

# A Perspectival Theory of Law

WALTER SINNOTT-ARMSTRONG\*

---

When a debate rages for a long time among intelligent people, there is almost always some truth on all sides. There is also usually some misunderstanding between the opponents. This pattern recurs in the debate among legal positivists, legal realists, and natural law theorists. That debate has raged for millennia. Each side contains some truth and some misunderstanding.

To show this, I will step back from details. I will not comment on the extensive literature or discuss actual cases. My goal is to understand the broad motivations behind the main positions in the traditional debate. These positions will be characterised in general terms that abstract from variations within each tradition. Still, I do hope to illuminate the basic issues at stake and to gesture in the general direction of a new approach.

## Definitions vs. Prescriptions

What is the traditional debate about? Many things. Parts of the debate concern semantic definitions and epistemic criteria. A *semantic* definition of law gives necessary and sufficient conditions for something to be a law or against the law. *Epistemic* criteria for law give tests that people can use to determine (or justify claims about) what is a law or against the law. Semantic definitions and epistemic criteria are often conflated in the traditional debate, which creates some confusions. It is also important to distinguish *a* law from *the* law, since an action could be said to violate a law without being against the law. My main topic will be with the semantic definition of the law, although I will sometimes write about epistemic criteria and about what is a law in order to capture certain aspects of the traditional debate.

*Legal positivists* claim that the general definition of the law can be morally neutral in the sense that it need not refer to what is or is believed to

---

\* Professor of Philosophy, Dartmouth College, Hanover, New Hampshire. This paper was written for the Workshop on Judicial Activism and Judicial Review in Australian Democracy at the Australian National University in July, 1998, organised by Tom Campbell. I am grateful to the Australian Research Council for financial support and to several participants, especially Chin-Liew Ten, Fred Schauer, and Tom Campbell, for helpful comments.

be morally right or wrong, good or bad, and so on. *Natural law theorists* deny that any such morally neutral definition can be adequate. This definitional dispute is over what is called *the separability thesis*.<sup>1</sup>

Legal positivists and natural law theorists also disagree with *legal realists* who claim that the law can be identified by looking at decisions by judges in particular cases without looking at any general rules, including those passed by legislators as well as the general moral rules emphasised by natural law theorists. Legal positivists and natural law theorists both insist that the law cannot be determined independently of general rules.

This debate among these three positions is *not prescriptive*, since it is about what the law is and not about what it ought to be. These views do not tell us which laws and legal decisions are good or bad but only which rules count as laws and which acts are against the law.

Still, legal positivism also has its prescriptive or normative side. Legal positivists often claim that laws should be written by legislators in such a way that judges can identify them and apply them to cases without depending on their own beliefs about what is morally right or wrong, good or bad, and that judges should then identify laws and decide cases in this way.<sup>2</sup> This claim is not about what law is or about how laws are in fact written, since positivists admit that many laws are not written in this way and that no law has to be written this way in order to be a law. Instead, this positivist claim is about how laws should be written and how legal cases should be decided. Of course, some natural law theorists make competing prescriptive claims about how laws should be written and how cases should be decided, namely, in accordance with natural law. So do some legal realists, who claim that judges should decide particular cases without too much, if any, regard for the general rules passed by legislators.

There is, then, one debate about the definitional issue of how to identify the law and a separate debate about the prescriptive issue of how

---

<sup>1</sup> Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing Co., Aldershot, 1996), formulates the conceptual separability thesis as “the view that law and morality *can* be separated (in that, for instance, legal decisions need not draw on moral premises)” (3; compare 69). In contrast, the descriptive separation thesis is “the claim that law and morals actually are separate” (3). Legal Positivism is often and here defined so as to include the separability thesis, but not necessarily the separation thesis. Natural Law Theories are often and here defined so as to deny the separability thesis. On the separation thesis, see Frederick Schauer, “Legal Positivism and the Contingent Autonomy of Law”, forthcoming in Tom Campbell and Jeffrey Goldsworthy, (eds), *Judicial Power, Democracy, and Legal Positivism* (Dartmouth Publishing Co., Aldershot, forthcoming).

<sup>2</sup> This is called the prescriptive separation thesis by Tom Campbell, *The Legal Theory of Ethical Positivism*, pp. 2-3, 71, and 85.

laws should be written and how cases should be decided. Opponents in both debates are called positivists, realists, and natural law theorists, but it is perfectly coherent to be a positivist in one debate and a realist or natural law theorist in the other debate.<sup>3</sup> Confusion can result unless we separate the definitional debate from the prescriptive debate.

To ensure this separation, I will address these issues in different papers. The definitional issue will be the topic of this paper. When I refer to legal positivism, legal realism, and natural law theory in this paper, I have in mind the definitional versions of those theories. I will address the prescriptive theories in another paper.<sup>4</sup>

One might be tempted to skip the definitional issue and go straight to the hotter topic of how judges should act. That would be a mistake. The definition of the law might not seem very interesting for its own sake, but it is an essential preliminary to the prescriptive issue. If one does not know what the law is, then one cannot say anything precise and systematic about what the law ought to be. On a more practical level, people often decide what to do by determining what the law is, and they often criticise others for disobeying the law or for not applying the law when that is their job. In such contexts, the term “law” is used as a tool for changing other people’s behaviour, so it should come as no surprise that people fight over the right to use the word “law” in the way they want. Each of these uses of the phrase “the law” presupposes some view of the nature of the law, so they cannot be adequately justified or understood without first getting straight about the definition of the law.

## Kinds of Definition

I contrasted prescription with definition. It is more common to contrast prescription with description, so some readers might wonder why I did not refer to the descriptive debate. The reason is that, in my view, the definitional debate is not purely descriptive because of the kind of definition that is at issue.

Different kinds of definitions serve different goals and meet different standards.<sup>5</sup> Some definitions are lexical or *dictionary* definitions. Definitions of this kind report how common English speakers actually use

---

<sup>3</sup> For example, David Brink, “Legal Positivism and Natural Law Reconsidered”, *The Monist* vol. 68, no. 3 (July 1985), pp. 364-388.

<sup>4</sup> “A Patchwork Quilt Theory of Constitutional Adjudication”, forthcoming in Campbell and Goldsworthy, *op. cit.*

<sup>5</sup> The following discussion of definitions draws on Robert Fogelin and Walter Sinnott-Armstrong, *Understanding Arguments*, Fifth Edition (Fort Worth; Harcourt, 1996), pp. 329-331.

the defined word. Such reports need to be justified by empirical research in linguistics or by introspection by speakers of the language.

It is doubtful that any legal positivists, legal realists, or natural law theorists intended their claims to provide such a dictionary definition of the word "law". They did not do empirical research on actual language use. Nor did they usually base their theories on introspection. They also intended their theories to apply where English is not spoken. Most importantly, common English speakers are pretty loose with what they call "law", so any descriptive definition would have to be very vague. I suspect that linguistic research would favour legal positivists, but it would fail to resolve the issues that fuel the traditional debate. So that debate is not really about dictionary definitions.

A second kind of definition is *stipulative*. A stipulative definition merely tells how someone intends to use the defined word, so it would be irrelevant to do empirical research about how other people use that word.

The traditional debate cannot be about purely stipulative definitions. If legal positivists' definitions of law were purely stipulative, there would be no point in arguing for them, criticising them, or responding to criticisms, other than by saying "That is how I use the word." The same goes for legal realists and natural law theorists.

Between dictionaries and stipulation lie *precising* definitions. The goal of a precising definition is to specify a precise use within the vague limits of common language in order to serve some practical purpose. For example, linguists who want to define the word "city" might ask hundreds of people which areas they would call a city. Or one might just stipulate, "By 'city', I mean a densely populated area of more than 50,000 people..." Such stipulation is fine in a friendly contest to see who can name the most cities in Asia (as long as both contestants agree to the stipulation). In other contexts, however, a definition of a city might have important implications. It might, for example, affect the distribution of funds if a law provides federal support for public transportation in all cities. When the definition has such effects, it needs to be justified at least to people who live in areas that are deprived of funds by the definition.

