Office-Holding and Officiality

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Abstract

Much of positivist jurisprudence and public law theory celebrates an idea of the ‘legal official’ as one appointed and identified by law to claim and wield law’s powers over subjects. That idea treats the official as the holder of an office constituted by law, and so relies heavily upon law’s fabricated normativity and its insulation from social and moral normativity. This paper challenges that view by drawing a distinction between ‘law’s offices’ and ‘officials of the law’. More precisely, it distinguishes the status of office-holding under the law, from the moral standing of “officiality” carried by officials of the law and transmitted through practices of recognition of the role of official. The paper challenges positivist orthodoxy to account for the moral standing that recognition carries into the role of official, alongside the institutional rules of office. In a response to John Gardner’s work on “officials of the law”, which insists upon the morally-laden role of official but avoids an over-moralised account of law’s normativity, I argue that recognition generates and carries moral normativity within and between the roles of official and subject in a way that re-inserts such recognition, and the role of official, into the story of law’s normativity.

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“Since law is not a game, nobody – least of all law-applying officials – should take a playful or light-hearted attitude to it while administering it.”

Public law, private law, and jurisprudence share in common the need to explain the connection between an office and its occupant, to take account of the many ways in which law is not a game, and its agents are not mere players. Does an office simply attach institutional empowerments and burdens

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1 John Gardner, Law as a Leap of Faith: Essays on Law in General (Oxford: Oxford University Press, 2012) at 136 [Gardner, Leap of Faith]. Gardner’s admonition to law-applying officials thankfully does not apply to the fun we can have while discussing them (and their offices). John was to have graced this Symposium with his own contribution, and enriched our discussions with his insight, wisdom, humour, and generosity. John’s illness precluded his participation, and in his absence we missed so many things, including a full working out of his account of “officials of the law”. Parts of that account are engaged here, though I cannot hope to do justice to John’s work and its importance to our questions. That he lost the chance to offer his own account, or to reply, correct errors, and debate contentions across the Symposium, is a deeply-felt loss, amidst the more profound sadnesses of those who knew and loved him best.
to an office-holder? What is the impact of office upon other powers and duties to which its holder is subject? Both private and public law offices are legal forms carrying doctrinal content through which office/office-holder relations are purportedly constituted and constrained. For general jurisprudence, however, the very connection between office and its occupant marks a foundational tension between different accounts of the character of law’s normativity; which may either confirm or upset formal office/office-holder connections operating within public and private law.

The jurisprudential significance of the connection between office and occupant falls on the idea of the “legal official.” As a descriptive category, this includes those who make, apply and enforce the law, and while there may be borderline disputes over who counts as an official, both legal practice and legal theory typically make do with the convenience that officials are “identified by law to do law’s bidding.” Such descriptive ease, in which legal officials are those whom law appoints and anoints, conceals more foundational debates over the role of official: first, whether its normative significance lies only in law’s own fabricated normativity or is grounded on robust moral normativity; and second whether, if the latter, law’s offices can successfully use legal rules to close off an institutionalised variant of the role that is insulated from both broader social practices of recognition and moral normativity. On one view of these issues, the legal official is a creature of law itself, carrying powers and bearing burdens constituted and insulated by (public) institutional offices. Whatever normativity attaches to the position of the official depends on law’s own presumed or postulated normativity, in which a standard of legal validity can be applied to determine the powers and duties of office. On a second view, legal officials are creatures of social practices that generate law’s normativity and ensure its social character. In this second reading, law’s fabricated normativity arises out of social normativity, but is carved out and insulated from that social normativity through its articulation in particular forms, including the institutional office. Here I will reject both readings in which officials as mere legal office-holders, in favour of a view in which the role of the official carries moral content, and thus robust normativity, into what is either presumed or practiced by officials; and in which robust normativity continues to apply within the role of legal official, notwithstanding law’s efforts at the insulation of an office.

The differences between these views situate conceptions of office and official, and their connection, right on the line between jurisprudential commitments that either divide or relate law’s normativity and moral normativity. Within that broader debate, an account of office and official must either divide

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2 A full exploration of the jurisprudential load borne by the idea of the legal official is carried out in the author’s book manuscript, Officials, in progress.
or relate the normativity of official activities (including claiming law’s authority and wielding its coercive power), from/to the normativity of subjection to the law. On both sides – official and subject - there are roles, agency, and agents. I will argue that the two roles of official and subject are connected through normative social practices of recognition among and between occupants of both roles, and that unless they are so connected, whatever those holding themselves out as ‘officials’ do together has no more value than a game, and whatever they do to subjects has less value than the activities of a gang.\footnote{Less, because officials hold themselves out as having legitimate authority, upholding the rule of law, and/or justifiably wielding coercive powers. The added deception detracts further from value.} If law is not a game, and officials not members of a gang, it is because there is recognition of a role of official carrying and transmitting normativity.

