Social Philosophy & Policy Vol. 4 Issue 1 ISBN 0265–0525

CHOOSING A LEGAL THEORY ON MORAL GROUNDS

By Philip Soper

I. INTRODUCTION

Twenty-five years is roughly the time that has elapsed since the exchange between H. L. A. Hart and Lon Fuller[1] and the subsequent revival in this country of the natural law/positivism debate.[2] During this time, a curious thing has happened to legal positivism. What began as a conceptual theory about the distinction between law and morality has now been turned, at least by some, into a moral theory. According to this theory, the reason we must see law and morality as separate is not (at least not entirely) because of the logic of our language, but because of the practical implications of holding one or the other of the two traditional views in this area. The natural law theorist, it is said, can connect law and morality only at the cost of investing official directives with undeserved moral authority, thus encouraging obedience where there should be none. The natural law position should therefore be rejected – and the positivist's accepted – on moral grounds.[3]

What makes this position doubly curious is the contrast it presents with the moral implications that previously surrounded this debate. Hart's claim about the separation of law and morals was initially presented as a neutral theory about the concept of law; it was not presented as a moral or political theory. Moreover, it was Fuller in the earlier debate who claimed to occupy the moral high ground by suggesting that evil regimes like Nazi Germany were in some way a consequence of German positivism. Hart took pains to deny this alleged connection between positivism and the emergence or viability of unjust states. But he did so again largely by emphasizing the

[1] See Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Fuller, *Positivism and Fidelity to Law – a Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

[2] The debate continued with the subsequent publication of Hart's influential book, The Concept of Law (1961), and Fuller's The Morality of Law (1964, rev. ed. 1969). For Fuller's own description of the various "rounds" in this exchange, see the revised edition of the latter at 188 ("A Reply to Critics").

[3] See MacCormick, *A Moralistic Case for A-Moralistic Law*, 20 Valparaiso L. Rev. 1, 9–10, *passim*; *id.*, H. L. A. Hart (1981), at 159–62. MacCormick's precise argument, which differs somewhat from the above characterization, is quoted below.

morally neutral character of the positivist's theory, which leaves open the question whether to obey the laws of such a state.[4]

In this paper I examine these moral claims about the consequences of choosing a particular legal theory. My general conclusion will be a skeptical one. I argue that the particular moral argument recently advanced for legal positivism fails: there are no adverse practical consequences to be expected from viewing law and morality as connected. I do not, however, conclude that honors for the morally superior theory must therefore be returned to the natural law theorist, for it is equally clear, I think, that no unhappy consequences attend adoption of the positivist's view either. The upshot, if I am correct, is that no practical consequences of any kind or, at least, not of the kind that concerns ordinary moral theory, attend this debate at all.

This conclusion implies, not that the debate is verbal or meaningless, but that its resolution must be sought in the cognitive arena, rather than the moral one. The importance of the debate arises from the long-standing concern to understand the *existing* connections between such basic concepts as justice, law, authority, and obligation. Of course, we may seek such understanding because our ultimate interests are moral and involve the question what ought to be done. Moreover, because morality itself is such a difficult concept, we will undoubtedly find that comparing "legal" and "moral" obligation helps us to define and understand the features of both. In these respects, moral interests may guide and motivate the inquiry, even though the inquiry itself remains primarily conceptual.[5] In the last part of this paper, I describe this enterprise more fully and consider its relationship to moral and political theory.

II. THE MORAL CASE FOR POSITIVISM

The moral argument for legal positivism, briefly described above, has been most explicitly advanced by Neil MacCormick:

> The practical argument is that states, governments, wielders of power in general, will in practice be able to manipulate the idea of "law." If we insist that nothing is really "law" unless it passes a

[4] To be sure, Hart did suggest that these moral issues would be clarified by keeping law and morality separate. But that claim falls short of the new moral arguments being advanced on behalf of positivism which predict not just moral confusion, but actual immoral conduct (an undermining of the "sovereignty of conscience"), as the consequence of failing to preserve the distinction. See MacCormick, *A Case for A-Moralistic Law*, at 10.

[5] By "conceptual," I do not mean that the goal is to set out complete conditions for the proper use of "law" or "legal system." The critical agenda for legal theory, which may be related to this definitional one, is conceptual clarification: probing what we mean by both morality and law in order to see whether the moral claims we make in the name of law are consistent. See note 27, *infra*. Of course in conducting this enterprise, one may find that one is inevitably engaged in substantive moral argument: i.e., by "conceptual" I do not mean to suggest that a sharp distinction can be drawn between "meta" and substantive inquiries.

> substantive moral test as well as a "formal sources" test, we risk *enhancing* the moral aura which states and governments can assume, even if our true hope is to cut out of the realm of "law" evil and unjustifiable acts of legislation and of government.
>
> The argument of last resort here is an argument for the final sovereignty of conscience, and how best to preserve it. . . . [A] powerful case, and perhaps a sufficiently powerful case, can be made out for the positivist position on purely practical and moral grounds. For my own part, I do not believe that any sufficient case can be made out which does not at least include these moral and practical grounds, these arguments for conceptually buttressing the sovereignty of moral conscience.[6]

MacCormick's argument is attractive because it includes a claim about the final sovereignty of conscience which is both important and correct: "[E]very order of positive law or positive morality ought always to be subjected to the critical judgment of an enlightened morality . . . ."[7] This claim, however, is only one half of the argument. The other half – in my view, the incorrect half – is the claim that the way to get people to adopt this critical attitude toward state authority is to insist on the conceptual distinction between legal validity and moral value.