Of course, it would be very misleading to define a city as any area with more than ten people, or to require cities to have over ten million people. Precising definitions usually must lie somewhere within the loose limits of common language. Still, many alternative definitions lie within those loose limits, so any choice of a particular precising definition needs to be justified in contrast with the other remaining possibilities.

Such choices cannot be justified by showing that one alternative is the true one or the accurate one. There is no way to determine truth or accuracy when each alternative lies within common language. The only

way to justify such a definition is to show that that definition best fulfils the relevant interests.

This pragmatic test still will not pick out a single best precisising definition without presupposing that certain interests are relevant and others are not. The reason is that different definitions can serve different interests. An official might need to distribute public transportation funds to cities, whereas an academic might want to study crime trends in cities. Each will favour and be justified in adopting the precisising definition that best serves his or her interests. Relative to those particular interests, one might be able to show that one definition is the best. Nonetheless, when different people have such different interests, they might be justified in adopting different precisising definitions.<sup>6</sup>

A fourth kind of definition may be seen as a kind of precisising definition, but it still needs to be distinguished. *Theoretical* definitions also specify a precise use within the vague limits of common language in order to serve some purpose, but here the purpose is theoretical rather than practical. The goal is to construct the best theory and capture what is important about the defined thing. The above precisising definition of a city does not purport to say what really is important about a city or to construct a theory about the true nature of cities. In contrast, when chemists define water as H<sub>2</sub>O, they often do claim to capture what water really is. The purpose of this definition is to allow chemists to construct general theories about how water interacts with other chemicals, when it boils, etc. If water were defined not in terms of hydrogen and oxygen in general but instead in terms of the most common isotopes of hydrogen and oxygen, then the definition would not be as useful for theoretical purposes, since generalisations about how water forms compounds with other chemicals would not be as simple and powerful, insofar as H<sub>2</sub>O with other isotopes of hydrogen and oxygen are covered by almost all of the same generalisations. That is what justifies chemists in claiming that their definition of water as H<sub>2</sub>O without mentioning isotopes captures what is important about water for the theoretical purposes of chemistry.

Now, which of these four kinds of definition is at stake in the traditional debates about how to define the law? I already argued that the proposed definitions are neither stipulative nor dictionary definitions, so they must be either precisising or theoretical definitions. The question then comes down to whether the purposes of the traditional debaters were practical or theoretical. Did legal positivists, for example, give their

---

<sup>6</sup> Similar points could be made about precisising definitions of death in medicine and in criminal law, of insanity in criminal law and in civil commitment, of blindness in insurance and in restrictions on school bus drivers, and so on.

definitions in order to construct theories to help us understand how law actually operates (as with the theoretical definition of water) or were they trying to serve practical purposes (as with the precisising definition of a city)? The answer is that they were doing both. Some legal positivists might have been purely theoretical, but most had political goals mixed in with their theoretical goals. They often argue for their definitions and against other definitions of law by pointing to the practical, political effects of adopting those definitions.<sup>7</sup> This makes their definitions of law practical in a way that chemical definitions of water are not. Admittedly, even chemists have practical goals in mind, insofar as they have an eye to uses of their theories to aid society or to make them money. However, chemists do not usually directly cite these practical uses to justify their theoretical claims. In contrast, legal positivists do often justify their definitions by citing effects of using those definitions or the alternatives. The same goes for legal realists and natural law theorists. These traditional positions still differ from the precisising definition of a city, because nobody would claim that a precisising definition of a city tells us what a city really is, and the traditional positions also purport to discover what the law really is. To that extent, the traditional debate is about theoretical definitions. But, since such theoretical purposes are usually mixed in some proportion with practical purposes, the traditional positions about law seem to seek some mixture of a precisising definition and a theoretical definition.<sup>8</sup>

This goal determines the tests to use in deciding among the traditional definitions. Both precisising and theoretical definitions need to fall within common language, but that does not settle the debate. Common English speech about law is notoriously loose and even inconsistent. It might rule out a few definitions, but it still allows some competing definitions of the law by legal positivists, legal realists, and natural law theorists. The only way to justify one such definition over another, then, is to show how one definition better serves the relevant interests or better captures what is important about the law.

## Social Institutions

Sometimes it might seem that a single precisising or theoretical definition could capture all that is really important about the thing defined. For example, the standard definition of water as H<sub>2</sub>O might seem to capture what is important about water. Modern chemistry shows how fruitful this

---

<sup>7</sup> See, for example, Neil MacCormick, "A Moralistic Case for A-Moralistic Law", *Valparaiso University Law Review*, vol. 20 (1985), pp. 1 ff.

<sup>8</sup> Brian Bix gives further arguments for a similar conclusion in "Conceptual Questions and Jurisprudence", *Legal Theory* vol. 1, no. 4 (December 1995), pp. 465-479.

definition of water is. Still, the limits of what counts as water will be different when one orders a drink in a restaurant, since then water often comes with ice, carbonation, fluoride, and even flavouring. Some scientists might respond that what restaurants serve is not really or purely water. However, professional organisations and courts might need to decide what to allow restaurants to serve when someone orders plain water. The interests that are relevant in this context are just as legitimate as the interests of chemical experimenters. There might, then, be one definition of water for the purpose of drinking and another for the purpose of chemistry.

Besides, even if each natural kind did take a single precisising or theoretical definition, other such definitions need not be so singular. This is especially clear with social institutions. Different people participate in social institutions for different reasons. Once they enter the institution, they play different roles. These different reasons and roles will give them different interests and will make them see different aspects of the institution as most important.

For example, what exactly is a church? The janitor might say that it is a building, and fund-raisers might say that they are going to build a new church. However, after the new building is finished, members who go to church mainly for social reasons will say that they still go to the same church (St. Peter's), since the clergy and congregation did not change with the building. Still others focus on doctrines that are believed or taught. If the doctrines changed radically, some would say that they still go to the same church, but theologians and the national organisation might say that it is now a different church. Even among those who emphasise doctrines, there can be disputes if, say, only 10% of the doctrines change. Those who see this 10% as important enough will call it a new church, while others will call it the same old church if they attach more importance to the stable 90% of the doctrines. If a philosopher were to ask, "Is it *really* the same church?" or "What is the church *really*?", we should not expect agreement. Different people define the church differently, because they have different interests and play different roles, so they take different perspectives on the church and see different aspects of it as important. It is hard to see how anyone could show that one perspective is the right one or that certain aspects are the important ones for every purpose.

These disputes about what is important in a church will lead to different views on the rules of the church. Suppose the congregation and priest claim to be Catholics, but the clear majority of the congregation do not oppose either contraception or sodomy, the priest opposes contraception but not sodomy, and the Pope claims that nobody can be a true Catholic without opposing both. If one sees formal institutional structures as important, one might say that this church has rules against both contraception and homosexual sodomy, even though these rules are neither

followed by the congregation nor enforced by the priest. However, if one focuses on social relations within the congregation, one might say that this church has neither rule, despite what the priest and the Pope say.

Similar points could be made about other social institutions and about other concepts that interact with social institutions. Because social institutions include many people who get involved for many reasons, different people will usually take different perspectives on most large social institutions. These institutions, then, cannot be understood without taking into consideration all of the different perspectives of different people who participate in the institution.

