

## Philosophy in Review



### Kenneth Einar Himma, "Morality and the Nature of Law."

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Volume 40, Number 1, February 2020

URI: <https://id.erudit.org/iderudit/1068151ar>

DOI: <https://doi.org/10.7202/1068151ar>

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#### Publisher(s)

University of Victoria

#### ISSN

1206-5269 (print)

1920-8936 (digital)

[Explore this journal](#)

#### Cite this review

Kaufman, W. (2020). Review of [Kenneth Einar Himma, "Morality and the Nature of Law."]. *Philosophy in Review*, 40(1), 16–18.  
<https://doi.org/10.7202/1068151ar>

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**Kenneth Einar Himma.** *Morality and the Nature of Law*. Oxford University Press 2019. 240 pp. \$80.00 USD (Hardcover ISBN 9780198723479).

Himma's new book on law and morality is a useful contribution to the literature of legal positivism. He presents an exceptionally clear exposition of the legal positivist philosophy and its rejection of the natural law tradition, which holds that law is necessarily connected to moral legitimacy. Much of the book is devoted to a defense of 'inclusive' legal positivism (the idea that a legal system may incorporate moral criteria of validity, though it need not) against 'exclusive' legal positivism (the idea that a genuine legal system may not utilize moral criteria of validity). Himma presents a convincing case against exclusive legal positivism, especially the version defended by Raz. For those interested in a general account of legal positivism, this book will provide a good summary of the current state of the debate and a defense of the legal positivist position, which Himma claims is vindicated by our linguistic practices. The book is concise and well organized (though marred by an inadequate index that includes only proper names).

The chief concern about the book is that it, like virtually all works in the legal Positivist position, is committed to a controversial method of doing philosophy, that of 'conceptual analysis.' This is an *a priori*, armchair conception of philosophy as investigating the essential nature of concepts, and it has dominated the Legal positivist movement for close to a century. This situation creates difficulties for critics of legal positivism who reject 'conceptual analysis' as a viable way of doing philosophy. It also has the unfortunate result that legal positivists tend to ignore those who don't share their methodological presuppositions. Thus, in this book Himma quickly dismisses critics of legal positivism and focuses almost entirely on intramural disputes within the field of legal positivism ('inclusive' versus 'exclusive' positivism). From reading this book, one might get the (utterly false) impression that there are no serious critics of legal positivism nor any significant alternatives in legal philosophy.

Himma's wholehearted commitment to this method is evident; he uses the word 'conceptual' almost 200 times in the book (approximately once per page), plus another 100 usages of the term 'concept' or 'conception.' The commitment to essentialism is also evident in Himma's constant search for the 'necessary' properties of law (the word 'necessary' or 'necessity' is used over 150 times) and his conviction that philosophy aims to discover the 'nature' of things (7), and here to uncover the 'nature' of law, as indicated by the book's title. Himma makes a brief effort to defend his use of 'conceptual analysis,' citing Frank Jackson's book on the subject. However, he does not mention that Jackson's book was written to defend 'conceptual analysis' against its widespread rejection by the philosophical community. The worry is that what is called 'conceptual analysis' is really just a means of restating one's own presuppositions by claiming insight into the essential nature of the concept. Thus when legal positivists use 'conceptual analysis' they inevitably discover that legal positivism is correct, as Himma does here.

Despite his claim to be investigating our linguistic practices, there is not a survey to be found in Himma's book, nor anything but the most minimal attempt to engage with historical or empirical evidence (the closest Himma comes to marshaling evidence for his views is a couple of citations to dictionary entries on the word 'law'). Himma's method is essentially one of analysis of the idea of law through thought alone. The illustration he repeatedly refers to as an example of 'conceptual analysis' is the well-worn example of the bachelor as unmarried male. It is an unfortunate choice, since there is no reason to think that 'conceptual analysis' can or has ever uncovered any truths about

the essential nature of bachelorhood other than the tautological, definitional idea that bachelors are unmarried males.

