# EXPLAINING THE LAWS OF JUSTICE

*Emad H. Atiq*[*]

*The idea that a judge could use "laws of justice" or "moral law" to decide a case may seem alien to contemporary legal minds. But for much of legal history, the practice was pervasive. Judges regularly cited, analyzed, and predicated their holdings on the "laws of justice." The practice can be traced through judicial decisions, many of which have yet to be cataloged as instances of a general pattern in juridical thought. The practice is worth tracing for the challenge it poses to the dominant theory of the nature of law in contemporary jurisprudence: legal positivism.*

*This Article makes two principal contributions to jurisprudence. It offers an unprecedented accounting of the scale, prominence, and pedigree of judicial appeals to the "laws of justice," based on a unifying examination of Anglo-American constitutional and common law, early modern and contemporary civil law, and classical Roman law. It then parlays the spotlighted caselaw and historical record into a novel critique of positivism.*

*Positivists maintain that a rule's legality is ultimately determined by jurisdiction-specific social facts. This leaves unanswered why judges have had a longstanding and deep-rooted practice of treating basic principles of justice as universally valid law. This Article argues that positivists can neither explain the practice using the conceptual resources available to them nor dismiss it as a pervasive mistake. The explanatory inadequacy calls into question whether positivism deserves to be the consensus view in the legal academy. And the broader argument serves as a methodological call for general theories of law to be evaluated against the legal historical record.*

[*] Assistant Professor of Law & Philosophy. Cornell Law School and the Sage School of Philosophy at Cornell University. For exceptionally helpful feedback, I thank Rachel Schutz, Andrei Marmor, Michael Dorf, Maggie Gardner, Brian Leiter, Matthew Etchemendy, Martha Nussbaum, Kevin Toh, Ryan Doerfler, and participants in the Law and Philosophy Workshop at the University of Chicago Law School, where a draft of this Article was presented. Thanks also to Sam Preston, Alison Shea, Emily Sherwin, and Jeff Rachlinski for their helpful suggestions.

## INTRODUCTION

There is an urgent need in the philosophy of law for a disinterested, historical examination of legal practice. Questions of philosophical significance turn on accurately tracing how judges have thought and talked about law, and not just over the last one hundred years, but across legal history; viewed, not through layers of ideology and interpretation, but as far as possible, as black-letter observation. This Article demonstrates the value of an observation-first, genealogical methodology. It traces judicial classification of moral principles as law through a large and diverse body of cases to unearth a novel challenge to the prevailing orthodoxy in analytic jurisprudence and modern American constitutional theory: legal positivism.[1]

[1] For the importance of legal positivism to contemporary jurisprudence, *see, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1298 n.23 (2014) (describing "Hart's version of legal positivism" as "the most influential position in contemporary philosophy of law"); Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1323 (2017) (observing that "[t]heories of legal interpretation have taken a 'positive turn' in recent years"); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1459 (2019) (arguing for originalism based on positivism while observing that a "positivist premise fits within an overlapping consensus among American legal scholars, largely centered on the theories of Professor H.L.A. Hart"); BRIAN SIMPSON, REFLECTIONS ON 'THE CONCEPT OF LAW' 1 (2011) (describing Hart's view as "the most successful work of analytical jurisprudence ever to appear in the common law world"). *See generally* MATTHEW D. ADLER & KENNETH E. HIMMA, THE RULE OF

Legal positivists maintain that social facts—facts concerning what people have historically said, believed, done, or intended to do—ultimately determine whether a rule is law or not.[2] On H.L.A. Hart's influential formulation of positivism, what makes a rule a rule of *law* is either the prevalence in the jurisdiction of certain attitudes of obedience towards the rule or the fact that the rule's legality is entailed by more fundamental legal rules that are suitably obeyed——for example, local rules of adjudication or law-making.[3] This implies that no matter which legal system we look at, a rule cannot be a rule of law for that system just because it is a morally good or just rule. Positivism has been described as the "consensus" view within the American legal academy.[4] To provide just one illustration of its grip on the contemporary legal imagination, modern varieties of originalism in constitutional theory are expressly defended on positivist foundations.[5]

The problem with this premature consensus is that judges have always made legal claims which seem to contradict positivism's core tenets. The degree to which they have and what it means for positivism have yet to be fully grappled with. This Article, based on a broad-ranging historical examination, spotlights just how pervasively judges have referred to basic principles of justice as *universally valid law* on free-standing moral grounds.[6] It argues that this deep-rooted practice of judges is a challenge for positivism. Any adequate theory of law should be able to explain why judges—as legal experts—have conceived of law in this way. And yet, as we shall see, none of the potential explanations a positivist could give seem plausible, which calls positivism's adequacy as a general theory of law into question.

This Article broadens the terms of the debate over legal positivism by

---

RECOGNITION AND THE U.S. CONSTITUTION (2009).

[2] *See* LESLIE GREEN & THOMAS ADAMS, *Legal Positivism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter ed. 2019).

[3] *See* H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012). *See also infra* Part I (descibing Hart's theory).

[4] Baude & Sachs, *supra* note 1, at 1459.

[5] *See, e.g.*, sources cited *supra* note 1; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1116 (2017) ("We assume in this Article something like Hartian positivism…. Whether our system is textualist, intentionalist, purposivist, or something else is a legal question, to be answered by our sources of law—and, in the end, by the appropriate theory of jurisprudence."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2365 n.80 (2015) ("Hart will sometimes make appearances in the footnotes here because his work is more frequently invoked in the relevant legal scholarship."). For an example of a non-originalist view defended on positivist grounds, *see, e.g.*, RICHARD H. FALLON, *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Himma eds., 2009) (defending precedential reasoning "by invoking and applying H. L. A. Hart's famous assertion that the ultimate foundation for all legal claims lies in a 'rule of recognition.'").

[6] *See infra* Part II (cataloging judicial claims concerning the "laws of justice").

merging two strands of legal research. The historical literature, examining judicial claims about law's relationship to justice, and the philosophical literature exploring that relationship have traditionally carved distinct paths. Legal historians have previously documented judicial appeals to the "laws of justice," but in piecemeal fashion and without mining the relevant parts of the record for its jurisprudential significance.[7] Many of the cases this Article highlights have not previously been cataloged as instances of a general juridical practice.[8] Meanwhile, philosophers of law have engaged in *a priori* reflection on the status of moral principles within law, often with great insight, but mostly untethered from the historical record.[9] Consider a prominent example.

Ronald Dworkin famously challenged positivists to explain the role of moral principles in adjudication.[10] Dworkin observed that judges rely on moral considerations in deciding cases.[11] He inferred from this that moral principles may have a role to play in determining what the law is, calling into question positivism's thesis that it is only social facts, concerning what we do around here, that determine the law. Dworkin's challenge prompted several positivist replies. Some positivists pointed out that the moral principles in question may be law not on moral grounds but because of the social fact that prior judges have embraced the principles.[12] Others pointed

---

[7] *See e.g.*, Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365 (1928); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-65 (1978); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); RICHARD H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE ix (2015) (noting that "for all that has been written about the law of nature… almost none of it dealt with the subject of its place in law courts"). Helmholz provides the most extensive general commentary to date, though without focusing on the content of judicial opinions.

[8] *See, e.g.*, *infra* Part II.A (discussing the state takings cases) and Part II.B (discussing common law cases).

[9] *See infra* Part I (highlighting the ahistorical terms of the debate in legal philosophy).

[10] For example, a judge might cite the fact that a contractual provision takes "unfair" advantage of the buyer as a reason for deeming it unenforceable as a matter of law. *See e.g.*, Henningsen v Bloomfield Motors, inc., 161 A.2d 69 (N.J. 1960). Dworkin develops the argument based on moral principles in several classic articles, including *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *Model of Rules*]; *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972); *Hard Cases*, 88 HARV. L. REV. 1057 (I975) [hereinafter, Dworkin, *Hard Cases*].

[11] *See* Dworkin, *Model of Rules*, *supra* note 10, at 20-25. *See also infra* Part 1 (discussing cases Dworkin uses to illustrate his challenge).

[12] *See e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 67–68, 103–19, 151–52 (2001) (arguing that a rule of recognition can recognize moral principles as law); WILL WALUCHOW, INCLUSIVE LEGAL POSITIVISM 185-6 (1994).

out that judges rely on all kinds of extra-legal rules or principles in adjudication (principles of grammar, logic, statistics, and, indeed, morality), but that does not necessarily make the relied-on principles *law*.[13]

Both sides based their claims primarily on philosophical intuitions about judicial practice, rather than a detailed examination of how judges themselves have conceived of moral principles. Dworkin, for instance, finds himself vulnerable to the standard positivist replies for focusing so narrowly on just one aspect of judicial reasoning in relation to moral principles (adjudicative reliance), in a small selection of illustrative cases (two, in *Model of Rules*) from a unique area of law (common law), in a unique legal system (American), at a unique point in time (the contemporary period).[14] The debate has been divorced from the details of how judges have thought and talked about moral principles throughout legal history.[15]

When we take a closer look at the historical record, the complexion of the debate changes. Judges have not only relied on moral principles in adjudication; they have classified moral principles as *law* while explaining why the classification is apt. These are not just passing references to the "laws of justice," as a judge might refer to the "laws of physics" in a case that happens to implicate some extra-legal structure. Rather, the "moral laws" have been used in ways that bear all the markings of juridical law: they have been cited, analyzed, and made the basis for prominent holdings. And the more deeply we examine the record—from the contemporary period to the founding, to English common law, to early modern European law, to classical Roman law—the more pervasive the practice appears.[16]

As we shall see, the statements of jurists regarding the nature of the "laws of justice" flatly contradict the standard positivist accounts of judicial

---

[13] *See e.g.*, JOSEPH RAZ, PRACTICAL REASON AND NORMS 152-154 (2nd ed. 1990); SCOTT J. SHAPIRO, LEGALITY 272 (2011) ("When interpreting a congressional statute, for example, judges are supposed to use the rules of English grammar. Yet the rules of English grammar are not part of U.S. Law.")

[14] *See infra* Part I (describing Dworkin's ahistorical argument).

[15] *See infra* Part I (describing how Hart and fellow positivists have neglected to examine judicial claims concerning the principles of justice).

[16] Its ubiquity is reflected in what was once a widely accepted legal maxim: *aequum et bonum, est lex legum* or 'what is good and equitable is the law of laws.' LEGAL MAXIMS, BLACK'S LAW DICTIONARY (11th ed. 2019). The maxim can be traced to an Ancient Roman conception of the principles of justice as *lex naturae*, the law of nature, construed as a necessary constraint on legality, which medieval and early modern civil lawyers likewise conceived of as universally applicable juridical law, revealed through reason—a view that greatly influenced early American constitutional and common law jurisprudence. *See generally* JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §8 (1907); Day v. Savadge, 80 Eng. Rep. 235, 237 (1614) (describing the laws of justice as "leges legum"). *See also infra* Part II (discussing the relevant legal history).

behavior.[17] This suggests that a positivist conception of law is in tension with the way legal experts have conceived of law for centuries, calling into question positivism's compatibility with any theory of law that aims to preserve continuity with the past—for example, a theory of constitutional interpretation that deems every occurrence of "law" in the Constitution to mean what the Founder's meant.[18] The gathered evidence portrays positivism as a historically isolated legal ideology.

In addition to (a) documenting a deeply rooted judicial practice of regarding principles of justice as law and (b) parlaying it into a new challenge for positivism, this Article (c) demonstrates the value of an overlooked methodology. To borrow a phrase from Thomas Kuhn, the methodology may be described as "[legal] history for philosophical purposes."[19] A practice- and history-first approach has paid dividends in other domains of philosophical inquiry. For example, consideration of the history of mathematical practice and the terms in which mathematicians have debated foundational questions have informed philosophical reflection on the ontology and epistemology of mathematics.[20] Likewise, there is a well-developed tradition of studying the history of scientific practice for philosophical insights into the nature of scientific concepts.[21] It is only fitting for philosophers of law to similarly trace how the concept of law has been understood and applied by legal experts, rather than artificially imposing on legal practice philosophy's own view of what law is. And while the historical investigation is presently aimed at challenging legal positivism, it would be a mistake to construe the highlighted parts of the historical record as an argument *for* opposing views of the nature of law.[22] The aim for now is simply to stress-test the positivist

---

[17] *See infra* Part III (arguing against available explanatory approaches).

[18] It is easy to multiply examples of the Supreme Court construing Constitutional requirements based on the history of the Anglo-American legal system. For a recent example, *see* Ramos v Lousiana, 140 S. Ct. 1390, 1395-1400 (2020) (No. 18-5924) (determining the scope of the Sixth Amendment's promise of "an impartial jury" by looking to English common law history, as well as well as opinions and treatises written immediately after the Founding). *See also infra* Part III.C (explaining the theoretical costs to positivism of conceding a break with the past in our modern conception of law).

[19] THOMAS KUHN, THE ROAD SINCE STRUCTURE 276 (2000).

[20] For a selection of recent work on the topic, *see, e.g.*, PAOLO MANCOSU, THE PHILOSOPHY OF MATHEMATICAL PRACTICE (2008). For accessible summaries of the philosophical uses to which mathematical history has been put, *see, e.g.*, STEWART SHAPIRO, *Philosophy of Mathematics and its Logic*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF MATHEMATICS AND LOGIC (Stewart Shapiro ed. 2005); Gideon Rosen, *Kitcher Against the Platonists*, *in* THE PHILOSOPHY OF PHILIP KITCHER (Mark Couch & Jessica Pfeifer eds. 2016).

[21] The literature is too vast to be effectively summarized here. *See, e.g.*, THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3rd ed. 1996); MARC LANGE, NATURAL LAWS IN SCIENTIFIC PRACTICE (2000); André Kukla, *Scientific realism, Scientific practice, and the Natural Ontological Attitude*, 45 BRIT. J. PHIL. SCI. 955 (1994).

[22] The aim is not to defend any existing theory of law's nature, including Dworkin's own

orthodoxy, not to elevate some alternative view of law's nature.

The structure of the Article is as follows. Part I provides a brief but necessary summary of the debate within analytic jurisprudence concerning the status of moral principles within law. The ahistorical terms of the debate are emphasized.

Part II compiles the relevant legal history. Relying on a combination of caselaw and secondary research, I trace judicial claims about the "laws of justice" through the contemporary period, the Founding, English common law, early modern civil law, and classical Roman law.[23] Key observations to be gleaned from the written statements of judges can be enumerated. (1) Jurists have invoked the "laws of justice" or "moral laws" in consequential ways—to provide compensation for property taken in the absence of constitutional requirements; to preclude states from interfering with financial obligations owed to foreign creditors; to ensure impartial adjudication; to determine equitable remedies; to establish rights to protection under law; to convict agents perpetrating gross injustice under the authority of enacted law; and in various other ways. (2) These jurists have not explained the legality of moral principle by adverting to social facts or more fundamental laws, including prior caselaw and common practice; on the contrary, they have treated the import of "moral law" as self-evident, universal, and independent of local custom. (3) Judges have cited the "laws of justice," and the ethical treatises which purport to clarify their content, as they would statutes or prior opinions. (4) The practice can be traced to an Ancient Roman conception of the principles of justice as *lex naturae*, the law of nature, which medieval and early modern civil lawyers likewise conceived of as universally applicable law revealed through reason; a view that shaped early Anglo-American

account of law, on which the legality of any rule partly depends on moral facts, or classical 'natural law' theory. For varieties of broadly 'anti-positivist' views, *see, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter, DWORKIN, LAW'S EMPIRE]; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 646-60 (1958) (arguing that for a system of rules to count as a *legal* system, it must conform to key principles of impartiality and justice); Greenberg, *supra* note 1 (defending a Dworkinian view on which the legal facts are determined by the "moral impact" of social-institutional choices); Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN-ZEITUNG JAHRG 105 (1946) (arguing that basic principles of morality are essentially linked to the concept of *recht*); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (defending natural law theory); MARK MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS (2006). For an overview of traditional and contemporary natural law theories contrasted with anti-positivism generally, *see* JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW Ch1 (2019). For a general critique of mainstream varieties of anti-positivism, *see, e.g.*, Emad H. Atiq, *There are No Easy Counterexamples to Legal Anti-positivism*, 17 J. ETHICS & SOC. POL'Y 1; *infra* notes 234, 235, & 261 and accompanying text.

[23] *See infra* Part II (describing the research methodology).

constitutional and common law, as reflected in prominent judicial holdings and founding era lawyering, and that continues to influence contemporary caselaw though far less explicitly. (5) Opposing judges (and there are surely very many) who have denied the existence of universally valid laws of justice have accused their peers of being confused about the nature of law rather than about local legal customs, adjudicative or otherwise; and so on.

Part III puts this legal history to philosophical use. I taxonomize the explanatory strategies available to the positivist, drawing in part on positivist replies to Dworkin's original challenge. The taxonomy is intended to clarify previously elided distinctions and be exhaustive, organizing the available explanatory strategies into three kinds: CONVENTIONALISM, FICTIONALISM, and ERROR THEORY. The conventionalist offers a justifying account of why judges have classified moral principles as law: a jurisdiction-specific legal custom among judges licenses such classifications. The fictionalist takes the legal judgments to be insincere—a useful fiction that legal officials sometimes knowingly indulge in. The error-theorist pegs the judgments to some kind of mistake or confusion.

