Note: The chapter below is from my forthcoming monograph: *The Principle of Legality: A Moral Theory* (OUP 2025). This version is an uncorrected proof. Please do not circulate further.

This book develops a non-positivist theory of the principle of legality, but how exactly should one understand non-positivism? This chapter engages with contemporary debates within non-positivist general jurisprudence, in order to clarify some important misconceptions and articulate the core tenets that unite different versions of non-positivism. The chapter argues that non-positivism consists in the rejection of the idea that jurisprudence should be concerned with conceptual questions about the 'nature' of law. Non-positivist accounts deal in first-order moral arguments about legal practice. They view law as a 'domain' of morality and offer accounts of the way in which morality bears on certain institutional actions (the enactment of statutes, judicial decisions, etc) in the generation of legal obligations, which are understood as genuine moral obligations. The chapter then considers several alternative ways of articulating non-positivism, each of which, it is argued, is liable to mislead in important ways. This includes framing non-positivism around the claim that the law 'contains' principles as well as rules, the distinction between 'one-system' and 'two-systems' views of law and morality, and the claim that non-positivism takes an 'eliminativist' approach to general jurisprudence.

non-positivism; interpretivism; Ronald Dworkin; Mark Greenberg; Scott Hershovitz; Hillary Nye; Nicos Stavropoulos; eliminativism; one-system view; two-systems view

C5

5

What Is Non-Positivism?

C5S1

1 Introduction

C5P1

When a philosophical theory has been around long enough, has splintered and gone off in different directions, and has developed in response to challenges posed to it, it can be helpful to take stock, try to clear some ground, and articulate the core tenets that unite the different variations of the theory. John Gardner notably undertook this sort of task with legal positivism, and jurisprudential debate was the better for it.[1] Non-positivism is arguably more in need of housekeeping now than positivism was when Gardner's essay was published.[2] There are a few reasons for this.

C5P2

First, consider the label. Non-positivism, or anti-positivism, as the labels suggest, developed in response to positivism. Non-positivism, however, consists of more than the refutation of positivism. An unfortunate label, then, but that's not a big

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[1] J Gardner, 'Legal Positivism: 5½ Myths' in *Law as a Leap of Faith* (OUP 2012).

[2] For the avoidance of doubt, I am not talking here about natural law theories such as those of J Finnis in *Natural Law and Natural Rights* (Clarendon Press 1980). When I refer to non-positivism, I mean the 'interpretivism' of Dworkin and others who build on his work, such as Scott Hershovitz, Mark Greenberg, and Nicos Stavropoulos.

problem in and of itself. What is a problem, however, is that there is a tendency to frame non-positivism in analytical terms more familiar to positivism. In doing so, we can miss the deeper point that non-positivism seeks to make. For example, in section 3, I consider Dworkin's initial critique of Hart's theory, and the early tendency to view this critique as resting on the claim that the law contains not just rules but principles. This is not the best way of framing Dworkin's theory. In fact, it is a framing that only makes sense if we accept the very positivist approach that Dworkin rejects.

C5P3 How about if we drop 'non-positivism'? There are other labels we could use. 'Interpretivism' is the most obvious candidate.[3] This gives rise to problems of its own. Despite the centrality of the notion of interpretation in Dworkin's work, one could accept many of Dworkin's jurisprudential insights without subscribing to his wider view of moral reasoning as part of a broader genus of interpretation that includes, for example, literary or artistic interpretation.[4] Moreover, there are other versions of non-positivism that share important philosophical characteristics with Dworkin's theory, but that do not share these broader views about interpretation.

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[3] N Stavropoulos, 'Legal Interpretivism' (2021) *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/law-interpretivist/> accessed 27 January 2025.

[4] This moral theory is developed most fully in R Dworkin, *Justice for Hedgehogs* (Harvard UP 2013).

C5P4 Another reason why it would be helpful to clear some ground in non-positivism is that in recent years, prominent non-positivist theories have been put forward as alternatives to Dworkin's, but it is not always entirely clear how these theories relate to one another.[5] A recent distinction has been drawn between 'one-system' and 'two-systems' approaches to law and morality, but dispute has arisen about where different non-positivist theories fit into each of these frameworks.[6] In section 5, I try to cut through this debate.

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[5] There is another reason why the 'interpretivism' label creates problems. Some of these theories do not rely on the same analytical tools as Dworkin did and it would seem odd to categorise them as 'interpretivist' theories. Indeed, Greenberg explicitly points to this as a distinction between his theory and Dworkin's. M Greenberg, 'The Moral Impact Theory of Law' (2014) 123 Yale Law Journal 1288, 1301–02. Equally, however, if we focus too much on the notion of interpretation in the 'earlier' non-positivism, we might miss the ways in which these theories are continuous and, therefore, mask the ways in which the theories can engage with one another.

[6] The labels are from Dworkin (n 4) 402, and are sometimes used to draw a distinction between Dworkin's earlier work and the work of contemporary non-positivists like Greenberg and Hershovitz.

C5P5 A final complication arises as a result of the emergence of a strand of theory advocating an 'eliminativist' approach to legal philosophy.[7] According to eliminativists, legal theory can proceed without a 'doctrinal' concept of law, or without questions about the 'nature' of law. Again, confusion potentially arises because it is not always clear how eliminativism relates to non-positivism. Eliminativism is generally put forward as a methodological approach that is neutral as between different theories of general jurisprudence. On closer examination, however, it looks much more like eliminativism is a theoretical consequence of non-positivism. I try to clear this up in section 6.

C5P6 This chapter will necessarily be somewhat exegetical. In the rest of this book, I defend a particular version of non-positivism against critiques and then deploy that theory to analyse the principle of legality in public law adjudication. I argue that several well-established tenets of public law theory tenets—parliamentary sovereignty and the rule of law, for example—are typically analysed in implicitly positivist terms, and that these doctrines look very different when viewed through a non-positivist lens. I want to be as clear as possible, therefore, about what it means to approach legal theory from a non-positivist perspective.

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[7] L Kornhauser, 'Doing without the Concept of Law' (2015) NYU School of Law, Public Law Research Paper No 15-33; H Nye, 'Does Law "Exist"? Eliminativism in Legal Philosophy' (2022) 15(1) Washington University Jurisprudence Review 29.

C5S2 ## 2 What the Debate Is Really About: Conceptual Analysis vs First-Order Moral Theory

C5P7 Scott Shapiro distinguishes between two approaches to jurisprudence: normative and analytical.[8] The former, he says, is concerned with articulating the moral underpinnings of law, while the latter is concerned with metaphysical questions about 'the nature of law and legal entities'.[9] These metaphysical questions, Shapiro says, are the questions that general jurisprudence is concerned with. One of the primary tools that the legal theorist uses in this endeavour, he goes on to say, is conceptual analysis.[10]

C5P8 In this chapter, I want to suggest that the core of non-positivism consists precisely in the rejection of the idea that jurisprudence should be concerned with conceptual questions about the 'nature' of law. Non-positivism approaches law by inquiring into particular moral differences made by certain political actions, such as the enactment of statutes or judicial decisions. It does not seek to offer a conceptual account of our 'shared understanding' of law. This is what distinguishes non-positivism from positivism, and it is why the theory of the principle of legality developed later in this book is a *moral theory* of that principle. When we begin from a non-positivist starting point, there is no other kind of theory to give.

