Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law'

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With a light touch, delightful clarity and intimate familiarity with the issues, Liam Murphy presents a defence of 'hard' or 'exclusive' legal positivism on the basis of a normative political consideration. This piece of prescriptive conceptualism is justified on the basis of the avoidance of 'quietism', that is, the too ready acquiescence in the acceptable moral standing of existing laws. This thesis crosses a significant methodological Rubicon in that it goes beyond the assumed normative neutrality of the conceptual analysis of societal ideas that characterises much contemporary analytical legal philosophy.[1] To this extent Murphy's approach savours of prescriptive legal positivism, endorsing the idea that there are normative grounds for adopting legal positivism as a theory of what law ought to be, and, how it is best conceived of in order to implement an essentially prescriptive theory.[2]

To Murphy's quietist argument for legal positivism we can add many other considerations that point the way to the moral and political benefits of positivist models of law: predictability, formal justice, effective regulation, democratic control, non-retroactivity, and so on, all of which identify certain types of benefit that derive from the governance via prospective, clear, specific general rules that can be identified, understood and applied without the need to draw on the moral or other speculative opinions of citizens and adjudicators.

However, Murphy does not regard himself as a prescriptive legal positivist, if that is taken to mean understanding legal positivism to be primarily a recommendation of a particular sort of law or legal system: that is, an affirmation of the political and social importance of having formally

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1 The modern classic in this vein is H L A Hart, *The Concept of Law* (1961). The background to the development of Hart's methodology is admirably treated in the recently published biography of Hart: Nicola Lacey, *A Life of H. L. A. Hart* (2002).

2 See Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004).

good law, with agreed identifiable social sources. Thus in a footnote in his essay in *Hart's Postscript,*[3] Murphy is careful to distinguish what he sees as the purely conceptual versions of legal positivism that concern the meaning and nature of law, from associated normative issues about the proper form of law and preferred methods of legal reasoning that some positivists adopt. In 'Concepts of Law', Murphy again clearly affirms that his interest is in concepts of law not about how judges ought to decide cases or how to formulate good legislation.[4] Although his arguments may be prescriptive, his conclusions are conceptual. For this reason Murphy draws back from full on prescriptive legal positivism by asserting that, while his arguments may be prescriptive, his conclusions are directed at what 'law' should be taken to mean, not what it ought to be. He provides evaluative reasons for adopting legal positivism, but the legal positivism he adopts is a conceptual not a prescriptive theory.

This is an unstable, perhaps, in some respects, an inconsistent position, which puts Murphy in the position of being unduly selective in his prescriptive conceptualism, neglecting the evidence that much of what proceeds in contemporary legal philosophy as morally neutral conceptual analysis is in fact morally motivated and morally received, in that it is the moral and political implications, rather than our conceptual intuitions or practice, that determine which concept of law we find satisfactory. Much ostensibly detached conceptual analysis is in effect normative political philosophy and the discourse of traditional legal positivism is much more prescriptive than is usually acknowledged (although there are also powerful explanatory motivations at work that render the prescriptions intelligible and feasible). Against this background, I question Murphy's thesis that adopting a concept of law carries minimal implications for what sort of laws ought to be made, and how they ought to be interpreted and applied, and then go on to ask where this leaves us in the search for an acceptable concept of law.

Law and morality

Murphy identifies his zone of interest as the conceptual boundary between law and morality, and focuses on the issue of whether an unjust law can, as distinct from should, be law. He distinguishes this issue from whether or not judges should have extensive discretion when making adjudicative decisions, from the question of whether laws should be clear and precise,

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3 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.

4 Liam Murphy, 'Concepts of Law' (2005) 30 *Australian Journal of Legal Philosophy* 1, 3.

and from the question of what judges should do when actually laws are not in fact clear and precise. These practical issues are, he says, 'almost entirely distinct' from more abstract and esoteric matters, such as the boundary between law and morality, or whether an unjust law is in fact a law, or whether judges who use morality in their decision making are making law or simply interpreting it.