To see why the conceptual distinction is unlikely to affect ordinary attitudes and behavior, imagine two hypothetical citizens. One, call him Gandhi, is ideally conscientious; the other, call him Eichmann, is not. By *conscientious*, I mean that Gandhi already possesses the morally desirable trait of testing all legal demands by reference to critical morality before deciding what to do. Eichmann, in contrast, never appraises law but always complies, just as a soldier might unquestioningly comply with a superior's orders.[8]

[6] N. MacCormick, *A Case for A-Moralistic Law*, at 10–11. MacCormick previously advanced this view as a tentative interpretation of Hart's own position, see *id.*, H. L. A. Hart, at 160 (referring to Hart, Concept of Law, at 206). But as the text notes, Hart's arguments were always primarily conceptual, rather than moral. It is not without interest that someone like MacCormick who, with some minor variations, carries on in the positivist tradition of Hart, finds it necessary now to turn to normative arguments to defend that tradition. The discomfort that leads to this turn of events may be due to the inability of the positivist to connect law *conceptually* with the normative implication that "law" justifies coercion. Compare P. Soper, A Theory of Law (1984).

[7] MacCormick, H. L. A. Hart, at 162.

[8] Such automatic compliance could, of course, be due to a conscientiously held moral theory according to which laws were thought always to have overriding moral authority. That would be an incorrect moral theory, but would still qualify citizen Eichmann as conscientious, however wrong. I assume for purposes of the argument that Eichmann's compliance is unthinking and not the result of a moral judgment about either the content or legitimacy of law. It should also be clear that when I describe Gandhi as subjecting the demands of law to the inspection of critical morality, I do not mean to deny that Gandhi's view of critical morality may permit or require compliance with some laws even though Gandhi believes them to be misguided or wrong in their content.

How is the behavior of either Gandhi or Eichmann affected by the choice between natural law and positivism?

Begin with positivism. Assume that Gandhi and Eichmann both live in a society that has accepted the positivist's claim about the distinction between law and morality. The few natural law theorists who remain are treated like flat-earthers, with bemused tolerance, while all others accept without question that legal validity is determined without reference to moral tests. How will Gandhi and Eichmann behave? Gandhi, of course, will behave as he always has, subjecting the claims of law to the test of critical morality, so the critical case is that of Eichmann. But Eichmann, by hypothesis, is unconscientious. He does not critically appraise the demands made on him, but defers his judgment to others – either out of fear, laziness, or the ease of going along. Eichmann too, then, will behave as he always does, complying with the law automatically without engaging in critical reflection.

Does behavior change if we now imagine a revolt in legal theory? All citizens (including Gandhi and Eichmann) now believe and are taught that nothing is law if it does not meet certain minimum moral requirements, as well as formal tests for validity? Eichmann, of course, continues to obey without thinking as always, so the critical case is now that of Gandhi. But Gandhi's behavior doesn't change either, since he reacts not to what legislators and judges claim is the case, but to what his moral conscience tells him is the case about the compatibility of formal law with moral requirements.

Part of the problem here is that deciding between positivism and natural law at the level of legal theory will not affect the claims of officials *within* a society about the moral legitimacy of the laws they enact. Assuming that officials are thorough positivists only means that they deny any necessary connection between law and morality. It does not prevent their claiming a contingent connection and asserting that their own legal order is, happily, a moral one. MacCormick is aware of this problem, but does not seem to realize how it undermines the attempt to put the case for positivism on moral grounds:

> When evil is done in the name of the law, the greatest evil is that whatever is done in the name of the law is also and inevitably done in the name of a public morality.
>
> Hence it seems simply inconceivable that appeals to law – even iniquitous law – can ever shed their moral load. . . . [or] that it will ever be thought other than virtuous, albeit at a modest point on the scale of virtue, for a person to be 'law-abiding' – even when the law by which he or she abides contains much of evil. By the same

token, the law breaker however conscientious, will be stigmatized by the legal officials as a moral wrongdoer and a moral danger.[9]

The fact that law comes "morally loaded" regardless of one's legal theory makes it difficult to see how one might vary the Gandhi/Eichmann example to sustain MacCormick's claim. Here are two possibilities. First, it might be suggested that my example is flawed because it assumes citizens who are already conscientious or not and thus no longer subject to reform through the choice of legal theory. MacCormick's claim might be an educational one: the way to bring up citizens so that they become Gandhis and not Eichmanns is to teach the positivist view from the beginning, instilling in yet-unformed citizens the understanding that no moral tests are part of the criteria for law and urging such citizens to develop for themselves the capacity of sifting formal law through moral filters. But this suggestion highlights the difficulty. It is indeed the case that what we want to do, given my assumption about the correctness of the moral half of MacCormick's argument, is train citizens to be conscientious. (We ought also to put Eichmann back in school and retrain him.) The question is how one's view about the conceptual distinction between law and morality can have any bearing on this educational goal. If we succeed in making citizens conscientious, it will not be because of the legal theory. It will be because of the arguments about why individual autonomy and moral reflection are inescapable and the judgments of others always potentially fallible. Those arguments are not arguments of legal theory, because they are arguments that both positivists and natural law theorists can and do accept. A good positivist knows there is no necessary connection between law and morality. But nothing in that knowledge explains whether he knows what morality is or, more importantly, whether he cares about finding out. Graduates of schools of positivism or of natural law, it seems, must both make their way to some other school to find their moral consciences.

