

BETTER TO SEE LAW THIS WAY

LIAM MURPHY*

With a clear and compelling ethical vision, H.L.A. Hart attempts to persuade us that it would be better to see law the positivist way. Much of Lon Fuller's reply can be read as an equally compelling case for seeing law another way. Both articles are rewarding precisely because they bring to the fore the ethical and political stakes of the debate over the concept of law. The problem is that while these instrumental arguments do a lot to explain why philosophers have tended to be so invested in either positivism or nonpositivism, they have no chance of changing our social world such that either view can be said to be true.

INTRODUCTION

To Lon Fuller, H.L.A. Hart seems to suggest in his Holmes Lecture “that if we do not mend our ways of thinking and talking we may lose a ‘precious moral ideal,’ that of fidelity to law.”¹ Fuller congratulates Hart for agreeing with nonpositivists that “one of the chief issues is how we can best define and serve the ideal of fidelity to law. Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials.”²

Yet Hart's essay, *Positivism and the Separation of Law and Morals*, nowhere uses the phrase “fidelity to law,” and the only “precious principle of morality” Hart invokes is that which condemns retrospective criminal legislation and punishment.³ The main point of Hart's discussion of the Nazi informer is that the question of the content of the law in force and the question of whether one ought to obey it are distinct. Not only is it not part of Hart's project to provide an account of law that makes “meaningful the obligation of fidelity to law,”⁴ it is essential to Hart that his account of law leave open the question of whether there is any such obligation.

* Copyright © 2008 by Liam Murphy, Vice Dean and Herbert Peterfreund Professor of Law, and Professor of Philosophy, New York University School of Law. This Article was prepared for the Symposium on the Hart-Fuller Debate at Fifty, held at the New York University School of Law on February 1–2, 2008.

¹ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630–31 (1958); see also *id.* at 646 (referring to fidelity to law as “the one high moral ideal [positivism] professes”).

² *Id.* at 632.

³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619 (1958).

⁴ Fuller, *supra* note 1, at 635.

All of this is so obvious that Fuller's mischaracterization of Hart's position requires some explanation. I believe that Fuller simply could not bring himself to acknowledge, even as a position he opposed, the main motivation for legal positivism—the desire precisely to leave the issue of fidelity open and, therefore, to present law's content as turning on nothing but matters of fact. That is the underlying idea, and appeals to “a simple fiat of power or a repetitive pattern discernible in the behavior of state officials” are different possible ways of making the idea work. A better way, of course, is Hart's: The social fact that grounds law is the acceptance by legal officials of a certain set of ultimate criteria of legal validity. It is true that these accounts do not necessarily present law as “something deserving loyalty”—but that is part of their point.

Fifty years on, the dispute over the nature of law remains a clash of two fundamentally different pictures of law. On the one hand, we have the picture of law as fact. The law is simply what is posited or put forward as law by a person or people. We may all hope that what gets posited is good, that it matches closely with what the law ought to be as a matter of political morality. But, insists the positivist, it would be mad to look at what has been put forward as law and see instead what *ought* to have been put forward. Suppose someone were to argue that slavery is illegal because it is a violation of people's moral rights. For the positivist, that is akin to defending the proposition that sexual promiscuity causes disease by noting that promiscuity deserves to be punished.

On the other hand, we have the picture of law that is captured by Fuller's notion of fidelity to law: Law is in its nature something good, or at least striving toward being something good, and is deserving of our obedience, all else equal. For most people who see law this way, positivism is hopelessly and obviously wrong. To see law as ultimately grounded in fact is to be blind, perhaps willfully so, to these essential normative aspects of law. From this point of view, it may turn out that the Nazis and the Taliban have no law, but who cares about that? If there is something interesting going on in this domain, something worth reflecting on, it must be because there is something potentially valuable about law, or at least something immediately morally relevant about law. Part of the philosophical task is to figure out what that is.

Of course, positivists agree that there is something potentially valuable about law. Good law is good. They may even agree that, wherever there is law, you are likely—or even certain—to find something that is in one way good. For example, an effective legal system will greatly increase the range of social possibilities, and we may say

that this, in itself, is in one way good. They also are likely to say that, depending on its content, there are often moral obligations to obey (some of) the law. The disagreement is that nonpositivists insist that the inherent moral significance of law must be kept in mind when thinking about what kind of thing law is and, in turn, must structure any theory of how to determine legal content in any particular place. Positivists, by contrast, believe that we can account for law's nature while bracketing any moral significance it may have, even though once the job is done we may notice that, as it happens, law has moral significance.

There are a number of ways in which it could be claimed that the content of the law in force is partly determined by moral considerations. One might say, for example, that what is good about law is that it regulates social life in a way that respects the autonomy of its members and treats them all as equals before the law. So the ideal of the rule of law needs to be kept in mind when we are figuring out the content of law in a particular place. This was roughly Fuller's view⁵ and has always been an aspect of Ronald Dworkin's view.⁶ There is more to Dworkin's view, and there are, of course, other possibilities. But I am not concerned about options and problems internal to the two pictures. Rather, the problem I will discuss, or begin to discuss, is that of how legal philosophy might help us choose between them.

I

We first need to leave conceptual dogmatism aside. Fuller puts the point nicely:

When we ask what purpose these definitions serve, we receive the answer, "Why, no purpose, except to describe accurately the social reality that corresponds to the word 'law.'" When we reply, "But it doesn't look like that to me," the answer comes back, "Well, it does to me." There the matter has to rest.⁷

In a later passage, brilliant in its succinctness, Fuller rightly points out the ideological nature of conceptual dogmatism: "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes

⁵ See generally LON L. FULLER, *THE MORALITY OF LAW* (1964) (arguing that law must satisfy certain principles of legality).