The example he gives to illustrate this is one in which two appellate courts in Germany took different conceptual paths to making the same decision as to the legal guilt of border guards accused of the unlawful killing of people seeking to cross the Berlin wall.[5] The guards' defence to the charge of homicide was that they were carrying out orders that were lawful at the time. The outcomes in the two very similar cases, Murphy argues, were unaffected by the concepts of law at work in the legal argument. In particular, the verdict of guilty did not depend on whether or not conceptual arguments deriving from a legal positivist analysis were deployed. The two courts came to the same conclusion without sharing the same views on the conceptual boundary between law and morality. Both made a finding of guilt as a matter of law, one on the basis that because of the wickedness of the killing in question there was no valid law that permitted the killing (hard natural law theory), and the other because a constitutional ban on retrospective law does not apply to the criminalisation of actions done in accordance with grossly immoral laws (a positivist discretionary judgment, exercised on moral grounds).[6]

Murphy's point is not just the legal realist thesis that judges do not in fact follow established law or the logic of legal argument, but that abstract theories are not relevant to practical legal questions. But this does not follow from the example given. Different legal arguments may lead, by different routes, to the same conclusion in particular cases, and different courts may use different arguments to reach the same conclusion. This does not negate either the relevance of the arguments, or the possibility or likelihood that they may rise to conflicting outcomes in other cases heard before other courts. Abstract theories such as natural law and legal positivism remain legally relevant to the case at hand, even if they both suggest the same conclusion in some cases or are simply ignored by judges in particular cases. Putting aside the possibility that either or both were wrongly decided, and discounting the sort of extreme legal realism that

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5 Ibid 4.

6 This is, of course, a version of one of the Hart–Fuller debates, in which Lon Fuller takes the first type of position and Hart a different form of the second position. See H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, and Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

regards legal arguments as no more than post facto justifications of decisions reached on quite other grounds, the example given would seem to illustrate how different concepts of law can feature in legal arguments that are legally relevant, although not held to be decisive by all courts.

Thus, on the facts of this example, if the natural law approach is taken then, prima facie, the guards are legally guilty of unlawful killing since the order they were given was not legally valid. If a positivist approach is adopted then, prima facie, the guards are not guilty, for the retrospective law is incompatible with the constitutional bar on retrospective legislation in the jurisdiction where the trial is taking place. However, the court in question put its own moral gloss into its reading of the constitution, as is commonly done in constitutional courts, and took the provision to include an exception to the ban on retrospectivity with respect to acts licensed by the grossly immoral laws of previous regimes.

There may be no practical difference in outcome here, but there clearly could have been. And certainly, any responsible defence lawyer would have put forward one or both of the arguments in question. What is at stake here is not the relevance of the arguments, but how persuasive they will be in particular courts. We cannot argue from the fact that a certain argument is or is not accepted as decisive in a particular case that it is not, therefore, legally relevant to the case in hand. Murphy indicates that, because conceptual differences on the boundary of law and morality rarely affect the outcome in a particular case, concepts of law give rise to no significant reasons for deciding cases one way or the other. This is a sweeping claim that is not established by a few illustrative instances.

Something depends here on the level of abstraction that is involved, and, in this case, on which version of legal positivism is being deployed. It may be argued that hard or exclusive legal positivism, which requires that all law originate in an identifiable and recognised social source, would be less supportive than other theories of an exercise in judicial interpretation that uses a moral override, either in the selection or the interpretation of law. 'Soft' or 'inclusive' legal positivism, which allows for moral criteria in a rule of recognition, is more likely to countenance the invalidation of apparently good law on the grounds of its immorality. As is to be expected, the more precise the legal theory, especially its conceptual ingredients, the clearer its legal implications will be. Thus, if hard legal positivism is the theory in question, it is clear that the positivist approach to the defence of lawful orders is likely to be more sympathetic, not because of any deduction from the concept of law involved, but because of the moral and political reasons that lie behind the adoption of that concept.

