On Juridical Norms at the Edge of Legality

Abstract. Judges decide cases by appeal to rules of general application they deem to be law. If a candidate rule resolves the case and is, *ex ante* and independently of the judge's judgment, the law, then the judge has a legal obligation to declare it as such and follow it. That, at any rate, is conventional wisdom. Yet the principle is false—a rule's being law is neither necessary nor even sufficient for judges' being legally obliged to follow it. The principle's falsity is especially apparent in so-called hard cases, where the line between legal and non-legal rules is obscure. Moreover, judges have authority to disregard law in hard cases not because moral (or non-legal) obligations trump legal obligations. Rather, the law itself circumscribes its own authority. The implications for legal philosophy are significant; for one, a theory of juridical norms can be developed independently of the precise boundaries of legality.

Keywords: Legality, Judicial Norms, Hard Cases, Positivism, Anti-positivism

Introduction

Suppose a judge were to become persuaded that the central debate within analytic jurisprudence—the debate between positivists and anti-positivists about the nature of law—should be decided in favor of the positivist (the choice of theory is irrelevant). Should this make any difference to how she should rule in legal cases? It is tempting to think so based on the following sort of argument. Positivists and anti-positivists disagree about how to draw the line that separates legal from non-legal rules and there are cases where their competing theories come apart. As between two incompatible rules that a judge might rely on to decide a case, say one that prohibits capital punishment as cruel and unusual and another that permits it, which rule happens to be law independently of the judge's judgment turns on whether the positivist or anti-positivist is right. It is platitudinous that judges have at least a professional duty (a duty deriving from their status as judges) to remain faithful to the law—that is, to follow a rule and declare it to be law if it *is* in fact law.[1] Accordingly, what judges legally ought to do turns on the resolution of the philosophical debate.

This quick argument and others like it often crop up in legal theorizing, but they rest on a fundamental misunderstanding of judicial duty.[2] That judges have a duty to remain faithful to the law is indeed platitudinous, but the platitude has been misinterpreted. Judges are *not* obliged to follow the law in all cases, even if there is a fact of the matter about what the law is *ex ante*. While it is a familiar enough

[1] HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982) 158-59:

> When a judge of an established legal system takes up his office he finds that though much is left to his discretion there is also a firmly settled practice of adjudication, according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources. This settled practice is acknowledged as determining the central duties of the office of a judge and not to follow the practice would be regarded as a breach of duty one not only warranting criticism but counter-action where possible by correction in a higher court of appeal.

[2] Lon Fuller finds common ground with Hart in thinking that it is the province of general jurisprudence to clarify what 'fidelity to law' amounts to with a precise characterization of law's nature: 'if we do not mend our ways of thinking and talking [about the nature of law] we may lose a "precious moral ideal," that of fidelity to law…. one of the chief issues is how we can best define and serve the ideal of fidelity to law.' LL Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 630-2. It is easy to multiply examples of this common sentiment. See discussion in section III. Our principle question is whether *perfect* fidelity to law could even be a *legal* ideal, let alone a precious moral one. As it turns out, fidelity to law is not the kind of legal (or moral) ideal that is best served by demarcating the precise boundaries of legality.

notion that judges may have authority to create new law in cases where the law is undetermined (in other words, a rule's being law, *ex ante*, may not be a necessary condition for its being declared as such by a judge), the claim that judges have legal authority to *ignore* determinate law in individual cases rings of heresy.[3] Nevertheless, it is true that judges have such authority and precisely in the sort of cases where competing philosophical theories of law come apart. Moreover, judges have this authority not because, as some have suggested, *moral* obligations (or some other non-legal species of obligations) trump legal obligations. Rather, the law itself circumscribes its own authority. In the relevant class of cases, how a judge should rule simply does not turn on what the law is. The implications for legal philosophy are significant; for one, a theory of juridical norms can and should be developed independently of the precise boundaries of legality.[4]

The dispute within analytic jurisprudence is an example of one where rival theories of law conflict in just the range of cases where legality's normative significance for judges is slim to non-existent. But there are other, more parochial disputes that similarly involve competing claims about *what the law is* in cases where legality is not what matters—for instance, the dispute over the precise legal significance of original intent in American constitutional jurisprudence.[5] My argument generalizes to these other disputes: their resolution does not bear on how a judge legally ought to rule.[6] The present

[3] That judges have authority to make new law where there are 'gaps' in the law is a popular notion amongst legal positivists. See, e.g., J Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823, 847–8. Timothy Endicott has argued that when the law runs out, judges are legally authorized to decide the case (and plug gaps in the law) by appeal to extra-legal, moral considerations. See T Endicott, 'Raz on Gaps – The Surprising Part,' in LH Meyer, SL Paulson, and TW Pogge (eds), *Rights, Culture and Law* (OUP 2003). The claim defended here goes further and should prove more controversial: in cases where there is *no* gap in the law but the law is uncertain given the evidence, judges can lawfully ignore what they deem to be law.

[4] The argument relies on the idea that the legal concept is vague at the margins for epistemic reasons, even if it has precise applications conditions as theorists standardly assume. On epistemic theories of vagueness, see T Williamson, *Vagueness* (Routledge 1994); R Sorensen, *Vagueness and Contradiction* (Oxford University Press 2001).

[5] Compare S Scalia, 'Originalism: The Lesser Evil' (1989) 57 Cinn. L. Rev. 849, with J Balkin, *Living Originalism* (HUP 2011) ch1.

[6] There are good debates to be had about what judges should do in the relevant range of cases. But these are not debates about what the law is. See discussion in sections III and IV.

focus, however, is on showing that the debate between positivists and anti-positivists, on its own terms, entails the untethering of judicial duty from legality.[7]

In section one, I defend a standard account of analytic jurisprudence as aimed at articulating the precise application conditions of the concept expressed by predicates like "is law" and "is legal." Positivists and anti-positivists disagree about the general conditions that a rule must satisfy in order to fall under the legal concept.

In section two, I argue that even card-carrying positivists and anti-positivists should acknowledge that cases where the theories come apart in their implications for which rules count as law are 'hard' cases, in the sense that it is non-obvious what the law is in such cases—the line that separates the legal from the non-legal rules is obscure given the evidence.[8] To use an idiom familiar from first-order legal theory, *reasonable persons can disagree* about the law in such cases. I offer two arguments for why our confidence in our judgments about legality in the relevant range of cases should be low, one from persistent theoretical disagreement about law and the other based on the totality of facts that determine conceptual application conditions.

In section three, which forms the bulk of the discussion, I argue that judges are not legally obliged to follow preexisting law in hard cases, and, moreover, that they are not so obliged from any other normative perspective (say, that of morality). My general strategy is to show that a rule requiring strict conformity to the law in hard cases could not *itself* be law, whether positivism or anti-positivism is true. The rule is neither conventionally embraced in modern jurisdictions nor is it a morally good rule for a legal system to adopt. The rule's non-conventionality follows from a *de re* as opposed to *de dicto* interpretation of the platitude that judges should strictly follow the law and from the actual content of

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[7] Analytic jurisprudence provides a convenient starting point for the analysis because it is easy to motivate the non-obviousness of law in cases where philosophical theories of law come apart, and law's non-obviousness plays a critical role in the overall argument. See discussion in L Murphy, 'Concepts of Law' (2005) 30 Austl. J. Leg. Phil. 1; B Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, (Oxford University Press 2007), 180-4. A further reason that the analytic dispute provides a useful argumentative lens is that the central claim can be motivated using positivistic as well as anti-positivistic theories of law.

[8] Another way to put it would be that judges have authority to ignore rules they *believe* to be law in hard cases and even if their beliefs turn out to be correct.

judicial oaths and constitutional rules. The rule's moral inferiority follows the evaluative irrelevance of a rule's legality when it's legality, though genuine, is not known. I conclude that judges can and should decide hard cases based entirely on features of rules other than their legality.

In section four, I address possible objections to my view, including that it misguidedly (a) affords judges the authority to misrepresent what the law is; (b) overlooks the virtues of a principle of judicial decision-making that demands strict conformity to preexisting law; and (c) permits judges to frustrate the reasonable expectations of persons held accountable under legal rules.

In section five, I conclude by commenting on the argument's implications for legal philosophy generally and on the light it sheds on Ronald Dworkin's classic but ultimately misleading discussion of hard cases.[9]

I. The Philosophical Significance of the Concept of Law

Analytic jurisprudence has traditionally been characterized as an investigation into the application conditions of a *concept*—the concept expressed by juridical predicates like "is law" and "is legal."[10] Just as we judge certain rules to be those of etiquette or morality, we classify some as "legal rules" or "rules of law."[11] The philosophical task is to specify those general features of rules that determine whether a rule falls under the legal concept. It might be helpful to think of concepts as akin to abilities.[12] To possess the

[9] R Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057. Dworkin uses 'hard case' to refer specifically to difficult judicial cases that arise before courts involving plaintiffs and defendants, whereas I use the term more generally to refer to any situation where a judge has to decide what the law is on some question but the law is obscure.