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[8] S Shapiro, *Legality* (Harvard UP 2011) 2.

[9] ibid 3.

[10] ibid 13.

C5P9 Let me explain that in a bit of detail. Below, I will refer to the positivist approach as 'conceptual' and the non-positivist one as a 'first-order moral' approach. It is worth noting, however, that these labels are themselves imperfect. Positivism involves normative analysis, since the key insight of contemporary positivism is that law is a *normative* practice. The non-positivist approach, inasmuch as it seeks to make evaluative claims about a practice, needs some agreed-upon idea of what the practice being evaluated is. So, positivism is a partly normative enterprise, and non-positivism relies to some extent on the attitudes and beliefs of participants in a practice. Nonetheless, there is a meaningful and useful distinction to be drawn between the two approaches.

C5S3 ## 2.1 Legal Positivism: Jurisprudence as Conceptual Analysis

C5P10 Positivism, since at least HLA Hart's *The Concept of Law*, has sought to advance beyond the search for a classificatory definition of law, of the kind that earlier positivists like Bentham and Austin developed.[11] Instead, Hart aimed to uncover deep truths about our shared understanding of law:

[11] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012). For an analysis of the development of Hart's conceptual approach from Bentham's earlier analytic technique, as well as the influence of JL Austin's speech-act theory on Hart's method, see G Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (Springer 2011) 265–67.

C5P11 Plainly, the best course is to defer giving any answer to the query ‘What is law’ until we have found out what it is about law that has in fact puzzled those who have asked or attempted to answer it, even though their familiarity with the law and their ability to recognize examples are beyond question.[12]

C5P12 By setting aside the question ‘what is law?’ in favour of the other ‘persistent questions’ about law identified in the first chapter of *The Concept of Law*, Hart hoped to uncover these truths about the social phenomenon.

C5P13 This is not an entirely non-normative enterprise. One of Hart’s most important contributions to jurisprudence was his recognition that law is a fundamentally *normative* phenomenon, and that any theory of law must take account of this.[13] He thus seeks to build a theory that explains the normativity of law from the internal perspective of participants in the practice. The picture of law that Hart goes on to offer—that of a system of primary and secondary rules whose institutional validity depends on a rule of recognition, a rule whose own existence depends on the practices and attitudes of legal officials—is the result of his application of this methodological approach.

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[12] Hart (n 11) 5.

[13] ibid 89–90; G Postema, ‘Jurisprudence as Practical Philosophy’ (1998) 4 Legal Theory 329, 332–35.

C5P14 Raz refines this approach, articulating it more explicitly as a form of conceptual analysis.[14] Like Hart, he encourages us to move away from the definitional approach that characterised theories like Austin's.[15] Concepts, Raz says, 'are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other'.[16] In order to access a concept, we must give an account of the conditions under which it could be said that one has mastered the concept.[17] What a theory of law should expound, then, are those universal properties without which law would not be law, and which, taken together, are sufficient to guarantee that the object in view is law.

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[14] Postema points to important differences between the two. Postema (n 11) 351–52. Raz, for instance, is clearer that the theorist must sometimes reconstruct the views of participants in the practice, rather than merely report those views. Raz's approach is perhaps conceptual in a more thoroughgoing way than Hart's. Hart generally described his approach as 'descriptive' or 'explanatory'. Nevertheless, the approaches are substantively similar enough that we can usefully group them together to contrast them with the non-positivist approach.

[15] J Raz, *Ethics in the Public Domain* (OUP 1994) 196–97.

[16] J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 19.

[17] ibid 20.

C5P15 As with Hart, this is not an entirely non-normative enterprise (though it is partly normative in a different way to Hart's theory). Legal philosophy, Raz says, sits under the broader domain of 'practical' philosophy; the branch of philosophy concerned with the reasons that we have for action, and which 'includes both a substantive or "evaluative" part and a formal part concerned with conceptual analysis'.[18] Law, on this account, purports to provide moral reasons to those subject to it. Because of this, if we wish to understand the nature of law, then we must give an account of how law could have moral force in the way it claims. While positivism maintains a distinction between law and morality, then, *the theorist*, for Raz, must approach conceptual analysis of law as a partly evaluative task.

C5P16 This all sounds rather abstract, but it becomes clearer when we look at the rest of Raz's theory. On this view, law is best understood as a system of norms created through authoritative directives. Law, Raz tells us, claims authority to guide our conduct.[19] On this view, it is part of our shared understanding of legal practice that legal institutions claim authority to create norms through acts of communication. These norms are part of the 'legal' set.[20] Legal obligations, it follows, are not genuine

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[18] J Raz, *Practical Reason and Norms* (new edn, OUP 1999) 10.

[19] J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1989) ch 2.

[20] Raz (n 18) ch 4.

moral obligations, but obligations internal to a particular, legal domain of normativity. For Raz, they are the obligations that we have from the 'legal point of view'.[21]

C5P17 This whole picture is part of a conceptual claim about our shared understanding of law. In order to make sense of this claim, however, Raz needs an account of the conditions under which law's claim to legitimate authority would be true. He duly furnishes us with such an account: law is actually possessed of legitimate authority just in case we better comply with reasons that apply to us by obeying law's directives rather than by trying to follow those reasons directly.[22] This latter part of the theory is necessarily evaluative, but it does not follow that any legal system is in fact possessed of such authority. The evaluative dimension of the theory is necessary only to flesh out the conceptual claim that law claims authority to morally guide us.

C5P18 I will not engage in a full analysis of the traditional positivist picture here. I have argued earlier in the book that such a picture cannot vindicate intentionalist accounts of the principle of legality. This is mainly a problem for intentionalist accounts, rather than for positivism. What I want to highlight here, however, is that the various elements of the positivist picture—legal validity, law as a system of norms, Hart's rule of recognition, the idea that law claims authority, and the idea that legal obligations are obligations that we have 'from the legal point of view'—depends

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[21] ibid 170–77. See also Shapiro (n 8) 186–88.

[22] J Raz, *The Morality of Freedom* (OUP 1986) 53.

in the first instance on the particular mode of conceptual analysis favoured by positivism. This picture is a claim about our *shared understanding* of what legal practice is. It rests, therefore, on an important background claim: that 'shared understanding' of this kind is what jurisprudence should be interested in, and that conceptual analysis is how we access it.

C5P19 I highlight the connection between these tools and the conceptual method to make the following point: these are not jurisprudentially neutral tools that any theory of law must use. A theory of law that begins from a different methodological starting point should be free to discount these tools. This is important for the purposes of this book, because these tools tend to feature heavily in public law analysis. It is said, for example, that the *validity of legal norms* under the UK constitution depends on legislative enactment. It follows that cases that seem to cast doubt on this, such as some of the cases outlined in Chapter 2, are analysed in these terms as well. When judges interpret a statute in a way that seems to depart from legislative intention, it is asked whether the rule of recognition in the UK is changing.[23] But a theory of public law that rejects the conceptual approach from the outset can also reject notions like legal validity, since the idea of law as a system of norms follows from a claim about our shared understanding of what law is. I will draw this out in greater depth in

[23] A Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31(1) OJLS 61.

subsequent chapters. First, it is necessary to say something about how exactly the non-positivist approach differs from the positivist one.

