Discussion

Defective, But Still Law:
A Critique of Mark Murphy's Weak Natural Law Jurisprudence

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Mark Murphy's weak natural law (WNL) thesis addresses a particular concern: if, as Murphy argues, the fundamental claim of natural law jurisprudence is to show, "a positive internal connection between law and decisive reasons for action"[1] then such a connection must be ubiquitous. Murphy wishes to place a limit on this claim. Unlike traditional positivist interpretations, Murphy resists viewing such law (when not backed by decisive reasons) as fully law; but he equally wants to resist the strong natural law (SNL) temptation of viewing such law (not backed by decisive reasons) as 'no law at all'. Instead, he offers a third option: law not backed by decisive reasons for action is indeed still law, but is defective precisely as law.[2]

What essentially distinguishes Murphy's WNL jurisprudence from a stronger version of the same thesis is the notion of 'defectiveness'. Murphy rightly points out that propositions of the type 'all S's are P' can be read in one of two ways: either, a.) as expressing that a necessary connection exists between the subject and predicate of the proposition (e.g., all triangles have three sides); or, b.) as expressing that no such necessary connection exists (e.g., all ducks are good swimmers). It is in this latter way that Murphy claims 'being backed by decisive reasons' is predicated to law.[3] If a duck is not a good swimmer, it is not the case that it can no longer be considered a 'duck'—rather, it is still a duck, but is defective precisely as a duck.

This distinction brings an important issue to the fore. Even if we grant Murphy his concern regarding the SNL thesis (viz., that it fails to account for empirically confirmed counterexamples to its own position[4]) unless he adequately explains the way defectiveness helps to resolve the problem, he seems to be in no better position than his natural law adversary. Murphy's WNL position takes as its central claim that, 'law not backed by decisive reasons is still law, but is defective precisely as law'. By doing so, he immediately inspires the question: in the face of law's being defective, what is it about law that still constitutes it as 'law'?

1. Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006) at 1.
2. *Ibid* at 9.
3. *Ibid* at 10.
4. Murphy refers to 'The Fugitive Slave Act of 1850' ("requir[ing] citizens not to hinder, and even aid, federal marshals who sought to return runaway slaves to bondage". *Ibid* at 8) as an example where, in opposition to the central claim of natural law, a particular law was *not* backed by decisive reasons for action.

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As far as I can tell, Murphy never successfully addresses this question. To be sure, certain clues can be dug out that may help to elucidate how Murphy could answer the question, but never do we encounter a direct discussion of what it is about law that continues to make it 'law' despite its being defective. And it seems to me that if an answer to this question cannot be recovered within the limits of Murphy's project, that project loses much of its appeal. For it is one thing to merely state that some law is 'still law, but defective precisely as law', but entirely another thing to explain what this could possibly mean.

With this concern in mind, the project awaiting this paper will be an attempt to construct just such an answer for Murphy. Three different, but related, strategies will be employed in this regard—each strategy building on the conclusions of the one previous. By the end of the paper, it will be shown that all three strategies fail in their attempt to provide Murphy with an adequate response to our central question, and that it is therefore reasonable to question the general viability of Murphy's WNL jurisprudence.

I. The First Strategy: Law as a Conventional Entity

To begin, we will investigate a strategy based on viewing law as a conventional entity. Although as a natural lawyer, Murphy would most likely never engage this strategy directly, there are two clear benefits to exploring it as a first possible candidate: a.) the natural way this strategy responds to the central question of the paper will help to focus our investigation right from the outset; but more importantly, b.) by determining the reasons why this strategy is out-of-bounds to Murphy, we will in turn get a better sense of those avenues that may not be so antagonistic to his intended project.