## Perspectives on Law

Law is another social institution where different people play different roles and, hence, have different interests. One's role can limit the kinds of reasons that one may cite to justify a decision.<sup>9</sup> One's role can also affect one's interests, both by creating or destroying one's interest in something or by making something seem or be more important than when one is not in that role. Such collections and orderings of reasons and interests are what I mean by different *perspectives* on law taken by people in different roles.<sup>10</sup>

There are numerous intertwined roles and levels within any modern legal system, but I will simplify the discussion here by focusing on three main roles: those of legislators, judges, and private persons. Admittedly, legislators and judges have private lives, too; and legislators sometimes act as judges, such as in impeachment trials in the United States or when the Law Lords decide a case in Great Britain. When I describe a particular role (such as judges), I describe people insofar as they occupy that role (such as judges qua judges). This is not to deny that a single individual can take different roles and perspectives on law at different times. I also do not deny the great variety in the jobs of legislators and judges at different levels. There is even more diversity in the lives of private persons. So much of what I say will be oversimplified. Still, there are some common interests that keep my crude trichotomy from being too crude. I will say something later about some other roles and about interactions among roles. But I will begin with the three main roles and perspectives on law.

<sup>9</sup> This limiting role of roles is emphasised by Joseph Raz when he discusses exclusionary reasons. I agree that roles can limit reasons and interests, but that is not all there is to roles.

<sup>10</sup> In *The Concept of Law* (Clarendon Press, Oxford, 1961), pp. 86-88 (= pp. 89-91 in the Second Edition, 1994), H.L.A. Hart also talks about internal and external points of view on law, but what Hart means by a point of view is somewhat different from what I mean by a perspective, and he does not tie points of view to specific roles as I do.



My goal is to show that each of these three perspectives is expressed in one of the three classic definitions of law. The roles and perspectives are prior to the definitions of law, both in the sense that the definitions came later historically (even if certain political ideas caused those roles to be created) and also in the sense that the roles could exist without anyone explicitly formulating the definitions of law. Certain definitions then become and remain popular because they capture what is important from a certain perspective.

## **Legislators and Legal Positivism**

Consider the perspective of a legislator. Legislators write laws. Actually, their clerks write the laws; but the legislators still choose to support the laws that their clerks wrote, and then what legislators choose to support (or oppose) is the words in those laws. House bill #123 is a set of words. When this set of words is brought to the floor of the house, opponents propose amendments, which are additional or alternative words. The opposing sides argue about which words are better. Then they vote on the amendment and, if it passes, on Amended House Bill #123. What they vote for or against is a set of words. Given the nature of this legislative job, it is no surprise that legislators see laws as consisting of the words that they passed.

Of course, the legislators took those words to have certain meanings. A law about commercial banks is not a law about river banks. So it is not just the words but also their meanings and possibly also the speakers' meanings that constitute a law from the perspective of legislators. If legislators pass a bill whose words do not mean what they took those words to mean, then it is not clear what the law is from their perspective, just as it is not clear what I say when I misuse words. In any case, the crucial point here is that, even if words and meanings are part of a bill that passes, that bill is not changed by what other people, including judges, do later.

Admittedly, legislators support laws in order to achieve certain purposes. They hope that passing a law will have a certain effect on society. But legislators do not vote on those unstated purposes. If they had to vote on specific reasons for laws, majority support would be rare. When a law they passed does not serve their purposes as they hoped, legislators will be disappointed; but they cannot claim that the law they passed was not enforced. For example, if legislators vote to allow capital punishment because they think that this law will deter murder, but this law does not deter murder, then the law still allows capital punishment (assuming it is constitutional).

The point is not that judges may not consider legislative purposes when they interpret laws passed by legislatures. That is a prescriptive issue about how judges should reach decisions. The point for now is just that its purpose is not part of a law that legislators pass. Admittedly, legislators

often know that judges will consider legislative purposes in deciding cases, and this knowledge might affect how legislators write laws and which laws they pass. But legislators cannot be concerned solely with how judges will interpret laws, because their laws reach a wider audience, including private citizens. Moreover, what they vote on is still the words, and not any prediction about how judges will interpret those words.

Similarly, legislators know that individual laws will be applied in light of the rest of the legal system, and they use this knowledge in deciding which laws to support. A background of procedural laws must also be in place before anyone can be a legislator and before a vote can be taken. Nonetheless, what legislators choose to support or oppose is the single law that is before them at a certain time. Suppose a legislator votes for Bill #123, because she thinks that Bill #124 will pass the next day, and that these two laws will work together well, even though she would not vote for Bill #123 alone. The next day, House Bill #124 fails to pass. The vote on House Bill #123 still holds, and that bill is still a law.

There are, then, two distinctive features of the legislative perspective on laws. First, they pass laws one by one, not as groups. Second, what they pass is a set of words with certain meanings. As a result, legislators tend to talk as if a law is a set of words passed at a particular time.

This perspective on law is reflected in definitions of law by legal positivists. There are many versions of legal positivism, but my point applies to the movement as a whole. I will use Austin and Hart as examples. Austin followed Bentham, whose main goal was to figure out which laws maximise utility and then to get those laws passed. So it should be no surprise that Bentham and Austin view law from that perspective of a legislator. Austin then defines a positive law as a general command (or sanctioned expression of desire) by a human sovereign.<sup>11</sup> The crucial point here is that laws are commands or expressions, according to Austin. That means that they are words or uses of words on particular occasions. Just as I said a legislator would claim.

More recent versions of positivism are more subtle and inclusive. Hart, for example, does allow as laws some rules that are not passed by sovereigns or legislation. Still, Hart constantly assumes that the laws passed by legislatures consist of the words that they voted on. His central discussion of open texture in “the language of the rule”<sup>12</sup> would be misguided if law did not consist of language. Also, when Hart debates Lon Fuller about the rule “No vehicles in the park”, Hart stresses the words in the rule along with their meanings in contrast with the purposes for which

---

<sup>11</sup> John Austin, *The Province of Jurisprudence Determined* (Weidenfeld and Nicolson, London, 1955), pp. 13-14. Originally published in 1832.

<sup>12</sup> H.L.A. Hart, *The Concept of Law*, pp. 121-132.

the rule was passed.<sup>13</sup> Even when discussing precedents, Hart emphasises the words in judicial opinions rather than the principles that are implicit behind those precedents. This is one of Dworkin's main complaints against Hart.<sup>14</sup>

Thus, both traditional and recent versions of legal positivism are suited to capture those aspects of law that are important to legislators, given their peculiar role and interests. In that sense, legal positivism views law from the perspective of legislators.<sup>15</sup> Whether legal positivism can also capture other perspectives on law can be determined only after we describe those other perspectives.

## Judges and Natural Law Theory

Judges have a different job than legislators. They decide particular cases. This different role creates different concerns than legislators.

When judges decide a case, they do not consider only a single law. They need to consider all of the relevant statutes and constitutional clauses as well as judicial precedents. The point is not just that statutes might conflict among themselves and with the constitution, if any. Even when there is no conflict, judges need to consider rules of evidence and other procedural rules. They also need to determine whether any precedent restricts or reinterprets the statute. This makes a judge's job very different from that of a legislator. Legislators vote on bills one by one, whereas judges decide on whether the whole system of laws or the law as a whole allows a criminal conviction or civil damages.

Judges, then, have two jobs. First, judges must reach decisions. To refuse to reach a decision would be to decide in favour of the defendant, so judges usually aren't allowed to refuse to decide a case (or even to postpone a decision for very long) just because the case is hard.<sup>16</sup> Moreover, judges

---

<sup>13</sup> See H.L.A. Hart, "Positivism and the Separation of Law and Morals", and Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart", both in *Harvard Law Review*, vol. 71 (1958), pp. 593 ff. and 630 ff. respectively.

<sup>14</sup> Ronald Dworkin, "The Model of Rules I", reprinted in *Taking Rights Seriously* (Harvard University Press, Cambridge, 1978), pp. 14-45.

<sup>15</sup> Tom Campbell might seem to deny this when he writes, "Legal Positivism can, however, be taken as a citizen's, as contrasted with a social scientist's, theory of law, a theory about the way lawyers, and in particular judges, should identify and understand law" (*The Legal Theory of Ethical Positivism*, pp. 78-79). However, Campbell might just be saying that legal positivism is a view of law that captures the legislative perspective on how other people (citizens, lawyers, and judges) should view the legislature's pronouncements.

