# THERE ARE NO EASY COUNTEREXAMPLES TO LEGAL ANTI-POSITIVISM

**Abstract.** Legal anti-positivism is widely believed to be a general theory of law that generates far too many false negatives. If anti-positivism is true, certain rules bearing all the hallmarks of legality are not in fact legal. This impression, fostered by both positivists and anti-positivists, stems from an overly narrow conception of the kinds of moral facts that ground legal facts: roughly, facts about what is morally optimific—*morally best* or *morally justified* or *morally obligatory given our social practices.* A less restrictive view of the kinds of moral properties that ground legality results in a form of anti-positivism that can accommodate any legal rule consistent with positivism, including the alleged counterexamples. This form of "inclusive" anti-positivism is not just invulnerable to extensional challenges from the positivist. It is the only account that withstands extensional objections, while incorporating, on purely conceptual grounds, a large part of the content of morality into law.

## I. The Extensional Challenge

Legal positivists and anti-positivists disagree about the grounds of law. They disagree about what at the most fundamental level it is in virtue of that a rule gets to be a legal rule. Positivism is the view that a rule's legality is fully grounded—fully metaphysically explained—by its social properties: roughly, having to do with a community's attitude of acceptance towards the rule. That the rule is part of a hierarchical system of rules habitually obeyed in the community is what makes it law.[1] Anti-positivism is the view that a rule's legality is at least partly grounded in its moral features: e.g., in its being a rule one morally ought to obey.[2] The social features matter, but so does the morality of rules.

Positivists claim that there are straightforward counterexamples to anti-positivism involving rules that bear all the hallmarks of legality but that are by no stretch of the imagination ones we morally ought to obey. Among other things, the Third Reich promulgated legal rules requiring the outright exclusion and ultimate extermination of Jews and other minorities in Nazi Germany. Nazi law was genuine law. In antebellum America, the Fugitive Slave Act required the return of a runway slave to their master. The Fugitive Slave Act, morally grotesque though it was, was *bona fide* law.[3] It is easy to multiply examples of morally objectionable rules that clearly are laws of states (e.g., California had a 'three-strike' rule, mandating life imprisonment

[1] This is roughly the kind of positivism favored by Hart (1994) and, arguably, Kelsen (1945). See also Austin (1832), Raz (1979), Marmor (2011), and Shapiro (2011). Garden variety positivism entails that a rule is law either because it is itself conventionally embraced or derivable (in a sense that stands in need of further analysis) from conventionally embraced rules.

[2] See Dworkin (1986); Greenberg (2014).

[3] The example of the Fugitive Slave Act is discussed in Shapiro (2011, Ch1).

based on three criminal convictions regardless of gravity). But if anti-positivism is true, these morally abhorrent rules cannot be law. They might be conventionally followed. But their severe moral defects preclude their legality.

Nazi law, the Fugitive Slave Act, the three-strike rule in California are actual cases of law mobilized as counter-examples to anti-positivism. But there are also possible cases of law that present an extensional challenge. Consider a scenario offered by Marmor (2011, Ch4). Marmor imagines a community all of whose members sincerely believe that (and act as if) a rule is law: they follow it, they sanction deviations from it, they call the rule "law," they think it is a good thing the rule is law, and so on. We can stipulate that all the external trappings of a legal system are present (there are courts, police, and a legislative body, for example). If the anti-positivist is right, it is possible for everyone in the community to be mistaken about their favored rule's legality. After all, the rule might be immoral: say, one that demands a human sacrifice every New Year's Eve. But, surely, the community cannot be systematically mistaken about the rule's legality. Yet another false negative.

Anti-positivism's perceived extensional inadequacy explains why positivism is the dominant position in legal philosophy, or least why it is so often portrayed as such. To deny that the Nazis had law, that the Fugitive Slave Act was law, that Marmor's hypothetical society couldn't possibly be in error, is counter-intuitive.