I argue that conventionalism (III.A) and fictionalism (III.B) are not supported by the contextual and linguistic evidence. Both interpretations distort the claims and behavior of judges, and the degree of distortion is best seen in the light of all the evidence collected in Part II. Meanwhile, a positivistic error-theory (III.C), which by the end of the discussion should seem unavoidable, incurs serious theoretical costs of its own. The problem is that nothing in the affirmative claims that make up positivism as a theory of law can plausibly explain why experts immersed in legal practice should have basic intuitions about law that are not just mistaken but, on the assumption of positivism, seem implausibly arbitrary. The conviction that basic principles of justice exhibit self-evident and universal legality may well be mistaken. But if so, then the mistake must be pervasive, and theorists bear a burden of explaining why legal experts should be so pervasively mistaken. A positivist error-theory, in short, does not offer a plausible *theory* of error.

So concludes the argument. Since all of the available explanatory strategies lead to problems, there is reason to believe that the problem lies with positivism. And insofar as positivism is supposed to be the best and orthodox expression of contemporary analytic jurisprudence, there is reason to believe that analytic jurisprudence needs to rethink its observational starting points.

## I. AHISTORICAL JURISPRUDENCE

Analytic jurisprudence aims to provide a general characterization of

the fundamental grounds of a rule's legality.[24] First-order legal theories tell us what a jurisdiction's laws are. Higher-order but 'local' legal theories tell us the grounds of the laws of the jurisdiction in terms of other jurisdiction-specific laws—for example, a theory according to which all laws in the United States depend for their legality on being consistent with the U.S. Constitution, as the supreme law of the land. Analytic jurisprudence is a form of higher-order legal theorizing distinguishable in terms of its generality—we want an account of what it takes for *any* legal rule in *any* legal system to count as a rule of law; and distinguishable, also, in terms of explanatory depth—we want an account of the *fundamental* grounds of a rule's legality. Such an account might tell us, for example, what it is in virtue of that Constitutional rules count as law in the United States.[25] The deliverances of such foundational theoretical work may be limited to fairly modest, abstract truths about law. For example, Hart begins his own analysis with the humble observation "that a legal system consists, in general, … of *rules*" a fact he supposes "could hardly be doubted or found difficult to understand."[26] But the implications of such modest platitudes, when drawn out systematically, can be surprising, and uncovering them has been a central preoccupation of philosophers of law.

It is easy to get side-tracked into a discussion, itself philosophical, of the purpose and benefits of such theoretical work, but to state briefly points that have been elaborated elsewhere, the intellectual necessity of analytic jurisprudence lies in general jurisprudential commitments being unavoidable.[27] Anyone participating in a legal system is at least implicitly committed to some view of the fundamental general grounds of legality, even if it is the view that there are *no* general grounds and the best we can do is give local, jurisdiction-specific legal explanations. The philosophical task is to make our implicit commitments concerning the grounds of law explicit, and to consider whether our commitments withstand our critical scrutiny. It has seemed a worthwhile project to many, and one illustration of its influence lies in the general jurisprudential turn in modern constitutional theorizing.[28] Dworkin did not exaggerate when he wrote that "jurisprudence is the general

---

[24] *See generally* SHAPIRO, *supra* note 13, at 1-35.

[25] The species of explanation at issue here is a form of *non-causal* constitutive explanation. Contrast <the fact that there is water in the cup is (constitutively) explained by the fact that there is H20 in the cup> with <the fact that there is water in the cup is (causally) explained by the fact that someone poured water into it>. Analytic jurisprudence aims to provide a constitutive or metaphysical explanation of legal facts. *See generally* Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, *in* MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109-136 (2010).

[26] *See* HART, *supra* note 3, at 8.

[27] On purpose and motivation, *see* SHAPIRO, *supra* note 13, at 1-35.

[28] *See* sources cited *supra* note 1.

part of adjudication, silent prologue to any decision at law."[29]

The dominant position in contemporary analytic jurisprudence is legal positivism.[30] What unifies legal positivists is the claim that a rule's legality is ultimately determined by social facts—facts concerning peoples' attitudes; what they have historically said, believed, done, or intended to do.[31] Not just any social facts will do; positivists purport to offer a precise account of which jurisdiction-specific social facts fundamentally determine a rule's legality. For instance, on John Austin's view, a rule's legality is ultimately a function of its being prescribed by a 'sovereign'—a person habitually obeyed in a community and whose commands are backed by the threat of sanction.[32] On Hart's considerably more influential view, legal systems are systems of hierarchically structured rules; a system that includes 'primary' rules— such as rules that prohibit forms of conduct or confer powers on individuals—as well as 'secondary' rules which specify methods for making and determining the primary rules.[33] The legality of primary rules of law is determined by the secondary rules, while the secondary rules count as law in virtue of being suitably obeyed in the community by relevant officials.[34] To illustrate, most laws constitutive of the American legal system might depend for their legality on law-making procedures established by the Constitution, but the fact that the rules embodied in the Constitution are the supreme law of the land is grounded in what we do around here: the fact that we more or less follow Constitutional rules out of a sense of obligation.[35] Legality, in short, is fundamentally a purely social phenomenon.

There are many ways of testing a positivist theory of law. An adequate theory should be consistent with our considered intuitions about cases: paradigmatic examples of legal systems (American, German, Classical Roman) as well as foils (non-legal systems of rules, like the rules of grammar or etiquette).[36] It should be compatible with the theoretical role of the concept

---

[29] DWORKIN, LAW'S EMPIRE, *supra* note 22, at 90.

[30] *See* sources cited *supra* note 1.

[31] *See generally* Emad Atiq, *Legal Obligation & its Limits*, 38 LAW & PHILOSOPHY 109 (2019); Rosen, *supra* note 25, at 110 ("One of the aims of jurisprudence is to identify in general terms the facts in virtue of which the legal facts are as they are. One distinctive claim of legal positivism is that the grounds of law are wholly social. … Antipositivists typically maintain that pre-institutional moral facts often play a role in making the law to be as it is.").

[32] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (David Campbell & Philip Thomas eds. 1998) (1832).

[33] *See* HART, *supra* note 3, at 99. For a helpful discussion of Hart's view, see Shapiro, *supra* note 13, at 84–85.

[34] The details of the 'internal point of view' in Hart's theory can be largely ignored in what follows. The Article offers a fully general critique of positivist views, one that does not turn on the specifics of any particular strain of positivism.

[35] *See, e.g.*, sources cited *supra* notes 1, 5.

[36] The point is widely appreciated. *See, e.g.*, Jeremy Waldron, *Positivism and Legality:*

of law and the explanatory work that laws do for us in our broader theories of human institutions and behavior. An important desideratum in this regard is for positivism to plausibly explain the practice of adjudication and juridical legal intuition.[37] This criterion of theoretical adequacy is best appreciated by way of a famous argument against legal positivism due to Dworkin, one that provides a convenient frame for the Article and a starting point for critical discussion.

Various details of the argument can be suppressed, but its central and least question-begging observation is that judges tasked with figuring out what the law is frequently seem to base their conclusions of law partly on considerations of justice. For example, when determining the enforceability of a contract, a judge might refuse to enforce the contract or a contractual provision on the basis of the principle that courts cannot be "used as instruments of injustice."[38] Dworkin relies on a New Jersey case, *Henningsen v. Bloomfield Motors, Inc*., where the legal question was whether and to what extent an automobile manufacturer may contractually limit its liability due to the sale of a defective automobile.[39] The court bases its interpretation of the warranty provision on the fact that "courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other…."[40] In figuring out

---

*Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1139 (2008) ("[T]he concepts *law* and *legal system* pick out some systems of rule and distinguish them from others.").

[37] *See generally* Dworkin, *Model of Rules*, *supra* note 10; Dworkin, *Hard Cases*, *supra* note 10. Though positivists sometimes charge Dworkin with being overly focused on adjudication, they by and large concede that adequately explaining juridical practice is one (even if not the only) criterion for theoretical success in analytic jurisprudence. *See*, *e.g.*, Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 297 (1992) ("Why pay such attention to these acts of legislation and adjudication? One reason is that… we are concerned with the law, and whatever a coherence theory which has a different base may be a theory of, it is not a theory of law. Our common understanding of the law, that is, of 'the law' when used in the relevant sense, is that it is intimately concerned with acts of legislation and adjudication."); ANDREI MARMOR, PHILOSOPHY OF LAW 75 (noting Dworkin's important challenge for positivism based on judicial practice). *See also* Shapiro, *supra* note 13, ch8-9; COLEMAN, *supra* note 12, ch11-12; WALUCHOW, *supra* note 12.

[38] Dworkin, *Model of Rules*, *supra* note 10, at 20-25.

[39] 161 A.2d 69 (N.J. 1960).

[40] 161 A.2d at 86. Dworkin's other main example is *Riggs v. Palmer*. 22 N.E. 188, 189 (N.Y. 1889). "In Riggs, the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute." *Model of Rules*, *supra* note 10, at 29. Dworkin argues that the positivist cannot capture the legality of the principles relied on in *Riggs* and *Henningsen*:

> The positivist cannot defend his theory … by fiat; if principles are not amenable to a [positivist] test he must show some other reason why they cannot count as law. Since principles seem to play a role in arguments about legal obligation (witness, again, *Riggs* and *Henningsen*), a model that provides for that role has some initial

the import of justice in such cases, judges self-conceive as figuring out the content of the law, independent of their own opinions about what the law ought to be. So, the argument goes, positivism must be false: facts concerning what the law is are partly determined by moral facts—what is just and fair—independently of the social facts concerning what we do around here.[41]

Positivists have contested a number of controversial assumptions Dworkin makes about the practice in question—for example, he assumes that the content and structure of moral principles cannot be captured by a customary rule; and that judges lack law-making discretion in cases like *Henningsen*—assumptions that I have suppressed in order to sharpen the precise, theoretically neutral explanatory demand.[42] Positivists have also rightly emphasized that a general theory of law needs to do much more than simply explain juridical practice.[43] Still, there is wide agreement on both sides that Dworkin drew attention to an important legal phenomenon, one that an adequate philosophy of law needs to explain, as reflected in the various efforts by positivists to explain the highlighted practice.[44]

There are several well-known positivist replies to Dworkin's challenge.

---

> advantage over one that excludes it.

*Id.* at 37. He goes on:

> Most rules of law, according to Hart, are valid because some competent institution enacted them…. But this test of pedigree will not work for the *Riggs* and *Henningsen* principles. The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.

*Id.* at 41. As is well-known, Dworkin misinterprets Hart's view somewhat by ignoring the possibility of general customs being a source of valid law. The "sense of appropriateness" in the profession may be deference to custom, rather than owing to the morality of the relevant principles independently of custom. *See* Part III.A (discussing conventionalist strategies).

[41] For the developed version of Dworkin's own anti-positivist theory of law, *see generally* DWORKIN, *supra* note 29. For an excellent summary of Dworkin's challenge, *see* Carlos Nino, *Dworkin and Legal Positivism*, 89 MIND 519, 523 (1980).

[42] Dworkin attempts to strengthen the argument based on other assumptions including about the politically legitimate role for judges (law-discovery as opposed to law-making), the determinate nature of legal questions (the incorporation of moral principles as law is supposed to eliminate the indeterminacies that the legal rules of the system might otherwise present), and the metaphysics of moral principles (their normative content and logical form cannot be captured by a rule conventionally followed). These assumptions (and the independent lines of argument they undergird) are eminently contestable and needn't concern us. For critique, *see* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972); Nino, *supra* note 41; Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215 (2009); SHAPIRO, *supra* note 13, at 272. The challenge developed in Parts II and III avoids contestable assumptions about moral principles and differs in its observational starting points.

[43] *See, e.g.*, Joseph Raz, *Law and Value in Adjudication*, *in* THE AUTHORITY OF LAW 180 (1979).

[44] *See* sources cited *supra* notes 37, 42. *See also infra* Part III.

Some treat the moral justifications judges offer as superfluous rhetoric dressing up conclusions of law reached on other (purely social) grounds.[45] Others—'inclusive legal positivists'—point out that Dworkin's moral principles may be "implicit" in judge-made law, so that what makes the principle "courts shall not be used as instruments of inequity" legal is not the brute fact that it is a morally good principle, but the social fact that the moral principle has been customarily followed by previous judges.[46] A powerful reply questions whether mere reliance by a judge on a moral principle in adjudication establishes its legality in the first place. While inferential reliance is relevant to the question of whether judges conceive of moral principles as law, the theoretical role of distinctly legal rules and principles is considerably richer than simply being a basis for an adjudication. As Joseph Raz and Scott Shapiro have emphasized, judges rely on all kinds of extra-legal rules and principles (rules of grammar, logic, statistics, and, indeed, morality) in the course of making legal determinations, but that does not necessarily make such rules law or part of the grounds of law.[47] Dworkin may have responses to these familiar objections, but since my purpose, here, is not to defend Dworkin's argument as formulated but to develop an analogous one with a distinct observational base, I leave further elaboration to Dworkin's defenders.

In Part III, we shall consider and adapt to our own purposes the positivist's explanatory strategies. One of the main points of the Article is that the challenge implicit in the way judges think and talk about moral principles is considerably harder to evade than positivist responses to Dworkin's ahistorical observations make it out to be. Making that challenge explicit requires examining more of the legal record. Legal systems assume a degree of continuity with the past, so we can hardly draw strong conclusions about the status of moral principles within, say, Anglo-American common law, by looking at a couple of common law cases from the contemporary period. Likewise, we can hardly lay claim to having tested our general theory of the nature of law against the full range of test cases by examining just one potentially idiosyncratic legal system.

---

[45] *See, e.g.*, Leiter, *supra* note 42. *See also* Raz, *supra* note 43 (noting that "some," in contrast to Dworkin, take a judge's articulated reasons for a decision to be "mere window dressing"); *infra* Part III.B (discussing the fictionalist approach).

[46] *See, e.g.*, WALUCHOW, *supra* note 12, at 185–86; COLEMAN, *supra* note 12, at 67–68, 103–19, & 151–52 (observing that a rule of recognition can recognize moral principles as law). *See also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1958) ("neither Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best."); *infra* Part III.A (discussing the conventionalist approach).

[47] *See* sources cited *supra* note 13.

Indeed, Dworkin was not alone in neglecting to explore the details of judicial practice in relation to matters of principle. Consider the following passage from Hart's THE CONCEPT OF LAW:

> procedural standards such as *'audi alteram partem*' 'let no one be a judge in his own cause' are thought of as requirements of justice, and in England and America are *often referred to as principles of natural justice*. This is so because they are guarantees of impartiality or objectivity, designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself.[48]

Two famous maxims of adjudication are referenced in this passage, but the quoted remarks constitute the entirety of Hart's discussion of the maxims, which is remarkably cursory and even misleading. For the maxim, '*no person shall be a judge, or witness in his own cause*' (*Nemo Iudex in Sua Causa*) is associated with a famous line of English cases discussed in Part II.A.1. Hart's claim that it was "often referred to as a principle of natural justice" barely scratches the surface. Jurists have referred to the principle (along with others like it) as a "*law* of justice," as an "*unchangeable* law," as "moral law," and, even, the "law of laws" in the context of deciding cases.[49] Moreover, jurists have purported to explain *why* such principles of fairness and impartiality should count as law, and their relationship to other laws of the system. These details matter for purposes of evaluating competing philosophical explanations of judicial practice. For example, the use of "law" to refer to principles of impartiality and fairness in a natural context for the use of juridical terminology bears (even if non-decisively) on whether judges have treated moral principles as "extra-legal" bases for deciding cases or as *bona fide* law in the juridical sense—that is, as the law of the land.[50] Likewise, a juridical characterization of the maxim as an "unchangeable law" calls into question the claim that jurists have treated the principle's legality as dependent on local customs.

Taking proper measure of judicial practice—and, relatedly, the explanatory adequacy of legal positivism—requires examining a broader range of case law and the history of doctrine. Embedded in the details lies a challenge to positivism obscured by the cases Dworkin uses to illustrate his points, Hart's cursory discussion of legal maxims, and the ensuing

---

[48] HART, *supra* note 3, at 160.

[49] The leading precedent being *Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610). *See infra* text accompanying notes 72-77.

[50] Hart does, of course, engage and critique the "natural law" theories of philosophers, but he attends to philosophical arguments only. HART, *supra* note 3, at 185-213. *See also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594-595 (1958). That is not the same as addressing or explaining the convictions of legal experts concerning the "laws of natural justice" in court. *See infra* Part III.

literature.[51] Even those who more or less agree with Dworkin that plenty of judges have treated moral constraints as legal on pre-social moral grounds should find that examining judicial usage more closely, situating it within a broader trans-jurisdictional, trans-historic pattern, is of significant value, as I hope to demonstrate, first, by cataloging relevant parts of the legal record, and second, by making vivid the record's significance to analytic jurisprudence.

## II. LEGAL HISTORY FOR PHILOSOPHICAL PURPOSES: A GENEALOGY OF THE LAWS OF JUSTICE

The goal in what follows is a more detailed examination of how judges have thought and talked about the legality of moral principles through the ages. While there have been several piecemeal examinations of "moral law" reasoning among jurists, this Part takes an important first step towards a broader, unifying examination of the scale, prominence, and pedigree of such appeals in judicial decisions.[52] Several points about the methodology are worth emphasizing at the outset.