[10] As Raz puts it, 'It is part of the self-consciousness of our society to see certain institutions as legal. And that consciousness is part of what we study when we inquire into the nature of law.' J Raz, *The Authority of Law* (Oxford University Press 1979) 221; J Raz, 'Two Views of the Nature of the Theory of Law' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (OUP 2001): 'our aim is to explain the concept as it is, the concept that people use to understand features in their own life and in the world around them'; B Leiter 'Naturalism and Naturalized Jurisprudence' in B Bix (ed), *Analyzing Law: New Essays in Legal Theory* (Clarendon Press 1998); R Alexy, 'Legal Certainty and Correctness' (2015) 28 Ratio Juris 441. S Shapiro, *Legality* (Harvard UP 2011) 16-22, offers a useful discussion of the importance of conceptual analysis.

[11] We can construe rules as abstract objects akin to functions mapping circumstances to outcomes or actions.

[12] M Dummett, *Seas of Language* (OUP 1993). The argument does not turn on whether concepts are construed instead as abstract objects or mental representations. For alternative views of concepts, see J Fodor,

concept <law> is to be able to discriminate between entities in the world that differ in some respect—whichever respect it is that distinguishes all legal from non-legal rules.[13] We exhibit this ability in our dispositions to attribute legality to rules.

We take for granted that the legal concept has a public character in that it is shared by different agents. At the very least, judges and other important legal actors are assumed to possess a singular concept of law. This is a significant methodological assumption that might reasonably be questioned.[14] It may turn out individuals use juridical terms to express different concepts and, so, fail to converge in their judgments of legality. The possibility of conceptual divergence gains traction from widespread disagreement about law amongst experts.[15] One response to this type of worry emphasizes that people can be mistaken about their own concepts. It is one thing to have a concept, to deploy it in thought and talk, and quite another to have true beliefs about it. For instance, one might have the concept <good> as evidenced by one's ability to reliably distinguish good acts from bad ones, while having false beliefs about the features of acts one responds to in deploying the concept. One might falsely believe that all good acts are happiness maximizing, when in fact they have some other property in common (say, that of being defensible from an impartial perspective).[16] The legal philosopher can reasonably take people's self-understanding and their dispositions to call rules "law" with a grain of salt, while nevertheless treating these dispositions as *prima facie* evidence of the contours of the shared concept.

Assuming a shared concept of law, the theoretical task is to state in general terms the conditions that a rule must satisfy to fall under it. Specifying the concept's application conditions is an importantly different task from saying which rules in individual cases and jurisdictions satisfy the relevant conditions.

Psychosemantics: The Problem of Meaning in the Philosophy of Mind (MIT Press 1987); C Peacocke, *A Study of Concepts* (MIT Press 1992).

[13] Writing '<P>' for the 'concept expressed by 'P'.'

[14] See, e.g., B Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in J Coleman (ed), *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford University Press 2001) 355. For a critical take on conceptual analysis as a general philosophical methodology, see M Johnston and SJ Leslie, 'Concepts, Analysis, Generics and the Canberra Plan' (2012) 26 Philosophical Perspectives 1.

[15] On the pervasiveness of legal disagreement, see R Dworkin, *Law's Empire* (Harvard University Press 1986) 42-46; B Leiter, 'Explaining Theoretical Disagreement' (2012) 76 University of Chicago Law Review 1215.

[16] On conceptual analysis in ethics, see F Jackson, *From Metaphysics to Ethics* (Oxford University Press 2012).

The concept <bachelor> applies to individuals who are male and unmarried, but knowing the concept's application conditions is not by itself informative as to whether any given individual is a bachelor.

What unifies positivists about law is the view that the legal concept's application conditions are entirely social—the concept applies to a rule if and only if it has a certain social property, roughly, one having to do with what people have historically said, believed, done, or intended to do in a community.[17] On John Austin's view, for example, legal rules are those that have been prescribed by a sovereign (or other official) who is habitually obeyed in the community and whose commands are backed by the threat of sanction.[18] H.L.A Hart famously proposed an alternative and significantly more complex characterization of the social property essential to law.[19] For Hart, a rule's legality consists in its being part of a broader system of hierarchically organized rules that are habitually followed in the community: a system that includes 'primary' rules which govern conduct in particular circumstances and 'secondary' rules which specify methods for making primary rules. Hart's theory remains thoroughly positivistic insofar as it rejects any moral preconditions on a rule's legality. The relevant property of legal rules is a complex social property that refers, in part, to a broader system of rules habitually obeyed. More recently, Scott Shapiro has advanced a view on which legal rules are ones that have been incorporated into a collective plan adopted by members of a community with the aim of solving large-scale problems believed by the planners to be morally important but that need not in fact have moral significance.[20]

Anti-positivists oppose a purely social characterization of the legal concept's application conditions. Their distinctive claim is that rules fall under the concept only if in addition to their social

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[17] For a related characterization of the social property relevant to positivism, see M Greenberg 'How Facts Make Law' (2004) 10 Legal Theory 157. We can ignore the difference between inclusive and exclusive positivism in what follows. Inclusive positivists allow that moral features of rules sometimes play a role in determining whether the rule is law but only if some social fact independently makes the moral features relevant: e.g. a convention of treating punishments as legal only if they are humane. See discussion in S Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' in A Ripstein (ed), *Ronald Dworkin (Contemporary Philosophy in Focus)* (Cambridge University Press 2007) 22-55.

[18] J Austin, *The Province of Jurisprudence Determined* (first pub. 1832, Cambridge University Press 1995).

[19] HLA Hart, *The Concept of Law* (2d ed., Clarendon Press 1994) 99. For a helpful discussion of Hart's view, see Shapiro (n10) 84-85.

[20] Shapiro (n10) 118- 213. Shapiro describes the 'moral aim' of legal systems as 'the rectification of the moral defects associated with the circumstances of legality.' ibid 214.

properties, they also have some *moral* or broadly *normative* features. Ronald Dworkin's brand of anti-positivism is perhaps most well-known.[21] Dworkin argued that applying the concept <law> to a rule necessarily involves *interpreting* social practice, and interpretation involves more than just figuring out which rules community members follow.[22] Social interpretation for purposes of applying the concept consists partly in moral judgment. It involves characterizing individuals and their practices in a way that casts them in their morally best light even if the characterization is not entirely faithful to actual intentions and conduct. In other words, recognizing a rule as law involves appreciating not just that it is *actually* followed by community members but that it is a morally good rule to follow in light of community practices.[23] More recently, Mark Greenberg has suggested that legal rules are just those morally good rules whose moral status depends in part on our social practices.[24]

It should be noted that no one seriously doubts that positivists and anti-positivists have identified genuine worldly phenomena that our concepts could be tracking. There are rules with the relevant social properties (we might call them "S-rules") as well as rules with social and moral properties (call them "M-rules"). What Hart and Dworkin disagree about is whether a rule falls under the concept <law> if and only if it is an S-rule as opposed to an M-rule.

While we have put the central issue in terms of the concept of law, some writers prefer to frame the philosophical debate in terms of the property of *being law* that some rules have and others do not.[25] The central question for these theorists is whether a rule's social properties alone or its social and moral

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[21] Dworkin (n15) 40-46. Dworkin's 'semantic sting' argument against positivism should be construed as suggesting that the legal concept's application cannot simply be a function of linguistic usage and social facts. The argument's upshot remains a distinctively anti-positivistic account of the concept's application conditions.

[22] 'Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.' ibid 52.

[23] One way to conceive of the view is that the Dworkinian thinks the closest morally good approximation of the rule actually followed by members of the community is law.

[24] M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 Yale Law Journal 1118.

[25] G Rosen, 'Metaphysical Dependence: Grounding and Reduction' in B Hale & A Hoffmann (eds), *Modality: Metaphysics, Logic, and Epistemology* (Oxford University Press 2010) 109-136; A Marmor, 'Farewell to Conceptual Analysis (in Jurisprudence)' in W Waluchow & S Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013).

properties together explain *why* it instantiates the legal property.[26] The benefits of this alternative construal are somewhat obscure and one reason to favor the conceptual framing is it is broadly consistent with how legal philosophers have construed their own project.[27] Moreover, it simplifies the overall argument considerably to frame issues in terms of the legal concept. The argument can, however, be reformulated in terms of the legal property, and so there is no need to settle the question of ideal framing for present purposes.[28] The alternative construal is acceptable so long as one concedes that what practical reasons there might be to follow or obey legal rules are wholly explained by the social and/or moral features of such rules—the features in virtue of which a rule gets to be legal.[29] Happily, the claim that legality's normative significance is derivative in this way is by and large embraced by those who have defended the property-based view.[30]

II. Competing Theories of the Concept Diverge Extensionally in Hard Cases

[26] Rosen (n25) 110: 'One of the aims of jurisprudence is to identify in general terms the facts in virtue of which the legal facts are as they are. One distinctive claim of legal positivism is that the grounds of law are wholly social…. Antipositivists typically maintain that pre-institutional moral facts often play a role in making the law to be as it is.'