Anti-positivists have offered two types of responses to this extensional challenge. The first charges the critique as question begging. To assume anti-positivism's negative results are false negatives assumes the falsity of anti-positivism. Anti-positivism *just is* the view that an

"unjust law is not law."[4] So, contrary to what positivists tell us, the Nazis didn't have laws, the Fugitive Slave Act was not law, and communities can be systematically mistaken about their own laws.

To repeat, this is a hard position to maintain. Yes, the examples might be question begging. But the legality of Nazi rules is intuitive. And the intuition is pre-theoretical. Individuals unexposed to the debate between positivists and anti-positivists find it natural to say that Nazi Germany had a legal system. If anti-positivists can do no better than deny the legality of morally abhorrent rules, anti-positivism is deservedly characterized as the more counter-intuitive position.

The second response, offered by most modern anti-positivists, involves relativizing the morality of legal rules (or entire legal systems) to our social practices. A rule's legality is grounded not in its being morally obligatory. Rather, it is grounded in its being morally obligatory *in light of our* social practices. For instance, Dworkin (1986, 225) suggests that rules have the property of being law 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*." Famously, Dworkin thinks that in figuring out what the law is, judges face the Herculean task of figuring out precisely which rules it would be morally best for us to follow

[4] Aquinas, *Summa Theologiae*. Finnis (1980) is sometimes interpreted as suggesting that Nazi law is only law in an analogical sense. We say Nazis had law because their rules bear resemblance to the focal genuine cases of law which are morally good rules. But this is just to deny the intuition underlying the extensional challenge: that the Nazis *had law*, not something that merely resembles law.

given our practices. Likewise, Greenberg (2015, 1301) holds that law is the change in our "moral obligations" driven by our social conventions.

These modern refinements to anti-positivism allow law and morality to come apart. The rules we morally ought to obey *simpliciter* may be quite different from the ones we morally ought to obey in light of our social practices. The latter might be, all things considered, morally inferior, and we might have moral reason to follow them anyway because they represent the rules we've democratically elected to follow. Rawls' (1993) arguments for compromising on what is morally best in the interest of living on reasonable terms with parties who do not all share the same comprehensive moral theory provides a helpful (yet neglected) comparison to the Dworkinian view.

Although modern versions of anti-positivism allow legal rules and morally optimific rules to come apart, they cannot accommodate dramatic departures of law from what is morally required.[5] Dworkinian anti-positivism might accommodate the occasional immoral rule as genuine law in a community, like the three-strike laws of California. But it cannot accommodate Nazi law. It is entirely implausible that the morally best reconstruction of the conventions and practices of the Third Reich would recognize as law rules requiring the extermination of Jews in Nazi Germany. Our conventions—what we do around here—plausibly make *some* difference to what rules we should follow in light of the principles of justice and fairness.[6] But they cannot make the kind of difference that allows anti-positivists like Dworkin and Greenberg to recognize the laws of Nazi Germany as bona fide laws. Likewise, by no stretch of the imagination were the

[5] Alexy (2015): "Not every injustice, but to be sure extreme injustice is not law."

[6] On the moral significance of conventions generally, see Mavrodes (1975).

rules dubbed legal by judges who upheld the Fugitive Slave Act ones we had a moral obligation to obey in light of social practice.

Marmor's challenge also still stands. It remains possible for an entire community to treat a set of rules as law that are not the morally best rules for the community to follow given its habits, conventions, and practices. And if it is impossible for an entire community to be mistaken about its accepted laws, then modern versions of anti-positivism are just as vulnerable to Marmor's extensional challenge.

## II. Why the Extensional Challenge Fails

Morally grotesque legal rules may be counter-examples to parochial forms of anti-positivism. But they are not counter-examples to anti-positivism. Anti-positivism in the most general sense is just the view that the grounds of law include moral facts: a rule's being law is partly grounded in its moral properties. In addition to what I have called *optimific* moral properties—being morally best, being what ought to be done, being required by the principles of justice, and so on—there are moral properties that come in degrees, like the property of being morally good *to some degree*, or the property of being supported by *a* moral reason. Correspondingly, there are moral facts involving such weak or gradable properties: like the fact of a rule's being such that there is some moral reason to follow it.

