FAREWELL TO THE EXCLUSIVE-INCLUSIVE DEBATE

Danny Priel*

The beginnings of the debate between exclusive and inclusive legal positivists can be found in the responses offered by different theorists to Dworkin's arguments against legal positivism. Very roughly, Dworkin argued that morality plays an essential and non-discretionary role in legal reasoning, and from that it follows that at least some moral standards are necessarily part of the law. In addition, he argued that since these moral standards are not part of the law as a result of some 'pedigree' test, positivism is false. Some positivists (later to be known as inclusive positivists) conceded that in some legal systems the law includes moral standards; this however is an empirical finding, true perhaps of all 'developed' legal systems, but not necessarily true of the law, for we can easily imagine a legal system that contains no reference to morality. They went on to reject Dworkin's second point, by arguing that in legal systems that include moral standards, these are part of the law in virtue of the acceptance of those moral standards into the legal system through something like Hart's rule of recognition.[1]

---

* DPhil candidate, Magdalen College, Oxford (email: dan.priel@magd.ox.ac.uk). I thank participants of the Jurisprudence Discussion Group in Oxford for their probing questions and helpful comments, and in particular to Dimtrios Kyritsis and Larry Solum. I also thank Larry Alexander, Samantha Besson, Kenneth Himma, and for written comments. For invaluable financial support I thank the Clarendon Fund and Magdalen College.

[1] Responses to Dworkin along those lines were made in three articles, before the inclusive-exclusive debate was launched. See E. Philip Soper, 'Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute' (1977) 75 *Michigan Law Review* 473 at 511; David Lyons, 'Principles, Positivism, and Legal Theory' (1977) 87 *Yale Law Journal* 415 at 424; Jules L. Coleman, 'Negative and Positive Positivism' (1982) 11 *Journal of Legal Studies* 139.

As is so often the case in philosophical discussion, these responses were the starting point for a new debate among the positivists' ranks, one that by now has life of its own. Again, very roughly (more accurate characterizations will come in the sequel), on one side stand the inclusive (or soft) positivists who argue that there is no conceptual limit to the law's 'incorporation' of moral standards into specific legal standards or into the rule of recognition. On the other hand, exclusive (or hard) positivists believe that such a conceptual barrier exists. (Henceforth I will use ILP and ELP for inclusive and exclusive legal positivism, respectively.) The exclusive position should be properly understood: any cursory observation at modern legal systems will readily show that the laws of different countries often contain terms like equality, fairness or justice, and exclusive positivists of course do not deny that. They do not even argue that judges should not rely on moral standards. All they argue is that the law cannot incorporate morality, i.e. moral standards cannot become legal standards. When the law refers to morality, the correct explanation is not that moral standards become part of the law, but instead that in such instances there is a gap in the law, and the law directs the adjudicator to some non-legal standards upon which decision should be made.

In some sense it is inaccurate to call these conflicting views a debate. In reality there has been a small number of articles that stated the exclusive position, and they generated a considerably larger amount of responses and attempted refutations.[2] Since the debate has no practical

---

[2] The principal writings on the exclusive side are Joseph Raz, 'Legal Positivism and the Sources of Law' in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 37; 'Authority, Law, and Morality' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev. ed., 1994) 195 (the article will be referred to hereafter as Raz, 'Authority', the book hereinafter *Ethics*). More recently there has been one more article defending ELP: Scott J. Shapiro, 'On Hart's Way Out' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the* Concept of Law (2001) 149 (hereafter *Hart's Postscript*). The argument in the latter article is somewhat fuzzy, but as I will argue below it is essentially the same as the one made by Raz. For other supporters of ELP see Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in *Hart's Postscript* at 355; Eleni Mitrophanous, 'Soft Positivism' (1997) 17 *OJLS* 621. For an overview of the exclusive position see Andrei Marmor, 'Exclusive Legal Positivism' in Jules Coleman & Scott Shapiro (eds.),

implications,[3] the amount of literature dedicated to it and the importance attached to it seem to me to be a bit exaggerated.

My argument in this paper, however, is not simply that legal philosophers have more important questions to worry about. In this paper I will present an argument, which – if successful – will show that both sides to the debate are wrong. I will first present briefly the main argument that has been made for ELP, and will mention some ways in which inclusive positivists think this argument goes wrong. I will not try

---

Oxford Handbook of Jurisprudence and Philosophy of Law (2001) 104 (hereafter *Oxford Handbook*).

Since the volume of writings on the inclusive side is larger what follows is only a partial list: a few sentences in the first edition of *The Concept of Law* (2nd ed., 1994) suggest that Hart accepted the inclusive position already then. See ibid. at 204. He explicitly endorses this position in the Postscript, ibid. at 250-54. The first defences of ILP are the articles cited in note 1. Since then inclusive positivism was defended, among others, in the following: W.J. Waluchow, *Inclusive Legal Positivism* (1994); Matthew H. Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (1999); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Law* (2001) at 67-148; Kenneth Einar Himma, 'Law's Claim of Legitimate Authority' in *Hart's Postscript* at 270. I don't mention here articles that have been incorporated into the books mentioned here. Shapiro's article has garnered three responses: Kenneth Einar Himma, 'H.L.A. Hart and the Practical Difference Thesis' (2000) 6 *Legal Theory* 1; W.J. Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (2000) 6 *Legal Theory* 45; Matthew H. Kramer, 'How Moral Principles Enter into the Law' (2000) 6 *Legal Theory* 83. Shapiro responded in 'Law, Morality, and the Guidance of Conduct' (2000) 6 *Legal Theory* 127. Kramer then rejoined in 'Throwing Light on the Role of Moral Principles in the Law: Further Thoughts' (2002) 8 Legal Theory 115. For an overview on various inclusive arguments see Kenneth Einar Himma, 'Inclusive Legal Positivism' in *Oxford Handbook* at 125.

[3] There is one potential practical difference between the two positions: an inclusive positivist who also holds the view that judges are not allowed to rely on moral considerations relevant to the decision when these moral considerations are not explicitly mentioned in the law would differ from an exclusive positivist. Raz on the exclusive side argues that this position is untenable. See his 'Incorporation by Law' (unpublished manuscript) at 2-10. If there is such an inclusive positivist, there is a potential difference between what an exclusive positivist like Raz and such an inclusive positivist would consider is the correct outcome according to law of certain cases.

to give a complete survey of all the arguments and counter-arguments, not only because these are available elsewhere, but because these are not the focus of this paper; they are offered here only in order to understand what is at stake between the two versions of positivism.

