MORAL LAWS & THE POSITIVIST'S TRILEMMA

Abstract. Legal officials tasked with figuring out the law sometimes invoke the "moral law" or the "laws of justice" to decide disputes. Direct attributions of legality to moral principles and requirements present a surprisingly difficult interpretive challenge for positivist legal theories, on which a rule's legality is fundamentally determined by its social or non-moral properties alone. I taxonomize the interpretive strategies available to the positivist into three kinds: (i) the conventionalist portrays judges as following a local convention which warrants the classification of moral principles as law; (ii) the fictionalist interprets the classifications not as aiming at literal truth but as a useful fiction legal officials sometimes indulge in; (iii) the chauvinist pegs the judgments to conceptual error—a deficient understanding of the concept of law. I argue that conventionalist and fictionalist interpretations are not supported by the contextual and linguistic evidence. Meanwhile, the chauvinist lacks an adequate explanation for why experts steeped in legal practice should have legal intuitions that are not just mistaken but seem arbitrary. I conclude that since positivism entails either conventionalism, fictionalism, or chauvinism about an important class of legal judgments, there is reason to doubt positivism. While my stalking horse is contemporary legal positivism, there is a larger, more general lesson: a theory of law may imply significant conceptual confusion among legal experts, but it should be able to explain more or less charitably the common errors it implies—an adequacy constraint that none of the mainstream views in legal philosophy appear well-situated to meet.

Introduction

Contemporary philosophy of language provides ample evidence that large-scale patterns in the use of philosophically significant expressions are shot through with tensions. What is true generally is true of fundamental legal expressions of philosophical interest: “law” is used in ways which conflict with the popular conceptual analyses and ground-theoretic accounts of law. Surprisingly little attention has been paid to explaining such tensions between philosophical theory and ‘ordinary’ usage in the legal context.[1] [REDACTED]. Here, I explore an analogous challenge confronting legal positivism.

Legal positivists maintain that the grounds of law, the properties in virtue of which a rule counts as a legal rule, are fundamentally social in nature, roughly concerning people’s attitudes—their desires, beliefs, or intentions—in relation to the rule. In a catchphrase: legal rules are rules with key social properties, and it is in virtue of the fact that they have the relevant social properties that the rules are legal. On Hart’s (1968) formulation, the relevant social property concerns the community’s conventions. A rule counts as law in some jurisdiction if, only if, and because either the rule itself is conventional, in the sense of being followed by key members of the community, or is derivable from more fundamental (meta-)laws that are appropriately conventional.[2]

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[1] How a linguistic practice of interest is demarcated determines what constitutes ordinary usage relative to the practice. We can safely assume that the legal intuitions and classificatory dispositions of designated legal officials are of central interest to the philosophy of law.

[2] An important question for Hartian positivism that we can largely sidestep is how the content and structure of the relevant meta-rules (e.g., the Rule of Recognition or the Rule of Change) allow for the derivation of other less fundamental legal rules. On one way of modelling the hierarchical structure of Hartian legal systems, the rule of recognition reflected in the community’s conventions simply specifies who makes the rules around here and whose

The positivist needs to interpret and explain claims of legality that aren't straightforwardly reconcilable with the grounds of law being entirely non-moral. For example, a familiar challenge for positivism involves having to accommodate the fact that judges seem to consider how just or fair a rule is before deciding whether it is law or not (Dworkin 1967, 1975). Positivists have offered a range of responses to this well-known challenge (Raz 1979, Waluchow 1994, Marmor 2009, Shapiro 2011, Plunkett & Sundell 2013). But there is a subtly different challenge that has not received comparable attention. A practice observed in a variety of legal systems involves judges invoking the "laws of justice" or "moral law" to decide disputes. In other words, rather than simply offering moral justifications for their legal conclusions, judges sometimes attribute legality directly to what they take to be moral principles and claim to decide disputes based on these so-called "moral laws." The treatment of moral requirements as a basic and *a priori* form of law by ordinary legal officials presents a surprisingly difficult explanatory challenge and serves as our point of departure.

I begin by cataloging the frequency with which judges refer to the moral law, the laws of justice, and other equivalents, highlighting key features of the legal and semantic context in which such references appear (§1). I taxonomize the various interpretive strategies available to the positivist, drawing in part on positivist replies to more familiar challenges based on legal thought and speech. The taxonomy is intended to clarify previously elided distinctions and be exhaustive by organizing the available strategies into three kinds, which for reasons to be clarified I label

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rules are to be obeyed. On an alternative model, the rule of recognition and other conventionally grounded meta-laws of the system can be construed in a metasemantic formal mode as specifying how terms such as "law" are to be applied by officials. Greenberg (2014) describes Hart's view as "the most influential position in the philosophy of law."

'conventionalism' (§2), 'fictionalism' (§3), and 'chauvinism' (§4).[3] The conventionalist offers a vindicating account of why judges classify moral principles as law: a jurisdiction-specific custom or convention licenses such classifications. The fictionalist takes the legal judgments to be insincere—a useful fiction that legal officials sometimes knowingly indulge in. The chauvinist pegs the judgments to conceptual confusion: a deficient or idiolectic understanding of the juridical concept of law.

I argue that conventionalism and fictionalism aren't supported by the contextual and linguistic evidence. Meanwhile, a chauvinistic take on the judgments may be consistent with the character of the legal claims, but it fails to provide an adequate explanation for why individuals steeped in legal practice and well-exposed to the way legal language is used by their peers should have intuitions about law that are not just mistaken but given positivism seem arbitrary. I conclude that since the available interpretations all fall short, there is reason to doubt positivism and for drawing a larger, more general lesson: an adequate theory of law may imply significant conceptual confusion among competent users of legal terminology, but it should be able to explain, more or less charitably, the common errors it implies—an adequacy constraint that none of the mainstream views in legal philosophy appear well-situated to meet.

[3] As I see it, the positivist has only three options: vindicate the claims of legality as true by appeal to the social facts which make them true, dismiss the claims as insincere: judges don't *really* intend the literal content of their assertions, or treat the judgments as mistaken (for reasons I give later, I assume the mistake must be conceptual in nature, but that assumption can be relaxed). The positivist can always adopt a pluralistic approach—e.g., by explaining some of the claims as true and others as mistaken. But that is no mark against the taxonomy or the overall argument.