The above response, however, shows only that legal theory, whether natural law or positivist, cannot ensure conscientiousness. It does not yet show us whether one or the other theory might actually interfere with the development of individual moral sovereignty. This claim, that natural law results in the diminution of individual, moral, and political responsibility, has been made by others.[10] The basis for the indictment, as MacCormick's

[9] MacCormick, H. L. A. Hart, at 161. MacCormick makes this point, apparently not to qualify the moral argument for positivism which he accepts, *id.*, at 162, but as a criticism of Hart's failure to recognize that law itself is "in the sense of 'positive morality' a moral order." *Id.*, 160.

[10] See S. I. Shuman, Legal Positivism (1963), at 204–209. For criticism of the claim, see J. Stone, Human Law and Human Justice 253–54 (1965). Professor Stone's discussion of this issue has been valuable to my own thinking and may explain why I share his similarly skeptical conclusions about the attempt to resolve this debate on moral grounds.

argument makes clear, is the assumption that there is some additional power of officials to secure obedience and deter individual moral evaluation of "law," if they can present law as already consistent with morality. Thus, a society that adopts the natural law position will present citizens with the claim that law is not only valid by reference to the required formal tests, but that these laws have already been inspected for moral adequacy because otherwise they could not be claimed to be "laws." Of course, a conscientious citizen should not take this moral endorsement at face value, and citizen Gandhi presumably will not. But ordinary people lie somewhere between the extremes of Gandhi and Eichmann, and many of them will find that the official moral endorsement is just the excuse or reason they need to defer their own judgment and obey the law. To put the argument in constitutional terms, imagine two Supreme Court decisions rejecting, say, a challenge to the draft laws. One decision sustains the state's action on the basis of the Court's interpretation of existing statutes, but the Court explicitly disavows any opinion about the justice or morality of the draft law itself. The other decision reaches the same conclusion about the statute but also explicitly indicates – because of the due process clause in the Constitution – that the statute passes minimum requirements of fairness and, thus, is not too immoral to be enforced. Is not the latter decision more likely to deter citizens from making their own evaluation? If citizen conscientiousness is our goal, would we not sooner achieve that goal by removing any moral filters – even as a contingent matter in connection with our own Constitution – as tests for deciding what is "law"?

This argument, I believe, has some force, but it does not raise a question about the desirability of the natural law position so much as about the desirability of establishing particular, official institutions to pass on the moral merits of official directives. With or without a due process clause, the officials who enact and support the draft law will presumably claim that it is morally justified. Thus, the legislators will purport to have made and will continue to endorse the judgment about the moral validity of the law which the Supreme Court, in the first imagined case, refused to make. It may be true that fewer citizens would defer to the legislature's moral judgment than would defer to the moral judgment of the Court for reasons familiar to those who explain why judicial review is lodged in the Court in the first place. But none of this seems to me to be a consequence of adopting a natural law view about the connection between law and morality. It is a consequence of deciding to filter official directives through institutions which, for whatever reason, enjoy sufficient respect and prestige to give their moral judgments extra weight. If one accepts the empirical premise – that these institutions enjoy more prestige as moral judges – then a positivist society could also happily use the same institution to reenforce its claims about the morality of

its laws. (The monarch who also has the Church behind him has more chance of persuading citizens to defer their moral judgments to the official moral judgment.) Of course, doing so involves risks – the risk that the more prestigious judiciary (or other institution) will disagree about the moral merits of legislation; but weighing that risk against the possibility of reducing citizen disobedience can occur independently of the underlying legal theory.

III. THE MORAL CASE FOR NATURAL LAW

In the Hart/Fuller exchange, it was positivism that found itself on the defensive against the charge that it was responsible for the abdication of individual moral responsibility in Nazi Germany. It should be clear from what has been said that this charge seems no more capable of being sustained as an indictment of positivism than of natural law. Indeed, Hart's response to the charge was similar in many respects to the response given above: the fact that law and morality were seen as separate does not explain why individuals in Germany would defer to law rather than to their own assessment of the morality of action.[11] It is easy to imagine ways in which such deference *might* be explained. It might, for example, have something to do with the acceptance of an erroneous political theory about the absolute moral authority of the state, however unjust its laws. Or the explanation might lie in social–psychological theories about the "tendency of most people to submit to actual power, and even to the 'normative tendency of the factual.'"[12] But the suggestion that the legal theory itself had a causal influence is difficult to defend.[13]

Fuller, however, levels another charge against positivism. This charge focuses not on the connection between legal theory and individual moral responsibility, but on the connection between legal theory and the ability of those bent on doing evil within a legal system to achieve their ends. Here is the clearest statement of the indictment.

