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## LEGAL OBLIGATION & ITS LIMITS

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**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 or the judge's believing it to be law is neither necessary nor even sufficient for a judge 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.

### I. 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

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whether the positivist or anti-positivist is right. It is platitudinous that judges have at least a professional duty (a duty deriving from what the law requires of 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.<sup>1</sup> 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.<sup>2</sup> 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 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 or rules they believe to be law in individual cases rings of heresy.<sup>3</sup> Nevertheless, it is true that judges have such authority precisely in the sort of cases where competing philo-

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<sup>1</sup> 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.

<sup>2</sup> 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, 630–32. It is easy to multiply examples of this common sentiment. See discussion in Section IV. 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.

<sup>3</sup> 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, 847–48. 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.

sophical 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.<sup>4</sup> 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 judicial obligation can and should be developed independently of the precise boundaries of legality.<sup>5</sup>

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.<sup>6</sup> My argument generalizes to these other disputes: their resolution does not bear on how a judge legally ought to rule.<sup>7</sup> I explore the generalized version of the argument in other work. The present focus is on showing that the debate between positivists and anti-positivists, on its own terms, entails the untethering of judicial duty from legality.<sup>8</sup>

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<sup>4</sup> The argument relies on what should be uncontroversial assumptions about the nature of distinctively legal obligation. See discussion in fn. 60. Roughly, if an agent, A, is legally obliged to perform action-type  $\phi$  in circumstance C, then (at the very least) there is a rule with the property of being law that obliges A to  $\phi$  in C.

<sup>5</sup> 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).

<sup>6</sup> Compare S Scalia, 'Originalism: The Lesser Evil' (1989) 57 Cinn. L. Rev. 849, with J Balkin, *Living Originalism* (HUP 2011) ch1.

<sup>7</sup> The range of cases to which my argument applies include cases where reasonable judges can disagree about the content of the law and the disagreement is evidentially intractable: its resolution turns on complex empirical and moral facts. There are good debates to be had about what judges should do in such cases. But these are not debates about what the law is. See discussion in Sections IV and V.

<sup>8</sup> 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), 180–84. A further reason is that the central claims of the paper can be motivated using positivistic as well as anti-positivistic theories of law. I am confident that the results can be derived on any plausible general theory of law. But since I do not provide the fully generalized version of the argument here, those who reject both positivism and anti-positivism can take the conclusions of this paper in conditional form.

In Section II, 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 III, 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 highly 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. 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 application conditions for semi-technical concepts.

In Section IV, 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 judicial oaths and constitutional rules. The rule’s moral inferiority follows from the evaluative irrelevance of a rule’s legality when its legality, though genuine, is reasonably uncertain. I conclude that judges can and should decide hard cases based entirely on features of rules other than their legality. The conclusion is a thoroughly practical one with ramifications for the actual practice of judging. It entails, for example, that judges can, consistent with their professional duties, ignore rules they *believe* to be law in hard cases, even if their beliefs turn out to be correct.

In Section V, 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 VI, 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.<sup>9</sup>

## II. REASONABLE & PERSISTENT DISAGREEMENT ABOUT 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.”<sup>10</sup> Just as we judge certain rules to be those of etiquette or morality, we classify some as “legal rules” or “rules of law.”<sup>11</sup> 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.<sup>12</sup> To possess the 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.<sup>13</sup> We exhibit this ability in our dispositions to attribute legality to rules.

<sup>9</sup> R Dworkin, ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057. Dworkin uses ‘hard case’ to refer specifically to difficult 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 given the evidence.

<sup>10</sup> 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.

<sup>11</sup> We can construe rules as functions mapping circumstances to outcomes or actions. See also discussion in fn. 60.

<sup>12</sup> 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, *Psychosemantics: The Problem of Meaning in the Philosophy of Mind* (MIT Press 1987); C Peacocke, *A Study of Concepts* (MIT Press 1992).

<sup>13</sup> Writing ‘<P>’ for the ‘concept expressed by ‘P’.

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.<sup>14</sup> It may turn out that 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.<sup>15</sup> One response to this type of worry emphasizes that persons 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).<sup>16</sup> 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 a 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. 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.

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> On conceptual analysis in ethics, see F Jackson, *From Metaphysics to Ethics* (Oxford University Press 2012).

