In Defense of Classical Natural Law in Legal Theory:
Why Unjust Law is No Law at All

Philip Soper

I. Introduction

More than 700 years separate us from St. Thomas Aquinas and his assertion in the *Summa Theologica* that unjust law "seems to be no law at all."[1] In the time that has passed, this brief remark has been mocked, applauded, reinterpreted, and ignored. The mocking came mostly at the hands of the classical legal positivists, like Austin and Bentham, who insisted that nothing but confusion would result if we failed to separate the question of what law is from the question whether it is just or unjust. Here, for example, is Austin, at his most derisive, ridiculing Blackstone's echo of Aquinas:

> [T]o say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is … to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God … the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a court of Justice, from the creation of the world down to the present moment."[2]

So much for the mocking. The applause for Aquinas' suggestion has come more sporadically and less systematically, often from individuals who have been personal witnesses to, or preoccupied with, the possibility of unjust regimes. Martin Luther King invoked Aquinas's views in his famous letter from the Birmingham Jail to help explain his civil disobedience.[3] Gustav Radbruch, the German theorist who "converted" from positivism to natural law after his experience with the Nazi regime in World War II, insisted that "statutory injustice" should not count as law—a refinement of Aquinas' thesis that became a central issue in recent cases in

This article is developed from a paper presented in April, 2005 at the Natural Law Colloquium at Fordham University in New York. I am particularly grateful to the commentators on that occasion, Professor Charles Kelbley of the philosophy department and Professor Benjamin Zipursky of the law school, whose insightful comments led me to revise parts of the argument I develop here.

1. Thomas Aquinas, *Summa Theologica*, trans. by Fathers of the English Dominican Province, 1952, at ques. 95; art. 2; ques. 96, art. 4.
2. John Austin, *The Province of Jurisprudence Determined*, Library of Ideas ed. (New York: The Humanities Press, 1965) at 185.
3. See M.L. King, "Letter from Birmingham Jail" in *Why We Can't Wait* (New York: Harper & Row, 1963) 77 at 84.

Germany involving the prosecution of former East German border guards.[4] Radbruch's conversion itself became an issue of contention in the famous debate between Hart and Fuller in the late 50's, with Fuller again defending a position similar to that of Aquinas's.[5] But this famous exchange between Hart and Fuller probably marks the highpoint of the defense of the classical natural law thesis. For instead of continuing to explain how justice could be seen as a criterion of legal validity, those most sympathetic to the Aquinas tradition took a different approach. The claim that "unjust law is no law at all" was reinterpreted as a claim in political or moral theory, not legal theory. Aquinas's assertion, it was said, was not about the meaning of law; he was simply insisting that unjust laws do not create moral obligations—a proposition that any positivist could also happily affirm.[6] The upshot of these developments is that the classical view that official directives must meet minimum moral requirements to count as "law" has largely been ignored in recent jurisprudence. Contemporary legal theorists engage either in intramural squabbles among positivists about how to depict the normative claims or the social facts that characterize legal systems, or in unending disputes over whether or not moral principles that are "incorporated" into the law should count as "legal" principles.[7] Even the most powerful opponent of positivism today, Ronald Dworkin, has replaced the classical claim that statutory law must pass through a moral filter to count as law with a very different version of natural law that insists on incorporating moral theory into the process for finding law in the first place. I shall return to Dworkin's version of natural law in a moment. The point to note for now is that Aquinas' suggestion that moral injustice can disqualify official directives from counting as "law" receives at best only scattered support among contemporary legal theorists.[8]

In this article, I propose to defend the thesis that extreme injustice disqualifies otherwise valid official directives from counting as "law." I shall do so, in part, by tracing the evolution of this idea through the various alternative views I've just mentioned. I say the "evolution of the idea" rather than the "history of the idea" because I do not pretend here to give a *chronological* account of the developments in this field. My aim, rather, is to show the *logical* connections among these views and the way in which a particular theory about the nature of law seems almost to contain within itself the germ of its own contrary or alternative view. To borrow from Hegel, I aim to show how the thesis hinted at in Aquinas' classical statement

4. See Manfred J. Gabriel, "Coming to Terms with the East German Border Guards Cases" (1999) 38 Colum. J. Transn'l L. 375 at 404.

5. See Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71 Harv. L.Rev. 630 at 651-55.

6. See John M. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 363-66. For further discussion, see Philip Soper, "Legal Theory and the Problem of Definition" (1983) 50 U. Chicago L. Rev. 1170 at 1173-75.

7. For an unflattering but, in my view, largely accurate description of some of these developments within recent positivist legal theory, see Ronald Dworkin, "Thirty Years On" (2002) 115 Harv. L. Rev. 1655 (reviewing Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001).

8. For a recent review of contemporary natural law theories see Mark C. Murphy, "Natural Law Jurisprudence" (2003) 9 Legal Theory 241. Murphy's analysis confirms that there is little or no support for what he calls the "strong" natural law thesis, which is precisely the thesis I defend here.

leads naturally to its opposite—the antithesis, represented by the classical positivist view of theorists like Austin; this antithesis in turn has generated a new synthesis today in the modern version of positivism represented by theorists like Kelsen, Hart and Raz. This new synthesis, in turn, laid the groundwork for the antithesis represented by Dworkin's powerful attack on certain of positivism's central features. My claim is that these developments have now set the stage for a new synthesis—a return to where we began (though with deeper understanding): a return to Aquinas's claim that some element of justice is a criterion of legal validity.

I proceed as follows. First, I begin with some preliminary clarifying comments about methodology and the precise issue under discussion. Second, I describe four leading theories about the nature of law and consider how central ideas in each theory can be seen to generate opposing ideas that lead in turn to opposing models of law. Third, I state briefly the affirmative case for thinking that the classical natural law view is correct. Fourth, I identify basic mistakes in current approaches to the question about the nature of law that help explain why modern positivism has overlooked the manner in which it leads logically to the classical natural law view. Finally, I add some brief remarks about why it matters: what practical consequences follow from acknowledging that there are moral limits on what can count as law.

II. Preliminaries

A) Natural Law as Legal Theory and as Moral Theory

I have been referring thus far to Aquinas's statement as if it were a statement about the nature of law. "Natural law" is more commonly used to refer, not to a theory about law, but to a theory about morality—a theory about the ability of reason to establish moral truths "naturally," deriving them from a proper understanding of the laws of nature and, in Aquinas's case, ultimately from the eternal laws of God. Indeed, Aquinas' discussion in his Treatise on Law and throughout the *Summa Theologica* is probably best seen as defending and explaining this moral theory; it is not, at least not explicitly, about how to understand the concept of law. In this respect, what I designated above as the "reinterpretation" of Aquinas, which suggests that the claim about unjust law should be understood as a claim about the moral force, rather than the definition, of law is, in my view, entirely justified. Aquinas was not doing "legal theory" in the explicit, self-conscious way that characterizes modern analytic jurisprudence. But determining what Aquinas actually had in mind in his way of putting the point is not my project; I am only interested in explaining how the claim he made can *also* be defended as a claim about the nature of law, as well as a claim about political obligation.

