

# A Companion to Philosophy of Law and Legal Theory

Second edition

*Edited by*  
Dennis Patterson

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# A Companion to Philosophy of Law and Legal Theory

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*For Rayman Solomon*





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# Preface

A preface provides an opportunity to thank those who have helped in the production of a work. I am grateful to my EUI assistant, Macrco Rizzi, for reading the proofs of this book. This work is dedicated to Rayman Solomon, Dean of the Rutgers (Camden) School of Law. I dedicate this work to Ray for a variety of reasons. Personally, I have never encountered a person possessed of greater empathy and caring for his fellow human beings. His patience knows few limits. He is as selfless a person as one is ever likely to encounter in academic life. He knows what matters.

I dedicate this book to Ray because his support of my work means so very much to me. It takes a mix of personal and professional talents to be a successful academic leader. I doubt I shall ever encounter another individual who so thoroughly succeeds at this work. More to the point, in ways too numerous to count, Ray Solomon has helped me accomplish more than I ever had any reason to expect. For this, and so much more, I am eternally grateful to him.

Dennis Patterson  
*Florence*  
*August 2009*



# Introduction

The contributions to this volume are very much like legal philosophy itself: diverse, capacious and infinitely interesting. An overriding consideration in the production of this book has been the desire to appeal to specialists and non-specialists alike. To this end, three aspirations reflected in each contribution are depth, breadth and accessibility. The book is divided in a conventional manner. The first of three parts (Areas of Law) contains accounts of each department of law. Consistent with the editor's charge, each author addresses a given department of law, providing an overview of various approaches and putting debates and contested questions in focus.

Part II (Contemporary Schools and Perspectives) provides a survey of a variety of contemporary approaches to law. Largely theoretical in nature, each school or perspective represents a general account of law as an object of theoretical or reflective inquiry. The range of perspectives is quite wide, and, of course, there is considerable disagreement reflected in competing accounts of the nature of law and legal systems. This range is expanded further in Part III (Topics and Disciplines) where a wide variety of general questions are considered against the background of law as an object of theoretical inquiry. The topics addressed in this part range from the familiar (e.g., authority) to matters of policy (e.g., overcriminalization). These topics are joined as much by their focus as their centrality to current debates in legal theory.

While there is much to focus on in a work such as this, I want to give the reader a more in-depth view of two central concerns of those working in the field today. These are general jurisprudence and descriptive versus normative theory. General jurisprudence – identification of the most general features of law – is a perennial focus of legal theorists. The contrasting approaches of descriptive and normative theory are both traditional and quite new in the sense that scholars have now broadened the field of theoretical inquiry to take account of developments in other fields of scholarly inquiry. This brief discussion of both general jurisprudence and the nature of theory is intended to give the first-time reader an overview of two ongoing and central debates in the field.

## General Jurisprudence

The nature of law has been a perennial topic of discussion in legal philosophy. With a few exceptions, modern analytic approaches to law focus on the tradition of legal positivism and its critics. This is not to say that some find a place – indeed, a central place – for the work of Plato, Aristotle, Aquinas, Kant, and Hegel (just to name a few). But the contemporary analytic discussion centers around a few figures and debate regarding their central claims.

In 1961, H.L.A. Hart published his masterwork, *The Concept of Law*. With this book, Hart was the first to introduce some of the methodological insights developed in philosophy by the likes of J.L. Austin and Wittgenstein. While there is no shortage of debate about the continuing efficacy of Hart’s views, few would contest the importance of *The Concept of Law*. Hart’s predecessors in Anglophone jurisprudence, Jeremy Bentham and John Austin, exerted their influence on Hart but in quite different ways. From Bentham, Hart adopted utilitarianism as a moral stance. By contrast, Austin was an object of criticism.

Famously, Austin characterized the nature of law as an order backed by threat of sanction for noncompliance. What made the order legal in nature was that it issued from a “sovereign.” Taken together, these elements became the so-called Command Theory of Law. Hart argued that Austin’s account of the nature of law fails because of Austin’s failure to marry threats and sovereignty successfully. That is, Hart exposed a key weakness in Austin’s picture of law when he asked the question whether there was any substantive difference between the order of a gunman and that of a sovereign. Seeing none, Hart concluded that Austin’s account of the nature of law failed to tell us what it was about a legal system that made it “law” and not a normative system of another sort. Having demolished Austin’s picture of law, it fell to Hart to replace it with an alternative.

Law, Hart argued, is a matter of rules, rules of various kinds, to be sure. But the nerve of law was rules. So-called modern legal systems were comprised of primary and secondary rules. The regime of secondary rules was of vital importance, because it was in the realm of secondary rules that one found the rules for introducing, amending, and repealing primary rules. Most importantly, the so-called master Secondary Rule – the Rule of Recognition – was the means by which primary rules were identified as rules of law. The Rule of Recognition, Hart argued, provided both citizen and legal official alike with “authoritative criteria for identifying primary rules of obligation.” Hart was quick to point out that in modern legal systems, the Rule of Recognition might be quite complex: in short, there might well be multiple “sources” of law. Owing to its complexity, the Rule of Recognition of virtually any modern legal system is likely to be so complex that it warrants characterization as a “practice.” Further, Hart indicated quite clearly that the Rule of Recognition was ultimate in the chain of validity: the Rule was, itself, neither valid nor invalid. Rather, it was simply “accepted.”

Hart’s successor at Oxford, Ronald Dworkin, has devoted a significant amount of time and space to a critique of Hart’s positivism. It is conventional wisdom that positivists believe that the content of law can be identified by an intersubjective practice,

which Hart calls the Rule of Recognition. For positivists, the content of law – or the answer to the question “What is the law on X in this jurisdiction?” – is amenable to a descriptive report. Dworkin flatly denies this. In fact, for Dworkin, it is never possible to merely report the state of law on any but the simplest of legal questions because the concept of “law” is infinitely controversial.

Dworkin’s “interpretive” account of law is grounded in the idea that to understand the concept “law” one has to identify the point or purpose of law. Because the point or purpose of law is inherently controversial, no account of the law can be (merely) descriptive; for any such account will always depend upon a controversial thesis about the point of law, which thesis will drive the selection of some features of the practice and not others. Hence, all accounts of law are necessarily “constructive” in that their focus on some features of the practice and not others is a matter of selection driven by a prior choice of normative framework (i.e., an account of the “point” of law).

Dworkin’s argument about the need to discern the ‘point of law’ is driven by his more basic assertion that any conception of law “must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state.” Hart has never agreed with this characterization of jurisprudence. Some read Dworkin as asking a question different from Hart’s and, thus, agree with Hart that Dworkin and he are engaged in fundamentally different projects. This is an uncharitable if not incorrect reading of Dworkin. It is uncharitable in that it fails to take Dworkin’s criticism seriously. Dworkin is arguing that Hart assumes away a problem Dworkin maintains is fundamental to any account of law. In other words, Dworkin argues that Hart misunderstands a central feature of his own (i.e., Hart’s) account of law. This is not to suggest that Dworkin is correct in his critique of Hart. Rather, it is to suggest that Dworkin has a point, albeit a controversial one.

If we take Dworkin seriously, the question is whether or not he is correct in his claims for the inherently controversial nature of the concept of law. To answer this question, Dworkin needs to advance arguments about the nature of concepts or, at least, some account of why the concept of “law” is special. Whether Dworkin actually supplies such arguments remains a controversial question. The burden of proof clearly lies with Dworkin. When Hart explicates the Rule of Recognition, he is providing an account of how participants in the practice of law understand judgments of validity. In providing his account of this practice, the measure of Hart’s work is accuracy: does Hart’s description account for what participants in the practice take to be the central features of validity conditions for law? Dworkin’s critique has to be read to claim that even if Hart’s account is an accurate sociological or descriptive account of what participants in the practice take themselves to be doing, that account is not necessarily correct from the point of view of “law” as it is properly understood.

It seems that, at bottom, Dworkin’s debate with Hart is one about the meaning of concepts, more precisely the meaning of the concept of “law.” Hart says that the meaning of “law” (its extension) is fixed by what participants in the practice take the concept to mean. Dworkin denies that the way participants understand themselves exhausts the meaning of the concepts they employ. Dworkin maintains that “law” is a concept the content of which is (in part) dictated by something other than conventional understanding. Dworkin has been less than successful in articulating just what that extra “something” might be.

## Descriptive and Normative Theory

Descriptive theories come in a variety of forms. The most traditional, and the one closest to a law student's experience, is "doctrinal" scholarship. For the better part of its history in the United States and the United Kingdom, treatise writers were regarded as the most concrete of legal theorists. A treatise on a given department of law not only collected and analyzed decided cases; it systematically organized them in a fashion that contributed to the common law's process of development. In this connection, one thinks of the work of Prosser, Casner, Williston, and Corbin. Systematic in their approach, these writers set out to organize their field from within the field itself. This was done through the identification and explication of principles that, once grasped, enabled one to see the field as "all of a piece." What is distinctive about this approach is that its practitioners rarely ventured outside the domain of the individual department of law that was their focus. Doctrinal scholarship was at its best when it was comprehensive. Its practitioners never aspired to what would today be identified as "interdisciplinarity."

None of the entries in this book could remotely be characterized as "doctrinal" in nature. And yet each of the approaches on display here does depend on legal doctrine in some fashion. When legal theorists talk about "law" they are in most instances referring to a body of rules and principles that some doctrinal theorist has identified and explicated. This leads us to a small puzzle in theoretical approaches to law. One might ask, "Once the law has been described by a doctrinalist, what work remains?" This leads us to an organizing notion for our focus here. One might call it "The Variety of Theories."

An explanatory theory takes the law as a doctrinalist finds it, but asks the question, "How did the law get this way?" An economist, for example, might look at the law of warranties in the Uniform Commercial Code and try to make the case that the current state of the law is best explained from the point of view of efficiency. Roughly speaking, the theory is that the current state of the law represents the unwitting embrace of efficiency as the key methodological metric for working out the details of the law of warranties in the sale of goods. In a way, this work is classic social science. The economist is taking the law as explicated by the doctrinalist and then advancing a hypothesis about how the law achieved that particular form and content. Like the doctrinalist, this approach to law is "descriptive" in that it purports simply to be making factual assessments about the law. The doctrinalist articulates facts about the current state of the law and the economist articulates facts about how the law came to have that particular content.

As mentioned, some (e.g., Dworkin) contest the description/evaluation distinction. Without endorsing Dworkin's view, or perhaps as a way of co-opting it without endorsing it, many theorists do take the view that mere description of the law is not sufficient. The point here can best be seen in a contrast between two types of normative theory, which we can label "evaluative" and "ideal." I shall use tort law to illustrate the distinction between these two types of normative legal theory.

Tort law has a variety of doctrines but it is organized around key private law notions. These are duty, breach, causation, and injury. An evaluative theory – one of the varieties of law and economics, for example – will seek both to explain the law as we find it and to provide methodological and normative recommendations for decisions in future

cases. The economist will identify principles that both explain the law as we find it and provide an axiological metric for the development of tort law. The tort law economist might say that the point of tort law is to spread losses as widely as possible so as to minimize the costs of accidents. This principle purports to explain tort law as we find it and to provide a guide to judges deciding cases (especially hard cases) in the future.

A competing explanation of tort law will be offered by corrective justice theorists (e.g., Weinrib). Taking their cue from Aristotle, corrective justice theorists of tort law make the case that the point of tort law is to repair wrongs (i.e., compensate for losses) to victims of risk-creating (i.e., tortious) conduct. In its purest expression, the corrective justice theorists will reject the very idea that tort law (or any body of law) has a “point.” As Ernest Weinrib puts it, tort law has no point other than to be tort law.

The ongoing battle between economists of tort law and theorists of corrective justice is instructive in that it shows how competing theories use the law “as we find it” to make the case for the explanatory superiority of their particular approach to the subject. Each side agrees on the outline and much of the doctrinal content of tort law. What they disagree about are the best theoretical account of those doctrines and how best to approach the integration of new cases into the existing matrix of decisions and norms that constitute the doctrinal structure of the field.

Finally, there are what might be called “pure” theories of law. These theories take an issue or a problem under discussion by evaluative theorists and recast the problem in a way that does not depend on the law as we find it. Consider contract law. In the common law system, contract law has a variety of rules that are difficult to justify on normative grounds (e.g., the requirement of consideration). An ideal theorist of contract law would start with the core of contract law – promising – and develop an ideal account of contract law from the ideal theory of promising. Little or no effort would be made to justify the existing conventions of contract law, for the point is to reconstruct those existing norms in the light of ideal theory.

As the reader works through the entries in this book, matters of general jurisprudence and the varieties of theory will be seen throughout. These concerns, and the debates that animate them, form the intellectual core of this volume of essays. Taken together, they represent the state of the art in the field as we find it today.

Dennis Patterson  
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Part I

Areas of Law





# 1

## Property Law

JEREMY WALDRON

Philosophical thought about the law of property covers two types of issues. First, there are analytical issues about the meaning and use of the most important concepts in property law, such as “private property,” “ownership,” and “thing.” The second type of issue is normative or justificatory. The law of property involves individuals having the right to make decisions about the use of resources – the land and the material wealth of a country – without necessarily consulting the interests and wishes of others in society who might be affected. So what in general justifies giving people rights of this kind? And specifically, what principles justify the allocation of particular resources to particular owners? The two sets of issues are of course connected: the point of sharpening our analytical understanding of concepts like “ownership” is to clarify what is actually at stake when questions of justification are raised.

### Analytical Issues

Any attempt to define terms such as “private property” and “ownership” runs the risk of either oversimplifying the complexities of property law or losing any sense of the broader issues in a maze of technical detail. Some jurists have argued, indeed, that these terms are indefinable and largely dispensable (see Grey, 1980). They say that calling someone the “owner” of a resource does not convey any exact information about the rights that person (or others) may have in relation to that resource: a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the rights (and duties) of a landlord who owes nothing on his or her property might be quite different from those of a mortgagor who lives on his or her own estate.

If one is patient, however, it is possible to build up a reasonably clear conceptual map of the area, which respects both the technician’s sensitivity to legal detail and the philosopher’s need for a set of well-understood “ideal types” to serve as the focus of justificatory debate (see Waldron, 1986, pp. 26–61).

*The objects of property*

Let us start with some ontology. The law of property is about *things*, and our relationships with one another with respect to the use and control of things. What sorts of things? Material things, certainly, such as apples and automobiles, but property has never confined itself to tangible objects. Real estate provides an interesting example. A mobile home is a thing, and so is the plot of land on which it sits. In the eyes of the law, however, the land is not a tangible object. It is tempting to identify the land as the soil and rocks on which the mobile home sits; but take away any amount of soil and rock and the land remains. The land is more like the region of space or the portion of the earth's surface at which the soil, the rock, and indeed the mobile home are located. A different kind of intangibility is involved with intellectual property. My Madonna CD is a different material object from your Madonna cassette. But they contain the same songs, and the songs themselves – the tunes and the lyrics – may be regarded as things for which there can be property rights, just as much as for apples and automobiles.

A third sort of intangibility involves the “reification” of legal relationships themselves. If Jennifer owes Sarah 50 pounds but Sarah despairs of collecting the debt, Sarah may accept a payment of 30 pounds from Bronwen, a specialist debt collector, in return for which Bronwen acquires the right to recover the 50 pounds from Jennifer (if she can get it). It seems natural to say that Sarah has sold the debt to Bronwen and that, therefore, the debt was a thing that Sarah owned and had the right to dispose of even before Bronwen entered the picture. The legal term for this sort of thing is “choses-in-action.” (More complex choses-in-action include checks and shares in a company.) It may be helpful, for some purposes, to regard choses-in-action as an appropriate subject matter for property law, but in general they do not raise important issues in the philosophy of property in the way that land, intellectual property, and material chattels do. A composition, a plot of land, and an automobile are things that exist independently of the law and about which the law is required to make certain decisions, settle certain disputes, and so on. By contrast, a chose-in-action exists only because the law has *already* settled certain disputes in a particular way. The philosophical issues raised by a chose-in-action are thus better regarded as issues in the law of contracts or corporate law, not issues in the law of property.

The ontological differences between material chattels, land, and intellectual property can have an important bearing on questions of justification. In some ways, there is a stronger case for private property in intellectual objects than for private property in land. An original tune that I have composed is, in a sense, nothing but a product of my will and intellect. Apart from my creativity, the song might never have come into existence, and those who complain about the profits I derive from my copyright must concede that they would have been no worse off if I had never composed the tune and thus never acquired a right in it at all. A piece of land, by contrast, is sheer nature rather than human product or invention. Or, if we define it as a region in space, land is simply what is *given* in advance of any individual's activity; it is part of the given framework for human life and action.

Other contrasts between intellectual and nonintellectual property seem to work in the opposite direction. There is not the same *necessity* for property restrictions in regard to intellectual objects, if those objects are to be usable, as there is in regard to pieces of

land or material objects like chairs. When you are using a sports field for a cricket match, I cannot use it to play football; and two people can seldom sit on the same chair without catastrophic results. But if I perform or record a tune that another has composed, I am not precluding or interfering with the composer's or anyone else's use of it. Songs are not crowdable like chairs or plots of land, and they do not wear out with use. I *may* be interfering with the songwriter profiting from his or her composition, but that begs the question of property. Profiting is simply the exploitation of the right that the property of the tune would confer, namely, the right to exclude others from using the tune if they will not pay the songwriter for the privilege.

### *Types of property systems*

As we address the issues of justification posed by property rights in different types of objects, it is important to understand the main institutional alternatives to a system of private ownership. We should begin with the distinction between “property” and “private property.” The distinction is one of genus and species. The generic concept – property – may be used to refer to *any* system of rules governing people's access to and their use and control of things, whether tangible or intangible, natural or manufactured. According to David Hume, we may say that property rules are needed for any class of things about which there are likely to be conflicts concerning access, use, and control, particularly things that are scarce relative to the demands that human desires are likely to place upon them (Hume, [1739] 1888, pp. 484–98). Disagreements about who is to use or control such objects are likely to be serious because resource use matters to people, for their livelihood as well as their enjoyment. Thus any society with an interest in avoiding violent conflict will need a system of rules for pre-empting disagreements of this kind. The importance of such rules can hardly be overestimated, for their job is to provide a legal framework for the economy of the society in question. Without them, planning, cooperation, production, and exchange are virtually impossible, or possible only in the fearful and truncated forms that we see in “black markets” where nothing can be counted on. Jurists often cite these necessities as the basis of a case for *private* property, but, so far, all they establish is the need for property rules. As we proceed with our analysis, we must bear in mind that certain human societies have existed for millennia, satisfying the needs and wants of all their members, without private property or anything like it in land or the other major resources of economic life.

“Property,” I said, is a generic term. There are three broad species of property arrangement: common property, collective (or state) property, and private property. In a *common property* arrangement, resources are governed by rules whose point is to make them available for use by all or any members of the society. A tract of common land, for example, may be used by everyone in a community for grazing cattle or gathering food. A public park may be open to all for picnics, sports, or recreation. The aim of any restrictions on use is simply to secure fair access for all and to prevent anyone from using the common resources in a way that would preclude their use or access by others.

*Collective property* is quite a different idea. In a system of collective property, resources are not left open to all comers. Rather, the community as a whole determines how

resources are to be used; these determinations are made on the basis of the social interest through the society's mechanisms of collective decision making. Now what this amounts to will depend in part on the communal institutions that exist in particular societies. It may involve anything from a leisurely debate among the elders of a tribe to a bureaucratic decision implementing a Soviet-style "five-year plan." (In modern societies, collective property amounts in effect to state property, and is often referred to as socialism.) It depends also on the dominant conception of the social interest – for example, whether this is conceived as an equal interest in the welfare of all, or the greatest happiness of the majority, or the promotion of some future goal such as national glory, cultural splendor, or rapid industrialization.

*Private property* is an alternative to both collective property and common property. In a private property arrangement, rules of property are organized around the idea that contested resources are to be regarded as separate objects, each assigned to the decisional authority of some particular individual (or family or firm). The person to whom a given object is assigned by the principles of private property (for example, the person who found it or made it) has control over the object: it is for her to decide what should be done with the object. In exercising this authority, she is not understood to be acting as an agent or official of the society. Instead, we say that the resource is *her property*; it *belongs* to her; she is its *owner*; it is as much *hers* as her arms and legs, kidneys, and corneas. In deciding how the thing is to be used, she may act on her own initiative as a private person without giving anyone else an explanation, or she may enter into cooperative arrangements with others, for their benefit or her own profit, just as she likes. What is more, her right to decide as she pleases applies whether or not others are affected by her decision. If Jennifer owns a steel factory, it is *for her* to decide (in her own interest) whether to close the plant or to keep it operating, even though a decision to close may have the gravest impact on her employees and the prosperity of the local community.

Though private property is a system of individual decision making, it is still a system of social rules in the following sense. Owners are not required to rely on their own strength to vindicate their right to make decisions about the objects assigned to them: any attempt by others to thwart or resist the owner's decision will be met with the combined force of the society as a whole. If Jennifer's employees occupy the steel factory to keep it operating despite her wishes, she can call the police and have them evicted; she does not have to do this, or even pay for it, herself.

Sometimes we talk about these alternative types of property arrangement – common, collective, and private property – as though they were alternative ways of organizing whole societies. We say the former Soviet Union was a socialist society because the economically most significant resources were governed by collective property rules, whereas in the United States most economically significant resources are governed by private property rules. In fact, in every modern society there are resources governed by common property rules (for example, streets and parks), resources governed by collective property rules (such as military bases and artillery pieces), and resources governed by private property rules (toothbrushes and bicycles). Even among economically significant resources (agricultural land, minerals, railroads, industrial plants), we find in most countries a mix of private ownership and state ownership, with the balance between the two types of arrangement being a matter of continuing political debate.

In addition, there are variations in the degrees of freedom that private owners have over the resources assigned to them. Obviously, an owner's freedom is limited by background rules of conduct: I may not use my gun to kill another person. But these are not strictly property rules. More to the point are things like zoning restrictions and historic preservation laws, which amount, in effect, to the imposition on the private owner of a collective decision about certain aspects of the use of a given resource. The owner of a building in a historic district may be told, for example, that it can be used as a shop, a home, or a hotel, or left empty if the owner likes, but it may not be knocked down and replaced with a postmodern skyscraper. Or, in the case of Jennifer's steel factory, the owner may find that she is required by law not to close her plant without giving her employees and the local authorities 90 days' notice. Private ownership, then, is a matter of degree. In the examples just given, we may still want to say that the historic building and the steel factory were private property; but if too many other areas of decision about their use were also controlled by public agencies, we would be more inclined to say that the resources in question were in reality subject to a collective property arrangement (with the "owner" functioning as a steward of society's decisions).

### *Ownership: a bundle of rights*

Let us now focus more closely on private property. Analyzed technically, an individual's right to make decisions about the use of a thing has two elements. First, as we have just seen, it implies the absence of any obligation to use or refrain from using the object in any particular way. The owner may decide as he or she pleases, and the owner is at liberty to put his or her decision into effect by occupying, using, modifying, or perhaps even consuming or destroying the object. Second, private property implies that other people do not have this liberty: they *do* have an obligation – an obligation to the owner – to refrain from occupying, using, modifying, consuming, or destroying the object. Other people can use the object with the owner's permission; but what this means is that it is up to the owner to decide whether or not to exclude others from the enjoyment of the object.

The owners may give other people permission to use their property. They may lend their automobiles, rent their houses, or grant right of way over their land. The effect of their exercise of these powers is sometimes to create other (relatively limited) property interests in these objects, so that the various liberties, rights, and powers of ownership are divided up among several people. Thus the law of private property deals with things such as bailments, leases, and easements, as well as ownership itself.

More strikingly, the owners are legally empowered to transfer the whole bundle of their rights in the objects they own (including the power of transfer) to somebody else – as a gift, or by way of sale if they insist on receiving something in return, or as a legacy after death. Once the owner does this, the transferee is in the position of owner; the transferor no longer has any legally recognized interest in the object. With this power of transfer, the system of private property becomes self-perpetuating (which is not, of course, the same as self-enforcing). After an initial assignment of objects to owners, there is no further need for the community or the state to concern itself with distributive questions. Objects will circulate as the whims and decisions of individual owners and

their successive transferees dictate. (The exception is inheritance, which provides a set of default rules in case an owner dies without leaving instructions as to who should take over the property; but even these are usually modeled on the arrangements that testators are normally expected to make.) The result may be that resources are widely distributed or concentrated in a very few hands; some individuals may own a lot, whereas others own next to nothing. It is part of the logic of private property that no one has the responsibility to concern themselves with the big picture, so far as the distribution of resources is concerned. Society simply pledges itself to enforce the rights of exclusion that ownership involves, wherever they happen to be. As we shall see, philosophers disagree as to whether this is an advantage or an indictment of the system of private property.

These, then, are the most striking incidents of ownership: the liberty of use, the right to exclude, and the various powers of transfer. Other jurists have listed many more (see especially, Honore, 1961), including constitutional immunities against expropriation (such as that laid down in the Fifth Amendment to the US Constitution) and the owner's liability to have judgments (for example, for debt) executed by forced sale of the object. Obviously the formulation and level of detail in this analysis are in part a matter of taste, and in part a matter of what is taken to be most importantly at issue in any normative debate about the institution.

## The Need for Justification

Justificatory issues arise because the laws and institutions we have are not features of the natural world like gravity, but are human creations, set up and sustained by human decisions. We are not stuck with the arrangements we have inherited: acting collectively and politically, we can choose to change them if we like, either wholesale or in detail. Normative argument is what takes place when we think together about how to guide and evaluate such choices.

Every social institution requires justification if only because the energy and resources needed to sustain it could be used in some other way. Private property, however, falls into a special class of institutions that require justification not only because there are opportunity costs involved in their operation, but because they operate in a way that seems – on the face of it – morally objectionable. In this regard, private property is like the institution of punishment. We require a justification for punishment not just because the money spent on prisons could be spent on education, but because punishment involves the deliberate infliction of death, pain, or deprivation on human beings. Such actions are indefensible unless they serve some morally compelling point, and we want to be told what that morally compelling point actually is.

Similarly, we look for a justification of private property, because it deprives the community of control over resources that may be important to the well-being of its members, and because it characteristically requires us to throw social force behind the exclusion of many members of our society from each and every use of the resources they need in order to live. I said earlier that one effect of recognizing individual powers of transfer is that resources may gradually come to be distributed in a way that leaves a few with a lot, a lot with a very little, and a considerable number with nothing at all. Private

property involves a pledge by society that it will continue to use its moral and physical authority to uphold the rights of owners, even against those who have no employment, no food to eat, no home to go to, and no land to stand on from which they are not at any time liable to be evicted. That legal authority and social force are held hostage in this way to an arbitrarily determined distribution of individual control over land and other resources is sufficient to raise a presumption against private property. To call for a justification is a way of asking whether anything can be adduced to rebut that presumption.

It may be thought that the justificatory issue is nowadays moot, with the collapse of “actually existing socialism” in Central and Eastern Europe and the former Soviet Union. What are we seeing there, if not the belated recognition (by the erstwhile proponents of collective ownership) that markets and private property are necessary after all – and private property in businesses, factories, minerals, agricultural land, and the means of production generally, not just the private ownership of apartments, toothbrushes, and the occasional smoky automobile?

With this happening in the heartland of Marxism–Leninism, it is easy to conclude that collective property has been thoroughly discredited, and the problem of justifying *private* property solved by default, as it were. The issue can now be firmly handed over to the philosophers, as something with which practical people need no longer concern themselves. The philosophers will continue to play with it of course – but in the same way that they tease each other with questions about the reality of the external world, or whether the sun will rise tomorrow.

It would be wrong to dismiss the issue in this way. Consider an analogy: suppose that as the result of some worldwide “retributive revolution,” all the countries that had abolished capital punishment since the 1940s were to reinstate it. Would that lessen any of the concerns that people in the United States currently have about capital punishment in their society – the weakening of the taboo against killing, the danger of executing the innocent, racial disparities in the administration of the death penalty, the barbarism of popular fascination with its grisly details, and so on? It might make us less sanguine about the prospects for reform, but it would not lessen the need to examine whether this was an institution with which we were entitled to live comfortably, from a moral point of view.

Anyway, the point of discussing the justification of an institution is not only to contemplate its abolition. Often we need to justify in order to understand and to operate the institution intelligently. Again, an analogy with punishment might help. In criminal law, we study issues about *mens rea* and strict liability; the distinction between justification, excuse, and mitigation; the use (or overuse) of the insanity defense; and the similarities between felony homicide and deliberate murder. It is hard to see how any of that can be done without asking questions about the *point* of the criminal sanction. Without some philosophical account of punishment and individual responsibility, the doctrines and principles of the criminal law are apt to seem like a mysterious language with a formal grammar but no real meaning of its own.

Similarly, in thinking about property, there are a number of issues that make little sense unless debated with an awareness of the point of property rules (or specifically, rules of *private* property). Some of these issues are technical. The rule against perpetuities, for example, the technicalities of the registration of land titles, the limits on testa-

mentary freedom – all these would be like an arcane and unintelligible code, to be learned at best by rote, unless some attempt were made to connect them with the point of throwing social authority behind individual control or individual disposition of control over resources.

The same is true of less technical, more substantive issues. The Fifth Amendment to the US Constitution requires that private property not be taken for public use without just compensation. It is pretty evident that this right prohibits the government from simply seizing or confiscating someone's land (for use, say, as a firing range or an airport). But think of an example we used earlier: what if the state simply places some restriction on the use of one's land? Sarah is told that she may not erect a postmodern office building on her property, because it will compromise the historical aesthetics of the neighborhood. Does this amount to a taking for which she should be compensated under the Fifth Amendment? Certainly Sarah has suffered a loss (she may have bought the land purely with the intention of developing it). On the other hand, it is fatuous to pretend that there is a taking whenever any restriction is imposed. I may not drive my car at a speed of 100 miles per hour, but I am still the owner of the car.

I do not think it is possible to answer this question by staring at the words "property" and "taking." Certainly, it is impossible to address the constitutional issue intelligently (as opposed to learning by rote the answers that successive courts have offered) without some sense of *why* private property is regarded as sufficiently important to be given this sort of constitutional protection. Is it protected because we distrust the capacity of the state and its agencies to make collective decisions about resource use? Or is it protected only because we want to place limits on the burdens that any individual may be expected to bear for the sake of the public good? It may make a considerable difference to our interpretation of the takings clause, as well as other legally enshrined doctrines of property law, what we think are the ultimate purposes and values that private ownership is supposed to serve.

## Justificatory Theories

We turn now to the theories of justification that have actually been proposed. At this point, jurisprudence reaches out to political philosophy and to the debates about property in which thinkers like Plato and Aristotle; Grotius and Pufendorf; Hobbes and Locke; Hume, Smith, and Rousseau; Hegel and Marx; Bentham and Mill; and Nozick and Rawls have participated.

An institution such as private property requires justification in two regards. First, we need to justify the general idea of having things under the control of private individuals. Second, we must justify the principles by which some come to be the owners of particular resources while others do not. In principle, the same argument can perform both tasks, for some general justifying aims are nothing more than compelling distributive principles writ large. Robert Nozick, for example, justified private property purely on the ground that certain things belong intrinsically to certain individuals, and that we must set up our social institutions to respect those particular rights, whether or not the institution as a whole serves any broader social ends. "Things come into the world," he wrote, "already attached to people having entitlements over them" (Nozick, 1974,



p. 160). His most persuasive example was body parts. We do not need a general social justification for the rule that my kidneys belong to me. They just do, and any acceptable theory of property had better respect that fact. But it is doubtful whether this particularist approach can be extended to land or other external objects. The best-known attempt is that of John Locke ([1690] 1988, pp. 285–302), but, as we shall see, even Locke found it necessary to complement his theory of particular entitlements with more general considerations of social utility.

### *General justifying aims*

The most common form of justificatory argument is that people are better off when a given class of resources is governed by a private property regime than by any alternative system. Under private property, it is said, the resources will be more wisely used, or used to satisfy a wider (and perhaps more varied) set of wants than under any alternative system, so that the overall enjoyment that humans derive from a given stock of resources will be increased.

The most persuasive argument of this kind is sometimes referred to as “the tragedy of the commons” (Hardin, 1968). If everyone is entitled to use a given piece of land, then no one has much of an incentive to see that crops are planted or that the land is not overused. Or if anyone does take on this responsibility, they themselves are likely to bear all the costs of doing so (the costs of planting or the costs of their own self-restraint), while the benefits (if there are any) will accrue to all subsequent users. In many cases, there are unlikely to be any benefits, since one individual’s planning or restraint will be futile unless the others cooperate. Instead, under common property, each commoner has an incentive to get as much as possible from the land as quickly as possible, since the benefits of doing this are in the short term concentrated and ensured, while the long-term benefits of self-restraint are uncertain and diffused. However, if a piece of hitherto common land is divided into parcels and each parcel is assigned to a particular individual who can control what happens there, then planning and self-restraint will have an opportunity to assert themselves. For now, the person who bears the cost of restraint is in a position to reap all the benefits, so that if people are rational and if restraint (or some other form of forward-looking activity) is in fact cost-effective, there will be an overall increase in the amount of utility derived.

Arguments of this sort are familiar and important, but like all utilitarian arguments, they need to be treated with caution. In most private property systems, there are some individuals who own little or nothing, and who are entirely at the mercy of others. So when it is said that “people” are better off under private property arrangements, we have to ask: “Which people? Everyone? The majority? Or just a small class of owners whose prosperity is so great as to offset the consequent immiseration of the others in an aggregative utilitarian calculus?”

John Locke hazarded the suggestion that everyone would be better off. Comparing England, whose commons were swiftly being enclosed by private owners, to pre-colonial America, where the natives continued to enjoy universal common access to land, Locke speculated that “a King of a large and fruitful Territory there [that is, in America] feeds, lodges, and is clad worse than a day Labourer in England” (Locke, [1690] 1988, p. 297). The laborer may not own anything, but his standard of living

is higher on account of the employment prospects that are offered in a prosperous privatized economy. Alternatively, the more optimistic of the utilitarians cast their justifications in the language of what we would now call “Pareto-improvement.” Maybe the privatization of previously common land does not benefit everybody, but it benefits some and it leaves others no worse off than they were before. Now this is hardly a reason for the latter group to support or endorse such a change, but it indicates that they have little ground for complaint. The homelessness and immiseration of the poor, on this account, is not a result of private property; it is simply the natural predicament of mankind from which a few energetic appropriators have managed to extricate themselves.

So far, we have considered the utilitarian case for private property over common property. The case for private property over collective property has more to do with markets than with the need for responsibility and self-restraint in resource use (though it must be said that the environmental record of socialist societies is turning out to have been much, much worse than that of their capitalist competitors). The argument for markets is that, in a complex society, there are innumerable decisions to be made about the allocation of particular resources to particular production processes. Is a given ton of coal better used to generate electricity that will in turn be used to refine aluminum for manufacturing cooking pots or aircraft, or to produce steel that can be used to build railway trucks, which may in turn be used to transport either cattle feed or bauxite from one place to another? In most economies, there are hundreds of thousands of distinct factors of production, and it has proven impossible for efficient decisions about their allocation to be made by central agencies acting in the name of the community and charged with overseeing the economy as a whole. In actually existing socialist societies, central planning turned out to be a way of ensuring rather than preventing economic paralysis, inefficiency, and waste.

In market economies, by contrast, decisions like these are made on a decentralized basis by thousands of individuals and firms responding to price signals, each seeking to maximize profits from the use of the productive resources under its control. Some have speculated that there could be markets without private property, but this too seems hopeless. Unless individual managers in a market economy are motivated directly by considerations of personal profit in their investment and allocation decisions – or unless they are responsible to others who are motivated on that basis – they cannot be expected to respond efficiently to prices. This sort of motivation can be expected only if the resources in question are *theirs*, so that the loss is theirs when a market signal is missed and the gain is theirs when a profitable allocation is secured.

I said earlier that a utilitarian defense of private property is in trouble unless it can show that everyone is better off under a private property system, or at least that no one is worse off. Now, a society in which all citizens derive significant advantages from the privatization of the economy is perhaps not an impossible ideal. But in every private property system with which we are familiar, there is a class of people, often many thousands, who own little or nothing and who are arguably much worse off under that system than they would be under, say, a socialist alternative. A justificatory theory cannot simply ignore their predicament, if only because it is in part their predicament that poses the justificatory issue in the first place. A hard-line utilitarian may insist that the advantages to those who enjoy private ownership simply outweigh the costs to those who suffer. That is, the utilitarian may defend private property using purely

aggregative measures of output and prosperity. Philosophically, however, this sort of hard line is quite disreputable (Rawls, 1971, pp. 22–33; Nozick, 1974, pp. 32–3): if we take the individual rather than a notional entity like “the social good” as the focal point of moral justification, then there ought to be something we can say to *each* individual about why the institution we are defending is worthy of his or her support. Otherwise, it is not at all clear why the individual should be expected to observe the institution’s rules and requirements (except that we have the power and the numbers to compel the person to do so).

Maybe the utilitarian argument can be supplemented with an argument about desert in order to show that there is justice when some people enjoy the fruits of private property but others languish in poverty. Locke took this line too: God gave the world, he said, “to the use of the Industrious and Rational... not to the fancy or covetousness of the quarrelsome and contentious” (Locke, [1690] 1988, p. 291). If private property involves the wiser and more efficient use of resources, it is because someone has exercised virtues of prudence, industry, and self-restraint. People who languish in poverty, on this account, do so largely because of their idleness, profligacy, or want of initiative. Now, theories like this are easily discredited if they purport to justify the actual distribution of wealth under an existing private property economy (Nozick, 1974, pp. 158–9; Hayek, 1976). But there is a more modest position that desert theorists can adopt: namely, that private property alone offers a system in which idleness is not rewarded at the expense of industry, a system in which those who take on the burdens of prudence and productivity can expect to reap some reward for their virtue, which distinguishes them from those who did not make any such effort.

One can come at the issue of virtue also from a slightly different direction. Instead of (or as well as) rewarding the owner for the virtue that he or she displays, we might count it as a point in favor of private property that it offers people the opportunity to acquire and exercise such virtues. Owning property, in Hegel’s words, helps the individual to “supersede the mere subjectivity of personality” (Hegel, [1821] 1991, p. 73). In plain English, it gives people the opportunity to make concrete the plans and schemes that would otherwise just buzz around inside their heads, and to take responsibility for their intentions as the material they are working on – a home, a canvas, or a car – registers the impact of the decisions they have made (Waldron, 1986, pp. 343–89; cf. Munzer, 1990, pp. 120–47). In the civic republican tradition, the virtue argument was associated with the noble independence and self-sufficiency of the yeoman farmer. Owing nothing to anything besides his own industry, neither so rich as to be able to buy another nor poor enough to be bought, the individual proprietor in a republic of virtue could be relied on to act as a good citizen, using in public affairs the virtues of prudence, independence, resolution, and good husbandry that he necessarily relied on in running his private estate. If most economic resources are owned in common or controlled collectively for everyone’s benefit, there is no guarantee that citizens’ conditions of life will be such as to promote republican virtue. On the contrary, citizens may behave either as passive beneficiaries of the state or irresponsible participants in a tragedy of the commons. If a generation or two grow up with that characteristic, then the integrity of the whole society is in danger. These arguments about virtue are, of course, quite sensitive to the distribution of property (Waldron, 1986, pp. 323–42). As T. H. Green observed, a person who owns nothing in a capitalist society “might as well,

in respect of the ethical purposes which the possession of property should serve, be denied rights of property altogether” (Green, 1941, p. 219).

To complete this overview of the general justifications of private property, we must consider the relationship between property and liberty. Societies with private property are often described as free societies. Part of what this means is surely that owners are free to use their property as they please; they are not bound by social or political decisions. (And correlatively, the role of government in economic decision making is minimized.) But that cannot be all that is meant, for – as we saw in our analytical discussion – it would be equally apposite to describe private property as a system of *unfreedom*, since it necessarily involves the social exclusion of people from resources that others own.

Two other things are implied by the libertarian characterization. The first is a point about independence: a person who owns a significant amount of private property – a home, say, and a source of income – has less to fear from the opinion and coercion of others than the citizen of a society in which some other form of property predominates. The former inhabits, in a fairly literal sense, the “private sphere” that liberals have always treasured for individuals – a realm of action in which citizens need answer to no one but themselves. But like the virtue argument, this version of the libertarian case is sensitive to distribution: for those who own nothing in a private property economy would seem to be as unfree – by this argument – as anyone would be in a socialist society.

That last point may be too quick, however, for there are other indirect ways in which private property contributes to freedom. Milton Friedman (1962) argued that political liberty is enhanced in a society where the means of intellectual and political production (printing presses, photocopying machines, computers) are controlled by a number of private individuals, firms, and corporations – even if that number is not very large. In a capitalist society, a dissident has the choice of dealing with several people (other than state officials) if he wants to get his message across, and many of those people are prepared to make their media available simply on the basis of money, without regard to the message. In a socialist society, by contrast, those who are politically active either have to persuade state agencies to disseminate their views or risk underground publication. More generally, Friedman argued, a private property society offers those who own nothing a greater variety of ways in which to earn a living – a larger menu of masters, if you like – than they would be offered in a socialist society. In these ways, private property for some may make a positive contribution to freedom – or at least an enhancement of choice – for everyone.

### *Particular distributive arguments*

Assume now, for the sake of argument, that private property is in general a good institution for a society to have. Whether because it maximizes utility, facilitates markets, cultivates virtue, rewards desert, or provides a congenial environment for the growth of liberty, we think it is a good idea for resources to be under the control of individuals who will have to live with the effects of the decisions that they make about the resources. The question now is which individuals are to have control of which resources. How – that is, by what principles – is this to be determined?

The task of justifying a distribution of private property is an important one. In our analytic discussion, we saw that once a private property system is established, with particular resources assigned to particular individuals, no further distributive intervention is required for the system to operate. Even though needs change, people die, and one generation is succeeded by another, the institution of private property can largely run under its own steam, so far as distribution is concerned. But the results may not be attractive. In some cases, the concentration of resources in the hands of a few individuals, firms, or families may be so extreme that the authorities will feel compelled to intervene in the name of justice and undertake some large-scale redistribution. This has happened historically in a number of countries – in New Zealand in the second half of the nineteenth century, in Mexico at the turn of the twentieth century, and more recently in the Philippines. Countries that undertake land reform are in effect approaching the distributive question anew, attempting to establish an assignment of resources to individuals that is justified in the light of the present requirements of their society.

Even in countries where there is no such reshuffling of entitlements, distributive arguments may still play a part in people's thinking about the ways in which property rights should be regulated, and the ways in which they fit into the overall structure of social and economic institutions. Most developed countries have progressive income and wealth taxes, and provide income support and basic services to their poorest citizens on the basis of that taxation. These schemes are not usually conceived as ways of redistributing property, but they may nevertheless be informed by a sense of how far the existing system is from a just distribution or of what the basic principles underlying property distribution ought to be.

I emphasize this because there is a well-known argument in "law and economics" purporting to show that questions of initial distribution are uninteresting. Imagine that a wheat field beside a railroad is continually being set on fire by sparks from passing trains. It becomes clear that either wheat can be grown on this land or trains can run across it, but not both. A theorem due to Ronald Coase (1960) holds that an efficient outcome may be reached by the wheat grower and the railroad, irrespective of whether the former is initially assigned the right not to have his wheat set on fire. If running trains is more profitable there than wheat growing, the railroad will be in a position to pay the farmer damages for the loss of his crop and still make a profit if the farmer has the right to sue; and if the farmer does not have the right to sue, he will be unable to pay the railroad enough out of his profits to persuade them to stop running their trains and damaging his crops. The same applies, *mutatis mutandis*, if wheat growing turns out to be the more profitable activity: the initial assignment of rights makes no difference. But the Coase theorem shows only that the distributive question is uninteresting from the point of view of efficiency (and even then only under highly idealized assumptions about transaction costs). Coase and his followers concede that the initial assignment of rights will make a big difference as to how much wealth *each party* ends up with in the efficient allocation, and they can hardly deny that this is likely to matter more to the parties themselves than the issue of efficiency. In general, Law and Economics professors have made no attempt to show why we should be preoccupied with efficiency to the exclusion of all else, or why the law should take no interest in what has traditionally been regarded as its *raison d'être* – namely justice.

Among the philosophers who discuss principles for assigning resources to particular private owners, some embrace the inherent arbitrariness of the initial assignment, while others insist that unless the initial assignment is morally justified, the subsequent operation of the property system cannot be. Of the latter group – that is, of those who insist that the initial assignment must be morally justified – some maintain that the initial distribution of private property ought to be the subject of collective decision by the whole society, while others argue that morally respectable entitlements can be established by the unilateral actions of individuals. I shall call these three approaches Humean, Rousseauian, and Lockean after their three most famous proponents.

*The Humean approach*

In the Humean approach, we start from an assumption that since time immemorial, people have been grabbing and fighting over resources, and that the distribution of *de facto* possession at any given time is likely to be arbitrary, driven by force, cunning, and luck. It is possible that this predatory grabbing and fighting (some aspects of which will be physical, others ideological) will continue back and forth indefinitely. But it is also possible that the situation may settle down into some sort of stable equilibrium in which almost all of those in possession of significant resources find that the marginal costs of further predatory activity are equal to their marginal gains. Under these conditions, something like a “peace dividend” may be available. Maybe everyone can gain, in terms of the diminution of conflict, the stabilizing of social relationships and the prospects for market exchange by an agreement not to fight any more over possessions.

I observe, that it will be for my interest to leave another in the possession of his goods, provided he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour. (Hume, [1739] 1888, p. 490)

Such a resolution, if it lasts, may amount over time to a ratification of *de facto* holdings as *de jure* property.

The Humean approach, which finds a modern counterpart in the work of James Buchanan (1975), provides an account of initial distribution that is congenial to the spirit of modern economics. It makes no use of any assumptions about human nature except those used in rational choice theory, and it is accordingly quite modest in its moral claims. On the Humean account, the stability of the emergent distribution has nothing to do with its justice or moral respectability. It may be equal or unequal, fair or unfair (by some distributive standard), but the parties will already know that they cannot hope for a much better distribution by pitching their own strength yet again against that of others. We should not concern ourselves, Hume argued, with the distributive features of the possessory regime that emerges from the era of conflict. The aim should be to ratify any distribution that seems salient – that is, any distribution support for which promises to move us away from squabbling about who should own what, and towards the benefits promised by an orderly marketplace.

As an account of the genesis of property, Hume’s theory has the advantage over its main rivals of acknowledging that the early eras of human history are eras of conflict

largely unregulated by principle and opaque to later moral inquiry. In our thinking about property, Hume does not require us to delve into history to ascertain who did what to whom, and what would have happened if they had not. Once a settled pattern of possession emerges, we can simply draw an arbitrary line and say, "Property entitlements start from *here*." The model has important normative consequences for the present as well. Those who are tempted to question or disrupt an existing distribution of property must recognize that far from ushering in a new era of justice, their best efforts are likely to inaugurate an era of conflict in which all bets are off and in which virtually no planning or cooperation is possible. The importance of establishing stable property relationships on this account is not that it does justice, but that it provides people with a fixed and mutually acknowledged basis on which the rest of social life can be built.

The weakness of the Humean approach is, of course, the obverse of its strength. As we saw in our discussion of the Coase theorem, distributive justice matters to the law and it matters to us. We would not be happy with a Humean convention ratifying slavery or cannibalism, but, for all that, Hume showed it may well be a feature of the equilibrium emerging from the age of conflict that some people are in possession of others' bodies. And if this pattern of possession really was stable, all would gain – the slaves as well as their masters – from its ratification as property, but we would still oppose it on grounds of justice. What this shows is that even if Hume was right that the sentiment of justice is built up out of a convention to respect one another's *de facto* possessions, that sentiment once established can take on a life of its own, so that it can subsequently be turned against the distribution that engendered it.

### *The Rousseauian approach*

In the Humean model, the peace dividend is secured by mutual forbearance: I agree to respect what you have managed to hang on to, and you agree to respect what I have managed to hang on to. An alternative is to set up a public authority or state to enforce mutual forbearance. But if the state we set up is powerful enough to enforce a *de facto* distribution, it is probably powerful enough to move resources from one individual to another in accordance with its own ideas about justice (that is, those of its constituents and officials).

Indeed, the power of the state may be matched by a general moral sentiment: people acting together are entitled to establish a new distribution on the basis of broad principles of justice that reflect each person's status as an equal partner in a society. They may insist, for example, that the resources of the earth were originally given to everyone, so that no one can rightfully be displaced by any individual's appropriation without his or her own consent. Or they may insist, along lines suggested by Immanuel Kant, that the unilateral actions of an appropriator cannot create the obligations that private property rights assume, obligations that people simply would not have apart from the appropriation. Only a will that is "omnilateral" can do this, according to Kant – only the "collective general (common) and powerful will" associated with public law-giving (Kant, [1797] 1991, pp. 77, 84).

This position is associated most closely with the normative theory of Jean-Jacques Rousseau. Even if individuals are in possession of resources when society is set up,

Rousseau argued that, as an inherent part of the social contract, we must alienate our particular possessions to the general will of the community, which alone is capable of determining a distribution that provides a genuine basis of mutual respect (Rousseau, [1762] 1973, pp. 173–81). Of course, such submission seems to us terribly risky. But the risk may not seem so great if we consider that the alternative is certain individuals maintaining dominion over resources and hence power over others in a way that is simply unchecked by moral principle.

We must remember too that the Rousseauian model is a highly idealized one. The idea is not that everyone – rich and poor – should simply turn over their possessions to whatever band of robbers or vanguard party parades itself as the government. It is rather that the idea of a legitimate set of property rights is inseparable from the notion of a genuine social union in which people address the issue of resources together as free and equal individuals.

What this actually yields in the way of an assignment of resources to individuals is a matter of the distributive principles that survive the test (actual or hypothetical) of ratification by the general will. In fact, most of those who adopt the Rousseauian approach envisage some sort of rough equality of private property.

But it is here that the model runs into its greatest difficulty. If an *initial* set of holdings is to be assessed on the basis of a distributive principle (say, equality), then *any* set of holdings may be assessed on that basis. After all, there is surely no justification for applying the Rousseauian criteria at  $t_1$ , which would not also be a justification for applying it again at any subsequent time  $t_n$ . But if we are distributing private property rights at  $t_1$ , and if as one expects, they include powers of transfer, then as Robert Nozick (1974, pp. 162–4) has argued, any favored distribution is likely to be transformed into a distribution at  $t_2$  *unfavored* by the egalitarian principle, as a result of voluntary activities like gift giving, bequest, market exchange, and so on. To maintain a distributive pattern of the sort that Rousseauian principles envisage, “one must either continually interfere to stop people transferring resources as they wish to, or continually (or periodically) interfere to take from some persons resources that others for some reason chose to transfer to them” (Nozick, 1974, p. 163). Quite apart from the insult to freedom, the results of this constant application and reapplication of moral criteria might undermine market processes and, as Hume put it, “reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it unavoidable to the whole community” (Hume, [1777] 1902, p. 194).

John Rawls, who may be regarded as a modern exponent of the Rousseauian approach, maintains that the problem can be solved by insisting that the principles of justice ratified by a notional Rousseauian union are to be applied not to individual distributive shares, but to the assessment and choice of institutions that, it is understood, once chosen are to run under their own steam and by their own logic. “A distribution,” Rawls writes, “cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations” (Rawls, 1971, p. 88). But it remains to be seen whether this highly abstract specification can be converted into a way of thinking about and evaluating the actual operation of concrete property arrangements.



*The Lockean approach*

In the Rousseauian model, the initial allocation of resources to individual owners is done by society as a whole, on the premise that something that affects everyone requires the consent of all. The Lockean approach rejects this as silly and impracticable: "If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him" (Locke, [1690] 1988, p. 288). We come to consciousness, he argued, in a world evidently supplied with the necessities of life, and there cannot be anything wrong with a person simply taking possession of some of this and using it. What is more, if a person begins to use some piece of land or other natural resource, there does seem to be something obviously wrong with others trying to interfere or take it from her, unless somehow her appropriation has gravely prejudiced their subsistence. We do not seem to need any collective or "omnilateral" decision to establish the appropriator's entitlement to some sort of respect for the right that she has established.

In its simplest form, the theory of unilateral acquisition presents itself to us as first occupancy theory: the first person to occupy a piece of land gets to be its owner or, more generally, the first person to act as though he or she is the owner of something actually becomes its owner, so far as the morality of his or anyone else's actions are concerned. The traditional argument for this has been that second and subsequent occupants necessarily prejudice the interests of someone who came earlier, whereas the first occupant does not. But that will not do. Even if there is no earlier occupant-appropriator, there may still be others whose interests are affected by the first occupant – namely, those who had previously enjoyed the resource in common but who now find themselves barred by the first occupant's putative entitlement from using or enjoying it at all.

John Locke's theory is widely regarded as the most interesting of the philosophical discussions of property, in large part because it represents an honest attempt to deal with this difficulty. The starting point of Locke's analysis is that God gave the world to men in common, so that the unilateral introduction of private entitlements is acknowledged from the outset to represent something of a moral problem.

How did Locke propose to solve the problem? First, he made it manageable by emphasizing that when private property was invented, there was actually more than enough for everyone to make an appropriation. It was only the invention of money, he said, which led to the introduction of larger individual possessions whereby some came to own a lot and others little or nothing; and he argued – not altogether convincingly – that since money was rooted in human convention, that phase of distribution was governed by justificatory considerations of (what I have called) a Rousseauian kind: "Since Gold and Silver ... has its value only from the Consent of Men ... it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth" (Locke, [1690] 1988, pp. 301–2).

The chief significance of this argument is that it represents Locke's awareness of the limits of a theory of unilateral appropriation. A similar awareness is evidenced even in his discussion of the origin of property, where we find his theory of individual appropriation complemented throughout by what I referred to earlier as a general justificatory theory. Though Locke insisted, as much as any theorist of first occupancy, that a

person who takes resources from the wilderness normally acquires a title to them, he was always at pains to add that this is also a good thing from the social point of view, because it rewards industry and promotes the general welfare. Unilateral appropriation never has to stand nakedly on its own in Locke's theory, as it does in the view of his more recent followers, most notably Robert Nozick (1974).

In the end, though, it is the argument about unilateral appropriation that has captured the philosophical imagination. And it is indispensable to Locke's case because it provides the prototype of the individualized rights that the general arguments support and that consent will later ratify. Locke's contribution is to connect unilateral appropriation with the idea of self-ownership:

Though the Earth ... be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. (Locke, [1690] 1988, pp. 287–8)

That something I have worked on embodies a part of me is a common enough sentiment. Locke connected this sentiment with the sense of self-possession that characterized the emerging liberal individual, in a way that also made a convincing economic as well as moralistic case for unilateral appropriation. Since most of what we value in external things is not given by nature but is the result of labor, it not so strange, as Locke put it, "that the Property of labour should be able to over-balance the Community of Land":

Though the things of Nature are given in common, yet Man (by being Master of himself, and Proprietor of his own Person, and the Actions or Labour of it) has still in himself the great Foundation of Property; and that which made up the great part of what he applied to the Support or Comfort of his being, when Invention and the Arts had improved the conveniencies of Life, was perfectly his own, and did not belong in common to others. (Locke, [1690] 1988, pp. 296–9)

The part of Locke's theory that has aroused perhaps the most skepticism in jurisprudence is not the theory of unilateral acquisition, but something that seems to follow from it – namely, that there can be rights of private property prior to the institution of systems of positive law. Lockean property is established in the state of nature, and even though later inequality is ratified by consent, the consent in question has nothing to do with the social contract or the invention of government. Accordingly, when positive law does come into existence, it finds a set of individual entitlements already in existence, and a bunch of prickly citizens who are willing to fight for the proposition that the task of government is to protect their property rights, not to reconstitute or redistribute them. So conversely, those who believe that government should have more Rousseauian power over property than this often predicate their argument on the claim that property rights are unthinkable without law.

In fact, the Lockean view is not disposed of so easily. First of all, Locke's state of nature is not an asocial one, only apolitical. Locke took the plausible view that all sorts of moral relationships can exist in a dense web of social interaction, without the specific support of the state or positive law. But if this is accepted as a general proposition, why would property relationships be an exception? People may certainly cultivate land whether there is positive law or not, and the idea that others are incapable without law of forming, sharing, or acting on the view that it is wrong to interfere with or appropriate the products of another's labor seems very implausible. Similarly, we do not seem to need the aid of legal system to explain the existence of exchange and markets. As far as we can tell, trade between the inhabitants of different regions antedates the existence of determinate legal institutions by several millennia.

What is true is that law makes an immense contribution to a property system and that in the complex circumstances of modern life, property without law – where the rules rely on nothing more robust than shared moral consciousness – is likely to be riddled with disputes and misunderstandings. But Locke recognized this point. That, after all, was the purpose of entering the social contract – to provide mechanisms for settling details, enforcing rights, adjudicating disputes that did not exist in the state of nature. But it does not follow from the fact that we need these mechanisms – and that only a legal system can supply them – that our thoughts and sentiments about mine and thine, and property and distributive justice, are purely the product of positive law.

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## 2

# Contract

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### Introduction

Contemporary contract theory is characterized by the following paradoxical situation. On the one hand, the basic form and concepts of contract doctrine in both common law and civil law jurisdictions are, for the most part, firmly and clearly established as well as widely accepted. This has been so for decades now and, in the case of certain aspects of doctrine, for centuries. The present situation, as James Gordley (1991, p. 1) wrote, is that “[w]ith the enactment of the Chinese Civil Code, systems of [contract] laws modelled as the West will govern nearly the entire world ... The organization of the law and its larger concepts are alike even if particular rules are not.” In sharp contrast, the world of contract theory presents itself as a multiplicity of mutually exclusive approaches with their own distinctive contents and presuppositions. While these theories typically purport to provide complete explanations of contract, each of them rejects the others as incomplete and inadequate, although rarely on the criticized theory’s own grounds. There does not seem to be at present any shared principle or set of principles to adjudicate among their conflicting claims. For this reason, and despite the pervasive identity of contract doctrine across jurisdictions, many scholars share Gordley’s conclusion (1991, pp. 230–1) that today there is no generally recognized theory of contract. Indeed, there is widespread skepticism about the very possibility of finding general principles that can account for the rules of positive law or the conclusions that most people regard as fair. The effort to develop a coherent explanation of contract seems to have reached an impasse.

This paradoxical relation of contemporary contract theory to contract law fixes the fundamental situation that this chapter must address and sets the background against which it will pursue its objectives, which are twofold: to present the main contemporary theoretical approaches to contract and to suggest the direction that future theorizing should take. For these purposes, I will try to identify and explore the basic presuppositions of each of the principal efforts to provide a coherent and plausible explanation of contract. The range of available approaches will be considered. Above all, I want to see whether a given theory is able to live up to its own demands of completeness and adequacy. Thus, while the analysis will necessarily be critical, it will nonetheless take up and move within the different standpoints of the theories discussed.

Three categories of theories will be considered in detail: the first challenges, on juridical normative grounds, the traditional understanding of the distinctive character of contract as one relatively autonomous part of private law; the second tries to answer that challenge by arguing that contract's specific character can indeed be explained on the normative basis of a principle of autonomy; and the third holds that one needs a teleological justification that views contract as directed toward the realization of some individual or social good, such as the virtue or the well-being of the parties and economic efficiency. These constitute at present the principal distinctive positive theoretical approaches to contract that take a monistic view of the normative basis of contract.

In the face of the apparent insufficiencies of these monistic theories, some contract scholars have more recently suggested the need for "mixed" theories that suitably incorporate or order more than one of these approaches (for example, autonomy and economic efficiency) as aspects of a comprehensive theory. By way of conclusion, I will briefly note such mixed theories. As well, I hope to indicate the nature of what, following Rawls (2001, pp. 26–9) I shall call a "public liberal basis of justification" for contract. I suggest that the first step toward getting beyond the current paradoxical situation of contract theory is the development of such a public basis of justification. This, I argue, sets the immediate goal for future theorizing about contract.

## The Challenge to the Distinctiveness and the Coherence of Contract

### *Fuller*

Contemporary theoretical reflection on the common law of contract begins with Fuller and Perdue's 1936 article, "The Reliance Interest in Contract Damages." Widely viewed as "the most influential single article in the entire history of modern contract scholarship in the common law world" (Atiyah, 1986, p. 73), this essay has largely shaped the course of discussion since the 1940s. As we will see, much of contemporary contract theory may be situated in relation to it, whether as an effort to develop or to answer its challenge (Smith, 2004, pp. 78, 414–17).

The main topic of Fuller and Perdue's article (1936) is the seemingly technical issue of the choice of the appropriate measure of damages for breach of contract. Building on the work of others, Fuller (who is universally regarded as the main author of the article and, in particular, of its theoretical discussions) distinguished three purposes or interests that the law may pursue in awarding contract damages. First, the law may deprive a defaulting promisor of gain obtained at the promisee's expense and award it to the promisee to prevent unjust enrichment (the restitution interest). Second, the law may compensate the promisee for loss suffered through detrimental reliance on the promisor – for example, if in reliance on the promise, the promisee has made an expenditure now wasted or has given up an opportunity no longer available. The law's purpose here is to put the promisee in as good a position as he was in before he relied on the promise (the reliance interest). Third, the law may give the promisee the equivalent of what was promised him in order to place him in the position he would have been in

had the promise been performed (the expectation interest). As a result of the influence of Fuller's article, the analysis of contract damages in both judicial opinions and scholarly writing is now invariably conceived, and often explicitly so, in the very terms proposed by him.

The essay's *theoretical* contribution does not lie, however, in this influential classification of remedial interests or, for that matter, in its important claim that courts, in fact, protect the reliance interest along with the expectation interest in awarding contract damages and that they should openly acknowledge this. It is, rather, Fuller's puzzlement over the rational basis of expectation damages and his effort to make sense of them that give the piece genuine theoretical significance (Fuller & Perdue, 1936, pp. 52–66).

In the face of the (still) prevailing view in law and legal scholarship that a promisee's entitlement to sue for expectation damages is a ruling and a just principle, Fuller contends that "it is as a matter of fact no easy thing to explain" why recovery of the expectancy should be the normal rule of contract damages. He sees in this difficulty the still more fundamental problem of "why a promise which has not been relied on [should] ever be enforced at all."

What, for Fuller, is the basic difficulty with expectation damages? To begin, we must recall that in awarding the promisee expectation damages for the purpose of placing him in the position that he would have been in had the promisor performed, the law purports to be *compensating* the promisee; that is, to be giving the promisee the equivalent in value of something that was initially his but that was lost or interfered with as a result of the breach. In Fuller's view, however, the promisee never in fact "had" the expectancy – it was only promised him. Since he never had it, he could not have lost it. Hence, Fuller concluded, the award of the expectancy "seems on the face of things a queer kind of compensation."

Given this conclusion, Fuller suggested that the expectation interest presents a lesser claim in justice to judicial intervention than do the restitution and reliance interests. Whereas protection of the latter interests entails reparation of actual losses and therefore is compensatory in character, protection of the expectancy gives the promisee something he never had and "brings into being a new situation." In passing from compensation for losses to the satisfaction of expectations disappointed by breach, the law ceases to act restoratively and adopts a more active role. Referring to Aristotle's analysis of justice, Fuller noted that in so doing the law passes from corrective justice to distributive justice.

If we examine Fuller's difficulty with the expectation interest, we see that, necessarily, it rests on the following implicit premise: a promise, even if accepted, does not give the promisee anything; it is only if and when a promise is actually performed that the promisee acquires something. Consequently, breach – or, more generally, any failure to perform – cannot be viewed as depriving the promisee of something that is *already* his. Fuller must hold, then, that by obliging a promisor to pay expectation damages, the law imposes on him a positive duty to benefit the promisee rather than a negative duty not to injure him. This is borne out by his endorsement (1936, p. 56, n. 7) of two continental writers, Durkheim and Tourtoulon. In the passage quoted by Fuller, Durkheim contended that in the case of a purely executory agreement (where the promisor has not yet received remuneration and the promisee has not yet detrimentally

relied), a breach does not “take from another what belongs to him”; rather, the defaulting promisor “only refuse[s] to be useful to him.” Enforcement of the agreement does not repair an injury. Instead it has “an eminently positive nature.” Tourtoulon put the point this way: “the principle that promise or consent creates an obligation is foreign to the idea of justice.” As I shall now explain, this view, if correct, has far-reaching implications for the analysis of contract.

It is a basic and distinctive premise of private law that individuals can be held accountable only for injuring or otherwise interfering with what rightfully belongs to others. The essential idea is that obligation in private law has the form of being correlative to the right of others to be free from wrongful interference with what is their own, whether the latter is inseparable from their person (their bodies, for example) or is something they may have acquired in accordance with a principle of appropriation (such as the rule of first occupancy). By contrast, an obligation to benefit others, to preserve or improve their condition, or to contribute to the fulfillment of their needs and purposes goes beyond this severely limited idea of responsibility and does not belong to private law. Consistent with this, private law principles of appropriation themselves are on their face indifferent to the needs, purposes, and well-being of the individuals who may wish to claim something as their own. Although these ends are relevant in morality or in public law, they cannot be the basis of a claim of justice in private law.

Private law’s limited idea of responsibility is reflected in the common law proposition that there can be liability for misfeasance but not for nonfeasance (Benson, 1995a). Misfeasance is thus a wrong that violates another’s right to be free from interference with his or her own, in the sense just indicated. Nonfeasance, by contrast, is wrongful conduct that cannot be construed in this way but that must instead be explained on the basis of a duty to care for the well-being of others. Contrary to what is sometimes said, the difference between misfeasance and nonfeasance is therefore not the same as the distinction between acts and omissions: an act can be nonfeasance (for example, attracting a business competitor’s customer) just as an omission can be misfeasance (such as failing to warn another of danger in a situation of justified detrimental reliance).

Put in terms of the distinction between misfeasance and nonfeasance, Fuller’s difficulty with expectation damages is that they seem to make the promisor liable for mere nonfeasance. The promisor is compelled to improve the promisee’s circumstances, not to repair a loss wrongfully caused. The “normal” measure of contract damages appears anomalous from the standpoint of private law itself. For the same reason, the enforcement of purely executory agreements not relied upon by the promisee is problematic, given that the only basis for enforcement can be protection of the expectation interest. Yet it is precisely the enforceability of such agreements that is regarded as the hallmark of modern contract law. No wonder, then, that Fuller saw the normal rule of contract damages as “throw[ing] its shadow across our whole subject.” Nevertheless, because expectation damages are available at law, he deems it necessary to suggest possible reasons for the existence of this rule.

After rejecting a variety of possible justifications for the expectation measure, Fuller and Perdue (1936, pp. 60–3) proposed what they called a “juristic” explanation: awarding expectation damages is justified as a means of curing and preventing reliance



losses and of facilitating general reliance on business agreements. Fuller himself made explicit the implications and the limits of the proposed explanation. First and foremost, the expectation *measure* of damages (the value of the promised performance) is no longer justified as a way of protecting the expectation *interest* (which aims to put the promisee in the position he would have been in had the promise been performed). The reliance interest replaces the expectation interest as the main motive or substantive basis of the law in giving contract damages. But if the reliance interest is the basis of contractual liability, why use expectation rather than reliance damages as the proper measure of recovery?