[11] See Hart, *Positivism*, at 617–618.

[12] See Stone, Human Law, at 255.

[13] Fuller's argument relied in part on the example of the German philosopher Radbruch who appeared to undergo a conversion from positivism to natural law as a result of the Nazi experience. But attempts to understand exactly how Radbruch thought this conversion was connected to legal positivism confront a major problem. Radbruch's most significant conversion seems to have taken place within moral theory. Prior to the conversion, Radbruch's ethical views seemed either highly relativistic (there is no objective way to test the morality of law) or else they gave overwhelming weight to the legal value of certainty over the demands of justice. See generally, Stone, Human Law, at 232–262. It is easy to understand why anyone holding such views might decide such a *moral* theory was inadequate after witnessing the horrors of Nazism. But there is no explanation here for why this change in moral theory is connected to a change in legal theory. Confusion over the significance of Radbruch's conversion may be in part a reflection of the failure to distinguish between natural law as a moral theory and natural law as a legal theory. See Soper, *Legal Theory and the Problem of Definition*, 50 Chi. L. Rev. 1170 (1983).

> [L]et us suppose a judge bent on realizing through his decisions an objective that most ordinary citizens would regard as mistaken or evil. Would such a judge be likely to suspend the letter of the statute by openly invoking a "higher law"? Or would he be more likely to take refuge behind the maxim that "law is law" and explain his decision in such a way that it would appear to be demanded by the law itself?[14]

Fuller's claim is that positivism encourages the kind of buck-passing imagined in one of my previous examples in which the Supreme Court interprets and enforces a draft law, but avoids moral responsibility for the result by disclaiming power to review for fairness. A natural law society, in contrast, would in essence have incorporated a "due process clause" through its legal theory, thus blocking the Court's ability to hide behind its "role."

The validity of this argument partly depends on whether one agrees with Fuller about the inability to "justify" really evil aims. If, after all, it is not only the judges but other officials as well who support the result, the likelihood that a rationale for the result could not be offered may be slim.[15] Note also that the argument relies on empirical assumptions that contrast markedly with those considered in the previous section. The moral argument of the positivist is that if we come to believe that only those official directives are "law" that pass minimum moral tests, then evil will have an easier time: it will reinforce human tendencies to externalize responsibility. Fuller's claim is different. His concern is not with the possibility of preempting independent citizen evaluation, but with the possibility of diffusing evaluation. Concerned citizens, outraged by the evil result, will find they cannot muster what they need in terms of support to overturn the decision because they cannot get a response out of the system. The image is a rather modern one. It is the bureaucratic shell game which avoids citizen complaints by passing them from one agency to another for a response on the merits until the objections diffuse in general frustration.

I have tried to make Fuller's argument as vivid and realistic as possible in order to emphasize that if it fails as an indictment of positivism, it is not because of its empirical assumptions, but because it misses its intended target. The buck-passing scenario is not a consequence of legal positivism, but of a particular societal arrangement for enacting and enforcing laws. To see this, assume *arguendo* that Fuller is right about the restraints entailed by the need to justify. Presumably, then, an evil regime operating in a society that has embraced the natural law view, will also want on occasion to avoid

[14] Fuller, *Positivism*, at 637.

[15] Nazi Germany's reliance on secrecy does, however, provide some empirical support for Fuller's claim.

having to justify its decisions in the way we have just imagined. The critical assumption in Fuller's argument is that a natural law theory will not allow this to be done. But all that natural law requires, in the form that I am considering, is that the regime endorse the view that if official directives are too "unjust," they are not "law." There is nothing in this claim that requires one to institutionalize the process of testing the "justice" of the law in a forum of the sort that Fuller has in mind in talking about the Court. Thus, our imagined regime could simply disempower the Court from considering the merits of the claim. The Court's response could no longer be expressed in the same terms Fuller suggests. It could not claim "This is the law, and we have no power to consider its morality." Instead, its claim would be, "This passes the formal tests for law; whether it passes the substantive tests is a matter we cannot consider, though presumably the legislature has concluded that it does." Thus, the litigant is off on his wildgoose chase after a justification on the merits.

This rejoinder raises critical questions. Is it part of what we mean by a "court" that it must always reach results that it believes accord with "the law." If so, then the above institution is not a court because it has only done half of its job – checked the formal, but not the material status of the statute. Can a society decide not to have courts at all, or not to have some questions decided by courts, and still be a legal system? The answer to that seems to be a qualified yes, at least as respects partial withdrawal of questions from courts, since our own legal system exempts some questions from the competence of courts to decide. Of course, there is a price to pay for thus escaping the need to justify in this way.[16] One must again balance the desire to get away with evil (if that is the motive) against the damage one does to the general institution of the court which even the evil regime will want to use in most cases to underscore its general claim to be ruling justly. But that is a strategic problem that the positivist regime also faces, so again it does not appear that there is a moral advantage here for either theory.