⁶ See RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 30 (1977).

⁷ Fuller, *supra* note 1, at 631; see also Glanville L. Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 *BRIT. Y.B. INT'L L.* 146 (1945) (characterizing dispute over nature of law as purely terminological and therefore empty).

its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions.”⁸

Conceptual dogmatism is now rightly in disrepute. Nonetheless, the dispute between positivism and nonpositivism—between the picture of law as fact and the fidelity picture—is a conceptual dispute. It is a dispute about fundamental categorization, about the boundaries of our subject matter within which further inquiry can take place. When a positivist insists that the judge who appeals to moral considerations in reaching a decision is making law because those moral considerations are not part of law—because they cannot be since moral considerations are not the kinds of things that can answer legal questions—he makes a conceptual claim. When a legal realist and Dworkin say that there are not many determinate legal rules worth speaking of, at least in the United States, they are making a descriptive claim (one which can be true on both positivist and nonpositivist understandings of the concept of law). Where the realist and Dworkin disagree is at the conceptual level: The realist, assuming a positivist understanding of the grounds of law, concludes that there is not much law;⁹ Dworkin, agreeing that this is what a positivist should conclude, sees it as a *reductio ad absurdum* (one of many) of that understanding of law.

This distinction between conceptual and descriptive claims about law does not appear to involve a commitment to a philosophically significant distinction between truths of meaning and truths of fact. Though claims about proper categorization feel like claims about the proper use of words or deep structural meaning, and though it is natural to talk and think that way, there seems to be no reason why we could not understand them instead as just the most fundamental commitments we have about the nature of law, the shared background that is required for disagreement to be possible. The label “conceptual” could be understood as just marking out positions on the nature of law that are beyond the pale, not worth considering, at least for the time being. Since such commitments are not up for grabs but rather taken for granted, they would be revealed in the same way that truths of meaning are thought to be revealed: by intuitive responses to cases. And there would be no reason to insist that such commitments are immune to revision in light of further experience with the practice of law.

⁸ Fuller, *supra* note 1, at 632.

⁹ On the positivist assumptions of legal realism, see Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278 (2001).

Fuller may seem to reject this characterization of the problem when he writes that the dogmatic approach's "definitions of 'what law really is' are not mere images of some sense datum of experience, but direction posts for the application of human energies."¹⁰ This and many other passages may suggest that he is actually not interested in providing an account of the nature of law—that he is not, in particular, interested in the traditional question of whether moral considerations can or cannot be part of the grounds of law. He is instead interested in the different (and, I think, more important) question of what law must be like to deserve our fidelity.¹¹ Fuller's main contribution to this topic is his account of the rule of law and his plausible claim that the laws of a legal system that fails to satisfy that ideal do not deserve our fidelity. Unfortunately, Fuller also pronounces on the nature of law. For example, he writes that the "morality of order must be respected if we are to create anything that can be called law, even bad law."¹² This is just the kind of dogmatic conceptual assertion that Fuller so elegantly condemns in others. I can find no defense of this claim about the conditions necessary for the proper application of the concept of law in Fuller's article.

So we have a conceptual dispute between Hart and Fuller, and it cannot be solved by stipulation. It also cannot be solved by a descriptive philosophical account of the content of the concept of law of the traditional kind. Such an account, which aims at more than a dictionary definition, is built up from intuitive responses to well chosen cases. We may be able to figure out the deep structure of the concept of a chair by asking questions such as "Is this legless thing that carries people up the mountain a chair?" But this is not going to work for law. The kinds of examples we would need—"Is this retroactive criminal legislation law?", "Does the answer to the question of whether this piece of legislation satisfies the Due Process Clause of the U.S. Constitution depend on moral considerations?"—are not going to yield convergent intuitive responses.

Perhaps the most important development in legal philosophy since Hart, Fuller, and Hans Kelsen has been the emergence of a number of sophisticated accounts of how a univocal answer to the conceptual dispute may be found. In Joseph Raz's "normative-explanatory" approach¹³ and Dworkin's "interpretive" approach,¹⁴

¹⁰ Fuller, *supra* note 1, at 632.

¹¹ See, e.g., *id.* at 634 (noting that positivist writers offer no help with question of fidelity to law in times of constitutional crisis).

¹² *Id.* at 645.

¹³ Raz's approach is most fully worked out in JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986), and in JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE*

appeals are made to moral considerations in order to resolve apparent indeterminacy in the content of concepts. In Dworkin's approach, for example, we select the account of the concept of law that makes best moral sense of the values conventionally associated with the word "law." Such approaches offer hope that the true account of the (univocal) content of the concept of law (that we all currently share) need not be hostage to general convergence in intuitions about correct usage. I am skeptical about this new methodological turn. Methods such as these themselves require justification, and that, I believe, will ultimately bring us back to the need for convergence in intuitions of usage after all. But I will not try to defend that claim here.