C5S4 ## 2.2 Non-Positivism: Jurisprudence as First-Order Moral Theory

C5P20 If we view non-positivism as a conceptual theory, as engaging in the same kind of enterprise as positivism, a great deal of confusion is liable to arise. Non-positivist accounts deal in first-order moral arguments about legal practice. They view law as a 'domain' of morality and offer accounts of the way in which morality bears on certain institutional actions (the enactment of statutes or judicial decisions) in the generation of legal obligations, which are understood as genuine moral obligations. Non-positivism approaches law in this way by inquiring into the moral difference made by certain political actions. Legal obligations, on this view, are a subset of our genuine moral obligations.

C5P21 To bring out this distinction between conceptual and moral approaches to legal theory, it might be useful to first illustrate how we can use these approaches to analyse other aspects of social life. Nicos Stavropoulos helpfully illustrates how each approach can be used to theorise the practice of promising.[24]

C5P22 One way that we can approach this practice is by offering a conceptual account of our shared understanding of promising. Unsurprisingly, this is the

[24] N Stavropoulos, 'Obligations, Interpretivism and the Legal Point of View' in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

approach that Raz takes to the philosophy of promising.[25] According to him, one who promises undertakes to bind himself to undertake or forego from undertaking some action, by conveying an intention to so act. This is the conceptual account that describes our shared understanding of what a promise is. It follows that we can work out the content of our promissory obligation by consulting the intention we had, the intention we conveyed, the expectations to which we give rise, etc.

C5P23 Again, there is an evaluative dimension to this analysis. It must be able to explain the conditions under which people would actually succeed in creating obligations in the way described. The explanation that Raz offers is that we have an interest in being able to bind ourselves through the exercise of a normative power in this way: the power to promise 'expands people's ability to fashion their lives, or aspects of their lives, by their actions'.[26] Promising facilitates cooperation, trust, etc, and this grounds the normative power to bind ourselves through communicating an intention to be so bound.

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[25] J Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 79–102; J Raz, 'Promises and Obligations' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press 1977).

[26] J Raz, 'Is There a Reason to Keep a Promise?' in G Klass, G Letsas and P Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2015) 61.

C5P24 There is a different way of thinking about promising. Rather than seeking a conceptual account of the practice of promising, we can instead start by looking at certain practices and asking what difference they make to our moral profile. In order to do this, we will need to start with a moral explanation of why those practices are relevant. Stavropoulos points to Scanlon's account of promising as one that takes this approach.[27] According to Scanlon, principles concerning the wrongness of deceiving others make it the case that the action of inducing expectations through certain conventional linguistic formulations generates obligations.[28] Once we have an account of the moral principles that make the practice relevant to our moral profile, we can from there determine what counts as a promise, when promises are genuinely binding, etc. What is important here is that Scanlon does not start with any conceptual account of promising as a social phenomenon. Scanlon is not attempting to reconstruct the understanding of people who make promises about what they are doing. Instead, it is the moral explanation that tells us *what counts as a promise*. Scanlon identifies a morally distinct subset of our moral profile: the obligations concerned with the wrong in deceiving people through using particular conventional linguistic formulations.

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[27] Stavropoulos (n 24) 81–82.

[28] TM Scanlon, *What We Owe to Each Other* (Harvard UP 1998) 296. This principle is drawn from Scanlon's broader account of interpersonal morality, which holds, roughly, that interpersonal morality is structured by principles that one could not reasonably reject.

This account of the moral underpinnings of promises furnishes us with the tools to work out what obligations we are under when we use such conventional linguistic formulations in various contexts and circumstances.

C5P25 Perhaps one might object at this point that this sort of normative analysis still requires a preceding conceptual account of what a promise is. If we are asking about the normative effects of a particular practice, don't we need to know what that practice is? Not really. What a theory like Scanlon's is interested in is the way in which morality makes certain conventional practices relevant; in this case, using certain words, making someone believe you will do something, etc. We cannot understand *what a promise is*, on this view, without engaging in first-order moral theory. For example: there is a subset of morality concerned with the wrongness of deceiving people after you have made them believe you will do something, and the principles that govern this domain make particular kinds of conventional linguistic formulations morally relevant. From this, we get 'promising'. The label here follows the moral analysis, not the other way around. This priority is important to bear in mind. I will expand on it at greater length in the next chapter, when I defend this sort of moralised approach to legal theory. One might still, for other reasons, reject this kind of moralised approach. But the objection that a preceding conceptual analysis is needed does not seem to me to have any bite.

C5P26 This first-order moral approach is how non-positivism approaches jurisprudence. It takes as its starting point the idea that past institutional practice (this might mean the enactment of statutes, judicial decisions, etc.) has some bearing on

our moral rights and obligations. Non-positivist theories seek to explain what is morally relevant about this past institutional practice, and exactly what bearing it has on our rights and obligations. On the Dworkinian account, these past institutional practices are made relevant by a special moral concern: the demand that force is regulated in a morally acceptable way.[29] I will have more to say about this view, which I adopt, defend, and deploy to analyse the principle of legality, later in the book. For now, what I want to emphasise is the difference in methodological approach. We are no longer in the realm of conceptual analysis. Instead, we are approaching law from the perspective of moral philosophy. We are asking questions about the moral value of legal practice. Our answer to this question will help us to work out how and why certain practices (like statute enactment) are relevant to our moral profile, and will help us to work out what precise moral impact these actions have. This is all rather abstract. It will become more concrete in subsequent chapters. For now, the important point is this: non-positivism does not just reject positivism's conceptual picture of law; it rejects the whole idea of *giving* a conceptual picture of law.

C5S5

3 What the Debate Is Not (Really) About, Pt I Rules and Principles

C5P27

It might strike some as odd that, in setting out what I take to be the major theoretical dispute between positivism and non-positivism, I have said very little about the ideas

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[29] R Dworkin, *Law's Empire* (Harvard UP 1986); N Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22(3) Ratio Juris 339.

of rules and principles. For a while, the Hart–Dworkin debate tended to be articulated in something like the following terms: one side believes that the law contains only rules, while the other side believes that the law contains both rules and moral principles.[30] Or, less crudely: one side believes that the validity of a legal norm depends only on its sources, while the other believes that the validity of a legal norm can depend on its merits.[31] It will be helpful to clarify the ways in which this framing is inaccurate. In the rest of the book, I do not wish to be understood as claiming that the law of the United Kingdom contains both moral principles and other, non-moral standards validated by legislative enactment. That would be a crude caricature of non-positivism and would give rise to unhelpful arguments.

C5P28

It is not difficult to see where this framing comes from. In *The Concept of Law*, Hart articulated his theory of law as the union of primary and secondary rules. In Dworkin's first major argument against positivism, in 'The Model of Rules I', he argued that judges, when deciding cases, do not just rely on legal rules, but rather also draw on moral principles such as, famously, the principle that no one may profit from

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[30] See for example T Kearns, 'Rules, Principles, and the Law' (1973) 18 American Journal of Jurisprudence 114, 115; D Brink, 'Legal Interpretation and Morality' in B Leiter (ed), *Objectivity in Law and Morals* (CUP 2001) 20.

