, despite its moral worth.

Incorporating the feature *being morally good to follow* as a conceptually necessary feature of law is sold as a benefit because it allows for an “internal-to-practice moral critique of a legal system” such that all moral critique of law is legal critique.<sup>19</sup> IAP can better track what Atiq calls the “judicial intuitions about the legality of rules” because it supports the following legal reasoning: “posited law  $x$  was never actually legally valid (or, is now invalidated) because it contravenes non-posited law  $y$ ” (where  $y$  meets the normative threshold for legal validity under IAP on the basis of its moral worth).<sup>20</sup> Inclusive positivists, Atiq acknowledges, have the ability to draw on constitutional standards and engage internal-to-practice moral critiques of law. The problem, for Atiq, is that this ability is contingent on social facts.<sup>21</sup> However, this observation is not entirely correct, as positivists, inclusive and exclusive, can engage in internal-to-practice moral appraisal of law because drawing on rule-of-law principles is always a live option.

I wonder what, exactly, the benefit is of a conception of law that concludes

15 Atiq, “Counterexamples,” 21.

16 Atiq, “Counterexamples,” 22.

17 Atiq, “Counterexamples,” 16.

18 Atiq, “Counterexamples,” 3.

19 Atiq, “Counterexamples,” 22.

20 Atiq, “Counterexamples,” 18.

21 Atiq, “Counterexamples,” 22. If this is problematic, then it should also be problematic for Atiq that IAP’s ability to account for the legal validity of morally abhorrent rules is similarly contingent on social facts.

that all moral critique of law is legal critique?<sup>22</sup> The “familiar rhetoric of the judicial process” may be such that when some judges morally critique the law, they take it to be a legal critique.<sup>23</sup> However, I see no practical difference between the following decisions: (1) “Legal rule  $x$  should be struck down because it contravenes moral rule  $y$ ” or (2) “Legal rule  $x$  should be struck down because it contravenes legal rule  $y$ ” (where  $y$ ’s legality is entirely a function of its being moral principle  $y$ ). In either case, if the relevant officials buy the arguments about  $x$ , and their legal authority grants them the relevant powers, then  $x$  will be struck down. Decision 2 may allow judges to say to themselves that they engaged solely in a legal critique of the law, but that is smoke and mirrors.

One of the most interesting parts in *The Concept of Law* comes in the penultimate chapter, where H. L. A. Hart writes:

What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.<sup>24</sup>

Hart is speaking to the power that can come from the separability of moral merit from legal validity. Our laws are *always* capable of being morally scrutinized, externally to legal practice, not only by our officials, but also by us—and this is a good thing.

### III

Another area where Atiq sees a key explanatory difference between IAP and positivism is in their explanations of law’s normativity. Atiq writes that “no positivist, as far as I can tell, construes the property of legality as essentially identical to a *bona fide* normative property.”<sup>25</sup> He is correct: positivists do not typically make strong assertions as to whether a legal rule is objectively normative in virtue of its legal validity and this is simply because positivists do not have to.

22 Atiq claims that “one of the principal motivations for being an anti-positivist is the possibility of a moral critique and improvement of law from an *internal-to-law* perspective” (“Counterexamples,” 21).

23 Hart, *The Concept of Law*, 274.

24 Hart, *The Concept of Law*, 210.

25 Atiq, “Counterexamples,” 17. For an example of a positivist doing just this, see Himma, “A Comprehensive Hartian Theory of Legal Obligation” and *Coercion and the Nature of Law*.

Here is one way a positivist could explain the normative property of a legal rule: the traditional Razian assertion is that legal rules *claim* to provide us with objective reasons for action.<sup>26</sup> This means that there can be instances in which legal rules fail to provide us with such reasons. Put far too simply: in the Razian scheme, legal rules claim to be first- and second-order exclusionary reasons for action.<sup>27</sup> Imagine that you want to *y* because *y* is fun. Act *y* is morally inert and is legal where you live, but you are currently on vacation in another country, where, you discover, there is a law prohibiting *y*. That legal prohibition claims to give you a first-order reason not to *y*. This means it claims to be a reason in itself: you should not *y* because the law you are currently subject to prohibits it. The legal prohibition also claims to be a second-order exclusionary reason for action. This means that, because you are subject to a law prohibiting *y*, you should not act in accordance with other reasons you have to *y*, like the prudential reason “*y* is fun.”

There is a sense of the term “obligation” according to which to be under a legal obligation simply means that one is subject to a mandatory rule—a rule that *claims* to impose an obligation. This is the sense we can have in mind with regard to the legal rule in apartheid South Africa that prohibited Black and white persons from associating with one another on beaches. Because of that legal rule, there was a legal obligation not to associate. And yet the moral repugnance of that legal rule and the ideology it sustained entailed that it actually provided no objective reason for action, save the avoidance of sanctions. So, despite what some legal rules may *claim* (that they are first- and second-order reasons for action), it is possible for them to fail to *actually* provide such reasons for action.

