

## The Official Point of View and the Official Claim to Authority

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*Note: This draft paper is culled from a larger project, but remains too long. Those short on time, or those familiar with the literature on law's claim to authority and the internal/legal point of view, might wish to skip or skim section 1.1 and 1.2. As the work is in draft form, with incomplete footnotes, please do not cite or circulate without permission.*

### **Abstract**

*This article argues that the idea of the legal official is central to understanding the normativity of law. It offers a revision of two key devices used in contemporary analytical jurisprudence, arguing that the idea that law claims authority, and the notion that law either has or is represented by agents with an internal point of view, can both be reframed in light of closer attention to those who supposedly claim authority or adopt that view. That attention reveals a distinctive account of officials as institutional and relational agents, who occupy an objective 'Official Point of View' (OPV), from which an Official Claim to Authority (OCA) holds law out as authoritative for subjects and commits officials to the pursuit of that which would make it legitimate.*

### **Introduction**

The idea of the legal official is central to explanation's of law's existence and normativity, and crucial to the success or failure of two analytical devices offered by legal positivists in their attempts at such explanations. The first device is the idea that there law in some way manifests or entails a point of view on what law's subjects ought to do; the second is that law claims authority over subjects. This paper argues that both devices can be read as harbouring a robust notion of the legal official that is not present within the existing defenses of those ideas, which instead treat officials elliptically, as placeholders, or as mere representatives of the law. My focus on officials shifts attention away from 'what law claims,' in the abstract, or the content of 'law's point of view', on to the agents implicated in the devices, and in particular, to understanding the normative position from which some institutional agents (the officials) have the standing to make claims - not on behalf of the law, but to the authority of the law.

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Section 1 (re)introduces the devices of the internal/law's point of view and law's claim to authority, explores the connections between the devices and sets out the puzzles they generate, and examines what the existing literature has established and where it comes up short. The paper then revisits the devices themselves, arguing in section 2 that the point of view is best treated as a vantage point, not merely a subjective perspective about what sort of normativity law offers to its subjects. Section 3 offers a parallel revision to the idea that law claims authority, arguing that this claim should be understood not as an assertion of truth, but as an assertion of what is due to the law; a claim to justification. Both readings in sections 2 and 3 make the devices themselves, and not just their content, significant to a theory of law's normativity; and most importantly, they make the official not only conceptually but also normatively central rather than just a descriptive placeholder. In Section 4, I use the revised devices to frame an introduction of my substantive account of the legal official as a dual institutional and moral agent, and to fill the space left out by the descriptive stories of who counts as an official.<sup>2</sup> Finally, Section 5 uses this idea of a legal official to introduce two modified devices of the Official Point of View (OPV) and the Official Claim to Authority (OCA) to explain the normativity of law.

### **1. The Devices: claims to authority and points of view**

The idea that law claims authority, and the notion that there is a special point of view within which law is normative, are both devices for explaining the normativity of law. They are ways into debates over the domain of law's normativity, where theorists who adopt the devices then disagree about whether the law offers a point of view about what its subjects morally ought to do, and claims legitimate moral authority, or whether it offers a point of view about what its subjects 'legally ought' to do, and so claims (only) legal authority.<sup>3</sup> In both arguments, however, the idea that law sees itself as (and purports to be) normative, claiming some kind of authority to bind its subjects, is central.

The two devices will be explored in detail below, but as their content is largely familiar, it may be more interesting to start by considering the relationship between them, their common and differentiated concerns, and the challenges they generate to which a focus on officials can offer a response. While both devices are closely associated with positivist commitments, they are not common to all positivist accounts

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<sup>2</sup> This work draws upon a larger book project, *Officials*. That work explores the centrality of the idea of the legal official in jurisprudence more generally, but the full extent of official centrality in jurisprudence is not part of the argument here. My narrow focus is only upon the devices of the claim to authority and the point of view, to see whether they can be revised in order to bolster their explanatory value. This approach should not be read to discount the importance of other work on officials, from the likes of Fuller, Finnis and Dworkin, which are all explored in the full project, but which do not embrace the devices under examination here.

<sup>3</sup> These do not exhaust the entirety of debates over normativity. A third, 'prudential' position, rejects both devices along with any form of justificatory normativity, holding that law necessarily makes no moral claims and entails no necessary moral points of view on subjects' behaviour. For a discussion of prudential positivism, including the distinction between prudential and moral reasons, motivations, and their impact on normativity, see e.g. Kramer, *In Defense of Legal Positivism* (Oxford, 1999, 63-77; Kramer, *Where Law and Morality Meet* (Oxford, 2004) chs5-6. A further alternative alters the object of what is being claimed or practiced: not authority, but coercion (as for Dworkin); not authority, but moral correctness (as for Alexy).

and need not be rejected by all non-positivists; nor do they necessarily travel together.<sup>4</sup> Some have treated the devices interchangeably or as having integrated content – so that law’s point of view entails a claim to authority; while to claim authority for the law is also, at least in part, to hold the relevant (legal or internal) point of view.<sup>5</sup> Where they do travel together, there may be an inexact match: the idea of a relevant point of view might be endorsed whilst thinking that it does not entail any claims on law’s part; or one may think that law’s point of view does entail claims, but then substitute some other power in place of authority as their object.<sup>6</sup> In this respect the content of the point of view, and the object of a claim, has seemed more important than thinking about the point of view or the claim itself, at least for the task of explaining law’s normativity. That is where debates thus far have been focused.

The devices for explaining law’s normativity have several important features in common. First, they are both expressed in tentative and contingent fashion. They allow for the prospect that, whilst claiming authority, law might not have authority; or that law’s view of what morality requires may not be an accurate view of what morality requires. For many who adopt their use, this contingency is an important (and deliberate) positivist credential of the devices, or a way of walking between a reductive variant of positivism and an embrace of a robust natural law.<sup>7</sup> Secondly, the devices generate an overlapping set of challenges: (i) a personification problem: how can law, understood either as a practice or as an institution, claim anything at all, or have any point of view? (ii) an empirical challenge: does law, or do legal officials, in fact claim authority or adopt/express a point of view? (iii) a normative mystery: what exactly is being claimed – legal or moral authority; and what is law’s view a view of – legal or moral obligation? Each challenge has been well-treated in the literature and some points now seem settled, or at least present a settled range of options. The personification problem, in particular, has been treated at length by a series of exchanges culminating in the argument that law’s claims are made on its behalf by its officials, and that officials’ representation of law’s claims and their adoption of either the internal or the law’s point of view does away with any metaphysical worries about law’s personification.

The challenges and their purported solutions, however, have seldom offered attention to the agents doing the claiming or manifesting the point of view. More sustained attention is needed to explain what it is to be a legal official, what kind of role it is, and what sort of commitments it entails; or indeed to consider whether/how the idea of the legal official carries implications into the content or force of either the law’s

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<sup>4</sup> As Gardner nicely explains, the challenge for positivists defending the idea that law claims authority is to walk a line between making the normativity of law too moral (in the sense of actual / Alexian moral correctness), or of making it too contingent (only a system of claims with no moral bite). See Gardner, ‘Law as a Leap of Faith as Others see it’ (2014) 33 *Law and Philosophy* 813 (Hereafter ‘Leap of Faith, Response’). Gardner’s own views are discussed in detail below.

<sup>5</sup> Coleman, for instance, equates the two: “One way to understand the claim to legitimate authority is this: the law is, among other things, a ‘point of view’ about what is morally required and permitted.” *The Architecture of Jurisprudence*, (2011) 121 *Yale Law Journal* 2.

<sup>6</sup> For instance, law’s point of view might entail thinking that law claims to be justifiably coercive, or perhaps that law is merely expressive of social expectations but claims neither authority nor a justification for coercion.

<sup>7</sup> As Gardner puts it, this is one way “to show that it is possible to moralize the law without over-moralizing it.” Gardner, ‘Leap of Faith, Response’, 823.

claim or its point of view. That gap warrants the re-investigation of all three challenges to consider the impact of adding a full account of the legal official.

Starting with the first challenge, in which both devices wrestle with some variant of either a personification or an 'attribution' problem.<sup>8</sup> How could law be capable of either having or making its own normative claims, or having its normative claims/views expressed on its behalf? The personification problem arises directly from the phrasing of Raz's argument that law claims authority, which seems to render law an agent capable of claiming and/or being represented. This seems to personify law in a way that is metaphysically troubling and also potentially distracts from or obscures important aspects of the claim.<sup>9</sup> While some authors have minimized this concern, others have made it central to their critique of the idea that law purports to have moral authority for its subjects.<sup>10</sup>

In response, those who defend the claim to authority (including Raz himself) tend to reframe the argument that law claims authority as a shorthand for saying that claims to authority are made on behalf of the law by its officials.<sup>11</sup> This entails an argument that law itself is either some kind of principal for which the official is an agent, or that law as an institution is represented by its officials. These responses have focused on trying to pinpoint the activity of claiming on the officials as agents of the law, but then to move the normative significance of that claim away from the activities or (less plausibly) the attitudes of legal officials, on to the law itself. At that point the problem is less about personification than it is about 'attribution' or 'ascription' of the officials' claims to the law.<sup>12</sup> I will argue below that this approach emphasizes the wrong element of the connection between law and its officials, and that officials themselves should be at the center of explorations of the normativity of law. Rather than trying to defend or critique a way in which the conduct of officials can be explained as claims on behalf of the law, or can be directly attributed to law, the focus should be on what it is about officials that makes their conduct normatively significant.