The account offered here distinguishes the rules of office from the roles of the official; the legal status of law’s office-holder from the moral standing of an official of the law; and the fabricated normativity of legal institutions from the robust normativity transmitted through practices of recognition. The argument begins in part one with the separation of conceptions of (i) law’s offices and (ii) the role of the official of the law. This treatment distinguishes the status of office-holding under the law, from the standing of “officiality” carried by officials of the law. Part two turns attention to the relationship between customary accounts of law’s normativity and the idea of the legal official as an artifact of the law. In this section I challenge artifactual ideas of the legal official to account for the moral standing that recognition carries into the role of official, alongside the institutional rules of office. Part three sets out an interpretation of John Gardner’s work on “officials of the law”, which insists upon the morally-laden role of official, and the continuity of its burdens with general morality. I argue that Gardner’s account differentiates the official from her office, and her moral standing from her legal status. Part four builds upon and responds to that work, arguing that recognition generates and carries moral normativity within and between the roles of official and subject. My account re-inserts such recognition into the story of law’s normativity, rolling in, rather than ruling out, the moral content of the official role.

1. Office-holding and ‘Officiality’

A distinction between “office-holding” and “officiality” both (i) isolates the character and extent of the institutional office’s impact upon (respectively) the legal status of the office-holder and the moral standing of the official; and (ii) distinguishes legal institutions’ fabrication of normativity through
constitutive rules of office, from normative social practices generating and recognising the role of official.

Law’s offices conjoin legal powers, duties, and privileges and allocate them to an agent (the “office-holder”). More precisely, law’s offices are institutions of law that contain and house legal rules authorising, empowering, permitting and/or requiring its holder to act in certain ways, typically in the direct or indirect service or representation of persons outside of that office who cannot act as the office-holder can. Office thus corrals personal agency into an institutional form. Paradigmatic offices of the law (including the offices of private trustee and company director, or the public offices of the Attorney-General or the Governor-General) turn legal powers, duties, and privileges into incidents of a special legal status attached to the office and borne by its holder. On this narrow conception of office, the office-holder status is a capacity to act in ways that an ordinary person could not, bringing about legal effects an ordinary person could not bring about. The allocation of the office’s powers and duties to a person sets up a mechanism for achieving certain ends through a particular form — the office — rather than empowering or burdening persons in their personal capacities.

In the distinction summarised here, officials of the law are not (or not just) like this, rather they fill a role that is created within normative social practices of recognition. Those practices load the role with the moral standing of the official, or what I call “officiality.” Officiality is the quality of being an official: being in the position to wield authoritative powers and to make/apply/enforce rules over others (subjects) with the backing of an institutional (typically coercive) apparatus. Officiality entails correlative subjectivity, just as the role of official entails a correlative role of subject. It is a morally significant aspect of a person’s relationship to others (including other officials as well as subjects) and the duties she owes in those relations.

Officiality arises from practices of recognition both among those who occupy roles of officials, and among those for/over whom such officials wield institutional powers and duties. While the social role of official may thus vary in its exact content, its demarcation of some persons to wield institutional

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5 I leave open for now whether this “service” or representative element of office is necessary. It is addressed in Officials.

6 In contrast to some of the views defended by other contributors to this symposium, this suggests a narrow conception of law’s offices, against views in which mere sets (or bundles) of powers and duties (such as those of property-owners or contracting parties acting as ordinary legal persons (as themselves) are conceived as offices.

7 Leaving open whether there is any justificatory symmetry between them, or bare entailment. For analysis distinguishing factual from normative correlation, and both from notions of reciprocity, see Andrew Halpin, “Correlativity and its Logic: Asymmetry not Equality in the Law” (2019) 32:1 Can JL & Jur 83.