[27] See sources cited (n10). A more radical take on the dispute portrays anti-positivists, in particular, as concerned not so much with characterizing the ordinary concept of law, but with motivating its revision. There is an available reading of the later-Dworkin as a revisionist. R Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) ch19. For a positivistic brand of revisionism, see F Schauer, 'The Social Construction of The Concept of Law' (2005) 25 Oxford Journal of Legal Studies 493. Of course, it wouldn't be a Hart-Dworkin *debate* if while positivists were trying to characterize a pre-fixed concept, anti-positivists were in the business of trying to modify our conceptual repertoire. For this reason, I take revisionist characterizations of the debate to define away the debate. I return to this issue in section V.

[28] Although our argument can be reformulated in terms of the property-based view, there are several reasons for preferring the conceptual framing. For one, it is plainly counterintuitive to think that there is a fully real mind-independent property of *being law* on a par with properties like *being scarlet* or *being water* whose nature is available for investigation. On this point, see B Bix, 'Conceptual Questions and Jurisprudence' (1995) 1 Legal Theory 465, 468: 'The problem is that talk of ''essences'' and the ''nature'' of items does not fit as comfortably with human artifacts and social institutions as it does, say, with biological species or chemical elements.'

[29] A chief reason for avoiding talk of a distinctive property of being law is that it is potentially misleading. There is a temptation to think that when rules acquire the property they acquire a *sui generis* normative significance that isn't fully explained by the rule's social and/or moral features. Scott Hershovitz in his recent work has warned against this error. S Hershovitz, 'The End of Jurisprudence' (2014) 124 Yale Law Journal 882.

[30] It is the rare theorist who denies the reductive claim. On Hans Kelsen's non-reductive view, for example, the property of being law appears to be an irreducible normative property with its own distinctive normative significance. H Kelsen, *Pure Theory of Law* (2nd edn, University of California Press 1960). See discussion in A Hagerstrom, 'Kelsen's theory of law and the state' in K Olivercrona (ed), *Inquiries into the Nature of Law and Morals* (1953) 267.

It is easy to come up with versions of positivism and anti-positivism that end up saying very different things about which rules in a jurisdiction count as law. But *plausible* versions of positivism and anti-positivism of the sort we shall focus on end up agreeing for the most part on the legal concept's extension. For instance, such views will commonly acknowledge the U.S. Constitution as well as properly enacted statutes and judicial decisions as sources of law in the United States.[31]

There are several reasons for this theoretical convergence. To begin with, the social properties that interest positivists also tend to have moral features due in part to their social characteristics. If we plan to drive on the right side of the road, the rule prescribing driving on the right has the social property of being a rule we plan to follow. But it also happens to be one we morally ought to obey and precisely because of our planned conformity to it. On a larger scale, the plans, intentions, and practices of community members have moral significance for how individuals should behave.[32] And so, it is not surprising that the social properties of rules that interest positivists and the moral properties that interest anti-positivists—like that of being a morally good rule to follow—tend to 'co-travel.' In other words, S-rules are often enough *also* M-rules. Since everyone agrees that <law> is a morally important category, any plausible version of positivism will ensure that the concept tracks a social property that is at least in general (although not necessarily) morally significant in the sense of providing those who are subject to the law some moral reason to comply with the law's demands. [33]

On the flip side, any plausible version of anti-positivism will make sure not to wed legality too close to what is morally ideal. Legal rules that fall well short of being morally best are all too familiar. The highly retributive criminal laws of the United States are markedly unjust.[34] Yet the injustice inherent in a rule that prescribes life-imprisonment based on a third criminal conviction regardless of its gravity

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[31] See Greenberg (n17) 162-163 describing paradigmatic examples of law as common ground between the positivist and anti-positivist.
[32] On how coordinating conventions give rise to normative obligations, see D Lewis, *Convention* (Harvard University Press 1969); GI Mavrodes, 'Conventions and the Morality of War (1975) 4 Philosophy & Public Affairs 117.
[33] See discussion in Shapiro (n10) 181-186.
[34] On the harshness of American criminal law, see JQ Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press 2003).

did not prevent it from being one of the state laws of the United States.[35] Anti-positivists can accommodate the moral inferiority of law by, among other means, lowering the threshold of moral acceptability that socially embraced rules must meet to qualify as legal rules. By making a rule's legality turn on a more fine-grained moral property that comes in degrees, like the axiological property *of being good to degree n*, as opposed to binary deontic ones, like *being what ought to be obeyed*, the anti-positivist can make the moral preconditions on legal rules as weakly demanding as required to render the view extensionally adequate. Alternatively, anti-positivists accommodate the occasional immoral law by making the necessary moral preconditions of legality applicable to entire *systems* of socially embraced rules based on the overall good they do rather than to individual legal rules within such systems.[36]

What are the sorts of cases where the theories come apart? They involve rules that bear all the social markers that interest positivists but are so debased as to not even meet minimal standards of moral acceptability—cases involving grotesquely bad rules or systems of rules. The Fugitive Slave 'laws' of antebellum America which required marshals to return runaway slaves to their owners and the putative laws of Nazi Germany are often offered as examples of such debased yet apparently legal rules.[37] The positivist will insist that the Nazis had laws even though their scheme of social organization failed to meet minimal standards of moral decency. By contrast, the anti-positivist will suggest that while it is true that German legal officials might have believed at the time that the Nazi state's pronouncements were law, they believed falsely. She might accuse the positivist of confusing what individuals mistakenly called "law" with genuine law.[38] After all, the laws of most well-functioning states seem to be a force for moral good. Since we learn the concept through examples of legal systems that are plausibly believed to be

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[35] Cal. Penal Code § 667 (West 1994).

[36] See discussion in R Alexy, 'Legal Certainty and Correctness' (2015) 28 Ratio Juris. 441, 444-445: 'not every injustice, but to be sure extreme injustice is not law'; and more generally in G. Radbruch, 'Vorscule der Rechtsphilosophie' in A Kaufman (ed), *G. Gesamtausgabe* (C.F. Muller, 1990) 154.

[37] On the question of Nazi laws, see F Haldemann, 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law' (2005) 18 Ratio Juris 162. See also Shapiro's discussion of the fugitive slave act, (n10) 23, and the laws of the Soviet Union, *ibid* 16, 49.

[38] Additional arguments favoring anti-positivism are discussed in section V. The folk understanding of law is perhaps closer to the positivist line. But compatibility with the folk conception is hardly decisive, given that the folk conception of law is generally error-prone. For example, it only takes a semester of law school to disabuse students of the commonplace that all laws are to be found in statute books and constitutional texts.

morally well-functioning, it is far from obvious that moral conditions are not built into our legal concept.[39]

What seems true of such cases that separate positivists from anti-positivists is that they are *hard* cases in the sense that it is non-obvious whether the rules in question do (or did) count as law—for instance, the rule requiring the return of a runaway slave. This is because neither the positivist nor the anti-positivist line on morally wicked 'legal' rules seems decisive; and, so, as Liam Murphy writes, most people who have spent time thinking about the question 'feel the pull of both ways of thinking about the boundary between law and morality.'[40]

Even if one thinks one of these views is correct, one should *still* take the class of cases where the theories diverge to be hard cases. In other words, one should not think that either the positivist or anti-positivist line on morally inadequate rules is obviously correct.[41] There are at least two arguments for why our confidence in our judgments concerning the legality of morally inadequate rules should be low. The first is an argument from disagreement. Experts who have thought long and hard about whether the concept of law applies in borderline cases (as in the case of Nazi 'law') continue to disagree. Such persistent disagreement is sometimes thought to reveal that the concept of law is underdetermined. There might be grounds for a pessimistic meta-induction from the fact that no account of the necessary and sufficient conditions for the concept's application has persuaded all competent users of legal terms to the conclusion that there are *no* such conditions.[42] But, more plausibly, persistent disagreement about the

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[39] By analogy, consider Quine's example of learning the term 'gavagai' as a non-native speaker of the language arunta. WVO Quine, *Word and Object* (MIT Press 2013) 23–72. When a native speaker asserts 'gavagai' while pointing to a rabbit, they could be picking out a whole host of entities, including the rabbit, various rabbit parts or stages, food, an animal, and so on. We learn the legal concept by way of its application to S-rules that also tend to be M-rules, and it is hard to be certain that the public concept does not track moral features of rules.

[40] Murphy (n7) 7.

[41] A common reaction amongst those first exposed to the dispute is to find the positivist line more compelling. The ensuing discussion offers several reasons to doubt one's instinctive reactions to such cases.