I must stress that my argument is directed at those who accept either version of positivism as a correct theory of law. It therefore assumes without argument that something like Hart's rule of recognition is a necessary element of every legal system. Those who consider positivism mistaken in either form, will probably not be led to question their views by my argument.

1. The Argument for ELP

Raz's argument for ELP is by now well known:

(1) Law either is an authority or is (wrongly) taken by those subject to it as an authority.

(2) For something to be an authority or be considered an authority it must claim authority.

(3) Anything that claims authority must purport to replace the reasons for action those subject to the authority have with other reasons. Thus authoritative reasons are reasons not to act on certain reasons (i.e., they are exclusionary reasons) coupled with new reasons for action.

(4) Since law claims authority it must purport to provide exclusionary reasons (from (2) and (3)).

(5) When law incorporates morality, the law does not provide exclusionary reasons for action, because it does not replace the first-order moral reasons that apply to an agent, only tells the agent to act on the first-order reasons the agent should act on anyway.

(6) Therefore when law incorporates morality, law does not (in those instances) claim authority (from (3) and (5)).

(7) But (6) contradicts (4).

(8) Since (4) (and (1)-(3) from which it derives) are conceptual truths about law they cannot be dropped. So to resolve the contradiction we drop (5).

From which we conclude: (9) It is never the case that law incorporates morality (from (8)).

A similar point was recently made by Scott Shapiro:

> Marks of authority are supposed to eliminate the problems associated with people distinguishing for themselves between legitimate and illegitimate norms. However, a mark that can be identified only by resolving the very question that the mark is supposed to resolve is useless. A norm that bears such a trivial mark, therefore, is unable to discharge its epistemic duties. … [In legal] systems with inclusive rules of recognition … people are left to discover which rules they ought to apply rather than being able to rely on the mediating role of authorities.[4]

Shapiro indeed writes that his argument is close to that of Raz's, but that the arguments differ in that 'they use different concepts of "mediation". For Raz, rules mediate between reasons and people, not between competing standards of conduct.'[5] But if I am right in my explication of Raz's argument, mediating between competing standards of conduct is an essential element of Raz's account of the authority. In Raz's account legal norms (like other mandatory norms) are exclusionary reasons as well as first order reasons for action. It follows that legal norms in his account replace the reasons for action provided by morality and in addition provide different reasons for action. Indeed Raz has written:

> [T]he court's very utterance of its opinion is claimed by it to be a reason for following it, whereas my utterance of my opinion is not claimed to be a reason for following it. At best it amounts to informing the persons concerned with the existence of reasons which are themselves quite independent of my utterance.[6]

Raz stresses here that law is not concerned merely with mediating people and reasons they otherwise already have, but also with issuing 'fresh' reasons for action, something that does not occur if the law just tells people to follow the reasons they have in any case. As a matter of fact, as we shall see immediately, an authority is *justified* if it mediates between people and the right reasons they have, that is, guides them towards behaviour they should take, but this is true only of justified authorities, whereas Raz's argument is more general and covers justified as well as unjustified authorities.

---

[4] Shapiro, above note 2 at 177-78.

[5] Ibid. at 178 note 57.

[6] Joseph Raz, 'The Problem about the Nature of Law' in *Ethics*, above note 2 at 205. See also ibid. at 206-08 and Raz, 'Authority', above note 2 at 218-19.

What has been thus far provided is an explanation of what authorities do (or purport to do); one thing missing is an account of when an authority is justified, that is to say, when one should follow the dictates of an authority. In Raz's view the most common justification for an authority is if it satisfies what he called the Normal Justification Thesis (NJT). NJT maintains:

> [A] person['s] ha[ving] [justified] authority over another involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[7]

Obeying the requirement of the law is therefore justified to the extent that laws of a particular legal system conform to NJT, unless we can provide another justification for the authority of law, one not based on NJT, a possibility that Raz does not rule out. When there is no justification for the authority, but it is still followed we have the appearance of authority, what Raz called *de facto* authority. Cases of *de facto* authority, where there is an attempt, albeit an unjustified attempt, to provide reasons for action, should be distinguished from cases in which there is not even a claim to authority, that is to say, no attempt to provide reasons for action. Since law necessarily *claims* authority, something that cannot even attempt to provide reasons for action (say, a tree) cannot be law; on the other hand, in the cases where something claims to be an authority but makes an unjustified claim, its practical requirements can be law (if some other conditions obtain), only it would be bad law.

Before going on to examine inclusive positivists' responses to this argument, I must add that in earlier writings, and in particular in the article 'Legal Positivism and the Sources of Law' Raz discussed several other arguments for ELP, but they are either less compelling than the argument from authority or, and I agree here with Stephen Perry,[8] an inchoate version of that argument. Since these are affected by my

---

[7] Joseph Raz, *The Morality of Freedom* (1986) at 53. A similar definition (although slightly differently worded) appears in Raz, 'Authority' above note 2 at 214.

[8] Stephen R. Perry, 'The Varieties of Legal Positivism' (1996) 9 *Canadian Journal of Law & Jurisprudence* 361 at 366-67.

argument in much the same way as the argument from authority, I will not elaborate on them here.

2. Arguments for ILP

I think many supporters of ILP simply find it a much more natural position,[9] and they consider Raz's argument for ELP a hurdle that gets in the way of a view that would otherwise hardly require much additional argument for anyone who already accepted positivism. So more than providing a positive argument for ILP most (though not all) inclusive positivists' efforts are attempts to find fault in the arguments for ELP. (Of course, inclusive positivists may consider the fact, if it is a fact, that ILP conforms better with the common understanding of the legal practice to be a strong argument in its favour.) In defending ILP inclusive positivists divide into those (like Waluchow) who endorse a more modest necessity clause thesis, i.e. the thesis that law can incorporate moral standards as a necessary condition for validity, and others (like Himma and Coleman) who argue that morality can also be a sufficient condition for legal validity. I will have little to say about this distinction here. In the remainder of this section I will only hint towards three routes that arguments against ELP have taken. It is worth noting that since the argument for ELP sketched above, if sound, undermines not only ILP but non-positivist theories of law as well, some of the criticism recited below was made by theorists who reject positivism in any shape or form.

Some commentators rejected Raz's account of authority *in general*, for instance by rejecting his thesis about exclusionary reasons, which is a fundamental plank for his explanation of authority.[10] Thus it has been

---

[9] Waluchow, *Inclusive Legal Positivism*, above 2 at 158-59, states this strongly: 'the exclusive account is simply counter-intuitive. It seems quite at odds with our ordinary understanding of a constitutional document like the Canadian Charter.'