If I am right, if there is a concept of law that "we all share," it is indeterminate or partly ambiguous. Or perhaps it is better to say that "law" is ambiguous among several different meanings corresponding to distinct concepts.¹⁵ Whichever way we put the point, on some understandings of the category of law, moral considerations are never relevant to the determination of the content of the law that is in force—this view is referred to as "hard" or "exclusive" positivism.¹⁶ Other understandings allow moral considerations as grounds of law so long as there is some social fact that warrants this—"soft" or "inclusive" positivism.¹⁷ And on yet other understandings, moral considerations are always relevant—nonpositivism.¹⁸ All three of these ways of understanding the boundaries of the category of law receive signifi-

PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 194 (1994) [hereinafter RAZ, *Authority, Law, and Morality*]. For a discussion of Raz's approach, see Liam Murphy, *Razian Concepts*, AM. PHIL. ASS'N NEWSL. ON PHIL. & L., Spring 2007, at 27.

¹⁴ See generally RONALD DWORKIN, *JUSTICE IN ROBES* (2006) [hereinafter DWORKIN, *JUSTICE IN ROBES*]; RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]. Some initial skepticism about Dworkin's method is set out in Liam Murphy, *Concepts of Law*, 30 AUSTRALIAN J. LEGAL PHIL. 1 (2005).

¹⁵ Some philosophers prefer to conceive of concepts such that they cannot be ambiguous or indeterminate. The concept just is what it is, timelessly and unambiguously, and it is instead the meanings of our words that change and get murky. My own instinct is to agree with Nietzsche that interesting or important concepts have histories and therefore will typically resist univocal definitions: "[A]ll concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable." FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 80 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1989) (1887). But it does not matter: I believe that nothing in my argument turns on its being cast in terms of the concept of law rather than the meaning of "law."

¹⁶ For a critical discussion, see W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994). Raz defends exclusive positivism in RAZ, *Authority, Law, and Morality*, *supra* note 13.

¹⁷ Partisans of this view are many, including Hart—at least in his "Postscript." H.L.A. HART, *THE CONCEPT OF LAW* 250–54 (2d ed. 1994). For a comprehensive defense, see WALUCHOW, *supra* note 16.

¹⁸ See generally DWORKIN, *JUSTICE IN ROBES*, *supra* note 14; DWORKIN, *LAW'S EMPIRE*, *supra* note 14.

cant support from ordinary usage. But none of them, in my view, can claim to be the sole correct account.

Of course, the concept of law is not fully ambiguous because these accounts do overlap considerably. Thus, much genuine disagreement among their partisans is possible; they are not always just talking past each other. For example, there can be genuine disagreement between positivists and nonpositivists about whether Article 2-207 of the Uniform Commercial Code¹⁹ applies only to contractual contexts involving two forms.²⁰ But where a dispute about the content of the law in force turns on the relationship between law and morality, I believe that partisans of different accounts do simply talk past each other. When a nonpositivist asserts that the death penalty is not lawful in the United States, a hard positivist will rightly think that two different senses of the word "law" are floating around.

II

If the concept of law is partly ambiguous—making the dispute about whether moral considerations can be grounds of law in the end purely verbal—one might wonder why anybody has ever thought that this mattered. Part of the answer can be found by turning our attention to other concepts of political importance, such as liberty, democracy, and equality. These concepts tend to carry immediate weight, pro or con, in political argument, and so a political theorist or politician will use them in ways that help to persuade others to their point of view. Thus, most Western theorists of government today will reject an account of the concept of democracy that leaves their own theories beyond the pale.

For a more academic example, consider the discussion generated by John Rawls's theory of distributive justice about the difference between equality of welfare or resources as a value, on the one hand, and the moral significance of giving priority to the interests of the worse-off, on the other. Derek Parfit is probably right that the priority view cannot with conceptual propriety be considered an egalitarian view, since it does not recommend equality of anything, even as one value among many.²¹ Those attracted to the priority view feel a

¹⁹ U.C.C. § 2-207 (2001).

²⁰ According to Judge Easterbrook, two forms are required. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) ("Our case has only one form; UCC § 2-207 is irrelevant."). Most commentators disagree. See, e.g., John E. Murray, Jr., *The Definitive "Battle of the Forms": Chaos Revisited*, 20 J.L. & COM. 1, 33 (2000) (arguing that § 2-207 "clearly applies" to the situation in *ProCD*).

²¹ See Derek Parfit, *Equality or Priority?*, in *THE IDEAL OF EQUALITY* 81 (Matthew Clayton & Andrew Williams eds., 2002).

tension here. On the one hand, there is rectitude in saying: "That's right, the issue never was equality, as such, at all, so no, I'm not an egalitarian." On the other hand, since the priority view best captures what many of us who thought we were egalitarians were thinking all along, there is a natural inclination to spontaneously redefine the term "egalitarianism" so that it encompasses the priority view for the sake of the desirable associations this leaves in place.

When it comes to the concept of law, the range of politically significant issues tied up with its employment is great.²² Depending on the content we ascribe to the concept of law, it could be argued that we the public will be more or less likely to believe that there is a prima facie duty to obey the state's commands or to believe that its rule is legitimate, that we will have greater or lesser respect for the state, or that we will be more or less concerned about the legitimacy of judges' appealing to moral considerations in the course of making decisions. There are also a range of possible effects on legal officials of various kinds. Perhaps we get better outcomes from conscientious judges if they are not positivists,²³ or perhaps it is the other way around. If we are convinced that general convergence on a particular usage of "law" will produce one or more of these effects, and if we already regard those effects as desirable, then we will have reason not only to care about the ambiguity in the concept of law but also to wish for that convergence and to urge others to reform their usage.