First, the challenge, here, is to avoid as far as possible making theory-laden observations of judicial behavior. Some theory—relatively uncontested assumptions about the conceptual role of juridical law (law is used to decide cases, laws are cited, laws are situated within a larger body of legal rules, and so on)—will undoubtedly inform our observations, but only tentatively and subject to later revision. The primary objective for the time being is to take the black-letter, written claims of judges at face value. We shall turn to philosophical questions of ideal explanation and interpretation in Part III.

Second, the examination of case law is *candidly* selective. The point, recall, is not to compose a comprehensive legal history of the principles of justice, but to identify enough of the historical record to be able to put it to philosophical use. Our background question in legal philosophy—whether and to what extent have judges treated moral principles as juridical law—informs the parameters and scope of the investigation.

Third, the universe of searchable caselaw is vast, and some narrowing choices must be made for the observational task to be at all manageable. For instance, a quick search of all US state and federal cases as well as pre-1777 English reports included in Westlaw for references to "principle(s) of justice"

---

[51] Neither *Riggs* nor *Henningsen*, the cases Dworkin highlighted and that became the focus of the debate over moral principles, involved judges referring to moral principles as law or as a source of law independently of custom, statute, and constitutions in the direct terms I emphasize in Part II.

[52] *See* sources cited *supra* note 7.

returns over the maximum number of 10,000 hits, 4,293 of which appear in the same sentence as "law."[53] A search for "moral law" or "natural law" returns 4,376 hits, and a search for uses of "laws of natural justice" (and various equivalents) returns 1,115 cases.[54]

For US state and federal records, I closely examined a manageable sample of roughly 700 cases, with such occurrences as "law(s) of natural justice," "law(s) of morality," or "moral law(s)," along with referenced cases as relevant legal background. To reiterate, the aim was to find the clearest of cases likely to pose an explanatory challenge for positivism, so long as there are sufficiently many such cases to be found. One of the main points of the Article is precisely that if positivism is true, we should not expect to find the kind of evidence a targeted search for disconfirming evidence uncovers, especially when the observations are seen in the light of a broader historical pattern that begins to reveal itself as we dig deeper.

As for caselaw from foreign jurisdictions, there are similar challenges of scope. A search through German cases since 1947 available through the database Beck-Online, reveals comparably daunting usage patterns. "Gerechtigkeitsgedanken" or "principle of justice" appears in more than the maximum number of reportable cases (4000). "Sittengesetz(e)" or "moral law(s)" appears in 854 cases.[55]

Fortunately, we can supplement our caselaw observations with secondary research. Legal historians have independently documented the juridical treatment of moral principles in Anglo-American law, as well as in pre-modern legal systems, such as classical Roman and early modern European law. Their observations when consolidated confirm a historical pattern to be gleaned from the caselaw of considerable philosophical relevance.

### *A. In Anglo-American constitutional law*

There is considerable evidence, mainly from pre-twentieth century caselaw, of judges very plausibly referring to moral principles as law in the juridical sense—that is, the law of the land.[56] The juridical sense of law was

---

[53] Westlaw search: advanced: "principles of justice", Jurisdictions: All States and All Federal and All English Reports on Westlaw, Date before 1777 (last visited Aug. 01, 2020).

[54] Westlaw search: advanced: (moral or natural) +1 (law or laws), Jurisdictions: All States and All Federal and All English Reports on Westlaw, Date before 1777 (last visited Aug. 01, 2020).

[55] Beck-online search: "Gerechtigkeitsgedanken", limited to "Rechtsprechung" [case law] (last visited Aug 1, 2020).

[56] SHAPIRO, *supra* note 13, at 6, observes "many things that English speakers refer to as "law" are not law in the relevant sense," offering as examples of "Boyle's law" and the "law of Cosines." The distinction is worth bearing in mind. We shall be focusing on cases where the contextual and behavioral evidence makes especially clear that "moral law" or "law of justice" is being used in the relevant juridical sense—as the law of the land to be applied in

apparent both from what was expressly stated, or the broader semantic context, and how these alleged "moral laws" were utilized, or the behavioral evidence. What becomes rapidly apparent is these are not just 'outlier' cases. These are prominent and widely discussed cases involving judges commenting on moral law in markedly direct terms. One is left with the clear impression of a larger phenomenon: a generally popular judicial view that some basic principles of justice count as law, *ex proprio vigore*. Consider the following examples.

1. Pre-twentieth century

An illustrative set of cases from the 19th century involved a question of state constitutional law: whether a state that confiscates private property on behalf of the public owes the singled out private party fair compensation. While the U.S. constitution mandates compensation, the Fifth Amendment, as originally written, restricted the federal government alone, and it was not until after the Civil War that the requirements and prohibitions of the Bill of Rights were applied against state governments through the passage of the Fourteenth Amendment.[57] Before then, many state constitutions included a provision analogous to the federal Takings clause, but some omitted it.[58] It was in this context that the New York chancery court derived a duty of compensation constraining legislative powers to take private property from a "law of natural justice":

> I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes… But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. *This is a necessary qualification accompanying the exercise of legislative power*, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice. Grotius, (De Jur. B. & P. b. 8. ch. 14. s. 7.) Puffendorf, (De Jur. Nat. et Gent. b. 8. ch. 5. s. 7.) and Bynkershoeck, (Quæst. Jur.

cases. We must distinguish judicial uses of "law" systematically and by paying close attention to what judges say and do, bearing in mind the theoretical role of the juridical concept of law. The positivist cannot declare by fiat that a judge's use of "law" to refer to moral principles is extra-legal, no more than an anti-positivist can take for granted that any reference to "moral law" in a case is relevant to legal philosophy.

[57] Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 247 (1833) (holding the Bill of Rights did not apply to the States).

[58] *See* Orr v. Quimby, 54 N.H. 590, 647 (1874) (noting Pennsylvania, Delaware, and Ohio as having state constitutions with a takings clause).

> Pub. b. 2. ch. 15.) when speaking of the eminent domain of the sovereign… but they all lay it down as *a clear principle of natural equity*, that the individual, whose property is thus sacrificed, must be indemnified.[59]

The court admits that there was no compensatory duty to be found in the New York constitution, unlike the constitutions of other states, like Pennsylvania, Delaware, and Ohio, and the U.S. Constitution.[60] Its support for imposing a legal duty of compensation is a "principle of natural equity" along with a citation to Samuel von Pufendorf and Hugo Grotius who famously argued for "natural laws of justice" constraining the powers of government.[61]

The holding in *Gardner v Newburgh* prevailed in New York until a constitutional provision requiring compensation was officially adopted.[62] At the Proceedings of the New York Convention of 1821, there was general concurrence that the provision was unnecessary.[63] In *Bradshaw v Rodgers*, the court held that the constitutional provision was merely "declaratory" of a principle of justice which applied independently in the case:

> [The act which allows taking of property without compensation] is directly opposed to the fifth article of the amendments of the constitution

---

[59] Gardner v. Vill. of Newburgh, 2 Johns. Ch. 162, 166 (N.Y. Johns. Ch. 1816) (emphasis added). Whether these courts were correct about justice is irrelevant to the argument of the paper, so long as their moral judgment were not completely off the mark. *See* discussion *infra* note 176. As for the principle articulated in *Gardner*, it is quite reasonable to suppose that individuals morally ought to be protected against continually having to serve the state's ends or to be singled for contribution to aggregate social welfare without compensation. This is true even if the justification for property rights depends on positive welfare effects overall, as Bas Van Der Vossen nicely argues in *As Good as 'Enough and as Good'*, 71 PHIL. Q. 183, 188 (2021).

[60] *Gardner*, 2 Johns. Ch. at 16. The court lists states that include a provision in their constitutions requiring just compensation while clearly omitting New York:

> Such an article is to be seen in the bill of rights annexed to the constitutions of the states of Pennsylvania, Delaware, and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe, …, it is made a part of the constitution of the United States, "that private property shall not be taken for public use, without just compensation."

The holding is interpretated by subsequent courts as deriving a compensatory duty from a "law of natural justice." *See, e.g.*, discussion of New York cases and commentary in *Orr v. Quimby*, 54 N.H. 590, 647 (1874).

[61] *See* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE BK. I, ch. I, sec. x, para 1 (William Whewell trans., Cambridge Univ. Press, 1853) (1625) ("The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined.") *See also* CHRISTINE KORSGAARD, SOURCES OF NORMATIVITY 7, 21-22, 28-30 (1996) (discussing Pufendorf's view).

[62] It was not overruled in *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (N.Y. 1837).

[63] *Quimby*, 54 N.H. at 648-9.

> of the United States, which forbids the taking of private property for public use, without just compensation. The same inhibition to the power of the legislature, is contained in the late amendments to the constitution of this state. *I do not rely on either, as having a binding constitutional force upon the act under consideration. The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative.* But they are both declaratory of a great and fundamental principle of government; and *any law violating that principle must be deemed a nullity, as it is against natural right and justice.*[64]

The court could not have stated in clearer terms that it took the "fundamental principle… [of] natural right and justice" to legally constrain the legislature independently of the constitutional provisions requiring fair compensation, whether at the state or federal level: "I do not rely on either, as having binding constitutional force upon the act under consideration."[65]

The New York approach attracted notable critical commentary from a justice in New Hampshire. In *Orr v Quimby*, the judge begins by observing:

> There is, in our reports, an uncertainty as to the origin of the rule requiring compensation. It was decided nearly fifty years ago that our constitution is silent on the subject, and that decision seems to stand approved…. And *yet it has been taken for granted*, as a general theory, that a statute authorizing the taking of private property for public use, without compensation, would somehow or other be void.[66]

The judge then proceeds to reject in scathing terms the New York approach, which it sees as having influenced New Hampshire:

> New Hampshire is not the only state in which the constitutional view has been darkened by doctrines of natural justice, and *theories of the highest law*... The legislative power of New York was restricted by a duty of compensation, imposed not by a judicial interpretation of any particular passage of the constitution, not by any reasoning tending to show that "the supreme legislative power" was not to be understood in its English sense…*but by a judicial usurping administration of the higher law of natural justice*.[67]

The opinion is worth reading in full. It leaves an undeniable impression that

---

[64] Bradshaw v. Rodgers, 20 Johns 103, 106 (N.Y. Sup. Ct. 1882) (emphasis added). *See also* Cairo & F.R. Co. v. Turner, 31 Ark. 494, 499 (1876) ("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*.") (emphasis added).

[65] *Id.*

[66] *Quimby*, 54 N.H. at 605.

[67] *Id.* at 647 (emphasis added).

the judges disagreeing on the force of the "laws of justice" fully understood the distinction between an extra-legal body of norms and *bona fide* juridical law. Likewise, they understood the distinction between juridical law derived from custom, tradition, statutes, and constitutions, and juridical law derived, much more controversially, from unsourced principles of justice.[68] The opinion exhibits a manifest sensitivity to distinctions expounded by analytic philosophers more than a century later. For example, it distinguishes a case of charitable interpretation—where the court's morally inflected interpretation of an ambiguous clause in a legislative act or constitution is informed by its attribution to the drafters of an intent to do justice—from the enforcement of "moral law" independent of any act of interpreting the constitution and independent, also, from the "common law" described as a "a mere mass of customs."[69]

The judge continues:

> The constitution authorizes the legislature to make constitutional laws: and it requires the court to be sworn to officially support the constitution, and to perform the duties of their office agreeably to the constitution and the human laws of the state; not agreeably to that constitution and those laws supplemented or modified by the divine, natural, or moral law, or the principles of reason and justice…. A statute, authorizing the taking of private property for public use without compensation, cannot be held void on the ground that "natural justice speaks on this point where our constitution is silent."[70]

After bemoaning the law of takings in New Hampshire as "darkened by theories of the highest law," the court warns of the risks inherent in judges acting on a power to apply moral or natural law.[71]

Why was this veritable treatise on the relationship between law and morality masquerading as a dissenting opinion, full of distinctions of philosophical relevance a century before the Hart-Dworkin debate, seen as necessary? It was necessary because the idea that some *principles of justice are, by their very nature, the laws of the land* had considerable currency in the 19th century, and well before then.[72] The idea's popularity led Oliver

---

[68] *Id.* at 609 ("[J]udicial construction, that is, finding the legal meaning of words used by parliament [stands in] striking contrast with the power of holding that an unjust statute, when its legal meaning is found, is void on the ground that parliament has no authority to make an unjust law.").

[69] *Id.* at 636.

[70] *Id.* at 611.

[71] *Id.* at 649 ("Moral suasion is substituted for legal force; moral probability takes the place of legal security.")

[72] *See e.g.*, State v. Joyner, 625 A.2d 791, 814 (1993) (noting that a commitment to natural laws of justice "pervaded eighteenth century legal thought throughout America, including Connecticut.").

Wendell Holmes, in 1918, to observe that "[t]he jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted," attributing the idea's hold on jurists to "early associations and temperament."[73]

Crossing the Atlantic, it is easy to multiply examples of famous English cases where prominent jurists assert that the "laws of justice and reason" constrain parliament, cases that are subsequently relied upon by early American courts deciding constitutional questions.[74] In *Day v. Savadge*, Chief Justice Hobart notes:

> [E]ven an act of parliament, made against natural equity as to make a man judge in his own case, is void in itself; for *jura naturae sunt immutabili*a ("The Laws of Nature are unchangeable"), and they are *leges legum* (the laws of law).[75]

While Hobart declines to read the act at issue in the case as having a meaning in conflict with the laws of natural equity, the pleadings seemed to have conceded the objectionable meaning, conferring significance on the natural equity argument.[76] In *City of London v. Wood,* Chief Justice Holt, reaffirming the maxim that a person cannot be a judge in his own case, describes as "very reasonable and true"[77] Lord Coke's observations in the leading precedent for the maxim *Dr. Bonham's Case*: "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the

---

[73] *Natural Law*, 32 HARV. L. REV. 40, 41 (1918). *See also id.* at 42-43 ("The *a priori* men generally call the dissentients superficial. But I do agree with them in believing that one's attitude on these matters is closely connected with one's general attitude toward the universe. Proximately, as has been suggested, it is determined largely by early associations and temperament, coupled with the desire to have an absolute guide.").

[74] *See* Corwin, *supra* note 7, at 395; Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2152 (1994) (observing that the English natural law approach to judicial review, as innovated by Chief Justice Holt, was "suggestive of later American developments"); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XXIV, at 15 (Littleton, CO, Fred B. Rothman & Co. 1989) (12th ed. 1873) ("[t]he right of self-defense in these cases is founded in the law of nature, and is not and cannot be superseded by the law of society."). *See also* Robin v. Hardaway, 1 Jefferson 109 (Va. 1772).

[75] Day v. Savadge, 80 Eng. Rep. 235, 237 (1614).

[76] *Id.* ("*[T]hough in pleading it were confessed*, that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural equity, .. is void in it self") (emphasis added). The court's holding is, by its own accounting, based in part on the fact that if thse Act has the objectionable meaning conceded by the parties, then it is void for fundamental unfairness. Hobart's claims, at this stage of the analysis, should be taken at face value. *See also* Charles M. Gray, *Bonham's Case Reviewed*, 116 PROC. AM. PHIL. SOC'Y 35, 51 (1972) (noting that the pleadings in *Savadge* could have been read as having "conceded objectionable meaning" to the statute).

[77] 88 Eng. Rep. 1592, 1602 (1702).

common law will control it, and adjudge such act to be void."[78] Philip Hamburger writes that Holt, like Coke, was committed to certain fundamental principles of justice being "natural laws" and that "Holt argued that government—including even a representative institution such as Parliament—was subject to natural law."[79]

Coke himself refers, in *Calvin's case*, with exceptional directness to the "*Lex aeterna, the moral law*, called also the law of nature."[80] Coke's observations in the opinion concerning the character of the moral laws are worth highlighting: "the law of nature is immutable, and cannot be changed…the law of nature *is part of the laws of England*," and "the law of nature was before any judicial or municipal law in the world."[81] Coke cites Aristotle for the proposition that "natural right is that which has the same force among all mankind."[82] Important use was made of "moral law" in *Calvin's case*, which held that all persons born within English territory would enjoy the benefits of English law, allowing the Scottish-born plaintiff to bring a claim against the defendants for dispossessing him of his estate. In developing by judicial fiat, a precursor for birthright citizenship, Coke asserts that the law of justice was the determining factor in the case.[83] Coke's theory, as Polly Price puts it, was based on the "reciprocal nature of the relationship placed on subject and sovereign," such that "[i]n return for the subject's loyalty, the sovereign owed 'protection and government due by the law of

---

[78] 77 Eng. Rep. 646, 652 (C.P. 1610) (holding that a college of physicians punishing unlicensed medical practice under statutory authority could not act as "judges, ministers, and parties" simultaneously). On Coke's ambitious conception of the judge's role based on natural law and natural justice, *see* Grey, *supra* note 76, at 35-36 (1972) (adducing "evidence in addition to that already available that Coke's statement in his Reports" that Coke's theory "was understood by his contemporaries as a true judicial review position.") *See also* D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80, 92 (1974); Frederick Pollock, *History of the Law of Nature* in his ESSAYS IN THE LAW 157 (1922); LOWELL, GOVERNMENT OF ENGLAND 480-488 (1908) Historians, by and large, take Coke at his word. *See, e.g.*, Grey, *supra* note 7, at 859-65 ("This is not the usual language of statutory construction; here is no mere assertion of a power to interpret statutes in light of equitable principles."); Edward Corwin, *Higher Law and Constitutional Law*, in CORWIN ON THE CONSTITUTION 111 (Richard Loss, ed., 2019) ("One thing seems to be assured at the outset - Coke was not asserting simply a rule of statutory construction which owed its force to the assumed intention of Parliament as it would today, although the statute involved in Bonham's Case was also construed from that point of view…. Coke was enforcing a rule of higher law deemed by him to be binding on Parliament and the ordinary courts alike.").