Fuller's answer was as follows. In certain circumstances, he noted, the expectation and reliance measures will be the same. When this is the case, it is possible to view expectation damages as compensatory. For example, where a contract of exchange is affected under perfectly competitive market conditions, the value promised under the agreement can equal the value of an alternative exchange which the promisee did not make in reliance on the promisor. Moreover, even where this situation does not exist, it may sometimes be more difficult to prove or measure reliance losses than expectation losses, making an award of expectation damages easier to administer. These examples show that awarding expectation damages may sometimes be a good surrogate for repairing reliance losses. It must be kept in mind here that this compensatory rationale for expectation damages presupposes that the aim is to protect the reliance interest, not the expectation interest. Therefore, where the contract is not an exchange concluded in a purely competitive economic context and/or where reliance losses can be established with the requisite degree of certainty, the rationale "loses force." Then, as Fuller acknowledged, if a court awards expectation damages, they can no longer be viewed as compensatory but assume a quasi-punitive character.

This last point brings out the inadequacy from a legal point of view of the attempt to explain expectation damages simply as a means of curing and preventing reliance losses. In contemplation of law, contract damages – including expectation damages – are compensatory. Moreover, the mere fact that it may be difficult or even impossible to prove one kind of loss (reliance) does not by itself justify recourse to another measure of damages (expectation). That the latter may be more readily ascertained and administered in certain circumstances is insufficient to legitimate its use by the courts. After all, in tort actions for negligence, difficulty in establishing reliance losses is not normally remedied by recourse to the expectation measure. The action may simply fail. Fuller needed a positive general justification for contract law's recourse to a measure other than reliance, if, as he holds, the aim of the law should be the protection of reliance.

The second part of Fuller's juristic explanation was meant to provide the needed justification. It views an award of expectation damages, not as a surrogate for reliance losses, but as a way of encouraging individuals to make and to act on business agreements in order to facilitate the division of labor, to ensure that goods find their way to the places where they are most needed, and to stimulate economic activity. As Fuller noted, this part of the justification implies an essential correspondence between the legal view and actual conditions of economic life. The bilateral business agreement becomes the paradigm case of informal contracts that are enforceable without proof of actual reliance. A major task of contract theory becomes, therefore, the search for an

underlying correspondence between law and economics in the various doctrines and aspects of contract law.

We see clearly here that the search for a compensatory rationale for the normal rule of damages has been abandoned. On Fuller's view, breach of contract now appears more like a threat to social cooperation – a social wrong – rather than a violation of an individual's entitlement to performance. This analysis is entirely unconstrained by the limiting principle of no liability for nonfeasance. The juristic explanation does not attempt to justify the normal rule of contract damages on a basis that is consistent with the distinctive character of private law.

Fuller succinctly summarized the outcome of his analysis: "We might easily base the *whole* law of contracts on a fundamental premise that *only* those promises which have been relied on will be enforced. As the chief exception to this principle we should have to list the bilateral business agreement. The rationale for this exception could be found in the fact that in such agreements reliance is extremely likely to occur and extremely difficult to prove." Yet, we must emphasize, modern contract law in both common law and civil law jurisdictions continues to treat unrelieved mutual promises in both commercial and noncommercial contexts as fully enforceable with expectation damages. On Fuller's analysis, the divide between the law and theory seems fundamental.

### *Atiyah*

The challenge that Fuller left us with is to show that contractual liability can – and should – be entirely explained on the basis of just the two sources of obligation implied by the restitutionary and reliance interests, namely, the receipt of benefits at another's expense and the inducement of justified detrimental reliance. The work of Patrick Atiyah represents to date the most sustained effort to do this. His scholarship is particularly wide-ranging in its treatment of doctrine, history, and philosophy. For present purposes, however, the heart of his argument may be briefly summarized as follows.

According to Atiyah (1986, pp. 11–18), "the classical view of contract," as he called it, roots contractual liability in the actual intentions of the parties and attributes to promises the power to generate full-fledged enforceable obligations. Atiyah argued for an alternative conception of contract, which holds that persons are liable for what they do rather than for what they intend, and which doubts, and may even deny, that a promise can bind absent the receipt of an actual benefit or the inducement of reliance. His argument consists of two parts: one critical, the other constructive. In the critical part, Atiyah examined the law to see whether, in fact, it supports the claims of the classical view. He also considered a wide range of theoretical accounts of the basis of promissory obligation to see whether the classical view can be sustained as a matter of moral principle.

The classical conception, Atiyah contended, treats the unrelieved and unpaid-for executory contract, consisting just of mutual promises, as the paradigm of enforceable agreements. One of his objections against this view was that such agreements are, in fact, exceedingly rare. Most enforceable agreements involve the receipt of actual benefits or the inducement of actual reliance either at the moment of formation or very soon thereafter. In addition, Atiyah took the classical view to be in tension with certain

basic aspects of contract doctrine, such as the objective test of formation (by which parties may be bound irrespective of their intentions), the doctrine of consideration (which stipulates the existence of benefit or detriment as a condition of enforceability), or the mitigation requirement (which seems to be explicable only on the basis of the primacy of the reliance interest). Still, Atiyah acknowledged, as Fuller did before, that the law *does* enforce wholly executory, unpaid-for, and unrelieved mutual promises with expectation damages. Even if we grant that such promises may be statistically infrequent, the fact that they are enforceable as a matter of principle – and, historically speaking, have been treated as such since the emergence of the action in *assumpsit* – is surely an important datum for contract theory. Fuller left us with the challenge of trying to explain this well- and long-established feature of contract law within the bounds of liability for misfeasance only. How did Atiyah approach this question?

Atiyah began by exploring the basis of promissory liability. He examined an impressive number of the more significant philosophical accounts of promising, including classical utilitarianism and natural law, in addition to contemporary theories. In the end, he found them all wanting. I will not attempt to discuss or to evaluate his treatment of the various approaches. For present purposes, it is sufficient to note that he measured them all against a single problem. According to Atiyah, every theory of promising must explain how a promisee can be *entitled* to expect the promisor not to change his mind. This, for Atiyah, is perhaps the fundamental question for contract theory (Atiyah, 1981, pp. 127ff). Let us see why.

Atiyah started from the premise that people regularly do, and normally have the liberty to, change their minds. Not having this freedom to change one's mind can interfere significantly with one's choices, thereby imposing definite and sometimes serious costs on oneself. Why then, Atiyah asked of each theory, should a promisor's first statement of intention (the promise) be accorded priority over his second (change of mind)? Which preference should be accorded priority as an entitlement: the promisor's desire to change his mind or the promisee's desire to have his expectations fulfilled? "There is simply no basis," Atiyah wrote, "unless and until the entitlement decision is made, for ascribing any loss or disappointment of expectations suffered by a promisee to the promisor" (Atiyah, 1981). Atiyah contended that *all* theories of promising – whether they are welfare based (such as utilitarian or economic approaches) or autonomy based (such as natural law or contemporary liberal approaches) – are obliged to settle this question on pain of begging the issue. As I have mentioned, he did not find a satisfactory answer in any of the theories canvassed. In his view (1986, pp. 121–79), this is especially true of leading contemporary accounts, such as the economic analysis of contract or Charles Fried's liberal theory. Consequently, they do not explain why a bare, unpaid-for, and unrelieved promise should by itself give rise to an obligation, whether moral or legal.

If a promise is to be enforceable, Atiyah held that it must be so in virtue of the reasons for which it was given or because of the consequences that it has had. A promise may be given, for example, to obtain something of value from the promisee or, alternatively, to induce the promisee to change his position to his detriment. These are reasons for promising. As I have already noted, Atiyah held that contractual obligation should be founded on parties' acts, not their intentions. In his view, conferral of benefit and detrimental reliance are the two main types of acts that can take place in a contractual

setting. They are also consequences of promising. Now the actual receipt of a benefit at another's expense and the inducement of detrimental reliance can give rise to obligations in unjust enrichment and in tort respectively, and these obligations do not, of course, presuppose or derive from an obligation to keep one's promises. So, in addition to being reasons for promising, the receipt of benefits and the inducement of reliance represent, as consequences of promising, possible substantive bases of obligation. On Atiyah's view, then, promises are enforceable only when a benefit has been conferred or when reliance has taken place, and the basis for enforcement is in unjust enrichment or in tort respectively. But if this is so, what role is left for the promise itself to play?

Atiyah's answer was that a promise made to obtain a benefit or to induce reliance can play a "formal" role in shaping the legal consequences attaching to these effects (Atiyah, 1981, pp. 184ff). In particular, a promise may function, not as a separate substantive basis of obligation, but as a *conclusive admission* by the promisor that clarifies and sometimes settles a variety of issues pertinent to the existence and the extent of his obligation in unjust enrichment or tort:

[In the case of benefits rendered to the promisor] the promise is usually evidence that the transaction is an exchange and not a gift [hence at the expense of the promisee], and it is evidence of the fair value of the exchange ... [In the case of detrimental reliance induced by the promisor] the promise is evidence that the promisor himself thought that the promisee would be justified in acting in reliance on the assertion expressed in or implicit in the promise. (Atiyah, 1981, p. 193)

This conception of promises as admissions is the core of the constructive part of Atiyah's theory. He put it forward as plausible in principle and as more consistent with the law than the classical view. Yet there are important difficulties with this idea, some of which Atiyah himself acknowledged and addressed.

First, we must, of course, explain why a promise is to be treated as a *conclusive admission*. After all, since the promisor may have changed his mind, it is not self-evident why his initial expression of intention should be given precedence by being treated as conclusive.

Second, one must show how the making of a promise in the context of conferred benefits or induced reliance can *alter* the unjust enrichment or tort analysis that already applies in virtue of these facts, when the legal significance of the promise is supposed to be *merely* evidentiary. Let me explain. In circumstances of induced detrimental reliance, the duty of care in tort can often be fully satisfied if the defendant simply notifies the plaintiff of his change of mind even after the plaintiff has relied, so long as the notification does not come too late for the plaintiff to regain his prior position without loss. And further, the measure of damages in a case of breach of that tort duty will be only for the actual detriment caused. By contrast, when contract law enforces the reliance-inducing promise, the promisor is deemed to be in breach of his duty just because he has failed to perform as promised. Notification will not, in general, discharge that duty. And the measure of damages will be for the value of the promise, not just the reliance loss. It is not at all evident how a merely evidentiary conception of the role of promising can account for this difference in legal result.

Third, there is the basic difficulty that the evidentiary conception alone neither accounts for nor explains away the fact that mutual promises can be legally binding from the moment of formation whether or not there has been any actual conferral of benefits and any detrimental reliance. On this legal analysis, the function of promises at the moment of agreement cannot be to provide evidence of factors that relate to the benefit/detrimental reliance analysis simply because, by hypothesis, conferral of benefit and inducement of reliance can be legally irrelevant. The law, at least, seems to attribute to promises something more than the purely evidentiary function that Atiyah proposed.

The effort to ground contractual obligation on detrimental reliance is vulnerable to a further, though related, objection. The law usually distinguishes between reliance that the promisor expressly or implicitly *requested in return* for his promise and reliance that he merely foreseeably induced. In the first case only, the reliance is treated as consideration for the promise, with the legal consequence that the promise becomes contractually enforceable with expectation damages. By contrast, where reliance is merely (foreseeably) induced, the promise can give rise at most to an estoppel governed by principles of tort law: the promise is not as such binding, nor does its breach normally give rise to expectation damages. This dichotomy has important implications for the theory of contract. From the standpoint of legal doctrine, both reliance and promising play roles in contract formation that are qualitatively different from their functions in tort. A theory that purports to provide an account of the law cannot simply assume *ab initio* that there is a single undifferentiated notion of reliance or of promising that underlies contract and tort. To the contrary, it must begin by seeing whether it is possible to identify the specific structure that gives reliance and promising a character that is distinctively contractual. In legal doctrine, I have said, this structure is set by the requirement that the reliance must be requested in return for the promise. In contract theory, it is above all “autonomy-based” approaches that attempt to identify and to justify the specific structure of contract.

The work of four scholars – Joseph Raz, Charles Fried, T.M. Scanlon, and Randy Barnett, each of whom invokes a conception of moral autonomy to explain contract law – will now be considered.

### Four Autonomy-Based Theories

Autonomy theories view contract law as a legal institution that recognizes and respects the power of private individuals to effect changes in their legal relations *inter se*, within certain limits. These theories resist the reduction of contractual and promissory obligation to tort and unjust enrichment. They try to account for both the legal point of view, which continues to hold that mutual promises can be fully enforceable independent of actual enrichment or detrimental reliance, as well as the ordinary intuitive notion that rational persons can bind themselves just by promising, assuming that certain requirements (such as voluntariness) have been satisfied. To meet the challenge of Fuller and Atiyah, however, autonomy theories must also show that their proposed justifications of promissory obligation respect the basic principle of no liability for nonfeasance.

In Atiyah's terms, they must make clear the basis of the promisee's entitlement to performance despite the promisor's change of mind.

### *Raz*

The contrast between tort and contract – and between the roles of promising and reliance in each of these – is reflected in a distinction drawn by Joseph Raz between two different conceptions of promising – the “intention” and the “obligation” conceptions of promising (Raz 1977, 1982). Raz contends that the distinction between these two conceptions of promising is intelligible in principle and that it is the obligation conception that most fully captures our common idea of promising.

The “intention” conception defines promise as the communication of a firm intention to do something when one is aware that it may be relied on by the addressee or when one intends to induce or to encourage such reliance. According to Raz, the intention conception brings into play the estoppel principle: if the addressee has actually relied, the one who has communicated the firm commitment must avoid harming him by disappointing that reliance. There must be actual detrimental reliance for estoppel to apply and for the addressor to be bound. From a legal point of view, the protected interest at stake here is the reliance interest.

By contrast, the “obligation” conception defines promising as the communication of an intention to undertake, by that very communication, an *obligation* to do something (not just an intention to act, as in the intention conception) and to invest the addressee with a right to its performance. A promisor communicates to the promisee the belief that she (the promisor) knows that she will be obligated and that she wishes to be so obligated just by expressing this intention to the promisee. In a given society, there may be a variety of conventional ways of communicating this intention. These conventions help determine what acts can reasonably be taken to express an intention to undertake an obligation and to confer a right. Individuals may avail themselves of these conventions as ready means to channel and to fulfill their desire to bring themselves under an obligation. However, the existence of such conventions is not essential to the making of promises. An intention to undertake an obligation can be communicated even in a society that does not recognize the practice of promising. Moreover, while an intention to bind oneself may be conveyed, given the requisite shared background understandings, by the promisor inviting the promisee to rely, this does not mean that the obligation conception of promising is reducible to the intention conception. An invitation to rely and an intention to undertake an obligation by the very communication of that intention are categorically distinct. The first is, as such, neither necessary nor sufficient to establish the second (Raz, 1972, pp. 98–101).

One way of expressing the basic difference between the two conceptions is that in the case of the obligation conception, promising is a form of what Raz called a “voluntary” obligation. What makes an obligation voluntary in Raz's sense is not just that the obligation is attached to a voluntary act of some kind. The voluntary character of an obligation tells us something about the reason or justification for the obligation. In the case of a voluntary obligation, part of the reason the obligation is imposed is that the person obligated willed to be, or at least knew she could be, so obligated by her act. The person's awareness is morally relevant in a specific way: it is itself a *positive* reason

for imposing the obligation. By contrast, if a person's state of mind (in willing or at least in being aware of the obligation) is not itself to any extent part of the positive justification for the obligation, the obligation is not voluntary, even if it attaches to a person's voluntary acts. For example, I may buy goods in another country with full knowledge that I will have to pay custom duties on them when I return home. The purchase is voluntary and informed. However, my awareness that I will have to pay custom duties is not itself part of the positive reason for my obligation to pay them. The moral significance of my awareness is that but for it, it might be unfair to oblige me to pay: people are entitled as a matter of fairness to know in advance that if they buy goods abroad, they will have to pay duties on their return home. This knowledge fulfils a merely negative justificatory role. It does not provide, even in part, a positive reason for the duties – which, we suppose, will rest on a variety of policy considerations. The positive justification is entirely independent of the agent's awareness of the obligation.

Social life is replete with different forms of voluntary obligations. Promises, where the assumption of the obligation is undertaken in the form of an explicit communication to that effect, are but an extreme case of voluntary obligation at one end of a wide spectrum. Most voluntary obligations are not established with this degree of explicitness. Indeed, it is the mark of a healthy relationship that the number of explicit promises is small.

While all promises communicate an intention to undertake an obligation, they do not necessarily succeed in doing so. Raz holds that promises bind only if we suppose that it is *desirable* to give effect to the promisor's intentions. A promise purports to create a special bond between promisor and promisee, obliging the former to view the latter's claim as having peremptory force and not just as one of the many claims that persons may have, in general, to his respect and aid. The moral bindingness of a promise presupposes that this kind of relationship and the fact that it is voluntarily created and shaped by the choice of the parties are valuable. People have a normative power to bind themselves and invest others with rights because this is a form of life deemed to be intrinsically desirable. This is a moral presupposition of the obligation conception of promising.

According to Raz (1982, pp. 933ff), the purpose of contract law should be – and largely is – to protect both the practice of undertaking voluntary obligations (including promises) and the individuals who rely on this practice. He offered this analysis as an alternative to the view that contract is a hybrid of principles based on tort and restitution (Atiyah's approach) and as well as to the idea that its purpose is the enforcement of promises (Charles Fried's theory). On Raz's view, the function of contract law should be supportive and facilitative by recognizing and reinforcing the already existing social practice of undertaking voluntary obligations (including promises). This facilitative function of the law is, however, circumscribed by a "harm principle," which holds that the only legitimate purpose for imposing legal obligations on individuals is to prevent harm. In light of this principle, the goal of contract law should not be the enforcement of voluntary obligations (and promises) by making promisors perform or by putting promisees in the position they would have occupied had there been performance. To take the enforcement of promises as the end of contract law would be, according to Raz, to enforce morality, no different than the legal proscription of pornography. Protecting the practice of promising, by compensating individuals for harms they suffer as a result

of relying on broken promises and by ensuring that people do not intentionally or carelessly debase the practice by letting it appear as if they have promised when they have not, *are* legitimate goals. These are individual and institutional harms that the law may seek to discourage or to repair within the bounds of the harm principle.

Raz's conception of individual harm rests primarily on the need to protect the reliance interest and ultimately the practice of promising itself. Thus, according to him, reliance damages should be in principle the standard legal remedy for breach of contract. Expectation damages may, however, be awarded where this is needed to protect the reliance interest. For the prevention of institutional harm, Raz invoked the principle of estoppel. If people were often to allow it to appear (even through carelessness) that they have promised when they have not, the appeal and the utility of promising would be undermined. This would discourage individuals from entering and relying on agreements. In addition, they could be harmed by relying on supposed promises. To prevent this erosion of the practice of promising, the law, in its supportive role, should judge actions in accordance with how they reasonably appear to others. Where it appears that one has promised, one should be stopped from denying that one has promised. In this way, Raz justified the common law's use of the so-called "objective test" in different areas of contract doctrine, in particular for contract formation. Yet, as he pointed out, this results in the validation of numerous "promises" that are not, in Raz's sense, voluntary obligations at all.

This result, which, as Raz noted, seems paradoxical, may betray a fundamental tension in his analysis of the foundation of contractual liability. Let me explain.

We have seen that Raz's analysis is based on the idea of promise as a voluntary obligation and on the presupposition of the intrinsic value of relationships that embody this idea. Essential to the notion of voluntary obligation is the positive moral relevance of the actor's actual intention and state of mind: obligation is voluntary if and only if it is actually wanted by the actor – if it is the object of her actual intention. The intrinsic value ascribed to self-wrought relationships depends crucially on the relationship being initially envisaged and wanted in this way. Absent this connection with the actor's actual intention, there is no reason to attribute goodness to the resulting relationship *qua* voluntarily undertaken.

On the basis of this analysis alone, the goal of protecting the practice of promising (as one form of voluntary obligation) can clearly entail recognizing and supporting a *liberty* to promise, if a person so wishes; that is, the making of a promise should not be deemed wrongful and neither persons nor the state should act in a way that treats it as such. But a stronger conclusion is not warranted. In particular, the analysis does not justify binding a promisor to perform what she has now come to regret or never actually wanted, for this cannot be rooted in her actual intentions. Yet unless a theory can show how a person can be so bound irrespective of past intentions, it cannot begin to explain contract law. In Raz's analysis, the promisee's reliance interest and the social utility of a credible practice of promising provide the needed basis for this stronger conclusion. But these reasons, as Raz himself emphasized, are conceptually and normatively distinct from the idea of a voluntary obligation.

In short, Raz invoked two sets of ideas, both of which are essential to his explanation of contractual liability, yet they point in different directions. The first, the idea of voluntary obligation does not justify anything more than a mere liberty (in the limited



sense just discussed) to make promises. The second, the promisee's reliance interest and the general utility of promising, may justify a stronger conclusion but they do so at the cost of undermining the voluntary character of promises.

This point should be taken one step further. Given Raz's conception of voluntary obligation, the harm principle would seem to require that legal intervention – over and above legal recognition of a mere liberty to promise – be justified on grounds that are entirely distinct from the idea of voluntary obligation. To hold a promisor liable for a presently regretted promise for the reason that this shows respect for her interest in undertaking voluntary obligations is to oblige her to participate in a form of good – one that she does not want in the particular circumstances. This is to enforce morality. By the harm principle, a promisor should not be under a duty to confer the benefit of a special relationship on the promisee, even if the latter may want and expect it in light of the promisor's previous communication.

The harm principle requires, therefore, that considerations other than the idea of voluntary obligation be invoked to ground contractual liability. But while the considerations that Raz proposed – the promisee's reliance and the social utility of promising – may not offend the harm principle, they do not seem to account for the central and distinctive feature of contract. Simply stated, protecting the reliance interest and invoking the estoppel principle to prevent the erosion of promising do not justify a contractual analysis. As Raz acknowledged, both the reliance interest and the estoppel principle belong to tort. They do not require anything more than a conception of promising in which the promise functions as a representation inducing detrimental reliance – that is, an "intention" conception of promising. How there can be contract formation prior to and independent of reliance cannot be explained on their basis. The analysis satisfies the harm principle in a way that fails to preserve the essential character of contract from a legal point of view.

Raz leaves autonomy theorists with the challenge of seeing whether it is possible to account for contract on the basis of a conception of autonomy that need not invoke nonpromissory considerations such as the promisee's reliance. The next theorist to be considered, Charles Fried, has attempted to provide just such an explanation.

### *Fried*

Among contemporary theorists, Charles Fried (1981) has developed the most comprehensive and systematic autonomy-based theory of contractual obligation, which, like Raz's, is based on an obligation conception of promising. Fried's central aim is to vindicate the distinctive character of contract and the primacy of the expectation interest. The argument is in two steps.

Fried began with the premise that in order for promises to be binding on any particular occasion we must first suppose that there is a general convention of promising that provides individuals with a way to commit themselves to future performances, if they so wish. Fried's object at this first stage of the argument (1981, pp. 12–14) was simply to establish that such a convention would be rationally wanted by individuals, given the ordinary needs of daily life. Whether as an expression of generosity or in order to obtain reciprocal benefits, people will want to be able to give each other a secure moral basis for counting on their word. Without the possibility of such commitment, the

range and scope of human purposes would be severely limited. Hence, “it is necessary that there be a way ... to make nonoptional a course of conduct that would otherwise be optional.” We need a device that may be invoked to produce this effect. And for this purpose, one who invokes the convention must know that others know that he has undertaken a commitment by doing so, and they in turn must know that he knows that they know this, and so on. A general convention of promising answers this need. It defines a practice that enables individuals to create in others expectations that they will render certain future performances just because they have committed themselves to do so.

However, as Fried emphasized, the fact that the convention may be useful does not by itself explain why someone who has invoked it, absent detrimental reliance by the promisee, is morally obligated to keep his promise if he later comes to regret it. One may always come to regret a prior decision to commit oneself to a previously neutral course of action – no matter how firm the initial expression of commitment may have been. The convention of promising is just a device for communicating commitment and for creating expectations in others. We need to know why these effects, produced at one moment, rule out a change of mind later. This, we saw, is the fundamental difficulty raised by Atiyah. If changing his mind does not violate some entitlement in the promisee, it is not at all clear why a promisor may not properly do so if he comes to regret his prior decision – unless, of course, we suppose that the promisor is under an antecedent coerceable duty to promote the interests of the promisee. But such a duty, we will shortly see, would be inconsistent with Fried’s understanding of the liberal basis of contract, not to say with the private law principle of no liability for nonfeasance.

Fried’s answer (1981, pp. 15ff) to this question forms the second stage of his argument. By invoking the convention of promising, the promisor invites the promisee to trust the promisor on moral grounds. Breach of promise abuses that trust and uses the promisee. For Fried, the wrongfulness of the promisor’s breach is like the wrongfulness of lying. Both violate what he calls “basic Kantian principles of trust and respect.” But what exactly did Fried mean by “trust” in the context of promising?

While Fried did not explain in detail what he means by trust, he did say that by promising, the promisor invites the promisee to believe that the promisor has committed himself to forward the promisee’s good from a sense of right and not merely for reasons of prudence. In doing this, the promisor invites the promisee to make himself vulnerable. According to Fried, it is the intentional inducement of vulnerability that gives rise to the obligation to keep the promise. But what exactly is the nature of the promisee’s vulnerability? For Fried, it cannot be the fact that the promisee has detrimentally relied on the promise or that he entertains expectations of future benefit as a result of it. In Fried’s view, such reactions to the promise are morally justified and imputable to the promisor only if we already hold that the promise is binding. They cannot explain the obligation, but on the contrary, presuppose it. The promisee’s vulnerability must therefore consist in something else.

To make clearer Fried’s understanding of the promisee’s vulnerability, we must go back to certain first principles of liberal theory which he espoused (Fried, 1981, pp. 7–8, 106–11). Liberal theory, he suggested, views individuals as morally independent of one another in the pursuit of their good. This means that persons cannot claim against each other a right to be assisted in the pursuit of their good. They can only claim a right to

be left free from wrongful interference with, or injury to, whatever they have managed to acquire. That being said, liberal theory also holds that persons can be under a *general* duty to care for and to advance the means and conditions of human fulfillment, so far as this is compatible with respect for the freedom and equality of everyone. But this duty is not naturally owed to, and therefore cannot be enforced by, any given person in his individual capacity. Consequently, when someone refuses to promote another's good, he does not for that reason necessarily show lack of respect for that person or his good.

By promising, however, the promisor can change all this. The promisor invites the promisee to bring the furtherance of his good within the sphere of the promisor's commitment and responsibility. The promisor distinguishes the promisee from individuals in general by intentionally conveying to the promisee his commitment to take seriously and to promote the promisee's good as an end worthy in its own right – something that the promisor was under no antecedent duty to do. The promisee is now vulnerable as he was not before: the promisor can show moral contempt for the promisee's good – he can treat it as without moral significance in its own right – by choosing not to benefit the promisee in breach of his promise. It is precisely because the promisor need not have promised and because he was under no antecedent duty to further the promisee's good, in particular, that the promisor can inflict this injury on him. The trust that the promisee places in the promisor is just that the promisor will not do this. This, for Fried, is the trust that, necessarily, is invited by a promise and is violated by its breach – irrespective of whether the promisee detrimentally relies on the promise. It is the basis of the obligation to keep a promise.

Having explained promissory obligation in this way, Fried directly deduced from this obligation the promisee's right to exact the promised performance: "if I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance." On this basis, Fried upheld the centrality of the expectation measure of damages for breach of contract (1981, pp. 17–21). To limit the promisee to the reliance measure as a matter of principle would excuse the promisor from the full obligation he undertook – indeed it would preclude the promisor from incurring the very obligation he chose to assume at the time of promising. Hence Fried viewed the claim of Fuller and Atiyah, among others, that damages should be so limited in principle as destructive of the very moral basis of contract, which is the duty to keep one's promises.

Yet there are important questions raised by Fried's account of promissory obligation and by his explanation of the promisee's right to damages. First, it does not seem to be the case that necessarily, or even in most circumstances, a breach of promise should reasonably be viewed as an abuse of trust in the sense discussed above. Except in cases where the promisor has promised without any intention of performing or where he has breached simply out of spite or without any significant reason whatever, the conclusion that a given breach constitutes an abuse of trust will be far from evident. We will want to consider a number of factors, such as the promisor's personal motives for breaching, whether he gave appropriate weight to the promisee's interests in reaching his decision to breach, whether he tried his best to perform in the circumstances, whether he was willing to compensate the promisee for reasonable reliance losses, whether he apologized for the breach or sought to justify it in some way, and so on. But the idea of trust

does not tell us what is the appropriate weight that should be given to each consideration in relation to the others. In particular, it does not direct how the promisor should weigh the promisee's interests in the balance with his own. Moreover, from Fried's own standpoint, considerations such as a willingness to cover reliance losses should be completely irrelevant. Finally, while the above-mentioned factors may be important when considering whether a given breach constitutes an abuse of trust, most if not all of them are simply ignored by the law in deciding whether a contract has been concluded or whether it has been breached with resulting liability. At this basic level, the idea of trust seems to have implications that are out of sync with the legal point of view.

Even if we view a breach of promise as an abuse of the promisee's trust, there remains a further – and for our purposes, a more serious – difficulty with the theory. Fried presupposed that a breach of promise, working an abuse of trust, necessarily infringes *a right in the promisee that can be coercively enforced*. But this need not be so.

On Kant's view ([1797] 1991, pp. 45–7), for instance, there are fully binding “duties of virtue,” breach of which certainly fails to treat humanity (in ourselves or in others) as an end in its own right. But these merely ethical duties do not have correlative rights in others, so that their performance cannot be directly coerced (whether by an award of damages or otherwise). In this respect, they are categorically different from what Kant called “juridical” obligations, which *are* coercible because they are correlative to rights in others. In the same vein, both the natural law writers, such as Grotius ([1625] 1925, pp. 330–1) (whom Fried cited for his promise principle), and the common law regularly distinguish between promises that may be fully binding in morals but which do not as such give the promisee an enforceable right to performance and those promises that do so even in the absence of detrimental reliance by the promisee. These two kinds of promises are distinguished by fundamental qualitative differences in their formation and their basic structures. Fried's account of trust as the basis of contract does not, however, take cognizance of this difference in the kinds of obligations and promises. It does not explain why the obligation to keep a promise is not simply an ethical duty. In short, it is not clear how Fried has shown that the premise “I should do as I promise” – even if correct – leads to the conclusion that “it is *fair* that I should be *made* to hand over the equivalent of the promised performance.”

### *Scanlon*

In his discussion of promises and contracts, T.M. Scanlon (2001) suggested a different answer to the Fuller and Perdue objection, which revised Fried's approach in at least three important respects. First, Scanlon distinguished between promises and legally binding contracts and presents a moral basis for the enforceability of contracts that is parallel to but nonetheless distinct from the moral argument for the duty to keep one's promises. Second, Scanlon argued that the obligation to perform one's promises need not depend upon supposing the prior existence of a general convention of promising or indeed of any convention at all. Rather, it requires only that there be a moral principle that applies directly to a two-party relationship and that articulates a reasonable basis upon which, as between them, one party should perform as promised. Scanlon's account – this is the third point of difference – was thus geared to illumine the direct

moral relationship between two persons, where that relationship is brought about by the giving and receiving of a certain kind of *moral assurance* as to future performance. On this basis, Scanlon hoped to show that the duty to perform is *owed* to another in light of what is reasonable and fair between the parties. He viewed this approach as answering the Fuller and Perdue challenge.

Central to Scanlon's explanation of contracts as well as promises is the idea of assurance (2001, 93ff). The notion of assurance is simply that, apart from a concern about the consequences of relying to one's detriment upon another's word, one may want the other to do as promised, in and of itself. One wants, in other words, to be assured that the other person will do a certain thing that the latter is otherwise morally free to do or not to do. It will not be enough for the other to give timely warning of a change of mind before there has been actual reliance. One *wants actual performance* unless one releases the other from his or her obligation to perform. Promising is one way of providing this assurance. Not only promisees who receive such assurances but also promisors who give them can have an interest in being able to do so. In addition, given their interests in providing and receiving assurances, both promisors and promisees may wish to have reasonable legal remedies to motivate performance. Promisors may want, therefore, to be able to undertake a legal obligation to perform. Accordingly, a principle that makes performance legally obligatory and enforceable in certain instances and under certain conditions can be something that would be wanted by both promisors and promisees. What might such a principle entail and how might it provide a reasonable moral basis for the enforceability of contracts?

Suppose a situation where each party knows that both have reasons for wanting respectively to give or to obtain an assurance that one of them will do something unless the other releases him from so doing (2001, pp. 103ff). One party – the promisor – acts with the aim of providing this assurance by indicating to the other party – the promisee – his intention to undertake a legal obligation to perform it. Not only does the promisor intend that the promisee knows that he is providing such assurance and undertaking a legal obligation to fulfill it; in addition, the promisee understands that this is the promisor's intention and the promisor knows that the promisee knows this. Scanlon seems to be of the view that nothing less than an *actual* intention on the promisor's part to provide such assurance will suffice. Finally, assume that the promisor has adequate opportunity to avoid legal liability (and therefore has sufficient understanding of his situation, has not been unacceptably constrained, has adequate opportunity to know in advance the legal penalties for breach of contract, and so forth) and that the remedies for breach are not excessive. Scanlon argued that if, on these conditions, a promisor makes a promise and fails to perform without being released by the promisee and without special justification, it is permissible to enforce legal remedies such as specific performance and (reasonably foreseeable) expectation damages for the breach.

Scanlon contended that a principle that embodies the foregoing stipulations and conditions *cannot reasonably* be rejected by either party. The justification for this conclusion is in two steps. First, a principle of this kind reflects the fact that two parties have *reason to want to provide or obtain assurance* and enlist the use of legal remedies to give support to the value of this assurance. Thus there is, *prima facie*, good reason to permit the state to provide such enforcement. The second step asks whether this use of state power is something to which those against whom it may be used can reasonably object.

Without going into the details of Scanlon's discussion of this aspect, we may say that, according to him, the principle ensures that individuals have adequate understanding and opportunity to avoid making assurances or incurring legal consequences for so doing if they do not wish to be subject to state power for breach of their promises. Moreover, the costs of enforcement, including the proportionality of remedies to the aim of providing assurance, are not such as to give promisors a reason for rejecting this principle. Because individuals have reasonable opportunity to avoid being bound, they cannot reasonably complain about legal enforcement when they manifest the requisite intention to perform. The fact that they may have reasons to regret their promise when performance is due cannot be a basis for rejecting the principle: the very point of the assurance is to rule out this kind of reconsideration and promisors have intentionally provided this assurance when they can reasonably avoid doing so. To allow them to escape legal enforcement on the basis of regret nullifies the whole point of the assurance that they want to, and do, provide.

How does this explanation of contractual obligation answer the Fuller and Perdue objection? Scanlon argues explicitly that a principle of the foregoing kind would justify expectation damages or specific performance for breach of a purely executory contract, that is, before either party has performed and apart from detrimental reliance upon the promise. The principle thus "recognizes an independent basis of purely contractual obligation" (2001, p. 111). One rationale for legal enforcement is that "the threat of legal enforcement of specific performance or expectation damages provides people with an incentive to fulfill the contracts they make" (2001, p. 110). But as Scanlon himself noted, this rationale views contract remedies as having a "quasi-criminal aspect" (*ibid.*) and so doesn't explain them as compensatory in character. How then, contra Fuller and Perdue, does Scanlon's account of contractual obligation show that the expectation remedy can be understood as compensatory? Scanlon suggested that, in addition to deterring promisors from breaching contracts, the expectation remedies "give promisees what they have wanted to be assured of (or come as close to doing this as is practically possible)" (*ibid.*).

This answer does not, however, meet the Fuller and Perdue objection. The fact that both promisors and promisees may *want* to be assured of something does not, in itself, establish that either *owes* the other this thing or, correlatively, that either is *entitled* to it as against the other. Fuller's point, we have seen, is that a commitment to give anything, including the assurance of performance, need not entail the creation of a legal or, let us say, a juridical, relation of corresponding right and duty between the parties. The possibility of such a relationship, which makes the thing assured something that belongs in a juridical sense to the promisee just in virtue of the promise and prior to the moment of performance, remains unexplained in this account. Failing to perform what has been assured can quite reasonably and intelligibly be viewed as failing to confer a benefit that the promisee expects and upon which he may rely; but this does not show that what is promised is acquired by and belongs to the promisee just on the basis of the other party's promise, with the consequence that breach would properly be viewed as an interference with a present asset from which the promisee can by rights exclude the promisor.

The difficulty with Scanlon's suggested rationale can be put this way. It is the first step that provides the crucial *positive* basis for contractual obligation. By contrast, the

role of the second step is essentially negative, ensuring that the imposition of the obligation does not take parties unfairly by surprise, that it can reasonably be avoided by those who do not wish to be put under such an obligation, that the remedies for breach are not excessive, and so forth. The second step does not specify, nor does it in any way constitute, the contractual obligation obtaining between the parties. It is the first step, and it alone, that is fitted to do this. Yet, in Scanlon's account, the first step is rooted in the *usefulness* of promises to parties and so embodies the idea of the *rational* (referring to one's good or chosen ends) as distinct from that of the *reasonable* (referring to fair or reasonable terms of interaction between persons) (Rawls, 2001, pp. 6–7). The fact that promising involves an *intentional* giving of assurance in circumstances where the promisor *knows* that the promisee *wants* the assurance does not, in and of itself, make it *juridically unreasonable* for the promisor to fail to perform, at least in the absence of invited detrimental reliance by the promisee upon the promise. Strictly speaking, there is nothing in Scanlon's first step that entitles the use of the idea of "owing" as between the parties. In Scanlon's argument, it is the second step, not the first, which embodies requirements of the reasonable. But the second step, I have said, contributes nothing positive toward the existence and the specificity of the contractual obligation.

### *Barnett*

The third and last autonomy theory I will discuss – that proposed by Randy Barnett – does not seem on its face to be vulnerable to this objection. Barnett (1986) started from the general distinction between uncoercible moral obligations and coercible legal obligations and argued for a conception of intention that justifies the conclusion that a promisor may be legally, and not just morally, bound to perform in certain circumstances. According to Barnett, an expression of commitment to do or not do something is categorically insufficient to explain this consequence. It may at most give rise to a moral obligation to keep one's promise, an obligation that cannot, in principle, be coerced. Barnett suggested that, by contrast, the manifestation of an *intention to alienate one's rights to another* provides the essential basis for finding a legal obligation to perform.

Barnett began from the premise that respect for our freedom of action requires that we have principles to govern the rightful acquisition, use, and transfer of the relatively scarce resources that we want and need. These principles determine our enforceable entitlements to things *vis-à-vis* others. They establish moral boundaries that must be respected by others on pain of coercion; and they mark a domain within which the right-holder is relatively free to do as she wishes with the object of her entitlement – she may use it or transfer it as she wills. Whereas property specifies the principles governing the acquisition of entitlements and tort law concerns their protection and use, contract deals with the valid transfer of entitlements between persons. Thus far, Barnett's view is the same as Fried's. They diverge, however, when Barnett rests contract on a consent to transfer rights rather than on promising.

A valid transfer of entitlements changes the enforceable moral boundaries between the transferor and transferee. The transferor may now be constrained from interfering with the entitlement that was once hers but that, in virtue of the transfer, has become the transferee's. Barnett derives the crucial condition of a valid transfer, namely,

consent, from the fact that, prior to the transfer, the entitlement is already vested in someone – the transferor. Therefore, in a rights-respecting system, the only person who can decide to give up the entitlement and transfer it to another is the transferor himself. Absent her consent and without her act, the transfer must be invalid, being a tortious interference with her rights – hence the fundamental requirement of consent. And because entitlements are, by hypothesis, legally enforceable, the intention to transfer them necessarily implies, according to Barnett, an intention to be legally bound. This, he contended, provides the moral basis for legal enforceability that is missing in Fried's account.

According to Barnett, Fried's promise-based and Atiyah's reliance-based theories are both inadequate because each fails to bring out contract's *interrelational* character: the first focuses one-sidedly on the promisor's intent whereas the second seeks exclusively to protect the promisee's reliance. A central aim of Barnett's consent theory is to correct this defect. Does it present contract as interrelational, and if so, how?

The consent requirement as explained above highlights only one side of a transfer, namely the entitlement vested in the transferor and the need for the transferor's decision to alienate it. What role does the transferee play in the formation of contract in keeping with contract's interrelational character?

The principal, indeed the only reference to the transferee at this basic level is found in Barnett's defense of the objective test for contract formation. For Barnett, the test ensures that at the time of transacting the transferee can ascertain whether or not the transferor has indeed parted with her right and has thereby changed the enforceable boundaries between them. Any act or statement by the transferor that falls short of expression that can fulfill this boundary-determining function will not give rise to a contractual obligation. At the same time, anything a transferor says or does will be interpreted from this standpoint, even if the transferor's actual subjective intention is otherwise. Barnett viewed this test as protecting the rights and liberty interests of the transferee, whose plans and expectations would be seriously restricted if she were not entitled to rely on things as they are presented to her. In sum, the interrelational character of contract is reflected in the fact that it is the *transferor's* consent, *objectively* construed, that can create a relation of right and corresponding duty between the parties.

The analysis of contract as a transfer of rights has a long and distinguished philosophical history (Gordley, 1991). The earliest philosophical discussions go back at least to medieval thinkers, notably Thomas Aquinas and Duns Scotus. The natural law writers – in particular Grotius – and early modern political philosophers – especially Hobbes – developed the idea with great clarity and system. The latest and arguably the fullest philosophical treatment is found in Kant ([1797] 1991, pp. 90–5) and Hegel ([1821] 1952, §§72–81).

Moreover, the significance of this analysis of contract for contemporary contract theory is far reaching. If justified, this approach would provide a complete answer to the challenge raised by Fuller and Atiyah against the compensatory character of the expectation interest. Contract could now be conceived as a mode of acquisition. At formation and, therefore, independent of any detrimental reliance or passing of benefits, the promisee would acquire an enforceable entitlement to the promisor's performance; the measure of that performance would be its value and the vindication of that



entitlement would be the expectation measure. A promisor in breach could be viewed, not merely as failing to confer a benefit on the promisee, but as interfering with what already belongs to the promisee in virtue of their contract, thereby making enforcement consistent with the idea of misfeasance and an award of expectation damages truly compensatory.

While a transfer theory of contract is arguably the most promising variant of autonomy-based approaches because it goes furthest in elucidating a structure of correlative rights and duties that is specifically contractual, Barnett's account of this idea is incomplete in certain crucial respects.

For example, while Barnett is correct in emphasizing the promisor's consent as a necessary condition of a valid transfer, it is not a sufficient condition. An act by the promisee is also needed. Otherwise there cannot be a transfer, as opposed to a mere abandonment, of rights. This can be seen if we consider the structure of a present (completed) gift or exchange, through which ownership is transferred. If the transferor's alienation of ownership is not joined by the transferee's receipt, title to the thing may remain with the transferor or, alternatively, the thing may become ownerless, but in any case the transferee will not acquire it. Even in the case of gift, the transferee's act must be combined with that of the transferor. This two-act structure is a requirement of any transfer of right from one person to another. It must, therefore, be fully elucidated by a transfer theory of contract. However, in contrast to a transfer of property, the essential feature of contract is that it can be binding – and hence correlative rights and duties can be created – prior to performance; that is, prior to the point at which a promisee takes physical possession of what was promised him. If a transfer theory is to satisfy the principle of no liability for nonfeasance, it must be able to present a contract as giving the promisee possession prior to performance, possession that, therefore, cannot be physical. Explaining how such nonphysical but actual possession is possible is one of the most important tasks of a transfer theory (see Benson, 2001).

Until a consent theory in particular and autonomy-based approaches in general fill out the main features of the structure of contract, they will be vulnerable to the charge of indeterminacy. This objection, made recently by Craswell (1989) and Gordley (1991), holds that autonomy theories do not contain within themselves the conceptual resources to answer a variety of important doctrinal issues ranging from the choice of damage rules to the determination of implied terms in cases of contractual "gaps." The claim is that, absent some reference to substantive values other than the parties' bare consent or choice, it is impossible to account for central features and principles of contract law, especially where parties have not provided explicit contractual provisions to settle the issue that requires resolution. Supposing this objection to be correct, the question is which substantive values should be invoked at this basic level. The following section briefly considers three answers.

### Three Teleological Theories

The three theories discussed in this section endorse the preceding objection to autonomy approaches and postulate certain substantive values as the underlying rationale and goal of contract law. Subject to certain qualifications that cannot be elaborated

here, all three theories are teleological in approach; that is, they argue that contract law is best understood and justified if it is viewed as directed toward the fulfillment of some good. We have already seen that Raz postulates the goodness of voluntarily created bonds as part of the justification of contractual obligation. In this respect at least, his theory is teleological in character. The three theories I wish to consider now are James Gordley's Aristotelian interpretation of contract, Anthony Kronman's distributive analysis, and the economic approach to contract law.

### *Gordley*

According to Gordley (1991, pp. 234ff), the problem with autonomy theories such as Fried's is that they seek the ultimate source of obligation in human choice alone. But "without giving a reason ... other than the mere fact that the promisor willed to be bound," we cannot explain why the law enforces certain commitments or choices and not others. To explain the fact that promises are treated differently than other commitments, we must identify some goal or outcome that the former but not the latter enable a promisor to achieve. Building on his interpretation of Aristotle, Thomas Aquinas, and the Spanish natural law school, Gordley proposed that the virtues of liberality and commutative (or corrective) justice constitute the two main ends of contracting. A party's obligations should depend on which virtue he has exercised.

According to Aristotle, liberality is a virtue exercised "in the giving and taking of wealth, and especially in respect of giving ... [T]he liberal man ... will give for the sake of the noble and rightly; for he will give to the right people, the right amounts, and at the right time, with all the other qualifications that accompany right giving." Commutative justice, on the other hand, applies to voluntary and involuntary transactions between persons and it requires that each party's holdings be the same in value after the transaction as they were before it. This fulfils "arithmetic equality" (Gordley, 1991, pp. 12–14).

Gordley's main thesis was that a commitment should count as a promise and therefore should be enforceable as such only if doing so will instantiate liberality or commutative justice (Gordley, 2001, pp. 297–313). So, for example, a contract in which one side will receive a grossly inadequate consideration is not and should not be enforced unless that side intended this deprivation as a gift, thereby manifesting the virtue of liberality. Or, to take another example, terms may be deemed natural to a given transaction and may be implied by a court on this basis if they serve the end of that type of transaction, the end being either liberality or commutative justice. In this way, Gordley provided a comprehensive account, not only of the moral basis of contract, but of the full range of doctrinal issues that constitute the main content of modern contract law.

Without attempting to discuss in any detail Gordley's interpretation of the Aristotelian tradition or his application of it to contract law (see, however, Benson, 1992), it is important to note certain difficulties with and implications of his account.

To begin, while Gordley views both liberality and commutative justice as possible ends of contracting, there is for Aristotle (and Aquinas) a basic difference between these two virtues. Whereas liberality is a virtue that has to do primarily with the state of a person's character – his motives and manner – in accomplishing certain acts, com-

mutative justice is realized primarily in transactions – it is an objective requirement that can be quantitatively determined and that must be respected in interaction with others. Although liberality is instantiated in acts that benefit others, its essence consists in an ordering of character internal to the agent. Commutative justice not only orders how one acts toward others: it is essentially defined in terms of relation to another. Liberality and commutative justice are thus categorically different. If this is so, one must wonder whether they can both be ends of contract in the same way and on the same footing.

This question leads to a further point. The fact that liberality is a virtue of character makes it unclear how it can ever provide a moral basis for enforcing a commitment that could otherwise be revoked without injustice. How can a duty of character be coerced consistently with liberal premises or with the principle of liability for misfeasance only? And why does the virtue of liberality necessarily entail that the promisee has a correlative right to the act of liberality? Unless the virtue of liberality can be expressed in the form of a duty with a corresponding and enforceable right, the theory cannot explain the very kind of juridical relation that contract law presupposes. Here, it should be recalled that considerations of character are in themselves generally irrelevant to the legal analysis of contract. *Prima facie*, then, the invocation of virtues other than justice seems to be incompatible with the legal point of view.

According to Gordley, contract is to be understood on the basis of liberality and commutative justice alone. In this respect, he disagreed with Fuller who, we saw, viewed the expectation interest as part of distributive justice, not commutative (or corrective) justice. Gordley (1981) contended that the function of commutative or corrective justice is to ensure that whatever distribution of holdings exists at any given time is preserved and not disturbed by transactions. On this view, the distribution is taken as given, whether or not it is fair. But treating the distribution in this way seems morally arbitrary. It does not seem plausible to assume that the preservation of *any* distribution, no matter how inequitable, will always be valuable. Therefore, on Gordley's interpretation of commutative justice, one is compelled to evaluate the fairness of the presupposed distribution in deciding whether a particular transaction is morally acceptable or not. Ascertaining the fairness of a distribution is the work of distributive justice. Thus Gordley's view entailed that the moral acceptability of a given transaction depends, not just on commutative justice, but also on considerations of distributive justice.

### *Kronman*

The idea that contract principles should – and do – reflect distributive concerns has been defended by Anthony Kronman (1980). Fuller, we saw, already suggested that the expectation interest may have its justificatory basis in distributive justice. Kronman went further by arguing that “the idea of voluntary agreement ... cannot be understood except as a distributional concept.” If contract rules are to have even minimal moral acceptability, they must be framed so as to achieve a fair division of wealth and power among citizens. Kronman's argument for this view is in three steps.

Kronman accepted the basic premise of autonomy theories that contracts are voluntary agreements. The question is: what makes an agreement voluntary? Unless we

are content to say that the only thing required is that the promisor has deliberately chosen to contract – even if his choice was made in response to a threatened coercion or in error – we will have to refer to *circumstances* that may render consent, albeit deliberately given, involuntary. In this first step of the argument, Kronman contended that if we consider the various circumstances that can produce this effect, they may be analyzed as forms of advantage-taking in exchange relationships: in every case the promisee possesses an advantage – superior information or intelligence, a powerful instrument of violence or means of deception, a monopoly over a given resource – and the promisor’s claim is that the promisee has used this advantage at his expense. However, every exchange involves advantage-taking of some kind. Indeed, in transactions that are undoubtedly voluntary and mutually beneficial, each party has something that the other wants and this advantage enables each to extract something from the other in return. We therefore need some criterion or principle to distinguish impermissible from permitted forms of advantage-taking.

In the second step, Kronman considered, only to reject, a nondistributive idea of liberty as a possible criterion. This idea of liberty, as stated by Kronman, holds that advantage-taking by one at another’s expense should be permitted unless it violates the latter’s rights or the rights of a third party. Kronman noted that this liberty principle is both individualistic and egalitarian in nature. Persons are equally recognized as having moral boundaries that must be respected by others, even if more welfare could be produced by violating them.

Kronman rejected the liberty principle as a basis for distinguishing forms of advantage-taking for the following reason. To know whether an individual’s liberty has been violated – and thus whether there has been an impermissible advantage-taking – we must first know what his rights are. But the liberty principle itself does not provide this knowledge. It assumes that we have that knowledge independently of the principle itself. To give the liberty principle meaning, we must supplement it with some other principle or theory that specifies our rights in transactional settings.

In the third step, Kronman presented and defended a principle of distributive justice – the principle of Paretianism – as a basis for distinguishing permissible from impermissible forms of advantage-taking. This principle holds that advantage-taking in a transaction is permissible if, but only if, the person taken advantage of will be better off in the long run if this type of advantage-taking is generally allowed than if it is not. For practical reasons, however, Kronman suggested that the principle requires only that the welfare of *most* people who are taken advantage of in a particular way is increased in the long run.

Take the example of a farmer who sells his agricultural land at a gross undervalue to a buyer who, after expert investigation, has detected valuable mineral deposits beneath it. The question is: should the seller be permitted to back out of the deal, given his own ignorance and the buyer’s intentional nondisclosure of the deposits? If the buyer is not entitled to reap the fruits of such deliberately acquired information, people like the buyer may be discouraged from investing time and expense in acquiring it, resulting in the production of less or inferior information of this kind. But this could impair the detection and the allocation of land for this type of use, increasing the price that everyone, including people like the farmer, must pay for a variety of products, thereby making them worse off. The Paretian principle directs us to compare two states:

the welfare of most people similarly situated to the seller if buyers are not required to disclose and their welfare if buyers must do so. Only if the first is greater than the second will buyers be permitted to take advantage of sellers and withhold the information from them.

According to Kronman, autonomy theorists should accept the Paretian principle because it gives them a theory of rights that, while distributive, enables them to apply the liberty principle consistently with their underlying moral premises of individualism and equality. Unlike utilitarianism, Paretianism takes seriously the separateness of individuals by holding that no one should have to sacrifice his welfare just to promote the greater welfare of others or to advance some collective value. It is egalitarian because no one is permitted to use any advantage whatsoever at the expense of others unless the latter would be even worse off in the long run if such use was prohibited. The mere fact that someone possesses an advantage does not give him any prior claim to its use and benefit. No one has such a right. All assets and advantages are to be viewed as belonging to a common pool with respect to which everyone is to be treated equally. This baseline of equality requires that no one be granted an exclusive right to use something unless this will make those excluded better off than they would be in the absence of that right.

Kronman's argument for contract law as distributive justice is the most carefully developed contemporary account of its kind. Yet it too does not seem to be free from certain basic difficulties (Benson, 1989, pp. 1119–45) that should be noted here, even if briefly.

First, Kronman's contention that the idea of voluntary agreement is necessarily distributive rests on his claim that the liberty principle is empty and circular. But this claim is not supported by argument. Kronman did not show that there cannot be a *nondistributive* account of rights that would free the liberty principle from both its alleged emptiness and circularity. In fact, *nondistributive* accounts of rights are developed with great care and rigor by Kant and Hegel, to name but two of the more important philosophical precedents.

Moreover, the Paretian principle and its moral baseline of equality seem to be in tension with certain widely accepted premises of contract law as well as with the transactional framework that is normally presupposed in the adjudication of contract disputes. For example, viewing all assets as part of a common pool in combination with the principle of Paretianism, in effect, obliges individuals to use their assets only in ways that enhance the welfare of others. But contract law does not treat individuals as under an affirmative coerceable duty to promote the well-being of others or even to take their advantage into consideration as a factor in its own right. There is only liability for misfeasance.

Nor is it clear in Kronman's theory that consent has any morally significant role to play. In law, consent seems to count in its own right as an essential condition of contractual validity. The moral import of this requirement is, at the very least, that a person has a right to exclude others from using an asset even if such exclusion diminishes their welfare. The consent requirement seems to hold and to apply in a way that is indifferent to its impact on the advantage of others. On Kronman's view, however, it is not a person's consent but the Paretian principle that settles whether one can have the exclusive use of an asset. Impact on the welfare of others is the decisive moral factor.

Finally, the kind of welfare analysis required by the Paretian principle necessarily goes beyond the immediate interaction between the parties to a given transaction. Whether a contract is valid between two parties does not depend on the nature of their interaction but on how a rule making the contract valid or invalid would affect less advantaged parties in a whole range of subsequent transactions. But it is hard to see how a court could make this determination with the required certainty. Kronman's distributive analysis does not seem to lend itself readily to decision making in the relevant public institutional setting.

The upshot of the preceding remarks is that, contrary to Kronman's claim, there is reason to doubt whether his distributive approach is consistent with the liberty and equality of persons as these values are embodied in the liberty principle. An individual party can be held to a contract that advantages the other party at his own expense simply because this may be in the long-run interests of most similarly situated, disadvantaged parties, as explained above. The crucial point is that this justification does not require or guarantee that any particular disadvantaged party actually benefits in the long term from being taken advantage of. There can simply be an uncompensated-for detriment. And this means that persons will have to sacrifice their welfare just because it is outweighed by the greater welfare of others. This outcome reflects the tension inherent in any distributive approach between, on the one hand, the global and prospective analysis of welfare effects across an indefinite number of future transactions and, on the other hand, the singular and retrospective analysis of advantage-taking in a particular transaction before the court. It also brings Kronman's distributive theory closer to a welfare-maximizing efficiency analysis of contract, to which I now turn.

### *The economic analysis of contract law*

Among contemporary theories of contract law, the economic approach provides the most detailed and complete treatment of the subject (see Polinsky, 2003, chs. 5 and 8; Shavell, 2004, ch. 3; and Cooter & Ulen, 2007, chs. 6 and 7). Indeed, it is currently the dominant academic theoretical perspective, particularly in the United States. Given the aims and scope of this essay, however, I will not try to present or evaluate in detail the many, often highly complex, applications of economic analysis to contract. Instead, my primary aim will be to identify just some of the basic presuppositions and main theoretical implications of this approach, taking it as a distinct and relatively self-sufficient explanation of contract. And even this discussion will have to be brief and incomplete.

A basic premise of economic analysis is the assumption that if two informed parties have voluntarily transacted they must have judged that they would be better off as a result of transacting, otherwise they would not have done so (Trebilcock, 1993, p. 7). For economic analysis, which equates well-being with the satisfaction of preferences, this presumption of revealed preferences is sufficient to support the conclusion that the well-being of both parties has in fact been improved by the transaction. Economic analysis expresses this conclusion by saying that the transaction is Pareto superior. A transaction is Pareto superior if it makes at least one party better off without making the other worse off, in comparison to their pretransaction circumstances. This conclusion crucially depends, however, on the fact that neither party has changed his mind

and has come to regret the decision to transact. For then there would be two contrary revealed preferences and the welfare inference could not be made. We have already seen how autonomy-based theories deal with this possibility of regret, a possibility that is imminent to contract given the lapse of time between agreement and performance. How does economic analysis respond to it?

Pareto superiority can still be invoked. A transaction that one party has come to regret can nevertheless be Pareto superior, and thus should be enforced, if the other party receives sufficient gains from it to compensate the first and still be better off than if he had not transacted. Supposing that the second party actually compensates the first, thereby making him indifferent as between his pre- and post-transaction circumstances, one party has been made better off without any diminution to the other's well-being, thus satisfying Pareto superiority. In addition, economic analysis can invoke an alternative conception of efficiency, the Kaldor-Hicks criterion. A transaction satisfies this criterion, and therefore should be enforced, if it benefits a party sufficiently so that *hypothetically* he could fully compensate those disadvantaged by the transaction (making them indifferent as between their pre- and post-transaction circumstances) and still retain a net benefit for himself. In contrast to the Pareto criterion, Kaldor-Hicks efficiency does not require that the advantaged party *actually* compensate those disadvantaged. Because the better-off party need not actually compensate the disadvantaged party, the Kaldor-Hicks criterion allows one party to suffer an uncompensated detriment simply because this is outweighed by a greater sum of advantage enjoyed by the other.

Matters are not, however, so simple. Take, first, the application of Pareto superiority to a situation of regret. At the time of their agreement, both parties, we suppose, view themselves as better off. In the light of altered circumstances (a third party offers better terms, a party's tastes or priorities change), one of them regrets the transaction and wants to be released from performance. At one time the transaction is Pareto superior; at the other, this may no longer be the case: which moment should be chosen? From a legal point of view, there is no question: absent certain definite excusing circumstances, the fact of regret is normatively irrelevant and the party must still perform. Autonomy theories attempt to explain why one party's regret does not give rise to any rights or immunities against the other. The Pareto criterion, however, cannot decide between these two points in time. Each represents a set of revealed preferences that can be compared with the parties' pre-transaction circumstances. There is nothing in Pareto superiority to give priority to one set over the other. Trebilcock (1993, p. 103) has referred to this indeterminacy as the "Paretian dilemma."

Moreover, even if we select one set of preferences over the other – say, we give priority to the moment of regret – there is still the further question of which of the two criteria to apply. This comes down to the question of whether we should require the better-off party to compensate the one who is disadvantaged by the transaction. Once again, in law, the answer depends on whether the first party has violated any of the other's rights. One must show that the disadvantaged party is entitled to compensation. If not, the mere fact of regret and disadvantage establishes no claims in justice against the better-off party. But the question of whether to compensate or not cannot be settled by either criterion of efficiency (Coleman, 1988, pp. 92–4). Call this the "compensation dilemma."

The Paretian and compensation dilemmas make clear the need for normative principles to supplement the efficiency criteria. Without these principles, we lack reasonable grounds for applying Pareto superiority in a determinate way or for choosing between it and Kaldor-Hicks efficiency. By themselves, efficiency criteria cannot possibly constitute an adequate normative theory for the analysis of contract.

Economic analysis constitutes a normative approach in virtue of the fact that it invokes a supplementary moral principle. In contrast to autonomy theories, it postulates the maximization of a good, whether utility or wealth, as the aim of contract law. It is only because of this teleological element that the economic approach can purport to be a normative theory. And it is only on this basis that it can apply the efficiency criteria without falling into either the Paretian or the compensation dilemmas.

The basic method of economic analysis can be set forth briefly. What interests economic analysis in general is any act (or omission) that might further or hinder the realization of the goal of welfare maximization. From this perspective, "contract" is a totality of acts (and omissions) that may be relevant in this way. These acts may occur at any point along a continuum stretching from before an agreement is concluded to after performance is due. How far back or forward the analysis should go depends in any given case on the balance of benefits and costs of doing so. Moreover, no act or set of acts has, in principle, special significance in comparison to any other. Here also, the importance of an act depends entirely on the (quantitative) extent of its contribution (positive or negative) to the realization of the goal. This contrasts with the legal point of view which as a matter of principle ascribes qualitatively special normative significance to certain categories of acts (for example, those constituting offer and acceptance) and not to others (such as invitations to treat).

More specifically, the economic analysis of contract law is centrally interested in how a legal rule (actual or proposed) influences the acts and omissions of parties insofar as these relate to the goal of maximum net social benefit. It asks: compared to alternative rules, does a particular rule of contract create more effective and efficient incentives for welfare-maximizing behavior? To bring out and to illustrate some of the central features of this inquiry, I will now briefly consider one application of the economic approach, namely, the discussion by Charles Goetz and Robert Scott (1980) of an optimal enforcement scheme for promising. I select the Goetz-Scott analysis because it is theoretically instructive in a number of important respects.

First, the authors set out clearly and explicitly the basic method and premises of normative economic analysis as a teleological theory. Second, they carefully identify a set of welfare interests and transaction-related decisions at the time of contract formation that bear importantly on the goal of welfare maximization. Goetz and Scott emphasized that too often economic analysis has focussed exclusively on parties' behavior at the time of breach or performance, in this way assuming that the promise has already been made. From the economic perspective, however, this limitation is unjustified: "[t]he decision to enforce promises, and the subsequent choice of remedy, does not merely mold the performance behavior of the parties [but] also shapes the nature and amount of promise-making activity." Their central thesis is that the quality and extent of promise-making activity are crucially important to the goal of welfare-maximization. Moreover, the authors explicitly identified the welfare interests and transaction decisions of the parties in light of a basic conceptual distinction between the promise itself



and the future transfer that it announces. The promise itself, they emphasized, is just the production of information about expected future behavior. The task is to identify interests and decisions that are associated with this information-imparting function. Third and finally, while the authors' proposed economic analysis leads at the ideal level of principle to conclusions that are at variance with certain well-established parts of contract doctrine (such as the normal rule of expectation damages), they argued that much of current contract doctrine is best explained as the most efficient regime for implementing the conclusions of ideal theory, once the costs and benefits of administration are taken into account. In this way, they tried to close the gap between law and theory.

What, concretely, are the kinds of interests and transactional decisions that Goetz and Scott associated with the making of promises?

Taking the promisee first and keeping in mind the specific information-imparting function of promising, the authors argued that the promisee's positive main interest is in "beneficial reliance" and that his principal transactional decision is whether, and how much, to rely on the promise. Suppose, for example, someone promises to give me a sum of money two months hence. I may, in reliance on the promise, revise my consumption habits during the interim two months, say, by spending more money during that period than I would have otherwise done in the knowledge that after two months I will receive the promised sum. By conveying to me information about the future, the promise enables me to adapt my consumption schedule in a way that is different from what I would do if at the end of two months and without any advance notice, the sum of money were simply transferred to me. By deciding to rely on the promise and change my consumption schedule, I am able to achieve a higher intertemporal level of satisfaction compared to the situation in which I receive the wealth without the advance notice provided by the promise. This adaptive gain is what the authors called "beneficial reliance." In their view, the production of such gains is perhaps the main social rationale for promising. This, of course, presupposes that the promise is kept. Where it is not, the promissory information turns out to be misleading and adaptive behavior by the promisee may result in his being made worse off than if he had never relied on the promise in the first place. (In our example, I do not receive the promised money at the end of two months, leaving me with a shortfall necessitating a cutback in consumption that may not be offset by the increased benefit I received by spending more money during the preceding two months.) This diminution in welfare is called "detrimental reliance." The principal decision a promisee must make is whether to rely on the promise in light of the possibility of nonperformance and hence of detrimental reliance loss. The promisee must weigh in any given situation his prospective beneficial reliance gain (probability of performance  $\times$  value of gain) against his prospective detrimental reliance loss (probability of breach  $\times$  value of loss). If the latter exceeds the former, he should, as a rational person, take self-protective measures, such as limiting his reliance on the promise. But in addition to reducing the risk of detrimental reliance losses, this also entails concomitant reductions in possible gains from beneficial reliance – the main welfare interest to be promoted by the practice of promising.

As for the promisor, his main interest is in the welfare implications for him of "regret contingencies." A good-faith promisor knows *ex ante* that although he intends to perform, certain circumstances may arise in which he may come to regret having

made the promise and may want to breach, if this is costless to him. (Costs of breaching include “self-sanctions,” such as guilt or empathetic participation in promisee’s disappointment, or “external sanctions,” whether extra-legal or legal). A regret contingency is thus *any* future circumstances that would motivate the promisor to breach, if this were costless to him. A promisor knows *ex ante* that when a regret contingency occurs, he will have the option of bearing the loss that he will incur by going through with performance or of breaching and accepting the costs associated therewith. A rational promisor will choose the cheaper of these regret losses. This is the promisor’s main transactional decision. If prospective performance loss (or, in other words, prospective benefit from nonperformance) is greater than the costs of breaching, the promisor can either qualify the scope of the promise (by inserting excusing conditions) or decide simply not to make the promise at all. Either response will lead to reductions in the promisee’s beneficial reliance. If the costs of breaching are greater, the promisor may want to take “reassurance” measures that communicate effectively to the promisee (whether in the contract terms or otherwise) that the promisor *will* perform and that the promisee should definitely rely on him, leading to increases in beneficial reliance.

Absent from the promisor’s calculus of losses (except in a derivative and limited way) is however, appropriate inclusion of the promisee’s detrimental reliance loss if breach occurs and other costs (for example, loss of beneficial reliance gains) that the promisee may sustain by adapting to the possibility of nonperformance. But these are real costs that must be taken into account in ascertaining the net social benefit of promissory enforcement. According to Goetz and Scott, the primary function of an optimal enforcement scheme is to ensure that the promisor’s costs of promising be adjusted to reflect any external effects on the promisee. The aim is to encourage informed and efficient cost-reducing behavior by both parties. On the basis of a complex and careful analysis of the costs and benefits of promissory activity in the two main cases of nonreciprocal and reciprocal promises (which themselves are distinguished on economic grounds), the authors proposed an optimal damage formula. It is meant to encourage promisors to make promises that produce net beneficial reliance, but to do this in a way that does not induce the promisors to take excessive self-protective measures that reduce either the reliability of their promises or the number of promises they actually make.

