

Concepts of Law*

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At the second United States Presidential Debate in 2004, President Bush was asked whom he would choose to fill a vacancy on the United States Supreme Court. He replied:

I would pick somebody who would not allow their personal opinion to get in the way of the law. ... I would pick people that would be strict constructionists. We've got plenty of lawmakers in Washington, D.C. Legislators make law; judges interpret the Constitution.¹

The assumption behind this answer is that even a judge's judgment about right and wrong, justice and injustice, or what the law ought to be, can play no part in figuring out what the law is. The name traditionally given to this view is legal positivism and that's how I'll refer to it, though its precise contemporary label is 'hard' or 'exclusive' positivism.² Not everyone thinks it is correct. Gustav Radbruch believed that no grossly unjust directive from the state could really be law;³ so on his conception of what law is, judges do have to exercise their own moral judgment, at least in extreme cases, to know what the law is — in that sense, law and morality

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¹ George W Bush, 'The Second Bush-Kerry Presidential Debate' (8 October 2004) Commission on Presidential Debates
<<http://www.debates.org/pages/trans2004c.html>> at 24 March 2005.

² For a general discussion, see W J Waluchow, *Inclusive Legal Positivism* (1994).

³ See Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' in Arthur Kaufman (ed), *Gesamtausgabe* (1990) vol 3, 89.

overlap at the edges. And then there is the more sophisticated theory of Ronald Dworkin, according to which legal interpretation pretty much always involves moral judgment, since determining what the law is always requires us to make the best moral sense of otherwise inconclusive legal sources.⁴ On Dworkin's view, law and morality are not the same thing, since the legal sources — statutes, constitutions, judicial opinions — do constrain legal interpretation; but that constraint in his view is incomplete, and so moral reasoning is almost always required in order to extract a determinate legal conclusion from the legal materials.

But suppose that the President were told that on some views, the boundary between law and morality is not as strict as he supposes, and that we can, on those views, allow that judges who appeal to their own moral judgments may well be doing their best to interpret existing law, rather than make new law. It seems doubtful that he would find this relevant to the question of what kind of judge he should appoint. His basic claim, when pressed, would be that judges should not decide cases by appeal to their own moral judgments. In saying that judges who do this are making law, Bush gives a rhetorical edge to his argument, a suggestion of illegitimacy, but that isn't, I think it's a safe guess, where the case rests.

We should leave the President out of it, since the judicial nominations he has made cast doubt on the sincerity of his expressed distaste for 'activist' judges. Be that as it may, there is the following respectable view about how judges should make decisions: So far as possible they should be guided by legal materials — constitutions, statutes, prior decisions of judges — and interpret them without giving any role to their own moral judgment. How far that is possible will depend upon the kind of legal materials the judge is dealing with. Those who are against judges drawing on their own moral judgment when they make decisions should regret, for example, Article 2(1) of the German *Constitution*, which grants every person the right to the free development of his personality. Such abstract statements of legal rights invite judges to reflect on how the rights should best be understood. One way to constrain judges, then, is to design the legal materials in such a way that decisions in particular cases are as mechanical as possible; ideally, on this view, the legal materials should admit of but one legally reasonable answer in a particular case.

But this can only go so far. For a long time no one has seriously advanced the view that there is a possible set of legal materials of such detail and determinacy that judges are presented with only one possible professionally competent way of deciding a case. Some legal scholars think all legal materials are hopelessly indeterminate in the guidance that they provide judges and others who must apply law; others think that the legal

⁴ See Ronald Dworkin, *Law's Empire* (1986).

materials in some places are rather determinate, but in other places rather indeterminate. But despite what some judges say, no one who has thought much about the law really believes that there is a possible set of legal materials that would allow judges to decide all cases in a purely mechanical way. No matter how extensive and detailed the rules, there will always be hard cases, cases where the existing rules don't give a clear answer. In that case, if the judge is to make a decision, she must appeal to something other than the legal materials. What that other thing should be is controversial. It is a striking fact about the common law world that there is no consensus view about how judges should decide cases where the legal materials run out. Cardozo argued that in such cases judges should decide based on their sense of what community morality is; he called this the method of sociology.⁵ Others believe that we'll get better results if judges simply try to decide in light of their judgment about what would be the best outcome, morally speaking; and there are further options.

So there are three different questions. One concerns the nature of law, and in particular the boundary between law and morality. The two other questions are less obviously philosophical; they are, first, the question of what to aim for in the design of legal materials and, second, the question of adjudication, or how judges should decide cases, in particular where the legal materials do not give a clear answer.