8 If the wielding of power over others inevitably attracts moral duties on the part of the powerful, then the key is to decipher the relation between what Postema describes as institutional/professional moral duties, and moral duties that are owed because of subjection to power. Gerald J. Postema, ‘Coordination and Convention at the Foundations of Law 11 (1982) Journal of Legal Studies 165-203.
power over others inescapably burdens the role with moral duties in respect of the application of that power. Importantly, the role may (but need not) be constituted, constrained, and contoured through the form of the legal office described above, using legal rules to determine and apply the particular burdens and powers of the official. If it is, the official is also an office-holder. Yet the role of the official of law is to represent the law, not to represent other persons; qua official, the role-occupant has special moral standing, but not discrete legal status separate from her own person.

A role and its recognition may take more explanation than the more familiar constitutive rules of office. Starting with roles, work on social ontology and the philosophy of social practices treat roles as institutions in themselves; and/or as constitutive elements of more complex social institutions. They have normative content, and are not to be reduced to their functions. Roles exhibit varying degrees of fluidity, dynamism, challenge, and opacity, different degrees of formal institutionalisation, and are in every case particular to the social and institutional context in and from which they are generated.

More assistance can be provided in the idea that social roles arise in practices of recognition among “communities of practice” that include those affected by the role and those who come to occupy the role. Such recognition of social roles is not just cognitive, but also normative: not only the generation of functional divisions of labour; but also engaging the values of the role, grounding its powers and duties in service of those values.

In legal theory, treatment of the idea of recognition has become somewhat truncated by its association with a Hartian rule of recognition, concentrating more on “rule” than on “recognition.” A fairly stable conception of recognition in a rule of recognition treats it as an identification or assignation of criteria for legal validity; which the rule binds officials to apply. Theories of recognition, however complicate that picture with a division between treating recognition as responsive to value or generative of value. On some models, the moral powers and duties attaching to a role arise out of treating recognition itself as a kind of acceptance (in a collective ‘we-mode’) carrying the generative

9 On the normativity of roles, see Michael Hardimon, ‘Role Obligations’ (1994) 91 J of Philos 333; Christine Korsgaard, Sources of Normativity (Cambridge, 1994) 101-107, 120-121.


normative power of consent; while on other accounts, recognition responds to existing value; transmitting normativity out of that value.\textsuperscript{12}

Whether recognition harbours generative or responsive normativity, the key question for present purposes is what happens to the normativity it carries into the role of the official. Can the role remain responsive to social recognitive practices even when it is cabined off, by those practices, into insulated institutional forms (through rule-of-recognition-validated legal rules creating offices)? Formal institutionalization and insulation is often taken to be a key characteristic of law, as well as a defining feature of office itself,\textsuperscript{13} An orthodox conception which then treats a “legal official” as a bare manifestation or embodiment of a legal office not only relies on formal institutional arrangements to identify and constitute the office. It also treats those formal rules as separating out an office and conferring upon its occupant certain powers, immunities and duties that ordinary persons do not have. It relies on forms such as procedural entry-markers, oath-taking, or other assignations and acceptances of official statuses, to determine what counts as an office and who counts as an official, as if this determines what it is to be an official.

Rather than being a creature of formal rules and institutionalized practices that constitute an office, I will argue that the role of the official of law is grounded upon and can remain permeable by the recognitive practices of agents inside and outside the role. Its content is not determined only by the institutional rules that constitute an office’s particular legal status. The role-generating practice may recognise a requirement of formality and convey separate normativity as an aspect of the role itself, but this a contingent question about the content of what is valuably recognised. Arguably, practices of officiality and the recognition of a role of official loom large over public law offices, where the murkiness of the relation between public law office-holding and officiality reveals the importance of recognition. The more a public office-holder is recognised as filling a valuable social role and not merely as a technical institution of the law conferring status where it would otherwise be absent, the more it is enriched by the role of the legal official, and the more pressure may be placed on any insulation provided by office-holding.

\textsuperscript{12} For discussion of the differences, see Seumas Miller, \textit{The Moral Foundations of Social Institutions: A Philosophical Study} (New York: Cambridge University Press, 2010); Heikki Ilkkäheimo & Arto Laitinen

Recent work on artifactual theories of law revisit work in social ontology, theories of institutions, and broadly functional accounts, integrating these with canonical jurisprudential insights to treat legal officials as those appointed to fill law’s offices. Contemporary artifactual theories have roots in earlier efforts to draw legal normativity out of social normativity, including Hart’s somewhat ambivalent explanation which harnesses social normativity among officials, while relying on the descriptive convenience in which officials are identified by law. Hart’s efforts have been brought into sharper focus by a body of work putting to bed the ‘chicken-and-egg’ problem that affects the Hartian edifice in which law’s systematicity and normativity are grounded on the practice of officials under a rule of recognition. The well-known objection worries about the circularity of any explanation in which legal officials are creatures of valid law, which depends for its own existence and normativity on the practices of officials. Various work-arounds have sought to avoid the tautology that “law creates legal officials”, by sourcing law’s normativity in the practices of officials together, generating the emergence of either conventional, customary, or jointly-committed rules.