§1 Moral laws, the laws of justice, & other obscure forms of legality

A convenient starting point for our discussion is a more familiar challenge for legal positivism pressed by Dworkin (1967, 1975). Various details of the argument can be suppressed, but its central observation is that judges tasked with figuring out what the law is in the course of deciding disputes frequently seem to base their conclusions of law partly on considerations of justice. More precisely, they seem to infer the legality of a rule as it applies to a case based in part on its moral properties—whether the rule results in a just or fair outcome as a matter of moral fact—rather than its social characteristics alone. E.g., in deciding a dispute between a plaintiff and a defendant over the enforceability of a contract, Dworkin (1967: 20-25) notes that a judge might defend her legal conclusions on the basis that courts cannot be "used as instruments of injustice." In figuring out when and to what extent justice constrains the outcome of cases, judges self-conceive as figuring out the content of the law, independent of their own preferences for what the law ought to be. So, the argument goes, positivism must be false: facts concerning what the law is are partly determined by facts about justice.[4]

There are a range of well-known positivist replies to Dworkin's challenge (Raz 1979, Waluchow 1994, Coleman 2001, Marmor 2009, Plunkett & Sundell 2013). Some positivists treat the moral justifications judges offer as superfluous rhetoric dressing up conclusions of law reached on other (purely social) grounds. Others portray judges as deliberately disregarding what the law is, not to mention their professional role. We shall consider and adapt these explanatory

[4] Dworkin's conclusions are based on assumptions about the politically legitimate role for judges (law-discovery as opposed to law-making) and the metaphysics of moral principles (their normative content cannot be captured by a rule conventionally followed) that are contestable and needn't concern us. The present challenge avoids these assumptions and differs in its starting premises.

strategies to our own purposes. One of the central points of the paper is that the challenge implicit in the way judges think and talk about law is considerably harder to evade than the stock responses to Dworkin's original observations make it out to be.

While it may be the more familiar and ubiquitous practice, judges do not only reach conclusions of law ("the contract is unenforceable as a matter of law") based on considerations of fairness and equity ("the terms of the contract impose an unfair burden on the buyer"). They sometimes attribute legality directly to what they describe as principles of morality, invoking the "moral law" or the "laws of justice" in the process of deciding disputes. Certain easily verifiable aspects of the context in which such claims are made augment the interpretive puzzle. For instance, judges do not advert to social facts or other laws to explain the legality of moral principles. They explicitly distinguish "moral laws" from laws drawn from custom while seeming to treat the legality of moral principles as self-evident. The aim in what follows is to discuss and defend these observations systematically, setting aside for the time being philosophical questions concerning how best to interpret them.

I rely principally on widely used databases for judicial opinions, state and federal statutes, administrative codes, and treatises. Westlaw, Beck-Online, and other legal research databases document how legal language is used in its natural context with minimal experimental interference. A quick search of all US state and federal cases cataloged in Westlaw and pre-1777 English reports for uses of "laws of natural justice" (and various equivalents like "law of justice") returns 1,115 cases. A search for "moral law" or "natural law" returns 4,184 hits. And a search for "principles of justice" returns over 10,000 hits, 4,293 of which appear in the same sentence as "law."

A closer examination of such usage patterns reveals that the “laws of natural justice” are often conceived as binding parliaments, states, or government actors in the absence of written or “positive” law.[5] In other contexts, the “laws of justice” are invoked to provide a sympathetic plaintiff with a remedy that would otherwise be unavailable if judges were to rely exclusively on rules articulated in statutes, constitutions, or by judges in prior opinions.[6] For example, in a famous contracts case of Bailey v. West, the court explains that a voluntary conferral of a benefit without

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[5] State v Buzzard, 4 Ark. 18, 38 (1842): “Now, it has been often ruled, by the Courts of England, that an act clearly against the laws of natural justice and equity, is not binding; and that if Parliament, which is omnipotent in every thing, pass such acts, they are presumed to have intended no such outrage or wrong.” Den on demise of the Trustees of the University of North-Carolina v. Foy, 1 Mur. 58, 61 (1805): “Is the legislature released from the operation of this principle? No: It is incorporated into the immutable law of natural justice; and no power upon earth can rightfully overturn it.” Bourland v. Hildreth, 26 Cal. 161, 259 (1864): “I know of no restriction upon the power of the Legislature to pass laws, except the Federal and State Constitutions, unless they be found in the laws of natural justice; but if any are found there they practically belong to the department of the moralist rather than that of the jurist."

[6] Dean v. Kellogg, 37 Ill. App. 520, 527: “This equity will do where the business practices complained of may not be of such a nature as to enable the party aggrieved to obtain redress under the restrictive rules of law, if, nevertheless, they are of such a character as to offend that law of fairness which should govern the acts of men, of which equity may take cognizance." Illinois Steel Co. v. Putnam, 68 F. 515, 518 (1895): “There is nothing in this case to take the transaction out of the operation of the law of natural justice.” Hammond v. Allen, 11 F. Cas. 382 (1836). Thompson v. Matthews, 56 Miss. 368, 370 (1879). “The case of Houston v. Crutcher et al. … was decided under the act of 1822 … which did not give interest on accounts; but it was remarked in the opinion in that case that the right to interest on debts by open account, on principles of justice, would seem to stand on as firm ground as the right to interest upon written contracts for the payment of money. And by the Code of 1857 and that of 1871 this principle of justice was made positive law.”

the explicit consent of the beneficiary will sometimes entitle the benefactor to remuneration from the beneficiary when a "law of natural immutable justice" demands it.[7]

Similarly, courts describe a contract law principle that a party's mistake concerning a basic assumption upon which a contract was made voids the contract ("*non videntur, qui errant, consentire*") as a "maxim of universal justice."[8] One court opines that the principle is "firmly fixed in English and American jurisprudence, as it is in the Roman code; and springing from the same general source, *the law of natural justice*."[9] In the common law of property, the principle which "secures to each one the quiet enjoyment of his own, without intrusion or molestation from another" has been described as "most unquestionably the *law of natural justice*, whence it originated."[10] In a case establishing state constitutional law, the New York court of appeals derived a duty of compensation constraining legislative powers to take private property from "the higher law of natural justice," while expressly admitting that it was not relying on any judicial precedent or statutory and constitutional rules.[11]

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[7] In another case, Webb v McGowin, involving a voluntary rescuer crippled for life on account of his rescue seeking recompense from the estate of the rescued, the concurrence observes that although "the strict letter of the rule as stated by judges would bar recovery by plaintiff… I do not think law ought to be separated from justice, where it is most doubtful."

[8] Hammond v. Allen, 2 Sumn. 387; 11 F. Cas. 382, (1836).

[9] Id.