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.<sup>17</sup> 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.<sup>18</sup> H.L.A Hart famously proposed an alternative and significantly more complex characterization of the social property essential to law.<sup>19</sup> 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.<sup>20</sup>

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 properties,

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<sup>17</sup> 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.

<sup>18</sup> J Austin, *The Province of Jurisprudence Determined* (first pub. 1832, Cambridge University Press 1995).

<sup>19</sup> 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.

<sup>20</sup> 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.

they also have some *moral* or broadly *normative* features. Ronald Dworkin's brand of anti-positivism is perhaps most well-known.<sup>21</sup> 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.<sup>22</sup> Social interpretation for purposes of applying the concept consists partly of 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.<sup>23</sup> 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.<sup>24</sup>

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").<sup>25</sup> 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.<sup>26</sup> The central question for these theorists is whether a rule's social

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<sup>21</sup> 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.

<sup>22</sup> '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.

<sup>23</sup> One way to make sense 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.

<sup>24</sup> M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1118.

<sup>25</sup> There are skeptics about rules, functions, and other abstract objects, but their skepticism is not particular to the legal domain. This paper assumes, quite harmlessly, that there such abstract entities.

<sup>26</sup> 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 alone or its social and moral properties together explain *why* it instantiates the legal property.<sup>27</sup> The benefits of this alternative construal are somewhat obscure and one reason to favor the conceptual framing is that it is broadly consistent with how legal philosophers have construed their own project.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

<sup>27</sup> Rosen (n26) 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.’ I have no objection to this construal so long as properties are abundant, with a corresponding property for every well-functioning predicate.

<sup>28</sup> See *supra* (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 VI.

<sup>29</sup> Although the argument can be reformulated in terms of the property-based view, there are several reasons for preferring the conceptual framing. For one, it would be a mistake to think that the property of *being law* has a robust nature like the property of *being scarlet* or *being H2O*. 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.’ There is some sense to be made of legal property talk on an abundant conception of properties, where all it takes for there to be a property is for there to be, corresponding to that property, a well-functioning predicate in a language.

<sup>30</sup> 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 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.

<sup>31</sup> 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.

### III. COMPETING THEORIES OF THE CONCEPT DIVERGE EXTENSIONALLY IN HARD CASES

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.<sup>32</sup>

There are several reasons for this theoretical convergence. To begin with, the social properties that interest positivists tend to be morally significant due in part to their social character. 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.<sup>33</sup> 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 (though 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.<sup>34</sup>

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.

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<sup>32</sup> See Greenberg (n17) 162–63 describing paradigmatic examples of law as common ground between the positivist and anti-positivist.

<sup>33</sup> 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.

<sup>34</sup> See discussion in Shapiro (n10) 181–86.

The highly retributive criminal laws of the United States are markedly unjust.<sup>35</sup> Yet the injustice inherent in a rule that prescribes life-imprisonment based on a third criminal conviction regardless of its gravity did not prevent it from being one of the state laws of the United States.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> 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

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<sup>35</sup> 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).

<sup>36</sup> Cal. Penal Code § 667 (West 1994).

<sup>37</sup> See discussion in R Alexy, ‘Legal Certainty and Correctness’ (2015) 28 *Ratio Juris*. 441, 444–45: ‘not every injustice, but to be sure extreme injustice is not law’; and more generally in G. Radbruch, ‘Vorsculc der Rechtsphilosophie’ in A Kaufman (ed), *G. Gesamtausgabe* (C.F. Muller, 1990) 154.

<sup>38</sup> 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.

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.<sup>39</sup> 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 morally well-functioning, it is far from obvious that moral conditions are not built into our legal concept.<sup>40</sup>

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.'<sup>41</sup>

Even if one accepts one of these views as correct, one should still take the class of cases where the theories diverge to be hard cases. In other words, one should think that neither the positivist nor the anti-positivist line on morally inadequate rules is obviously correct (and, accordingly, that neither positivism nor anti-positivism is obviously correct).<sup>42</sup> 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 re-

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<sup>39</sup> Additional arguments favoring anti-positivism are discussed in Section VI. 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. It comes apart wildly from the *juridical* concept of law. 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.

<sup>40</sup> 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.

<sup>41</sup> Murphy (n8) 7.