Traditionally, anti-positivists have attempted to ground law in the optimific moral properties of rules. A rule's being law is always grounded in its being the morally best rule to follow, or its being the morally obligatory rule in light of community conventions. But gradable moral properties can serve as possible grounds of law. General arguments for anti-positivism

properly understood support this possibility, as I argue shortly. So long as a rule's legality can be grounded in the existence of some moral reason to follow it, the anti-positivist can accommodate the legality of any rule recognized as legal by the positivist. If a rule is law and its legality is consistent with positivism, then the rule is conventionally followed, widely accepted, and so on. And if a rule is widely accepted and conventional, then quite plausibly there is always some moral reason to follow it, albeit a very weak reason.

Consider the rules of the Third Reich. The fact that morally abhorrent rules involving state-sanctioned terror were widely accepted and enforced against persons entails *some* extremely weak and easily missed moral reasons for persons to obey them. There are, e.g., reasons of self-protection. Deviating from conventionally embraced rules renders individuals vulnerable to sanction. The reasons of self-interest that individuals have for obedience are, of course, moral reasons. While self-interest can be amoral or even *im*moral when an agent is disproportionately sensitive to her own interests to the exclusion of others, concern for one's self can also be perfectly ethical, insofar as every person's interests matter from the impartial point of view.[7] But while there may be *some* (non-decisive) moral reason to follow a rule that causes

[7] Reasons of self-interest are often contrasted with other-regarding moral reasons. The former seem to lack the obligatory or 'deontic' force of more familiar varieties of moral reasons (Raz 1999, Little and McNamara 2017). But this contrast does not show that the reasons of self-interest are a non-moral species of reasons. See Munoz (unpublished manuscript), arguing that the contrast in felt 'oomph' can be explained in terms of an absence of countervailing reasons and moral prerogatives. That there are moral reasons to promote one's own interests is evident, as suggested above, from the impartial perspective aimed at maximizing the good. Here is a related argument: it is a moral fact that happiness and its promotion are to some extent morally good. So, it is to some extent morally good to follow a legal rule for reasons of self-protection, insofar as doing so promotes someone's happiness. In any event, the issue of whether the relevant reasons count as 'moral' is a distraction. The point is that

extreme harm to others, that reason is vastly outweighed by competing considerations that militate against obedience. So, a German citizen might have had overwhelming moral reason to resist the laws of Nazi Germany, but this would not diminish the moral fact that she had some (albeit very weak) moral reasons, having to do with the good of self-protection, for following Nazi rules.[8]

Accordingly, Nazi law is not an example inconsistent with anti-positivism. An anti-positivist who grounds the legality of rules in their being conventional and there being some moral reason to follow them can count Nazi laws as genuine. And whether the legality of Nazi rules is fully grounded in their conventionality alone as opposed to their conventionality plus their moral features cannot be settled on extensional grounds.

If the emerging strain of anti-positivism appears too watered-down to be interesting, such concerns should be set aside for the time being. I explain in §3 why the grounding of morally abhorrent legal rules in weak moral reasons for obedience is entailed by a promising general theory of law that is consistent with the principle motivations for being an anti-positivist, that

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even immoral legal rules may be grounded in *bona fide* normative facts (facts about normative reasons), a claim no positivist can agree to.

[8] [omitted] suggests a society of lunatics with suitably bizarre conventions may prove challenging for my view. The relevant rules may be widely accepted, and yet it would not be in anyone's prudential self-interest to follow them. I suspect even bizarre but conventionally embraced rules will generate extremely weak moral reasons for some agents to follow them (see discussion below concerning reasons grounded in subjective attachments). But it is also worth noting that the legality of such fanciful rules is less obvious than the primary cases discussed. In §4, I discuss what makes for an 'easy' counter-example to anti-positivism.