Consider the same issues in a jurisdiction without a constitutional prohibition on retrospective criminal law in which a legislature debates whether to pass a retrospective law, perhaps one criminalising such prior

acts of border guards. In such a debate hard legal positivists are likely to put a stronger case against retrospective law because of their moral sensitivity to the reasons for having only prospective laws. Whereas natural lawyers in the legislature would tend to put much less weight, if any, on the consideration that there were positive (but, in their belief, pseudo) laws under which the guards carried out their duties, because of their belief that grossly immoral acts are deserving of punishment whether or not there is a positive law in place to validate such punishment. On Murphy's side of the argument, it is much harder to work out the implications of soft legal positivism for such debates, perhaps because this version of positivism rests more on descriptive than prescriptive grounds.

Should such a retrospective law then be passed and the matter come to court, hard positivist judges, if unencumbered by constitutional overrides of legislation, being loyal to their positivist principles, are likely to apply that law, whereas a natural law judge is more open, in theory, and maybe in practice, to 'interpret' the law in accordance with their moral convictions either against retrospectivity or in favour of disregarding the current legal relevance of a previous law, now held to be grossly unjust.

Of course, a positivist judge can always exercise her moral right to decide the case in accordance with her moral conscience in defiance of what she recognises as the law. Yet, in so far as the judge is a prescriptive hard legal positivist then she is likely to be impressed by arguments against retrospectivity and less likely to give retrospective laws legal recognition. And, while there are 'soft' legal positivists, who argue not only for allowing moral criteria into the rule of recognition but also for giving judiciaries the moral right to override laws of which they disapprove strongly, this would be an odd, although not impossible, position for a hard prescriptive legal positivist to adopt, since this would conflict with the moral reasons normally given for the governance of rules.

There is certainly much room for disagreement as to the justiciable implications of various theories of law and their associated conceptual assumptions, but these disagreements are about the precise nature of these implications not about their general relevance to the issues in question. It would therefore appear that the example Murphy gives, although it shows that legal positivists and natural lawyers can come to the same findings on the same facts, can equally well be used to demonstrate that the two approaches can lead us in different directions, and perhaps that, on this issue, legal positivists are committed to giving more weight than natural lawyers both to the rule of law advantages of not allowing courts to invalidate laws on the basis of their own moral views, and to the importance of adopting only non-retroactive legislation.

Conceptual criteria

Underlying these debates there are difficult questions that need to be raised about what constitutes the list of acceptable criteria for successful conceptual analysis. In particular, the issue that haunts analytical legal philosophy is whether there are any grounds for choice of concepts or conceptual analyses that are not reducible to prescriptions derived from the alleged moral, political, or even aesthetic, benefits of adopting one analysis over another, or, on the other hand the descriptive, empirical or explanatory gains to be derived from such choices. Hovering in between these prescriptive/evaluative and descriptive/explanatory options there is the apparently autonomous activity of analysing what is meant when we, and/or others, use certain terms.

Murphy does not make it entirely clear where he stands on such questions. Having distinguished his issues, and insisted on the largely non-practical implications of the abstract issue of the meaning and nature of law, he seems ambivalent about the importance of the conceptual issues involved and how they are to be resolved. Sometimes he suggests that the natural law/legal positivist conceptual debate is a fascinating academic conundrum of no interest to anyone outside academia.[7] In other places he assumes that which concept of law we adopt is a distinct but nevertheless important practical issue,[8] if only to discourage quietism, although he hints that there may be other reasons for getting involved in the conceptual question of the meaning of law, such as developing a methodology for socio-legal studies,[9] or furthering our self-understanding.[10]

There is real methodological ambivalence underlying this vacillation. On the one hand there is the tendency to dismiss the prospect of there being any way of deciding between concepts of law. He notes that we are confronted with a great variety of meanings associated with the same social and legal terms, particularly contested ones, such as 'law'.[11] Descriptively we can map this diversity and beyond this we may seek to explain it in terms of its social functions. This suggests that there is no one 'correct' analysis of a social term, although there is a measure of agreement within particular cultures. Murphy takes this line when noting that we cannot settle conceptual differences in legal theory by appealing to our 'intuitions', or how 'we' or a particular group deploy the terminology in question. Maybe, he suggests, we can locate the extent of the overlap between the concepts of law at work out there in the real world, and maybe, I would add, we can see

7 Murphy, 'Concepts of Law', above n 4, 5.
8 Ibid 11.
9 Ibid 15.
10 Ibid 9.
11 Ibid 7.

which concepts are used by which groups within which cultures at which times. And, perhaps, we can see which are more useful for certain empirical studies, such as in comparative law. But ultimately there is no way of settling as a matter of pure conceptual propriety the disputes between Raz and Dworkin, or Coleman and Perry, or Waldron and Alexander.