[10] See e.g., Michael S. Moore, 'Authority, Law, and Razian Reasons' (1989) 62 *Southern California Law Review* 827. See also Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 88-93, 196-206. Recently, in the course of criticizing Coleman's version of ILP, Ronald Dworkin subjected Raz's ELP to a comprehensive critique. See Ronald Dworkin, 'Thirty Years On' (2002) 115 *Harvard Law*

argued that it is a mistake to think of legal norms as exclusionary reasons. Instead, they are better understood as very strong (yet defeasible) reasons. If this is true, then the alleged problem of ILP, namely that it cannot explain how incorporated moral norms can replace the first-order reasons for action, disappears.

A second option is to argue that even if Raz's account of authority is correct of some institutions, it is mistaken as an explanation of the authority of law. An example of such an argument can be found in Matthew Kramer's account of legal authority. Kramer argues that a legal system claims authority, but that contrary to Raz's view (or the view he ascribes to him) it need not claim moral authority. For instance, a region in which a mafia syndicate has taken over and rules by force and is being obeyed only through fear can be considered a legal system if it conforms to requirements of generality, durability and efficacy. So, to put it a bit crudely, Kramer believes that the gunman situation, if writ large enough, is law.[11] This allows him to present an account of law's authority, which does not rely on the idea of mediating between people and the correct reasons that apply to them. Once the strong link between authority and right reason is severed, the problem supposedly created by the failure of law to replace the correct reasons for action no longer exists.

A third approach accepts Raz's account of authority, accepts also its relevance to the understanding of law, but denies that ELP follows from it. An example of this approach can be found in recent writings by Jules Coleman.[12] Coleman argued there that Raz's argument for ELP imposes an epistemic constraint requiring that we be able to know that a certain norm is a legal norm without recourse to morality. But the argument for ELP does not impose a metaphysical constraint on what a legal norm is. Therefore, Raz's theory of authority is not a problem for ILP so long as it is possible (and Coleman thinks it is possible) to have a legal system in which everyone can know the law without recourse to the moral

---

Review 1655 at 1665-76. However, it must be noted that Dworkin manages his criticism only by distorting Raz's views almost beyond recognition.

[11] See Kramer, above note 2 at 92-101, 219-21. The argument against ELP that follows in the text does not appear in exactly this form in Kramer's discussion. For an earlier – and to some extent similar – critique see Philip Soper, 'Legal Theory and the Claim to Authority' (1989) 18 *Philosophy & Public Affairs* 209 especially at 224-36.

[12] E.g., Coleman, above note 2 at 127-33.

considerations while at the same time moral standards are incorporated into the law.

3. The Shared Assumption

We need not examine whether these arguments are sound or not (for the record, I think many of them are not), because I think both sides to the debate share one false assumption, and therefore their views, whatever their merit otherwise is, are wrong about the question of the possibility of incorporation of morality into the law. The false assumption is the belief that when laws contain words like 'justice', 'equality', 'fairness' etc. – I will call such words henceforth 'moral words' – these words refer to the moral concepts JUSTICE, EQUALITY, FAIRNESS etc.[13] My view is that this assumption is mistaken and that these moral words refer to the legal concepts *justice*, *equality*, *fairness* etc. and that these are never (or hardly ever) the same as the moral concepts denoted by the same word. (Along with a difference in reference there is a difference in meaning, so I will distinguish between the moral and legal meaning of moral words.)

Raz is very clear of his endorsement of this assumption. In a review of Dworkin's *A Matter of Principle* Raz agrees with Dworkin that

> [t]he framers of the [American] Constitution intended to proscribe cruel and unusual punishment. They also had their own view as to what is cruel and unusual. No doubt they intended those punishments which they regarded as cruel and unusual and none others to be proscribed by the Constitution. But they chose not to proscribe them specifically (e.g., by refering to the rack, etc.) but to proscribe them because and inasmuch as they are cruel and unusual. Therefore, if they made a mistake, and if these punishments which they had in mind as examples are not cruel, or

---

[13] A note on typography: I will refer to words by putting them in quotes ('equality'), moral concepts appear in small capitals (EQUALITY) and to legal concepts in italics (*equality*). Thus the denotation of the word 'equality' in English is ambiguous between EQUALITY and *equality*. The French word 'égalité' is likewise ambiguous between EQUALITY and *equality*. To avoid confusion I will add that my typographical conventions are not the ones found in recent writings on concepts. There the distinction is between concepts (designated by small capitals, e.g. DOG) and the property they stand for (in italics, e.g. *dogness*). See e.g., Jerry A. Fodor, *Concepts: Where Cognitive Science Went Wrong* (1998) xii.

> if others which they did not find cruel are in fact cruel, then the Constitution may apply in a way which may surprise its framers. To put the point in a way that … I find most congenial, *the Constitution, by deploying many broad moral categories, gives discretion to the courts and directs them to use it in light of the true, or the best, moral understanding of what is cruel, etc.*[14]

Let us examine several possible arguments that might have been brought in support of this claim. One possibility is that this is a requirement of logic, i.e. the framers of the American Constitution could not, without contradiction, have limited themselves to a certain closed list of punishments they considered cruel. Obviously not: this suggestion is plainly mistaken because the words 'cruel and unusual punishment' could have been replaced with a list of certain punishments followed by 'and only those'. This does not mean that such a solution would have cleared all possible conflicts as to what constitutes, say, flogging. The point I am making is that the framers *could* have written the Constitution in this way without contradiction. Only if such a list could not have made any difference would we have reached such a conclusion. The second possibility is that this is in fact what they framers meant when they used the phrase 'cruel and unusual punishments' together with some version of originalism (or more generally a Gricean theory of meaning). Even if true, this is a contingent fact, and therefore we could imagine a hypothetical case in which this wasn't what they meant. In any case, such a claim calls for empirical backup. A third possibility is that this is what the phrase 'means', regardless of what the framers intended it to mean. Surely, Raz does not mean here that this is what the words 'alone' mean, because words 'alone' don't mean anything. Words alone are merely black shapes on paper (or more commonly nowadays, shapes on a computer screen). So it is most likely that what Raz (and Dworkin) believe is that the complex process of understanding or interpretation of the meaning of this text together with the surrounding circumstances brings out its meaning, which is that 'cruel and unusual punishments' refer to CRUEL AND UNUSUAL PUNISHMENTS whatever these turn out to be according to morality. Raz and Dworkin will surely differ on how

---

[14] Joseph Raz, 'Dworkin: A New Link in the Chain' (1986) 74 *California Law Review* 1103 at 1110 (footnote omitted, emphasis added). To the same effect see Raz, 'Authority' above note 2 at 232.

this interpretive conclusion is reached; and Dworkin of *Law's Empire* would probably not accept this statement as it stands, because it does not give due weight to political history as required by integrity. But all this is not relevant for our discussion. What is worth stressing again is that it is essential for the debate between the inclusive the exclusive positivists to even get off the ground that what the law refers to when using moral words and what is (or is not) incorporated into law is the correct moral standard, regardless of how it is understood by people at the time: this follows logically from the alleged problem from which ILP suffers, i.e. that of lack of guidance. If the standard to which the law refers is not external to the law, then the *logical* problem which ILP does not arise: that word is then no different from any other word that appears in the law. There is no problem to use the word 'night' in the law; why would there be a problem to use the word 'justice', if it is simply another word that has its unique meaning in the law? Both sides to the debate *must* hold, if they wish to avoid contradiction, that when the law uses moral words it refers to moral concepts which are external to the law, that the truth of which is not affected by their legal interpretation, and that those moral words refer to the correct standards of behaviour to which agents should abide.