[79] Hamburger, *supra* note 74, at 2093 and 2152.

[80] Calvin v. Smith, 77 Eng. Rep. 377, 392 (K.B. 1608).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 394. *See also* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 120 (1997).

nature.'"[84] Price observes: "[t]he critical result was that allegiance to the English sovereign, and for a time, acquisition of and rights associated with citizenship in the former American colonies, were considered not to be the subject of municipal or positive law-making."[85]

The imprint on American cases from the 18th and 19th centuries of the reasoning of Holt, Hobart, and Coke, finds virtually identical expression:

> This, and other like rules, such as that *no man shall be a judge, or witness in his own cause*, that an interested person is an incompetent witness, courts have felt themselves authorized to adopt, *as the dictates of natural justice or moral law*, though they never were prescribed by any statute.[86]

The historian Edward Corwin, writing in 1928, observed:

> The receptive and candid attitude thus evinced toward natural law ideas [by Coke and other English jurists], made allies of sixteenth century legalism and seventeenth century rationalism, and the alliance then struck has always remained, now more, now less vital, in American constitutional law and theory.[87]

In *Calder v Bull*, Justice Chase holding that the Constitutional prohibition of *ex post facto* laws did not apply exclusively to criminal legislation observed "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority,"[88] offering as an example "a law that makes a man a Judge in his own cause."[89] The dissent chided the majority for following the "speculative jurists" who have "held, that a legislative act against natural justice must, in itself, be void."[90]

A commitment to "moral law" made quite a difference to American constitutional jurisprudence in the founding era—indeed, as we have already seen from the early state takings cases, like *Gardner* and *Bradshaw*, it was far from mere dicta in ways that have rather remarkably passed unnoticed in

---

[84] *Id.* at 121 (citing *Calvin's case* at 392).
[85] *Id.* at 116. *See also id.* at 114.
[86] Powell v. Waters, 8 Cow. 669, 693 (N.Y. 1826) (emphasis added).
[87] Corwin *supra* note 78, at 109.
[88] 3 U.S. 386, 388 (1798).
[89] *Id.*
[90] *Id.* at 398 (Iredell, J., dissenting). The conventional wisdom in constitutional theory is that Iredell 'won' the battle, that principles of natural justice are not *ipso facto* principles of constitutional law; though, as is widely appreciated, considerations of justice continue to infuse modern constitutional interpretation. In any case, who officially won the debate is irrelevant to the philosophical argument of Part III, which focuses on a critical mass of juridical intuitions concerning the legality of moral principles, and the fact that, at an important juncture in US history, such intuitions were widely shared. The contemporary rejection of Chase's view may be attributable to reasons orthogonal to questions in general jurisprudence. Thanks to Michael Dorf for discussion on this point.

jurisprudence. Even the classification of judicial reasoning as 'dicta' can be theory-driven, and at this early stage of analysis we should take the judges at their word—for instance, Coke when he deems the moral law argument on grounds of state reciprocity as being the determining factor in *Calvin's case*. Alleged laws of justice appear to have decisively impacted case outcomes, and judges have been transparent about their role.

A commitment to the laws of justice impacted founding era lawyering as well. In a case argued by George Mason, representing Native Americans contesting their enslavement under a Virginian act passed in 1682, Mason's primary argument was that the act was void the day it was enacted for being contrary to natural right and justice or "the laws of nature"[91]:

> The Indians of every denomination were free, and independent of us; they were not subject to our empire; not represented in our legislature; they derived no protection from our laws, nor could be subjected to their bonds. If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. How all *acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.*[92]

Mason cited Coke in *Bonham's case*.[93] With no written opinion, and without offering any explanation for its decision, the court held that the act authorizing slavery was repealed by an act of 1705, and Native American slavery was presumptively illegal in Virginia, even though as scholars have noted, the statutory argument considered by itself was weak.[94]

In the famous Quock Walker cases, described by historians as the judicial abolishment of slavery as a matter of law in Massachusetts[95], a state which was in the 1790 census the only state reportedly free of slavery, the lawyers representing the plaintiff argued that slavery was against natural rights and the "law of nature."[96] Chief Justice William Cushing in *Commonwealth v*

---

[91] Robin v. Hardaway, Jefferson 109, 114 (Va. 1772).
[92] *Id.* at 114.
[93] *Id.*
[94] *Id.* at 123. *See also* Gregory Ablavsky, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy*, 159 U. PENN. L. REV. 1457, 1487 (2011) (noting that Mason's legislative argument was "convoluted").
[95] *See* John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case"*, 5 AM. J. LEGAL HIST. 118 (1961); Commonwealth v. Jennison, Proc. Mass. Hist. Soc'y. 1873–75, at 293, 293-94 (1783).
[96] Cushing, *supra* note 95, at 124-125.

*Jennison,* the most well-known of the cases, observed that "there can be no such thing as perpetual servitude of a rational creature" citing "the natural rights of mankind, and… that natural, innate desire of Liberty."[97] James Otis arguing before a Massachusetts court against writs of assistance, which gave officials sweeping powers to search for smuggled contraband, observed that the powers violated "the fundamental principles of Law" under which one is secure in one's home, observing that "[a]s to Acts of Parliament, an Act against the Constitution is void: *an Act against natural Equity is void*."[98]

Lawyers make arguments they expect courts to be receptive to, but there is some reason to focus more directly on judicial practice, rather than lawyering sentiments, since the philosophical argument in Part III is based primarily on judicial intuitions, for reasons to be discussed. Immediately after American independence, the Virginian legislature passed an act that purported to discharge any debts owed by American citizens to British creditors.[99] The Virginia High Chancery Court, rather than invoking a constitutional provision, held that the right to money due to the "enemy" could not be extinguished by the legislature of the debtor's country because of the "laws of nature" which "men, who did not ordain them, have not power to abrogate."[100] In response to an objection drawn from the Virginian Bill of Rights that "men are not bound by laws to which they have not, by themselves, or by representatives of their election, *assented*,"[101] the court observed that the requirement of assent only applies to "positive law" and not to the "law[s] of nature [which] harmonize with our innate notions of rectitude" and "are, as Antigone says to Creon, in Sophocles, *unwritten laws*."[102] Among the unwritten and inviolable laws of justice, the court lists:

> the prohibition to kill or wound our fellow men, to defame them, to invade their property, the praecepts to deal faithfully, to make reparation for injury.[103]

2. Twentieth century onwards

In the 20th and 21st centuries, it becomes harder to find evidence of judges making use of the "laws of justice" in comparably direct terms—that is, with courts admitting categorically that there is no other law to rely on to justify

---

[97] *Id.* at 133.
[98] 2 THE WORKS OF JOHN ADAMS 521-22. *See also* Corwin, *supra* note 7, at 398.
[99] Page v. Pendleton, Wythe 211, 212-3 (Va. High Ch. 1793).
[100] *Id.* at 214 n.e.
[101] *Id.*
[102] *Id.*
[103] *Id.*

their decision, as in *Bradshaw v Rodgers*.[104] There may be several possible explanations for the shift, from courts having changed their minds about the precise relationship between law and justice, to basic moral principles having become incorporated into customs or constitutions narrowing the opportunities for invoking justice by itself,[105] to judges becoming less confident in their abilities to figure out what is morally best and, correspondingly, attuned to the risks inherent in judges interpreting the requirements of justice, risks which include, ironically, the perpetuation of injustice.[106] Moreover, bear in mind throughout this abbreviated tour through legal history the larger philosophical aim, which is an account of law, not as it appears in some particular jurisdiction, or at some point in time, but law in full generality.

The especially clear references to and use of "moral law" do not disappear entirely in the contemporary period. In a case from 1986 involving a challenge to regulations restricting Medicaid payments for therapeutic abortions, a Connecticut court which struck down the regulations as an invasion of the right to privacy, notes:

> "Natural rights consist in the enjoyment and exercise of a power to do as we think proper, without any other restraint than what results from the law of nature, or what may be denominated *the moral law*..." To be sure, the Connecticut Supreme Court in early decisions has recognized this. Our Supreme Court has held that the legislature "cannot entirely disregard the fundamental principles of the social compact. *Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void*." Welch v. Wadsworth, 30 Conn. 149, 155 (1861); Camp v. Rogers, 44 Conn. 291, 296–97 (1877) ("natural justice"); Booth v. Woodbury, 32 Conn. 118, 127 (1864) ("principles of natural justice"); Goshen v.

---

[104] 20 Johns at 106.

[105] Noting common law principles (inviolability of person and property, due process of law, unfair takings, privilege against self-incrimination) that were eventually protected by state and federal constitutions, Roscoe Pound observes:

> If Coke were to come among us… he would be thoroughly at home in our constitutional law. There he would see the development and the fruition of his SECOND INSTITUTE. All that might surprise him would be that so much had been taken from and made of his labors with so little recognition of the source.

*Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 342 (1905).

[106] Michael Dorf, in conversation, points to "guilt by association" with *Lochner*-era invalidation of progressive legislation using natural law arguments. *See, e.g.*, Justice Black's dissent in *Griswold v. Connecticut*, 381 U.S. 479, 514-15, 522-25 (1965) (objecting to a natural rights theory of the due process clause, arguing that it threatens the "tranquility and stability of the Nation"). *See also infra* Part II.C.

Stonington, 4 Conn. 209, 225 (1822) ("vested rights").[107]

To emphasize, the court states in markedly direct terms a willingness to deem legislation void "irrespective of constitutional restraints" if an act violates "natural rights" encoded in "what may be denominated the moral law." In a case holding that the criminal defendant's burden to prove a defense of insanity is consistent with basic principles of fairness *and* the Connecticut constitution, the court observes, approvingly, that a commitment to natural laws of justice "pervaded eighteenth century legal thought throughout America, including Connecticut."[108]

Such examples can be multiplied. A New York judge once refused to include a stepmother within a statutory provision obliging "stepparents" to support their stepchildren because, according to the judge, the legal obligation lacked "necessary foundation of moral law."[109] A Puerto Rico court interpreting a provision so as to avoid gender-based discrimination, observes that "[l]aw has a foundation in morals, and juridical rules are a derivation of ethical and moral laws."[110] A Kentucky court observes "certain ethical values … are based on the moral law and expressed through the natural and civil law."[111] In a case involving the interpretation of a statute requiring that property be assessed for tax purposes based on its "present true and actual valuation" and "fair market value," a Connecticut court, upholding the state's use of an appraisal standard based on reproduction costs for an unsold estate for which there was no market, observes:

> Municipalities cannot properly function without income. Their sole income is derived from the proceeds of taxes…. This necessarily means that if individual assessments are reduced the tax rate must be increased. The net result, therefore, would be that the vast majority of taxpayers-the men and women who own modest homes-would have to bear additional burdens because of an increased tax rate…This court, borrowing from Bentham's famous principle, makes this observation: In the decision of certain types of cases that decision which will be productive of the greatest happiness of the greatest number of people *is the correct decision because it finds support in the principles of moral law* [a citation to Jeremy Bentham for the

---

[107] Doe v. Maher, 515 A.2d 134, 149 (Conn. 1986) (emphasis added).

[108] *Joyner*, 625 A.2d at 813.

[109] Glowsky v. Gitlin, 25 N.Y.S.2d 957, 959 (1941).

[110] Milan Rodriguez v. Munoz, 10 P.R. Offic. Trans. 790, 802 (1981) (reading a provision that referred to "men" as referring to both men and women to avoid unconstitutionality).

[111] DeGrella v. Elston, 858 S.W.2d 698, 712 (Ky. 1993) (holding that withdrawal of life-support is an unconstitutional infringement on individual's right to life absent "clear and convincing evidence" that the patient would be in favor).

Principle of Utility omitted].[112]

3. Dissent

The evidence, while significant, should not be overstated. References to moral law and its binding force in broadly constitutional and administrative adjudication in the kind of express terms I have highlighted were notable, in the sample of Anglo-American constitutional case law examined, but rare. This should be unsurprising. Most cases are unlikely to implicate basic matters of justice. And the existence of universally applicable moral laws has always been controversial among American jurists, even as it "pervaded eighteenth century legal thought throughout America," as one court notes,[113] a fact that will be of considerable relevance to the broader argument. Moreover, a *common law* inference of a moral principle as law *ex proprio vigore* can be superseded by statute, whereas a constitutional inference can only be superseded by a difficult to implement constitutional amendment. Accordingly, free-standing use of "moral law" in constitutional adjudication cannot be expected to occur very frequently, considering the stakes involved. The constitutional cases highlighted are so notable precisely because there are enough such prominent instances to point to a larger phenomenon of jurists embracing a distinctly moral legality.

The precise character of the controversy over the supra-constitutional "laws of justice" is worth noting, as reflected in the reactions to the New York state constitutional case discussed earlier, where the court derives a compensatory duty constraining legislative takings from a law of natural equity.[114] The dissent in *Quimby*, notes that "New Hampshire is not the only state in which the constitutional view has been darkened by doctrines of natural justice, and theories of the highest law."[115] In overruling a court's refusal on grounds of "moral law" to force a stepmother to support her stepson under a statute clearly obliging stepparents, the court observed that "[i]t can hardly be argued that every statute must find its foundation or basis in moral law."[116] A Texas court, objecting to the application of moral law as the law of the land, observes:

> There is a marked difference between the moral law and municipal law… …the precepts of the moral law, except as the municipal law has embodied them and diffused them through its own doctrines and

[112] Eitingon v. Town & City of Stamford, 11 Conn. Supp. 241, 245–46 (Ct. Com. Pl. 1942), *aff'd*, 34 A.2d 878 (Conn. 1943) (emphasis added).
[113] *Joyner*, 625 A.2d at 813.
[114] *Gardner*, 2 Johns. Ch. at 166.
[115] *Quimby*, 54 N.H. at 647.
[116] Dep't of Welfare of New York v. Siebel, 6 N.Y.2d 536, 542–43 (1959).

statutes, are left for their enforcement to the individual conscience.[117]

In a case where the Supreme Court held that the garnishment of wages without proper notice violates due process rights, Justice Black's dissent objected that the holding "savors too much of the 'Natural Law,' 'Due Process,' 'Shock-the-conscience' test of what is constitutional for me to agree to the decision."[118]

A recent dissent in *Alden v Maine*, which involved the question of whether private suits can be brought against nonconsenting states in state court, characterized the majority as basing its holding on "natural law."[119] The majority denied the charge insisting that "the contours of sovereign immunity are determined by the Founders' understanding, not by the principles or limitations derived from natural law."[120] Justice Ginsberg, writing for the dissent, did not relent:

> My object, however, is not to call names but to show that the majority is wrong, and in doing that it is illuminating to explain the conceptual tradition on which today's majority draws, one that can be traced to the Court's opinion from its origins in Roman sources. I call this conception the "natural law" view of sovereign immunity….[121]

These and other examples of "natural law" skepticism hardly need rehearsing. The idea that principles of justice could be the "law of the land" as a matter of basic and supra-constitutional legal fact has been controversial among American jurists. But the fact of controversy does not eliminate the need to explain why a great many jurists have found the existence of universally applicable basic laws of justice intuitive. It does not eliminate the burden on legal theorists to explain why, even if these judges were mistaken, their mistakes have been seen, internally by fellow jurists, as errors worth engaging with, not radical errors that call into question their place in the legal system. A notable feature of the resulting disagreement is that judges skeptical of the "laws of justice" do not accuse their peers of being mistaken about local legal customs or adjudicative traditions, but of being confused about what law is.[122] Alternatively, they articulate entirely practical fears about judges interpreting and applying the requirements of justice, fears that are orthogonal to questions in general jurisprudence.[123] Their disagreement is not so obviously an instance of "theoretical disagreement" in Dworkin's

---

[117] Westerman v. Mims, 227 S.W. 178, 184 (Tex. 1921).

[118] Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 350 (1969). *See also Griswold*, 381 U.S. at 522-25.

[119] 527 U.S. 706, 733 (1999).

[120] *Id.* at 735.

[121] *Id.* at 768.

[122] *See* case cited *supra* note 115.

[123] *See supra* note 106 and accompanying text.

sense, either, about the grounds of legal validity (or *why* the law is what it is).[124] The disagreement appears to be brutely intuitive—a clash of basic legal intuition concerning what counts as law—though I shall argue for this precise interpretation more systematically in Part III.