The way this first strategy would be employed is as follows: when law is defective (i.e., not backed by decisive reasons for action) we nonetheless continue to 'treat' that law as non-defective, and that 'treatment' will be what constitutes its status as 'still law'. As mentioned, this approach seems to quite easily (and even intuitively) explain why something like 'The Fugitive Slave Act' was rightly considered to 'still be law' despite its being defective. That the law was 'treated' as law means, in one sense, that it was still law; but that it was not backed by decisive reasons for action means, in another sense, that it was 'defective precisely as law'. In other words, the conventional 'treatment' of the law secures the law's ostensible efficacy, but its 'defectiveness' points to something entirely different—viz., the law's essential character. Now, although a recognition of this kind of separation has historically helped to elucidate both the positivist and/or SNL positions,[5] it cannot do the work we are seeking from it with regard to Murphy's WNL position. Precisely why it cannot is evidenced on both a practical

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5. See both Leslie Green, "Legal Positivism"(2009) in Edward N Zalta, ed, online: *Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/archives/fall2009/entries/legal-positivism/; and John Finnis, "Natural Law Theories" (2008) in Edward N Zalta, ed, online: *Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/archives/fall2008/entries/natural-law-theories/.

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and a theoretical level. I will deal with each in turn.

Upon the approach we are considering, we could, practically speaking, imagine that the law merely 'tricks' us into thinking we have decisive reasons for action when we really do not. Murphy briefly examines something like this when he refers to the idea of a 'glass diamond'.[6] A glass diamond, he mentions, 'appears' to be a real diamond, and due to that 'likeness of appearance', it tends to generate the same 'conventional attitude' that a real diamond would. Similarly, defective law, due to a 'likeness of appearance' to non-defective law, would generate an attitude in just this same way. Now, it would appear that for one to hold to this conventional interpretation of law, one would practically be forced to take up either a positivist or SNL response. For certainly it is the case that a conventional deception on the part of law will hold up only as long as citizens are in fact treating the law in such a way. The moment they cease to treat it as such, it will presumably no longer be 'law' (just as upon learning that the diamond is glass, it would no longer be treated as 'a diamond'). The fall out from this position therefore leaves us with an either/or option: either, a.) the law was considered law because it was treated as law (a plausible positivist position[7]); or, b.) the law should never have been considered law, despite its being treated as law (a SNL position). Murphy's WNL thesis seems to find no sympathy here.

But in addition to this practical concern, there is a more important theoretical concern keeping Murphy from answering our question through the present strategy—one that has to do with Murphy's employment of the idea of natural kinds in his consideration of law. Murphy writes, "the concept of being defective is not to be identified with the concept of being objectionable: a thing may exhibit a feature that is in some way objectionable without that feature's in any way constituting a defect in that thing."[8] What Murphy means here is that a thing's 'being defective' is not a mere aspect or attribute of that thing; rather, it is a reflection on the internal constitution of the kind of thing one picks out. In other words, for Murphy, defectiveness is kind-specific.[9] Consider his proposed example of a duck. A duck, Murphy argues, that happens to have an ugly pattern to its feathers, or a piercing tone to its quack, would not rightly be called 'defective'. Rather, the duck (and, more to the point, the features of the duck in question) would more appropriately be called 'objectionable'. Such 'objectionable' features are not essential to the duck's constitution—they are merely accidental to it. Conversely, a duck that, e.g., cannot swim, would rightly be called 'defective'. Since swimming is internal to the kind-specific constitution of 'being a duck', its inability

6. Murphy, *supra* note 1 at 14.

7. I write 'plausible' since it is certainly not the case that all legal positivists are conventionalists or that for one to be a legal positivist, one must bear a conventionalist attitude toward law. In fact, it has even been argued that positivism should simply cut ties with conventionalism once and for all (see Leslie Green, "Positivism and Conventionalism" (1999) 12 Can JL & Jur 35). There are, however, good arguments that support the idea of a strong link existing between positivism and conventionalism (see Gerald Postema, "Coordination and Convention at the Foundations of Law" (1982) 3 J Legal Stud 165 and Andrei Marmor, "Legal Conventionalism" (1998) 4 Legal Theory 509).

8. Murphy, *supra* note 1 at 11-12.

9. *Ibid* at 12.

