
ESSAY

OFFICIAL OBEDIENCE AND THE POLITICS OF DEFINING “LAW”

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I. INTRODUCTION

Fawn Hall must not have been reading her Dworkin.

Her name has dissolved into history, but Fawn Hall was front-page news in 1987. Until 1986, she had served as personal secretary to Colonel Oliver North, the man at the center of the Iran-Contra scandal and its unlawful sale of arms to Iran and equally unlawful use of the proceeds to aid the Contra guerillas in Nicaragua.¹ When the scandal broke, Hall was granted immunity and called before a congressional committee to testify about her role in the transactions and the ensuing cover-up.² After it became apparent that Hall fully supported Colonel North and more than willingly participated in the alteration and shredding of incriminating documents, Representative Thomas Foley pointedly asked her how she felt

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1. See, e.g., THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* (1991); LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP* (1997); ANN WROE, *LIVES, LIES AND THE IRAN-CONTRA AFFAIR* (1991). For additional general information on the Iran-Contra scandal, see *THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY* (Peter Kornbluh & Malcolm Byrne eds., 1993).

2. See Peter J. Boyer, *NBC Only Major Network to Carry Hall Testimony*, N.Y. TIMES, June 9, 1987, at C18; Times Wire Services, *Fawn Hall Admits North Ordered Papers Doctored: Secretary Given Grant of Immunity*, L.A. TIMES, June 8, 1987, at 1.

about the multiple illegalities in which she and North had been involved. “[S]ometimes you have to go above the written law, I believe,”³ she answered. And with those eleven words, Hall became a historical footnote and target for the mockery and wrath of countless pundits and political opponents.

The immediate negative reaction to Fawn Hall’s statement⁴ was hardly surprising on ideological or partisan grounds, as opponents of the Reagan Administration seized on Hall’s words as a way of insinuating a broader pattern of the executive branch’s disregard for the law. But setting aside the contemporaneous political opportunism, the criticism of Hall’s statement deserves closer inspection. She was, after all, aligning herself with a longstanding civil disobedience tradition that includes Henry David Thoreau,⁵ Mahatma Gandhi,⁶ and Martin Luther King, Jr.,⁷ among many others,⁸ all of whom believed that the calls of morality must sometimes override the demands of positive law.⁹ It is true that Hall and North were

3. Dan Morgan & Walter Pincus, *Hall Testifies of Necessity “To Go Above Written Law,”* WASH. POST, June 10, 1987, at A01, available at <http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/fawnhall.htm>.

4. *Id.* See also Janet Cawley, *Fawn Hall Defends, Applauds North*, CHI. TRIB., June 10, 1987, at 1 (discussing Hall’s statements to the joint House and Senate committees).

5. See Henry David Thoreau, *On the Duty of Civil Disobedience*, in WALDEN AND “CIVIL DISOBEDIENCE” 222 (Signet 1980) (1849), available at <http://www.constitution.org/civ/civildis.htm> (previously published as *Resistance to Civil Government*); Lawrence A. Rosenwald, *The Theory, Practice, and Influence of Thoreau’s Civil Disobedience*, in A HISTORICAL GUIDE TO HENRY DAVID THOREAU 153, 154–64 (William E. Cain ed., 2000).

6. JUDITH M. BROWN, *GANDHI AND CIVIL DISOBEDIENCE: THE MAHATMA IN INDIAN POLITICS* 388–89 (1977) (discussing Gandhi’s civil disobedience campaigns); MAHATMA GANDHI, *Civil Disobedience*, in SELECTED POLITICAL WRITINGS 73, 73–75 (Dennis Dalton ed., 1996) (offering a selection of Gandhi’s writing on civil disobedience).

7. Martin Luther King, Jr., *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 289–302 (James M. Washington ed., 1986) [hereinafter King, *Letter from Birmingham City Jail*]; Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, in CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 212, 217 (David R. Weber ed., 1978).

8. The actions and arguments of other major figures in the civil disobedience tradition are discussed in Kimberley Brownlee, *Civil Disobedience*, STAN. ENCYCLOPEDIA PHIL. (Dec. 23, 2009), plato.stanford.edu/entries/civil-disobedience/, and generally in CIVIL DISOBEDIENCE IN FOCUS (Hugo A. Bedau ed., 1991). See also RONALD DWORKIN, *Civil Disobedience and Nuclear Protest*, in A MATTER OF PRINCIPLE 104, 104–05 (1985) (noting Bertrand Russell and the suffragettes among memorable proponents of civil disobedience). Important modern analyses of civil disobedience include KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 226–43 (1987), and JOHN RAWLS, *A THEORY OF JUSTICE* 363–68 (1971).

9. It is important to appreciate that Hall, North, and similarly situated others typically possess a morally infused understanding of their own motivations. They sincerely believe that national security is an overriding concern and that the preservation of the nation against its sworn enemies is a moral calling. Note, for example, President George W. Bush’s post-9/11 speech to Congress on September 20, 2001, talking repeatedly about “progress,” “pluralism,” “tolerance,” “freedom,” “justice,” and the

part of the government in a way that the classic civil disobedients were not, and it is also true that Hall's violations were initially neither public nor symbolic, thus, potentially distinguishing them from the classic cases in the civil disobedience tradition. Nevertheless, these differences are no barrier to recognizing a calling higher than the formal law. Although Hall's critics obviously disagreed with her own particular application of the principle that law must sometimes be disobeyed in the name of morality, her abstract statement of that principle can hardly be faulted.¹⁰

Partisan sniping aside, Hall's assertion of a largely unimpeachable principle can still be seen as a political blunder. Had she been better steeped in contemporary jurisprudence, Hall might have relied on the work of a host of legal theorists—most prominently Ronald Dworkin—to explain her actions.¹¹ From a Dworkinian perspective, after all, Hall need not have

"values of America," and President Ronald Reagan's "Tear Down that Wall" speech in Berlin on June 12, 1987, referring to "truth," "faith," "freedom," and even "freedom for all mankind." George W. Bush, Address at the Joint Session of Congress (Sept. 20, 2001), *available at* <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>; Ronald Reagan, Address to the People of West Berlin (June 12, 1987), *available at* <http://www.historyplace.com/speeches/reagan-tear-down.htm>. Presidents Bush and Reagan, along with others, may be mistaken in believing that their (or anyone's) national security goals have a moral foundation, and even if they are right about the morality of national security generally they may be mistaken in applying that principle to various particular acts or events. To fail to appreciate that they themselves perceive their goals in highly moral terms demonstrates a lack of understanding that may impede successful prescriptive responses to the problem of moral mistake. The moral difference between Hall and King, for example, is a difference that cannot be captured by a glib observation that one perceived a moral calling while the other did not. To be morally mistaken is not to be amoral. And, thus, urging citizens or officials to place morality over law is no guarantee that they will do so correctly or wisely. *See* Frederick Schauer, *The Legality of Evil or the Evil of Legality?*, 47 TULSA L. REV. 121, 129–30 (2011) (reviewing DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS* (2d ed. 2010)).

10. There are ongoing debates about whether there is any moral obligation to obey the law qua law at all, but those who believe there is such an obligation almost universally consider it *prima facie* (or *pro tanto*) and not absolute. *Compare* M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 950–55 (1973) (arguing that there is not even a *prima facie* moral obligation to obey the law), Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 139–40 (1984) (same), and Donald H. Regan, *Law's Halo*, 4 SOC. PHIL. & POL. 15, 15–17 (1986) (same), with Tony Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39, 55–61 (1981) (maintaining that societal necessity grounds a nonabsolute obligation to obey the law), and Massimo Renzo, *Associative Responsibilities and Political Obligation*, 62 PHIL. Q. 106, 106 (2012) (finding a *prima facie* obligation to obey the law in our obligations to fellow citizens). A valuable analysis of the modern debates and terminology is in William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215, 215–17 (2004).

11. *See* DWORKIN, *supra* note 8, at 115–16 (arguing that some acts of integrity based civil disobedience are not violations of law at all). Dworkin's general approach, which includes much of political morality within his conception of law is set out in RONALD DWORKIN, *JUSTICE IN ROBES* 13–18 (2008) [hereinafter DWORKIN, *JUSTICE IN ROBES*] (discussing political morality in the "doctrinal stage" of legal interpretation); RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN,

acknowledged that she even broke the law. Understanding law as consisting solely of the words on the pages of the statute books, she might have said, is a false and crabbed understanding of what law is. Law, she could have argued, is more enveloping, incorporating a complex intersection of moral (and legal) principles, political values, and formal legal rules, all of which are part of the real law.¹² When law is understood in this broader and richer sense, she could have continued, the reasons of legal and moral principle for acting in contradiction to the bare words of a statute are revealed as part of the law. In her case, she would have concluded, there was, therefore, no violation of law at all, however much it may seem so to those burdened with too narrow an understanding of the components of law, and thus with too limited a conception of what is to count as “the law.”

Hall was no legal theorist, and her hypothetical Dworkinian response is intended to be comical. Yet similar responses by officials to charges of illegality, albeit lacking in theoretical adornment, are ubiquitous. When officials appear to violate obviously applicable formal positive law,¹³ they typically do not emulate Hall in admitting illegality and seeking to justify their actions by reference to a higher morality. Nor do they call forth the images of Thoreau, Gandhi, King, and other iconic figures of the civil disobedience tradition. Rather, officials who appear to have acted in legally questionable ways¹⁴ commonly offer an understanding of the components

LAW'S EMPIRE]; and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 206–22 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*] (discussing civil disobedience and morality).

12. Thus, in describing “two senses of the word ‘statute,’” Dworkin explicitly distinguishes between “a document with words printed on it” and “the law created by enacting that document, which may be a much more complex matter.” DWORKIN, *LAW'S EMPIRE*, *supra* note 11, at 16.