It is time to take stock of some central features of the Goetz–Scott analysis, viewed as illustrative of the economic approach. To begin, economic analysis is emphatically *prospective*: the question is how future promise-making behavior is influenced by rules of promissory enforcement (Goetz & Scott, 1980, p. 4; Kraus, 2002a). This prospective orientation, which we already saw in Kronman’s analysis, is implied by the teleological (or goal-directed) character of the economic theory. It contrasts with the retrospective orientation of the legal point of view in settling the rights and duties of parties to a particular past transaction now before a court.

Further, the Goetz–Scott analysis brings out an important question about the completeness and generality of the principles proposed by economic theory. While the authors seek with reason to correct economic analysis’ traditional and exclusive focus on performance-breach behavior by extending the analysis to promise-making activity, it is not enough that the principles regulating the different areas of conduct be justified in isolation of each other: they must be combined in one analytical framework. There

is but one goal, namely, the maximization of social welfare, and all the principles have the same relation to it. If there is a multiplicity of principles going to the different aspects of transacting behavior, one must show how each principle is optimal when combined with every other. Nothing short of this can satisfy the normative tendency of a teleological theory. This task is particularly urgent for economic theory. Not only is the work of combination hardly begun. The natural tendency of economic analysis is to focus on differences in types of transactional circumstances. Economic studies like Polinsky's (2003, ch. 5), for example, suggest that "in general, there does not exist a breach of contract remedy [whether expectation, reliance, or restitution damages] that is efficient with respect to both the breach decision and the reliance decision." What is efficient for one objective (for example, expectation damages for the breach decision or reliance damages for the reliance decision) is inefficient for the other. Whether expectation or reliance damages should be available cannot be definitely answered as a matter of principle of general application – as we find in legal doctrine – but only as an assessment of policy that depends crucially on the relative (quantitative) importance in efficiency terms of the breach and reliance decisions in each particular case. Until this is actually ascertained, economic theory cannot say which measure of damages is appropriate in any given circumstance. And this determination must precede the effort to combine and generalize.

The last, and, for present purposes, the most important feature that I wish to note is the particular way in which economic analysis conceives the parties' interests. Going one step further than Kronman's Paretian principle which requires that the pursuit of self-interest benefit (most of) the disadvantaged, economic analysis emancipates these interests completely from *any* normative constraint that imposes on the parties requirements of mutual fair-dealing or that sets limits to the extent of their mutual accountability. Interests are defined solely by each party's preferences; parties are viewed as separate rational maximizers of interests. Each person's interests and preferences, without reference to any antecedent normative criterion, are given equal weight *ex ante* in the calculus of maximum *net* social benefit. But this calculus can also allow, and indeed require, the sacrifice of one person's interests if his loss is outweighed by the greater sum of advantage enjoyed by others. Thus, the Goetz–Scott theory gives full standing to the promisor's regret contingency costs whether or not his regret is fair or reasonable *vis-à-vis* the promisee. Similarly, the promisee's beneficial and detrimental reliance interests are accorded full standing whether or not the promisor has done anything to assume responsibility and thus to be held accountable for what is, after all, the promisee's own voluntary decision. The promisee's reliance is "reasonable" only in the sense that it is probabilistically rational.

Here again the contrast with the legal point of view is striking. In attributing to the parties rights and obligations, the law purports to articulate fair and reasonable (as opposed to merely rational) standards of conduct and these requirements categorically constrain the claims that parties may legitimately make against each other. In addition, as I have emphasized, the law invokes a notion of limited mutual accountability that makes the parties liable only for misfeasance, even if a more extensive liability might be productive of greater net social benefit. In itself, the fact that one party may have decided to rely on another's representation – no matter how rational such reliance may be as a "good bet" – does not in legal contemplation give the first any entitlement

against the second. Something more – an assumption of responsibility by the second *vis-à-vis* the first – is necessary.

Goetz and Scott (1980, pp. 1288ff) freely acknowledged the existence of a significant gap between their conclusions and current patterns of contract doctrine. Whereas they propose, for example, a reliance measure of recovery and argue that gratuitous promises should be enforced where breach results in net detrimental reliance losses, the law gives expectation damages and treats promises unsupported by consideration as contractually unenforceable. As already noted, they attempted to bridge this gap by suggesting that current doctrine may be rationalized as the most efficient practical way of implementing the ideal conclusions reached by economic analysis, once administrative costs are factored in. What I wish to emphasize, however, is that this refinement does not overcome the gaps between law and theory referred to in the preceding paragraphs. Contract law presents itself as a point of view constituted by a set of principles and categories that articulate certain basic normative ideas. These ideas are specific to contract law as one part of private law, in contrast to other domains of the normative, such as public law, morality, or political life. At no point does economic analysis make the legal point of view with its normative ideas the immediate object of its analysis. It does not, for instance, investigate, as Sidgwick (1929, chs. 4–8) did for utilitarian theory, whether the principle of limited legal accountability might be justified on efficiency grounds within a value-maximizing framework. Instead, it begins with interests and preferences and its sole normative principle is welfare-maximization. At most, economic analysis applies this framework directly to the bare conclusions of contract doctrine detached from the normative ideas that give them life and meaning from a legal point of view. It hopes to show that these conclusions coincide with what economics requires *from its own standpoint*. Even if economic analysis were to become complete in its own terms, it is doubtful that it could legitimately claim to be a theory of contract law as opposed to an economics of transactions.

## Concluding Remarks

In my opinion, this gap between law and theory is the single most important characteristic feature of contract theorizing since Fuller. While the gap is arguably most explicit and therefore most visible in economic analysis, I have suggested that it is also present in different ways in every theory discussed, beginning with Fuller's. And as I shall now indicate by way of conclusion, the resolution of this gap must be the first item on the agenda for future theoretical reflection about contract.

Theoretical reflection about contract *law* presupposes an object given to us that embodies the *legal point of view*. That there is such a point of view, none of the authors discussed and certainly no lawyer will want to deny. The first task of theory, then, is to uncover and to present this point of view. A theory that fails to begin in this way condemns itself to being irrelevant as a theory of law. Accordingly, we must provisionally set aside existing contract theories that are one step removed from this starting point and make a fresh beginning by examining the public legal culture of contract (judicial decisions, authoritative scholarly interpretations, and so forth) to see whether it yields a conception of contract that is at once coherent and provisionally plausible in

moral terms. More specifically, we look to well-established parts of contract doctrine and try to make explicit the basic normative ideas underlying them. On this basis, we attempt to construct a conception of contract that fits best and that is normatively acceptable. Such a conception may be called, following Rawls (2001, pp. 26–9) a public liberal justification of contract because it draws on fundamental normative ideas and values latent in public legal culture of a liberal democratic society. It provides us with a preliminary shared object for further theoretical reflection. It makes explicit the legal point of view (Benson, 1995b).

What a public liberal justification of contract might look like is a question that goes well beyond the scope of the present essay. (For one effort, see Benson, 2001.) This much, however, may be said about the way to such a justification. If we can derive any general insight from contemporary contract theories, it is that a public liberal conception would seem to have to incorporate ideas of *both* the reasonable and the rational. In other words, it would have to articulate fair, legitimately coercible, terms of contractual interaction but in such a way that makes possible the meaningful and efficient pursuit by parties of their differing chosen purposes and preferences. To simplify, a public liberal justification of contract should suitably express and integrate the distinct requirements of autonomy and efficiency. How these two aspects should be combined is a question of the first importance and one that by no means has a clear answer.

Recently, a few contract theorists have proposed different models (see Eisenberg, 2001; Kraus, 2002b). There seems to be wide agreement that if the voluntary character of contract is to be respected, a principle of autonomy, giving rise to coercible obligations and rights between the contracting parties, must provide the basic framework. In light of the preceding discussion of autonomy theories, we may specify further the requisite idea of autonomy: it should reflect the fundamental distinction between misfeasance and nonfeasance (showing breach of contract to be, not just a failure to confer a benefit, but a wrongful injury that deprives the plaintiff of something that he or she owns as against the defendant in a way that can properly answer Fuller's challenge). The next question is whether the essential features and doctrines of contract law can be worked out on this basis alone or, whether, to the contrary, it is necessary to invoke additional normative considerations – relating to efficiency, distributive justice, and so forth. In other words, is an underlying framework of autonomy necessarily an incomplete basis on which to explain and justify contract law with the requisite detail? At present, most theorists hold that it is incomplete (Craswell, 1989; Eisenberg, 2001; Kraus, 2002b). The explanation of contract law's diverse but essential features and doctrines must, they suppose, draw on a combination or amalgam of fundamentally different and distinct normative values. On this view, for example, the law of remedies or mistake cannot be understood or justified on the basis of autonomy alone.

I would suggest that it would be a mistake to assume this conclusion without critical examination. Keeping in mind that an autonomy-based framework is, as most suppose, essential to explain how individuals may *rightly* be subjected to *coercible* duties of performance simply on the basis of having promised, it would seem clear that *any* and *every* aspect or condition of such duty, including legal modes of enforcement by way of damages or specific performance and injunctions, must be explicable within this

framework. In normative terms, there cannot be any “gap” in the autonomy-based justification that needs to be filled by a separate and distinct principle. (See discussion of contract doctrines in Benson, 2001.)

If this last contention is sound, a different picture of the relation between autonomy and efficiency or other values emerges. The first part of a liberal public conception of contract is an autonomy-based account of contract law, including its different principles and doctrines, that is relatively self-sufficient and complete in its own terms. This first part shows contract to be *legitimate* as a system of coercible contractual duties and corresponding rights. Beyond this, there is the further question of the *stability* of contract law.

To be stable, contract law, I suppose, must, first of all, perform in Fuller’s sense (Fuller, 1941) a “channeling” function by providing clear and usable facilities for individuals to pursue their permissible purposes and preferences in an orderly and efficient manner. Otherwise, it will not be wanted or needed by individuals nor will it be congruent with their good and well-being. What is necessary here is that contract law, viewed not primarily in terms of any given transaction or transactions but rather as an ongoing institution in relation to other economic and social institutions, performs this channeling function. In this sense, the reasonable can make room for the rational and in turn the latter supports the former. Stability also requires that contract law be compatible with the requirements of social and political (distributive) justice that govern social, political, and economic institutions as a whole. Not only must contract not thwart these requirements. To be fully part of a liberal conception of justice and thus to achieve genuine stability, contract must be shown to express norms of freedom and equality that, even if specific to contract and distinct from those underlying distributive justice, are fully consonant with the latter. These are among the principal tasks awaiting a public liberal justification of contract.

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# 3

## Tort Law

STEPHEN R. PERRY

The law of torts imposes legal liability on persons who in certain ways have interfered with certain interests of other persons. Although this is admittedly an oversimplification, I will, for purposes of this essay, make the assumption that every interference with an interest that is capable of giving rise to liability in tort is a “harm.” There is an important debate among legal theorists as to whether the theoretically most significant condition of liability in tort is the fact that the defendant harmed the plaintiff in some impermissible way, or whether it is the fact that the defendant violated a right of the plaintiff. For present purposes, at least, we can, in light of the simplifying assumption made above, set this question aside. On that assumption, every violation of a right recognized by the law of torts will involve the causation of harm to another person.

Even though lawyers sometimes use the term “liability” rather loosely, it should be borne in mind that “liability” is not itself a legal remedy for harm caused. When a court reaches a judgment in a tort action, it makes a determination of the parties’ respective factual and legal situations. If the plaintiff has won the suit, the judgment confers on him the legal power to initiate a process that will entitle him to have an appropriate remedy enforced against the defendant. The defendant is “liable” in the sense of being subject to this process. Some writers have maintained that tort law should be regarded not simply as a body of rights not to be harmed in certain ways, but as a form of “civil recourse” that gives persons the choice (a) to sue or not to sue for harm caused by another, and (b) the further choice, if their suit is successful, of whether or not to exercise the legal power that then accrues to them to have the legal system enforce an appropriate remedy against the defendant (Zipursky, 1998).

The law recognizes a number of discrete remedies, and sometimes these vary from tort to tort. In the case of nuisance, for example, which is a tort that protects the use and enjoyment of land against certain forms of interference, the standard legal remedy that follows a finding of liability is an injunction, which is an order issued directly by the court requiring the defendant to stop engaging in the harmful activity (or otherwise to put matters right). But the more common remedy in a torts case, and the one that typifies tort law as a legal regime, is an award of monetary damages. Damages is a backward-looking remedy that requires the defendant to *compensate* the plaintiff for the harm the former has caused the latter. The principle of compensation requires that the



plaintiff be placed, to the extent that it is possible to do so with money, in the position that he or she would have been in had the tort not occurred. A central feature of tort law, then, is a legal obligation to pay compensation for harm caused, where the obligation is owed by the person who caused the harm directly to the person who suffered it.

Not all harms, and not all ways of causing harm, give rise to liability in tort. Tortious liability is a function of, among other things, both the nature of the defendant's conduct and the nature of the harm that the plaintiff has suffered. For historical reasons, the common law of torts is a law of *torts*, in the plural, and the law defines a given tort by reference to a number of elements, or requirements, which the plaintiff must establish one by one in order to show that the defendant committed the tort in question. One such element focuses on what conduct on the part of the defendant is necessary to establish liability. When this element is in play, the law asks what *standard of liability* should be employed to assess the defendant's conduct. Another important element focuses on the type of harm that the plaintiff suffered. When this element is in play, the law asks whether the harm was, for purposes of the relevant tort, *legally cognizable*, or constituted interference with a *protected interest*.

Many different torts are recognized by the common law, and the range of protected interests is wide. To mention just a few examples, interests protected by the law of torts include an interest in not being physically harmed in one's person or property, an interest in not being subject to offensive contact with one's person, emotional and mental interests of various kinds, economic interests of various kinds, the interest one has in one's reputation, privacy interests of various kinds, the interest one has in the use and enjoyment of one's land, and the interest one has in the exclusive occupation of one's land. Because it is far from clear that a single principle or theoretical justification could comprehend the law of torts in its entirety, we will here take the course that is tacitly adopted in many discussions of tort theory, and focus on two protected interests in particular, namely, the interest in life and security of the person – that is, the interest in avoiding personal injury or death – and the interest in preserving the physical integrity of one's tangible property, both real and personal – that is, the interest in avoiding physical damage to or destruction of one's material holdings. This limitation seems justified because these two interests have always been, historically speaking, of central concern to tort law, and intuitively they also appear to be the most important interests that tort law protects. Let me therefore refer to them as “the core protected interests,” or “core interests” for short.

Against what sort of conduct should the core interests be protected? *Intention* offers one possible standard of liability. A defendant is said to intend harm if she either desires to bring harm about, or she is substantially certain that harm will ensue as a (possibly undesired) side effect of her activity. In the case of intentional harm, protection is provided primarily, although not exclusively, by the various forms of the tort of trespass. The tort of battery, for example, is a form of trespass which protects against intentional physical harm to one's person. Battery also protects, it should be noted, against intentional, nonconsensual contact with another's person even if no physical harm results, so long as the contact would be offensive to a reasonable person. Whether contact of this kind should be regarded as a form of harm in its own right is an interesting theoretical question, although not one that can be taken up here.

Since intentional harm is harm that the defendant either desires to bring about or is substantially certain will occur, *unintentional harm* can be defined as harm that the defendant does not desire to bring about and that he is not substantially certain will occur. Since the defendant is not substantially certain that harm will occur, we can say that, at least from the perspective of the defendant, there is only a *risk* that harm will occur. The concept of risk plays a crucial role, both practical and theoretical, in the law of torts as it applies to unintentional harm. There are two standards of liability that are potentially applicable to unintentional harm, namely, *negligence* and *strict liability*. The negligence standard requires the defendant to act with an appropriate degree of care if his activities might foreseeably harm a person in the position of the plaintiff. The standard can be either “subjective” – based on the defendant’s own awareness of and ability to avoid imposing risk – or “objective” – based on the hypothetical awareness of and ability to avoid imposing risk of a reasonable person. As a first approximation, strict liability can be said to hold the defendant liable for all harm to a core protected interest that his conduct *caused*.

In the case of unintentional harm, the most important tort is negligence. The term “negligence” is in fact ambiguous, since the *tort* of negligence adopts as its *standard of liability* the objective negligence standard that was described in the preceding paragraph. The term “negligence,” in other words, is properly applied to both the tort of negligence in its entirety, which consists of a number of distinct elements, and also to one of those elements in particular, namely, the negligence standard of liability. The objective negligence standard requires that persons act with “due” or “reasonable” care, which means acting as a reasonable person would have done in the defendant’s situation. In negligence law, the objective standard of liability defines a norm or standard of conduct to which the defendant must conform his or her behavior, and for that reason is often referred to as the standard of *care*, or the standard of *reasonable care*. To grasp the ambiguity more clearly, notice that a person’s conduct can be negligent because it falls below the standard of care applicable to a particular situation – the standard of care being a norm which determines which precautions, or what degree of care, must be taken in that situation – but still not have been negligent in the sense of committing the *tort* of negligence, because at least one of the other elements of the tort has not been established. For example, the defendant’s conduct might, despite falling below the standard of care, have failed to cause a legally cognizable injury to a person who was placed at risk by the defendant’s conduct.

The tort of negligence protects both of the two core interests, and certain other protected interests as well, against unintentional harm. But tort law also recognizes a number of exceptions to the hegemony of negligence: under some circumstances it protects the core interests by means of strict liability instead. The most important of these exceptions is the strict standard that has been applied in the United States (but not in most other common law jurisdictions) in products liability actions, that is, actions brought against a product’s manufacturer or seller for harms to person or property that were caused by a defect in the product. Another set of exceptions imposes strict liability for harm caused by certain abnormally dangerous activities, or by certain substances that are safe when confined but pose serious dangers if they escape from control. Notice that, while both the negligence standard and the strict standard are properly referred to as standards of liability, the strict standard, unlike the negligence standard, does not

define a norm of conduct. Thus if the defendant engages in an activity considered by the law to be abnormally dangerous – the standard example of such an activity is blasting – and her conduct causes harm to the plaintiff, the defendant is *prima facie* liable regardless of the degree of care that she took.

I have said that the common law defines a given tort by reference to a number of distinct elements, or requirements, which the plaintiff must establish one by one in order to show that the defendant committed the relevant tort in its entirety. Negligence, which is, from both a practical and theoretical point of view, the most important of the torts, consists of five such elements, two of which have already been mentioned. These are (1) duty of care; (2) standard of care (also referred to as the element of breach, meaning breach of one's duty of care); (3) legally cognizable injury; (4) actual causation, or cause in fact, which requires that the defendant's breach of his or her duty have caused the plaintiff to suffer the legally cognizable injury; and (5) proximate causation. Proximate causation places certain constraints on which instances of cause in fact can give rise to liability, where the most important of these constraints is that injury to the plaintiff, or to the members of a class of persons to which the plaintiff belonged, must have been reasonably foreseeable to the defendant.

With this thumbnail sketch of the relevant legal doctrines in mind, we can now proceed to consider the main theoretical justifications that have been offered for the law of torts as it applies to the core interests. There are two main categories of theory that have been put forward. Theories in the first category are sometimes referred to as "instrumentalist," because they regard tort law simply as a means, or instrument, for achieving certain collective (and usually aggregative) goals, such as economic efficiency or the maximization of utility. In what follows I shall only discuss the economic variants of this general category of views, which I will accordingly refer to as economic theories. Theories in the second category go by a wide range of labels, which variously make reference to such notions as corrective justice, rights, duty, fairness, reciprocity, responsibility, noninstrumentalism, and deontology. For reasons that will be discussed later, I will refer to this entire category of views as "rights based."

In subsequent sections, three types of economic theory will be discussed, based on the core ideas of internalization, deterrence, and loss spreading. We will then consider two types of rights-based theories. These take as their respective starting points the two forms of justice that were first distinguished by Aristotle – namely, distributive justice and corrective justice.

It bears mention that all economic theories must at some point take account of the costs of administering the tort system (or whatever alternative to the tort system might be adopted). For example, according to conventional wisdom, a standard of strict liability is simpler and therefore cheaper to administer than a negligence standard, but some and perhaps all of these savings might be offset by the greater quantity of litigation that could be expected to take place under strict liability. The minimization of administrative costs is theoretically a straightforward matter, but its practical implementation will often depend on information that could be very difficult to obtain. Accordingly, in order to avoid empirical inquiries that will not contribute to the theoretical understanding of tort law, the issue of administrative costs will, for the most part, not be considered in this essay.

## Economic Theories: Internalization

Internalization theories hold that “externalities” – costs that initially fall on *A* because the activity of *B* has caused him harm – should be “internalized”: the costs to *A* should be transferred to *B*, the causally responsible party. Drawing on the received economic wisdom concerning the treatment of externalities that had first been propounded by the English economist A. C. Pigou in the 1920s, Guido Calabresi argued in an early article that “resource allocation” – his term for internalization – was necessary to prevent the distortion of market prices that would occur if *A* were forced, in effect, to subsidize *B* by bearing some of the costs of producing *B*’s goods: “The function of prices is to reflect the actual costs of competing goods” (Calabresi, 1961, p. 502, cf. p. 514). The point of tort law, on this view, is to accomplish internalization by imposing legal liability for harm on *the* actor or enterprise that caused it (Calabresi, 1961, p. 533). Internalization thus supports a standard of strict liability. (Recall our preliminary characterization of strict liability as, very simply, liability for harm caused.) Historically, internalization has figured as one of several theoretical justifications offered for the adoption in the United States of strict products liability (Priest, 1985, pp. 463, 481).

As a justification for tort law generally, and for strict products liability in particular, internalization has largely fallen into disfavor. The reason for this is almost entirely attributable to the work of Ronald Coase. In what has turned out to be one of the most influential articles on the economic analysis of law, Coase argued, first, that internalization was not, considered in its own terms, a coherent notion; and second, that private market transactions would, under certain circumstances, bring about the economically efficient allocation of resources even if governmental agencies such as courts made no attempt to internalize costs (Coase, 1960). Traditional welfare economics had assumed, following Pigou, that the economically desirable result would only be achieved if the government intervened by, say, imposing a tax, or adopting the appropriate liability rule in tort.

Consider first Coase’s conceptual critique of internalization (a term, it should be noted, that he did not himself use). Coase argued that it made no sense, in typical cases of harmful interaction, to speak of one party as *the* cause of the other’s harm. To illustrate, take the example of crop damage that results when a railway’s locomotives emit sparks. The activity of the railway is not properly identified as the unique cause of the crop damage, since that damage would not have occurred without the actions of *both* the railway (in running trains that give off sparks) *and* the farmer (in planting the crops she did, where she did). “If we are to discuss the problem in terms of causation, both parties cause the damage” (Coase, 1960, p. 13). From this it follows that internalization, which was defined earlier as the assignment of costs to *the* activity that caused them, is not a determinate notion. Coase at one point in his article claimed, rather obscurely, that harm is “reciprocal” in nature, and on the basis of that remark he is sometimes accused of making a conceptual error about causation (Coleman, 1988, p. 80). In fact, however, he was just adopting a standard analysis of causation, according to which an event *A* is a cause of effect *B* if *A* is a necessary condition of *B*’s occurrence

(Perry, 1992, pp. 465–6). This is the understanding of causation presupposed by, for example, the traditional “but-for” test in tort law.

This brings us to Coase’s second main point, which is that private market transactions can often bring about the economically efficient result without government intervention. Coase argued that the traditional approach of welfare economics, based on cost internalization – in Coase’s terms, on the idea that activities should bear their “social” as well as their “private” costs – asked the wrong economic question. The proper question is not, which of two interacting activities caused the harm that one of them suffered, but rather, how is the total value of the production of both activities to be maximized? Coase further argued that, under certain conditions, the total value of production would be maximized by private bargains. The most important of these conditions are, first, that there be clearly defined and alienable legal entitlements, and second, that the costs of striking a bargain – the so-called transaction costs – be sufficiently low. The claim that value-maximizing bargains will be struck under these conditions has come to be known as the Coase Theorem. (For a more complete statement of the theorem, see Coleman, 1988, pp. 69–76.)

To illustrate, let us revert to our railway/crops example. Assume that there is just one affected farmer, that she is legally entitled to an injunction that would prohibit the railway from emitting sparks, and that spark control is not feasible. Suppose the crops that would be burnt represent a net annual profit of \$600 to the farmer, whereas being able to run its trains along that line increases the railway’s net profits by \$1,000 per year. According to the Coase Theorem, the railway will buy from the farmer her entitlement to an injunction for an amount between \$600 and \$1,000, since this will make both parties better off. Such a bargain will maximize the total value of production from both activities by giving effect to the optimal solution, namely, trains and burnt crops. Assume next that the figures are reversed. Now no bargain will be struck, since the optimal solution – no trains and unburnt crops – has already been attained: the total value of production cannot be increased. Analogous examples can easily be constructed on the assumption that the railway has a legal right to emit sparks. So long as transaction costs are less than \$400, the initial assignment of the legal entitlement will affect the relative wealth of the parties but not the total value of production. Of course, a more sophisticated economic model would allow for variations in the levels of farming and railroading, and would locate the optimal solution at the point where the marginal profit from railroading equals the marginal damage to crops from sparks (Coleman, 1988, p. 70). To put the point another way, the Coasean bargain would set the levels of farming and railroading in such a way that any further farming would be more costly than forgone railroading, and any further railroading would be more costly than forgone farming. But for present purposes we can ignore this complication.

Coase’s work led to the effective abandonment of internalization theories of tort law. Calabresi, for example, reshaped his resource-allocation theory into what he came to call a theory of general deterrence, which will be discussed below. Some theorists remain willing to speak of strict liability as a method of cost internalization, but internalization must now be regarded as a result to be justified rather than a justification in its own right. Most such theorists regard the appropriate source of justification as deterrence, and it is to theories of this kind that we now turn.

## Economic Theories: Deterrence

The abandonment of internalization theories, instigated by Coase, shifted attention among economic theorists to the idea that tort law is a mechanism for deterring economically inefficient behavior. One starting point for this development was the observation that transaction costs are often high enough to prevent value-maximizing private bargains from being struck. Market failure of this type is likely, for example, in situations of possible unintentional harm to a core interest, since it is ordinarily difficult to know in advance the identity of a person with whom you might have an accident. (Here, transaction costs take the form of information costs.) What tort law must do, according to deterrence theorists, is to set liability rules so as to give persons incentives to behave in value-maximizing ways.

In fact, most contemporary deterrence theories do not aim directly at value-maximization but adopt instead the complementary goal of cost-minimization (or *total* cost minimization, as I shall call it). The idea here is *not* to avoid as many accidents as possible, but rather to minimize the sum of accident costs and the costs of preventing accidents (Calabresi, 1970, p. 26). More precisely, the idea is to minimize the sum of *expected accident losses* and the costs of *taking care*. Expected accident loss can be defined as the probability that a given type of accident will occur, multiplied by the magnitude of the loss that would result if the accident did occur ( $P \times L$ ). The cost of taking care can be understood as the cost of taking steps to reduce or eliminate the probability that an accident of the type in question will occur. (In accordance with the usage first initiated by Judge Learned Hand and still widely observed, I shall represent the cost of taking care by “*B*,” which stands for “burden of precautions.”) For purposes of the present discussion, we shall follow the usual practice of deterrence theorists and make the admittedly unrealistic assumption that the parties to be deterred are risk neutral, which means that so long as the amount of the expected accident loss ( $PL$ ) remains constant they are indifferent to whether the magnitude of the potential loss ( $L$ ) is large or small. The usual justification for this assumption is that people who are fully insured will behave as if they are risk neutral (Landes & Posner, 1987, pp. 57–8; but see the more extensive discussion in Shavell, 1987, pp. 206–61).

We begin by considering the negligence standard for unintentional harm. Let us return to our railway/farming example, but this time adding the assumption that transaction costs between the parties are, for whatever reason, too high to permit a Coasean bargain to be struck. Suppose that the expected loss to crops from fires started by locomotives is \$1,000, and that the only available method of taking care is for the railway to install a spark arrester that will reduce the expected loss to zero. In other words, taking care is an all-or-nothing matter. From an economic perspective, negligence is understood as the failure to take care when the cost of taking care is less than the expected loss, that is, when  $B < PL$ . This is the famous Learned Hand formulation of “due” or “reasonable” care in negligence law; it is so called because it was first propounded by Judge Hand in the case of *United States v. Carroll Towing* (1947), 159 F. 2d 169. Given our assumption that only the railway is in a position to take precautions, liability in our example should be imposed, under a negligence rule, if and only if the railway did not install the spark arrester, the farmer suffers crop damage caused by

sparks from the locomotive, and the spark arrester would have cost less than the expected loss of \$1,000. This rule will give the railway, as an economically rational actor, an incentive to install the spark arrester when and only when the cost of doing so is less than the expected loss to crops, thereby achieving total cost minimization.

We have assumed that the cost of taking care is an all-or-nothing matter, and that only the railway is in a position to take care. Both assumptions are unrealistic. If we were to drop the first assumption and suppose instead that taking care was a matter of degree, so that, for example, spark-arresting capacity could be purchased incrementally, then the Learned Hand test would have to be applied at the margin rather than to total costs. On this approach, the optimal level of care is reached when the marginal cost of care – that is, the cost of one more increment of spark-arresting capacity – is equal to the reduction in expected crop loss that would result if that increment were in fact purchased (Posner, 2007, pp. 168–9). But while the proper theoretical formulation of the Learned Hand test requires this marginal form, nothing will be lost for present purposes if we continue to make the simplifying assumption that care is an all-or-nothing matter.

Consider, then, our second unrealistic assumption: that only the railway is in a position to take care. Suppose the railway could eliminate the expected crop loss of \$1,000 by installing a spark arrester for \$700, but the farmer could also completely avoid the expected loss by planting a fire-resistant crop at a net extra cost to her of \$500. Clearly, the goal of achieving *optimal* care – that is, the goal of achieving the level of care on the part of the railway, the farmer or both that will bring about total cost minimization – requires that the farmer take care rather than the railway. One way to create the appropriate incentive for the farmer would be to add to the law a defence of contributory negligence. A first approximation of the proper economic understanding of this defence would deny the plaintiff recovery when she was herself negligent in the Learned Hand sense. This would work for the example just given, but not if we reverse the figures and suppose that it would cost the railway \$500 to take care, and the farmer \$700. Since the farmer would be denied recovery, she would have an incentive to spend \$700 to eliminate the expected loss; the railway, on the other hand, would have no incentive to achieve the same result at a cost of \$200 less.

This problem is solved, however, if we define due care for both parties as the level of care that results in optimal care being taken – this is, recall, the level of care by either or both parties that achieves total cost minimization – *if* the other party is exercising due care (Posner, 2007, pp. 172–3). (It can be demonstrated that due care thus defined yields a unique equilibrium, that is, a pattern of conduct to which each party will adhere if the other party adheres to it: Shavell, 1987, pp. 10, 37–8). Due care for the railway will then require spending \$500, whereas due care for the farmer will be zero; there is no room for the defence of contributory negligence to apply. At common law, contributory negligence was traditionally a complete bar to recovery, and the economic version of the defence just described is also all-or-nothing. Most common law jurisdictions have, however, replaced contributory negligence by what is known in the United States as comparative negligence, which requires that the loss be shared among the parties in proportion to their respective degrees of fault. (In England and the Commonwealth, the term “contributory negligence” has come to be applied to this apportionment approach.) Perhaps surprisingly, the parties will be led to take optimal

care under comparative as well as under contributory negligence. The reason for this is that, given our definition of due care, party A will reason under either regime that if party B takes due care then *A alone* will be found negligent if he or she fails to take care, and hence will have to bear the full loss. For this same reason, formal defences of contributory and comparative negligence, in fact, become *superfluous* in a negligence system (Shavell, 1987, pp. 15–16).

Another consequence of adopting this definition of due care is that optimal care will be achieved not just in cases of “alternative care” – cases in which total cost minimization requires one or the other, but not both parties, to take care – but also in cases of “joint care” – cases in which total cost minimization requires both parties to take some care (Shavell, 1987, pp. 17–18; Posner, 2007, p. 173). We can illustrate the notion of joint care if we suppose that the expected crop loss of \$1,000 in our example could be completely avoided if the railway were to run its trains slightly more slowly, at a cost of \$200, and if the farmer were also to move her crop back a hundred yards, again at a cost of \$200. If we suppose that either of these actions would be completely ineffective by itself, optimal care can only be attained by joint action; due care for each of the parties would thus require an expenditure of \$200. If the railway spends \$200 on care then the entire expected loss of \$1,000 will fall on the farmer unless *she* expends the \$200 that due care demands of her and vice versa. (As was remarked earlier, this is true even if there is no formal defence of contributory negligence.) The expected loss would thus be avoided at a total cost of \$400, which is less than what we assumed would have to be expended by either party acting alone to achieve the same result (\$500 for one of them, \$700 for the other).

So much for the economic understanding of negligence. What about strict liability? As Coase, in effect, taught us, strict liability cannot coherently be understood as liability simply for losses caused. For this reason, it requires a prior division of the relevant universe of persons into “injurers” and “victims” (Shavell, 1987, p. 5). This is not true for a negligence regime, however, which can simply hold everyone to a well-defined standard of conduct. Moreover, under a negligence regime the residuary loss-bearers – the persons who must bear the losses that it is not cost-effective to avoid – are victims, and the category of victims is determined prior to and independently of the law; its boundaries are set “naturally,” simply by the empirical fact of where the loss falls. But under a rule of strict liability the residuary loss-bearers are injurers, and as Coase’s work made clear, this is not a natural category; because actions of both parties to a harmful interaction are properly regarded as causes of the harm, “injurers” must be defined by the law. This is fairly straightforward when, as in our railway/farming example, harm is consistently suffered by only one of two interacting activities rather than by both: the farmer is always the victim, and this makes the railway the inevitable candidate for the status of injurer. But the artificial nature of this division must not be forgotten; consider, for example, the difficulty of dividing in advance the universe of drivers into “injurers” and “victims,” and hence of applying a standard of strict liability to accidents between automobiles (that is, accidents not involving pedestrians).

A simple rule of strict liability for railways and farmers would impose all losses on the railway, regardless of which party, if either, had been negligent in the Learned Hand sense. Even though it would bear losses even when it had not been negligent, the railway, as a rational economic actor, would still take care when and only when



$B < PL$ . But a rule of this kind would not achieve optimal care, since it would not give the farmer appropriate incentives to take precautions. To attain optimal care we must add a defence of contributory negligence, which requires the farmer to bear the loss if she does not exercise due care in the sense defined earlier. In the case of strict liability, then, contributory negligence is *not* superfluous. Both strict liability with a contributory negligence defence, and the negligence standard with or without that defence, will, by inducing the parties individually to take due care, lead to the attainment of optimal care (Shavell, 1987, p. 16). This does not mean, however, that the two regimes are economically equivalent. The reason for this is that on the proper marginal understanding of due care and expected loss, the probability of an accident can be lowered *either* by taking more care *or* by engaging in a reduced level of the activity (Shavell, 1987, pp. 23–6, 29–32). Theoretically, a court could incorporate consideration of activity level into a determination of due care, but this would be very difficult; it would mean, for example, ascertaining how much driving would be socially optimal on the part of a defendant driver, and not just whether he had taken the appropriate degree of care in driving on this particular occasion.

Given the practical impossibility of courts directly determining the appropriate degree of activity level, this is something that must be left up to the parties themselves. The difficulty is that tort law can only give someone an incentive to adjust his activity level by requiring him to bear the residuary accident costs – these are, recall, the losses it is not cost-effective to avoid – but victims and injurers cannot *both* be residuary loss-bearers. Since injurers are the residuary loss-bearers under strict liability, they will be induced by this rule not only to exercise due care but also to adopt levels of activity that are socially optimal (that is, utility maximizing), whereas victims might be led to participate in *their* activities to an excessive, nonoptimal degree. Conversely, since victims are the residuary loss-bearers in a negligence regime, they will, under that regime, engage in their activities only to the optimal extent, whereas injurers' levels of activity might well be excessive. Because it is impossible for a single liability rule to achieve optimal activity levels for both injurers and victims, Steven Shavell suggests that the choice between negligence and strict liability depends on whether, in the particular context, it is more important to control injurers' or victims' conduct. He thinks this may help to explain why the activities the law holds to a strict standard tend to be unusually risky or hazardous (Shavell, 1987, pp. 29–32).

It should be noted that there is another economic conception of strict liability, in addition to the “injurer liability” model just considered. This second conception, which was first described by Calabresi (1970, pp. 135–73) and which has been invoked by him particularly in connection with strict products liability, calls for accident losses to be placed on the “cheapest cost-avoider.” The cheapest cost-avoider is the party who could take steps to avoid an accident at the lowest cost. In effect, it is the party for whom  $B$  in the Learned Hand formula is lowest. (Recall we are assuming that  $B$  is to be understood in an all-or-nothing rather than in a marginal sense; it represents the cost of completely avoiding the expected loss.) For purposes of applying the cheapest cost-avoider test, it does not matter whether, for either party,  $B < PL$  or  $B > PL$ ; all that matters, at least in theory, is determining for which party  $B$  is lower – although, as Gilles (1992, pp. 1315–17) makes clear, this will sometimes require a court to ascertain  $PL$  anyway. The idea is that the cheapest cost-avoider will make the appropriate

cost-benefit analysis privately and act accordingly. For this reason, Calabresi labelled this approach general or market deterrence. The main drawback of the cheapest cost-avoider test is that while it will lead to an optimal level of care in alternative care cases, it will not always do so in cases of joint care (Shavell, 1987, pp. 17–18). Stephen Gilles has argued, however, that even in joint care cases the test will still *tend* towards optimality (Gilles, 1992, pp. 1309–13).

We have so far discussed economic deterrence in cases of unintentional harm to one of the core interests. Intentional harm, when it occurs in the context of a conflict between legitimate productive activities, is treated very similarly; the element of “intention” usually rests on some economically irrelevant factor, such as a particularly high probability of loss. But there is, according to Richard Posner, another category of intentional harm that economics views in a different light. At stake are torts that involve an element of coercive, criminally prohibited transfer. (For example, the tort of conversion corresponds to the crime of theft, while battery – trespass to the person – covers, among other kinds of conduct, personal assault, murder and rape.) The sums invested by the injurer and victim in attempting respectively to accomplish and to prevent the coercive transfer represent a social waste of resources; this, according to Posner, “is the economic objection to theft.” There is, of course, a benefit to the injurer in obtaining, say, the car that he steals, but this gain is offset by the corresponding loss to the victim. In cases such as these, we should expect to find, according to economic analysis, that the law is more willing to award punitive as opposed to purely compensatory damages (Posner, 2007, pp. 204–9; cf. Landes & Posner, 1987, pp. 149–89).

Economic theories of deterrence obviously provide a very powerful model of, and potential justification for, the institution of tort law. But these theories have themselves been subjected to some very powerful criticisms. Some of the objections are directed towards the economic understanding of specific aspects of tort law, while others are directed at deterrence-based economic theories of tort in general. The most common specific criticism targets the economic understanding of the negligence standard. The basic point is well expressed by Epstein: “[A negligence rule patterned on the Hand formula] allows a defendant to trade the benefits that he (or society at large) receives from his own conduct against the costs inflicted upon the plaintiff” (Epstein, 1985, p. 40). In other words, a defendant is permitted to impose what could well be quite high levels of foreseeable risk on other persons, so long as the cost *to him* of taking precautions exceeds the expected loss (*PL*). But why should someone else be forced to bear these risks, when it is the person whose actions created them who stands to benefit? This criticism applies *a fortiori* to Posner’s analysis of “legitimate” intentional torts, where *P* (and hence the risk) will tend to be high. (A different but related criticism applies to Posner’s analysis of “illegitimate” intentional torts. Posner assumes that the gain to a thief, for example, will be offset by the loss to the victim, but this is not necessarily so. The thief might value what he steals more highly than its present owner, in which case a cost-benefit analysis could well favor the coercive transfer.)

Let us turn to the general criticisms of economic deterrence theory. One common objection is that these theories presuppose a generally unattainable level of information on the part of the persons whose behavior the law is supposed to shape, and that if a more realistic degree of knowledge of *B*, *P*, and *L* is assumed, the deterrent effects of tort liability are seen to be muted or nonexistent. (See, e.g., Sugarman, 1989, pp. 6–9.)

However, the most fundamental general criticism of economic deterrence theory concerns what Jules Coleman calls the “structure” of tort law (Coleman, 1992, pp. 374–85). By this he means the framework of case-by-case adjudication, between an individual victim and an individual injurer who causally contributed to the victim’s injury, that typifies an action in tort. Coleman thus identifies two related elements as central to the social practice of tort law: first, the individualized institutional form which requires a person who has suffered a loss – call her *A* – to make a claim against, and to recover damages from, not the state but rather some discrete person *B*; and second, the requirement that some act or, occasionally, omission of *B*’s have been a *cause* of *A*’s loss. Ernest Weinrib’s formalist theory of tort law also identifies these two elements as central, although Weinrib is willing to go further and label them as *conceptually necessary* features of the practice; any theory of tort law that does not incorporate these elements, integrate them into a single justification, and treat them as essential to the practice will be, according to Weinrib, incoherent (Weinrib, 1989b, pp. 493–7). But “incoherence” is a strong term, and it is by no means obvious that the thoroughly conceptual approach its use presupposes is warranted (Kress, 1993; Perry, 1993). Coleman’s more modest conception of the structure of tort law focuses, as seems appropriate, on the pragmatic dissonance between institutional framework and economic theory.

The difficulty that arises with respect to the structure of tort law is that neither the individualized procedure of tort nor its basic causation requirement seems to be demanded by, or even to make much sense in the light of, economic deterrence theory. Consider first, tort law’s individualized, bilateral procedure. There is no fundamental reason why the incentives that will induce people to take due care must be created by the determination of liability in tort actions between particular injurers and particular victims. For example, suppose that victims had to bear their own losses and injurers were required to pay to the state, rather than to the victim, fines equal to harm done or taxes equal to expected loss. As economic theorists concede, not only would injurers and victims both be led to take due care, but both would also choose optimal activity levels; in this respect, at least, a public law solution would in fact be superior to the private law solution of tort law (Shavell, 1987, pp. 29–30).

Consider next tort law’s causation requirement, which has traditionally meant that the injurer’s (negligent) action must have been a necessary condition of the occurrence of the victim’s harm: if the harm would not have occurred but for what the injurer did, then causation has been established (the so-called “but-for” test for factual causation). As economic theorists again concede, neither strict liability nor a negligence rule need be restricted to liability for losses that would not have occurred but for, respectively, the injurer’s action, or her negligence in acting, in order to induce injurers to take care; the reason is that potential injurers will have a rational incentive to take cost-effective precautions if liability is imposed in all circumstances where failing to take care is economically inefficient, without regard to whether the failure to take care actually resulted in harm (Shavell, 1987, pp. 105–10). Landes and Posner (1987, pp. 229–30) explicitly argue that the traditional notion of factual causation can and should be dispensed with in an economic analysis of torts. Richard Wright agrees, but from the perspective of a critic; the economic approach is, he says, “analytically incompatible” with the factual causation requirement, “the most pervasive and enduring requirement

of tort liability over the centuries" (Wright, 1985a, pp. 435–8). The reason for this incompatibility is that the economic approach is forward looking, collective, and policy oriented, whereas the determination of factual causation is backward looking, individualized, and fact based. Some economic theorists have tried to get around this difficulty by redefining causation as a general, probabilistic relation between *classes* of events (for example, Calabresi, 1975, p. 71), but this maneuver seems artificial and ad hoc; certainly it fails to capture the significance that has traditionally been thought to attach to the factual causation requirement (Wright, 1985a; Coleman, 1992, pp. 382–4).

A more recent battleground between economic and rights-based theorists concerns the relative importance of the duty of care and standard of care elements of the tort of negligence. As we shall see, almost all rights-based theorists think that the duty of care is a central element of the tort of negligence, because the defendant's duty is correlative of a right on the part of the plaintiff, and this correlativity establishes an important moral relation between the two parties. Economic theorists, on the other hand, tend to treat the standard of care as having theoretical primacy, and give short shrift to duty of care. This is because they envisage the standard of care as a free-standing legal norm, much like the legal norms that prohibit jaywalking or littering. There is, to be sure, a legal duty to comply with such norms, but it is not a duty that is owed to other persons. Rights theorists tend to regard liability in tort as flowing from, *inter alia*, breach of one's duty of care, where breach of duty is the flip side of violating the plaintiff's correlative right. Economic theorists, however, tend to focus directly on liability. In ideal deterrence theory, liability flows from a failure to conform one's conduct to the standard of care, which is understood in turn as a free-standing legal norm; in practice, of course, tort law premises liability on the fact that a failure to conform to the standard of care caused someone harm. Loss-spreading theories are in a better position to explain this aspect of tort practice, although, as we shall see, such theories face other difficulties.

One response available to the economic theorist is to argue that the structure of tort law can be accounted for by considerations of administrative efficiency: tort law, with its individualized procedure and requirement of factual causation, constitutes a system of private enforcement; such a system, the argument runs, is less expensive to administer than a public regulatory regime. But, as Coleman points out, this argument renders the structure of tort law "radically contingent and far too tenuous to explain its centrality to our actual practice" (Coleman, 1992, p. 378). Coleman concludes that the centrality of that structure is better explained, and tort law as a whole is better justified, by a principle of corrective justice. Weinrib and Wright accept this conclusion as well.

### Economic Theories: Loss Spreading

The third type of economic theory is comprised of theories that call for losses to be distributed throughout society as thinly and widely as possible. The basic rationale for such loss-spreading is that it will have the effect, because of the diminishing marginal utility of money, of minimizing the overall social impact that a given loss will have (Calabresi, 1970, pp. 39–41). Thus taking \$1 from each of 100 persons, all of whom have \$100 of wealth, will (in theory at least) result in less overall disutility than taking

\$100 from just one of those persons; each further dollar taken from the same person represents a greater share of her total remaining wealth, and its loss is accordingly accompanied by more disutility than the loss of the previous dollar. Sometimes the overall social impact of a loss can similarly be decreased not by spreading it, but by taking it from a “deep pocket.” Thus total disutility will in theory be reduced, again because of the diminishing marginal utility of money, by shifting a \$100 loss from someone worth \$100 to someone else worth \$1,000. Loss-spreading theories view tort law as a mechanism for spreading losses, or at least for placing them on deep pockets.

The assumption that a person is subject to the diminishing marginal utility of money is equivalent to the assumption that he is risk averse; this means, for example, that he prefers a sure loss of \$100 to a 10 percent risk of losing \$1,000, even though the expected loss (*PL*) is the same in each case (Shavell, 1987, pp. 186–7). Risk-averse parties care about the magnitude of potential losses, since the greater the loss, the greater the marginal impact on their well-being. Thus loss-spreading only makes sense as a goal for tort law if we drop the unrealistic assumption of risk neutrality that we made when discussing deterrence theory. (It is worth recalling in this regard that deterrence theorists base their premise of risk neutrality on the assumption that persons have the ability to spread their losses through private insurance.)

It is often said that if loss-spreading were the only goal of tort law, then the most efficient way of achieving it would be to abolish tort and institute a general social compensation scheme (Calabresi, 1970, p. 46). A social compensation scheme, which could be comprehensive or limited in scope, can be defined as a public regime, usually created by legislation, that compensates for (specified kinds of) losses either by drawing on general tax revenues or by requiring compulsory insurance coverage of some kind. But social compensation offers an alternative to, rather than a justification for, tort law, and our concern here must be with loss-spreading theories that purport to take tort law seriously. The law of torts can play a role in loss-spreading mainly by affecting incentives to obtain private insurance (or to self-insure). Private insurance is itself a loss-spreading mechanism, based on voluntary contractual arrangements. Loss (or first-party) insurance provides direct cover against specified forms of loss, while liability (or third-party) insurance provides cover against being held liable in tort to third parties.

Theories of tort law that view tort as a viable instrument for loss-spreading generally advocate some form of *enterprise liability*. Enterprise liability calls for commercial enterprises to be held liable, regardless of fault, for losses caused by their goods or services, because they can then spread those losses to all their customers through the prices they charge (Calabresi, 1970, pp. 53–4). In effect, enterprise liability requires commercial enterprises to insure consumers against losses their products might cause, and hence to build a premium into the prices of those products. Enterprises can provide this insurance either by using those premiums to purchase liability insurance, or, possibly, by self-insuring. The main rationale for enterprise liability is that it will automatically provide insurance cover for consumers, and, in particular, poor consumers, who might not obtain loss insurance for themselves (Priest, 1987, pp. 1534–9). It has also been argued that adding a premium to the price of a product is a relatively efficient way of providing insurance, since the risks the product creates are automatically aggregated into one large risk pool (Priest, 1987, p. 1559). The idea underlying enterprise liability

that tort law can be used to spread losses was a crucial factor leading to the introduction in the United States of strict products liability, which holds manufacturers strictly liable for losses resulting from the use of their products when these are defective in certain ways (Priest, 1985).

The theory of enterprise liability has, however, encountered some serious criticisms. As in the case of deterrence theory, one objection concerns a lack of congruence with the structure of tort law (Weinrib, 1989b, pp. 498–9; Coleman, 1992, p. 375). Enterprise liability is concerned with the provision of insurance, and there is no intrinsic reason for making insurance coverage conditional on the outcome of case-by-case litigation, or, more specifically, for requiring that the provider of the insurance have caused the loss. At this point, a defender of enterprise liability will typically concede that it is probably not the most sensible or efficient method for spreading losses, but will then add that loss-spreading cannot be regarded as the only goal of tort law: enterprise liability, the argument runs, is a defensible compromise solution for achieving a reasonable measure of both loss-spreading and deterrence (Calabresi, 1970, pp. 37, 54, 312). However, given that *neither* loss-spreading *nor* deterrence fits very well with the structure of tort law, it is far from clear that tort offers the most appropriate framework for pursuing both goals together. For one thing, the two goals may conflict: the general thrust of the loss-spreading rationale is to place losses on enterprises, yet every deterrence theory requires that losses at least sometimes be left on victims. It may be that separate institutions – for example, a public regulatory regime for deterrence, and a social compensation scheme for loss-spreading – is the better way to pursue both goals simultaneously. This is, in fact, the route we have chosen for personal injuries that occur in the workplace (industrial safety legislation plus workers' compensation) and, to a more limited extent, on the highway (traffic codes plus compulsory no-fault automobile insurance).

Moreover, some deterrence theorists have questioned whether loss-spreading is a goal that should be pursued by tort law *at all*. George Priest has argued very persuasively that enterprise liability is an extremely poor vehicle for providing insurance, and that in the United States it has at times undermined insurance markets and led to the withdrawal of some lines of third-party coverage. In Priest's view, tort law should concentrate exclusively on the deterrence goal of total cost minimization; loss-spreading is much more efficiently achieved by encouraging possible victims to purchase loss insurance, something that can be done by requiring them to bear residuary losses (Priest, 1987, pp. 1538, 1588–90). Priest gives the following six reasons in support of this view. First, while enterprise liability does a relatively good job of aggregating risks into a risk pool, viable market insurance requires not just aggregation of risks but *segregation* into relatively narrow risk pools, in which the range and variance of risks are limited; otherwise, low-risk members will drop out of the pool because their premiums exceed their expected losses, eventually causing the pool to unravel (the phenomenon of adverse selection). But enterprises have very little control over who buys their products, and hence are very restricted in their ability to segregate risks. Second, viable market insurance requires that the risks within risk pools be statistically independent, but the risks pooled by enterprise liability tend to be highly correlated; if a product is subject to a design defect, for example, all consumers who purchase it are subject to essentially the same risk.

Third, by permitting recovery for nonpecuniary damages such as pain and suffering, which do not directly affect income flow, tort law compensates for losses that people would not, and in fact could not, voluntarily insure against; the premiums built into the prices of products therefore exceed what individuals would pay for the same effective level of coverage provided through loss insurance. Fourth, by providing full compensation for losses – indeed, in insurance terms, *more* than full compensation – tort law does not allow for the kinds of mechanisms found in loss insurance, such as deductibles and limited coverage, for dealing with moral hazard. (Moral hazard is the decreased incentive created by insurance itself to avoid incurring a loss, or to mitigate its effects after the fact.) Fifth, the administrative costs of enterprise liability exceed those of loss insurance; the latter, unlike the former, does not require expensive litigation. Finally and perhaps most importantly, the insurance provided by enterprise liability has a regressive distributional effect. All consumers, rich or poor, pay the same premium that has been built into the price of a given product, but tort law awards higher damages to those who have suffered a greater loss of earnings, or who have a greater wage-earning capacity. In effect, the wealthy receive better coverage for the same premium. This contrasts sharply with loss insurance, where more extensive coverage (for example, for damage to a luxury car) requires the payment of higher premiums. This aspect of enterprise liability is somewhat ironic, given that one of its merits is supposed to be the provision of insurance for the poor.

### Rights-Based Theories and Distributive Justice

This brings us to the second main category of theories that have been advanced to justify tort law, namely, those that are rights-based. We begin by considering theories that take the rights protected by tort law to be grounded in distributive justice, where the point of distributive justice is understood to be the just distribution of material resources, and perhaps other goods, throughout society as a whole. On this view, which we can call the distributive priority view, tort law is regarded as a mechanism for rectifying deviations from a pattern of holdings antecedently determined to be just (and also, perhaps, for moving an unjust pattern closer to a just one). If *A* deliberately or accidentally destroys property belonging to *B*, then *B* will have less than he is entitled to under the relevant distributive pattern. The appropriate moral response, on the view under consideration, is to require *A* to make good the loss *B* has suffered, thereby restoring the distributive equilibrium. (See references in Benson, 1992, p. 531.)

The distributive priority view faces some simple but strong objections. First, a theory of this type cannot hope to justify tort law in its current form: No existing society can plausibly claim to have achieved a truly just distribution of resources, nor do the courts seriously attempt to use tort as a method for correcting distributive imbalances. Second, this approach appears to apply to just one of the two core interests, namely, the interest in preserving tangible property, since we do not ordinarily think that persons' lives and bodies are subject to distributive justice. The most fundamental difficulty, however, is that, because of its structure, tort law is a particularly inappropriate instrument for maintaining a distributive pattern. Assume, for the sake of simplicity, that the required pattern is equality of material resources, that the relevant society consists of four

persons, and that each person has ten units of goods. If *A* causes the destruction of four of *B*'s units, equality will not be restored if, as a rule of strict liability in tort would require, *A* gives *B* four of *her* units. Equality can only be restored if *B* receives one unit from each of the others, thereby constituting a new distribution of nine units each (Alexander, 1987, pp. 6–7). The point here is that the maintenance of a distributive pattern is a global problem, the solution to which requires taking account of the shares of all persons within the relevant group. But tort law is a mechanism for rectification on a *local* scale, between two persons. As a general matter, the local mechanism cannot respond satisfactorily to the global problem. Moreover, this institutional deficiency reflects a deeper difficulty: the reasons for action arising from distributive justice pertain to society as a whole, whereas the assumption of tort law is that the defendant alone has a reason to compensate the plaintiff (Coleman, 1992, pp. 319, 374).

The difficulty just considered concerns the bilateral nature of tort law. But the other aspect of the structure of tort law, namely, the causation requirement, is also problematic for the distributive approach. A patterned conception of distributive justice should no doubt be sensitive to the losses people suffer, but there is no obvious reason why it should be sensitive to the *source* of a loss; the consequences for the victim's well-being, and the effect on the overall pattern, are presumably independent of how the loss came about. Thus, in our example, it does not matter, from the perspective of distributive justice, whether *B* lost his four units because of something *A* did (quite possibly without fault), or because of a hurricane. The basic tort requirement that recoverable losses have been caused by human agency thus seems to be an entirely arbitrary restriction on any institutional apparatus intended to maintain a distributive pattern. In light of this and the other problems the distributive priority approach faces, it should come as no surprise that many theorists who emphasize the importance of distributive justice advocate the abolition of tort law. To replace it they call for social compensation schemes that do not distinguish among possible sources of loss or, preferably in their view, for broad social *welfare* schemes that focus on need in general and not just on loss (Sugarman, 1989, pp. 127–52). Addressing the particular issue of driving accidents, Jeremy Waldron argues that a compulsory no-fault automobile insurance scheme, which levied a charge on all negligent drivers, or on all drivers in general, would be preferable to the tort system because it is less arbitrary, and therefore, in Waldron's view, *fairer* (Waldron, 1995, pp. 406–8).

It bears mention that we have been assuming that the relevant conception of distributive justice is, in Robert Nozick's words, *patterned*, which means that it calls for a distribution of resources based on a formula such as "to each according to his need," "to each in equal shares," and so on (Nozick, 1974, pp. 149–60). Our example of equal shares is a particularly simple pattern, but the general point holds in more complex cases as well, such as John Rawls's difference principle (to each in equal shares except as required to maximize the position of the least-advantaged) (Rawls, 1999, pp. 52–93). Nozick's own historically oriented, nonpatterned conception of justice in holdings, which he calls the entitlement theory, is not really about distributive justice at all, as that notion has traditionally been understood. The entitlement theory cannot be considered here, except to observe that it is probably best regarded as a conception of property rights complementary to the libertarian argument to be discussed in the following section.



## Rights-Based Theories and Corrective Justice

I earlier contrasted economic (or, more broadly, instrumentalist) theories of tort law with a second category of theory, which I labeled rights-based. As we saw earlier, rights-based theorists such as Coleman and Weinrib argue that economic theories, in both their deterrence and loss-spreading variants, are unable to offer any but the most superficial account of the fundamental requirement in tort law of causation – in the technical language of tort law, the requirement of cause-in-fact, or actual causation. Given the fundamental importance that rights-based theories attach to this requirement, it will be helpful to say something about its nature at the outset of our discussion. The most satisfactory analysis of causation in tort law has been presented by Richard Wright, who argues that the but-for test for causation that was discussed earlier is really just a special case of the so-called NESS test. According to the NESS test, an event *A* is a cause of event *B* if *A* is a *Necessary Element in a Set* of conditions that are jointly *Sufficient* to produce *B* (Wright, 1985b, pp. 1794–803). “Necessary” here means that the element is required to complete a minimally sufficient set. The but-for test then provides a satisfactory test for causation in the common circumstance in which there is only one set of existing conditions jointly sufficient to produce *B*. (But for *A*, an element in the set, *B* would not have occurred.) If there is more than one such sufficient set, the situation is one of concurrent causation, which is exemplified by the two-fire cases: In these cases, each of two independently set fires converge and burn down the plaintiff’s house, where either fire alone would have been sufficient by itself to produce that result. The but-for test fails to account for our strong intuition that both fires are causes of the plaintiff’s loss, because it cannot be said of either fire that, but for it, the house would not have burned down. The NESS test, by contrast, treats each fire as a cause of the plaintiff’s loss, because each fire is regarded as a necessary element in one or the other of two distinct (but possibly overlapping) sets of conditions that are sufficient to produce the loss.

There is a wide range of rights-based theories and they differ considerably from one another in substance, but, apart from some early work by Jules Coleman (1988, pp. 184–201) and George Fletcher (1972, pp. 542, 553–4), they invariably characterize tort law as being “relational” in character (Goldberg & Zipursky, 1998, pp. 1825–42), a feature which has also been referred to as “bilateral” (Benson, 1992, p. 533; Coleman, 2001, pp. 13–24), “bipolar” (Weinrib, 1995, pp. 63–6), “transactional” (Ripstein, 2007, pp. 14–15), and “correlative” (Perry, 1992, p. 507). What rights theorists have in mind in employing these terms is quite straightforward, and involves two separate but related points. The first is that tort law regulates certain kinds of interactions or transactions between persons, who in the paradigmatic case are two in number. The second and ultimately more important point concerns the normative character of the duty of care. As we saw earlier, negligence law on any view involves a duty to comply with a mandatory norm. But the traditional understanding of the duty of care, and the understanding advocated by rights theorists, is that of a duty which is *owed* to another person or class of persons. As we saw earlier with the examples of laws making it an offense to litter or jaywalk, duties to comply with mandatory norms do not necessarily, or even usually, have this feature. But to say that a duty is owed to another person is

to say that that person has a correlative right. Duties can exist without rights, but rights, at least in this context, cannot exist without duties. That is the main reason I prefer to label the second category of theories that I identified at the beginning of this essay by using the term “rights-based” rather than one of the other terms in current use, such as “corrective justice.” The term helps to signal what is distinctive about and common to the entire family of theories in question.

John Goldberg and Benjamin Zipursky, who, like a number of other prominent rights theorists such as John Gardner and Gregory Keating, avoid employing the term “corrective justice” altogether, have been particularly forceful in defending an interpretation of existing tort doctrine in relational and rights-based terms (Goldberg & Zipursky, 1998). They point to the classic opinions of Judge Benjamin Cardozo as exemplifying this understanding. In *Palsgraf v. Long Island Railroad* (1928), 248 NY 339, at 343–4, Judge Cardozo wrote: “What the plaintiff must show is a ‘wrong’ to herself, i.e., the violation of her own right, and not merely a wrong to someone else, nor conduct ‘wrongful’ because unsocial, but not a ‘wrong’ to anyone.”

A number of rights theorists state that the starting-point of their theories is the principle of corrective justice. Weinrib defines corrective justice as “the idea that liability rectifies the injustice that one person inflicts on another” (Weinrib, 2002, p. 349). Coleman holds that the principle of corrective justice “states that individuals who are responsible for the losses of others have a duty to repair those losses” (Coleman, 2001, p. 15). Other theorists who have characterized their theories by reference to a principle of corrective justice have included George Fletcher (1972), Peter Benson (1992), Stephen Perry (1992), and Arthur Ripstein (2007). Self-identified corrective justice theorists have come in for a certain amount of criticism, most but not all of which seems misplaced, from other rights-based theorists for supposedly concentrating on remedy rather than substance (Goldberg & Zipursky, 1998, p. 1739; Stevens, 2007, pp. 327–8). The very use of the term “corrective” is said to emphasize after-the-fact rectification or compensation rather than the substantive rights and duties that lie at the core of tort law. For the most part, however, corrective justice theorists have taken the principle of corrective justice to extend to substantive rights and duties – the most important instance being the duty of care in negligence law and its correlative right – as well as to those rights and duties which arise at the stage of remedy. Thus Weinrib, for example, writes that “[t]he idea that correlativity informs the injustice, as well as its rectification, is a central insight of the corrective justice approach to the theory of liability” (Weinrib, 2002, p. 11).

For Weinrib, corrective justice is not just a moral principle but a *form* of justice. Following Aristotle, who first drew the distinction, corrective justice is to be contrasted with distributive justice, which is likewise a form of justice. On Weinrib’s view, corrective justice is concerned with, paradigmatically, interactions between two persons: A violation of corrective justice involves an interaction in which one party gains at the other’s expense; the rectification of the injustice, at the stage of remedy, is accomplished by the “annulment” of the parties’ correlative gain and loss. (Weinrib, 1995, pp. 63–5). Distributive justice is concerned with the distribution of some benefit or burden among the members of an indefinitely large group in accordance with some criterion of distribution. As we saw in the preceding section, distributive justice can be understood in terms of what Nozick calls patterning, which distributes a benefit or burden on the basis

of some variation on the formula “to each according to his or her \_\_\_\_” (Nozick, 1974, pp. 149–60).

The substance of Weinrib’s account of corrective justice, which draws strongly on the work of Kant, begins with the concept of exercising agency. According to Weinrib, “Kant locates the root of corrective justice in the free purposiveness of self-determining activity,” so that the equality which serves as the baseline for the operation of corrective justice is determined not, as it is for some theorists, by a distributively just arrangement of resources, but rather by “the equality of free wills in their impingement on one another” (Weinrib, 1995, p. 84). The person and tangible property of a given individual are said to be embodiments, in the Kantian sense, of that individual’s will, and as such cannot be subjected to wrongful interference by the acts of will of another. “Wrongful” here means either intentional or negligent interference. Weinrib thus defends a fault-based standard of liability for all instances of unintentional harm. If *A*’s wrongful exercise of agency results in harm to the person or property of *B*, *A* has a duty in corrective justice to compensate *B*, and *B* has a correlative right to be compensated (Weinrib, 1989a; 1995, pp. 56–144).

One difficulty with Weinrib’s approach is that the core-protected interests are not protected *as* interests, that is, as aspects of human well-being, but only as Kantian embodiments of the will. In Weinrib’s view, “the significance of particular rights [that is, embodiments of the will] consists solely in their being actualizations of [the capacity for rights] and not in their contribution to the satisfaction of the rights holders’ particular interests” (Weinrib, 1989a, p. 1290). In tort law, however, a loss is compensated precisely because, and to the extent that, it constitutes an interference with a particular interest. It is thus not clear how Weinrib’s theory can justify the paradigmatic tort remedy of compensatory damages (Perry, 1992, pp. 478–88). Weinrib has responded to this objection by distinguishing a “factual” from a “normative” loss, suggesting that the latter occurs “when one’s holdings are smaller than they ought to be.” Kantian right is then said to see “the factual in light of the normative”: If in causing a factual loss to the plaintiff the defendant has breached a duty correlative to the plaintiff’s right, he or she “is required to undo the consequences of [the] wrongful act by making good the factual loss” (Weinrib, 1995, pp. 116, 129). Without more, however, this approach seems vulnerable to the criticism that it assumes the conclusion it sets out to prove.

For Weinrib, the characterization of both corrective and distributive justice as forms of justice, or, as he also puts it, as modes of ordering, has implications for the realization of corrective and distributive justice in the legal order (Weinrib, 1995, pp. 72–5). Taking the example of personal injury law, he writes that the legal regime can be organized either correctively, in the form of tort law, or distributively, in the form of a social compensation scheme such as workers’ compensation or compulsory no-fault automobile insurance. If it is to be coherent, however, the law cannot, in Weinrib’s view, rest on a combination of corrective and distributive justifications. The characterization of corrective and distributive justice as forms of justice leads Weinrib to defend a version of formalism, which requires that a legal regime such as tort law be “internally intelligible” and possess a distinctive kind of unity and coherence (Weinrib, 1995, pp. 22–55, 75–6). For criticism of this aspect of Weinrib’s work, see Perry, 1993. Theorists who regard corrective justice simply as a moral principle, and not as a form of justice,

often argue that tort law can be understood in pluralist terms, thereby rejecting Weinrib's claim that corrective and distributive considerations cannot be mixed. According to these theorists, rights-based considerations have priority over distributive and economic considerations, but they do not rule out these other kinds of considerations altogether (Coleman, 1992, p. 428; Perry, 1993, pp. 618–19).

One issue that has been much discussed among rights theorists concerns the relationship between corrective and distributive justice. At one extreme is the distributive priority view that was discussed in the preceding section, which in effect regards corrective justice as completely subsumed by distributive justice. At another extreme is Weinrib's view, which regards corrective and distributive justice as completely independent of one another. Peter Benson, drawing on the work of Hegel, defends a similar view. Benson argues that "[a] person who, through an external manifestation of will, has brought something under his or her present and exclusive control prior to others is, relative to those others, entitled to it in corrective justice" (Benson, 1992, p. 543). He concludes that an entitlement in distributive justice can simultaneously constitute an entitlement in corrective justice if the holder of the entitlement has brought the relevant item under exclusive control.