Contrary to this view, my view is that in all (or almost all) instances in which moral words are mentioned in the law, the reference is to a legal concept, which normally bears a close relationship to the moral concept (or more accurately, to the social understanding of the moral concept) but is logically independent of it. I think there are good reasons for thinking that the view that we might ever discover or know the 'best' or 'correct' morality is mistaken. Even if there is such correct morality (and I doubt that), the possibility of us ever getting to know it seems to me unlikely. My argument will begin on the more modest assumption that seems to me well supported by the history of ethical thought, both popular and professional, that we currently do not know what the correct morality requires, even if such morality actually exists. I will not try to provide a detailed argument for this view here, and will assume it is true. However, as part of my argument I will also hypothesize that the correct morality somehow becomes known beyond all controversy tomorrow. Later I will raise doubts whether the ELP-ILP debate will make sense even after such discovery.

My argument is simple. Suppose that as part of our discovery of the correct morality, we will learn tomorrow beyond dispute that death penalty in always and in all circumstances a form of cruel and unusual punishment. If it is the moral concept that the term used in the American Constitution refers to, it follows that the practice of imposing that punishment on people for centuries in the United States has been morally wrong. However, does it follow that a trial judge in, say, 1850 that imposed the death penalty on a correctly convicted defendant in a capital crime made a wrong legal decision? To some extent it is a question about intuitions, and saying that my intuition is that there is a sense in which he was not wrong when he imposed those punishments will probably not convince those who do not share this intuition with me. But I think anyone who is a positivist will share this intuition with me. The reason is that there is a sense in which the judge was acting correctly in this case, and this is a sense positivists have always been mindful of: at the time the judge handed down his judgment, to the best of everyone's knowledge the judge was acting as the law, *including its prohibition on cruel and unusual punishment as then understood by the legal community*, required. Indeed, imagine such a judge refused to impose the death penalty in the imagined case and would have explained his refusal by saying that he is supposed to impose the death penalty, and since it is morally cruel, and since the Constitution prohibits morally cruel punishments, he cannot impose such punishment. No doubt such a decision would have been overruled on appeal as *legally* wrong.

Some theorists (presumably Dworkin) would perhaps not care much about this fact, but I think positivists are committed to the view that the content of the law of a community is in some way fixed by what the majority of the legal community thinks it is. If it were otherwise, it could be that an entire legal community can get the law wrong, and in our case the entire legal community in 1850 did not know that imposing capital punishment is forbidden by law. By adopting this view we lose an important sense of correctness according to law as it was in a society at a particular time. We lose it for some universal a-temporal sense of correctness. But what positivists have always emphasized is that both senses are meaningful and important for the understanding of the law, and that one need not deny the relevance of the latter sense of correctness in order to acknowledge the importance of the former.

So what do words like 'equality' or 'fairness' refer to when they are mentioned in the law? I believe my argument above lends credence to the view that it is more accurate to think that in such cases the law refers to what I call legal concepts, and judges are required to decide cases according to these concepts' legal meaning. What are these legal concepts? The legal concepts are the way moral words are understood in the law. It is very likely that the correct moral concepts are related to the legal concepts denoted by the same word, but it is important to see that even if some correct morality exists, unless we know what that correct morality is, it is not the correct morality that influenced the content of moral words but rather the common understandings of moral words in different societies. Since these change over time, if there is a correct morality that never changes, we can be sure that social understanding of morality often differs from the correct morality. Now it may be argued in response that while the general principles of morality do not change, morality itself is under-determined, and that these specifications of the requirements of morality do change from time to time, and as long as they are consistent with the general principles of morality, they are morally permissible. But even granting this point, this in no way helps the ELP-ILP debate. The reason is that according to this view there are things about which, *ex hypothesi* morality cannot guide us: there is no answer in morality as to the right course of action in such a case. Hence in such a case the NJT is not applicable: it is not the case that law guides us towards right action, and therefore the possible problem from authority that exclusive positivists argue the ILP suffers from does not arise. Furthermore, in such cases what the law requires is not an aspect of morality (that was our assumption), rather it is a requirement that is *consistent* with morality. Hence, it is hard to see how such an argument can be the basis for defending either ELP or ILP.

There is also a strong link between commonly held meanings given to moral words in a certain society and the legal meaning given to those words: judges after all are part of society, and their training and selection procedures usually guarantee that those elected for the judiciary do not hold views that are grossly at odds with those of much of their society. However, it would also be a mistake to think that the legal meaning of moral words is identical, or even similar, to the common understandings of those words in society. There are many historical examples of cases in which the majority of people in a certain state thought the judiciary is

mistaken in its understanding of certain moral words, which are part of that state's laws. To some extent legal discourse is conducted independently of other political discourses: when a lawyer is asked what constitutes 'cruel and unusual punishment' in American law, she would turn for the answer to a law book; the meaning of those words in the law will often have some unique peculiarities. (It should be noted that substantial differences between the legal and social meaning of moral words are an unstable state, and meanings tend to move towards equilibrium, either by the social meaning getting closer to the legal meaning, or vice versa (or both).) Despite the possibility of deep conflicts about these issues in any society, there are both legal and non-legal considerations that guarantee some degree of convergence. The legal ones are the hierarchical structure of courts and the binding force of precedents (by doctrine in common law legal systems, and at least to some degree in practice in civil law countries). The most significant non-legal factors are the processes of socialization which lead to considerable convergence within a single society. (What constitutes a single society is a difficult matter that I will not address here, but it should not be assumed that members of one state necessarily form a single society.) Changing economic and physical situations are also significant are also significant. One factor that affects societal views on what constitutes a *cruel and unusual punishment* is moral discourse, but in this moral words are no different from other words appearing in laws, whose meaning is affected by the very same non-legal societal considerations.