Fuller writes that "[i]t is not clear . . . whether in Professor Hart's own thinking the distinction between law and morality simply 'is,' or is something that 'ought to be' and that we should join with him in helping to create and maintain."²⁴ I agree that it is not as clear as it might be, but I think it is clear enough: In his article, Hart argues that the positivist understanding of law was something that ought to be and that we should join with him in helping to make it be. Fuller goes on to embrace both of the options he raises for Hart,²⁵ but the rewarding parts of his paper are also best seen as arguments that a nonpositivist concept of law is something that ought to be. So though Fuller is wrong that he and Hart have joined issue on the importance of fidelity to law, I do think that he is right that theirs is a "truly profitable

²² For more on the issues discussed in this paragraph, see Murphy, *supra* note 14, and Liam Murphy, *The Political Question of the Concept of Law*, in HART'S POSTSCRIPT 371 (Jules Coleman ed., 2001).

²³ See, e.g., DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS* (1991) (arguing that positivist understanding of law inclines judges to "plain fact" approach to adjudication which prevents them from taking into account values of legality that would lead to better decisions).

²⁴ Fuller, *supra* note 1, at 631.

²⁵ *Id.*

exchange of views,"²⁶ because the two of them embrace the same instrumental method for approaching the traditional dispute about the concept of law.

The main source of Hart's argument was Jeremy Bentham's discussion of the twin dangers of "quietism" and disobedience that are posed, Bentham believed, by the nonpositivist view.²⁷ Hart illustrated the quietism part of Bentham's critique with his discussion of the Nazi informer. At the conclusion of that discussion, he writes:

I have endeavored to show that, in spite of all that has been learned and experienced since the Utilitarians wrote, and in spite of the defects of other parts of their doctrine, their protest against the confusion of what is and what ought to be law has a moral as well as an intellectual value.²⁸

When *The Concept of Law* was published, Hart's argument for a positivist concept of law was unchanged: "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, or advance and clarify our moral deliberations, or both."²⁹ However, Hart seems to have abandoned this argument in the Postscript to *The Concept of Law*, as it is not repeated there. The unfortunate consequence is that at the end of his life, he was left with no argument at all for the positivist understanding of the concept of law.

Hart's essentially instrumental argument for positivism once seemed powerful to me. It is common to reject it by saying that it confuses "what is" with what we would like to be.³⁰ Those making this claim generally seem to believe that "what is" is a univocal concept of law. But we can leave that aside. For the instrumentalist can cheerfully claim, as Frederick Schauer does, that even if there were convergence on a univocal concept of law, it could still be appropriate to argue that we would be better off changing our practice of categorization.³¹ Hart and Schauer are not confused: The instrumental argument is not about what the content of the concept of law really is, but rather about what it would be best for it to be. In Rudolf Carnap's terms, it offers an explicative definition of "law"—one which pre-

²⁶ *Id.*

²⁷ Hart, *supra* note 3, at 597–98.

²⁸ *Id.* at 621.

²⁹ HART, *supra* note 17, at 209.

³⁰ JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 215–16 (2d ed. 1980); WALUCHOW, *supra* note 16, at 86–98.

³¹ Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005).

serves much of the meaning the word has in ordinary use, but extends or refines it for the sake of certain ends.³²

Instrumentally motivated campaigns to reform usage are often reasonable, and not only in the sciences. Even if there is a shared and univocal sense of “egalitarian” that categorizes the priority view as nonegalitarian, there are reasons in favor and few reasons against trying to nudge usage in a different direction. Whether the reformers get away with this depends, as Hart might say, on whether they get away with it. But perhaps it is not silly to think that they might.

With “law,” however, the instrumental approach seems hopeless for a number of different reasons. Before I consider those reasons, let me first lay out the best case I can for the instrumental argument.³³ The most important claim is that to the extent that we believe that figuring out what the law is involves thinking about what it ought to be, we are in danger of taking a quietist, to use Bentham’s word, attitude to the state. Bentham attacked Blackstone for “‘that spirit of obsequious *quietism* that seems constitutional in our Author’ which ‘will scarce ever let him recognize a difference’ between what is and what ought to be.”³⁴ The idea is that to the extent that we say that the law cannot be grossly unjust or that the law is what flows from the morally best reconstruction of the legal materials, we will be less likely to subject what the state presents as law to critical scrutiny. The best form of this argument was actually made by neither Bentham nor Hart, but by Kelsen, who consistently repeated it throughout his life, despite many big changes elsewhere in his theory of law. In 1948, he wrote:

[A] terminological tendency to identify law and justice . . . has the effect that any positive law . . . is to be considered at first sight as just, since it presents itself as law and is generally called law. It may be doubtful whether it deserves to be termed law, but it has the benefit of the doubt. . . . Hence the real effect of the terminological identification of law and justice is an illicit justification of any positive law.³⁵

This, as he says elsewhere, “tends towards an uncritical legitimisation of the political coercive order constituting that community. For it is

³² RUDOLF CARNAP, *MEANING AND NECESSITY* 7–8 (2d ed. 1956); WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 24–27 (2d ed. 1961).

³³ Here, I draw on my paper, Murphy, *supra* note 14.

³⁴ Hart, *supra* note 3, at 598 (quoting 1 JEREMY BENTHAM, *A Fragment on Government*, in *THE WORKS OF JEREMY BENTHAM* 221, 294 (John Bowring ed., Edinburgh, William Tait 1843)).