<sup>42</sup> 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.

veal 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.<sup>43</sup> But, more plausibly, persistent disagreement about the concept may be explained *not* by its indeterminacy but by the non-obviousness of facts that govern its application in hard cases.<sup>44</sup> 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 vagueness.<sup>45</sup> 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.<sup>46</sup> The application conditions of <bald>, for example, are highly sensitive to the overall pattern in the dispositions

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<sup>43</sup> The concept <law>, the pessimists suppose, is simply indeterminate when it comes to the sort of cases philosophers argue over. Leiter (n8). 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 application, see HLA Hart, 'Definition and Theory in Jurisprudence' in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 21.

<sup>44</sup> 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, 486–87. But see T Kelly, 'Peer Disagreement and Higher Order Evidence' in R Feldman and T Warfield (eds), *Disagreement* (Oxford University Press 2010), 111–174.

<sup>45</sup> T Williamson, *Vagueness* (Routledge 1994).

<sup>46</sup> *Ibid.*, 231–37.

of speakers to classify persons using “bald” across a range of cases. Whatever one thinks of Williamson’s proposal generally, it is very tempting to think in the case of a semi-technical concept like <law>, one that has been self-consciously understood by judges and other experts as applying determinately in hard cases, 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 situations – that is, given perfect information about the non-legal features of rules.<sup>47</sup> If the concept is sensitive in this way to the judgment of competent speakers across many different cases, and it certainly seems to have been understood by legal experts in this way, 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.<sup>48</sup> 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 as to which concept is expressed by legal predicates.<sup>49</sup>

While the above arguments needn’t be decisive, especially given that the second turns on a view of conceptual determination one might reject, they provide reasonable grounds for taking cases where

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<sup>47</sup> 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, 181–86.

<sup>48</sup> 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 involve 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.

<sup>49</sup> 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 (n45) 230–34.

positivism and anti-positivism come apart to be hard cases.<sup>50</sup> Notably, this is a charitable 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 any one of a range of plausible theories of the precise boundaries of legality.<sup>51</sup> 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.

#### IV. JUDGES HAVE LEGAL & MORAL PERMISSION TO 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

<sup>50</sup> Of course, hard cases of law arise not just due to it 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 V and VI.

<sup>51</sup> B van Fraassen, *The Scientific Image* (Oxford University Press 1980).

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.<sup>52</sup> Hart himself was explicit in his hopes that a clearer understanding of the legal concept might inform judicial practice.<sup>53</sup> Meanwhile, Dworkin defended various controversial developments in American constitutional law by appeal to his anti-positivism.<sup>54</sup>

The suggestion that the philosophical enterprise might be relevant to judges is at least *prima facie* plausible, but it has seen opposition.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> As

<sup>52</sup> Shapiro suggests that 'many of the most pressing practical matters that concern lawyers' turn on the philosophical dispute. Shapiro (n10) 25–29. 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, 221–23. Both sides presuppose law's basic normative significance for judges.

<sup>53</sup> Hart, 'Definition and Theory' (n43) 21–22; Hart, 'Essays on Bentham' (n1) 158–59; 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.

<sup>54</sup> 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.'

<sup>55</sup> Farrell (n52) 221–23; R Posner, *Law and Legal Theory in England and America* (Clarendon Law Lectures 1996) ch1.

<sup>56</sup> Posner (n55) 2–5; Murphy (n8) 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.

<sup>57</sup> Posner (n55) 2–5.



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, 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.”<sup>58</sup>

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.<sup>59</sup> In the light of hard cases, one can show that LEGALITY

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<sup>58</sup> There is an epistemic version of the principle which the discussion also shows to be false.

LEGALITY<sub>EPISTEMIC</sub>: If a judge *believes* that 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.”

I have left open whether the nature of the obligation referred to in LEGALITY and LEGALITY<sub>EPISTEMIC</sub> is distinctively *legal* or *moral*. The conclusion I argue for is that LEGALITY is false on either reading of the deontic modal.

<sup>59</sup> Another way to put it is that LEGALITY is neither a legal nor a moral rule. There is no legal obligation to follow legal rules in every case and there is no moral obligation either.