Fuller's argument about natural law constraining evil judges seems to assume an evil judge working within an evil regime. How is the argument affected if we suppose, now, that the regime does not support the wicked ends the judge is trying to impose? The danger of such a judge getting his way is, of course, lessened by the likelihood of legislative response to overturn the decision or remove the judge. But even if some danger remains, it should be clear again that it will exist independently of whether the society believes there are moral tests for law. Thus, a "good" positivist regime might

[16] For further discussion of the connection between the concept of a court and of a legal system, and of the costs involved in dispensing with courts as the primary justificatory organ, see Soper, A Theory of Law, at 113.

also be concerned about "evil" judges who, if they could avoid the need to justify and thus reach decisions inconsistent with the regime's goals, might prove troublesome just because judicial decisions are always to some extent insulated, by time if nothing else, from immediate legislative correction. In that case, the sensible thing for the positivist regime to do is to adopt something like a constitutional due process clause and require judges to enforce "the law." That will cut off a court's ability to hide behind its "role" in refusing to justify a decision, because its role ("find the law") will now require testing official directives for compatibility with minimal moral standards. It has been suggested that a regime that adopted such moral tests for law would no longer be positivist, but as long as the connection with morality remains contingent, it is hard to see why this is so.[17] Indeed, this example illustrates the basic flaw in arguments like Fuller's. If a regime thinks that the empirical claim about evil being constrained by the need to justify is plausible, then – regardless of whether the regime thinks moral tests are *necessarily* part of the test for law – it can take advantage of that empirical fact by requiring any institution – or official – to justify a decision that declares, enacts, or otherwise finds the law. Thus, a positivist regime could even require legislators to write opinions defending the morality of proposed legislation prior to enactment, if it were thought that such a procedure would help ensure better results. All of these strategies seem independent of the prevailing legal theory.

So far I have considered arguments about the effect of legal theory on two kinds of citizens – the conscientious and the unconscientious. I have also considered the potential constraints legal theory might place on one kind of official: the evil judge. What about the opposite kind of judge: the good judge attempting to achieve morally desirable results in a regime that does not support him? Will he have a better chance in a natural law or a positivist regime? Robert Cover's book,[18] analyzing the dilemma faced by antislavery judges who enforced fugitive slave laws, presents a possible test case. Indeed, Ronald Dworkin interprets the dilemma these judges faced as proof that legal theory was partly to blame for judicial failure to move the country more rapidly toward the abolition of slavery.[19] Dworkin's interpretation, however, is not one that will help us in deciding whether there are moral implications in the debate between natural law and positivism as I am using those terms. Dworkin's claim is that if judges had correctly interpreted the available institutional materials, they would have seen that the law supported

[17] Compare Dworkin, Taking Rights Seriously (1977), at 345, with Soper, A Theory of Law, at 181 n. 3.

[18] Cover, Justice Accused (1975).

[19] See Dworkin, *The Law of the Slave-Catchers*, Times Literary Supplement, Dec. 5, 1975, p. 1437 (review of R. Cover, Justice Accused (1975)).

the antislavery result the judge wanted to reach. Thus, there need not have been a dilemma between the judge's role and the morally correct decision. Whether or not Dworkin is correct about what the institutional materials indicated at the time[20] makes no difference, because the "rights thesis" which underlies Dworkin's claim about how judges were supposed to decide cases is independent of the natural law/positivism distinction.[21] A positivist regime, if it thought it made sense to tell judges to seek the best answer even in hard cases, could so instruct judges with the result that the failure here, if it was one, must again be charged not to legal theory but to the particular theory of adjudication judges were using.

The argument that must be made in the case of the antislavery judge goes something like this. Judges in a natural law regime who are morally ahead of the rest of society will be free to express their moral judgments and base their opinions on them without fear of criticism for stepping outside the limits of their role. In doing so, they are more likely to move society ahead in line with their, presumably correct, moral views. This is not possible in a positivist regime which insists on separating "the law" that the judge must enforce from judgments about its morality.

One difficulty with this argument, of course, is that it assumes that the individual judges who are being "freed" to advance society in accordance with their own views do indeed have the correct views. If natural law has the posited freeing effect for those who do not like the accepted rules, it will free in both directions: the proslavery judge after the Civil War, who wants to return, as well as the antislavery judge who wants to "move forward." But there are other problems. Individual judges acting on their own moral lights are not likely to have much chance of reversing the contrary moral judgment of the rest of society. Indeed, if such judges are continually reversed by other judges or replaced by society, at some point the invitation to keep moral tests in view in reaching legal decisions is going to be so obviously futile that a good judge would do better to resign or look for other ways to change opinion. Even in a natural law society, some Court at some point must have the final say about whether the moral tests for law have been met; individual judges who continue to flout that highest court's decisions are not likely to find that they are any more "free" to do so than their positivist analogues.

Yet the argument might still have purchase. Even though individual judges are not likely to immediately effect a change in the rest of society, the fact that they are encouraged to engage in moral evaluation in reaching their decisions might initiate a dialogue that could lead to reevaluation of existing

[20] Serious doubts about this part of Dworkin's claim are raised in Greenawalt, *Policy, Rights, and Judicial Decision*, 11 Ga. L. Rev. 993, 1050–51 (1977).