<sup>16</sup> A legal system could allow judges to postpone decisions in certain kinds of

must base their decisions on the law. Their job is to apply the law, not to impose their own moral beliefs on everyone else.<sup>17</sup>

Judges need to do both jobs in a range of cases over which they have little control. Whereas legislators get to decide which bills to consider, judges typically do not get to decide which cases come before their courts. The cases that do get to court are rarely simple, since few people waste time on cases when it is obvious what the courts will decide.

It is difficult for judges to do both of their jobs in the hard cases that come to court. When precedents or statutes or constitutional clauses conflict without clear rankings, or when they are too vague to dictate a single decision, then the judge cannot decide the case on the basis of any of these sources of law alone. So the judge has no choice but to look beyond the explicit words in precedents, statutes, and constitutions. Sometimes judges look for broader moral principles that somehow underlie the explicit words in precedents, statutes, and constitutions. But evaluative claims are needed to show that a certain moral principle is implicit. The appeal to values is obvious when one argues that a broad right is implicit because it provides the *best* way to justify rights that are explicitly listed.<sup>18</sup> An appeal to values is also needed to argue that an implicit right is necessary for an explicit right to be secure or meaningful, since the necessity in question is not logical but is rather a matter of the best available or only acceptable means of adequately securing the explicit right.<sup>19</sup> Thus, judges cannot determine which moral principles are implicit without relying on their own moral beliefs. Sometimes judges admit this. Sometimes they even refer directly to what is fair or just, and they say that their job is to do justice.<sup>20</sup> Such

---

cases until the legislature provides more specific directives, but to apply these directives to the case before them would involve admitted retroactivity. This might explain why this option is usually not available.

<sup>17</sup> I am referring here to a common understanding of the job of judges. I am not assuming any particular definition of the law. This is crucial, since it would be circular for me to presuppose any definition of law in my descriptions of the three main roles or perspectives.

<sup>18</sup> This seems to be the argument for a right to privacy in *Griswold v. Connecticut* 381 U.S. 479 (1965).

<sup>19</sup> For example, in *NAACP v. Alabama* 357 U.S. 449 (1958), the U.S. Supreme Court held that an implicit right to keep membership lists private underlies explicit rights to assemble and associate, because people could not associate without too much personal risk if all membership lists were public. This argument depends on value judgments about how much risk is too much.

<sup>20</sup> This might mean just that they avoid dashing expectations that are legitimate because based on law, but that is not all there is to justice for most judges who think their job to do justice. The view of judges as doing justice is very attractive to judges who do not want to see themselves as mere servants of the legislature.

decisions and claims are controversial, since many critics believe that judges should never base legal decisions on moral beliefs. But that is the prescriptive issue. Even if judges *should* not use such grounds, they often *do*; and they cannot avoid doing so in practice at least in some hard cases.

When judges use their moral beliefs to reach decisions, they cannot see themselves as applying the law unless they also see those moral principles as part of the law. Moreover, the judge will have to see those principles as having been part of the law even before the decision, since otherwise the decision would seem retroactive and unfair.<sup>21</sup> Thus, judges will not be able to see themselves as accomplishing their dual job of deciding every case on the basis of the law unless they view the law as including moral principles.

A critic might respond that judges could (and possibly should) base their decisions on empirical beliefs about the original intent or about moral principles of legislators or of the majority instead of on the judges' own moral principles. However, even if original intent can be determined in some cases, there will be many cases where no original intent can be found, or none that is clear enough to dictate a single decision. It is also not clear why original intent must always be followed when it is determinate.<sup>22</sup> These same arguments can be extended to show why the moral beliefs of contemporary society also cannot always be used to ground judicial decisions. One might respond that laws should be written so that judges never face such problems. However, nobody has ever done that or shown how to do that. It seems practically inevitable that there will be some cases where judges must reach decisions but cannot base their decisions on anything other than their own moral principles. If their job is to apply the law, then they cannot see themselves as doing their job unless they see those implicit moral principles as part of the law.

In any case, that is how judges talk. Even if laws really do run out, so judges have strong discretion, and then judges really do go beyond explicit laws and use their own moral beliefs, judges still do not admit this in their official capacity. Judges never announce from the bench that their decisions

---

<sup>21</sup> As emphasised by Ronald Dworkin, "The Model of Rules I", pp. 30 and 44. C.L. Ten pointed out that a trial loser's prior expectations could not be legitimate because based on law when law is indeterminate or lacking, but it still seems unfair to take the loser's freedom or money without clear warning, and judges normally would and should not publicly admit to doing so.

<sup>22</sup> For more problems with original intent, see Paul Brest, "The Misconceived Quest for the Original Understanding", *Boston University Law Review*, vol. 60 (1980), pp. 204 ff.; and Ronald Dworkin, "The Forum of Principle" (1981) reprinted in *A Matter of Principle* (Harvard University Press, Cambridge, 1985), pp. 33-71.

are not based on the law. They have good reason not to announce this, since such an admission would tend to undermine respect for the legal system and to create resentment in trial losers. Thus, even if judges sometimes do go beyond law and use their own moral beliefs, they talk as if they never do so, as if they base every decision only on the law, and as if implicit moral principles are part of the law.<sup>23</sup>

The same tendency occurs when laws are extremely bad. One classic example is a law that requires killing all blue-eyed babies. Suppose this morally horrendous law is not rendered legally invalid by anything in the pre-existing precedents, statutes, or constitution in this jurisdiction. However, many judges will want to refuse to apply this law. Nonetheless, these judges will also want to do their job, or at least to say publicly that they are doing their job, which is to apply the law. These conflicting pressures will give judges a strong reason to announce that the blue-eyed baby law is legally invalid. Their real reason for this announcement is that they see this law as immoral, even if they are not willing to admit publicly that this is their reason. Thus, judges will tend to talk as if morality restricts what is the law.

This feature of judges' linguistic usage is most easily captured by natural law theory. I doubt that many judges today will go so far as to adopt natural law theory in the crude forms of Cicero and Aquinas.<sup>24</sup> Still, more recent natural law theories do seem to try to capture the perspective of judges. This point could be illustrated with Lon Fuller,<sup>25</sup> but my main example will be Ronald Dworkin.<sup>26</sup>

---

<sup>23</sup> Judges in continental Europe reportedly claim to follow statutes without injecting any of their own values. As Deborah Cass pointed out, Australian judges also often describe their own method in positivistic terms, although they usually soon add undermining qualifications. My point is that judges' actual practice often belies such positivistic self-descriptions, which are nonetheless justified speech acts, whether or not they are self-serving or self-deluded.

<sup>24</sup> But see Clarence Thomas, "The Higher Law Background of the Privileges and Immunities Clause of the Fourteenth Amendment", *Harvard Journal of Law and Public Policy*, vol. 12 (1989): "The higher law background...provides the only firm basis for just, wise, and constitutional decisions".

<sup>25</sup> See Frederick Schauer, "Fuller's Internal Point of View", *Law and Philosophy*, vol. 13 (1994), pp. 285-312 at 301: "the same focus on defining law for the purpose of guiding the activities of lawyers and judges exists throughout much of the rest of the Fuller corpus".

<sup>26</sup> Dworkin is sometimes described as holding a third theory of law distinct from both legal positivism and natural law theory, but he himself allows his theory to be described as a natural law theory in "Natural Law Revisited", *University of Florida Law Review*, vol. 34 (1982), pp. 165 ff.

Dworkin's views have changed over the years, but in one recent major work he writes: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."<sup>27</sup> He goes on to propose two dimensions on which to test which constructive interpretation is best: An interpretation must, first, fit the precedents or past judicial decisions. When two interpretations both fit well enough, the best interpretation and thereby the law is determined by "his more substantive political convictions about the relative moral value of the two interpretations".<sup>28</sup> This second dimension is what makes Dworkin's account a version of natural law theory. And it is clear that by "his" convictions, Dworkin refers to the judge's convictions. Legislators do not normally interpret prior laws, much less "the community's legal practice" as a whole. Fit with precedents does not constrict legislators. Of course, Dworkin realises and even emphasises that "judges are in a very different position than legislators".<sup>29</sup> My point is just that his whole theory is addressed to judges and would be pointless at best if addressed to legislators.