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.<sup>60</sup>

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 general 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.<sup>61</sup> 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 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,

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<sup>60</sup> I have assumed that for there to be a distinctively *legal* obligation to perform some action (say, e.g., follow the law in every case), there must be a rule *with the property of being law* that prescribes that action as obligatory. In other words, to be a legal obligation is in part to be an action deemed obligatory by a legal rule. This view leaves open whether legal obligations are robustly normative like moral obligations, a species of moral obligation, or purely ‘formal’ like the rules of chess. It may be that what it is to be a legal obligation *just is* to be an action deemed obligatory by a legal rule, and what it is to be a legal rule *just is* to be a rule conventionally followed. The nature of legal obligation is a topic of considerable controversy, but the argument of this paper is intended to be ecumenical. The argument is compatible with an even stronger requirement on legal obligation, where in order for agent A to be legally obliged to  $\phi$  in C, there needs to be a first-order legal rule,  $R_1$ , obliging A to  $\phi$  in C *and* second-order ‘backing’ rules ( $R_2, R_3, \dots$ ) with the property of being law obliging A to follow the lower order rule ( $R_2$ , e.g., obliges the judge to follow  $R_1, \dots$ ). In other words, in order for a first-order legal rule to create a robust and distinctively legal obligation, it may need appropriate ‘backing’ from higher-order legal rules that oblige the relevant actor to follow the first-order rule precisely on account of its legality.

I have suggested that rules be construed as functions from circumstances to actions, and one might worry about how to make sense of a rule that invokes a normative notion like requirement or obligation. We can conceive of rules specifying obligations as function mapping circumstances to action-types that are *ruled out*, which is just to say that in following such rules, we never perform the relevant type of action in the appropriate circumstance. An agent following such a prescriptive rule makes sure that she only performs an action in the relevant circumstance that isn’t of the forbidden type. In other words, obligatoriness can be cashed out in terms of the nature of the function or its role in our practical deliberation and action.

<sup>61</sup> 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.’

canons of statutory interpretation, prior judicial pronouncements, and so on.<sup>62</sup> She might use the concept <law> to pick out 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 concepts. It is simply not clear, even to those who have considered the issue carefully, what is entailed by the *de dicto* claim that

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<sup>62</sup> U.S. Const. am. 5.

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.<sup>63</sup>

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 ever addressed the issue. The *de re* interpretation (along with several others)<sup>64</sup> of the platitude that judges should follow the law strongly undercut support for LEGALITY as a conventionally embraced and supported rule.

My 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.<sup>65</sup> 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.

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<sup>63</sup> The argument for why persons would be hard to rationalize if they had such desires comes later. 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.

<sup>64</sup> Even if the *de dicto* interpretation were correct, this wouldn’t necessarily support LEGALITY. It might be that what individuals have in mind when they assert ‘judges should follow the law’ is something like a *prima facie* or *pro tanto* obligation to follow the law *de dicto* as opposed to a decisive obligation. There are other readings of the platitude that similarly undercut support for LEGALITY. It isn’t clear whether the assertion ‘judges should follow the law’ is a *generic* claim (like ‘Mosquitoes carry the West Nile virus’) as opposed to a universal generalization. A claim that the generic judge or judges generally should follow the law *de dicto* would not imply that all judges *in every case* have an obligation to follow law *de dicto*.

<sup>65</sup> For example: well-established constitutional rules, detailed and clearly stated statutory requirements, and so on.

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 oath speaks of duties incumbent under the constitutions and the laws, but leaves the specific content and character of these duties unspecified. 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.<sup>66</sup> The American oath of office and legal background are not at all unusual in this respect compared to the laws of other jurisdictions.<sup>67</sup>

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

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<sup>66</sup> 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 own 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.

<sup>67</sup> 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.

legal concept in all cases. This relates to the question: could LEGALITY be an M-rule? For even if 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 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.<sup>68</sup> 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 – or higher-order rule for deciding cases where first-order legal rules are hard to figure out – 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

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<sup>68</sup> The perspective of the institutional designer is intended merely as a heuristic: a means of identifying a moral ideal for the design of a judicial system.

judges would make things go morally best, all things considered.<sup>69</sup> 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 note 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 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.<sup>70</sup>

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,

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<sup>69</sup> 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.

<sup>70</sup> We shall return to this point in Section V when addressing objections to the view—in particular, the objection that the legal concept might already be optimally tailored to our ends.

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,<sup>71</sup> 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 have we been sensitive to in classifying certain ones as “marriage.”<sup>72</sup> 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*

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<sup>71</sup> 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.