[21] This claim is defended more fully in Soper, A Theory of Law, at 115–117, 129–30.

doctrine as other courts and society attempt to respond to the moral arguments of the enlightened judges. If judges continue to be reversed, then presumably at some point the prevailing moral judgment should be seen as preventing further argument within the role of judge. But the constant possibility of being allowed to test existing doctrine and force a definitive moral response could well result at least sometimes in greater forward progress.

This argument will be seen to have considerable affinity with Fuller's argument about evil judges. Indeed, it rests on similar assumptions about the relationship between moral dialogue and the direction of moral progress. Where Fuller focused on preventing evil by requiring justification, we are now focusing on undoing evil through the same means: requiring the system to respond to the demand to justify. Because the arguments are so similar, it should not surprise that the same response is available here that we gave above. There is no necessary connection between the society's prevailing legal theory and whether or not it has designed courts to permit this continued possibility of built-in challenge and response. A natural law society, if it preferred not to allow judges to demand justification for settled doctrine, could restrict their role to determining only whether directives passed the required formal tests. In that case, legislators could still claim to have made the judgment that the necessary moral tests had been passed and citizens would have to treat the judicial decision as "law," unless, being conscientious citizens who disagreed with the legislative claim, they decided it was too immoral. Conversely, a positivist society that valued the chance to constantly reevaluate doctrine by responding to moral challenge could empower courts to check doctrine for moral adequacy – though the power could be withdrawn at any time, consistent with the positivist claim that the connection is only contingent.

IV. LEGAL THEORY AND POLITICAL THEORY

So far, I have been considering particular arguments about the moral implications of legal theory. I want now to consider the issues raised by these arguments from a perspective that is more general in two senses. First, I shall consider a general argument that purports to explain why the choice of legal theory could never affect moral deliberations. Second, I shall use this general explanation to suggest a different view about the relationship between legal theory on the one hand, and political or moral theory on the other.

The general reason for doubting that practical consequences hinge on this debate can be seen by noting how odd it sounds to suggest that one can "choose" a legal theory. To suggest that we can "choose" whether to call unjust law "law" sounds as if we are selecting between alternative proposals for a stipulative definition. But stipulative definitions do not normally have

practical consequences. They can be criticized by reference to what might be called internal criteria, which ask, for example, whether the proposed definition is convenient or easy to use or consistent with other definitions within a preexisting set to which the new definition is to be added.[22] But the underlying phenomenon will remain unchanged whatever we decide to call it. To suggest that the name we give the phenomenon has practical implications is like suggesting that the impact of the new moons of Uranus on various human interests will depend on the names we give them.

Apply the argument to the present context. We are trying to decide whether anything hinges on whether or not we call "unjust law" "law." The double appearance of the word "law" in this slogan indicates that we have a different potential referent in mind for each use of the term. The "unjust law" whose title is in question is the phenomenon which, like the new moons of Uranus, will remain unchanged whatever we decide to call it. The referent of this phrase is fairly easy to determine: it is the official directive that has passed the formal test of pedigree or source that is determined by the positivist model of law. Thus, we are asking whether to call such official directives "law" without further moral tests, or to call them "law" only if they are not too unjust. But surely, what we call them does not matter. Whether one should obey them or not, and whether one will obey them is determined independently of names. Indeed, that is why some of the arguments considered above failed: If one is worried about the tendency of people to respond to official directives without considering their merits, that tendency is not going to be affected by the name we give to those directives, but only by some more fundamental educational process that brings home the individual's responsibility to evaluate official claims.

I have tried to elaborate this general explanation for the irrelevance of the debate as carefully as possible because, I think, it helps bring out the differences between moral theory, legal theory, and stipulative definitions. The above argument helps explain why debates about law are not likely to affect moral deliberations about what to do. But it would be a mistake to conclude that nothing but names is at stake. This debate is not about how to affect people's behavior, but about how to be consistent when we make claims about law and authority, and moral and legal obligation. The debate may force us to explain how law relates to the obligation to obey, and thus force us to engage in political theory in order to do legal theory. But there remains in this joint enterprise a special role for legal theory. Legal theory explains why the joint enterprise is required in the first place and furnishes plausible pre-analytic candidates (e.g., "official directives") to use as a starting point in conducting the inquiry.

[22] See Morris, *Verbal Disputes and the Legal Philosophy of John Austin*, 7 U.C.L.A. L. Rev. 27, 29–31 (1959).

The reason it is a mistake to think that we can simply "choose," in the sense of stipulating, a legal theory is that we *do* have what I called above "internal criteria" that affect our ability to decide what to call official directives. We are not asking whether to call official directives "Arthur" or "Lorien," as if all that mattered were questions of convenience in terms of the string of letters or sounds we should use as interchangeable ways of designating the same phenomenon. We are puzzled about whether to call official directives "law," because we already have some sense of what it means if we say something is "law." Getting at this sense is what legal theory is about. If one wants to say we are stipulating, then we are doing so within a world of preexisting concepts like "obligation" and "duty" that have meanings we cannot ignore. If some of those concepts are connected with what we mean by "law," then we cannot make "law" mean anything we want without affecting the meanings of all of these other terms.