Many objections to Dworkin's theory seem to overlook this perspective. Critics say that the job of judges is to apply the law, but Dworkin licenses judges to base their decisions on implicit moral principles rather than on the law. This charge seems right insofar as law is defined from the perspective of legislators, so that law includes only the words and meanings of bills passed by legislatures. Dworkin does say that judges must, may, and should go beyond that kind of law in reaching judicial decisions. However, it is not so clear that or why the job of judges is simply to apply law as defined in that legislative way. If the job of judges is instead to apply the law as defined from the perspective of judges, and if Dworkin's theory accurately reflects that judicial perspective, then Dworkin's theory does not license judges to base their decisions on anything other than the law. Legislators might not like Dworkin's theory for licensing judges to apply the law as judges see it, but that only confirms that Dworkin's theory, like other natural law theories, reflects the distinctive perspective of judges on the law.

## Private Persons and Legal Realists

Most people are neither judges nor legislators. They are private persons. They are private insofar as they have no special status in making or

---

<sup>27</sup> *Law's Empire* (Harvard University Press, Cambridge, 1986), p. 225.

<sup>28</sup> *Ibid*, p. 248.

<sup>29</sup> *Ibid*, p. 244. Dworkin emphasises the difference between legislators and judges in his rights thesis in his "Hard Cases", reprinted in *Taking Rights Seriously* (Harvard University Press, Cambridge, 1975).

applying the law. They are (legal) persons insofar as the law applies to them, that is, restricts and protects them. The perspective of private persons on the law is different from that of legislators and judges. Most private persons are woefully ignorant of the particular words in the laws that legislators pass. They also do not know the precedents that figure so prominently in judges' decisions. What they do know is that judges can send them to jail and take money or their home or children away from them. From the perspective of private persons, then, what is important about law is whatever determines whether they lose liberty, money, possessions, or family. It is also important whether people who harm them will be punished or forced to pay damages.

What determines all of this is particular decisions by judges. Suppose legislators pass a rule that is then questioned through the courts and eventually overturned as unconstitutional. That rule will not affect the lives of most private persons, except insofar as they are uncertain about whether it will be overturned. Similarly, if a rule passed by a legislature seems to apply to a particular case, but judges decide not to apply it to that case, then the parties in that case are not affected by the rule, except insofar as the parties wasted time because they did not know whether the courts would apply it. So what is important in the end to private persons is how rules affect their lives outside courtrooms. That depends primarily on particular judicial decisions.

Admittedly, private persons often cite laws as reasons for them to do or not to do something, even when they know that they will not get in trouble for breaking the law. Private persons also often cite laws to criticise official actions when they think that officials are not following or applying the law, even if they know that those officials will get away with such misbehaviour. Nonetheless, not all private persons do or need to engage in this use of the law, but all private persons are concerned about their lives, freedom, possessions, and family. Even those private persons who do cite laws as reasons why they or officials ought to behave some way, they still care *more* about their personal goods and, hence, about how officials actually behave. Such personal concerns are in these ways more central or essential to the perspective of a private person.

It is also important to recognise that laws can have effects when they are not applied. Even if nobody ever robs a bank, so the law against bank robbing is never applied in any court, that law still affects people's lives if some people would rob banks in the absence of such a law. Moreover, laws can symbolise ideals and thereby affect society's values, which in turn affects private persons' lives. Law operates in many ways. Nonetheless, most private persons are most concerned about how the law affects them when they are prosecuted for crimes or are potential victims of crimes, when they sue or are sued, when officials decide whether their tax



deductions are allowed, and so on. These decisions by officials are what most private persons see as most important about the law.

To capture this perspective or set of concerns, it is natural to define law in terms of decisions by officials. This is what legal realists do. Karl Llewellyn writes, “What these officials do about disputes is, to my mind, the law itself” and “The main thing is what officials are going to *do*.”<sup>30</sup> This perspective is also captured by Oliver Wendell Holmes, when he writes, “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court;—and so of a legal right”.<sup>31</sup> There are important differences among these definitions by legal realists, but all such definitions try to capture what is important about law from the perspective of private persons who care mainly about whether their liberty or property will be taken or protected by courts.

Something like this point was made long ago by Holmes, who said: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”<sup>32</sup> In contrast, I do not want to say that private persons who are concerned for material consequences are “bad” people. Nor are people who follow law for its own sake always good. When the law is evil, there can be much good in refusing to follow the law for its own sake. And there might be nothing morally wrong with taking a questionable tax deduction simply because one knows that it will be allowed by an IRS agent or a judge. Many private persons do follow the law even when they know they will not suffer if they disobey, but they are not necessarily better people. That depends on what the law is.

Moreover, victims of crimes are not bad, but they also care mainly about whether officials enforce laws. When women are beaten or raped, but the aggressors are not pursued by police or prosecutors or judges, then these victims often complain that the law does not protect them, so the law has to be changed. They will not care so much about rules on the books against what these aggressors do, if those rules are not enforced. What concerns them is mainly what judges and the police do to stop the crimes against them.

To such private persons, then, what is most important about the law

---

<sup>30</sup> Karl Llewellyn, *The Bramble Bush: Some Lectures on Law and its Study* (Columbia University School of Law, New York, 1930).

<sup>31</sup> “The Path of the Law”, *Harvard Law Review* vol. 10, no. 8 (March 25, 1897), pp. 457-78 at 458.

<sup>32</sup> “The Path of the Law”, p. 459.

is captured by legal realist definitions of law in terms of particular decisions by legal officials. However, such definitions of law by legal realists would be rejected as unhelpful or worse by legislators and judges. To tell a judge that the law is whatever she decides will not be of any use in reaching one decision as opposed to another. To tell legislators that the law is whatever judges decide will in effect tell them that it does not matter whether or not they pass House Bill #123, or how that bill is worded. So definitions of law by legal realists do not capture the perspectives of legislators and judges. But they do capture what they try to capture, which is just the perspective of private persons.<sup>33</sup>

### Other Perspectives on Law

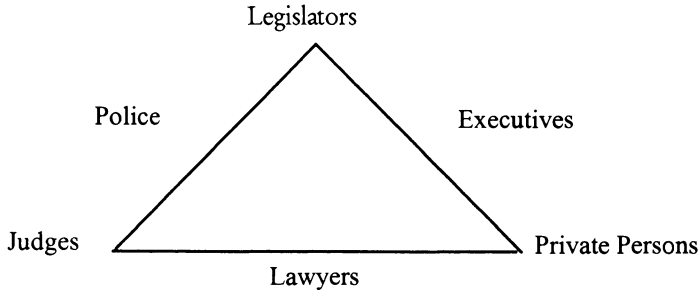
In addition to legislators, judges, and private persons, many other people are involved in the legal system. One prominent group is lawyers. Do lawyers have their own distinctive perspective on law? I think not. Here is why. Lawyers are caught in the middle between their clients and judges. When their clients ask for advice, lawyers take the perspective of their clients, who are private persons. But when lawyers present arguments to judges, lawyers need to take the perspective of judges in order to convince those judges. Thus, parts of a lawyer's job are done from the perspective of private persons and other parts of that job are done from the perspective of judges. Perhaps this dual role explains why these perspectives are often confused in articles about the nature of law by lawyers (and by law professors who train lawyers).

Police are also caught in the middle. Legislators pass laws that, in effect, order police to pursue certain types of cases. But police officers know that they are wasting their time if they cannot get convictions in courts from judges. So sometimes police take the perspective of the legislators who are their bosses, and sometimes police take the perspective of judges who decide the cases that police bring to court.