How then is the critic of legal positivism to respond if one believes the concept of law does not have a Platonic essence, but is an essentially open-ended term that can be used in many different ways (law of nature, law of science, moral law, law unto himself, etc.)? Let us take for example the core issue in the debate between legal positivists and those who reject positivism: is legal obligation grounded in moral obligation? Himma claims in this book to demonstrate that legal positivism is correct. He focuses on the natural law idea that an ‘unjust law is no law at all,’ and asserts that this is ‘clearly’ wrong based on ordinary linguistic conventions, since we can easily imagine an unjust law (44). Now in fact the proposition that an ‘unjust law is no law at all’ is at best a peripheral position in the natural law tradition, so it is unclear why Himma chooses to focus on this tangential issue. In fact, the heart of the natural law position is the macro rather than the micro issue: that an unjust legal *system* is not a legal system at all, but rather a gunman state or a tyranny or whatever one wants to call it. Unfortunately, Himma barely addresses this larger and more fundamental issue in his book. He does bring up the example of the ‘legal system of apartheid in South Africa’ (44), but even here, his concern again is the micro picture: the individual laws in this system. It is not at all clear how we should think of a system like South Africa, with its hybrid system that dispensed basic justice to whites but injustice to blacks. In any case, this sort of issue cannot be quickly resolved in a couple of paragraphs, as Himma thinks. It is a complex question both historically and philosophically, and one that almost certainly does not have a single clear answer, despite Himma’s assurances.

Moreover, it is far from clear that ordinary usage does in fact support legal positivism even on the micro issue (individual laws). Take for example Martin Luther King’s famous use of the phrase ‘an unjust law is no law at all’ in his Letter from a Birmingham Jail, a key document in the civil rights movement. If Himma is right, then King was simply confused about the nature of law and essentially talking nonsense. However, I am not aware of anyone ever being confused by King’s use of this phrase or accusing him of contradicting himself. The fact that everyone immediately understands what he means is strong evidence that natural law assumptions are consonant with ordinary usage. Oddly, Himma seems to concede this point, acknowledging that our everyday concept of law recognizes that an unjust law is a ‘defective’ law and is not law in the ‘fullest sense’ (12). So if an unjust law is not a law in the fullest sense, why insist that ordinary usage clearly supports the legal positivist position, rather than that it supports the natural law view? Indeed, one might even say that it undercuts legal positivism, in that a definition of law that ignores morality can only provide us with a partial and incomplete account of what law is.

Himma would respond that legal positivism aims merely to consider the ‘descriptive’ aspect of law and to leave aside the normative aspect of the concept, so that it is not a criticism of legal positivism to say it provides only a partial account of law. But this assumes a basic dogma of positivism (positivism in the broad sense) that is widely rejected by philosophers today in the post-positivist age: the fact/value dualism. The dominant view today is that it is a mistake to think one can wholly separate the descriptive from the normative, especially for a fundamentally normative institution like the law. What could it mean, for example, to analyze the idea of legal obligation as a merely descriptive phenomenon? To talk of the nature of legal obligation is necessarily to raise questions about whether one *should* obey an unjust law. At the very least, it is unfortunate that Himma does not even acknowledge this problem but simply assumes one may unproblematically separate out the descriptive from the normative, a claim that critics of legal positivism widely reject.

A broader problem is that the use of ‘conceptual analysis’ has focused far too much attention on the question of definitions or elucidations of concepts. Surely, the question of whether to call

South Africa or Nazi Germany or the slave South a legal system is not the important point; concepts are elastic and can be used in very different ways. What matters is the concrete implications of one's view, and in particular the normative issues. Critics of legal positivism reject its attempt to evade normative issues. It has become, remarkably, something of a badge of pride among legal positivists to claim that their work has no practical implications. Himma insists that the value of his work rests entirely in the pursuit of knowledge for its own sake; he compares it to Fermat's Last Theorem as a parallel. Now one might think it rather presumptuous to compare 'conceptual analysis,' a method that was only invented in the early 20<sup>th</sup> century and that has no record of significant discoveries, to the field of mathematics, a field with a well-accepted methodology that has been in existence for thousands of years with an astonishing record both of widely-accepted results and, notably, immense practical applications, especially in the physical sciences. Himma even disparages as 'anti-philosophical' the view that knowledge needs to demonstrate its instrumental value. This is an unfair accusation. Those who criticize 'conceptual analysis' are criticizing it as bad philosophy, not rejecting philosophy. Nor are critics rejecting the value of knowledge for its own sake. To be sure, a total lack of instrumental value does not necessarily disqualify a field as a genuine form of inquiry. It can also raise, however, serious doubts about whether it is a legitimate method of inquiry. Second, and more importantly, critics will worry that it is merely an evasion to insist that Legal positivism has no practical or normative implications. It is hard to see how insisting that law is separate from morality cannot but have significant normative implications for legal systems, e.g. for judges who are told by philosophers that unjust laws are just as legitimate as just laws.

This book will no doubt have great appeal to those already committed to legal positivism and to those who believe in 'conceptual analysis.' It seems unlikely that it will make any converts among those who reject legal positivism, or don't believe that the concept of law has an essential nature, or those who think legal philosophy should aim at solving the real problems faced by judges and legislators and lawyers, rather than to investigate a Platonic realm of concepts with no practical implications for the real world.

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