Of these, the most promising accounts rest law’s normativity on customary rules rather than mere collective conventional behaviour (which lacks the right kind of normativity), or joint commitment (which requires the wrong kind of normativity). Gardner and Macklem revised the genealogy of the Hartian official and the characteristic normativity of the rule of recognition, so that “benign self-referentiality” can be explained as the quite ordinary operation of custom.

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

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18 On legal theory’s embrace then rejection of both convention and hypercommitted practices, see Smith, supra note 17. On custom, see Gerald Postema “Custom, Normative Practice, and the Law” (2012) 62:3 Duke LJ 707.
19 Gardner & Macklem, supra note 17.
creating binding norms. ... 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.

Gardner’s work concisely recommits to a rendering of Hart’s views in which:20

proto-officials or would-be officials of the legal system take each other already to be officials 
under the rule, and by conforming their conduct to the rule as they thus take it to be, they 
make that the rule, and anoint each other as officials of the legal system. That is why the 
ultimate rule of recognition cannot be legislated, but can only be customary.

Yet Gardner cautions against reading too much into this customary character, or engaging 
“romantically” with the idea of a social rule: “the relevant custom, the one that makes the rule what it 
is, is not the custom of a population that can be identified independently of it. There is no wider population, 
beyond the official users, who participate in making the rule by their cumulative attempts to follow it.”21

Notice that this position, like most responses to Hart, focuses upon the customary character of the 
rule of recognition and not the idea of the legal official itself. The objections most relevant here, 
however, convey the concern that the official-centrism of the customary rule account fails to capture 
the relationship in which officials stand vis-à-vis subjects, and/or the dependence of the idea of the 
oficial upon broader recognizable practices beyond those of the proto-officials themselves.22 These 
objections are reflected in accounts which hinge law’s artifactual character upon social practices 
among both officials and non-officials, requiring cognition of, and attention to, the categories of 
subject and official;23 work which emphasises a crucial official/subject “division of labour” in the task 
of governance or the modes through which legality holds official power to account;24 and any Fullerian 
insistence on reciprocity or other model of legality requiring a structure of obligation that is reciprocal, 
even if asymmetrical, between officials and subjects.25

[Gardner, “As Others See It”].
21 Gardner, Leap of Faith, supra note 1 at 283, citing HLA Hart, The Concept of Law, 2nd ed (Oxford: Oxford 
22 Smith, supra n 17. Though see Gardner’s reply in Gardner, “As Others See It”, supra note 20 on the subject-
centrism of the official duty to uphold the rule of law.
23 See e.g. Smith, supra note 17.
24 See e.g. David Lefkowitz, supra note 15; Gerald J Postema, “Law’s Ethos: Reflections on a Public Practice of 
Illegality” 90 BUL Rev 1847.
25 Compare the treatment of Fullerian reciprocity in Kristen Rundle, Forms Liberate: Reclaiming the 
Rule of Law” in Gardner, Leap of Faith, supra note 1; and on reciprocity in Hobbes, see David Dyzenhaus, 
The full range captures a spectrum of approaches from methodological worries about the right place (if there is one) to focus conceptual analysis, through to robustly normative accounts of legality. They share in common the concern that, if there are customary rules among proto-officials, they are normative (if at all) only for those proto-officials and only in respect of the rule-generation practices themselves. Without more, normativity isn’t also carried outside of the starting customary rule into what is done by those who have anointed themselves and each other, accidentally or otherwise, outside of their group.

This familiar legal positivist account of fabricated normativity in the intra-group practices of officials is met with a second objection disrupting the comfort of that story. As emphasised by more critical objectors, the self-referentiality of the official/law nexus is benign only in its analytic plausibility. Nothing (or nothing else) about the self-recognition or intra-group anointment of officials is benign. Even if there are rules of recognition that are accidentally made, the official role within those practices cannot itself be considered accidental, even if it is unintended or unreflective among its operative participants. Absent unusual and perhaps revolutionary circumstances, it involves a casting and sharing of existing privilege; a juridification of elite power.26 If a customary rule of recognition divides labour in the project of governance according to law, then ‘proto-officials’ should be understood as setting up a division of labour in which they carve off the best jobs and the most privilege for themselves. A customary rule of recognition, then, not only carries custom’s brand of normativity, but also, at least to some degree, its conservatism.