It is at this point that Murphy resists the move of saying that the apparently purely conceptual debates that dominate the heavyweights of contemporary analytical jurisprudence are really some amalgam of ideological, normative and descriptive disagreements, although he does express his own preference for a normative approach. He gives one relatively modest prescriptive argument for a conceptual conclusion but holds back from reducing the conceptual disagreement to a normative disagreement, perhaps because he could then no longer hold to the general position that the conceptual question about law is almost entirely separate from the various normative disagreements about judicial reasoning, legal obligation and legislative standards. What he does is to use the prescriptive argument about quietism as a sort of tie-breaker between different accounts of the conceptual overlap that he finds out there in the discourse that utilises the terminology of law.

Beyond that, Murphy's main concern seems to be to make clear that the conceptual alternative he prefers on prescriptive grounds does not have conceptual implications that are absurd in that no reasonable participant in the discourse could accept them.[12] His worry is that hard positivism appears to have the implication that, if there is disagreement as to the content of the rule of recognition, or the meaning of a particular law, then this reduces the amount of law in that jurisdiction. However, he slips out of this unpalatable conclusion neatly enough, partly by minimising the extent of the problem and partly by accepting that there is indeed much less law in existence than we often think.

Murphy might have added that one reason for adopting hard legal positivism is to encourage and argue for the achievement of consensus on the rule of recognition within a jurisdiction for a variety of practical reasons, including success in the enterprise of making actual laws. That would be, however, to acknowledge further prescriptive grounds for a conceptual conclusion, grounds that could lead him down a slippery slope to full on prescriptive legal positivism. Perhaps he is also keen to resist a form of prescriptive legal positivism that swallows up conceptual analysis as an independent way of reaching social and self-understanding.

Murphy's come-back here may be to ask how the prescriptive legal positivist deals with its conceptual issues. Does the prescriptive positivist claim that there is no such thing as pure conceptual analysis? That all

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12 Ibid 16.

meaningful conceptual analysis is part of a non-conceptual enterprise? That all conceptual issues are reducible to normative or descriptive issues? Is prescriptive legal positivism opting out of the traditional and ongoing conceptual debate between natural law and legal positivism?

My personal view is that a prescriptive legal positivist, allowing that the coins of discourse must be given stable meanings in the interests of communication, should hold that the meaning of social terms and concepts are ultimately a matter for stipulation, justified solely in terms of what it is that we want to achieve by that stipulation. In this sphere there is no intrinsic conceptual correctness. This does not mean that conceptual analysis is not a key ingredient in prescriptive legal positivism, only that there are lots of good reasons of different types for making this rather than that stipulation. Thus, maximising accordance with current linguistic practice is important as a reason for a stipulation of meaning if the purpose is or requires successful communication. Encouraging or discouraging good or bad social consequences, along the lines undertaken by Murphy, is another. The quietism argument is indeed relevant to determining which concept of law to adopt, as are many other arguments of the same form. Further, it is desirable, from a positivist point of view, that the morally desirable conceptual recommendations regarding the concept of law provide us with existence conditions for law that enable us to determine empirically whether or not a particular putative law does or does not exist.

This brief outline of a prescriptive positivist methodology for conceptualising 'law' is directed at the adoption of an operative concept of law to be used in practical as well as theoretical discourse. It is compatible with adopting different concepts of law for other purposes, such as identifying the range of social phenomena that a social scientist might want to describe and explain, or a philosopher might want to reflect on to enhance her self-understanding. The methodology of conceptual analysis is relative to the purpose for which the analysis is undertaken. This is one reason why there will always be concepts rather than simply a concept of law.