³⁵ Hans Kelsen, *Law, State and Justice in the Pure Theory of Law*, 57 *YALE L.J.* 377, 383–84 (1948).

presupposed as self-evident that one's own political coercive order is an order of law."³⁶

The exact claim being made here, as I interpret it, is that if people think that bad law is not really law or that nothing gets to be law unless it flows from the morally best way of reading the legal materials, they will be less inclined to subject what the state presents as law—apparent law—to critical appraisal. The important premise here is that what the state presents as law is, as Kelsen says, typically given the benefit of the doubt. They say it is law, and so it probably is, which means that, because of the way law and morality are mixed, it cannot be too bad.

So this is an instrumental claim: A nonpositivist concept of law leads to quietism, an uncritical attitude to the state and its directives. The claim could be doubted. Isn't it just as likely that a nonpositivist understanding of law will lead to greater disrespect for the state? If people believe that legal directives only get to be law if they survive some kind of moral filtering, won't that mean that citizens will not take the state's authority for granted but will believe instead that its legal directives must be morally evaluated before they know that they are worthy of obedience? Gustav Radbruch thought this was so and thought for that reason that it would have been better if the Germans had not been positivists during the Third Reich.³⁷ Bentham's concern that nonpositivism would lead to disobedience actually aligns with Radbruch's argument, which would mean that it is in direct conflict with his argument about quietism.

Whatever the effect on obedience, however, I think that if we focus on the overall political culture—the attitude we take to the state—the thought that this legal directive is not really law because it doesn't survive a moral washing also seems likely to lead to quietism. Suppose we accept Dworkin's suggestion that the legal materials permitting the death penalty in the United States are actually not valid law because they do not survive the moral reading of the United States Constitution.³⁸ Where does that leave the citizen and her attitude to the state? One might say it would increase criticism of the

³⁶ HANS KELSEN, *Law and Morality*, in *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 83, 92 (Ota Weinberger ed., Peter Heath trans., 1973).

³⁷ See Hart, *supra* note 3, at 615–21 (discussing argument in Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* [*Statutory Lawlessness and Supra-Statutory Law*], 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (1946) (F.R.G.), translated in 26 OXFORD J. LEGAL STUD. 1 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2006)).

³⁸ RONALD DWORKIN, *FREEDOM'S LAW* 301 (1996).

state—not only are all these executions morally wrong, they are unlawful. That attitude seems critical, not quietist.

I am inclined to see it differently. Law is connected not just to morality but to the state; as Kelsen says, it is presupposed as self-evident that one's own political coercive order is an order of law.³⁹ The biggest determinant of the content of law, on any view, is action by state actors, and the institutions of the state are themselves legal creations. Given that, the opponent of the death penalty can actually rest more content: She will believe that, though the state is imperfect (issuing as it does unlawful official directives), at least the law of her society prohibits the death penalty, which in turn reflects well on the state. In effect, when we say that the state executes people contrary to law, we imply that the state is being false to its true (just) nature. The more we infuse our concept of law with a moral ideal, such that we can regard unjust actions by the state as *mistakes*—mistakes about a normative order that the state both constitutes and is constituted by—the more accepting we will be of the state.

III

So I believe that there are two initially plausible claims that can be made about the effect that a nonpositivist understanding of law may have on the political culture. A person with a nonpositivist understanding of law may adopt an uncritical attitude toward the legal materials the state produces. He may think: This is presented as law, so it probably is law and, therefore, given the nature of law, is probably not too bad. In addition to this, the fact that a nonpositivist understanding of law may lead someone to regard many legal directives as unlawful also encourages an uncritical attitude to the state: If we think that the state is doing something not just bad but contrary to the law of that state, we are led to think that the solution to this problem is for the state to be true to its own nature.

As I have said, I once believed that this was a good argument for positivism. What is certainly true is that it is the intuitive sense that nonpositivism entails an insufficiently critical attitude to the state that explains positivism's continuing appeal for me. I believe that the same goes for Hart and many others.

But the argument cannot work. We first need to remember that many other instrumental effects have been claimed for one or another disambiguation of the concept of law; these would need to be factored into the overall instrumental calculus. There is the argument that pos-

³⁹ See *supra* text accompanying notes 35–36.

itivism or nonpositivism will lead to better judicial decisions.⁴⁰ Development of this argument requires consideration of a wide variety of possible situations, turning on the many possible permutations of the variables of the goodness or badness of existing law and of each branch of government. And there is the argument that one or another disambiguation will have better or worse effects on people's dispositions to obey law.⁴¹ There are a lot of different effects to consider, and I think it evident that even if we all agreed on which effects were good and which were bad, it would be impossible to make the instrumental case that one or another way of understanding the relationship between law and morality will be the means to the best outcome, all things considered, in all circumstances.

It is, in any case, not plausible to think that desired ends will be the same in all circumstances. A critical attitude to the state seems obviously desirable in stable and relatively homogenous polities such as Britain, but in particular times and places, a quietist attitude to the state may be for the best. One option is to accept that the instrumental argument for the best concept of law is inevitably parochial. I have heard it suggested, for example, that justice was well served in the civil rights era in the United States by a quietist attitude to the (national) state. Should we wish that the accepted categorization mandated by "law" differs between, say, Canada and the United States, so that Canadian judges applying the *Charter* must always in part make law while American judges applying the Equal Protection Clause never do? Whatever may be the importance of either a quietist or a critical attitude in any given circumstance, this seems like a bad result (which of course would also never come about). But it gets worse: Perhaps quietism was for the best in the United States in the civil rights era. Probably it is not for the best in the new imperial era. It would be silly to think that practices of categorization should or could change that fast.