The important point to note is that natural law as a legal theory has no necessary connection with natural law as a moral theory. One might decide that moral questions are to be determined by reference to a natural law moral theory, while still agreeing with the positivist that one can separate law from any such moral theory. Conversely, one might decide that there is a necessary connection between law and morality—as a matter of what we *mean* by the concept of law—without agreeing

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

that the morality so connected is the kind embraced by natural law moral theorists. This point about the independence of these two ways of talking about "natural law," has been made more than once in the literature,[9] but still causes confusion. For my purposes, when I talk about natural law, I shall be using it in the sense of legal theory—that there is a necessary connection between law and morality; the question of just how to characterize moral theory itself and the question whether there is an objectively determinable, "natural" moral law, I leave aside.

B) Methodology

The second clarification concerns the problem of explaining what kind of enterprise is involved in arguments about the nature of law. Is the enterprise descriptive, conceptual, prescriptive? A descriptive theory aims at describing salient features of legal systems. A conceptual theory aims at isolating some of these features as "essential" in some sense to the very concept of law itself. A prescriptive theory argues that accepting one view of the nature of law over another will have better consequences and thus should be adopted on practical grounds. The literature on these various methodological approaches is now almost as large as the literature on the substantive question about the nature of law itself. I shall spend no time here canvassing the various arguments about the possibility and relative merits of these various methodological approaches. Instead, I shall simply explain that my claim here is a conceptual one. Recognizing that "law" must meet minimum requirements of justice is essential to the very idea of law. By "essential" I do not mean simply "important," an adjective that can easily lead to questions about whose idea of importance here should count.[10] By "essential" I mean just what a conceptual inquiry implies: this feature of law cannot be eliminated without creating contradictions or conflicts with other concepts or other aspects of legal practice. It is part of what we mean by law in the sense that we could not change or eliminate this feature without requiring a radical alteration in other connected concepts in our legal or social life.[11]

III. Four Models of Law.

A) Introduction

With these preliminaries out of the way, we can now summarize and describe a bit more fully the four theories of law that have been alluded to in the discussion thus far. These are: 1) Classical Natural Law; 2) Classical Positivism; 3) Modern Positivism; and 4) Modern Natural Law. What follows is a brief if superficial

9. See Philip Soper, "Some Natural Confusions About Natural Law" (1992) 90 Michigan L. Rev. 2393 at 2394-96; Kenneth Einar Himma, "Natural Law" in *The Internet Encyclopedia of Philosophy* (http://www.iep.utm.edu/n/natlaw.htm) (2006).

10. See Stephen R. Perry, "Interpretation and Methodology in Legal Theory" in Andrei Marmor, ed., *Law and Interpretation* (Oxford: Clarendon Press, 1995) 97 at 112-21; Gerald Postema, "Jurisprudence as Practical Philosophy" (1998) 4 Legal Theory 329.

11. For further discussion, see Philip Soper, *The Ethics of Deference* (Cambridge: Cambridge University Press, 2002) at 28-34.

description of these major divisions within legal theory which I provide, not in the thought that they may be unfamiliar, but as background for the argument of the next section.

1) Classical Natural Law

The Classical Natural Law view is the one I have been ascribing to Aquinas. The classical view has no particular quarrel with the positivist's insistence that one begins the process of identifying what is to count as law by employing empirical tests of "pedigree" or validity that can be traced to social sources or social facts. But the classical view insists that these officially identified directives cannot count as law if they are too unjust. The classical view erects, as it were, a "substantive due process" check or filter for official directives to determine their consistency with notions of fundamental fairness or minimum requirements of justice before concluding that such directives are valid law.

2) Classical Positivism

Classical positivism is Austin's view of law. The single essential feature that characterizes law on this view is the potential sanction attached to the State's directive. It is easy to see how this view leads to Austin's ridiculing of the natural law alternative: if the State is going to hang you for violating the law, what's the point of claiming that, because the law is unjust, it isn't law. For all practical purposes, exactly the same thing will happen to you as in the case of laws that *are* just: the sanction will be imposed.

3) Modern Positivism

Modern positivism does not quarrel with Austin's claim that law is characterized, at least in part, by the potential sanction; it just insists on adding a second essential feature in order to capture the concept of law as it is employed by insiders of the legal system. Law purports to be more than a coercive system: a legal system claims that its coercion is justified. Law, in Kelsen's terms, is a "normative coercive order;"[12] in Hart's terms it is more than the "gunman writ large."[13] This view of law as making normative claims about its official directives that purport to distinguish it from a purely coercive system is probably the dominant view among contemporary legal theorists, and certainly among contemporary positivists.[14] Positivists assume that

12. See Hans Kelsen, *The Pure Theory of Law*, trans. by Max Knight (Berkeley: University of California Press, 1970) at 44.

13. H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994) at 82.

14. Among positivists, Matthew Kramer is one of the few to endorse a model of law largely indistinguishable from Austin's as respect the normative claims that are essential to a legal system. See Matthew Kramer, *In Defense of Legal Positivism* (Oxford: Oxford University Press, 1999), 103-05; see also Frederick Schauer, "Positivism Through Thick and Thin" in Brian Bix, ed., *Analyzing Law* (Oxford: Clarendon Press, 1998) 65 at 73-74.

by adding this dimension of normative claims made by insiders on behalf of law, one can account both for the moral language of the law (legal "obligation" and legal "rights" and "duties"), while still insisting on the separation of law and morality. That separation is ensured, it is thought, because what legal systems *claim* is one thing; whether the claims are true is another. Thus law is still identified empirically (though now we take account of moral claims as well as threatened sanctions) while the evaluation of the law, including an evaluation of the claims officials make about their laws, remains independent of the identification of law.

4) Modern Natural Law

The best known contemporary opponent of positivism is Ronald Dworkin. But Dworkin's version of natural law, if that's what it is, is strikingly different from the classical version. Unlike the classical version, which begins with the positivist's empirical tests for identifying law and uses morality as a filter or check to determine validity, Dworkin's theory of adjudication insists that moral or political theory is embedded in the process of identifying law from the very beginning. In all cases, judges are implicitly drawing on moral and political theory to construct the "soundest theory of law" that both explains the settled cases and also explains how to decide current controversies—even in hard cases where the settled rules don't seem to point to a single, unique result. In one sense, this theory seems to present a stronger challenge to positivism because it apparently connects law and morality from the start, rather than simply bringing morality in at the end as a filter or check on the empirically determined legal directive. But in another sense, for reasons I explore briefly below, Dworkin's challenge is weaker than the classical natural law challenge because the connection with morality is open to the charge that it is a connection only with conventional or positive morality—the morality of the society whose law the judge interprets—not true morality. Thus in evil societies, the "soundest theory of law," may still leave one with laws that are so evil that there is no true connection to justice.[15]

B) The Dialectics of Legal Theory

Having introduced, however briefly, the main candidates for explaining what we mean by law, consider now the ways in which each of these theories seems to point to its alternative in a manner reminiscent of Hegel's claim about the dialectical movement of ideas in history. Begin, again, with the claim that "unjust law is no law at all." On its face, it is easy to see how this slogan might provoke the response of the classical positivist since the slogan itself uses the term "law" both to say that it is unjust and to say it isn't law. To avoid contradiction, we must be using "law" here in two different senses. We must be saying something like "official directives that otherwise have all the features of 'law,' will not count as 'law' if too unjust." So it is easy to sympathize with those who, like Austin, argue that we are confusing