The prescriptive conceptualist might be accused of fallacious argumentation in drawing conceptual conclusions from prescriptive premises. Just as we expose and oppose the naturalistic fallacy (mistakenly deducing what ought to be the case from what is the case), so, it may be argued, we should expose and oppose what has been called the 'normative fallacy' (deducing what is the case from what ought to be the case).[13] The accusation here is that the prescriptive positivist commits a conceptual form

[13] T D Campbell, 'The Normative Fallacy' (1970) 20 *Philosophical Quarterly* 368.

of the normative fallacy, in which conceptual conclusions are drawn from normative considerations.

This would certainly be the case, if the positivist is claiming that her conclusions are about how a concept is actually used in practice, but it is not invalid if what is going on is a recommendation about how a term ought to be used. It would be an invalid argument if the assumption is that there are independent grounds for establishing that there is a correct as distinct from merely a better way of understanding and using a certain discourse, but if the conclusion is in the form of a recommendation as to useful usage rather than a claim to conceptual propriety, then no fallacy is involved.

Nevertheless, since the recommendation is for the general adoption of a particular concept of law, there remains the possibility that those who accept this recommendation then go on to use the prescribed conceptual usage as an independent source of moral reasoning, as when it is argued that it is wrong for courts to take moral considerations directly into account when deciding cases, simply because this conflicts with what 'law' means. Using conceptual recommendations to require moral conclusions in this way is an illicit form of rhetoric that does smack of the normative fallacy. The fallacy is avoided if the apparently conceptual conclusion in question is perceived and used as a prescription, but not if it is thought that the conceptual conclusion has a non-moral ontological status independent of its evaluative base. In other words: there is no fallacy if the conceptual conclusion is construed as playing a subordinate part in a prescriptive (or descriptive) enterprise, but it is a mistake in reasoning to treat the conceptual conclusion drawn from prescriptive reasons as in some way 'true' or 'correct' (although it may be more or less useful). And it is fallacious if the conceptual conclusion in question is taken to be an authoritative or given meaning within which moral (or empirical) debate must take place. Conceptualising cannot in itself settle moral issues about or deriving from the concept being conceptualised.

Murphy himself can be exonerated from making this mistake because he adopts a conventionalist approach to social meanings, and, for the same reason, prescriptive legal positivists as a group can avoid being implicated in moral brow-beating via conceptual dogmatism. Yet, clear legislative and legal reasoning requires that we have a working concept of law that expresses our provisionally shared constitutional assumptions, and the more we agree on that working concept the better our law-making and law-application will be. Ideally, such a concept would enable us to articulate the choices to be made about the moral questions that divide us about the proper content of law. The need for the concept does not however mean that the concept we adopt should dictate the answers we give to such questions.

Thus it is arguably a good thing to agree on a hard positivist concept of law. This could provide a working conceptual framework within which

we can proceed to debate which particular constitutional and other laws we ought to have. That working conceptual consensus would be based on a general acceptance of the moral advantages of rule governance in a pluralistic society. This concept can be used to formulate other morally relevant questions, such as what rule of recognition to adopt, and which ordinary laws ought to have political acceptance in our society. The hard positivist concept of law in practice restricts our choices to the range of formally good 'laws' in the broader conceptual sense of the wider range of social phenomena that accord with some or others' working concept of law. What we cannot do, is argue in favour of positivist rule governance on the basis of an allegedly prior and morally neutral concept of law.

Prescriptive legal positivism provides a desirable working concept of law for ordinary political discourse in contemporary societies, in part for the reasons Murphy gives. But there are other concepts of law that are useful for other purposes, such as identifying the broad domain of law-like phenomena about which we may want to theorise empirically (some jurisdictions are more positivist than others) and from which we may want to select normatively. It is therefore correct to think in terms of 'concepts of law' rather than 'the concept of law'. Concepts can serve as approximate identifiers as well as demarcation tools and building blocks of scientific theories. What they cannot do, in the social world at any rate, is provide independently based conceptual grounds for settling what are ultimately normative or descriptive/explanatory theses.