Combining and developing some of these insights, I have argued elsewhere that the chief limitations of accounts that focus on what officials do together, in order to generate some kind of intra-official normativity, are that they (i) fail to attend directly to what it is to be an official even while relying on officials’ practices; (ii) treat the official as a creature only of rules, not of roles; (iii) fail to explain the dependence of both the role of the official and its carriage of normativity upon recognition practices that are inclusive of subjects; and so (iv) either ignore or fail to draw out the full implications of such recognition for the moral standing, powers and duties that make up the role of official via an account of integrated and robust, rather than bifurcated and fabricated normativity.27

26 Among Hart’s own descriptions of officials, he offers “a subset of powerful persons.” The role of official arguably applies its own logic of differentiation and elite power to new governing groups in post-revolutionary contexts.
3. From Legal Officials to ‘Officials of the Law’

The first objection above cannot hold against Gardner’s work on the idea of the official, which has defended, debunked, developed and disputed different aspects of Hart’s account to reveal his own. In the spirit of further response, reflection, and revision, I will argue that Gardner’s officials are not mere office-holders; they cannot be, if they are to do the work he asks them to do in his accounts of law’s normativity, the rule of law, and law’s authority. They rather carry the moral standing of “officiality”. I then argue that Gardner’s officials not only act to generate a customary rule of recognition, but also act in recognition of a role of official, generating and transmitting normativity vis-à-vis subjects of the law.

Gardner’s work reveals a view of the normativity of the official role that infiltrates his account of the normativity of what officials do. It explores a series of connections between the official and the law, including: (i) officials’ special relational obligations to obey the law; (ii) the representative agency of officials; (iii) officials’ moral duties to uphold the rule of law (and their implications for legality); (iv) officials’ conceptual connection to law’s claim to authority; (v) the moral character of that claim; (vi) the non-moral conditions of being an official; (vii) the continuity of officials’ moral responsibilities; which (viii) attach to the role, not its allocation; and (ix) the moral seriousness of the official role. 28 Importantly, Gardner jettisons the language of “legal official” in favour of “official of the law,”29 in a move which, in my interpretation, reinforces his departure from the view that treats legal officials merely as a subset of officials that are legally constituted. The new terminology, followed here, emphasises the official role before the law. It connects officials to law as occupants not only of a constituted legal office, but of a role of official bearing moral responsibilities for the law and its claims over subjects.

A non-exhaustive list of Gardner’s insights includes:

(i) Officials stand in a special relationship to the law because of their commitment to it.

28 I extract Gardner’s exact text as much as space allows. Commentary explains where my own position may contour, colour or perhaps challenge my reading of Gardner’s.
Officials have relational reasons, in addition to their other reasons, to obey the law: “they take oaths of allegiance or fidelity to the law of a certain country upon accepting a public office in that country...”\(^{30}\)

These commitments are: “morally binding so long as following such laws would not be positively immoral (and so long as the commitment was not extracted by coercion or other immoral means). Such a commitment is a truly relational reason to follow the law. But it is also an abnormal reason confined to exceptional cases.”\(^{31}\)

Gardner also explains the character of that special relationship between officials and the law:

\(\text{(ii) Officials act on behalf of the law, as its agents:}\)

“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.”\(^{32}\) This connection, Gardner explains, is conceptual: part of what it is to be a legal official is to claim law’s authority.

Gardner carefully explicates Raz’s argument that law necessarily claims moral authority, in order to put to rest persistent objections that law cannot claim because it lacks its own agency, or that at least some of its officials are too critical of the law to be taken to claim moral authority on its behalf. Gardner argues: “the law’s action of claiming moral authority is not autonomous, even logically autonomous, of the actions of law-applying officials. ... 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.”\(^{33}\)

On this view, even a critical judge cannot help but claim law’s authority when issuing judgment.

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\(^{32}\) Gardner, Leap of Faith, supra note 1 at 131.