[10] Seeley v. Peters, 5 Gilman 130, 151 (1848).

[11] Orr v. Quimby, 51 N.H. 590, 646 (1874) discussing Gardner v. Vill. of Newburgh, 1816 WL 1306 (N.Y. Ch. 1816). The court cites Pufendorf, Grotius and others as articulating a "principle of natural equity" adopted in other countries from a universal sense of its justice.

We shall consider the viability of positivist friendly interpretations of judicial behavior shortly. They are not to be ruled out at this early stage. More generally, philosophical questions concerning what sense can be made of the judgments are not yet being raised. The point for now is just that judges invoking the “laws of natural justice” do not advert to social matters to explain why principles of justice sometimes count as locally applicable law. I could not find any instances of a judge claiming that a moral principle counts as law because it has been treated as such by other judges, or that there is a convention of treating a body of moral principles relied on by past courts as locally applicable law.

Appeals to the moral law can hardly be dismissed as a unique feature of English or American legal systems. A search through German caselaw since 1947 provided by the database Beck-Online, reveals similar usage patterns:

Search term	English translation	Number of results
"naturrecht"	natural law	148
"naturgesetz"	natural law/law of nature	65
"naturgesetze"	natural laws	670
"gesetze der gerechtigkeit"	laws of justice	0
"Sittengesetz"	moral law	790
"Sittengesetze"	moral laws	64
"Moralisches Gesetz"	moral law	2
"Grundsätze der Gerechtigkeit"	principles of justice	96
"Gerechtigkeitsgedanken"	ideal of justice/principle of justice	>4000

"Gerechtigkeitssinn"	sense of justice	67
"Gerechtigkeitsprinzip"	principle of justice	270
"Gerechtigkeitsgrundsatz"	principle of justice	28

One German court opines that "The principle of justice is applicable on its own, regardless of whether the support claim is determined by a court or not."[12]

The intuition that moral requirements exhibit a basic form of legality was even more widely shared in pre-modern legal systems. Pomeroy (1907) in his work on the courts of equity notes that in pre-Christian Rome, magistrates explicitly distinguished laws conventionally followed among nations from the laws of morality as two independent sources of Roman law. Pomeroy's observations (§8) are worth quoting in full:

> In their work of improving the primitive jus civile, the [Roman] magistrates who issued edicts and the jurisconsults who furnished authoritative opinions … obtained their material from two sources: namely: At first, from what they term the *jus gentium*, the law of nations, meaning thereby those rules of law which they found existing alike in the legal systems of

[12] Beschluss vom 10.02.2003, 9 WF 191/02. See also: "*Art. 2 I GG verbrieft jedem das Recht auf freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.* [Translation: Art. 2 I GG guarantees everyone the right to free development of their personality, provided that they do not violate the rights of others and do not violate the constitutional order or the moral law.]" LG Zweibrücken, Beschluss vom 3. 11. 2003 - Qs 10/03 u. Qs 11/03. "*Über allem gesetzten Recht steht ein höheres, ungeschriebenes Recht. Vom Menschen geschaffenes Recht kann keinen Anspruch auf Gültigkeit erheben, wenn es dem Naturrecht zuwiderläuft.* [Translation: There is a higher, unwritten right above all set law. Man-made law cannot claim validity if it goes against natural law.]" SchwurG Köln, Urteil vom 24. 10. 1951 - 24 Ks 1/51.

> all the peoples with which Rome came into contact, and which they conceived to have a certain universal sanction…; and at a later day, from the Stoic *theory of morality*, which they called *lex naturae*, the law of nature. The doctrines of this jus gentium and of this *lex naturae* were often identical…. The particular rules of the Roman jurisprudence derived from morality called the law of nature were termed "aequitas," from aequum, because they were supposed to be impartial in their operation, applying to all persons alike. The *lex naturae* were assumed to be the governing force of the world, and were regarded by the majistrates and jurists as having an absolute authority. They felt themselves, therefore, under an imperative obligation to bring the jurisprudence into harmony with this all-pervading morality, and to allow such actions and make such decisions that no moral rule should be violated. … [T]hus a body of moral principles was introduced into the Roman law, which constituted equity. This resulting equity was not a separate department; it penetrated the entire jurisprudence, displacing what of the ancient system was arbitrary and unjust, and bringing the whole into an accordance with the prevailing notions of morality.

The binding authority of the "laws of morality" is not couched in terms of conventions in Rome of treating or incorporating moral principles as Roman law. Rather, on Pomeroy's reading (who, it should be emphasized, does not have an anti-positivist axe to grind), the legality of the rules of justice was presented by jurists as following self-evidently from the fact that the rules reflect the requirements of justice.[13] Moreover, the legality of equitable principles was expressly distinguished from the legality of rules deriving their legal force from their conventional character

[13] That these jurists may have been quite incorrect in their judgments concerning what justice requires is beside the point. The overall argument of the paper presupposes only that they took the principles to reflect the requirements of justice.

across nations, even when moral and conventional requirements seemed to coincide. Finally, ancient Roman jurists did not see themselves as inventing or making law. They saw themselves as engaged in bona fide law-discovery. Similar observations have been made by historians concerning the legal culture of Ancient Greece.[14]

The evidence, while significant, should not be overstated. References to moral law and its binding force in adjudication are infrequent relative to the vast universe of searchable juridical usage. The practice of invoking such laws remains highly controversial among jurists, as evidenced by the reactions to the New York state constitutional case discussed earlier, where the court derives a compensatory duty from a "principle of natural equity" based on "a sense of its justice." Peer courts interpreted the decision negatively: "The legislative power of New York was thus restricted by a duty of compensation, imposed not by a judicial interpretation of any particular passage of the constitution, … but by a *judicial usurpation* of the higher law of natural justice." One court opined that "much confusion has been introduced by dominant authorities erroneously holding compensation to be necessary or putting the necessity of it on untenable ground. New Hampshire

[14] In Simon v. Philip Morris Inc., the court considering a conflict of laws issue discusses work by Juenger on the emergence of choice of law principles in Ancient Greece in cases involving conflict between the written laws of individual city states: "Choice of law issues were in part alleviated because the Greeks gave greater weight to fairness concerns, than to the sovereignty of the individual states…. As an Athenian speaker once asked rhetorically, "Are not the laws of justice concerning mercantile cases the same for all of us?" The designation of the requirements of justice and fairness as laws that govern all Greeks was not based on an assessment that the requirements have been conventionally embraced by all Greeks. Rather, the juridical observations echo Aristotle: "[T]he laws of natural justice… are universally valid above all human regulations and legally valid." *Nicomachean Ethics* (V/ vii, 1134b, 25-1135a 15).

is not the only state in which the constitutional view has been darkened by doctrines of natural justice, and theories of the highest law."[15]

To summarize, certain facts concerning the use of legal terminology should be admitted on all sides.