### *B. In Anglo-American common law*

The cases considered so far have involved broadly constitutional and administrative matters, with judges invoking the "laws of justice" as supra-constitutional constraints on the legislature. But there is also evidence of judges referring to moral principles as *bona fide* law in common law cases traditionally associated with the courts of equity. The evidence of juridical usage from such cases is harder to interpret since a popular understanding of the equitable courts in England was that they were expressly authorized to invoke 'equitable' considerations to resolve disputes.[125] The English Judicature Act of 1873 merged the courts of law and equity, but the general assumption that equitable principles have a special status in law persisted.[126] What that "special status" amounted to, however, has always been controversial and thoroughly debated by English jurists. As Stuart E. Prall writes, there was, on the one hand, a view of the equitable courts as "essentially an administrative tribunal seeing that justice was done where there was no law,"[127] but there was an alternative and similarly influential view, espoused, for example, by Christopher St. Germain, in his famous treatise on the relationship between English common law and conscience, *The Doctor and Student*, that "the Chancellor's jurisdiction was well within the framework of the laws of England"[128] involving the discovery of "exceptions" to the positive law due to the "*law of reason*… the which exception is secretly understood in every general rule of every positive

---

[124] DWORKIN, LAW'S EMPIRE, *supra* note 22, at 4-6 (describing theoretical disagreement).

[125] The origins of equity jurisprudence lie in the deliberate expansion of the powers of English courts, through the development of the Chancery Courts of England, to provide remedies that were not otherwise available through the restrictive rules of the common law. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105-6 (4th ed. 2002). American states tended to allow the same courts to hear cases at law and equity to avoid the complicated nature of the bifurcated English system, even though there remained a conceptual separation. *See* WILLIAM Q. DEFUNIAK, HANDBOOK OF MODERN EQUITY 6-7 (5th ed. 1956).

[126] *See, e.g.*, C.M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICAN AND ENGLAND § 44, at 45 (1897) ("While some of the American Colonies and States, following the example of England, did in fact vest the powers of equity in courts which were entirely distinct from the courts of law, the tendency in America was to delegate both the equitable and the legal jurisdiction to the same judges.").

[127] Stuart E. Prall, *The Development of Equity in Tudor England*, 8 AM. J. LEGAL HIST. 1, 18 (1964).

[128] *Id.* at 4 (interpreting CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT).

law."[129] It is, indeed, easy to multiply examples of English cases, several of historic importance, where both courts at law and equity refer to equitable principles as "laws of justice," citing to treatises arguing for universally applicable "natural laws."[130]

It is, likewise, of considerable relevance that judges, especially in the United States where the same courts often heard cases at law and equity,[131] have referred to equitable principles as "moral laws" or "laws of justice" or "natural law," when invoking them 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.[132]

---

[129] *Id.* (citing DOCTOR AND STUDENT) (emphasis added).

[130] *See, e.g.*, Cornfoot v. Fowke, 151 E.R. 450, 458 (1840) ("In the case of Hodson v. Williamson (1 W. Black. 463), Mr. Justice Yates lays it down as a general proposition, that "the concealment of material circumstances vitiates all contracts, upon the principles of natural law." If this be true, can it be doubted that the false representation of a material circumstance also vitiates a contract?"); Millar v. Taylor, 98 E.R. 201 (1769) (holding that the Statute of Anne did not extinguish common law rights giving publishers a perpetual right to publish a work for which they have acquired rights); *id.* at 229 ("the claim of authors to a perpetual copy-right in their works, is maintainable upon the general principles of property." And *this, I apprehend, was a necessary ground for the plaintiff* to maintain; for, however peculiar the laws of this and every other country may be, with respect to territorial property, I will take upon me to say, that *the law of England, with respect to all personal property, had its grand foundation in natural law*."); *id.* at 223 ("It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work. Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locupletiorem. And Lord Coke (1 Inst. 142) says "The common law is sometimes called right, common right, common justice."); Gurney v. Hardenberg, 127 E.R. 923 (1908) (holding that a defendant's property could be levied who was not present in England but conducted trade through agents) *id.* at 924 ("it is strange that such a practice should have so long prevailed in this court, since however it is established, it must prevail now, but it appears to me repugnant to the principles of law and the principles of justice. *The same thing is law and justice in this court*, which is in others: there, if the Defendant is abroad, the Plaintiff must proceed to outlawry against him, and when he comes home, he may reverse the outlawry and have his goods restored."); Wright v. Simpson, 31 E.R. 1272, 1275 (1902) ("*[T]he equitable jurisdiction is more enlarged; proceeding upon principles of universal justice*; which must not be defeated by slight obstacles; as in the cases, in which equity has interposed in respect of public policy or public justice. Formerly Courts of Law would not advert to such considerations: of late they have made some progress in that way; but they have not gone the length of Courts of Equity.").

[131] *See* John H. Langbein, *The Disappearance of Civil Trial*, 122 YALE L.J. 522, 541 (2012) ("Some states, such as New York and Delaware, replicated the English system of separate courts of law and equity. In other states, notably Massachusetts and Pennsylvania, and in the federal court, one court administrated both systems….").

[132] *See e.g.*, Houston v. Walton, 129 P. 263, 271 (Colo. 1912) ("[The common law] is the result and embodiment in the unwritten law of the centuries-long efforts of the courts to make practical application of the principles of the moral law to the affairs of men."); 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

As a Connecticut court recently observed: "common law meant more than judicial precedent and case law; *it included the natural law as well*."[133] Corwin notes "the close connection between equity and the law of nature in the fifteenth and sixteenth centuries" in English common law, observing that: "while equity never served the purposes of a higher law, restrictive of royal or Parliamentary authority… the adaptability of the common law was referred in the nineteenth century to its resting upon the law of nature."[134]

Indeed, not all the equitable principles invoked as moral law were previously recognized or imported from English or American custom. In *Wright v Dickinson*, the plaintiff sought restitution for monies paid under a contract for the purchase of land which the defendant did not have title to convey.[135] The court ordered restitution notwithstanding the fact that the plaintiff had entered the property to cut timber. According to the conventionally accepted equitable principle, the person seeking restitution must offer to "place the other party in statu quo."[136] The court noted that because returning the property to its original state was impossible and the plaintiff was willing to pay for the timber, restitution was appropriate since "[t]hat is the *law of reason*, and it is the *law of justice*. If the current of authority is the other way… I cannot yield my assent to the doctrine."[137]

The U.S. Supreme Court in early cases has sometimes described principles of justice as part of the law. In *Hughes v Trustees of Town of Clarksville*, the Court notes "the sound principles of morality and justice which belong to the law."[138] In a contracts case from the same period, the Court notes that a right to performance under a contract is to be:

> found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three,—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law.[139]

---

(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.").

[133] *Joyner*, 625 A.2d at 814 (1993) (emphasis added).

[134] Corwin, *supra* note 7, at 369.

[135] 67 Mich. 580 (1887).

[136] *Id.* at 590.

[137] *Id.*(emphasis added).

[138] Hughes v. Trustees of Town of Clarksville, 31 U.S. 369, 384 (1832).

[139] Ogden v. Saunders, 25 U.S. 213, 282 (1827). The reference to "positive law" separately suggests that the Court very much thought of juridical law, within the body of common law,

Likewise, state courts have described the 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."[140] 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."[141] In a classic contracts case, *Bailey v. West*, the court, expounding on quasi-contractual principles, explains that a voluntary conferral of a benefit without 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.[142] 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."[143]

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 is to be made of the judgments are not yet being raised. The point, for now, is simply to canvas relevant evidence of juridical claims. Taken at face value, the evidence suggests that a significant number of courts in the eighteenth and nineteenth centuries thought of the common law as consisting of more than "judicial precedent and case law" insofar as it was thought to include natural "laws of justice" as well.[144]

### *C. In German, classical Roman, & early modern European law*

A philosophical theory of law purports to explain law *as such*, not law that is local to any particular jurisdiction or time, but law and our concept of law in full generality. There may be limits to the insights to be gleaned, but it has nevertheless seemed a worthwhile philosophical task to explore the contours of law and legal practice generally. Given this, it would be a mistake for general jurisprudence to draw all its lessons from judicial practices of a

---

as including more than just positive law. In the 20th century, the Court's scope of common law cases shrunk following the shift from the regime of *Swift v. Tyson* to that of *Erie Railroad Company v. Tompkins*. 304 US 64 (1938).

[140] Hammond v. Allen, 11 F. Cas. 382, 385 (R.I Cir. Ct.1836).

[141] *Id.* (emphasis added).

[142] In another famous contracts 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." 168 So. 196, 199 (Ala. 1936).

[143] Seeley v. Peters, 5 Gil. 130, 151 (1848).

[144] *Joyner*, 625 A.2d at 814.

single jurisdiction (or at a single time) since what is learned may not fully generalize.

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. "Gerechtigkeitsgedanken" or "principle of justice" appears in more than the maximum number of reportable cases (4000).[145] "Sittengesetz(e)" or "moral law(s)" appears in 854 cases.[146] 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."[147] Another court observes: "Art. 2 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."[148] Yet another observes: "There is a higher, unwritten right above all set law. *Man-made law cannot claim validity if it goes against natural law*."[149] Ernst von Hippel provides a broad range of examples of German courts invoking "natural law," "moral law," "material justice," and "suprapositive principles of justice which underlie all written law."[150] For instance, in one case involving physicians who defended their participation in "experimental killings" by appealing to express authorization under the laws of the Third Reich, the appellate court held:

> Such a way of thinking would not do justice to the true character of the National Socialist "law." *Law must be defined as an ordinance or precept devised in the service of justice* [citing the legal philosopher Radbruch]. Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a 'lawless law [unrichtiges Recht].' An accused may not justify his conduct by appealing to an existing law if this law offended against certain *self-evident precepts of the natural*

---

[145] Beck-online search: "Gerechtigkeitsgedanken", limited to "Rechtsprechung" [case law] (last visited Aug 1, 2020).

[146] Beck-online search: "Sittengesetz", limited to "Rechtsprechung" [case law] (last visited Aug 1, 2020)

[147] Oberlandesgericht Brandenburg [OLG Brandenburg] [Brandenburt Highest Regional Court] Feb. 10, 2003, 9 WF 191/02.

[148] Landesgericht Zweibrücken [LG Zweibrücken] [Zweibrücken Regional Court], Nov. 3, 2003, Qs 10/03 & Qs 11/03 (Ger.).

[149] Schwurgericht Köln [SchwurG Köln] [Cologne Jury Court], Oct. 10, 1951, 24 Ks 1/51, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 358, 1952 (Ger.).

[150] Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal* Republic, 42 NAT. L.F. 106, 113, 111-115 (1959). *See also* Jeffrey B. Hall, *Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany*, 9 GERMAN L.J. 771 (2008) (arguing that German jurists since the Third Reich conceive of the Basic Law (Grundgesetz) as founded on an "objective order of value") (2008).

> *law*. That is the situation here.[151]

Another court described the regulations of the Third Reich as having:

> lacked the quality of laws because *they violated those basic principles which are independent of the recognition of governments and stronger than any enactment by the government*. Regulations issued by the government which do not even attempt to bring about true justice do not create law; and actions which conform to them remain wrong.[152]

The Federal Constitutional Court in 1951 went so far as to declare:

> Blind adherence to the principle that the original framer of the Constitution may arrange everything to suit himself would be tantamount to a relapse into *legal positivism, a way of thinking that jurists have long since abandoned, both in theory and in practice*.[153]

Von Hippel's examples present German jurists after the second World War as strongly committed to a necessary connection between law and basic justice. Likewise, Kiff Adams notes that the "conflict between positivism and natural law is not new" to German law.[154] Adams provides various examples, including the conviction by courts of East German guards based on "a higher moral law" for acts that were expressly authorized under East German law, such as shooting to kill those attempting to cross the border.[155]

The intuition that the basic requirements of justice exhibit a universal form of legality independently of local practices was even more widely shared in pre-modern legal systems. Justinian's *Institutes*, which summarized ancient Roman law for new law students in the sixth century, begins by defining "jurisprudence" as "the science of the just and the unjust."[156] Justice is in turn defined in terms of three principles "To live honestly, to hurt no one, and to give everyone his due."[157] What follows is an "exposition of the law of the Roman people," introduced thusly:

> The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire; private law, that which concerns the individuals. We are now to treat of the latter, which is composed of three elements,

---

[151] Von Hippel, *supra* note 150, at 111 (citing 2 SUDDEUTSCHE JRUISTEN ZEITSCHRIFT 521 ff. (1947)) (emphasis added).
[152] *Id.* at 112 (citing 1 ENTSCHEIDUNGEN DES BUNDESORICHTSCHOFS IN STRAFSACHEN 177 (1952)) (emphasis added).
[153] *Id.* (citing 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGERICHTS 18 ff. (1952)) (emphasis added).
[154] Kif Augustine Adams, *What is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271, 297, 301 (1992).
[155] *Id.*
[156] J. INST. 1.1.1. (T.C. Sandars trans., 1883).
[157] *Id.* at 1.1.3.

> and *consists of precepts belonging to natural law, to the law of nations and to the civil law*.[158]

It warrants emphasis that the text was intended as an elementary textbook for new students of law, not a philosophical treatise. The "law of nature" is characterized in terms of "rules prescribed by natural reason" and as "observed by all peoples."[159]

Along similar lines, the Roman jurist Ulpian writes in the *Digest*, "[a] law student at the outset of his studies ought first to know the derivation of the word *jus*. Its derivation is from *justitia*. For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness."[160] Ulpian proceeds to give an account of Roman "private law" in terms of a a "tripartite" division, "being derived from principles of jus naturale [natural law], jus gentium [law of nations], or jus civile [civil law]."[161] Meanwhile, the "civil law" which is "derived from statutes, plebiscites, decrees,…" is described as:

> that which neither wholly diverges from the jus naturale and jus gentium nor follows the same in every particular. And so whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, jus civile, civil law. 1. This law of ours, therefore, exists either in written or unwritten form; as the Greeks put it, "of laws some are written, others unwritten."[162]

John Norton Pomeroy in his treatise on the courts of equity notes that in pre-Christian Rome, magistrates construed Roman law as consisting of laws conventionally followed among nations as well as the unwritten laws of morality.[163] Pomeroy's observations 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 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

---

[158] *Id.* at 1.1.4 (emphasis added).
[159] *Id.* at 1.2.1.
[160] DIG. 1.1.1, pr (Ulpian, Ad Edictum 18) (C Monro trans., 1904).
[161] *Id.* at 1.1.2.
[162] *Id.* at 1.6.1, pr.
[163] POMEROY, *supra* note 16.

> 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.[164]

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. Moreover, the legality of equitable principles was discussed alongside the legality of rules deriving their legal force from their conventional character across nations, even when moral and conventional requirements seemed to coincide.[165] Finally, the jurisconsults conceived of their task as law discovery.[166] Similar observations have been made by historians concerning the legal culture of Ancient Greece.[167]

---

[164] *Id*. (emphasis added).

[165] *Id*.

[166] *Id*. *See also* Peter G. Stein, *Roman Law, Common law, and Civil Law*, 66 TUL. L. REV. 1591, 1591-2 (1991) (noting that Roman law was "built up through the discussion and decision of cases, and the law was perceived as essentially law discovered through debates among experts over particular sets of facts").

[167] As one commentator notes, the idea that a "natural law" enforced "the principles of natural right" exercised "a profound influence on the course of ethical and juridical thought." John W. Salmond, *Law of Nature*, 11 L. Q. REV. 121, 124 (1895). In *Simon v. Philip Morris Inc.*, the court considering a conflict of laws issue discusses work by the historian Freidrich 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?

124 F. Supp.2d 46, 63 (2000). 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 observations echo Aristotle: "[T]he laws of natural justice… are universally valid above all human regulations and legally valid."

Ancient Roman law, in addition to having left its mark on English and American common law,[168] strongly influenced civil law on the continent. Based on an extensive study of court decisions on the European continent from the late 15th to the 18th centuries, the historian Richard Helmholz observes:

> The law of nature, taken up and used as a source of legal argument and decision, *appeared within virtually every collection of decisions and consilia consulted*. … References to the law of nature were… clear and repeated in the reports—enough to show that it was not simply abstract jurisprudential theory.[169]

One of Helmholz's examples is a case involving unowned property belonging to the first possessor—the holding "was supported by a citation to the law of nature as well as a text from the digest."[170] In a Florentine case, "a prior precedent's apparent violation of the law of nature was given as the reason for *not* following it."[171] On Helmholz's assessment of the caselaw, "[n]atural law was regularly cited in the law of civil and criminal procedure" and "citations of both sources of law made a stronger case."[172]

Helmholz suggests that European lawyers were taught the legality of principles of justice discovered through natural reason:

> Evidence found in the early European deciones and works of praxis shows the relevance of the law of nature to what happened in courts. Lawyers put into practice what they had first learned as students. In giving advice and in arguing cases, they drew upon the experience with natural law they had acquired. It served various ends: to create presumptions to interpret statutes, to evaluate commercial transactions, to solve disputes within a family, and to restrain arbitrary exercises of power. … virtually always, it was cited together with precedents from the positive law or ius gentium… overlap between positive and natural law was actually a sign of the influence of the latter, not an indication of its lack of consequence…. Where no positive law to govern a particular subject could be found, recourse

---

NICOMACHEAN ETHICS V/ vii, 1134b, 25-1135a 15 (W.D. Ross trans., 2009).

[168] On the impact of Ancient Roman Law on English and American law, *see* Edward D. Re., *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 468 (1961) (noting that Roman law authorities "were habitually cited in the common law courts of Britain… as primary and practically conclusive"); Fritz Pringsheim, 5 CAMBRIDGE L.J. 347 (1935); Charles P. Sherman, *The Romanization of English Law*, 28 YALE L.J. 318 (1941) (noting that many of the most famous principles of English law have Roman origin).