What is, then, this preexisting sense of "law?" One possibility, which underlies some of the arguments considered above, is that the symbol law, simply as a matter of social-psychological fact, has emotive power which tends to induce obedience. This suggestion is like pointing out to someone considering what to name a child that certain names evoke emotional images which may have repercussions on the child's personality or future development. The claim in our context would be that we have to be careful about calling official directives "law," because of the possibility that the name will cause an unjustified obedience response. A natural law theorist might use this possibility to insist that we reserve the name for just those directives that are not too unjust. A positivist, as illustrated in MacCormick's argument, may argue that what is needed is to educate people to get rid of the emotive connotations so that the symbol "law" will not induce obedience. I suggested that both arguments are unpersuasive: The natural law argument ignores the fact that regimes will always claim that their directives are just and hence will always be in a position "to manipulate the symbol."[23] The positivist argument assumes that the emotive force of the symbol can be removed by educating people to see that official directives have no *necessary* claim on their allegiance. But positivist officials will still make a contingent claim on allegiance by insisting that their particular legal system is just and hence its "laws" should be obeyed. As Julius Stone puts it, "How much of the tendency to obey what is 'law' is to be attributed to its power as a symbol, and how much to the tendency of most people to submit to actual power . . . is probably at best rather problematic."[24]

A second explanation for the preexisting sense of law looks for the reason why that symbol might have emotive force. Worrying about the emotive force

[23] See J. Stone, Human Law, at 255.
[24] *Id.*

of "law" is not like worrying about whether to name a child Tristram Shandy and wondering what social-psychological facts would have to be changed to prevent adverse reactions to the name. Law has emotive force because it has already been connected with other concepts of practical reasoning in ways that we cannot alter without altering our existing moral vocabulary.

To see what these existing connections might be, return to the basic problem that confronts attempts to trace moral implications to this debate. The basic problem is that most regimes will claim that their official directives are just. Thus whether or not we limit the term "law" to only those directives that *are* just, officials will not be confronted with an inconsistency in their attempts to connect official directives with practical implications. This conclusion suggests that there are definite practical implications that any regime will want to attach to its official directives. It also suggests that these practical implications are the same ones that give "law" its preexisting sense. What are those implications, and what must be true of official directives if they are in fact to have such implications?

Here are three plausible candidates for the implications we might intend to attach to official directives: Official directives, we might say, are:

(1) Directives courts must enforce (as a matter of the role assigned to them);
(2) Directives citizens ought to obey;
(3) Directives citizens ignore at their peril.

The first statement describes the role of a court in a legal system. The second statement makes a moral claim. The third statement is a reminder of the potential hostile reaction that will attend failure to comply. This last statement would probably be accepted by most people as at least one of the things officials intend people to infer from their directives. (For classical positivists like Austin, it was the only thing one could necessarily infer.) The arguments we considered in the first part of this paper are arguments that focus on the first two possibilities. Fuller's argument seemed to assume that official directives are necessarily things that it is part of a court's role to enforce. Thus, if we require these directives to pass moral tests, courts can do their job only by justifying, which constrains their ability to get away with evil. In response, I suggested that one might require directives to pass moral tests in order to count as "law," while still reserving to the legislature the question whether those tests had been met. Conversely, if having an institution to check the moral status of official directives was thought to be a good thing for the reasons Fuller suggests, a positivist society could also create such an institution. This debate, in short, is independent of arguments about the best institutional way for making and enforcing the judgments about morality which both kinds of societies will implicitly make.

What about the moral claim? If officials intend their directives to be

directives that citizens ought to obey (or that courts ought to enforce as a matter of morality, not merely as a description of their assigned role), what must be true of these directives? The answer to that depends on political theory. Here are four possible claims that might be made about the moral implications of official directives:

(1) Citizens are obligated to obey official directives if and only if they are in fact just (in their content);
(2) Citizens have some moral duty to obey official directives regardless of content, but this duty can be overridden by other duties;
(3) Except in very unusual cases (including cases of great injustice) citizens are obligated to obey official directives regardless of content;
(4) Citizens are always obligated to obey official directives.

These four possibilities are listed in order of increasing strength of the claimed moral duty to obey official directives. No legal system that I am aware of makes the first claim: i.e., officials do not claim[25] that citizen compliance is entirely dependent on the correctness of the official claim of justice but, rather, that citizens should obey sometimes even if officials are wrong.[26] Many people probably believe that the fourth claim, demanding absolute submission, is typical of the implicit claim that officials make. If so, officials would be making a claim difficult to justify under any political theory accepted today.[27]

Now we can see why arguments about the moral implications to be attached to official directives are not simply stipulative. Officials hold out their directives as just. Typically, they also hold them out as directives that obligate even if they are wrong about that moral judgment. Thus, officials endorse some version of political theory described in sentences (2)–(4)

[25] I talk about the "claims that officials make," as simply another way of talking about the meaning of "legal obligation" when that phrase is used by persons within a legal system to make demands on others.