15. See H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982) at 151.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

the issue unnecessarily by purporting to qualify the phenomenon referred to in the first part of the statement ("official directive") before concluding that it is "law." If these official directives will be enforced anyway, what's the point of suggesting they aren't law? More recently, critics sympathetic to Austin's argument have made the point even more strongly: Since one must start, in any event, with the phenomenon of "official directive," and identify it as a putative candidate for the term "law," there is little point in adding moral tests to the criteria of legal validity. Because the positivist's criteria will already have been employed to identify the "official directive"—the pre-evaluative facts that count as law under the positivist's test—the upshot, it is argued, is that we "would only replicate positivism at a different remove, thus providing essentially no advantages."[16]

Consider now, the move from classical positivism to modern positivism. This move can be understood as an extension of Austin's own claim that what counts in characterizing law is the viewpoint of those who interact with official decrees. Austin's command theory of law is both plausible and unimpeachable as long as one has in mind the view only of the citizen who does not accept the legal system and whose motivation for compliance is simply fear of the sanction.[17] But once Austin has directed our attention to the possibility that what counts in determining the meaning of the concept is what will happen to you if you fail to comply with certain directives, he naturally invites one to think about the other side as well—how does the matter look from the point of view of those who *do* accept the legal system, enacting and enforcing directives in accord with the accepted scheme for doing so? Suddenly, Austin's account seems only half correct. Modern positivism, which may have begun with and received its most powerful formulation from Hans Kelsen, is a natural outgrowth of Austin's insistence that we should look at the matter from the point of view of those who interact with official directives—but that means both those on the giving end of "orders" as well as on the receiving end. And once we think about those who are giving the orders, it is easy to see that to capture their view of the nature of law requires taking account of the normative claims about why it is right to issue the orders they do and how they purport to distinguish themselves from purely coercive systems.

It is also easy to see, I think, how the development of modern natural law in the form advocated by Ronald Dworkin is itself a direct outgrowth of modern positivism. Indeed, as is well known, Dworkin's initial attack on Hart's version of positivism began exactly where Hart left off: with the fact that the normative claims that are made by litigants in judicial cases cannot be accounted for on Hart's model of rules. With modern positivists insisting that we look for the key to law in the

16. Frederick Schauer, "Positivism as Pariah" in Robert George, ed., *The Autonomy of Law* (Oxford: Clarendon Press, 1996) 31 at 42. Schauer's argument fails for reasons explored below in Part V (B). The argument makes the "identification" approach to determining the meaning of law (what are the tests for determining legal validity?) the critical one, ignoring the "functional approach" (once a directive is identified as "law," what functions must it serve to qualify as a correct identification).

17. Even Hart seems to concede that if the question about the nature of law is approached entirely from the perspective of Holmes "bad man," the classical positivist's account of law may be sufficient. See *The Concept of Law*, *supra* note 13 at 40.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

claims of insiders, Dworkin did just that, though he decided to focus on litigants in hard cases, rather than on the officials who accept and promulgate the basic rules of the system. Just as Hart had noted that the normative claims of officials who accept the system cannot be squared with Austin's coercive account, so Dworkin noted that the arguments of litigants and the opinions of judges show that they do not think they have run out of law just because they have exhausted the guidance available from conventional sources of the sort identified by Hart's "rule of recognition". Indeed, the strongest evidence for Dworkin's claims about the inability to sharply separate law and morality is the fact that litigants and judges alike appear to assume that there are answers to the question "what is the law?" in a particular case in a way that can only be explained by expanding the range of what counts as "law" to include moral principles embedded in the legal system as a whole as well as conventional rules of the sort described by Hart.

Having traced the movement from Aquinas, to Hart, to Dworkin, can we also see in this story an explanation for why we might now be on the verge of a new stage in the dialectic—this time back to where we started: back to the view that unjust law is no law at all? I develop the detailed argument for this view in the next section, but at this point I think one can suggest what it is about the combination of modern positivism and Dworkin's modern natural law that points to a revival of the classical natural law view. The modern positivists are right that one must take account of the normative claims of insiders as well as the motivations for compliance of those who do not accept the system. And Dworkin is also right that we will improve our understanding of the concept of law if we pay attention, not just to the claims of those who enact and accept rules, but also to the process of adjudication that reveals the assumptions of litigants and judges who argue about what the law is in particular cases. Dworkin is also right, in my view, to suggest that those assumptions reveal a theory of how to identify law that does not permit a sharp separation of "official directives" from the moral and political principles that underlie the legal structure as a whole. The problem, however, is that this practice of adjudication does not seem to reveal a connection between law and morality, as Dworkin insists, but between law and ideology—the underlying principles of the particular legal system in which litigants and judges operate and which may, of course, be evil or good. Consider, for example, Dworkin's struggle to explain how Judge Siegfried, called upon to enforce a blatantly discriminatory Nazi law that purports to allow an Aryan plaintiff to confiscate the property of a Jewish defendant, can still insist that the legal right of the confiscating party is also a kind of moral right. However unjust the law, Dworkin seems to say, there might still be some weak moral right for the plaintiff to prevail. But the explanation for why such evil laws might still provide some moral as well as legal right abruptly departs from Dworkin's own theory of adjudication. The moral right does not derive from a connection with morality that is revealed by the "soundest theory of law;" rather, the moral right, if any, now stems from a completely independent argument that Dworkin introduces from political theory to suggest that sometimes even unjust laws should be enforced or obeyed.[18] We no

18. See Ronald Dworkin, "A Reply" in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (Totawa, N.J.: Rowman and Allanheld, 1983) 247 at 258.

longer have a connection between law and morality through a theory of adjudication that reveals legal rights to be a species of moral rights. What we have are legal rights that cannot be defended as moral, but that invite us to turn from legal theory to political theory to see if there might be an obligation to obey even unjust laws. It is easy to see why Hart might claim that this is just positivism: the law is unjust, and the question becomes whether political theory supports obeying the law anyway.[19] But Dworkin's struggle here points the way, I suggest, to a better theory. The phenomenon that provokes the struggle to explain the evil Nazi law is the assumption of insiders that we must be able to justify the coercion the law employs; maybe we can justify it through political theory, however unjust the law. But Dworkin wants to make the justification through legal theory and, I think, correctly points to the possibility that this is also the assumption that insiders share about the concept of law—it can't be law if coercion in its name can't be justified. The problem is that we cannot establish the moral justification through legal theory as long as we are wedded to a theory that connects law with a particular society's underlying ideology because evil ideologies leave room for justification only through political theory, if at all. The solution is simple. If Dworkin is right that insiders expect explanations about what the law is that still make it possible to claim that they are morally justified in applying legal sanctions, we need only refuse to recognize sufficiently unjust law as law. In Aquinas's formulation, we do not struggle to explain how the moral principles of a particular society's underlying ideology can generate "legal rights" that are a species of "moral rights"; instead we are invited to decide directly by reference to "true" morality whether the official norms that evil ideologies generate are consistent with minimum requirements of justice, refusing to count them as "law" if they are not.