While the connection between law and its officials is the central problem explored here, its treatment cannot be divorced from the second and third challenges listed above. The empirical challenge asks whether law (or a legal official) actually claims authority, and/or whether anyone actually holds law's point

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<sup>8</sup> Himma has called this the 'attribution problem', and elsewhere the 'metaphysical problem'. See Kenneth Einar Himma, 'Law's Claim of Legitimate Authority' in Jules L. Coleman (Ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford, 2001); and Kenneth Einar Himma, 'Why Law Can't Claim: What Law Would Claim If it Could' (June 28, 2015). Available at SSRN: <http://ssrn.com/abstract=2624340>. Gardner focuses upon the 'personification' aspect of the critique. As I explain below, it is important to be clear about the difference between these.

<sup>9</sup> McCormick, 'Why Law Makes No Claims,' in George Pavlakos (Ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, 2007) 59: "There are hidden implications about the character of law that lurk in the metaphor".

<sup>10</sup> Ronald Dworkin, 'Thirty Years On' 115 *Harvard Law Review* (2002); and Himma, *supra* note 8. Compare Coleman, *Architecture* (*supra*), who calls it a "natural but misguided objection." This personification mystery has, in my view, been decisively answered by Gardner's response to Dworkin and Himma, to which I return below.

<sup>11</sup> See Raz, *Authority, Law and Morality*, 215-6, and at 2017: "the claim is made by legal officials wherever a legal system is in force (2017).

<sup>12</sup> Himma, 'Why Law Can't Claim' (*supra*)

of view. Some of the same critics who challenge the supposed personification of law, or the attribution of claims to the law, have argued that, empirically, there is doubt whether any such claim to authority is ever made, or if it is, that it is not always made.<sup>13</sup> In particular, they have offered examples of critical officials (Holmes is the recurring character) whose personal commitments and beliefs do/did not place law on a pedestal. While the challenge can be addressed through careful attention to what it means to claim authority or adopt the law's point of view,<sup>14</sup> it also suggests the need for more careful attention to the official role.

The third challenge is the 'normative mystery'. Even if law can, does or must make claims or have a point of view, what is the content of that view and the object of that claim; what sort of normativity is the target: moral or 'legal'? The core idea is that law's claims are normative claims; claims to bind or at least give reasons to its subjects, but there is debate about the domain of normativity (legal or moral) within which law aspires to bind.<sup>15</sup> In accounts of distinctly legal normativity, such as Hart's, law's normativity is coextensive with legal validity, and is a matter of social fact. In contrast, the Razian account treats normativity as a generic moral phenomenon, not something that can be cabined off into separate isolated domains.

Solving each of these challenges takes us back to the door of the legal official. Some explanation of the personification problem is to be found in the connection between law and its officials; any empirical evidence of claims or manifested viewpoints will be found in the work of officials, and, perhaps more controversially, I will argue that the character of law's claimed normativity can be traced into the standing of officials and the standards they must embody. To set up that argument, however, the remainder of this section first offers a brief recap of debates over (i) the idea of some special point of view associated with the law and (ii) law's claim to authority, both revised with the role of officials in mind.

### 1.1. *Points of View: from IPV to LPV*

As is well known, Hart set out the internal point of view (IPV) towards some set of rules as the view of "a member of the group which accepts and uses [the rules] as guides to conduct."<sup>16</sup> To take the IPV towards a rule, Hart explained, is to adopt its 'internal aspect,' namely to treat the rule as binding for oneself and others.<sup>17</sup> For Hart, the internal point of view could be adopted by anyone, but had to be adopted by the officials of a legal system towards its rule of recognition, in order to make law possible. Hart thus used the idea of the IPV - taken by officials towards a rule of recognition - to explain the very possibility of law as a

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<sup>13</sup> E.g. Dworkin, 'Thirty Years On' (*supra*).

<sup>14</sup> Again Gardner's response here is persuasive, demonstrating that Holmes' judgments and work as an official, whatever his private and extra-judicial views, still manifest a claim to authority.

<sup>15</sup> See e.g. Berteau's treatment of this question in Stefano Berteau, *The Normative Claim of Law* (Hart, 2009); and compare essays in Berteau and Pavlakos (Eds) *New Essays on the Normativity of Law* (Hart, 2011).

<sup>16</sup> HLA Hart, *The Concept of Law* (2Ed), 89.

<sup>17</sup> *Ibid*, 90.

normative institution, placing an enormous theoretical burden upon both the IPV and the officials who must hold it.<sup>18</sup>

Hart then offered an account of legal officials are those identified and empowered by law to act as legal officials. This has been variously described as a tautology, or as presenting a 'chicken-and-egg problem' about both the genesis (and logical possibility) of law or law's normativity.<sup>19</sup> Hart's solution to all of this has to be picked out of his work, but the most charitable interpretation takes Hart to be setting out a partial account of social normativity, in which the rule of recognition is indeed a rule – a customary rule or some other form of normative social practice, manifested in the conduct of those who see themselves and others as being bound by the rule of recognition.<sup>20</sup> Gardner and Macklem offer a helpful reformulation, which solves the chicken and egg normativity/genesis problem for Hart by offering a customary norm constituting officials, who then make law. In place of circularity, they suggest, the solution rests upon:

a benign self-referentiality in the customary rule of recognition (as in all customary rules). One implication is that the ultimate rule of recognition is, to a very large extent, accidentally made. Each official takes himself or herself to be merely following the practice of his or her peers, when in fact he or she is helping to constitute that practice and thereby to shape the rule. The rule changes precisely as it was born, mainly by mistake -- that is to say, by successive attempts merely to follow it that in fact contribute to its development.<sup>21</sup>

On the subject of officials and their internal point of view, Hart further maintained, relatedly and repeatedly, that the internal point of view need not be a moral point of view, and that those who voluntarily adopt the internal point of view could do so for non-moral reasons, including "long-term interest, disinterested interest in others; an unreflecting or traditional attitude, or the mere wish to do as

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<sup>18</sup> As Postema has argued, something like the practice of the IPV was also explained by Salmond. Postema articulates Salmond's view that, "viewed from within the practice, judges do not just happen to recognize some rules and reject others; they do so for reasons that are rooted in some further rule or principle." G.J. Postema, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 11: Legal Philosophy in the Twentieth Century: The Common Law World*, (Springer, 2009), 2-42; 157-8. Citing, Salmond himself, Postema outlines Salmond's view in which courts of law are constrained by "an authoritative creed which they must accept and act on without demur. This creed of the courts of justice constitutes the law" (Salmond, *Jurisprudence*, 1924 (first published 1902), 40).

<sup>19</sup> See e.g. Shapiro's characterization of the broad and specific chicken and egg problems in S. Shapiro, *Legality* (Harvard 2011), 36-40; and John Gardner and Timothy Macklem's comprehensive review of that title in *Notre Dame Philosophical Reviews* (2011.12.08).

<sup>20</sup> As Gardner and Macklem put it (*ibid*), in Hart's account "a group of people (thereby rendered 'officials') regard themselves as bound to follow the practice of their own group in treating certain of their own ('official') actions and activities as creating binding norms."

<sup>21</sup> Similar readings of Hart have attracted well-known objections: that there is no mistake here; that officials don't in fact constitute a normative practice at all because of the depth of their disagreement etc. Less charitably, but finding some support from *The Concept of Law*, the rule of recognition may be treated as a mere social practice, not a normative one, and thus unable to resolve the chicken and egg problem. For discussion see Shapiro, *Legality* (*supra*) chapter 4.

others do.”<sup>22</sup> Those who accept the system could even be morally opposed to the system, yet continue to accept it.

Even if we could explain law’s genesis in this way (and charitably attribute this view to Hart), it doesn’t solve the (arguably) more interesting problem of normativity. Although Hart sought to use the internal point of view to explain the existence of social rules, he did not detail an account in which such rules could actually or even purportedly generate reasons for action for non-participants in those rules, or those we might describe as subjects.<sup>23</sup> Furthermore, what matters in this story is not any actual obligation upon officials to accord with the rule of recognition, merely their belief that one exists, which is a matter of social rather than normative fact. On the ‘customary rule of recognition’ view in which officials have the internal point of view and engage in the practices that turn out to establish the customary rule, there is no reason to think that officials’ normative practices carry any normativity into the rules that are validated within that practice, other than those rules that are applied to the other participants in the practice of generating those rules. Thus although logical and genealogical problems might be resolved through a customary rule understood as a normative social practice, the account doesn’t get further than the establishment of official practices of self and other-recognition, and recognition of criteria of validity. Neither of these are sufficient to make the resulting norms themselves normative for subjects, only (arguably) for the officials themselves.

Among the array of responses to Hart, many adopted the IPV device even as they disagreed with its role in Hart’s story.<sup>24</sup> Some sought to bolster the normative credentials of Hart’s own account by fleshing out what was normative about the social practices of Hartian officials, without departing altogether from Hart’s social foundation. For instance that work explores the rule of recognition as a rule imposing obligations upon officials, arguing over whether/how the activities of officials, including their acts of explicit or implicit commitment to the legal rules, the system, or to each other, could both generate obligations upon officials and carry the normativity of the law they apply. Post-Hartian positivists seeking to establish actual normativity (not just beliefs in normativity) out of the practice of officials, have focused, first, upon the idea that the rule of recognition could be treated as a kind of convention (either coordinative or constitutive), and secondly upon the possibility that the rule of recognition is an instance

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<sup>22</sup> Hart, *Concept of Law* (supra) at 203. In Hart’s own terms: “Those who accept the authority of the legal system look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals: ‘I (you) ought’, ‘I (he) must’, ‘I (they) have an obligation’. Yet they are not thereby committed to a moral judgement that it is morally right to do what the law requires.”