On the other hand, so long as we do not know what the correct morality is the relationship between the content of *cruel and unusual punishments* and CRUEL AND UNUSUAL PUNISHMENTS is contingent. It is likely that there will be some convergence between them, and it is likely that the content of the latter will influence in some way the content of the former, but it is very likely that the two will differ, and it is definitely possible that the two will occasionally not even partly overlap.

Thus, even if we concede that those who enacted the Eighth Amendment used moral words like 'cruel and unusual punishments' because they realized the possibility of them being wrong and allowing for change in the meaning of those words (e.g., that they wanted to allow for the possibility that capital punishment is cruel and unusual despite their view that it is not), there are at least two possible

interpretations of their decision to use moral words: one is that by doing so they referred to the moral concepts with the belief that while they know the correct content those moral concepts, a future generation might discover the content of the immutable moral concepts to which they referred; a second possibility is that they used such moral words so that the meaning of those words will change according to the change in the content of the social standards found in the law. The difference between the two possibilities is that in the former case the content of the moral words remains the same but our knowledge of the words' correct meaning changes (an epistemic change), whereas in the latter the change is in the meaning of those words (a semantic change). Of these two options the one that makes less sense is the former, since it involves the more extravagant assumption that those who enacted the American Bill of Rights believed that their ability to know the content of moral concepts is somehow hampered, and they believed that some new ways of knowing the true content of moral concepts would be discovered after their days: it makes little sense to think that they believed they may be wrong, unless we think that there is some epistemic barrier from which they thought they suffered, one that believed would be removed in the future. If on the other hand, when using moral words in law, the legislator or adjudicator refer to the moral concepts and they know the content of those moral concepts, then future generations should not depart from what is the correct morality. We can conclude then that even if we accept that those who put moral words into the law wanted to allow for the meaning of those words to change with time, it does not follow that these words refer to moral and not to legal concepts; indeed it is more likely that they do not.

4. Seven Objections

I will deal now with possible objections to the position I presented here. I hope that from what follows will emerge not only a satisfactory response to some possible criticisms of the argument, but also to a better understanding of it.

(a) *Moral Standards as Part of the Rule of Recognition*

My argument focused on cases in which the moral standard appears in specific norms. Can it be extended to references to moral standards in

the rule of recognition? At first the obvious answer would seem to be 'why not?' My main example, taken from the American Constitution, was arguably from what makes up part of the rules of recognition of the various legal systems existing in the United States. Yet perhaps some inclusive positivists may wish to distinguish between moral words used in all norms apart from the rule of recognition, which they would concede refer to legal concepts, and moral words as part of the rule of recognition. The reason for the distinction is that in the case of the rule of recognition the reference is more likely to be morality, since this is the standard by which society wishes its laws to be validated: there is no point it would seem in validating laws by reference to other laws; on the other hand, it seems reasonable to validate laws by reference to an external standard, namely morality.

I think this objection is mistaken, but not for the reason given above. The response suggested above commits two mistakes that many inclusive positivists make. The first is in claiming that the constitution, being the supreme law of a state, is part of that state's rule of recognition. It is a mistake because whatever recognizes the constitution as part of the law cannot be the constitution itself. What recognizes the constitution as part of the law of a given country is the social rule part of its content is that the constitution is the supreme law of that state. So references to morality in the constitution are not part of the rule of recognition.

The second mistake is to think that the social rule known as the rule of recognition refers to morals standards. This is a mistake because the rule of recognition cannot 'refer' to such moral standards. The rule of recognition is a social rule: its content consists in a certain behaviour, a certain dispositional attitude. My view is that the role of the rule of recognition is more substantial than just identifying the materials from which the content of legal norms is determined; I believe that the rule of recognition is essential also in determining the content of legal norms. However, even this more expansive understanding of the rule of recognition does not imply that morality can be in any way 'included' or 'incorporated' into behavioural dispositions. It is important not to misunderstand my position: people can of course behave in ways that accord with morality or that conflict with it, and consequently some things might not be recognized as laws because they are immoral. But how exactly can morality be incorporated into behaviour? Think of a

person whose actions conform with the demands of morality. I do not think we would describe her as 'incorporating' morality; we would just say that she behaves morally.

When the question arises whether a law should be invalidated because it is in conflict with the constitution it has already passed the 'test' of the rule of recognition. If it is found to be inconsistent with the constitution, it is declared to be non-law. (It is irrelevant for my argument whether it is declared to never having been law or that the declaration is prospective.) There is no circularity in thinking that some sub-set of standards is given priority over another sub-set if this superiority is determined by an external test like the rule of recognition, so there is no mystery or any peculiarity in thinking that it is legal norms, which are not part of the rule of recognition, which determine that some of what was recognized by the rule of recognition as law is nonetheless set aside and disregarded ('invalidated') because they are in conflict with other norms deemed superior. Anyone who thinks there is some insurmountable problem with this description must then explain how by-laws are invalidated if they conflict with statutes. Would we say that all statutes that delegate power to enact by-laws to executive or administrative bodies are part of the rule of recognition? Or would we say that through some highly artificial construction they partly belong to the rule of recognition and partly not? Such view seems to me obviously mistaken.

To conclude: my response to the objection in discussion is not 'why not?' but rather it is 'it never happens: moral standards are never part of the rule of recognition.' If I am right here, then even if my main argument is mistaken, those versions of ILP that mention the incorporation of moral standards into the rule of recognition are mistaken on this count.

(b) *Explicit Reference to Moral Concepts by Law*

Assume a hypothetical case in which an alternative Eighth Amendment is part of the American Constitution, and it had forbidden inflicting cruel and unusual punishment 'whatever these turn out to be morally'. Would not this be the case in which the law asks for decision according to moral standards, and the question of the ELP-ILP debate would then arise? Even if I am right about the constitutional texts like the American Constitution or the Canadian Charter, so the objector would contend,

we can hypothesize situations about which the debate could be revitalized.

The main problem with this argument is its unlikelihood. It rests on two counterfactual assumptions at least one of which is highly unlikely: the first, and less difficult to imagine, is that a constitution would include such an explicit reference to moral concepts; the second, and it is essential for the argument's validity, is that the content of the correct morality is known. If the content of the correct morality is not known, then the law cannot 'expect' judges to resort to a standard the content of which is unknown. If these assumptions are granted it is indeed true that the question of the ELP-ILP distinction would arise, but since they are both false with regard to our world, it is not clear why legal theorists spend so much time on a question that rests on assumptions so different from the ones in our world.