The next stage in the development of our understanding of the concept of law is, in short, an outgrowth of the same basic instinct that underlies both modern positivism and modern natural law. We must be prepared to recognize as essential to our concept of law those features that are necessary in order to make plausible the claims of insiders about their right to coerce through law. One way to do this is to try to find a theory of adjudication that guarantees that any official directive identified as "law," will necessarily have some minimal connection with morality. Dworkin's attempt to follow this way in his theory of adjudication leads, in the end, to failure. The second way is to abandon the attempt to find the connection with morality in the underlying principles of any particular society and simply recognize directly that extreme injustice prevents insiders making the claims they must if they are to remain a legal, rather than a coercive, system.

IV. Why Unjust Law is No Law At All

With these four competing theories and their potential connections in mind, it is now possible to make the affirmative case for the classical natural law view. My argument proceeds through four steps. First, I agree with the modern positivist's claim that an accurate account of law must include, not just the "bad man's" perspective that

19. See Hart, *supra* note 15 at 149-53.

focuses on the sanction, but also the perspective of those who accept the system and enforce its directives. Law's "self-image"[20] insists that, unlike purely coercive systems, the legal system's actions are justified. The second step in the argument asks what it is that requires justification. The answer to that seems obvious. The State must justify its invasion of human interest in life, liberty and property when sanctions are employed: i.e., legal systems must claim that coercion through law is justified. The third step asks how one justifies taking another's life, liberty or property. The answer to that question is not quite so easy and requires a somewhat longer discussion. The State's claim that its coercive actions are justified necessarily entails several subsidiary claims: claims both about the State and why it has the right to create and enforce norms in the first place, as well as claims about the content of the norms the State has enacted. The State, in this respect, is no different from any individual who is trying to justify action that impinges on someone else's interests. Imagine, for example, that you are unhappy that your neighbor's tree hangs over the property line, dropping leaves on your lawn and shading your prize tomatoes. Can you take an axe to the offending limb, or for that matter, to the entire tree? Well, if you have the physical ability to do so and can get away with it, of course you *can* simply as a matter of your *de facto* power to impose your will on your neighbor. And if your neighbor understands that you have the power to enforce your will, she will realize that if you order her to remove the offending tree or branch, the threat posed by your superior power gives her a reason to comply. So far, our example is just the "gunman" situation that Austin thought characterized the legal system. Since we are assuming that Austin's model is incomplete, we need to bring the example in line with the modern positivist's view by insisting that, in addition to your power to impose your will on your neighbor, you must do so only in the good faith belief that such action is justified. What does this require us to add to the example? What would you have to do in defending a claim that your action against your neighbor was justified? Any such claim seems to have at least two components. First, you would have to claim that the overhanging branch invades legitimate interests of yours. That is, you would have to make a claim about the content of any directive you give your neighbor about what she should do with her tree—a claim that removing the limb is justified as a matter of moral theory. Second, in addition to defending the correctness of the action you want her to take, you would also have to justify your right to impose your view of morality on her. After all, she may disagree about whether her tree is invading legitimate interests of yours, or she might insist that she also has interests at stake that outweigh yours, or she might appeal to the inherent right of trees to expand to their limits and realize their natural potential. In short, both of you could, in good faith, hold competing views about the right course of action. So to justify your action you have to make a double claim: 1) that removing the tree is the correct thing to do; and 2) that you have the right to impose your view on your neighbor, even if she, in good faith, disagrees with your moral judgment (and even if your judgment proves to be wrong).

So, too, with the State. To justify coercion, a legal system must typically claim,

20. See Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988, pbk 1990) at ch. 3.

first, that the actions required by legal directives are correct (a claim about the content of its laws). Second, the State must claim that it has a right to create and enforce norms that reflect its judgment about correct action, even though others may disagree and even though the State's judgment may be wrong. This second claim presumably draws implicitly for its defense on familiar arguments from political theory that explain why the State is legitimate (because someone must decide in the face of normative disagreement (Locke) and/or mutual hostility (Hobbes), we must have a State). Anarchists, presumably, will contest this claim, but by and large the suggestion that the State is entitled to exist, and to create and enforce norms it thinks are correct and necessary for governing, will be conceded by most people. But contested or conceded the point is that these two claims, about the content of its laws and about the State's right to enforce its views, are necessarily entailed by the modern positivist's position.

At this point, it is important to notice one feature about the second claim—the claim that the State has the right to enact and enforce its views—that distinguishes it from the claim about the content of the act. The claim that a legal system may enforce its views about the norms required to govern society is what has come to be called a "content-independent" claim.[21] The State does not claim that it is justified in punishing only if its views about the content of the law are correct. It claims that it is entitled to act on its views even if it turns out ultimately to be wrong about the content of the legal norm. It claims, in short, that it is justified in coercing "just because it's the law." Suppose, e.g., that the State prohibits you from cutting your neighbor's overhanging tree branches. You do so anyway and are prosecuted or sued for trespass. You want to challenge the State's claim that it is correct to require you to tolerate invading trees. The short answer, of course, is that you can't. What counts in the court is not whether the law was correct, but whether it was the law. Unless you can appeal to some other law (like a Constitutional protection for property that you think makes the tree ordinance unconstitutional), your argument about the merits of the law's claims concerning the content of its law is legally irrelevant. You can try to get the law changed, of course, and take your arguments to the legislature; but, in the meantime, legal coercion takes place regardless of whether the State's judgment is correct or not. Austin, it seems, was right in this much at least: it is not only the question of the injustice of the law which is ruled out of court; it is any challenge at all to the wisdom of the law. Legal practice, in short, reflects the fact that legal systems make content-independent claims about their right to coerce "just because it is the law". Again, the presumed, if implicit, justification for such a claim is not hard to imagine. Drawing on familiar arguments from political theory, and on the fact that human judgments can be fallible, the State can justify its behavior by claiming that as long as authorized officials have made the decision about which norms to enforce in good faith, the resulting coercion is justified (no moral wrong is committed) even if one later discovers that the decision was wrong. This claim may require supplemental procedural claims to make it plausible: claims, for example, that the State has appropriate means in place for deliberating about

21. See Hart, *supra* note 15 at 254-55.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

and deciding what laws are correct, as well as appropriate means for identifying and establishing guilt when the laws are broken. But these procedural claims reinforce the point that the basic claim here is that one has done one's best and no more can be expected. Thus the coercion is justified.

That this is a familiar feature of legal systems can hardly be denied. Think how often process (good faith attempts to get at the truth) trumps substance in any legal system. Innocent persons may be imprisoned for years, only to discover that a factual error was made and no crime committed. For the most part, such persons seldom have a claim for reparation as of right, rather than being dependent on legislative grace for redress. In short, we justify mistakes *in applying the law* on the ground that we did our best. It should hardly surprise, then, that we also justify on the same ground enforcing laws that we thought at the time were just, but that we now believe were unjust. Here, too, the defense that we did our best to act as we thought justice required is all that is required to avoid moral culpability.