<sup>23</sup> This is Hart’s departure from Salmond’s prior account, which is otherwise otherwise similar to Hart’s rule of recognition, and in which the recognition practices of officials are morally required due to the officials having taken oaths of office. Salmond, *Jurisprudence* (supra), 56-57.

<sup>24</sup> These are of course only a small sub-set of the responses to Hart - For instance, one set of responses challenged the moral detachment of Hart’s IPV as held by officials, including challenges over methodology (particularly Finnis’ argument for a central case methodology starting from the practically reasonable viewpoint); various substantive analytical attempts (such as MacCormick’s) to show that the IPV must be a moral attitude towards the law; normative accounts of the moral work that legal officials (particularly judges) do, understood reciprocally (Fuller, Postema), and the alternative or simultaneous denial of the existence or normativity of a rule of recognition (Dworkin).

of shared (and committed) cooperative activity.<sup>25</sup> In both cases, the argument is that the activities of officials (either enmeshing their actions and beliefs about their obligations or intentionally engaging in a joint project with one another) generates the normativity of the rule of recognition and accounts for its imposition of an obligation to apply (only) the law it picks out as valid. These present an important elaboration or extension of the normativity that is never consistently explained in Hart's own work, in which the sociality of the rule, not its normativity, was the primary focus of explanation.

A third set of responses, related to the second, has re-examined what it is for a point of view to be *internal*, in a line of argument that shifts the emphasis from the point of view held by officials, to the institution or the practice in which they are engaged. Postema, for instance, argued that the internal element of the internal point of view should be understood not as "something interior to an agent, but rather as the point of view of the practice itself."<sup>26</sup> Others have advocated a central viewpoint that is not internal to the practice, but is simply the view of the practice itself – namely 'law's point of view.' In Shapiro's extended account, for instance, the law's point of view:

"is not necessarily the perspective of any particular legal official. No officials may personally accept it, *although they will normally act as though they do*. The legal point of view, rather, is the perspective of a certain normative theory. According to that theory, those who are authorized by the norms of legal institutions have moral legitimacy and, when they act in accordance with those norms, they generate a moral obligation to obey."<sup>27</sup>

Such a point of view refers to an underlying theory according to which the law's demands are not only systemically coherent, but also "turn out to be morally legitimate."<sup>28</sup> Individuals (subjects or officials) can adopt that theory, but law is only possible if most of its officials are in fact "disposed to regard the law's demands as morally legitimate and to act accordingly."<sup>29</sup> Importantly, and unlike in Hart's account of the IPV, advocates of the moralized device of the LPV treat that point of view as a view about what a subject is morally required to do.<sup>30</sup>

Some accounts then offer the important addition of an obligation to adopt this view. Coleman, for instance, argues that "those *bound* to [adopt the moralized LPV] are those charged with creating, enforcing and adjudicating law – officials."<sup>31</sup> While this appears to be a key addition, it does not, at this

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<sup>25</sup> Compare Postema, 'Coordination and Convention at the Foundation of Law' 11 *The Journal of Legal Studies* (1982) 165; and Marmor, *Positive Law and Objective Values*, (Oxford, 2011). For analysis of the 'conventionalist turn' see Les Green 'Positivism and Conventionalism' 12 *Canadian Journal of Law and Jurisprudence* (1999) 35; and Julie Dickson, 'Is the Rule of Recognition really a Conventional Rule?' 27 *Oxford Journal of Legal Studies* (2007) 373,

<sup>26</sup> Gerald J. Postema, 'Custom, Normative Practice and the Law' 62 *Duke Law Journal* (2012) 707-738.

<sup>27</sup> Shapiro, *Legality*, (supra) 186.

<sup>28</sup> Coleman, 'Architecture' (supra), 22.

<sup>29</sup> *Ibid*, 26.

<sup>30</sup> For Shapiro, for instance, "The law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims. Their avowals need not be sincere, but they must be made". See Shapiro, *Legality* at 217.

<sup>31</sup> Coleman, 'Architecture', 23 (my emphasis).



point in the account, change very much. For while the LPV might sound more normatively significant than the IPV because of its moralized character and obligatory (for officials) status, it remains merely an obligation to act 'as if' law is morally legitimate.<sup>32</sup> As Coleman himself noted, while the requirement may not (without circularity or Kelsenian postulation) be treated as a legal requirement, it may be a requirement that is itself imposed by the social rule/practice of recognition, a logical requirement necessary to the very possibility of legal officials, a functional requirement derived from law's role in social life (whether or not that role is a moralized one), or a conceptual requirement delimiting what it is to be an official. It need not have any substantive moral foundation.<sup>33</sup> Coleman's own view seems to suggest it is a functional requirement: "if law is to play the role in our practical and moral lives that it does, then the bulk of those who are charged with making, interpreting, and enforcing law must endorse law as morally legitimate."<sup>34</sup> Thus although the idea of the official in Coleman's LPV is moralized to the extent that the official is required to treat the law she applies as if it is morally legitimate, that requirement falls out of the role of law in social life, not anything particular about the official role itself.<sup>35</sup>

Others have offered alternative accounts of the obligation to treat law as if it is morally binding. Shapiro argues that officials are engaged in a shared planning activity, whose inner rationality explains the normativity of law – because once the officials adopt a plan, they have a reason to stick with it, such that any departures (for non-compelling reasons) can be criticized.<sup>36</sup> Yet in Shapiro's account, the plan (with its internal rationality) does not stand alone; important normative work is also done by both the adoption of the plan and its jointness. The argument of the planning theory endorses some normatively robust shared or committed practice among those who adopt the law's point of view, while the individuals' adoption of the point of view seems insufficient by itself to generate anything normatively significant.<sup>37</sup>

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<sup>32</sup> Note that while there is an echo of Salmond's pre-Hart notion of a moral obligation on legal officials to engage in practices of recognition, those practices were not moralized in the way Coleman presents. While a positivist such as Salmond can endorse a moral obligation upon officials to recognize and practice sources of law, those officials need not be obligated to treat law's own demands as moral requirements.

<sup>33</sup> The question is whether a positivist could endorse a moral requirement to treat the law as a view on what morality requires. Compare this with the non-positivistic conclusions offered by Fuller and Postema on the idea of the point of view that is internal to the practice (Postema), echoing some of Fuller's work on the duties of reciprocity owed between officials and citizens. (See Fuller, *The Morality of Law* (1969), at 39-40.) Postema goes further than Fuller, to treat the reflexivity of law (namely its application to those who wield it), to be grounded upon a commitment on the part of those who wield the law's power. This suggests that the ethos is not primarily, or at least not entirely, a matter of virtue, but a matter of obligation; less about a sense of duty, than the realization of an actual (albeit voluntary) duty. Gerald J. Postema, 'Reflexivity, Mutual Accountability, and the Rule of Law' in Xiabo Zhai and Michael Quinn (Eds). *Bentham's Theory of Law and Public Opinion* (Cambridge, 2014); though cf Postema Treatise, 444 on official virtue.

<sup>34</sup> Shapiro then expressly explains law's fundamental aim as a moral one: to meet the moral demand of solving numerous and serious moral problems in an efficient manner. See *Legality* 213-217. The 'Moral Aim Thesis' states that: the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality.

<sup>35</sup> This could be a significant move away from Hartian (or indeed Razian) positivism, depending on what exactly we understand by law's actual role in social life – whether it has, for instance, moral or prudential aims. This, of course, opens up an array of worries about the explanatory value of functional accounts.

<sup>36</sup> This point draws significant objections from Gardner and Macklem in their review of *Legality*.

<sup>37</sup> As Postema objects, however, it is odd to focus upon the joint action of officials, when the primary normative relationship is between the official and subject.

My purpose here is not to adjudicate between these accounts, nor to mark out territory that could be defended within positivism or positions which amount to its rejection. Rather I will go on to show that both the IPV and the LPV, so understood, are dependent upon some idea of the legal official, whose agency is central to staking out not only what makes law possible, but also what makes law normative.<sup>38</sup> While some accounts of the IPV and LPV are more intent than others on preserving an account of law grounded upon a social rule of recognition, and others more open to moral content or the pursuit of moral aims much closer to anti-positivist positions, all of them take the key explanatory and normative load-bearing element to be the self and other-referential *activities* of officials, not their status or more broadly, their role. They treat the practice of adopting a point of view, even the law's point of view, as normatively significant in itself, so that the normative potential of officials lies in virtue of what they do (whether this is the act of accidental or intentional generation of a rule of recognition which in turn recognizes them as officials) rather than who they are.

Yet if official actions are so important – either because they plan together, are similarly committed or jointly committed to a theory of law's legitimacy, because they act (and interact) to recognize valid legal rules, or because they fulfil practical and perhaps moral functions – then we need to know more about the agents themselves. Who are these agents and why do their practices matter, for legality and normativity, more than anyone else's? If we are left with the fundamental importance of agency and activities, and a normative practice in the form of a social rule or a set of joint commitments which only exists because of the conduct and practices of some agents, then surely the critical piece of the puzzle is the agents themselves. Yet despite the important move from analyzing the beliefs of the officials to their activities, and from the individual perspective to the perspective within a normative social practice, there is still insufficient attention in both the IPV and the LPV to what it is to be an official, and what that role entails.

### 1.2. *Law's Claim to Authority*

The official is similarly both central yet under-developed in the argument that law necessarily claims legitimate authority over its subjects.<sup>39</sup> In Raz's oft-cited terms:<sup>40</sup>

though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority. If the claim to authority is part of the nature of law then whatever else the law is it must be capable of possessing authority.