[169] HELMHOLZ, *supra* note 7, at 42 (emphasis added).

[170] *Id.* at 44.

[171] *Id.*

[172] *Id.*

was to be hard to the law of nature.[173]

Moral law's grip on the imagination of jurists and legal practitioners through the ages, who, as Helmholz notes could hardly have all been immersed in abstract jurisprudence, indicates how intuitive and familiar its existence must have seemed to many of them.[174]

### *D. Synopsis*

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

1. Judges (and other legal officials) throughout legal history have attributed legality to what they take to be moral principles or requirements in a natural context for the use of legal terminology, using these alleged laws of justice to provide compensation for property taken in the absence of constitutional requirements, to preclude states from interfering with financial obligations owed to foreign creditors, to ensure impartial adjudication, to determine equitable remedies, to establish rights to protection under law, to convict agents perpetrating gross injustice under the authority of enacted law, and in various other ways.
2. These jurists do not explain the legality of moral principle by adverting to social facts, judicial choice, or more fundamental laws; on the contrary, they seem to treat moral laws as self-evident, unchangeable, and applicable *ex proprio vigore*, expressly distinguishing moral law from enacted laws and customary laws.
3. Judges have cited the "laws of justice," and the ethical treatises which purport to clarify their content, when using them to decide cases.
4. Such claims of legality are made infrequently in contemporary caselaw and have been controversial among legal officials; however, the claims were widespread in earlier times.
5. The juridical idea that "what is good and equitable" is law and a basic constraint on laws (the "law of laws") can be traced at least as far back as to an Ancient Roman conception of the principles of justice as *lex naturae*, the law of nature, which medieval and

---

[173] *Id.* at 79-80.

[174] *Id.* at 13 (noting that this "does not prove that [they] knew nothing" of legal philosophy). To reiterate a point made at the outset, that some proposition has seemed intuitive to many hardly determines whether it is in fact true. The paper's claim is not that these judges could not have been mistaken; it is that a theory of law that attributes widespread error to experts immersed in legal practice needs to charitably explain the errors it attributes. *See infra* Part III.C.

> early modern civil lawyers likewise conceived of as universally applicable juridical law revealed through reason. The view appears to have influenced early American constitutional and common law jurisprudence, as reflected both in prominent judicial holdings and founding era lawyering.

We have managed to avoid taking a stand on the nature or normative content of moral principles—for example, whether a moral principle's content can be captured in terms of a rule conventionally followed; and what it means for the outcome of a case for a principle of justice 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 entirely side-stepped, as we shall see next, in considering whether a plausible positivist-friendly interpretation of the judgments is on offer, a question to which we now turn.

## III. POSITIVISM'S TRILEMMA

The record from Part II provides the basis for a novel critique of legal positivism. A philosophy of law needs to systematically explain why principles of justice have seemed, whether rightly or wrongly, to be legal—legal, that is, independently of local customs—to jurists across a range of jurisdictions. Whatever turns out to be its ultimate basis, a remarkably consistent pattern of moralistic and universalist intuitions about law invites systematic explanation, a pattern that, as we have seen, even Ronald Dworkin, famous for emphasizing the role of moral principles in adjudication, neglected to fully characterize. The work of showing positivism's explanatory inadequacy in relation to this well-observed legal phenomenon means shifting gears, from caselaw and the historical record, to philosophical analysis.

Recall that the core positivist thesis being tested, for its fit and explanatory power, is that, necessarily, for any rule of law in any legal system, the rule's legality is ultimately determined by jurisdiction-specific social facts—roughly, what we do around here, or the rules we follow as a matter of custom or convention. There appear to be three approaches the positivist could take in relation to the observed practice:

(A) Argue that the judges beholden to "laws of justice" were correct in their legal judgments, although, despite appearances, they were correct precisely because jurisdiction-specific legal customs licensed the classification of moral principles as law.

(B) Argue that the jurists in question were being insincere: they did not *really* intend the literal content of their assertions (that there are universally applicable moral laws).

(C) Argue that jurists throughout the ages were simply in error—wrong, that is, about law.[175]

The positivist can adopt a pluralistic approach—for example, by explaining some of the juridical claims as true, others as insincere, and still others as mistaken. But pluralism comes with its own costs and tensions. Indeed, the possibility of pluralism is no mark against the taxonomy or, for that matter, the overall argument when one of its central points is that explanatory disunity in relation to a markedly stable legal phenomenon undercuts the account's plausibility.

The three explanatory strategies are all drawn from positivist replies to Dworkin's original challenge. The drawbacks of each are best seen in the light of the evidence collected in Part II. Indeed, many of Dworkin's own counter-replies can be both strengthened as well as supplemented with novel criticisms of positivist conventional wisdom based on the record.

A caveat before we begin. Even if the evidence tends to disconfirm positivism, it would be a mistake to infer from it that moral principles *do* have legal force *ex proprio vigore* and independently of the social facts. While it might be tempting to suppose that the concept of law has some moral content built into it (it may well), as Dworkin and others have suggested, the evidence base, selectively culled for disconfirming purposes only, is plainly not strong enough for such a conclusion. Jurists have found all kinds of claims, whether about law or otherwise, to be intuitive at various times, and they are often wrong.[176] The challenge for the theorist who convicts large numbers of

---

[175] I assume the positivist will not want to retreat to an admission that positivism is a parochial legal ideology, and that these other 'legal' systems were using 'law' in some different sense. The move would amount to a major concession. *See infra* notes 239-240 and accompanying text.

[176] I have *not* been using 'intuition' in the factive sense whereby if *p* seems intuitive, it is the case that *p*. Intuition in the broad and intended sense is just a deeply held conviction, that may or may not be false. The fact hardly needs to be stated that, quite apart from getting the law of the land right, judges have gotten matters of justice very wrong over the course of human history. As Helmholtz observes, the law of justice as applied by courts:

> …did not abolish slavery. It did not end judicial torture. It did not require payment of a 'living wage.' It did not prevent the oppression of native peoples in the Americas. It did not prevent what by our lights seem to have been serious miscarriages of justice.

*Supra* note 7, at 177-178. Judges are fallible like the rest of us, beholden to institutional norms and self-interest. Moreover, most human societies have been unknowingly guilty of serious wrongdoing. What is of relevance to the argument is the cumulative evidence that jurists have treated as law what they appear to have sincerely believed to be principles of justice, even if they might have only dimly seen what is in fact just. Their moral intuitions could not have been entirely off the mark given that many principles of fairness historically treated as law have become constitutional, statutory, or customary law, as the discussion in Part II illustrates. Indeed, it would be moral hubris to dismiss all of legal history as *a*moral ideology, or to think that our moral achievements today owe nothing to the past. I am

experts of error on the basis of philosophical enquiry into the nature of law, is to explain *why*, based on the theorist's account of the relevant subject matter, expert intuition should be so mistaken. I motivate this explanatory demand systematically, in what follows, though like many others I find it intuitive.[177] As Ernie Sosa observes more generally, "[u]nless we can cite something different in the conditions or in the constitution of [those who we charge as mistaken], doubt will surely cloud the claim to competence by those who *ex hypothesi* are getting it right."[178] There are indeed different ways of charging people with basic mistakes on grounds of high theory, and some ways turn out to be undermotivated and self-effacing.

### *A. Problems for conventionalism*

Before reaching for an error-theory, we can try to fit the legal judgments into the conceptual categories of positivism. A familiar interpretive strategy 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 custom or convention which licenses such classifications.[179] |

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 legal conventions. Error-theoretic interpretations will be considered separately in III.C.

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.[180] In classifying ('declaring' might be more accurate) moral principles 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

indebted to Martha Nussbaum for an exchange on this point.

[177] *See, e.g.*, Ernie Sosa, *Experimental Philosophy and Philosophical Intuition*, 132 PHIL. STUD. 99 (2007) ("But how plausible can [a theory] be, absent some theory of error that will explain why so many are going wrong when we are getting it right?"); sources cited *infra* note 242 and accompanying text. A theory of some X is implausible if it cannot explain basic expert intuitions about X, even intuitions it deems mistaken.

[178] *Id.*

[179] *See, e.g.*, COLEMAN, *supra* note 12; WALUCHOW, *supra* note 12; Hart *supra* note 46.

[180] *See, e.g.*, Raz, *supra* note 13; SHAPIRO, note 13.

legality of moral principles prior to any individual judge's recognition of it.[181] Green and Adams summarize the view thusly: "moral principles may be implicit in the web of judge-made law, for instance in the common law principle that *no one should profit from his own wrongdoing*. Such moral considerations, inclusivists claim, are part of the law because the sources make them so."[182] For instance, the moral principles invoked as "law" by European courts in the 15th to 18th centuries were, perhaps, customarily embraced as law in the community, or, perhaps, courts felt authorized to invoke moral principles articulated in, say, ethical treatises by Grotius and Pufendorf, because the customary rules of adjudication (or law-making) in the relevant jurisdictions authorized them to do so. The various forms of conventionalism can be considered together 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.

The conventionalist account of judicial behavior may have been a powerful answer to the cases highlighted by Dworkin, of common law judges relying on principles like "no one should profit of his own wrongdoing." There is nothing in the statements made by the court in the relevant cases that would contradict a conventionalist account of the practice.[183] But the account cannot possibly be a satisfying explanation for the range of cases I have highlighted. The contextual and linguistic evidence does not support the assumption that judges have treated moral principles as law because those principles have been customarily embraced. Neither does the evidence support the assumption that judges have felt authorized to invoke moral law because local jurisdiction-specific customary rules of adjudication and law-making have authorized them to do so. We can count the reasons why.

First, judges do not advert to social facts to explain the legality of the principles of justice.[184] Their failure to do so is significant because in general judges readily appeal to background agreements or customary 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 explanatory connections explicit and are adept at doing so.[185] So, the

---

[181] *See, e.g.*, WALUCHOW, *supra* note 37.

[182] GREENE & ADAMS, *supra* note 2.

[183] *See supra* note 40 and accompanying text.

[184] *See supra* Part II.

[185] Furthermore, judges know how to deem a rule or imperative "extra-legal" or as stemming from "powers outside of law." See, for example, Philip Hamburger's account of the treatment

conventionalist owes us an explanation for why judges invoking the "laws of justice" are not 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 are always 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 controversial in, for example, 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.[186] Neither do they indicate that the authority to invoke moral law is included in adjudicative powers conferred on judges as a matter of 'local' custom.

Second, and more damningly, the proposal *flatly contradicts* what judges have historically stated in no uncertain terms about the nature of the alleged moral laws. Judges have described the "laws of justice" as an original basis for deciding cases while invoking moral principles that have not been previously recognized or applied by courts.[187] In the New York state takings case described earlier, the court admits that there is no support to be found in the state constitution for the alleged law of justice obliging the state to compensate a private party for publicly possessed property.[188] The constitution is acknowledged as being "silent" on the matter.[189] The "common law" construed as a "mere mass of customs," in the words of one New Hampshire court, cannot explain the use of the "laws of natural justice" to constrain the legislature in the eighteenth and nineteenth centuries.[190] Furthermore, the proponents of moral law seem entirely willing to declare that "no power on earth"—which includes, one assumes, the powers of shifting legal conventions in the jurisdiction—could undercut the force of the

---

by English courts of binding Royal prerogatives. LAW AND JUDICIAL DUTY 22-26 (2008). With or without statutory foundations, the King's prerogatives were deemed extra-legal imperatives.

[186] *See supra* Part I.A.3.

[187] *See, e.g.*, *supra* notes 59, 62, 64 and accompanying text.

[188] *See, e.g.*, *supra* note 59.

[189] *Quimby*, 54 N.H. at 605, 647 (summarizing the use of "higher law" in New York and New Hampshire); *See also* Cairo & F.R. Co. v. Turner, 31 Ark. 494, 500 (1876) ("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.").

[190] *Quimby*, 54 N.H. at 636.

laws of justice or the judge's responsibility to apply them.[191] "Man-made law," we are told, cannot go against the moral law.[192] The unwritten laws of justice, according to one court, do not require the "assent" of a legislature or the general public to be juridically and legally binding on both, and they apply universally, not specifically to one jurisdiction.[193] Even in the contemporary period, various courts have invoked "moral law… irrespective of constitutional restraints."[194] Recall the direct terms in which Coke describes the "*Lex aeterna*, the moral law, called also the law of nature," as "immutable, and [that] cannot be changed," and also that "the law of nature is part of the laws of England."[195]

Likewise, when early Roman magistrates and jurisconsults reasoned about why moral principles and requirements are locally applicable 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 'laws of nature,' even where customary and moral requirements coincided.[196] And, as Helmholz notes, European courts in the early modern period similarly distinguished principles they believed were implicit in custom from principles believed to be the laws of reason and justice with universal application, the latter sometimes contradicting the prevailing customary norms.[197] Moreover, "overlap between 'positive' and natural law" was seen as "a sign of the influence of the latter, not an indication of its lack of consequence."[198]

Indeed, it seems quite anachronistic to superimpose on these jurists a commitment to only recognizing the legal validity of moral principles if custom allows it. The implausibility of conventionalism is best brought out by considering how Ancient Roman or early European and English jurists who endorsed the legal maxim *aequum et bonum, est lex legum* might have responded to the question of whether they felt authorized to apply the "law of laws" because of local legal customs, or whether the laws of justice would be valid and applicable even if the legal customs of the jurisdiction deviated from them. The evidence strongly suggests that they would have favored the anti-conventionalist position.

Of course, the positivist can always maintain that these judges would have

---

[191] *Pendleton*, Wythe 211 at 213.

[192] *Id*.

[193] *Id.*

[194] *Maher*, 515 A.2d at 149 (Conn. 1986). *See also supra* notes 151, 152, 153 and accompanying text.

[195] *See supra* notes 80, 82 and accompanying text.

[196] *See supra* note 163 and accompanying text.

[197] *See supra* notes 169-173 and accompanying text.

[198] *See supra* note 173.

been confused, but then the explanation becomes a form of error theory, even if the error concerns with *why* moral principles are law, or a 'meta-error.'[199] Error-theoretic explanatory strategies generate distinct problems that I shall discuss separately in Part III.C. Our focus for now is on *vindicating* explanations derived from positivism—ones that portray judges as correct in their judgments of legality.

Third, judges who deny the existence of moral laws do not accuse their peers of being mistaken about judicial custom or the customary 'rules of adjudication' in the community. Consider the fact that legal officials *routinely* disagree about whether convention supports or disfavors a claim of legality. Most majority and dissent opinions written by the U.S. 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 wrong or confused about law (or else warn them of the practical dangers of judges applying 'moral law'), which suggests that their disagreement does not concern the character of local customs.[200]

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 (and fourth) objection is that the proposal assumes the existence of conventions in the relevant jurisdictions that are highly uncertain in several of them. 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 by many (though certainly not all) judges as *extra-legal* considerations. The treatment of moral principles or requirements as *law* has been and remains controversial even in cases associated with equity. Whereas Judge Cardozo writes that "equity works as a supplement for law and does not supersede the prevailing law,"[201] other courts have taken the view that "common law meant *more* than judicial precedent and case law; it included the natural law as well."[202] 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 common law cases is that a convention emerged of doing so. But she cannot appeal to a corresponding

---

[199] Judges have not just believed moral principles to be law. They have held second-order beliefs about why and in what ways moral principles are law: they are law *ex proprio vigore*, they apply independently of local customs, they apply universally, and so on. *See supra* Part II.D. *See also infra* Part III.C.

[200] *See supra* note 115 and accompanying text.

[201] *Graf*, 171 N.E. at 887. Cardozo's view was not universally shared, as Part II illustrates.

[202] *See, e.g., Joyner*, 625 A.2d at 814.

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.[203]

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? 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? 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 sometimes do on behalf of a sympathetic litigant while *admitting* that precedential, statutory, and constitutional law all fail to authorize the litigant's recovery.[204] To be sure, anti-positivists may be subject to a similar challenge (which moral principles become part of the law and when can they be applied?), but we are not presently comparing positivism to alternative views; we are examining an explanatory puzzle as it arises for a widely favored theory of law, a puzzle that needs to be addressed quite apart from how well or badly other theories fare at explaining the relevant legal phenomenon.

Judges have invoked the laws of justice with relative certainty and conviction. If conventionalism were true, one would expect judges to be considerably more uncertain in their claims than they have been. The conventionalist account seems *ad hoc* in comparison to a far simpler descriptive hypothesis: many jurists (whether rightly or wrongly) have treated 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 for several reasons:

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.

---

[203] The positivist may respond that it is enough that past courts relied on moral principles to justify future judges in treating those principles as law whether or not the legality of the principles has been widely recognized. But it is not just that the legality of moral principles was not widely recognized. It was *denied* by many English judges. Moreover, as positivists themselves regularly point out, judges rely on all sorts of principles (logical, semantic) in deciding cases, but subsequent judges do not feel pressure to regard these as law. *See* SHAPIRO, *supra* note 13, at 272. So, it remains prima facie puzzling why mere reliance on moral principles would lead some judges to deem them pre-existing law.

[204] *See supra* note 64 and accompanying text.