<sup>72</sup> 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.



moral significance, being a function of our entirely contingent sensitivity to certain non-legal features of rules over others.<sup>73</sup>

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.

To sum up, the conception of the judge's role I have defended invokes, first and foremost, a negative thesis: the *legal* 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 just because they are law. This negative thesis is compatible with the view that judges should resist the temptation to treat rules as law based on whether doing so would maximize morally good outcomes. In other words, the view is in principle consistent with a traditionally conservative take on how judges should ultimately decide hard cases.

Can we say, more positively, what a judge's professional duties are when it comes to deciding hard cases, if the duty isn't simply to follow the law as such, or, for that matter, to follow rules the judge believes to be law?<sup>74</sup> One might worry that my argument generalizes and undermines any distinctively *legal* theory of judicial professional responsibility for hard cases, and not just one according to which the principle of LEGALITY best characterizes the judge's legal obligations. Consider the second-order question: what legal rule governs judicial decision-making when a judge confronts a hard first-order question of law? As a reminder, the judge confronts a hard first-order question

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<sup>73</sup> 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 V.

<sup>74</sup> Thanks to Joseph Raz and an anonymous referee for *Law & Philosophy* for discussion on this issue. I have benefited greatly from their objections and comments.

of law when there are two or more incompatible first-order rules – say, an M-rule and an S-rule – that would decide the question, but it isn't perspicuous which has the property of being law. First-order legal rules are rules prescribing actions or outcomes in circumstances characterized in non-legal terms (in terms that do not involve reference to other legal rules): e.g. *if a defendant is convicted of murder, he shall be imprisoned for life*. Second-order legal rules make essential reference to legality, either by referring to other legal rules or some legal status: e.g. *when confronted with an illegal statute, the judge is obliged to strike it down*. Suppose that the second-order question – how, from the law's point of view, should the judge decide a hard case? – is itself hard: as between various second-order decision rules the judge might follow (LEGALITY; a principle that prescribes following the M-rule in hard cases quite apart from the M-rule's legality; one that recommends following the S-rule in hard cases; and so on), the legality of any particular decision rule will be subject to reasonable disagreement.<sup>75</sup> By my own lights, the *legality* of a rule is not sufficient to generate a legal obligation to follow it. When a candidate rule's legality is not perspicuous and subject to reasonable disagreement, judges are not obliged to follow the rule even if they correctly believe it to be legal. A rule's being legal but not perspicuously so undermines its normative significance *qua* law, because there is no general rule with the property of being law that directs judges to always follow the law when the law is not perspicuous. So, even if there is some higher-order decision rule other than the principle of LEGALITY with the property of being law, this will not entail that judges have a *legal* obligation to follow it, given that its legality will be at best non-perspicuous.<sup>76</sup>

There are several things to say about this line of reasoning. First, suppose it is true that there are no second-order legal rules for deciding hard cases that judges are obliged to follow simply on

<sup>75</sup> Thanks to an anonymous referee for raising this worry.

<sup>76</sup> There is a general view of distinctively *legal* obligation at work throughout this paper. Legal obligations arise when a rule specifying a type of action as obligatory has the property of being law. And there can be higher-order legal rules that oblige actors to follow the law in various contexts. E.g. the principle of LEGALITY, if it were conventionally embraced, might be such an obligation-generating rule. For our purposes, there is no need to settle the hard question of whether legal obligations are *genuine* (in the sense of having the same kind of normative force as moral obligations) or purely 'formal,' like the rules of chess. On formal vs. robust normativity, see e.g. Stephen Finlay, "Defining Normativity," in (D. Plunkett, S. Shapiro, K. Toh, *Dimensions of Normativity: New Essays in Metaethics and Jurisprudence*, OUP, 2018. See also discussion in fn. 60.

account of their legality because their legality is non-perspicuous. It remains an open question whether judges might be *morally* obliged to decide hard cases in some particular way. The moral question would be a natural one to ask if the legality of decision rules is irrelevant from the point of view of a judge deciding a hard case. We shall consider an answer to this moral question in a moment. But quite apart from how that question is settled, it would be an important result in its own right that there are no distinctively legal obligations – that is, no rules with the property of being law that the judge is legally obliged to follow on account of their legality – in hard cases. This result would turn on (a) the absence of a general legal rule that directs judges to always follow the law, even when the law is not perspicuous; and (b) the legality of all second-order rules for deciding hard-cases being non-perspicuous. If (a) and (b) hold, it would be pointless for a theory of judging to be concerned with *what the law is* in hard cases, either at the first-order or second-order level, at least if the theory aims to be practical and action-guiding.