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<sup>38</sup> That shift is itself an achievement. See e.g. Postema, arguing that "we should focus on the activity, not the attitude." Custom, Normative Practice, and the Law (supra)

<sup>39</sup> The claim [to authority] is made by officials wherever a legal system is in force Raz, *Authority, Law and Morality* 217. The full argument from Raz is that law claims authority; claims to be comprehensive in its domain; and claims supremacy over other normative systems. For a discussion of the supremacy aspects of this claim, see N. Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford, 2013).

<sup>40</sup> Raz, *Authority, Law and Morality*, 215.

Raz continues:<sup>41</sup>

The claims that law make for itself are evident from the language it adopts and from the opinions expressed by its spokesmen i.e., by the institutions of the law. The law's claim to authority is manifested by the fact that legal institutions are officially designated as 'authorities,' by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed.

Raz's argument has been well-traversed in the work of many leading contemporary figures in the field who either challenge, modify or defend the idea that law necessarily claims authority over its subjects. Their debates thus far have targeted the three puzzles outlined at the outset of this paper: the personification problem, the empirical challenge, and the normative mystery. Dworkin's early challenge, reinforced and developed by Himma, in particular, raised the personification problem and the empirical challenge, both of which were aimed at denying any role for this device in explaining law's genealogy or normativity. Among the responses in defence, Gardner has argued that the personification problem can be overcome, thus preserving the idea that law claims authority, by attributing a 'non-autonomous agency' to law, and non-elliptically ascribing to law the claims made by its officials as a conceptual truth about the official role. For Gardner, "it is part of the concept of a legal official that, when someone acts as a legal official, she acts on law's behalf."<sup>42</sup> Gardner has recently elaborated this claim. In his own words (but with my emphasis):

"Law makes claims only insofar as law-applying officials make those very same claims at the very same time and place. The claims of law are identical to certain claims of its officials. And these claims must be non-elliptically ascribed to law, not because of any mutual responsiveness among the law's officials, nor because of any constitutional rules that make law itself the agent of anything in virtue of what its officials do. Rather, they must be non-elliptically ascribed to law because the only way to unpack the idea that they are claims made by law-applying officials is as follows. *Some people (be they dressed in robes or in pyjamas) make these claims on behalf of law, and making these claims on behalf of law is part of what makes them law-applying officials. It is an irreducible part of this explanation that the claims in question are made on behalf of law. One cannot omit, from any adequate explanation of what a law-applying official is, the fact that law-applying officials serve as law's representatives or spokespeople, identified by law to do law's bidding.*"

Gardner's explanation is important for two reasons. The first is the attention Gardner draws to the relationship or connection between officials and law itself: in the final phrase, we learn that officials are

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<sup>41</sup> *Ibid*, 2015.

<sup>42</sup> John Gardner, 'Law's Aims in Law's Empire' in Scott Hershowitz (Ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP, 2008) at 213.

*identified* (and note not constituted) by law to serve as its agents in the manner of “representatives or spokespeople.” Earlier, the claims of officials are “non-elliptically ascribed” to law – again, in the manner of agency. Officials are thus conceived as the agents of the law, which itself has non-autonomous agency that renders it capable of identifying those who are its officials, who make their claims on its behalf. Law is granted its own kind of agency, but one which is integrated with the agency of officials, is thus non-autonomous, and therefore avoids the metaphysical mistake of personification.

The second important aspect of the defense is Gardner’s argument that, in Raz’s account at least, legal officials’ claims to authority on behalf of the law are, in part, what makes them legal officials. The explanation that Raz offers for the manner in which ‘law claims authority’ – that these are the claims of legal officials – should be understood, Gardner argues, as a conceptual rather than descriptive or empirical claim. It is conceptual because part of the idea of what it is to be a legal official is captured by the making of a claim to authority on behalf of the law. This reading treats officials’ claims to authority as law’s claims to authority, by conceiving of officials as those who make the law’s claims on its behalf. Where previous accounts had focused upon what officials do (or believe) in claiming law’s authority, Gardner’s view very helpfully focuses on the idea of the legal official as a part of the argument that law claims authority, and finds a way to put more than just descriptive force on that idea. Gardner thus offers a concept of the official which includes making claims on behalf of the law.<sup>43</sup>

Gardner’s defense has sparked several recent responses.<sup>44</sup> Those of most relevance here challenge both the character of the connection between law and officials, and Gardner’s conceptual solution. A first response follows MacCormick in discounting the value of a metaphorical connection or personification, favouring instead the direct discussion of either officials’ claims, or of law’s normativity, without resort to metaphors connecting the two.<sup>45</sup> A second response challenges the metaphysical or logical attribution or ascription of officials’ claims to law itself, relying upon arguments against the identity of officials’ claims and law’s claims. As d’Almeida and Edwards put it: “that law empowers officials to make claims on its

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<sup>43</sup> It also serves to disempower any empirical objection of the form offered by Dworkin and others, which sought out examples of particular judges who seemed not to claim moral authority on behalf of the law. Gardner explains that those statements were not made in the course of their official role, while their actual work as officials did entail claims to authority. Critical or simply skeptical judges’ private beliefs about the value of the role they perform, or the law they represent, are in this sense irrelevant to their making of claims to law’s authority.

<sup>44</sup> Some appearing in a book symposium on Gardner’s *Law as a Leap of Faith*. Those not considered in this paper, but important for the full project, include Matthew Noah criticism of a ‘uni-directional’ approach which gives insufficient consideration to the role of subjects and their impact upon the claims of officials. Matthew Noah Smith, ‘Officials and Subjects in Gardner’s *Law as a Leap of Faith*’ 33 *Law and Philosophy* 795-811. In the same symposium, and in addition to their arguments discussed below, d’Almeida and Edwards have taken issue with Gardner’s focus on law-applying officials. Luis Duarte D’Almeida and James Edwards, ‘Some Claims about Law’s Claims’ 33 *Law and Philosophy* 725-746.

<sup>45</sup> D’Almeida and Edwards, *ibid*. Himma also argues that neither Gardner nor Raz fully deals with the issue of attribution, which, he argues, must amount to a literal attribution that is metaphysically robust, and neither elliptical nor metaphorical, if it is to have any analytical bite. Himma argues, echoing his earlier work, that law, as a ‘non-propositional abstract object’ cannot make its own claims nor have claims attributed to it, and so falls afoul of Raz’s own articulation of the non-moral prerequisites for having authority, which include the ability to communicate with others.

behalf does not imply that those claims should be ascribed to law *as its claims*.”<sup>46</sup> A third response reiterates the metaphysical impossibility of the literal personification of law, including the continued rejection of any agency on the part of law, even the barest (and non-autonomous) agency that would enable it to be represented by appointed officials.<sup>47</sup> Finally, a fourth response challenges the concept of an official within which Gardner rests the claim to authority. D’Almeida and Edwards suggest that this is a revisionist idea of an official. They prefer to retain “our common concept of a law-applying official,” which, though not elaborated in full, refers to “someone who is legally empowered to perform acts of law-application of a certain type.”<sup>48</sup> Himma, going further, challenges the conceptual strategy itself, arguing that “analysis of the concept of an official simply cannot bear [the] justificatory weight” of attributing a claim to an abstract object.<sup>49</sup>

In responding to these challenges with a new focus on a conceptual connection between law and its officials, Gardner’s work goes a long way towards putting the personification problem to rest. While I think Gardner’s account locates attention in exactly the right place (upon the officials and their connection with the law), his attribution-focused explanation emphasizes the law element in the law-official connection, and does not go far enough to spell out just what it is to be an official. On Gardner’s account, to be an official is to claim authority on behalf of the law, and to be identified by the law as an official; and therein is a tension between treating officials as embodiments or representatives of law; and between characterizing officials’ claims as both identical to law’s claims and being made on behalf of law.

The point signals two potentially fruitful lines of departure from Gardner’s arguments, both of which demand further attention to the idea of the official. Gardner is right that there are people *identified by law* to be its officials, and that there is a conceptual connector between law and officials, but what is the exact character and content of the connection? Are officials best understood as representatives and spokespeople? That connection paints officials as agents in the sense of those who act for others. Yet there are two different senses in which officials might be agents connected to the law. One describes a capacity for intentional (and to some degree autonomous) action. The other describes a relationship where one party acts for another. There is room for debate about which of these two senses is primary to the official role. Do officials embody an institution, and bring their agency to bear upon it, or do they act

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<sup>46</sup> D’Almeida and Edwards, 732, (original emphasis).

<sup>47</sup> *Ibid*, 732. Note also Himma’s objection: that law’s abstraction renders it antithetical to being an agent in any sense – even in Gardner’s non-autonomous sense - or being represented as such. Himma, ‘Why Law Doesn’t Claim,’ (supra).

<sup>48</sup> D’Almeida and Edwards, 728.

<sup>49</sup> We should also avoid the idea that there is some magic in the choice of words here, such that maybe Himma is right that a claim to authority couldn’t be *attributed* to law (because law could not be its author), or maybe d’Almeida and Edwards are right that law can only be metaphorically ‘represented,’ but that such a claim or representation could be *ascribed* to law in a more abstract and informal sense. That argument is generally unsatisfying, failing to capture the heart of the point each intervention contests, about the connection between law and its officials. A second possible response to Himma would argue that a claim can indeed be made on behalf of a non-autonomous and even non-personal being, and so claims are made on behalf of law in the same manner in which claims are made on behalf of the environment, or of animals, or future generations. Neither argument would satisfy Himma, whose objection is that law is not the sort of thing that could be represented in this way, at least not by a merely conceptual argument.

on its behalf? Do officials claim authority on behalf of the law, or do they themselves claim to law's authority? Gardner's conceptual solution also opens up a host of fresh contests over the very concept of a legal official, to which I return in section 4 below.