One could also say that the executive branch is caught between legislators and private persons insofar as they are supposed to administer the laws of legislators with respect to private persons. This would yield a neat diagram:

---

<sup>33</sup> Compare H.L.A. Hart, *The Concept of Law*: "It is plain and has often been remarked that whatever truth there may be in [rule-scepticism's contention that rules are predictions of courts' decisions], it can at best apply to the statements of law ventured by private individuals or their advisers. It cannot apply to the courts' own statements of a legal rule" (143). The same could be said of that recent offshoot of legal realism called Critical Legal Studies. For example, Duncan Kennedy argues that all judging is a matter of bad faith, but a judge could hardly adopt this perspective on himself while remaining in bad faith.



Unfortunately, this diagram is too simple, since executives are also concerned about facing judges in court, police deal with private persons every day, and lawyers often confer with legislators. So we need to be careful not to let this simple diagram obscure the more complex reality.

Moreover, many other perspectives are taken on law. When law students studying for a bar exam ask what the law is, their concern is to pass, regardless of whether their answers help them later when they practice law. Law publishers also ask what the law is, with slightly different concerns. And state government officials have a somewhat different perspective on federal law. The notion of a private person also covers a very wide and diverse group, so different racial, sexual, and economic groups view the law somewhat differently. I do not want to deny or disparage any of these complexities. There are perspectives within the perspectives that I discuss. In picking out the three main perspectives, all I intend to do is focus on certain abstract common concerns because these reflect the abstract theories of law in the traditional debate.

These three perspectives (along with the others on the diagram) also seem special because they are essentially legal and essential to law. They are essentially legal, because they are defined by legal rules. Judges and legislators are made judges and legislators by laws. So are private persons, since a private person is someone to whom the law applies, and the law itself determines those to whom it applies.<sup>34</sup>

The three main perspectives are also essential to law in the sense that every legal system must have legislators, judges, and private persons. In contrast, legal systems can easily exist without bar exams or racial differences. Other cultures and legal systems might not have roles corresponding exactly to my descriptions of legislators, judges, and lawyers, but there are limits, because we would not call something a legal system if it differed too much from paradigm modern legal systems.

Despite these complexities, the crucial point here is that many other

<sup>34</sup> Citizens are also made citizens by the law, but even illegal aliens are private persons insofar as they are governed and protected by the law.

perspectives on law can be understood in terms of how they interact with the main three perspectives (those of legislators, judges, and private persons) that are reflected in the main three theories (legal positivism, natural law theory, and legal realism). Perhaps that explains why these three theories of the nature of law have remained the dominant triad for so long.

## Applications

The differences among these perspectives could be illustrated by many examples, but I will discuss only two.<sup>35</sup> My first example is speed limits. This example is meant to be relatively trivial, so that strong emotions will not cloud the conceptual issues. However, speed limits are not as trivial as they might seem, since speed limits are among the first laws that teenagers encounter, so they affect many people's attitudes towards the law in general even as adults.

Suppose the following facts, which are not too distant from what actually happens in many jurisdictions from the United States to Australia: The road sign says: "Speed limit 65." The legislature's purpose in picking this number was to reduce traffic accidents, and they believed that most drivers cannot drive safely at higher speeds. Nonetheless, the average speed where such signs are posted is 70 mph. Police radar is accurate only to plus or minus 7 mph, and no admissible evidence is more accurate. As a result, any competent lawyer could get off any client who is caught driving 72 mph or less. The relevant legal system includes a right to competent counsel. Partly because of this, the police have a written public policy of not stopping anyone who is driving under 75 mph. They always follow this policy in actual practice.

In such circumstances, how fast can one drive without breaking the law? Most people will answer that the speed limit is 65 mph, because the sign says: "Speed limit 65." Most of my students start with this perspective, as do some of the friends whom I polled informally. It is also the

---

<sup>35</sup>

Another illuminating illustration is dead laws that were passed long ago and never repealed but are no longer enforced. One reported example in Memphis requires all motor vehicles to blow their horns before every intersection. When legislators find such rules on the books, they sometimes repeal them. These legislators must view dead laws as laws, since otherwise they would not bother to repeal them. In contrast, judges would probably refuse to find anyone guilty of violating such laws. And, if private persons were asked whether it is still against the law for a motor vehicle to go through an intersection without blowing its horn, most people in Memphis would deny this, even if they were aware of the dead law. So judges and private persons do not view such dead laws as laws or as part of the law, despite what legislators do and should do.

perspective of legislators. When legislators decide whether to make the speed limit 55 or 65 mph, they are deciding which number to write in the law books and on the road signs. Rules of evidence and police practices are relevant to their choice, as is their goal of preventing accidents and unsafe driving. Nonetheless, even safe drivers are said to break the law if they drive faster than 65 mph. From this perspective, then, the law is whatever number legislators pick to post on signs. The reason is that legislators make the law, and that number is what they pick.

Judges, in contrast, are concerned to apply the law as a whole to particular situations, so they cannot look only at the road sign. As any legal scholar knows, that sign gets its legal force from the system of laws. That larger system includes other rules regarding evidence and competent counsel that create a legal right not to be convicted or fined for driving at any speed up to 72 mph. What judges need to decide is which defendants to convict and fine, not which number to post on signs. In the absence of conviction, judges are not supposed to announce officially that the defendant is guilty of violating the law. From the judges' perspective, then, there is reason to see the real speed limit as 72 mph.<sup>36</sup>

Finally, suppose that a driver is in a hurry, like most people these days. Luckily, his lawyer happens to be sitting in the car with him, so he asks her, "How fast may I drive legally?" His lawyer could say: "The speed limit is 65 mph" or "There is no legal way for you to be fined if you drive up to 72 mph." However, both of these statements would overlook a very relevant fact: the public policy of police not to stop anyone below 75 mph. Since the lawyer knows this policy, and also knows that the driver's main concern is to avoid being fined, the lawyer's best advice would be, "You may drive up to 75 mph without worrying about the law."<sup>37</sup> One might

---

<sup>36</sup> The situation is actually slightly more complex than this, since someone might confess to driving 66 mph, and then maybe that person could legally be convicted. For the sake of argument, I will assume that all convictions must be based on radar or other less accurate evidence. Another complication is that one might be arrested for driving 69 mph if the radar shows one's speed to be 7 mph faster than that. For the sake of argument, I will assume that the radar always registers one's speed accurately, although this cannot be proven in court.

<sup>37</sup> I do not disagree with Tom Campbell when he writes, "While it is the lawyer's duty to advise the client in terms of what he may and may not do legally, this does not mean concentrating on how closely a person can get to breaking the law in the pursuit of his personal objectives without actually violating or going beyond the law" (*The Legal Theory of Ethical Positivism*, p. 106). I agree because not all clients want to know how far they can go without getting in trouble; and, even when they do, a lawyer might not have a *duty to concentrate* on these limits. Still, when a client clearly wants to know the limits, it would be less than ideal for the lawyer to withhold

object that the law is still 65 mph even if the police do not stop cars below 75 mph. However, what is written on the sign does not matter to such a driver, as long as the police policy stays at 75 mph. If the sign is changed to 60 mph, but the police policy remains the same, then the driver would not care about the sign. The driver also would not care about the legal possibility of being fined for going 73 mph if he knows that he will never be stopped at that speed. What matters is the public policy that police officers always follow. If this policy were changed without notice, a driver caught driving 73 mph would have a legitimate complaint insofar as he acted on a public policy of legal officials (in contrast with a hunch that a friend on the police force would let him off). Police officers are legal officials just as much as legislators and judges, so their publicly announced policies create legitimate expectations. From the perspective of private persons, then, there is reason to say that the speed limit is 75 mph. Indeed, this is just what was said by some of my friends whom I polled.