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in this regard would adequately qualify its 'defectiveness'.[10] Now, the important point to take away from all this is that Murphy views law in the very same way as he views ducks—he views it as a natural kind item. Like ducks, law is something that has an internal constitution that determines its kind. And, like ducks, it will be this kind-specific nature that will determine when law is defective. This then brings us directly to the theoretical problem surrounding the application of the present strategy to Murphy's theory: to treat law as a conventional entity is to deny its status as a natural kind item—each treatment relies on a contradictory theory of meaning:

> [a] conventionalist about meaning believes that words like 'gold' and 'law' refer to their respective things in the world only via a conceptual intermediary. That is, what determines what the word 'gold' refers to—gold—is our concept of gold … [an] alternative theory of meaning … asserts that our concepts do not determine the reference of terms like 'gold' or 'law'. Rather, the theory is one of direct reference whereby 'law' refers to law without some third thing intervening. The meaning of 'law', on this theory, is given by the nature of the thing referred to—law—and not by some concept of law that fixes what can be law.[11]

It seems clear to me that it is in this second approach to the meaning of law that Murphy is staking his claim.[12] He does not consider the mere conventional usage of the term to fix its reference (e.g., how people are 'at a particular moment' using the term)—rather, the actual 'thing' referred to—law—is what will fix its reference. As such, what makes law 'still law' despite its being defective, cannot theoretically for Murphy be constituted by its mere conventional use. Law's essential character is 'to provide dictates backed by decisive reasons for action'. As we will now see, such an essential character is theoretically bound to disappear the moment it is defective (i.e., not backed by decisive reasons for action).

II. The Second Strategy: Law as a Functional Kind

Murphy's position on law's essence is to conceive it as a functional kind. In this light, it seems reasonable to look to a strategy that invokes law's function to answer the central question of the paper—viz., what is it about law that continues to make it law despite its being defective? Such a strategy could be employed in one of two ways: first (1), we could consider defective law to 'still be law' insofar that it continues to function as law at all; but secondly (2), we could also claim that the very notion of defectiveness has to do with how well (or not well) the law is functioning, and that law is 'still law' because, despite its not functioning optimally, it is still functioning as law to a degree. Since both ways of implementing this strategy depend on law's function, it would do us well to quickly go over what Murphy understands the function of law to be.

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10. *Ibid* at 10-11.

11. Michael Moore, "Law as a Functional Kind" in Robert P George, ed, *Natural Law Theory* (Oxford: Oxford University Press, 1992) 188 at 204-05.

12. See Murphy, *supra* note 1 at 8-24.

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Murphy never gets entirely clear on what he considers to be 'the definitive' function of law—in fact, it is even suggested that law may not have a definitive function.[13] But one would not have to search too long to dig up something like the following: law's function is to provide dictates that are backed by decisive reasons for action.[14] Now, based on this notion, it should immediately be obvious that Murphy will not be able to employ the first way (1) of implementing the present strategy. For if it is the function of law that it 'provide dictates backed by decisive reasons for action', then law that fails to function properly is precisely to say that it is defective (i.e., not backed by decisive reasons for action). And if this is the case, then it is essentially defective, meaning nothing about law is 'left over' when it malfunctions. By basic standards of logic then, the first approach (1) must be rejected as an answer to the question of how defective law is 'still law'. But the second route (2) looks, initially at least, to be more promising. The second route is not interested in law's 'general functionality'; rather, its concern is with its 'optimal functionality'. To say that law is functioning defectively is not to say that it is not functioning at all; rather, law's functioning defectively is only to say that it is not functioning as well as it might. And it is not at all difficult to understand how just such an approach might be implemented. To borrow Murphy's preferred example, think of the functioning of a heart. The heart's function is to 'pump blood', and there appear to be certain objective considerations available that could decisively tell us how well a heart is performing its function. For example, a cardiologist could stipulate that x objective metric is to be used to measure the optimality of 'blood pumping' (e.g., so and so units of blood being pumped per second = optimal functionality). And in this way, any heart that fails to perform its function according to the standard set by this objective metric could rightly be considered 'defective'. So far so good. The problem is introduced when we attempt to extend this analogy to law (at least based on Murphy's functional definition of it). Quite simply, it is difficult—if not impossible—to understand what 'degrees of functioning' could possibly mean upon Murphy's chosen definition. As Murphy conceives it, law's function is 'to provide dictates backed by decisive reasons for action'. As such, it is a function that does not seem to admit of 'qualitative degrees' in the same way that 'pumping blood' does. Indeed, it would be quite strange to hear someone claim that law is only being backed by decisive reasons for action to a degree. For what could this statement mean? Is it, a.) that law is only providing dictates to a degree; or, b.) that law is only backed by decisive reasons to a degree? Both ways of conceiving the statement seem confused. Using 'how well the law is providing dictates' as the relevant standard of defectiveness would surely be to betray Murphy's more general commitments to natural law. For one could quite easily imagine a situation in which the law was providing dictates exceedingly well, even though none of those dictates were backed by decisive reasons for action. And no natural lawyer—including Murphy—could say that those dictates would 'still be law'.