Setting aside the personification or attribution problem, the debate over the claim to authority then explores the normative mystery: what exactly is being claimed? Gardner argues that one of the reasons for thinking that law's claim is a claim to moral, not legal authority (leaving aside the Razian argument about the singular domain of normativity itself), is that the claim to authority must include room for its own falsity. Law could not claim legal authority without removing the space for that claim to be false, hence it must claim moral, not legal authority. Himma offers a logical objection to that part of Gardner's strategy of argument, but more important for my purposes is d'Almeida and Edwards' objection that it is a different thing to claim authority than it is to require someone to do something, and that it is the latter, prescriptive notion, which is central to law and which can be framed in distinctly legal terms. They argue: "to *claim* something is to perform a *descriptive* speech act; requirements are *prescriptive* rather than *descriptive* speech acts."<sup>50</sup> In their view, contra Gardner, law is not plausibly seen as a set of claims, because law's prescriptive acts (requiring things of its objects, or enabling them) do not involve the making of claims.

Though I will disagree with this argument below, it raises squarely the questions of what exactly it means to claim authority; and what is entailed in that claim. To address those questions requires a crucial step that I take to be crucial to the debate over law's claims to authority, which will help to generate the substantive account of the officials, and, which also helps to bring us full circle back to link the notion of law's claim to authority with the idea of law's point of view.<sup>51</sup>

## **2. Claims and Points of View: Devices under Scrutiny**

Consider first a comparison of the two devices under discussion here. To say there is a special, legal point of view on what is morally required sounds more tentative, and less normatively significant, than saying that law claims moral authority. We should consider why that is so. A point of view, in ordinary parlance, is subjective, an opinion, something that requires no particular substantiation but which can also be easily ignored by someone who overhears it. A claim, on the other hand, is directed at someone or to something. It is inter-subjective, either directly as a presentation in an argument, or indirectly as an assertion of a right to some object that another subject might contest. A claim's inter-subjectivity invites an investigation into its truth or justification, because something will be at stake.

Sometimes we use the language of claiming to tell us more about the claimant than about what is being claimed. For instance, we sometimes refer to an assertion as a 'claim' not only to invite an investigation into truth, but also to convey doubt about the truth of what is being claimed or the believability of the

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<sup>50</sup> *Ibid*, 741 (emphasis in original).

<sup>51</sup> And see Gardner's response to this point in his reply which, notably, invokes the idea of the law's point of view in conjunction with the claim to authority.

claimant. This may be the way that ardently critical theorists read Raz's argument that law claims authority. For instance, they might think, 'how bizarre, knowing what we know of law's divisiveness, protection of dominant interests, subjection to capitalist forces etc., to think that law could have moral authority! To 'claim' such authority tells us how blind law is to its own inadequacies.' Yet this does not seem to be the sense in which Raz himself offers up the idea that law claims authority. Instead there is an ambiguity. To claim may be to assert that some proposition is true, but it may also, *or alternatively*, be to assert what one is due, or that something is one's own. This distinction is captured in the difference between the phrases 'to claim that' and 'to make a claim to' or 'to lay claim to.'<sup>52</sup> More importantly, the ambiguity means we must revisit the content of law's claim to authority and law's point of view, to see whether indeed they involve mere 'moral pretentiousness', or something more normatively significant.

What happens if we read the claim to authority not as a claim to truth, but as a claim to what is due to law (or to its officials qua agents of the law), or perhaps in stronger terms, what is rightfully law's? For law to claim authority in that sense would be to for its officials to assert that the law they make, apply or enforce should be treated as authoritative; that law is rightfully authoritative; that authority is due to the law. This reading accords with Raz's description of the manifestations of the claim to authority, which include that law demands "allegiance" from its subjects; but it is stronger because it claims to deserve subjects' obedience rather than simply attract their allegiance. Yet this 'claim to what law is due' reading seems out of synch with others' detailed engagements with Raz's idea of law's claims, which tend to focus upon the truth variant of claiming rather than the claim to an entitlement.<sup>53</sup>

What does this change, if anything, in the debates over law's claims to authority? Note that the claim still remains just that; it does not entail that law actually is due such authority. Yet if we read the claim to authority as a claim to the moral authority that is due to the law, we locate it as a normative claim to a normative power, rather than a descriptive claim about the existence of that power. Moreover, the inter-subjective and argumentative character of the claim differs from a mere descriptive proposition that we might verify or disprove. Note also that Raz's own explanations can sometimes be read in either sense, in part because of his objectivist account of justification itself, which suggests that a claim to be entitled to authority equates to a claim to the truth of an objective justification for that authority. Yet Raz's work also acknowledges the fundamental importance of subjective acceptance or recognition of authority, without which authority cannot succeed or be justified.<sup>54</sup> One important implication of reading the claim to authority as a claim to what law is due, is that it may allow space for both the role of reasons and the role of recognition in an integrated justification of authority.<sup>55</sup> As an intervention in debates over the idea that

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<sup>52</sup> With that ambiguity in mind, d'Almeida and Edwards' suggestion that claiming is a descriptive act (in contrast to prescriptive 'requiring') loses its force.

<sup>53</sup> See e.g. Coleman's account of the claim, a "law asserting that—from its point of view—its directives always have the appropriate moral force; that is, they express true moral authorizations, permissions, and requirements." Coleman, *Architecture of Jurisprudence* (supra)

<sup>54</sup> See e.g. most recently, J. Raz, 'Why the State' in N. Roughan and A. Halpin (eds) *In Pursuit of Pluralist Jurisprudence* (Cambridge, forthcoming).

<sup>55</sup> On these dual aspects of authority, see for instance N. Roughan, 'From Authority to Authorities: Bridging the Social/Normative Divide.

law claims authority, furthermore, an advantage of this way of reading law's claim is that it may be persuasive for those who would otherwise reject the full Razian position because of its demands of objective truth. It offers a way of explaining the claim to authority that law makes, without treating that claim as a claim to the truth of some objective justification, rather as a claim to subjects' acceptance that a claimant is due authority, whether on the basis of objective reasons or some more contingent subjective grounds.

Quite aside from the internal debates over law's claims, and more important for present purposes, this way of understanding the claim has important implications for the way we understand what is required of those who make it. For law (or its officials) to claim that law deserves or is entitled to authority, rather than claiming that law has authority, is to commit the law and the officials to the pursuit of whatever would justify its/their having such authority. Specifically, I argue, law's claim to authority entails the officials' commitment to the pursuit of whatever conditions would satisfy the legitimacy of authority. In order to make such a normative claim to authority, law and its officials must be engaged in the pursuit of legitimacy. For law to claim moral authority, then, is not to be morally pretentious, it is to be morally committed. It is not to believe that law has moral authority, nor even to "act as if" it does. Rather it is to hold law out as being entitled to moral authority, and thus to commit the claimant to the pursuit of its legitimacy, in good faith, to ground that claim and to persuade others of its force.

An obvious objection to this is that anyone can claim anything he wants, without this claim committing him to anything at all, and without needing to act so as to make the claim plausible. That is true of private persons who in fact lack any capacity to claim law's authority. My next-door neighbor, who is officious but not an official, can claim authority on behalf of the law (e.g. when he drops a letter in my mailbox telling me that he has decided we will now have a 7pm curfew on our street), and because he has no *de facto* standing or status on which I or others might rely, and because it doesn't matter that his claim is neither believable, persuasive, nor true, he is not thereby committed to do anything (except, possibly, to stop being a git). For officials, however, it is a different story. As I will argue below, a judge or other legal official might "act as though" she is handling and describing mere legal requirements," but in doing so, by virtue of her standing as an official *vis-à-vis* subjects, and regardless of what she thinks she does, she holds law out as being entitled to moral authority.

The full implications of this view of the official claim to authority also include implications arising as constraints upon what can count as a claim to authority. To inter-subjectively claim that one is due something, or entitled to something, one has to offer plausible and/or reasonable grounds for that entitlement. Otherwise the claim would be empty and implausible, or even disingenuous. This point can be illustrated by contrasting first good faith and bad faith claims to law's moral authority; then plausible and non-plausible claims. A claim that entails a commitment to the pursuit of legitimacy distinguishes a good faith claim from a claim in bad faith. In contrast, to claim legitimate authority without committing to at least an attempt to realise that claim, would be to claim in bad faith. As for plausibility, a claim that is offered in an argument or a negotiation needs to be reasonably well-grounded if it is to be taken seriously, let alone if it is to succeed. For a claim to moral authority to be plausible, the claim must be



made from a position of potential legitimacy, including a position of actual or likely de facto authority.<sup>56</sup> It may also, in substance, need to offer a reasonable view of what morality requires, for although a claim to moral authority is not a claim to moral correctness, so that a claim including a moral mistake would not be implausible or unfounded solely for that reason, a claim to moral authority that was obviously unreasonable would not get off the ground.<sup>57</sup>

Other important implications include the space that this view opens up around the claim to authority, for it renders the claim open to contestation and argumentation about whether or not law deserves moral authority. Such a view creates space for subjective engagement and potential pushback, and in particular, it generates argumentative space for challenging whether law is due authority even when it is morally incorrect, as well as for debating the moral correctness of its requirements.<sup>58</sup> Framed in this way, the law's claim to authority can be read as one stage in an argument, or perhaps even a negotiation - with both its subjects as well as other bearers of authority - about practical reasoning itself.

The more important implication for present purposes, however, is the manner in which this view of the claim to authority both draws attention to and results from attention to the role of the agents who make the claim. If the claim to authority is understood as an argument about law's entitlements, then it depends upon agents more urgently than in the truth variant of the claim. An agent's role here is not to be a mouthpiece or a manifestation of a claim to truth, rather to act in defending and grounding law's claims and actively to engage with those who will reject the claim or make opposing claims. The claim to authority requires agents who are capable not of simply manifesting or voicing the claim, but of justifying their claims to others and acting so as to make the claim successful vis-à-vis those others. As I argue in the following section, it requires that the claimants have some form of standing and empowerment that would allow them to realise the claim.