[31] Gardner (n 1) 21.

their own wrong.[32] This posed a challenge to Hart's theory, which held that the validity of legal norms depended only on their satisfying criteria set out in the rule of recognition. What Dworkin highlighted was not just that judges seemed to rely on moral principles in adjudication, but that they acted as though they were *applying the law* when doing so.[33]

C5P29 One way that we can think of this argument is as a challenge to the conceptual picture put forward by Hart. In this version, the argument would be that it is part of our shared understanding of the concept of law that the law contains not just rules but principles. The debate would then turn on which account of our shared understanding of the practice is the more convincing one.

C5P30 In the early days of the Hart–Dworkin debate, this seemed to be the version of the argument that positivists responded to. Inclusive positivists concede that the principles on which judges rely are part of the law, but they argue that they only obtain legal status when validated by a rule of recognition.[34] Exclusive positivists argued that the moral standards on which judges rely cannot count as legal, since this

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[32] Collected in R Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22–28. Originally published as R Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14.

[33] ibid 28–31.

[34] J Coleman, 'Negative and Positive Positivism' (1982) 11 Journal of Legal Studies 139; Hart (n 11) 263–68.

would undermine the authoritative nature of legal directives.[35] When judges do rely on principles, it is because determinative standards have run out, and they must reach for extralegal standards in much the same way that they must occasionally consult legal standards from other jurisdictions.[36]

C5P31 I don't want to say much about the debate between inclusive and exclusive positivists. Instead, I want to draw attention to an assumption shared by both camps in their respective responses to Dworkin. Inclusive positivists respond by acknowledging that it is part of our shared understanding that there can be moral tests of legal validity. Exclusive positivists deny that this is so. Both sides view 'The Model of Rules I' as a challenge to a specific conceptual picture of law, that of a system of norms whose validity depends on their source alone. This is an understandable, perhaps natural reading, given Dworkin's framing in that essay, and given that we did not yet have his own mature legal theory to contextualise his argument. There is, however, another way of reading the argument, one that poses a deeper challenge to positivism and paves the way for a more distinct alternative theory.

C5P32 We can think of Dworkin's argument as a challenge not to Hart's conceptual picture, but to his conceptual approach. Dworkin's point in 'The Model of Rules I' is that when litigants go to court, they make arguments about what outcome they are entitled to by relying on moral arguments. Judges, when they rely on principles to

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[35] Raz (n 19) 45–52; S Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469.

[36] Raz (n 19) ch 4.

resolve these arguments about who is entitled to what, claim that they are deciding the case before them on the basis of what the law *is*, rather than changing the law to better conform with moral principle. The point here is not just that 'the law' contains moral standards as well as non-moral ones. It is that there is no settled body of norms called 'the law' that we can appeal to at all. We only ever work out what we are entitled to in court by engaging in moral reasoning.

C5P33 On this version of the argument, both the inclusive and exclusive positivist responses miss the point. They respond to the claim that the law—understood as a system of norms—contains principles. The inclusive positivist concedes the point, but says that they are only legal when validated by a source. The exclusive positivist denies the point and says that they are non-legal standards. But the non-positivist challenge can be understood as a deeper one. Judges appeal to principles, when they decide cases, in an effort to interpret the moral impact of past institutional decisions. They are not trying to access and apply some distinct body of legal norms. The question of what we are entitled to in court is a first-order moral question.[37] Jurisprudence, Dworkin thinks, should be approached in the same way, as a normative discipline.

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[37] For a recent non-positivist theory that uses this insight as its lynchpin, see S Hershovitz, *Law Is a Moral Practice* (Harvard UP 2023).

C5P34 This becomes clearer in two subsequent essays: ‘The Model of Rules II’ and particularly ‘Hard Cases’.[38] In the former, Dworkin shifts his focus to the controversial nature of adjudication in order to critique Hart’s notion of the rule of recognition. Since the rule of recognition requires action of the legal officials that apply it, we are owed some explanation of the rule’s normativity. In *The Concept of Law*, Hart set out his practice theory of social rules, according to which, the existence of a practice and a convergent attitude towards that practice among its practitioners is enough to ground an obligation.[39]

C5P35 Dworkin first sought to clarify his target by arguing that, by the lights of the practice theory, the obligations that obtain in virtue of a social rule must be *conventional* in nature.[40] This means, roughly speaking, that we have an obligation to follow a social rule because others follow it and believe it should be followed. The problem with this theory, according to Dworkin, is that the obligation to obey a rule

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[38] Both are collected in Dworkin (n 32). ‘The Model of Rules II’ was originally published as R Dworkin, ‘Social Rules and Legal Theory’ (1972) 81 Yale Law Journal 855. ‘Hard Cases’ was originally published as R Dworkin, ‘Hard Cases’ (1975) 88 Harvard Law Review 1057.

[39] Hart (n 11) 85–87.

[40] Dworkin (n 32) 53. Hart accepted this framing in the posthumously published postscript to *The Concept of Law* (n 11) 255–56.

cannot be conventional, because people disagree about the content of such rules.[41] If people disagree about the content of a convention, then there is no convention to speak of. The rule of recognition, therefore, cannot do the work it was introduced to do, namely, capture the normative foundations of law in a way that earlier command theories did not. Again, this dialectical turn provoked different kinds of responses.[42] Rather than assess the strength of these counterarguments, I want to consider Dworkin's own explanation for the controversy in adjudication.

C5P36 This explanation is fairly simple. In 'Hard Cases', Dworkin puts forward the view that 'the right to win a law suit is a genuine political right' which judges are required to enforce.[43] When we go to court, Dworkin argues, we claim to be morally entitled to the institutional enforcement of particular rights and obligations. He seeks to answer the question of how it is that such rights can depend on past institutional decisions.[44] I consider Dworkin's answer to this question, developed fully in *Law's*

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[41] Dworkin (n 32) 54.

[42] These are helpfully collated in Postema (n 11) 413–15. One influential line of responses aims to show that people who accept the same rule can disagree about its application. Coleman (n 34) 156–57, later endorsed by Hart in the postscript (n 8) 258–59.

[43] Dworkin (n 32) 89.

[44] ibid 86–87. This is the question that is at the heart of Dworkin's mature theory of law. Any theory of general jurisprudence, he argues, should attempt to give a moral

Empire, in the next chapter. For now, just note that this development in Dworkin's argument helps explain why controversy in adjudication is pervasive. Put simply, controversy and disagreement exist in adjudication because adjudication is a form of moral argument, and reasonable people can disagree about morality's demands.

C5P37 This appeal to controversy in adjudication helps contextualise the older argument about principles. The point, once again, is not just that the law contains principles, the content of which can be the subject of disagreement, as well as rules. Dworkin's theory begins from an entirely different starting point, one that rejects both the conceptual picture of the model of rules and the conceptual methodology underpinning it. This view underpins the critiques of positivism in both 'Model of Rules' essays and begins to emerge as its own fully fledged theory in 'Hard Cases'. The core of the idea is that law is a moral phenomenon that can only ever be approached through first-order moral reasoning.