The questions about the optimal legal materials and adjudication are easy to understand: it is easy to understand the sorts of considerations that are relevant to their resolution. The main issue lying behind both questions is the political one of the appropriate institutional role of the judicial branch. Some believe that at least as far as questions of individual rights are concerned, it is better — all things considered — to allow judges to develop an understanding of those rights than to have the legislature come up with whatever cramped and compromised detailed rules majoritarian legislatures are likely to come up with. So for that reason it is a good idea both to have abstract and general provisions such as one finds in bills of rights and also to encourage judges to interpret those provisions in the light of their own understanding of what those rights really involve as a matter of morality.⁶ Others believe that the increasingly common combination of bills of rights and judicial review is objectionable for turning what are among the most important political questions over to a nonelected professional elite.⁷ There's a lot to be said about these issues. But my topic is the almost entirely independent one of the nature of law and its boundary with morality.

⁵ See Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

⁶ See, eg, Ronald Dworkin, *Freedom's Law* (1996).

⁷ See, eg, Jeremy Waldron, *Law and Disagreement* (1999).

To illustrate the independence of the issue of the nature of law with some quick examples: Ronald Dworkin believes that judges should decide hard cases by extracting the most attractive principles — attractive from the point of view of political morality — from the existing legal materials, and applying the principles thus arrived at to the new case. Dworkin also believes that when judges make decisions in that way, they are deciding what the law already is. But, as has often been pointed out, a positivist could agree entirely with Dworkin on the question of how judges should decide cases.

A perhaps more interesting example centers on Radbruch. After the fall of the Berlin wall, the question arose whether homicide convictions of former East German border guards who had shot people attempting to flee over the wall should be upheld. The case in favour was that these guards had killed without justification. The case against was that the Constitution of the Federal Republic of Germany prohibited retroactive punishment, and punishment of guards who acted according to the law of the German Democratic Republic ('GDR') would violate that ban. One court, the German Federal Court of Justice (Criminal Division) decided that the murder convictions of some former border guards did not violate the constitutional ban on retroactivity because there never was any valid law commanding them to shoot at persons fleeing across the wall. They reached this conclusion by applying Radbruch's conception of law: the GDR's legal directive requiring the guards to shoot was so unjust that it could not properly be said to be law at all.⁸

Here it looks as if the abstract philosophical question of the nature of law did have a very significant practical payoff. But in fact there was another way to reach the same conclusion, as a decision by a different court shows. In upholding convictions in a rather similar case, the Federal Constitutional Court did not declare that the relevant legal directives of the former GDR were not law at all. Instead, it held that the ban on retroactive punishment in the Constitution of the Federal Republic did not apply in cases of otherwise criminal acts made permissible by grossly unjust law.⁹ Same result, the convictions stand, but the court proceeded on the assumption that the directive to shoot at people fleeing over the wall was, indeed, lawful at the time. And a positivist need have no objection to the Constitutional Court's reasoning about whether the GDR law was grossly unjust, since this need not itself be seen as a question of German law.

We can say that the issue of the nature of law, its boundary with morality, need have no impact on the outcome of legal cases. No doubt this partly explains the continuing deep disagreement about the boundary of law

⁸ (1992) BGHSt 39, 1.

⁹ (1996) BVerfGE 95, 96, at 135.

and morality and the fact that most lawyers and officials, not to mention people generally, are not at all troubled by this disagreement. If the issue of the nature of law did affect the outcome of legal cases, more people, especially more lawyers, would be interested in the topic and continuing disagreement about it would be considered a problem.

As things stand, however, the question of the nature of law, its boundary with morality, remains a specialist interest. But I continue to find it an important question, one worth thinking about even though its direct payoff in the life of the law may be negligible.

It will help to first say a little more about the competing positions, now that we have put the issues of adjudication and the optimal design of legal materials to one side. For of course there are different versions of positivism and different nonpositivist theories of law, so to make what follows more concrete, I'll present two particular positions in outline. The positivist option is drawn from H L A Hart¹⁰ and Joseph Raz,¹¹ and the nonpositivist option from Dworkin.¹²

The positivist I have in mind believes that the question of what the law is is always determined by reference to valid legal sources. The validity of legal sources is determined by other, higher level, sources. Obviously the chain of validity cannot go on up indefinitely. Hart's view is that the supreme criteria of validity are established by an ultimate rule, the rule of recognition, which is not itself either valid or invalid within the system. A particular rule of recognition is in force in a particular legal system just in case the officials of the system accept it.

Some find this picture disturbing. The entire legal order just rests on the brute social fact of what is accepted by those who occupy the positions of power within the system. And what if some of them change their minds? Hart's view is that if enough of them do change their minds, the rule of recognition has changed. As he says, here, all that succeeds is success.

On this view, we must say that application of very abstract legal provisions, such as are found in bills of rights, will often not be a law-applying exercise, but an exercise of judicial discretion. We can say, with Raz, that the legal system turns over to the courts the task of engaging in the moral reasoning necessary to further specify the legal content of these rights.

On Dworkin's view, there are always answers to questions about what the law is; when judges decide cases according to his recommended

¹⁰ See H L A Hart, *The Concept of Law* (2nd ed, 1994).