captures the unity of our notion, and that explains how the social and moral characteristics of rules work together to ground their legality. The present aim is simply to clarify the force of the alleged counter-examples. Consider Marmor's hypothetical. Marmor suggests that anti-positivism entails a community might be systematically mistaken in its treatment of rules as law. But anti-positivism does not entail this. Inclusive anti-positivism is compatible with the impossibility of error in Marmor's case. The force of the hypothetical turns on the assumption that moral properties that ground law according to the anti-positivist must always be optimific. If the legality of rules is always grounded in their moral optimality (whether relativized to practice or not), it is possible for law and people's treatment of a rule as law to come apart. But, so long as we have gradable moral properties in the picture, we see that a rule that the community treats as law is guaranteed to have some moral properties: the property of being good to follow to some degree. And so, the anti-positivist can agree with Marmor about the impossibility of error, while disagreeing about its explanation.

Why does conventional acceptance of a rule's legality entail some moral reasons to follow the rule, even if there is no moral obligation? As before, the widespread acceptance of a rule entails a prudential interest in following it, which ensures the existence of some moral reasons for obedience. Moreover, 'acceptance' of a rule arguably involves having a desire or pro-attitude towards following it. While not entirely uncontroversial, it is a viable ethical position that there is always some reason to perform an action just because one desires it (Schroeder 2007). The overwhelming weight of reasons that speak against the satisfaction of certain perverse desires should not be confused with the state of there being *no moral reason whatsoever* for satisfying them. There are other, related moral reasons for following conventionally accepted

rules of a broadly Humean variety, which derive from an agent's subjective attachment to conventional ways of doing things.

It bears emphasizing that the moral facts I'm suggesting might ground morally grotesque legal rules are limited in scope. The claim isn't that every agent subject to a legal rule has moral reasons to follow the rule. The identified reasons for following abhorrent rules won't apply to agents who can break laws without consequence or those who fail to have any attachment to conventionally embraced rules. But anti-positivists needn't ground every legal rule in perfectly general moral facts. The best arguments for anti-positivism, as we shall see in a moment, are compatible with the legality of some rules being partly grounded in minimal moral features and particularistic moral truths.

The commitments I'm ascribing to a counterexample proof anti-positivism are consistent with a robustly objectivist metaethics and a non-relativistic normative ethics. The anti-positivist needn't think moral facts, like the fact that there is a moral reason to follow rules widely accepted and obeyed, are themselves fully grounded in social facts. The social facts would then fully explain the legality of rules *and* their relevant moral features. The anti-positivist can instead treat the relevant moral facts as irreducible. That there is a moral reason to follow a conventionally embraced rule might be partly grounded in the rule's conventionality. But it is also grounded in a pure moral fact: the moral principle that *if* there is a rule that is conventionally embraced, then there is some moral reason to follow it (Cf. Scanlon 2013, 36-40). It is this latter moral fact that is part of the explanation for the legality of rules and is not itself grounded in a social fact. And as far as first-order ethical commitments go, just because the anti-positivist thinks there are moral reasons to satisfy desires or moral reasons of self-interest, this does not

rule out a wider range of objective goods that come apart from the desires and interests of agents.

## III. Inclusive Anti-positivism

The version of anti-positivism we're exploring, which deserves to be called "inclusive anti-positivism" not just because it admits the legality of all legal rules consistent with positivism but because there is an obvious parallel here with inclusive positivism, is of more than just theoretical interest. In what follows, I clarify the view and its appeal in terms of the central motivations for being an anti-positivist. To be clear, a full-scale defense of inclusive anti-positivism is not the aim of this paper. The primary aim is to explain the moves made in the previous section to disarm the positivist's challenge in terms of a principled theory of the nature of law.