\(^{33}\) Ibid.
Gardner directly invokes the official role, and its distinction from its occupant, to support this moralised reading of law’s claim to authority, so that:

(iii) *The official claim to law’s authority is a claim to law’s moral authority, not to “legal authority”.*

The point rests on a crucial distinction Gardner makes between law’s first-order claim to authority (represented by officials of law), and second-order claims about the law (made by officials of law). Law’s first-order claim is “a moral claim for itself, in the sense of a claim to be made up of moral obligations, rights, permissions, and so on.” Second-order claims are “claim[s] about what law claims,” e.g. “the claim that there is a *legal* obligation or right.” Gardner shows that the first claim is law’s claim (as made/represented necessarily by officials); while the second can only be a claim about the law (which can be made by anyone, not just officials, but not by law itself).

In this argument it is important that the official representing the law and making its claims does not become the law. She does not lose her personal agency: “an error about, and hence a claim about, what legal rights and obligations there are can only be attributed to a particular law-applying official, not to law itself. ... her error of law, and her claim about what legal rights and obligations there are, are hers and not the law’s ... .”

This distinction is essential to the way in which I have set up the office/official relationship in distinction to the office/office-holder relationship. It suggests, importantly, separation between the role of the official, and the office.

The same distinction plays into Gardner’s view that:

(iv) *There are non-moral criteria for being an official, including the holding of special legal powers.*

Gardner tidily reminds us that, amidst all the moral content in the role of official and the powers and duties its occupants wield vis-à-vis subjects of the law, the criteria for occupying that role must include non-moral criteria:

There are non-moral criteria, in other words, for someone to count as a police officer. There must be. Otherwise those who fail badly enough in the moral duties of police officers (individually or collectively, as you like) are not police officers, and so do not have those duties, and so cannot fail

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34 *Ibid* at 137.
35 *Ibid* at 133.
36 *Ibid*.
37 Gardner, “Criminals”, *supra* note 30 at 105. (Gardner is after all a positivist, and an exclusive one at that … though also subversively *thus* ‘nearly’ a natural lawyer.)
in them. ... [P]olice officers have special legal powers to do certain police-characteristic things, which remain their legal powers even when they are systematically abused.

Note here that the non-moral criteria are criteria for someone to count as a police officer, not for the existence or content of the official role itself. This may be an over-reading of Gardner’s original point, reading in a sharper role/occupant distinction than he set up, but it is consistent with Gardner’s view that the official role is a social role like any other.38 The role’s rationale may require that its occupant have special legal powers conferred, and that when powers are thus conferred, they authorise the occupant to exercise moral judgment and then validate their outcomes, even when those judgments are morally mistaken.39

Further reinforcement for the separation may be found in Gardner’s insight that:

(v) The official’s moral duties lie in the role, not its allocation to an agent:40

It is tempting to trace the moral duties under discussion here to the oath of office, or the contract of service, of a police officer. ... For the most part such oaths and contracts exist to solemnize, and hence to reinforce morally and psychologically, and sometimes to give legal effect to, moral duties that belong to the role anyway, thanks to the rationale for the role’s existence.

The remaining content of the official/law connection comes out of the understanding that the role of official is a valuable social role, and that an ‘official of the law’ has special powers and responsibilities, in virtue of being an official, vis-à-vis the law and law’s subjects.

Among these responsibilities:

(vi) Officials owe a moral duty (not owed by non-officials) to uphold the rule of law.

Expressly, the rule of law’s impact on moral duties is “asymmetrical”, burdening officials while serving subjects:41

39 See e.g. John Gardner, “Justification under Authority” (2010) 23:1 Can JL & Jur 71 at 74 [Gardner, “Justification”]: “the legal norms that supply justification defences in the criminal law should always be read, like all other legal norms that call for moral judgment in their application, as elliptically investing authority in someone to determine their application by exercising such moral judgment.”
the rule of law sets up an unequal struggle between officialdom and the rest of us. ... officials of the law have an obligation to obey the law that most of us don’t have. That is because, as officials of the law, they have an obligation to uphold the rule of law that the rest of us don’t have. We are the beneficiaries of the rule of law; they, when in official capacity, are its functionaries. We should generally laugh at stupid laws. They, poor things, should generally uphold them.

From an earlier account of the asymmetry focusing on the duties upon enforcement “officers” to uphold the law:42

The police are ... morally bound to uphold the law, and to make it the case that people answer to it, even when (as the police themselves often well know) the law is an ass and has no legitimate hold over those same people. That is another harsh burden of office. It is one that police officers share with prosecutors, judges, and other officers of the law. They have a moral obligation to subject people to the law even when those same people have no moral obligation to submit to it.