¹¹ See Joseph Raz, *The Authority of Law* (1979); Joseph Raz, 'Authority, Law, and Morality' in Joseph Raz, *Ethics in the Public Domain* (1994) 194.

¹² See Dworkin, *Law's Empire*, above n 4.

theory of adjudication, they are doing no more nor less than figuring out what the law is. Determination of what the law is requires what Dworkin calls constructive interpretation. The judge, or anyone else trying to figure out what the law is, must ask herself what general principles can explain the legal materials at hand and, because many different principles could be compatible with the existing materials, must choose that principle or set of principles which shows the law in its best light, which is to say, as doing best at achieving its aim or function. The question of what the law is requires thinking about the best, the morally best, that the law could be.

This disagreement between our positivist and Dworkin is over how to conceive of what the judge is doing when moral reasoning is employed by a judge deciding a case. Traditionally, this dispute about the nature of law and its boundary with morality has been understood to turn on the content of the concept of law. The questions that then arise are: How might this dispute about the concept of law be resolved, if at all, and, relatedly, does it matter?

Let me start with the view that it doesn't matter. Partisans on either side, we might think, insist on a particular understanding of the concept of law merely for the sake of gaining a rhetorical advantage in some other dispute that really does matter. I noted that President Bush's statement that only legislators should make the law gave a rhetorical edge to his claim that judges should not allow their personal opinions to influence their decisions. Similarly, one might think that Dworkin's concern to advance a conception of law that allows for the role of moral argument is motivated by the desire to be able defend the progressive decisions of the United States Supreme Court under Chief Justice Warren without having to defend the idea that it is legitimate for judges to make law. And it's noteworthy that the oldest discussion of this issue that I'm aware of is found in Aristotle — in his *Rhetoric*.¹³

Aristotle advises advocates that where what he calls the 'written law' is on their side, they should argue that, no matter how unjust its application to the present case may appear to be, the law is after all the law and it is the role of the court to apply the law, not to decide on the basis of what it might think is right or wrong. Where the 'written law' is not on their side, however, Aristotle advises advocates that they should argue that the real law must of necessity comport with justice and that to apply the 'written law' when it is unjust would be to misunderstand the nature of law.

This is a bit dispiriting. Nonetheless, I think it is worthwhile to discuss the concept of law, for the pretty obvious reason that it is a concept of political significance. As Raz says, 'unlike concepts like "mass" or "electron", "the law" is a concept used by people to understand themselves.

¹³ Aristotle, *Rhetoric* book I, ch 15.

... It is a major task of legal theory', he says, 'to advance our understanding of society by helping us understand how people understand themselves.'¹⁴

Raz's own methodology for this task is that of conceptual analysis. Philosophical analysis of the concept of law will yield necessary truths about law's nature. Now this kind of project has some famous detractors.¹⁵ But I think we could recast what Raz is attempting to do in terms less likely to cause philosophical anxiety. Whether or not conceptual analysis can yield necessary truths, and whether or not conceptual claims have some kind of fundamentally different status from factual claims, it is clear enough that the dispute about the boundary of law is a dispute that cannot be resolved by looking at the world; we can't discover the boundary of law by doing legal sociology. The issue is which is the right way to conceive of law and its boundary, and, as I've said, an answer to that question will leave legal practice more or less untouched.

My objection to Raz's methodology is more simple: there is insufficient agreement in the intuitions that are the data for any philosophical conceptual analysis. When attempting to analyze the concept of knowledge, philosophers worked with examples that were supposed, at any rate, to elicit the same response — either it was a case of knowledge or it wasn't — in pretty much everyone. But on the question of the boundary between law and morality, the concept of law is simply equivocal — some of us, in some moods, see that boundary as strict, others of us, in other moods, see it as very porous. The equivocation in the concept of law is what allows Aristotle to give the rhetorical advice that he does. It is hard to see how conceptual analysis can settle a disagreement that is present in the very data that the analysis is supposed explain. Of course, Raz attempts to do just that, with his ingenious argument concerning the connection between the concept of law and the concept of authority.¹⁶ Without going into its details, let me just say that I find each of the steps in his argument reasonably resistible, and that this is what we should expect, given that most people who have spent time thinking about law, authority, and the authority of law, feel the pull of both ways of thinking about the boundary between law and morality. If our aim 'is to explain the concept as it is, the concept that people use to understand features in their own life and in the world

¹⁴ Raz, 'Authority, Law, and Morality', above n 11, 221.

¹⁵ See W V O Quine, 'Two Dogmas of Empiricism' in W V O Quine, *From a Logical Point of View* (first published 1953, 1980 ed). For discussion, see Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 355.

¹⁶ See Raz, 'Authority, Law, and Morality', above n 11.

around them',¹⁷ then at a certain point we have to accept that lack of convergence in usage is a bad sign.