(i) Some judges (and other ordinary legal officials) attribute legality to what they take to be moral principles or requirements in a natural context for the use of legal terminology.

(ii) These officials do not explain the legality of moral principle by adverting to social facts or more fundamental laws, and on the contrary seem to treat the existence of moral law as self-evident.

(iii) Such claims of legality are made infrequently and remain highly controversial among legal officials.

We have managed to avoid taking a stand on the nature or normative content of moral principles—e.g., whether their content can be captured in terms of a rule conventionally followed; and what it means for the outcome of a case for a moral principle to be law—whether it entails giving weight to some moral value or requirement in deciding the dispute or something else entirely. These issues can be side-stepped in considering whether a plausible positivist-friendly interpretation of the judgments is on offer, a question to which we now turn.

§2 Problems with conventionalism

[15] Orr v. Quimby, 54 N.H. 590, 646–47 (1874).

An interpretive strategy familiar from positivist replies to Dworkin's original challenge can be adapted to our purposes (Raz 1979, Waluchow 1994, Coleman 2001). It involves supposing that there are local conventions in the relevant jurisdictions which explain why judges correctly classify moral principles as law:

CONVENTIONALISM	Judges who classify principles of justice as law are implicitly relying on a jurisdiction-specific convention which licenses such classifications.

An important feature of conventionalism as I've defined it here is that it does not deem judges mistaken in classifying moral principles as law. A view counts as conventionalist in my stipulated sense only if it attempts to vindicate the observed judgements by appeal to local conventions. Error-theoretic interpretations will be considered separately in §4.

Conventionalism comes in two varieties marking an internecine disagreement among positivists. An 'exclusive' positivist might take the convention to involve a rule of law-making. Judges in the relevant jurisdictions have a custom of making new law in a specified range of cases rather than deciding based on pre-existing law. In classifying ('declaring' might be more accurate) moral requirements as law, judges are simply relying on law-making powers they enjoy as a matter of convention. By contrast, an 'inclusive' positivist takes the background convention to guarantee the legality of moral principles prior to any individual judge's recognition of it. To illustrate, we might imagine that at an early stage of development of the English legal system, legal officials desiring to avoid the inequities of the existing law established special courts of equity which empowered judges to resolve disputes and adjust remedies based on considerations of justice and fairness; and, eventually, the moral principles relied on by these courts began to be treated by judges as law. When contemporary courts invoke and apply "the laws of natural justice" they are

simply following a pre-existing convention of treating moral principles as law.[16] The two types of conventionalism can be considered jointly since I shall be focusing on a critical assumption they share—namely, that judges who deem moral principles law are relying on a local convention which justifies their doing so.[17]

The contextual and linguistic evidence does not support that assumption. To begin with, judges do not advert to social facts to explain the legality of the principles of justice. Their failure to do so is significant because in general judges readily appeal to background agreements or past practices to justify their claims of legality which turn on conventions in the jurisdiction. When the legality of a rule or principle is based on precedent, prior judicial recognition of a principle as law, a law-making power customarily enjoyed, or some more general laws reflected in a statute, constitutional document, or judicial custom, judges appreciate the importance of making these

[16] This just-so story about the courts of equity is quite implausible, as I go on to discuss. While the equitable courts had jurisdiction to decide cases based on moral considerations, the considerations of justice and fairness were treated as extra-legal bases for deciding disputes. That moral principles, whether previously relied on or not, are *law* has always been and remains controversial. This difference brings out one of the ways in which the present challenge is harder to evade than Dworkin's. The conventionalist may be able to explain based on the history of the equitable courts why judge rely on moral considerations to decide cases. She cannot adopt the same strategy for explaining why some number of judges treat moral requirements as pre-existing law because the practice of doing so cannot be straightforwardly deemed an English or American convention. More on this below.

[17] In the exclusive positivist's case, the convention the judge is portrayed as following is one which empowers judges to make new law by declaration. For the inclusive positivist, the convention being followed is that of treating some set of moral principles as law. This difference is irrelevant to the objections I go on to raise which concern the very idea that the judges in question could be relying on a local convention or thinking that a convention justifies their claims of legality.

explanatory connections explicit and are adept at doing so. So, the conventionalist owes us an explanation for why judges invoking the “laws of justice” aren’t similarly disposed to explain the legality of moral principles in terms of background conventions or law-making powers.

The conventionalist cannot take refuge in the fact that not all aspects of legal reasoning need to be made explicit. A judge can hardly be expected to indicate her reliance on basic rules of logic or semantic principles in defending her legal conclusions. However, judges are expected to make explicit the controversial empirical assumptions on which their legal conclusions are based. The existence of customarily recognized “laws of justice” is highly controversial in, e.g., the American legal system, and yet judges who invoke such laws do not justify their claims of legality in more fundamental terms, by, for instance, appealing to prior recognition of the moral principle as law.

On the contrary, judges describe the “laws of justice” as an “original” basis for deciding cases while invoking moral principles that have not been previously recognized or applied by judges. In the New York case described earlier, the court expressly admits that there is no support to be found in prior judicial opinions, statutes, or state constitutional law for the alleged law of justice requiring that the state compensate a private party for publicly possessed property. Likewise, when early Roman magistrates and jurisconsults reasoned about why moral principles and requirements are law, they did not refer to conventional authority and instead afforded a kind of primitive status to the laws of justice, explicitly distinguishing laws derived from custom from the so-called moral law, even where customary and moral requirements coincided.

Relatedly, judges who deny the existence of such laws do not accuse their peers of being mistaken about judicial custom or the background social conventions in the community. It should not escape notice that legal officials routinely disagree about whether convention supports or disfavors a claim of legality. Many majority and dissent opinions written by the United States

supreme court, for instance, clash in terms of what prior judicial practice establishes. Yet judges skeptical of the "law of natural justice" do not disagree in such terms. They accuse their peers of being plainly wrong or confused, which suggests that their disagreement does not concern the character of local customs.