We now reach the final step in the argument for the natural law view. It may seem that I have been arguing up to this point against my own position and in favor of the positivist's. It sounds as if everything I have said so far about the normative claims that must be made if legal systems are to be distinguished from coercive ones makes the positivist's case. What counts is what the law is, not whether it is correct. But we have yet to recognize an important limitation on the claims I have just described—a limitation that is widely recognized in criminal law and moral theory alike and that leads directly to the classical natural law view. The upshot of the account I have just given is that the State's basic normative claim is that it enjoys what has been called a "justification right."[22] The State's claim to be acting justly is not a claim that it is infallible but only a claim that it is not culpable. That claim is indeed enough to distinguish a legal system from that of the gunman writ large. But presumably, the legal system must purport to make this claim in good faith. After all, the gunman does not become any less a gunman if he, facetiously, mockingly, or perhaps just disingenuously claims to be acting rightly, knowing that he is not. If this is true, if insiders must have a plausible (not necessarily "correct") basis for the claim that coercion through law is permissible, then we have an opening for a clear limitation on the range of laws that can be backed by such a claim. For the denial of culpability on the ground that one has done one's best to get it right reaches a limit that would be admitted by virtually any plausible theory for assigning liability or moral responsibility. You cannot deny culpability, claiming that you thought in good faith that what you were doing was right if you ignore obvious evidence that you are making a very great mistake. Culpability is not just a question of consciously doing what you know to be wrong; it is also a question of being grossly negligent in informing yourself about the truth of your position. To quote a recent explanation of the concept "Moral culpability consists in intending to do an action that is wrongful, knowing that one will do an action that is wrongful, *or failing to infer from available evidence that one will do an action that is wrongful*

22. See R. Ladenson, "In Defense of a Hobbesian Conception of Law" (1980) 9 Phil. & Pub. Affairs 134 at 137-40.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

(emphasis added)."[23] So the law's attempt to justify coercion fails in those cases where the evidence of error is so great and so obvious to ordinary people that one can no longer hide behind the plea that one didn't know. What are those cases? When is one inclined to say that a legal system's denial of culpability fails? Why, exactly when Aquinas suggested: when the law is so unjust that it becomes a "perversion." In that case, the sanction may still remain, but the claim of justice cannot be defended. What we are left with is only pure coercion, which is exactly what Aquinas also suggested: such unjust laws "are acts of violence rather than laws."[24]

Legal systems, if they are not to collapse into coercive systems, must admit in short that all standards tentatively identified as law by a positivist pedigree will only count as valid law if they are not too unjust and thus remain capable of supporting a claim that using coercion to enforce the law is morally permissible. Several points are worth emphasizing. First, the argument for this classical natural law view has both descriptive and conceptual support. Descriptive support is found in the increasing international recognition of the Nuremberg principle, according to which domestic law provides no defense when one commits crimes against humanity. Conceptual support for the claim is found when one asks "why not still call a directive "law," however wicked, so long as it has the proper pedigree?" The answer is that if it is so wicked that no practical consequence attaches (other than coercion)—no defense for those who obey or enforce the law and are later prosecuted, no justification for State enforcement, no obligation for citizens to obey—then to continue to call the directive law, as Dworkin notes, puts us "suddenly in the peculiar world of legal essentialism."[25] Second, the concern that natural law leads to anarchy by inviting subjects to second-guess the State and decide for themselves whether particular laws are unjust is misplaced: only in extreme cases of wicked law, not ordinary cases of injustice, will the law lose its ability to claim that coercion is morally justified. The extreme cases are sufficiently rare that the spectacle of anarchy is unreal. Moreover, the increasing willingness to create Nuremberg Tribunals and prosecute crimes against humanity provides evidence that we are quite able to tolerate, at least in international law, the principle that domestic law can always be trumped where grave injustice is committed. There is, in short, no concept of "finality" in applying the concept of law where extreme injustice occurs. Third, the fact that pedigree and fiat will normally suffice to identify the applicable law helps explain why one might adopt the positivist's test for law as a "presumptive" test *in the evidentiary* sense: i.e., in most cases, pedigree alone *is* a sufficient test for law, even where the law is "unjust" (but not "too unjust"). But it is a mistake to turn this *evidentiary* presumption into a presumption that positivism as a legal theory is correct.

---

23. Heidi M. Hurd, "Justification and Excuse, Wrongdoing and Culpability" (1999) 74 Notre Dame L. Rev. 1551 at 1558.

24. *Summa Theologica*, *supra* note 1, ques. 96; art. 4.

25. Ronald Dworkin, "A Reply", *supra* note 18 at 259. Lon Fuller made a similar point much earlier and quite forcefully in his famous debate with Hart. See Fuller, *supra* note 5 at 655 ("So far as the courts are concerned, matters certainly would not have been helped if, instead of saying, 'This is not law,' they had said, 'This is law but it is so evil we will refuse to apply it.' Surely moral confusion reaches its height when a court refuses to apply something it admits to be law … .").

V. Understanding Where We Went Wrong

The affirmative case just sketched for the natural law view can be strengthened by explaining what has gone wrong in the alternative views of law. In particular, why is it that modern positivists have not recognized that modeling the claims of insiders who purport to distinguish law from coercion requires recognizing a substantive limit on what can count as law? And why is it that the modern form of natural law advocated by Dworkin hesitates simply to admit that directives that are sufficiently evil cannot count as law, however much the directive may be the best we can come up with under the "soundest" theory that explains the settled law and the underlying principles of a particular legal system?

In my view, the explanations for the failure fall into two major categories, two major respects in which a mistake has been made or a critical feature or implication overlooked in the discussions and debates among legal theorists about various models of law. The first set of mistakes involves a defective understanding of the kind of normative claims that characterize legal systems. The second mistake lies in failing to appreciate two distinct ways in which one can approach the question of the nature of law and the necessity of keeping both of these approaches in mind in evaluating a proposed model of law.

A) Law's Normative Claims

The puzzle created by the modern positivist's position can be simply stated. If moral claims about the "law," are essential aspects of legal systems as viewed by those who accept them, how is it possible that the question what counts as law can be entirely a factual question? Given the divide between "is" and "ought," how can a factual account of what law is (which positivists continue to insist on) entail a normative conclusion (coercion through law is justified)? Why isn't the recognition that law makes moral claims necessarily a recognition that law is a moral concept, as well as a factual one?

1) Intended Normativity vs. Normativity As Such

One standard response to this puzzle is to explain that the positivist's account of the moral claims that are attached to legal facts is only an account of "intended" normativity, not "true" normativity.[26] That is to say, the positivist model reveals that insiders make claims about the justice of their laws in order to distinguish legal from purely coercive systems; but these claims themselves are simply facts about the normative attitudes of those who accept the law. Whether the claims are true or false is a separate question from the fact that they are made. Both the "pedigree"

26. This argument was forcefully made by Professor Zipursky in comments on an earlier version of this paper. I try here to indicate that it is precisely this difference that distinguishes my argument from the modern positivist's: my argument requires assigning normativity as such to law, not simply intended normativity.

that establishes that a norm is law, as well as the normative attitude that attaches to it, are "facts" which the positivist's model reflects. Thus no puzzle arises about how one goes from a purely factual concept to a moral conclusion because both are facts: the normative claim that accompanies the law's enforcement (coercion for violating this law is justified) is simply a fact about insider attitudes, the "moral truth" of which (true normativity) remains to be established.