My second example is more emotional. Suppose that a legislature passes a statute that assigns a seven to ten year sentence for coerced sex within marriage, and another statute requires more than one witness as evidence before any conviction under the first statute. Other laws forbid self-incrimination and forbid police from coming onto anyone's private property regarding any family matter without notification before the time of entry. Illegally obtained evidence is excluded from trials, and defendants have a right to competent counsel.

In this jurisdiction, John and Jane are married and live on a large, isolated farm in a house that is a mile from the closest border of the property. John is sole owner of the farm. One evening in the house, Jane tells John that she is too tired for sex, but John threatens to kill Jane if she refuses to have sex with him. Since Jane takes John's threat seriously, she agrees to have sex with him. Then Jane reports the incident to the police in the morning.

Under these circumstances, does John's act violate the law? It might seem clear that it does. John coerced his wife into sex. The first-mentioned legislative statute forbids this very kind of act. That is the end of the story for anyone who looks at law from the legislative perspective, such as a legal positivist. So legislators and positivists would say that John's act violates the law.

However, if this particular case ever gets to court, then the judge must find John not guilty and must treat him as not guilty in every way. This result is ensured by the other statutes that require a second witness, forbid self-incrimination, limit police entry, exclude illegally obtained evidence, and guarantee competent counsel. More generally, there is no

way realistic way for a court ever to convict John for this kind of act in these circumstances.<sup>38</sup> As long as John can never be found guilty, he must never be treated as guilty by any legal official. To that extent, it does not seem to violate the law for John to do this kind of act in these circumstances. The same kind of act is still illegal for others and for John in other circumstances, but the current law as a whole allows John to do what he does in his home. Or, at least, a judge cannot say officially that John violated the law.

Of course, Jane will complain. She will say that the law as it stands does not protect her, so the law should be changed to make it possible to convict John and others in similar circumstances. Other women and men will agree. The reason why the law has to be changed is that John's act does not violate the current law as a whole. Or, at least, that is how it will look from the perspective of private persons who are concerned with whether the law will punish others who harm them, and not with "paper rules" like the words that legislators passed in the unenforceable statute against rape.

If the police find that they cannot enforce this marital rape statute because of the other laws, so they make it clear that they will not waste their resources trying to catch husbands who violate this law, then wives like Jane will have even stronger reasons to complain that the law does not protect her or forbid what husbands like John do. Suppose one statute says that all women have a right to get an abortion, but another statute prohibits abortion clinics anywhere in the state, or the police publicly announce that they will not stop protesters who prevent any women from entering any abortion clinic. Then women will complain that the legal right supposedly granted by the first statute is hollow at best. Similarly, Jane could argue that the law as a whole gives her no real legal right not to be raped by her husband. Such indictments of the law reflect the fact that what is most important about law to private persons is not the words that legislatures pass but the actual decisions made by other legal officials.

## Conclusion

These illustrations along with the preceding arguments suggest that legislators, judges, and private persons take distinct perspectives on law and that these three perspectives are captured by the traditional definitions of law by legal positivists, natural law theorists, and legal realists,

---

<sup>38</sup> I assume that it is physically impossible for the police to get from the border to the house quick enough to catch John in the act if they give prior notice, and that no friend will conspire with Jane to catch John. If any critic comes up with a practical way to convict John, then I will modify the example to include additional laws or facts that make that conviction impossible.

respectively.

Can all of these perspectives be combined into a single definition of law? I do not see how. Theoretical definitions are supposed to include all and only those features that are important or essential to the defined thing. If a theoretical definition of law includes only what is important to legislators, then it will not include some features that are important to judges and private persons. And if a theoretical definition of law includes all that is important to legislators, then it will include some features that are not important to judges or private persons. One might try to formulate a definition in unspecific terms that all parties can accept because they all fill in details according to their own concerns;<sup>39</sup> but such a schematic definition would fail to specify which aspects of law are important, so it would fail to satisfy any of the parties in the traditional debate. In the absence of any other approach, it seems that no single coherent theoretical definition can capture all and only what is important from all three perspectives.

The same problem arises for other theoretical and precisising definitions. There seems to be no way to formulate a unified definition of a church to satisfy the interests of priests and also of their congregations and janitors. There might be no single definition of water for chemists and restaurateurs and no single definition of a city that would work for federal officials distributing highway funds as well as for sociologists studying crime patterns in cities. Similarly, it does not seem possible to provide a single unified definition of law that would capture the concerns of legislators as well as judges and private persons.

What about legal theorists? I am not thinking of practical law professors who see their job as training future lawyers, judges, or legislators. I am thinking of academics who want to understand the phenomenon of law as a whole, while remaining neutral among the interests and perspectives of legislators, judges, and private persons.<sup>40</sup> The only way to do this is to describe the three perspectives on law and specify the features of law that are important from each perspective, without claiming that any of these features really is important or essential to law. This neutral description will not result in a single coherent definition of law, but it could

---

<sup>39</sup> This is what H.L.A. Hart seems to be trying to do when he formulates his "soft positivism" so as to be acceptable to everyone, even Dworkin. But Hart still fails to capture the perspective of private persons and legal realists. Another example might be Neil MacCormick's institutional theory of law.

<sup>40</sup> Some might argue that no neutral perspective is possible, since everyone, including philosophers, have particular interests. I am not so pessimistic. Philosophers do have interests, or else philosophy would not be interesting; but philosophical definitions still can be neutral among the interests of legislators, judges, and private persons, just as referees can have interests but still be neutral between the teams competing in a game.



mention every feature of law that is important to anyone, specify whom each feature is important to, and explain why and how each aspect is important to those to whom it is important.

If all of this is accomplished, then it is not clear what would be gained by adding a general definition of the thing on which all of these perspectives are taken. Some legal theorists still might long for a single coherent definition, but why? A formal definition would not tell us anything new about law, once we have a comprehensive description of law from every perspective. Even if a definition would add something, that something might just be beyond our grasp, in which case our only realistic alternative is the perspectival approach.

## Objections

All of this is crude, general, and incomplete, but I cannot go into more detail here now. My only hope is that these brief remarks at least point in a new direction that might be more illuminating than arguing about which traditional definition of law is the right one. In order to spread that hope, I will close by trying to head off a few initial objections that might make some readers despair too early of ever developing any complete, defensible perspectival theory of law.

### Do I overlook a priority?

Some traditionalists will object that, although many perspectives may be taken on law, one perspective is primary in some way that makes one theoretical or precisifying definition the correct one. For example, some legal positivists will probably argue that, since all legitimate political authority and power come from the people, the legislative perspective is more basic than the others, so some corresponding positivist definition of law is more basic as well.<sup>41</sup>

A perspectival theorist might deny that the legislature really is more basic. If authority comes from the people, why isn't the private citizen's perspective primary? But I want to avoid that normative issue.

My response is that, even if the legislature is more basic in some sense, that does not make other perspectives and definitions inaccurate or

---

<sup>41</sup> Campbell suggests such a response when he writes, "From the viewpoint of Ethical Positivism, discussions of interpretation which start with the judicial role, particularly in appellate courts, start in the wrong place. Kelsen notwithstanding, the base relationship in law is between the sovereign law maker and the legal subject" (*The Legal Theory of Ethical Positivism*, p. 133).

incorrect. My topic here is definitional versions of legal positivism, legal realism, and natural law theory. These claims about the nature of law might each capture part of that multi-faceted phenomenon, even if one facet is more basic or has more value than the others. The foundation of a building might be more basic or important in some way, but one still cannot define or describe the building solely in terms of its foundation. To say that the legislative perspective is more basic is presumably to make a normative claim about the relative importance of different branches of government. That normative claim does not show any inaccuracy in descriptions of the other facets that can be seen only from other perspectives. If none of the other perspectives can be dismissed as illegitimate, then each of these other perspectives needs to be captured by any legal theorist who wants to remain neutral among all legitimate perspectives. That is what my perspectival theory aims to do.