13. *Ibid* at 30.
14. *Ibid*.

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Instead, for natural lawyers, the relevant standard must be how well those dictates are 'backed by decisive reasons for action'. But using this standard won't do the work we need it to either: if law was only 'backed by decisive reasons' to a degree, then those reasons would fail to be decisive at all (since 'decisiveness' implies that the matter is settled, full-stop). In a word, 'providing dictates backed by decisive reasons for action' seems to be an either/or determination: either the law provides dictates backed by decisive reasons for action, or it does not—there is little to no room for qualitative evaluation. And indeed, this is even borne out by Murphy himself when he introduces the idea of a 'reason-backed-rule-machine'. Of such a machine, he writes, "[w]hen there appear several dictates that are not backed by decisive reasons for action … people begin to tinker with the inner workings of the machine … until the machine again begins to produce a series of dictates backed by decisive reasons for action."[15] In other words, if the machine is not functioning properly (i.e., not providing dictates backed by decisive reasons for action), we will tinker with it until it is functioning properly (i.e., providing dictates backed by decisive reasons for action). There seems to be no middle-ground here.

The only place Murphy might find a bit of breathing room in this regard would be to claim something like the following: the law is 'generally' performing its function well, but at the level of a 'particular law', it is not. In this way, law would 'generally-speaking' be functioning at a non-optimal level (since some 'particular law' is defective); and, as such, it could 'generally-speaking' be called defective.[16] But the problem with this reasoning should be clear. Precisely the same problem we just encountered above is reintroduced at the level of the 'particular law': what is it that makes that 'particular law' still law despite its being defective? Murphy once again seems to be forced to choose between either a positivist response to the quandary (viz., whether or not the poor reasoning behind the 'particular' defective law should be corrected, of itself, that defective law does not upset the status of law 'generally'); or, a SNL response (viz., the defectiveness at the level of the 'particular' law deems it to be 'no law at all'). Again here, Murphy's WNL position invites little sympathy.

III. The Third Strategy: Law as a Structural Kind

But perhaps there is a third strategy that can do the work we need it to for Murphy's WNL account. Upon this strategy, law would be viewed not as a functional kind, but rather as a structural one. But before we get into the details of how such a strategy would be implemented, an initial worry must be addressed. As has just been argued, Murphy is committed to a functional conception of law. As such, would it not be insincere to read him instead as a structuralist regarding law? Perhaps we can mitigate this concern somewhat. If it can be shown that Murphy is at some level committed to a structural account of law (in addition

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15. *Ibid* at 33.
16. The problem with this approach is addressed more fully in the next section of the paper, which deals specifically with law's *structure*.

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to a functional account) perhaps the present strategy will turn out to be of some assistance to him. At the very least, engaging such a strategy will ensure we have offered as wide a reading as possible on behalf of Murphy.

Now, the difference between attributing a structural essence to an item rather than a functional one is quite straightforwardly expressed by the names of each: whereas a structural account relies on some particular structure for that item's essential constitution, a functional account will merely be concerned with that item's performing some relevant function.[17] For example, the essential nature of a human heart would, for a structuralist, be constituted by its particular 'structural makeup' within the human body; for a functionalist, it would merely be something that is capable of performing a particular 'function' (e.g., pumping blood). In this way, the structuralist would not (ostensibly anyway) allow for something like a heart-and-lung-machine to have the proper designation 'heart'.[18] The functionalist, of course, could.