2. It flatly contradicts the reasons judges themselves give for why moral principles are law independently of legal custom—their claims about the laws of justice being "fundamental,"[205] "independent of written constitutions and positive law,"[206] "highest law,"[207] "unchangeable… law of laws,"[208] "immutable,"[209] and "prior to judicial… law"[210]; and as having "the same force" [211] for all legal systems, not requiring local "assent,"[212] being applicable "irrespective of constitutional restraints,"[213] distinguishable from "positive law,"[214] rationally "self-evident,"[215] and so on.
3. It does not fit the way judges skeptical of the existence of moral laws disagree with their peers.
4. It assumes background customs among legal officials that are highly uncertain and controversial in several of the jurisdictions where we find judges invoking moral law.

In short, conventionalism is not sufficiently supported by the statements and general practice of judges to be a satisfying explanation of the highlighted legal judgments.

### *B. Problems for fictionalism*

Fictionalism about an area of discourse treats claims made within it not as aiming at literal truth, but as a useful fiction.[216] Fictionalist interpretive

---

[205] *See* cases cited *supra* note 64.
[206] *Id.*
[207] *See* case cited *supra* note 67.
[208] *See* case cited *supra* note 75.
[209] *See* cases cited *supra* notes 80 & 142.
[210] *See* case cited *supra* note 79.
[211] *See* case cited *supra* note 80.
[212] *See* case cited *supra* note 99.
[213] *See* cases cited *supra* notes 107, 151-155, and accompanying text.
[214] *See* case cited *supra* note 139.
[215] *See* sources cited *supra* notes 151 & 159.
[216] A variety of distinct views in philosophy have been described as 'fictionalist.' Stephen Yablo, *Go Figure: A Path Through Fictionalism*, 25 MIDWEST STUD. PHIL. 72 (2001). The specific brand of fictionalism I have in mind here is broadly 'instrumentalist' in Yablo's 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 are best analyzed under the node of conventionalism in my

strategies are all too familiar in the legal context. 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.[217] A targeted fictionalism affords an alternative interpretation of the highlighted usage:

| | |
|---|---|
| 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 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.

Brian Leiter in a different context—that of explaining why judges might act as if there are determinate answers to legal questions in hard cases—helpfully points out that charges of judicial disingenuousness can be put in terms that are more or less accusatory.[218] The "harsher" version of the accusation charges judges with conscious dishonesty, whereas a milder version attributes self-deception "because of the familiar psychological and emotional influences on human decision-making in the heat of a legal

---

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 *supra* Part III.A.

[217] *See, e.g.*, Marmor, *supra* note 36, at 90 (observing that judicial reliance on moral principles "has the status of an inconvenient truth… [a]nd this inconvenience puts judges under considerable pressure to coat the making of new law in the rhetoric of law application."); Leiter, *supra* note 41, at 1224-5; Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, 39-40, *in* RONALD DWORKIN 39-40 (A. Ripstein ed., 2007); David Plunkett and Timothy Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal* Disputes, 19 LEG. THEORY 242 (2013). Plunkett and Sundell 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 Plunkett & Sundell proposal attributes considerable lack of forthrightness and disingenuousness to core participants in legal practice and is vulnerable to all the objections I go on to raise.

[218] Leiter, *supra* note 42, at 1224-5.

dispute."[219] The milder charge is really a form of error theory—judges are mistaken, perhaps due to motivated reasoning. And we shall consider error theories in the section to follow. For now, fictionalism in my stipulated sense involves the "harsh" accusation of conscious deception.

Consider the scale of the pretense implied by the proposal. Jurists across a wide range of jurisdictions and over the span of legal history—famous English jurists, like Hobart, Coke, and Holt, post-WWII German constitutional courts, Roman jurisconsults, founding era judges, the Connecticut supreme court, and so on—have all been perpetrating a fraud on the law's subjects. And for some reason those who have ostensibly seen through this fraud have failed to make it sufficiently transparent to remedy judicial behavior. Dworkin wonders along similar lines why the public has failed to pick up on the forms of deceit that positivists are generally willing to attribute to judges in order to evade inconvenient facts about judicial practice: "if legal officials were being disingenuous their [judicial] opponents would say so, if only, at the very least, to undercut such arguments."[220] The fact that the alleged dishonesty is not called out suggests that a good portion of judges and legal professionals must be fundamentally in error rather than lying. So, pervasive fictionalism seems a hard position to maintain.

Indeed, the proposal feels awfully glib, and not just because of its conspiracist undertones or the fact that it posits a deliberate fraud that has endured over many centuries. 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 hardly any contexts where jurists like Coke and Holt own up to the precise pretense in question, as far as I can tell—that is, they do not claim to be pretending about the existence of moral laws or the laws of justice. To be sure, contemporary judges *do* sometimes admit to making exaggerated statements about the extent of legal determinacy and the like,[221] but those who seem beholden to "moral laws" in the emphatic and clear terms highlighted earlier seem

---

[219] *Id.* at 1225.

[220] DWORKIN, LAW'S EMPIRE, *supra* note 22, at 37-38. Shapiro suggests that the "simple" explanation is that "the law is a professional practice and lay persons are either ignorant of its grounds rules or too intimidated by legal officials to challenge them." Shapiro, *supra* note 217. But Shapiro concedes that it is somewhat puzzling that lawyers, judges, and law professors have failed to undercut judicial fraud if it is so widespread. *Id.*

[221] Leiter, *supra* note 42, at 1225 (2009) (discussing Richard Posner's confessions in HOW JUDGES THINK).

awfully sincere, and the earnestness of these judges need not be decisive evidence to be evidentially significant.[222] Positivists have not addressed the written 'demeanor' evidence. In fact, they have hardly made any note of it.

Second, the proposal is uncharitable and, as such, calls for special justification. If the fictionalist is right, judges are plainly dishonest, and their dishonesty is not 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. 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 is not motivated solely by a desire to save one's preferred theory from inconvenient facts, and especially if there are alternative interpretations (e.g., innocent error) that avoid such lack of charity.

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. The point is helpfully contrasted with a related observation of Dworkin's in a different context. Dworkin believes that the way judges disagree with one another, if taken at face value, reveals a judicial commitment to determinate legal answers in hard cases.[223] The positivist who denies determinacy portrays the conduct of judges as dishonest posturing. Dworkin's response was to deem the positivist's fictionalist gambit "unmotivated"[224] because "there is *no positive evidence of any kind* that when… judges seem to be disagreeing about the law they are really keeping their fingers crossed."[225] Dworkin was surely exaggerating and has been taken to task for not considering relevant evidence of judicial disingenuousness.[226] Judges frequently 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 precisely for 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

---

[222] *See supra* Part II.
[223] DWORKIN, LAW'S EMPIRE, *supra* note 22, at 15-20.
[224] *Id.* at 159.
[225] *Id.* at 39.
[226] Leiter, *supra* note 42, at 1247 ("[W]hat [Dworkin] really ought to have said is, 'There may be lots of evidence, but I have made no effort to consider any of it.'").

legal interpretation; and are even convicted of these crimes of intellectual dishonesty in the court of law reviews.[227] And so, Leiter is surely right that a failure to notice how often judges engage in "interpretive opportunism" reflects "a kind of naivety about legal practice."[228]

However, 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, more importantly, there are no arguments to critique since judges committed to the existence of moral law do not defend their legal claims on independent grounds (prior precedent, empirical evidence, and so on). Instead, as noted earlier, they seem to treat the legality of moral principles as basic, intuitive, and not requiring independent justification. The legal "maxims" of fairness and impartiality, like *no man may be a judge in his own case*, "do not admit of proof by reason and argument but bear with them their own evidence."[229] Alternatively, the jurists in question defer, on occasion, to the moral theories of Pufendorf and Locke, as evidence, for example, that there is a constraint on the legislature precluding uncompensated targeted takings.[230] So, the fictionalist cannot maintain that the insincerity of judges invoking the laws of justice becomes transparent based on a substantive examination of their arguments or the spuriousness of their offered justifications. And it would be a mistake to think entirely *general* evidence of disingenuousness among legal actors will suffice, for serious theorizing can hardly be based on a stereotyping inference, convicting specific judges of dishonesty based on purely statistical evidence associated with their membership in a group. In short, we can distinguish the present point from Dworkin's general complaint that positivists rarely provide the kind of evidence that would justify charges of deceptive intent when judges behave in ways that are hard to square with positivism. The point I am making here on the basis of the evidence is stronger: that the usual ways of justifying accusations of bad faith are not available in the case of judges who treat the legality of moral principle as a basic or ungrounded fact. The proposal's fundamental charge of dishonesty remains undermotivated in the cases at issue.

Fourth, fictionalism attributes motives to judges which do not make a lot

---

[227] *See, e.g.*, Alan M. Dershowitz & John H. Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971) (charging the Court with "gross negligence concerning the state of the record and the controlling precedents"); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2060-66 (1994) (pointing out the Court's lack of transparency).

[228] Leiter, *supra* note 42, at 1242-1246.

[229] *See* Corwin, *supra* note 78, at 103-104 (citing Sir John Fortescue, Henry VI's Chief Justice, in DE LAUDIBUS).

[230] *See e.g.*, *supra* note 59 and accompanying text.

of sense generally. There is, again, an analogous point made by Dworkin, who questions an assumption he sees the positivist-fictionalist as being committed to—namely, that the public would stop taking judges seriously if they owned up to deciding cases based on extra-legal policy or moral reasons rather than pre-established law.[231] In fact, there may be good reasons for judges to disingenuously clothe their reliance on moral principles in legal vocabulary at least in contemporary jurisdictions of the sort Dworkin focuses on. It is hardly a stretch to suppose that modern American judges might have reasons for misrepresenting their extra-legal reliance on moral principles in a pluralistic democracy characterized by pervasive moral disagreement, since public awareness might undermine the legitimacy of judges as unelected *de facto* legislators. But the suggestion loses plausibility in the case of Ancient Roman jurists, who could hardly have been concerned with their perceived legitimacy in the eyes of a public not particularly sensitive to democratic values or problems of moral pluralism.[232] It remains entirely unclear why Roman jurisconsults and magistrates who deemed the stoic theory of morality as an independent source of Roman law, or early European jurists who deemed the principles of justice the highest law of the land, discovered rather than invented, would have reason to lie to the public about their practice. The fictionalist gambit seems markedly anachronistic.

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 have invoked the laws of justice were being dishonest. If anything, the resort to moral principles as law *ex proprio vigore* seems especially unlikely to be rooted in dishonesty given how easy it is to provide opportunistic arguments based on conventional sources like precedent, custom, statutory text, legislative intent, and so on. A judge who admits "there is nothing in positive law to authorize this result, but I find it in principles of justice" seems especially transparent. In any case, it would be plainly wrong, I submit, to convict specific judges of dishonesty—conveniently those whose legal intuitions happen to be in conflict with positivism—based on some general stereotype associated with judges.

---

[231] DWORKIN, LAW'S EMPIRE, *supra* note 22, at 155 ("Is the community so anxious that its judges not behave as [legal realists] that this "noble lie" will help [the judge] serve its true interests better in the long run?").

[232] For example, when MARMOR, *supra* note 37, at 90, observes that it is an "inconvenient truth" that judges rely on moral principles, surely, the point must be limited to contemporary jurisdictions. For many centuries, judges were transparent about their use of moral principles to decide cases.

### *C. Problems for error-theory*

The difficulties facing the previous two proposals suggest that the juridical claims should be taken at face value: a substantial number of judges have historically believed that basic principles of justice exhibit a self-evident and universal legality. If positivism is true, this belief must be chalked up to error:

ERROR THEORY — Judges who have believed that moral principles are universally valid law have been mistaken.

This section's main contention is that the error—and error it may well be—is not so easily explained if we assume positivism is true and that this undermines positivism's acceptability as a general theory of law.

Since this section's argument is somewhat more involved, its overall structure is worth making explicit at the outset. I will be defending three core claims. (1) That the positivist error theorist needs to explain why legal experts have been so pervasively mistaken. (2) That the mistake in question cannot be explained away as judges having been misled by complicated arguments; for it appears that jurists were intuitively drawn to the idea that there are universally valid laws of justice. (3) If positivism is assumed to be true, then it is puzzling why judges would have made *this* intuitive mistake so pervasively.

Consider the explanatory demand first. Why suppose that the erroneous beliefs of others need explaining in the first place? Some legal philosophers appear unbothered by the errors their theories attribute to legal experts. For instance, Leiter, who takes most judges to be mistaken about legal determinacy in hard cases, observes:

> [Judicial mistakes] should hardly be surprising, given that the mistake involved is a *fairly abstract and theoretical* mistake—misunderstanding the conditions of possibility of legal validity itself—and the opportunities for the mistake arise only in a miniscule range of cases. Systematic mistakes *at the margins of any social practice* are hardly surprising, especially when avoiding them would require a degree of reflective theoretical awareness that practitioners have no reason to acquire.[233]

To be clear, Leiter's target is not judicial mistakes of the sort presently at issue. Nevertheless, his observations serve as a helpful foil for the view I will be defending—that an error theory needs to systematically explain the errors it implies.

Leiter suggests two reasons why judicial mistakes about the grounds of law might be "unsurprising": (1) the mistakes are "abstract and theoretical"

---

[233] Leiter, *supra* note 42, at 1232 (emphasis added).

and (2) they occur "at the margins" of a social practice. That a mistaken belief concerns abstract matters hardly seems relevant to whether it should be surprising or not. It would be quite surprising to discover judges denying some abstract yet entirely trivial mathematical proposition. So, presumably, the idea that the mistakes are 'theoretical' or argument-driven is doing most of the work. Argument-driven mistakes can indeed be unsurprising for reasons we shall discuss shortly. As for a mistake occurring at the margins of a social practice, presumably the idea is that very few judges are mistaken or that judges are unlikely to have given the question at issue much thought because it rarely comes up in their cases. Either way, the assumption that there are universally valid laws of reason and justice may seem 'marginal' these days, but it was quite central to legal practice and widely shared for much of legal history, as Part II demonstrates.

We can motivate the explanatory demand more directly, by analogy to a demand for explanation that positivists press against anti-positivists. Anti-positivists of the relevant sort (including Dworkin) maintain that the legality of any rule depends on its conformity with principles of justice. One of the strongest objections to mainstream varieties of anti-positivism begins with the banal observation that a wide range of legal experts endorse the legality of radically unjust rules.[234] Anti-positivism seems to entail that much of what has been upheld by judges as law was not really law: fugitive slave laws, racial segregation laws, Nazi genocidal laws, overharsh criminal laws, and so on. If anti-positivism is true, then judges turn out to be regularly mistaken. For anti-positivism to be a plausible theory of law, the anti-positivist needs to explain why so many legal experts end up mistaken.

Now suppose the anti-positivist dismisses the explanatory demand. She might claim that juridical mistakes about so-called unjust 'laws' should be "unsurprising." After all, the mistake concerns "abstract and theoretical" matters, concerning the grounds of legality, and is rarely one judges have to grapple with in regular practice since they are rarely asked to uphold transparently unjust 'laws.' The response, I submit, would be quite unsatisfying. The problem is not that Dworkinian anti-positivism implies error; the problem is that it needs to plausibly explain the errors it implies.[235]

The positivist may attempt to break the analogy by pointing out that most legal experts *these days* conceive of Nazi laws as genuine law, whereas only a minority find "moral laws" intuitive. But for many centuries the existence of moral laws was widely seen as intuitive. Consider the evidence recited in

---

[234] *See generally* discussion in CROWE, *supra* note 22. Atiq *supra* note 22, at 3.

[235] *See e.g.*, Atiq, *supra* note 22, at 3 ("While it would indeed be question begging to assume anti-positivism is refuted by simply pointing to these cases of apparent legality, the problem for the anti-positivist is that it is very hard to explain away (as widespread error) judgments made by a diverse range of experts and nonexperts about law").

Part II. Recall Holmes' observation in 1920, who characterizes belief in natural law in terms of "what has been familiar and accepted."[236] In earlier legal systems, it was widely accepted that what is good and equitable is "the law of laws."[237] If anti-positivists need to explain why legal experts today find counter-intuitive Aquinas' famous assertion that "an unjust law is not law,"[238] then the positivist needs to explain why "the laws of justice are not universally valid laws" would have seemed counter-intuitive to legal experts for much of legal history. There is no evidence that there are different concepts of law in play—in fact, our contemporary legal traditions assume continuity with the past.[239] And even if we *are* dealing with a conceptual shift, no positivist to my knowledge has motivated positivism as involving a substantial linguistic break with the past, a redefinition of "law" or revision of our centuries-old concept of law.[240]

---

[236] *See supra* note 73.

[237] *See* sources cited *supra* note 16.

[238] THOMAS AQUINAS, THE SUMMA THEOLOGIÆ OF ST. THOMAS AQUINAS (English Dominican Province trans., 1920).

[239] For example, originalists claim to construe law as the Founders did, assuming continuity in our concepts of law, and the Founder's took the concept of law to be inherited form the English, and so the chain goes. *See supra* notes 1, 18, 5 and accompanying text. Whenever a philosophical theory embraces a conceptual break with the past, it incurs theoretical costs that I am not aware of any positivist as having addressed. Our common law structure traces its maxims all the way back to the English Chancery and the English in turn were influenced by Roman equity. Moreover, one does not get the impression from looking at these other legal systems that they were speaking a different legal language. In any case, if positivists have been debating some narrow selection of terminological intuitions about "law" 'around here' 'these days,' the project's worth and usefulness is significantly undercut. It would be an extremely costly move to retreat in the face of the present argument to the position that positivism is just a local theory about how some of us these days think about law, uninfluenced by the history of legal thought and practice. To quote Dworkin, "I have no answer to the argument that the term 'law' can be used in such a way as to make the positivist's thesis true by stipulation. ... No doubt 'law' can be used in that way, and perhaps some lawyers do so." SOCIAL RULES, *supra* note 10, at 856.