Suppose that the instrumental argument worked on its own terms: One or another explication of the concept of law would do best, all things considered, in promoting certain political ends in all circumstances. More fundamental problems remain. The concept of law is part of everyday life everywhere. The instrumental argument has no purpose if there is no serious prospect of convergence on the preferred usage. Where the motivation for an explication is that convergence on the new meaning will have good effects, it would be pointless to offer an explication outside a constrained and perhaps

⁴⁰ See *supra* note 23 and accompanying text.

⁴¹ See *supra* text accompanying note 37.

professionalized context of communication. Convergence on a new meaning for “egalitarian” is imaginable, since “egalitarian” (in contrast with “equality”) is not an important part of everyday discourse. It is largely a technical and theoretical term, and so we can imagine that the people who use it might be persuaded to accept a wider scope of application. The thought that the urging of theorists might change the usage of “law,” by contrast, seems absurd.

More important for the purposes of understanding philosophers’ interest in the concept of law, there would never be convergence even among theorists, since they will not all agree about the values on which any particular instrumental argument about the concept of law depends. It makes no difference that there may be a correct answer; being correct does not mean that others will agree with you. There is not agreement on all the values relevant to the scope of “egalitarian” either, but since the term is not an important part of actual political discussion, the stakes are low: Only language purists will care whether it becomes acceptable to refer to the priority view as a kind of egalitarianism.

Though the instrumental approach to the dispute over the concept of law is hopeless, both its initial appeal and its failure highlight the importance of the perceived political implications of different ways of drawing the boundary of law for any explanation of why this has seemed worth fighting over. Even those who insist that there is a correct rather than just a preferable way to draw the boundary between law and morality can agree that one reason this particular project of conceptual analysis is important is that its outcome may have politically significant consequences.⁴² The two pictures of law that lie behind positivism and nonpositivism are grounded in political attitudes.

But the clear political stakes tied up with the concept of law are not in themselves sufficient to explain legal philosophers’ fixation on the conceptual question. Different accounts of the concepts of liberty, democracy, justice, and the rule of law have political implications too. No one makes instrumental arguments for reformist explications of these concepts, presumably because it is so obvious that there would never be agreement about the ends that the reform should be directed at. And hardly anyone mounts arguments about how to get those concepts right. What most of us feel instead is the need to be on the lookout for ideological conceptual fudging and the importance of identifying cases where very different political commitments are

⁴² A good example of what I have in mind can be found in the first and penultimate paragraphs of RAZ, *Authority, Law, and Morality*, *supra* note 13, at 194, 221.

expressed in the same words. Though we all might wish for concepts of liberty and the rest that best suit our political commitments, most of us do not feel that searching for a method that might yield those results is a central part of political philosophy. Like the concept of law, the concepts of justice, liberty, democracy, and the rule of law are all part of everyday political life, and the political stakes of different usages are not lower for these than for the concept of law. Why then the continued quest for the truth about the concept of law in particular—a quest which persists no matter how hostile the philosophical environment to conceptual inquiries may be?

IV

Unlike the other politically important concepts I have mentioned, law is a central concept not only for evaluation of the state but also for the day-to-day operations of its main institutions and for people's understanding of their day-to-day interactions with it. For whatever else it does, the concept of law governs the categorization of rules and standards into those that are in force as obligations imposed by the state on its citizens and those that are not. This is the main reason why the concept of law has such everyday importance for all of us.

Dworkin is often criticized by his positivist opponents for running together the issue of the content of the concept of law with that of how we figure out what the law is in a particular place.⁴³ But he is right to do so because we cannot decide as a general matter how questions of legal validity should be answered in a particular legal system without first settling the conceptual question. Of course, as already noted, there is a good deal of common ground among the various possible senses of "law." Thus, for example, all parties will be able to agree about the legal validity of properly enacted speed limit rules. Disputes over the concept of law will not be relevant when we are faced with properly enacted legislation that is both obviously constitutionally innocent and susceptible to a plain reading. Nor will they generally affect our thinking about firmly entrenched private law precedent that takes the form of formally realizable rules. But once we get beyond these kinds of things, variations in commitment on the boundary between law and morality will lead to variations in judgments of legal validity. Suppose that the law declares that contracts entered into under duress are voidable, but there is no binding precedent that fits the facts of some case where duress is alleged, and there

⁴³ For example, Raz makes this criticism of Dworkin in Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT, *supra* note 22, at 1, 23–25.

is no established interpretive method (such as Cardozo's method of sociology⁴⁴) that enables us to settle the legal question without engaging in moral reflection about the best way to understand or improve the doctrine of duress. Under these conditions, a judge trying to decide whether the contract is enforceable against the party claiming duress will have to engage in moral reflection. Even if he concludes that the right way to make the decision is to appeal to community morality, or to a criterion of efficiency, or to toss a coin, he will need to engage in moral deliberation in order to reach that conclusion. Since finding an answer requires moral reflection, some will say that valid law does not settle the matter prior to the decision. But others will disagree. Though a judge making a decision need not take a stand on the conceptual question, anyone venturing an opinion on what the law was before the decision was made must do so.

As I have said, none of the different stances that philosophers have taken on whether there was prior law in a case like this is obviously mistaken at the conceptual level. Nonetheless, most of us are inclined to think that one of those stances must be right. Although it seems acceptable for concepts like liberty and democracy, it would strike most people as unsatisfactory to be told that there are simply different senses of "law" such that, for example, in one sense the contract was not ever legally enforceable while in another sense there was no answer to the question of whether it was enforceable until the judge made her decision. Most people are comfortable with the idea that some questions about what the law is have no answer; what seems unacceptable is that there may be no uniquely correct answer to the question of whether or not there is an answer to the question of what the law is.

