Dissertation Summary:

Practical Wisdom & Meta-Normative Reflection: Essays on Legal & Moral Normativity

Emad H Atiq
PhD candidate, Princeton University, Dept. of philosophy
JD, Yale Law School

There are questions about what we legally or ethically ought to do. Are persons legally or ethically obliged to follow the law in all cases? Call these first-order *normative* questions. If first-order normative questions have factual answers, we can ask questions about the nature of the relevant facts: if persons are ethically obligated to follow the law, what kind of fact is this? Are there interesting general differences between legal and ethical facts? Call these second-order *metaphysical* questions about the normative. It is controversial whether first-order normative enquiry can proceed independently of metaphysical enquiry. In my dissertation, I argue that it cannot—normative enquiry needs meta-normative reflection. Further, I argue that the reasons why the two enquiries are related have been misconstrued even by those who accept their relatedness.

The project divides into two parts: a legal philosophical part and an ethical part. The unifying theme running through my work is that the metaphysics of legal and ethical norms can support surprising first-order legal and ethical conclusions. In the legal case, my argument proceeds ecumenically. I draw first-order conclusions from minimal and uncontroversial assumptions about law's nature—for example, that the practical significance of legal norms can be explained in wholly non-legal terms. My approach in ethics is more provincial. I develop and defend an original version of a controversial view within meta-ethics—quasi-realistic expressivism—and pursue its first-order ethical implications.

(1) From Metaphysics to Law

Chapters One through Four of the dissertation demonstrate the distinctively legal significance of meta-normative facts. Chapter One argues for a surprising and perfectly general claim about the force of legal norms. It is standardly assumed that judges have a legal obligation to follow the law in all cases. I argue that perfect fidelity to law is not and could not be a juridical ideal. Judges are not legally obliged to follow law in hard cases. A case is hard in the relevant sense when as between two rules or norms that a judge might rely on to decide the case, there *is* a determinate fact of the matter about which rule is the law, but reasonable persons can disagree about which is the law. I argue that a principle requiring strict judicial conformity to rules deemed to be (or even those most likely to be) law in hard cases could not itself be a *legal* principle, given a range of plausible theories of law's nature. On the view that, necessarily, legal rules are ones that are conventionally embraced, a rule requiring strict conformity is not conventionally embraced in modern jurisdictions. On the view that, necessarily, legal rules are a species of moral rules, a rule requiring strict conformity could not be a moral norm. I suggest that what judges are legally required to do in hard cases is decide which rule to follow based on the *non-legal* features of candidate rules rather than their apparent legality. A paper based on this chapter, entitled "Juridical Norms at the Edge of Legality," is currently under review.

In Chapter Two, I discuss the implications of my argument about law's normative significance in hard cases. A theory of judicial obligations in hard cases can be developed independently of accounts of what the law is. Consequently, the debate in analytic jurisprudence about the precise nature of legal facts as well as others in American constitutional law are irrelevant from the judicial point of view. This runs contrary to a popular view amongst legal philosophers that the discovery of non-obvious facts about the nature of law will help clarify judges' professional responsibilities. I offer the beginnings of a general theory of judicial professional

responsibility, one whose animating principle is the direct relationship between the *ex ante* certainty of a rule's legality and the strength of a judge's legal obligation to follow the rule based on its legality.

Meta-normative premises do most of the argumentative heavy-lifting in Chapters One and Two. The inferred legal conclusions are perfectly general. Chapters Three and Four weave in more substantive legal premises to deliver jurisdiction-specific legal conclusions. Chapter Three begins with a long-standing puzzle within the common law: judges classify normative questions as *questions of fact* in some legal domains and as *questions of law* in others. For example, if the question concerns the reasonableness of contractual terms, it is a question of law. If it concerns the reasonableness of dangerous risk-taking in a negligence suit, it is a question of fact. The dominant view amongst legal theorists is that the common law's fact/law distinction tracks the empirical/evaluative distinction. But judicial practice flatly contradicts this view. I suggest that judges are tracking a distinction within the domain of the evaluative: the difference between essentially convention-dependent normative questions and those that are convention-*in*dependent. The former do not admit of determinate answer except by appeal to social conventions and are for sound conceptual and pragmatic reasons classified as *legal* questions. The latter implicate foundational moral norms having to do with what persons are owed simply based on their personhood and are aptly classified as non-legal questions of fact. After defending the meta-normative distinction and clarifying its grounds, I use it to explain how judges have dealt with normative questions. Moreover, I argue that the correct legal classification of a question that arises in capital trials—whether a convicted defendant deserves to die—is as a question of fact. It is wrongly decided in certain states by judges as though it were a question of law. A version of this chapter, entitled "Legal vs. Factual Normative Questions," is forthcoming in NOTRE DAME JOURNAL OF LAW, ETHICS, & PUBLIC POLICY.

Chapter Four begins with an account of what it means for judges to follow a rule out of a sense of legal rather than moral obligation. The account draws on a point of consensus within legal philosophy that legal norms are at least partly dependent on social conventions. To follow a norm for its legality is to be moved by its convention-based normative significance. The difference between legally and morally motivated decision-making is worth clarifying because in certain contexts the law explicitly demands pure moral decision-making from legal actors. For example, a line of constitutional doctrine in the United States concerning capital sentencing procedure suggests that the mitigating weight of evidence presented by a convicted defendant must be evaluated from a *non-legal*, moral point of view. Accordingly, legally motivated consideration of mitigating evidence by judges violates the law. The argument has the significant upshot that capital sentences issued to hundreds currently on death row in the United States should be set aside. A paper coming out of this chapter, co-authored with Erin Miller and entitled "What Constitutes "Consideration" of Mitigating Evidence?, is forthcoming in AMERICAN JOURNAL OF CRIMINAL LAW.