Other theorists defend a view that falls between these extremes. They begin by pointing out that a moral entitlement to tangible property depends *partly* on distributive justice, but maintain that it does not depend on distributive justice alone. For example, Jules Coleman and Stephen Perry argue that legal property rights can be legitimate even when the background pattern of holdings deviates from an ideally just distribution, so long as the deviation is not too great. If an existing system of private property makes a contribution to individual well-being and social stability, then the legal entitlements it generates are, according to Coleman and Perry, morally justified and deserving of the protection of corrective justice; moreover, this is true even if those entitlements are vulnerable to redistributive action by the state (Coleman, 1992, pp. 350–4; Perry, 2000, pp. 253–63). Perry elaborates on this view more fully: "Distributive justice often contributes to the legitimacy of an entitlement that corrective justice protects, and in that sense there is a normative connection between the two. But corrective justice does not protect the entitlement *qua* distributive share, and its purpose is not to maintain or preserve a distributive scheme as such. Rather it protects a legitimate entitlement because interference with the entitlement *harms* the entitlement-holder. In that sense, corrective and distributive justice are conceptually independent" (Perry, 2000, p. 237, emphasis added).

Richard Epstein has defended a rights-based account of strict liability, which is grounded in a number of "paradigms" of causation, such as "A hit B," or "A created a dangerous condition that resulted in harm to B." These paradigms are meant to capture typical situations in which one person can be said to have unilaterally caused harm to another. Epstein's most important argument for the conclusion that unilaterally causing harm should give rise to strict liability is as follows: "The action in tort enables the injured party to require the defendant to treat the loss he has inflicted on another as though it were his own. If the [defendant] must bear all the costs in those cases in which it damages its own property, then it should bear the costs when it damages the property of another" (Epstein, 1973, p. 158). This argument can be understood as one aspect of a broad libertarian approach to moral and political philosophy. The more general

libertarian argument is that if a person chooses to act in the world, she is both fully entitled to whatever gains she may make and fully responsible for whatever harms she may suffer or cause. The claim about gains is implicit in the standard libertarian thesis that forced redistribution, for example by means of redistributive taxation, is in general illegitimate. The claim about harm is meant to capture the idea that, because the harms a person causes are properly regarded as costs of her activity, it would be unfair to require someone else to bear them. Both claims are premised on a certain understanding of the moral significance of action. I have a *choice* about whether to become active in the world, and if I choose activity over passivity then all subsequent consequences, both good and bad, are appropriately chalked up to my moral ledger and no one else's. Thus other persons are not entitled to share in whatever gains may accrue to me as a result of my activity, but by the same token I cannot force passive bystanders to absorb any losses my activities may create. We might rephrase the core claim of the libertarian argument by saying that agents should be required, for reasons of fairness rather than economic efficiency, to internalize the costs of their activities. As this formulation immediately suggests, however, a basic weakness of the argument is the Coasean point that tort losses are caused not by one actor or activity alone, but rather by the *interaction* of actors or activities. Thus internalization can no more underpin a moral argument for strict liability than it can an economic one: A tort loss cannot be assigned to one party's moral or economic ledger on causal grounds alone (Perry, 1988).

George Fletcher has, in a well-known article, defended a rights-based theory of torts which allows for both negligence and strict liability as standards of liability. Fletcher argues that the general principle underlying both negligence law and the areas of tort law that impose a standard of strict liability – for example, the law concerning abnormally dangerous activities – is the “paradigm of reciprocity”: “[A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant – in short, for injuries resulting from nonreciprocal risks” (Fletcher, 1972, p. 542). In the case of common activities, such as driving, plaintiff and defendant are ordinarily imposing similar risks on one another: Liability is therefore required only when the defendant injures the plaintiff as a result of imposing a risk that exceeds the level of background risk, which is how Fletcher understands the negligence standard. By contrast, abnormally dangerous activities, such as blasting, are uncommon, so that the very act of engaging in the activity creates a nonreciprocal risk: Strict liability is therefore in order.

Fletcher argues that the moral basis of the paradigm of reciprocity is the following, Rawls-inspired principle of equal security: “[W]e all have the right to the maximum amount of security compatible with a like security for everyone else” (Fletcher, 1972, p. 550). As the analogy with Rawls' first principle of justice suggests, Fletcher's principle of equal security is best understood as being grounded in distributive justice (distributing the good of security). Someone who imposes on another person a level of risk that this principle would deem excessive comes under an obligation to compensate for any loss that results because “[c]ompensation is a surrogate for the individual's right to the same security as enjoyed by others” (Fletcher, 1972, p. 550). Fletcher thus appeals, in effect, to a subsidiary distributive principle that reassigns losses so as to maintain the expected level of well-being guaranteed by the initial distribution of security. Since Fletcher assumes that a loss can only be reassigned to the particular

excessive-risk imposer who happened to cause it, he is implicitly relying on a *localized* conception of distributive justice. (The term is Perry's, not Fletcher's; see Perry, 1992, p. 461.) But the underlying logic of the distributive argument offers no basis for this restriction. It seems more sensible and fair, from the perspective of distributive justice, to require a given victim's loss to be shared among *all* persons who imposed nonreciprocal risks on others, without regard to whether they caused injury (and thus, *a fortiori*, without regard to whether they caused *this* injury). Given that the paradigm of reciprocity is best understood as resting on distributive justice, it should come as no surprise that, unlike the great majority of rights theorists, Fletcher rejects the correlativity of right and duty at the stage of remedy; he writes that the paradigm requires "bifurcation of the questions of who is entitled to compensation and who ought to pay" (Fletcher, 1972, p. 542). This leaves room for the possibility that injured persons can recover from a social compensation scheme rather than from the person who injured them (Fletcher, 1972, pp. 553–4).

Gregory Keating has offered a variation on Fletcher's theory of reciprocal risks that draws on Rawlsian social contract theory. Keating argues that the standard of care in negligence law should specify the terms of reasonable risk imposition rather than, as economic theories would have it, the terms of rational risk-imposition: "Social contract theory takes reasonableness to differ from rationality in that the canons of reasonableness are those that apply to a plurality of free and equal persons who seek to advance their diverse aims and aspirations on fair terms, whereas the canons of rationality are those that apply to single actors pursuing their own ends" (Keating, 1996, p. 313). Given the reasonable diversity of persons' aims and aspirations, the justification for accepting risk impositions by others is not the common acknowledgment of some shared final end, but rather reciprocity, which means the reciprocal right to expose others to equal risks. The most basic tenet of the social contract conception is that accident law must be "a realm of equal freedom and mutual benefit" (Keating, 1996, p. 342). More specifically, Keating defends the "disproportion test" as the best interpretation of the standard of due care in negligence law. According to the disproportion test, a defendant who does not take precautions with cost B has exercised due care only when B is substantially greater than PL, or, as Keating also puts it, only when B is "disproportionately greater than" PL (Keating, 1996, pp. 352–3). Given that the disproportion test is obviously a variation on the Learned Hand test, one might reasonably think that it is subject to some of the same difficulties. (See the discussion of these difficulties in the section of this essay on economic deterrence theories.) For example, so long as B is sufficiently high for a given defendant, he or she can impose very substantial risks on others. Furthermore, since B will vary considerably from one person's activity to another's, the disproportion test permits some persons to impose much greater risks than it permits others to impose. In other words, the test permits, contrary to Keating's understanding of reciprocity, the imposition of *unequal* risks.

Arthur Ripstein argues in favor of a rights-based, broadly Kantian theory which treats the fundamental concern of tort law as the obligations of private persons within a system of reciprocal limits on freedom. Ripstein argues that fault is a required feature of harm-based torts, such as negligence and nuisance, but never a feature of trespass-based torts, such as battery and trespass to land: "In the case of negligence, the require-

ment of due care reflects the need to reconcile the interest that separate persons have in settling and pursuing their own purposes. ... A standard of reasonable care protects equal freedom by demanding that private persons moderate their conduct, not abandon it. ... The primary question concerns the limits that one person's entitlement to have his use of his means [to pursue his own purposes] on another person's freedom to use hers. People cannot be constrained to never use their means in ways that could cause damage [which would lead to a standard of strict liability]. Instead, plaintiff must establish defendant's fault precisely because plaintiff must establish that defendant has wronged her by injuring her in the course of unduly risky conduct" (Ripstein, 2007, pp. 16–17).

Tony Honoré has defended a rights-based theory of tort law that begins with what he calls "outcome-responsibility" (Honoré, 1988). Outcome-responsibility means being responsible for both the beneficial and the harmful outcomes that a person brings about by her actions. It is a much broader concept than either moral or legal responsibility, and is, according to Honoré, the most basic type of responsibility in any community. To choose and execute a course of conduct inescapably involves *betting* on one's skill and one's assessment of the probabilities of various outcomes. If a person opts to make a U-turn rather than wait until he reaches the next traffic circle, he implicitly makes a bet that he will reach his destination more quickly. If he does reach his destination more quickly, he is outcome-responsible for that consequence and he appropriately reaps the benefits. If he causes an accident, he is likewise outcome-responsible for that consequence. Being outcome responsible for harm to another person does not automatically entail a duty to compensate. Such a duty arises when (1) one's action is negligent, or (2) the type of activity one is engaged in involves a special risk that justifies the imposition of strict liability. Honoré argues that allocating responsibility according to outcomes is defensible when the system is fair, which means that in its operation it must be impartial, reciprocal, and, over a period of time, beneficial for all persons. He further argues that the system is in fact fair for most persons who possess a minimum capacity for reasoned choice and action.

Drawing on Honoré's work, Perry has defended a different version of outcome-responsibility (Perry, 2001). According to Perry, we are outcome-responsible for those outcomes of our actions that can be said to be within our control. Control involves a general capacity on the part of an agent to foresee an outcome and to take steps to avoid its occurrence. To emphasize the importance of both foreseeability and avoidability to this account, Perry quotes Oliver Wendell Holmes: "[T]he only possible purpose of introducing [the element that the defendant should have made a choice] is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen" (Holmes, 1881, p. 95).

Theories that ground liability in tort on outcome-responsibility have been criticized on the ground that they can only justify liability against the background of an independent account of the rights of the parties (Ripstein, 2001). However, both Honoré's and Perry's accounts can be read as stating necessary conditions for the existence of substantive rights and their correlative duties. John Gardner offers an interpretation of Honoré's theory according to which outcome-responsibility bears two senses: One of these is roughly equivalent to liability, while the other is roughly equivalent to the defendant's obligation, or duty (Gardner, 2001, pp. 130–2).

I will conclude this survey of rights-based theories of tort law with some brief observations on the difficult problem of defining, from a rights-based perspective, the precise content of the standard of reasonable care in negligence law. The Learned Hand test seems clearly unsatisfactory in this regard, for the reasons considered earlier in connection with deterrence theory. Other suggestions concerning which risks should be characterized as unacceptable from a rights-based perspective include the following: nonreciprocal risks, meaning risks imposed by the defendant on the plaintiff that exceed those imposed by the plaintiff on the defendant (Fletcher, 1972, p. 546); risks that exceed a background level existing within a given community or activity (Fletcher, 1972, p. 549); risks that a reasonable person would recognize as substantial (Perry, 1988, pp. 169–71); risks that arise because the agent has failed to conform with certain community conventions (Coleman, 1992, pp. 357–60); and risks that fail the “disproportion test” (Keating, 1996, pp. 352–3). Each of these suggestions has some initial plausibility, but the determination of which among them, if any, is correct is by no means a simple one.

While this issue cannot be further considered here, it seems appropriate to conclude with the following observation. Even if the pure Learned Hand test is not an appropriate formulation of the negligence standard, it might nonetheless be the case that, to the extent that the correct rights-based formulation is indeterminate, economic considerations play at least a secondary role in the determination of what constitutes reasonable care. If this admittedly speculative suggestion turned out to be correct, then tort law would in an important sense be, to quote Jules Coleman’s provocative phrase, “a mixture of markets and morals” (Coleman, 1992, p. 428).

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## 4

# Criminal Law

LEO KATZ

### Why We Punish

"Philosophy of criminal law" may have a remote, impractical air about it, but in fact just answering relatively commonplace legal questions quickly propels one into the thicket of it. Imagine the legislature were thinking about a radical new law sharply increasing the penalty for drunk driving from its currently modest levels (often no more than the suspension of one's driver's license) to something as draconian as life imprisonment. The law may sound a bit harsh, its sponsors acknowledge, but they point out that at the cost of ruining the lives of a few drunk drivers we would be saving the lives of legions of potential drunk driving victims. And let us suppose further that the law's sponsors actually have the statistics to back up this claim. Would such a law be a good, or even an acceptable idea? If one believes, as a number of criminal codes explicitly say, that the purpose of the criminal law is to deter, and maybe to rehabilitate, then one might well say yes to this question. But do those codes in fact correctly state the purposes of criminal law? Most of us will react with decided unease to the prospect of meting out such draconian punishment for something like drunk driving. It just seems all out of proportion to the blameworthiness of the defendant's conduct. However salutary the consequences of such a law from a utilitarian point of view, it seems unfair. It seems in excess of what some deep-seated sense of just deserts calls for. It offends against some vague but strong sense of what kind of punishment fits what kind of crime, what kind of retribution is due what kind of misdeed. If one believes that it is this sense of proportionality that ought to determine how severely something like drunk driving can be punished, one is really embracing a rationale of punishment quite different from the fairly utilitarian aims of deterrence and rehabilitation. One is endorsing retributivism, the pursuit of retribution: proportionate punishment, one's just desert for its own, quite nonutilitarian sake.

Although retributivism tends to conform more closely to people's intuitions about punishment than utilitarianism, it is not without difficulties, and resolving those difficulties has been the subject of much debate. The most important challenge to retributivism has been its alleged vagueness: Everyone may agree that five years in prison is unjustly harsh desert for shoplifting, or that a five dollar fine is unjustly lenient desert for rape, but beyond such clear cases our intuitions seem to fail us. Is two years, five

years, or ten years the proper sanction for a rape? How about a bank robbery? Or accepting a bribe? Our sense of just deserts here seems to desert us. Which then makes us wonder: Is retributivism really a meaningful enough concept to be a suitable rationale for punishment?

But we shouldn't be too quick to give up on retribution. Some startling empirical studies have shown that our judgments about just deserts are actually a lot more precise than at first appears. These studies had their beginnings in a landmark book by Thomas Sellin and Marvin Wolfgang called *The Measurement of Delinquency* (Sellin & Wolfgang, 1964). Sellin, Wolfgang, and those who came after them confronted ordinary citizens with vivid descriptions of a range of offenses and furnished them with a variety of means of expressing their feelings about the gravity of an infraction. Aside from doing the obvious – having the subjects rate the offenses on a numerical scale – they furnished them with various mechanical means to better give vent to their feelings: they had subjects squeeze a power gauge (also known as a dynamometer), and they had them adjust the brightness of lights and the loudness of sounds, the assignment in each case being to squeeze, adjust and otherwise manipulate the equipment with an intensity of effort that seemed subjectively commensurate with the crime's seriousness. On the basis of those recorded intensities, they would assign a severity rating to that crime.

The experimenters then asked subjects to contemplate prison sentences of varying lengths and once again to express their feelings about the seriousness of the punishment by squeezing gauges and adjusting lights and sounds. The experimenters then assigned each sentence a severity rating. When the dust had settled, a remarkable finding emerged. Generally speaking, the sentence that the criminal justice system metes out for an offense turns out to carry the same severity rating as the offense itself. All of this strongly suggests that underlying our punishment practices is a fairly refined sense of just deserts (Gescheider, Catlin, & Fontana, 1982).

Retributivism is thus able to deflect the charge of vagueness. But there are other serious challenges which retributivism has a much harder time answering. Here are two of the more serious ones. Consider the case of a perfectly sane individual who commits a perfectly ordinary crime, and who goes perfectly mad after he has been caught. The general rule is that if he goes mad, that puts the criminal process on hold: If he has not yet been tried, he cannot be tried, and if he has been tried and sentenced already, he cannot be punished; indeed if he has been sentenced to die he cannot be executed, until and unless he recovers. (He can be put in an asylum, but that's different from punishment.) This rule is a fairly well entrenched feature of our criminal justice system, and more importantly, one that comports well with our intuition about what justice calls for. But it is a rule that is very difficult to square with retributivism: It is hard to see how any insanity that befalls a criminal after he has committed his crime diminishes the punishment that is his just deserts. (For the definitive treatment of this problem, see Duff, 1987, which first revealed its profound significance for theories of punishment).

Retributivism faces another, perhaps even more intriguing difficulty. Imagine the following. A man robs a bank in New York City. He is wearing no disguise. His image is accurately caught on the bank's cameras, wanted posters of him are quickly put up, and a man closely resembling the poster is soon arrested. At around the same time,

another man commits premeditated murder in Los Angeles. As it happens, he too does so in full view of a camera, wanted posters of him too are quickly produced and disseminated, and again an arrest of someone closely resembling him is soon made. But then a difficulty surfaces. Don't laugh, but the two men turn out to be identical twins. So despite the wonderfully clear-cut photographic evidence, the prosecutors are in a quandary. They know that one of the two committed the murder and one committed the bank robbery, but since neither is talking, they can't figure out who did what.

Now imagine further that the two cases are tried jointly before a judge, who arrives at the following solomonic solution: He declares both defendants guilty of bank robbery and imposes a commensurate sentence. He notes that since we know beyond a reasonable doubt that each of them is guilty of an offense at least as serious as bank robbery, though one of them of course is guilty of something far more serious yet, each at the very least deserves the bank robbery sentence. But the judgment will almost certainly be reversed on appeal. Any appellate court following the usual understanding of the matter will insist that the crime of which the defendant is convicted (in this case, bank robbery) be proved beyond a reasonable doubt. This has not been done. Therefore the verdict cannot stand. Yet from a retributivist point of view that is very hard to explain, since under the judge's verdict no defendant would be receiving a harsher sentence than he deserved.

Does this problem just seem too crazy to be taken seriously? It isn't. What I have given you is a highly stylized version of a very real, almost commonplace phenomenon: judges and juries not infrequently find themselves in the position where they know that the defendant has committed at least one of several crimes, but cannot tell which. The defendant is in possession of some stolen goods, which it is clear he obtained in one of several forbidden ways – by committing either (1) robbery, (2) larceny, (3) blackmail, (4) fraud, or (5) the purchase of stolen goods. Unless the court knows which of these he did beyond a reasonable doubt, it will have hard time justifying a conviction. Another interesting, not all that uncommon illustration of the same phenomenon is this: X is charged with murder. His friend Y gives heavily self-incriminating testimony leaving the jury with the strong impression that X could not have committed the murder, because he, Y, did it! The problem is that although Y's self-incriminating remarks are good enough to create reasonable doubt about X's guilt, they will usually not be good enough to prove Y's own guilt beyond a reasonable doubt. We are now in a position where we are totally certain that Y is guilty of one of two crimes: He either committed perjury when he gave his self-incriminating testimony or he actually committed the murder. We simply cannot prove beyond a reasonable doubt which of the two he is guilty of, and we thus have to let him go.

## How We Punish

In what way may someone be punished? Imprisonment, to be sure, as well as monetary fines. But what of the vast range of other unpleasant forms of treatment available? The criminal code provides us with a fairly exhaustive inventory of those: torture, mayhem, rape, castration, homicide. No civilized country allows these to be used, with the pos-

sible exception of the homicide (i.e., the death penalty), which remains controversial. Strangely, however, the main theories justifying the infliction of punishment – deterrence and retributivism – do not really have anything much to say about the justifiability of specific means of punishment. Although retributivism is associated with the “eye for an eye” metaphor, no modern day retributivist thinks of that as more than a metaphor. It is the severity of the punishment that should in some sense mirror the seriousness of the crime, not the actual means of punishment. And although deterrence might justify some intuitively quite disproportionate punishment, few deterrence advocates would consider means other than the customary ones to be acceptable. This consensus reflects deeply held intuitions that one should not easily overrule. In ethics, our intuitions are often more reliable than our justifications of them. But as a philosophical matter, one cannot but be interested in the question of why these and no other means of punishment are permissible?

The question becomes particularly puzzling, when we frame it in the following way. Suppose a wild-eyed legislator were to suggest that we could save ourselves a lot of public expenditures if we switched from the current forms of punishment to something he calls “voluntary torture.” Punishment, he explains is fundamentally about the infliction of distress. Without distress, there is neither deterrence nor retribution. But there are many ways to inflict distress, some cheaper than others. Detention is one of the more expensive ones, he points out. We could achieve the same amount of deterrence and retribution if instead of making the prisoner’s life moderately distressing for a prolonged period of time, which is what we presently do, we made it a living hell, but for a much shorter period of time. No one will be forced to undergo this form of punishment, he says; it will simply be an option. This, he adds, is quite different from what we had in the Middle Ages, precisely because it is voluntary: No one will be tortured unless he asks to be and unless we are sure that he is of sound mind and knows what he is doing. In other words, everyone will continue to have the option of serving his regular prison term, but whoever doesn’t want to, can opt for the torture alternative instead. Now why would anyone opt for the torture alternative? What the legislator has in mind is making the torture alternative just slightly more attractive than the prison sentence – not quite long enough and not quite severe enough to be judged by most prisoners the exact equivalent of a long sentence. What we are offering them, he says, is a “torture discount,” a little like the prepayment discount you get for paying your real estate taxes by a certain date. Although the discount is slight, prisoners will come to view torture much like a very painful medical procedure for curing paralysis – the paralysis of jail. The amount of deterrence and retribution we get out of the new system is virtually the same as before, but it will come so much more cheaply. “As you can see, it’s a win-win situation,” he cheerfully concludes.

Is there anything wrong with this proposal? Of course there is, but what? It isn’t easy to say. The system is voluntary. Society is a lot better off because it costs so little, and the prisoner is slightly better off because he gets the torture discount. That’s why the legislator sees this as a win-win transaction. *Yet despite all of that no civilized society would not dream of adopting it. Nor am I suggesting that it should.* But there is something perverse here that requires explanation. We have the possibility of an all-round beneficial reform but are adamantly refusing to avail ourselves of it. Why?

## What We Punish

The criminal code punishes a great many things, not just the expected stuff – murder, rape, theft, perjury, treason and the like. The US criminal code “contains thousands of separate prohibitions, many ridiculously obscure, such as the one against using the coat of arms of Switzerland in advertising, or using ‘Johnny Horizon’ as a trade name without the authorization of the Department of the Interior,” but it is not these minor offenses that have exercised legal philosophers. What has exercised them is rather clearly suggested by the titles of Joel Feinberg’s classic four-volume treatise on “The Limits of the Criminal Law.” Only a fourth of the work is preoccupied with the traditional kinds of offenses, which Feinberg puts under the heading “Harm to Others.” The remaining three volumes concern themselves with “Offense to Others,” like public nudity and other conduct that gives offense but does no tangible harm; “Harm to Self,” which ranges from suicide to the use of narcotics and gambling, and “Harmless Wrongdoing,” which encompasses such crimes as blackmail, price gouging and other forms of what one might call consensual exploitation.

From a philosophical point of view, blackmail probably poses the most interesting problem. Take the archetypical blackmail scenario. Busybody says to Philanderer, “Give me \$10,000, or I will reveal your secret love life to your wife.” On reflection, it should start to seem extremely puzzling that the law makes this a crime. There would be nothing criminal in Busybody telling Philanderer’s wife about his infidelities. Nor would there be anything criminal in his not telling her about them. Now usually when we have a right to do something or not do it, as we please, we are also entitled to make my doing it or not doing contingent on what someone is willing to pay me to do or not do it. If Busybody said to Philanderer, “Pay me \$10,000 for my car, or I will sell it to someone else,” he is also making something he is entitled to do or not do, namely sell the car or not sell it, contingent on what Philanderer is willing to pay him. But no one obviously has a problem with that. So what makes blackmail different? Why isn’t it Busybody’s good right to exchange his right to tell Philanderer’s wife for money? This is known as the paradox of blackmail and has proved remarkably intractable, despite valiant efforts by legions of legal scholars to tackle it.

Also of interest, though largely overlooked, even in Feinberg’s wide-ranging treatise, is something which I would call the problem of undercriminalization. There are a variety of situations in which it seems at once natural and strange that the law should not intervene. We find a nice illustration of this in *Gulliver’s Travels*. Among the Lillputians, Gulliver, informs us, “Ingratitude is a Capital Crime, as we read it to have been in some other Countries: For they reason thus; that whoever makes ill Returns to his Benefactors must needs be a common Enemy to the rest of Mankind, from whom he hath received no Obligations and therefore such a Man is not fit to live” (Swift, 1726). This is meant to be funny and absurd; presumably because everyone considers it obvious that although rank ingratitude might qualify as a great villainy, it could not possibly qualify as a felony, or even a misdemeanor. But although the conclusion seems obvious, the reason for it hardly is. So what is the reason? That is the problem of undercriminalization.

Michael Moore offers the following inventory of further examples of this genre:

Suicide is often deeply hurtful to persons other than the actor, persons to whom the actor is bound by many ties and to whom the actor owes an obligation to stay alive ... [Y]et my firm sense is that no one (including the state) has the right to prevent someone from killing themselves. There are many kinds of parental abuse apart from physical and sexual abuse. Some parents make their favouritism between siblings apparent on a daily basis, making the less favoured develop feelings of worthlessness and despair. Some parents, when they divorce, poison their children against the other parent. Some parents make servants out of their children, others spoil them rotten. Some parents dominate their children's ambition, telling them exactly what they will be in all aspects of life. Some imbue them with religious beliefs that can only be described as deranged, and some simply ignore their children emotionally, leaving them to find what warmth they can in this life. ... [T]hese are deeply immoral behaviors, yet we tend to think that the state should not use the criminal law to punish such wrongs. ... [O]r consider free speech. ... Revealing a damaging truth from a distant past of a now well-respected and virtuous citizen ... purely for motives of private gain is a plausible candidate for a serious moral wrong, and thus the punishment of such wrong is a legitimate state concern. Despite this, [we don't] think it should be punished. (Moore, 1993, p. 463)

Scholars have only just begun to probe the reasons for this reluctance to criminalize such conduct.

## Whom We Punish

One of the main preoccupations of the philosophy of criminal law has been the explanation of what is commonly referred to as the “general” part of the criminal law, the rules of attribution or responsibility. At the core of criminal law doctrines lie a series of concepts that make their appearance in connection with nearly every crime for which we might seek to hold someone liable: They are concepts like act, omission, intent, recklessness, causation, complicity, attempt, necessity, duress and self-defense. That's because in connection with any offense – be it murder, rape, theft, treason, tax evasion, or insider trading – it will matter whether the offense was committed intentionally or recklessly, whether the harm in question was precipitated by an act or an omission, whether it can really be said to have been caused by the defendant, whether the defendant was the perpetrator of the crime or a mere accomplice, whether he merely attempted it or whether he actually succeeded, and whether he acted under special pressures such as self-defense, necessity, or duress. Making these determinations raises numerous philosophically vexing questions. Not infrequently, the most narrow-sounding doctrinal issue, posed by the pedestrian facts of some everyday case, will turn out to be the miniature version of one of the deepest of moral conundrums, as I hope to show you with the four examples that follow.

My first example involves a thorny problem of causation. A man who happens to be afflicted with a frequently fatal sexually transmitted disease, something like AIDS, and who knows that he is afflicted with this disease, nonetheless has intercourse with a woman without first warning her. He infects her, though luckily she never comes down

with a full-fledged version of the disease. In addition to infecting her, however, he also impregnates her. The child that comes of this union also carries the fatal disease and dies within a year of its birth. The question for the court is a simple and basic one: Is the defendant guilty of homicide, specifically, has he committed involuntary manslaughter, or perhaps even murder?

On the one hand, one is inclined to say that of course his reckless act of intercourse fairly directly led to the child's death, and therefore, yes, he is guilty of manslaughter and given the extreme recklessness of his behavior, maybe even murder. On the other hand, there is the fact that the child is not really worse off on account of his father's recklessness: It isn't as though, but for his father's recklessness, the child would be flourishing. But for the father's recklessness, the child would never have been conceived in the first place! Given that, can one really find him guilty of homicide?

Which of these two possible ways of looking at the matter is right? Whichever view we choose turns out to have some oddball implications. If we say that he is guilty of murder, it seems we might then have to convict all parents who know that they carry a genetic disease that will eventually lead to their offspring's death. Worse yet, it seems we might be led to convict an obstetrician who prevents an endangered fetus from being spontaneously aborted, if it is then born with a fatal ailment that leads to its death a few years later. That's because both the parent with the genetic disease and the helpful obstetrician took actions which they knew had a high probability of leading to the death of the person in whose birth they had such a crucial part. Indeed if we press the logic of this view further, are we not driven to conclude that every mother is a murderer by virtue of the fact that she knowingly causes the death of every creature she causes to be born?

Unfortunately, if we take the alternative view, that the man with the infectious disease did not kill the baby, we are driven to some equally troublesome conclusions. Think of a woman who takes a perfectly legal recreational drug late in her pregnancy which she knows will precipitate the death of her baby soon after its birth. We tend to think she should be found guilty of something. Now suppose she argues that if she had realized that she would not be permitted access to that drug late in her pregnancy she would never have gone through with the pregnancy. If we exonerate the AIDS-infected father on the ground that but for his recklessness the child would never have been born in the first place, don't we have to exonerate that mother as well on the grounds that but for her recklessness her child would never have been born either? But for being able to take that drug, the mother would not have carried her child to term.

Lurking behind this somewhat specialized case is nothing less than the more general question that has come to preoccupy a number of philosophers, whether it is ever possible for one generation to complain about the actions of an earlier generation. That's because in a fundamental sense, all of us bear a very similar relationship to most mishaps that befall our children as the AIDS-infected father bears to his offspring. Suppose our generation decides to binge on energy, and that as a result five generations from now there is next to none left for our descendants. Do they have a right to complain? In a sense, they certainly do: our binging on energy causes their misery. On the other hand, is it really true that if we hadn't binged, they would now live more splendidly? No, it is not true. It is not true because of an easily overlooked fact, to which some moral philosophers have very insistently drawn attention. If we today had pursued a



different, less spendthrift energy policy, a lot of other things would be different as well. Different people would marry or mate with different people and would conceive children at different times. Some children would then be born that otherwise wouldn't have been. To be sure, in the first generation after us only a few such children would be born. But these children would mate with others and in the second generation there would be more children yet who would not have been born otherwise. And five generations onward, an entirely different population would exist than would exist if a different energy policy had been pursued. What this means is that a future generation will never be in a position to claim that it would be better off if we had not binged on oil. Someone would be better off, but not they. They would not have been conceived. That is, here as in the AIDS hypothetical, the very act that renders the lives of the future generation bad ones also causes them to come into existence. Therefore, here as in the AIDS hypothetical, the complainers can say that their ancestors' actions led to their plight. But they cannot say that but for those actions they would be better off. They would not be around.

So which is the appropriate perspective? Can future generations complain about past generations or not? Philosophers are all over the map on this. Thomas Schwartz (1978), who first focused on this problem, said they cannot complain. Derek Parfit (1987), who has examined the problem in more detail since then, says they *can* complain, and has devised a brilliant hypothetical to prove his point. Imagine, he says, two drugs both dispensed by the government. There is a disease that, if it afflicts women, causes their children to be born with some prominent congenital defect, say, a missing limb or two. There are two strains of the disease. For both we have cures of a sort, but slightly different cures. For strain A, we can give the mother the drug and the child will not have a problem. For strain B, we can tell the mother to wait until she has recovered and to have her children only then. Since the disease has produced no symptoms in the mother, testing is required to see whether she is infected. The government has two programs in place for preventing each strain of the disease. Program A tests women for whether they have strain A and if they do gives them the pill. Program B tests women for whether they have strain B, but if they do, they are not treated (there not being any treatment), but simply told to wait a month before conceiving, until the disease has had a chance to disappear. The first program forestalls about a thousand problem births per year. The second program forestalls about 2,000 problem births per year. If the government had to cut one of them, which should it cut? Why, clearly says Parfit, it should cut Program A, which only forestalls 1,000 and not 2,000 problem births. If we took Thomas Schwartz's view instead, we would have to reason thus: if we cut Program A, there will be 1,000 children who can say that but for what we did they would be uninjured, whereas if we cut Program B, there will not be a single child who can say that but for what we did they would be uninjured. The 2,000 children thus afflicted would not have been born if the government had pursued its old policy.

Parfit's hypothetical is inspired, but hardly clinches the matter. I do not, however, aim to solve the problem here. (Not that I could!) My only purpose in expounding on it is to show the close connection between a narrow question of causation in the criminal law and that broad question of intergenerational ethics.

Another perennial doctrinal question of the criminal law, with broad philosophical import, is the distinction between acts and omissions. One can cause death by an act

or by omitting to save someone's life. Ordinarily, in both law and morality, we only consider the former to be murder. There are exceptions: If I bear a special relationship to someone, if I'm his father or doctor, I might be found guilty of murder for deliberately or recklessly failing to save him when I could. In some jurisdictions I might even be considered guilty of murder, absent such a relationship, if I was nearby when the victim got in trouble and could have saved him with incredible ease. But generally speaking, omitting to save is not murder.

This doctrine has gained special significance in the courts' treatment of euthanasia. Most jurisdictions do not permit a doctor to kill a terminally ill patient (regardless of the patient's wishes or those of his family). They do, however, permit him to not apply extraordinary measures to prolong the life of such a patient (at least provided the patient or his family have so indicated). What this means is that different standards are applied to the doctor depending on whether he causes his patient to die by an act or an omission. He simply may not cause the patient's death by an act, however hopeless and painful the patient's plight appears to be. He may, however, cause the patient's death by an omission, at least if his patient's plight appears sufficiently hopeless and painful. Thus a lot hinges on a quintessentially philosophical issue whether a particular way of causing death is to be regarded as causing death by an act or as causing death by an omission. Perhaps the best way to get the philosophical flavor of that issue is to construct a little imaginary dialogue that might erupt between a prosecutor and a defendant in such a case. Imagine that a doctor has just unplugged the life-support system of an irreversibly comatose patient. Let us suppose further that if this measure could be described as an omission to save, we would deem it appropriate. Not so if it amounts to an act of killing. So which is it?

*Prosecutor: (to doctor):* You disconnected the life-support system that kept the patient going and the patient died. Therefore you clearly killed the patient.

*Doctor:* I did not. Each pulsation of the respirator and each drop of fluid introduced into the patient's body by intravenous feeding devices is comparable to a manually administered injection or item of medication. Hence disconnecting the mechanical devices is really the same as withholding such injection or medication.

*Prosecutor:* Nonsense. Suppose the patient's worst enemy had walked into the hospital and done what you did here. Suppose, that is, he had just simply disconnected the patient. He owes no special duty and he has killed by omission. Thus by the logic of your argument he should not be found guilty. And that seems preposterous.

*Doctor:* You've got things wrong. Suppose a child is drowning. I am about to save it. The child's worst enemy tackles me and thus prevents me from saving the child. I will have killed that child by an omission. But he will have killed it by an action inasmuch as he prevented me from saving it. The same thing can be said about your hypothetical about the patient's worst enemy. When the doctor disconnects, he is behaving as I am when I fail to go out to save the drowning child and thus only kills by omission. But when the enemy unplugs the equipment, he is preventing the doctor from treating the patient and thus behaving just like the fellow who is tack-

ling me to prevent me from swimming out to save the drowning child. He is causing death by an act. He is a killer.

*Prosecutor:* I agree with your analysis of the case of the drowning child. But I don't think you are applying it correctly to the situation of the terminal patient. Wouldn't it be more accurate to say that when a doctor disconnects the life-support equipment which is in the process of keeping the patient alive he is behaving like the person who tackles a would be rescuer and prevents him from saving the child? So he really is killing by an act rather than an omission.

*Doctor:* You are stretching the notion of prevention all out of shape. By that token one could say that the person who passed by a desperately thirsty man in the desert but who failed to open his water hose to him was preventing the water from reaching the man and thus was killing him.

*Prosecutor:* Look, suppose this man was living in a comatose state without support systems. But some other patient needed kidneys. Could you remove this man's kidneys on the grounds that they are basically the same as a dialysis machine, each pump of which is the equivalent to some manually administered treatment, which it is legitimate to withhold?

*Doctor:* If you insist on being commonsensical, don't introduce misleading metaphors like kidney dialysis. The fact is that there was here a sick man. If we intervened to save him, he lives. If we do not, he dies. We leave him no worse off than he would be without us. That's a classic case of letting die, not killing.

*Prosecutor:* What do you mean by saying "If we intervene to save him, he lives. If we do not, he dies. We leave him no worse off than he would be without us." If you had never started to help him in the first place, he would have ended up in the care of some other doctors, who would have saved him. He would thus not have died. So in fact he would be better off if you had never intervened in the situation. You did leave him worse off than he would be without you. That can hardly be described as a mere case of letting die.

*Doctor:* But how do you know those other doctors would have proceeded just as I did?

Although the debate is hardly at an end, we shall here cut it short. It has served its purpose, to illuminate the kinds of arguments that go into deciding whether to characterize conduct as an act or an omission.

Like my earlier AIDS hypothetical situation, the somewhat technical issue of the act-omission distinction connects up rather easily with all kinds of burning and concrete issues of practical ethics, the abortion controversy, for instance. This was famously illustrated with a celebrated hypothetical situation by the philosopher Judith Jarvis Thomson (1971). Imagine, Thomson wrote, a hospital patient wakes up one morning only to discover that while asleep he has been hooked up to a renowned violin virtuoso. The virtuoso is afflicted with a strange blood disease and will die unless he is able to remain continuously hooked up to a compatible healthy blood donor for the next nine months. Are you obligated to make the sacrifice the virtuoso asks of you? Must you

remain hooked up to him for the next nine months? Your judgment of this issue will largely depend on how firmly you believe in the ethical underpinnings of the act-omission distinction. If you are convinced by the ethical force of the distinction, if you think there is a world of an ethical difference between killing someone and letting him die (notwithstanding the prosecutor's arguments) to the contrary in the above dialogue), then you probably also judge the hospital patient entitled to disconnect from the virtuoso – and the pregnant woman entitled to abort.

For a further example of a doctrinal question with broad philosophical import, consider the law of complicity. If you help someone commit a crime, you are his accomplice. That sounds like a straightforward enough idea. What possible complications could arise in the course of implementing it? Plenty, it turns out. The most puzzling aspect of the concept of complicity is this basic question: What kind of contribution does it take to become an accomplice? The problem is neatly posed by a case like *Wilcox v. Jeffery* [1951] 1 All ER 464. In 1949, a man named Coleman Hawkins, described by the court as a “celebrated professor of the saxophone,” arrived in London to give a jazz concert at the Prince Theater. He did so without having a work permit. Among the people greeting him at the airport was one Herbert Wilcox, the owner of a magazine called *Jazz Illustrated*. Wilcox attended the concert and gave it an enthusiastic review. Then, no doubt to his great surprise, he was prosecuted for the crime of aiding and abetting someone (namely Coleman Hawkins) in violating the immigration law provision prohibiting foreigners from working in England without a permit.

The court explained:

[Wilcox] paid to go to the concert and he went there because he wanted to report it. He must, therefore, be held to have been present, taking part, concurring or encouraging, whatever word you like to use for expressing this conception. It was an illegal act on the part of Hawkins to play the saxophone or any other instrument at this concert. [Wilcox] clearly knew that it was an unlawful act for him to play. He had gone there to hear him, and his presence and his payment to go there was an encouragement. He went there to make use of the performance ... he went there ... to get “copy” for his newspaper. It might have been entirely different ... if he had gone there and protested, saying “the musicians’ union do not like you foreigners coming here and playing and you ought to get off the stage.” If he had booed, it might have been some evidence that he was not aiding and abetting. If he had as a member of clique to try to drown the noise of the saxophone, he might very likely be found not guilty of aiding and abetting. In this case, it seems clear that he was there, not only to approve and encourage what was done, but to take advantage of it by getting “copy” for his paper. [Thus we can say that] he aided and abetted. (*Wilcox v. Jeffery* [1951] 1 All ER 464)

Given the logic of the court's opinion, it is quite likely that it would have found all the other spectators to qualify as accomplices as well. Is this a sensible outcome? Many think not. Surely, they say, a more substantial contribution is needed to make someone an accomplice than something as insignificant as attending and applauding? On the other hand, together the various spectators did make a substantial contribution, one without which Hawkins's performance would not have taken place.

This sort of problem is quite common. We can shed light on it by thinking about a related phenomenon in economics: When you add up the marginal contributions of

every worker in some enterprise (the amount of the total product that would not have been produced if that worker were absent), you will generally find that these contributions do not add up to the enterprise's total output. After all, every corporation would pretty much run on as it does if any one of its employees were to be cut. That employee's absence would only subtract a smidgeon at most from the corporation's total output. Add up the smidgeons of all employees and their sum is still less than the total product the corporation turns out. This is just a special manifestation of the principle of diminishing marginal returns, which should perhaps more revealingly be called the principle of increasing marginal redundancy: in group activities everyone is more or less redundant and becomes increasingly so as the size of the group increases. Therefore, adding up the amounts that would not have been achieved but for any individual's presence does not add up to the total.

With this in mind, it's pretty easy to think of lots of cases that are like *Wilcox v. Jeffery*. Imagine that A, B, C, and D jointly issue some stock. As the law requires, they prepare a prospectus describing the stock, to be given to every potential purchaser. Many people buy. Then it turns out that the prospectus contained four egregious misrepresentations, falsehoods deliberately inserted to boost the value of the stock. When the truth comes out, the stock price falls. Some injured shareholders sue A, B, C, and D. The trial reveals that each of the four defendants contributed one of the misrepresentations. A study is conducted to assess the damages and it determines them to be \$1,111. The study also concluded that had there been only one misrepresentation, damages would have been \$1,000; had there been two, they would have been \$1,100, and had there been three they would have been \$1,110. In other words, one misrepresentation did \$1,000 worth of damage, a second added only \$100 to the total, a third only \$10, and a fourth only \$1.

It is now easier to understand the purpose of the law of complicity. Under traditional noncomplicity doctrines, everyone is only liable if, but for him, some substantial harm would not have happened. Under that approach, most members of a vicious group would be let off. Like the lying stock issuers, they would get off by reason of redundancy.

Once one has decided that it is possible to be an accomplice both to good and to bad deeds without actually making a difference, and certainly without making a substantial difference, one confronts a further problem. How is one going to distinguish bona fide accomplices from everyone else who did not make a difference to the outcome either? If I shout encouragement at a would-be assassin, I am an accomplice, even though the assassin was already determined to go ahead without my encouragement. If I shout encouragement at a deaf assassin, or at the television set depicting the assassination Jack Ruby-style, I am not an accomplice. Yet in both cases I shouted encouragement, which made no difference. Why in the former case am I an accomplice and not in the latter case?

The answer is that there are different ways of not making a difference. Just think about a firing squad shooting at a lone target. Suppose that the execution is witnessed by a silently approving onlooker. Every single soldier in that firing squad as well as the onlooker is superfluous to the deadly outcome. But only the soldiers qualify as accomplices. Not the onlooker. Because they are superfluous in very different ways. The soldiers are superfluous by reason of redundancy: if we subtracted other soldiers from the

scene, a given soldier's contribution to the outcome would eventually come to make a difference. The same cannot be said for the onlooker: he is superfluous by reason of his sheer ineffectuality. However, many other actors we subtract from the scene, the onlooker's contribution will never make a difference to the outcome.

This problem too rather easily connects up with a larger issue: the question of collective responsibility for the atrocities said to be committed by one country upon another. Understanding complicity helps us sort out the contradictory impulses that beset our thinking about the responsibility of entire communities. It tells us that we are right to discount the frequent objection members of such communities make on the ground that their contribution to the atrocity made no difference: redundancy is a feature of all collective action and is the very feature the doctrines of complicity were meant to cope with. Of course, the analysis of complicity also makes it clear that one must carefully distinguish different ways of making no difference: one must distinguish the redundancy of the soldier from the redundancy of the onlooker. And those two won't always be easy to keep apart. This, then, is the legitimate part of our discomfort with collective responsibility.

There is scarcely an issue in moral philosophy which fails to find its most concrete expression in the criminal law.

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## Public International Law

PHILIP BOBBITT

The term “international law” first appears in an essay by Jeremy Bentham, *The Introduction to the Principles of Morals and Legislation*, written in 1789. The timing and the definition of this term are significant; not only has “international law” developed as a result of the development of the state itself, but 1789 is usually taken as a turning point in the structure of the state. In that year, the state began to change from the dynastic, monarchical structures that had dominated Europe to a more abstracted structure that drew its legitimacy from its relationship to the nation, rather than to a royal family. Accordingly, although Bentham claims to be doing no more than renaming what had been called “the law of nations,” in fact he makes two important distinctions between that law and the new subject of international law. While the law of nations held that suits by a state against a private citizen of another state, and also suits between two citizens from different states, lay in the domain of the law of nations, Bentham excludes such cases and assumes that they properly belong to domestic rather than international law. For Bentham, as for us – at least until recently – international law has to do with relations among states within a society of states that is distinct from the relationships among rulers and their subjects that hitherto prevailed.

This chapter examines the applicability and sources of international law, both of which are distinct from that of domestic jurisprudence. This distinction lies in the society that gives rise to international law – a society of states rather than individuals. There are, nevertheless, profound links between domestic and international law such that one might well say that international law is constructed out of the assumptions of constitutional law. Different assumptions about the ground of legitimacy for the state, the bases for constitutional law, will ultimately yield a different international law; another transition is in fact already underway today.

### The Subject Matter of International Law

The subject matter of international law thus concerns the various legal relationships of the society of states (and not simply those of states, *per se*). These are principally: (1) those matters that arise among states because they do not fall within the authoritative scope of a single state, such as questions arising as to territory, jurisdiction, nationality,

migration, and other trans-state subjects; (2) issues that concern a state's behavior in relation to other states, such as the use of force, the construction of treaties, the operation of intergovernmental organizations; and (3) aspects of the state itself, including its definition, liability and immunity, and the relationship to its own nationals, especially its respect for their human rights.

### *Territory*

Whether the accession of territory is lawful is a matter for international law to determine. It is thus more than a coincidence that the first scholarly commentary that we may count as reflecting a modern perspective on the legal relations among states occurs in Spain at about the time Europe was struggling with the legal and moral issues arising from the discovery and exploration of the New World. Pope Gregory XIII's "line of demarcation" that divided up South America between the Portuguese and the Spanish more properly belongs to the medieval, religious function of the universal church than to the Renaissance displacement of that function which turned to legal relations among states as providing the defining rule for territorial legitimacy.

The modes of legitimate acquisition of territory include: discovery, occupation, prescription (as by long and peaceful possession), purchase from another state, or cession by another state, conquest, disposition by treaty, and assignment by an international organization (including assignment in trust, as was frequently done by the United Nations in the aftermath of World War II). The content of such transfers is by no means limited to the right to control activity within a defined border, but extends also to airspace, subsoil rights, and authority over the continental shelf and the deep seabed. Moreover, international law recognizes special domains that do not merely concern simple, absolute territorial rights but include various servitudes, demilitarized zones (such as those that divide North and South Korea), transit corridors (as once connected the Weimar Republic with East Prussia), free cities (such as Danzig), customs-free zones (such as the Coal and Steel Community of 1950s Europe) and concessions (such as those accorded Western powers by China in the latter part of the nineteenth century). Because territorial contiguity is one of the defining characteristics of the modern state – as opposed to the often widely separated inherited holdings of feudal domains – international law has taken this as a crucial subject for its development.

### *Jurisdiction*

The competence of a state to prescribe, adjudicate, and enforce its domestic law is primarily a matter of its territorial extent, with the rare exceptions when there are persons within its territory who are immune from its jurisdiction, and the rare occasions in which a state may exercise jurisdiction beyond its territory. To this territorial principle must be added four other principles that support jurisdiction: nationality, security, universality and passive personality. These principles are used to resolve those situations in which more than one state claims jurisdiction. Thus, although typically events occurring within a single state's territorial boundaries give that state a basis for the application of its laws, some offenses may be committed within the territory of one state that cause injury in another state. Most controversially, this has occurred when one



state seeks extraterritorial jurisdiction beyond its borders, as for example when the United States seeks to apply its antitrust laws to the actions of companies situated abroad whose anticompetitive behavior has effects within the United States. More than one state may legitimately claim jurisdiction; no rule of international law grants a state exclusive jurisdiction, even over matters that occur solely within its borders. In addition to jurisdiction arising from territoriality, states often exercise their authority based on the nationality of the party. A state may exercise jurisdiction over its nationals wherever they may be and with respect to offenses committed anywhere. Also a state may exercise jurisdiction over non-nationals whose offenses occur abroad but the effects of which are injurious to the security of the state. On this basis a state might claim jurisdiction over persons plotting to overthrow its government, although strictly speaking no “effects” had occurred within the target state, and the conspiracy took place abroad among nonnationals. British efforts to gain jurisdiction over IRA terrorists could rely on this basis even if the criminal acts took place outside the United Kingdom, were carried out by non-UK nationals, and were thwarted before any injuries could be accomplished. While this basis for state jurisdiction is typically relied upon when the acts are either not criminal in the state where they occur, or are unlikely of prosecution, it nevertheless relies upon a universality principle that the crimes for which prosecution is sought are universally recognized as such or are crimes pertaining to the whole of humanity. The idea of a universal crime over which all states could exercise jurisdiction regardless of the offender’s nationality or the place of incidence arose from the efforts to combat piracy; today, universal jurisdiction may be invoked over war crimes and acts of genocide. Whether torture also supports this jurisdiction is at present unclear. Finally, a state may exercise jurisdiction over its non-national with respect to acts that, although they occurred beyond the territory of the state, inflicted harm on that state’s national. This basis for jurisdiction – the passive personality principle – is vigorously contested by states in the Anglo-American tradition and was not included in the 1935 Draft Convention that recognizes the four other principles.

### *Nationality*

International law is the law for a society of states; thus it does not confer nationality on any individuals – including those born within the territory of a state – but it can be said to restrict the discretion of states to grant or withdraw nationality and to give rules by which contested versions of a single person’s nationality can be resolved. For example, the conferment of naturalization by a state depends on the acquiescence of the individuals – because to hold otherwise risks infringing the rights of the previous state of national origin; nor does a state have any duty to admit former nationals whom it has denationalized, excepting insofar as such refusal amounts to an effort to deprive the current state of residence of the right of expulsion. Similarly, the very freedom of states to determine the identity of their own nationals leads to two kinds of problems: the stateless person, from whom all nationality has been withdrawn, and the plural national. Statelessness is the absence of nationality, and its consequence is that a state that inflicts injury on a stateless person cannot be challenged by any other state attempting to invoke its protection for that person. With respect to plural nationals, every state whose nationality a person possesses may regard him as a national and no

state can invoke the protection of its nationals against a state to whom those persons are also nationals. The *Nottebohm* case – in which a German national, long resident in Guatemala, sought to avoid belligerent status at the time of World War II through a hasty and attenuated claim of Liechtenstein nationality – illustrates, however, the movement toward a realistic examination of a claimant's links with a particular state as determinative of the claims of protection asserted by one state against another with respect to a claimed national. In an effort to forestall the asserted protection of its nationals by certain states, "Calvo" clauses – named after a distinguished Argentine jurist and statesman – were frequently included in agreements between Latin American states and foreigners, purporting to waive the protection sought by nationals of foreign states. This ploy has been ineffective owing to the fact that international law recognizes such protection as a right of states and, thus, not alienable by a person.

### *International movement of persons*

As a general matter, states have the right to determine whom to admit within their borders, and whom to expel. If nationals of a state are expelled from another state, however, the state of nationality is obliged to receive them unless they are willing to go to another state that will admit them. It was in acknowledgment of this rule of international law that the United Kingdom in 1972 admitted all East African Asians who were not Ugandan nationals, following their despicable expulsion from Uganda. States are, however, free to repatriate aliens whom they regard as undesirable – although, as the Mariel exodus of Cubans to the United States showed, this is not always easy – and states are also absolutely free to admit persons seeking asylum, though they are not required under international law to do so. Under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, the Contracting Parties promised to accord refugees treatment no less favorable than that accorded aliens generally and agreed that no refugee once admitted could be expelled to territory "where his life or freedom would be questioned."

### *Global areas*

Despite the territorial basis of the modern state, and its association with nationality and jurisdiction, vast domains are the subject of international law even when this territorial basis is absent. Thus, the law of the sea, polar regions, air and outer space, as well as the global ecology that transcends any particular territory, are all important dimensions of international law. How would we determine the scope of a state's territorial sea, particularly in cases where offshore islands or the waters of a bay bounded by more than one state give rise to overlapping claims? How would we devise consistent rules for safe passage, the transit through international straits, and duty to aid vessels of a foreign flag in distress? Such subjects are not amenable to the decision of a single state alone. The continental shelf, which varies from region to region but is everywhere a potential source of minerals and sea life, provides but one example of the legal difficulty posed by oceanic resources that are not obviously within the political borders of a system of states organized by borders. The Grotius–Selden debate of the seventeenth century was resolved in favor of freedom of the high seas and ever since international

law has governed this subject. The high seas are defined by international law and are open to all commercial navigation, but only vessels that are associated with a particular state have such freedom – another reflection of the state-based nature of international law. A vessel that does not display a state flag may be detained and searched by any governmental vessel, and there must be a genuine link between the vessel and its state of origin. It was at first thought that the high seas would provide a model for the legal treatment of airspace, but the military use of the air to deliver lethal fire has led to the assertion of national airspace. Each state has sovereignty as to the airspace over its territory, and indeed this has also led to the assertion of aerial defense zones, extending hundreds of miles out to sea beyond a state's borders. But the most significant contemporary development in international law over subjects that are necessarily not amenable to a territorial treatment has been the growing consciousness of the need for rules to protect the global ecology. International law will embrace such problems as marine pollution, climatic change, air quality and the protection of the ozone layer, the byproducts of development, and the export of hazardous materials. The competitive nature of the state system puts the system itself at risk if there is a fragmentary application of national law to such subjects.

### *Use of force*

Before there was international law, there were doctrines on the legitimate use of force. A "just war," St Augustine wrote, was one to avenge injuries when "the nation or city against which war-like action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it." Thus for a very long time, violence and legitimacy have been intertwined. One might say that current doctrines on the use of force, however, are so completely different in their makeup as to suggest that pre-state notions represent a vestigial line that has been largely replaced. "Just war" doctrine was a theological idea, whereas the state system did not emerge until the universal political authority of the European Church had been shattered. When this happened, the right to use force was considered an attribute of every sovereign state, and the law of nations placed no restraints on the resort to war (though there were customs regarding permissible tactics in war). During pauses in the wars that began in 1914 and ended in 1990, there were efforts to outlaw war as an instrument of state policy. In 1928, the international community agreed on a comprehensive ban on war (except in self-defense). Sixty-three states signed the Kellogg-Briand Pact for the Renunciation of War that year. In 1945, the United Nations Charter banned the threat or use of force (except in self-defense or as authorized by the United Nations itself). But it is only since 1990 that there has been a consensus within the society of states – which is to say also among the great powers of that system – to rely on the rules and procedures of the Charter. It is thus far too soon to say whether this will be an effective rule of international law, but one can say that, at present, it is the law even if, as in the wars in the former state of Central Africa, it has been difficult to generate the moral and physical resources to enforce that law.

Article 2(4) of the UN Charter prohibits the use of force and, thus is not limited to war alone but embraces all threats and acts of international violence by states. There are three exceptions to this proscription: states may use force: (1) in self-defense on

behalf of themselves (as for example when Iran responded to the Iraq invasion in 1981) or in aid of other states (as when the United States sent forces to assist South Vietnam); or (2) as part of a collective enterprise taken pursuant to UN authorization (as was the case in Korea in 1949), or if the use of force is specifically endorsed by the UN Security Council (as was the case when Coalition forces invaded Iraq and Kuwait in 1990 and also with the barely averted US invasion of Haiti in 1995). "Self-defense," however, is not self-defining. The *Caroline* rules articulated by the US Secretary of State, Daniel Webster, provide that the state resorting to force in self-defense must demonstrate that the need for action was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Moreover, it is also generally accepted that the extent of the force used must be proportionate to the aggression it seeks to repel. But what of anticipatory retaliation, such as the Israeli attack on the United Arab Republic in 1967, that seeks to preempt an imminent aggression? And what of acts of force on behalf of state nationals abroad? The US mission to rescue hostages held in Iran in 1980, and the Israeli raid on Entebbe in 1976, provide instances of states acting without UN endorsement to intervene when the host state has either failed to protect foreign nationals on its territory or, as in the case of Iran, has illegally held them as hostages. What of humanitarian intervention, perhaps the most vexing case of all, in which a state uses force to protect another state's nationals against that state itself? It is very difficult to reconcile the flat textual prohibitions of Article 2(4) with transborder uses of force to support democratic self-determination or democratic processes when these have been hijacked, to suppress crimes against humanity including genocide, even to provide humanitarian aid where there is no constituted authority to request aid and the context of assistance is contested by force. It may be, however, that a common law of the Charter, composed of the actions of the UN Security Council, is creating a body of doctrine that stands on equal footing with text, such as the Council's subsequent ratification of North Atlantic Treaty Organization action in Kosovo.

### *Construction of treaties*

"Treaty" is the general term used to describe conventions, agreements, protocols, and exchanges of notes between or among states and governed by international law. International law does not distinguish between agreements identified as treaties and other agreements. The interpretation of treaties, including even those interpretive agreements such as the 1969 Vienna Convention of the Law of Treaties, is based on customary international law. As with other subjects of international law, the interpretation and application of treaties and interstate agreements necessarily cannot be confined to the domestic law of a single state, any more than the construction of a contract can be left to the opinion of a single party. Moreover, the importance of treaties is greater than ever before. Although the commercial movement of goods and services is largely governed by private international law, the international law of trade is largely treaty-based. Tariffs, quotas, contraband rules, subsidies, antidumping provisions, free trade zones, export controls on weapons technology and fissile material, all are governed by treaties.

To some extent, treaties are an effort to escape customary international law, much as statutory codification is an effort to escape the common law. But it would be errone-

ous to conclude that treaties privatize law; on the contrary, treaties depend upon international law because their construction depends on international law. Subjects such as treaty accession (by which a nonsignatory state may subsequently become bound by treaty provisions), reservation (which applies to multilateral agreements), amendment and modification (which apply to all agreements), interpretation and termination are all matters of international law.

### *Operation of intergovernmental organizations*

Organizations such as the United Nations and its predecessor the League of Nations were created as permanent congresses, not unlike the Congresses of Vienna, Verona, and Troppau, with representatives from member states. Other organizations, like the Red Cross and the World Health Organization, deal with governments but are not representative bodies. Still others, like the International Law Commission and the International Labor Organization, have state representatives but have a specialized function. All these organizations are created by international law, which determines their competence, functions, immunities, and legal status. Whereas formerly only states could bring claims against another state, make treaties, appear before international tribunals (or violate international law for that matter), today intergovernmental organizations can also do all these things. The role of nongovernmental organizations (NGOs), such as Greenpeace, the World Wildlife Federation, Amnesty International, and the World Council of Churches, is becoming increasingly influential owing to the ability of such groups to influence the publics of the democracies. Their status in international law, however, is still unclear.

### *The State*

By far the most important subject for international law is the state itself. The international order is composed of states; international law only became a reality once there was a society of states self-conscious enough to be constituted in a particular way. International law is built out of the most fundamental assumptions of constitutional law, since the state is a constitutional idea. The principal constitutional characteristics of the state – sovereignty, recognition, personality, continuity, integrity – all supply subjects for international law because they provide the constitutive elements of the society of states that is governed by that law.

### *Sovereignty*

Of these constitutional ideas, the most influential and profound is the idea of sovereignty. Essentially, international law rests on the assumption of European constitutional concepts of sovereignty. Like American ideas of sovereignty, these concepts provide a universal role for international law and an egalitarian status for states. Because all states are equal with respect to the rights of sovereignty, they are equal with respect to the rules of international law. The historical sources of this equality and universalism are, however, quite different for the American and European paradigms of sovereignty. European sovereignty proceeds by descent from that of princes whose

dynastic legitimacy was inherited by the states that they called into being; for this reason all states, like all princes, are equal with respect to the law. American sovereignty, by contrast, derives its legitimacy from its relationship to popular consent with similar consequences for the universality of international law and the equality of states, but for different reasons and, potentially, with somewhat different consequences.

For example, international law – owing to its origin in European constitutional ideas – accords absolute authority to the state over internal, domestic affairs. Indeed, we owe the term “sovereignty,” in this context, to an essay by Jean Bodin in 1577, entitled “*De la Republique*,” which took the familiar idea of *le souverain* (meaning that from which there was no higher appeal) and applied it to the state itself. Both Bodin and Hobbes, who were influential constitutional theorists, agreed that the sovereignty of a state cannot be restricted by a constitution. By contrast, if we derive the legitimacy of the state from the consent of its people, then certain domestic and internal practices by the state would effectively de-legitimize it, even to the extent of inviting intervention. One account of the US invasion of Panama depicts the Panamanian regime, which had usurped authority from a democratically elected government, as having lost its legal status as a legitimate government. This view would justify the resulting armed intervention that restored the legitimate regime, whereas on the conventional view of international law the invasion appears to be illicit.

### *Recognition*

The society of states must have a means of recognizing legitimate members of that society. The international community is in constant flux, as new states appear and new regimes come to power. The 1933 Montevideo Convention on Rights and Duties of States codifies the three criteria for the recognition of a state: (1) effective control of a defined territory with a permanent population; (2) capacity to conduct international relations; and (3) independence from other countries. Recognition is thus a purely factual matter and is to be distinguished from “relations,” which are a discretionary matter and can be accorded by a state to another state for a variety of political and diplomatic reasons.

### *Personality*

The possession of international personality means that an entity is capable of possessing international rights and obligations under international law and that it has the capacity to maintain its rights by bringing international claims. As late as 1912, Oppenheim could write, “States solely and exclusively are the subjects of international law.” This is no longer so. States alone may be parties to actions in the International Court of Justice (ICJ), but today not only states but also confederations, insurgents, the inhabitants of a territory placed in trusteeship, international organizations, certain individuals, and even the Holy See and the Knights of Malta (for anomalous historical reasons) have international legal personality. International organizations, whose principal members are states, enjoy *varying* degrees of personality. Like states they may have the capacity to enter into agreements with states, and if so this is evidence of some degree of international personality; such organizations may pursue legal rem-

edies under international law to enforce those agreements. International organizations, most notably the United Nations, have been deemed to have sufficient international personality even to press claims against states outside an enforceable agreement, for example, for reparations as a result of damages to the organization or its agents. Other examples include the European Union, which has the capacity to make treaties, and also to receive and accredit diplomats, and to post delegations to other international organizations. Individuals have limited personality. It is no longer the case that only states can assert the human rights of persons; for example, the European Convention on Human Rights provides that an individual can initiate a claim against his or her national state for breaches of that Convention. Nor is it still true that only states can be held responsible for breaching international law. Genocide and war crimes are now recognized as acts for which individuals can be held responsible.

### *Continuity*

Change in the attributes of a state may have legal consequences. Changes in territory (as by partition or unification), in population (through mass migration), in regime (through normal political processes or on account of a revolutionary overthrow of the pre-existing government), or in independent states (as by an occupying force or treaty arrangement) all call into question whether the new situation of the state carries with it all the rights and obligations of the previous regime. Although the *Restatement Third of Foreign Relations Law* and the 1978 Vienna Convention on State Succession take inconsistent positions, it may be that a consensus is emerging in the turmoil that has accompanied the collapse of the Soviet Union and the disintegration of Yugoslavia. Prior to this period, international commentators were focussed on the problems of continuity that are manifested in decolonization, as, for example, in the case of Hong Kong. What treaties entered into by the United Kingdom were retained by Hong Kong? Did it get to choose some and reject others? Is the fresh consent of its treaty partners required? These questions can now, in light of experience, be seen to be problems largely, though not entirely, of continuity. If the new state is a *successor* state, then it inherits all the rights and obligations of the previous state. For example, Russia was treated as a successor and thus retained the Security Council seat of the Soviet Union. If the new state is a breakaway, such as a former colony, it is entitled to a clean slate. The obligations previously maintained are not automatically incumbent on the new state, which has the option of assuming the treaties of its predecessor where these are appropriate. For example, Lithuania may succeed to the fishing rights maintained in the Baltic *vis-a-vis* other Baltic states on a proportionate basis. If the new state is the product of a dissolution, then no state is a true successor but all parties to the dissolution take the obligations of the former state. This was the case with the dissolved United Arab Republic and is, arguably, the case with the states of the former Yugoslavia. Finally, some kinds of treaty undertakings are fundamental to the essential continuity of the state system itself – especially boundary treaties, but also it may come to be recognized, certain arms control treaties and environmental undertakings – so that whatever the continuity of the particular state, the treaty obligations are necessarily imposed and remain intact.

*Integrity*

A state may lack integrity if the territorial composition of the state renders it unable to exist as a coherent entity. For example, the Vance-Owen proposals for the state of Bosnia-Herzegovina, the so-called ink-spot plan, posited a state with disparate provinces connected only by narrow corridors in the control of other states. This raises the question whether, as a legal matter, such a revised entity is a union, like the combined states of Colombia and Venezuela, or Denmark and Norway in the nineteenth century, or is in reality a dismembered state whose various parts are entitled to be treated separately. This may yet prove to be the case with a Palestinian state compound of Gaza and the West Bank.

*State liability*

Under international law, a state can be held liable for the consequences of its torts, breaches of contract, and nonpayment of debts, much as other juridical entities. What distinguishes the state in this respect is its unique duties to aliens and the authority it possesses over the instruments of the state. Thus, states can be held liable for the failure to prevent harm to aliens, the failure to prosecute persons who wrongfully injure aliens, and the judicial denial of justice to aliens. This follows from the duty a state owes to the society of states, since aliens are presumably (though not always) nationals of some other state. On a somewhat different basis, states can be held responsible for acts that are incident to state sovereignty, such as nationalization and expropriation of foreign property, the malign consequences of weapons testing or maneuvers by fleets at sea or the noncombat activities of their armed forces.

The most formidable state defense against any legal action is the invocation of the doctrine of sovereign immunity – according to which a state may not be sued without its consent, because no other state has legal authority over any other state and, thus, cannot assert jurisdiction over the latter (*par in parem non habet imperium*). This doctrine has been substantially modified as twentieth-century states have become involved in commercial enterprises, eventually putting such enterprises in a privileged competitive position. A distinction is now drawn between the acts of a state *qua* state (*jure imperii*) and its nongovernmental, proprietary acts (*jure gestionis*). Immunity is granted only with respect to the former and is typically denied to a state's trading and commercial activities. Other defenses asserted by the state include distress, necessity, self-defense, and, particularly, the sort of waivers embodied in the Calvo clauses discussed above.

*Human rights*

Prior to the UN Charter, human rights *per se* were not a subject for international law. Certain minority groups – racial, ethnic, religious – were guaranteed certain rights by way of special treaties, such as those concluded in Albania, Finland, and Poland and customary international law had long recognized freedom from slavery, but there was no general attempt to regulate human rights, owing to the assumption of complete sovereignty that underlay the society of states. How a state treated its own citizens was, as a legal matter, no other state's affair.