There is considerable irony in the fact that the best arguments for anti-positivism turn out to be extensional. Although rarely characterized as such, the classic arguments which appeal to judicial behavior emphasize an extensional inadequacy of positivism (Dworkin 1967, 1975; Radbruch 1990). Positivists deny that the moral characteristics of a rule suffice for its legality. Yet judges routinely classify rules that enjoy strong moral support as law even if there isn't a widespread convention within the jurisdiction of following the rule.[9] And they appear to be

[9] Dworkin (1967, 20-25) provides various examples of common law judges invoking general moral principles as law, and without citing to custom, including, for example, the principle that "courts will not permit themselves to be used as instruments of inequity and injustice." Dworkin argues that in determining the content and application of these principles, judges view themselves as figuring out the law, but the content of these principles cannot be grounded in conventionally embraced rules. Additionally, judges justify broader interpretive methodologies by appeal to moral considerations, and not as an indirect means of identifying the socially embraced methodology for

doing so on conceptual grounds alone, because there is no obvious social convention within jurisdictions which authorizes such behavior by judges.[10] If we take judicial intuitions about the legality of rules seriously, positivism seems falsified by the existence of legal rules that aren't widely embraced as a matter of convention or derived from other conventionally embraced rules, but are instead treated as morally well-supported.

Anti-positivists have undermined the force of these adjudicative considerations by declining to follow the extensional logic where it leads. As discussed, anti-positivists have tended to dismiss or altogether ignore judicial willingness to classify morally abhorrent but strongly conventional rules as law. A truly extensionally adequate theory of law, one that takes seriously the extensional intuitions of experts, would be consistent not just with their willingness

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interpreting law (Dworkin 1986). For positivist rejoinders, see Raz (1979, Ch9) and Waluchow (1994). We needn't assume that Dworkin prevails over his critics (though I think he does) in order to show that inclusive anti-positivism of the sort developed in this section can be motivated based on considerations that have traditionally inspired anti-positivists.

[10] "Inclusive" positivists suggest that a convention in the community authorizes judicial treatment of morally optimific rules as law even if the rules aren't themselves conventional (Waluchow 1994). So, the ultimate grounds of their legality remain purely social. The anti-positivist should respond that there is no obvious convention within jurisdictions which authorizes the ascription of legality to rules based on their moral features alone. We must distinguish behavioral regularities from conventions. Judicial willingness to classify moral principles as law is at best a regularity, not self-conscious rule-following; a fact apparent from considerable disagreement amongst judges (e.g. in the United States) about whether local custom authorizes appeals to morality to identify law. I defend this claim more systematically in other work (citation omitted). An additional premise of the Argument from Judicial Behavior is that we should interpret judicial behavior charitably: judges aren't engaged in pretense or deception.

to classify on conceptual grounds alone strongly moral but weakly conventional principles as law, but also abhorrent laws like the Fugitive Slave Act.

It is not obvious what an account of law consistent with both strands of judicial behavior would look like. But here's a sketch of how such an account might be developed. First, a helpful concept in this context is that of an evaluative perspective marked by special solicitude for conventional ways of doing things but also moral concern.[11] Such 'mixed' evaluative perspectives are very familiar. We occupy such a perspective when, for example, we weigh our subjective attachments (say, special concern for a loved one) against impartial other-regarding moral considerations in determining whether a course of action is justified relative to the totality of our values (Williams 1981). We can identify a normative property of rules defined in terms of an evaluative perspective that involves high respect for conventionality as well as moral concern: that of *being sufficiently favored based on a combination of social and moral considerations.*[12]

Whether a rule instantiates this normative property is grounded in its social and moral characteristics. If a rule meets the justificatory threshold of being sufficiently worth following in terms of the relevant combination of concerns, it does so in virtue of the *sum* of social and moral support for the rule, not a precise blend. In some cases, a rule will meet the relevant threshold despite weak moral support. When a rule is strongly conventional, its strong social support can

[11] Williams (1979) famously offers an account of normative reasons in terms of what he calls an agent's "subjective motivational set"—the totality of the agent's commitments, desires, goals, etc.— allowing motivational changes based on sound deliberation. I intend the notion of an evaluative perspective to be very close to Williams' notion of a subjective motivational set.