[42] The concept <law>, the pessimists suppose, is simply indeterminate when it comes to the sort of cases philosophers argue over. Leiter (n7). In this, the legal concept might be like the concept <bald>. There is no fact of the matter concerning whether persons midway through the process of losing hair count as bald or not, and this is because we have not even tried to achieve consensus on how to use the predicate "is bald" in borderline cases. However, the analogous conclusion in the legal case strikes one as over-hasty (and overly pessimistic). The legal case is not like the case of baldness given that there is no analogous disagreement about what baldness consists in or how it applies in borderline cases. On the 'conviction' that there are determinate principles governing law's

concept may be explained *not* by its indeterminacy but by the non-obviousness of facts that govern its application in hard cases.[43] Indeed, anyone who takes the concept of law to be sufficiently regimented for there to be a fact of the matter as to whether positivists or anti-positivists are right about law—and, accordingly, a clean and determinate edge of legality—is under pressure to admit the hardness of cases where the theories come apart. For one needs an explanation for persistent theoretical disagreement amongst epistemic peers, and the elusive character of the relevant conceptual constraints looks to be the only one available.

The other argument for taking cases that separate positivism and anti-positivism to be hard cases invokes controversial yet defensible assumptions concerning the determinants of the legal concept's application conditions. Similar assumption underwrite Timothy Williamson's epistemic theory of vague concepts.[44] Williamson suggests that even putatively indeterminate concepts like <bald> or <thin> have determinate application conditions, and their apparent indeterminacy in borderline cases is only due to our inability to *know* the complex totality of facts that determine the precise application conditions.[45] The application conditions of <bald>, for example, are highly sensitive to the overall pattern in the dispositions of speakers to classify persons using "bald" across a range of cases. Whatever one thinks of Williamson's proposal generally, it is tempting to think in the case of a shared or public concept like <law> whose application in cases is the subject of much disagreement that its application conditions are determined not just by any particular individual's usage of "law" but by our *collective* dispositions (or the dispositions of a broad range of experts) to classify rules using legal vocabulary in epistemically ideal

application, see HLA Hart, 'Definition and Theory in Jurisprudence' in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 21.

[43] The literature on the significance of peer disagreement is extensive. For an overview, see D Christensen, 'Disagreement as Evidence: The Epistemology of Controversy' (2009) 4 Philosophy Compass 756. The argument presented here sides with those who think peer disagreement provides significant reason to lower one's credence in a disputed proposition. A Elga, 'Reflection and Disagreement' (2007) 41 Noûs 478, 486–487. But see T Kelly, 'Peer Disagreement and Higher Order Evidence' in R Feldman and T Warfield (eds), *Disagreement* (Oxford University Press 2010), 111–174.

[44] T Williamson, *Vagueness* (Routledge 1994).

[45] ibid 231-37.

situations—that is, given perfect information about the non-legal features of rules.[46] If the concept is sensitive in this way to the judgment of competent speakers across many different cases, then any single individual's understanding of law is likely to be inchoate for one has no way of surveying and knowing the overall pattern of linguistic dispositions in all its details.[47] We have reason to be wary of our conceptual intuitions, especially in cases where competent users of legal terms disagree, for these are precisely the kind of cases where the overall pattern of linguistic dispositions is likely to make a difference to which concept is expressed by legal predicates.[48]

While the above arguments needn't be decisive, especially given that the second turns on a view of concept determination one might reject, they provide reasonable grounds for taking cases where positivism and anti-positivism come apart to be hard cases.[49] Notably, this is a charitable and ecumenical line to take towards the philosophical dispute. It does not beg the question by assuming there is no way of resolving the dispute. The very weak assumption is that neither positivism nor anti-positivism is obviously true. It may be reasonable to adopt either theory or suspend judgment on which is correct. Alternatively, as Bas van Fraassen has argued in the case of competing empirically adequate scientific theories, some attitude that falls short of full-blown belief (like 'acceptance') may be appropriate towards

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[46] Plunkett offers an account of how the legal concept might be fixed by patterns in our linguistic dispositions drawing on work by Frank Jackson and David Chalmers. D Plunkett, 'A Positivist Route to Explaining How Facts Make Law' (2012) 18 Legal Theory 139, 181-186.

[47] Admittedly, it is controversial that the legal concept's application conditions are sensitive in this way to patterns in linguistic dispositions. For instance, ES Anderson and RH Pildes suggest an alternative 'expressivist' account of the concept in 'Expressive Theories of Law: A General Restatement,' (2000) 148 University of Pennsylvania Law Review 1503, on which applying the concept might involves expressing a positive non-cognitive attitude towards a rule, like a desire to follow it. While it is true that the current argument presupposes a view of concepts that is controversial, a version of the argument goes through without this commitment. So long as one thinks that the meta-semantic question about how the legal concept's application conditions are fixed is itself *hard*, as one should, and that its resolution bears on the positivism vs. anti-positivism dispute, then one should think that cases where the theories come apart are hard cases.

[48] The sensitivity of conceptual application conditions to slight differences in linguistic usage is the basis for Williamson's claim that whatever we might *believe* about the boundaries of vague concepts, we cannot have *knowledge* of the boundaries, because knowledge must satisfy a 'safety' requirement: if S knows that p, then there are no nearby possible worlds in which S believes p, but p is false. Given a concept's sensitivity to slight variations in usage, there are nearby possible worlds where one's beliefs about the boundaries are false. Williamson (n44) 230-4.

[49] Of course, hard cases of law arise not just due to its being non-obvious which general theory of the legal concept is correct. A case can also be hard for more mundane reasons, like semantic ambiguity, conflicts in rules, and evaluative complexity. See discussion in sections IV and V.

any one of a range of plausible theories of the precise boundaries of legality.[50] For our purposes, we need not settle the question of what to *believe* given the law's obscurity in hard cases. Our concern is solely with the *legal* ramifications of our epistemic situation with respect to legality.

III. Judges Can Ignore Legality in Hard Cases

Let us trace the dialectic so far. The anti-positivist and positivist disagree about whether the concept <law> tracks the positivist's preferred purely social property of rules, something like the property of *being conventionally embraced* (call it the S-property and rules that have it S-rules) or the anti-positivist's moral-cum-social property, say that of *being morally good to follow given social conventions* (call it the M-property and rules that have it M-rules). Since S-rules are often enough also M-rules, such as when the relevant social conventions involve conformity to morally good rules, the theories by and large converge in their accounts of the concept's extension—that is, on which rules count as law in a jurisdiction and which do not. Cases where they come apart are *hard* cases: it is not obvious whether the rules in question count as law.

It is tempting to think that figuring out precisely whether the legal concept tracks M-rules or S-rules matters for judicial decision making. After all, judges bear responsibility for saying what the law is. To know how she should decide a hard case where S-rules are not also M-rules, a judge needs to understand the legal concept's application conditions. Echoing this line of reasoning, the opening chapter of Shapiro's defense of positivism begins with the promise that addressing the philosophical question has implications for how judges should decide cases.[51] Hart himself was explicit in his hopes that a clearer

[50] B van Fraassen, *The Scientific Image* (Oxford University Press 1980).

[51] Shapiro suggests that 'many of the most pressing practical matters that concern lawyers' turn on the philosophical dispute. Shapiro (n10) 25-9. Shapiro goes on to claim that analytic jurisprudence bears on the correct theory of constitutional interpretation. ibid 220. Farrell argues that Shapiro ultimately fails to deliver on his claims because his theory entails considerable downstream disagreement about the content of law. IP Farrell, 'On the Value of Jurisprudence. Book Review: Legality' (2011) 90 Texas Law Review 187, 221-223. Both sides presuppose law's basic normative significance for judges.

understanding of the legal concept might inform judicial practice.[52] Meanwhile, Dworkin defended various controversial developments in American constitutional law by appeal to his anti-positivism.[53]

The suggestion that the philosophical enterprise might be relevant to judges is at least prima facie plausible, but it has seen opposition.[54] Legal practitioners often express disbelief that philosophical insight into law's nature could have any impact on case outcomes. But the skepticism tends to be question begging.[55] Richard Posner, for example, insists that the philosophical debate has no significance for legal cases because he is skeptical that there is any essential content to the concept <law> for the legal philosopher to discover, rendering the analytic enterprise futile; and, relatedly, Posner is skeptical that philosophical argument could persuade judges to adopt some particular approach to legal decision-making.[56] As it turns out, one can grant legal philosophy its assumptions—e.g., that competing theories of the concept do not always converge in their implications; that there is a fact of the matter as to which is correct; that there are compelling philosophical arguments for both positivism and anti-positivism that a judge might reasonably be persuaded by—and yet still maintain that the analytic project's relevance to a judge's professional obligations is vastly overblown.