It is precisely this response, however, that is ruled out under the argument of the preceding section. The basic claim of the law is a claim of moral permissibility: law claims that it may and does justly coerce. This is a content-independent claim about the right to punish: regardless of the merits of the law, punishment is morally permissible (not blameworthy) just because an act violates law. For this claim to be plausible, it is not enough simply that one believe in good faith that one has done one's best to design just laws. Good faith excuses "ordinary" injustice only. The whole point of the argument in the preceding section is to show that even the "fanatical" tyrant, for example, who sincerely believes in the justice of his evil decrees, must concede that his sincere belief alone is not enough to warrant the conclusion that his decrees are "law". If they are too unjust, sincerity will not rescue them. Of course, the fanatic will, if sincere, believe and claim that his decrees aren't too unjust, but the argument of the preceding section means he must also admit that if he is wrong about that, he is also wrong about the claim that these are "laws." It is true normativity, not intended normativity, that the argument establishes.

2) Claims About Particular "Laws" vs. Claims About the Concept of Law

The above explanation of how "true" normative claims characterize the insider's view of law is connected to a second problem in current accounts of law's normativity. Current accounts often appear to attach the relevant normative attitudes of insiders to the particular laws of a particular legal system. It is *our* particular laws (prohibiting abortion, or permitting the death penalty) that are defended normatively when enforced. A variation of this attitude toward the *content* of particular laws also occurs in connection with content-independent claims: It is because our particular legal system has a certain political structure (democratic, for example) that we can in good faith enforce laws, even if we are wrong about the justice of the content. The argument in the preceding section differs from these normative claims about particular laws or about a particular legal system in a critical respect. The normative claim defended above is about the concept of law itself. Of course, normative claims about particular laws are entailed by the above argument: both the content of, and the particular procedures for establishing, norms are integral ingredients of the claim that laws may justly be enforced. But this particularized claim is not enough. The argument about the need to admit a limit that disqualifies particularly unjust laws as "law," proceeds counterfactually:

> "What if you are wrong about the content of this particular law, or about the justice of the particular political structure that you claim makes enforcement of these particular laws, even if unjust, non-culpable? Would you say that if you are very wrong, so wrong that the laws are seriously unjust, you could still deny culpability?"

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

The answer to this question, I argued above, must be no: the State must admit culpability if its judgment is seriously in error. At some extreme, mere sincerity is not enough: substantive injustice of sufficient magnitude leads to culpability. If that is so, one seems to be saying something about the concept of law itself, not simply about the particular laws of a particular society. Only if one thought that one's own society's particular political structure was so designed as to guarantee that gross injustices could never be committed by the human institutions that create law could one plausibly continue to suggest that the normative attitude is about the particular legal system, rather than the concept of law itself. But no one is likely to defend the assumption of political theory that underlies such a view—no political structure offers guarantees against serious injustice, though some, of course, provide more safeguards than others.

3) Ordinary Normative Claims (Claims About Content Only)

Related to the above mistake, which sees the relevant normative attitude as attaching to particular laws or legal systems rather than to the concept of law itself, is another that is sometimes found in the literature. This mistake, which I do not think most modern positivists make, is to assume that legal systems only need to make content-dependent claims about their laws. If the legal system puts you to death for committing murder, or if the system fines you for cutting down your neighbor's tree, it implicitly claims that both the act of murder and the act of felling your neighbor's tree are wrongful (and that the punishments attached to these acts are appropriate). Now if this claim about the content of the law were the only normative claim essential to law, it is easy to see why positivism could still insist on the separation of law and morality. Legal systems claim the content of their laws is just; whether they *are* is a separate question, independent of the determination that something is law. So the positivist's insistence on the separation of law and morality is untouched if all we need to recognize as essential to law is a claim of this sort.[27]

27. This mistake (seeing the normative claim as primarily or only a content-dependent one) appears more often in some of the critiques by certain opponents of positivism than it does in the positivist literature itself. These critiques suggest that because the law makes a moral judgment when it punishes, that fact alone shows a necessary connection between law and morality. (The suggestion is implied by the title of, and much of the argument in, Deryck Beyleveld & Roger Brownsword, *Law as a Moral Judgment* (London: Sweet and Maxwell, 1986). For other examples, see Michael J. Detmold, *The Unity of Law and Morality* (London: Routledge & Kegan Paul, 1984) at 21-27; Alexy, "On Necessary Relations Between Law and Morality" (1989) 2 Ratio Juris 167. The mistake also appears in Roger Shiner, *Norm and Nature: the Movements of Legal Thought* (Oxford: Clarendon Press, 1992). For further discussion, see Philip Soper, "Critical Notice: Legal Systems, Normative Systems, and the Paradoxes of Positivism" (1995) 8 Can. J. L. & Juris. 363 at 366-73.) But no such inference is warranted. Content-dependent claims alone will indeed lead to a moral judgment, but they do so without showing a connection between law and morality. The problem in all of these accounts stems from a failure to appreciate the distinction between the implicit moral claims that underlie particular legal norms (which need only be content-dependent claims that the norm is "right," "just," and so on) from claims about the concept of law itself. The judge who sentences the defendant to death implicitly represents that the law believes the sentence is just; but that does not entail that the judge also represents the sentence as permissible "just because it is the law." The latter claim is a claim about the concept of law itself; the former, though a moral judgment, can be modeled as a factual characteristic of legal systems without showing a connection between law and morality.

4) Strong Normative Claims (Content-Independent Claims)

What we need to add to the claim about content in order to capture law's posture is a claim of content-independence. As we have seen, this is a claim, not just about the action required by law, but a claim about the concept of law itself: a claim, e.g., that coercion is justified just because an action is against the law, even if the law is wrong. I call this a strong claim because it makes a double appeal, first to the content (it is wrong to cut your neighbor's tree), and then to the role of the law: even if cutting the tree isn't wrong, the law forbidding the act may justly be enforced just because the law thinks it's wrong. I have already argued that legal systems make just such content-independent claims about the right to coerce. But now the literature on modern positivism seems to insist on an even stronger kind of content-independent claim: the law not only claims a right to coerce; it also claims that citizens have obligations to obey, just because something is the law. It is this mistake, attributing to legal systems a claim of law's ability to actually provide new reasons for action, just because of the law, that I believe is both mistaken and partly responsible for positivism's failure to take the next step toward a natural law view.

I hope it is clear that these two kinds of content-independent claims are quite different. The first claim, concerning the right to coerce, I have called elsewhere a claim of "coercive authority."[28] The law claims the *right* to coerce (hence this is a claim of "coercive authority," not merely an exercise of *de facto* power); but it makes no associated claim that citizens have any new reasons to comply—apart from the reasons supplied by the sanction and the content-based reasons. The stronger kind of content-independent claim insists that the law creates an obligation to obey just because of the law—a claim of "moral authority" and of the power to change the normative reasons that bear on the question of correct conduct.