[12] I intend the *favoring* relation here in roughly the same sense as Scanlon (1998) when he speaks of 'considerations counting in favor.'

be understood as compensating for its extremely weak moral support. Not in a moral sense. But in the special normative sense I'm suggesting reflects the distinctive evaluative perspective under consideration.[13] The robust or optimific moral properties of certain rules can similarly compensate for their weak social acceptance (in the terminal case, acceptance by a single moral agent). In other words, a morally optimific principle may meet the relevant threshold of being sufficiently favored despite its weak social acceptance in the community.

An account of the nature of law which identifies legality with the aforementioned normative property of rules is consistent with and explains judicial behavior.[14] Judges will recognize as law morally optimific but weakly conventional rules as well as strongly conventional but weakly moral rules, because these two types of rules represent different ways of meeting the normative threshold of being sufficiently worth following from the legal evaluative perspective, where conventions matter greatly but so does the morality of rules. This is how I

[13] If you value respecting conventions highly enough, moral considerations never trump institutional support. Just because moral considerations are relevant from the legal evaluative point of view, this does not mean they have their usual peremptory force. No doubt the legal evaluative perspective may be criticizable from the moral point of view. But that's true of most evaluative perspectives that are not exclusively concerned with morality. I've presupposed that there are distinct evaluative perspectives and normative properties corresponding to them. Defending that assumption based on meta-normative considerations would take us too far afield. Fortunately, a defense is unnecessary for the purpose of disarming the positivist's extensional challenge. No positivist to my knowledge has ever construed the extensional challenge posed by morally grotesque legal rules for anti-positivism as one that turns on the metaphysics of normative properties.

[14] That this identity thesis results in an extensionally adequate and explanatorily powerful theory of law would be a key part of the justification for accepting it.

imagine an "inclusive" and extensionally adequate version of anti-positivism should be developed.[15]

The view respects constraints on metaphysical explanation.[16] It does not amount to an implausible 'disjunctivism' about the grounds of law. The inclusive anti-positivist does not purchase extensional adequacy at the price of saying legality is sometimes wholly grounded in social properties and in other cases wholly grounded in optimific moral properties.[17] This would be implausible because, in general, non-disjunctive phenomena do not have as independent full grounds two entirely distinct types of facts. Social/empirical facts about a rule's conventionality and moral facts about a rule's being morally favored are intuitively quite different propositions (Moore 1903).[18] It would be incoherent to say that a type of non-disjunctive fact wholly reduces to (is nothing over and above) B-facts, *and* that it wholly reduces to C-facts, where B-facts and

[15] [Omitted] observes that this view can't explain how we are morally obligated to follow the law. But I deny that all laws create binding moral obligations. The claim that, necessarily, law morally binds beggars belief in light of morally grotesque laws. What my view does do is secure the possibility of laws being morally binding. The principal motivations for being an anti-positivist do not include guaranteeing moral obligations to follow law in every case. The relevant motivations include the adjudicative considerations mentioned above, the apparent normativity and unity of law, and others I discuss below.

[16] It is true that the grounding of law turns out to be an instance of normative grounding. Whether normative grounding is distinct from metaphysical grounding is an issue that needn't concern us. For general discussion of the unity of ground, see Berker (2017).

[17] Finnis (1980, pp. 203-4, 363-66) is sometimes interpreted as embracing disjunctivism.

[18] This is a somewhat controversial thesis, but it is easy to multiple examples of theorists across the metaethical spectrum who endorse it, including quasi-realists, non-naturalists, and, arguably, synthetic naturalists.

C-facts are entirely dissimilar.[19] The disjunctivist might try to defend her claims on semantic grounds, arguing that the term “law” is polysemous: we use it to refer to two very different kinds of phenomena. But if “law” were like the English word “bank,” we would expect to find some natural language that disambiguates the two senses by giving them different names (like "berge" and "banque" in French). We don't find this disambiguation in the case of "law." On the contrary, we find that the variety of legal rules exhibit an appearance of unity (Hart 1994, Ch1).