I'll be similarly brief with Dworkin's preferred methodology for resolving the dispute about the concept of law. His position is that contested normative concepts, such as law, liberty, democracy, and equality, should all be approached in the same way: by the method of constructive interpretation.¹⁸ We are to take the practice associated with the concept of law, and any disagreement about how to understand that practice should be resolved in a way that shows that practice in its best light. To do that, we have to first attribute a point or function to the practice, and then engage in moral argument about which conception of law would show law to be achieving that function best. The function Dworkin attributes to law is that of providing a possible justification of the use of coercive force by the state; it does this by demanding that coercion be constrained by past political decisions. And he holds that law does a much better job justifying the use of coercive force by the state if we see the boundary between law and morality as fluid in the way he recommends.

Again there's a lot to discuss here, but my objections are basic. Constructive interpretation may be appropriate for the task of making a legal decision — for in that context it is natural for a judge to want to reach the morally best decision that is consistent with what's gone before. But when it is a question of understanding the nature of law as a whole, I can see no reason whatsoever for saying that the right way to conceive of law is the way that will show the legal practice we have, and have had, in its best light, as doing best what it is trying to do. Why is the best way to resolve disagreements about the best way to understand a practice or institution to choose the understanding that makes the practice look best?

Of course, there is no greater case for choosing an understanding that makes the practice look worst. Perhaps we should choose an understanding that will make it look no better nor worse than it is? But that, of course, won't work, since if we already know just how good it is prior to interpretation, we must already be in possession of a settled understanding of what it is. The need to find an account of law that shows our legal practice in its best (or worst) light is due to the fact that there are different accounts of what law is that equally well fit the practice. Which leads to the second, though in a way prior, objection: Hart is right, I think, that law has no uncontroversial function. There may well be a particular central

¹⁷ Joseph Raz, 'Two Views of the Nature of the Theory of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 1, 26.

¹⁸ On the broader list of concepts, see Ronald Dworkin, 'Justice for Hedgehogs' (1998) unpublished manuscript.

function that law ought to have, but that's a different matter.¹⁹ I will return to this below.

Both Raz and Dworkin propose ways of finding the true content of the concept of law underneath what they must regard as the superficial equivocation in the concept as it is actually employed. This seems to me to be a hopeless project. When it comes to the boundary of law and morality, there is no truth of the matter. There are just different ways of drawing that boundary, preferred by different people.

If that's so, it might look like the whole enterprise is one of playing with words after all — How can this be, as I said I thought it was, an important issue? The reason for continuing interest in the topic, the reason why philosophers produce ingenious arguments for their preferred way of drawing the boundary, is, I believe, that the different options reflect different political views about how it would be best to draw the boundary. We could put it this way: each side has moral reasons for wishing that the boundary be drawn in one place or another. These moral reasons relate, as Raz said, to the way in which we understand our society, in particular the role of the legal authorities within it.

So the methodology I favour for thinking about the boundary of law is what could be called a practical political one: the best place to locate the boundary of law is where it will have the best effect on our self-understanding as a society, on our political culture. This method was favoured by Bentham and by Hart in his Holmes' Lecture of now nearly 50 years ago.²⁰ For better or worse, Hart abandoned this approach by the end of his life, and there are now very few legal philosophers who find it plausible.²¹ This way of thinking about the ancient debate does raise puzzles, which I'll turn to shortly. But first, to illustrate the methodology I have in mind, I'll explain why I think it would be better if we were all positivists.

The central claim is that to the extent that we believe that figuring out what the law is in part involves thinking about what it ought to be, we are in danger of taking a quietist, to use Bentham's word, attitude to the state.

¹⁹ See the Postscript to Hart, *The Concept of Law*, above n 10.

²⁰ H L A Hart, 'Positivism and the Separation of Law and Morals' in H L A Hart, *Essays in Jurisprudence and Philosophy* (1983) 49.

²¹ I am aware of only Neil MacCormick and Frederick Schauer. See Neil MacCormick, *H.L.A. Hart* (1981) 158–60; Neil MacCormick, 'A Moralistic Case for A-Moralistic Law?' (1985) 20 *Valparaiso University Law Review* 1, 8–11; Frederick Schauer, 'Positivism as Pariah' in Robert P George (ed), *The Autonomy of Law* (1996) 31; Frederick Schauer, 'Positivism Through Thick and Thin' in Brian Bix (ed), *Analyzing Law* (1998) 65; Frederick Schauer, 'The Social Construction of The Concept of Law: A Reply to Julie Dickson' (2005) 25 *Oxford Journal of Legal Studies* (forthcoming).