To understand this point better a short digression is required here. It seems to me highly likely that if such a counterfactual were to occur, the question, at least in the way the debate is framed now, might no longer be relevant. The reason is that in such a situation our concept of law would not be appropriate to describe what would then be called law. It is true that legal philosophers are aiming at 'general jurisprudence', that is to say, they hope to produce an explanation of law made at such level of abstraction that it would be true of all legal systems in our world and in all possible worlds, but I doubt whether our concept of law would be very useful in describing a situation so utterly different from anything that ever existed in any human society. Unless one thinks there is some Platonic concept of law, immutable and true in all possible worlds, and that explicating it is the goal of jurisprudence, then general jurisprudence of the 'all possible worlds' kind seems to be impossible. The reason is that once one starts travelling on the possible world spaceship one can get very far indeed: it is possible to imagine a world in which a law is passed that orders people to believe that Aristotelian physical theory is correct; it is possible to imagine a world in which a legal system forces people to believe that events that happened in their past did not happen; it is possible to imagine a legal system with a single law: 'Do the right thing!'; it is possible to imagine a ruler in a country deciding that laws will change according to the weather or by lottery.

To accommodate such diverse hypothetical cases one can either broaden and consequently weaken the concept of law so that it captures

all those (and other) cases that anyone may wish to call law with the consequence of having an empty concept of law, with little or no explanatory power, or alternatively one can maintain a more specific concept of law at the cost of some parochialism. What others call 'law' would then be seen as not 'really' law, or less imperialistically, as not belonging to our concept of law.

At this point philosophers might have an additional worry: philosophers commonly try to explain phenomena by imagining other-worldly counterexamples. To say that this is not the aim of legal philosophy (or more generally, philosophy of social phenomena) is, some would think, akin to saying that philosophizing on such phenomena is impossible. If it is only *our* concept of law that we seek to explain, isn't it better to ask the sociologist than a philosopher? If there is anything distinct about philosophical reflection isn't it the analysis and elucidation of concepts through examining our intuitions about possible worlds?[15] This is a big issue that cannot be addressed here in full. I hope my brief comments point to the direction of what I think is the right way of thinking about these questions, namely that with at least some social phenomena (and law is one of them), there is a point at which it is not fruitful anymore to try to think of some hypothetical, possible world cases as a helpful way for understanding the social phenomena existing in our world.

Whatever one's view on this topic is, there is one important point that should not be missed in the context of the ELP-ILP debate: my argument here is not merely that we should not broaden our concept of law in order to keep it explanatorily powerful. If I am right, then both sides of the ELP-ILP debate are wrong in the way they describe *our*

---

[15] Some naturalistically-inclined philosophers may consider this an overly old-fashioned characterization of philosophy, but modest conceptual analysis is something that all philosophers constantly engage in, and it plays an important role in understanding the world. For an argument to the effect that there is nothing in conceptual analysis that conflicts with a strong naturalistic thesis, and that it is actually required for arguing for that thesis see Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (1998) chs. 2-3. There is also nothing in this view, which is incompatible with keeping the theoretical understanding of concepts (to some extent) in line with lay understanding of social phenomena.

concept of law, since it conflicts with the way the law is. Hence, both ELP and ILP are unhelpful in understanding our concept of law.

(c) *First Instances*

Someone sympathetic to my argument may still raise the following objection: 'It is true that "equality" in the American Fourteenth Amendment is not the same as EQUALITY, but this is because from the time it was introduced into the law it has been changed and affected by many judicial decisions and other societal factors. But this does not affect the first instance. When the Fourteenth Amendment was adopted as law in the United States surely it referred to the moral concept EQUALITY. What else could it refer to?' Moreover, even if they do not refer to the moral concepts, they surely cannot refer to any legal concept, because such legal concept does not yet exist; the moral words attain their legal meaning only after the first decision. Again, note that even if this objection is correct it leaves the ELP-ILP debate a very narrow scope of existence: the first case(s) in which the meaning of words like 'equality' or 'liberty' were interpreted in their respective countries. Secondly, this argument assumes that if the judges do not rely on legal standards they necessarily follow morality. At first this might seem plausible: after all, the law uses a moral word. However, it is usually the case that courts commonly refer to the decisions of courts in other jurisdictions, and this is particularly true in first instances when the legal materials of a particular jurisdiction provide meagre support for the meaning of moral words. This is commonly done instead of attempts to figure out what the meaning of, say, EQUALITY. When not doing so the courts will probably be referring to earlier cases in their jurisdiction from which they try to derive the (legal) meaning of the moral word. Of course, reliance on comparative materials or on earlier local cases not pertaining to a case is never compulsory, and in using it courts may be trying to discover the content of the moral concept. So this point is admittedly not decisive, but it shows that the claim that the courts are forced to use the moral meaning of a moral word in first instances is mistaken. Thirdly, when moral words are used they are used as conveyors of an attitude: the words used are not there for no reason. Even non-originalists will agree that when certain moral words are used they are used with an eye to particular instances that should be covered by the law. Thus, for instance, when the 'equal protection of the laws' was

introduced to the American Constitution it was generally agreed in the legal community that it did not ban segregated schools.[16] As time went by the legal understanding of these words has changed, until (in what was the result of a long process) it was decided that the doctrine of 'separate but equal' is inconsistent with the Fourteenth Amendment. Whether such changes in the meaning of moral words are to be allowed is a separate question; what the example shows is that the objection that in first instances moral words necessarily refers to moral concepts is unfounded, because I believe most people today would think that it was the later interpretation, and not the first one, that accorded with the moral concept. A similar argument can be made, I think, with regard to any reference to moral words in the law. There is no more reason to think that judges refer to moral concepts in first instances than in subsequent cases.

There is another way of making this point: when the judges first confront a moral word, this word either refers to the moral concept or not. If it does, then further developments in the law should not lead to any change in the meaning of the moral word, and future judges would *always* be wrong to move away from what they are required by law, a position that few positivists would be happy to endorse. If the moral word does not refer to the moral concept, then the objection fails, as it is admitted here that it is not the moral concept which is invoked in the in the first case, and whether the first of these two options is the correct one is a contingent matter. It would be a mistake to reply here that while the law may refer to the moral standard, the judge may be mistaken, because the assumption on which this objection is premised is that the first instances are different since these are cases in which the law necessarily refers to moral concepts, which is supposed to be the conclusion of the argument. Furthermore, if true it makes the ELP-ILP debate survive only by claiming that all cases subsequent to the first one (assuming the meaning of the words has changed in those cases) were

---

[16] This is a matter of some controversy; William E. Nelson, *The Fourteenth Amendment: From Political Doctrine to Judicial Principle* (1988) at 133-36, treads carefully but admits that '[h]istorians who conclude that most Americans in 1866 favored segregated schools are probably correct in their assessment.' Ibid. at 135. For a survey of contemporaneous judicial opinions on this matter, the vast majority of which saw no conflict between the Fourteenth Amendment and segregated schools, see ibid. at 151-52.

either wrongly decided, or that after the first case in which the moral meaning of the moral words was sought, in all subsequent cases the meaning of the words was shifted from the moral meaning to different legal ones for reasons that are all but clear.