### **Do I conflate separate issues?**

Other critics might charge that I confuse indefinite with definite articles, since there is *a* law against driving 66 mph, even if this act is not against *the* law. Some might go further and say that driving 66 mph is against the law, even if judicial practice and police policy is not to enforce the law in this case. They will claim that I confuse the law with its enforcement.

I plead not guilty. My topic is the law, so I do not mind admitting that there is a law against driving 66 mph. I might even admit that legislators talk about a law, while judges talk about the law. If different linguistic forms are used from different perspectives, those perspectives are still distinct and must all be captured by any completely adequate theory of law as a whole.

I draw the line, however, when it comes to separating the law from its enforcement. To assume that the law should be defined independently of its enforcement is to assume that the law is what the legislature passes, regardless of what judges and police officers do. But what these other legal officials do is important to many people. The point of a precisifying or theoretical definition is to capture what is important about the defined thing, so a definition of the law that did not include enforcement policies would be inadequate insofar as it did not reflect the concerns and perspectives of these people. This does not mean that there is anything wrong with the legislative perspective. All it means is that there is more to the law than can be seen from the legislative perspective or from any single perspective alone.

### **Do I trivialise the debate?**

Still other opponents might argue that I trivialise the traditional debate by allowing everyone to determine what the law is from their own perspective.

If judges and legislators can each decide what law is, how can legislators criticise judges for failing to apply the laws that they as legislators passed? Are they even talking about the same thing?

Trivialisation is an endemic problem for definitional theories. And I admit that this debate about the definition of law is less important (at least directly) than the other debate among positivists, realists, and natural law theorists, namely, the prescriptive debate about how legislators and judges ought to do their jobs. Still, I do not think that the definitional debate is trivial, much less that my view makes it trivial in the alleged sense.

My view is not like the well-known story of three blind people who feel different parts of an elephant, so they describe the elephant differently. My thesis holds for people who are not blind, that is, for people who can and do see every aspect of the law. Another difference is that elephants might be definable in terms of internal features, such as genetic structure, that cause and explain the felt features, such as the trunk, tail, and legs; but law is not a natural kind and has no such universal internal structure to define it. As with elephants, there are paradigm cases of the law that enable different theories to be about a common subject matter. However, unlike natural kinds, there need be no internal features of those paradigm cases that could be used to define what the law is.

For similar reasons, my view is different from Wittgenstein's famous discussion of a duck-rabbit drawing.<sup>42</sup> There is no physical drawing to see differently in the case of law. Moreover, different practical purposes underlie different views of law but not different views of the duck-rabbit. This practical conflict keeps the debates about law from being trivial on my view.<sup>43</sup>

Perspectivalism also might seem to trivialise the debate by giving judges the right to decide what law is. My perspectival theory implies no such thing. On my view, it is perfectly legitimate for legislators to complain that judges are not following the law when judges do not follow what is law from the legislative perspective as captured in some version of legal positivism. However, it is also perfectly legitimate for judges to respond that they are indeed following what is the law from the judicial perspective as captured by some version of natural law theory. When legislators and judges argue in this way, they are each expressing their own legitimate perspectives. That does not mean that they have nothing to argue about. They are each trying to get the others to see the law from their perspective

---

<sup>42</sup> Ludwig Wittgenstein, *Philosophical Investigations*, translated by G.E.M. Anscombe (MacMillan, New York, 1953), p. 194.

<sup>43</sup> Thus, my view of law is closest to W.B. Gallie's view of art, democracy, and a Christian life in his "Essentially Contested Concepts", *Proceedings of the Aristotelian Society*, vol. 56 (1955-56), pp. 167-198.

or even to show that their definition better captures what is really important or most important about the law. Each definition does capture what is important about the law to the person who is speaking, but they still disagree about whether this is or should be what is important or most important to the other people. That is the topic of the traditional debate in my view, even if the traditional debate was not framed explicitly in those terms.

### **Do I contradict myself?**

Yet more critics might suppose that my theory implies that in the above circumstances driving 66 mph violates the law and also does not violate the law. This might be a contradiction, but I never assert or imply this. What I do assert is that a legislator may say the former and a judge may say the latter. However, neither person may make both statements at once. The whole point of a perspectival theory is that there is no single perspective or definition that incorporates the perspectives of both the legislator and the judge. One simply cannot view the phenomenon from both sides at once, so one is never in a position to make both of the contradictory statements. A perspectival legal theorist can describe both perspectives, but a theorist does not take or make statements from either perspective, since such a theorist tries to remain neutral among all perspectives. So a perspectival theorist is also not committed to any contradictory statements.

Compare a perspectival theory of cities on which an official distributing highway funds may say that Burlington, which has 60,000 inhabitants, is *not* a city (because the best definition for these purposes requires a city to have 80,000 inhabitants), but a sociologist studying crime trends also may say that Burlington *is* a city (because the best definition for these purposes requires a city to have only 50,000 people). This perspectival theory does not take the perspective of either the official or the sociologist, so it does not imply either of the statements that appear to contradict. Moreover, the statements by the official and the sociologist are not really contradictory. Nor are statements by a chemist and a restaurateur who deny and affirm that a certain glass contains only water. Similarly, there is no real contradiction when a perspectival theory of law implies that legislators may say that driving 66 does violate the law, and judges may say that driving 66 does not violate the law. The difference in perspectives, concerns, and hence definitions keeps these statements from being logically incompatible.

### **Am I too relativistic?**

A final group of critics will complain that my perspectival theory is a form of perspectivism, which is just a fancy name for relativism, so it is subject to all of the well-known problems of relativism. However, the kind of

perspectivism that I endorse does not imply wholesale relativism about anything.

A more radical form of perspectivism is endorsed by Friedrich Nietzsche when he says: “There is *only* a perspective seeing, *only* a perspective ‘knowing’; and the *more* affects we allow to speak about one thing, the *more* eyes, different eyes, we can use to observe one thing, the more complete will our ‘concept’ of this thing, our ‘objectivity’ be.”<sup>44</sup> This claim is applied by Nietzsche to all things. On some days I have some inclination to accept Nietzsche’s general claim, but that confession is irrelevant here. My claim here is only that precisising and theoretical definitions of social institutions are perspectival in the sense that their adequacy and justification depend on one’s perspective. My claim applies only to precisising or theoretical definitions and only to social institutions, so it is much more limited than Nietzsche’s. That is why I prefer to describe my theory as perspectival rather than as full-fledged perspectivism.

The limited scope of my theory makes it immune from most of the standard arguments against relativism. I am not saying that anything goes, or even that anything goes in precisising and theoretical definitions of the law. Some such definitions of law can be rejected as incorrect, because they fail to capture any legitimate perspective on law. Relativism would follow if the only standard of legitimacy for a perspective were the concerns of that very perspective itself. However, each of my three main perspectives recognises the legitimacy of the other perspectives.<sup>45</sup> Legislators know that they need people in the roles of judges and private persons, and vice-versa. Moreover, as I argued, these three perspectives are essential to law and are essentially legal. That gives them a special legitimacy and primacy that cannot be claimed by all other perspectives. That also limits which theories and definitions of law are acceptable.

Nonetheless, even after rejecting some perspectives and definitions, my point is that several definitions of law remain and have an equal claim to define what is important about the law. These legitimate claims cannot all be recognised as equal in any single definition. So, if you want your theory of law to remain neutral among all legitimate claims and concerns, as I do, then you have no choice but to adopt some perspectival theory of law.

---

<sup>44</sup> Friedrich Nietzsche, *On the Genealogy of Morals*, translated by Walter Kaufman, in *Basic Writings of Nietzsche* (The Modern Library, New York, 1966), Third Essay, Section 12.

<sup>45</sup> This is not true of the three theories. Legal positivists claim to have the whole truth and also claim that the other theories are not only partial but are false. Legal realists and natural law theorists return the favour. These claims to completeness are not legitimate in my view, despite the legitimacy of the perspectives that those theories capture.