[240] Positivism has never been defended as a stipulative or ameliorative definition of "law." On ameliorative definitions generally, *see* Sally Haslanger, *What are we Talking About? The Semantics and Politics of Social Kinds*, 20 HYPATIA 10 (2005). We can certainly imagine a form of positivism according to which the concept of law was originally defective and needed to be replaced with a new concept that preserves what is worth preserving in the old. But arguments for positivism do not sound in an ameliorative register, and certainly do not carry what would, then, be the argumentative burden. For example, one way of showing that the old concept was defective would be to show that there are *no moral principles*. $\text{LAW}_{\text{olde}}$ was referentially defective like the concept PHLOGISTON which 18th century chemists took to refer to a (non-existent) substance inherent in combustible bodies. There may be some reasons to construe Hans Kelsen as motivated in his positivism by moral skepticism; *see* MARMOR, *supra* note 37, at 19-20. Yet no positivist to my knowledge has offered an argument for moral error theory, although arguments outside of legal philosophy for moral error theory are familiar. *See, e.g.*, J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG

There are other ways of motivating the explanatory demand. In other areas of philosophical inquiry—ethics, general metaphysics, philosophy of mathematics—it is widely acknowledged that an error theory needs to charitably explain the errors it implies.[241] A philosophical theory is 'revisionary' when it treats people's intuitions about some subject matter (justice, persons, causes, numbers, *law*) as widely mistaken. Revisionary philosophical theories bear a special burden of explaining how people's intuitions could have reasonably gone wrong.[242] Eli Hirsch grounds the explanatory demand in a principle of interpretive charity, which requires philosophers interpreting a practice to avoid attributing entirely arbitrary errors to individuals immersed in the practice.[243] David Kovacs calls it the Problem of Reasonableness for revisionary theories, a satisfactory solution to which involves explaining (a) why it is not 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 context since the error in question has been widely shared by legal experts. Judges

---

(1977). At any rate, if contemporary positivists have been engaged in a revisionary project of conceptual replacement motivated by radical moral skepticism, they have been remarkably under-explicit about it.

[241] For example, in ethics it is widely acknowledged that moral differences are often due to variance in people's moral 'starting points' and that a systematic metaethics needs to explain 'fundamental moral error.' *See generally* David Enoch, *How is Moral Disagreement a Problem for Realism?*, 13 J. ETHICS 15 (2009); Sebastian Kohler, *What is the Problem with Fundamental Moral Error?*, 93 AUSTRALASIAN J. PHIL. 161 (2015); Jennifer Zamzow and Shaun Nichols, *Variations in Ethical Intuitions*, 19 PHIL. ISSUES 368, 373 (2009) (noting the fact that "basic disagreement" in moral intuitions has implications for ethical theory). Likewise, in the philosophy of mathematics, the mathematical formalist takes numerical expressions to be non-referential (roughly, mathematical claims are not 'about' reality) and so treats at least some mathematicians as fundamentally mistaken about their own concepts—those who take numbers to refer to *sui generis* mathematical objects. *See generally* Rosen, *supra* note 20. But the formalist tries to explain the alleged error charitably, in terms of (a) the grammatical structure of mathematical claims being misleading—"there exists a number that is both even and prime" seems to trivially entail the existence of a numerical object—and (b) the error being harmless in not getting in the way of mathematical practice: the work of proving theorems, formulating conjectures, and developing new mathematical categories. And yet certain brands of formalism are analogously accused of "grossly distorting mathematical practice." *See* ALAN WEIR, *Formalism in the Philosophy of Mathematics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2020). *See also* sources cited *infra* 242 and accompanying text.

[242] *See e.g.*, Eli Hirsch, *Against Revisionary Ontology*. 30 PHIL. TOPICS 103, 116 (2002) (arguing that charity considerations require philosophers to interpret people's utterances without attributing unexplained a priori errors to them); Dan Korman, *Eliminativism and the Challenge from Folk Belief*, 43 NOÛS 242 (2009) (discussing the challenge of explaining reasonable error); David M. Kovacs, *How to be an Uncompromising Revisionary Ontologist*, SYNTHESE §2 (forthcoming).

[243] *Id.*

have relied on the laws of justice to decide important cases in consequential ways: to obligate the legislature to pay compensation for property taken, to combat slavery, to convict agents who perpetrated injustice under authority of enacted law, to force states to pay their debts, to preclude self-serving adjudication, and so on.[244] Their belief can hardly be ignored as some arbitrary whim that has no real impact on legal practice.

Accordingly, the explanatory demand seems well-motivated. Positivists should grant the need to explain the error at issue. We can now turn to the explanatory options. One possibility is that judges who have believed in laws of justice were misled by unsound philosophical arguments—theirs was a "theoretical mistake" in Leiter's terminology.[245] After all, there is a rich tradition associated with 'natural law' theory that gives complex reasons for accepting that there are unsourced laws of justice.[246] This tradition can be traced to Aristotle, was developed further in the early modern period by Aquinas, Grotius, and Pufendorf, and in the modern era by writers like Murphy, Finnis, Radbruch, and, indirectly, Dworkin.[247] The positivist may claim that judges over the ages have been persuaded by arguments developed by natural law theorists—concerning law's function, legal determinacy in hard cases, or whatever else—for the existence of "moral law." These arguments are mistaken, according to the positivist, but they are not *obviously* mistaken. In fact, philosophical arguments are notorious for leading careful and intelligent thinkers to adopt ultimately mistaken views. So, the observed error among "natural law judges" can be explained charitably and plausibly: it is easy to be misled by unsound philosophical arguments.

The 'blame unsound philosophy' or 'theory is hard!' approach exhibits more than a veneer of plausibility. However, it does not withstand scrutiny. First, it is extremely unlikely that the broad range of lawyers and experts who have been drawn to "moral laws" were all immersed in the natural law tradition, enough to be moved by the sheer force of clever argument alone. Helmholz, in his study of the education of lawyers in continental Europe and 18th century America, notes that there is great difficulty in accounting for the broad sympathies towards unwritten laws of justice at the Founding and "how these men had come to the knowledge of the law of nature they asserted so confidently."[248] Helmholz notes that while it can be surmised that American

---

[244] *See* discussion *supra* Part II.

[245] Leiter, *supra* note 42, at 1232.

[246] *See generally* CROWE, *supra* note 22.

[247] *See generally* ARISTOTLE, *supra* note 167; GROTIUS, *supra* note 61; THOMAS AQUINAS, *The Different Kinds of Law*, *in* THE SUMMA THEOLOGIAE OF ST. THOMAS AQUINAS: I-II q.91 (Alfred J. Freddoso trans.); sources cited *supra* note 22.

[248] HELMHOLZ, *supra* note 7, at 130. Helmholz concludes that it is "hard to arrive at a fully satisfactory explanation for what the authors of American independence knew." *Id.* at 128-

jurists had some exposure to works by Grotius, Pufendorf, and others: "the extent of this contact with the law of nature was nothing to brag about. It was almost incidental, not professional. None of the 'proprietary' schools that were later begun and in which rudimentary coverage of the law of nature was provided had yet seen the light of day."[249] Likewise, historians have observed more generally that the "laws of justice" were invoked by jurists instinctively.[250] Philip Hamburger writes that most English jurists in the 18th century "were blissfully ignorant of ponderous natural-law tomes" and yet "non-technical features of natural-law analysis were widely … received."[251]

Second, passing or incidental exposure to philosophical argument rarely has the effect, it seems to me, of persuading people to accept what seems counterintuitive to them.[252] Misleading philosophical arguments tend to get a grip on those not immersed in abstract philosophy when they justify claims that seem independently intuitive (even if incorrectly so). An apt example may be arguments for the existence of free will. No doubt plenty of people have been persuaded by clever yet, to my mind, very much unsound philosophical arguments for the existence of free will. But belief in free will can hardly be explained away as an error transmitted to the many by the sheer force of unsound philosophical argument. Plenty find the existence of free will intuitive for all kinds of reasons that are not necessarily argument-based (or truth-tracking). Likewise, while "moral law lawyers" may have had passing exposure to philosophical arguments, they presumably found the existence of laws of justice independently intuitive. Another way to put it is that the existence of universally valid laws of justice must have been fairly concordant with their concept of law.

Third, recent experimental work on the 'folk' concept of law finds support for the "moral law" intuition among undergraduates who had not yet taken any courses in legal philosophy. Flanagan & Hannikainen surveyed 218 students for their intuitions regarding the legality of immoral laws, and report results consistent with what they describe as a "natural law" concept of law:

> consistently with a natural law view, the more that participants believed the marriage ban to be wrong, the more likely they were to deny that it was truly law… Studies 1 and 2 demonstrated that people

---

132.

[249] *Id.* at 130.

[250] Hamburger, *supra* note 74. *See also* John G.A. Pocock, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY 5-6. 25-27, 144 (1971).

[251] *Id.*

[252] For instance, arguments for skeptical conclusions about knowledge have a long history and famous pedigree. *See* Peter Klein, *Skepticism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter ed. 2019). Yet it is not easy to find large numbers among the educated public claiming that we do not know almost all that we ordinarily take ourselves to know.

> tend to deny the lawfulness of gravely immoral statutes, as predicted by natural law theorists.[253]

In fact, asked outright "a large majority (64.4%) rejected the view that, ultimately, law is just a matter of concrete social facts."[254] Undergraduate intuition hardly counts as expert legal intuition or intuition that is tutored in the grounds of law. But that is precisely why the results are relevant to our explanatory question. The Flanagan & Hannikainen study suggests that natural law commitments among legal experts over the ages were likely intuitive commitments that a legal education did not erase.

In sum, it seems unlikely that unsound philosophical arguments are entirely to blame for the juridical conviction that the principles of justice count as universally valid law. The pre-theoretical intuitions of legal experts may have been further rationalized and reinforced by misleading (according to positivists) philosophical arguments. But the fact that universally valid "laws of justice" have seemed intuitive to so many jurists over the ages is a fact that calls out for explanation.

A philosophy of law should be able to explain legal intuitions commonly shared among experienced legal experts. Legal experts tend not to be embedded in abstract jurisprudence but are very much embedded in ordinary ways of thinking and talking about law.[255] The problem is that there is nothing in the positivist's account of law that sheds light on why judges might have found intuitive that there are universally valid laws of justice. The positivist tells us that laws are rules that are conventionally embraced in a jurisdiction or rules derived from conventionally embraced rules. But if so, then why have principles of justice seemed to exhibit a form of legality that transcends local conventions?

Some positivists may be tempted to peg the legal intuitions to wishful thinking, with a 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 (or norms they *wish* were law). Sooner or later, they become confused and start supposing that what morality requires *is* the law, independently of their own agency.

Even if we were to ignore the narrative's entirely speculative nature (and we should not), it appeals to a form of wishful thinking that should seem alien.

---

[253] Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law is Intrinsically Moral*, AUSTRALASIAN J. PHIL. 1, 8-10 (forthcoming).

[254] *Id.* at 11.

[255] The point is not the same as Dworkin's concerning theoretical disagreement. *See* Dworkin, LAW'S EMPIRE, *supra* 22, at 4-6. The fact to be explained is not that jurists disagree, but that many of them find intuitive or commonsensical a view that turns out to be quite mistaken if positivism is true.

When agents engage in motivated reasoning, their mistaken beliefs at least roughly track what it would take for the belief to be true. Ziya Kunda in her well-known work on the psychology of 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."[256] Someone who wants to believe that a dishonest friend is trustworthy 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 basic moral requirements as law do not attempt to justify their judgments in social terms. Their legal intuitions seem entirely insensitive to what, according to positivism, determines whether a rule is law or not—social facts. That is, the proponents of "moral law" do not try to explain the legality of moral principles in terms of such principles being widely embraced. On the contrary, they expressly *deny* that moral laws are derived from socially embraced rules or dependent on custom.[257] Accordingly, while judges (like most of us) undoubtedly engage in motivated reasoning,[258] the positivist cannot invoke motivated reasoning to explain the basic juridical conviction that there are moral laws precisely because these judges do not attempt to rationalize moral laws in positivistic terms—by grounding them in social facts.

The point I am driving at is that the positivist charges legal experts with a surprisingly arbitrary error. To reiterate a point made at the outset, the argument of this section is consistent with judges being in fact mistaken. The target has not been error-theoretic accounts generally, but an error theory that is specifically based on positivism. As we have seen, a positivistic error-theory lacks a serious *theory* of error. The problem is not that legal experts are deemed mistaken; some undoubtedly are. The problem lies in the fact that the affirmative claims that make up positivism sheds no light on why legal experts end up confused in the precise 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 positivist constructs a theory of the nature of

---

[256] Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990).
[257] *See supra* Part II.
[258] Leiter, *supra* note 42, at 1247, points out that judges often take inconsistent interpretive positions across cases and suggests that "the jurists may simply be motivated subconsciously by their moral view of the merits, such that they convince themselves of the legal propriety of their preferred outcome." Leiter is surely right. This sort of thing happens all the time. The problem facing the motivated reasoning story in the present context, however, is that the judges in question make no effort to rationalize the existence of moral laws in terms of what positivists claim are the true grounds of legality. By contrast, judges usually do try to rationalize inconsistent legal positions based on precedent and the like, just as Kunda suggests about motivated reasoning generally.

law—as rules derived from custom—that lacks the resources to charitably explain why actors immersed in legal practice should find intuitive that moral principles are an *a priori* custom-independent form of law. The error appears arbitrary precisely because we have assumed, for the sake of argument, that the ultimate grounds of legality are entirely social and not moral.

Positivism appears artificial as an account of the nature of law—at least law as it has been conceived by jurists for centuries. Theories should not posit arbitrary errors among agents with expertise about the relevant subject matter. We are justified in seeking a better theory, one that might explain more charitably why jurists have tended to assume, whether rightly or wrongly, that basic principles of justice exhibit universal legality. For instance, historically, the concept of law may have been the concept of socially embraced rules that meet some moral threshold, with basic moral constraints reasonably believed to be essential pre-conditions for law and legal systems.

## CONCLUSION

Let us take stock. This Article has traced a deeply rooted practice of judges classifying principles of justice as law. Several aspects of the practice seemed noteworthy. Jurists have deemed the laws of justice self-evident, universally valid, immutable, and not dependent on local assent, while basing prominent holdings on said laws. Any adequate theory of law needs to explain this practice, even if it is rarely seen in contemporary caselaw, given its prevalence for much of legal history.

By examining a historical practice, we uncovered a novel challenge for the dominant theory of law today. Since legal positivists believe that a rule or principle can never be law on purely moral grounds and that a principle's legality is ultimately determined by jurisdiction-specific social facts, this leaves a deeply rooted judicial practice explanatorily orphaned. Positivists seem limited to three explanatory options—the jurists in question were either (a) following local legal rules, (b) disingenuous, or (c) pervasively mistaken. None of the strategies seem to work. And thus, the explanatory demand remains unanswered.

Our sequential consideration of the explanatory possibilities should not blind us to what the various flaws reveal about legal positivism as a theoretical program. Positivists are forced to take a remarkably consistent pattern of moralistic legal intuition in the historical record and try to make it fit a disunified set of explanatory frameworks, each lacking a certain depth, sensitivity to the evidence, and empirical confirmation. Conventionalists interpret judicial behavior as beholden to local customs contradicting judges' self-reports. Fictionalists attribute deceit on the basis of undermotivated

generalization. Error theorists posit unexplained error and arbitrary intuitions among legal experts. The collective flaws provide ample grounds for suspicion of positivism. Indeed, the mark of a mature theory is that it succeeds in unifying its various ideas, commitments, and criteria for what counts as a good explanation, typically after hard and lengthy efforts at organizing theory around data. By that measure, the science and philosophy of law—if positivism may be deemed its best expression—has a lot of work left to do.

While the Article has focused critically on positivism, the intended upshot is (emphatically) not that some alternative view of the nature of law is correct—for instance, Dworkinian anti-positivism or traditional 'natural law' theories.[259] These views face similar challenges explaining the full range of expert legal intuition.[260] 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, and it may be time to look beyond the conventional forms.[261] Indeed, the Article's ultimate aim has been to underscore a methodological point: that the legal historical record must be fully examined before we commit ourselves to a general theory of law. While juridical intuitions about law through the ages may be shot through with tensions, a philosophy of law needs to take those tensions seriously. And when our theory convicts legal experts of error, it should be able to explain what aspect of the concept of law leads legal experts to hold inconsistent conceptions of legality. I have argued that legal positivism, the prevailing orthodoxy in the American legal academy, appears explanatorily inadequate when examined through the lens of legal history; and the standard of theoretical adequacy which rules out positivism may be an even more powerful sieve than the present analysis has revealed.

* * *

[259] *See* sources cited *supra* note 22.

[260] *See supra* notes 234-235 and accompanying text.

[261] Exploring how an account of the concept of law might be developed that can explain why a variety of moral as well as non-moral conceptions of legality understandably gain traction among legal experts would take us too far from this Article's limited purpose. Developing such an account is reserved for follow up work.