We expect there to be an answer to questions of legal validity—a particular rule or standard is legally valid, or invalid, or it is unclear which. It is not an answer to be told: "It is in one sense valid, in another invalid, and in a third neither the one nor the other." The question of what, if anything, the law is on some matter in some jurisdiction matters to everybody living in that jurisdiction, and the idea that it all depends on which among various equally acceptable senses of "law" you prefer can seem almost repugnant, politically speaking. I venture that this is a large part of the reason why legal philosophers persist in trying to get the concept of law right.

⁴⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

V

To sum up for a moment, the concept of law is indeterminate, or partially ambiguous. We cannot live with the ambiguity, since we need to be able to make statements about the content of the law in force. So it appears that we need to disambiguate. But there are political stakes associated with each possible disambiguation, so we cannot just pick one at random. It matters to people which disambiguation we use. This explains the appeal of the instrumental argument as well as the persistence of the quixotic search for the correct ambiguity-free account of our concept of law.

A possible reaction at this point would be to reconsider our attachment to the concept of law. Perhaps once we see things straight, we will realize that we do not need it after all. More precisely, the suggestion would be that we need not make use of what Dworkin has recently called the "doctrinal" concept of law:⁴⁵ that concept which governs our thinking about legal validity or, as Lewis Kornhauser puts it, our thinking about the legal order as opposed to the legal regime.⁴⁶ My discussion so far has focused entirely on the doctrinal concept. Kornhauser discusses a different, social-scientific concept of law that is relevant to our thinking about the legal regime.⁴⁷ The social-scientific concept would categorize some governance structures as legal systems and others not.⁴⁸ Though there is not, in general usage, a determinate social-scientific concept of law, it is easy to imagine that an explicative definition of "legal system" might become accepted within a community of social scientists with shared aims.

This social-scientific concept would be largely irrelevant for participants in legal systems, however, and the question is whether that participation could go on without the doctrinal concept. Or rather, since there is no chance of the doctrinal concept actually falling into disuse, what we are really asking is whether it is playing any important role in legal practice and social life generally or whether it can be regarded as otiose—a wheel spinning on its own.

Within legal practice, judges and other legal officials need a theory of legal decisionmaking setting out what legal materials and

⁴⁵ DWORKIN, *JUSTICE IN ROBES*, *supra* note 14, at 2.

⁴⁶ Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 *CHI.-KENT L. REV.* 355, 375 (2004).

⁴⁷ This should not be taken to suggest that accounts of the doctrinal concept of law do or should ignore institutional factors. Thus, Raz holds that it is essential to the existence of law that there exist "law-applying" institutions, such as courts. RAZ, *supra* note 30, at 187–238; JOSEPH RAZ, *The Institutional Nature of Law, in THE AUTHORITY OF LAW* 103 (1979).

⁴⁸ Kornhauser, *supra* note 46, at 371–76.

other considerations it is appropriate to take into account and in what way. But such an account can be expressed without making use of the idea of the law in force prior to the decision. There is nothing novel here; anyone who holds that a conscientious legal decision may involve more than simply applying existing law already recognizes the need for such a theory.

Legal practice also requires a theory of legal counsel, of how lawyers should advise clients. This is where Holmes's "bad man" theory of law seems plausible: Lawyers should advise clients on the assumption that all they care about is how the legal system will affect their interests and so offer predictions about its likely impact on their lives.⁴⁹ Whether or not the "bad man" description is necessary, the idea that lawyers do and should advise clients based on predictions about what will happen, as opposed to considered judgments about the content of current law, is also hardly novel.

Finally, considering legal practice in the broadest political sense, we need a theory of what legal systems should strive for if they are to achieve the distinctive virtues legal governance can achieve—a political theory of the rule of law.⁵⁰ Construed broadly, this theory would encompass such questions as whether it is better in general to have a set of legal materials made up so far as possible of formally realizable rules.⁵¹

We can say and do a lot with these accounts of legal decision-making, legal counsel, and the rule of law. What we cannot do is discuss what the law now is. Any such question must be paraphrased into a question about what a legal official ought to decide or what the state is likely to do to people or should do to them. So one consequence of an eliminativist attitude to the doctrinal concept is that there can be no meaningful discussion of the legal domain where there are neither law-applying nor law-enforcing institutions. This would pose problems for the discussion of international law where law-

⁴⁹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

⁵⁰ In Dworkin's terms, we might here employ the "aspirational" concept of law, DWORKIN, *JUSTICE IN ROBES*, *supra* note 14, at 5; in Kornhauser's terms, we are thinking of "law" as a term of commendation, Kornhauser, *supra* note 46, at 376.

⁵¹ This is one of the issues that "normative positivists" are most centrally concerned with. See generally TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* (1996); TOM D. CAMPBELL, *PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS AND DEMOCRACY* (2004); Tom D. Campbell, *Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law,'* 30 AUSTRALIAN J. LEGAL PHIL. 20 (2005) [hereinafter Campbell, *Prescriptive Conceptualism*]; Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT, *supra* note 22, at 411. Methodologically, Campbell embraces the instrumentalist approach: We should stipulate the concept of law that, among other good effects, fits best with the model of law as a set of formally realizable rules. Campbell, *Prescriptive Conceptualism*, *supra*, at 27.

applying institutions of compulsory universal jurisdiction are in short supply: A debate between positivists and nonpositivists would have to be understood as really a debate about some combination of what national legal officials should do, what is likely to happen, and perhaps the moral obligations of states.