(2) From Metaphysics to Ethics

The focus shifts in Chapters Five through Eight from legal to ethical facts. These chapters explore the relationship between quasi-realistic expressivist accounts of the nature of ethical facts and first-order ethical theory. Quasi-realistic expressivists hold that ethical judgments express motivational states. To judge that one ought to help the poor *just is* to express a desire or plan to help the poor. The motivation-expressive account of ethical judgment combines with a deflationary view of fact- and property-talk, on which the judgment that *it is a fact* that one ought to help the poor is equivalent to judging that one ought to help the poor. The ethical implications of quasi-realistic expressivism are not just interesting for friends of expressivism. They challenge assumptions made within meta-ethics more broadly.

One of the advertised virtues of expressivism is that it, unlike other views in meta-ethics, fully explains why it is a conceptual truth that the ethical *supervenes* on the non-normative—non-normatively identical individuals must be ethically identical. Chapter Five challenges this conventional wisdom. I begin by arguing that ethical supervenience has been misunderstood. The conceptual truth that needs explaining is the supervenience of

ethical properties on non-normative properties that are *repeatable*. A property is repetable if it can be shared by two numerically distinct individuals. Repeatable supervenience rather than being explained, could not even be a conceptual truth given expressivism. This result can be derived using the expressivist's preferred semantics for normative terms together with constitutive facts about our motivational states. I suggest that expressivists need to mitigate this result by accepting repeatable supervenience as an ordinary *ethical* truth—a truth they *can* explain—rather than a conceptual one. There is, in other words, pressure internal to expressivism to treat repeatable supervenience as a first-order ethical truth. Perhaps not so coincidentally, there is a minority position in metaethics that argues on more general grounds for the ethical rather than conceptual status of the truth of supervenience. A version of this chapter, entitled "The Hard Problem of Supervenience," is under review.

Chapter Six explores whether there are other ethical implications of expressivism that might be more troubling. It takes as a starting a point an argument of David Enoch's. Enoch argues that views like expressivism entail that moral disagreements are mere desire-based conflicts and, from this, absurd ethical implications follow: standing one's ground in a moral disagreement seems to be a way of behaving *partially*. I disarm the objection with an original account of the nature and value of being impartial, using only the resources available to expressivists. I argue that an agent acts impartially whenever she acts on final (i.e. non-instrumental) desires that aim at promoting the wellbeing of persons in a way that is insensitive to the identities of persons and their morally arbitrary features like their gender or skin color. To be impartial *just is* to be motivated by such "identity-independent" desires. Accordingly, one can behave impartially despite holding steadfast in moral disagreements even if they turn out to be mere desire-based conflicts. Although expressivism does not *entail* this account of impartiality, it proves illuminating for purposes of ethical theorizing. A paper based on this chapter, entitled "How to be Impartial as a Subjectivist," was published in PHILOSOPHICAL STUDIES.

Chapters Seven and Eight consider a different challenge confronting quasi-realistic expressivists—that of saying precisely what the distinction between quasi-realists and traditional *robust* realists about the ethical amounts to. Quasi-realists take ethical facts and properties to be real but in some sense minimal—admitting such entities into one's ontology entails no theoretical costs. Robust realists deny the minimality of ethical facts and properties. Rendering the minimalist idiom and the attendant distinction between the two views precise is of intrinsic interest. But it is especially important from the perspective of first-order ethical theory given that there is an *ethical* way of drawing the distinction, or so I argue. Chapter Seven is largely critical. It rejects a popular view that the line should be drawn in terms of whether a theorist invokes ethical facts and properties in metaphysical explanation. The explanationist approach fails in both directions: it misclassifies realist views as quasi-realist and vice versa. A paper based on this chapter, entitled "On Ground as a Guide to Realism," is forthcoming in RATIO.

Chapter Eight defends an alternative proposal on which the line is drawn in terms of the *nature* or *essence* of quasi-real/minimal properties. I argue that a theory of property F should count as minimalist based on what it builds in to the essence of F relative to other candidate theories of F. In the case of ethical properties, it is a key insight of quasi-realistic expressivism that ethical properties, though real, do not have any kind of nature that would, among other things, make them intrinsically worth caring about from the ethical point of view. In other words, quasi-realism about ethical properties entails, together with ethical facts concerning the normative significance of certain kinds of essences, that desiring to perform right actions *de dicto* (just because the actions have the property of being right) can only be instrumentally rational, never intrinsically so.

In sum, the brand of quasi-realist expressivism I end up defending is heterodox. It rejects the standard view of what makes one a quasi-realist rather than a robust or traditional realist: the failure to invoke the candidate property in metaphysical explanation. It rejects the conventional wisdom that the supervenience of ethical facts on non-normative facts is a conceptual truth. And most importantly, it accepts what quasi-realists have fervently denied: the possibility that ethical conclusions may be gleaned from the quasi-real nature of ethical properties.