The objection so far against conventionalism is that it does not properly account for what judges expressly say in defense (or criticism) of the laws of justice. A different objection is that the proposal assumes the existence of conventions in the relevant jurisdictions that are highly uncertain. Take the account of the English courts of equity described earlier. It is clear enough that a convention emerged in England of deciding disputes based on moral considerations after a deliberate expansion of the powers and jurisdiction of courts. But the considerations of justice and fairness were treated as *extra-legal* considerations.[18] The treatment of moral principles or requirements as law has always been and remains controversial even in cases associated with equity. So, the positivist may be able to rely on prevailing conventions to address Dworkin's challenge: the reason why judges started relying on moral considerations to decide cases is because a convention emerged of doing so. But she cannot appeal to a corresponding convention to address the present challenge: there was no straightforward custom of treating moral principles as *bona fide* pre-determined law that English or American judges could have relied on.[19]

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[18] Historically, this appears to have been the dominant view among American judges. As Cardozo, one of the most famous judges in American legal history, observes "equity works as a supplement for law and does not supersede the prevailing law." Graf v. Hope Building Corporation, 254 N.Y 1 at 9 (1930).

[19] The positivist may respond that it is enough that past courts relied on the moral principles to decide cases to justify future judges in treating those principles as law whether or not the legality of these principles has been widely or expressly recognized. But it isn't just that the legality of moral principles wasn't widely recognized. It was

The point can be generalized. According to the conventionalist, a local convention explains why judges classify moral requirements as law. Yet it is unclear when an appropriate custom would have emerged in the relevant jurisdictions. Could American or German jurists, for example, be able to articulate which moral principles have been recognized as law (or the circumstances under which they have the authority to 'make new law' out of moral principles)? Surely, the conventional norm does not license judges to declare *all* moral requirements law. If it empowers judges to incorporate a select few, which ones and on what basis?[20] If judges are permitted to invoke moral principles to decide cases only when the principle has been previously relied on or where pre-existing law is indeterminate, it remains unclear why judges would invoke moral law as they

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conventionally denied. Moreover, judges rely on all sorts of principles (logical, semantic) in deciding cases, but subsequent judge do not feel any pressure to regard these as law. So, it remains prima facie puzzling why mere reliance on moral principles would lead some judges to deem them pre-existing law. In any case, the view is vulnerable to other objections, including, e.g., that not all moral principles treated as law by judges have been relied on by previous courts, as I discuss below.

[20] Alexander and Kress (1997) suggest that moral principles have *weights* in adjudicative decision making and that it is not clear how these weights could be determined by conventions or past practice: "No set of past cases, no matter how large the set, can fix as a matter of logical entailment the weight in the context of a present case of any principle that would explain those past cases." I do not rely on such assumptions. It seems to me that the weight of moral considerations may well be reflected in juridical custom. The dispositions of judges, in aggregate, to rely on a principle in deciding a case might give us a measure of its weight as it bears on the outcome. The real challenge for the positivist stems from the fact that it is very hard to state (or determine) the relevant dispositional facts that might capture the precise weights. That the dispositional facts are inaccessible to individual judges has intrinsic significance for the proposal's plausibility, as I discuss below.

sometimes do on behalf of a sympathetic litigant while admitting that precedential, statutory, and constitutional law all clearly preclude the litigant's recovery.[21]

It turns out to be extremely difficult to specify the precise content of the alleged convention which might explain the observed claims of legality. The problem cannot be dismissed as a case of needing to fill out the details of a proposal that remains fundamentally sound. The gaps in the proposal bear directly on its plausibility regardless of whether they can be filled in principle. We can reasonably assume that if there is a social convention in the relevant jurisdictions which explains when and why judges invoke the moral law, its content—the conditions under which it licenses the classification of a moral principle as law—must be so complicated as to elude precise capture. But this renders puzzling how judges can so confidently assert the existence of moral laws.

Here's a different way of putting the crucial point. The conventionalist portrays the legality of moral principles as turning on a complex social fact concerning the community's conventions. The complexity of the relevant social fact suggests that judges invoking the "laws of justice" must be sticking their necks out: their claims about law are risky insofar as the truth or general legitimacy of such claims turns on difficult to discern social facts. Moreover, the risk of error should be transparent to these judges insofar as they are portrayed as basing their judgments on the background social facts. Yet judges appear to invoke the laws of justice with relative certainty and conviction. In other words, if conventionalism were true, we would expect judges sympathetic

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[21] "The duty to make compensation for property taken for public use, is regarded, by most enlightened jurists, as founded in the fundamental principles of natural right and justice, and as lying at the basis of all wise and just government, *independent* of all written constitutions or positive law." Cairo & F.R. Co. v. Turner, 31 Ark. 494, 499 (1876).

to the laws of justice to be considerably more cautious in their claims of legality than they in fact are.[22]

The conventionalist could posit some intuitive sense among judges for the contours of the background convention, a practical know-how that is hard to explain or put into words. But the account begins to look increasingly *ad hoc* in comparison to a far simpler descriptive hypothesis: some judges (whether rightly or wrongly) treat the legality of moral principles as basic and *a priori*, not needing further support in terms of the conventions in the community.

To summarize, conventionalism is implausible because:

(1) It lacks a satisfying explanation for why judges fail to advert to social facts in defense of their treatment of moral principles as law and why judges expressly distinguish the so-called moral laws from laws derived from custom.

(2) It assumes background conventions among legal officials that are highly uncertain and controversial.

(3) It portrays judges who invoke the laws of justice as making a transparently risky legal judgment, a portrayal that is incompatible with the easy certainty with which these judges invoke moral law.

The above considerations are not intended to deliver a knock-dead argument against the conventionalist. The point is simply that conventionalism is not sufficiently supported by the

[22] The point does not presuppose that the judges are correct in their legal judgments, only that if conventionalism is true the risk of error associated with such judgments should be transparent.

statements and general practice of judges to be a fully satisfying proposal or a complete explanation of the observed legal judgments.