The signing of the Charter marked the beginning of a new era in international law, although not perhaps quite the era its signatories had in mind. For while it is easy to see the United Nations as a second-generation League of Nations, with all the legalism of parliamentarianism on-the-march, the development of a human rights agenda, largely enforced by nongovernmental organizations against the state-parties themselves was probably unforeseen by even its most visionary authors. The Charter calls for “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion” and announces as one of the purposes of the United Nations “to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” Nevertheless, it was the consequence of a series of developments that work against the vitality of the nation-state—international communications; multinational markets and financial consortia; instant and pervasive publicity; religious, ethnic, gender, and racial sectarianism – in other words, the increasing impossibility of governance – that made the effective promotion of human rights a subject of international law. Various multilateral conventions have been widely ratified that provide rights to minimal sustenance, freedom of opinion, freedom of peaceful assembly, habeas corpus, public trial of crimes, the right to marry and procreate, to be educated, to work and own property and, what is more important than any of these declarations, institutions have been constructed to vindicate such rights, including a reporting system (provided for by both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) and, in an optional protocol, for nonstate submissions by individuals to the Human Rights committee that receives such reports. Perhaps the most dramatic step has been taken in Europe, where the European Convention for the Protection of Human Rights and Fundamental Rights (1950) has led to the creation of a European Commission on Human Rights and a Court of Human Rights, a structure that has been mirrored in the 1976 American Convention on Human Rights. The importance of these institutions, which have little enforcement power, is to bring to light matters that, once public attention is engaged, take on a political life of their own. This reflects a profound shift in the assumptions of sovereignty, not only piercing the territorial veil of the state, but activating those non-state elements that, increasingly, play a role in governance itself.

## The Sources of International Law

Article 38 of the Statute of the International Court of Justice lists the sources of international law available to the Court in deciding cases. These are essentially the same sources for all international legal institutions, much as the forms of constitutional argument used by the US Supreme Court are the same forms as those of other American constitutional deciders. Article 38 directs the Court to:

- 1 international conventions, whether general or particular, establishing rules recognized by the contesting states;
- 2 ... international custom as evidence of a general practice accepted as law;

- 3 the general principles of law recognized by civilized nations;
- 4 judicial decisions and the writings of publicists.

The “sources” of law reveal what the system of laws regards as legitimate kinds of reasons. For example, the sources of US constitutional law are the text of the Constitution, the history of its proposal to and ratification by the people, the practices of American courts and other authoritative deciders who believe themselves to be compelled by constitutional norms, cost-benefit (or welfare) assessments, the constitutional structure and ethos in no particular hierarchy. The sources of international law are the texts of treaties, the intentions of the parties to an agreement (but not the history of the ratification of that agreement), decisions by international courts, widespread practices by national authoritative deciders who believe themselves guided by the norms of international law, and the common judicial ethos of civilized states. The hierarchy is: texts (treaties), doctrine (custom), ethos (general principles of states), and decisions (which are evidence of doctrine, but do not supply it).

The contrast with US constitutional law largely reflects two facts: (1) that international law is made out of the constitutional assumptions of European states that are fully sovereign (instead of the partial sovereignty of the United States) and thus need not, indeed cannot, rely on the ratification of a provision in derogation of the text; and (2) that there is no overarching world governmental structure whose sovereignty supersedes that of states and to whom the welfare of the society of states has been entrusted. Thus, some of the sources of argument for constitutional law simply drop out (structure and prudence, for example) and some are changed (historical argument shifting to the intentions of the signatories, and not of the domestic actors that ratify). This fact sometimes misleads commentators on international law to conclude that it is not actually “law” since it varies from our expectations about the sources of national law; this is usually expressed as arising from the lack of enforceability and/or the lack of an authoritative sovereign. But once we realize that national law also varies in the availability of sources (as for example, the absence of historical argument in European models) and as to the nature of the sovereign, this question resolves itself into a factual one about actual reliance on the norms of international law. Do authoritative deciders actually look to international law to guide and to implement their decisions? And once we realize that the forms of legal argument in national law are only invoked necessarily as rationales for decisions (rather than as guides to decisions), this factual question about reliance seems to have a clear answer. To a very great extent, and to an increasing extent for some centuries, states have rationalized their decisions by invoking the rules of international law. There is no sublime mechanism beyond this that amounts to “law.”

### *Treaties*

The phrase “any international conventions whether general or particular” refers to treaties. Sometimes treaties are analogized to legislation and sometimes to contracts. Multilateral conventions – those agreements to which there are more than two parties – may have such a broad effect owing to the large number of signatories that they seem to encompass as general an application as legislation. Provisions of such treaties are,

it was argued in the *North Sea Continental Shelf Cases*, of such broad adoption that they become customary international law and are thus binding on all states. Bilateral agreements look more like contracts: they expressly take the parties out of the background context of customary international law, just as a contract takes the signatories outside the market. Perhaps the best way to conceptualize the legal role of treaties is to think of their origin as contracts among princes, before the state superseded the princely function, and then to adapt such a contractual approach to the unique status of the state. Treaties are contracts (they are not legislation) but they are contracts among states, and because they are among states, they can have the general application of law (since the state, unlike typical parties to a contract, has a role in providing law). And, because are among states, when breached they are not enforced by third parties but rather by the adjusted expectations of the “market” – which will exact higher costs the next time a breaching state attempts to negotiate a treaty.

No state has ever disputed the principle that treaties are legally binding, the legal imperative *pacta sunt servanda*. That is because the binding nature of treaties is a dimension of statehood, and to disavow this principle would strike at the legitimacy of the state itself. States, of course, from time to time may break their treaty obligations, or repudiate treaties entered into by former governments, but there is no instance of a state suggesting that treaties are not, as a matter of law, binding. Treaties are the paramount method of determining what has been agreed to by states and, thus, if a treaty and a customary rule exist simultaneously on an issue in dispute, the treaty provision will govern, as illustrated in the *Wimbledon* case. There, the Permanent Court of International Justice (PICJ) accepted the argument that customary international law prohibited the passage of armaments through the territory of a neutral state, but nevertheless upheld a provision of the Treaty of Versailles that designated the Kiel Canal as “free and open to the vessels of commerce and war of all nations at peace with Germany.” In stopping a vessel flying a neutral flag, Germany had breached her obligations.

If the factual context within which a treaty was supposed to operate changes so radically that its purposes cannot be served by adherence to its provisions, then the doctrine *clausula rebus sic stantibus* can be invoked to relieve the parties of obligations that do not make sense in the new context. In these circumstances, a contracting party may unilaterally withdraw from a treaty. Some writers, notably Kelsen (1952), disparage this doctrine because, unlike similar national rules that allow for the modification of contract in domestic law, there is no objective and impartial authority to determine the validity of claims of changed circumstance, but it is clearly an overstatement to claim that “it is hardly possible to prove that the *clausula* is part of positive international law.” Rather, let us say that the effect of changed circumstances on treaty obligations is a matter of judgment, which judgment is ratified – like those of so-called objective authorities – by the acceptance and legitimacy accorded them.

### *Customary international law*

The customary practices of states have the status of international law when they are of sufficient duration, are widespread among the states of the international community, and are observed with the requisite consistency. Most importantly, such practices must be followed by states who believe themselves to be legally obliged to do so. Thus, custom

is to be distinguished from mere comity, the consequence of an interruption of which would not produce legitimate sanctions.

But what precisely amounts to the necessary duration – or sufficient consensus or consistency – is a matter of context. There is no minimum time limit, and practices that have been observed for only a short period may, nevertheless, achieve the status of international law if the practice is both extensive and virtually uniform, particularly where the subject matter of the practice is relatively novel. Inconsistency also, however, is not necessarily a bar: factors such as subject matter, the identity of the states involved and their number, are also relevant. A practice can be regarded as general, even if it is not of universal adoption; it is more important that the practices of those states likely to be affected by the rule are consistent. If a rule is to be derived from practice, the leading states concerned with the practice in the international community must concur. All this is a way of determining when the society of states has tacitly adopted a legal rule because a society of equal sovereigns is defined by its common adherence to rules. Because a paramount constitutive rule of this society, however, is that its members are equal and are sovereign, it follows that customary international law does not bind the state that – from the time of the inception of the rule – consistently rejects the practice. Change with respect to well-established rules occurs only when a state deliberately alters its practices, in the knowledge that to do so represents an illegal act: to change customary international law, a state must break it. If a sufficiently large number of influential states do so over time, a new rule comes into being. Like the rules of etiquette, an initial departure is always improper, but may, if ratified by time, retrospectively be the first act of a new and successful custom. Just as a practice of states cannot become a legal rule unless it is obeyed under the belief that international law imposes such an obligation (the requirement of *opinio juris sive necessitatis*), so the rule can only be changed by states that acknowledge they are refusing to obey a legal rule, rather than simply adopting a contrary one as if through inadvertence or disagreement as to what the law requires. A practice that is generally followed but that states feel free to disregard as a legal matter can neither attain the status of a rule of customary international law, nor, if disregarded, serve as a basis for a new contrary rule. Failure to establish this self-consciousness is fatal to the claim of custom as rule. In the *Lotus* case, for example, a French ship collided with a Turkish ship, killing eight Turkish seamen. A Turkish prosecution of the French captain was challenged by France who invoked the rule that matters occurring on a ship come exclusively within the jurisdiction of the state under whose flag the ship sailed. The PICJ held, however, that instances of states refraining from prosecution under similar circumstances did not demonstrate that states were aware of a legal duty requiring them to do so. Thus, a new practice can overtake an old one when the novel behavior departs from custom in the full awareness that the state is otherwise required to conform; and other states adopt the new practice in the expectation that the new rule – as it purports to be – requires them to behave in a certain way.

### *General principles*

The *principles* contemplated by this phrase are not those of international law, in the sense of rules of international behavior commonly adhered to by civilized states. That

definition would better comport with customary international law. Rather the “general principles” referred to are principles of domestic law shared by civilized states. Such principles, applied by the ICJ, its predecessor the PICJ, and other international tribunals, include: the responsibility of a principal for the acts of its apparent agent, collateral estoppel, reparations for damages, and so on. Relying on just such principles, the ICJ, faced in *Barcelona Traction* with a Canadian corporation doing business in Spain but owned largely by Belgians, held that the reality of Belgian control did not confer standing on Belgium to sue Spain for unpaid debts to the company. Where one might have supposed, in light of *Nottebohm* cited above, the “reality” of actual links between the state and the party seeking protection might be dispositive, the Court instead looked to the general principles that might be derived from the domestic courts of states that, as a usual matter, rely on the corporate residence when this diverges from the residence of the shareholder. This too has a certain practicality – for such “principles” are the result of innumerable encounters with similar legal problems and thus supply international law with a resource of useful legal rules. While these rules are typically procedural in nature, the resort to principles of equity can, on occasion, enter international law by this route. This is distinguishable from the agreement by the parties to decide a case *ex aequo et bono* – which will permit the reliance on equity as a decisive factor only with the consent of the parties.

Article 38 also provides the subsidiary means of “judicial decisions and the teachings of the most highly qualified publicists of the various nations” as evidence of what the content of international law is, that is, not as the content itself but as providing direction in determining that content. Thus, the arguments that derive from this source are not “doctrinal” in the usual sense of that term, and there is no rule of *stare decisis* in international law. Indeed it would be more accurate to say of customary international law that it follows the pattern of *stare decisis*, especially with respect to the requirement of *opinio juris*, because the binding nature of a precedent only strictly adheres in those situations amenable to argument as to *why* the rule was invoked in the allegedly governing case.

## Conclusion

The relationship between constitutional law and international law is undergoing significant changes. As the American paradigm of constitutional sovereignty becomes more widespread, an international order of limited sovereigns may replace the current legal order, with profound consequences for state responsibility and intervention. This comes at a time in the history of the state system when many threats to sovereignty are pressing the state – transborder environmental problems, migration, terrorism – and which will invite, therefore, the strategic change that invariably accompanies legal changes of this magnitude.

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## 6

# Constitutional Law and Religion

PERRY DANE

The encounter of religion and law excites both theology and jurisprudence. Religion and law are each potent, ancient forces in human life. Their dialogue is abiding, if culturally contingent. It is profound, if sometimes refreshingly mundane.

This chapter will devote most of its attention to the efforts of contemporary secular law to make sense of religion and determine its place in the civil state. That, however, is only one piece of a larger conversation on the relation of law and religion. It will do well to begin with some of those other pieces, if only to give the topic breathing room.

### The Encounter Writ Large

Religion and law both have many layers. Each is, to begin with, a movement in human history – a social, cultural, intellectual, and institutional phenomenon. In some societies, law and religion come close to merging. Even when they are distinct, they grip each other. Religious values, directly or through the conduit of moral sensibility, obviously influence legal traditions. But legal doctrines also affect religious thought. In the Hebrew Bible, the covenant between God and Israel echoes ancient Near Eastern treaty law. Patristic accounts of the efficacy of Christ's redemptive sacrifice drew on the Roman legal doctrine of "satisfaction."

The communal dramas of religion and law also mirror each other. Legal institutions take on religious trappings, sometimes to the point of idolatry. Religious institutions and communities not only take on legal trappings, but also often see themselves in juridical terms, and govern themselves through ecclesiastical law.

Nevertheless, in Western history, the effort of the civil legal order, in particular, to define itself as distinct from the religious order has long been a powerful theme. At its most realized, this effort helps mark the spirit of modernity. The story is not just one, however, of civil institutions escaping religious domination. Harold Berman (1983) has, to the contrary, linked the Western tradition of legal rationalism and separated competencies to the eleventh-century Papal revolution, as the Church articulated grounds for its autonomy from secular powers.

In other cultures, the story has played out differently, but not more simply. Traditional Islamic thought and practice, for example, which is often wrongly stereotyped as rejecting any division between clerical and state authority, has actually struggled throughout its history with trying to work out how the two domains could co-exist and even overlap without one swallowing the other (Hallaq, 2005; Feldman, 2008).

Law and religion, however, are not only historical or institutional phenomena. They are also each modes of thought, ways of negotiating reality. Like other modes of thought – science and art, for example – they are frames of reference, ideational and affective approaches to subjects both in and beyond their literal domain.

At one level, the resemblance between law and religion, as modes of thought, is striking. They are both hermeneutic activities. Both find efficacy in ritual. They each live a dialectic between a commitment to authority and tradition and a commitment to objective truth. They are both obsessed with questions of right and wrong, sin and crime. And both set that inquiry into a larger, structural, often hierarchical, frame.

A question for both law and religion, however, has been whether their resemblance implies a true bond, or is just a snare and a distraction. The question, whether asked from the perspective of religion or that of law, exposes deep debates about the nature of both.

For some religious traditions, including Judaism, Islam, and Hinduism, law is a central religious category. Traditional Judaism focuses on the halakhah (Jewish law). The halakhah is more than ritual law. It is a complete body of law, encompassing also tort, property, and all the rest. More important, the law is, in classical Judaism, an expression of divine love. To study and obey the law is to join with God in creating the world. Rabbi Joseph Soloveitchik explained Judaism's "this-worldliness," despite belief in afterlife, by emphasizing that "here, in this world, man is given the opportunity to create, act, accomplish, while there, in the world to come, he is powerless to change anything at all" (Soloveitchik, 1983, p. 32).

Other religious traditions have defined themselves against the worldview of law. Forms of Pauline Christianity are obvious examples. Classic Confucianism is another. For these traditions, "legalism" is a dangerous temptation. In antinomian Christianity, law is an impediment to grace. In classic Confucianism, law obstructs the internalization of norms of conduct and deference that are the true signs of virtue and character building.

For religious traditions that define the spiritual sensibility against law and its mode of thought, two questions remain. One is how to make sense of whatever place law retains in the religious community itself. For Christianity, this is the locus for the long debate over what Christian thinkers have historically labeled "Judaizing."

The second question is how to make sense of the place of law in the general social order. John Calvin ([1535] 1956, p. 46) argued that civil government was a response to human evil, designed to protect church and society and "establish general peace and tranquility" in this "mortal and transitory life" as an "aid necessary to our pilgrimage" to the "true country" in the Kingdom of God. Law is necessary, even "excellent," but second best. Put another way, Calvin and Soloveitchik agree that law is a distinctly human, material enterprise; paradise is not a place for law. The difference is that, for Calvin, this is so much the worse for us; for Soloveitchik, it is so much the worse for paradise.

These contrasting religious perspectives on the place of law continue in contemporary secular culture's effort to think through the role of law. Is it a redemptive enterprise, or a mere accessory, even an impediment, to more authentic forms of temporal salvation? Consider, on one side, the perfectionist impulse in the common law tradition and in American constitutionalism. On the other side, consider the antinomian impulses apparent even in Anglo-American legal thinking, in the claimed dis-



junction, transplanted from theology to jurisprudence, between the “letter” and “spirit” of the law.

Two contemporary authors capture this debate, and its layers of paradox, with words whose religious resonance is obvious. Robert Cover (1983, p. 9), amid his critique of the state of the law (and the law of the state), nevertheless, described the enterprise of law as the creation of normative worlds, fragile but lofty bridges between the real and the ideal:

Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions – the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away – dictate no particular set of transformations or efforts at transformation. But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium.

Grant Gilmore (1977, pp. 109, 110–11), in contrast, despite his affection for law and its history, nevertheless ended one of his books with these words:

As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved ...

Law reflects, but in no sense determines, the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

As religion has struggled with the place of legal modes of thought, the law has struggled, as intensely, with the place of religious modes of thought. Appropriately, a classic site for this struggle has been religious law itself. Jewish tradition has generally insisted that the meaning of halakhah is to be found in the art of interpretation and not in divination or prophetic charisma. A powerful expression of this doctrine is the famous tale of the sage who, dissenting on a question of law, successfully summons the voice of heaven to support his position. His opponents, however, declare that, though God revealed the law, it is no longer “in heaven” (*Baba Metzia*, 59b). Its meaning is not to be decided by God, but by the hermeneutic authority of the sages.

In the contemporary secular legal conversation, questions about the autonomy of law arise in at least two guises. One is the debate between positivists and natural lawyers. This is not the place to explore that debate. But worth note is that among the issues it raises are both the religiously resonant one of the existence of transcendent normative truths, and the more directly jurisprudential one of the relevance of such truths to law. (For some particularly interesting historical insights, see the work of Brian Tierney, e.g., Tierney, 2001.)

Debate over the autonomy of law also arises in another form more resonant with the rabbis’ tale. This is the disagreement, at least as important as the arid quarrel over legal positivism, about whether law has the resources, in its own hermeneutic traditions, to fulfill its social and intellectual mission, or whether it should look, unmediatedly, to the methods of economics, moral theory, or other disciplines.

These two dimensions of legal autonomy can configure themselves in various combinations. Part of the power of Ronald Dworkin's (1986) work, for example, is that he rejects legal positivism, but also embraces legal hermeneutics, and rests both views on a commitment to the "integrity" of law.

## Religion as an Ordinary and Extraordinary Constitutional Problem

The discussion so far has stressed the breadth of meaning of both "law" and "religion," and the dimensions of their discourse. We will need to return to these themes. Nevertheless, as noted, the bulk of this chapter will look to a more specific instance of the encounter, in the relationship between actual communities of faith and one type of legal order – the modern constitutional state.

This discussion will begin with constitutional law, the obvious focus for the civil inquiry into the place of religion. Equally interesting issues arise, however, in subconstitutional and nonconstitutional contexts. Tort, tax, zoning, and corporation law, and other fields, all encounter the difficulties of fitting religion into their conceptual schemes. Some of those topics will be treated, briefly, later.

In the United States, the First Amendment to the Constitution treats the legal place of religion in two clauses: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The *establishment clause* controls the involvement of government in religion, through sponsorship of religious acts and symbols, as in organized prayer in the public schools, or through material aid, as in subvention of parochial schools. The *free exercise clause* guarantees a measure of liberty for religious practice. A central problem in free exercise debate has been whether religious conviction should be a ground for exemption from otherwise generally applicable laws – compulsory education, drug laws, tax laws, and many others. Both religion clauses figure, as a doctrinal matter, in two other sets of problems: discrimination among religions, and the state's role in adjudicating disputes within religious institutions or arising out of disagreements about religious governance.

One question of philosophical interest about both religion clauses is their precise relation to other constitutional and political philosophical principles. Some commentators have argued for a close link between the religion clauses and other enumerated constitutional protections. Others, particularly in the tradition of modern liberal theory, have read them as pointers to a more rigorous vision of the place of government in a true liberal state. Neither of these approaches necessarily rejects the idea that religion deserves heightened legal interest. But both resist the idea that the calculus of rights would treat religion as fundamentally different from other realms of human life and to that extent reflect very similar impulses.

In the first of these projects – to wit, the effort to link the religion clauses to other provisions of the Bill of Rights – the free exercise clause is often cast as a protection of religious expression (for example, Marshall, 1983). It is part of a constellation of rights that also includes freedoms of speech and association. The establishment clause, meanwhile, is sometimes read as a specialized application of principles of equal protection (for example, Kurland, 1962). It guarantees nondiscrimination, both among religions and between religion and nonreligion.

That the religion clauses are, in certain respects, instances of more general constitutional principles is certain. Nevertheless, this reductionist hypothesis is radically incomplete. By tying the clauses so closely to other features of the constitutional order, it fails to account for the most interesting, theoretically excruciating, questions that they raise.

The most profound and difficult problem in free exercise law is the question of religion-based exemptions, and it is precisely this problem that is so difficult to assimilate to the larger logic of constitutional rights. Most constitutional civil liberties protections definably limit either what government can do, or how it can do it. The gravamen of a usual constitutional challenge is that there is something objectively wrong with a statute or policy. It is stifling speech, or invading privacy, or denying due process, or making forbidden distinctions.

Emblematic claims to religion-based exemptions do something different, however. They seek relief from a government action that is not defective itself, but happens to conflict with the religious obligations of the claimant. For example, a statute requiring drivers to have photographs on their licenses is not constitutionally suspect, as such. But it might happen to conflict with the views of persons who are trying to obey the biblical restriction on graven images. For that matter, *any* statute or government action, however ordinarily benign, is potentially subject to challenge under the free exercise clause (Dane, 2004, pp. 1722–32).

This property of religion-based exemptions raises obvious difficulties. Justice Scalia, in *Smith v. Employment Division*, 494 US 872, a 1990 Supreme Court case restricting such claims, called them “a constitutional anomaly,” “not remotely comparable” to other types of constitutional claims (p. 886). Arguments for religious exemptions do not merely raise substantive questions of constitutional meaning; they challenge the rule of law itself by positing “a private right to ignore generally applicable laws” (*Smith v. Employment Division*). Chief Justice Waite, writing about 110 years earlier in rejecting Mormon challenges to bigamy statutes, wrote that to allow such exemptions would be “in effect to permit every citizen to become a law unto himself” (*Reynolds v. United States*, 98 US 145, 167 [1878]).

Nevertheless, religion-based exemptions have a long history, in many jurisdictions. In 1963, in *Sherbert v. Verner*, 374 US 398 (1963), the Supreme Court read the free exercise clause to require religion-based exemptions from generally applicable laws unless the government could show a compelling interest in enforcing the law. When the Supreme Court, in *Smith*, gutted *Sherbert*, Congress responded with the Religious Freedom Restoration Act, 42 USC §2000bb (RFRA), which created a statutory para-constitutional right that effectively overruled the Court and reinstated the *Sherbert* test. (The Supreme Court invalidated RFRA’s application to the States on federalism grounds, *City of Boerne v. Flores*, 521 US 507 (1997), but – significantly – has not rejected its application to federal law.)

Whether *Sherbert* or *Smith* represents the better view of the matter, what remains undeniable is the appeal of religion-based exemptions within the argumentative space defined by the free exercise clause. That appeal requires a theory, which will not be found in the more conventional civil liberties provisions of the Constitution (cf. Sandel, 1989).

The problems raised by the effort to assimilate the Establishment Clause to more general principles of nondiscrimination are just as acute. To begin with, the analogy

does not explain why the clause requires, not only neutrality among persons but also, within its proper domain, neutrality among ideas. The Bill of Rights does not forbid the “establishment” of welfare liberalism, supply-side economics, or anticommunism, as long as that “establishment” does not entrench on individual liberties. But it does forbid the establishment of Presbyterianism, or of atheism.

Moreover, the clause forbids outright a range of government involvements with religion, discriminatory or not. The clause would bar official prayer in the public schools even if the prayers were rotated among every faith, or even interspersed with humanist texts. And the clause forbids direct aid to parochial schools, even if that aid is part of a general program extending to nonreligious institutions. If anything, the clause mandates discrimination as often as it forbids it, by denying to religious beliefs and institutions access to government favor available to their secular counterparts.

Even putting all these doctrinal issues to one side, there are two mysteries that a theory of the establishment clause must confront. One is the basic normative vision of the clause. The equal protection clause only limits the actions of government. But its normative vision, if only by analogy, is more general. It forbids, for example, only official racism. But it implicitly condemns, so to speak, racism in the larger society as well. The establishment clause is different. It mandates secular government. But it does so for the purpose of allowing, even nurturing, a religious society.

A second mystery of the establishment clause is its cultural specificity. Most constitutional liberties reflect principles shared, in spirit if not in detail, by other democratic legal traditions. The free exercise clause is no exception. But the establishment clause is. Many Western democracies do fine without separation of church and state, or with radically different versions of separation. England, for example, has an established church, but that does not prevent it from being broadly tolerant of other faiths. Many nations give aid to religious schools, convinced it furthers religious freedom rather than inhibiting it.

A final defect of efforts to assimilate the religion clauses to other parts of the constitutional fabric is that they do not effectively connect the two clauses to each other. The free exercise clause seems to “favor” religion, by granting religious persons entitlements and immunities not available to others. The establishment clause seems to “disfavor” religion, by denying to religious persons, institutions, and ideas, rights, and favors available to their secular counterparts. Presumably, these characterizations, and the apparent contradiction they generate, are too crude. But to go beyond them will take more than simple analogies to other parts of the Constitution.

As noted above, though, there is a second way to try to connect the religion clauses to broader themes. This solution, attractive to some architects of resurgent liberal theory, is to understand the religion clauses as foundations for a more rigorous account of the liberal state and its relation to the individual. John Rawls (1971, §§ 33–4), for example, treats free exercise of religion as part of a larger notion of “equal liberty of conscience,” subject to “the common interest in public order and security” (p. 212) but extending to both “moral and religious” claims (p. 206). With respect to the possible philosophical foundation of the establishment clause, liberal theory has suggested two different if related arguments. The broader argument, as articulated, for example, by Bruce Ackerman (1984, p. 359) understands the separation of church and state to exemplify the thoroughgoing “neutrality” to which a just state should adhere among

conceptions of the good. A somewhat narrower account, most closely identified with John Rawls's later work, posits that fundamental political policy must be grounded in reasons that are at least accessible to the "common human reason" – which is to say the secular reason – of all citizens (Rawls, 2005, pp. 136–7).

This is not the place to discuss at length contemporary philosophical liberalism and its arguments. As readings of the religion clauses, however, these analyses, though more interesting and powerful than readings that merely link the clauses to other parts of the existing constitutional logic, are still both too sweeping and too narrow.

That the new liberal analysis is too sweeping is evident from the theoretical and practical distance between the religion clauses, as they are usually understood, and the liberal effort to give them a more general theoretical grounding. A general "right of conscience" would radically revise, both jurisprudentially and substantively, the relationship between law and the individual. The free exercise clause, understood as limited to religious claims, does, to be sure, raise its own problems. But its narrow scope is what makes it more an island in a world of legal obligation than an overarching challenge to the notion of such obligation.

A generalized notion of "neutrality" among conceptions of the good raises similar problems. Some critics have argued that aspirations to pure neutrality are self-contradictory. Even if such neutrality is coherent, it still suggests a thinness to the vision of the state that many critics find pernicious.

Rawls's later argument was specifically intended to accommodate a somewhat thicker form of political discourse. But its exclusion of religious and similar arguments from the public square still seems unnecessary, even in the interests of democratic legitimacy and respect for individual rights (May, 2009), while imposing an arbitrary and possibly unjust restriction on public normative debate. Even on its own terms, Rawls's notion of "common human reason" reveals an unduly narrow understanding of religious discourse (Carter, 1993), and fails to appreciate how the prophetic, ethical, and narrative registers of religious argument (Gustafson, 2001) might successfully appeal even across the chasm of religious differences.

Moreover, these broad efforts to connect establishment clause values to liberal principles go well beyond anything in the actual doctrinal understanding of the clause. To be sure, the Supreme Court will in principle strike down laws that lack a "secular legislative purpose" (*Lemon v. Kurtzman*, 403 US 602, 612 [1971]).

But, despite occasional infelicity and doctrinal static in the opinions, there is an important difference, which the Court has respected, between statutes with impermissible religious purposes, on the one hand, and legislators motivated by religious arguments, on the other. Indeed, in practice, the Court has only used the "purpose prong" of the *Lemon* test to strike down legislation, such as bans on the teaching of evolution or displays of the Ten Commandments that would have been constitutionally suspicious in any event. (Dane, 2007, p. 552)

So much for why some liberal readings of the religion clauses are too sweeping. Even more revealing is the degree to which they are too narrow.

With respect to free exercise, the most profound problem is that "liberty of conscience" is in some ways a more limited and restricted idea than "freedom of religion." "Conscience" is a peculiarly deep, personal, sensation, different from mere preference

or convention. The impetus to religious behavior, on the other hand, often is a matter of habit or social conformity. It is not always deep. It is often subject to doctrinal and personal conditions and contingencies. Nevertheless, the law treats that impetus as different in kind from other reasons for action, however intensely felt. To extend this regime, by analogy, beyond religion would require more than “liberty of conscience.”

With respect to the establishment clause, the problem, again, is that simple appeals to general concepts such as “neutrality” or “common human reason” do not explain the specific constitutional hostility to financial subsidies to at least certain religious institutions, even as part of a “neutral” program of aid. Nor does it even adequately explain the specific restrictions on government sponsorship of religious acts and symbols. Indeed, far from reflecting a “thin” set of substantive commitments, the establishment clause, in its strictest interpretations, itself constitutes – and unapologetically so – a thick, non-neutral, vision of government and the common space of political discourse.

All this is not to say that the liberal arguments for liberty of conscience or strict neutrality are wrong. But whatever the merits of these ideas, they are not simple, linear, extensions of the principles underlying the religion clauses. Nor do they capture the distinct, long-held intuitions supporting those principles.

## Separation and Deference

For all the genuine links between the constitutional treatment of religion and broader issues in constitutional and political theory, those connections cannot be the whole of the matter. The constitutional treatment of religion is also an extension of the specific conversation between law and religion, which was the subject of the earlier part of this chapter.

A full constitutional theory of religion would have to take much into account. In the American context, one part of the story, as historian Mark DeWolfe Howe (1965) and many others have pointed out, has been the confluence of two opposing but complementary traditions: rationalist anticlericalism, which feared the divisive and tyrannical potential of religion, and radical Baptist thought, which feared the corrupting influence of the state on salvation. To put it even more bluntly, both the establishment clause and (if to a lesser extent) the free exercise clause reflect (at least in part) very specific, and to some extent very specifically American, theological commitments.

The operational effect of this confluence of influences and ideas might perhaps best be understood by reference to two overlapping principles that animate much of American legal thinking on law and religion. One principle is separation. The other is deference. The Constitution separates the religious and secular realms, however much they might overlap. And it seeks to defer to religion’s understanding of its own demands.

The notions of separation and deference are neither obvious nor uncontroversial. But they do help to make sense of the puzzling aspects of the law’s understanding of both disestablishment and free exercise. They also help dissolve the apparent contradictions between the two clauses. And, together, they embody the simple but deep idea, with both philosophical and theological implications, that for the law and civil state to succeed in its encounter with religion, it must take religion seriously, on religion’s own terms, without either co-opting it or being co-opted by it.

The establishment clause expresses the imperatives of separation and deference at the “wholesale” level. It broadly defines the respective jurisdictions of religion and civil state. This does require nondiscrimination. But it also requires avoidance of state involvement with religion, both to protect the state from religious encroachment, and to protect religion from the subordinating, homogenizing, influences of state sponsorship. That “deference” is at stake besides “separation” is evident to the extent that the state forgoes aspects of its sovereignty, such as certain potent symbols and rites, that could serve secular ends, but only at the expense of religion’s institutional and ideological autonomy.

The establishment clause is more than a civil liberties provision. It is a structural component of the constitutional order, more akin to federalism than to equal protection (Esbeck, 1998). This helps explain the two mysteries noted earlier. Structural provisions of the Constitution, unlike civil liberties provisions, have little to say, even by analogy, about the morality of social relations. It should therefore not surprise that the establishment clause’s vision of a secular government does not imply an accompanying vision of a secular society. And there should be no surprise at the establishment clause’s cultural specificity, much as we do not expect all Western democracies to have American-style federalism or tripartite government.

If the establishment clause draws a general, “wholesale,” set of boundaries between the domain of the state and the domain of religion, the free exercise clause expresses the imperatives of separation and deference at the “retail” level. It adjusts the boundaries to fit the perspectives and demands of particular faith traditions. Regulating drug use, requiring photographs on drivers’ licenses, and imposing taxes do not violate the establishment clause; they are legitimate subjects of secular interest. But the law might still, by providing religion-based exemptions, accommodate the insistence of some faiths that these are profoundly religious questions.

Religion-based exemptions are analogous to the deference that a court shows when it invokes choice of law rules to apply the law of a foreign state to a case before it. Exemptions do not “permit every citizen to become a law unto himself.” They do recognize that religious persons might, sometimes, legitimately be governed by a law other than the law of the state (Dane, 1980).

To invoke separation and deference as governing principles in the jurisprudence of both religion clauses is not to answer every doctrinal difficulty that those clauses raise. For the establishment clause, a central question remains how to distinguish impermissible involvement with religion from the permissible accommodation of individual religious exercise (see McConnell, 1985). This problem becomes particularly acute as the role of government expands. Two hundred years ago, it would have been easy to imagine a scrupulously secular government leaving room for a devoutly religious society. In today’s world, however, how much is left to “society” once “government” has taken its bite?

In the free exercise context, many important remaining questions are methodological. A recurring theme in the *Sherbert* era, which continues to figure in some constitutional contexts and in the working out of the Religious Freedom Restoration Act, is the play between ad hoc “balancing” and more categorical criteria. Even within the realm of balancing, there are doctrinal puzzles. For example, should “state interests” in the balance be measured in toto? Or should they be measured only at the margin, as they

apply to the persons seeking exemption? The state's general interest in compulsory education might be enormous. But its interest in enforcing compulsory education laws against a small group of Amish might be minimal. The paradox is this: to measure state interests in toto is beside the point. But to measure state interests only at the margin suggests that the number of persons seeking an exemption would be a factor in whether that exemption should be granted. This dilemma is a direct result of the special dynamic of religion-based exemptions; it affirms, for better or worse, their singular place in the normative order.

### The Intractable Residue

The principles of separation and deference help make sense of much of the present theory and doctrine of the American dispensation of law and religion. But that dispensation is too complex and textured to be captured fully by any formula. For example, the implications of separation and deference do not always converge. Some examples arise in the difficult domain of religious "institutional autonomy" cases that involve secular law in property and governance disputes arising within religious communities. American law has long held that secular courts may not resolve such disputes by interpreting for themselves the substantive content of theology or ecclesiastical law. That, though, leaves two alternatives. One is to bow to the pronouncements of authoritative religious tribunals, much as one court recognizes the judgments of another. The other is to ignore the religious element, and decide the dispute by sole reference to secular legal instruments such as deeds and contracts. The first approach emphasizes deference but compromises separation by requiring the secular court to decide, at the threshold, where the locus of religious authority is. The second approach is better at maintaining distance, but it risks depriving the church of the ability to project its own normative apparatus and vocabulary. In a deep sense, the "institutional autonomy" cases straddle the "wholesale" and "retail" pieces of the church-state puzzle, and their ultimate intractability – which goes beyond mere conceptual difficulty – might reflect the difficulty of locating them squarely in one box or the other (Dane, 2001).

The specter of intractability is also clear with respect to certain corners of the legal landscape where the religious and secular dimensions of life have become so intermeshed that the powerful acids of separation and deference become unhelpful or even destructive. One such context is marriage, which is why, for example, the current debate over same-sex marriage might turn out to be more difficult and complicated than either side to that debate is willing to admit (Dane, 2009).

### The Normative Landscape Beneath and Beyond the Constitution

Theories and doctrines of constitutional law are, as noted, only one piece of secular law's effort to make sense of religion and fit it into a larger normative landscape. Indeed, the full texture, and importance, of that act of imaginative composition only becomes fully apparent in the range of subconstitutional and nonconstitutional contexts in which the law confronts religion. A few examples will suffice.



Consider, as one apparently mundane example, the corporate form of churches. Legal theory usually treats corporations as creatures of the state, fundamentally different from natural persons. As Carl Zollmann (1917) pointed out decades ago, however, religious corporate identity is different. For religious entities, taking corporate form is only sometimes a constitutive act. It is more often a mediating act, putting a secular face on an existing reality.

For a church, corporate form might be the least important part of what it is. From the state's perspective, though, hard choices abound, each with practical and symbolic significance. Some American jurisdictions assimilate churches into their general law of nonprofit enterprise. Others have distinct provisions for religious corporations. Some, remarkably (or not so), have distinct statutory provisions specifying separate structures for different, named, denominations. Some state codes provide for legal forms, such as the "corporation sole" (used by Catholic and Episcopal bishops, among others), that are generally unavailable outside the religious context.

Religious institutions pose distinct problems for the theory of nonprofit enterprise. Corporate and tax codes distinguish between "public benefit" and "mutual benefit" nonprofits. Arguably, religious congregations are classic mutual benefit societies, like country clubs. The law, however, usually treats them, either as *sui generis*, or as public benefit societies, with charities and schools. If that is to be, however, what, strictly speaking, is their "public" benefit?

Modern English courts take this question seriously. They have, for example, denied property tax exemption to the London Mormon Temple, because it was not open to the general public (*Church of Jesus Christ of Latter-Day Saints*, [1963] 2 All ER 733, [1963] 3 WLR 88). Similarly, they have struck down charitable trusts for cloistered religious orders (as against active religious orders), holding that those trusts conferred no "public" benefit (*Gilmour v. Coats*, [1949] 1 All ER 848, [1949] WN 188).

No modern American court would reach such results. But that only confirms the original question: what, from the view of the law of nonprofits, is the "public benefit" of a church? Maybe the best answer is that treating churches as public benefit societies is more a recognition of their awkward place in the legal order than of their subjection to it.

The law's treatment of religious individuals must consider whether religious conduct is essentially voluntary, or is akin to status or obligation. Bankruptcy law, for example, asks whether religious tithing is, for various purposes, a legitimate expense of the bankrupt. To treat it as such is to allow less money to creditors. On the other hand, it is not clear why God is less of a "creditor" than a furniture store. (See 11 USC § 1325[b][2][A].)

A similar dilemma arises when tort law confronts Christian Scientists and others who refuse to seek medical treatment after an accident. Should their awards be reduced for failure to mitigate damages? At first glance, it seems that not doing so would unfairly saddle tortfeasors with the cost of tort victims' religious choices. On the other hand, as Guido Calabresi (1985, pp. 45–52) points out, it is also plausible to analogize the Christian Scientist to the proverbial victim with an "eggshell skull" whose unexpected but expensive injuries are, under settled doctrine, charged to the tortfeasor.

Finally, and most interestingly, the law must often choose between treating all religions alike, or treating religion like other things. In general tax law, employees who live in company-provided housing as a condition of employment need not count the

value of that housing as income. This rule would cover Catholic priests who live in a rectory. It would not, however, cover the housing allowances paid to clergy of faiths who are free to pick their own home. Thinking this distinction unfair, Congress included in the tax code a special provision (26 USC § 107), which allows all active clergy to exclude or deduct the value of their housing. By keeping theological differences from determining tax burdens, however, the law treats clergy as a special class distinct from other workers. The choice between these two forms of discrimination is inevitably unsatisfactory.

All the issues noted here can, with enough effort, be shoehorned into constitutional analysis. But that ignores the genuine puzzles that these problems pose in their own right to theories of tort, tax, nonprofits, and the like. It also overlooks that these are issues that the legal imagination must face regardless of any particular constitutional structure.

### A Continuing and Evolving Encounter

As this chapter has emphasized, the encounter of religion and law goes both ways. Fully appreciating the legal issues just discussed, constitutional and not, requires realizing that many of those issues have mirror images in questions that religious traditions ask about the state.

This chapter will not discuss in detail the theological effort to draw a picture of the state and find a place for it. It did note one piece of that effort earlier, in the citation from John Calvin ([1535] 1956). Other traditions have struggled with the same questions, and reached different conclusions.

The state's encounter with religion, and religion's encounter with the state, are dynamic and contingent processes, and deeply interactive. That interaction is apparent, for example, in the current struggle over the future of political Islam and its role – whether constructive or destructive – in the state (Feldman, 2008). The American dispensation of law and religion, as emphasized earlier, has traditionally drawn both on Enlightenment views of the state and the individual *and* on theological traditions that rejected state involvement in religious life. A crucial question is whether those original views and traditions, or (more accurately) their more contemporary reformulations, retain their salience. The headlines, including Supreme Court opinions limiting free exercise and eroding the establishment clause, or religious attacks on church-state separation, might lead one to wonder. But the older insights retain their pull. The precise terms of the encounter between the state and religion will continue to evolve, and will very likely continue to be full of puzzles, inconsistencies, and episodes of intractability. Through it all, though, some recognizable form of the distinct American experiment in framing the rules of engagement will very likely survive, at least as long as its underpinnings are understood, not as platitudes or power plays but as truly radical insights into the character of both religion and the state.

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# Constitutional Law and Interpretation

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Constitutional interpretation is the subject of those who study how the Constitution is applied. When this study is a matter of actual legal decision making by, for example, an American court addressing a constitutional question, constitutional interpretation focuses on certain forms of argument, developed over the centuries of such decision making. When this study is a speculative matter, it often amounts to the application of various extralegal disciplines to the analysis of the American method of constitutional decision making. Constitutional interpretation is distinguished from constitutional discourse, which is the means by which various interpretations are compared when not constrained by the context of making decisions according to law. Let us consider these two dimensions of constitutional interpretation: the application of the Constitution by government officials; and the normative analysis of this application by academic commentators.

## Interpretation According to Law

This activity – decision according to law – is practiced daily by government officials in all branches, and at all levels, and by private lawyers appealing to those officials for such decisions. Because the American Constitution is the sole source of law for the United States, every act by government must have a legitimating ground in the Constitution. Any act that is inconsistent with the Constitution is simply not law in the American system, and no legal claim is enforceable unless that enforcement is compatible with the Constitution. Thus, it may be said that every legal question depends, initially, on an interpretation of the Constitution.

The United States was created by the American people to be a state under law – and that law is the US Constitution. This striking political innovation, the state of limited sovereignty expressly created as such, brought forth another innovation, the written Constitution. For so long as the state is the embodiment of fully vested sovereignty, written instruments can be no more than codes, changeable at the will of the sovereign state. A written constitution is neither necessary nor particularly useful. It is only when sovereignty is at least partly detached from the state that it makes any sense to have a written constitution. Only then can a state be held to account by the People for

departing from the terms of its creation by the People. For this reason, Thomas Jefferson wrote that “[o]ur peculiar security is in the possession of a written Constitution.”

It is possible of course to have a limited government without a written constitution (for example, Great Britain) or a written constitution without a limited government (for example, the Third Reich), but it is very difficult to have a limited sovereign without a written instrument, though of course the promises of a written instrument cannot always forestall a government that usurps the sovereignty it claims to lie in the people (for example, the Soviet Union). But a limited sovereign, acting by means of a government under the written constraints of a wholly superior legal instrument, will at least face the embarrassment of exposure and illegitimacy when it contravenes that instrument.

One consequence of the decision to embody the constitution in a text is the necessity to construe that text. Of greater importance, however, is the decision to put the state under law; this means that the text that accomplishes this will be construed along legal lines, and thus that the *modalities* of legal argument will structure the rationales that determine the legitimate power of the state. Although it is often taken for granted, it is noteworthy that the ways in which the American Constitution can be legitimately interpreted are similar to the ways in which Anglo-American lawyers and judges construe legal documents generally. By relying on a written instrument to perfect the constitutional understanding of limited sovereignty, the framers of the constitution introduced the habits and style of Anglo-American legal argument into constitutional interpretation. The ways in which the constitution is interpreted could have been different; indeed they are different in other societies. In the United States, however, the familiar methods of the common law – the ways in which the texts of contracts, wills, promissory notes and deeds were construed – were the basis for the methods of constitutional construction once the state itself was put under law.

These methods may be characterized as the *forms* of constitutional argument, or the *modalities* of constitutional interpretation. They determine whether a proposition of constitutional law is true from a legal point of view, and thus they also show whether reliance on that proposition to support a legal decision is legitimate. These modalities might be categorized slightly differently, or subdivided, but the following six are generally accepted as composing the standard model of constitutional interpretation:

- 1 history, which relies on the original intentions of the ratifiers of the constitution;
- 2 text, which looks to the meaning of the words of the constitution as they would be interpreted by an average contemporary American today;
- 3 structure, which infers rules from the relationships that the constitution mandates between the structures it creates;
- 4 doctrine, which generates and applies rules from precedent;
- 5 ethos, which derives rules from those traditions that are reflected in the US constitutional practice;
- 6 prudence, which balances the costs and benefits of a proposed rule.

“Strict Construction” consists of an exclusive reliance on the first three forms.

It is an open question – and a hotly contested one in constitutional theory – whether there must be some rules that are generated outside these six modalities that would

enable us to choose among them when they conflict, and justify them when we rely on them. As Ronald Dworkin has observed, “Some parts of any constitutional theory must be independent of the intentions or beliefs or indeed the acts of the people the theory designates as framers. Some part must stand on its own political or moral theory; otherwise the theory would be wholly circular” (Dworkin, 1988). By contrast, Philip Bobbitt argues that such a resort to an external theory would de-legitimize the system of decision making (Bobbitt, 1991) and in any case only deepens the problem of circularity. Bobbitt uses that point to support his conclusion that the forms are modalities – determining the truth of a proposition (for example, that the guarantee of a free press applies to electronic media) but neither true nor false in themselves (for example, that the constitution *ought* to be construed according to the intentions of the ratifiers because they alone endowed the constitution with authority):

There is no constitutional legal argument outside these modalities. Outside these forms, a proposition about the US. Constitution can be a fact, or be elegant, or be amusing or even poetic; and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world. (Bobbitt, 1982)

We will return to this debate when we consider the academic commentary on the standard model. First let us explore more carefully these six forms, which are said to constrain legal decision making when construing the constitution.

### *History*

Historical arguments (or arguments from “original intent”) attempt to ascertain the intentions of the People, the ratifiers of the constitution, when they delegated their constitutive authority to the state with respect to a particular matter. One way to think of the constitution is to imagine it is a trust agreement, created by the People in their role as grantors. The constitution specifies what powers the government, the trustees, are to have and endows these agents with the authority to accomplish the goals of the trust, subject to various limitations explicitly in the agreement or implied by it or inherent in the very nature of such a delegation (for example, the grantors could not irrevocably or permanently give away their “inalienable rights” to sovereignty because these, by definition, cannot be delegated to a limited government). Since the grantors created the trust, it is they who provided the authority to dispose of the corpus of powers with which they endowed the trust and it is to their purposes and intentions that we must look in interpreting the trust agreement, especially the powers of the trustees. If the trustees act beyond these intentions, they are altering the trust agreement and their acts are *ultra vires*. As with a trust agreement, the governing text constrains the grantor’s agents only to the extent that the methods of interpreting that text compel such constraints.

Consider the following question: does the Equal Protection Clause of the Fourteenth Amendment protect whites from discrimination on the basis of their race when this discrimination is an effort to compensate African-Americans for the effects of slavery? Arguments that take a historical approach might be framed as follows: did the ratifiers of the Fourteenth Amendment intend to eradicate race discrimination, as evidenced by

the statements of some of the drafters of that amendment when they were arguing for its adoption, on the basis of which statements the public can be presumed to have relied? Or did the ratifiers intend that the amendment be used exclusively to eradicate the race discrimination that attended black slavery, as was also urged by some of the drafters of the amendment, and which purpose reflected the historical context – the emancipation of slaves and the victory of the Union in the American Civil War – in which ratification took place? Or is it simply unclear what the ratifiers' intentions might have been, since race discrimination in favor of African-Americans was rare and largely unconsidered?

The method of historical argument is difficult, as the methods of history are difficult, and for the same reasons. The more remote the period of ratification, the more elusive is the intention of the ratifiers, and the more likely that an unwanted anachronism will corrupt our efforts to retrieve that intention. Although Justice Rehnquist once sarcastically wrote that, "if those responsible for [the Bill of Rights and the Fourteenth Amendment] could have lived to know that their efforts had enshrined in the constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's rooms of truck stops ... it is not difficult to imagine their reaction," in fact it is quite difficult to imagine their reactions. What is altogether too easy is to imagine our reactions and then transpose them to parties who would themselves be different were they thinking and writing today. Indeed, since we can never wholly free ourselves of our own expectations and emphases when we study the past, we should not place too much confidence in our ability to understand even the articulated motives of the ratifiers, to say nothing of the problems of mixed motives, misunderstood objectives, absent evidence, and the like that bedevil the conscientious historian.

Alexander Bickel suggested one way of coping with this difficulty: he proposed that we attend to the larger principles enshrined in the constitutional language as evidence of the purpose of the ratifiers, while permitting flexibility as to the actual policies that will serve those principles. Based on the facts available to them, it may well have been that the ratifiers of the Equal Protection Clause believed it could co-exist quite undisturbed with the racial segregation of schools for example; but we, who have learned a great deal about the harm such segregation works on both races, and who have learned to respect and admire the intellectual achievements of the descendants of slaves, could only give effect to the purposes of the Equal Protection Clause by applying it in the context of our knowledge, not simply that available to its framers. To confine ourselves to the latter would actually frustrate the intentions of the ratifiers, just as if one were to mindlessly execute Leonardo's design for a helicopter in defiance of twentieth-century lift equations. This move, however, merely throws us back to a question of at least equal difficulty: how do we know that the ratifiers wished us to proceed in this way? Felix Frankfurter suggested that we may infer this command from the relative precision of the text: the more vague the language, the more we are free to execute principles and ignore the actual policies extant at the time of ratification. This seems like a valid and helpful inference; but how do we know that it is one the ratifiers would have endorsed, and not just a move to vacuous generalities that will efface their intentions? After all, how can we understand a principle when it is entirely stripped of policies?

Jefferson Powell (1985) has addressed this problem and shown rather convincingly that the framers and ratifiers of the original text and Bill of Rights intended that the constitution be construed by means of the entire range of legal arguments, that is, the full group of the modalities discussed above. His arguments are a rebuff to those who would confine constitutional interpretation to historical argument: the original intent, it seems, was not to be confined in this way.

### *Text*

Textual approaches are easily confused with historical approaches. Consider the determination by Chief Justice Roger Taney in *Dred Scott v. Sandford* whether Article III's diversity jurisdiction, which provides for suits in the federal courts by the citizens of one state against the citizens of another, encompasses a suit brought by a slave. In construing the term "citizen," Taney wrote,

We must inquire who, at that time [1787–9, that is, the time of ratification] were recognized as the citizens of a state, whose rights and liberties had been outraged by the English government and who declared their independence, and assumed powers of Government to defend their rights by force of arms.

In contrast to this historical approach, Taney might have adopted a textual form. He might have asked: does the text of the constitution, to the average contemporary person (at the time of *Dred Scott*), appear to declare that a former slave can bring suit in federal court because the text does not qualify the word citizen by race? Or does the text appear to deny this jurisdiction because the word *citizen* is used instead of *person*, a difference that implies a distinction by race? Or is the text simply noncommittal on this point? The answer in Taney's day, the mid-nineteenth century, might well have been different from the one he hypothesized for the late eighteenth century; the answer today would certainly be different.

The rationale for our attention to the contemporary construction of the words of the constitution is, like that for historical argument, based on the sovereignty of the People. Since they alone can consent to the actions of government, a text granting powers to that government cannot exceed the will of the People. Their ongoing acquiescence – in contrast to those of the generation "who declared their independence, and assumed the powers of Government" – amounts to an ongoing consent, but they cannot be presumed to consent to terms that differ from their own common use of those terms.

Textual approaches, despite their connection to contemporary life, can have their own anachronistic qualities. Should Congress be able to authorize an air force? The text speaks only of an army and navy. Consider, for example, the Supreme Court's interpretation of the Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Chief Justice William Howard Taft relied on textual argument when federal prohibition officers wire-tapped a telephone without seeking a warrant. Taft wrote:

The amendment itself shows that the search is to be of material things – the person, the house, his papers or his effects. The amendment does not forbid what was done here for



there was no seizure. The evidence was secured by the sense of hearing and that only. There was no entry of the houses. (*Olmstead v. United States*, 1928 at 464)

But the greatest impact of textual argument on constitutional interpretation has been in the area of the Fourteenth Amendment. Its demands drove the Supreme Court doctrine of incorporation by which the various texts of the Bill of Rights were “incorporated” in the Fourteenth Amendment and their guarantees applied against the states. This was principally the work of the great jurist Hugo Black who used the legitimacy conferred by textual approaches, and their popular appeal, to effect a dramatic change in human rights. Black’s textual jurisprudence was also felt in his construction of the terms of the Bill of Rights and his insistence that these terms were often “absolute.” Black cited the First Amendment’s provision that “Congress shall make no law ... abridging the freedom of speech” as an example of a textual absolute when read with the expectations of the ordinary citizen. “No law,” he often said, “means no law,” an unwelcome and surprising interpretation to the lawyers and commentators who pointed out that this would strike down all obscenity laws, defamation and anti-incitement statutes, conspiracy laws, and the like. Black conceded that some texts did not contain absolutes because they did not state their prohibitions quite so categorically. The Eighth Amendment, for example, bars “cruel and unusual punishments” but does not specifically bar any particular punishment. But whatever such punishments are determined to be, Black wrote, they are absolutely prohibited because that is what the language of the amendment would mean to the ordinary contemporary American. Thus textual approaches can be made to stand as a bulwark against the prudential and doctrinal approaches that tend to balance such texts against necessity or provide a lawyerly construction of the terms driven by the evolving context of their use.

### *Structure*

Structural arguments depend on the fact that the constitution creates certain relationships among the governmental entities it endows with power. Rather than focussing on the sovereignty of the People, which is the basis for textual and historical argument, structural argument focuses on the limited sovereignty of the government. Perhaps the most celebrated example of this form of argument is found in Part II of *McCulloch v. Maryland*. In determining whether a Maryland tax on the federally chartered Bank of the United States could be enforced, Chief Justice John Marshall declined to rely on any specific text, and explicitly rejected reliance on historical argument. Instead he offered a rationale based on inferences from the structure of federalism and representative government. A federal structure could not be maintained, he argued, if the states, whose officials are chosen by a state’s constituency only, could tax the agencies of the federal government and thereby levy a tax on the entire national constituency which was represented by Congress only. Such an argument made the state tax unconstitutional in principle, and not, as is often thought, because it carried with it “the power to destroy” the federal instrumentality. The constitutional structure would not tolerate such a practice even though the text and the ratification debates did not explicitly condemn it.

Structural arguments follow a deceptively simple form. They rely on an uncontroversial statement about the institutions of government, from which inferences are drawn regarding the relationship among such institutions or between those institutions and the people. For example, in *National League of Cities v. Usery*, Justice William H. Rehnquist addressed the constitutional question whether a state may be required by Congress to observe minimum wage laws with respect to state employees. His rationale was entirely structural: first he asserted simply that we have states, that is, the constitution sets up a federal system in which at least some matters must be left to state determination; second, he argued that otherwise state sovereignty would be entirely merged into the federal government and the federal *system* would cease to exist; finally, he concluded that the decision as to how much to pay certain state employees, if made by the federal government, would effectively remove a state's ability to make its own policies – because some policies would become more or less expensive depending on the decisions of Congress – and thus that this must be one of those matters committed to the states without which the federal system would collapse.

Many celebrated examples of this form of argument can be found in the recent jurisprudence of the Supreme Court. *Bowsher v. Synar* struck down an attempt to use an officer, who was in fact responsive to the legislative branch, as a key executive official. *INS v. Chadha* struck down the legislative veto on the grounds that it represented a new and additional process by which laws could be created, despite the limited sovereignty of the federal government.

Although structural argument is one of the classic modalities, and was much relied upon by Marshall during the early period of American constitutional interpretation, it fell into disuse during the first half of the twentieth century. Its renaissance may be credited to an important lecture given in 1969 by Charles L. Black, Jr. entitled “Structure and Relationship in Constitutional Law,” which described a mode of constitutional interpretation based on “inference from the structure and relationships created by the Constitution in all its parts or in some principal part.” Black argued against “Humpty-Dumpty textual manipulation” in place of a reliance on “the sort of political inference which not only underlies the textual manipulation but is, in a well constructed opinion, usually invoked to support the interpretation of the cryptic text.”

### *Prudence*

“The Constitution,” Justice Goldberg wrote in the most famous single sentence expression of prudential argument, “is not a suicide pact.” By this he meant that, whatever the commands of other forms of constitutional interpretation, a conclusion from those commands that was fatal to the state and its people was unacceptable. Of course, usually it does not come to that; indeed the balancing of costs and benefits entered the explicit jurisprudence of constitutional interpretation by the modest avenue of judicial restraint.

Justice Louis Brandeis, most notably in his concurrence in *Ashwander v. TVA*, brought prudential argument on this limited basis into judicial opinions in the twentieth century. His opinion provides various rules by which the Supreme Court can avoid unnecessarily deciding constitutional cases. Many of these derive from the restriction that the courts decide only “cases or controversies,” but the effect, as Brandeis intended,

is to enable the Court to better manage its own role, avoiding becoming embroiled in political conflicts that undermine the authority of the Court. “The most important thing we do,” he said, “is not deciding.” The means of avoiding decisions are crucial, Alexander Bickel wrote, “because [they] are the techniques that allow leeway to expediency.” Insofar as a judge may decide to decline to hear a case on the basis of expediency – preferring to leave the issue, for example, to other branches to decide – prudential techniques are more than simply methods. If the rationale for prudential argument is that the ends can sometimes justify the means, such arguments also provide the means by which such a rationale is brought to bear. As a consequence, these sorts of arguments open the door to a wide range of policy considerations.

Prudential arguments introduce the calculus of costs and benefits into constitutional decision making, and ask that the practical effects of a decision be weighed as a legitimate element in constitutional interpretation. A striking example occurred when, in the depths of the midwestern farm depression of the 1930s, the Minnesota legislature passed a statute providing for a moratorium on mortgage payments as a relief measure for hard-pressed farm debtors. On its face the statute seemed an example of precisely the sort of law the framers feared would threaten democracy when legislatures wished to confer economic benefits on the majority of voters at the expense of capital holders – debtors usually outnumbering creditors. To prevent this, and to prevent the destruction of the national capital market, Article I includes the Contracts Clause, whose text would appear to decisively negate any such measure as a mortgage moratorium. Nevertheless, the Court recognized the political expediency of the state’s action, upheld the statute and concluded,

It is manifest ... that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people, and the complexity of our economic interests, have inevitably led to an increased use of the origination of society in order to protect the very bases of individual opportunity ... [T]he question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. (*Home Building and Loan Association v. Blaisdell*)

Similarly, another national crisis provided the background for *Bowles v. Willingham* (1944). Congress enacted the Emergency Price Control Act, providing for administrative actions to freeze or reduce rents for housing adjacent to defense plants and bases. The Court upheld the statute in frankly prudential language:

Congress was dealing here with conditions created by activities resulting from a great war effort. A nation which can demand the lives of its men and women in waging that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a “fair return” on his property ... Congress ... has done all that due process under the war emergency requires. (at 519)

But prudential arguments are by no means confined to emergencies. One can see their distinctive watermark in a number of ordinary constitutional situations. The

characteristic reliance on facts, and the weighing of consequences, identifies these arguments.

### *Doctrine*

In a mature juridical system, cases of first impression – where the subject matter comes for a decision absent prior decisions on the same subject – are relatively rare. In highly adjudicated areas, like those of the First Amendment's guarantees of free speech and freedom of religion, or the Fifth Amendment's bar against involuntary self-incrimination, the weight of past decisions is heavy. These areas have become so heavily doctrinalized that the characteristic questions and cues looked for by the decider are likelier to come from prior decisions than from the constitution itself. The American version of the doctrine of *stare decisis*, however, does not accord prior decisions ultimate authority, and though given presumptive weight, they may be modified or overruled by a subsequent decider. This follows naturally from the limited sovereignty of the state, which must constantly check its actions against the grant of power from the people, that even the most respected precedent is vulnerable to re-evaluation.

With regard to decisions by judges, doctrine is created out of judicial opinions – precedents. But all official deciders are guided to some extent by precedent, and there is much constitutional doctrine in the prior practices of Congress and the President that is little commented on by scholars, but which may serve as the basis for doctrinal argument.

When a judge states that a neutral, general principle derived from case law construing the constitution is “on all fours with the instant case” and therefore governs it, or, instead, that no precedent can be found, or that the case law is divided such that no clear rule can be inferred, these arguments are drawn from a doctrinal modality. This form of argument relies on common law legal reasoning from the rationales offered by previous deciders. Thus it does not rely on dicta, which are mere expressions of opinion not crucial to the holding of the prior case. Only the rationale that leads to a decision may govern a later decision by serving as the basis on which the rule is determined. “Adjudication is meaningless unless the decision is reached by some rational process ... [and] if a decision is to be rational it must be based upon some rule, principle or standard,” wrote Hart and Sacks. On this view of judicial review, constitutional interpretation is essentially a common law function, arising from the Court's processes to deciding cases.

Doctrinal argument is assessed not only by the rigorous standards of inference from precedent, but also by two other requirements: that is, in addition to being principled, such argument must be neutral as to the parties (such that no rule systematically favors any particular class or group, but treats those similarly situated with respect to the rule, similarly) and general as to applicability (such that new cases governed by the rule are not routinely distinguished away, thereby confining a precedent to its facts.)

### *Ethos*

This modality of constitutional interpretation denotes an appeal to the very ethos of the American Constitution, an ethos that is clearly reflected in the superstructure of the

limited government and the legal traditions this superstructure reflects and fosters. The fundamental commitment of this ethos presumes that all residual authority remains in the private sphere and that the ultimate nature of that authority means that it cannot be delegated. A corollary to this idea is reflected in the ethos of self-government and representative institutions. The proto-constitutional document, the Declaration of Independence, manifests these foundational commitments.

Arguments from this modality can be called ethical arguments; they are defined by their appeal to those rights of individual choice that are beyond the power of government to compel. This contrasts with some European constitutions that, though they depend upon popular sovereignty, do not create limited states, so that personal rights are granted, rather than confirmed, by the constitutional instrument.

Ethical arguments are perhaps most evident where unremunerated – that is, non-textual – human rights are at stake. Thus they are associated with the open-textured language of the Ninth and Tenth Amendments, as well as the undeveloped privileges and immunities clause of the Fourteenth Amendment. Ethical arguments are also sometimes called arguments of substantive due process, because they attempt to give substantive, rather than procedural, content to the due process clauses of the constitution.

Structural and ethical arguments share some similarities: each is essentially an inferred set of arguments, and neither depends upon any particular text but rather on the necessary relationships that can be inferred from the overall arrangements embodied in the text. Structural argument, however, infers rules from the powers granted to governments; ethical argument, by contrast, infers rules from the powers retained by the people and thus denied to the government. Finally, while structural arguments can yield different results for the state and federal governments, respectively, ethical arguments apply to both equally. Those means that are denied to the federal government on the basis of ethical arguments are also usually denied to the states.

Sometimes ethical arguments are said to rely on natural law, which is correct only to the extent it can be said that the fundamental division in American constitutional life between the public and private is itself derivative of notions of natural law; and sometimes ethical arguments are equated with moral and political arguments, which is largely incorrect save in those cases where the constitutional ethos reflects a specific moral or political commitment (for example, the bar against involuntary servitude).

### *Academic commentary*

Commentary on constitutional interpretation has long been a fertile field for academic and political controversy. The dramatic Supreme Court decisions that restricted the New Deal, and then, after World War II, that were associated with the Warren Court – the desegregation, criminal procedure and abortion decisions, for example, sparked the current debate, which has largely concerned itself with the legitimacy of judicial review. This was famously stated by Alexander Bickel as arising from the Counter-majoritarian Objection – the claim that when an unelected court overturned the decisions of a legislature the court was acting without the legitimacy conferred by representation and was thus vulnerable, even suspect (Bickel, 1962).

Although the analysis of constitutional interpretation in terms of the modalities of argument is relatively new (Bobbitt, 1979, 1982), academic commentary in response to this objection can be seen to reflect positions derived from each of the forms of argument, and indeed has been evident to do so since the New Deal controversy brought the issue of legitimacy into play. Each of the modal forms was relied upon to limit the discretion of judges and create a particular basis for decision making, thereby restoring the legitimacy of their acts of judicial review. Thus jurists like Hugo Black developed a jurisprudence based on textual approaches which sought to legitimate court decisions by denying any independent role for the judiciary in interpreting the clear commands of the constitution. Charles L. Black, Jr, in a remarkable series of lectures (Black, 1969) and an influential article on *Brown* and the desegregation decisions (Black, 1960), described structural argument and defended the Court's role in face of attacks from a doctrinalist perspective (Wechsler, 1959). Doctrinalists generally were hesitant about the *Brown* decision, which overturned considerable precedent without actually offering the rationale that has later become apparent (see Hand, 1958) and were greatly distressed by the opinion in *Roe v. Wade* on similar grounds. One objective of the Legal Process School, a doctrinalist enterprise, was to rescue the legitimacy of official constitutional interpretation from the consequences of legal realism and the politicization of the Court (Hart, 1959) that the New Deal crisis had brought into high relief.

[The Court] does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats. Thus, the Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law. (Hart, 1959)

By contrast, Judge Robert Bork spoke for many adherents to the mode of historical argument when he testified that,

The judge's authority [to interpret the Constitution] derives entirely from the fact that he is applying the law and not his personal values ... [The only legitimate way to find the law] is by attempting to discern ... the intentions of... those ... who ratified our Constitution and its various amendments. The judge's responsibility is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know. If a judge abandons intention as his guide, there is no law available to him and he ... goes beyond this legitimate power. (Bork, 1987)

Bickel himself developed a sophisticated, prudential defense of judicial review (Bickel, 1961). A later generation pushed these rationales further, articulating highly sophisticated theories that legitimated judicial review on structural (Ely, 1980), prudential (Ackerman, 1991), historical (Berger, 1977), textual (Linde), ethical (Grey, 1987), and doctrinal (Brest & Levinson, 1983) grounds, and this was further enriched by still later commentators (historical: Amar, 1991; prudential: Tushnet, 1988; structural: Powell, 1985; ethical: Dworkin, 1988; textual: Balkin, 1987) who tended to write more self-consciously in the awareness that each preferred modality was only one among many (Tribe, 1985; Griffin, 1989).

Thus the debate moved from controversies like the Meese/Brennan exchange, which was still principally concerned with legitimating judicial review, to a new set of questions, such as “How can any of these forms of argument maintain legitimacy when each is not objective?”; “How does one choose among the forms when they conflict?”; “What is the role of collateral disciplines in clarifying the operation of these forms, or in providing ideal models for decision making?” (Fallon, 1987; Post, 1990). In the mid-1980s, Edwin Meese (1985), US Attorney-General in the Reagan Administration, had maintained that judicial review was confined to the modalities of strict construction (history, text, and structure), while Justice William Brennan had taken a more expansive view, stressing the prudential and ethical forms of argument. By the end of the decade, all the forms of argument were assimilated into a standard model that denied a privileged position to any particular modality of constitutional interpretation (Bobbitt, 1982), although the implications of this model remained highly contested.