With this distinction in mind, there is a part of Murphy's argument that seems to at least flirt with a structuralist account of law. As is the case with other functionalist accounts, Murphy is forced to deal with an apparent problem. The problem, stated by Michael Moore, is this: "[o]n the one hand, functional jurisprudence seeks some distinctive end that law serves. The very idea that law is a functional kind depends on there being some such good that law can uniquely serve; that is what allows the functionalist to define law by its (functional) ends, and not by its (structural) means. Law cannot have as its distinctive good 'all things that are good' without ceasing to be a functional kind."[19] If functional jurisprudence demands that one find the unique good that law distinctively serves, the natural lawyer, based on his central claim, must include 'all things that are good' within this distinctive goal. But surely this goal is not distinctive to law. Many institutions other than legal ones take their goal to be something like 'bringing about all things that are good' (e.g., moral or religious institutions). And in this way, the proponent of functional jurisprudence seems to have overextended his definition.

To respond to this concern, Murphy tweaks Moore's functional-kind approach to law 'ever so slightly' by shifting the focus of law's function from the 'distinctive end that law serves' to 'law's characteristic activity'.[20] And that he does so seems to impose certain limitations on his theory. As we have just seen, to view law as a functional kind, one will seek the goal (or function) that law performs. Alternatively, if one wishes to view law by its structure, one will not be as interested in the goal law performs as one will be in the means by which law brings about that goal. And, as it strikes me, Murphy's 'ever so slight' tweaking of Moore's position has him at least flirting with the idea of this structural conception.[21]

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17. See Ingo Brigandt, "Natural Kinds and Concepts: A Pragmatist and Methodologically Naturalistic Account" in J Knowles & H Rydenfelt, eds, *Pragmatism, Science and Naturalism* (Frankfurt am Main, 2011) 171 at 173-75.

18. It is not inconceivable that the structuralist could allow for this—but depending on the level of specificity of his definition, he need not.

19. See Moore, *supra* note 11 at 223.

20. See Murphy, *supra* note 1 at 32.

21. *Ibid* at 31.

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Now, if Murphy were to employ a structuralist strategy for answering our central question, it would take the following general form: the unique structure of law is what remains 'still law' despite the content of that structure being defective. To clarify how the strategy could be implemented, let us return to Murphy's 'duck analogy'. Upon a structural approach, what would constitute a duck's 'still being a duck' despite its not being able to swim (its defectiveness), is merely that it maintain a number of the other internal or essential qualities constitutive of 'being a duck' (e.g., has a beak; quacks; has a certain genetic make-up; etc.). In this way, a structural approach seems to circumvent the direct concerns we encountered above when examining the two previous strategies: unlike viewing law as a conventional item, the essential quality that Murphy wants to attribute to law is upheld; but unlike a fully functional account, we avoid the problem of how to separate law's function from its defectiveness (which, as we saw, appear to be contradictory). Of course, for the strategy to do the work we need it to do concerning law, we would have to show that a structural explanation of a duck's defectiveness could be extended to one pertaining to law; and whether this is in fact possible will depend on how much similarity Murphy is willing to allow between 'being a duck' and 'being law'.

Superficially at least, Murphy would seem to allow for quite a bit. A duck's 'swimming' is merely one quality (characteristic activity) among many that make up the duck's 'being a duck'—take away that one quality, and the duck remains a 'duck' (albeit a defective duck). But is this not precisely what Murphy's WNL thesis is saying about law? Did we not just see that Murphy expressly shifts his attention from law's distinct goal to its characteristic activity? And because of this, could it not be argued that Murphy understands 'being backed by decisive reasons for action' as but one quality among many proper to law (just as 'swimming' is one quality among many proper to 'being a duck')? Although this is a tempting route to take, it is one that would entail far too much interpretive liberty on our part regarding Murphy's argument. It is true: Murphy does seem to shift his investigative focus from law's 'function' to its 'structure'. But the important thing to keep in mind is how that shift is being employed. For Murphy, a structural account is only useful insofar as it promotes a more fundamental functional account of law. In other words, Murphy is still interested in getting to law's function—he just proposes that we get there indirectly through law's structure.[22] But there is even a bigger concern with the present strategy. Although it may turn out to be the case that Murphy is not theoretically disqualified from holding to the idea that 'being backed by decisive reasons for action' is but one of a number of qualities that can be predicated to law, if he does hold to this, he will then theoretically disqualify himself from holding that 'being backed by decisive reasons for action' is law's distinct function. In the very least, this would force him to rewrite much of his treatise. But more to the point, it would appear that Murphy actually wants to claim much more than this. In essence, Murphy wants to collapse the notion of 'characteristic activity' into the notion of 'function' such that