Bentham attacked Blackstone for “that spirit of obsequious quietism that seems constitutional in our Author” which “will scarce ever let him recognize a difference” between what is and what ought to be.²² The idea is that to the extent that we say that the law cannot be grossly unjust, or that the law is what flows from the morally best reconstruction of the legal materials, we will be to that extent less likely to subject the legal materials the state offers us to criticism. Here is Kelsen:

A terminological tendency to identify law and justice ... has the effect that any positive law ... is to be considered at first sight as just, since it presents itself as law and is generally called law. It may be doubtful whether it deserves to be termed law, but it has the benefit of the doubt. ... Hence the real effect of the terminological identification of law and justice is an illicit justification of any positive law.²³

This as he says, ‘tends towards an uncritical legitimisation of the political coercive order constituting that community. For it is presupposed as self-evident that one’s own political coercive order is an order of law.’²⁴

The exact claim being made here, as I interpret it, is that if people think that bad law is not really law, or that nothing gets to be law unless it flows from the morally best way of reading the legal materials, they will be less inclined to subject what the state presents as law — apparent law — to critical appraisal. The important premise here is that what the state presents as law is, as Kelsen, says, typically given the benefit of the doubt. They say it’s law, and so it probably is, which means, because of the way law and morality are mixed, that it can’t be too bad.

So this is a practical claim: a nonpositivist concept of law leads to quietism, a noncritical attitude to the state and its directives. The claim could be doubted. Isn’t it just as likely that a nonpositivist understanding of law will lead to greater disrespect for the state? If people believe that legal directives coming from the state only get to be law if they survive some kind of moral filtering, won’t that mean that citizens will not take the state’s authority for granted, but believe instead that its legal directives must be morally evaluated before they know that they are worthy of obedience? Radbruch thought this was so, and thought for that reason that it would have been better if the Germans had not been positivists during the Third Reich. Hart’s reply to this is effective: the question of obedience should not be

²² Hart, ‘Positivism and the Separation of Law and Morals’, above n 20, 53–4, quoting Bentham.

²³ Hans Kelsen, ‘Law, State and Justice in the Pure Theory of Law’ (1948) 57 *Yale Law Journal* 377, 383–4.

²⁴ Hans Kelsen, ‘Law and Morality’ in Hans Kelsen, *Essays in Legal and Moral Philosophy* (Ota Weinberger ed, Peter Heath trans, 1973) 83, 92.

settled by taking a stand on the question of what the law is.²⁵ I will return to this below.

But I think we can go further. If we focus on the overall political culture, the attitude we take to the state, the thought that this legal directive is not really law because it doesn't survive a moral washing actually seems likely also to lead to quietism. Suppose we accept Ronald Dworkin's suggestion that the legal materials permitting the death penalty in the United States are actually not valid law, because they do not survive the moral reading of the Constitution.²⁶ Where does that leave the citizen and her attitude to the state? One might say it would increase criticism of the state — not only are all these executions morally wrong, they are unlawful. And that attitude seems critical, not quietist. But I'm inclined to see it differently. Law is connected not just to morality, but to the state; as Kelsen says, it is presupposed as self-evident that one's own political coercive order is an order of law. The biggest determinant of the content of law, on any view, is action by state actors, and the institutions of the state are themselves legal creations. Given that, the opponent of the death penalty can actually rest somewhat more content because of her belief that, though the state is imperfect (issuing as it does unlawful official directives), at least the law of her society prohibits the death penalty, which in turn reflects well on the state, which is an order of law. In effect, what we are saying when we say that the state executes people contrary to law, is that the state is being false to its true (just) nature. The more we infuse our concept of law with a moral ideal, such that we can regard unjust actions by the state as *mistakes*, mistakes about a normative order that the state both constitutes and is constituted by, the more accepting we will be of the state.

So I have made two claims about the effect a nonpositivist understanding of law may have in the political culture. A person with a nonpositivist understanding of law may be led to an uncritical attitude towards the legal materials the state produces. He may think: this is presented as law, so it probably is law, and therefore, given the nature of law, not too bad. But in addition to this, the fact that a nonpositivist understanding of law may lead someone to regard many legal directives as unlawful also encourages an uncritical attitude to the state, for if we think that the state is doing something not just bad, but contrary to the law of that state, we are led to think that the solution to this problem is for the state to be true to its own nature.

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Everything that [Radbruch] says is really dependent on an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'

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Hart, 'Positivism and the Separation of Law and Morals', above n 20, 75.
See Dworkin, *Freedom's Law*, above n 6, 301.

The politics behind this argument should not be controversial. Pretty much everyone can agree that a more critical attitude to the political coercive apparatus is better. As Mill pointed out, this is better even if, in fact, what we have is the very best there is.

But surely the claims about how nonpositivism leads to an uncritical attitude to the state are just speculative unverifiable guesses? I don't think so. The claim that some people will give the state the benefit of the doubt about the lawfulness of official directives is an empirical claim, but it is not an especially speculative one. And the argument does not depend upon the truth of this claim, since even if nonpositivists do not give the state the benefit of the doubt, but always try to figure out whether the official directives survive a moral filtering and thus sometimes conclude that official directives are not law, quietism still follows. This second strand to the argument does depend on the idea that so far as there is law at all in a society, the state is an order of law, in good part determining what the law is, and itself constructed according to law. That people believe that there is law in their society may be an empirical claim, though again not a speculative one in most contexts, but the connections between law and the state simply follow from what is uncontroversial about the nature of law.