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## Constitutional Law and Privacy

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The concept of privacy plays a significant role in constitutional thought and practice. Particularly in the United States, privacy's sometimes controversial role extends far beyond the ideals of private property and a political order comprised of separate public (governmental) and private (nongovernmental) spheres. It extends broadly to ideals of tolerant, limited and neutral government; and to moral conceptions of human beings as bearers of dignity, autonomy, rights, preferences or needs, by virtue of which they merit lives and ties substantially of their own choosing.

The expressions "privacy" and the "right to privacy" each have more than one usage in the law (Allen, 2007). For example, in US tort law, the "right to privacy" refers, individually and collectively, to four distinguishable rights (Prosser, 1960). Tortfeasors compensate plaintiffs for unauthorized: (1) intrusion into seclusion; (2) publication of private or embarrassing facts; (3) publicity placing another in a false light; and (4) commercial use of another's name, likeness, or identity. This collection of legal rights relating to interests in seclusion, reputation, personality, and identity suggests that adequate privacy obtains where restrictions on access to persons and personal information accord freedom from intrusion and public exposure.

Like US common law, US state and federal statutes ascribe privacy rights. New York and several other states have legislated versions of one or more of the common law privacy torts. Moreover, a wide array of state and federal statutes limit disclosure of information contained in medical, genetic, school, adoption, tax, census, library, video rental, financial, and criminal records. Statutes also regulate potentially invasive practices such as employee polygraph testing, collecting personal data from children over the internet, and the interception of wire and electronic communications.

Most US privacy statutes implicitly define "privacy" much as tort law implicitly defines it, as restrictions on access to people and information. However, some legislation denominated as "privacy" legislation implies a broader definition. In the name of "privacy," some statutes establish qualitative standards for the collection, use, transfer, and storage of information. Policy makers call these standards "fair information practices." Fair information practices require that data collectors: (1) protect personal information from public exposure and breaches of data security; (2) take reasonable steps to verify and update information; (3) allow individuals access to records of which they are the subject; and, finally, (4) obtain consent prior to otherwise unauthorized uses of

personal information. Fair information practices were first mandated in the United States by the federal Privacy Act of 1974, 5 USCA, Section 552a, a statute governing information held in US government record systems. Where privacy is conceived as a set of fair information practices, respecting privacy entails policies that grant the individual a degree of control over acquirable personal information.

The term “privacy” in US constitutional law often means what it means in US tort and statutory law, except that the fair information practices conception of privacy has not figured prominently in constitutional discourse. Constitutional uses of “privacy” include two that overlap those routinely found elsewhere in law. They are: (1) privacy used in a *physical* sense, to denote seclusion, solitude, security, or bodily integrity, at home and elsewhere; and (2) privacy used in an *informational* sense, to denote confidentiality, data protection, secrecy, or anonymity, especially with respect to correspondence, conversation, and records. But constitutional uses of “privacy” include a third one that is not yet characteristic of tort and statutory law: (3) privacy used in a *decisional* sense, to denote liberty, freedom, choice, or autonomy in decision making about sex, reproduction, marriage, family, and health care. In the First Amendment context, (4) privacy is used in an *associational* sense. The Supreme Court has described the right of individuals to belong to exclusive private social and political groups as a “privacy” right.

In countries around the world, protecting a broad range of privacy interests is deemed a core function of government. Virtually every country’s constitution or equivalent basic law provides for a degree of privacy protection by limiting government access to homes, possessions, persons and personal data (Blaustein & Flanz, 1994). The European Union Data Directive (1995) requires that member states implement strong minimum information privacy safeguards. Other EU directives mandate electronic privacy and data retention. The UN Universal Declaration of Human Rights recognizes the importance of privacy in its Article 12: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

### Focus: The United States

The specific idea of a constitutional right of privacy did not emerge until the twentieth century, when it sprang to life in American law. Well before its explicit emergence, however, provisions of the US Constitution, along with constitutionally mandated structural features of the US government, implied rights of privacy for free individuals, and male heads of households and their families (O’Brien, 1979; Flaherty, 1972). The constitutional law of the United States illustrates that the concept of privacy can play a major, complex role in a constitutional framework, whether or not “privacy” and a “right to privacy” are recognized explicitly.

Americans have nearly always assumed inherent moral and political limits on the power of state and federal government to dictate the terms of individual lives. They have nearly always embraced the principle that government may not arbitrarily or unduly curtail physical, informational, and decisional forms of privacy. *The Federalist* (1788) omits explicit mention of privacy as a principle of good government. Yet, this

collection of political essays written by Alexander Hamilton, James Madison, and John Jay to the people of New York urging adoption of a US Constitution with a strong central government, presupposes a division between a politically prior private people and a created public government.

Throughout, *The Federalist* makes reference to the people as the possessors of the “ultimate authority” and as the “only legitimate fountain of power” (Cooke, [1788] 1961: no. 45, p. 315; no. 49, p. 339). Along the same lines, it depicts the Constitution as creating a national government with specific, limited powers: “the people surrender nothing and as they retain everything, they have no need of particular reservations [of rights]” (Cooke, no. 84, p. 581). In explaining why a separate bill of rights was not necessary, Hamilton wrote that: “The truth is ... that the Constitution is itself ... a Bill of Rights” (Cooke, no. 84, p. 581). Rights of privacy are not set forth in *The Federalist*, but the papers refer to “private rights of particular classes of citizens” (Cooke, no. 78, p. 528). They appeal to “public and private confidence” (Cooke, no. 78, p. 529), and “certain immunities and modes of proceeding, which are relative to personal and private concerns” (Cooke, no. 84, p. 581).

The word “privacy” appears nowhere in the original eighteenth-century US Constitution or its amendments. Yet one finds in US constitutional law broad doctrines relating to the protection of physical, informational, associational, and decisional privacy. Most notably, Justices of the Supreme Court interpreting the text and logic of the Fourth Amendment have determined that a right to a “reasonable expectation of privacy” limits government search and seizure. The Court has also held that a fundamental “right of privacy” derived interpretatively from the Fourteenth Amendment limits government interference with autonomous personal decision making respecting birth control and abortion. The well-developed Fourth Amendment “reasonable expectation of privacy” doctrine and the controversial Fourteenth Amendment “right of privacy” doctrine are only part of the story of privacy in American constitutional jurisprudence. Constitutional case law and theory link privacy with the First Amendment (the privacy of religion, conscience, and group association), the Third Amendment (the privacy of the home), the Fifth Amendment (the privacy of thought and personality), and the Ninth Amendment (unenumerated privacy rights reserved to the people).

Privacy as a distinct legal value and right entered the mainstream of American tort law in the late nineteenth century, following the publication of “The Right to Privacy,” in the *Harvard Law Review*. The work of Boston lawyers Samuel Warren and Louis Brandeis (1890), the much-cited article successfully argued for the recognition of a new common law invasion of privacy tort. Although Warren and Brandeis made no claim for privacy as a constitutional value in the article, their work arguably laid the intellectual groundwork for the eventual development both of constitutional and statutory privacy rights. The Supreme Court cited the Warren and Brandeis article as persuasive authority as early as 1891 in *Botsford v. Union Pacific Railways*, 141 US 250 (1891). As a member of the Supreme Court dissenting in *Olmstead v. United States*, 277 US 438 (1928), Brandeis himself drew on the language of his 1890 article to defend privacy as a civilized value fit for a modern constitutional jurisprudence.

The federal Constitution does not include the word “privacy” or a cognate expression. But several state constitutions include express protections for “privacy,” “private life,” and “private affairs.” Since 1974, privacy has been one of the “inalienable rights”

specifically enumerated in Article I, Section 1, of the California Constitution. Under Article I, Section 22, of the constitution of Alaska, “The Right of the people to privacy is recognized and shall not be infringed.” In Hawaii, New Jersey, California, Florida, and Louisiana, case law holds that state privacy guarantees are stronger or broader than federal guarantees. States that do not have express privacy provisions in their constitutions, nonetheless, protect aspects of privacy. The courts have inferred a right of decisional privacy from the equal protection clause of the Massachusetts Constitution. In New Jersey, judges acknowledge a right of privacy under a “natural and Unalienable rights” provision of the state constitution; in Pennsylvania, judges acknowledge privacy rights as among the “Inherent rights of Mankind.”

The judicially developed “right to privacy” doctrines associated with state and federal constitutions concur that privacy interests are strong without being absolute. Even jurisdictions that elevate privacy interests to the level of fundamental, inalienable, or natural rights do not treat them as invariably superior to other interests. In practice, courts weigh and balance privacy interests against other important interests. Thus, to cite a series of illustrative examples, courts weigh the interests of prison inmates in freedom from cell searches and body-cavity searches against the state interest in law enforcement, corrections, and prison security. They weigh the interests of high school students in control over their lockers, handbags, hairstyles, bodies, and clothing against the interests of public school administrators in discipline, security, and education. They weigh the interests of highway motorists in unmolested travel against the interest of the public police in traffic safety.

To cite additional examples, courts weigh the interest in choosing one’s own spouse against the state interest in family stability, child welfare, and inheritance. They weigh interests in collecting sexually explicit materials in the home, against a state interest in regulating the manufacture and sale of obscenity. They weigh patients’ interests in confidentiality against the health data-collection needs of state agencies and insurance companies. Courts weigh the “right to die” of people with incurable diseases against the state interest in preventing coercion and disrespect for life. Judges balance interests of employees in avoiding drug, alcohol, and AIDS testing against employers’ interest in efficiency and workplace safety. They balance the interests of corporations in the confidentiality of competitive business strategies and practices against the public interest in regulatory compliance and consumer protection. Lastly, courts weigh the privacy interests of the President in his notes, papers, and sound recordings against the national interest in preserving the separation of powers and the integrity of the executive branch.

Some state constitutions that confer privacy rights specify how privacy considerations are to be weighed in the light of competing social concerns. In Montana, for example, a constitutional privacy right may be overcome only by a “compelling” state interest. The US Supreme Court does not always require the showing of a compelling state interest in cases that relate to constitutional privacy interests. In *Cruzan v. Missouri Department of Health*, 497 US 261 (1990), the Court considered whether parents of an automobile accident victim in a permanent vegetative state were entitled to make a “private” decision on her behalf to terminate hydration and nutrition. The Court recognized an important Fourteenth Amendment liberty interest in private medical decision making; but held that the state has a “legitimate interest” in erecting procedural evidentiary barriers to family decision making.

The Supreme Court applied a “compelling interest” standard in cases scrutinizing the regulation of abortion, beginning with *Roe v. Wade*, 410 US 113 (1973). Under this highest of standards of review, a governmental regulation that interferes with the decision to abort is presumed invalid; to overcome the presumption, the government must show that its regulation constraining personal choice is narrowly drawn to further a legitimate and compelling state interest. The Court no longer applies the compelling state interest requirement of *Roe* in abortion cases. In *Planned Parenthood v. Casey*, 505 US 833 (1992) and again in *Gonzales v. Carhart*, 550 US 124 (2007), the Court required only that the government establish that challenged abortion restrictions did not “unduly burden” the important constitutional right to choose. Still, the Court rendered progressive decisions, upholding the essential holding of *Roe* in *Planned Parenthood v. Casey* and striking down criminal sodomy laws in *Lawrence v. Texas*, 539 US 558 (2003).

### Theorizing about Privacy

Theoretical accounts of privacy, including constitutional privacy, are plentiful. This was not always so. In the nineteenth century, the concept of privacy received focussed attention in the writings of few theorists. British utilitarian John Stuart Mill did not label liberty from collective and government regulation of decision making about personal life as “privacy.” Yet Mill’s *On Liberty* (1859) stands out as a compelling libertarian effort to delineate a defensible zone of personal privacy.

For Mill, the appropriately private sphere is the domain of what he termed “self-regarding” or “purely personal” conduct. Self-regarding conduct is conduct that “neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself” (Mill, 1859, p. 80). Phrased differently, an individual’s conduct is self-regarding when it “affects the interests of no persons besides himself, or need not affect them unless they like” (Mill, 1859, pp. 73–4). Mill offers a utilitarian rationale for the libertarian principle that people should be let alone when their conduct is self-regarding. Mill argues that each individual is ultimately the best determiner of his or her own utility or interest. Consequently, “[t]he strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place” (Mill, 1859, p. 81). This is because “with respect to his own feelings and circumstances the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else” (Mill, 1859, p. 74). Collective interference with individual judgment about self-regarding behavior “must be grounded on general presumptions which may be altogether wrong and, even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without” (Mill, 1859, p. 74).

Using these arguments, Mill drew a line between public and private realms. But the realm of privacy he marked has parameters many would reject. In the United States, marriage, childbearing, and childrearing are often regarded as quintessentially private matters. Mill saw the issue differently. He did not consider behavior respecting one’s

own children “self-regarding” behavior. Mill thought government ought to regulate marriage and childbearing heavily: “[t]he laws which ... forbid marriage unless the parties can show that they have the means of supporting a family do not exceed the legitimate powers of the State ... [and] are not objectionable as violations of liberty (Mill, 1859, p. 107). Mill observed that “to bestow a life which may be either a curse or a blessing[,] unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being” (Mill, 1859, p. 106). In an overpopulated or potentially overpopulated country, “to produce children, beyond a very small number, with the effect of reducing the reward of labor by their competition is a serious offense against all who live by the remuneration of their labor” (Mill, 1859, pp. 106–7).

In *Liberty, Equality and Fraternity* (1873) Mill’s critic James Fitzjames Stephen disputed the possibility of doing what Mill tried to do – to clearly delineate a zone of privacy. Actually employing the term “privacy,” Stephen maintained that to “define the province of privacy distinctly is impossible” (Stephen, 1873, p. 160). What we can say is that it pertains to “the more intimate and delicate relations of life” (Stephen, 1873, p. 160). Stephen went on to assert that “[c]onduct which can be described as indecent is always in one way or another a violation of privacy” (Stephen, 1873, p. 160). Similarly, effete images of privacy’s “delicate” realm emerged from the jurisprudential writings of Americans Samuel Warren and Louis Brandeis (1890), who, following C. Cooley (1880), sometimes characterized privacy vaguely as “being let alone.”

Until the final third of the twentieth century, sustained discussions of privacy per se were rare in the academic law, humanities, and social science publications. By contrast, theoretical discussions of concepts such as “equality,” “freedom,” “liberty,” and “democracy” have been commonplace for centuries. Expositions of “private” property have been frequent occurrences in post-Enlightenment scholarly literatures. Numerous expositions of the public/private distinction have been published since classical antiquity, both in law and in political science. Political theorists Hannah Arendt (1958) and Jürgen Habermas (1962), for example, illuminated conceptual links among Greek conceptions of *polis* and *oikos*, Roman conceptions of *res publicae* and *res privatae*, and modern conceptions of public and private.

In response to developments in law, though with largely unarticulated linkage to the concept of private property or the public/private distinction, “privacy” and the “right to privacy” significantly entered scholarly lexicons in the 1960s. Building on the contributions of nineteenth-century lawyers, Milton Konvitz (1966) and Alan Westin (1967) were among the first to provide systematic accounts of privacy as a philosophical concept with a place in law. Citing biblical sources, Konvitz identified privacy with the concealment of the true, transcendent self. In a more pragmatic vein, Westin emphasized the respects in which the privacy means control of information, a notion queried in recent scholarship about computer and electronic communication.

## Meaning and Definition

Detailed analyses of the meaning of “privacy” appear in the scholarly writings of academics seeking to illuminate conceptions of privacy found in law, medicine, and politics

(Allen, 1988, 2003, 2007; Wacks, 1989; Inness, 1992; Schoeman, 1992; Solove, 2008). Privacy scholars have sought to describe prevailing linguistic usages; and to prescribe ideal ones. (Moore, 2005) Prescriptive definitional analyses have sought to show why particular uses of “privacy” and the “right to privacy” ideally would be eliminated from legal and moral discourse. Rather than simply make points about how “privacy” is and ought to be used, philosophers have also attempted to illuminate cultural dimensions of privacy broadly (Pennock & Chapman, 1971; Young, 1978).

No definitional analysis of “privacy” boasts universal acceptance. One large family of definitions has had a particularly diverse following and energetic critics (Inness, 1992). Those definitions of privacy in which the idea of *restricted access* to people and personal information play a role have been especially popular (Allen, 1988). For example, privacy has been defined as *limitations on others’ access* to the individual (Gavison, 1980); to an individual’s life experiences, and engagements (O’Brien, 1979); to certain modes of being in a person’s life (Boone, 1983); and to an entity that possesses experiences (Garrett, 1974). It has also been defined as the condition of being *protected from unwanted access* by others (Bok, 1983); as *lack of access to information* related to intimacies (Dixon, 1965); as selective *control over access to oneself* or to one’s group (Altman, 1976; Nissenbaum, 2004); and as the *exclusive access of a person to a realm of his own* (Van den Haag, 1971).

Philosophers commonly characterize seclusion, solitude, anonymity, confidentiality, secrecy, intimacy, and reserve as particular forms of physical or informational privacy rather than as wholly independent concepts. Seclusion and solitude can be plausibly cast in popular “restricted access” privacy terms as restrictions on physical access to persons. Anonymity, secrecy, confidentiality, and reserve can be characterized plausibly as restrictions on access to personal information.

Limiting access to people and information is an evident goal of constitutional law. It is also a major theme in the constitutional jurisprudence of the courts. For example, the privacy theme figures importantly in First Amendment jurisprudence. The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble.” The Supreme Court has held that this provision guarantees a right of free association for individuals, and a right of privacy for groups: individuals may form exclusive political, social, or civic groups whose meeting places and membership lists are beyond the reach of state and federal government. Writing for the majority in *NAACP v. Alabama*, 357 US 449, 462 (1958), Justice Harlan explained that the “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association.” Restricted access to meeting places is the demand of physical privacy; restricted access to membership lists, the demand of informational privacy. Group privacy rights under the Constitution have been successfully claimed from time to time by groups seeking to end discrimination (for example, the NAACP) and by groups seeking to preserve it (for example, social clubs with membership criteria that exclude nonwhites, Jews, or women).

In the words of the eighteenth-century thinker James Otis: “A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle” (Wroth & Zobel, 1965, p. 142). This conception of the physical privacy of the home is reflected in Third Amendment strictures on access to private houses: “No Soldier shall, in time

of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The British Parliament enacted the Quartering Act of 1774, authorizing the housing of British soldiers anywhere in the American colonies, including private dwellings. The ubiquitous soldiers were not subject to the authority of household patriarchs, whose "castles" were forceably breached (Gross, 1991, pp. 219–20). The Third Amendment appears in the Constitution as a direct result of England's refusal to treat the American colonists' homes as unbreachable safe havens. The Third Amendment, as demonstrated by *Engblom v. Carey*, 677 F. 2d 957 (2d Cir. 1982), "carved out a sharp distinction between public and private ... [and] symbolized an emergent sense of privacy among the Revolutionary generation" (Gross, 1991, p. 220).

The privacy norms that motivated the Third Amendment are highly consonant with the privacy norms that underlay the Fourth Amendment. Also carving out a sphere of physical household privacy, the Fourth Amendment asserts that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment cases since *Katz v. United States*, 389 US 347, 351 (1968), have ascribed a right to a "reasonable expectation of privacy." To fall under the protection of the Fourth Amendment's limit on search and seizure, a person must exhibit an actual (subjective) expectation of privacy and the expectation must be one that society is prepared to recognize as reasonable. Traditionally private areas such as homes and public restrooms are not the only places in which a person may have a reasonable expectation of privacy. When the government intrudes in an area where a person has justifiably relied upon a sense of privacy, its intrusion is potentially a search or seizure. The "reasonable expectation of privacy" formula invites philosophic speculation as to the relevance in Fourth Amendment law of competing individual, judicial, and societal understandings of privacy. It also invites criticism for the implicit positivism of purporting to hang constitutional privacy rights on people's actual expectations rather than on considered judgments about the optimal distribution of power between government and citizen (Seidman & Wasserstrom, 1988).

The Fifth Amendment restricts access to personal information by limiting the government's power to compel persons to provide evidence against themselves that would lead to their prosecution in a criminal proceeding: "[N]or shall any person ... be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation" *Couch v. United States*, 409 US 322, 327 (1973). On the face of things, it is not clear how being asked to speak the truth could be considered demeaning. Yet, human personality arguably is compromised by compulsory self-disclosure: "Personal dignity and integrity, both intimately tied to the ability to keep information about ourselves from others, are demeaned when the state is permitted to use tactics that make the unwilling incriminate themselves" (Berger, 1978, p. 213). Also compromised are the nontotalitarian ambitions of liberal democratic society. The amendment "enables the citizen to create a zone of privacy



which government may not force him to surrender to his detriment” (*Griswold v. Connecticut*, 381 US 479, 484 (1965)).

The claim that the Bill of Rights privacy jurisprudence relates both to physical and informational privacy raises an interesting conceptual question. Is physical privacy reducible to informational privacy? The Fourth Amendment restricts access to people, households, and other private areas, while also restricting access to information of the sort that might be contained in a person’s papers, effects, and conversations. Since physical contact can yield new information, one might take the view that concerns about restricting physical access ultimately boil down to concerns about information learned through sensory exposure.

A reason to be wary of purely informational approaches to the First, Third, and Fourth Amendments is this: From the point of view of the person whose privacy is at issue, uncovering information about a person and uncovering the person can be invasions of different dimensions. For example, although both invasions are offensive, it is probably less assaultive to have one’s sexual orientation revealed as a result of unauthorized access to medical records (an informational invasion) than as a result of unauthorized access to one’s bedroom during a sex act (a physical invasion).

In any case, the “restricted access” definition of privacy can capture both the physical and informational senses of privacy at play in the jurisprudence of the First, Third, Fourth, and Fifth Amendments privacy doctrine. The same is not true of the “decisional” sense of privacy at play in the jurisprudence of the Ninth Amendment, the Fourteenth Amendment, and the penumbral privacy doctrine of *Griswold v. Connecticut*, 381 US 479 (1965). One can speak of restricted access to decisions or to a zone of private decision making, but this use of “restricted access” is metaphorical in a way that definitional uses were not.

Acknowledging that the expression “privacy” is used in current constitutional law to refer to autonomous decision making (Feinberg, 1983), some philosophers argue that that usage is in error. They say that decisional privacy is not a sense of privacy at all, and therefore that a defensible definition of privacy – whether of the popular “restricted access” variety or otherwise – would not embrace decisional usages. Philosophers have proposed definitions of privacy that capture many shared intuitions about paradigmatic forms of physical and/or informational, and intentionally exclude decisional conceptions of privacy (Gavison, 1980; Parent, 1983).

Scholars sometimes condemn the idea of decisional privacy as a colossal conceptual blunder perpetuated by the courts. Ruth Gavison (1980) seems to view it that way. Her influential restricted access definition of privacy includes, in her words: “such ‘typical’ invasions of privacy as the collection, storage, and computerization of information; the dissemination of information about individuals; peeping, following, watching, and photographing individuals; intruding or entering ‘private’ places; eavesdropping, wiretapping, reading of letters, drawing attention to individuals, required testing of individuals; and forced disclosure of information” (Gavison, 1980, pp. 438–9). Her definition deliberately excludes: “prohibitions on conduct such as abortions, use of contraceptives and unnatural sexual intercourse ... [and] regulation of the way family obligations should be discharged” (Gavison, 1980, pp. 438–9). What Gavison chooses to include and exclude is to some extent arbitrary. But the reason she gives for rejecting decisional

privacy is one of considerable interest to philosophers who value the project of offering distinct, consistent accounts of major moral and political concepts; or to lawyers who value conceptual rigor and clarity in the law.

Gavison argues that a lack of rigor and clarity is the inevitable consequence of using “privacy” as a shorthand for autonomous decision making, or for liberty or freedom from outside interference with private choice. She maintains that once a decisional usage of “privacy” is adopted, it becomes impossible to give a philosophic account of the concept that distinguishes privacy from the concepts of liberty, freedom, and autonomy. The objection has also been raised that the idea of a right to be free from interference is absurd among a people with respect for the rule of law. So much interference with individual judgment and whim must be tolerated that the idea even of a *prima facie* right of private choice is untenable. This objection calls for attempts like John Stuart Mill’s to give a principled account of legitimate and illegitimate collective interference with “private” decision making.

Criticisms like Gavison’s have not prevented the idea of decisional privacy from taking hold in ordinary language, philosophy, and constitutional jurisprudence (Feinberg, 1983; Rubinfeld, 1989; DeCew, 1987). It is a fact of current linguistic practice and law that “privacy” will sometimes mean restricted access to people and information, and at other times mean limits on government regulation of decision making. The US Supreme Court’s best known decisional privacy cases – *Griswold v. Connecticut* and *Roe v. Wade* – reflect judicial confusion about the meaning of privacy. It is not always clear whether by “privacy” the justices have in mind physical privacy or informational privacy, in addition to or instead of personal decision making. Over time, the Supreme Court has learned to write about privacy with clarity. In *Whalen v. Roe*, 429 US 589, 589–90 (1977), the Court itself distinguished physical and informational privacy (“interest in avoiding disclosure of personal matters”) from decisional privacy (“interest in independence in making certain kinds of important decisions”), affirming that each is protected by constitutional law.

Philosophical objections to advancing personal liberties under a privacy rubric are to be distinguished from lawyerly objections based on interpretations of judicial role, textual meanings, and broad constitutional purposes. Some scholars of the US Constitution worry that the document cannot be coherently interpreted as providing protection for so indefinite a category as “privacy” (Henkin, 1974). Some argue that the category of privacy simply cannot be narrowed or defined without appeal to the values of the particular justices charged with deciding particular cases, or, at best, their interpretations of social values. Appeal to privacy is thus charged as moralistic “natural law” jurisprudence, as illegitimate “judicial activism” or as “substantive due process.” To strike down a state law because it violates “privacy” is to misunderstand the Fourteenth Amendment as an invitation for the courts to second-guess the states or Congress on matters of substantive policy about which the Constitution itself has nothing to say (Ely, 1973).

Theoretical debates about decisional privacy have become intertwined with political advocacy. In the North American political arena, being for decisional privacy rights signifies being for women’s rights and gay and lesbian rights. Being against decisional privacy rights signifies being against *Roe v. Wade* and in sympathy with *Bowers v. Hardwick*, 478 US 186 (1986). In *Bowers* the Supreme Court held that a selectively

enforced Georgia law criminalizing sodomy was constitutional. Some constitutional scholars continue to defend a decisional understanding of privacy, whether or not they hold the liberal views on abortion and gay rights, because they believe such an understanding is at the heart of notions of marital, family, and heterosexual sexual privacy. Other scholars have distanced themselves from decisional privacy jurisprudence. Cass Sunstein (1992) announced a preference for equal protection over privacy arguments for abortion that appears to be based in part on the definitional view that decisional privacy has nothing to do with “conventional” privacy; and in part on the strategic assessment that privacy arguments have a history of being confusing and unpopular.

### Questions of Value

A number of books survey normative moral and legal theories about privacy (Allen, 1988, 2003; Inness, 1994; Schoeman, 1994). As they reveal, one way to understand “privacy” is as a term of approbation referring to highly, even intrinsically, valued conditions or states. The thinking goes something like this. An anthropologist or cultural outsider can coherently ask what an unfamiliar social group treats as private; but it makes no sense for a cultural insider to ask whether privacy is a good or desirable thing. Such questions misunderstand the grammar of privacy. Typical statements about privacy, including, (1) “He needs his privacy!”; (2) “They invaded her privacy!”; and (3) “This is private!”, presuppose a judgment on the part of the speaker that privacy is a good thing, and that there is substantial social consensus about the significance and value of privacy. The grammar of privacy suggested by the above examples is that of a term whose function in language is to evoke basic, shared norms concerning approved modes of intimacy and separation. The precise nature of these norms is not revealed by statements like (1), (2), and (3), and is amenable to theoretical disagreement. Privacy norms are arguably explicable variously as norms of etiquette, civility, decency, morality, justice, or nature. But the value of privacy is not something it makes sense to debate.

A more commonly held view than the one just described assumes that whatever “privacy” denotes, it denotes something that *can* be judged good or bad, useful or useless, depending upon the facts of the matter. Under this view, “privacy” is not inherently a term of approval, even though within a culture speakers often can presume shared privacy values.

Judith Thomson (1975), who argues that privacy can be judged good or bad, also argues that privacy interests are an amalgam of interests in property, the person, and confidentiality. She maintains that the value of privacy depends upon the value of undisturbed possession of and control of property, personal safety and peace of mind, and information nondisclosure. The libertarian who attaches a high value to property, safety, and peace must also attach a high value to privacy.

For John Stuart Mill (1859), the value of privacy is that it promotes the greater balance of happiness over unhappiness in society – it promotes social utility. Many theorists similarly evaluate privacy by reference to its capacity to further specified ends. For some, the relevant ends recommending privacy are political goods that may or may

not have value of the sort utilitarians care about. These presumed goods include neutrality (tolerating all and privileging no one's conception of the good) and democracy (letting each unique individual have an equal voice in government). To view privacy as a good relative to the ends of neutral, democratic government is to view rights of privacy as formal limits on government power, and as expressions of collective tolerance for individuality and conscience (Richards, 1986). Several scholars have emphasized that privacy is an important constitutional value relative to the goal of limiting totalitarian government (Rubenfeld, 1989).

S. I. Benn (1988) and other philosophers (Pennock, 1971; Schoeman, 1984) explain the value of privacy by direct deontological appeal to conceptions of human dignity and personhood. In connection with the normative underpinnings both of tort law and constitutional law, privacy has been accorded high value for its supposed capacity to further respect for human personhood (Bloustein, 1967; Feinberg, 1983). In both cases, philosophers depict human personhood as consisting of unique, morally autonomous, and metaphysically free personalities. Without privacy and private choices, individuals become uniform and repressed. Individuals with these traits are incapable of flourishing as unique and morally independent persons. Although the "personhood enhancement" account of the value of privacy has been enormously influential, it has been criticized as exaggerating human individuality and wrongly turning individual choice into an unqualified good (Boone, 1983; Rubenfeld, 1989).

The value of privacy sometimes receives explanation in relation to its supposed capacity to enhance relationships. Thus, privacy is defended as a boon both to love and friendship and to merely civil ties with strangers (Fried, 1970; Rachels, 1975; Post, 1989). The repose that can come from periods of voluntary seclusion and control over personal information has important psychological and social benefits. Involuntary privacy losses can result in shame, embarrassment, humiliation, tension, and aggression; they can degrade and debilitate (Schneider, 1977). All cultures have privacy practices on which successful relationships depend (Moore, 1984). These practices promote individual and societal well-being.

Judge Richard Posner (1977) raises a dissenting voice on the question of the social value of one kind of personal privacy: informational privacy. Posner argues that people generally use privacy to conceal "bad" facts about themselves. The concealment of bad facts gives a person potentially undesirable "market" advantages over those with whom he or she deals. Stressing the value of accurate mutual knowledge on moral rather than economic grounds, Judith Andre (1986, p. 315) concludes that "there is no right to privacy nor to control over it" since "a society without mutual knowledge would be impossible."

Many normative accounts of privacy are premised on individualistic moral and political theories. In response, the "personhood enhancement" and the "relationship enhancement" accounts of privacy's value can be given a frank and communitarian twist. The communitarian account of privacy's value assumes that men and women are embedded in social worlds replete with responsibilities for others and obligations to contribute up to one's capacities. Without privacy for purposes of rest, rejuvenation, experimentation, and independent action, men and women would be less fit for performing their responsibilities (for caring for children, for example) and fulfilling social

obligations (to cultivate artistic talent, for example). Privacy facilitates the flourishing of productive and responsible persons.

Criminal abortion statutes, sexual harassment, and rape stem in part from a disregard of the importance of women's privacy. The realization of this fact has turned some feminists into solid proponents of strong privacy rights throughout the law. Yet, leading feminists have been ambivalent about privacy as a regulative ideal in constitutional law. Catharine MacKinnon (1987) and other feminist legal theorists have argued that decisional privacy doctrines in constitutional law reinforce an ideal of lives free from government intervention, thereby legitimating community neglect of women and children (Colker, 1989, 1992; Olsen, 1989; Schneider, 1991). Feminists argue that the Supreme Court rejected arguments for public abortion funding for poor women because the abortion right was won under the banner of privacy. So long as abortions are treated as private rights, government is not likely to be assigned an obligation to pay for them.

How much "letting alone" can a just society permit? With autonomy comes risk. Harm to self and others is a decided risk when government closes the door to public intervention or assistance. In *Wisconsin v. Yoder*, 406 US 205 (1972), the Supreme Court permitted an Amish family to truncate its children's formal education at the eighth grade, out of respect for the freedom – the privacy – of the Amish religion. But placing a child's fate in the hands of his father in the name of privacy had tragic consequences in *Deshaney v. Winnebago County Department of Social Services*, 489 US 189 (1989). Joshua Deshaney was left severely brain damaged after beatings by his father from whose custody a supervising government agency failed to remove him (Schneider, 1991).

But *Deshaney* is not the whole story of privacy as a regulatory ideal within constitutional law in the United States. Privacy norms can facilitate violence, but they also facilitate romance. *Loving v. Virginia*, 388 US 1 (1967), the historic decision that validated the marriage of a poor Virginia couple ordered to leave their home for violating miscegenation laws, is a symbol of the romance of privacy. Categorical condemnations of privacy as a constitutional value appear less tenable the more one recalls about the very large and often positive role privacy norms have played in constitutional law.

## Conclusion

The absence of the word "privacy" from the text of the US Constitution has not prevented American judges from articulating the most extensive law of constitutional privacy in the world. Recent controversies over abortion and gay rights leave doubts about whether the American approach to constitutional privacy merits more than partial emulation. A widely shared reverence for felt boundaries of public and private shaped the Constitution and Bill of Rights. Americans understand better today than in the nation's founding moment that a sharp distinction between public and private is something of a fairy tale (Radest, 1979); that they must rely on government to secure the privacy that they define, in part, as the absence of government (Kennedy, 1982). This irony – or incoherence – in American thought about constitutional privacy may

help to explain why the nation has been unable to settle upon a jurisprudence that mediates basic concerns about the roles of judges in disputes about collective influence over individual lives.

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# Constitutional Law and Equality

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No two people (or things) are exactly alike. In that sense, none is equal to another. Yet all share points in common. At a minimum, all people are people (as, for that matter, all things are things). To that extent, at least, they are equal. Whatever the ways people might be equal or unequal, they can be *treated* equally or unequally in a wide variety of different ways. They might receive equal respect, or equal rights at law, or equal opportunities to distinguish themselves, or equal property and other resources, or equal welfare and happiness. Equality might be reckoned by individuals, or it might be by groups. There might be absolute equality: the same for everyone, regardless of what is thought to be deserved or otherwise proper. Or equality might be proportional: the same for everyone according to what is deserved or otherwise proper.

These different kinds of equality, it is fairly obvious, can often be mutually exclusive. Equal opportunity to distinguish oneself amounts to an equal opportunity to become unequal. Equal rights for people whose skills or whose luck is unequal may ensure unequal possession of property and other human resources. To ensure equality of possessions, conversely, may require unequal rights, by way of equalizing or “handicapping” people with unequal abilities. Equal possessions are apt to mean unequal welfare and happiness for people with different needs, tastes, and personality types; equal welfare may require unequal resources. Individual equality, at least of some kinds such as equality of opportunity, is apt to mean group inequality, since groups – almost however defined – will have differing distributions of skills, luck, and ambition. Absolute equality and proportional equality are sharply different: honors or possessions or prison sentences for all, say, as against honors or possessions or prison sentences according to a scale of who deserves them.

Equality, in truth, might mean almost anything. The crucial questions are, “Who is to be equal to whom? With respect to what?” Yet as an ideal, equality exerts great moral force, especially in modern places and times. What are the sources of equality’s power as an ideal? And toward what sorts of equality ought people and their laws to strive?

## The Enlightenment and Its Antecedents

Envy of those more fortunate than oneself is undoubtedly something as old as humanity, and surely it is an important source of some people’s passion for equality. But envy



as such is generally considered a vice, not a moral imperative. Equality as a plausible ideal might reach back to the Stoic idea that by sharing a common humanity all people are equal, alike the children of God. This was not an idea that found much echo in Aristotle or other classical writers. Aristotle (1941) was more concerned with proportional equality: treating likes alike, with emphasis on the many ways in which people are unlike.

At least two Aristotelian ideas resonate with modern egalitarianisms, however. The first was more prudential than moral: that whenever people for good reasons or bad come to expect equality – whether sameness of rights, or goods, or whatever – the conspicuous absence of that equality can make for dangerous social turbulence. The second was the suggestion that human friendship can hardly exist between people whose condition is greatly unequal, with the implication again that social solidarity might presuppose some degree of social equality.

The Jewish and Christian sides of the Western heritage are a complex tangle of egalitarian and inegalitarian tendencies. At least in some moods, Jews and Christians have perennially seen themselves as communities of believers equal before God. Hence the prophetic and New Testament denunciations of the rich, and the allusions in the New Testament to believers holding their goods in common. There is also an element of equal rights for all before the law: Leviticus commands “one manner of law, as well for the stranger, as for one of your own country.” Then again, there are important inegalitarian themes in Judaism and Christianity: distinctions between Jew and Gentile, saved and damned, priest and people, man and woman. At the beginnings of modernity, there was a leveling thrust to the Protestant Reformation, which abolished priesthood and hierarchy, and opened the Bible to all believers. And from some of the early Protestant sectaries, there was a whiff of more radical equality, social and economic as well as religious: “When Adam delved and Eve span/Who was then the gentleman?”

But the secular Enlightenment was the most important source for modern ideals of equality. For Hobbes, Locke, and Rousseau, men are equal in the state of nature. Hume – echoing Diderot and Adam Smith – wrote that all mankind are “much the same in all times and places.” The American Declaration of Independence, perhaps the greatest political document of the Enlightenment, proclaimed it a self-evident truth that all men are created equal. And the French Revolutionaries, with *égalité* as one of their watchwords, claimed the mantle of the Enlightenment, as did the nineteenth- and twentieth-century socialist movements.

If equality was a salient Enlightenment idea, what sort of equality, among the myriad conflicting possibilities, was meant? As an intellectual and social movement, the Enlightenment arose to repudiate what it saw as the backwardness, superstition, and intolerance of mediaeval Christianity, and the frozen, hierarchical society of mediaeval Christendom. The Enlightenment rejected the idea that a person’s worth, identity, and destiny should be overwhelmingly bound up in birth and kinship. In Sir Henry Maine’s later expression, the Enlightenment was a great step away from the “society of status.”

Instead, the Enlightenment thinkers put a high value on the individual, endowed as a person with natural rights. The supreme natural right is the right to pursue happiness, each person in his own way, according to his own faculties. Natural rights attach to every person, regardless of birth. As such, they are equal rights.

But for the Enlightenment, including the American founders, this meant equal rights before the law. It did not mean equal outcomes in life. On the contrary, life's happiest outcome is to achieve enlightened reason, and the Enlightenment accepted that people's capacities for this are unequal. Moreover, trying to ensure equal human happiness would mean that people could not pursue their own ideas of happiness: there would have to be a collectively imposed definition of happiness in order to administer an equal distribution of it.

As for any idea of equal wealth or resources, the American founders followed Locke in emphasizing the right to property as a fundamental human right, with the recognition that property rights inevitably mean differences in wealth. For these Enlightenment thinkers, property rights were important in at least two ways: first, they encourage industriousness and hence promote prosperity; and second, they afford each person a practical opportunity to pursue personal goals, a personal idea of happiness, independent of any collective orthodoxy about what constitutes a good life. (The paradigm orthodoxy, of course, was that of the Church, against which the Enlightenment defined itself in the first place.) The characteristic social ideal of the Enlightenment was the *carrière ouverte aux talents*: equal opportunity to pursue various (and hence unequal) careers, for unequal rewards, without legal disabilities founded on irrelevant accidents of birth.

## Equal Rights and American Constitutional Law

The Enlightenment idea of equality exerts great influence on American constitutional law, which tends to treat discrimination on the basis of hereditary status as the model of what equality forbids. Historically, this has evolved somewhat fitfully. There is no mention of equality as such in the original Constitution and Bill of Rights. Instead, the constitution prohibits titles of nobility, and the First Amendment guarantees government neutrality toward religion – religious discrimination having been a prime source of hereditary civil inequality in the seventeenth and eighteenth centuries. The US Constitution's only explicit provision for equality is the Fourteenth Amendment, adopted after the American Civil War. It prohibits the denial to any person of "the equal protection of the laws," and its point was to abolish government discrimination against blacks, who had been held in slavery on a hereditary, racial basis and flagrantly denied equal rights before the law.

From the time it was adopted until nearly the mid-twentieth century, however, the "equal protection" clause was virtually a dead letter in American constitutional jurisprudence. There were occasional honorable exceptions, but the courts upheld most kinds of racial discrimination, relying on the fiction of "separate but equal"; Oliver Wendell Holmes dismissed the equal protection clause as "the usual last resort of Constitutional arguments." This climate began to change only after the Second World War – a war that had been fought at least in part against Nazi racialism, after all – and in the 1950s the Supreme Court made equal protection the constitutional cornerstone for the civil rights revolution in the United States. The Justices did this by creating a kind of double standard: routine legal classifications or discriminations would continue to receive "minimal scrutiny" from the courts and would almost always be upheld, but

“suspect” classifications – racial discriminations above all – would now be “strictly scrutinized” under the equal protection clause, and nearly always struck down.

The Supreme Court’s school desegregation decisions were the prototype for “strict scrutiny.” Racially segregated schools, established by law in many parts of America, had meant drastically reduced opportunities in life for black pupils, based on hereditary status. Race ought to be irrelevant to one’s legal status, the Court now declared. School segregation was therefore condemned as a violation of equal protection. Within a few years after the famous decision in *Brown v. Board of Education*, the courts went on to condemn any law or government action – having to do with anything whatsoever, not just schooling – that treated people differently because of the color of their skin.

More recently, the courts adopted a kind of analogy between race and sex. Most sex discriminations nowadays receive something near “strict scrutiny,” and are disallowed as denials of equal opportunity. Yet the courts stop short of holding that sex (unlike race) can never be a relevant difference that might justify different legal rights and duties.

Even where race and sex are concerned, moreover, the courts interpret the constitution to bar the government only from “intentional” discrimination. This has a clear link to the idea that equality is a matter of individual rights, rather than of group outcomes, under the constitution. To condemn a law (or any government action) as violating equal protection, it is not enough to show that racial groups, or the sexes, fare unequally under the law. The court will only intervene if persuaded that the government’s *purpose* was to treat people differently on these bases. After all, the races and sexes fare unequally under many laws, perhaps under most of them. If blacks and whites have different average levels of education, for example, educational requirements for civil service jobs will affect the races differently. If they have different average incomes, fees and taxes will affect them differently. By scrutinizing intent, rather than effects, the courts turn the focus away from the group, and avoid trying to prescribe the massive social engineering that would be required to make every law and public policy affect every different group alike.

Court decisions in American civil rights cases routinely emphasize that equal protection means individual equality of opportunity, equal rights before the law, not equal outcomes or group rights. There are countertendencies, however, particularly in the “affirmative action” or “reverse discrimination” cases of recent decades. These reflect, quite obviously, the pressures created by the great racial disparities in America’s past, disparities that continue into the present.

“Affirmative action” means quotas and preferences for people because of their group membership. It has roots, paradoxically, in the Enlightenment idea of individual equality before the law. If all individuals have a right to be free of racial discrimination by the government, say, it seems a natural step to test whether such discrimination is actually occurring by looking at how many people of each race are hired into government offices, offered government contracts, or whatever. Yet this step puts the focus straightaway on numerical outcomes for the group, rather than on the question of individual discrimination. Furthermore, since there is no way of knowing how many people of each race there would be in the absence of discrimination, any benchmark figure is bound to be more or less arbitrary. The desire to compensate for past discrimination seemingly gives reason to set the benchmarks higher rather than lower. And

there is a strong incentive to meet any such benchmark, since doing so will tend to exonerate one from charges of discrimination. Hence, to achieve numerical outcomes, the society comes to apply different standards and qualifications to people depending on their group membership.

The decisions of the courts about all this, especially the Supreme Court, suggest that “affirmative action” is something of an exception that proves the rule about American constitutional doctrine. The judgments are often inconsistent, allowing and disallowing various affirmative action programs in situations that are essentially indistinguishable. The Court often decides these cases by patchwork plurality rather than by majority. Altogether, the decisions have an air of equivocation about them. Even when the Justices uphold or prescribe affirmative action, they tend to justify it in the language of equal opportunity and individual rights rather than group rights and equal outcomes.

Where racial (or sexual) discrimination is not at issue, the American courts do not read the equal protection clause to interfere with most of the ways government differentiates people. This too is linked to the idea of equal rights under law. Any constitutional principle of equality must grapple with the fact that in almost every law there is an element of equality, but also an element of inequality. The element of equality is that any general rule, by virtue of being a rule, applies equally in equal cases. Thus, insofar as a rule authorizes or forbids certain people to do certain things in certain situations, all persons within the stipulated category are equally within it. But there is an element of inequality as well, because most rules also “classify” or make distinctions among people. Criminal laws distinguish the culpable from the nonculpable; budgets spend money on some things (and people) but not on others; the laws of tort and contract create rights and liabilities for people in some situations but not in others, and so forth.

If it is in the nature of laws to “classify” or discriminate, equality before the law cannot mean equality without such discrimination. Ideally, it must therefore mean something like “treating likes alike.” One way that lawyers assess how well a rule treats likes alike is to consider how the classification corresponds to the legitimate purpose of the rule. To take an example that most Americans are now ashamed of: if the purpose of the internment of Japanese Americans during World War II was to round up disloyal people, the round-up was both “overinclusive,” since the overwhelming majority of Japanese Americans were loyal, and “underinclusive,” because members of the German American Bund, say, were not rounded up.

A drawback of this way of reasoning is that the statement of a rule’s purpose can often be manipulated to minimize over- or underinclusiveness. If the purpose of the Japanese American internment is said to be “to round up people with personal or family roots in any country that has actually attacked the territory of the United States,” for example, then the policy is not underinclusive in exempting the German American Bundists. Moreover, it is almost impossible for any law to achieve a perfect fit between its purpose and its scheme of classification. Any minimum age fixed by law for acquiring a driving license, for example, will be both over- and underinclusive: some underage people would undoubtedly be model drivers, whereas some people who meet the age requirement will be childish and irresponsible on the road.

“Equal protection” cannot mean that all legal classifications are improper, nor has it meant that the courts assume the power to decide which likes are alike or how much

over- or underinclusiveness is too much. According to the American Supreme Court, drawing distinctions by way of lawmaking is what democracy is all about. What civic equality forbids is discrimination on the basis of hereditary status, like race and sex; equality also forbids what the courts more recently have considered purely invidious or ill-willed discriminations based on sexuality. Other legal differentiations among people and their activities get “minimal scrutiny” under the equal protection clause and are routinely upheld.

As for the ways in which people differentiate themselves economically and in their ideas of a good life, the American courts have never adopted the equal protection clause as a charter for promoting equality of wealth or happiness. “Minimal scrutiny” extends to the laws of property, and to the legal framework for economic markets generally. This means that democratic institutions are free to decide from time to time how much economic freedom or regulation or redistribution is wanted. The idea that most such lawmaking should get minimal judicial scrutiny arose, in fact, in the New Deal years of the 1930s specifically to repudiate earlier conservative court decisions striking down social welfare legislation as unconstitutional. But by the same token, the Supreme Court disavows the idea that “equal protection” requires the state to provide even a minimum standard of welfare subsistence. There is nothing whatever in American constitutional history to suggest any requirement of actual equality of resources or of human happiness.

## Liberty and Equality under the Constitution

A great strength of the Enlightenment idea of civic equality, or equality before the law, is that it allows for a large measure of personal freedom under the Constitution. All freedoms, after all, entail the freedom to differentiate oneself from others. Political, artistic, or religious freedom, for example, is needed only by people who wish to differ politically, artistically, or religiously. It requires no exercise of freedom to conform to the prevailing orthodoxy. But to differentiate oneself is to make oneself unequal in one's condition, be it political, artistic, or religious. So likewise, economic freedom – economic activity being most people's daily endeavor – means the freedom to differentiate oneself economically: freedom to become economically unequal. Economic freedom is also related to other freedoms, as the Enlightenment thinkers recognized, since a degree of economic independence allows one to differ politically, artistically, or religiously in the face of pressures to conform. The ideal of equality before the law can coexist with the inequalities of condition that freedoms foment.

Hence the close link throughout American history, emphasized by Alexis de Tocqueville (1961), between this particular idea of equality and the idea of individual liberty embodied in the Bill of Rights. The Enlightenment thinkers' rationale for equal rights before the law is the supreme worth of the individual. Every individual, regardless of birth or ancestry, is a bearer of natural rights by virtue of being an individual. Respect for equal rights therefore entails respect for the unequal outcomes produced by the exercise of equal rights. Since every individual has unique abilities, luck, ambition, and so forth, the exercise of equal rights will mean different possessions and different levels of well-being for different individuals. (There will be different outcomes for groups as

well, since groups, almost however defined, are not identical in their distributions of abilities, luck, and so forth.) Only by curtailing or suppressing the exercise of equal rights could the state create and preserve equality of possessions or of welfare.

The Enlightenment idea of equality, which has been so decisive for American constitutional law, has surely held great attraction for many people over the generations and continues to do so, in America and elsewhere. But there has also been considerable dissatisfaction with it, a dissatisfaction that lies near the heart of much nineteenth- and twentieth-century radicalism, continuing into the twenty-first century. In fact, the Enlightenment idea of equality itself carries the seeds of many of the political and philosophical objections raised against it.

### The Radical Critique and the Radical Dilemma

There are at least two important objections. First, equality of rights does not prevent – to some extent it promotes – great inequality of condition. But the very success of the Enlightenment rejection of feudal inequality creates a moral sensitivity to inequalities of other kinds. Equality of rights implies equal dignity for every person, which inequality of condition seems to mock. If all people were not of equal dignity, after all, why should they have equal rights? Yet it seems a pious fraud to claim that there really is equal dignity for the rich and the poor, the happy and the miserable, those who enjoy the best of everything and those who hustle for castoffs. Modern life abounds in individual and group inequalities of resources, success, and happiness. Unease with these inequalities, a sense that they are wrong, is encouraged both by the wide popular acceptance of the Enlightenment proclamation of equality and by the ambiguity of what that proclamation might mean. Once it is accepted as a self-evident truth that all men are created equal, and without great pedantry about what is intended, there is a natural recoil from glaring human inequalities of any kind.

Second, there is a double edge to the association between equality of rights and the idea of freedom. As has been suggested, equality of rights respects the inequality of outcomes that liberty produces, whereas to keep people equal in their condition would require curtailing or suppressing the liberties that people would exercise to differentiate themselves if they were free to do so. The trouble is that equal rights cannot be exercised equally (sometimes they can scarcely be exercised at all) by people of greatly unequal condition. Just as it can be jeered that “the law in its majesty forbids rich and poor alike to sleep under bridges,” so freedom of speech, for example, is not the same for the rich, who can own a newspaper or a television network, and the poor who cannot. Likewise, the Enlightenment’s fundamental egalitarian idea of careers open to talent gives an obvious unequal advantage to those with greater talents.

The ideology that inspired much nineteenth- and twentieth-century radicalism was Marxism, and it might be expected that Marxist thought would offer a well-developed body of ideas about equality, by way of an alternative to the Enlightenment ideas that tolerate such inequality of condition. Equality was surely at the heart of Marxism, but Marx’s writings actually have little to say on the subject. This turns out to be consistent with the logic of Marx’s intellectual system. To be sure, equality – or rather, the principle “from each according to his ability, to each according to his needs” – is the goal

of history in the Marxist scheme. But there can be no equality so long as there are economic classes. And class conflict is the key characteristic of human life according to Marx, once people progress past “primitive communism” and until at the final synthesis they reach the Communist millennium. The definition of that millennium, however, is that when it is reached, problems of distribution will no longer exist. Once communism is achieved and the problem of distribution solved, the question of equality, therefore, becomes moot.

If Marxist “scientific socialism,” although inspired by the ideal of equality, had so little to say on the subject, the various strands of “utopian socialism” tended more toward yearning for equality, or struggling for it, than toward systematic philosophical speculation about it. The tension between liberty and equality of condition already dogged radical egalitarianism, however, as early as the Babeuf conspiracy during the French Revolution. The Babeuf manifestos proclaimed that all men by nature have the same right to earthly goods, that private property is the source of inequality and must therefore be done away with, that in order to ensure equality all men must be compelled to live in the same manner and to do manual work. “Let all the arts perish, if need be, so that we may have true equality.” It was clear to the Babouvists that “true” equality of condition would require a regime of compulsion, not of freedom.

Can there be equality of condition, in practice, without giving up constitutional freedoms? This is the crucial question for any radical theory of equality and of what “equal protection” ought to mean under the constitution.

History, as opposed to philosophy, does not give reason for great hope about this. Voluntary “utopian socialist” communities, it is true, appeared throughout the nineteenth and twentieth centuries in various places around the world, with equality of possessions and often with a sincere effort at free and equal participation in governance as well. But – with perhaps the single exception of the Israeli kibbutzim – all were short-lived: experiments began in hope that broke up quickly, usually in rancor.

Marxist “scientific socialism,” on the other hand, has enjoyed (if that is the right word) longer sway in various countries, and a greater opportunity to put an alternative vision of equality into actual practice. True equality of condition was never achieved for the peoples under Communist government, nor did the governments ever claim that it was: as a matter of theory, complete equality must always await the final synthesis, on a golden dawn yet to come. Still, in the most intense periods, in the USSR in the 1930s and in China during the Cultural Revolution, there was perhaps something close to equality of condition for all but the *vozhd*, Stalin himself, and for Mao, the Great Helmsman: an equality of terror, the haunting knowledge that no one, high or low, however conformist, was safe for even a moment from denunciation, arrest, and destruction. For the rest, the Communist regimes attained the sort of equality best expressed on George Orwell’s *Animal Farm*: “All animals are equal, but some animals are more equal than others.” The Communist ruling castes had their privileges, which were kept partly hidden; there was a shabby, often hungry, equality of possessions for everyone else; and there was rigid suppression of any “inequality” or distinction of political, artistic, or religious expression. It was all leavened with corruption, and bought at the price of tens of millions of dead and untold suffering.

At the philosophical level, any theory of equality that offers itself as an alternative to the Enlightenment’s equality before the law – any theory that seeks to satisfy the

sense of injustice brought on by great inequalities of human condition – must presumably find ways of escaping the fragility of utopian socialism and the various drawbacks of “real, existing” Marxist socialism. At least, such a theory must do so if it is to hope for widespread acceptance and a chance to influence constitutional law.

John Rawls led the way among contemporary academic philosophers in trying to develop such a theory. Ronald Dworkin is also an influential philosophical advocate of the idea that justice requires equality of resources. Amartya Sen and Martha Nussbaum argue for an egalitarianism of capabilities, which implies state-enforced redistribution based on needs or human condition rather than equality of resources. Although they differ on various points, all these argue that economic egalitarianism is consistent with individual liberty, and perhaps essential to it. Michael Walzer is an example of a liberal writer with egalitarian sympathies who, nonetheless, accepts a range of inequalities in various spheres of life. Some academic feminists and like-minded “postmodern” radicals, on the other hand, more or less openly repudiate the liberal idea of individual freedom.

## Rawls

John Rawls’s book *A Theory of Justice* appeared in 1971, and reflected to some degree the resurgence of egalitarian radicalism that had rocked America and much of the Western world at the time. Philosophically sophisticated and complex, this book and Rawls’s subsequent writings have provoked enormous interest, by no means only among philosophers (Rawls, 1971, 1993). Rawls achieved at least three important things. First, he brought political philosophy back into the mainstream of academic philosophy at a time when analytic philosophy – prevalent in English-speaking countries – had appeared to turn away from social thought. Second, he insisted on the question of equality as a central issue for liberalism. And third, he succeeded in casting his argument (and much of the ensuing academic debate) in terms of the ways in which equality and liberty might reinforce each other, turning the spotlight away from the tensions between equality and freedom.

Rawls argues that justice requires two principles:

- 1 Every individual in a just society has an equal right to a fully adequate scheme of equal basic liberties consistent with a similar scheme for everyone.
- 2 Social and economic inequalities must satisfy two conditions. First, such inequalities must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.

The first principle is very close to the Enlightenment idea of natural rights and equality before the law. The second principle (known as the “difference principle”) adds a requirement that there should be considerable (but not necessarily total) equality of property and other resources for all individuals, presumably throughout their lives. Inequalities are justified only as incentives or rewards that promote such increases in the society’s wealth that actually make the poorest better off.



Rawls derives these principles from a hypothetical social contract. Suppose that a group of people meet to lay the framework for their society, and that they are behind a “veil of ignorance” as to what individual places they will have in that society. They do not know their race, sex, social class, talents, personal characteristics, or ideas of what makes for a good life. Rawls argues that they would adopt his principles in order to ensure that, when the “veil” is lifted, even the worst positions in society are as good as possible, and that all will be able to exercise their “moral powers” to pursue their ideas of a good life, whatever those ideas might turn out to be.

Much of the appeal of Rawls’s theory comes from the way it links equality to liberty. Rawls insists, in fact, on the “lexical priority” of liberty, by which he means that liberty must not be exchanged for other economic or social advantages, including greater equality. In Rawls’s social contract, equality is esteemed not for its own sake, but so that all persons will have the best practical opportunity to exercise their freedoms in pursuit of their individual ideas of the good life. Thus, Rawls’s equality principle avows its adherence to Enlightenment ideas about liberty, individual autonomy, and the supreme worth of the individual, while appealing to the egalitarian ethic, which the Enlightenment has fostered in modern men and women.

Actually, it is not clear how much equality of economic outcome is really required by Rawls’s “difference principle.” If inequality of resources could only be justified insofar as it improves the position of the single worst-off individual in society, then no inequality whatsoever could be justified, since the life of an utterly dysfunctional derelict, say, is probably not improved by any net improvement in the wealth of society. Rawls suggests that inequalities are justified if they improve the lot of a “representative member of the least advantaged class.” But then the size of that class is crucial. If by the “least advantaged class” one means the poorer 50 percent of society, say, then great inequalities might be justified: the poorer 50 percent of Americans are probably better off now on average than they would be in a society with significantly fewer incentives for the creation of national wealth. Yet Rawls surely implies that he intends something close to equality of property and other resources as his governing principle of distributive justice.

An objection frequently raised against Rawls’s scheme is that his parable of the social contract assumes great risk aversion on the part of those behind the “veil of ignorance.” He pictures them agreeing to forbid inequalities of economic outcome that do not benefit the least advantaged (or the least advantaged class), because any of them might turn out to be the least advantaged when the “veil” is lifted. But suppose in a society with more inequality, and more incentive to produce wealth, many people – perhaps most people – would be better off (although the worst off would be worse off) than they would be in a society where property is equal. Might people not wish to risk greater inequality – the possibility of being amongst the few who would be worse off than otherwise – in hopes of being amongst the many who would be better off?

This objection has implications that go beyond the niceties of social contract theory. The stated goal of Rawls’s theory of justice is that everyone should be enabled to pursue an individual idea of the good life. For many intellectuals, and perhaps for many religious people, that pursuit might be a matter of adhering to a particular theory, cause, or faith. But for many nonintellectuals, economic activity is the grist of daily life, and the idea of a good life is bound up with achieving economic distinction for oneself and

one's family. Yet economic distinction means economic inequality, and much of it might be forbidden by Rawls's theory of justice.

The question of risk aversion suggests that even behind the veil of ignorance, there might be no consensus for Rawls's principles. And once the veil is lifted, talented, lucky, or ambitious people might surely chafe. It is not clear how a notional agreement "behind the veil" would compel actual agreement in real life. In the absence of such agreement, a society intent upon Rawls's equality principle might have to use considerable compulsion in order to maintain it. Rawls insists that his theory gives "lexical priority" to liberty, even over equality. But a society really intent on equality – persuaded, perhaps, that if people stand out too much in their attitudes, outlook, or ideas, that they are apt to try to stand out economically as well – might relegate freedom to a priority that is "lexical" in the other sense: merely verbal or nominal, and only honored in the breach.

## Dworkin

Ronald Dworkin is a lawyer and philosopher, and probably the leading intellectual heir to Rawls. He derives his egalitarianism not from any parable of a social contract, but rather from an ethical theory that would judge people by how they meet the ethical challenges they set themselves in life. Since all are equal in having to face such challenges, justice requires that they should have equal resources with which to face them. Moreover, ethics are apt to be frustrated by unjust circumstances, so each person's ethical life is best led under conditions of justice, with equal resources for all. Freedom is essential for such equality, because to define equal resources in a complex world, and to allocate them fairly, there must be ongoing freedom of discussion; likewise, people must have liberty to develop their ideas of a good life in order for resources appropriate to those ideas to be distributed equally.

Equality of resources, for Dworkin, means that people's unequal talents and luck should not be permitted to produce inequalities of wealth. Dworkin is more radical than Rawls about this, inasmuch as he would not even tolerate inequalities that improve the condition of the worst off. On the other hand, Dworkin accepts that once everyone has received an equal initial bundle of resources, those people who choose to engage in valuable activities ought to be entitled to acquire and to keep what others are prepared to pay – so long as the ensuing inequality is the result of a person's choice of occupation and hard work, rather than a result of unequal talent or luck. And Dworkin (1987, 1988, 2000) calls for equality of resources, but not for a government effort to create equal welfare or happiness, because on his ethical model people ought to be responsible for pursuing their own, autonomous ideas of welfare.

Dworkin does not propose that people's talents and luck should actually be made identical – that those favored by birth should be forced to undergo physical or mental amputation of some kind. Instead, he envisions an insurance scheme, carried out in practice by redistributive taxation, which would compensate for inequalities of luck and ability. The goal would be to compensate for handicaps, but not for expensive tastes or other moral choices, whose consequences a person should rightly live with on Dworkin's "challenge model" of ethics.

One objection to this is that it is difficult to know where handicaps, talents, and luck might end and where matters of moral choice begin. If one is conditioned by one's upbringing to choose a valuable occupation and to work hard at it, is that one's luck or one's moral choice? And if handicaps are difficult to distinguish from expensive tastes and other personal choices, an egalitarian society might be driven towards a policy of compensating for expensive tastes as well as for handicaps, which tends to convert the principle of equality of resources into a policy of trying to ensure equal welfare or happiness for all.

A deeper objection is that equality of resources might not really promote Dworkin's goals of ethical autonomy and responsibility. Dworkin's argument is that equal resources give people the best chance to choose (and to try to meet) their own individual ethical challenges in life. But darker possibilities suggest themselves. Perhaps many people would not feel they can "afford" to be ethical individualists in conditions of general poverty: and in a society that enforces equality of resources there would be little incentive to create wealth and hence, it is fair to predict, little wealth. (There is evidence, surely, that ethical attention to human rights is greater in affluent countries than in poor ones.) Then again, there is the danger that when society enforces a sameness of resources or conditions, it may foster a human sameness as well – a climate of conformity and lack of imagination. People might be most apt to develop independent ethical ideals where there is wide human diversity, and there tends to be wider human diversity when human conditions differ, not when they are the same. Still another possibility is that, far from promoting ethical responsibility, a society that ensures equal resources might create a sense that no urgent ethical obligations remain, or that it no longer matters very much how any individual behaves.

Finally, it might be questioned how much liberty there could really be in a society committed to Dworkin's equality of resources. Unlike Rawls, who says that equality is necessary for autonomy and freedom, Dworkin suggests that freedom is valuable primarily because it is needed to achieve justice, by which he means a genuinely equal distribution of resources. If freedom is not valuable for its own sake, but only as a means towards equality, it is not clear why there should be freedom for people who do not believe that justice requires such equality, and who would use their freedom to speak and work against equality of resources.

### Equality of Capabilities

Amartya Sen is an economist and philosopher; Martha Nussbaum is a classicist and philosopher; both have a strong liberal egalitarian bent. Sen (1992) and Nussbaum (2000) urge an egalitarianism of capabilities: that society should ensure that each person has the capability to exercise freedom effectively and to achieve the "functionings" or the goals that the person considers valuable. This approach is explicitly put forward as an alternative both to equality of welfare and equality of resources. A liberal society cannot and should not ensure equality of welfare, because to do so it would have to define what welfare is for everybody, preempting people from choosing for themselves among a variety of different and conflicting values and goals in life. But equality of resources would not have equal value for people who differ widely in their

natural and social situations: equal resources would not mean real equality, for example, for people who suffer physical, mental, or social handicaps.

Sen is somewhat abstract about what particular capabilities society should ensure to each person, although he alludes to Franklin Roosevelt's "four freedoms" – including freedom from want and freedom from fear – as being at least illustrative. Nussbaum lists ten central capabilities: life; bodily health; bodily integrity, including freedom from assault and sexual freedom; ability to exercise the senses, imagination, and thinking; emotional development; practical reason, including freedom of conscience; affiliation or relations with others; ability to live with concern for and in relation to animals, plants, and nature; ability to play; and control over one's political and material environment.

Both Sen and Nussbaum insist that people vary in their need for resources in order to develop their capabilities, and that society should provide more resources to those with physical, mental, or social handicaps. Social handicaps include obstacles created by traditional hierarchies and prejudice. Redistribution, therefore, should include preferential treatment on the basis of race, gender, and class.

Sen, however, concedes that extensive government redistribution may conflict with promoting economic efficiency and productivity. Sen suggests a need for compromise between market principles and redistribution, and criticizes the "extremism" of Rawls' principle that inequalities can only be justified if they improve the condition of the worst off. Sen even suggests that Rawls was driven by that principle to opt for mere equality of "primary goods" or resources rather than a more meaningful equality of capabilities, since the level of government intervention that would be required to ensure the latter would be prohibitive if no countervailing consideration of economic efficiency (beyond what would help the worst off) could be taken into account.

A theoretical criticism of capability egalitarianism is that it may tend to collapse either into equality of welfare or equality of resources rather than being truly a "third way." Sen and Nussbaum both emphasize that capabilities and effective free choice are good in themselves, not just as means to achieving other goods. But if capabilities are important goods – perhaps among the most important goods in life – then redistribution intended to equalize them is really an effort to equalize welfare. As for offering an alternative to Rawls' and Dworkin's equality of resources, Dworkin at least stipulates an insurance scheme to compensate for handicaps, so it is not clear that capability egalitarianism (intended to compensate for physical or social handicaps) is really any different in principle.

There are practical objections as well. Sen and Nussbaum insist that people with "natural and socially generated difficulties" need and should receive more resources than others in order to develop their capabilities. But no government could assess on an individual basis what each person needs along these lines. So capability grants would have to be on a group or category basis: a person would be eligible for preferential or affirmative action redistribution depending on whether the person belongs to an eligible group or category. The politics of victim group identity would appear to follow inevitably, with intense competition among racial, ethnic, religious, sexual, regional, class, and other groups, as well as groups based on physical and mental conditions of various kinds, for who is needier, who is more handicapped by "traditional hierarchy and prejudice," and who will receive bigger slices of the pie.