22. *Ibid* at 34-35.

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a thing's characteristic activity is just that thing's function.[23] In this way, the analogy to the heart (rather than to a duck) is much more indicative of how Murphy would like to conceive law. The heart's characteristic activity is 'to pump blood', and this is also its function. In just this way, Murphy wants to say that 'being backed by decisive reasons' is both law's characteristic activity and its function (its characteristic activity disclosing its function).[24]

But if this is Murphy's position (and surely it is) we reach an impasse. For it seems implausible that the analogy of the heart to law can do the work we need it to regarding our central question. When considering the defectiveness of a heart, it is precisely the structure of the heart that will be the cause of its functional defectiveness. That is to say, when a heart fails to pump blood, it is due to a structural defect of the heart (whether it be a natural or an artificial heart). But this is not the case with law. Law's structure (as positivists rightly note) seems to hold up just fine despite any defectiveness in its content. In fact, one might go so far as to argue that the central claim of positive law is that although law might not be perfect (which it seldom, if ever, is), it is the ongoing nature of its structure that upholds its status as law.

And so Murphy once again appears to be stuck. This third strategy again admits him an either/or option: either take the positivist route and argue that, as the structure of law is chugging along just fine despite its defective quality, it is still law; or, take the SNL route and argue that it is not the structure of the law that counts at all—it is its proper functioning. Surely this either/or position undermines any convincing argument one can offer in support of Murphy's WNL theory. If Murphy's outright project is content to reject the basis upon which a natural law position typically grounds itself (SNL) and if legal positivism, the competing position, can get to the same conclusion of rejecting SNL but now within the limits of positivism's own position, then surely Murphy must fail to convince his reader that his position is superior to either. As it strikes me, this is precisely the unfortunate consequence left surrounding Murphy's WNL project.

IV. Conclusion

I have asked the reader to consider three distinct strategies one might employ to help answer the central question posed to Murphy: in the face of law's being defective, what is it about law that still constitutes it as 'law'? All three, for distinct but connected reasons, seem to fail. It may just be that Murphy simply wants too much out of his WNL jurisprudence, and is willing to give up too little. At one point, Murphy admits that his WNL thesis is in fact, "compatible with the letter of positivism"[25] which encourages the question: why then struggle so hard to break from it? The official point he takes to distinguish his project from a positivist one is that:

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23. *Ibid* at 34.
24. *Ibid* at 34-35.
25. *Ibid* at 23.

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> one cannot have a complete descriptive theory of law without an exhaustive account of the ways that law can be defective, and one cannot have an exhaustive account of the ways that law can be defective without having a complete understanding of the requirements of practical reasonableness. And surely it is contrary to positivist theoretical aims … to hold that a complete understanding of the requirements of practical reasonableness is necessary for a complete description of law.[26]

But this is just it. What help is a list of the ways in which law can be defective if it cannot actually then tell us what law is despite its being defective? As was suggested in the Introduction to the paper, it would be no help at all. For Murphy, law is defective when it fails 'to provide dictates backed by decisive reasons for action'. But what exactly is law for Murphy other than 'providing dictates backed by decisive reasons for action'? As our investigation has shown, Murphy's WNL thesis seems to be ill equipped to provide an adequate response to the question posed—a question easily handled by both the positivist and SNL positions. This being the case, one has reasonable basis to question the general viability of his thesis.

26. *Ibid.*

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