[26] When I say that no "legal system" makes such a claim, I am making a statement about the typical, modern legal system. I am not attempting to define "legal system" in a way that would force every society to meet certain tests in order to count as "legal." The goal of legal theory described here is not definition in that sense, but *consistency*. Anyone who claims to be using "law" in a way that entails moral conclusions, must confront the possibility that he is not using "law" and/or "morality" correctly. Officials or societies who do not use "law" in this way – to connect official directives with moral conclusions – will not face this problem of consistency, but that is not, in my view, the typical posture of officials in the modern state. (Again, I put these views in terms of what "officials claim," but that is but another way of getting at the meaning of "legal obligation" from the insider's perspective.)

[27] Whether this *is* the claim that officials implicitly make would be difficult to determine empirically because officials, if they think that their laws are just, probably aren't very self-conscious about what they would expect if their moral judgments prove wrong.

above. Whether these claims are consistent or correct requires one to check political theory to see what connections there might be between official directives and moral obligation.. The positivist who suggests we would do better to keep these ideas totally distinct must persuade not just citizens of that view; he must also persuade officials to stop suggesting that their directives obligate just because (in part) of their status. Officials must make no claim for the practical implications of their directives other than the claim that citizens ignore them at their peril.

Some positivists, of course, have been happy with this last conclusion: that law's only practical meaning is its prudential one. In this respect MacCormick departs from his predecessors. He recognizes that if this is all one meant by "law" one could never explain the persistent view that state coercion is (morally) justified in part just because a legal duty has been breached.[28] But the moral connection that MacCormick establishes cannot account for the claims made in the name of law. MacCormick's view is that law's moral value lies in the fact that it is a formal, rule-like system. By intervening only on the basis of publicized rules, "human beings are treated with some respect for humanity, not like dogs or some other kind of "pets" of the state. . . ."[29] MacCormick acknowledges that this idea traces to Fuller; he also notes that positivists have never been disturbed at conceding this element of value in rule-like structures, because, of course, such rule-like intervention can be consistent with totally immoral aims and purposes.[30] But this concession is fatal to MacCormick's enterprise. Showing only that law meets *necessary* conditions for having moral value does not establish that it has any moral value at all. Gangsters may also order me about by clearly established rules simply because, as a human rather than a dog, that may be the most efficient way to communicate with and use me for their unjust ends. The problem we are considering requires one to show that official directives not only meet necessary but also sufficient conditions for having some moral value – for that is the implicit claim that is made and that must be defended by officials within the state.

V. CONCLUSION

In this paper, I have considered and rejected the recent claim that the best way to promote the sovereignty of individual conscience is to accept the positivist view that what the law requires has no necessary connection with

[28] See MacCormick, *A Case for A-Moralistic Law*, at 23, 39–40. These passages make clear that even MacCormick is determined to retain some conceptual connection between the idea of legal obligation and a practical moral conclusion – a connection that we cannot simply "choose" to give up.

[29] *Id.*, at 26.

[30] This was exactly the criticism levelled by positivists at Fuller.

what morality requires. Two related reasons make one skeptical about such a claim: (1) Moral conscience, if it is inclined to yield to officialdom, is likely to do so regardless of the prevailing legal theory because both positivist and natural law regimes will claim that their directives are just. Whether that claim is a contingent one (as in the case of the positivist), or a matter of the "necessary" meaning of law is too subtle a distinction to affect whether or not individuals defer moral judgment to others. (2) Even if certain institutions, because of their "moral prestige," could preempt individual evaluation of law, the decision whether to include such institutions within a "legal system" is independent of the natural law/positivism distinction.

I have also considered and rejected the claim that it is morally preferable to adopt a natural law view. This claim, in contrast to the claim made on behalf of positivism, focuses on officials rather than on individuals, and suggests that the "moral price" one pays for preserving individual sovereignty of conscience may be an increase in official injustice. I have suggested again that the question whether to restrain officials by forcing them openly to justify their decisions is independent of the natural law/positivism distinction.

In the last part of the paper, I argued that the question of whether legal and moral obligation are connected must be answered on its own terms as a conceptual matter. Officials in modern legal systems implicitly claim such a connection, and even recent positivist theory finds this claimed connection to be sufficiently persistent and in need of justification to warrant some attempt to explain law's perceived moral value. These positivist explanations, however, remain inadequate so long as they show only that law meets necessary conditions for having moral value. The important claim that is typically made and that must be defended is that the breach of a legal duty is a sufficient condition for the act of state coercion. The question for legal theory is not whether it would be a good or a bad thing for such a claim to be accepted as true, but whether it *is* true.[31]

Law, University of Michigan

[31] In deciding whether it is true, one must not make the mistake of thinking that the only task is to check the claims that are made in the name of law with "true" political theory to see if the claims are correct. The persistence of the claim that law (morally) obligates is itself evidence of what we mean by "moral obligation." Thus one who concludes that no plausible account of "law" can be made consistent with both its primary linguistic sense (which tends to identify law by its official source, rather than its content) and with the moral claims made on law's behalf, must stop to consider whether it is the prevailing moral theory that needs revising. The phenomenon in question (the combination of linguistic and moral claims made about "law") serves, in short, as pre-analytic data for both an adequate legal and an adequate political theory.