Moreover, government would have to grow considerably in size and power in order to direct society's economic resources towards promoting a complex list of human capabilities, while trying to accommodate, if not to suppress, controversy about the list. ("Concern for other species" does not appear to contemplate a high priority for hunting, to take one example of a capability that might be contested.) It is at least plausible that human capabilities flourish best, on average, in a more prosperous society. Prosperity surely tends to offer more choice, not only of commodities, but also of cultural and even spiritual resources. A significantly more politicized economy and a larger, more powerful, more intrusive state would (to put it mildly) not necessarily be conducive to prosperity.

Capability egalitarianism is perhaps most open to criticism for its want of what the poet Keats called "negative capability." Keats meant a kind of humility about the limits of reason and analysis in the face of beauty and the sublime. But in this context, what might be wanted is a degree of humility about the limits of government. Capability egalitarianism would mean extensive state intrusion in the economy, if not into the private life of each person whose capabilities are to be promoted. There is at least a question whether such state policy would in practice be benevolent, disinterested, or efficient.

### Equality Unmodified or Spheres of Justice

One possible reaction to the avowedly liberal egalitarianism of Rawls and Dworkin can be seen in the writing of some academic feminists, proponents of "critical race theory," and other "postmodern" radicals. These harken back to the eighteenth-century Babeuf manifestos and denounce liberalism in all its forms as inconsistent with true equality.

In the view of many of these writers, individual autonomy, legal rights, the artifacts of civilization, even rationality and language, are all means of acquiring unequal power, and hence sources of sexual, racial, or class oppression. Although equality is taken to be a transcendent virtue, the suggestion is that equality can scarcely even be defined within a society (and in a language) so corrupted by inequality of power.

The only way to try to achieve equality, on this view – or even to find out what equality might mean – is through a radical new form of democracy that gives "voice" and "power" to the disadvantaged. In particular, the best that the law can do is to "listen empathically to the powerless," to abandon "false neutrality," and to "empower the oppressed."

One thing that these feminist and other writers surely illustrate is how readily various ideas of equality can be at war with one another. Equality in the sense of generality is probably basic to most ideas of law: law, in other words, means creating general rules to be applied "without regard to persons," and specifically without regard to any person's wealth or status. By contrast, the strong implication in much of the more radical legal writing over the past generation is that legal rules (and judges) should above all "take account of persons" and favor those deemed to be oppressed: in the name of equality, of course, and hence in the name of constitutional equal protection.

Michael Walzer represents a very different reaction to Rawls and Dworkin. Walzer is a democratic socialist. Nonetheless, his book, *Spheres of Justice* (Walzer, 1983), begins with the recognition that it is the human way for people to differentiate themselves

from one another, unless prevented by overwhelming force from doing so. Walzer accordingly rejects any principle of equality of resources or equality of condition that would try to prevent people from differentiating themselves economically.

Rather, Walzer suggests that the nub of equality, the basic thing that egalitarians want, is that life should not be a matter of domination by some people and subordination for others. The best way to have less domination is to recognize that there are many different spheres of life, and to ensure that there are opportunities for dignity and success in each. Walzer's goal is what he calls "complex equality," whereby people are able to face each other as equals, not because all are required to be the same in any particular respect, but because all have a real chance to achieve dignity in one or other sphere of life.

Thus, for Walzer, the market is one legitimate sphere, but politics is another, kinship is another, the sphere of basic human needs is yet another. In some of these spheres there will inevitably, and rightly, be a hierarchy of achievement and success. Economic activity is a sphere in which some people will be more successful than others. But success in one sphere ought not, in justice, to spill over into another. For example, there are many things that money cannot buy, and in Walzer's view there are many more – including political power – that it should not be able to buy. Provision for basic human needs, according to Walzer, should itself be considered a sphere separate from the market. So, like political power, a basic level of welfare should not be a matter of what money can buy, although money inequality need not otherwise offend "complex equality."

As a socialist, Walzer might favor "blocking" a variety of money exchanges that most people in market economies might not find objectionable. But "complex equality," as a general idea of justice, has strong affinities to the Enlightenment idea of equality before the law. Unlike Rawls and Dworkin, Walzer does not see human dignity as requiring equality of economic outcome. Rather, like the Enlightenment thinkers, Walzer intends his spheres of justice as a way for people to differ from each other – with as much equal status as possible, but short of creating pressures for human sameness that are apt to overwhelm all freedom to be different.

### Is Equality a Value?

Equality is shorthand for many values, some of which conflict with one another, and some of which conflict with other values such as freedom. Two ideas of equality, however, probably command broad support in most developed countries today. The first is that, whatever inequalities of condition there might be, these inequalities should not be permanent and hereditary, and that social policy ought to do what it can to promote opportunities for "mobility" and success. This is essentially the Enlightenment idea: that the law should not treat people differently on the basis of accidents of birth, and more generally, that race or caste or status should not overwhelmingly govern a person's destiny.

The second idea is that, in relatively wealthy societies, "no one ought to starve": that there ought to be some minimum of social insurance and alleviation of need. Strictly speaking, this is not an idea of equality at all. It stipulates a minimum, and in no way

forbids inequalities of condition above the minimum. Still, what underlies it is an idea of equality, not equality of condition but equality of respect: that to be respected as a person, and to have any real opportunity to take advantage of equal rights, one must be above a certain threshold of want. Whether alleviating want is best done by government or by civil society and private philanthropy, or in what combination, is of course controversial.

These two ideas do not fully answer the radical egalitarian objections, namely that great inequalities of condition ought always to be a source of moral unease, and that equal rights cannot really be exercised equally by unequal people. Yet there is a paradoxical, perhaps even self-defeating, aspect to radical egalitarianism. The source of almost every kind of egalitarianism, after all, is something like the liberal idea of the supreme worth of the individual. Were it not for that idea, why would it matter that all should be equal and that no individual should be slighted? Yet the tendency of radical egalitarianism – of trying to achieve anything like equality of condition – is to efface the differences that distinguish one person from another, that make each person individual.

An important reason that the Enlightenment idea of equal rights is widely accepted is that it coexists fairly well with other widely held values, including the idea of individual freedom. More radical ideas of equality, it is true, are deeply held by some people, and have an influence in the popular culture and sometimes in electoral politics. But these ideas are far from displacing the Enlightenment idea of equal rights. Outside the academic world, for example, there is little public resonance even to Rawls's and Dworkin's avowedly liberal egalitarianism. The same is surely true of radical feminism and other "postmodern" radical theory. Equality as a matter of constitutional law continues to mean equal rights, not equal resources or equal capabilities or a requirement that the government should try to ensure an equally happy life for everyone. This is perhaps unlikely to change very much under liberal constitutions, at least until equality of human condition can be persuasively reconciled with human freedom to distinguish oneself and to be different.

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## Evidence

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Although problems of truth and knowledge have raised philosophical questions throughout the centuries, there has been little theorizing about such problems in legal contexts until relatively modern times. Much of the reason for this may be attributed to the fact that in the Middle Ages questions of fact were not determined by forms of proof that appealed to evidence. Instead, legal procedures prescribed methods of proof, such as ordeal, battle, or compurgation, which did not require a tribunal of fact to come to conclusions on the basis of evidence (Berman, 1983). Even when these methods came to be replaced and the production of evidence ceased to be a matter for God, Anglo-Saxon and Roman-canon procedure became governed by highly technical rules of proof based on the authority of the church, the early scholastic writers, and writers of classical antiquity. Only gradually when the theories of the Enlightenment suggested that individuals could make their own inquiries about the nature of the world did legal systems allow the courts to estimate for themselves the probative value of the various claims made by the parties.

It took some time, however, for this principle of “universal cognitive competence,” as it has been called (Cohen, 1983), to be reflected in a theory of legal proof. Through the development of jury trial, the English legal system came to embrace this principle earlier than continental systems, but it was not until the work of Jeremy Bentham (1827) in the early nineteenth century that the principle was applied in a rigorous and consistent manner toward English legal procedure. Although not widely recognized for his writings on evidence, his theory of evidence and proof is still the most developed in the history of legal thought. The first section of this article assesses the legacy left by Bentham to the field of evidence scholarship. The article then goes on to examine the regulation of the process of proof and the competing values that underpin the formulation of rules to effect this regulation. The next section considers the development of the “new” evidence scholarship, whose adherents have focussed attention on the indeterminate nature of the process of proving facts rather than on the rules themselves, which dominated the realm of evidence scholarship until recent times. Finally, the article looks at the implications of this break with tradition for the future development of the law of evidence.

## The Benthamite Legacy

Bentham's views were controversial and were not universally accepted, but his work has influenced thought about evidence in the legal process in three very significant ways. First of all, Bentham articulated a cognitivist, empirical epistemology that laid the foundation for many of the epistemological and logical assumptions of standard evidence discourse in the Anglo American world. Twining (1990), the leading theorist on the intellectual history of evidence scholarship, has called this the "rationalist tradition of evidence scholarship." Although Bentham did not invent this epistemology – it had its roots in the English empiricist philosophy of Bacon and Locke – he was one of the first legal theorists to articulate these ideas. According to Twining, one of the key tenets of the rationalist tradition was the belief in a correspondence theory of truth. This theory postulates that events and states of affairs occur and have an existence which is independent of human observation and that true statements correspond with these facts. Present knowledge about past facts, which is what much adjudication is concerned with, is possible, but because it is based on incomplete knowledge, evidence establishing the truth about the past is typically a matter of probabilities, and the characteristic mode of reasoning is inductive by which one starts with certain basic data and moves by way of inductive generalization towards a probable conclusion. Twining remarks that nearly all leading Anglo American writers on evidence have adopted these views, although more often than not *sub silentio*.

Bentham's second and more distinctive contribution to evidence scholarship was to commit adjudication to truth finding. Twining (1985) has concluded that to this day Bentham's theory of evidence represents the most fully developed and unequivocal form of a truth theory of adjudication. Inspired by the ideas of the French revolution and the need for the will of the legislator to be done, Bentham believed that the object of legal procedure must always be the vindication of rights and the enforcement of the law. Although the substantive laws may not in themselves maximize the principle of utility, it was essential that laws were enforced in the interest of security so that expectations raised by law should not be disappointed, hence the need to put priority on rectitude of decision. Bentham conceded that there were constraints on the achievement of this goal. Due regard was to be had to the avoidance of vexation, expense, or delay. But he had little time for values which do not so much constrain truth finding as conflict with it. So he was opposed to rules of privilege designed to protect marital harmony or confidential information and was particularly critical of the lawyer–client privilege and the privilege against self-incrimination.

These ideas were controversial in their day and remain so. Even accepting Bentham's famous principle of utility, there is room for argument about the importance that should be placed on rectitude of decision making. In certain kinds of adjudication, dispute settlement is seen as more important than strict enforcement of the law, particularly where the parties have a continuing interest in maintaining a relationship. Other theorists not so wedded to the principle of utility can argue that Bentham gave insufficient attention to the notion of procedural rights, such as the right to be heard, the right to legal advice and assistance, and the right of silence (Galligan, 1988). But the very fact that these issues are debated within a general consensus about the impor-

tance of truth finding illustrates the continuing significance of Bentham's ideas. Twining has commented that given the vastly different context in which litigation takes place today, the extent to which Bentham's central concerns and themes still have resonance is remarkable. Indeed the growing unpopularity in many jurisdictions of certain privileges, most notably the privilege against self-incrimination, is a testament to the continuing appeal of Bentham's concern for truth finding.

Bentham's third contribution to the field of evidence scholarship has been his approach toward the law of evidence itself. Bentham not only championed the importance of truth finding in adjudication, but he developed a model of adjudication to achieve this goal. His preference was for what he called a natural as opposed to a technical system of proof, by which he meant that all relevant evidence should be admitted and evidence should be weighed solely on the merits of the individual case without reference to rigid rules. This "anti-nomian" thesis, as it has been called (Twining, 1985, pp. 66–75), may be regarded as a logical consequence of his attachment to the principle of universal cognitive competence and the importance of truth finding in adjudication. If it is the case that individuals can reason for themselves about evidence (without the need to rely on authoritative rules) and that such individuals are not to be fettered by values unrelated to the discovery of truth, which may require that certain relevant evidence is not taken into account, then there is no need for rules of evidence at all.

### The Regulation of Proof

The effect of Bentham's anti-nomian thesis was to lay down the gauntlet to the law of evidence, challenging it to justify its continuing existence. Instead of the law of evidence being viewed as an all-embracing set of rules for the regulation of proof in legal procedures, it has come to be viewed as a series of disparate exceptions to the Benthamite principle of free proof. This is best encapsulated in Thayer's (1898) famous depiction of the law of evidence as based on two principles: that nothing is to be received which is not logically probative of some matter to be proved, and that everything which is probative should be received unless a clear ground of policy of law excludes it. Unlike Bentham, Thayer did not favor a complete absence of rules, but he led the way toward a rationalization of the rules of evidence; the result has been a gradual diminution in their scope. This theme of rationalization continued to resonate throughout the work of leading twentieth-century evidence scholars such as Wigmore, Maguire, McCormick, and Morgan. In the same spirit of reductionism, one of the century's leading expositors of the law of evidence on the other side of the Atlantic, Sir Rupert Cross, is reputed to have remarked: "I am working for the day when my subject is abolished" (Twining, 1990, p. 1).

Yet the anti-nomian thesis can be taken too far. No matter how highly a system of proof values rectitude in decision making, it is impossible to have a system of adjudication without *some* rules regulating proof. In any system of adjudication, a decision must be reached on the issues in dispute; this requires a decision rule to determine when a party has won and when it has lost. In a typical case scenario, the facts as presented are gauged by reference to a rule of law. In turn, the application of that rule to those

facts which the rule deems to be material produces a resolution of the central issue, namely whether the defendant is guilty or liable (MacCormick, 1978). But if it cannot be shown that these facts occurred, it does not follow that the defendant is not guilty or not liable. To enable a decision to be reached, provision must be made for what should happen when the material facts have not been shown to have occurred.

Furthermore, it follows from the imperative to reach a decision that it may not be possible to prove the material facts to a degree of absolute certainty. The decision will then have to be made under conditions of uncertainty. The rationalist tradition assumes that knowledge is a matter of probability and not certainty; this is particularly the case in the kind of institutionalized setting in which litigation is conducted. In addition to rules determining who wins in the event of the material facts being proved, there is therefore a need for rules to determine what standard of proof is necessary to enable the material facts to be considered proved or not proved. The standard required must be a degree of probability, but it need not be the same degree for all kinds of litigation, as it should take account of the magnitude of the harm that will be caused if a decision is wrong. What is required here is an essentially political and moral judgment concerning the extent to which the various parties should be exposed to risks of error (Zuckerman, 1989, pp. 105–9). So standards of proof are conventionally different in civil and criminal cases. Since civil litigation has traditionally been viewed as a dispute between private parties, it has been considered wrong to favor one party over another; the standard has thus been guided by the principle that the risk of errors should be allocated as evenly as possible between the parties. In criminal cases, on the other hand, it is considered preferable to allocate the risk of error in favor of the defendant because the risk of a person being wrongly convicted is considered much graver than the risk of a person being wrongly acquitted. The value judgment involved here is often expressed in the aphorism that it is better that ten guilty persons go free than that one innocent person be convicted. The state must therefore bear the burden of proving guilt beyond reasonable doubt, but it is worth noting that the standard is not stretched to one of beyond *all* doubt, as this would make it practically impossible to convict anyone. Hence the phrasing of the above aphorism is in tens rather than, say, thousands, although the position of the standard of proof beyond reasonable doubt on this scale cannot be precisely located.

As well as rules specifying when the material facts will be proved, there is also a need for rules determining *how* the facts are to be proved. This involves making value judgments as to how proof is best determined, but it also involves making moral and political judgments as to what is a fair procedure. Legal decisions have to inspire confidence in their impartiality and fairness. One question is whether the task of proof should be put into the hands of the courts, as happens in so-called inquisitorial systems, or whether it should be put into the hands of the parties (Damaska, 1986). This question cannot be determined solely on the basis of which method is better able to aid truth finding. If, for example, there is mistrust of official decision making, then there may be a reluctance to give the courts too large a role in the resolution of the dispute. The parties will be given more control over the process and lay decision makers may be brought in to assist in the resolution of the facts. In this event, there will be a need for further rules to specify which parties bear the burden of proof on the issues in dispute and to regulate the presentation of proofs.

If the anti-nomian thesis underestimates the extent to which rules of proof are *necessary* in any adjudication system, the thesis also underestimates the extent to which rules may be thought to be *desirable*. The judgments about risk allocation and procedural fairness that have to be made in constructing any adjudicative system may be thought in certain contexts to require the kind of exclusionary rules and rules regulating the weight of evidence that Bentham most disapproved of. Adversary adjudication has encouraged parties to produce direct oral evidence in support of the claims they are making in order that their evidence can be cross-examined by opposing parties. Hence the traditional ban on hearsay evidence. In addition, parties cannot be allowed to protract proceedings endlessly. Thayer's first principle requires that nothing should be adduced which is irrelevant, but it may be considered that rules of relevance are required to regulate the admissibility of *insufficiently* relevant kinds of evidence.

In the context of criminal adjudication, Zuckerman (1989) has argued that apart from the need to discover the truth, there are in addition two important principles: the principle of protecting the innocent and the principle of maintaining high standards of propriety throughout the criminal process. The principle of free proof is founded, as we have seen, on the belief that human beings are competent to find the truth, but it does not deny that errors may be made in the evaluation of evidence. In particular, there has been a concern that certain kinds of evidence, such as evidence of an accused's convictions or confession evidence, or identification evidence, may be overvalued by particular tribunals of fact. Such concern is accentuated when this tribunal is a jury, due to the perception that the lay mind is particularly vulnerable to the influence of prejudicial evidence and particularly ill equipped to identify potential deficiencies in certain genres of evidential material which appear on face value to be reliable. It follows that given the prominent place which the jury has occupied in the Anglo American legal tradition, the development of the law of evidence has been shaped to a significant extent by the dictates of jury trial.

Returning to the allocation of the risk of error, if this is to be accomplished on an even basis between the parties then it may be argued that each party must bear the risk of evidence being improperly evaluated against them. But if particular weight is to be given to the principle of protecting innocent defendants in criminal procedure, then evidence which might have the effect of increasing this risk when it is evaluated may have to be excluded or regulated. This would seem to explain in part the continuing use of rules that restrict admission of an accused's character, the strict rules governing the admissibility of confessions and rules requiring corroboration of certain kinds of evidence. Similarly, the principle of maintaining high standards of propriety in the criminal process may be thought to justify the use of exclusionary rules. The principle against self-incrimination and the rules regulating confession evidence, for example, arguably stem as much from concern about maintaining a proper balance between the power of law enforcement officials and the accused as from a concern about the risk of false confessions. To the three principles considered, there might indeed be added a fourth, which veers even further from pure truth-finding concerns and which extends to legal procedures generally. It has been argued that the entire legal process, including the rules of evidence, has, at its core, the goal of promoting the acceptability of verdicts (Nesson, 1985). On this view, for example, the actual effectiveness of instructions to the jury on how to deal with certain kinds of potentially suspect evidence would be

subordinate to the cathartic and morally legitimizing role that such instructions play in the context of the trial process.

The discussion until now has characterized evidential rules as mandatory in form. It is, however, undeniable that there has been increasingly less reliance on mandatory rules to protect the principles of adversary and criminal adjudication. Rather, the prevailing view is now that these are better protected by means of judicial or statutory discretion or by means of guidelines and rules of practice. Bentham himself made a distinction between rules addressed to the will of the judge to which he was opposed and instructions addressed to the understanding, general guidelines that he sometimes referred to as rules. While the scope of the rules of evidence has therefore declined throughout the twentieth century, there has been a movement in favor of flexible standards, guidelines, balancing tests, and rules of practice to deal with particularly problematic kinds of evidence. So, for example, exclusionary rules such as the hearsay rule have been relaxed and replaced by guidelines to judges or in jury cases by judicial instructions and warnings to juries. Juries are also given warnings on the evidential significance to be attached to character evidence, identification evidence, and the accused's lies and silence. It might be argued in this connection that just as we have seen that the development of mandatory exclusionary rules was inextricably linked to mistrust of the jury, so the transition to more flexible guidelines and instructions may reflect a heightened faith in the capacity of the lay tribunal to weigh certain forms of evidential material, which was traditionally withheld from its sphere of deliberation.

### The "New" Evidence Scholarship

Much of the law of evidence has therefore moved in an anti-nomian direction. If Bentham somewhat underestimated the importance of values external to truth finding in adjudication, it has appeared that these can be given force without the need for exclusionary rules. Just as Bentham's anti-nomian thesis would seem to have been realized, however, a more fundamental challenge has been mounted in the late twentieth century to the entire rationalist tradition, which is calling into question this reductionist approach towards the law of evidence. Outside mainstream evidence scholarship, there has been increasing skepticism about the possibility of objective knowledge. As Nicolson (1994, p. 729) has noted, "The apparent failure of the Enlightenment project to deliver its promise of a social utopia through continuous scientific advance has led to a questioning of its epistemological assumptions." In particular, it is being questioned whether it is ever possible to see the world except as shaped by our world experience and culture. This challenge to the rationalist tradition has been manifested in philosophy, the humanities and science, but is also breeding a societal malaise with many established institutions. In the legal world, this has meant skepticism about the courts' ability to achieve truth or justice.

Much of this prevailing mood would seem to have passed evidence scholars by (Nicolson, 1994; Seigel, 1994). But there has in recent years been a shift in the focus of their interest away from the rules of evidence toward the process of proof. This "new" evidence scholarship, as it has been dubbed (Lempert, 1988), can be traced back to the

early twentieth-century evidence scholar, J. H. Wigmore, but it did not attract much interest until the 1960s and 1970s when a number of scholars became embroiled in a dispute about the application of probability theory to legal processes after an erroneous attempt was made to use statistical reasoning to resolve problems of evidence in a celebrated Californian case (*People v. Collins*, 68 Cal. 2d, 438 P.2d 33 (1968); contrast Finkelstein and Fairley, 1970, with Tribe, 1971; and Williams, 1979, 1980, with Cohen, 1980). Although this debate was conducted largely within the spirit of the rationalist tradition, it provided the stimulus for evidence scholars to examine the process of proof, and this exposed evidence scholars to ideas that have gained ground in other disciplines.

The rationalist tradition assumed that it is possible to start with certain basic items of evidence that correspond with reality and then reason from these toward a probability judgment of a past event. But some of the new evidence scholars are now arguing that we do not collect bits of evidence as one might collect shells from the sand (Schum, 1986; Tillers, 1988). Instead, evidence is gathered according to the relevance of the investigation in hand, and this involves considering and testing hypotheses from the beginning. Furthermore, it is highly questionable whether we will all reach the same conclusion on the presentation of the same evidence. When we test evidence, we do not test it against a universally available stock of knowledge about the common course of events but, according to certain cognitive scientists, by reference to particular schemas or stories that form the basis of our knowledge structures (Pennington & Hastie, 1986). It is questionable how far these ideas question the rationalist tradition. Certain scholars believe that theoretical structures are as much dependent on facts and evidence as facts and evidence are dependent on theoretical structures (Tillers, 1988). No evidence is presented in a form that is free from theoretical shaping, but it remains possible that external events as well as subjective ideas shape the evidence we see. Others, however, have gone further and advocated a coherence theory of truth instead of a correspondence theory of truth so that instead of determining the truth of what happened, all we can do is to fit the evidence to a theory or story about what happened (B. Jackson, 1988).

### Future Directions of the Law of Evidence

The implication of these ideas for adjudication and the rules of evidence is quite startling. To say that we can never reach a universal consensus on truth claims is not to say that we have to take the extreme relativist position that one method of truth finding is as good as any other. If we take this position, we may as well either abandon the goal of truth finding and search for other methods of dispute settlement or permit those whose verdicts are likely to be most acceptable to the community to decide questions of fact (taking the fourth principle mentioned above to its logical extreme). In fact, of course, there is much on which we can reach agreement; it is just that we have to be aware that biases can easily creep into our schematic processing of evidence. The antinomian thesis associated with the rationalist tradition assumed that because every normal and unbiased person will come to the same conclusion about the evidence, there was little need to regulate the proof process. Questions of fact were matters of

common sense to be distinguished from rules of evidence, which were treated as exceptional and artificial constraints on free inquiry. As Thayer (1898, p. 264) put it, "The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience." But if our knowledge is conditioned by our particular perspectives and biases, then we need to be much more careful about our truth-finding procedures. Far from this suggesting we need no rules, it suggests we need *more* rules.

First of all, it would seem that we need to open up the process of discovery of evidence to as much scrutiny as the process of justification, which means that we need to focus as much on the process of proof before trial as on the process of proof at trial (J. Jackson, 1988). Any justification at trial will appeal to selective information, so we need to examine how that evidence was selected. Furthermore, the process of obtaining information is interactive and information will change as it is reported to others. We therefore need to regulate the evidentiary process at as early a stage as possible. We also need to ensure that all those who are interested parties in the dispute are able to participate in the fact-finding enterprise so that their perspective is not excluded from consideration. This requires fair disclosure of existing evidence to the relevant parties, but it also requires that parties are able to put forward their stories in a manner that does justice to them. Much attention has rightly focussed already on the conditions under which defendants are questioned by police officers and elaborate codes of conduct have been drawn up to govern this process, but there needs to be as much attention given to the way in which evidence is elicited from other witnesses.

Second, the existing procedures for evaluating evidence need to be fundamentally reviewed. It is now argued that triers of fact conceptualize evidence holistically by constructing stories or episodes from the evidence that is heard rather than atomistically in terms of whether the items of evidence adduced add up to proof to a certain standard. It would seem to follow that triers of fact should be asked to decide between competing versions of reality specified by the parties rather than whether each of the elements of guilt or liability have been proved to a required standard of proof (Allen, 1991, 1994). If we can no longer be sure that our commonsense assumptions are universal, we also need to scrutinize rules that are supposedly based on common sense but may in fact reflect stereotypical assumptions and discriminatory generalizations about certain kinds of people (MacCrimmon, 1991). The rule, for example, that evidence of sexual complaint should be admissible has tended to focus attention on whether a complaint was made on the assumption that a victim of sexual abuse will wish to make a complaint. It is also now recognized that the traditional rules of competence and hearsay have prevented the courts from having access to children's evidence. This does not necessarily mean that we should abandon all exclusionary rules. There is a danger that if we leave questions of relevance and probative value exclusively to judges, they may discriminate against particular classes of people with whom they have had no experience. One example is the way in which it would seem that the sexual history of rape complainants has in certain jurisdictions been allowed to seep into the trial on the ground that it has some relevance to the case (Adler, 1987). One solution is to issue statutory guidelines on the relevance of certain difficult issues such as sexual history evidence. Another is to allow greater use of expert evidence to enable a better understanding to take place of persons whose experience may not be within the experience of trial decision makers.



Third, we may need to reconsider the role of the parties and adjudicators at trial. In the adversary system, the tribunal of fact has traditionally occupied a passive role, and it is assumed that triers of fact do not need to engage in the cut and thrust of argumentative debate with the parties before reaching their conclusions. But since evidence is no longer conceived as a set of individuated items that is absorbed by the tribunal of fact but is instead a dynamic process which involves fitting information within a more global framework, then presenters of evidence and triers of fact could both benefit from greater interaction between each other. Advocates could be given more feedback as to how the evidence is being interpreted and triers of fact could question advocates and witnesses more on what they are finding it difficult to understand. Indeed, since the stories and schemas used by fact finders to make sense of the evidence are inevitably used by them to reach their conclusions, there is an argument that parties should be entitled to engage in debate with the tribunal of fact on the processes of reasoning that are being used by the triers of fact to reach their decision. This suggests that we may need to reshape the conventional roles that participants have in the trial process in order to introduce a more formal channel of communication between the parties and triers of fact. There is a danger that this may result in a risk of certain prejudicial information coming to the knowledge of the tribunal of fact. But it is arguably better that any risk of prejudice is exposed openly during the trial than allowed to fester silently behind closed doors. To such reformatory ideas should be added a cautionary note. While logic may point toward an enlarged participatory role for the finder of fact in the process of proof, the constraints imposed by the adversary system in general and by the jury in particular cannot be overlooked. First, the adversarial trial is founded on the notion of party control over the process of proof, and it may be objected that an intrusive fact finder will have the effect of skewing this process and in so doing *impeding* the discovery of truth. Second, the jury, as we presently know it, is not ideally placed in practical terms to engage in active debate with trial participants. Both of these reservations, however, invite broader questions that stray far beyond the remit of the present work, relating to the general desirability of the adversarial model and to the claim to primacy of the jury as a finder of fact.

Whatever view we may form on such questions, the foregoing discussion suggests that far from shrinking into nothingness, the law of evidence has a vital role to play in the preparation, presentation, and evaluation of evidence. The law of evidence has tended to be seen in a negative way as imposing constraints on free proof, often in the interests of fairness to the accused or other parties. But modern conceptions of truth finding suggest that there is not such a dichotomy between truth and fairness as is sometimes thought. If there are no objective criteria against which to match our conclusions of fact, we must test them out against others who are making claims about what has happened. In a legal claim, this will invariably mean the participants in the case. It is therefore not merely fair to give such participants a chance to respond to the claims that have been made, but it becomes important to enable them to participate so that a more informed decision is reached. So while we may say that a procedure is fair only if both sides to a dispute are permitted to be heard, we can also say that such a procedure is likely to assist in the pursuit of truth finding. But this means that positive steps need to be taken to ensure that the parties and witnesses affected by litigation are able to participate in telling their stories in as effective a way as they can, and that those

who ultimately have to reach decisions of fact understand the evidence presented and justify the conclusions that are reached.

At present, however, there is a growing perception that procedures throughout the common-law world are failing to give satisfaction to participants who become embroiled in adjudication. Much of this has to do with the failure of the legal system to provide outcomes that are considered fair and accurate. But there is, in addition, growing concern about the cost and delay of existing procedures, much as there was in Bentham's day. Litigants are in consequence turning away towards alternative procedures, and conventional legal procedures are slowly being displaced by alternative forms of dispute resolution such as negotiation, mediation, and arbitration, which do not count truth finding amongst their primary goals (Seigel, 1994). For certain kinds of disputes where the parties are in a continuing relationship and it is more important to look forward than to look back, truth finding may not be as important. For other disputes, however, particularly those which involve issues of public importance, truth finding is of great importance. Here, it is vital not only that there is access to justice, but that an outcome is reached that is as fair and accurate as it can be within the constraints of litigation. In this sense, the goals that Bentham defined are as relevant today as they were in his day, and the challenge for evidence scholars is still to design procedures that do justice to these goals.

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## Interpretation of Statutes

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After a lengthy period of slumber, statutory interpretation has, since 1982, enjoyed a renaissance among scholars of public law. Most human rights protections in the United States today involve the interpretation of statutes rather than the Constitution, and the ordinary business of lawyers is overwhelmingly statutory. The topic is central to an understanding of American public law. The following is a mini-history of “legisprudence,” the jurisprudence of interpreting statutes.

### The Positivist Era, 1890s to 1930s: Eclecticism and Specific Intent

Before the 1890s, American theories of statutory interpretation largely tracked English theory, following the plain meaning of the statute, except in the rare case where the plain meaning is absurd (Sutherland, 1891). Thus American theory was in the main positivist: follow the rules enacted by the legislature. But it contained a safety valve – the exception for absurd results – that was jurisprudentially ambiguous. An absurd meaning should not be imputed to the legislature because it was probably not the legislature’s intent (positivism) *or* because it is not right, just, or fair (natural law). In a celebrated case, the Supreme Court interpreted a sweeping federal prohibition against prepaying transportation of people immigrating to the United States, not to bar a church’s payment of travel expenses for a rector it had engaged (*Church of the Holy Trinity v. United States*, 143 US 457 (1892)).

*Church of the Holy Trinity v. United States* was a prolegomenon to an era in which the Court expressed a constitutional hostility to socioeconomic regulatory statutes that displaced old common-law rules. The judicial philosophy scorned as “mechanical jurisprudence” (Pound, 1908a) was one nostalgic for the economic libertarian values of the common law, that judges felt were under assault from the new regulatory statutes (Pound, 1908b). The conservatives of the bench and bar in that period expressed their Arcadian philosophy through statutory as well as constitutional interpretation (for example, *Caminetti v. United States*, 242 US 470 (1917)). The common law had long been a natural law surrogate in statutory interpretation (for example, statutes in derogation of the common law should be narrowly construed), and an avuncular Supreme Court episodically pursued that theme for two generations (1892–1938).

The rallying cry of anti-Court progressives during this period was distinctly positivist: they contended that the common law was no longer sufficient to the needs of a complex, strife-ridden society, that the legislature was in a better position to gather the facts and make the judgments necessary for such a society, and that the role of courts was to follow these progressive commands of the legislature and give up their *Lochnerian* obduracy. Roscoe Pound argued that the libertarian values imported into statutes by mechanical jurisprudence was “spurious” statutory interpretation, and a betrayal of the proper role of courts in a democracy (Pound, 1907). According to Pound, the proper method of statutory interpretation is “imaginative reconstruction” of the legislature’s specific intent.

Justice Oliver Wendell Holmes, Jr. asserted that statutory interpretation is usually just an exercise in determining the statute’s plain meaning (Holmes, 1899). Like Pound, Holmes was a positivist who believed in the separation of law and morals, rejected as spurious a judge’s effort to read his own values into statutes, and under the banner of legislative supremacy was willing to swallow virtually any silly thing the legislature was willing to enact. Unlike Pound, Holmes emphasized plain meaning, not only for reasons of democratic theory, but also for rule of law reasons. For our polity to be a “government of laws and not men,” legal rules must be objectively determinable and “external” to the decision maker. For the same reasons that Holmes favored a “reasonable man” standard in torts cases, he advocated a “normal speaker” theory of plain meaning.

In contrast to both Holmes and Pound, the legal realists in the 1920s and 1930s debunked the possibility of objectivity in statutory or any other kind of interpretation, arguing that judges had enormous lawmaking discretion, a discretion that was little confined by statutory plain meaning or imaginative reconstruction (Llewellyn, 1934; also Gray, 1921). For example, Judge Benjamin Cardozo defended a decision, questioned by Pound, in which the New York Court of Appeals held that a murdering heir cannot inherit as a result of his crime under state inheritance law (Cardozo, 1921, defending *Riggs v. Palmer*, 1884). Max Radin defended such creative interpretation within positivist premises, on the grounds that there is no coherent “original” collective intent embedded in statutes and that any such intent is not binding on the constitutionally independent judiciary (Radin, 1930). These realists unsettled the statutory interpretation debate, for they rejected the legislative positivism of Pound and Holmes as well as the natural law of *Church of the Holy Trinity v. United States*. Though positivists, the realists viewed the sovereign’s rules as the results of the judicial and not the legislative process. And because judges had great leeway in reading their own policy preferences into statutes, the realists emphasized instrumental, policy-driven considerations.

The New Deal ensured the complete defeat of mechanical jurisprudence and offered the prospect of a very attractive positive law regime in which smart young judges and administrators (many of whom were prominent realists) were making policy. Yet at the very moment of progressive positivism’s electoral triumph over *Lochnerian* natural law, positivism found itself intellectually vulnerable. The more American intellectuals learned about fascism in Europe, the more they became restive over positivist separation of law and morals (Fuller, 1940). Were Nazi decrees “law” in the same way that New Deal statutes were? If not, what gave US law a legitimacy denied to Nazi law?

## The Legal Process Era, 1938–69: Purposive Interpretation

American law faced a severe intellectual challenge on the eve of World War II. The insufficiency of both formalism and realism gave rise to a demand for a theory of statutory interpretation that tied law to reason as well as democracy and rules. Judges as well as statutory interpretation theorists grappled with this conundrum, and a tentative answer emerged in the period from 1939 to 1942: “law” is the purposive rules devised to facilitate the productive cooperation of interdependent humans in society, and statutory interpretation is therefore the carrying out of the legislature’s instrumental purposes (de Sloovere, 1940; Jones, 1940; Nutting, 1940; Radin, 1942).

The new generation of scholars and judges accepted the realist argument that non-elected officials engage in lawmaking, but they suggested that such lawmaking must have some direction from democratic sources. “Legislation has an aim,” asserted Justice Felix Frankfurter; “it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government” (Frankfurter, 1947, pp. 538–9). Hence statutory interpretation should be guided by “the principle that in determining the effect of statutes in doubtful cases judges should decide in such a way as to advance the objectives which, in their judgment, the legislature sought to attain by the enactment of the legislation” (Jones, 1940, p. 757). By tying statutory interpretation to legislative purpose, these thinkers established a link to democratic theory, and they further argued that this contributed to the rule of law. Remarkably, at the same time an academic consensus was forming against the plain meaning rule and in favor of interpreting statutes to fulfill their purposes, the New Deal Court was filling the US Reports with the fruits of that consensus (*United States v. American Trucking Associations, Inc.*, 310 US 534 (1940)). Additionally, young scholars were incorporating this view of law into teaching materials that would in the 1950s be published under the same title: “The Legal Process” (see Feller, Gellhorn, & Hart, 1941–1942; Garrison & Hurst, 1940–1).

After World War II, legal academics developed a full-fledged “legal process” theory of law and statutory interpretation. The most important early effort was Lon L. Fuller’s “The Case of the Speluncean Explorers,” a collection of hypothetical opinions applying a murder statute to explorers who cannibalized one of their number in order to survive while trapped in a cave (Fuller, 1949). The debate among the hypothetical judges sharply contrasted the legislative positivism of holmesian Judge Keen and the judicial positivism of realist Judge Handy, with the New Deal law-as-purpose approach, which is laid out in the opinion of Judge Foster. Foster’s opinion maintained, first, that law is premised upon the possibility of human interdependence and that the conditions for that interdependence vanished when the explorers became stuck in the cave. In any event, Foster argued that murder statutes should be interpreted in light of their deterrent purpose, which would not be served by convicting people killing in self-defense or by necessity.

Fuller’s jurisprudence provided legal scholars in the emerging legal process school with a political theory on which to rethink statutory interpretation. In the

1950s, Fuller's colleagues at the Harvard Law School, Professors Henry M. Hart, Jr., and Albert M. Sacks, dilated Hart's prewar teaching materials into more than 1,400 pages about *The Legal Process* (Hart & Sacks, 1958). Following the views of Foster's opinion, Hart and Sacks's intellectual starting point was the interconnectedness of human beings, and the usefulness of law in helping us coexist peacefully together. "Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living," they asserted (1958, p. 166). Because the legitimacy of law rests upon its purposiveness and not upon abstract social contract principles, Hart and Sacks further asserted that "[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible" (1958, p. 1156.)

Hart and Sacks emphasized that the process of lawmaking hardly ends with the enactment of a statute and that law is a process of reasoned elaboration of purposive statutes by courts and agencies. Because "every statute ... has some kind of purpose or objective," ambiguities can be intelligently resolved, first, by identifying that purpose and the policy or principle it embodies, and then by deducing the result most consonant with that principle or policy (Hart & Sacks, 1958, chs. 1 and 7). Hart and Sacks not only rejected the plain meaning rule in favor of a rule of reasonable interpretation, but rejected imaginative reconstruction as well. Their theory of interpretation was a dynamic one, as revealed in their analysis of the "Female juror cases" (Hart & Sacks, 1958, ch. 7). After ratification of the Nineteenth Amendment ensuring women the right to vote, state courts addressed the question whether statutes requiring all eligible voters to be available for jury service included women, who had been excluded when the statutes were enacted. Hart and Sacks were scornful of opinions refusing to update such statutes to reflect Nineteenth Amendment values and the underlying citizenship purposes of the jury service laws. Similarly, Hart and Sacks echoed Cardozo's endorsement of the dynamic, principle-based result in *Riggs v. Palmer* (Hart & Sacks, 1958, ch. 1).

Hart and Sacks's purposive theory of statutory interpretation has remained widely influential and inspired the leading works on statutory interpretation (for example, Dickerson, 1975; Hurst, 1982). The Supreme Court in the 1950s generally followed the approach (for example, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 US 384 (1951), which contains an excellent debate among the Justices as to whether the Court's responsibility is to apply the statute's purpose, its plain meaning, or the original legislative expectations), and the Warren Court in the 1960s followed a very liberal version of this approach. The plain meaning rule became a virtual dead letter in the 1960s, as the Warren Court invoked statutory purpose to update statutes relating to antitrust, habeas corpus, selective service, consumer welfare, and civil rights. Overruling 100 years of contrary precedent and strongly contradictory legislative history, the Court reinterpreted the Civil Rights Act of 1866 to provide a cause of action for racial discrimination in property and contract transactions (*Jones v. Alfred H. Mayer Co.*, 392 US 409 (1968)). The Warren Court in cases like this one went well beyond Hart and Sacks, who were reluctant to override clear statutory directives in the name of purpose or principle.

## Post-Legal Process Theories: 1969–Present

Although legal process theory was the dominant mode of thinking about law from the 1940s to the 1960s, since about 1969 it has been under siege. Legal process theory remains fundamentally important and perhaps even preeminent, but it has fragmented, partly in response to these new challenges.

### *Revival of positivism: formal theories of interpretation*

The ascendancy of legal process coincided with a period of sustained growth and expansion in American society, a period that ended no later than 1973. After a generation of economic and legal binging, America rediscovered scarcity in the 1970s, and statutory interpretation in both theory and practice reflected this and the concomitant interest in economic theories of interpretation. Economics-inspired scholars saw statutes as precisely delineated deals, rather than as mini-constitutions evolving to satisfy broad purposes (Landes & Posner, 1975). Such scholars also tended to view statutes as deals that were wont to distribute rents to specific groups, rather than as measures in the public interest, as Hart and Sacks assumed them to be (Easterbrook, 1984). This engendered a more beady-eyed approach to statutory interpretation, emphasizing either original intent (Posner, 1985) or text (Easterbrook, 1983).

The Supreme Court of Chief Justice Warren Burger amply reflected this development, and indeed did so ahead of the academy. The milestone was Chief Justice Burger's opinion in *TVA v. Hill*, 437 US 153 (1976). The issue was whether the Endangered Species Act of 1973 precluded the completion of a \$100 million dam to ensure the survival of a species of snail darter. Although the cost was lavish and the result unreasonable to him, Burger applied the statute's plain meaning to the letter – and sided with the snail darter against TVA. This opinion was an important turning point, giving the plain meaning rule new life after a generation of desuetude. In the 1980s, a group of “new textualist” judges and scholars pressed the plain meaning rule as the only legitimate mode of statutory interpretation, and Justice Antonin Scalia has been the leading exemplar of the plain meaning rule on the Rehnquist Court (Eskridge, 1994, ch. 7). The new textualism takes a harder line than plain meaning cases such as *TVA v. Hill* against considering either legislative history or reasonable results. Its motto would be that a judge should consider the text, the whole text, and nothing but the text.

The new textualism is inspired by a particularly dogmatic positivism (Scalia, 1988): under Article I, § 7, of the Constitution, all that is “law” is the text actually adopted by the legislature and presented to the chief executive (Scalia, concurring in *Green v. Bock Laundry Machine Co.*, 490 US 504 (1989)). Nothing else should count. For essentially the same reasons suggested by Radin, the new textualists posit that legislative intent and purpose are spongy and incoherent concepts that cloud rather than illuminate statutory meaning. “Imagine how we would react to a bill that said, ‘From today forward, the result in any opinion poll among members of Congress shall have the effect of law.’ We would think the law a joke at best, unconstitutional at worst. This silly ‘law’ comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to the subjective intent” (Easterbrook, 1988).



Additionally, the new textualists believe that any freedom judges feel to consult legislative history or evaluate the reasonableness of results will increase the ambit of judicial discretion, an unhealthy development in a democracy (Scalia, 1985–6). Finally, leading exemplars of the new textualism are inspired by traditional liberal presumptions against state interference in the private sphere (for example, Easterbrook, 1983).

### *Critical scholarship and normativism*

The legal process vision of law as reasoned elaboration of legitimate legislative activity was persuasive in the 1950s in part because of society's consensus about what is "reasonable" and who is "legitimate." That consensus shattered in the 1960s, as it became clear that most Americans – women, people of color, gays and lesbians, people living in poverty, non-English-speaking citizens – had not been consulted as to what is reasonable and who is legitimate. When these were heard from in the 1960s, consensus died, and it remained dead for a generation of identity politics. Critical scholars have developed antilegal process insights into public law out of this experience.

Hart and Sacks implicitly claimed that all law, legislative as well as judicial, is (or can be) rational, objective, and neutral. Formalist scholars assert a dichotomy between rational, objective, neutral principles the judiciary is obliged to enforce and irrational, subjective, partisan rent-seeking which the legislature is entitled to adopt. Critical scholars, in turn, claim that *all* law, legislative as well as judicial, is ultimately arational, subjective, and ideological; they further claim that the difference between neutral principles and partisan politics is hard to divine and impossible to apply (Brest, 1982; Peller, 1985).

It is as much a myth that courts can determine whether a statute fit when it was passed, or fits today, as it is a myth that prescient courts can use the perceived values of tomorrow's majority in a value-neutral way. As much as shaping the present by predicting the future, courts will shape the present by interpreting the past. (Hutchinson and Morgan, 1982)

Critical scholars are skeptical about the premises or operation of pluralist positivism (Unger, 1975). For example, they reject the concept that "interests" are exogenous facts and claim that interests are socially constituted and subject to change through politics (Brest, 1982). Attitudes and values are, similarly, subject to change; and much of the critical agenda is a call to transform our society by alerting it to inhuman modes of oppression and anomie. Hence, some of the critical scholars who have set forth a positive vision of government have urged a redefinition of what "law" does. Law's agenda should not be determinacy, objectivity, or certainty (the legal process, pluralist hallmarks of statutory law), but rather "edification" (Singer, 1984). The law is pulled toward formalism and its concomitant certainty, apparently because of fears that uncertainty about what exactly the law is will leave us without fair means of regulating private conflicts, or even of knowing how to behave, and will encourage predatory conduct by the government and private power centers. Legal rules do not protect us against these horrors and that, in truth, the main value of legal rules is constitutive: the formulation of rules is how we create and express shared values.

For these and other reasons, at least some critical scholars insist that statutory interpretation be explicitly normativist, because law itself rests upon social justice rather than following the rules laid down. A decision that reflects unjust racial or sexual power alignments is unacceptable. Stated less strongly, a normativist viewpoint could maintain that all statutes be interpreted as though they had been enacted yesterday, and therefore normatively updated to reflect current values (Aleinikoff, 1988).

*The new legal processes: positivism, principles, and pragmatism*

Legal process theory remains important in American law, but for recent generations of lawyers process theory has taken on new meanings and nuances. The relatively traditional process thinkers emphasize the positivist features of that philosophy: its commitment to neutrality and neutral principles, the principle of institutional settlement, and the importance of continuity, precedent, and tradition in law (for example, Farber, 1989; Maltz, 1991; Redish, 1991). This group of thinkers is on the whole eclectic but formalist in its approach to law, emphasizing legislative supremacy and, with it, the importance of both textual plain meaning and legislative intent.

At the other side of the spectrum, but still within the legal process tradition, are the progressives, who emphasize law's purposivism, the fidelity owed by officials to reason, and the central role of public values (Calabresi, 1982; Sunstein, 1990; Eskridge, 1994, ch. 5). Common themes tie together these process progressives. One is antipluralist: legislation must be more than the accommodation of exogenously defined interests; lawmaking is a process of value creation that should be informed by theories of justice and fairness. Another theme is that legislation too often fails to achieve this aspiration and that creative lawmaking by courts and agencies is needed to ensure rationality and justice in law. A final theme is the importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy (Minow, 1987).

The distinction between progressive and progressive process theorists may be captured in Ronald Dworkin's distinction between a pluralist "rulebook community," in which citizens generally agree to obey rules created by the government, and a "community of principle," in which citizens see themselves governed by basic principles, not just political compromises (Dworkin, 1986). The latter is a worthier sense of community, Dworkin argues, and legislation as well as adjudication must be evaluated by its contribution to the principled integrity of the community. Thus, in Dworkin's ideal community of principle, "integrity in legislation" requires lawmakers to try to make the total set of laws morally coherent. Like justice and fairness, integrity in the law contributes to the sorority/fraternity of the body politic, the moral community that bonds the nation together. The role of courts is to interpret authoritative statements of law in light of the underlying principles of the community. In the "hard cases" of statutory interpretation, like *TVA v. Hill*, the best interpretation is the one that is most consonant with the underlying values of society and makes the statute the best statute it can be, within the limitations imposed by the statutory language.

In between the process formalists and the progressives lie a centrist group, which travels under the banner of "pragmatism" (Radin, 1989; Eskridge & Frickey, 1990;

Posner, 1990; Patterson, 1995). These thinkers emphasize the eclectic and instrumental features of the process tradition: legal reasoning is a grab bag of different techniques, including not just textual analysis, but also sophisticated appreciation of the goals underlying the legal text and the consequences of adopting different interpretations. Law involves a balance between form and substance, tradition and innovation, text and context. Pragmatism probably best captures the actual practice of courts and agencies, but provides little normative direction for that practice.

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## Conflict of Laws

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Conflict of laws, or “private international law,” adjudicates the private law effects of the awkward fact that the world consists of distinct jurisdictions. This essay focuses on choice of law, the branch of conflict of laws that specifies the relevance of foreign law to a case heard in one jurisdiction but having connections to others. For example, a New York driver takes a Turkish passenger on a car trip in Ontario. The car crashes. The passenger sues the driver in a Scottish court. In deciding whether the driver is immune from suit by the passenger, should the court look to the law of New York, Turkey, Ontario, or Scotland?

William Prosser wrote in 1953 that choice of law “is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it” (Prosser, 1953, p. 971).

More recently, choice of law has sometimes resembled the law’s psychiatric ward. It is a place of odd fixations and schizophrenic visions. It abounds with purported cures to alleged diseases, and questions about which are crazier.

The scolding tone of both these metaphors, however, obscures the real difficulties of choice of law, and the opportunities it provides to legal theory. In truth, choice of law is a psychiatric ward *in* a swamp, a jurisprudential wilderness encounter group. It is an exercise that forces the law to reveal its deepest assumptions, and to rub raw its contradictions and demons. Moreover, it is an urgently practical challenge, a rare genuine example of applied jurisprudence.

Choice of law has long been a scene of struggle. In the United States, and to a degree elsewhere, this century has seen an epic battle between two very different views. The first is classical choice of law, drawn most fully by Joseph Beale in the 1930s in his treatise (1935) and in the *Restatement of Conflict of Laws* (American Law Institute, 1934). Like most “classical” outlooks, it lasted in its most refined formulation for only a slice of time, and was both the culmination of, and a reaction to, earlier trends.

The second view – or set of views – might be called modernist choice of law. It began, even before classicism reached its peak, with Walter Wheeler Cook (1942) and others. Its influence grew in the 1950s and 1960s with the work of Brainerd Currie (1963) and the drafting of the *Second Restatement* (American Law Institute, 1971). It inspired

a powerful academic and judicial revolution, with dissonant, even contradictory branches. That revolution became choice of law's new orthodoxy, though increasingly subject in recent years to the challenges of judicial disenchantment and counter-revolutionary scholarship (see, e.g., Dane, 1987; Brilmayer, 1995; Roosevelt, 1999; Fruehwald, 2001).

Most of this chapter is organized around the dispute between the classical and modernist outlooks. First, it outlines the premises of classicism. Then it discusses the modernist challenges to most of those premises. In its concluding sections, the article turns to other debates, inside each of these traditions, or transcending the differences between them.

### Classical Choice of Law

Classical choice of law rested on eight pillars. It was not always fully faithful to each. Some were matters of degree. Together, however, these propositions defined the classical commitment.

1. The first pillar was so ingrained it was rarely noticed. In common with the prevailing legal imagination, classical choice of law assumed that the only sources of effective legal norms were nation-states and their juridical divisions. Some legal theories recognize the independent authority of religious or other nonstate communities. Classical choice of law had little use for such pluralism.

2. The classical thinkers also assumed that choice of law was typically not a matter of international law or, among states in the United States, federal law. Nor was it grounded in the self-executing reach of one sovereign's law in another sovereign's courts. It was the law of individual forums, each adjudicating the rights of litigants before it. Classical authors often said that a forum was not bound by, nor did it enforce, foreign law as such. Rather, when appropriate, it enforced foreign-created rights.

The classical view did not necessarily preclude a role for international law, federal law, or other external authority as a matter of principle. It simply assumed that these bodies of law had little to say about choice of law. The upshot, though, was that the classical view understood the practice among forums of applying foreign-derived law, not as a constraint on any sovereign's autonomy, but as the collective effort of those sovereigns to make sense of each other's role in the creation of rights.

3. This leads to the third, most jurisprudentially laden, pillar of classicism, which might be called "vestedness" (see Dane, 1987). Classical choice of law insisted that substantive legal rights vested on the basis of real-world, primary events and behaviors. A court's job was to find those pre-existing rights. Choice of law (or at least most choice of law) was not like tort or contract law or the like, which regulated primary behavior. It did not reflect an *exercise* of lawmaking authority, but the forum's effort, according to its own best lights, to *allot* that authority. It was a second-order process, the law that found which law would apply.

The operational meaning of vestedness is that a forum should not, in doing choice of law, take its own identity as a variable (Dane, 1987, pp. 1205–7). To do so would be to assume that a party's pre-existing rights change when the party enters a particular forum. Thus, a tort choice of law rule that looks to the "law of the place of injury"

is consistent with vestedness. So is a rule that looks to the “law of common domicile” or even “the law favoring recovery.” But a rule that specifies the “law of the forum,” as forum, is not.

Vestedness did not require that outcomes be identical whatever the forum in which a case was brought. For one thing, different forums could have different choice of law regimes, each itself consistent with vestedness. Even if forums did have the same choice of law rules, that would not, in the classical conception, require identical results. Only substantive law created vested rights. Rules of procedure and other elements of adjective law, even if outcome-determinative, did not, and classicism was unperturbed by that. Finally, vestedness did not require that a forum with jurisdiction always enforce even substantive rights. Doctrine treated some causes of action as non-transitory; their enforcement was left to the jurisdiction that created them (American Law Institute, 1934, §§ 610–11). In addition, the classical view recognized a forum’s power to decline to enforce foreign norms that violated its own “public policy” (American Law Institute, 1934, § 612). Traditionally, though, this idea only referred to the forum’s prerogative to dismiss a case without reaching the merits. It was not a general warrant for a forum to apply its own law.

Because vestedness could not, and was not designed to, produce uniformity of result, it was not just a strategy to deter forum-shopping or advance another purely instrumental goal. Rather, it reflected a particular vision of adjudication, to which we will have to return.

4. The fourth pillar of classical choice of law is often called “territorialism.” This label is misleading, however. Any choice of law theory grounded in the division of the world into territorial states will be “territorial.” The question is which territorial variables the theory finds relevant.

Western choice of law since the middle ages has struggled with two forms of territorialism. One form – call it person-territorialism – looks to where actors come from, as defined by domicile, citizenship, or similar notion. The other, which is what most commentators mean when they speak of “territorialism,” but could more rightly be called act-territorialism, looks to where relevant events, such as an injury or the making of a contract, occurred.

Classical American choice of law doctrine, except in matters of status, rejected domicile or citizenship as variables in choice of law. Even contractual capacity, for example, was governed, not by domicile, as in Continental doctrine, but by the law of the place where the contract was made.

Leading advocates of classical American choice of law admitted, though, the contingent character of their emphasis on act-territorialism. They thought personal law archaic (Beale, 1935, § 5.2, p. 52). Their American sensibility affirmed an ethic of mobility and the fluidity of political and legal affiliation. But, in contrast to their view of other aspects of their system, they never claimed that looking to domicile would be incoherent, or violate any axioms of jurisprudence.

5. The fifth commitment of classical choice of law was to a regime of rules. Classical choice of law strove for objective, automatic, simple, criteria.

Like most regimes of rules, this one did not always live up to its billing. As critics long ago complained, it elided some hard questions for which its rules were little help. More interesting, there were some instances in which classicism explicitly recognized

a place for more “practical” standards, not susceptible to simple rules (for example, American Law Institute, 1934, § 358, comment b).

6. As part of its commitment to rules, but also on independent jurisprudential grounds, classical choice of law doctrine rested on what might be called instantaneity. Not only did rights vest. And not only did they vest on act-territorial, bright-line rules. They also vested from facts at an instant in time, before which the relevant rights did not exist and after which they were in crucial respects fixed. The task of most choice of law rules, therefore, was to identify the event that would locate the place and the precise instant that established which law should govern the relevant right. In the choice of law of torts, for example, the magic instant was the injury – the “last event” necessary to the cause of action. Thus, even if all the conduct causing an injury occurred in state X, and all the consequences of that injury were felt in Y, if the injury (appropriately defined) occurred in Z, the law of Z governed.

Again, instantaneity had its wrinkles. But the resolve to find a magic instant for the creation of every right and to collapse complex narratives into that instant, was, as much as anything, the source of what most observers, even otherwise sympathetic, have thought to be the frequent arbitrariness of the classical scheme.

7. The seventh pillar of classical American choice of law was its effort to frame choice of law rules that were neutral as to substantive outcomes. Its rules specified which law would apply, not which result would prevail. Thus, for example, although a choice of law rule that looked to “the law favoring recovery” would, as discussed above, satisfy the constraint of vestedness, it would violate this separate principle of outcome-neutrality.

8. Finally, the classical tradition sought to find choice of law rules – “place of injury” for tort, “place of making” for contracts, and so on – that did not depend on particularized assessments of state interests in specific legal rules. This attitude might be called formalism, except for the vagueness and disutility of the term. It is better to say that the classical view tried to rely on general, unmodulated, ideas about how the normative concerns of jurisdictions translated into the creation of legal rights.

Nevertheless, classical choice of law did not claim to escape substantive commitments entirely. It had to, even at the second-order level on which it operated, rely on assumptions about what tort law was about and for, what an “injury” was, how a contract could be “made,” and the like. Indeed, on this last question, Beale’s work relied on a set of rules that were explicitly drawn from “general contract law.” These second-order rules did not predetermine first-order outcomes, even on the exact same issues. (For example, the law of the place where – for choice of law purposes – a contract was “made” might hold that no contract was made at all.) But the justification for, and provenance of, such rules was never fully explained within the classical logic.

These eight fundamental ideas joined into a single picture of the theory and doctrine of choice of law. In that picture, the occurrence of a specific event, in a defining moment, in a given place, led the law of that place to fix a set of rights, and the self-imposed duty of a forum was to search for the act and the moment and the place and the rights.

There is, however, a crucial point rarely made by either friends or foes of the classical account. The pieces of this picture, though they fit together, were also analytically distinct. Vestedness does not require act-territorialism. Rules do not require instantaneity. And so on. To be sure, there are connections. But in a different



history, all these issues could have configured themselves in any number of other combinations.

## Modernist Choice of Law

Oddly, the leading choice of law modernists did not question the first two premises of classical doctrine – the exclusivity of states and the limited relevance of international or federal law. If anything, modernist trends reinforced both these ideas, leaving it to otherwise counter-revolutionary scholars to look beyond the classical assumptions (e.g., Roosevelt, 1999).

Modernists have, however, mounted sustained attacks on each of the other six pillars of classicism. These attacks intertwine. The following discussion wrenches them apart, to study the significance of each. I am more interested in particular arguments than in identifying all the modernist factions, or spelling out their doctrinal implications. The order of presentation here will be, roughly, from the least to the most interesting.

1. The least surprising element of modernist choice of law, echoing other fields of law, has been its retreat from a regime of simple rules (Pillar 5). This retreat has never been wholesale. Currie, in particular, as will be further discussed below, tried to fashion a new set of very simple rules grounded in a stripped-down jurisprudence. But many more eclectic modernists have insisted that the connections between facts in the world and legal regimes are not binary, logically exclusive couplings, but are matters of degree, like gravitational attraction.

From this basic insight have come diverse approaches. Various modernists have championed impressionistic searches for a legal issue's "center of gravity," multi-factor inquiries into which state has the "most significant relationship" to an issue (American Law Institute, 1971, §§ 145, 188), and single-factor balances (Baxter, 1963, pp. 8–20). Others have tried to fashion new, more complex rules, which often have no more than presumptive force. Putting aside such specifics, though, the progress of rule-skepticism in the field has resembled similar stories in other areas of law: tentative exceptions to the old rules, followed by bouts of liberated anarchy, then efforts to reduce the anarchy to formulas, reduction of the formulas to generalizations (or new rules), a breakdown of those generalizations, and so on.

2. The modernist attack on instantaneity (Pillar 6) has tracked the attack on rules. Its intellectual resonance, however, is distinct.

Various fields of law – contracts comes to mind – assumed, in their own most formalist periods, more or less contemporaneous with the heyday of classical choice of law, that rights vested in an instant. Before that instant, no right existed. After that instant, everything that happened just unwound the spring. The traditional view of contract formation is a perfect example.

The modern trend has been to relax such strictures. Rights can mature and evolve. They can also arise out of a set of events, even if a later adjudicator cannot pinpoint the moment of their creation.

Choice of law has taken a similar, if more radical, turn. In contract law, the idea that contracts form at an instant is still alive, if struggling. But instantaneity in choice of law, the magic moment that locks everything in place, has lost almost all its currency.

The instant has given way to a full-scale narrative, a set of defining events over time and space. In some modernist choice of law theories, that set of events is rich and complex. In others, as in those that single-mindedly focus on the domicile of the parties, the drama is much simpler. But even in the latter cases, the goal is not to find a “magic instant” before which no rights existed and after which they did, but rather a sort of “magic affiliation” according to which the entire conflict can be assessed.

The pregnant question, though, for both complex and single-minded theories, is how to cabin the choice of law narrative. A revealing example is the problem of “after-acquired domicile,” which is relevant to any theory in which domicile plays at least some role. Consider a choice of law regime that, as many modern approaches do, emphasizes domicile. What if, say, after an accident, one of the parties establishes a new domicile? Is this after-acquired domicile germane to the choice of law inquiry? Many courts and theorists, whose methodologies might otherwise lead them to answer yes, have held back. However they articulate their reasons, the intuition at work seems to be that there is some proper boundary to the events that tell the story of a cause of action. After-acquired domicile falls outside that story.

3. Mention of domicile anticipates the next point of the modernist attack. This is the shift, albeit only partial, from act-territorialism (Pillar 4) to person-territorialism.

Many modernist authors cast their criticism of act-territorialism as an attack on formalism and reification. Cook, in a famous discussion of married women’s contracts, argued that the classical view that a woman could lose her contractual disability by just crossing a border was unrealistic and arbitrary (1942, pp. 434–8). Building on Cook, Currie based much of his system on a claim that there was a category of “false conflicts” that classical choice of law overlooked, and for which its rules could only produce correct results by sheer chance (1963, pp. 107–10).

Currie’s “false conflicts,” however, were just cases of common domicile. Through the lens of person-territorialism, such cases will, naturally, be easy. But from an act-territorial perspective, there is an exactly analogous set of “false conflicts” in which all the relevant events of an interaction take place in one jurisdiction.

The real dispute between act- and person-territorialism was not about formalism or reification, but over accounts of legal jurisdiction and personal affiliation, accounts whose implications extend to the great issues of war, peace, and national identity ravaging the present age. (cf. Bosniak, 2006). Critics of act-territorialism argue that polities are composed of people, not plots of land. The defenders of act-territorialism reply that, however true this is, the people of a polity still create a legal regime whose reach is territorial (Twerski, 1971). Expectations are territorial. So are entitlements. Persons who cross into a state come under the protection and control of that state.

Moreover, choice of law modernists do a good deal of reifying themselves. Domicile and related concepts, such as residence or citizenship, are all legal constructs. It is unclear whether any of them can capture the full texture of the links between persons and states.

4. Modernism has challenged the classical claim to substance-independence (Pillar 8). That challenge has been as multilayered as the claim itself.

At one level, almost all modernists agree that choice of law must look to the particulars of state interests in legal questions. In this consensus lurk vital differences, some of

which will be taken up later. At the root of the consensus, though, is the conviction that the abstract sureties of the old regime must be tested by this question: which states would care about the outcome of a case, and why?

The modernists have never quite resolved, however, to what extent their account of state “interests” is descriptive or normative. As Lea Brilmayer demonstrates, this has led some devotees to invoke “interests” not grounded in any empirical inquiry into the actual policies of real states (Brilmayer, 1995, pp. 101–9).

A more serious problem is that some schools of interest analysis have yet to give a satisfactory account of the theoretical limits to legitimate state interests. Modernists of a purist bent disdain halfway approaches, such as those that look to “centers of gravity” or “most significant relationships,” that leaven a concern for “interests” with a search for relevant “contacts” between states and the facts of a case. The purists argue that these approaches perpetuate, if with a broader palate, the classical tendency to ignore questions of “policy.” Nevertheless, the inquiry into “contacts,” however arbitrary it sometimes seems, at least recognizes that there must be normative constraints to the reach of any state’s concern; without some such inquiry, any state could, at least in principle, have an interest in every case. If “contacts” without “interests” are vacuous, “interests” without “contacts” are unanchored.

5. A more controversial strain of modernism has argued that choice of law analysis should give up, not only its indifference to substance, but its neutrality as to outcome (Pillar 7) as well. Some authors have urged specific substantive preferences in choice of law, such as one favoring tort victims over tortfeasors. Others, including Robert Leflar (1966), have argued that courts should undertake an explicit, objectively defined, search for the “better law.”

Such proposals, though rejected by some of the most theoretically purist modernists, also seem, in their own way, to constitute the most severe departures yet from classical choice of law. But they actually raise rich and useful questions from the classical perspective.

Recall that a friend of the other pillars of classical choice of law, specifically vestedness, would not necessarily object, in principle, to abandoning outcome-neutral choice of law rules. To say that choice of law is a second-order law about laws is not to say that it can have no substantive content. The question is where the content comes from.

Outcome-oriented methods, including the “better law” approach, can be consistent with vestedness if they rest on second-order principles. Such principles might be substantive, grounded in a sort of weak version of natural law that comes into play only in jurisdictionally complex cases. Or such principles might be more descriptive, even sociological, positing that states share certain underlying policies, such as the importance of contractual obligation. Or they might involve a complex account of legislative jurisdiction in which the reach of any particular state’s legal norm depends, at least in part, on how that norm fits into the shape and trajectory of the larger legal culture. These possibilities are fascinating, if only for their echoes of long-lost views of a “general common law.” But they do not contradict the second-order character of choice of law. It is a different matter, however, if the reason for introducing specific outcome preferences into choice of law is the infiltration of the forum’s own, first-order,

substantive views. Interestingly, the proponents of outcome-driven choice of law have never quite settled between these two types of argument.

6. These thoughts lead to the question of vestedness (Pillar 3) itself. I have put off discussing that part of the modernist challenge so far, so that its glare would not overwhelm the other elements of the battle between the classical and modernist schools. Nevertheless, the attack on vestedness has been the most powerful part of the modernist program, which most sharply illuminates larger issues in legal theory.

The crucial moment in the modernist attack on vestedness came when Brainerd Currie moved from “false conflicts” to his solution of “true conflicts.” A true conflict exists when both the forum and another state have a genuine, serious, interest in a case. Currie rejected, head on, the notion that a forum should not treat its own identity as a variable in the choice of law calculus. Instead, he wrote, the “sensible ... thing for any court to do, confronted with a true conflict of interests, is to apply its own law” (Currie, 1963, p. 119). To understand the profound implications of this statement, however, requires some perspective.