Inclusive anti-positivism provides a unified account of the grounds of every legal rule. It is always a combination of moral and social properties of rules that grounds their legality, although the mix might differ in individual cases, just as an object’s redness can be grounded in its being one of a range of determinate shades of red, with variable hue, chroma, and brightness. Another helpful comparison may be found in what Kovacs (2018) calls “aggregative cluster concepts” like <is bigger than> which combines volume, length, and mass, but without a precise trade-off function. The analogy with *redness* and other properties which give rise to an objective similarity or natural unity is intended very seriously. A theory of law is attractive to the extent that it identifies legality with a property that can serve a useful theoretical role on account of its nature and that can explain how the moral and social characteristics of rules work together in generating law. Legality, as construed by inclusive anti-positivism, is just such a property. It is the *bona fide* normative property of rules one would be sensitive to were one’s evaluative

[19] Grounding and reduction are related. When A is wholly grounded in B, it is natural to say that A is nothing over and above B (Fine 2012; Rosen 2014). If A is nothing over and above B, and A is nothing over and above C, then B better be nothing over and above C.

perspective marked by uniquely high solicitude for conventional ways of doing things but also concern for moral values.[20]

To reiterate, these remarks are not intended to serve as a substitute for a full-scale defense of inclusive anti-positivism.[21] The aim is primarily to explain why the moves made on behalf of the anti-positivist to evade the positivist's extensional challenge in the previous section can be principally justified in terms of a general theory. The view that legality is constitutively a normative property of rules—roughly, that of being sufficiently worth following given the cumulative weight of all legally relevant considerations—entails that whether a rule is law depends on *all* the relevant reasons for following it, where the relevancy of reasons is determined

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[20] The existence of a normative property with a distinctive nature defined in terms of the relevant evaluative perspective is presupposed. A defense of this commitment based on meta-normative considerations would take us too far afield. Defending it is not a prerequisite for making the central point of this paper: which is that the traditional extensional objection to anti-positivism, an objection that has never been construed as turning on the metaphysics of normative properties, fails on its own terms. Notably, the special status of moral properties may be reclaimable, on this view, based on a distinction between 'formal' and robust normativity (McPherson 2011).

[21] We have secured the beginnings of a defense. If Dworkin's (1967, 1974) arguments based on judicial behavior are sound, inclusive anti-positivism delivers a better extensional fit than positivism. It delivers a better extensional fit than traditional varieties of anti-positivism, including Dworkin's, because it is consistent with morally grotesque legal rules. Accordingly, inclusive anti-positivism is extensionally superior to traditional views as determined by the classificatory dispositions of legal experts. Furthermore, the view offers an account of the nature of law that sheds explanatory light on judicial behavior as well as on the appearance of unity exhibited by legality.

The preliminary nature of this defense is justified by the view's novelty and neglect despite its appearing to be the only version of anti-positivism that withstands the most damning objection to anti-positivism in the literature, the disarming of which is the principle objective of this introductory work. A systematic exploration of the view's merits is the subject of a follow-up paper (manuscript citation omitted).

by the evaluative perspective that gives rise to this distinctive flavor of normativity. That is why even morally grotesque legal rules are grounded in very weak moral reasons for following them. It is an essential feature of the view (motivated by the extensional evidence) that moral considerations are relevant from the legal evaluative perspective.

The view incorporates a large part of the content of morality into law. One of the principle motivations for being an anti-positivist is the possibility of a moral critique and improvement of law from an *internal to law* perspective. It is always possible to morally criticize a system of rules from the external point of view. One might morally object to the rules of Monopoly because they encourage acquisitiveness. It is quite another thing to critique a system of rules using its own rules. The inclusive anti-positivist can say that while morally abhorrent rules were law in Nazi Germany, so was a rule requiring respect for human dignity, even though it was not recognized as such. The rule had enough morally going for it that it arguably met the legal normative threshold.[22] Had it been recognized as law by Nazi jurists, there might have been greater official resistance against the Third Reich. (That the laws of a regime can conflict is of course a commonplace.)