Again relatedly, and perhaps most importantly:

(vii) There is continuity and generality in the moral burden upon officials as “citizens in uniform.”43

In Gardner’s view the official not only retains her agency, but also her personal moral responsibility. As he explains it colloquially: “[d]on’t think that when you step into your official role (your ‘uniform’) you stop being yourself and can abdicate responsibility in your capacity as an ordinary member of the public (a ‘citizen’) for the things that you do. You still answer to the law as yourself, and you can’t hide behind your public role when you do it.”44

This view of the official/law connection draws upon Gardner’s broader thesis about the ‘inescapability’ of morality,45 supported by a view of role morality in which moral duties within the official role are continuous with “general” morality.46 The special duties of officials are owed because they fall out of

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42 Omitting footnote referencing the special relationship described at (i) above. Gardner, “Criminals”, supra note 30 at 109. See also Gardner, “As Others See It”, supra note 22 at 842; Gardner, Leap of Faith, supra note 1 at 214–216.

43 Gardner is careful to point out that the label has lyrical, but not technical bite. Neither the presence nor absence of actual uniform or formal citizenship are necessary to the view that officials retain their ordinary moral responsibility even while bearing special duties in their role. See Gardner, “Criminals”, supra note 30.

44 Ibid at 98.


46 Gardner uses this work to counter Thorburn’s argument that the official standing of the decision-maker alters the structure of justifications for criminal wrongdoing. Gardner’s point is that officials’ special moral burdens renders their wrongdoing worse than that of a private person who has no role as a protector representing the law. See Malcolm Thorburn, “Justifications, Powers, and Authority” (2008) 117:6 Yale LJ 1070. Cf Gardner “Justification”, supra note 39; and see Thorburn in this volume.
the value of their institutional role, but they do not attach to officials some special status. Here Gardner uses the same core thesis to argue that occupying the role of official is like occupying other social roles: it changes the circumstances in which role-occupants are subject to general morality.

Finally, what may seem a small point but is fundamental:

(viii) Law speaks with the moral voice; and the moral seriousness of law-application means that officials representing that law should act with seriousness.

In a response to commentary from d’Almeida and Edwards, Gardner suggests that they “fail to hear the distinction that Hart and I hear between law and the gunman.” That distinction holds that law: “cannot be understood except as issuing its requirements in a moral voice. There is no way to reduce this feature of law out. It is a defining aspect of the legal point of view.”

This supports the admonition from Gardner with which this paper opened. The two are connected because the moral voice is a serious voice. It does not “mean business” in the way of the gunman, because it appeals to reason and not to force. Yet it also appeals to reason and not to frivolity. Failure on this count is reason to doubt the irreverent official’s fitness for her office.

The collation of these insights across Gardner’s work not only puts in one place his ideas about officials that have largely been deployed in service of other debates or expositions. They also point to a core insight about the moral content of the role of the official, and its relationship to the legal status of office. The question is whether this is the role of the official through which to build an account of law’s normativity.

1. The Moral Role of Official

My own work has offered an account of the official in which the special moral standing of the official role, arising out of broader cognitive practices including those of law’s subjects, is crucial to law’s normativity. While this goes further than Gardner to load up the moral standing carried by the recognition of the role of official and its value, perhaps tripping over into the “overmoralizing” that he cautions against, the accounts share some common commitments and my own owes much to his. To

47 See also Raz’s reminder that judges are human, too: Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason (Oxford: Oxford University Press, 2009).
48 Gardner, “As Others See It”, supra note 22 at 826.
49 Ibid.
sustain the account requires distinctions between office-holder and official; between standing and status; as well as attention to the special normative force of recognition. Together these generate a revised view of the normative activity that Gardner’s earlier work attributed to the ‘accidental’ official.

Recall Gardner and Macklem’s argument that legal officials are creatures of a self-referential customary rule which they make accidentally. In my view that appearance is deceptive, because a customary rule of recognition itself depends upon recognition of a role of official – a role in which some people are to act for institutions that wield powers and claim authority over others, administering a system of rules to which others are subject. This view of the law/official connection adds moral content to the role from which officials are the inadvertent architects of a customary rule of recognition. It suggests that, not only is the customary practice not benign, it is not wholly self-referential. The normativity of the rule of recognition is generated not by people acting as themselves, or even with their “peers” or their group, but by acting within a valuably recognised role of official. The actors generating a rule of recognition perform the valuable recognised role of official, and therein lies the normativity of what they do. Recognition on both sides - by both the wielders and the subjects of official power - is important. Officials see themselves not as following any old rule that they (thereby) accidentally make, but as following a requirement of a role.