13. The understandable reaction to the phrase in the text is that what is included within “formal positive law” is exactly what is at issue. Statutes? Regulations? Precedent? Canons of statutory interpretation? Or is it even more than that? This is exactly what is at issue, but in order to get at it, we need to start somewhere, and Ruth Gavison’s notion of “first stage law” is useful for this purpose. Ruth Gavison, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 21, 30–31 (Ruth Gavison ed., 1987). Because there are important debates about what counts as law, or written law, or positive law, it is valuable to have a term—such as Gavison’s—that brackets these debates in order to identify in a theoretically thin way the stuff that the ordinary person thinks of as law—constitutional provisions, statutes, administrative regulations, and reported court decisions, for example. This is the initial conception of formal or positive law I adopt here, and importantly, it is the conception that Thoreau, Gandhi, and King employed in defending their disobedience of law. Indeed, it is pretty much the only conception of law that makes their arguments even sensible.

14. Even the phrase “legally questionable ways” is subject to the objection noted above. Gavison, *supra* note 13, at 30–31. I have no desire to load the deck by assuming a definition of “law” at the outset, and so I emphasize again that this phrase should not be taken to assume a particular conception of law embedded in the word “legally.” All of this will become more apparent as the analysis proceeds, but that analysis needs some way of getting started, and a thin and commonplace understanding of what law is will serve that purpose.

of law that transforms their seemingly illegal acts into ones that are not unlawful at all.¹⁵ In doing so, these officials are not merely recharacterizing an act to place it outside what all agree is the governing law,¹⁶ nor arguing for a favorable interpretation of a controlling statute.¹⁷ Rather, they offer alternative characterizations of just what is to count as law,¹⁸ presenting a broader picture of law that transforms the seemingly illegal act into what becomes lawful conduct under the broader conception of law.

The strategy of relying on a capacious conception of law in order to convert the unlawful into the lawful comes in multiple forms. Sometimes, as with the Bush Administration's domestic warrantless wiretapping in violation of the literal terms of the Foreign Intelligence Surveillance Act,¹⁹ officials insist that the law includes not only the precise words of the most directly applicable statutes, but also higher and less concrete

15. An interesting exception is Franklin Roosevelt's dismissal of the constitutional objections to the Second World War internment of Japanese-Americans as "legalisms." JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 48 (2007). Implicit in that dismissal is an acknowledgment of formal illegality that officials nowadays appear less prone to accept.

16. This is of course an everyday occurrence throughout the legal system, as when lawyers argue that certain investment instruments are insurance policies and not "securities" for purposes of the securities laws. *See* *Lincoln Nat'l Life Ins. Co. v. Bezich*, 610 F.3d 448, 449–51 (7th Cir. 2010) (holding securities laws inapplicable to certain insurance contracts). Or that trash on a sidewalk is not part of one's "house" or "effects" for purposes of the Fourth Amendment. *See* *California v. Greenwood*, 486 U.S. 35, 46 (1988) (holding trash left outside for collection is not covered by the Fourth Amendment).

17. *See generally* KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* (2012); CALEB NELSON, *STATUTORY INTERPRETATION* (2011). This is not to say that officials would not prefer to be able to claim to be following exactly the law their critics allege them with violating, and sometimes there is enough interpretive leeway to permit this type of response. But sometimes there is not, and the officials must face a choice among offering a preposterous interpretation of the particular law they are charged with violating, admitting the violation and claiming moral justification for doing so, or arguing that the law includes more than just the rule they are alleged to have violated. Without denying that officials typically prefer to rely on a nonlaughable interpretation if one is available, the basic point of this Essay is to explore the official's choice among the alternatives if no nonlaughable interpretation will work.

18. I am emphatically not referring to the concept of law in a broader and universal sense, and thus not to what necessarily must constitute law in all possible legal systems in all possible worlds. Such questions of general jurisprudence are important and enduring; they lie at the heart of modern debates about, for example, inclusive and exclusive positivism, the flavor of which can be seen in the various essays in *HART'S POSTSCRIPT* (Jules Coleman ed., 2001), and the valuable overview in Leslie Green, *General Jurisprudence: A 25th Anniversary Essay*, 25 *OXFORD J. LEGAL STUD.* 565, 565 (2005). In this Essay, however, which is focused on American public discourse about lawful and unlawful official conduct, my interest in the nature of law is far more modest, and indeed is as much sociological as it is philosophical, encompassing only the questions of what is understood to count as law in a particular political or legal culture, and of what that culture takes to be on one or the other side of the divide between legal and other norms, values, and sources.

19. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1802 (2006).

legal / constitutional principles of presidential authority.²⁰ At other times, for example, when members of Congress vote for laws that contradict the clear holdings of recent Supreme Court decisions,²¹ officials deny that such decisions bind them in the face of their own constitutional and, therefore, equivalently legal obligation to interpret the Constitution according to their own best understanding.²² On still other occasions, as with the decisions of the mayors of San Francisco, California and New Paltz, New York, to perform same-sex marriages in violation of what was at the time the prevailing state statutory law, officials seem even more Dworkinian. These officials maintain that the law to which they profess allegiance includes a broad range of moral and political principles, principles they sometimes attempt to describe in constitutional terms, existing constitutional doctrine notwithstanding.²³ And at times, as with Senator Barbara Boxer's dismissal

20. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting that the Bush Administration defended violating the statute by arguing that its actions were legally authorized by the congressional resolution in September 2011, which authorized actions against Al Qaeda); John Yoo, Opinion, *Why We Endorsed Warrantless Wiretaps*, WALL ST. J., July 16, 2009, at A13 (arguing that acting in contravention of the statute was permitted under the President's implicit constitutional powers to deal with emergencies, national security, and foreign affairs, and to protect against foreign threats).

21. Among the many examples are the laws invalidated in *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (child pornography), *United States v. Eichman*, 496 U.S. 310, 318–19 (1990) (flag desecration), and *Sable Commc'ns Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (indecent nonobscene telephone services). A slightly more ambiguous example was presented in *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (upholding the requirement that the Miranda warning be read to criminal suspects, and striking down the Federal statute purporting to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)). Although it is clear that the members of Congress who voted for 18 U.S.C. § 3501 in 1968 believed they were overruling a Supreme Court decision, and although none of the proponents of the legislation subscribed to the subsequently developed prophylactic and thus nonconstitutional account of the statute, a prominent argument in Congress at the time was that Congress had the power to correct mistaken Supreme Court factual assumptions even if not the Court's "constitutional theory." See S. REP. NO. 90-1097, at 63 (1968), reprinted in 1968 U.S.C.C.A.N. 2212, 2150 (Report of the Senate Judiciary Committee); *Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary: U.S. S.*, 90th Cong. 28 (1968) (statement of Sen. Sam Ervin). In an important way, the episode, even if supporting the view that some members of Congress did not believe they were challenging Supreme Court constitutional interpretive authority, reinforces the primary theme of this Essay—that opposing parties in public law legal controversies will adopt differing theories of what counts as law in order to avoid seeming to violate the law.

22. See Bruce G. Peabody, *Congressional Attitudes Toward Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION 39, 56 (Neal Devins & Keith Whittington eds., 2005) (discussing examples in which members of Congress voted for laws contradicting Supreme Court holdings).

23. See Dean E. Murphy, *San Francisco Mayor Exults in Move on Gay Marriage*, N.Y. TIMES, Feb. 19, 2004, at A14 (describing San Francisco mayor's argument that the law does not permit him to discriminate); *Mayor Defends Same-Sex Marriages*, CNN (Feb. 22, 2004, 10:51 PM), <http://www.cnn.com/2004/LAW/02/22/same.sex/> (same); Interview by Amy Goodman with Jason West, Mayor, New Paltz, N.Y. (March 5, 2004), available at www.democracynow.org/2004/3/5/new_paltz_ny_mayor_arrested_for (recounting the mayor's defense of performing same-sex marriages in terms of his decision to "uphold the law"); Interview by Owen

of Senator Patrick Leahy's objection that a voluntary congressional pay cut would violate the Twenty-Seventh Amendment, officials insist there is simply no law to be violated until there has been a court challenge and a judicial ruling.²⁴

These examples embody differing approaches, but all rely on so broad an understanding of the components of law as to make the possibility of moral illegality (or, for that matter, legal immorality) close to impossible. In describing the elements of law, these approaches include within the idea of law not only conventional statutory, constitutional, and common law sources of law, but also a host of moral, ethical, political, and practical considerations.²⁵ Thus, these approaches make conceptually unavailable the very conflict that Thoreau, Gandhi, King, and Hall thought so important. The strategies in these examples also stand in contrast to the conception of law implicit in the charges of illegality to which these defenses are responding—charges focused on the exact language of individual statutes, constitutional provisions, or judicial decisions, and thus

Thompson with Jason West, Mayor, New Paltz, N.Y. (May 14, 2004), available at www.upsidedownworld.org/WestInterview.htm (presenting defense of performing same-sex marriages as dictated by the Constitution and illegality of discrimination).