Armed with this more robust notion of what it is to claim authority, we can then revisit the satisfactoriness of the device in which there is a point of view from which that claim is made. There is a recurring trouble with points of view as devices for explaining normativity. In its ordinary (subjective and speculative) sense, a point of view seems to be too casual, too contingent, and just too small a device to carry the burden of law's actual normativity in the way the post-Hartian theorists have articulated. This may be because a point of view, at least in colloquial terms, might be just an opinion, and a statement of one's point of view is (implicitly or sometimes expressly) a modest claim, in which the speaker does not claim objective truth for his or her position.<sup>59</sup> Such a point of view remains a subjective device.

What could possibly render a point of view to have normative explanatory value? A point of view held by some person, or a point of view internal to a practice that could be adopted by any of its participants,

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<sup>56</sup> This is consistent with Raz on the non-moral preconditions of legitimacy.

<sup>57</sup> Compare here Raz's view that a clear mistake would not be authoritative. See *Morality of Freedom*, chapter 3.

<sup>58</sup> This may also preserve greater space for autonomous judgment and beliefs of those subject to authority, notwithstanding their practical subjection.

<sup>59</sup> See the discussion in Raz, 'Incorporation by Law' 10 *Legal Theory* (2004) 1-17, arguing that claims to moral truth cannot be understood in this conditional way, because of the nature of morality.

cannot in itself be normatively significant for anybody other than the subject themselves, because some person's acceptance of a standard for the behavior of others cannot *thereby* be normative for those others.<sup>60</sup> In the shift from the IPV to the LPV, while there was a shift from pure subjectivity to an abstraction, the point of view is still a view of truth, not justification. Thus the LPV succumbs to the same limitations of the truth variant of claiming, which is normatively less powerful than a claim to right, if not inert.<sup>61</sup> If the law's point of view remains a theory, then however much it aspires to truth, doesn't generate normativity.

An alternative possibility treats a point of view as an objective device, which moves closer to a claim as a justification. In that shift it is tempting to simply do away with the language of 'point of view,' for what is left at this point is not a subjective point of view, but an objective vantage point. Another way of putting this is to offer a different reading of a point of view as, literally, a vantage point or perspective. But a vantage point needs an occupant otherwise it is just an empty space. This forces attention not only to the position or location of the vantage point, but also, and most importantly, upon those who occupy that position. This vantage point might be understood as the position from which, as suggested above, a plausible and good faith claim to authority can be made. The vantage point is not simply an empty or a physical space, nor even a space from which some have a de facto capacity to impose their will on others; it is a normative space in which some people, not just any old people, have the standing to make claims to law's authority.

What could possibly give people such standing? What could render their claims to law's moral authority plausible? The simple answer is that these are not people, ordinarily conceived, but officials.<sup>62</sup> The more complex answer then has to spell out what it is to be a legal official, and how such an official may occupy the special vantage point that I will characterise as the Official Point of View (OPV), from which they make the Official Claim to Authority (OCA).

#### **4. The Idea of the Legal Official**

The challenge is to reconsider the connection between law and officials, in a way that revises the explanatory promise of the 'point of view' and 'claim to authority' devices, so understood. The arguments above suggest that the Hartian solution to the genealogical chicken and egg problem has lingered among those who use the devices, even when the question is not one of possibility, but normativity. The constitution of those who are officials, *and* their authorization to engage in legal activity, is regarded as

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<sup>60</sup> Unless the person is an agent able to bind her principal. Notably, even if we treat a point of view as a practical attitude or disposition, manifested in practice and not just in private opinion or belief, the mere fact of such practice cannot generate obligations for anybody not engaged in the practice, and possibly not even its participants, however committed they may be. See Coleman, *Architecture of Jurisprudence (supra)*.

<sup>61</sup> A claim to truth will not be normatively inert in so far as there is normative value in the pursuit of truth. Even if truth is uncontested, it will not settle a normative dispute in which truth is only one of the relevant considerations.

<sup>62</sup> Consider how the simple answer is used by (e.g.) Shapiro's Planning Theory, where Shapiro defends the view that planning for others can be normative. Shapiro argues that parents share the normative power to plan for others, but are not officials. Only officials engage in legal planning activity.

being either determined by the law – replicating the chicken and egg problem but with a pragmatic lack of concern about it; or by master rules/plans/customary foundations in which officials are constituted and governed by a rule arising from the social practice of those who come to be recognized and regulated as officials.<sup>63</sup>

Whatever the utility of the genealogical story about the existence of law, when it comes to explaining law's normativity it has no continuing role. While law's genesis might be a chicken and egg problem, its normativity is not; and this comes back to the question of standing. As a number of scholars have pointed out, the self and other-referential practice of officials cannot carry any normative weight beyond that practice itself. It doesn't authorize them to make laws (or plans) for others, and nor can the internal normativity of the practice (if such normativity exists at all) imbue it with any external justification.<sup>64</sup> I think there is a further problem here, which serves to undermine not only the normativity point, but also the genealogical story itself. It arises when we reconsider the connection between law and officials.

As Gardner and Macklem note, the most common alternative to Hart's solution is to abandon the chicken move (in which legal officials create legal norms), and turn to some form of non-positivism in which legal norms are not simply the creations of officials.<sup>65</sup> Hart's solution (as isolated by Gardner and Macklem), in contrast, effectively abandons not the chicken (officials create norms) but the egg (law creates officials). Instead, officials accidentally create themselves and each other through engaging in practices that become custom. Hart's solution is a plausible solution, but its normative content runs out. I think there is an alternative solution, which need not be inconsistent with positivism and which also abandons the egg, but replaces it with a substitute whose normativity can be sustained.

Like Hart's solution, the argument is that something other than legal norms create officials, and that the solution lies in the foundational work done by normative social practices. But the relevant normative social practices are not those of officials acting and recognizing each other as such, thereby identifying who is an official. They are instead the practices that constitute the role of Official, rather than the *existence* of actual officials. The relevant normative social practices are also inclusive rather than specialized – they include the practices of the whole community of law-subjects and law-users, as well as those who will be subjects as well as those who will take on the roles of officials.<sup>66</sup> This story can be told

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<sup>63</sup> Shapiro's officials are "certain people" described and constituted by the shared plan "as the holders of offices." Coleman offers several descriptions which aid his functional account but remain unelaborated. Officials are: "those authorized to exercise the power to constrain the freedom of others;" "those situated by law to judge the conduct of others and to determine whether coercion is called for;" and "those who are empowered by law and charged by law with its creation, modification, interpretation, and application.

<sup>64</sup> For example, see Michael Bratman, 'Reflections on Laws, Normativity and Plans', in *New Essays on the Normativity of Law*, edited by Stefano Bertea and George Pavlakos (Oxford: Hart Publishing, 2001), 73–85. (Responding to Shapiro in the same volume).

<sup>65</sup> Gardner and Macklem argue that this is the typical move, and the one Shapiro seeks unsuccessfully to avoid.\*

<sup>66</sup> . Among the important integrated accounts here is the corpus of work offered by Postema, who argues for an integration of the official and subject worlds in the explanation of legal phenomena, and in particular, the interdependence of official and unofficial beliefs and practices. Postema, "Convention' (*supra*) and Law's Ethos\* It also now seems clear that subjects' experiences and practices play a significant part in even the more official-centered theories, even if only at the point of securing the existence of de facto authority.

in much the same manner as Hart's story, but with the egg substituted so that subjects are among those whose practices constitute the roles of officials. The practice that establishes the role of officials remains a normative social practice, but the role it establishes is replete with powers and duties as well as a special kind of standing that is not only conceptually different from ordinary human agency, but is normatively different. It arises out of (and carries the normative standing of) the whole weight of a subject community's normative practices, not just a small (elite) group of self-referential officials. So constituted, the impact of legal norms is then a small part of the story of a legal official – such norms might formally concretize officials' powers and duties, make them salient for others to identify and structure the manner of their use, but they are not the source of officials' normative standing.<sup>67</sup>

At the same time as replacing the egg (the generator of officials' normative standing), therefore, we also significantly modify the chicken (the role of official). The official who makes law is no ordinary agent, but an agent of a special kind. People are agents (they have capacity to act, reason, and are moral subjects) but they are mere agents; while officials retain aspects of their human agency but, in their institutional role, are also agents who act for the institution and in interaction with its subjects: they have superpowers and superburdens beyond those of mere human agents.<sup>68</sup> If we just use theories of ordinary agents' actions to explain normativity, then whatever joint action or conventions they come up with would have only a little more normative standing than a pecking order.<sup>69</sup> Instead, we need to consider what difference these superpowers and superburdens make.

Elsewhere I argue for the full account of this official role which, in summary form, is a dual institutional-relational role in which the duties that both constitute and constrain officials are moral duties that respect the official's (institutionally-mediated) relationships with subjects.<sup>70</sup> The account treats officials as dual agents, who retain the capacities and burdens of their moral agency as well as the powers and duties of their status as institutional agents. The role of an official relates its occupant to other people through a set of powers and duties that can affect the rights, powers and duties of these others.<sup>71</sup> The role of an official thus combines institutional rules and inter-personal relationships, and the duties constitutive of the roles of legal officials do not solely derive from the apparatus of the legal system itself, the institutions within which officials are housed, nor even from the law that legal officials are tasked to uphold and apply. Instead the duties of officials are explained as an instance of 'relational role-morality,' in which responsibilities ('role-obligations') are owed by officials to those for whom they hold office, and who are

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<sup>67</sup> This step has much in common with Fuller and Postema's accounts emphasizing reciprocity, or Smith's version of bi-directionality (*supra*)

<sup>68</sup> Although he was mostly joking, I am grateful to Michael Sevel for the description of officials as having superpowers – a description I embrace.