§3 Problems with fictionalism

Fictionalism about an area of discourse treats claims made within it not as aiming at literal truth, but as a kind of useful fiction, and fictionalist interpretive strategies are all too familiar in the legal context.[23] Positivists (as well as self-styled 'legal realists') sometimes portray judges who make controversial claims of legality as engaged in a pretense, intentionally disregarding the true criteria of legality in order to achieve some desired outcome (cf. Marmor 2009: 20; Plunkett & Sundell 2013). A targeted fictionalism affords us an alternative interpretation of the highlighted locutions:

[23] A variety of quite distinct philosophical views have been described as fictionalist (Yablo 2001). The specific brand of fictionalism I have in mind here is broadly 'instrumentalist' in Yablo's (2011) taxonomy: judges do not intend the literal content of their legal assertions, while intending to convey the impression that they are speaking literally for instrumental reasons. A different kind of view, that Yablo calls 'metafictionalism' and that is not the intended target of this section, portrays speakers not as pretending to say something they know to be false, but as intending to say something other than the literal assertion. E.g., a metafictionalist might paraphrase "Sherlock Holmes lives in London" as "according to the fictional work by Arthur Conan Doyle, Sherlock Holmes lives in London." A metafictionalist account of a set of claims does not treat those claims as false or intentionally misleading. Metafictionalist accounts of legal assertion (e.g. Marmor's 2018) are best analyzed under the node of conventionalism in my taxonomy. E.g., a metafictionalist might argue that judges who assert "moral principles are law" really mean to be saying something like "around here, we treat moral principles as law" which the positivist might try to vindicate as true. Such views are not supported by the contextual or linguistic evidence for reasons discussed earlier.

FICTIONALISM

> Judges who invoke the "laws of justice" are aware that the principles of justice aren't *really* law. Their pretense is aimed at promoting justice while keeping up the façade of strict obedience to the law. Since appeals to "moral law" and "laws of justice" are insincere, such talk among jurists is entirely compatible with the true criteria for legality being entirely social.

Like conventionalists, fictionalists in the specified sense deny that ordinary legal officials could possibly think moral principles exhibit an *a priori* basic legality. But the fictionalist goes further in denying that these officials could, for any reason, be seriously committed to moral principles being law.[24]

[24] Plunkett and Sundell (2013) defend a general metasemantics for legal terms which, I would argue, is aptly characterized as a kind of qualified fictionalism about legal discourse. They argue that a central feature of using legal language is negotiating the meaning of "law" by deliberately using it in ways that flout the conventional criteria associated with the term's use. There is a kind of license, in other words, possibly appreciated by core participants in the linguistic practice, to make claims of law the speaker knows to be false (e.g., "the principles of justice are law") but hopes will eventually be accepted by others resulting in a shift in the meaning of legal expressions. The account presupposes that judges must intend to use "law" in ways that do not fit existing semantic conventions to shift those conventions in a preferred direction without a transparent ascent into the formal mode. Even if judges and other core participants in legal practice appreciate that there is a kind of license for using "law" in this way, ordinary citizens—the law's subjects—do not. In other words, even if legal officials are 'in' on the game of disguised meta-linguistic negotiation, the general public isn't and will likely interpret the claims as sincere (mistaken, perhaps, but sincere). It seems to me, then, that judges who engage in the practice are knowingly misleading the law's subjects. And so, the Plunkett & Sundell proposal attributes considerable lack of forthrightness and disingenuousness to core participants in legal practice and is vulnerable to all of the objections I go on to raise (cf. Burgess 2019 on the essential hypocrisy involved in meta-linguistic negotiation).

Consider the scale of the pretense implied by the proposal. Jurists across a wide range of jurisdictions must be perpetrating a fraud on the law's subjects. And for some reason those who've ostensibly seen through the fraud have failed to make it sufficiently transparent to remedy judicial behavior. Of course, the central idea behind fictionalism is that the 'as if' locutions are useful, so we shouldn't be surprised that those in the know go along with the pretense. Still, the proposal feels awfully glib, and the reasons why can be brought out in several different ways.

First, there are no 'winks' and 'nods' to be found in the linguistic evidence or, for that matter, in the private admissions of judges. Fictionalists in other domains are often able to point to special contexts where there is an argument to be made that the fictional character of the discourse is more or less acknowledged by participants in the practice. Yet there are no contexts where judges own up to the pretense in question, as far as I can tell. By all accounts, those committed to the laws of justice seem sincere, and their apparent sincerity needn't be decisive evidence to be evidentially significant.

Second, the proposal is uncharitable and, as such, calls for special justification. If the fictionalist is right, judges are plainly dishonest, and their dishonesty isn't mitigated by the fact that it helps them pursue just outcomes or correct the moral defects of legal systems. The stakes involved in alleged violations of the judicial oath of office are quite high (Fuller 1958). Errors in judgment—legal or otherwise—can be blameless, whereas judicial dishonesty generally is not. The proposal is considerably less charitable than one which portrays judges as mistaken, and the more uncharitable an explanation, the more closely it must be examined to ensure that it isn't motivated solely by a desire to save one's preferred theory from inconvenient facts.

A third problem relates to the second: it is hard to see what evidence the fictionalist could possibly draw on to defend the specific charge of dishonesty.[25] It would be a mistake to think general evidence of disingenuousness among legal actors will suffice. For example, judges routinely make claims about what constitutional framers intended, what past precedent establishes, what the empirical evidence suggests, and so on, that seem motivated by the judge's political or policy preference, rather than a considered take on law and fact. However, in such cases accusations of bad faith have bite by being predicated upon an examination of the justice's arguments, which are found to be wanting. In other words, judges are often *demonstrably* guilty of selective emphasis, of ignoring contrary precedent or empirical evidence, and of reasoning in ways inconsistent with their expressly articulated theories of legal interpretation.

Yet jurists invoking the laws of morality cannot be demonstrably guilty in the same way. The practice specifically at issue has not been directly addressed by positivists, as far as I can tell. And in any case, there are no arguments to critique since judges who invoke the moral law do not defend their legal claims on independent grounds. Instead, as noted earlier, they seem to treat the legality of moral principles as basic, intuitive, and not requiring independent justification. So, the fictionalist cannot maintain that the insincerity of judges invoking the laws of morality becomes transparent based on a substantive examination of their arguments or the spuriousness of their offered justifications. The proposal's fundamental charge of dishonesty remains undermotivated.

[25] The objection here is analogous to one offered by Dworkin (1986, ch 1). Dworkin notes that when judges behave in ways that are hard to square with positivism, positivists rarely provide the kind of evidence that would justify the attribution of deceptive intent. The point I'm making here is even stronger: that the usual ways of justifying accusations of bad faith aren't available in the case of judges who treat the legality of moral principle as a basic fact.

Fourth, fictionalism attributes motives to judges which don't make a lot of sense generally. It is entirely unclear why ancient Roman jurisconsults and magistrates who deemed the stoic theory of morality as an independent source of Roman law, discovered rather than invented, would have reason to lie to the public about their practice. One could plausibly accuse modern American judges of having a reason to misrepresent their extra-legal reliance on moral principles because public awareness might undermine their legitimacy as unelected *de facto* legislators. But the suggestion loses plausibility in the case of Roman and Ancient Greek jurists and legal experts, who could hardly have been concerned with their perceived legitimacy in the eyes of a public not particularly sensitive to democratic values.