24. Josiah Ryan, *Dem Senator Slams Dem Colleague's Measure as Unconstitutional*, HILL FLOOR ACTION BLOG (Mar. 1, 2011 7:03 PM), www.thehill.com/blogs/floor-action/senate/146859-dem-senator-slams-dem-colleagues-measure-as-unconstitutional (describing the colloquy between Boxer and Leahy over whether a law could be unconstitutional without a court challenge). See also Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 719–20 (1985) (describing argument by Senator Dixon that a law became unconstitutional only by court decision). Indeed, this was the nature of the arguments supporting Vice President Gore's well-known claim that there was "no controlling legal authority" prohibiting his admitted solicitation of campaign funds from his White House office, see Alison Mitchell, *Gore Says He Did Nothing Illegal in Soliciting from White House*, N.Y. TIMES, March 4, 1997, at A1, available at <http://www.nytimes.com/1997/03/04/us/gore-says-he-did-nothing-illegal-in-soliciting-from-white-house.html>, although the relevant statute provided that "[i]t shall be unlawful for any person to solicit or receive a [political] contribution . . . in any room or building occupied in the discharge of official duties by [any officer or employee of the United States or any department or agency thereof]." 18 U.S.C. § 607 (1994). Interestingly, officials who seek to justify their legally questionable acts typically offer an expansive conception of "law," as in most of the examples described here, but sometimes, as with the response of Senator Boxer to Senator Leahy, they rely on very narrow rather than very broad understandings of what counts as a law.

25. Insofar as so-called legal pragmatism incorporates within the "legal" the full panoply of moral, political, policy, and practical concerns, it represents in broad form the issue presented more narrowly by the incorporation of the moral within the legal. The thoroughgoing pragmatist cannot make sense of the idea of something being the law, or good law, but pragmatically defective. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (defining legal pragmatism as "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy"); Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 480 (2003) (understanding legal pragmatism as pervasively instrumental and collapsing the distinction between legal and moral rights and interests).

premised on a narrower understanding of what counts as law and what does not. In an important way, these are all strategies of reconciliation. Faced with an inconsistency between law and morality, or law and the best policy, reconciliation strategies seek an understanding of law that reconciles the two and, thus, dissolves the inconsistency.

When those charging illegality rely on a narrow conception of law and those defending against such charges adopt reconciliation strategies employing far broader conceptions, it becomes difficult to determine whether the law has been broken at all.²⁶ Yet this Essay's purpose is not to resolve whether the proper understanding of the domain of law is broad or narrow, nor to determine the real components of law. Rather, its more modest aim is to examine the dependence of claims about official legal compliance and noncompliance on contested conceptions of law, with the goal of helping understand the jurisprudential issues lurking behind the common charges that officials have violated the law and the equally common claims of officials who have been following it.

The issues are jurisprudential, but they are also rhetorical. Most officials recognize, as Fawn Hall did not, that admitting to violating the law entails substantial political and reputational risks, especially for those holding governmental positions. But they understand as well that their constituencies typically reward doing what is right and not what is wrong, questions of legality aside.²⁷ Faced with this widespread tension between

26. A conflict of conceptions of law surfaces in recent debates about the ethics and legal competence of various lawyers involved in recent controversies about the legality of torture and other national security controversies. Compare W. Bradley Wendel, Book Review, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 730–34 (2012) (adopting a narrow conception of law that excludes many moral considerations), with William H. Simon, Book Review, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEX. L. REV. 709, 709–10, 726 (2012) (arguing that lawyers' ethical responsibilities should be evaluated according to a conception of law that incorporates moral considerations).

27. I have discussed this issue in several previous articles. See Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 13–14 (2007) [hereinafter Schauer, *Ambivalence About the Law*] (discussing how “American political tradition is replete with instances of Presidents, governors, cabinet officials, members of Congress, and countless less exalted officials and non-governmental leaders who have relatively shamelessly taken the position that immoral and at times simply unwise laws and legal decisions need not be considered binding when they conflict with what those officials and their constituents believe is moral necessity or wise policy”); Frederick Schauer, *The Political Risks (If Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 98 (2012) [hereinafter Schauer, *The Political Risks (If Any) of Breaking the Law*] (analyzing whether breaking the law is political risky for legislators and high executive officials who, for reasons of immunity or otherwise, are not subject to formal legal sanctions); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 797–99 (2010) [hereinafter Schauer, *When and How (If at All) Does Law Constrain Official Action?*] (offering the hypothesis that although there is much talk about official obligation to the law, in fact, officials rarely obey the law just because it is the law, and are rarely politically punished for engaging in

public allegiance to the rule of law in the abstract and commitment to first order substantive correctness in particular cases, officials see the value of defining law so as to make their substantively appealing actions appear lawful, just as their critics will define law so as to make substantively objectionable policies unlawful as well. Given such a complex rhetorical terrain, figuring out when an official is violating the law becomes a conceptual morass.

In addition to involving the public rhetoric of legality and illegality, the issue is about the mechanisms available for enforcing the widely accepted belief that even officials are not above the law.²⁸ Although ordinary citizens are obviously subject to various tangible sanctions compelling them to obey the law, and although lower level officials such as police officers and city councilors are vulnerable to civil rights actions and related remedies should they violate the laws that constrain them,²⁹ higher officials are often immune from the obvious sanctions the law has at its disposal.³⁰ Members of Congress cannot be sanctioned directly, for example, for voting for a blatantly unconstitutional law. And short of the extraordinarily rare remedy of impeachment and removal, presidents are not subject to the normal legal penalties of fines, imprisonment, or civil damages should they violate even those laws explicitly designed to constrain their actions.³¹ Given the typical unavailability of the legal system's normal penalties for sanctioning illegality, the importance of

sanction free illegal actions). Thus, Thoreau may have captured something enduring in urging that “[i]t is not desirable to cultivate a respect for the law, so much as for the right.” Thoreau, *supra* note 5, at 228.

28. Thus, the United States Department of State announces that the rule of law means, “no individual, president or private citizen, stands above the law.” U.S. Dep’t State, *The Rule of Law*, INFOUSA, www.usinfo.org/enus/government/overview/law.html (last updated Apr. 2005). That the state and its officials are subject to the law is central to most of the influential accounts of the rule of law. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 39–40 (1964); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 223–25 (2d ed. 1979); Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8 (1997).

29. See generally JOHN C. JEFFRIES, JR., ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* (2d ed. 2007) (providing an introduction to modern civil rights legislation); SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (3d ed. 1991) (providing a comprehensive overview of 42 U.S.C. § 1983); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983) (discussing the significant effect on street level bureaucrats of the risk of liability).

30. See *infra* text accompanying notes 38–39.

31. For example, although the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548 (2006)), is explicitly aimed at limiting the power of the president to mandate military action absent congressional authorization, the resolution is supported by no sanctions that would not have existed even without it.

political and rhetorical remedies for high level official illegality becomes apparent. And thus, in examining the rhetorical and political terrain on which such remedies are applied or withheld, we are inquiring not into rhetoric and politics for their own sake, but into the most important mechanisms by which officials are—or are not—held accountable for the lawfulness of their conduct.

II. THE INCENTIVES TO OFFICIAL COMPLIANCE

The question can be put directly: We expect officials to comply with the law, but what is “the law” with which we expect them to comply? This question is more important in the context of official compliance than in the parallel context of compliance by ordinary citizens, because when the issue is citizen compliance, the citizen’s definition of law will ordinarily yield to that held by those with the power to punish. John Austin said it best almost two centuries ago:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.³²

Austin’s language is quaint, but his point endures. Whatever the citizen may think that morality requires, the hangman has the last word. And although Austin was objecting specifically to Blackstone’s version of natural law,³³ he would have said the same to any citizen claiming to be

32. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 158 (Wilfred E. Rumble ed., Cambridge Univ. Press 1995) (1832).

33. For context on Austin’s (and Bentham’s earlier) campaign against natural law, and their insistence on separating the question of the existence of law from that of its moral merit, see Frederick Schauer, *Positivism Before Hart*, 24 *CAN. J.L. & JURIS.* 455, 456, 464–67 (2011). Bentham and Austin argued principally against the “unjust law seems to be no law” position of Cicero, Blackstone, and others, see Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All*, 20 *CAN. J.L. & JURIS.* 201, 201, 221–23 (2007) (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA* quest. 95, art. 2 (Fathers of the English Dominican Province trans. 1952)) (internal quotation marks omitted), but other natural law theorists accept the separation of positive law’s existence from its moral status, see generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (explaining that Aquinas and the best natural law position understands the notion of potentially immoral positive law); MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2006) (arguing that immoral law is defective as law but is still law); John Finnis, *Natural Law Theories*, *STAN. ENCYCLOPEDIA PHIL.* (July 25, 2011), <http://plato.stanford.edu/entries/natural-law-theories/> (same).

acting under any other expansive conception of law. Indeed, it is part of the civil disobedience tradition that the disobedient typically expects to be punished for his or her acts,³⁴ often out of respect for the state and its authority, the aberrational immoralities of particular laws aside.³⁵ Even when their moral objections to the state are more pervasive, however, those who disobey the law for reasons of conscience understand that the law deploys its force in the service of its own conception of legitimacy, the citizen's potentially different conception notwithstanding.³⁶ From the law's own standpoint, as Austin recognized in the nineteenth century and King in the twentieth,³⁷ the nature of legality is not a matter for debate.

This is not to say that sorting out the conception of law that governs the ordinary citizen is an unimportant philosophical project; but from a crudely practical perspective, the citizen's conception will normally be subservient to the state's. In the everyday, nonphilosophical course of things, the state's power to impose sanctions makes its conception of law supreme. But when we turn from the citizen's legal compliance to the official's, different considerations come into play. Most importantly, formal penalties are often impossible for cases of official noncompliance. Sometimes a legal remedy is simply unavailable, as with a member of

34. See HEIDI M. HURD, *MORAL COMBAT* 274–75 (1999) (noting that justified law violation involves people who are “prepared to be punished for their disobedience”). *But see* Kent Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48, 69–71 (1970) (arguing that morally justified disobedience does not require accepting punishment).