Someone may now object that if this is true, I am committed to a version of originalism. If the words 'cruel and unusual punishments' refer not to what cruel and unusual punishment turn out to be according to the correct morality, but according to what was thought by those who enacted the norm. Of course, this is an objection only if originalism is necessarily mistaken, which requires an argument. In any case, however, this objection is false: saying that historical background is relevant does not mean that it is decisive.[17] Moreover and more importantly, this claim would be warranted only if it were coupled with the further assumption that the law never changes unless changed by the legislature. In my view whether this is true is a contingent matter. Different legal systems can adopt different approaches on this question which, if carefully articulated, can all be coherent; and choice among them is a matter of preference regarding the proper division of labour between the legislature and the judiciary, which in itself depends on many contingent factors (the population of the country, the ease of amending its statutes etc.). But since all this is a contingent matter, originalism does not follow from my argument.

(d) *Critique of the Law Based on Morality*

Imagine a person that I will call 'the moral-legal objector'. The moral-legal objector is a person who, after years in which a moral word used in law has been interpreted in a certain way, will say something like: 'All

---

[17] There are many arguments aimed to show that any search for original intention is impossible. For a representative summary of such arguments see Ronald Dworkin, *Law's Empire* (1986) at 313-27. A modest intentionalistic position could grant that the intentions of drafters are many times inconclusive (or non-existent) about specific problems. This does not mean that we cannot sometimes discern the purpose of a certain enactment, and this may be helpful in determining the scope of specific norms. And the ascription of intentions to multi-person projects may not be as hopeless as it has been made to look. See e.g., Michael E. Bratman, 'Shared Intention' (1993) 104 *Ethics* 97; J. David Velleman, 'How to Share an Intention' (1997) 57 *Philosophy & Phenomenological Research* 29.

previous decisions based on the Eighth Amendment are wrong because they got the moral concept wrong.' The objection to my argument now would be, that if I am right such an objection would not make sense. An objector of this sort would presumably be dismissed in the following way: 'As the moral concept is independent of the legal concept, and since lawyers are interested only in the legal concept, it does not matter what the content of the moral concept is.' In fact, however, such criticisms not only make sense, they are quite common.

I have two answers to this objection: first, moral criticism of the law is prevalent, and such criticism is possible regardless of whether a corresponding moral word appears in the law books of that country. Someone who believes the death penalty is immoral would continue to think so even if the Eight Amendment were abolished. It may be said that this response misunderstands the nature of the moral-legal objector's claim. She is a '*moral-legal* objector' exactly because she thinks her criticism is not based on a standard external to the law. (Of course, this is a point that only an inclusive positivist can make.) But whether our objector is a moral-legal objector or just a moral objector (or in other words, whether the moral-legal objector actually exists) is not something we can assume in advance, rather it would be the result of our inquiries after we found out that something like ILP is true. My second response is that as I stressed above, my view is not that CRUEL is unrelated to *cruel*. Both law and morality are relevant to practical reasoning, so it would indeed be surprising if the understanding of moral concepts would not affect the understanding of legal concepts. But it is doubly mistaken to be overly influenced by the fact that the word 'cruel' denotes both a legal concept and moral concept. On the one hand it is a mistake to think that whenever a word that denotes a moral concept is used in the law the reference is to a distinct moral concept as it is understood (to the extent that it is) in moral philosophy. On the other hand, such a view may lead to the erroneous conclusion that the connection between law and morality is limited only to those cases in which a moral word is mentioned in the law.

(e) *Utopia*

Assume again that we discover the true requirements of morality tomorrow. Wouldn't it make sense to argue that even if we can say that the trial judge in 1850 did not refer to the moral concept, from now on

laws containing moral words would refer to moral concepts? I doubt if anyone who wishes to show the relevance of the ELP-ILP debate would make such an objection since even someone more optimistic than me about the possibility of ever discovering the correct morality, would probably agree that such discovery is not likely anywhere in the near future. However, for completeness's sake, let us examine this possibility. There are actually at least two different scenarios hiding here. The first is that once the correct morality is discovered it will be available for everyone and motivate everyone for action. Human society would then become more like a society of angels. (One difference: had angels existed, they would not have, presumably, suffered from weakness of the will; humans in the imagined hypothetical, presumably, still would.) In such unlikely circumstances some may wish to argue that laws would no longer be required. And of course, if that were the case, all debates about legal philosophy would become irrelevant. Some, however, have challenged this view and argued that even in such circumstances laws may still be required in order to co-ordinate among conflicting yet morally permissible activities.[18] Depending on the richness and detail of what is discovered the justification of laws will then be twofold. First, roughly that of efficiency: laws will only regulate the pursuit of permissible activities in order to ensure that conflicts do not end up with loss of resources (most broadly conceived). Second, collective goals for societies (or states etc.) will still require such determination. Presumably however in such cases laws will not include references to morality, since by assumption everyone knows and is motivated by the requirements of morality. The laws will be required for different ends.

The alternative case is one in which the requirements of morality are known but not to everyone. It is only in a case like this that the ELP-ILP question might arise. Here moral words would refer to moral concepts, but this is true only if all judges have access to the content of correct morality, whereas non-judges are not so privileged. But again, it is not clear what we can learn about *our* concept of law from such an unusual hypothetical: not only does it ask us to assume that the content

---

[18] That is Raz's view. See Joseph Raz, *Practical Reason and Norms* (2nd ed., 1999) at 159-60 (arguing that even a society of angels would require a legal system). A fuller treatment of the relationship between co-ordination and authority is found in Joseph Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153 at 1187-94.

of true morality becomes known, it makes the additional assumption that the content of morality known to judges cannot be known by anyone but them.

Perhaps I did not cover the whole range of possible utopias (for instance, the possibility that the content of morality is known to everyone but people are not always motivated by it), but the point of this section should by now be clear: if it makes any sense, the ELP-ILP debate would *perhaps* survive only in a social environment which is very different from ours and that we have little reason to think is likely to obtain in our world in the near future. I would therefore suggest leaving the debate for those utopian days. Once we get there, we will be much better equipped to see if and how to think about the ELP-ILP problem.