Its flaws are several, but the proposal's undermotivated character seems to me to be the principal one. Judges are often influenced by political, self-regarding, or otherwise extra-legal considerations in reasoning about law and are unlikely to be transparent about such influences on their decision making, but this does not by itself constitute sufficient grounds for supposing that jurists who invoke the laws of justice are being dishonest. By analogy, it would be equally ad hoc for a theorist committed to the laws of justice to dismiss judges who deem radically unjust rules law as reasoning in bad faith solely on the grounds that judges are sometimes insincere.

§4 Problems with chauvinism

The difficulties facing the previous two proposals suggest that the juridical claims of legality should perhaps be taken at face value: at least some number of judges must genuinely believe that moral principles exhibit a kind of basic *a priori* legality. If positivism is true, this

belief must be chalked up to confusion, likely conceptual in nature[26], which leads us to a third kind of interpretive stance available to the positivist:

CHAUVINISM	Judges who classify moral norms as law are conceptually confused. Their use of "law" is idiolectic—it departs from the more or less shared meaning of "law" within the community of competent legal language users.

The basic assumption undergirding the proposal seems reasonable: individuals can have an imperfect understanding of their own concepts, without their general ability to effectively deploy those concepts in thought and speech thereby being undermined. Moreover, the approach avoids some of the defects of the previous two proposals. For example, it fits the contextual and linguistic facts. As noted earlier, judges seem to treat the legality of moral principles as self-evident. Those who deny the existence of moral laws express their disagreement by portraying their peers beholden to the laws of justice as basically confused rather than mistaken about some background fact on which the legality of moral principles might turn. The proposal is consistent, also, with the infrequent character of references to moral law or the laws of justice.

The main problem with the proposal, which to my mind justifies the charge of chauvinism, is that it portrays individuals to whom legal communities generally defer on questions of law and who happen to be highly exposed to the way legal language is used by their peers as conceptually

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[26] Why must the legal mistake be chalked up to a distinctly conceptual error rather than some other kind of error? Because otherwise it is hard to explain why the legality of moral principle would seem *a priori* to these judges. As noted previously, judges beholden to the laws of justice do not explain the legality of moral principles in independent terms—e.g., by appeal to social facts. That said, most of my objections to chauvinistic positivism in this section do not turn on the assumption that the mistake must be conceptual.

confused without a plausible explanation for why these experts should have such arbitrary-seeming conceptual intuitions. To be clear, the problem isn't that legal experts are deemed conceptually mistaken—some undoubtedly are.[27] The problem stems from the fact that the truth of positivism sheds no light on why these experts end up confused in the way the theory portrays them as being—in particular, why the Good & the Right should appear to these judges in the guise of legality.

The undischarged explanatory burden can be motivated in several different ways. A philosophical theory is revisionary when it deems non-philosophical, ordinary intuitions about some subject matter (persons, causes, events, etc.) as mistaken. It is widely acknowledged that revisionary philosophical theories bear a special burden of explaining how non-philosophical intuition could have gone wrong (Hirsch 2002, p. 117; Korman, 2009, Kovacs forthcoming).[28] In other words, even after having offered positive arguments for embracing a revisionary theory, the theorist needs to explain why otherwise reasonable people appear to hold markedly false beliefs. Hirsch (2002) grounds the explanatory demand in a principle of interpretive charity, which requires philosophers interpreting a practice to avoid attributing entirely arbitrary or egregious errors to individuals immersed in the practice. Kovacs (forthcoming) calls it the Problem of Reasonableness for revisionary theories, a satisfactory solution to which involves showing (a) why

[27] This point warrants emphasis. I am not arguing against an error theory about the highlighted judgments—judges who think moral requirements are law may well be mistaken about law. I am arguing against an error theory specifically based on positivism and that is, as a result, chauvinistic for reasons I elaborate below.

[28] Korman (2009, p242): "virtually everyone agrees that, even after having presented the arguments for their positions, proponents of revisionary philosophical theories—that is, those that deviate from the pretheoretical conception—are required to provide some sort of account of the conflict between their theories and the pretheoretical beliefs of non-philosophers."

it isn't surprising that people's beliefs come apart from the truth and (b) why the mistaken beliefs remain reasonable.

The Problem of Reasonableness has special bite in the present instance, even if the conceptual intuitions deemed deviant aren't universally shared, insofar as they remain intuitions of ostensible experts about the category of interest. An analogous case may be found in the philosophy of mathematics. A certain type of mathematical formalist takes numerical expressions to be non-referential, and thereby convicts at least some mathematicians as mistaken about their own concepts—those who take numbers to refer to *sui generis* mathematical objects. But the formalist can explain the alleged error charitably, in terms, e.g., of the grammatical structure of mathematical claims being misleading and the error being harmless in not getting in the way of mathematical practice—the work of proving theorems, formulating conjectures, developing new mathematical categories, and so on. The legal positivist has no comparable defense to offer on behalf of experts who think the category of law applies directly to moral principles.[29]

The positivist might try to evade the problem with a superficially plausible 'just-so' story along the following lines:

> Judges sometimes encounter cases where the law leads to unjust results. Succumbing to temptation, they ignore the law and decide the case based on what morality requires. Sooner or later they become confused and start supposing that what morality requires *is* the law, independently of their own agency and involvement.

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[29] Among other things, the error is far from harmless—it affects the outcome of cases. It is also entirely unclear why a concept that applies to rules based on their social non-moral features should be erroneously applied based on purely moral criteria.

Ignoring the narrative's entirely speculative nature, it appeals to a form of wishful thinking that should seem alien and surprising. Motivated reasoning of the sort to which even reasonable people are vulnerable typically involves mistaken beliefs that at least roughly track what it would take for the belief to be true (Kunda 1990).[30] Someone who wants to believe that a dishonest friend is trustworthy and ends up convincing themselves while ignoring contrary evidence can be expected to make some effort to justify their judgment in terms of the criteria for trustworthiness. The problem for the positivist's motivated reasoning story is that judges who treat moral requirements as law do not attempt to justify their judgments in social terms (see §1). Their legal intuitions seem entirely insensitive to what, according to positivism, determines whether a rule is law or not—social facts. In short, the positivist charges legal experts with a kind of error that is hard to see oneself making. And in doing so, chauvinistic positivism runs afoul of what seems a reasonable standard to hold a philosophical theory to—namely, that the common errors it implies among agents with apparent expertise about the category of interest be ones the theorist is able to see herself (or reasonable people generally) making in similar circumstances.