C5S6 ## 4 What the Debate Is Not (Really) About, Pt II: Interpretation

C5P38 This section's title might be the most surprising of all to some readers. At the beginning of *Law's Empire*, Dworkin's theory takes what looks like another turn, when he argues that law must be understood as an 'interpretive' concept.[45] The theory in *Law's Empire* serves as the jurisprudential foundation for the theory of the

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explanation for how past institutional practice constrains the deployment of force. Dworkin (n 29) 93.

[45] Dworkin (n 29) ch 2.

principle of legality developed in this book. I have no problem with this being called an 'interpretivist' theory, but we must be careful about what work the idea of 'interpretation' is doing in the theory. I believe that one can accept the version of Dworkin's view as law as integrity developed in the next chapter of this book even if one does not wish to commit to some of Dworkin's broader views about the nature of interpretation as a wider phenomenon.[46]

C5P39

After developing the argument about controversy in adjudication begun in 'The Model of Rules II', Dworkin points to the phenomenon of adjudicative disagreements about the 'grounds of law'.[47] These 'theoretical disagreements'—disagreements about what makes a proposition of law true—pose a problem for positivism. This is because positivism asserts that the existence of a proposition of law is a matter of 'plain historical fact', the sort of thing on which we cannot sensibly disagree.[48] Positivism, Dworkin says, must be understood as a 'semantic theory', one that seeks to explicate criteria for the correct use of the word 'law'.[49] The grounds of

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[46] See R Dworkin, 'How Law Is Like Literature' in *A Matter of Principle* (Harvard UP 1985). For a critique of this aspect of Dworkin's theory, see S Shpall, 'Dworkin's Literary Analogy' in D Plunkett, S Shapiro and K Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019).

[47] Dworkin (n 29) ch 1.

[48] ibid 31.

[49] ibid 32.

law, on such a view, are fixed by shared semantic rules for the correct use of the concept. But plainly, judicial disagreements of the kind Dworkin points to cannot be characterised as disagreements about the correct application of semantic rules.

C5P40 Instead, Dworkin argues that law is an 'interpretive' concept. We engage with social practices like law through the process of 'constructive interpretation', which 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'.[50] Theoretical disagreements are easily explained on this view as evaluative disagreements about law.

C5P41 The picture that emerges from the first three chapters of *Law's Empire*, then, is this: the positivist view of law as a 'semantic' concept cannot explain theoretical disagreements in adjudication, while Dworkin's own view of law as an 'interpretivist' concept can readily account for such disagreements. The point that I would like to make in this section is that we do not need to worry very much about each of these labels. Each might be helpful in its own way, but we should not let either distract us from the heart of the debate, which turns on whether jurisprudence is best approached as a conceptual or a normative enterprise.

C5P42 Much of the positivist response to *Law's Empire* focused, understandably, on whether Hart's theory is properly characterised as a 'semantic' one, and therefore

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[50] ibid 52.

whether it is vulnerable to Dworkin's critique.[51] Postema argues that what Dworkin's 'semantic sting' really attacks is not any reliance on criterial semantics, but rather the conventionalist account of law with which he first took issue in 'The Model of Rules II'.[52] The point is that the 'grounds of law'—the more basic facts in virtue of which propositions of law are true—are shown by theoretical disagreements to be the subject of pervasive controversy. What this means is that the grounds of law cannot be a matter of the shared practice and attitudes of legal officials, because there is no consensus among officials as to what these grounds are.

C5P43 This motivates the idea that law is an 'interpretive' concept, one that requires us to make evaluative claims about the moral significance of legal practice in order to determine the moral impact of particular events in the world, events like the enactment of legislation and past judicial decisions. Dworkin points to an adjudicative phenomenon—theoretical disagreements—to draw this claim out, but his theory is about philosophical jurisprudence as much as it is about judging. As Postema puts it:

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[51] Positivists consistently deny this point. As outlined above, the move away from 'definitional' theories of law is precisely the advance that Hart and Raz thought they were making on Bentham and Austin. For general discussion of this part of the debate, see Postema (n 11) 417.

[52] ibid 418.

C5P44 [Dworkin] challenged outright the scaffolding of distinctions contemporary analytic jurisprudence used to construct its positivist theory of law, among them the distinction between legal theory and ordinary legal argument and, in particular, between neutral analytic jurisprudence and engaged moral inquiry and argument. He argued that the positivists' quest for a disengaged, morally neutral, 'observer's' theory of the nature of law is a fool's errand; philosophical jurisprudence is inevitably engaged and *normative*.[53]

C5P45 The notion of constructive interpretation, the different stages of such interpretation, the demands of fit and justification, are all analytical devices that are supposed to capture the way we engage with law; namely, as a moral phenomenon accessible only through first-order moral reasoning and argument.

C5P46 For Dworkin, this kind of reasoning belongs to a wider category of interpretation, which includes literary and artistic interpretation. These categories, he argues, 'share important features that make it appropriate to treat interpretation as one of two great domains of intellectual activity, standing as a full partner beside science in an embracing dualism of understanding'.[54] Morality is one such domain of the interpretive: 'The epistemology of a morally responsible person is interpretive',[55] and

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[53] ibid 415–16.

[54] Dworkin (n 4).

[55] ibid 101.

'moral reasoning is best understood as the interpretation of moral concepts'.[56] Law, as a domain of morality, is also an interpretive concept, and so legal concepts are both moral and interpretive. To understand statute-making, for instance, we might put forward a theory of democratic self-government explaining the value of that practice, and this evaluative explanation will allow us to make particular claims about the impact of statute-making on our rights and obligations in particular cases.

C5P47 Can we accept the claim that jurisprudence can only be approached in an evaluative manner without viewing moral reasoning as part of a broader genus of interpretation? I think we can. Legal practice, for non-positivism, is analysed through moral reasoning, whether that reasoning is put in terms of 'constructive interpretation' or not. I see no reason why one could not have a different view of the structure of morality while holding that legal practice is the sort of thing that can only be meaningfully analysed through first-order moral reasoning.

C5S7 5 What the Debate Is Not (Really) About, Pt III: One-System vs Two-Systems

C5P48 In recent years, some scholars have sought to clarify the claims that non-positivism makes about the connection between law and morality. According to this line of thought, contemporary non-positivism is defined by a 'one-system' view of law and morality, according to which legal obligations are a subset of our genuine moral obligations. This marks a distinction, it is sometimes argued, from the earlier version

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[56] ibid 102.

of non-positivism put forward by Dworkin, which were tacitly committed to a 'two-systems' view of law and morality.

C5P49 When we pay attention to the core of non-positivism as articulated above, it becomes clear these kinds of arguments mischaracterise the 'earlier' non-positivist theories. It would be a mischaracterisation of Dworkin's earlier work, for instance, to think that it laboured under a 'two-systems' view. This does not mean that the scholars canvassed here do not make advances on Dworkin's theory. Part of my motivation for trying to show that these theories can be understood under a single theoretical framework is to clarify the ways in which non-positivist theories can engage with one another and avoid arguing past one another.