35. Indeed, this is why Socrates accepted what he believed to be unjust punishment. See Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 579 n.124 (1992) (“Among the possible complicating factors, perhaps the most interesting is Joseph Raz's suggestion that conscientious citizens whose sense of personal identity is linked to their membership in a reasonably just society may have moral reasons, possibly rising to the level of a moral duty, to express their respect for the society through obedience to its laws.” (citing JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 250–61 (1979))); Joel Feinberg, *The Right to Disobey*, 87 MICH. L. REV. 1690, 1690–91 (1989) (“[D]isobedience can be morally justified, but only when the weighty reasons that tend to support a moral duty of obedience are outweighed in a particular set of circumstances by even weightier reasons that support a moral duty”); Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 733 n.38 (1991) (defining civil disobedience as “knowing and deliberately unlawful protest undertaken in a public way with a willingness to accept official sanction”); Philip Soper, *Another Look at the Crito*, 41 AM. J. JURIS. 103, 104 (1996) (defending an interpretation of the Crito that supports the claim Socrates makes concerning the universal moral force of law). For the alternative view that Socrates accepted his punishment because it would demonstrate the injustice of his conviction, see Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 929–31 (1984).

36. David Luban interprets much of King's *Letter from a Birmingham Jail* in this way. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2191–210 (1989).

37. *Id.* See also DAVID LYONS, *ETHICS AND THE RULE OF LAW* 73 (1984) (“The breach of a legal obligation constitutes a lapse or fault in the eyes of the law, but not necessarily in any other respect.”).

Congress who votes for a patently unconstitutional law.³⁸ At other times, officials are protected by absolute or qualified immunity from civil liability.³⁹ And even when formal enforcement is technically possible, various practical and political considerations often make the imposition of civil or criminal liability difficult. Of course, officials do go to prison for bribery and other forms of self-dealing illegality, but most constitutional and statutory constraints on official action are largely unenforced and unenforceable through the legal system's normal enforcement methods. Because formal sanctions are so often unavailable for official noncompliance, the conception of what constitutes the law adopted by the institutional mechanisms of formal enforcement within the legal system, therefore, becomes less dominant.

That official illegality is not often punishable by formal sanctions does not mean there are no sanctions at all. But now, the terrain has shifted. Official illegality is punished—or not—in the court of public opinion, not in the courthouse. In this court—one constituted by an amalgam of elite opinion, media commentary, the Internet, social media, interest groups, citizen beliefs, voting behavior, and much else—the actions of officials are evaluated, and when those evaluations are negative, the careers of officials are often ended or impeded.⁴⁰ Volumes have been devoted to the conceptualization and measurement of public opinion,⁴¹ but that would not be so were public opinion irrelevant. In a democracy, and even in many nondemocracies, public opinion matters, and thus, the ability of public opinion—however constituted and however measured—to distribute

38. *Powell v. McCormack*, 395 U.S. 486, 505 (1969). *See also Doe v. McMillan*, 412 U.S. 306, 312 (1973) (action against members of Congress for committee reports); *Gravel v. United States*, 408 U.S. 606, 621–22 (1972) (same for legislative aides); *United States v. Johnson*, 383 U.S. 169, 179 (1966) (same for floor speeches). *Cf. United States v. Brewster*, 408 U.S. 501, 528–29 (1972) (holding that legislative acts and motives are beyond judicial scrutiny, but that nonlegislative acts by legislators are not).

39. On official immunity generally, including questions about which officials are protected by which kinds of immunity for which acts, see generally JEFFRIES ET AL., *supra* note 29, and NAHMOD, *supra* note 29.

40. And, at times, the actions of officials are evaluated not in the court of public opinion, but still in political and not legal institutions, and thus in the “court” of a rival government institution, as when Congress evaluates the legality of actions of the president. Still, for example, whether and when Congress will prevail in this rivalry ultimately is a matter of public opinion.

41. For classic discussions of public opinion, see EDWARD L. BERNAYS, *CRYSTALLIZING PUBLIC OPINION* 87–98 (1923) (explaining the components of public opinion); V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* 3–25 (1961) (same); and WALTER LIPPMANN, *PUBLIC OPINION* 29 (1991) (“The pictures inside the heads of these human beings, the pictures of themselves, of others, of their needs, purposes, and relationship, are their public opinions.”). Important academic journals include *Public Opinion Quarterly* and *Political Behavior*. For a sampling of contemporary methodological issues, see generally Symposium, *On Public Opinion*, *DAEDALUS*, Fall 2012.

rewards and penalties, especially to those who hold public office or aspire to it, is virtually a self-evident proposition.⁴²

If public opinion is important, however, and if public opinion can impose penalties even when formal law cannot, the inquiry then turns to the criteria that the court of public opinion employs in determining whether and when to mete out its punishments. Which official actions are punished in the public and political arena, which are rewarded, and which are largely irrelevant? With formal legal sanctions largely off the table, the question of legal compliance is answered in the realm of politics, rhetoric, and the other determinants of public opinion. So if official illegality is sometimes subject to punishment in the court of public opinion,⁴³ and if officials naturally seek to avoid that punishment, then we can inquire into how officials who wish to avoid punishment for illegality in the court of public opinion seek to justify their actions.

When sanctions for illegality are determined by public opinion, Austin's analysis is inapt. The hangman no longer has the last word, because there is no hangman. Nor are there very many widely accepted criteria for determining which official illegalities will be condemned in public discourse and which will not. Against this background, the conception of law that undergirds claims of compliance or noncompliance becomes of overriding but often unrecognized significance. Most officials profess allegiance to the law, but the absence of any consensus on what "the law" means in this context makes many of these claims hollow. The issue is rarely disagreement about the application or interpretation of an

42. See Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29, 29 (2003) ("[P]ublic opinion influences policy most of the time, often strongly.").

43. When and how official illegality is treated politically is a complex matter. For my own hypotheses, see generally Schauer, *Ambivalence About the Law*, *supra* note 27, at 13–14 (discussing how "American political tradition is replete with instances of Presidents, governors, cabinet officials, members of Congress, and countless less exalted officials and non-governmental leaders who have relatively shamelessly taken the position that immoral and at times simply unwise laws and legal decisions need not be considered binding when they conflict with what those officials and their constituents believe is moral necessity or wise policy"); Schauer, *The Political Risks (If Any) of Breaking the Law*, *supra* note 27, at 83, 98 (analyzing whether breaking the law is political risky for legislators and high executive officials who, for reasons of immunity or otherwise, are not subject to formal legal sanctions); Schauer, *When and How (If at All) Does Law Constrain Official Action?*, *supra* note 27, at 797–99 (offering the hypothesis that although there is much talk about official obligation to the law, in fact, officials rarely obey the law just because it is the law, and are rarely politically punished for engaging in sanction free illegal actions). For purposes of this Essay, however, I make only the simple assumption that officials often wish to avoid explicit public acknowledgment of unlawful conduct.

accepted legal source.⁴⁴ More often, it is about what counts as law.

III. A FEW EXAMPLES

Recall the Bush Administration's defense of its electronic surveillance of American citizens in apparent violation of the Foreign Intelligence Surveillance Act.⁴⁵ Although the precise terms of the statute had seemingly been violated,⁴⁶ much of the administration's defense was couched in terms of legal justifications for superficially illegal actions. Those justifications included, *inter alia*, the supremacy of the president's constitutional commander-in-chief, executive, and emergency powers over the literal words of a statute, the presumed intentions of a post-9/11 Congress, and the implications of congressional authorization of military action against Al Qaeda.⁴⁷ But the administration did not argue, even in the public arena, that moral, political, or pragmatic considerations might outweigh the law. Instead, it insisted that restricting "the law" to one statute was too constricted an understanding of the elements of law. Such an argument might not prevail in a court, but it seems to matter outside it. To the extent

44. This is not to say that there are never interpretive disagreements, for of course there are. Sometimes there are simply what appear to be brazen assertions of linguistically tenuous interpretations, as with the claim that withholding the salary of a member of Congress does not count as varying it for purposes of the 27th Amendment. See Scott Bomboy, *27th Amendment Gets Publicity in Budget Battle*, YAHOO! NEWS (Jan. 22, 2013, 11:15 AM), <http://news.yahoo.com/27th-amendment-gets-publicity-budget-battle-111609688.html>.

45. See *supra* text accompanying note 19.

46. See *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 700 F. Supp. 2d 1182, 1195–97 (N.D. Cal. 2010) (estopping defendants from arguing the existence of a Foreign Intelligence Surveillance Act warrant based on defendant's failure to produce evidence of the warrant), *aff'd in part, rev'd in part sub nom.* Al-Haramain Islamic Found., Inc. v. Obama, 705 F.3d 845 (9th Cir. 2012); ACLU v. NSA, 438 F. Supp. 2d 754, 779–80 (E.D. Mich. 2006), *rev'd on other grounds*, 493 F.3d 644 (6th Cir. 2007); Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1433 (2010) (describing circumvention of FISA statute); Wesley MacNeil Oliver, *America's First Wiretapping Controversy in Context and as Context*, 34 HAMLINE L. REV. 205, 254–57 (2011) (explaining inconsistencies between Bush Administration's wiretapping and requirements of the FISA statute); Adrienne Ratner, Note, *Warrantless Wiretapping: The Bush Administration's Failure to Jam an Elephant into a Mousehole*, 37 HASTINGS CONST. L.Q. 167, 182–90 (2009) (same).

47. See *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, U.S. Dep't Justice, Jan. 19, 2006, at 6–10, 23–41, available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf> (supporting domestic electronic surveillance); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 119–22 (2006) (arguing that various constitutional provisions justified domestic electronic surveillance); Kitrosser, *supra* note 46, at 1406–07 (describing the administration's constitutional claims); Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375, 383–91 (2008) (arguing that the Vesting Clause justifies the administration's actions); Oliver, *supra* note 46, at 253–60 (describing the administration's constitutional claims); Ratner, *supra* note 46, at 172 (same).

that a claim to be acting legally resonates with the public even if not to a judge, the public opprobrium for acting unlawfully may well be lessened. When officials are concerned that their actions will be perceived as lawful, technical illegality as perceived by a court aside, they have reason to offer an understanding of law that may diminish the public perception of illegality.