The familiar ways of explaining conceptual error in other contexts have no present application. For instance, mistaken assumptions about a concept are sometimes due to illusions generated by pervasive agreement. The fact that everyone accepts some proposition about *F*s—that all *G*s are *F*s—can make it seem as if were one to deny it, one wouldn't have properly grasped

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[30] Kunda (1990) in her well-known work on motivated reasoning documents the "considerable evidence that people are more likely to arrive at conclusions that they want to arrive at" but notes that "their ability to do so is constrained by their ability to construct seemingly reasonable justifications for these conclusions." The problem for the positivist is that judges beholden to the laws of justice don't even bother to offer what would be reasonable justifications if positivism were true. Accordingly, the standard motivated reasoning story isn't available.

the concept of an *F*. Nothing like that could be going on in the case of the laws of justice, which remain highly controversial. Conceptual error is sometimes explained in terms of low or unrepresentative exposure to how a concept-expressing term is used in a shared language. Someone who thinks an overstuffed armchair is a sofa has an incomplete understanding of the concept SOFA likely due to limited exposure to paradigmatic sofas. Likewise, someone who isn't embedded in legal practice and has limited exposure to how legal language is used might suppose it to be a conceptual truth that all laws are written in some document even though legal actors recognize many unwritten rules as law, such as laws reflected in the customs of the community. The positivist cannot appeal to low exposure to legal usage in the case of legal experts.

Other general explanatory strategies seem like more dead ends. While there is empirical evidence that individuals are prone to a type of conceptual failure which involves wrongly inferring from the generic presence of some feature among instances of a kind to the necessity of the feature for kind-membership (e.g. Mosquitos carry viruses > All mosquitoes carry viruses) (Lerner & Leslie 2017), there is no comparable evidence of a tendency to infer from the generic presence of some feature among members of a kind to the feature's sufficiency for kind membership (Ducks lay eggs > If something lays an egg, it is a duck). So, even if paradigm instances of (socially grounded) law tend to be morally good rules (or are at least believed to be so), we have no reason for supposing that the generic moral goodness of laws should by itself lead judges to assume that the moral goodness of a principle is sufficient for its legality.

In short, chauvinistic positivism is unsatisfying because it convicts legal experts of an arbitrary-seeming conceptual error. The error appears arbitrary precisely because we have assumed, for the sake of argument, that the true criteria of legality are entirely social. The point is worth emphasizing that everything I've said in this section is consistent with judges beholden to

the alleged laws of justice being mistaken about law. My target hasn't been error-theoretic or revisionary accounts generally, but an error theory that is specifically based on positivism. The positivist's account of the criteria of legality hamstrings the positivist's ability to explain why actors immersed in legal practice and who seem generally reasonable should assume that moral principles are an *a priori* form of law. At the very least, none of the standard ways of explaining conceptual error seem to fit, which suggests that positivists hoping to pursue this line have their work cut out for them.[31]

§5 The upshot

Let us take stock. Judges attribute legality to moral principles directly, often explicitly distinguishing instances of 'moral law' from rules derived from custom or background law. Their claims appear sincere and, together with the context in which the claims are made, belie the possibility that in making them judges are following local or jurisdiction-specific conventions. If the claims must be taken at face value, then at least some legal experts must find, whether rightly or wrongly, that moral principles exhibit a basic self-evident legality, and the positivist is forced to chalk this up to conceptual confusion. But this turns positivism into an unacceptably chauvinistic view, for attributing without explanation an arbitrary-seeming error to experts immersed in legal

[31] Plausibly, the positivist could maintain that there is some unknown explanation for the error, but positivism's failure to come up with the explanation is not a decisive flaw. In general, a theory isn't refuted by its inability to explain all relevant phenomena—theories survive explanatory gaps. So, perhaps positivism should be accepted notwithstanding its failure to explain why informed users of legal language assume purely moral criteria for legality, given positivism's independent attractiveness as a theory of law. Even if this is true, it wouldn't justify ignoring the explanatory demand which to the extent that it remains unanswered renders positivism inferior to a theory that avoids similar gaps while doing just as well in other respects.

practice. Since the various explanatory strategies available to the positivist all lead to problems, there is reason to believe that the problem lies with positivism.

The legal positivist may have been my stalking horse in this paper, but the argument's intended upshot is not that views standardly framed in opposition to positivism are correct: Dworkinian anti-positivism, for example, or traditional 'natural law' theories (cf. Dworkin 1986, Greenberg 2014, Finnis 1980).[32] [REDACTED]. Traditional varieties of anti-positivism make the legality of a rule strongly dependent on its conformity with basic principles of justice (see discussion in Crowe 2019). Yet jurists regularly classify as law socially embraced rules that are radically unjust: the fugitive slave act of antebellum America, racial segregation laws, laws allowing husbands to rape their wives, Nazi genocidal laws, overharsh criminal laws, and so on. Their legal judgments are hard to explain away as systematic and widespread error.

Fortunately, the familiar battle lines of the Hart-Dworkin debate do not exhaust the space of possible views one might take on the nature of law and legal language.[33] As I indicated at the outset, I expect the way legal language is used by experts to be shot through with tensions, and no

[32] Neither should the argument be construed as being supportive of views which denude the concept of law of any determinate constraints. The 'anything-goes' view of the conceptual criteria is vulnerable to an analogous critique: it cannot charitably explain what it portrays as systematic conceptual confusion: e.g., the widely shared intuition that the concept of law *is* determinately constrained. I suspect most mainstream accounts of law and legal language are unacceptably chauvinistic.

[33] In recent work, I've defended a view of the concept of law as an essentially normative concept, where the relevant species of normativity is not necessarily moral in nature but is easily mistaken as being (omitted). Unsurprisingly, I take the view I defend to avoid the type of challenge I've raised in this paper. Showing that there is a viable account of the concept of law that can explain why a variety of moralistic conceptions of legality blamelessly gain traction among legal experts is the project of a different paper.

general theory of law can be expected to vindicate the many contradictory intuitions of legality that find expression in legal theory and practice. Nevertheless, a philosophy of law needs to take those tensions seriously. When it convicts legal experts of error, it should be able to explain what treacherous feature of the concept of law leads reasonable and seemingly competent users of legal language to common errors. I've argued that legal positivism lacks this important theoretical virtue, and the standard of theoretical adequacy which rules out positivism may be an even more powerful sieve than I have had occasion to explore here.

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