The rest of both strands of the argument is not empirical at all; rather, the argument just points out the implications of the nonpositivist idea of the law.

To further clarify, the quietism argument does not need to assert that everyone will follow the chain of ideas to the point where they adopt quietist attitudes to the state. Most people don't think that much about these questions at all. But we can still say that quietism is where you will end up if, employing a nonpositivist conception of law, you do think about the relationship between law and the state.

It might be thought that partisans of positivism are not entitled to the quietism argument, at least if they embrace, as I have, Hart's response to Radbruch.²⁷ For in that response we say that people ought not to think that the question of whether a directive is law settles the question of the obligation to obey. Why cannot the partisan of nonpositivism say that people ought not to think in the ways outlined in the quietism argument? The reason is that the issues involved are different. The response to Radbruch is that the issue of the duty to obey is a moral one that can be rationally discussed. If people are being led astray by the combination of positivism and this view about the duty to obey, the natural place to start is by arguing that the moral position that there is always a duty to obey the law is untenable. There is no need to adopt a different concept of law in order to address this problem. It is not as if a duty to obey all law is a fixed

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I here respond to a question put to me by Frank Michaelman.

point in the debate about the concept of law — part of the core of the concept that all share — so that we can say that whatever else is true about law, we always have a duty to obey it and so the task is to come up with a conception of law that can make sense of this. In fact, nobody believes that there is a duty to obey all law. The most some believe is that there is always a *prima facie* duty to obey all law, but this is not enough for Radbruch's argument about the bad effect of positivism to go through. And even those arguing for a *prima facie* duty to obey all law typically impose conditions on the nature of the law-making process before this conclusion follows.

The nonpositivist could respond that rational argument is also available to show people that they should not give the state the benefit of the doubt about its legal directives. Indeed Dworkin urges the citizenry to adopt a Protestant attitude to the law, figuring it out for ourselves rather than taking it on authority.²⁸ So the nonpositivist could also say that there is no need to change the concept of law to address the problem. Unlike the claim that it is not the case that all law imposes overriding duties to obey, the claim that we should not give the state the benefit of the doubt about what is law seems resistible. But the main point is that even if we should not give the state the benefit of the doubt, and people see this, the other strand of the quietism argument still stands. And I don't see how the attitudes to the connection between law and state that this argument depends on can be undone by rational argument.

As I've said, the political claim behind the practical political argument I've been making should not be controversial. We can all agree that quietism is bad. Further practical political arguments would be available to those with more particular political views. Most important, we might believe that it would be better for our political culture if we could justifiably believe that law, as law, is always *prima facie* morally binding.²⁹ Alternatively, we might believe that it would be better for our political culture if coercion according to law could justifiably be seen as *prima facie* legitimate. If either or both of these practical political claims have force, there is reason to prefer a concept of law, a nonpositivist one, presumably, which makes the desired result more likely. Dworkin's case for his theory of law includes an elaborate and ingenious account along these lines, embedded in the project of showing our existing legal practice in its best light.³⁰ But the political morality behind Dworkin's argument could be the basis of a practical political argument about which concept of law would be better. Rather than asserting that the function of law is to justify coercion,

²⁸ See Dworkin, *Law's Empire*, above n 4, 190.

²⁹ I am indebted here to Carlos Rosenkrantz.

³⁰ See Dworkin, *Law's Empire*, above n 4, ch 6.

one could argue that it would be very beneficial to our political culture if we could plausibly believe that law does justify coercion.

I think these arguments should be taken seriously. They seem to me to be plausible counterarguments to the quietism argument. My reasons for thinking the quietism argument is stronger are, first, that I don't believe that embracing one rather than another conception of law can make the state prima facie legitimate: I don't find convincing Dworkin's argument that turns on the role of law, suitably understood, in the creation of a community of principle.³¹ And, second, I don't see the obvious political advantage of being able to make convincing arguments that law, as law, provides prima facie obligations. If the best we can do is make plausible instrumental arguments about the general benefits that flow from obedience to even imperfect law, our political culture would not be the worse for that. But this is a big topic which I cannot begin to properly address here.

There are also some practical nonpolitical arguments that could be made. Brian Leiter has recently been defending the view that the best way to conceive of law and its boundary is the way that best facilitates our social scientific enquiry.³² In part this is a call to change the subject, to worry less about the question of what law is and more about what happens in legal practice. Perhaps we should change the subject. Others have, in effect, made similar suggestions. I see so-called ethical or normative positivists as suggesting that we should worry less about what law is and more about the theory of adjudication and how to design optimal legal materials.³³ And Stephen Perry can be seen as suggesting that, rather than the question of what law is, we should worry about what would have to be the case for law to generate reasons for action.³⁴ But Leiter also seems to be suggesting that we can answer the question of what law is by embracing the concept that emerges as most convenient in social scientific study of legal practice. Presumably the positivist conception of law would emerge from this approach. But I don't find this reason for favouring one conception of law rather than another to be as compelling as any of the political reasons I have mentioned. The importance of the traditional dispute over the nature of law

³¹ See Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 371.