<sup>69</sup> More, because chickens are not agents at all.

<sup>70</sup> Note here that Postema, 'Coordination and Convention' (*supra*) raised a similarly dual account of the duties of legal officials, referring to both their "professional-institutional" duties, and the duties they owe to subjects because of the dependence of subjects upon their activities. That duality, however, was not a focus of his separate or sustained attention, and needs further unpacking.

<sup>71</sup> The asymmetry here is deliberate. Officials, as institutional agents, do not have rights. The persons occupying those offices will have the ordinary rights of employees, and whatever general and particular rights apply to them as persons.

made vulnerable by the powers of the officials. The dual agency account, in which officials are both moral and institutional agents, changes the standing of the officials and the normative impact of what they do.<sup>72</sup>

What does this role entail? The dual notion of an official as part institution, part moral (relational) agent, means that the duties constitutive of the official role cannot be reduced to the technical constitutive rules of an institution or an institutionalized system; but nor do relational accounts substitute institutional duties with pure inter-personal duties. Officials are not just people owing inter-personal duties, rather they owe the duties of their office. Their relational capacities and responsibilities are thus mediated by their offices, and their actions are not entirely free, rather are constrained by both institutional rules and realities. Most important for present purposes, however, is that an official is not only an agent who is part of some club of actors all performing some interrelated role as representatives of the law, but wields powers over subjects. In the official-subject relationship there is at least a degree of vulnerability, on the part of subjects, to the activities of the officials. Subjects depend upon an official doing what they are supposed to do, and they might be vulnerable to an official not only doing her job, but doing it fairly, or expertly, or doing it well in some other respect. The official-subject relationship is a relationship of power and vulnerability in both normative and de facto senses.

If it matters, we can then have a debate over whether these duties upon officials are moral duties, or something else. Outside of arguments which treat all duties as moral duties, which tend to divide theorists in ways that make their debates unsatisfying, the key justification for characterizing official duties as moral duties stems from both the institutional and relational aspects of the official role. On the institutional side, if the institutional functions of the office are themselves morally justified, then any duties upon the official that are necessary to the furtherance of the justified function/institution will also be best understood as moral duties.<sup>73</sup> Perhaps more powerfully, the relational account of the official reveals morally significant features of vulnerability or dependence upon the part of subjects. If there is a relationship between subjects and officials, in which officials wield powers to which subjects are vulnerable, then there is arguably an inescapable moral quality to the duties that the one owes the other. As Raz argues,<sup>74</sup>

whatever else we grace with the title 'moral', principles which impose, or give people power to impose on others, duties affecting central areas of life are moral principles. That much about the nature of morality is clear.

If this is right, and officials' duties are moral duties, then it might seem I have simply ended up replicating core non-positivist aspects of others' accounts. My account is indeed consistent, and resonant, with

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<sup>72</sup> If we followed the path of seeking normativity in convention or in other forms of joint action, we might miss this point. The character of the actor makes an obvious difference to the utility of theories of action. Actual (not metaphorical) chickens, for instance, can act, but they are not moral agents, they are only chickens. The significance of who or what is acting similarly applies to the difference between people, qua moral agents, and officials.

<sup>73</sup> Finnis, \*

<sup>74</sup> Raz, 'Incorporation by Law' (supra note 60). This argument will become more definitive in the consideration of the role of officials in a coercive system of public governance.

aspects of the reciprocity views of official-subject relationships offered by Fuller or Postema; and with the idea of officials fulfilling an important moral function, having a moral character, requiring moral reasoning, even pursuing a moral aim, from the likes of Coleman and Shapiro and Raz as much as from Dworkin or Finnis or Simmonds. Even Hart, in his recently rediscovered essay on discretion, offered a bare but gently moralized and relational description of an official occupying a “public responsible office.”<sup>75</sup> My concern here, however, is to show the impact of this view upon the claim to authority and the point of view, rather than to canvas its roots or the impact it has on other central debates in jurisprudence (or their resolution).

Some brief distinctions may also prove useful. My account is different from that of Finnis, for instance, who argues for prioritizing a morally robust viewpoint (in his case the practically reasonable viewpoint) on methodological as well as normative grounds. While I share some of his concern to find a normatively defensible account of the point of view, that is not my core aim. Rather my account proceeds from the observation that officials, those who occupy the official role, act with *de facto* power and often legal authorisation over subjects. By virtue of their offices, and the ways in which they are marked out and made salient for subjects, officials interact with subjects and in the course of that interaction, they both lay claim to law’s authority over subjects and exercise power. My account thus emphasizes duties arising from the social fact that officials exercise power and claim law’s authority, not any methodological or normative preference for a non-positivist foundation. My view is also distinct from the reciprocity-based views of Fuller and Postema, which are grounded upon what subjects of power are entitled to as a conditions of their obedience. It entails that officials’ duties towards subjects pertain even in the absence of an obligation to obey the law. They are not founded on the expectations of subjects (e.g. whether or not they are entitled to assume officials act in good faith and in pursuit of whatever would make them legitimate), rather the fact that in holding law out as being due authority, and backing up that claim with manifestations of power even when the claim itself falls short, officials owe duties to subjects quite apart from subjects’ responses to (or expectations about) those duties.<sup>76</sup>

## 5. The OPV and the OCA

Finally, then, the point of view and claim to authority devices can be reworked with this full account of what it means to be a legal official. This offers a very different idea than the one previously relied on in attributing to officials law’s claim to authority or point of view. Officials cease to be descriptive or

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<sup>75</sup> While Lacey’s commentary on the essay argues that Hart’s failure to further the essay’s tentative engagement with sociological legal theory situates its content as part of a ‘path not taken’ by Hart, and Hart’s own note characterizes the essay as a “fugitive” not worth of durable form, the notion of the public responsible office, understood in Hart’s own philosophical terms, likely survives with some degree of importance.

<sup>76</sup> This does not excuse subjects from any relevant duties, but I take it that any duties on subjects to obey the law depend on the law having legitimate authority, of which a large determinant will be its ability to help subjects conform to reasons they owe one another. Note that in the full project I also argue that officials, qua institutional agents, do not have rights, on the basis that, as institutional agents who are not mere people, their interests are derived from what would help them serve their institutional function. Lacking any non-derived interests, officials do not have rights of their own (other than those pertaining to them as persons). Though he would likely disagree with the beginnings of an argument here, I am grateful to Luis Duarte d’Almeida for discussions on this point.

conceptual placeholders and come to be normatively loaded, so that, then in entering an official role, a person comes to hold, occupy and wield the Official Point of View (OPV), and to make and commit to the Official Claim to (Law's) Authority (OCA).

Starting with the OPV – this is not a point of view that happens to be, or even ought to be, adopted by legal officials, rather it is the standing that is generated as part of the official role, so that officials do not adopt a generic point of view towards the law, they rather embody or occupy a special point of view in virtue of their official role. Thus the OPV is not a subjective device in the manner of the IPV, nor a generic objective vantage point in the manner of the LPV. The OPV is a view from a special place of standing provided by the role of an official, not the perspective of the person who happens to occupy that role, or the institution or practice in which that role is situated.<sup>77</sup> While still likely encompassing an internal view towards the rules, as Hart explained, the OPV is burdened by moral duties and empowered in ways that any subjective point of view (such as a Hartian IPV), is not. The OPV is also laced with responsibilities, accountabilities and limitations that do not constrain the subject's actions or powers or affect their adoption of an IPV. It is in this sense neither a free nor a subjective point of view. It is not the perspective of persons who happen to be have actual or potential power over others, it is the perspective of office-holders who have such power as well as duties to perform the tasks required of the office, within the constraints imposed upon it.

Nor is the OPV simply to be equated with the LPV. For a start, it is not an abstract device, rather it is occupied by actual agents. Thus one apparent advantage of the OPV over the LPV is that it avoids even a hint of the personification mystery that plagued law's claim to authority and law's point of view. Officials are agents, and there is no metaphysical mystery over their capacity for action.<sup>78</sup> In focusing on agents, not only do we get rid of the personification puzzle, we also show why it is misguided – agents and their agency are the story, not processes of attribution, ascription, or representation. Yet this is not the OPV's primary advantage.<sup>79</sup> Much more importantly, inserting agents into the device has the effect of concretizing the point of view, so that it is no longer an abstract normative theory about the law's coherence and legitimacy, which people might and officials must adopt. Rather the OPV amounts to an objective standing of officials, generated non-mysteriously by normative social practices, and from which particular occupants of the official role can act to fulfil the role's functions and responsibilities. When we insert officials - as institutional-relational agents - into that vantage point, we then have agents with both capacity and standing to do things from the official point of view.

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<sup>77</sup> In a sense then, Hart is right that personal motivations for having the IPV don't matter – but they don't matter because they don't change the normative fact of the matter, which is that officials have duties and powers *qua* officials, which I argue include the duty and the power to commit to aspirational legitimacy in the exercise of any functions or pursuit of any opportunities arising in the course of their official role. An official who fails to accept the good reasons that exist for making these commitments is deserving of criticism for that fact.

<sup>78</sup> As MacComick's treatment shows, these are the claims of officials, worth attention in themselves, rather than seeking for attribution or personification of law's claims.

<sup>79</sup> Any advantage on that point is in any event largely nullified by both Gardner's account of the claim to authority and Coleman's account of the LPV (set out above), which also avoid the personification mystery).