I believe the conception of the judge's professional role presupposed within legal philosophy is mistaken. It is true that judges incur duties constraining their conduct by virtue of their legal office, oaths,

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[52] Hart, 'Definition and Theory' (n42) 21-2; Hart, 'Essays on Bentham' (n1) 158-9; Hart (n19) 209: 'If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries.' There are places where Hart seems to suggest his theory of law is not going to be helpful for judges, but Hart's reasons for pessimism concern his belief that the law is full of gaps and a theory of judicial discretion in cases where the law is silent should obviously be developed independently of enquiries into law. See HLA Hart, 'Discretion' (2013) 127 Harv. L. Rev. 652, 657. As I go on to argue, the central issue is epistemic not metaphysical—it is not necessarily the actual indeterminacy of law that renders legality insignificant in hard cases, it is our uncertainty about law from our evidential standpoint.

[53] Dworkin (n15) 90: 'Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers.... Jurisprudence is the general part of adjudication, silent prologue to any decision at law.'

[54] Farrell (n51) 221-223; R Posner, *Law and Legal Theory in England and America* (Clarendon Law Lectures 1996) ch1.

[55] Posner (n54) 2-5; Murphy (n7) 4-5: 'We can say that the issue of the nature of law, its boundary with morality, need have no impact on the outcome of legal cases…. If the issue of the nature of law did affect the outcome of legal cases, more people, especially more lawyers, would be interested in the topic and continuing disagreement about it would be considered a problem.' Murphy does not explain *why* the issue should have no impact on the outcome of legal cases. The cited lack of interest in the problem might reveal only a general failure to properly appreciate the significance of the philosophical debate.

[56] Posner (n54) 2-5.

and obligations to the public, as well as, simply, as a matter of justice. But the relevant duties do not include an obligation to always treat those rules as law that *are* law, and certainly not in hard cases where it is not obvious whether the concept applies to a candidate rule. Call the principle obliging judges to track the concept perfectly 'the principle of legality':

LEGALITY: If a rule in a case is, *ex ante* and independently of the judge's judgment, the law, then the judge has an obligation to follow it and declare it "law."

The aim is to show that hard cases of the sort discussed in the previous section serve as counter-examples to the principle: a judge does not have reasons, internal to the law or otherwise, to comply with LEGALITY.[57] In the light of hard cases, one can show that LEGALITY is neither an S-rule nor an M-rule—in other words, the principle is neither embraced in contemporary jurisdictions as a matter of social convention nor is it a morally good rule for a legal system to embrace.

First, LEGALITY is not an S-rule, or at the very least we lack grounds for supposing that it is conventionally embraced. One might be misled into thinking otherwise by the oft-repeated platitude that judges have a duty to strictly follow the law. Not just legal officials but the public as well tend to endorse this common sentiment and it is tempting to infer from it both a general expectation that judges will conform to the principle *and* actual conformity by judges.[58] But the inference would be mistaken. The fact that it is widely accepted in modern jurisdictions that judges should obey the law does not entail that strict conformity with LEGALITY is what is generally expected or desired of judges. The assertion "judges should always follow the law" is ambiguous. On one interpretation, the speaker has particular rules in mind that happen to fall under the legal concept in her jurisdiction: for instance, rules stated in the American Constitution forbidding cruel and unusual punishment and unjust takings, canons of statutory interpretation, prior judicial pronouncements, and so on.[59] She might use the concept <law> to pick out

[57] Another way to put it is that LEGALITY is not a legal rule.
[58] For data on public beliefs about and evaluation of judging, see JM Scheb and W Lyons, 'The Myth of Legality and Public Evaluation of the Supreme Court' (2000) 81 Social Science Quarterly 928, 938: 'Americans who believe the Court bases its decisions on [legality] are more likely to render positive assessments of the Court.'
[59] U.S. Const. am. 5.

these specific rules and believe that judges should strictly follow them quite apart from whether (and for what reason) the rules fall under the legal concept. For instance, her belief that American judges should follow rules stated in the Constitution may be based on her reverence for the values enshrined in it. But a quite different (and more complex) thought one might express in making the assertion "judges should always follow the law" is that judges should follow all and only those rules that fall under the concept <law>, without having specific rules in mind.

The familiar *de re* / *de dicto* distinction marks these two different senses of an assertion and applies also to beliefs and desires. I desire *de re* to read a novel by Virginia Woolf if I have a particular novel in mind—say, 'To the Lighthouse'—one that I believe satisfies the description: *a novel written by Virginia Woolf*. I desire it *de dicto* if I desire to read any novel that satisfies the relevant description. Knowing whether a novel was in fact written by Woolf is quite important if your goal is to satisfy my *de dicto* desire. On the other hand, if you know precisely which novel I have in mind when I express the *de re* desire, you need not know whether it satisfies the description I use to refer to it in order to help me achieve my ends.

The generally embraced platitude that judges should follow the law supports LEGALITY only if individuals *de dicto* desire or expect that judges will follow the law. But the *de dicto* interpretation is implausible. A person's reasons for requiring judges to follow rules that happen to be legal, like constitutional prohibitions against restricting free speech or religion, will likely implicate a wide range of moral and prudential concerns. Since how judges rule on the bench is a matter of some political importance to individuals, it seems unlikely that persons would want case outcomes to be determined by a pre-established legal concept whose precise contours may or may not line up with their preferred policy preferences.

A less cynical reason for favoring the *de re* over the *de dicto* interpretation of public expectations concerns the opacity of our legal concept. It is simply not clear, even to those who have considered the issue carefully, what is entailed by the *de dicto* claim that judges should follow the law in cases where M-rules and S-rules come apart. In the case of the Fugitive Slave 'laws,' for instance, it is uncertain whether

the rules that happened to be declared "law" by judges really were. In attributing a *de dicto* desire to the public, we would be committed to thinking that individuals want judicial behavior to be constrained in ways whose consequences are uncertain, and by a concept whose precise contours most of us perceive rather dimly. In general, we should be wary of attributing to persons *de dicto* desires with less than transparent aims because it renders persons and their interests hard to rationalize.[60]

While the above considerations are far from decisive, they shift the burden of justification on the proponent of the *de dicto* interpretation of the widely-held platitude in support of LEGALITY. No legal philosopher, as far I one can tell, has addressed the issue. My strong suspicion is that upon considering hard cases, where it is unclear whether the legal concept applies to a rule, most of us would be disinclined to think judges should follow a rule simply because of its legality (in part because this is clearly the rational response to hard cases, as we shall see in a moment). It seems reasonable to assume, at least tentatively, that what the public expects is for judges to always follow *paradigmatic* legal rules—those familiar jurisdiction-specific rules that both anti-positivists and positivists can and should agree fall under the concept.[61] There is no room to infer from this *de re* expectation a further general expectation or practice of judicial conformity to the principle of LEGALITY.

Perhaps grounds for thinking LEGALITY is conventionally embraced (and, accordingly, an S-rule) might instead be found in judicial promises and constitutional rules. But the actual content of judicial oaths and constitutions in modern legal systems suggests otherwise. The American oath of office for judges includes the words: "I … swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me …. under the Constitution and laws of the United States." The

[60] The core of the argument for why persons would be hard to rationalize if they had such desires comes later. Another alternative to the strict *de dicto* reading is that the platitude expresses a 'tentative' *de dicto* claim. A tentative *de dicto* claim would confer *some* normative significance to legality in all cases, but defeasible normative significance. Indeed, it suffices for the present view to suppose that even if persons think judges should obey the law *de dicto*, their commitment to this principle is probably very weak. A very weak obligation to obey law in hard cases may be sufficient for present purposes to render legality's significance negligible.

[61] For example: well established constitutional rules, detailed and clearly stated statutory requirements, and so on.

oath speaks of duties incumbent under the constitutions and the laws, but leaves the specific content and character of these duties unspecified. In particular, whether these duties include conformity to the principle of LEGALITY is entirely underdetermined. Moreover, while Article VI of the U.S. Constitution specifies that judicial officers "shall be bound by oath or affirmation, to support this Constitution," it is hardly obvious that support for constitutional legal rules entails upholding all rules that fall under our legal concept. There is simply no clear statement of a rule, in the Constitution or elsewhere in American law, that requires judges to fetishize the concept <law> by following only those rules that fall under the concept simply for falling under the concept.[62] The American oath of office and legal background are not at all unusual in this respect compared to the laws of other jurisdictions.[63]

It is one thing to repudiate the notion that LEGALITY is conventionally embraced, and quite another to show that no ideal legal system or public would adopt the principle given the possibility of hard cases. It is the normative question we turn to now: whether there is *reason* to want judicial behavior to be constrained by the legal concept in all cases. This relates to the question: could LEGALITY be an M-rule? For even it is not *in fact* followed as part of an established convention, the principle's moral characteristics—like its being a good principle for judges to follow—might render it legal. On Dworkin's theory, for example, the fact (if it is one) that LEGALITY is a morally good principle for judges to follow would give us reason to charitably interpret our practices—the platitude that judges should follow the law, judicial oaths, constitutional rules, and so on—in a way that supports LEGALITY, even if our practices do

[62] Rule 2.2. of the American Bar Association's Model Code of Judicial Conduct notes that judges shall uphold and apply the law fairly and impartially. But this is far from a clear statement of LEGALITY. The comments acknowledge the appropriateness of each judge bringing her on personal philosophy of interpretation to bear on the law. The only form of judging the code explicitly prohibits is deciding what the law is based purely on personal taste.