What does this have to do with IAP? As stated, IAP asserts that legal validity of a rule is identical to the rule's property of being actually normative—of actually providing objective reasons for action. Where morally abhorrent legal rules are concerned, their normative property comes down to socially contingent considerations raised in section 1: whether such rules are backed by sanctions. So, per IAP, in apartheid South Africa the desire to avoid sanctions gave white and Black persons objective reason to comply with its morally abhorrent legal rules. What I hope I have made clear in this section is that this is the same explanation of legal normativity offered by the Razian sketch above: even if a legal rule does not itself give its subjects objective reasons to comply with its directives, the legal system may give other reasons for compliance by, for instance, threatening the use of sanctions.

The only relevant difference between IAP and the Razian picture is the connection between legal validity and the normative property of legal rules. For

26 Raz, *The Authority of Law*, 30.

27 Raz, *Practical Reason and Norms*, esp. 35–48, 58–59.

those who accept the Razian picture, inquiries into legal validity are distinct from inquiries into the reasons we have for complying with legal rules. Atiq may be generally correct when he notes that positivists do not typically construe legal validity as identical to its objective normative property, but that is simply because positivists can explain the legal validity of a rule without needing to draw such an identity claim. To connect this point back to the passage by Hart at the end of section II, there are very good reasons for preferring such a conception of law.

## IV

With IAP, Atiq has shifted the moral fact of interest away from the moral merit of a legal rule and toward the rule's property of *being good to follow*. This is how IAP is able to account for the legal validity of morally abhorrent rules. In this discussion I raise three observations. First, our ability to appeal to weakly moral reasons to comply with morally abhorrent law is contingent on social facts (e.g., that the law is backed by sanctions).<sup>28</sup> Second, the upshot to IAP that all moral appraisal of legal rules is legal appraisal is not necessarily as appealing as Atiq takes it to be. Last, the Razian thesis that law *claims* to provide its subjects with objective reasons for action is not necessarily at odds with the picture of legal normativity that Atiq draws.

Of the three observations, I think the first presents the most trouble for IAP. Positivists argue that law is a social institution and that what counts as valid law ultimately depends on social sources. As I observed in section I, following IAP, unless the state gives its subjects weakly moral reasons to comply with its rules (by institutionalizing sanctions), then those rules, should any of them be morally abhorrent, would fail to be legally valid. Given this essential connection between the contingent social fact of sanctions and legal validity, IAP seems to be grounded by the positivist principle regarding the social nature of law. And so, is IAP actually *anti-positivist*?<sup>29</sup>

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28 Atiq could perhaps make the claim that obedience to morally abhorrent law is morally required for the common good, which is Aquinas's view (though Aquinas, of course, maintains that morally abhorrent human laws are not genuine instances of law). See Aquinas, *Summa Theologica*, q.96, a.4.

29 I am indebted to Emad Atiq who wrote an article that I thoroughly enjoyed spending time with (no small thing as this was written during the first lockdown of the COVID-19 pandemic). My thanks as well to the anonymous reviewers for their thoughtful and supportive com-



## REFERENCES

- Atiq, Emad. "There Are No Easy Counterexamples to Legal Anti-positivism." *Journal of Ethics and Social Philosophy* 17, no. 1 (March 2020): 1–26.
- Aquinas, Thomas. *Summa Theologica*. Translated by Fathers of the English Dominican Province. New York: Benziger Brothers, 1911–1925.
- Foot, Philippa. "Morality as a System of Hypothetical Imperatives." In *Virtues and Vices*, 305–16. Berkeley: University of California Press, 1978.
- Green, Leslie. "Positivism and the Inseparability of Law and Morals." *New York University Law Review* 83, no. 4 (October 2008): 1035–58.
- Hart, H. L. A. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, 2012.
- Himma, Kenneth Einar. *Coercion and the Nature of Law*. Oxford: Oxford University Press, 2020.
- . "A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligation of Citizens." In *Philosophical Foundations of the Nature of Law*, edited by Wil Waluchow and Stefan Sciaraffa, 152–82. Oxford: Oxford University Press, 2013.
- . "Philosophy of Law." *Internet Encyclopedia of Philosophy*. <https://iep.utm.edu/law-phil/>.
- Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. 2nd ed. Oxford: Oxford University Press, 2009.
- . *Practical Reason and Norms*. London: Hutchinson and Co., 1975.
- Woodbury-Smith, Kara. "Inclusive Legal Positivism." In *Encyclopedia of the Philosophy of Law and Social Philosophy*, edited by Mortimer Sellers and Stephan Kirste. [https://doi.org/10.1007/978-94-007-6730-0\\_62-2](https://doi.org/10.1007/978-94-007-6730-0_62-2).