But I doubt that the general application of my argument to the legality of second-order decision rules is sound. The claim was never that mere disagreement about the legality of rules results in a hard case in the relevant sense. The argument that cases where S-rules and M-rules come apart are hard appealed not just to reasonable disagreement about whether S-rules or M-rule are law, but on the nature of the evidence that would settle the issue: the complex and hard-to-access facts that determine the application conditions of the juridical concept of law.<sup>77</sup> Given the difficulty in discerning precise conceptual application conditions, reasonable disagreement on whether M-rules or S-rules are law is likely to persist. The argument against LEGALITY focused on such extreme cases of legal ‘anti-luminosity.’ There is no general rule that is conventionally embraced or one that is morally compelling that obliges judges to follow the law *as such* even in such extreme cases. That is, there are no clear conventions of law-following in such cases, and neither is there moral reason to fetishize law in such cases. So, it does not follow from the argument developed here that mere disagreement about which higher-order decision-rules are *legal* rules is sufficient to undermine

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<sup>77</sup> See discussion in Section III.

the possibility of such rules obliging judges simply on the account of their legality.

Secondly, it is not at all obvious that there is or can be reasonable disagreement concerning the legality of *all* second-order decision-rules for hard cases. So long as there are reasonably clear conventions in a jurisdiction for how to decide hard cases that also happen to involve decision-rules that are morally quite defensible, then lack of clarity concerning the precise contours of the legal concept certainly won't render a candidate decision-rule's legality non-perspicuous. The argument of this paper shows only that the legality of rules is subject to reasonable disagreement (and juridically insignificant) when the rules conventionally followed come apart in dramatic ways from the rules morally favored. But that is consistent with there being morally good and conventionally embraced rules within our legal system for deciding hard cases.

Indeed, there are plenty of examples of morally good conventionally embraced decision-rules for hard cases that seem to be perspicuously law. It is fairly uncontroversial that judges cannot decide what to do in hard cases on the basis of mere whim or in deliberately immoral ways. In other words, it seems a plausible *legal* rule governing hard cases – one conventionally embraced within developed jurisdictions and morally sound – that judges must be *principled* and not have as one of their ultimate (or 'final') reasons for favoring a particular decision-criterion that it results in immoral outcomes (which is, of course, consistent with following a rule because one deems it immoral but not ultimately for the sake of its immorality). These legal constraints on judging in hard cases leave a lot underdetermined regarding the precise outcome that the judge is (legally) obliged to pursue. But the main point is just that the argument of this paper is compatible with there being *some* legal rules that *do* bind judges in hard cases simply on account of their legality, such that failing to follow such rules amounts to a failure of professional duty. American judges, for example, consent in their professional undertaking to abide by rules of principled decision-making even in hard cases.

So, it is a positive result of our discussion that although the principle of LEGALITY is not itself a legal rule constraining judges, there plausibly are distinctively legal norms governing juridical decision-

making in hard cases. The edge of legality is not a legal free-for-all. Even if the legality of first-order rules does not matter in such contexts on account of first-order uncertainty, uncertainty at the first-order level does not translate into sweeping higher-order legal uncertainty. There are higher-order rules that oblige judges and are perspicuously legal:

PRINCIPLE PRINCIPLE: In hard cases, judges must declare rules as “law” in a principled way

PRINCIPLE PRINCIPLE is quite plausibly *the law* and perspicuously so.<sup>78</sup> A careful study of the conventions within jurisdictions and reflection on morally ideal institutional design might result in the discovery of even more fine-grained distinctively legal norms governing hard cases. But that study is a project for a different paper.