[63] No *de dicto* promise to obey all and only legal rules is to be found in the British, Australian, and Swedish versions of the judicial oath. While the Indian Constitution requires judges to 'uphold the Constitution and the laws,' the use of the plural form suggests reference to a plurality of legal rules rather than to any rule with the property of being law. The German oath requires judges to 'fulfill the duties of an honorary judge… faithfully to the law' and adds a requirement 'to serve only truth and justice.' It would be question begging to assume that fulfilling the duties of the judicial office and fidelity to law involve respecting law *de dicto*. As I go on to argue, it is far more reasonable to interpret such requirements *de re*, in terms of paradigmatically legal/constitutional rules. Could there be a jurisdiction that explicitly incorporated LEGALITY *qua* legal rule? Of course. But it suffices for present purposes that most jurisdictions are not like this and that LEGALITY is not an essential feature of legal systems.

not in fact involve commitment to such a principle. And so, we have not yet ruled out the possibility that LEGALITY may be binding on judges *qua* legal rule on anti-positivistic grounds.

There are practical consequences to a rule's being called "law" by judicial officials. Rules declared "law" are enforced by the state and obeyed by others. The moral question is: how should judges decide which rules to call "law" in hard cases given the significant consequences of their speech acts? One way to address this question is to entertain the perspective of an institutional designer—someone with power and ability to decide which general principles will govern judicial decision-making.[64] The principle of LEGALITY is an example of a decision criterion the institutional designer might impose on judges in hard cases, one that tasks judges with the responsibility, in deciding which rule to follow, of tracking the legal concept whatever its precise constraints turn out to be.

The inferiority of LEGALITY as a decision criterion can be brought out by considering how we might weigh the following alternatives: (a) a rule that requires judges to follow and declare as "law" all and only M-rules, and (b) one that requires judges to follow and declare as "law" all and only S-rules. Note that, depending on whether the positivist or anti-positivist is right about <law>, one of these will have the same implications as LEGALITY for which rules judges should regard as law. Between the two principles, we would naturally prefer the criterion that when employed by judges would make things go morally best, all things considered.[65] If, for instance, judges are bad at identifying morally good rules (rules that it would be morally good for us all to follow), the positivistic principle of law-declaration would be best from the institutional point of view, for it does not require of judges that they appraise the moral features of rules in deciding which rules to follow.

But notice that in deciding between the two principles, extensional equivalence with LEGALITY is irrelevant. The institutional designer should not care whether M-rules or S-rules are the ones our concept <law> has been tracking all along. Knowledge of the conceptual fact simply does not bear on what the

[64] The perspective of the institutional designed is intended merely as a heuristic: a means of identifying a regulative ideal for the design of a judicial system.
[65] If one dislikes this way of putting it which assumes consequentialism in ethics, we can instead say: the institutional designer should pick whichever decision criterion has all the moral right-making features.

best criterion is that judges should be using. Suppose we find it would make things go best if judges obeyed and pronounced as "law" rules that have the Hartian S-property. This is possible despite M-rules being the ones that meet a minimal degree of moral acceptability when obeyed. If it is best for judges to decide cases using S-rules from an institutional design stand-point, this fact is in no way undermined by a discovery that our concept <law> has tracked M-rules all along. Indeed, it would be implausible to think that, as users of the concept, we fixed on the M-property as opposed to the S-property precisely because it was the property it would be best for judges to track in deciding cases. Far more plausible is the assumption that judges and other users of the legal concept latched on to a property of rules that serves as an *adequate*—rather than best—basis for judicial decision making.[66]

The point can be motivated using a non-legal example. Suppose one becomes interested in the ordinary concept <marriage> because relationships that fall under the concept seem worth valuing. An examination of what marital relationships have in common might reveal a range of properties that make them valuable. Should it matter, ultimately, which of these features is essential to the ordinary concept? It should not if the aim is to identify relationships worth valuing. There may be features that are not essential to marriage but nevertheless typically found in marital relationships that make them valuable—like romantic devotion. In other words, one might discover upon reflection on the nature of marriage, features that are more relevant to the normative question than whatever it is that is essential to all and only those relationships that fall under the ordinary concept <marriage>. Moreover, in cases where it is non-obvious whether a relationship counts as a marriage because the ordinary concept's precise application conditions are obscure,[67] the question of whether the relationship is worth valuing should be decided independently of whether it counts as a marriage. For deciding the conceptual question involves deciding an issue that is irrelevant to the evaluative question—namely, which features of relationships

[66] We shall return to this point in section IV when addressing objections to the view—in particular, the objection that the legal concept might already be optimally tailored to our ends.

[67] Consider a case where a couple has lived together for several years under the false belief that they were officially married by a priest who turns out to be an unlicensed charlatan. The ordinary concept's application, I submit, is obscure.

have *we* been sensitive to in classifying certain ones as "marriage."[68] A relationship's value is determined by its intrinsic features; *not* by our sensitivity to those features within our linguistic practices.

The concept <law>, like the concept <marriage>, is a practically significant category. In well-functioning legal systems, rules that fall under the concept are at least typically ones we morally ought to obey. Accordingly, an institutional designer trying to find a decision criterion for judges to use in hard cases that would make things go morally best would do well to study the legal concept. She might discover features of rules that it would be beneficial for judges to track and use to decide cases. But, ultimately, the legal concept will be useful only in the limited way the concept <marriage> is useful to someone interested in the defining features of valuable relationships. In cases where the legal concept's application to candidate rules is uncertain because the precise application conditions are obscure, the institutional designer should determine what rules judges should follow based on their *non-legal* features rather than their legality. Their legality is not just obscure; it is of no *intrinsic* moral significance, being a function of our entirely contingent sensitivity to certain non-legal features of rules over others.[69]

Fully specifying the ideal decision criterion for judges to use in hard cases is beyond the scope of this paper. But we must resist the temptation to think that just because we have not settled on an answer to this difficult question of institutional design, our default rule must be one that requires judges to fetishize the legal concept. LEGALITY cannot be a default rule that defines the judge's role precisely because the concept used to state the principle is far from transparent: it is not clear what the principle commands judges to *do* in hard cases.

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[68] Could our sensitivity to certain features reflected in the precise conceptual constraints be an indirect yet ultimately useful guide to value? Perhaps. But, in all likelihood, the conceptual constraints are arbitrary. I address this concern more fully in the next section.

[69] If the boundaries of the concept were obvious, the analysis would be different. If the law were clear, determinate, and antecedently recognizable, there would be reason to follow it at least in part because those who are subject to the law's demands act based on their reasonable expectations concerning the law, and there are good reasons not to frustrate reasonable expectations. Moreover, there may be reasons for judges to *treat* legality as though it were intrinsically significant when the law is clear that do not apply in cases where the law is non-obvious. The obscure edge of legality is thus critical to the overall argument for why judges have authority to ignore law. The issue is discussed in further detail in section IV.

To sum up, the conception of the judge's role I have defended invokes, first and foremost, a negative thesis: the rules that govern judicial decision-making do not include one that mandates treating all and only those rules as law that fall under the legal concept. This negative thesis is compatible with the view that judges should resist the temptation to treat rules as law that they think would maximize good outcomes and keep their policy-preferences out of adjudication. In other words, the view is in principle consistent with a conservative take on how judges should ultimately decide hard cases.

More positively, the view entails that judges might fulfill their professional duties by deciding hard cases based on a decision-criterion that would be endorsed by ideal institutional designers. Call this alternative to the principle of LEGALITY the 'PRINCIPLE PRINCIPLE,' which, to put it simply, requires judges to behave in a *principled* manner:

> PRINCIPLE PRINCIPLE: In hard cases, declare rules as "law" based on principles and decision criteria that if institutionally set would make things go best, all things considered.

The PRINCIPLE PRINCIPLE is consistent with the claim that judges should remain faithful to well-recognized and paradigmatic *laws* (in the *de re* sense) and make a good faith attempt to figure out what the law is. It entails, only, that in hard cases where the line between legal and non-legal rules is unclear, judges can lawfully follow whichever principle for law-declaration would be endorsed from the general institutional point of view.

Does the positive claim entail that by acting on the PRINCIPLE PRINCIPLE judges do end up following the law in hard cases? The view might be interpreted as imputing to legal systems something like a *higher-order* rule that allows judges to ignore the legality of first-order rules in hard cases and, instead, decide cases based on the substantive merits of candidate rules. For example, when a judge decides whether to declare a morally abhorrent but conventionally embraced rule as the law, she should ignore whether the rule is *in fact* law in deciding what to do. Instead of the rule's legality, her decision should be guided by whether it would be institutionally best for judges to declare morally abhorrent rules that are conventionally embraced as "law." So, it seems, contrary to the paper's negative claim, judges *do*

end up following the law in hard cases and indirectly comply with LEGALITY by complying with the PRINCIPLE PRINCIPLE. One might analogize with a trustee who gives advance permission to a trustor to ignore his commands when he is mentally impaired. It seems the trustor complies with the trustee's commands when she ignores the trustee's instructions when the latter is mentally impaired.