C5P50 My purpose here, however, is not only exegetical. In this next chapter, I consider important critiques of contemporary non-positivism. Part of my defence of non-positivism is that these critiques rest on precisely the misunderstanding that I have sought to highlight in the rest of this chapter. That is, they proceed on the assumption that non-positivism offers a conceptual theory of law. If we separate contemporary 'one-system' views from the rest of non-positivism, it is easy to make such a mistake. When we see, however, that the 'one-system' picture is simply a way of redescribing the view of law that has *always followed from* non-positivism's methodologically normative starting point, such critiques lose their bite. It is important, then, that we clear this ground early on.

C5P51 The distinction between ‘one-system’ and ‘two-systems’ views of law and morality was introduced by Dworkin himself in *Justice for Hedgehogs*.[57] Put simply, on a two-systems view, law and morality are different normative domains, while on the one-system view, law is part of morality. Around the same time, another pair of influential articles developed non-positivist thought in similar ways. In one, Scott Hershovitz argued that we can progress beyond the confines of the Hart–Dworkin debate by doing away with the idea that there is a distinctly legal domain of normativity.[58] Non-positivist theories, he argued, should view legal obligations as genuine moral obligations. In the other, Mark Greenberg put forward a non-positivist theory that he views as distinct from Dworkin’s, called the ‘Moral Impact Theory’ (MIT) of law.[59] According to this theory, legal obligations are a subset of the genuine moral obligations that obtain in virtue of the actions of legal institutions.

C5P52 This triptych recasts non-positivism in more digestible terms. Rather than relying on the language of constructive interpretation, or debates about the determinants of legal facts, we have a clearer claim: legal obligations are a subset of our genuine moral obligations, law is part of morality. Some confusion has arisen, however, over the question of how exactly this rearticulated non-positivism relates to Dworkin’s earlier work.

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[57] ibid ch 19.

[58] S Hershovitz, ‘The End of Jurisprudence’ (2015) 124 Yale Law Journal 1160.

[59] Greenberg (n 5).

C5P53 In the relevant chapter of *Justice for Hedgehogs*, Dworkin stated that while his earlier work had laboured under a two-systems view, his theory from 'The Model of Rules II' onwards should be understood in 'one-system' terms.[60] Hershovitz argued that while Dworkin had, by the 'Model of Rules II', embraced the sort of view Hershovitz advocated, by the time of *Law's Empire*, Dworkin was 'back in Hart's framework, trying to work out the relationship between our legal practices and a distinctively legal domain of normativity'.[61]

C5P54 Greenberg also argues that there is a marked change in Dworkin's views before and after *Justice for Hedgehogs*. He believes that the earlier view is very different to Greenberg's own MIT, and the later view is a less sophisticated version of the MIT. The key difference between the MIT and the early Dworkinian theory, he says, is that each takes a different view of the 'content of the law'. On the MIT, this content is the rights and obligations that obtain in virtue of the actions of legal officials, while for Dworkin, the content of the law consists of the principles that best

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[60] Dworkin (n 4) 402.

[61] Hershovitz (n 58) 1197. As I discuss below, Hershovitz's view of Dworkin has developed since then.

justify the actions of legal officials.[62] In *Justice for Hedgehogs*, then, Dworkin moves away from this view, adopting a variation of the MIT.[63]

C5P55 Others take a different view. Hillary Nye argues that it follows from Dworkin's longstanding 'anti-metaphysical' commitments that his theory of law has always been a 'one-system' one.[64] Throughout his career, Dworkin rejected the idea that there is any way to make 'external' claims about the domain of value; claims, that is, about what morality 'really is', as distinct from first-order claims about what morality requires.[65] Dworkin, Nye argues, understands law in the same way.[66] There are no external claims, on the Dworkinian view, about what law 'really is', as a conceptual matter. There are only interpretive claims internal to the practice. When we recognise this, it makes little sense to think that Dworkin was ever committed to a 'two-systems view'. Rather, the view of law articulated in *Justice for Hedgehogs* is

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[62] Greenberg (n 5) 1301.

[63] M Greenberg, 'The Moral Impact Theory, the Dependence View, and Natural Law' in G Duke and R George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (CUP 2017).

[64] H Nye, 'The One-System View and Dworkin's Anti-Archimedean Eliminativism' (2021) 40(3) Law and Philosophy 247.

[65] See also A Ripstein, 'Introduction: Anti-Archimedeanism' in A Ripstein (ed), *Ronald Dworkin* (CUP 2007) 5.

[66] Nye (n 64) 261–63.

not ‘a dramatic shift, but a different way of expressing his longstanding emphasis on legality and the thought that legal theory is an inherently normative endeavor’.[67]

C5P56 More recently, Scott Hershovitz and Steven Schaus have marshalled an array of textual evidence from Dworkin’s writing to argue that the ‘one-system’ view was always at work in his theory.[68] Dworkin’s adoption of language prevalent in (positivist) jurisprudential writing at the time masked the deeper point that he was trying to make in his theory. Dworkin’s project was not aimed at establishing a connection between two domains—the legal and the moral—but rather articulating a view of law as part of morality.

C5P57 It should hopefully be clear that the non-positivist theory that I am deploying in this book, as described above, aligns with the view that Hershovitz and Schaus attribute to Dworkin. Non-positivism, I claimed, is characterised by the rejection of a conceptual approach to legal theory in favour of a first-order moral approach. The picture of law as a distinct domain of normativity flows directly from the conceptual analytical approach on which positivism relies. When we reject this starting point, the picture of law as a distinct normative domain drops away. Put another way, when we start by asking first-order moral questions about legal practice, then our theory is by

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[67] ibid 250.

[68] S Hershovitz and S Schaus, ‘Dworkin In His Best Light’ in N Stavropoulos (ed), *Interpretivism and Its Critics* (Bloomsbury, forthcoming 2025). This represents a development in Hershovitz’s view since ‘End of Jurisprudence’ (n 58).

definition a ‘one-system’ one, and legal obligations are necessarily a subset of our genuine moral obligations.

C5P58 Greenberg notes that on the MIT, unlike on Dworkin’s theory, ‘working out the content of the law is not a genuinely hermeneutic enterprise—rather, it involves straightforward moral reasoning about the moral consequences of various facts and circumstances’.[69] It is important to note, however, that for Dworkin, there is no distinction between the hermeneutic process of interpretation and what Greenberg calls ‘straightforward moral reasoning’. Moral reasoning, for Dworkin, is a form of interpretation. In the previous section, I argued that one could accept much of Dworkin’s legal philosophical claims while rejecting the idea that moral reasoning belongs to a broader genus of interpretation. Perhaps this is what Greenberg has in mind. In the absence of an argument to this effect, however, it is not clear that the distinction he draws between his and Dworkin’s theories here is a meaningful one. Both agree that working out the ‘content of the law’ depends on straightforward moral reasoning. Dworkin simply characterises that reasoning in a particular way, and has a specific story about the specific moral principles that feature in that reasoning (explored in the next chapter).

C5P59 This is not to say that the MIT cannot be distinguished from Dworkin’s theory. In the next chapter, I discuss ways in which non-positivist theories, including these two, can be distinguished from one another and can fruitfully argue with one another.