I shall begin by explaining why this second view about law's claims is mistaken, and then show why it is that by viewing law as making this strong claim of moral authority, positivists are able to avoid recognizing the connection between law and morality that I defended above. First, the major argument in the literature to explain why the strong claim of moral authority is the correct account is that otherwise we could not account for the language of rights and duties and obligation that the law makes.[29] Notice that this is exactly the same argument that is made to explain why the coercive view of law is wrong. The argument is a conceptual argument about what is essential to law if we are to avoid conflict with other aspects of legal practice. But the argument is wrong. To move beyond the coercive model to a model that accounts for the moral language of the law does not require one to go beyond the weaker claims I have already described. One can explain the talk of "rights" and "duties" in law by reference to the content-based claims alone. (We tell defendants it was wrong to commit murder or to cut down one's neighbor's

28. Soper, *supra* note 11 at 54.

29. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 27 (claiming that Ladenson's characterization of law's normative claims as "justification rights" (which this article endorses, see *supra* note 22) is inconsistent with the language of duty and blame found in the law).

trees because we believe those acts are wrong apart from the law.) And one can explain why we talk of legal "obligation" (rather than simply of what one "ought" to do according to the law) because law claims the right to enforce its view of what one "ought" to do. To assume that we use "obligation" in law in the same way that we do when we talk of "moral obligation," begs the question. We do not use "obligation" in the same sense: we preface the term with the adjective "legal." And all that is needed to explain this use of the term "obligation" is the combination of the two claims I have already mentioned: the content-based claim about the act in question (which explains what one "ought" to do), and the weaker content-independent claim about the law's right to enforce its views (which explains the sense in which one is "obliged" to do what the law thinks one ought to do). To see how superfluous the stronger claim is, imagine that legal systems openly admitted that they were taking no position on the question whether citizens have reasons to obey just because of the law. Nothing in our current practice would change. We would still prosecute, claiming that disobedience was wrong (because the act was wrong) and we would continue to insist that whether the law's view about the act was correct or not, the law is entitled to enforce its view. Whether one has obligations to obey just because of the law can be left for political theorists to debate.

So the conceptual argument for the stronger view fails. But there are other reasons for thinking that this model of law's normative claims is wrong. The claim that citizens have a duty to obey, regardless of the merits of the law, is a claim in political theory that nobody today defends. In fact, most moral philosophers today deny that there is even a *prima facie* obligation to obey. Yet the account we are now questioning has law claiming, not just a *prima facie* obligation, but an absolute obligation to obey. Why would one saddle law with a claim that is both unnecessary to account for current practice and that is branded as false by virtually all political theorists?

But the most interesting aspect of this second view of law's normative claims is the way it enables modern positivism to continue to insist on the separation of law and morality. Note what happens if one attributes to law a claim of moral authority that insists that all laws, however unjust, create reasons for compliance just because of their legal status. This view of an absolute obligation to obey (which perhaps only Hobbes and possibly Socrates ever advocated) means that one can continue to identify law with empirical tests of the positivist's sort and then proceed to attach to them the normative claims (however implausible) that distinguish legal systems from coercive systems. But if these claims about law's moral authority are as indefensible as political theory suggests, then modern positivists should take the next step, just as we have in connection with the weaker claim of the right to coerce. No one in good faith can defend the claim that law obligates absolutely. So if that is the claim legal systems necessarily make, then the claim is not in good faith and we are dealing once again with little more than a coercive system—a gunman who issues orders backed by threats, accompanied by an implausible and undefended assertion about the moral obligation to obey his orders.

5) Conclusion

We can summarize the argument thus far as follows. We have been tracing the implications of the claim that one can enforce laws without culpability even when those laws are unjust. Defending the plausibility of that claim leads to the following conclusions:

a) As to ordinary injustice, it is sufficient that one has tried in good faith to enact and enforce laws believed to be just;

b) But failure to recognize grave injustice is not excused, however sincere one's belief in the justice of the law; in these cases, law's power to enforce cannot be distinguished from that of a purely coercive system;

c) No plausible political theory, either about the State in general, or about the political structure of a particular society, can guarantee that seriously unjust laws will never be enacted; it is therefore not possible to make the test for "law," turn solely on empirical questions of social source while still claiming that enforcement of such laws is always permissible;

e) The claim that one is entitled to enforce the law "just because it is the law," is thus true only if the law is not too unjust. Recognition of this conclusion means that the concept of law itself is recognized to be a moral concept, not just a factual one.

B) Two Routes to the Meaning of Law

A second problem in current debates about the nature of law arises from a failure to appreciate two different approaches to discovering the meaning of a concept like law. The first approach I shall call the "identification" approach. This approach seeks the criteria—the tests for validity—that are used by courts and others to identify (determine what is) the legal directive. The second approach I shall call the "functional approach." This approach assumes that one has already identified the apparent legal directive, and then asks what functions this directive must serve in order, indeed, to count as a law. The functional approach, for example, is illustrated by the claim that a law that does not provide for sanctions is no law at all: this claim assumes that to count as law, an official directive must at least be distinguished from other social or moral norms by the possibility of a threatened state sanction. The functional approach also seems to underlie current arguments over whether or not moral principles can be incorporated in the law and count as legal standards. If it is a critical function of law to guide conduct, it is argued, then moral standards that are inherently controversial cannot count as law for they cannot guide conduct. Both of these approaches, the identification approach and the functional approach, need to be kept in mind in defending any particular account of law.[30]

30. I agree in this respect with Mark Murphy's suggestion that the functional approach to the definition of law should be combined with an approach that also emphasizes features that characteristically identify law. See Murphy, *supra* note 8 at 259 (criticizing Michael Moore's reliance entirely on a functional approach).

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

Thus, e.g., if one has a model for determining legal validity that produces candidates for the term "law," that do not or cannot perform an essential function of law, that fact is evidence that the model is inaccurate. Conversely, to claim that a directive counts as law because it serves a particular function, such as guiding conduct, may be questioned if the method for identifying this norm cannot distinguish legal directives from directives that depend on social or religious pressure for conformity.

This distinction between the "identification" of law and the "function" of law helps explain both the faults and the virtues of the new natural law of Ronald Dworkin. Preoccupation with the question of how to identify law leads Dworkin to a theory of adjudication that seems to abandon the attempt to show a connection between law and morality; law is "identified" by tests having to do with the soundest theory that explains the existing regime, which means that in evil societies we may still be left with evil laws. On the other hand, Dworkin is right to note that if the positivist insists on tests to identify law in ways that result in no practical consequences at all—including no obligation to enforce by courts—then there is little reason to count such directives as "legal."[31] The classical natural law account rests on this functional criticism of positivism's willingness to accept any directive as "law" so long as it meets the prescribed identification tests. And it rejects the exclusive reliance on identification as the clue to what we mean by law. In my view, much of current legal theory, particularly on the positivist's side, has become preoccupied with the identification approach to determining what we mean by law—preoccupied with debates over exactly how to understand and model the social facts, or social sources, or conventions, or fundamental rules, or criteria of validity or pedigree that supposedly support the positivist's attempt to identify law without reference to morality. What we have lost sight of is the original motivation for modern positivism's turn away from Austin: anything identified as law must be plausibly capable of supporting one of law's essential functions: namely, that of justifying the coercion it employs.[32] By returning the focus to the question of the function of law, the debates about identification will quickly become irrelevant as respects the critical question of the connection between law and morality. Whatever the proper description of the "social facts" that identify the legal directive, the directive must still be consistent with minimum requirements of morality in order to fulfill law's function of justifying coercion.