(f) *Thin and Thick Moral Concepts*

I have been challenged that while my argument is perhaps true about 'thin' moral concepts (like GOOD) it is not true of 'thick' moral concepts like CRUEL. While we may not be able to say what GOOD consists of, we can say about certain acts that they are CRUEL. So some moral words can refer to thick moral concepts and not to legal concepts.[19] The response can be made from two perspectives, one ethical and the other legal.

First, we need to look more closely at the distinction between thick and thin concepts. If thick concepts are derivative of the thin ones – this, I should stress, is not how Williams understand them – then this distinction is not helpful: our inability to know the content of the correct thin moral concept would 'infiltrate' to the thick concepts as well. The conclusion of Williams's complex argument different: he argues that we should reject the objectivist picture of ethics, and that we can maintain ethical knowledge of thick ethical concepts only to the extent that they are not part of what he calls the 'absolute conception' of the universe, that is to say as part of a non-perspectival worldview. As such concepts are no different from certain slang used in a certain school: 'in both cases it is a matter of belonging to a certain culture.'[20] This view is fully

---

[19] I owe this objection to Larry Solum. The distinction between thick and thin moral concepts comes from Bernard Williams, *Ethics and the Limits of Philosophy* (1985) at 129-30, 140-45.

[20] Ibid at 144. See also ibid at 147.

consistent with the view advanced here, because as such these concepts are not part of the true or correct morality, a notion which according to Williams cannot be attained. And in that case the problem of authority arises again: if such concepts can be known only to the extent that there is convergence about them, then the argument from authority, which is the basis for the argument to ELP falters.

The second response, from the legal point of view, should convince even those who disagree with Williams's conclusions. Notice, first, that my example was not about a thin moral concept: my example was about the moral word 'cruel'. If 'cruel' refers to CRUEL and we know the meaning of the latter, then how come there are debates about whether certain punishment (including capital punishment are cruel). More importantly, even in the context of such thick concepts there is nothing odd in saying, while CRUEL means one thing, *cruel* means another: the fact that capital punishment is mentioned in the American Constitution has been used as an argument to the effect that capital punishment does not constitute cruel and unusual punishment. Whether this argument is decisive or not is not the issue, but it definitely is a plausible argument. But if the word 'cruel' referred to the moral concept, that fact would not have been relevant. This again shows that judges are not trying to elucidate moral concepts, even when thick ethical concepts are concerned.

(g) *Dworkinian Anti-Positivism*

One may accept everything I have hitherto said and still counter: 'What you offer is not positivism, but, albeit in rudimentary form, the most powerful competing legal theory, namely Dworkin's interpretivism. If your argument is sound it not only shows the end of the ELP-ILP debate, but also the demise of the entire positivist theory of law.' But this is a mistake. It is not the existence of legal principles as part of the law that makes a particular theory anti-positivistic. Rather it is the relationship between legal principles and specific true propositions of law in Dworkin's theory that makes it anti-positivistic: 'propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.'[21] What makes

[21] Dworkin, above note 17 at 225.

Dworkin's view so unpalatable for a positivist is that he thinks that since true legal propositions are what follows from some moral-legal principles, it follows that the entire legal community may not know what the law is. In the same way that Dworkin thinks that the legal community before the American Civil War did not know that slavery is unconstitutional, it may well be that we are currently thoroughly ignorant of all the laws of all countries. But that this is an implausible conclusion is exactly what my argument tried to establish. Therefore, such an objection simply misunderstands what is at stake between positivists and Dworkin's view.

5. Implications for Legal Theory

In this final section I wish to address briefly some of the implications of my argument. The first question is whether and how it affects Raz's influential account of authority and its relevance to law. My argument against the ELP-ILP debate presupposes that at least until we know the content of correct morality, both sides to the ELP-ILP debate are mistaken. But it may seem that if this is true, then it is not just the ELP-ILP debate that is false, but also possibly Raz's account of the authority of law: arguably, Raz's argument from authority presupposes that the content of morality is somehow knowable *to us*. It seems to follow from NJT that law is justified if by following the requirements of the law we would better conform to the reasons that apply to us. But if no-one can know the content of the correct morality, then the authority of law can never be justified. Addressing this issue goes beyond the scope of this paper, and here, I can only make here two cursory points. The first is that even if the correct morality is unknown, it may still be possible to think of valid reasons for action that an agent may have, and that a state (and law) would be justified because we are more likely to conform with those reasons if we conform with the demands of the law; in such circumstances it is definitely possible that the authority of law would be vindicated. The second point is that, even if law's authority cannot be explained by reference to NJT, as I said above, there may be other justifications for authority in general or the authority of law.

A more decisive conclusion that emerges from this discussion is the importance of staying in touch with the actual practice of social phenomena when theorizing about (some of) them. One can always stipulate a definition of law, and then determine whether some

phenomena in our world fit one's definition or not. There is nothing that stops me from defining 'law' as limited to the acts of judges on Monday till Wednesday and to the acts of parliaments on Thursday and Friday. All other things that purport to be law, I would contend, are only superficially similar to law, but they are not 'really' law. But if we wish to explain concepts used by non-philosophers to describe social phenomena, we must keep an eye at the way the lay term is used. All this may sound trivial, but I believe both sides to the ELP-ILP debate failed to pay enough attention to the way law is actually practised in such cases. True, moral words often appear in legal discourse, but does it does not follow that by using those words participants actually refer to moral concepts. I hope I succeeded in showing that from looking at legal practice we can see that they are not.

Finally, I wish to advance another more cautious conclusion. One mistake to which I drew attention is partly the result of an interesting development in the history of philosophy: the claim usually associated (rightly or wrongly) with positivism is that there is no necessary connection between law and morality. Phrased in such sweeping language many positivists, even exclusive positivists, would deny it. But even in weaker form (like the sources thesis) it is usually phrased with the modal word 'necessary', and then some sort of necessary connection between law and morality is then affirmed or denied. Describing positivism in this way has a long history. On the other hand, only more recently, there have been considerable developments in the understanding of necessity claims in terms of truth in all possible worlds. The spirit if not the language of these discussions permeated to other philosophical debates, jurisprudence included. But while these ideas are helpful in understanding the relations between the epistemic concepts of *a priority* and *a posteriority* and the metaphysical concepts of necessity and contingency, I am less sure to what extent the application of these ideas to legal philosophy is fruitful. I doubt if there is anything that we can know about the law *a priori* (even granting that there are things that can be known *a priori*), and there is more work to be done in order to understand what 'necessity' means in jurisprudential contexts and to what extent, if at all, it is useful there. I am cautious here, because these are difficult issues which were only tangentially discussed in this paper, but I think the fact that not enough attention was given to them is part of the reason why the ELP-ILP debate has been with us for so long.