While the OPV entails a particular kind of standing, it also humanizes both institutional forms and the powers and duties they generate. It introduces human qualities into the picture, including aspects of both practical reasoning and human psychology, as well as matters of choice, doubt, critique, conscience, error, effort and discretion. It also makes room for a whole host of actual officials who do not, privately or even publicly, think the law they make or apply is anything particularly special, let alone morally legitimate. It makes space for the critical Holmesian official, and may even endorse his critical attitude to the extent it serves his moral duties, as well as the humble official who would think moral pretention hubristic. It can thus overcome the primary difficulty in the literature on the beliefs of legal officials: those who advocated for the view that officials must believe in law's legitimacy have had a hard time explaining why it should matter if they see themselves as rightfully exercising authority in the name of the law. The OPV, however, makes that view irrelevant, instead it matters only that, in occupying the official role, an official accepts the standing and the requisite burdens and powers that are constituted out of the relevant practices. Furthermore, once the OPV is built into the official role, then any office-holders who fail to adhere to it (who fail to fulfil their duties, act within the constraints on their powers, etc.) can rightly be criticized.

This takes us back to Gardner's conceptual account of what it is to be an official (including the claim to authority), and the role of law in identifying who is an official. Putting this together with the above conception of officials and the idea of the Official Point of View, the conceptual solution and the law-official connection takes on a different structure and character. Officials' standing is more normatively significant than the mere identification function provided by the law or the bare conceptual truth that claiming is part of the official role.<sup>80</sup> What makes them officials is not that they claim authority on behalf of the law and are also identified by the law, rather that they actually occupy an official role, complete with an OPV, from which they have the moral standing to make claims to law's authority. The standing, logically and normatively, comes first, before any claims they may make plausibly and in good faith.<sup>81</sup>

Another way of putting this point is to argue that there is more than just a conceptual proposition linking officials and law's claims to authority. There is also a series of normative arguments. If some people are to make claims that the law deserves authority, and if those claims are to be relied on by other participants (subjects and other officials) in the practice, they must have some standing from which to make the claim. The claimants of law's authority need the moral standing that comes with the office they occupy. Part of being a judge, for instance, is to have the legal power (and thus capacity) to decide cases and issue rulings, but it is also to have the standing of an official and the duties incumbent within that role, owed to both the institutions of law and to law's subjects.<sup>82</sup> We would rightly criticize a judge who carried out his pronouncements with open disdain for the duties he owes to subjects or for the institution itself. We may even criticize judges for expressing and acting with this disdain even outside the course of their official

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<sup>80</sup> Himma - though he uses this argument to criticize the attribution/personification move, which is no longer necessary on this account.

<sup>81</sup> Note that this may not be persuasive as a genealogical story, indeed the full story of officials might require different genealogical and normative explanations.

<sup>82</sup> In the full account I explore in detail the role of officials in the existential debates about legality, including the prospect of 'wicked' legal systems, quasi-legal systems, and legal systems other than state law. I use the idea of an official as one of the sociological markers of legality, e.g. there are no officials in organized crime syndicates).



role – so powerful is the burden of the role itself. When a judge’s conduct fails to live up to the standing of the role, or contravenes the role’s duties, or misuses its powers, we don’t just feel angry that she violated some conceptual understanding we had about officials (i.e. that they claim legitimate authority), we worry she failed to do her official duty. Thus we might even think Gardner’s pyjama-clad judge issuing decisions has failed in his duty, because whilst he may claim authority, part of his official duty includes conducting himself in accordance with the moral seriousness of his role, and respecting the subjects whose lives are so deeply affected by his decisions and to whom he is offering up law’s claim to authority. There are reasons why judges wear robes.

The significance of the officials’ standing for the device of the point of view best reveals itself in the old distinction between law from the gunman. In responding to Edwards and d’Almeida, Gardner suggests they fail to hear the different voices in the gunman v law example. He suggests that, in the claim to authority, there is a moral voice that the gunman does not have. The gunman speaks with his own voice, acts without any claim to authority; the tax collector speaks with the voice of the law, and claims to wield the authority of the law. What is this voice? In treating it as a moral voice Gardner has pinpointed what the voice is used to claim. But whose voice is it? With what standing does it speak? The voice itself differs from what it is used to claim. It is the voice of the official, or what I have described as standing. Note that not everything the official does, with that voice, will claim authority. The difference between the gunman and the official tax collector asking for money is not only that one claims authority, but also that only one of these actors is an official with the standing to do so. Only one has standing conferred by a normative social practice that carries normativity into what she then does. When the official, unlike the gunman, makes a normative claim, its normativity is carried not by the fact of its being claimed, nor by its object, but by the standing of the one doing the claiming.

If the OPV is the position of official standing, then we can add more detail about what is done from that standing, and in particular, the making of claims to authority. The claim to law’s authority may not be what makes these people *officials*, but it is what makes them *legal* officials. If to be an official is to have moral standing complete with powers and duties vis-à-vis subjects; to be a legal official is to use that standing to claim authority for the law and to operate the law in its direct and indirect powers over subjects. I argued above that to make a claim to authority (in the course of making or applying rules, enforcing judgments, or issuing regulations etc.), is to hold the law out as deserving of authority whilst committing oneself to the pursuit of its legitimacy. Official actions that carry out the law, or establish the law that is to be carried out, are claims to law’s authority, even if they are conducted by officials who privately believe that law cannot have such authority. This does not render all critical conduct of officials to be extra-official, rather, the power of the role itself is revealed in the fact that the official conduct still carries the relevant legal effect, despite the criticism expressed by the occupant of that office.<sup>83</sup>

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<sup>83</sup> There may of course be grounds for criticism of such an official, where the criticism is made in bad faith on serves to unreasonably or unjustifiably undermine an aspect of the institution. Equally, there may be grounds to praise such an official, when their conduct reveals or remedies a particularly abhorrent legal rule or institution.

This suggests the need to rethink the character of the law-official connection. Officials don't claim authority on behalf of the law, rather they claim to law's authority, something which they are only in position to do in virtue of their occupation of the OPV. Officials are thus not best understood as agents in the sense of embodying the law, or agents in representative sense. Rather they are closer to advocates; they make claims to law's authority, rather than claiming authority' on law's behalf. Why not think that officials are, primarily, agents of the law in the sense of being representative of the law, making claims on its behalf? The first reason is that officials could only be partial representatives of law. Without them, law wouldn't (and doesn't) exist.<sup>84</sup> More importantly, however, officials owe relational duties to subjects as well as institutional duties to the law itself. Officials act with the authorisation of the law, but in the performance of roles that are ultimately normative only if they are consistent with the duties the role entails. They don't act for law's benefit; sometimes their role may even require action contrary to or in departure from what law requires. If they are to plausibly claim (let alone carry and embody) law's authority, they need to conform to duties owed to those subject to the law. (This includes acting for the indirect benefit of subjects who have an interest in the good functioning of the legal system, even when it doesn't favour other interests they have).<sup>85</sup>

I will argue in my full account that the OPV entails commitments to the pursuit of an ideal of legitimacy commensurate with the duties and powers constitutive of the official role. Officials who have power over subjects, whether directly or indirectly, have a moral obligation to use their powers in a legitimate way, or at least to try to do so. Instead of saying officials must adopt the view that law's demands turn out to be morally legitimate, or act as though they do, it requires something more meaningful and perhaps difficult - that officials are committed to doing that which would make the law legitimate.<sup>86</sup>

## Conclusion

The official point of view, then, is not just a view in which a rule or system is binding for oneself and others, as Hart conceived it, and the claim to authority is not an assertion that law is morally legitimate and therefore must be obeyed. The corollary of being in a position to claim legitimate authority over

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<sup>84</sup> Some have argued that forms of pluralist jurisprudence can make do without an account of the legal official (an argument I reject in the larger project from which this article is drawn). See e.g. Keith Culver & Michael Giudice, *Legality's Borders* (2010). This is without committing to Hartian ideas about pre-legal systems, in which there are no officials, or as further elaborated by Shapiro.

<sup>85</sup> The exact contours of these duties will differ according to the type of legal official, their interdependence with other officials in the distribution of authority, and the particular system in which they operate. These questions are taken up in the full project.

<sup>86</sup> Compare Postema, 'Ethos\*/ Fidelity\*' "We must understand that undertaking a commitment is not (merely) a matter of adopting an attitude or developing a disposition. Strictly speaking, commitments are not reducible to any sort of mental entity. Commitments are, or at least essentially involve, a normative status and a kind of performance within that status" This may include civil disobedience or rule departures on the part of officials when they are confronted with tasks that run counter to that commitment. On rule departures and civil disobedience, see e.g. Kimberley Brownlee, 'Responsibilities of Criminal Justice Officials; cf Brownlee, *Conscience and Conviction* (Oxford, 2012); William Smith. 'Civil Disobedience and the Public Sphere,' 19 *The Journal of Political Philosophy*, (2011) 145–166.

subjects is that one is obligated to pursue legitimate authority, and this commitment is found within the very claim to authority made by officials, made from the official point of view.

While the two devices have placed considerable weight upon the conduct of officials, their lack of attention to the very idea of the legal official has carved open a space for a fresh account of the role of officials. Rather than trying to defend or critique a way in which the conduct of officials can be explained as claims made on behalf of the law, or being directly attributable to law, the focus here is on the features of the official role that makes officials' conduct normatively significant. By emphasizing the role's moral character, its standing, its dual institutional-relational agency and its constitutive powers and duties, the idea of the legal official reforms the way and direction in which the point of view and the claim to authority operate as devices to explain not the genealogy of law, but its normativity.