Does the positive claim, that judges must follow some legal rules simply on account of their legality even in hard cases, vindicate LEGALITY? The view imputes to legal systems a higher-order rule that permits judges to ignore the legality of first-order rules in hard cases and requires only that judges decide cases in a principled way. For example, when a judge decides whether to declare a morally abhorrent but conventionally embraced rule as the law, she can ignore whether the rule is *in fact* law in deciding what to do. Instead of the rule’s legality, her decision might be guided by the principle of doing what is morally best out of a sense that the law requires her to make *some* principled decision. So, it seems, contrary to the paper’s negative claim, judges *do* end up following the law as such in hard cases and indirectly comply with LEGALITY by complying with the PRINCIPLE PRINCIPLE as a legal rule.

The fact that PRINCIPLE PRINCIPLE is a higher-order rule that judges are legally obliged to follow on account of its legality does not entail that judges must follow the law as such in hard cases. At best, judges should follow a higher-order legal rule – one that leaves the precise outcome to pursue in a hard case open – while ignoring the legality of first-order rules. There is simply no obligation to follow the law *tout court* in hard cases.

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<sup>78</sup> I have taken for granted that judges are legally obliged to remain faithful to well-recognized and paradigmatic laws (in the *de re* sense)—that is, there is a legal rule requiring judges to follow clear cases of law. That seems to be a truism, and the only plausible reading of the platitude that judges should follow the law. So, there is a distinctively legal obligation to follow PRINCIPLE PRINCIPLE just because it is the law.

As mentioned earlier, even if it turns out that *legality* is simply not what matters at any stage of juridical deliberation about what to do in hard cases (because even a rule like the PRINCIPLE PRINCIPLE is at best only non-perspicuously legal), a theory of judging can fruitfully engage with the question *what are judges morally obliged to do quite apart from the law?* Again, answering this question is not the point of this paper. But if the correct moral theory turns out to be some form of rule-consequentialism, the answer to the moral question will have the following form:

RULE-CONSEQUENTIALIST JUDGING: In hard cases, judges (morally) must declare rules as “law” based on principles and decision criteria that if widely followed by judges would make things go morally best, all things considered

RULE-CONSEQUENTIALIST JUDGING is consistent with the claim that judges should, both legally and morally, 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 have a moral obligation (and legal permission, so long as the argument of this paper is sound) to follow whichever principle for law-declaration would be morally best from the general institutional point of view.<sup>79</sup>

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<sup>79</sup> It is important to see why this view does not amount to a form of anti-positivism. Even the positivist can agree that a judge may be under a *moral* obligation to decide hard cases on the basis of moral principles. But this does not entail that there is a *legal* obligation to decide cases on the basis of such principles. It would entail it if one were to assume the truth of anti-positivism.

The distinction between my view and the anti-positivist’s concerning what is legally required in a hard case is practically quite significant. Here’s an illustration of why it matters. Many judges are (rightly) concerned with their distinctively legal obligations – they refuse to act contrary to them. Suppose such a conscientious judge is a positivist. She will only rely on moral considerations, if at all, when she thinks the positive law runs out. Suppose such a judge confronts a case where she thinks there is positive law (it hasn’t run out) but realizes that her judgment about there being positive law is debatable – the positive law isn’t perspicuous (it’s a hard case). If I’m right, I’ve given her reasons to rule on the basis of moral considerations (ignoring her own beliefs about what the law is) consistent with her positivism and her conscientious commitment to following her legal obligations. She isn’t doing anything legally wrong. By contrast, an anti-positivist cannot convince her to ignore what she believes to be law without begging the question against her positivism and her commitment to the principle of legality. Thanks to Kevin Clermont for encouraging me to make this explicit.

## V. OBJECTIONS AND REPLIES

Some might consider it a *reductio* of my 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 is legally permitted (and maybe morally obliged) to ignore what the law is and declare the M-rule “law.” Is this not tantamount to a fraud on the public? Relatedly, one might think that by declaring rules to be law while believing them not to be law, the judge is morally blameworthy for being deceptive.<sup>80</sup>

As I have argued, cases where ignoring preexisting law is legally and morally appropriate are ones where it is not obvious what the law is. A 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 M-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 morally best decision-criterion 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 *legal* duties despite ignoring the law in hard cases. Even if she is morally blameworthy for calling a rule law while not believing it to be law (though it should be noted that it is highly controversial whether moral blame attaches to all instances of deceptive conduct or pretense),<sup>81</sup> I have primarily been interested in the question whether the judge is criticizable from *the law’s point of view*. She would be legally criticizable if she were violating an explicit or implicit legal rule that governs her conduct. But, as argued, no legal rule requires her to conform her law-declaration to her beliefs about

<sup>80</sup> Thanks to an anonymous referee for raising this worry.