³² See, eg, Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' above n 15.

³³ See Tom Campbell, *The Legal Theory of Ethical Positivism* (1996); Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 411.

³⁴ See Stephen Perry, 'Hart's Methodological Positivism' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (2001) 311.

is, as I've said, that it affects our understanding of our relationship to the state.

No doubt there are other practical arguments that could be made on either side. No doubt neither case is obviously correct. What I will now turn to, however, are some of the implications of this way of understanding the dispute about the boundary of law. On the approach I am recommending, and this applies to all versions of the practical argument,³⁵ it turns out that there is no answer to the question of the boundary of law. There are just different ways it can be drawn, and reasons for preferring that we all do it one way rather than another. Frederick Schauer believes that practical political argument such as his might convert people to the positivist concept of law.³⁶ I doubt it. But the important point is that until it becomes possible to say that there is little disagreement, among people who have thought about law, about the boundary between law and morality, we cannot say that either positivism or some version of nonpositivism states the truth about law. Here too, all that succeeds is success.

Dworkin calls disagreement about what factors can play a role in determining what the law is 'theoretical disagreement in law', and he writes that '[i]ncredibly, our jurisprudence has no plausible theory of theoretical disagreement in law.'³⁷ If I am right, we have a theory of theoretical disagreement in law; that disagreement is due in part to people conceiving of law's boundary in different ways, influenced, as I think, in the main by their views about what a healthy political culture would look like. But Dworkin would not regard this as a plausible theory of theoretical disagreement because it provides no resources for arguing, now, when people continue to disagree, that one or the other side is right.

Why does there have to be a truth of the matter about the boundary of law? One of Dworkin's longstanding objections to Hart's idea of the rule of recognition is that if the content of the law depends upon a convention, an agreement among legal officials about the criteria for valid law, there isn't any law, because the officials don't agree.

This *reductio ad absurdum* argument has been resisted by defenders of positivism who have pointed out that there can be a truth of the matter about the conclusion that should be drawn from valid legal sources in a

³⁵ Including Leiter's. The concept that best facilitates social scientific enquiry will not be 'the' concept of law unless there is convergence in usage. And there won't be convergence, as the concept is not just employed in social science. This is one reason why the naturalist project, whatever its merits for general epistemology, is inappropriate for normative concepts such as law.

³⁶ See Schauer, 'The Social Construction of The Concept of Law', above n 21.

³⁷ Dworkin, *Law's Empire*, above n 4, 6.

particular case even if reasonable people might disagree.³⁸ And to a large extent, this defence is surely right. For example, Judge Frank Easterbrook's decisions about contract formation in the American cases of *Pro CD v Zeidenberg*³⁹ and *Hill v Gateway 2000*⁴⁰ have been very controversial among contracts scholars, but there is no reason to think that a correct answer to the question of whether a buyer of something in a box is bound to terms discovered at home, after she has opened the box, cannot be found in traditional offer and acceptance doctrine along with the 'battle of the forms' provision of the United States' *Uniform Commercial Code* ('UCC'). The controversy can certainly in part be explained by the fact that the doctrine is actually quite complicated and it can be difficult to think through how it applies to new kinds of fact pattern. None of this, of course, raises any problem for positivism.

But there is another way of reading the controversy over these decisions that does raise a problem. There's reason to think that in these cases Judge Easterbrook didn't care that much about either traditional contract formation doctrine or §2-207 of the *UCC*. Rather, he decided based on what he thought would make sense for an efficient commercial practice. If we suppose that these were not cases where the law had run out, the positivist has to confront the fact that in American common law jurisprudence, at least, there is rather little agreement about the shape of the doctrine of *stare decisis*, at least in the horizontal dimension. And, as the venerable discussion of the murdering heir in *Riggs v Palmer*⁴¹ illustrates, rather little agreement about the proper role of the court when interpreting a statute that may, if read straight, produce manifestly bad results. The result is that we very often are unable to say whether, or why, appellate decisions have been decided in accordance with law or not. This strikes me as the most important point made by Dworkin in 'The Model of Rules I';⁴² it is also, as Leiter has shown, at the heart of the legal realists' argument for the indeterminacy of American law.⁴³ In a way easy cases — or cases where the legal materials give a clear answer, at any rate — raise more of a problem for the positivist than hard cases.

What is striking here, however, is that there is a way of responding to the problem that 'there isn't enough law' that does not require us to reject

³⁸ See Jules Coleman, 'Negative and Positive Positivism' in Jules Coleman, *Markets, Morals, and the Law* (1988) 3; Raz, 'Authority, Law, and Morality', above n 11.

³⁹ 86 F 3d 1447 (7th Cir, 1996).