31. See Dworkin, *supra* note 25.

32. It misses the point to insist that the "purpose" of law is not to justify coercion but only, for example, to guide and coordinate conduct. See Hart, *The Concept of Law*, *supra* note 13 at 248-49 (raising this objection to Dworkin's similar suggestion that legal practice purports to be able to justify coercion through law). Whatever one thinks the main "purpose" of legal systems might be, the whole impetus behind modern positivism was the recognition that the means used to accomplish these purposes (whether it be coordinating or guiding conduct, or something else) is represented by those who accept the system as distinguishable from the means used by purely coercive systems. Whatever the purpose, law purports to accomplish it through sanctions that can be defended as morally permissible.

V. Why Does it Matter?

What difference would it make if we recognized that law is a moral concept, not just a factual one, in the manner suggested by the classical natural law claim? As I have already suggested, I do not think that recognition of the classical natural law view would lead to a significant change in legal practice. In part that is because, as already explained, it is only extreme cases of injustice that deprive the law of its ability to defend coercion. It is true that the invitation to judges to always check official directives for compatibility with minimum requirements of justice *in theory* invites judges to ignore even clear conventions if they are sufficiently unjust. But this is hardly tantamount to handing over to judges the power to substitute their views of morality for those of the society whose laws they are asked to enforce. The assumption that natural law looses a judge to do whatever she wants, ignoring even clear texts, is wrong. Natural law does not tell a judge to do whatever she wants; it empowers her, at most, to reach decisions that she believes are required by her own views of a sound, defensible moral and political theory. Natural law may authorize a judge to look to a "higher" moral law; but legal theory itself has nothing to say about the content of that higher moral law. Any sensible judge will recognize that a plausible higher "natural law" will include a political theory and, in the case of our own particular society, a theory about the place of democratic values that assign a limited role to judges, justifying and requiring their enforcement of laws even though they are not the laws the judge would have enacted herself.[33] Far from being a license to enact one's own views whatever they might be, natural law requires a judge who embraces the underlying principles of our society to defend a departure from the clearly expressed democratic will by an implicit political theory that explains why, in this case, such a departure is justified. That justification will require a confrontation with the arguments for democracy and the arguments from political theory that both explain the state's existence and that allocate distinct areas of responsibility to legislative and judicial branches of government. Small wonder, then, that the cases in which this *theoretical* possibility of ignoring clear conventions will actually occur are likely to be confined to rare cases of extreme injustice.[34]

It is, in short, a mistake to think that the debate about the nature of law somehow turns on the practical difference it might make to adopt one view or the other. It is sometimes thought, for example, that what is at stake is whether we can justify retroactively punishing those whose actions at the time were legal under a particular

33. See Ronald Dworkin, "Natural Law Revisited" (1982) 34 Univ. Fla. L. Rev. 165 at 178 (in easy cases, the conventionalist and the natural law theory of law as integrity will reach the same result).

34. In the modern world, the examples that might fit such a model of judicial activism are those "crimes against humanity" that are currently the basis for Nuremberg tribunals, trying persons guilty of committing such crimes regardless of whether the domestic law at the time "clearly" authorized the conduct in question. Applied to our own country, although we can all cite examples of laws in our history that were immoral and even eventually recognized to be horribly wrong, it is difficult to suggest (with the possible exception of slavery, see Robert Cover, *Justice Accused* (New Haven, CT: Yale University Press, 1975)) that a natural law theory would have led more quickly to their overturn.

regime's domestic law by declaring, after a regime change, that the former regime's laws were too evil to be law, thus avoiding the retroactivity problem. But this is a mistake. The recent attempts by German courts to come to grips with the problem of punishing former East German border guards are illustrative. Some courts did phrase the issue in terms of whether the East German law, interpreted as providing a justification for shooting refugees attempting to escape, was too unjust to count as law, thus depriving the defendant of the defense that his action was lawful. But as the German courts ultimately made clear, the retroactivity problem would have to be confronted (and was, in the end, the critical issue in these cases) regardless of whether one called the directives in force at the time "law" or not.[35] Neither natural law nor positivism, in other words, can avoid asking whether reliance on official directives in force at the time provides a defense for punishment when the directive is later determined to be extremely unjust. It is just as much a mistake to accuse natural law of avoiding a candid confrontation with this practical problem of transitional justice, as it is a mistake to think that positivism's insistence on calling even unjust directives law means that positivists are somehow forced to resort to *ex post facto* punishments in ways that natural law theorists are not.

What then is the point of insisting that law is a moral concept? The point is simply the conceptual one that underlies all attempts to understand the connections between basic concepts that we appeal to in regulating human affairs. The aim of the enterprise is to reveal poorly understood connections among the concepts of law, morality, and force. The real import of the natural law claim lies in what it reveals about us and our own attitudes toward the institution that probably plays the most significant role of any in regulating and directing our lives. Compare, for example, the concept of justice. Few people, I think, would have trouble with the claim that "justice" is a moral concept, not just a factual reference to prevailing conceptions of morality. There is, of course, a huge philosophical issue here about whether moral judgments, not rooted in convention, are meaningful or objective. But note that the insiders whose normative views we are modeling in legal theory apparently assume the meaningfulness of such judgments, whatever the philosophers might say. Even the modern positivist who purports to remain aloof from this issue of moral objectivity in his model of law[36] must concede that the insiders whose claims he is attempting to capture assume the meaningfulness of moral judgments—else there would be little point in advancing beyond the coercive model. So if legal systems are necessarily committed to the belief that debates about justice are meaningful, it may be that the answer to the question why we might have made "law" a moral concept is similar to the answer why people believe in "justice" as a meaningful moral concept. And why is that? Presumably part of the answer lies in the fact that it means that prevailing conceptions of justice in a particular society can never be the end of the question whether those conceptions are, in fact, just; thus dialogue and debate about the issue can never be ruled out simply by pointing to conventional facts. So, too, with law. The natural law position tells us something

35. See *supra* note 4.
36. See Hart, *The Concept of Law*, *supra* note 13 at 254.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press

about the limits of societal claims about what counts as law: the official directive and the accompanying official claims can never wall themselves off from the question whether these demands placed on us are anything more than pure force: it is always open, in theory, to challenge the claim that this is the law, however "settled" in some factual sense, in the same way that conventional views about justice are always open, in theory, to challenge. I cannot pretend to say much here about why this openness to continued challenge is important to people. My goal, after all, has been to establish that this *is* our concept of law, not to explain why we might want the concept to be a moral one. But though I have no very good answer for why it is important, at least, I think, I can suggest where to look for the answer: look for the answer in the same place one looks to explain why people, like Aquinas, find it important to believe that moral judgments are meaningful and grounded in some objective reality; that explanation is likely to apply to law as well.

https://doi.org/10.1017/S0841820900005750 Published online by Cambridge University Press