There are two things to say in response. First, even if PRINCIPLE PRINCIPLE can be understood as a higher-order legal rule, it does not imply that judges should follow the law in hard cases. At best, they should follow a higher-order legal rule while ignoring the legality of first-order rules—those that apply to the facts of the case. There is simply no such thing as following the law *tout court* in hard cases, just as there is no such thing as the trustor's obeying the trustee's commands *tout court* when the latter is mentally impaired—the trustee's commands are followed on one description of the situation and they are not on another.

Second, it is entirely unclear whether PRINCIPLE PRINCIPLE should be regarded as a *legal* rule. As discussed, it seems the law does not have clear prescriptions for what judges should do in hard cases where it is uncertain whether the legal concept applies to a rule. If anything, the PRINCIPLE PRINCIPLE seems supported by *moral* considerations, one's that do not clearly establish its legality, especially if positivism is true. The proposal should therefore be construed as an attempt to say in general terms how we *might* fill a potential gap in the law—the absence of clear legal guidelines for how judges should rule in hard cases. Our primary aim has been to show that the gap certainly should not be filled with LEGALITY. Whatever else we might say about law-declaration in hard cases, it should not be that judges should strictly follow the law even if there *is* a fact of the matter about what the law is in such cases.

IV. Objections and Replies

Some might consider it a *reductio* of the view that it entails judges can satisfy their professional obligations despite deliberately ignoring the law. In difficult cases where S-rules and M-rules come apart, the claim is it is simply irrelevant to what judges should be doing that historically "law" has been

associated, say, with S-rules. If it is institutionally best for judges to be tracking and pronouncing M-rules "law" in hard cases, then the judge should ignore what the law is and declare the M-rule "law." Is this not tantamount to a fraud on the public?

As I have suggested, cases where ignoring preexisting law is appropriate are ones where it is not obvious what the law is. So, we should resist describing the judge in such cases as dishonest or perpetrating fraud. The judge who pronounces an M-rule "law" because of her sincere belief that her pronouncement conforms with what institutional designers would expect of judges need not be certain that all and only S-rules are law. The judge can in good conscience decide the case as though she were an anti-positivist. Even if the judge is for some reason certain that positivism is true, she should not be criticized for deviating from what she believes to be law insofar as she employs the best decision criteria for judges. The entire point of the previous discussion was that a judge can have respect for the law (or, better yet, respect for *laws*) in a way that fully satisfies her duties despite ignoring the law in hard cases.

It might be objected that the view neglects the fact that our shared concepts often encode our collective wisdom. Perhaps the fact, if it is one, that the legal concept tracks S-rules as opposed to M-rules reflects reasons for tracking S-rules that would not be transparent to institutional designers. These reasons, implicit in our conceptual practices, might be neglected in trying to settle the question of what judges should do in difficult cases independently of law. If so, it may be best to let the judge's role be defined by whatever it is we were tracking all along using the legal concept. In other words, it may be best to impose LEGALITY on judges after all.

Insofar as our legal concept has been shaped by the judgments of a wide-range of experts, including judges and other key actors, it has no doubt been informed by our collective sense of the correct way to rule in individual cases, judicial capacities, and so on. However, it is implausible to suppose that every aspect of our legal concept reflects the community's considered judgement as opposed to arbitrary convention. M-rules and S-rules come apart in unusual cases, and it seems unlikely that our decision to conceptually privilege, say, S-properties as the defining feature of the legal would have been informed by our collective sense of practical reasons that would elude an institutional designer for requiring that

judges, even in circumstances of the sort that arose in Nazi Germany or antebellum America, attribute legality to all and only S-rules.[70]

Finally, there is an important objection to the view that appeals to the 'reliance interests' of those held accountable under legal rules, one that can seem especially compelling when illustrated using the example of criminal law (and its *nullum crimen sine lege, nulla poena sine lege* principle).[71] Individuals act based on their expectations of what the law is and there are good reasons to avoid frustrating reasonable expectations. The ideal that laws be antecedently recognizable has been deemed central to law by a broad range of legal theorists.[72] In the case of criminal law, it seems especially important from the point of view of justice not to hold individuals accountable under rules that could not have been antecedently recognized by them as legal, given the severe consequences of being found to have violated the criminal law. But the proposed view of judicial obligations neglects this fairness constraint. If it is a conceptual fact that only S-rules are law, then calling an M-rule "law" and punishing a person under it offends against principles of justice having to do with adequate notice and fair warning.

The objection from citizens' reliance on law only goes through if the kind of linguistic infidelity the view recommends frustrates the reasonable expectations of persons. But since it is very unclear whether the ordinary concept tracks M-rules or S-rules, persons are unlikely to have (reasonable) expectations about whether judges will follow one sort of rule or the other in borderline cases where the two come apart. The point can be made more generally and not just with respect to cases that separate

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[70] A different objection turns the fact that conceptual application conditions can be arbitrary into a rejoinder. It is often useful to be able to resolve a question of institutional design using arbitrary convention. When such questions are deeply contested, as the question of how judges should decide hard cases clearly is, it is helpful to have an apolitical way of resolving the issue. Having LEGALITY be the rule for judging may be the only fitting response to the fact of political disagreement over the proper role of the judge.
There are two things to say in response. Firstly, resolving the dispute over what judges should be doing by appeal to a merely conventional conceptual fact is not apolitical. That it represents the most fitting response to disagreement regarding the judge's role is a normative assumption, likely to be politically contested itself. Secondly, if what we need is an arbitrary, apolitical way of resolving the dispute over which rules judges should be tracking in hard cases, there are surely easier, yet equally arbitrary ways of settling the issue than one that involves figuring out the precise application conditions of the legal concept. One could flip a coin in deciding between M-rules and S-rules, for example.

[71] 'No crime without law, no punishment without law.'

[72] See, e.g., L Fuller, *The Morality of Law* (Yale University Press. 1964).

positivism from anti-positivism. Hard cases of law where it is difficult to discern what the preexisting law is arise not just because the legal concept's application conditions are non-obvious, but also due to more familiar factors, such as semantic ambiguity in the statement of rules, uncertainty about judicial practice, evaluative complexity, and so on.[73] Are judges, in adjudicating such cases, obliged by considerations of fairness to take into account the reliance interests of those in the business of trying to do as much as could conceivably be permitted by law (Holmesian "bad men", in other words)?[74] It seems not. A much more plausible view is that citizens should not stray into the 'gray zone' or edge of legality; or, at the very least, that if they do, they give up reasonable grounds for complaint when their conduct is judged to be illegal. To the extent that people do have reasonable expectations about law, we serve that interest as I suggested before in discussing what the public *in fact* expects of judges: by examining the *paradigmatically* legal rules of a jurisdiction—that is, the clearest cases of law.[75]

The question of whether and to what extent laws need to be antecedently recognizable was front and center during the Nuremberg trials after World War II. There was considerable anxiety over holding Nazi war criminals liable under rules whose basis in prior international law was dubious. The criminalization of aggressive war in particular was seen as something of a legal novelty.[76] The agents of Nazi Germany could hardly have expected that the rules pronounced as international law at Nuremberg would be and yet, as David Luban has argued, an ideal of the rule of law that would prohibit such pronouncements, one that would "require lifelong protection for the elite of a genocidal regime," would not be worthy of respect.[77] In the case of Nazi Germany, the wickedness of the Nazi state deprived its agents of a reasonable complaint against being punished for their complicity after a fair trial. Relatedly, if

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[73] Dworkin (n9).
[74] OW Holmes, 'The Path of the Law' (1987) 10 Harvard Law Review 457, 459: 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.'
[75] An issue I have not discussed here but analyze elsewhere is the precise relationship between the degree of *ex ante* certainty about the law on some issue and the law's intrinsic normative significance for judges. The claim defended is that as the degree of *ex ante* certainty about law diminishes so does legality's normative significance.
[76] D Luban, 'The Legacies of Nuremberg,' (1987) 54 Social Research 779.
[77] ibid 800.

considerations of justice favor our calling M-rules as opposed to S-rules "law" going forward, these are not defeated by the fact that some citizens (say, die-hard positivists) expect law at the margins to be constrained by entirely non-obvious conceptual facts.

V. Closing Remarks and A Reply to Dworkin

While not all theoretical inquiries need to be justified in terms of their practical upshot, our interest in the category of law is chiefly practical. Legal officials, among others, are tasked with the responsibility of figuring out what the law is, and it matters that they do this job correctly. The argument from judicial role highlights a way in which legal philosophical investigation can become untethered from its practical moorings. If judges need not be concerned with legality in hard cases, where the concept's application is non-obvious, then nailing down the precise application conditions does not serve judicial ends. The project of conceptual analysis in legal theorizing needs a different justification than the one traditionally given: namely, that answering the conceptual question will help judges comply with their legal obligations better.