The rhetorical and political strategy of converting the narrowly illegal into the broadly legal seems to have scant political incidence.⁴⁸ The Bush Administration used a broad conception of law to justify its contravention of the specific words of the Foreign Intelligence Surveillance Act, but the Obama Administration did much the same with respect to the War Powers Resolution.⁴⁹ In defending what seemed to many commentators a clear violation of the resolution in deploying drones in Libya without the need for approval by Congress,⁵⁰ the Obama Administration did not contend that the violation was justified on moral, political, or pragmatic grounds. Instead, its principal argument was that its actions did not count as “hostilities” under the terms of the resolution,⁵¹ and supported that argument with a conception of law that relied heavily on historical practice as a source of law⁵²—a broader conception of the domain of valid legal

48. Indeed, neither legality nor illegality seem to be the special province of one or another political party or perspective. See Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 483–84 (2011) (“[A]voidance of the law in the service of what are perceived to be sound political, policy, or moral goals appears at first glance to have little political valence.”).

49. See *supra* note 31 and accompanying text.

50. See Louis Fisher, *Military Operations in Libya: No War? No Hostilities?*, 42 PRES. STUD. Q. 176, 180–83 (2012) (charging the Obama Administration with defying the plain words of the War Powers Resolution); Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62–63 (2011) (same); Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27 (arguing that disregard to the War Powers Resolution lacked a “solid legal foundation”); Bruce Ackerman & Oona Hathaway, *Obama’s Illegal War*, FOREIGN POL’Y (June 1, 2011), http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war (same).

51. This was part of the claim made by Harold Koh, Legal Adviser to the State Department, before the Senate Foreign Relations Committee. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 12–16 (2011) [hereinafter *Libya Hearing*], available at http://www.fas.org/irp/congress/2011_hr/libya.pdf (statement of Hon. Harold Koh, Legal Adviser, U.S. Dep’t State). And the claim was based not only on the administration’s understanding of the meaning of the word “hostilities,” but also on the argument that, especially in foreign relations and national security, past historical practice is a valid source of law. On the status as law of historical practice, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–32 (2012) [hereinafter Bradley & Morrison, *Historical Gloss*]. On whether actual practice evolving out of the “push and pull of the political process” counts as law, see Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1099–100 (2013) [hereinafter Bradley & Morrison, *Presidential Power, Historical Practice, and Legal Constraint*].

52. See *Libya Hearing*, *supra* note 51, at 9.

sources than the one used by those who accused the administration of acting unlawfully.⁵³

The strategy of defining law broadly in order to make the superficially unlawful appear legal has a distinguished history. Lincoln's defense of his unwillingness to enforce the *Dred Scott* decision⁵⁴ was not based on the quite good argument that the profound immorality of slavery overrode the requirements of positive law, but rather on a broader conception of law that included the president's own power to interpret the Constitution for purposes of his own decisions.⁵⁵ For Lincoln, disregard (or even disobedience) of *Dred Scott* was not a question of disregarding the law, but of understanding the law more widely than his opponents. So too with generations of departmentalists after Lincoln, who, in disregarding Supreme Court decisions, have claimed not to be challenging the law, but to be operating under a conception of law broader than that of their narrowly focused critics.⁵⁶

Long after Lincoln, Ronald Dworkin used a different aspect of the law of slavery to begin developing his own expanded conception of the components of law. Criticizing those judges who had enforced the Fugitive Slave Laws despite their own alleged belief in the immorality of those laws, Dworkin observed that these judges had rejected a theory of law

53. In fact, the conception of law that was employed was especially broad because the administration did not even rely on congressional acquiescence in those past practices. See Bradley & Morrison, *Historical Gloss*, *supra* note 51, at 459; Bradley & Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, *supra* note 51, at 1105–07.

54. *Scott v. Sandford*, 60 U.S. 393, 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIII.

55. ABRAHAM LINCOLN, *Sixth Debate with Stephen A. Douglas at Quincy, Illinois*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953); Abraham Lincoln, *First Inaugural Address—Final Text*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra*, at 262, 268. Lincoln's position has, of course, become a central tenet in the departmentalist canon. See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 22–24 (2007); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1073 (1987); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 984 (1987); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 47 (1993); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1547 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

56. Thus, I include within the notion of an expanded conception of law an expanded conception of whose interpretations of law are considered authoritative. See Jennifer Mason McAward, *Congress's Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319 (2008) (discussing the role of Congress in constitutional interpretation); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (discussing the role of the executive branch in constitutional interpretation).

according to which “the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification.”⁵⁷

Given Dworkin’s jurisprudential and philosophical commitments, his focus on justice and fairness as existing inside law is expected, but others may bring into law’s domain different considerations that some would consider extralegal. Some of the arguments noted above substitute principles of national security or emergency avoidance for justice and fairness, for example, but nonetheless implicitly adopt the Dworkinian approach of including broad background principles, and not necessarily legal principles in the narrow sense of “legal,” within a more capacious understanding of law.⁵⁸ Similarly, if public policy is itself part of law, as some Legal Realists believed,⁵⁹ and as most so-called legal pragmatists believe,⁶⁰ then departing from the strict words of the most immediately applicable formal rule in order better to serve public policy is no longer an extralegal act, but is simply a matter of applying the law broadly understood.⁶¹ And when the mythical Justice Foster in Lon Fuller’s *The*

57. Ronald M. Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437 (reviewing ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)).

58. See *supra* text accompanying notes 11–12. Consider also Justice Jackson’s famous observation that the Constitution is not a “suicide pact.” *Terminiello v. City of Chi.*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Justice Jackson used the phrase to suggest that anarchy avoidance was itself a legal consideration, and it has since been deployed to imply a background principle of national security that has legal significance in interpreting and, at times, outweighing more specifically designated constitutional rights. See *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964) (unconstitutionality of Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (repealed 1993)); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (Nationality Act of 1940, 28 U.S.C. § 2282 (repealed 1976)); *Am. Commc’ns Ass’n, CIO v. Douds*, 339 U.S. 382, 408 (1950) (Labor Management Relations Act of 1947, 29 U.S.C. § 159(h)); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 68–71 (2006) (discussing the unconstitutionality of President Truman’s seizure of steel industry operations in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952)). Jackson himself was hardly of one mind on the issue, and noted in his famous opinion in *Youngstown* that “[s]uch power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.” *Youngstown*, 343 U.S. at 653 (Jackson, J., concurring).

59. Most obviously, Karl Llewellyn. See Frederick Schauer, *Editor’s Introduction* to KARL N. LLEWELLYN, *THE THEORY OF RULES* 1, 1–4, 26 (Frederick Schauer ed., 2011) (discussing Llewellyn’s influence on legal thought); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 87–371 (1973).

60. See *supra* note 25 and accompanying text.

61. For descriptions of a number of other contemporary examples in which the executive branch used “practical” or “all things considered” arguments to press against or contradict a formal legal rule, see David Pozen, *Congressional Sclerosis and Constitutional Countermeasures*, prepared for Columbia Law School Workshop on “Are Government Institutions Constrained By Law?” (Apr. 9, 2013). Pozen’s

Case of the Speluncean Explorers voted to free the defendants because not doing so would be unreasonable⁶² and a rejection of common sense,⁶³ he did not suggest that reasonableness and departure from common sense could override the law. Instead, he argued that the demands of reasonableness and common sense were themselves part of the law, contrary indications of specific legal rules notwithstanding.⁶⁴

Finally, consider the recent academic debates about the role of executive branch lawyers. In suggesting that the Office of Legal Counsel insufficiently safeguards legality from the president's policy and political goals, Bruce Ackerman has identified what he believes is the "politicization" of that office and also the Office of White House Counsel.⁶⁵ But partly in response to Ackerman (and others), and partly as a component of more encompassing positions about the constitutional dimensions of separation of powers, Richard Fallon and Richard Pildes have each questioned separating law from politics, urging an understanding of law that includes the very politics that Ackerman decries.⁶⁶ Without

argument, that some actions may become (sort of) lawful by virtue of precipitating congressional action that may itself have been constitutionally problematic, is a good exposition of the way in which different conceptions of law become weapons in political or policy debates.

62. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949).

63. *Id.* at 620, 644.

64. Like the Realists, Fuller was concerned with courts and judges more than with the role of legality in public discourse, *id.* at 624, but we can see how the same arguments could be used in extra-judicial public debate.

65. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 19, 34, 87–88, 106 (2010); Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 14–15, 26–35 (2011). Ackerman's claims have been challenged. See Trevor W. Morrison, Book Review, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1691–94 (2011) [hereinafter Morrison, *Constitutional Alarmism*] ("His twin claims—that the executive branch is on the verge of lawlessness, and that only something like the Supreme Executive Tribunal can save it—thus deserve serious engagement. Ultimately, however, neither claim succeeds."); Morrison, *supra* note 50, at 62–65 ("[A]lthough the Administration's reported decisionmaking process on the 'hostilities' question might seem to support Ackerman's broader argument, the fallout from the decision underscores the costs to any presidential administration of departing from the traditional processes of executive branch legal interpretation."). But nothing in this Essay turns on the underlying merits of the descriptive aspects of the respective positions in the debate between Ackerman and Morrison about Office of Legal Counsel independence. A useful commentary on the debate, including a discussion of "political lawyers," is David Fontana, *Executive Branch Legalisms*, 126 HARV. L. REV. F. 23, 28–34 (2012). But insofar as this is also a debate about the role of politics in law, and the role of politics in what the public understands law to be, and the role of politics in the public understanding of the word "law," then this Essay is, in part, a peripheral contribution to that debate.