The significance of a robust incorporation of morality into law is hard to overstate. Consider the perspective of a conscientious judge concerned with abiding by her distinctively *legal* duties. Such a judge will not rule against the law, unless authorized by law to do so. If

[22] Admittedly, talk of a legal normative threshold is vague. But we should not aspire for greater determinacy than is warranted by the nature of the target phenomenon. Rules that score highly with respect to only one of the core values of the legal evaluative perspective will be marginal cases of law at best precisely because it will be unclear whether they meet the relevant threshold. Accordingly, the inclusive anti-positivist can explain why the legality of morally optimific but weakly conventional rules might be obscure and subject to disagreement.

inclusive anti-positivism of the form I've described is true, it remains possible for a judge to comply with her legal duties while striking down morally abhorrent laws for conflict with other laws that are morally optimal even if weakly conventional. An account of law's nature which secures on conceptual grounds alone a moral critique of law that is, at the same time, a legal critique is a view worth taking seriously.[23]

## IV. What About False Positives?

There are two kinds of counter-examples one can mobilize against a view. There are false negatives: cases of manifest legality that the view cannot capture. But there might also be false positives: rules that the view entails *are* law but that don't appear to be. Even if I'm right that inclusive anti-positivism is invulnerable to extensional challenges based on false negatives, perhaps grounds for an extensional challenge remain. Isn't it obvious that a rule requiring respect for human dignity failed to be law in Nazi Germany?

The focus on false negatives is well-motivated. An extensional challenge based on the denial of the legality of weakly conventional yet morally optimific moral principles would be far less compelling than a challenge based on the legality of Nazi rules. Everyone agrees that the legality of rules is often obscure. Interpreters of law often struggle with the evidence to determine what the law is on hard legal questions (Dworkin 1975). The obscurity of law explains

[23] This isn't just wishful thinking. Arguably, judges behave as though an internal-to-law moral critique is possible, and not because a convention authorizes such behavior (Dworkin 1975; Atiq forthcoming).

failures to appreciate the legality of rules.[24] By contrast, it is much harder to explain away persistent positive intuitions of a rule's legality. The property of being law is not the kind to be mistakenly detected by a large number of reasonable interpreters of law. It is hard to see why there would be persistent illusory manifestations of legality.

There is another difference between the positive and negative extensional challenge. The mere fact that inclusive anti-positivism offers a different account of law's extension than positivism is hardly a problem. The problem arises if the positivist can mobilize theory-neutral intuitions of legality (or the absence of legality) against the anti-positivist. That is what makes the false negatives so damning. Legal theorists who've thought long and hard about the legality of rules independently of the philosophical debate strongly judge that the Nazis had a legal system, and that the Fugitive Slave Act was law. So, to have a viable theory, anti-positivists should worry about accommodating these cases.

It is much harder to build a theory-neutral case against the anti-positivist based on the alleged false positives. Judges unexposed to the positivism/anti-positivism debate act *as if* moral principles are law. Even certain positivists (inclusive positivists) agree that morally optimific principles can be (and in many jurisdictions are) law. They just have a different account of why, fundamentally, they are law—namely, in terms of an alleged convention within the jurisdiction allowing judges to treat morally optimific principles as law. The case where inclusive positivism

[24] The inclusive anti-positivist can explain why the legality of morally optimific (but weakly conventional rules) might be obscure. The legality of rules is a function of their meeting a vague normative threshold. The rules that easily meet the threshold involve both social and moral support. It is harder to recognize the legality of rules that just barely meet the threshold because they score well along a single evaluative dimension. If morally optimific but barely conventional rules are law, they are marginal cases of legality at best.

and inclusive anti-positivism deliver incompatible verdicts concerns morally optimific (yet weakly social) rules in a jurisdiction where no widely accepted convention exists of treating morally optimific principles as law. And it is implausible that *this* extensional dispute can be resolved on pre-theoretical grounds alone. The case is too unfamiliar to be decided based on the deliverances of pre-theoretical intuition. This is not a decisive showing that the anti-positivist is right about the case. It *is* a decisive showing, I submit, that there are no easy counterexamples to (inclusive) anti-positivism.

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