⁴⁰ 105 F 3d 1147 (7th Cir, 1997).

⁴¹ 115 NY 506 (1889).

⁴² In Ronald Dworkin, *Taking Rights Seriously* (1977), 14-45.

⁴³ Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics* 278.

positivism: we could reform the legal materials. There are many jurisdictions that have much clearer rules on the weight of precedent and statutory interpretation, even in the common law world, than is the case in the United States. Of course, as already noted, there is no possible legal order where the legal materials clearly answer every legal question. But there are possible legal orders much more determinate than that found in the United States.

But now all of this discussion of Dworkin's objection to positivism assumes that positivism may be, simply, true. My account is conventionalist all the way down. When we acknowledge that positivism could only be correct if more or less everyone took that view of law and its boundary, and acknowledge that this is not now so, Dworkin's *reductio ad absurdum* argument would seem to gain more force.⁴⁴

This is clearest in a country whose constitution specifies certain rights in general language. Some people, such as Dworkin, believe that the equal protection clause of the 14th Amendment to the *United States Constitution* enacts, as part of United States law, a moral principle of equal treatment: 'government must treat everyone as of equal status and with equal concern'.⁴⁵ Others believe that the equal protection clause authorizes the Supreme Court to decide, outside the boundary of law, whether legislation violates its view of what morality requires in the domain of equal protection. As decisions are made, and to the extent that the principle of *stare decisis* is taken seriously, a body of equal protection law builds up. But certainly, the positivist will say that right after Reconstruction there was very little in the way of a law of equal protection.

As there is no agreement on the right way to understand the Equal Protection Clause, and as every piece of legislation must satisfy that clause, do we not face the result that there is no law at all? If there is no way to resolve the disagreement between those who believe that adjudication of equal protection issues takes place at least in part outside the law and those who believe it all happens within law's boundary, it may seem to follow that there is no truth of the matter about whether a particular piece of legislation is, or is not, valid law.

Take a piece of legislation that is not unconstitutional on a nonmoral reading of the Constitution and Supreme Court precedent. Assume also that on the best moral reading of equal protection, the legislation violates this right. The positivist holds the legislation valid, Dworkin holds it invalid. And there is no way of saying who is right because the disagreement depends not on competing interpretations of the legal materials but on the boundary of law and morality, and there is no truth of the matter about that.

⁴⁴ I thank Ronald Dworkin for making this clear to me.

⁴⁵ Dworkin, *Freedom's Law*, above n 6, 10.

It is significant that we may have to conclude that there is no law in such a case. But the problem does not generalize to every legal question. On the approach I am recommending, we should be conventionalists not just about the nature of law but also about the proper method for thinking about the nature of law. To the extent that law has a true nature, that is fixed by a convergence of beliefs. But of course for anything that I have said to have made any sense at all, there must be a substantial core to the concept of law that all of us share despite our disagreement about the boundary of law and morality. We don't have to share all the same beliefs about law to be talking about the same thing, but we do have to share a good deal. To borrow from Rawls, we can say that there must be an overlapping consensus on the nature of law, or an overlapping consensus among our various concepts of law.

So the response to Dworkin's challenge is this: to the extent that there is an overlapping consensus on the content of the United States' law of equal protection, there is a law of equal protection. There is no need for us all to share the same account of why true legal propositions are true for it to be possible for some of them to be true.

The area of overlap seems to me to be rather big. No one thinks that 10 years imprisonment for murder is unconstitutional, or that the law against murder violates the law of equal protection, or that only marriage between persons of the same sex is permissible under Massachusetts law. At least, if they do, they are in the same category as someone who thinks that the law has whiskers.

My sense is that the domain of legal disagreement which can be traced to disagreement about the boundary of law and morality is not big enough to render the approach I have taken to the second disagreement absurd on its face.

But we have reached the conclusion that the dispute over the concept of law has an implication that, while it still won't make any difference to the outcome of cases, will strike many as hard to accept. And it can't be avoided by changing the legal order. As the decision by the Australian High Court in *Australian Capital Television* illustrates, a court can get into the business of protecting individual rights against Parliament with no explicit textual basis.⁴⁶ Some American constitutional theorists believe that their Constitution would properly be interpreted as protecting individual rights even without the Bill of Rights and the 14th Amendment.⁴⁷ These views could not be said to reflect obvious misunderstanding of the nature of law. And in any case, if the price of avoiding the problem is to banish individual

⁴⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁴⁷ See Lawrence Sager, *Justice in Plain Clothes* (2004).

rights from the law, there will be plausible grounds for saying that the cost is too high.

Still, so long as the absurd conclusion that there is no law at all is avoided, it is not at all clear that an approach to the question of the nature of law that implies that there is less law than many have believed is for that reason implausible. And in any case, the only way to avoid this result would be to come up with a compelling methodology for discovering the truth of the matter about the boundary between law and morality. This, it seems to me, will never happen.