66. Richard H. Pildes, Book Review, *Law and the President*, 125 HARV. L. REV. 1381, 1408–16 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)); Richard Fallon, *Sensible and Nonsensical Skepticism About Whether Officials Are Constrained by Law*, prepared for Columbia Law School Workshop, *supra* note 61. See also Morrison, *Constitutional Alarmism*, *supra* note 65, at 1747 ("Especially when the institutional

taking sides about who has the better of the argument on normative grounds, it is clear that the two sides are adopting different conceptions of the realm of law, with one including much of the political that the other excludes. If this is a debate about legality, the two sides, by adopting different definitions of law, turn out to be talking past each other.

IV. STRATEGIES OF RECONCILIATION

These broad conceptions of law can be seen as components of what we can call reconciliation strategies. Conflicts between law and morality⁶⁷ have been around since *Antigone*,⁶⁸ but reconciliation strategies seek to show that there is actually compatibility even where others find conflict, and so too with the analogous conflicts between law and politics, law and policy, and law and security.⁶⁹ By rejecting a conception of law limited to statutes, reported cases, and the other components of first stage law,⁷⁰ reconciliation strategies use a broadened conception of law to admit morality, policy, and even politics into law, thereby dissolving what would otherwise be a conflict.

In using a wide conception of law to eliminate what others see as conflicts, reconciliation strategies curiously circumvent the classical arguments for civil disobedience. Thoreau's plea for civil disobedience, premised on the immorality of tax laws supporting slavery and the Mexican War, necessarily presupposed that law was a morality-independent concept.⁷¹ For Thoreau, morality was complex, but his conception of law was simple and straightforward. The laws supporting slavery and taxation were official edicts, enforced by the coercive apparatus of the state. Thus, they were law. So too with the status of the colonial laws in India and South Africa that Gandhi understood himself to be violating.⁷² Martin

location is the White House, politics has a legitimate place in the law."); H. Jefferson Powell, Book Review, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 385 (1998) ("[P]olitics and law, are not rigid, mutually exclusive categories.").

67. See generally GREENAWALT, *supra* note 8 (discussing the conflicting claims of law and morality from the perspective of those who must choose whether to obey the law and those who make and apply the laws).

68. SOPHOCLES, *ANTIGONE* (F. Storr trans., 1912).

69. Jeffrey Brand-Ballard calls these approaches, conflating the morally bad with the legally incorrect, "Panglossian." JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 86–88 (2010). Although focused on judging, Brand-Ballard's book is useful on official obedience generally, as is Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013).

70. Gavison, *supra* note 13, at 30–31.

71. Thoreau, *supra* note 5.

72. GANDHI, *supra* note 6, at 73–75.

Luther King's justification for defying the laws of Alabama was more complex because he relied in part on the classical natural law claim that an unjust law simply was not law.⁷³ But he also acknowledged that the laws he violated were indeed laws, albeit immoral ones, thus grounding what King perceived to be the moral obligation to violate them.⁷⁴ For Thoreau, for Gandhi, and in part for King, therefore, the status as "law" of the laws they violated was not a function of their moral value. Indeed, were it otherwise, their arguments, along with those of history's other civil disobedients, would be incomprehensible because insisting on the moral necessity of violating a law whose legal status is dependent on its moral acceptability is self-contradictory. And so Thoreau, Gandhi, and King—like Bertrand Russell and the suffragettes—were Austinians, understanding law as the command of the sovereign backed by the threat of force, with morality playing no role in defining law.

Against Thoreau, Gandhi, and Austin, among many others, those who adopt reconciliation strategies claim that law and morality (or policy) can be reconciled in most cases, thereby eliminating what seems on the surface to be the argument for disobedience.⁷⁵ Sometimes the reconciliation strategy will be based on a version of the kinds of natural law claims made by Cicero, Blackstone, and Fuller. These natural law claims, although not typical of modern natural law theory, hold moral acceptability to be an essential property of law, causing what looks like law to become nonlaw because of its immorality.⁷⁶ At other times, a reconciliation strategy will be premised on a conception of interpretive responsibility, as with Lincoln and members of Congress voting for laws that the courts had held to be plainly unconstitutional.⁷⁷ And occasionally reconciliation will be based on the view that limiting the idea of law simply to first stage law is, as a descriptive matter, simply too constricted an understanding of what is to count as law.⁷⁸

73. King, *Letter from Birmingham City Jail*, *supra* note 7, at 295.

74. *Id.* at 299.

75. In a different context, note Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 657 (2012) [hereinafter Carroll, *The Jury's Second Coming*] ("Properly understood, jury nullification is not an act of extralegal rebellion but rather the moment when citizen jurors lend meaning to the law through their interpretation."), and Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. (forthcoming 2014) [hereinafter Carroll, *Nullification as Law*], available at <http://ssrn.com/abstract=2190703> (arguing that nullification of law is part of law itself. Plainly this is a reconciliation approach, the effect of which is to make nullification of law not really nullification at all).

76. See *supra* note 33 and accompanying text.

77. See *supra* text accompanying notes 53, 56.

78. For a discussion of the complexities of disobedience, see DWORKIN, *JUSTICE IN ROBES*, *supra* note 11, at 13–18.

This latter approach is presented in sophisticated form by Ronald Dworkin. Recall his perspective on the judges who enforced the Fugitive Slave Laws.⁷⁹ Dworkin criticized them in multiple ways, but especially on the grounds that the judges had made a legal error in not understanding that principles of justice and fairness were part of the law, no less than the specific statutes with which those principles might conflict. For Dworkin, law is comprised not simply of statutes and enacted rules, but a complex matrix of statutes, rules, and deeper principles infusing the entire system. Although this matrix, even when best and most charitably interpreted, might in theory compel an outcome inconsistent with basic moral principles, Dworkin admits such possibilities are, for him, rare.⁸⁰ Far more often, Dworkin believes the good judge will find a legally justified outcome that will not require the judge to face the law versus morality dilemma that inspires civil disobedience, at least in a system more or less just as a whole.

Dworkin would bridle at characterizing his understanding of judicial responsibility as strategic, but when we turn to official and not judicial behavior, we see reconciliation approaches as central to the rhetorical and political arsenal of officials who recognize the perils of being an acknowledged law-breaker. Thoreau, Gandhi, and King, after all, were not officials, and were responding to different constituencies and different incentives, even apart from the question of conscience. For them, it was comparatively easy—and perhaps even strategically desirable—to acknowledge the illegality of their acts. But for officials and others in public capacities, admitting to illegality, even with no formal punishment in the offing, is risky. Adopting a reconciliation strategy enables them to do what they believe right—first stage law notwithstanding—and then justify their actions without acknowledging any unlawful behavior.

Officials who adopt reconciliation strategies are likely reflecting the unarticulated preferences of their constituents. We know that official disregard of positive law is commonly treated as politically inconsequential when the public agrees with the decision on policy grounds.⁸¹ And we suspect that the public, as an abstract matter, expects its officials to obey

79. Dworkin, *supra* note 57.

80. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 11, at 36–38; DWORKIN, LAW'S EMPIRE, *supra* note 11, at 219. See also Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 169–73 (1982) (recognizing that the existing matrix of law may at times not permit a morally attractive interpretation).

81. For examples, see Schauer, *Ambivalence about the Law*, *supra* note 27, at 15–16; Schauer, *supra* note 48, at 481–82; and Schauer, *When and How (If at All) Does Law Constrain Official Action?*, *supra* note 27, at 770–74.

the law.⁸² When an official disobeys the law in the service of what the public believes is the right decision on policy or moral grounds, therefore, the public may on occasion reconcile this inconsistency by understanding law in a way that renders the policies it prefers lawful and the policies it dislikes unlawful. Officials adopting reconciliation strategies may thus be tracking the preferences of a citizenry that has adopted its own reconciliation strategy as a way of at least occasionally denying the uncomfortable conflicts between morality or good policy, on the one hand, and what the law requires, on the other.

Reconciliation strategies have an antipositivist flavor—at least in the Austinian sense of positivism—for they all understand law in ways that make the notion of an immoral valid law, if not exactly a contradiction in terms, at least a noncentral case of law. Dworkin is of course a prominent critic of legal positivism, and although much ink has been spilled in efforts to show that he misunderstands positivism,⁸³ most of those efforts are located within the domain of general jurisprudence, a domain that is not my concern here, and may not be Dworkin's anywhere.⁸⁴ At the very least, though, there is tension between Dworkin's views and the positivism exemplified by Jeremy Bentham and John Austin,⁸⁵ as well by H.L.A. Hart in his debate with Lon Fuller.⁸⁶ For Bentham, law was often deficient as a matter of morality and policy, and his positivism was related intimately to his law reform agenda.⁸⁷ Austin, as the quotation above indicates,⁸⁸ was insistent that the moral merit of a law was totally distinct from its status as law. And Hart, in 1958, emphasized that a judge's possible moral duty to refuse to enforce an immoral law was consistent with recognizing its status

82. Interestingly, there seems to have been no public opinion research directed at precisely this question.

83. See H.L.A. HART, *Postscript*, in *THE CONCEPT OF LAW* 238 (Paul Craig ed., 3d ed. 2012). Valuable commentary on Dworkin's understanding of positivism can be found generally in the various essays in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* (Marshall Cohen ed., 1983), and Alexander Lawrence & Michael Bayles, *Hercules or Proteus? The Many Theses of Ronald Dworkin*, 5 *SOC. THEORY AND PRAC.* 267 (1979).

84. See Ronald Dworkin, *Book Review, Thirty Years On*, 115 *HARV. L. REV.* 1655, 1655–66 (2002) (reviewing JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* (2001), and expressing dissatisfaction with the entire general jurisprudence agenda).