<sup>81</sup> On the question of whether moral blame attaches, the juridical context might be one where pretense is morally appropriate, because the practice or conventions within the legal system authorize it. I have argued elsewhere that our practices can change our default moral obligations. “Legal vs. Factual Normative Questions,” *Notre Dame Journal of Law, Ethics, & Public Policy* (forthcoming). .

the law in hard cases, because there is no legal rule that obliges the judge to follow the law *as such* and in every case.

There is a different objection to the overall view that appeals to the interests of those held accountable under legal rules, one that might seem especially compelling when illustrated using the example of criminal law (and its *nullum crimen sine lege, nulla poena sine lege* principle).<sup>82</sup> 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.<sup>83</sup> 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 permits 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 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.<sup>84</sup> 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

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<sup>82</sup> ‘No crime without law, no punishment without law.’.

<sup>83</sup> See, e.g., L Fuller, *The Morality of Law* (Yale University Press. 1964).

<sup>84</sup> Dworkin (n9). My argument applies to such cases as well, so long as reasonable judges can disagree about the content of the law and the disagreement is evidentially intractable: it turns on hard to access empirical and moral facts.



as much as could conceivably be permitted by law (Holmesian “bad men,” in other words)?<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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 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.

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<sup>85</sup> 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.’

<sup>86</sup> 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. .

<sup>87</sup> D Luban, ‘The Legacies of Nuremberg,’ (1987) 54 Social Research 779.

<sup>88</sup> *Ibid.*, 800.

## VI. 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 several juridically significant philosophical projects. 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 morally 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 morally sound judicial decision-making generally? There is, relatedly, an important project that is part sociological and part moral. It involves figuring out the precise conventions amongst judges for deciding hard cases within jurisdictions that involve morally good (even if not ideal) decision-criteria. These conventionally embraced morally good rules might be perspicuously legal, like the PRINCIPLE PRINCIPLE, and, if so, would provide additional content to the distinctively legal obligations that constrain (or purport to constrain) judges within jurisdictions simply on account of their legality. What

that set of conventionally embraced and morally good rules won't include, we can be reasonably sure, is LEGALITY.

The suggestion that legal philosophy would benefit from being re-oriented around a normative inquiry is by no means novel.<sup>89</sup> It has 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.<sup>90</sup> 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.<sup>91</sup> Dworkin famously used hard cases to argue in favor of anti-positivism, and the present

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<sup>89</sup> See, e.g., Schauer (n28) 493; Murphy (n8) 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.

<sup>90</sup> 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 reinterpret 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.

<sup>91</sup> Dworkin (n9).

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 principle' or 'right').<sup>92</sup> 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 U.S. Supreme Court had to decide whether a law purporting to grant free busing to parochial schools violated the First Amendment prohibition against religious establishment.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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 principal claim was that it would be wrong for unelected officials to decide hard cases by exercising discretion unconstrained by moral principles of right.<sup>96</sup>

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.<sup>97</sup> Secondly, a judge committed to

<sup>92</sup> *Ibid.*, 1059.

<sup>93</sup> 330 U.S. 1 (1947). See discussion in Dworkin (n9) 1083–84.

<sup>94</sup> See the dueling opinions of the majority lead by Justice Black, 330 U.S. 1–17 (1947), and the dissent led by Justice Rutledge, *ibid.*, 28–63.

<sup>95</sup> 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 (1947). 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.

<sup>96</sup> 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.

<sup>97</sup> As Dworkin puts it: 'The rights thesis ... provides a more satisfactory explanation of how judges use precedent in hard cases.' *ibid.*, 1064.

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 their legality.<sup>98</sup> 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 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 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

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<sup>98</sup> 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.

any 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), so long as they decide in a principled way – legality is not ultimately 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 practical 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.

## VII. CONCLUSION

Those who take the central question animating analytic jurisprudence – what are the precise boundaries of the concept of law? – to be practically significant 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 (and maybe even a moral one) to declare it as such and follow it. 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. The practical upshot of legality's irrelevance in hard cases for judicial decision-making is significant. It entails, for example, that judges can, consistent with their legal professional duties, ignore rules they believe to be law in hard cases.

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