But we need not pursue any further the prospects for more or less clever rephrasings of familiar discourse about law. Even if coherent paraphrases were available for every familiar kind of claim about the law, it would be implausible to think that nothing important had been lost in translation. It is not, in other words, plausible to think that all talk about the law that is in force is idle.

Law professors, at least in the United States, seem surprisingly comfortable with the idea that there is no such thing as "the law," that there are rather just legal materials and good and bad legal decisions. Perhaps this is an effect of legal realism, but it is more fundamentally an effect, I think, of teaching American appellate decisions. Comparatively speaking, American legal sources on their own provide strikingly little determinate guidance. Of particular importance is the lack of convergence on legal standards of interpretation and *stare decisis* in the horizontal dimension. My anecdotal sense is that law professors in other countries, even other common law countries, are far less inclined toward the kind of knowing skepticism about "the law" that is prevalent in American law schools.

Even in the United States, however, the eliminativist option is surely not agreeable to judges and other officials. It seems that almost all judges believe that their duty is to figure out what the law is and apply it. Though not all judges believe that this exhausts their responsibility (Cardozo, for example, did not⁵²), most believe that this is their first obligation. They could, instead, follow a theory of adjudication that did not address the issue of where the law ends and other considerations begin, but we can guess that this way of conceiving of what they are doing would strike most as both artificial and wrong.

One reason for this, perhaps, is that any theory of adjudication is going to be controversial. In the absence of convergence within this particular branch of political theory, judges can insist that nonetheless they are all constrained by the law. In light of the lack of convergence on an account of the law, and given that it is inevitable that judges must sometimes appeal to considerations of political morality in order to reach a decision, this claim of course rings somewhat hollow. But not entirely so. To suggest that judges abandon entirely the idea of being constrained by the law and instead only follow the theory of

⁵² CARDOZO, *supra* note 44, *passim*.

legal decisionmaking they judge best is to suggest a radical reworking of the understanding of the role of legal officials—the understanding both of the officials themselves and of the rest of us.

As I have already suggested, it is, in the end, the understanding of the rest of us that most fully undermines the eliminativist option. Though we ordinary citizens could negotiate our relationship with the state reasonably effectively if we only asked ourselves what the state is likely to do—and while that may be the main question people who seek the advice of lawyers want answered—it is nonetheless the case that many of us are in the habit of acting on beliefs about what the law is. For some, this might be because they are concerned about not violating what they believe is a (*prima facie*) moral duty to obey the law. For others, it is just part of their self-understanding of how they relate to their state and, through it, to others. Many people who are skeptical or have no view about a moral obligation to obey the law nevertheless “accept” the law in Hart’s sense: For some reason or other, they treat valid law as giving them reasons for action.⁵³ It is hard to take seriously the idea that we should just stop thinking and deliberating in this way. For the criminal law, in particular, it is ridiculous to propose that, properly understood, there are no crimes, just good or bad decisions in criminal cases and better or worse predictions about our interactions with the criminal justice system.

But could not acceptance of the law by citizens be understood instead in terms of a theory of good legal decisionmaking? Is anything lost if we say that what people really treat as reason-giving are good legal decisions—what those with authority ought to decide? What is lost is a distinction between what the law is and what a legal official ought to do that is entirely familiar to all of us and compatible with every contending account of the concept of law. For the positivist, of course, it is important to be able to say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or strike down the relevant legislation. But even for Dworkin, whose theory of law implies that if a judge ought to overrule a precedent then that precedent was already not a valid source of law (but rather a “mistake”), there is an important distinction between how a judge ought to reason when she ought to give force to the law and how she ought to reason in those circumstances that justify not giving force to the law—a kind of justified official disobedience.⁵⁴ To suggest that we can get along just fine with a

⁵³ HART, *supra* note 17, at 203.

⁵⁴ See the discussion of the distinction between the grounds and the force of law in DWORKIN, *LAW’S EMPIRE*, *supra* note 14, at 108–13.

moral theory for legal decisionmakers in their official capacity—that we lose nothing by not being able to discuss as a distinct question what they ought to do insofar as they are applying law—is again to suggest an implausibly radical view about how far our ordinary discourse is based on confusion and mistake.

CONCLUSION

So I conclude with a problem. We cannot give up on the idea that some statements about what the law is make sense and can be true, but the ambiguity of the doctrinal concept of law makes it hard to see how this is possible.⁵⁵

The reason why, fifty years after the Hart-Fuller debate, most positivists and nonpositivists seem no closer to agreeing even about the ground rules of their debate is that they are searching for something that does not exist: a true account of an unambiguous concept of law that we all share. It is a great virtue of Hart's essay—which remains, I think, the most rewarding single work in defense of positivism—that it does not attempt to declare that positivism is correct. Rather, he skillfully, and with a clear and compelling ethical vision, attempts to persuade us that it would be better to see law the positivist way. Much of Fuller's article can be read in the same way, as an equally elegant and compelling case for seeing law another way. Probably the main reason why both articles are such pleasures to read is that the ethical and political stakes of the debate over the concept of law are so much to the fore. The problem is that, while these instrumental arguments do a lot to explain why philosophers have tended to be so invested in either positivism or nonpositivism, they have no chance of changing our social world such that either view can be said to be true.

⁵⁵ I believe that there may be a solution to this problem. We may say that true statements about the content of law are possible where a particular proposition about law could be true for all plausible disambiguations of the concept of law. But I cannot pursue that possibility here.