85. Schauer, *supra* note 33, at 464–67.

86. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 624–27 (1958) (presenting the normative argument for accepting positivism). Whether Hart's views on the separation of law and morals persisted unchanged into *The Concept of Law* is the subject of some uncertainty and much jurisprudential debate.

87. Schauer, *supra* note 33, at 460–62.

88. See *supra* text accompanying note 32.

as a legally valid law.⁸⁹

The antipositivism of reconciliation strategies is relevant here not because this is an Essay in general jurisprudence. To repeat, it is not, and I call reconciliation a “strategy” precisely because the issue here is not whether the things that are labeled as law (or not) really are law (or not). Rather, the issue for the rhetoric of politics and the rhetoric of law is about what we designate as “law” in the public arena. And the importance of this question, with its deliberately definitional tone,⁹⁰ lies in what it tells us about how society thinks about law and about what law means to public officials. In other words, the use or nonuse of a reconciliation strategy tells us much about how the public understands law, and about how officials responsive to that public understanding will actually behave. Just as reconciliation strategies reflect a rejection of classical positivism’s insistence on a law / morality divide, so do the criticisms of official illegality that prompt reconciliation responses reflect the kind of positivism not only associated with Bentham and Austin, but accepted by Thoreau, Gandhi, and (in part) King as well.

V. JUST ENOUGH PSYCHOLOGY

But why are reconciliation strategies so common? Why is public and official antipositivism so widespread and why was Fawn Hall so strategically misguided in failing to understand that fact? One hypothesis takes us more into psychology than legal theory, and into the related phenomena of cognitive consistency and cognitive dissonance.⁹¹ The basic

89. Hart, *supra* note 86, at 620.

90. And that is the purpose of the quotation marks in the title of this paper. Here, if not elsewhere and not always, I am precisely interested in the role that the word “law” and associated references to law play in public political debate. I also believe that there is a causal relation between this question and what a society’s concept of law actually is, but exploring that relationship must be saved for another day.

91. The basic idea of cognitive consistency is set out in Bertram Gawronski & Fritz Strack, *Cognitive Consistency as a Basic Principle of Social Information Processing*, in *COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION* 1, 1 (Bertram Gawronski & Fritz Strack eds., 2012); Eddie Harmon-Jones, Cindy Harmon-Jones & David M. Amodio, *A Neuroscientific Perspective on Dissonance, Guided by the Action-Based Model*, in *COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION*, *supra*, at 47, 48–51; E. Tory Higgins, *Motivational Fit*, in *COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION*, *supra*, at 132, 141–42; Stephen J. Read & Dan Simon, *Parallel Constraint Satisfaction as a Mechanism for Cognitive Consistency*, in *COGNITIVE CONSISTENCY: A FUNDAMENTAL PRINCIPLE IN SOCIAL COGNITION*, *supra*, at 66, 66; and *THEORIES OF COGNITIVE CONSISTENCY: A SOURCEBOOK* 3 (Robert P. Abelson et al. eds., 1968). On the related and derivative idea of cognitive dissonance, see LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1–32 (1957); LEON FESTINGER, *CONFLICT, DECISION, AND DISSONANCE* 1–8 (1964). Representative research includes Mark D. Alicke, Teresa L. Davis & Mark V. Pezzo, *A Posteriori Adjustment of A Priori Decision Criteria*, 12 *SOC. COGNITION* 281, 281–83, 303–05 (1994);

idea is simple: people want their beliefs to be internally consistent, and will engage in cognitive adaptation to lessen inconsistency.⁹² One type of adaptation—the one most relevant here—is changing the meaning of one of two (or more) inconsistent beliefs so that the beliefs are no longer inconsistent.⁹³

The search for cognitive consistency may help explain reconciliation strategies. If peoples—and here we are not talking about officials, but about the public whose preferences officials often seek to satisfy—perceive an inconsistency between their abstract belief in the desirability of lawful behavior and their belief in the rightness of a particular illegal act, they can achieve consistency between the two by redefining their conception of law to make the behavior they believe right no longer illegal. Of course, one way of eliminating the conflict, fortunately rare these days, is to adopt the belief that what is lawful is *eo ipso* moral. But another is to believe that what is moral is, for that reason, legal. And this approach to achieving cognitive consistency may well explain much of the strategy of reconciliation. If people want what they think is right to be legal as well, they may be especially receptive to political arguments that employ a definition of law that make it so.

I do not want much to rest on a psychological hypothesis for which the existing evidence, at least with respect to this particular application, is thin. And there may also or instead be political or sociological explanations for why people resist the very idea of an unjust or unfair law. Whatever the

Bertram Gawronski, *Back to the Future of Dissonance Theory: Cognitive Consistency as a Core Motive*, 30 SOC. COGNITION 652, 652–53, 655–65 (2012) (“[I]nconsistency serves as an epistemic cue for errors in one’s system of beliefs.”); Anthony G. Greenwald & David L. Ronis, *Twenty Years of Cognitive Dissonance: Case Study of the Evolution of a Theory*, 85 PSYCHOL. REV. 53, 53, 56 (1978) (reviewing the progression of cognitive dissonance theory since 1957); Dale Griffin & Roger Buehler, *Role of Construal Processes in Conformity and Dissent*, 65 J. PERSONALITY & SOC. PSYCHOL. 657, 657–58, 665 (1993); E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319, 319–21 (1987); Thomas R. Shultz & Mark R. Lepper, *Cognitive Dissonance Reduction as Constraint Satisfaction*, 103 PSYCHOL. REV. 219, 219–21 (1996); Barbara A. Spellman, Jodie B. Ullman & Keith J. Holyoak, *A Coherence Model of Cognitive Consistency: Dynamics of Attitude During the Persian Gulf War*, 49 J. SOC. ISSUES 147, 148–49 (1993) (describing the “Coherence Model of Cognitive Consistency”).

92. See, e.g., Alicke, Davis & Pezzo, *supra* note 91, at 303–06 (finding after review of five studies that “the basic phenomenon of outcome bias appears to be quite robust”); Shultz & Lepper, *supra* note 91, at 238–39 (finding that “high level of dissonance decreased substantially over [study] time cycles”).

93. See David L. Hamilton & Mark P. Zanna, *Context Effects in Impression Formation: Changes in Connotative Meaning*, 29 J. PERSONALITY & SOC. PSYCH. 649, 649, 653–54 (1974) (“[T]he connotative meaning of an attribute shifts in a manner directly parallel to context desirability.”); Mark P. Zanna & David L. Hamilton, *Further Evidence for Meaning Change in Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 224, 224–26, 236 (1977) (same).

deeper cause, it does appear that the public is often not with Charles Dickens' Mr. Bumble. It does not want to believe that "the law is a ass."⁹⁴ Thus it may believe, or want to believe, that that which is fair or just is for that reason legal, and that which is unfair or unjust is for that reason illegal. To the extent that this is so, then when officials go above the law, as Fawn Hall put it, the public may want to hear that their actions were within and not above the law, and officials adopting reconciliation strategies may be giving the public what it wants.

VI. ON CONCEIVING LAW NARROWLY

The foregoing psychological, sociological, and political hypotheses are speculative, but the consequences are less so—American officials, who we presume understand and appeal to the preferences of their constituents, seem remarkably Dworkinian, persistently characterizing their behavior vis-à-vis the law in a way that reflects a capacious understanding of law.⁹⁵ But as the officials adopting reconciliation strategies well know, those strategies make criticizing them for violating the law a slippery business. When what is understood to be "the law" is infused with morality and policy as well as statutes and court decisions and other items of first stage law, identifying law breakers becomes a task as contested as identifying immoral behavior. But to identify this problem is not to engage in moral or policy relativism. Rather, it is simply to make the empirical claim that for many salient issues of public policy, moral and policy opinions are deeply divided. When this is so, incorporating these contested factors into an understanding of law causes legal criticism to dissolve into the contested domain of moral and policy criticism.

Perhaps this is not a bad thing. Maybe Thoreau was right, and the good society is one that evaluates its officials on the first order morality of their actions and not on legality per se.⁹⁶ Yet in a nonideal world, one function of law is settlement: the ability to agree on accepted standards for action in the face of moral and political disagreement.⁹⁷ For this purpose,

94. CHARLES DICKENS, *OLIVER TWIST* 489 (Heron Books 1970) (1839).

95. For a different, especially broad understanding of law, see Carroll, *Nullification as Law*, *supra* note 75, at 2014, and Carroll, *The Jury's Second Coming*, *supra* note 75, at 657, which discuss juries' disregard for the positive law as part of a wider conception of law.

96. See Thoreau, *supra* note 5, at 228 ("It is not desirable to cultivate a respect for the law, so much as for the right.").

97. See Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1580–83 (2007) ("[B]ecause moral and practical disagreement seems endemic to the human condition, law must step in to settle practical controversies over what ought to be done."); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional*

first stage law, or Bentham's clear law easily understood by citizens without the intervention of lawyers or judges,⁹⁸ has an important role to play. Confronted with moral and political disagreement, we often desire short or intermediate term settlement for the purposes of action. But for law to serve this function, it must be sufficiently concrete to provide a focal point,⁹⁹ thus avoiding reproducing the exact disagreement that it was designed to lessen. Moreover, the virtues of concrete and less contested law for purposes of settlement are especially great when courts are not in the picture. When legal questions are resolved in court, the judicial resolution can provide the determinacy that is necessary for settlement even if the legal norms are themselves vague or dependent on contested moral and policy questions. When there is no court, however, the legal norms must achieve this determinacy without judicial assistance, making it especially important to create law in concrete and uncontested terms if enforcement is by public opinion and not by the machinery of legal sanctions. For law to provide the platform for settlement without judicial involvement, it may be important to adopt a simple understanding of "the law" that allows public commentary to identify with ease those who have followed the law and those who have broken it.