The more positive lesson to draw from the argument is that there remains room for a juridically significant philosophical enterprise. Theorists offering candidate analyses of the concept of law can afford to be less concerned with getting the legal concept's extension exactly right and instead focus on ensuring that if judges were to rely on the suggested analysis in cases where there is disagreement over the concept's extension, they would be acting in ways that are institutionally best. In other words, the debate between positivists and anti-positivists might be re-oriented around the moral and political question: what criterion of law-declaration for hard cases results in sound judicial decision-making generally?

The suggestion that legal philosophy would benefit from being re-oriented around a normative enquiry is by no means novel.[78] It has even been suggested that positivists and anti-positivists may have been implicitly debating a normative question—something like: which conception of law is best for us to use?—despite seeming to debate the actual contours of a fixed concept.[79] Nevertheless, we have discovered reasons for favoring a reorientation that appear to have been neglected in the broader debate and are unique to the legal context: reasons having to do with the professional role and responsibilities of judges. Whether or not the predicate "is law" expresses a concept that refers to all and only M-rules is not what ultimately justifies, from the legal point of view or otherwise, a judge's use of the word to refer to an M-rule in a hard case. If anything justifies such usage, it is a fact of ideal institutional design: that judges *should* pronounce M-rules "law" given the practical consequences of their generally doing so.

Finally, it would be a mistake to close an argument in which hard cases play such a major role without commenting on Ronald Dworkin's classic discussion of such cases.[80] Dworkin famously used hard cases to argue in favor of anti-positivism, and the present analysis sheds new light on Dworkin's insights as well as on the argument's shortcomings.

Dworkin observed that in hard cases judges both *do* and *ought to* decide which rules to declare "law" based on their moral features (based on their consistency with what Dworkin calls 'arguments of

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[78] See, e.g., Schauer (n27) 493; Murphy (n7) 9: 'So the methodology I favour for thinking about the boundary of law is what could be called a practical political one: the best place to locate the boundary of law is where it will have the best effect on our self-understanding as a society, on our political culture.' The present argument can be viewed as highlighting additional reasons for preferring this prescriptive methodology.

[79] D Plunkett and T Sundell, 'Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response' in *Pragmatism, Law, and Language* (Routledge 2014). Plunkett and Sundell refer to the phenomenon of parties implicitly debating the question of what concept we *should* be tracking with our words as 'meta-linguistic negotiation.' More generally, see S Haslanger, 'What are we Talking About? The Semantics and Politics of Social Kinds' (2005) 20 *Hypatia* 10. I am skeptical that philosophers—or judges, for that matter—have been disputing how we *should* use "law" independently of its meaning. Some of my reasons for being skeptical are Dworkin's, who derided positivist attempts to re-interpret what judges are doing when they disagree about law. Dworkin (n15) 42-46. One would think that parties engaged in a 'meta-linguistic negotiation' would directly assert the fact whose acceptance is up for negotiation. That is, one would expect parties engaged in a dispute over how to use a word—say, "law"—to clearly assert, as part of the dispute, that the word ought to be used one way or another quite apart from its public or ordinary meaning. But, in fact, judges, and philosophers debating the nature of law, do not do that. Moreover, the argument developed here suggests that *there is no need* for meta-linguistic negotiation on the part of judges (or philosophers) in hard cases. When the precise contours of a concept are obscure and a predicate may very well express the ideal concept, one can use the predicate in the hopes that it expresses the ideal.

[80] Dworkin (n9).

principle' or 'right').[81] Moreover, he pointed out that social facts seem to underdetermine what the law is in such cases. For instance, in *Everson v Board of Educ.*, the US Supreme Court had to decide whether a law purporting to grant free busing to parochial schools violated the First Amendment prohibition against religious establishment.[82] The social facts having to do with prior judicial decisions, constitutional text and history, interpretive practice, etc., did not determine whether assistance to parochial schools constitutes religious promotion of the sort the Constitution prohibits.[83] The Court seems to have decided the case by appeal to its conception of principles that ought to govern a democratic society that aspires to religious neutrality.[84] Dworkin's argument that in relying on general moral principles to decide such cases, judges end up behaving as they *should* is complex. But his principle claim was that it would be wrong for unelected officials to decide hard cases by exercising discretion unconstrained by moral principles of right.[85]

Dworkin infers based on these observations that positivism must be false. What the precise argument against positivism is supposed to be is not entirely clear, but there are at least two compelling possibilities. Firstly, the positivist owes us an explanation of why, if the law has run out, judges continue to rule as though it has not based on a moral analysis of rules.[86] Secondly, a judge committed to positivism has no way of deciding the relevant cases as judges manifestly do (and should do) without violating her legal obligations, for she must treat the moral features of rules as ultimately irrelevant to

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[81] ibid 1059.
[82] 330 U.S. 1 (I947). See discussion in Dworkin (n9) 1083-4.
[83] See the dueling opinions of the majority lead by Justice Black, 330 U.S. 1-17 (I947), and the dissent led by Justice Rutledge, ibid 28-63.
[84] Although, the majority claimed that blocking this form of assistance which *enables* parochial schools to operate was 'obviously not the purpose of the First Amendment,' it did not defend its claim. 330 U.S. 1, 17-18 (I947). The majority was likely motivated by the thought that it would be *morally wrong* to interpret the First Amendment to prevent a State from 'extending its general state law benefits to all its citizens without regard to their religious belief.' ibid 16-17.
[85] Dworkin offers two arguments against unconstrained judicial originality: 'The first argues that a community should be governed by men and women who are elected by and responsible to the majority…. The second argues that if a judge makes new law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but rather a new duty created after the event.' Dworkin (n9) 1061.
[86] As Dworkin puts it: 'The rights thesis… provides a more satisfactory explanation of how judges use precedent in hard cases.' ibid 1064.

their legality.[87] If she were to base her decision-making on moral considerations, then, by her own lights, she would be involved in the pretense of treating extra-legal considerations as though they were legal.

Positivists tend to respond to the explanatory challenge with the fair observation that just because judges act *as if* they are discovering law in hard cases, we need not take their behavior at face value. But the response remains under-motivated without an account of *why* a deeper, less surface-level interpretation of judicial behavior is called for. The present discussion provides principled and theory-neutral reasons for being skeptical of appearances. We would have reason to think judges are single-mindedly attempting to discover pre-existing law in hard cases if we had grounds to assume the truth of LEGALITY. But, as argued, the rule that judges in hard cases should make law-declarations based on actual law is unlikely to be conventionally embraced nor is it a good rule for a legal system to adopt. The entirely contingent conceptual fact as to whether rules supported by considerations of moral principle fall under the legal concept has no intrinsic normative significance for what judges should do in cases where the conceptual constraints are obscure. If judges should declare morally good rules as "law" in hard cases it is not because by doing so they would be discovering law, although they very well *might be*. If judging in hard cases *as though* anti-positivism were true is warranted; it is so for the moral and political reasons that Dworkin gives *and* because it is obscure what the law is in such cases; and not because anti-positivism is actually true. Accordingly, positivism is entirely compatible with judicial behavior in hard cases.

The second version of the argument seems also to rely on LEGALITY, at least implicitly. It presupposes that if there is a fact of the matter about what the law is, as it seems there might be in hard cases, positivist judges would be violating their legal obligations if they based their decision-making on what they deem to be non-legal considerations. But, as we have seen, judges would *not* be violating any

[87] Social conventions *might* render moral analysis relevant—see Endicott (n3) on inclusive positivism—but we are imagining a case where the social conventions do not necessarily entail that moral analysis is appropriate in the case at bar.

legal obligations by basing their decision-making on what may or may not turn out to be non-legal considerations (e.g. the moral characteristics of rules)—legality is simply not what matters in hard cases.

Since these ways of responding to Dworkin's arguments rely on the falsity of LEGALITY, they also undercut the stakes in the debate between Dworkin and the positivist. Neither side can claim the truth concerning the precise boundaries of law and morality would make any difference to how judges should rule. Positivists may well prefer a response to the argument that does not rob the debate of significance in this way. It is not positivism that we have been concerned with defending, however. Our aim was simply to clarify the true significance of hard cases.

Conclusion

Those who take the central question animating analytic jurisprudence—what are the precise boundaries of the concept of law?—to be practically significant tend to assume that we needed to settle the question to specify the professional duties of judges. That presumption is mistaken because it takes as unquestioned a long-standing shibboleth of legal philosophy— namely, that if a rule is, *ex ante*, the law, then judges have at least a *legal* obligation to declare it as such. In fact, a rule's being law is neither necessary nor even sufficient for judges' being obliged to follow it, a fact especially apparent in hard cases of the sort where positivism and anti-positivism come apart, rendering the truth of either theory and the precise limits of our legal concept irrelevant from the juridical point of view.