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[69] Greenberg (n 5) 1302.

But the difference does not lie in the claim that law involves different *kinds* of moral reasoning.

C5P60 In the next chapter, I try to bring together these threads by arguing that on the strongest reading of *Law's Empire*, the theory articulated in that book should be read in 'one-system' terms, and therefore as continuous with Dworkin's later work in *Justice for Hedgehogs*.[70] I would caution, however, that just as we need not place much emphasis on the idea of interpretation, neither need we place much emphasis on the idea that non-positivism is a 'one-system' view. This is just a way of rearticulating what has always been the core of non-positivism: the idea that the primary task of general jurisprudence is first-order moral analysis.

C5S8 6 What the Debate Is Not (Really) About, Pt IV: Eliminativism

C5P61 Alongside the development of 'one-system' variations of non-positivism, there has been a recent, parallel move to recast non-positivism in terms of an 'eliminativist' approach to general jurisprudence. In other branches of philosophy, eliminativism is a method which entails the elimination either of certain *entities*, or the *talk of* those entities.[71] Legal philosophers engaging with eliminativism have generally claimed

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[70] C Crummey, 'One-System Integrity and the Legal Domain of Morality' (2022) 28(4) Legal Theory 269. A version of this paper makes up the next chapter of this book.

[71] E Irvine and M Sprevak, 'Eliminativism about Consciousness' in U Kriegel (ed), *The Oxford Handbook of the Philosophy of Consciousness* (OUP 2020) 349.

that we should eliminate *talk of* certain entitles in jurisprudence. What sort of talk, then, is being eliminated?

C5P62 Kornhauser suggests that we eliminate talk of a 'doctrinal' concept of law.[72] This is a slippery notion, but, roughly, it means that we do without the idea that there is a body of 'law' that exists between the actions of legal institutions and the obligations that obtain in virtue of those actions:

C5P63 In the standard model, every decision-maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision-maker need only undertake a one-step decision procedure: weigh all reasons one has at that step. In this one-step procedure, the agent consults legal materials through which all agents coordinate their activity; these legal materials, however, are not legal norms in the conventional sense.[73]

C5P64 On this view, we can replace questions about the doctrinal concept of law with questions about, for instance, the normative value of legality, predictive questions about how legal officials will decide cases, or questions about 'folk' understandings of law.

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[72] Kornhauser (n 7).

[73] ibid 14–15.

C5P65 We see a similar sort of suggestion in Hershovitz's proposed way out of the 'fly-bottle' of the Hart–Dworkin debate.[74] As discussed in the previous section, Hershovitz argues in that essay that there is little reason to think there is a specifically legal domain of normativity. He argues that we should leave behind the idea 'that there is an existing body of law that comprises all the legal rights, obligations, privileges, and powers in force in a legal system'.[75] In his recent book, Hershovitz develops this line of thought, suggesting that there are many concepts of law, or sets of norms that could conceivably be thought of as 'legal', and that the one we choose to engage with depends on the analytical task at hand.[76] There might be, for instance, the set of norms that legal officials are *in fact likely to apply*, the set of norms that the community *believes* they should apply, the set of norms that they *should in fact* apply, etc. Hershovitz is concerned with the last of these sets, since, he argues, this is the set that is applied in courts. But he doesn't think that it does much good to say that any one set of norms is the 'legal' one.

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[74] Hershovitz (n 58).

[75] ibid 1202. The eliminativist aspects of Hershovitz's book are considered in both H Nye, 'Moral Decision-Making in the Name of Society (without Expertise)' (2024) 15(2) Jurisprudence 125; and C Crummey and G Pavlakos, 'Not a Set of Norms or a Set of Practices' (2024) 15(2) Jurisprudence 135.

[76] Hershovitz (n 37) ch 1.

C5P66 Hillary Nye refines the notion of eliminativism in general jurisprudence by suggesting that we eliminate questions about the *nature* of law.[77] She argues that debates about the 'nature of law' are intractable because they are insensitive to our experiences.[78] If we begin by thinking that law is *by its nature* a system of authoritative norms, then we will explain the data to fit that theory. If we think that law *by its nature* involves moral argumentation, then we will explain the data to fit that picture. There is no example that can convince the other side. Instead of arguing past each other, she suggests, each jurisprudential camp should focus on its own tasks. Some can ask predictive questions about what judges will do, others can ask empirical questions about what the folk think, others can focus on evaluative questions about the moral value of legality.

C5P67 It will become clear that I agree with much of what these theorists have to say. But there is an important clarification to make here. Proponents of eliminativism tend to present eliminativism as a jurisprudentially neutral methodology, rather than a substantive commitment that *follows from* a particular theory of jurisprudence. Eliminating talk of the nature of law, or the doctrinal concept of law, or a distinctly legal domain of normativity, is something we do in order to clarify the questions that each jurisprudential theory is asking, and avoid arguing past one another. I have

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[77] Nye (n 7).

[78] ibid 40.

difficulty, however, in seeing how eliminativism can be thought of in this way without begging the question against positivism.

C5P68 To see this, try to think about what questions are left for positivism to ask if we take the eliminativist suggestions seriously. Kornhauser suggests eliminating the 'doctrinal' concept of law, which 'identifies the truth conditions for a "proposition of law"'.[79] The idea here seems to be that we do without the idea that there is something called 'the law' that exists between 'legal materials' and the rights and obligations that obtain in virtue of those materials. This is a perfectly sensible invitation. I accept it in the rest of this book. But what does it leave for positivists? The doctrinal concept of law—the idea that there is a distinct body of norms called 'the law'—is at the heart of the positivist project. What positivism's conceptual analysis apparently reveals is that there is such a body of norms, and that their validity is ultimately dependent only on their sources. Positivism is a theory *of* the doctrinal concept of law. We can argue that there is no such concept, or that we are better off without it, but we can't argue that this is something that positivists can accept.

C5P69 Kornhauser presents his eliminativism as a way of moving beyond the Hart–Dworkin debate:

C5P70 Dworkin and his critics disagree about the content of the doctrinal concept of law. Exclusive legal positivists hold that, *necessarily*, these truth conditions rest on social

[79] Kornhauser (n 7) 14.

facts alone; they make no reference to morality. Dworkin, by contrast, holds that the truth conditions for propositions of law *necessarily* include moral considerations.[80]

C5P71 This is fairly consistent with the kind of language Dworkin used at one point, and the kind of language in which the debate between positivism and non-positivism has generally been framed. It seems to me an unhelpful way of framing the debate, however, because each camp has very different ideas of what a 'proposition of law' is. As I have argued above, the debate between the two camps really turns on whether we should take a conceptual or a normative approach to jurisprudence. If we take the former approach, then a 'proposition of law' is a claim about the existence of a norm that is part of an institutional system. If we take the latter approach, a 'proposition of law' can only be a claim about a genuine moral obligation.