Regardless, then, of individual officials’ particular views about the value of what they do, they carry out a morally rich and laden role in which they claim law’s moral authority, bear special moral obligations to uphold the rule of law, and wield morally serious power over others. The official/subject distinction itself renders what officials do to be morally serious, even when they do something relatively technical., for the moral seriousness lies precisely in there being a role from which to claim authority and wield powers over others. There is no other way to regard the role of the official of law, without collapsing its practice it into either a self-serving game among a group of similarly-situated and powerful participants; a game that is being played on those who feel the effects of that power. Instead, the view offered here is that the role of official, as valuably recognized, is directly interdependent with the normativity of the role of subject.

Recognition therefore serves to calibrate the normativity of what goes on between official and subject; it connects the two and transmits normativity and standing within their relationship, in both

50 The customary foundation of both the social role of official and any rule of recognition may harbor synchronic or diachronic ordering. See Gerald Postema “Melody and Law’s Mindfulness of Time” (2004) 17:2 Ratio Juris 203.
51 Gardner, “As Others See It”, supra note 22.
directions. Recognition of value (e.g., of a valuable institution, or of the person) carries normative significance into the relationship between the recogniser and that which is recognised). Yet recognition also requires less than reciprocal obligation; importantly, its calibrated normativity may burden the official role without conjuring duties of obedience into the role of subject. The full account thus sits somewhere between a commitment to official/subject reciprocity and a practice of bare cognition of an official/subject distinction, and avoids both a unilateral focus on officials and a functional division of labour. It understands the roles of officials and subjects to have integrated and not bifurcated normativity, and treats that integration to be essential to the modality of law.

Yet if official is a social role, is its normative content merely aligned with whatever is practiced? Gardner’s work applies a robust metaethical position to the idea of the official and the morality required of those in the role. As moral duties and powers, their existence depends upon the actual values carried by the role and are not simply whatever communities of practice take them to be. Yet I would add the impact of recognition itself here – so that not only facts about the value of the institutional role, but also its recognition, responding to or generating such value, grounds the moral standing of officiality in which officials stand in relation to subjects. This makes a difference to how official duties are understood. For example, in my view, the judge or prosecutor or police-officer who takes too light-hearted an attitude to the law, in the course of administering it over a subject, not only raises doubts about her fitness for the role of official, but also wrongs the subject. By failing to act in accordance with the moral seriousness of the role, the official fails to appropriately recognise that her role empowers her at the expense of the subject’s vulnerability. In turn, to make light of her role is to fail to appropriately recognise the subject and her subjection. This is crucial to the modal understanding of legality in which the powers wielded and operated by the law are wielded and operated in a certain way - seriously, and in recognition of the insult of subjection - by officials.

The core account thus connects law and officials in both structural and substantive relationships, while connecting officials and subjects in moral relationships. In certain contexts (including in most of public law in liberal state systems), the content of those connections might be very tightly determined by the holding of law’s offices, so that the insulation between the normative social practices that generate the role, and the formal institutional rules that constrain and constitute the normative entailments of office, might be thick. My point here is not that broad recognition practices shape the office itself,
rather that they shape and generate its officiality insofar as subjects and officials take that office (and its conferral of legal status) to be constitutive of a valuable social role of official.

That takes us back, finally, to the distinctions between office-holding and officiality, and between legal status and moral standing. In both public and private law, office carries special legal status into the role of the office-holder. Yet the normative magic of law’s offices must rest upon robust moral normativity in the role of official, not just a club of people ordering themselves with rules and others with force. In both private and public law, offices are derivative of the institutional structures that officials of law put in place to govern and allocate private and public rights and duties. Their conferral of legal statuses turns upon the work of officials of law in creating them by fabricating or fashioning powers and duties as artifacts of law, but they owe their thick insulation to the less-insulated, permeable roles of those officials. In this way, the legal status of office is grounded not on the institutional or constitutional rules of office, but on the recognition of roles of officials having the special moral standing to carry normativity into what they do with each other and what they do to and for their subjects.