Of course, law serves more than settlement purposes. Law is often the forum in which uncertain moral or political or policy ideas are worked out over time, and this aspect of law may well provide the basis for appreciating the vagueness—and consequent moral and policy dependence—of the Equal Protection Clause,¹⁰⁰ the Sherman Antitrust Act,¹⁰¹ and perhaps even the entire common law.¹⁰² But we achieve flexibility and the capacity to adapt law to changing circumstances and changing values, often wisely, not without cost, and one of those costs is the ability to identify crisply and saliently those officials who have violated the law. If this too is at times valuable, then it may be important not only to

Interpretation, 110 HARV. L. REV. 1359, 1371–72 (1997) (offering a settlement-based defense of judicial interpretive supremacy).

98. Bentham's preference for clear legal rules readily understood by ordinary people is described in Gerald J. Postema, *Bentham and Dworkin on Positivism and Adjudication*, 5 SOC. THEORY & PRAC. 347, 358–62 (1979) (proposing a return to the historical roots of positivism, and setting Dworkin's criticism of positivism against the historical backdrop of Bentham's complex and subtle theory).

99. On the circumstances in which law can serve as a focal point to coordinate citizen criticism and citizen resistance, see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245, 251 (1997).

100. U.S. CONST. amend. XIV, § 1.

101. 15 U.S.C. § 1 (2012) (prohibiting "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce").

102. See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

have some laws whose meaning is largely beyond debate, but also to have a public conception of “the law” that is beyond debate (and strategic manipulation) as well. When a society deems it useful not only to identify official law breakers, but to deny to them, at least in the public arena when formal legal sanctions are unavailable, the ability to claim with a straight face the legality of their actions, the virtues of a narrow conception of law loom large. If under those circumstances officials wish to claim the political high ground, it may be better were they, like Hall, to side with Thoreau, Gandhi, and King, letting the political process decide on the morality of their disobedience, rather than letting them take cover behind a conception of “the law” that is largely beyond the ability of the public and the political process to evaluate.

Indeed, having glimpsed the public politics of legality, a new dimension of the hoary question about the relative virtues of rules and standards is revealed.¹⁰³ As conventionally understood, rules are relatively precise and standards relatively vague. And according to the conventional analysis, rules bring the advantages of predictability, stability, and constraint on the discretion of adjudicators, but at the expense of limiting the flexibility that enables decisionmakers to accommodate an uncertain future. Conversely, standards allow enforcers and decisionmakers to adapt to the previously unforeseen, but at the cost of making it difficult for those whose conduct is at issue to predict just which forms of primary conduct are allowed and which are prohibited.¹⁰⁴

All of this is old stuff, but what the conventional analysis tends to ignore is the way in which legal norms provide the basis for criticism of norm violating conduct. We know that internalized norms can provide the basis for criticism,¹⁰⁵ but the existing analyses of rules versus standards

103. The literature on rules and standards is large and growing. *See, e.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 188–202 (2009); Moshe Cohen-Eliya & Iddo Porat, *Judicial Minimalism and the Double Effect of Rules and Standards*, 25 CAN. J.L. & JURIS. 283, 286 (2012); Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 181, 187–89 (1996); Joseph R. Grodin, *Are Rules Really Better than Standards?*, 45 HASTINGS L.J. 569, 569 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 24 (2000); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 517–18 (2012); Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 303 (2003).

104. A good overview of the respective characteristics and advantages of rules and standards is Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM. L. REV. 1287, 1295–97 (2006).

105. The standard reference is H.L.A. HART, THE CONCEPT OF LAW, *supra* note 83.

neglect the way in which rules can provide a firm basis for criticism in ways that standards cannot, and the way in which this firm basis for criticism is especially important when formal sanctions are unavailable. We believe, although it has never been tested, that members of Congress would face political but not formal sanctions should they vote to allow convictions for treason on the testimony of only one witness, and we believe that, absent extraordinary circumstances, the electorate is unlikely to elect even a popular president to a third term. But if we inquire into whether members of Congress will suffer political penalties for voting for laws that exceed Congress's powers under the Commerce Clause, or for enacting what some believe to be deprivations of liberty or equality, the electorate's distribution of political rewards and punishments will likely track its first order preferences, technical questions of law aside.¹⁰⁶

Insofar as these speculations about political attitudes are sound, rules may well provide the purchase for political and social sanctioning in ways that standards do not.¹⁰⁷ If even those who disagree with a law's underlying substantive judgments can agree that the law has been violated, criticism for violating the law occasionally may have a chance of success. But if criticism (or not) for violating a law tracks the underlying first order substance of the law, then law will likely drop out of equation. Thus, one additional virtue of rules over standards may be the way in which rules can empower criticism in ways that standards do not, and the way in which rules can cause law-focused criticism to resonate in ways that standards cannot.

The question of narrow versus broad conceptions of law can now be

106. Consider, for example, the recent congressional debates on the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119. Although I cannot provide a citation for a negative, it appears that no member of Congress publicly took the position that the act was constitutional but unwise as a matter of policy, nor did any publicly assert that the act was wise as a matter of policy but still unconstitutional. Note also that the research suggesting that even outside of the rarified domain of the Supreme Court's docket, policy preferences strongly influence legal interpretive decisions. Joshua R. Furgeson, Linda Babcock & Peter M. Shane, *Do a Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test*, 32 L. & HUM. BEHAV. 219, 225-26 (2008) (concluding that even law students who denied policy views should influence legal decisions about constitutionality were influenced by policy preferences in reaching constitutional conclusions); Joshua R. Furgeson, Linda Babcock & Peter M. Shane, *Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences*, 32 L. & HUM. BEHAV. 502, 509-10 (2008) (concluding that individuals' political orientation influences the methodologies they prefer to use to interpret the Constitution).

107. Indirect support for this conclusion comes from experimental research indicating that crisp rules may induce higher levels of compliance. Brian Sheppard, *Calculating the Standard Error: Just How Much Should Empirical Studies Curb Our Enthusiasm for Legal Standards?*, 123 HARV. L. REV. F. 92, 98 (2010).

seen as the question of rules versus standards, but at one remove. Understanding law narrowly may be analogous to preferring rules over standards, and understanding law broadly may be analogous to preferring standards over rules, and for many of the same reasons. And just as preferring rules over standards may bring the advantages of enabling public criticism of rule violation in ways that standards cannot, so too may preferring a narrow over a broad conception of law enable the same sort of effective public criticism of law violation. At times, of course, public criticism may not be all that important. Nevertheless, if public criticism is the only form of enforcement, as is the case with many laws constraining the behavior of public officials, then the way in which a narrow conception of law enables the only effective method of enforcement is an advantage that should not be ignored.

VII. CONCLUSION: ON NOT TALKING PAST EACH OTHER

The tone of the previous section notwithstanding, this Essay's goal is primarily descriptive and conceptual rather than normative. My aim is chiefly to identify the phenomenon by which officials and their critics appear to have multiple conceptions of law available to use in charging illegality and defending against it, at least when courts and formal sanctions are, as is often the case with respect to official behavior, out of the picture. Indeed, just as the Legal Realists and their successors argued that multiple and conflicting items of positive law are available to rationalize in legal terms outcomes reached on prelegal or extralegal grounds,¹⁰⁸ so too do officials today have different and often conflicting concepts of law available to legally justify those criticisms and defenses that are largely a matter of prelegal or extralegal first order substance. And just as the Realists and their successors recognized that judicial and lawyer perception, understanding, and interpretation of specific items of law or specific litigated facts were often shaped by outcome preferences,¹⁰⁹ so too

108. The use of legal sources and doctrines as *ex post* rationalizations for outcomes reached on nonlegal grounds is commonly associated with JEROME FRANK, *LAW AND THE MODERN MIND* 38, 125, 186 (1963), but the same ideas can be found in the work of many other Realists. *See, e.g.*, Hanoch Dagan, *The Realist Conception of Law*, 57 *U. TORONTO L.J.* 1, 614–17 (2007) (discussing the importance to the Realist perspective of the availability of multiple and often conflicting items of law); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274, 284–85 (1929) (discussing intuitive thinking and postdecision justification).

109. *See* FRANK, *supra* note 108, *passim* (arguing that outcome preferences influence legal analysis); JEROME FRANK, *COURTS ON TRIAL* 47–50 (1949) (discussing the effect of policy preferences on factual determinations); Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *HARV. L. REV.* 1, 4–9 (2011) (same); Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 *STAN. L. REV.*

can we now see that it is far more common than often recognized for entire conceptions of “law” to be shaped by outcome preferences.

The observation that multiple and conflicting conceptions of law do battle in public discourse is neither a deep philosophical claim about the nature of law, nor a relativist one about the jurisprudential equivalence of the competing conceptions. Many claims in the public arena about legality and illegality rely on concepts of law that are either wrong or confused. At the very least, however, we can use an understanding of the different concepts that have some social salience, even in a nontechnical way, as a way of requiring those who charge illegality or claim legality to specify just what understanding of the law undergirds those claims. Any charge of illegality or claim of legality necessarily rests on some understanding of what law is. As long as multiple understandings exist in the world as a matter of sociological fact, it is not surprising that at least one of these understandings will be available to justify just about any charge of illegality or defense of legality that an official wishes to make. Expecting the citizenry, the press, the pundits, and the other participants in public discourse to settle on one of those concepts of law will not occur in any of our lifetimes. Expecting those participants to specify the conception of law they are employing may be a more realistic goal.

851, 853–55 (2012) (discussing their experimental study regarding what degree “cognitive illiberalism poses to constitutional ideals”).