C5P72 Another way of putting this is that if one is a non-positivist, then there is no doctrinal concept of law. The doctrinal concept of law is the child of conceptual analysis. Kornhauser highlights how easily we can do without such a concept. We don't seem to need it in court, when thinking about how to organise our lives, or when thinking philosophically about law. So why take this conceptual approach? What are we revealing about this aspect of our lives? The suggestion that we eliminate the 'doctrinal' concept of law is not a way of sidestepping the Hart–Dworkin debate. It is a contribution to that debate.

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[80] ibid (emphasis in original).

C5P73 The same can be said of Nye's approach, which calls for the abandonment of talk of the nature of law. There is some ambiguity about what 'the nature of law' means (indeed, this is why Nye suggests eliminating it), but Nye seems to equate claims about law's nature with conceptual claims about our shared understanding of law. She opens by noting that the 'foundational question' in legal philosophy came to be 'interpreted as a question about the nature of law, answerable via conceptual analysis'.[81] As I have argued above, however, it is only positivism that is interested in conceptual analysis. Non-positivism is defined by the rejection of this approach. When Nye calls for abandonment of the 'nature of law' question, then, what she is really calling for is not a certain methodologically neutral approach to jurisprudence, but simply the abandonment of positivism.

C5P74 Nye's suggestion is that 'we do not need an account of the grounds of law and can and should dispense with it in favour of a set of better-formed questions that will address all the important issues'.[82] Nye is correct, in my view, that it is problematic to organise legal philosophical inquiry around the 'what is law' question, but she is correct for slightly different reasons than the ones she gives. If the question about the nature of law is understood as a question about the correct conceptual account of our shared understanding of law, then clearly this begs the question against non-positivism, which rejects that conceptual approach from the outset.

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[81] Nye (n 7) 31.

[82] ibid 50.

C5P75 Just as we cannot stipulate that any theory of general jurisprudence must give a conceptual account of the nature of law, neither can we stipulate from the outset that *no* theory of general jurisprudence should give a conceptual account of the nature of law. That, plainly, would beg the question against positivism. Nye's suggestion that we eliminate talk of the 'grounds of law', it seems to me, leaves little for positivism to do. The question of what features in the 'grounds of law' depends on a certain background picture: that of a system of distinctly 'legal' norms whose relationship with morality is the subject of dispute. This picture in turn is the result of positivism's conceptual approach. To call for the abandonment of the 'grounds of law' question is to call for the abandonment of conceptual analysis of law, in favour of other kinds of analytical question.

C5P76 Interestingly, the suggestion that we eliminate the 'grounds of law' debate seems to me precisely what Dworkin was trying to do when he embraced the language of a 'one-system' view of law and morality in *Justice for Hedgehogs*. The Hart–Dworkin debate came to be characterised as a debate about the relationship between law and morality. But this already presupposes separate domains, and it was this that Dworkin's theory always rejected.

C5P77 What Kornhauser, Nye, and Hershovitz each really call for, it seems to me, is the elimination of positivism. We might be in favour of this. In the rest of this book, I offer a first-order moral analysis of the principle of legality that rejects the positivist starting point. But we cannot stipulate that the abandonment of conceptual analysis, and the 'doctrinal' concept of law that follows, as a theoretically neutral

methodological approach. The elimination of the doctrinal concept of law, or the debate about the 'grounds' of law, is a *result of* non-positivism, not a theoretically neutral starting point.

C5P78 How do we motivate this starting point, then? Why would we choose to do without the conceptual approach to law, and proceed directly to normative analysis instead? One answer, turning all the way back to Dworkin's arguments in both 'Model of Rules' essays, might lie in an appeal to the phenomenology of adjudication. Judges appeal to moral principles in deciding cases, no more clearly so, I will argue, than when they appeal to the principle of legality. The outcomes of these cases are controversial and subject to disagreement because their outcome depends on first-order moral argument. This argumentative character of law is what led to Dworkin's positing that law was an 'interpretive' concept, accessible only through normative analysis.[83] As Hershovitz puts it, 'Lawyers do not consult the law to ascertain what legal obligations people have. Rather, they read records of their community's legal history—statute books, case reports, and the like—and then they construct arguments about what obligations people have as a result.'[84] When deciding what 'the law' requires, judges and lawyers do not rely on 'the law' in any doctrinal sense.[85] Rather,

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[83] Postema (n 11) 428–29.

[84] Hershovitz (n 58) 1202.

[85] George Letsas puts pressure on Hershovitz's claim that there might be many sets of norms that are properly called 'legal'. He argues that if, as Hershovitz thinks, judges

they look at certain past institutional events (the enactment of statutes, decisions in other cases, etc) and they figure out what the litigants before them are entitled to today.

C5P79 This process, moreover, is a reason-based one. When we claim that we are legally entitled to a particular outcome, we are relying on another background claim: that certain more basic facts make it the case that we have that legal entitlement.[86] For example, I can claim that because a particular statute was enacted, I am entitled to sue my employer for wrongful dismissal under certain conditions. In order for this claim to be intelligible, there needs to be some built-in reason why the enactment of that statute gives me that entitlement. One obvious way of bridging this gap between past institutional events and current entitlement is to rely on moral claims.[87] The statute entitles me to sue my employer because there are democratic reasons why decisions about who gets to sue who when should be decided by legislative assemblies.

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are concerned with enforcing genuine moral norms, then the other sets of norms Hershovitz identifies are parasitic on that more basic set. G Letsas, 'In Defence of a Distinctively Legal Domain' (2024) 15(2) Jurisprudence 145.

[86] M Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157.

[87] ibid.

C5P80 Perhaps one could find a role for conceptual analysis in all of this.[88] But what the recent writing on eliminativism demonstrates is that it is difficult to motivate such a role. What these theorists show is that we can ask and answer all of the interesting questions about law without engaging in conceptual analysis. What do the folk think about law?[89] What are legal officials likely to do? What are we entitled to demand in court? None of these are conceptual questions.

C5S9 ## 7 Conclusion

C5P81 I will finish where I started: with the inadequacy of the 'non-positivism' label. This label suggests a particular direction for the theoretical burden of proof. If non-positivism is the refutation of positivism, then it needs to offer some good reasons for departing from positivism's conceptual method. I pointed to some arguments in the literature motivating this departure. But I will close with another suggestion: what if we reverse the burden of proof? Why would we take the conceptual approach? What is missing if we approach legal practice from the perspective of first-order moral theory?

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[88] See for example D Plunkett, 'A Positivist Route for Explaining How Facts Make Law' (2012) 18 Legal Theory 139.

[89] B Flanagan and G de Almeida, 'Lawful, but not Really: The Dual Character of the Concept of Law' (2024) 43(5) Law and Philosophy 507.

C5P82 Positivists may well have answers to this question. I hope that the scope of this book is ambitious, but it is not ambitious enough to seek to resolve the debate between positivism and non-positivism. I have sought only to show, in the discussion of legislative intentions in Chapter 4, why we might approach public law from a non-positivist perspective. In this chapter, I tried to clarify exactly what that means. In the next chapter, I flesh out the specific version of non-positivism on which I will be relying in more detail. I hope that by being clear about what non-positivism is and what it isn't, which analytical tools are central to the theory, and which are helpful accoutrements, I have at least clarified the theory in a way that will enable interlocutors to argue directly with the theory rather than past it.