Vestedness in the classical scheme rested on two distinctions built into a traditional, norm-based, view of law and adjudication (Dane, 1987, pp. 1218–23). The first distinction is between the existence of legal rights and their enforcement. With this distinction in hand, the classical model could describe choice of law as a second-order search for rights that existed, in some objective sense, independent of the forum in which a case was brought.

The second distinction is between the reason for a legal norm and the reason for enforcing the rights created by that norm. Even if the reason for a legal norm is one or another substantive policy, the reason for enforcing the norm is to vindicate the system of rights itself, apart from that policy. With this distinction, the classicists could justify how a forum with one set of substantive convictions would be willing to enforce rights established under legal norms expressing radically different substantive convictions.

One way of appreciating the history of the choice of law revolution is to notice that Walter Wheeler Cook took aim at the first of these distinctions, and Brainerd Currie at the second.

Cook pressed the claim that, when a court engaged in choice of law, it was not, despite appearances, applying foreign law. All it was doing was enforcing a “right created by its own law,” but incorporating, in the definition of that right, “a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country” (Cook, 1942, p. 20).

This argument, or “local law” theory, seems at first to be mere quibbling. If anything, it resembles the classical mantra that a court cannot, strictly, enforce foreign law, but only, by operation of its own law, foreign-created rights.

Cook, however, had more in mind. He was a leader of American legal realism. His project, beyond choice of law, was to advance and refine the nominalist and behaviorist strain of legal realism, which – contrary to norm-based jurisprudence – argued that law was nothing more than the behavior of legal institutions engaged in the exercise of power. Courts, in this view, could do right by parties. But they were not in the job of finding “rights,” at least distinctly legal rights, in the sense of entitlements with a real, objective, juridical existence apart from their enforcement.

Cook's view collapsed the distinction between first-order and second-order decisions. Classicism required courts to rise above themselves, so to speak, to find the proper law. But in a behaviorist jurisprudence, what counted was what courts did. If a court, to do right by the parties, incorporated a foreign "rule of decision," this was no different in principle from what it did in a purely domestic case. Thus, in a tort case, a court might consider, as relevant data, the legal standards in effect where certain acts were done, and bring those standards to bear. But this would be the forum's tort law at work, not a second-order effort to referee between the forum's law and foreign law.

Currie accepted Cook's view that a court doing choice of law was only doing "local law." But that still left the question of when it should incorporate foreign "rules of decision." Currie's answer – that it should not do so if it had a genuine interest in a case – rested on a simple observation and resulted in a simple new rule. If a forum applies its own law, "it can be sure at least that it is consistently advancing the policy of its own state" (Currie, 1963, p. 119). Put another way, Currie – in violent contrast with the classical view – assumed that the only persuasive reason for enforcing a legal norm was to advance the policy or substantive moral vision underlying the norm.

Thus, the quarrel between classical and modern choice of law is also a quarrel between radically different visions of law. How this quarrel will work out remains unclear. The legacy of legal realism persists. A new jurisprudence of rights has appeared, but it is only beginning, tentatively and sporadically, to influence choice of law.

Nevertheless, Currie's solution to true conflicts, though it shaped the modernist conversation, has, in its purest and most rule-bound form, only had very partial successes. Sometimes the resistance has been grounded in classical premises, but often it has found new formulations, as will be discussed below. Vestedness, if only as an instinct, retains a surprising hold on the legal culture.

## Questions for Modernists

Not all the great issues in choice of law track the conflict between classicism and modernism. Important issues remain, for example, within the modernist program itself. We have already seen debates about "contacts" and "interests," and about outcome neutrality. Another set of questions concerns the content of state "interests" themselves.

The most pressing problem within the modernist paradigm involves the nature of the interests that states have in their domiciliaries. Currie, anticipating "public choice" theories, assumed that states enact legal norms to benefit favored classes of persons. He then argued, in a powerful and formative departure from more traditional accounts of domiciliary connection, that, when the parties to a controversy were domiciled in different states, a state would only be interested in applying its law if application of that law would benefit its own domiciliary, but not otherwise. Thus, if state X had a pro-plaintiff rule on an issue, and its domiciliary was the plaintiff, it had interest in applying its law. But if its domiciliary was the defendant, then it had no interest.

The implications of Currie's account are starkest in the so-called "unprovided-for case." Assume that state X has a pro-plaintiff rule and state Y has a pro-defendant rule, but the domiciliary of X is the defendant and the domiciliary of Y is the plaintiff.

According to Currie's view at its most rigorous, neither state has a real interest in applying its law.

For Currie's supporters, the unprovided-for case is a charming puzzle, which calls for supplementary rules. For his detractors, it is the loose end that unravels the whole fabric. Other choice of law theories have "unprovided-for" cases. In traditional person-territorialism, stateless persons pose a problem. For classicism, torts on uncharted territories pose a problem. But Currie's "unprovided-for case" is neither of these. It suggests that there are ordinary legal controversies outside the normative field of *any* jurisdiction. That, to many, seems to run counter to what the idea of lawmaking jurisdiction is about.

The flaw in Currie's view, according to his critics, is that he ignores the extent to which laws reflect, not a state's wish to confer largesse, but its judgment of corrective justice. Lawmakers do not only legislate entitlements; they also legislate correlative duties (Ely, 1981, pp. 196–9). A state making judgments of corrective justice has as much of an interest in penalizing its domiciliaries when they have done wrong as in benefiting them when they have been wronged.

Currie's view of state interests raises a second problem. Currie recognized that, in addition to party-directed interests, states might have more systemic interests, including legal predictability, comity with other states, and so on. He argued, however, that those interests were too remote and speculative to excuse a forum facing a true conflict from applying its own law. He also argued that it was unfair to put on a forum's domiciliaries the cost of vindicating those systemic interests.

Many of Currie's successors have been, however, more congenial to systemic interests. In particular, there is a tradition of suggesting that states might have a long-term selfish interest in selectively deferring to the laws of other jurisdictions, in the expectation that those other jurisdictions will in turn sometimes defer to its law. A popular analytic tool to which this tradition has turned in recent years has been game theory, with its demonstrations that tacit cooperation can, under certain conditions, be the most effective long-term strategy for maximizing self-interest (Kramer, 1990, pp. 341–4; cf. Brilmayer, 1995, § 4.2).

The consequence of some of these views is to resurrect forms of forum-neutrality under the guise of self-interest. Given the complexity of game theory, this may be too much of a coincidence. As noted earlier, it sometimes appears that what is really at work are the same instincts, in sublimated form, that committed the classical authors to vestedness in the first place.

### Questions for Classicists

The decline of classicism also left issues hanging that might otherwise have engaged its interest, and which would be important in any renewal of classicism. Three of these issues hold particular jurisprudential interest.

First, as noted earlier, classicism never frankly assessed the role of substantive legal ideas in the authority-allocating task of choice of law. If a classical perspective would urge some modernist theories to be more explicit about the warrant for their substantive commitments, it can ask no less of itself.

Second, the classical tradition never fully defined what it meant to “apply” foreign law. The legal realists had their own, reductionist, answer to this question. But for an anti-Realist, it remains a rich and important puzzle, related to the problem of adequacy of translation in philosophy of language.

A third challenge that a renewed classicism might have to face is to refine the distinction between first-order and second-order legal processes. Modernists since Cook have argued that choice of law is necessarily a first-order process, no different in principle from tort or contract. The general classical view is that it is a second-order process, an effort to *allot* rather than *exercise* legislative jurisdiction.

Within the classical model, however, there might be room to recognize that *some* of choice of law is a first-order exercise of authority. The First Restatement implicitly suggests this possibility at several points. For example, although it provided that the law of the place of injury would govern most questions in a tort suit, including the standard of care (negligence, strict liability, or some other), it also held that the specific law of the place of tortious conduct could determine if a given standard had been satisfied (American Law Institute, 1934, § 380(2)). The meaning of this rule is obvious. The place of injury has legislative jurisdiction. It can use that jurisdiction any way it likes. But the Restatement assumes that the place of injury would, under its own tort law, look to the prevailing norms in the place of conduct as data relevant to its assessment of whether an alleged tortfeasor has acted properly. The problem is that, by not making this point explicitly, the Restatement never developed the machinery with which to work out the implications of that assumption. Similarly, the First Restatement’s provisions regarding the interjurisdictional recognition of marriage, a question that has taken on new urgency with the debate over same-sex marriage, confuse second-order principles and first-order generalizations in a way that obscures their actual commitment to the simple idea that any two persons’ domiciles ultimately get to decide whether or not they can validly marry (Dane, 1999, pp. 512–9).

## Questions for Us All

I conclude with an issue that transcends the differences between classical and modernist choice of law. That issue is the relevance to choice of law of the normative authority of non-state legal regimes. The aim here is not to discuss the merits of legal pluralism, but rather to chart its implications for the shape of choice of law.

Classical choice of law’s rejection of legal pluralism is explainable by both the tenor of its times, and by its own tendency to conceptual rigidity. Less immediately obvious is why modernist choice of law would have, for all its revolutionary zeal, left these assumptions untouched.

Part of the answer lies in modernism itself. Although there have been other trends in modern jurisprudence, modernist choice of law has been, in form as well as belief, profoundly statist. It has relied on an account of law that looks to institutions rather than norms, and it has tied the duties of courts to the “interests” of states. Thus, it has deprived itself of the imaginative capacity to see what Robert Cover (1983, pp. 15–6, 26–40) has called the “jurisgenerative” power of myriad human communities outside the formal boundaries of the state.

It remains unclear whether legal pluralism is a mortal challenge to choice of law modernism. It is also unclear whether a renewed classicism, should it arrive, will effectively devote its own intellectual resources to the problem. What is clear is that, as the ideology of state exclusivism, and the nation-state itself, come under increasing theoretical and practical attack, choice of law will have to find a place in that conversation too.

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## Part II

# Contemporary Schools and Perspectives



## Natural Law Theory

BRIAN BIX

Natural law theory has a long and distinguished history, encompassing many and varied theories and theorists – though there are probably no points of belief or methodology common to all the views that claim the label “natural law” or that have had that label assigned to them. In legal theory, most of the approaches dubbed “natural law” can be placed into one of two broad groups, which I call “traditional” and “modern” natural law theory, and will consider in turn below.

### Traditional Natural Law Theory

We take it for granted that the laws and legal system under which we live can be criticized on moral grounds; that there are standards against which legal norms can be compared and sometimes found wanting. The standards against which law is judged have sometimes been described as “a (the) higher law.” For some, this is meant literally: that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature. For others, the reference to “higher law” is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law: on one hand, that not everything properly enacted as law is binding morally; on the other hand, that the law, as law, does have moral weight. (If it did not, we would not need to point to a “higher law” as a justification for ignoring the requirements of our society’s laws.)

“Traditional” natural law theory offers arguments for the existence of a “higher law,” elaborations of its content, and analyses of what consequences follow from the existence of a “higher law” (in particular, what response citizens should have to situations where the positive law – the law enacted within particular societies – conflicts with the “higher law”).

#### *Cicero*

While one can locate a number of passages in ancient Greek writers that express what appear to be natural law positions, including passages in Plato (*Laws*, *Statesman*, *Republic*) and Aristotle (*Politics*, *Nicomachean Ethics*), as well as Sophocles’ *Antigone*, the

best known ancient formulation of a Natural Law position was offered by the Roman orator Cicero (1928).

Cicero wrote in the first century BCE, and was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say that Cicero merely provided an elegant restatement of already established Stoic views). Cicero offered the following characterization of “natural law”:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment. (Cicero, 1928, *Republic* III.xxii.33, at 211)

In Cicero’s discussions of law, we come across most of the themes traditionally associated with traditional natural law theory (though, as might be expected in the first major treatment of a subject, some of the analysis is not always as systematic or as precise as one might want): natural law is unchanging over time and does not differ in different societies; every person has access to the standards of this higher law by use of reason; and only just laws “really deserve [the] name” law, and “in the very definition of the term ‘law’ there inheres the idea and principle of choosing what is just and true” (Cicero, 1928, *Law* II.v.11–12, pp. 383, 385).

Within Cicero’s work, and the related remarks of earlier Greek and Roman writers, there was often a certain ambiguity regarding the reference of “natural” in “natural law”: it was not always clear whether the standards were “natural” because they derived from “human nature” (our “essence” or “purpose”), because they were accessible by our natural faculties (that is, by human reason or conscience), because they derived from or were expressed in nature, that is, in the physical world about us, or some combination of all three.

As one moves from the classical writers on natural law to the early Church writers, aspects of the theory necessarily change and therefore raise different issues within this approach to morality and law. For example, with classical writers, the source of the higher standards is said to be (or implied as being) inherent in the nature of things. With the early Church writers, there is a divine being who actively intervenes in human affairs and lays down express commands for all mankind – though this contrast overstates matters somewhat, as the classical writers referred to a (relatively passive) God, and the early Church writers would sometimes refer to rules of nature which express divine will. To the extent that the natural law theorists of the early Church continued to speak of higher standards inherent in human nature or in the nature of things, they also had to face the question of the connection between these standards

and divine commands: for example, whether God can change natural law or order something that is contrary to it, a question considered by Ambrose and Augustine (among others) in the time of the early Church and by Francisco Suarez more than a thousand years later.

### *Aquinas*

The most influential writer within the traditional approach to natural law is undoubtedly Thomas Aquinas (1993), who wrote in the thirteenth century. The context of Aquinas's approach to law, its being part of a larger theological project that offered a systematic moral and political system, should be kept in mind when comparing his work with more recent theorists.

Aquinas identified four different kinds of law: the eternal law, the natural law, the divine law, and human (positive) law. For present purposes, the important categories are natural law and positive law. According to Aquinas, (genuine or just) positive law is derived from natural law. This derivation has different aspects. Sometimes natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices). Thus, while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 miles per hour or 60, are matters for which either choice would probably be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second Aquinas refers to as the "determination" of general principles ("determination" not in the sense of "finding out," but rather in the sense of making specific or concrete). The theme of different ways in which human (positive) law derives from natural law is carried by later writers, including Sir William Blackstone (1765), and, in modern times, John Finnis (1980, 281–96).

As for citizens, the question is what their obligations are regarding just and unjust laws. According to Aquinas, positive laws that are just "have the power of binding in conscience." A just law is one that is consistent with the requirements of natural law – that is, it is "ordered to the common good," the lawgiver has not exceeded its authority, and the law's burdens are imposed on citizens fairly (Aquinas, 1993, Qu. 96, art. 4, corpus, pp. 324–26). Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust; but what is the citizen's obligation in regard to an unjust law? The short answer is that there is no obligation to obey that law. However, a longer answer is warranted, given the amount of attention this question usually gets in discussions of natural law theory in general, and of Aquinas in particular. The phrase *lex iniusta non est lex* ("an unjust law is not law") is often ascribed to Aquinas, and is sometimes given as a summation of his position and the (traditional) natural law position in general. While Aquinas never used the exact phrase above, one can find similar expressions: "Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law"; and "[Unjust laws] are acts of violence rather than laws; because ... a law that is not just, seems to be no law at all" (Aquinas, 1993,

Qu. 96, art. 4, corpus, p. 324). (One also finds similar statements by Plato, Aristotle, Cicero, and Augustine – though, with the exception of Cicero’s, these statements are not part of a systematic discussion of the nature of law.)

Questions have been raised regarding the significance of the phrase. What does it mean to say that an apparently valid law is “not law,” “a perversion of law,” or “an act of violence rather than a law”? Statements of this form have been offered and interpreted in one of two ways. First, one can mean that an immoral law is not valid law at all. The nineteenth-century English Jurist John Austin (1832 [1995]) interpreted statements by Sir William Blackstone (for example, “no human laws are of any validity, if contrary to [the law of nature]”; Blackstone, 1765, I.41) in this manner, and pointed out that such analyses of validity are of little value. Austin wrote,

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the 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 ... 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. (Austin, 1995, Lecture V, 158)

Though one must add that we should not conflate questions of power with questions of validity – for a corrupt legal system might punish someone even if shown that the putative law was invalid under the system’s own procedural requirements – we understand the distinction between validity under the system’s rules and the moral worth of the enactment in question (Bix, 1993, 84–6).

A more reasonable interpretation of statements like “an unjust law is no law at all” is that unjust laws are not laws “in the fullest sense.” As we might say of some professional who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: “She’s no lawyer” or “He’s no doctor.” This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is “not really law” may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with “higher law.” This is almost certainly the sense in which Aquinas made his remarks, and the probable interpretation for nearly all proponents of the position (Kretzmann, 1988; but cf. Murphy, 2006, 8–20). However, this interpretation leaves the statement as clearly right as under the prior (Austinian) interpretation it was clearly wrong. One wonders why such declarations have, historically, been so controversial.

To say that an unjust law is not law in the fullest sense is usually intended not as a simple declaration, but as the first step of a further argument. For example: “This law is unjust; it is not law in the fullest sense, and therefore citizens can in good conscience act as if it was never enacted; that is, they should feel free to disobey it.” This is a common understanding of the idea that an unjust law is not law at all, but it expresses a conclusion that is controversial. There are often moral reasons for obeying even an unjust law: for example, if the law is part of a generally just legal system, and public disobedience of the law might undermine the system, there is a moral reason for at least minimal, public obedience to the unjust law. This is Aquinas’s position – he stated that a citizen is not bound to obey “a law which imposes an unjust burden on its subjects”

if the law “can be resisted without scandal or greater harm” (Aquinas, 1993, Qu. 96, art. 4, corpus, p. 327) – and it has been articulated at greater length by later natural law theorists (e.g., Finnis, 1980, 359–62).

Finally, it should be noted that the proper interpretation of certain basic aspects of Aquinas’s work remains in dispute. For example, there is debate within the modern literature regarding whether Aquinas believed moral norms could be derived directly from knowledge of human nature or experience of natural inclinations, or whether they are the product of practical understanding and reasoning by way of reflection on one’s experience and observations (e.g., Hittinger, 1987).

### *Natural law in early modern Europe*

In the period of the Renaissance and beyond, discussions about natural law were tied in with other issues: assertions about natural law were often the basis of or part of the argument for “natural rights” (later referred to as “human rights”) – individual rights that included rights against the state, and thus served as limitations on government. Additionally, natural law theories laid the groundwork for international law. Hugo Grotius and Samuel Pufendorf (writing in the early and late seventeenth century, respectively) were prominent examples of theorists whose writings on natural law had significance in both debates. The natural rights approach would be further developed in the “social contract” theories of Thomas Hobbes; John Locke, who also wrote extensively on natural law (Locke, 1988); and Jean-Jacques Rousseau.

A further significance of Grotius’ (1925) work was his express assertion that natural law, the higher law against which the actions of nations, lawmakers, and citizens could be judged, did not require the existence of God for its validity. (Though it is commonly claimed that this assertion was first made by Grotius, one can find hints of such a separation of natural law from a divine being at least as far back as the fourteenth-century writings of Gregory of Rimini; e.g., Finnis 1980, p. 54.) From the time of Grotius to the present, an increasingly large portion of the writing on questions of natural law (and the related idea of “natural rights”) was secular in tone and purpose, usually referring to “the requirements of reason” rather than divine command, purpose, will, or wisdom.

### *Perspective*

It is normally a mistake to try to evaluate the discussions of writers from distant times with the perspective of modern analytical jurisprudence. Cicero and Aquinas and Grotius were not concerned with a social-scientific-style analysis of law, as the modern advocates of legal positivism could be said to be. These classical theorists were concerned with what legislators and citizens and governments ought to do, or could do in good conscience. It is not that these writers (and their followers) never asked questions like, “What is law?” However, they were asking the questions as a starting point for an ethical inquiry, and therefore one should not be too quick in comparing their answers with those in similar-sounding discussions by recent writers, who see themselves as participating in a conceptual or sociological task.

Natural law has, from time to time and with varying degrees of importance, escaped the confines of theory to influence directly the standards created and applied by officials.

For example, natural law (or standards and reasoning that appear similar to natural law, but which are characterized as “substantive due process,” “natural justice,” or simply “reason”) has been offered as the source of legal standards for international law, centuries of development in the English common law (cf. Helmholz, 2005), and certain aspects of United States constitutional law. Natural law also appears to have played a significant role in American history, where natural law and natural rights reasoning, or at least their rhetoric, have been prominent (among other places) in the Declaration of Independence, the Abolition (antislavery) movement, and parts of the modern Civil Rights movement.

*John Finnis*

In modern times, the traditional approach to natural law has been advocated by a number of theorists, most of whom were self-consciously writing in the tradition of Aquinas. For example, the French writer Jacques Maritain (e.g., 1954) has had significant influence in the area. Among the English-language writers, the most prominent advocate of the traditional approach is arguably John Finnis (1980, 1998, 2000, 2007a, 2007b).

Finnis’s work is an explication and application of Aquinas’s views (at least, of one reading of Aquinas, a reading advocated by Germain Grisez, among others): an application to ethical questions, but with special attention to the problems of social theory in general and analytical jurisprudence in particular.

Finnis’s ethical theory has a number of levels. The foundation is the claim that there are a number of distinct but equally valuable intrinsic goods (that is, things one values for their own sake), which he calls “basic goods.” Finnis lists the following as basic goods: life (and health), knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion (Finnis, 1980, 85–90). These are “intrinsic” goods in the following sense: one can value, for example, health for its own sake, but medical treatment only as a means to health. If someone stated that she was buying medicine, not because she or someone she knew was sick or might become sick, and not because it was part of some study or some business, but simply because she liked acquiring medicines and having a lot of them around, one might rightly begin to question her rationality or her sanity.

However, the difference between right and wrong cannot be drawn at the level of basic goods. At this level, one can only distinguish the intelligible from the unintelligible. We *understand* the person who is materialistic, greedy, malicious, or unfair, however much we disapprove of such attitudes and actions. The greedy person is seeking the same basic goods as we are, though in a way we would consider out of balance (and thus wrong).

Finnis describes the basic goods he identifies, and other principles identified in his moral theory, as “self-evident,” but he does not mean this in the sense that the truth of these propositions would be immediately obvious to all competent thinkers. For Finnis, what it means for a (true) proposition to be “self-evident” is that it cannot be derived from some more foundational proposition; thus, “self-evident” is here the opposite of syllogistically demonstrable. (However, while these propositions cannot be thus demonstrated, they can be supported by consistent data of experience and by dialectical



arguments, for example, from consistency.) Nor does the claim about “self-evidence” suggest that everyone will be equally adept at reaching these propositions. People of substantial experience, who are able and willing to inquire and reflect deeply, may be better able to discover the “self-evident” truths than others (George, 1999, 43–5). Aquinas had written, similarly, that some propositions, including the first principles of practical reason and natural law, were only self-evident to the wise (Aquinas, 1993, Qu. 94, art. 2, corpus, p. 246).

Much of what is conventionally considered to be ethics and morality occurs at a second level in Finnis’s theory. Because there are a variety of basic goods, with no hierarchy or priority among them, there must be principles to guide choice when alternative courses of conduct promote different goods. (This is one basis for contrasting Finnis’s position with utilitarian moral theories, under which all goods can be compared according to their value in a single unit, for example, promoting happiness.) On a simple level, we face such choices when we consider whether to spend the afternoon playing soccer (the value of play) or studying history (the value of knowledge). The choice is presented in a sharper form when someone (say, a medical researcher) must choose whether to kill (choosing against the basic good of life), in a situation where the person believes that doing so would lead to some significant benefit (perhaps saving more lives at some future time) or avoid a greater evil. Morality offers a basis for rejecting certain available choices, but there will often remain more than one equally legitimate choice (again, there is a contrast with most utilitarian theories, under which there would always be a “best” choice).

For Finnis, the move from the basic goods to moral choices occurs through a series of intermediate principles, which Finnis calls “the basic requirements of practical reasonableness.” Among the most significant, and most controversial, is the prescription that one may never choose to destroy, damage, or impede a basic good regardless of the benefit one believes will come from doing so. In other words, the end never justifies the means, where the chosen means entails intending to harm a basic good. Other intermediate principles include that one should form a rational plan of life, have no arbitrary preferences among persons, foster the common good of the community, and have no arbitrary preferences among the basic goods (Finnis, 1980, pp. 59–99).

Law enters the picture as a way of obtaining certain some goods – social goods that require the coordination of many people – that could not be obtained (easily or at all) without law, and it also enters as a way of making it easier to obtain other goods. Thus, the suggestions Finnis makes about law and about legal theory are derivative from the ethical code which is, in a sense, his primary concern.

Even though Finnis’s theory might be seen as primarily a prescriptive account – a theory of how we should live our lives – the analysis also has implications for descriptive theory, including a descriptive theory of law. Finnis argues that a proper ethical theory is necessary for doing descriptive theory well, because evaluation is a necessary and integral part of theory formation. For example, while he agrees with the legal positivist, H. L. A. Hart, that a descriptive theory of a social practice like law should be constructed around the viewpoint of a participant in the practice, Finnis proposes a significant amendment to Hart’s approach. He argues that, when doing legal theory, one should not take the perspective of those who merely accept the law as valid (Hart would include those who accept the law as valid for a variety of reasons, including

prudential ones); rather, the theory should assume the perspective of those who accept the law as binding because they believe that valid legal rules (presumptively) create moral obligations (Finnis, 1980, pp. 3–13). The difference may seem minor, but it means crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the Natural Law theorist's assertion that moral evaluation is an integral part of proper description and analysis.

## Modern Natural Law Theory

As has been noted, the concept of “natural law” or the “natural law approach” to analyzing law has deep historical roots. It is fair to speak of the “natural law tradition,” but the meaning and significance of the earlier works are sufficiently ambiguous that many different perspectives have claimed to be part of that tradition. What criteria should be used in identifying a theorist's affiliation, and which theorists one includes under a particular label, will generally not be important, as long as one understands the moral or analytical problems to which the various theorists were responding, and the answers the theories are proposing.

While it may not be useful to try to adopt the role of gatekeeper, saying which theories are properly called “natural law theories” and which not, there may be some point, for the purpose of greater understanding, to identify similarities among those theorists who have defined themselves (or have been defined by later commentators) with that label. One such division is as follows: there are two broadly different groups of approaches that carry the label “natural law” theory. The first group includes the theorists already discussed: Cicero, Aquinas, Grotius, Pufendorf (1991), and Finnis, among many others. The second group reflects debates of a different kind and a more recent origin; the second approach focuses more narrowly on the proper understanding of law as a social institution or a social practice. (The two types of approaches are by no means contradictory or inconsistent, but they reflect sets of theoretical concerns sufficiently different that it is rare to find writers contributing to both.)

The second (or “modern”) set of approaches to natural law arises as responses to legal positivism, and the way legal positivists portrayed (and sometimes caricatured) traditional natural law positions. While attacks on the merits of natural law theory can be found in the works of John Austin, O. W. Holmes Jr., and Hans Kelsen, a large portion of the recent discussions of “natural law theory” derive from the 1958 “Hart-Fuller Debate” in the *Harvard Law Review* (Fuller, 1958; Hart, 1958). In this exchange, H. L. A. Hart laid the groundwork for a restatement of legal positivism, which he more fully articulated in *The Concept of Law* (Hart, 1994). Part of his defense and restatement involved demarcating legal positivism from natural law theory, and the demarcation point offered was the conceptual separation of law and morality. Lon Fuller argued against a sharp separation of law and morality, but the position he defended under the rubric of “natural law theory” was quite different from the traditional natural law theories of Cicero and Aquinas (as will be discussed in detail below).

In part, because of responses to legal positivists like Hart, a category of “natural law theories” has arisen which is best understood by its contrast to legal positivism, rather than by its connection with the traditional natural law theories of Cicero and Aquinas.

While the traditional theories were generally taking a particular position on the status of morality (that true moral beliefs are based in or derived from human nature or the natural world, that they are not relative, that they are accessible to human reason, and so on), a position which then had some implications for how legislators, judges, and citizens should act (as well as for all other aspects of living a good life); this second category of “natural law theories” contains theories specifically about law, which hold that moral evaluation of some sort is required in describing law in general, particular legal systems, or the legal validity of individual norms.

### *Lon Fuller*

Lon Fuller (1958, 1969) rejected what he saw as legal positivism’s distorted view of law as a “one-way projection of authority”: the government gives orders and the citizens obey. Fuller believed that this approach missed the need for cooperation and reciprocal obligations between officials and citizens for a legal system to work.

Fuller described law as “the enterprise of subjecting human conduct to the governance of rules” (Fuller, 1969, p. 96). Law is a form of guiding people, to be contrasted with other forms of guidance, for example, managerial direction. Law is a particular means to an end, a particular kind of tool, if you will. With that in mind, one can better understand the claim that rules must meet certain criteria relating to that means, to that function, if they are to warrant the title “law.” If we defined “knife” as something that cuts, something that failed to cut would not warrant the label, however much it might superficially resemble a true knife. Similarly, if we define law as a particular way of guiding and coordinating human behavior, when a system’s rules are so badly constructed that they cannot succeed in effectively guiding behavior, then we are justified in withholding the label “law” from them.

Fuller offered, in place of legal positivism’s analysis of law based on power, orders, and obedience, an analysis based on the “internal morality” of law. Like traditional natural law theorists, he wrote of there being a threshold that must be met (or, to change the metaphor, a test that must be passed) before something could be properly (or in the fullest sense) be called “law.” Unlike traditional natural law theorists, however, the test Fuller applies is one of process and function rather than strictly one of moral content; though, as will be noted, for Fuller these questions of procedure or function have moral implications.

The internal morality of law consists of a series of requirements which Fuller asserted that a system of rules must meet – or at least substantially meet – if that system was to be called “law.” (At the same time, Fuller wrote of systems being “legal” to different degrees, and he held that a system which partly but not fully met his requirements would be “partly legal” and could be said to have “displayed a greater respect for the principles of legality” than systems which did not meet the requirements.)

The eight requirements were:

- 1 Laws should be general;
- 2 They should be promulgated, that citizens might know the standards to which they are being held;

- 3 Retroactive rulemaking and application should be minimized;
- 4 Laws should be understandable;
- 5 They should not be contradictory;
- 6 Laws should not require conduct beyond the abilities of those affected;
- 7 They should remain relatively constant through time; and
- 8 There should be a congruence between the laws as announced and their actual administration. (Fuller, 1969, pp. 33–91)

Fuller's approach is often contrasted with that of traditional natural law positions. Fuller at one point tried to show a connection, writing that "Aquinas in some measure recognized and dealt with all eight of the principles of legality" (Fuller, 1969, p. 242). On the other hand, Fuller also realized that there were significant differences: he once referred to his theory as "a procedural, as distinguished from a substantive natural law." However, he chafed at the dismissal of his set of requirements as "merely procedural": an argument frequently made by critics that his "principles of legality" were amoral solutions to problems of efficiency, such that one could just as easily speak of "the internal morality of poisoning" (Fuller, 1969, pp. 200–2). Such criticisms misunderstand the extent to which our perceptions of justice incorporate procedural matters. This is a matter Fuller himself brought up through an example from the former Soviet Union. In that system, there was once an attempt to increase the sentence for robbery, an increase also to be applied retroactively to those convicted of that crime in the past. Even in the Soviet legal system, not known for its adherence to the rule of law, there was a strong reaction against this attempt to increase sentences retroactively. It is a matter of procedure only, but still it seemed to them – and it would seem to us – a matter of justice (Fuller, 1969, pp. 202–4). Following the rules laid down (just one example of procedural justice) is a good thing, and it is not stretching matters to characterize it as a moral matter and a matter of justice.

On the other hand, there were times when Fuller overstated the importance of his "principles of legality." When critics argued that a regime could follow those principles and still enact wicked laws, Fuller stated that he "could not believe" that adherence to the internal requirements of law was as consistent with a bad legal system as they were with a good legal system (Fuller, 1958, p. 636). There are various ways that this "faith" can be understood. One argument could be that a government which is just and good will likely also do well on procedural matters. Additionally, when proper procedures are followed (for example, the requirement that reasons publicly be given for judicial decisions), some officials might be less willing to act in corrupt ways. The contrary claim, that governments that are evil will be likely to ignore the procedural requirements, also has some initial plausibility. There have been regimes so evil that they have not even bothered with any of the legal niceties, with establishing even the pretense of legality, and to some extent Nazi Germany is an example. However, there have also been regimes, generally condemned as evil, which have at least at times been quite meticulous about legal procedures (South Africa before the fall of Apartheid or East Germany before the fall of Communism may be examples). Since the principles of legality can be understood as guidelines for making the legal system more effective in guiding citizen behavior, wicked regimes would have reason to follow them.

Thus, on one hand, one might say: first, that following the principles of legality is itself a moral good; second, the fact that a government follows those principles may indicate that it is committed to morally good actions; and third, that following such principles may hinder or restrict base actions. On the other hand, it is probably claiming too much for those principles to say that following them would guarantee a substantively just system. However, one should not conclude, as some critics have, that the evaluation of Fuller's entire approach to law should turn on the empirical question of whether there have ever been (or ever could be) wicked governments which, for whatever reason, followed the rules of procedural justice. (Like the question of whether there can ever be, over the long term, "honor among thieves," the ability to maintain procedural fairness amidst significant iniquities, is an interesting topic for speculation, but little more.) The main points of Fuller's position – that a value judgment about the system described is part of the way we use the word "law"; and that there is analytic value to seeing law as a particular kind of social guidance, which is to be contrasted with other forms of social guidance, and which can be more or less effective according to how well it meets certain criteria – would not be undermined by pointing out legal systems which were substantively unjust but which seemed to do well on questions of procedural justice.

Those who approach natural law through the Hart-Fuller debate sometimes over-emphasize the question of when a rule or a system of social control merits the label "law" or "legal." There is a danger with such a focus, in that debates about proper labeling (not just whether something is "law" or not, but also whether an object is "art" or not, whether a particular form of government is "democratic" or not, and so forth) often smother real moral, sociological, or conceptual arguments beneath line-drawing exercises. It is always open to theorists to stipulate the meaning of the terms they use, even for the limited purpose of a single discussion. To say that it is important that the products of a wicked regime be called "law" or not indicates that there is something further at stake (for example, whether and when citizens have a moral obligation to obey the law, and whether punishment is ever warranted for people who had been acting in accord with what the law at the time required or permitted), but the burden must be on the advocate to clarify what the further point is. It is probably preferable to bypass questions of labeling and line-drawing, to face directly whatever further substantive issues may be present.

### *Ronald Dworkin*

Ronald Dworkin is probably the most influential English-language legal theorist now writing. Over the course of forty years, he has developed a sophisticated alternative to legal positivism. Though his theory has little resemblance to the traditional natural law theories of Aquinas and his followers, Dworkin has occasionally referred to his approach as a natural law theory, and it is clearly on the natural law side of the theoretical divide set by the Hart-Fuller debate.

In Dworkin's early writings (collected in Dworkin, 1978), he challenged a particular view of legal positivism, a view that saw law as being comprised entirely of rules, and judges as having discretion in their decision-making where the dispute before them was

not covered by any existing rule. Dworkin offered an alternative vision of law, in which the resources for resolving disputes “according to law” were more numerous and varied, and the process of determining what the law required in a particular case more subtle.

Dworkin argued that along with rules, legal systems also contain principles. As contrasted with rules, principles do not act in an all-or-nothing fashion. Rather, principles (for example, “one should not be able to profit from one’s own wrong” and “one is held to intend all the foreseeable consequences of one’s actions”) have “weight,” they favor one result or another; there can be – and often are – principles favoring contrary results on a single legal question. Legal principles are moral propositions that are grounded (exemplified, quoted, or somehow supported by) past official acts (for example, the text of statutes, judicial decisions, or constitutions). There is still a legal positivist-like separation of law and morality in this view of law, in that judges are told to decide cases based not on whatever principles (critical) morality might require, but rather based on a different and perhaps inconsistent set of principles: those cited in, or implicit in, past official actions.

Dworkin argued for the existence of legal principles (principles that are part of the legal system, which judges are bound to consider where appropriate) by reference to legal practice (in the United States and England). Particularly telling for Dworkin’s argument are those “landmark” judicial decisions where the outcomes appear to be contrary to the relevant precedent, but the courts still held that they were following the “real meaning” or “true spirit” of the law; and also, more mundane cases where judges have cited principles as the justification for modifying, creating exceptions in, or overturning, legal rules.

With the conclusion that there were legal principles as well as legal rules, it would seem to follow that there are fewer occasions than previously thought where judges have discretion because there are “gaps” in the law (that is, places where there is no relevant law on the subject). However, now the likely problem is not the absence of law on a question, but its abundance: where legal principles could be found to support a variety of different results, how is the judge to make a decision? Dworkin’s answer was that judges should consider a variety of views of what the law requires in the area in question, rejecting those (for example, “in tort cases, the richer party should lose”) which do not adequately “fit” past official actions (statutes, precedent, constitutions). Among the theories of what the law requires that adequately fit the relevant legal materials, the judge would then choose that theory which was morally best, which makes the law the best it could be. This final stage of judicial decision making is where moral (or partly moral, partly political – the characterization is neither obvious nor crucial) factors take a central role in Dworkin’s view of how judges do (and should) decide cases. Two tenets of Dworkin’s early writings were thus related: that law contained principles as well as rules; and that for nearly all legal questions, there was a unique right answer.

In his later writings, Dworkin (1986, 2006) offered what he called “an interpretive approach” to law. (While Dworkin has said little about the relationship between his earlier writings and his later work, the later work is probably best seen as a reworking of earlier themes within a philosophically more sophisticated analysis.) He argued that “legal claims are interpretive judgments and therefore combine backward- and

forward-looking elements; they interpret contemporary legal practice as an unfolding narrative” (Dworkin, 1986, p. 225).

According to Dworkin, both law (as a practice) and legal theory are best understood as processes of “constructive interpretation.” (He believes that constructive interpretation is also the proper approach to artistic and literary works, and his writings frequently compare the role of a judge with that of a literary critic. Both the applicability of constructive interpretation to art and literature and the treatment of legal interpretation as analogous to artistic or literary interpretation, are controversial claims.) One can think of constructive interpretation as being similar to the way people have looked at collections of stars and seen pictures of mythic figures, or the way modern statistical methods can analyze points on a graph (representing data), and determine what line (representing a mathematical equation, and thus a correlation of some form between variables) best explains that data. Constructive interpretation is both an imposition of form upon the object being interpreted (in the sense that the form is not immediately apparent in the object) and a derivation of form from it (in the sense that the interpreter is constrained by the object of interpretation, and not free to impose any form she might choose). Dworkin also described the concept of “integrity”: the argument that judges should decide cases in a way which makes the law more coherent, preferring interpretations which make the law more like the product of a single moral vision.

For Dworkin, the past actions of legal officials, whether judges deciding cases and giving reasons for their decisions or legislators passing statutes, are data to be explained. In some areas, there will be little doubt as to the correct theory, the correct “picture.” The answer seems easy because only one theory shows adequate “fit.” Often, however, there will be alternative theories, each with adequate “fit.” Among these, some will do better on “fit” and others on moral value. In making comparisons among alternative theories, the relative weighting of “fit” and moral value will itself be an interpretive question, and will vary from one legal area to another (for example, protecting expectations – having new decisions “fit” as well as possible with older ones – may be more important regarding estate or property law, while moral value may be more important than “fit” for civil liberties questions). The evaluation of theories thus takes into account (directly and indirectly) a view about the purpose of law in general, and a view about the objectives of the particular area of law in which the question falls. Dworkin wrote, “Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community” (1986, p. 255).

Dworkin’s writings (both earlier and later) can be seen as attempts to come to terms with aspects of legal practice that are not easily explained within the confines of legal positivism. For example:

- 1 The fact that participants in the legal system (regularly, if not frequently) argue over even basic aspects of the way the system works (for example, the role of precedent in constitutional interpretation and the ability of courts to invalidate legislation), not just over peripheral matters or the application of rules to borderline cases;

- 2 Even in the hardest of hard cases, lawyers and judges speak as if there were a unique correct answer which the judge has a duty to discover; and
- 3 In landmark cases, where the law seems on the surface to have changed radically, both the judges and commentators often speak of the new rule having “already been present” or “the law working itself pure.”

A standard response to Dworkin’s work (both to his early writings and to the later “interpretative” work) is that judges and legal theorists should not look at law through “rose-colored glasses,” making it “the best it can be”; rather, they should describe law “as it is.” The key to understanding Dworkin, in particular his later work, is to understand his response to this kind of comment: that there is no simple description of law “as it is”; or, more accurately, describing law “as it is” necessarily involves an interpretative process, which in turn requires determining what is the best interpretation of past official actions. Law “as it is,” law as objective or noncontroversial, is only the collection of past official decisions by judges and legislators (which Dworkin refers to as the “pre-interpretive data,” that which is subject to the process of constructive interpretation). However, even collectively, these individual decisions and actions cannot offer an answer to a current legal question until some order is imposed upon them. And the ordering involves a choice, a moral-political choice among tenable interpretations of those past decisions and actions.

Dworkin, like Fuller, is a natural law theorist in the modern rather than traditional sense of that label, in that he denies the conceptual separation of law and morality, and asserts instead that moral evaluation is integral to the practice, description, and understanding of law.

### *General considerations*

Within this second type of natural law debate, as exemplified by the works of Fuller and Dworkin (and their critics), it is not always immediately clear what the nature or status is of the claims being made. Some of them could be merely sociological or lexicographical: that is, statements about the way we actually use the label “law.” For example, one could plausibly interpret Fuller as arguing that, for better or worse, the way most people use the word “law” includes a moral claim (in other words, that we tend to withhold the label from wicked laws or wicked regimes).

At other times, for example, with some of Dworkin’s arguments, the claims regard the best description of our practices, but not merely our linguistic practices in how we use terms like “law,” but also our practices in how we act within or react to the legal system. In a different sense, Dworkin’s theory also (tacitly) presents a normative claim: that law and legal theory seen as Dworkin would have us see them are (morally) better than the same practices as viewed through the alternative characterizations of other theories.

A different set of problems arise when students of legal theory try to understand traditional natural law theories (such as the works of Aquinas and Finnis). The difficulties come because the issues central to many of these theorists (for example, the extent to which moral truths are “self-evident”; the extent to which various goods, claims, or arguments are incommensurable; whether a moral theory can be constructed or



defended independent of a belief in God; and the like) bear little resemblance to what normally passes for legal theory. This, of course, is not a criticism of the traditional natural law theorists; if anything, it is a criticism of the way such material is often presented to a general audience, glossing over the differences in concern and focus between traditional natural law theorists and (many) modern analytical legal theorists.

### *Other modern writers*

A number of other modern writers have written works offered as “natural law” theories, some of which do not fit comfortably in either of the two broad subcategories considered above.

Michael S. Moore (1985, 2000) has discussed various aspects of law in the light of a Platonist (metaphysically realist) approach to language, morality, and legal concepts. Moore’s analysis might be best understood as responding to the question: how do we determine the meanings of legal terms like “valid contract,” “criminal malice,” and “due process”? On one extreme is the (“conventionalist”) response that like all language, the terms mean whatever we want them to mean, or whatever meaning they have gained from our practices and conventions over generations. Moore’s response is at the opposite extreme: simple descriptive terms (“bird,” “tree”), legal terms (“malice,” “valid contract”), and moral concepts (“due process,” “equal treatment”) all have meanings determined by the way the world is, not by our changing, and often erroneous beliefs about those objects. Moore has shown how this approach to metaphysics (and language) has numerous consequences for the way we should interpret constitutions and statutes and analyze problems of the common law and precedent.

Lloyd Weinreb (1987) has offered an interesting characterization of the natural law tradition (that is, the tradition of Cicero and Aquinas) that varies from the way it is seen by most commentators and advocates today. In particular, Weinreb sees the works of the ancient classical theorists and Aquinas (among others) as having been concerned, each in his own way, with the problem of explaining the possibility of human moral freedom in a world that otherwise appears determined by fate or fortune (in classical thinking) or by divine providence (in the view of the early Church). In Weinreb’s view, recent natural law writers like Finnis and Fuller are missing the basic point of natural law theory when they try to distance their claims from earlier arguments about normative natural order, which can now be understood as addressing generally the problem of the ontology, or reality, of morality.

Ernest Weinrib (1995) sees law as having an “immanent moral rationality.” For Weinrib, one can speak of the essence or the nature of law, of various parts of the law (for example, tort law) and of doctrines within the law. This view of law is contrasted with approaches that assert or assume that law is basically a kind of politics, or that it is a means of maximizing some value (for example, utility or wealth). In Weinrib’s words, “legal ordering is not the collective pursuit of a desirable purpose. Instead, it is the specification of the norms and principles immanent to juridically intelligible relationships” (Weinrib, 1988, p. 964). The essence of law can be worked out to particular normative propositions, and therefore what the law requires is not merely identical with the rules legislatures (and judges) promulgate. While Weinrib generally does not

use the label “natural law” for his approach (provocatively choosing instead “legal formalism,” a label modern theorists usually apply pejoratively), he has noted the overlap of his arguments with those put forward by Aquinas and other traditional natural law theorists.

Deryck Beyleveld and Roger Brownsword (1986) have constructed an approach to legal theory around Alan Gewirth’s argument for objective moral principles. Gewirth’s argument states that engaging in practical reasoning itself presupposed a commitment to a number of moral principles. Beyleveld and Brownsword use this analysis to argue against value-free social theory; in the context of legal theory, they argue that Gewirth’s analysis requires a rejection of legal positivism in favor of an equation of law with morally legitimate power.

Mark Murphy (2001, 2003, 2006, 2008) has developed a natural law approach to jurisprudence and politics that parallels that of John Finnis, though grounded on a reading of Aquinas arguably more conventional within the natural law tradition than Finnis’s own.

## Conclusion

A diverse family of theories carries the label “natural law.” Within legal theory, there are two well-known groupings that cover most (but not all) of the writing that has carried the label “natural law”: (1) “traditional natural law theory” sets out a moral theory (or an approach to moral theory) in which one can better analyze how to think about and act on legal matters; and (2) “modern natural law theory” argues that one cannot properly understand or describe the law without moral evaluation.

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## Legal Positivism

JULES L. COLEMAN AND BRIAN LEITER

Along with natural law theory, legal positivism is one of the two great traditions in legal philosophy. Its adherents include important nineteenth-century figures like John Austin and Jeremy Bentham, as well as twentieth-century thinkers like Hans Kelsen, H. L. A. Hart, and Joseph Raz. All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention (“the social thesis”); second, that there is no necessary connection between law and morality (“the separability thesis”). Positivists differ among themselves, however, over the best interpretation of these core commitments of positivism. Indeed, the definitions offered here of the social and separability theses are broader than the ones offered by those who coined the terms (Raz, 1979, p. 37; Coleman, 1982, p. 29). Legal positivists also share with all other philosophers who claim the “positivist” label (in philosophy of science, epistemology, and elsewhere) a commitment to the idea that the phenomena comprising the domain at issue (for example, law, science) must be accessible to the human mind. This admittedly vague commitment does little to convey the richness of positivism as a general philosophical position, but it serves to indicate that the label, though acquiring a very special meaning in legal philosophy, is not utterly discontinuous with its use elsewhere in the philosophical tradition.

### Jurisprudence: Method and Subject Matter

Hart (1961) has done more than anyone else to define methodology in the positivist tradition. Hart wrote his seminal work when “linguistic” philosophy was still dominant in the English-speaking world; he, in turn, adopted its method of “conceptual analysis” for questions in legal philosophy. On this approach, jurisprudence aims to give a satisfactory analysis of the uses to which the concept of “law” is put in various social practices (for example, legal argument in courts, in legislatures, in everyday settings). Such an analysis must account, in particular, for two features of the concept: first, our sense that of all the various norms in a society (moral, aesthetic, social) only some subset are norms of “law”; second, our sense that “legal” norms provide agents with special reasons for acting, reasons they would not have if the norm were not a “legal” one. A satisfactory analysis of the concept of law, then, must account for these two features,

what we may call, respectively, “the criteria of legality” and the “normativity” or “authority” of law.

Conceptual analysis is not a mere exercise in lexicography. As Hart observed: “the suggestion that inquiries into the meanings of words merely throw light on words is false” (1961, p. v). Rather, “a sharpened awareness of words ... sharpen[s] our perception of phenomena” (1961, p. 14, quoting John Austin). Thus, Hart describes his inquiry as a kind of “descriptive sociology” (1961, p. v), that is, an analytic taxonomy of the uses to which the concept is actually put in real social practices (for example, how activities referred to as law relate to and differ from other activities, such as those referred to as morality). Later writers in the positivist tradition have also emphasized that the “sociological” inquiry can be detached from the “linguistic” one (cf. Raz, 1979, p. 41: “we do not want to be slaves of words. Our aim is to understand society and its institutions. We must face the question: is the ordinary sense of ‘law’ such that it helps identify facts of importance to our understanding of society”).

Invariably, positivists and natural lawyers are treated as a contrasting pair. Unlike, say, the legal realists, who made empirical claims about adjudication, positivists and natural lawyers have focused primarily on the concepts of legality and authority and they are typically thought to express diametrically opposed views about both (roughly, natural lawyers reject both the social thesis and the separability thesis).

Ronald Dworkin, positivism’s most eloquent critic, presents a special case. His earliest objections to positivism were built around the claim that moral principles can be legally binding in virtue of the fact that they express an appropriate dimension of justice or fairness. This rejection of the separability thesis has led many commentators to characterize him as a natural lawyer. Dworkin’s work (1986), however, introduces an important distinction between the conditions of legality (or legal validity) and the meaning of a valid legal rule. Dworkin does not claim that the validity of legal principles depends on their morality, but he does believe that in *interpreting* the meaning of valid legal rules it is often necessary to consult moral principles. Insofar as Dworkin does not claim that morality is a criterion of legality, he appears to reject one of the classic commitments of natural law.

Perhaps the most distinctive feature, however, of Dworkin’s jurisprudence – certainly when compared with positivism and natural law theory – is its focus on adjudication. For Dworkin, a jurisprudence, above all else, must provide a plausible account of certain features Dworkin finds in adjudication: for example, that judges disagree not only about what recognized legal rules or principles require, but also about what principles and rules are really “legal” ones; and that even in hard cases, judges argue as though there are legally binding standards, rather than writing as though they are exercising discretion. For Dworkin, then, the accounts of legality and authority grow out of his theory of adjudication. While for the positivist, the central legal figure is the lawmaker or legislator, the central figure for Dworkin is law’s interpreter, the appellate judge.

### Legality and Authority

Hart has expressed positivism’s central tenet as the claim that there is a difference between the way the law is and the way it ought to be (1983, pp. 49–87). This tenet

is expressed by the account of legality given by the social and separability theses. The resulting account of the criteria of legality, however, has received differing interpretations. On a “restrictive” construal, favored by Joseph Raz, positivism holds that it can never be a criterion of legal validity that a norm possess moral value; the criterion of legality must simply be some determinate social fact: for example, that the norm has a particular social source (for example, it was passed by the legislature; Raz, 1979, pp. 37–52; Raz, 1985, pp. 311–20). On a more “inclusive” construal (sometimes called “incorporationism” or “inclusive legal positivism”), favored by H. L. A. Hart himself, and several later writers, positivism is only committed to two weaker claims: first, that it is not *necessary* in all legal systems that for a norm to be a legal norm it must possess moral value (what Coleman has dubbed “negative positivism”); and second, that what norms count as legal norms in any particular society is fundamentally a matter of *social conventions*. The latter can include a convention among relevant officials to make the moral value of a norm a condition of its legal validity (see Lyons, 1977; Soper, 1977; Coleman, 1982; Hart, 1994; Waluchow, 1994).

Note that positivists do not deny that there may be a great deal of overlap between a community’s law and its morality, both its positive and critical morality. Many of morality’s most urgent demands are typically enacted into law; indeed one might hold that an even greater convergence of the demands of morality and law should be seen as law’s ultimate aspiration. Even complete convergence between the demands of morality and law would not violate the separability thesis, however, for this thesis involves only a claim about the conditions of legal validity, not about the extent to which moral and legal norms overlap in practice.

Accounts of legality are often driven by accounts of authority. Indeed, positivism has often proved attractive because of natural law theory’s failure to account adequately for either. The moral value of a norm, for example, cannot be a necessary condition of its being a legal norm (as the natural lawyer would have it) since we all recognize cases of binding laws that are morally reprehensible (for example, the laws that supported apartheid in South Africa).

Natural law fares no better as an account of the authority of law. A practical authority is a person or institution whose directives provide individuals with a reason for acting (in compliance with those dictates). If Brian accepts Friedrich as an authority, then the fact that Friedrich commands Brian to do something gives Brian a reason for doing it, *without assessing how good Friedrich’s reasons are for having commanded it*. If what Friedrich commands is something Brian ought to do on its own merits, then Brian has a reason for doing what Friedrich commands independent of the fact that Friedrich commanded it. On the other hand, if Friedrich is an authority, then Brian has a reason for doing what Friedrich commands independent of the substance of that command.

Now we can see the problem with the natural lawyer’s account of authority. For in order to be law, a norm must be required by morality. Morality has authority, in the sense that the fact that a norm is a requirement of morality gives agents a (perhaps overriding) reason to comply with it. If morality has authority, and legal norms are necessarily moral, then law has authority too.

This argument for the authority of law, however, is actually fatal to it, because it makes law’s authority redundant on morality’s. Consider, for example, the moral prohibition against intentional killing. Individuals have a good reason, *as a matter solely of*

*morality*, not intentionally to take the lives of others. Now suppose that a law proscribing intentional killings is enacted. For law to be authoritative, it must provide citizens with a reason for acting that they would not otherwise have. But if all legal requirements are also moral requirements (as the natural lawyer would have it), then the fact that a norm is a norm of law does not provide citizens with an additional reason for acting. Natural law theory, then, fails to account for the authority of law.

The failure of natural law theory to account adequately for legality and authority makes positivism an attractive possibility, though it plainly does not imply that positivism is correct. We must now explore in greater detail positivist accounts of legality and authority.

### Positivism: Austin vs. Hart

It is natural to begin any discussion of positivist theories of legality and authority with John Austin's so-called, "will" or "command theory of law." According to Austin (1955), law is the order of a "sovereign" backed by a threat of sanction in the event of noncompliance. A norm is law, then, only if it is the command of a sovereign. Legality, on this account, is determined by its *source* – that is, the will or command of a sovereign – not its substantive merits. The criteria of legality are matters of fact, not value.

If law is a matter of fact, not value, then what can explain its normative force? How can we derive a normative conclusion (about law's authority) from a factual premise (its legality)? Recall that on Austin's account, a command is not law unless it imposes a threatened sanction in the event of noncompliance with its demands. Without sanctions, commands would really be no more than requests. Agents act in compliance with law's demands, then, in order to avoid imposition of sanctions. It is the threat of sanction that gives agents a (prudent) reason to act and thus the sanction accounts for law's normativity.

Hart (1961, pp. 18–77) famously critiqued each aspect of Austin's theory: the picture of the sovereign as a distinct individual; the conception of law as commands and as primarily prescriptive in nature; and finally, the emphasis on sanctions as the explanation of law's normativity.

For Austin, the sovereign is a particular person, namely that individual who, as a matter of fact, happens to have secured the habit of obedience, but who herself is not in the habit of obeying anyone. Hart rightly notes that, by treating the sovereign as a person, Austin's account is unable to explain other salient features of law, namely the fact that legal rules remain valid or binding even after a sovereign dies or is otherwise disempowered, even, in other words, when that particular person no longer enjoys the habit of obedience. It fails as well to explain the fact that the commands of a new "sovereign" can be law even though she has not yet secured a habit of obedience.

To remedy this failing, Hart reformulates Austin's conception of the sovereign so that the sovereign is not a person but an office. The authority to legislate vests in the office, not in the person, except insofar as one is a legitimate occupant of the office. But the office is an institution, and institutions are created by rules. The rules that create offices are plainly not orders backed by threats. Instead, they are rules that empower or authorize certain actions by public officials.

Thus, not all laws are liberty limiting in the way in which Austin envisions; rather, some laws expand liberty. They are enabling, or what Hart calls power conferring – expanding rather than contracting the scope of individual freedom by giving legal effect or force to personal choices, for example, the distribution of one’s holding through wills, the decision to bind oneself to future actions by contract or marriage, and so on. Some rules confer power on private individuals while those that create offices confer power and authorize public persons. So Austin is wrong to emphasize law’s prescriptive nature to the exclusion of its power-enhancing functions.

If not all laws are commands backed by threats, then the existence of sanctions cannot be the source of law’s normativity, for laws that confer power are presumably authoritative though they do not impose sanctions. Sanctions may lead people to comply with law’s demands, but they cannot explain the sense in which law might be thought to impose an obligation of compliance. Rather than explaining the obligations law imposes, sanctions are a sign that the law has failed fully to motivate compliance on its own terms. In order to understand the authority of law, we need to understand how law might motivate compliance in the absence of sanctions.

For Hart, law consists of rules of two distinct types: primary rules that either limit or expand liberty; and secondary rules that are *about* the primary rules. Hart distinguishes among three different kinds of secondary rules: those that create a power to legislate; others that create a power to adjudicate; and finally a rule of recognition. The rule of recognition is not a power-conferring rule. Instead, it sets out the conditions that must be satisfied in order for a norm to count as part of the community’s law. So we might say that Hart really believes that there are three kinds of legal rules: those that obligate, those that enable, and the rule of recognition that sets out validity conditions.

In contrast to Austin, Hart maintains that wherever there is law, there are primary rules that impose obligations and a rule of recognition that specifies the conditions that must be satisfied for a rule that imposes obligations to be a legal rule. These are the minimal conditions for the existence of a legal system.

In place of Austin’s reliance on sanctions as a source of law’s authority, Hart emphasizes the idea that law consists in *rules*, in particular, *social rules*. There is a difference between what people do *as a rule* and what they do when they are *following a rule*. In the latter case, the rule provides them with a reason for doing what they do. Social rules have both normative and descriptive dimensions. Rather than being mere descriptions of what individuals are in the habit of doing (as, for example, the habit of obeying the commands of a sovereign), rules provide agents with reasons for doing what they do (as a rule), and with grounds for criticizing those who fail to follow suit. Rules, when accepted from an “internal point of view,” provide reasons for acting apart from the mere reasons of prudence that threats supply. Social rules, in short, are normative in a way that habits of obedience are not – or so Hart argues. If law is normative, it is because it consists in rules. (Threats, by contrast, can only explain the sense in which one feels *obliged* to comply, not the sense in which one feels one has an obligation of obedience.)

The *content* of a social rule depends on the scope of convergent behavior, and its *normativity* depends on its being accepted from an internal point of view by the majority of individuals. There is an essential behavioristic dimension to both aspects of social



rules. Its content is fixed by behavior, and its normativity depends on acceptance, which is not simply a psychological state or disposition, but a pattern of behavior related to that state or disposition: namely, the reflective practices of justification and criticism by appeal to the rule. Just as Austin identifies law with social facts – the orders or commands of sovereigns – Hart also advocates understanding law in terms of social facts – in his case, social rules: that is, normative practices whose content and normative force depend on actual behavior.

We can distinguish social from other kinds of normative rules, including those of *critical morality*. A requirement of critical morality need not describe or correspond to a prevailing practice; in fact it may be inconsistent with prevailing practice. At the other extreme are descriptions of existing practices – accounts of what individuals do as a rule. The rules of critical morality have normative force in a way in which rules that are mere descriptions of behavior do not, but their force is independent of social practices. It should be clear that the concept of a social rule is designed to fit between Austin's habits of obedience and the view that law consists in rules of critical morality. If Hart is correct, the former are inadequate to explain the normative force of law, whereas the latter explain the normative force of law by rooting it in the demands of critical morality in violation of the separability thesis.

## The Authority of Law

Hart advances two distinct views about the role of social rules in explaining the authority of law. In the earlier sections of *The Concept of Law*, he argues that law is authoritative because it consists in social rules. The social rule theory does not represent Hart's ultimate view about legal authority, however. Often legal rules are enacted to promote social practices where none exist, or to mediate between conflicting social practices, or even to eliminate an undesirable, but nevertheless widespread social practice. In each of these cases, the law's validity does not depend on the existence of the corresponding social practice. Being a social rule, then, is not a necessary condition of legal validity. If law is authoritative, it cannot be because all laws are social rules.

Once Hart correctly, albeit not explicitly, abandons the view that law consists in social rules, he needs an account both of legality and authority that does not depend on the claim that the distinctive feature of legal rules is that they are social rules. The view he comes to is roughly this: the rule of recognition is a social rule whose authority depends on its being accepted from the internal point of view by the relevant officials, that is, judges. Rules subordinate to the rule of recognition may or may not be social rules. Their status as law is independent of that fact and so is their authority. Instead, their authority derives from their being valid under the rule of recognition. The authority of the rule of recognition is transferred to rules whose legality depends on their standing in the relationship of being valid under the rule of recognition.

There are two problems with this account of legal authority. Even if we accept that the rule of recognition is authoritative in virtue of its being a social rule, it does not follow that rules valid under the rule of recognition are authoritative in virtue of their validity under the rule of recognition. The rule of recognition applies only to the behavior of relevant officials. It provides officials with very narrowly defined reasons for acting

– that is, grounds for applying certain criteria as standards for assessing the validity of other “legal” actions. These reasons simply have nothing to do with the reasons legal rules in general might be said to provide ordinary citizens. Whereas the validity relationship is truth preserving, it is not authority transferring.

Second, the authority of the rule of recognition does not derive from it being a social rule – that is, it being accepted from an internal point of view. Acceptance from an internal point of view is expressed through the behavior of appealing to the rule as grounds of criticism and justification. The claim that the authority of a social rule derives from the internal point of view thus amounts to the view that what makes a norm reason giving is the fact that the majority of individuals treat it as such. But the authority of a rule (its reason-giving capacity) cannot be grounded in the mere fact that individuals treat it as reason giving.

Typically a normative social practice will be accepted from an internal point of view. That is, if a rule or practice is normative, individuals are likely to appeal to it as providing them with justifications for what they do and grounds for criticizing the noncompliance of others. Acceptance from an internal point of view is likely to be a reliable indicator of the normativity of a social practice. But if acceptance from an internal point of view is inadequate to explain the normative force of a social rule, what does?

Social rules have two components: the description of what individuals do as a rule and their being accepted from an internal point of view. If the internal point of view does not explain the rule’s normative authority, the only remaining possibility is the fact of convergent behavior. Accounts of legal authority rooted in convergent behavior have been ignored ever since Hart devastated Austin’s version of it in *The Concept of Law*. How, after all, can the mere fact that individuals do something as a rule provide someone with a reason for doing the same thing?

Here are two ways in which merely convergent behavior can be reason giving. Suppose Newt is self-interested. Then the fact that everyone drives on the right side of the road gives Newt a reason for doing the same thing. Newt’s interests often require him to coordinate his behavior with others, and when they do, Newt has a reason to do what others do simply because they do what they do. The fact of convergent behavior, then, provides a *prudential* reason for treating law as authoritative.

Alternatively, suppose that Emma is motivated to do the right thing but is uncertain about what morality requires of her. If Emma believes that others are similarly motivated, then Emma has a reason to do what they are doing – not because in doing so Emma coordinates with others but rather because, on the (plainly contestable) assumption that others are trying to do what morality requires, by following their lead, Emma is more likely to be doing what she ought to do, that is, the right thing. Here, then, the fact of convergent behavior provides an *instrumental* reason of morality for treating the law as authoritative.

Some officials believe that the rule of recognition provides something like the right standards for evaluating the validity of norms subordinate to it. For them, compliance with what other officials do may be required in order that they all do what is required (morally or otherwise). Still other officials are motivated largely by a desire to coordinate their behavior with other officials – quite apart from their views about the substantive merits of the rule of recognition itself. The avoidance of confusion and mayhem, as well as the conditions of liberal stability require coordination among officials.

Whether motivated by political or private moral virtue, or even by brute self-interest, the mere fact that many judges act in a certain way – that is, apply certain standards to determine legal validity and reason from those standards in certain ways – can provide particular officials with a compelling reason to do what others do – just because they do it. Convergent behavior, not acceptance from the internal point of view, is the key to understanding the authority of the rule of recognition.

What becomes, then, of Hart's notion of the internal point of view? We can take what Hart offers as an analysis of a social rule as in fact a stipulative definition of the term: a norm cannot be a social rule unless it is accepted from the internal point of view. In that case, the internal point of view is a necessary condition of a norm's being a social rule. Acceptance, then, from the internal point of view may be both a necessary condition of a normative practice constituting a social rule and a reliable indicator that a practice or rule is normative. But it is not this fact about social rules that explains their normative force. Instead, convergence does the normative work – at least with respect to the rule of recognition. We still require, however, an account of the authority of rules subordinate to the rule of recognition.

To develop such an account, we need to say more about the positivist conception of legality. Hart correctly rejected Austin's conception of law as the commands of a "sovereign" backed by threatened sanctions. In its place, we have acknowledged a distinction between the rule of recognition and other kinds of (primary) rules: those that confer power and those that impose obligations. The centerpiece of this conception of legality is the rule of recognition. One useful way of developing this conception of legality is to examine Dworkin's objections to it. Once we have this conception of legality in place, we can then take up the question of what explains the authority of law so conceived.

## Judicial Discretion

Dworkin (1977, pp. 14–45) describes Hart's position in terms of four basic tenets: (1) the rule of recognition; (2) the model of rules, that is, the claim that all legally binding norms are rules; (3) the separability thesis; and (4) judicial discretion, that is, the constrained authority of judges to appeal to standards other than those legally binding on them in order to resolve controversial legal disputes. We have discussed each of these except the argument for judicial discretion.

Why is judicial discretion unavoidable? Hart suggests two general lines of argument: one having to do with the rule of recognition, the other with the "open texture" of language. As Hart understands it, a rule of recognition sets forth the conditions necessary and sufficient for a norm's counting as part of a community's law. The set of norms satisfying these conditions will be finite. It is conceivable that a dispute will arise in which no norm satisfying the rule of recognition applies or controls the outcome. In such a case, the judge has no option but to go beyond the set of binding legal norms and consult a nonlegally binding standard.

Even where there are binding legal norms, discretion may still be required. Legal rules, after all, are expressed in general terms (for example, "No vehicles in the park"). General terms have a core of accepted meaning and a penumbra of uncertain or

controversial meaning. A man without hair is “bald”; a Rolls-Royce is a “vehicle.” But is a man with a hundred hairs bald? Is a motor scooter a “vehicle”? Rational individuals who are competent speakers of the language cannot disagree about whether a hairless man is bald or a Rolls-Royce is a vehicle; but they can disagree about whether a man with thinning hair is bald and whether a motor scooter is a vehicle.

Terms like “bald” and “vehicle” are general (or sortal) terms and they appear everywhere in the law. Cases arise in which the question is whether the general term applies to the facts at hand. Hart’s idea is that there is a distinction between easy and hard cases that parallels the distinction between the core and penumbra of a concept. Legal rules are binding with respect to their core instances: no rational, competent speaker of the language could deny that the rule applies in such cases. However, with respect to the penumbra of a concept, rational disagreement is possible and the law dictates no particular answer. The judge must exercise discretion and, in effect, legislate meaning. In doing so, he typically appeals to norms of fairness as well as to the policies that the law could be seen as aspiring to implement. In doing so, judges typically appeal to moral principles and social policies that are not themselves binding legal standards. This view of discretion, then, grows out of a particular theory of meaning.

Dworkin’s objections to Hart exploit his theory of adjudication, especially its commitment to discretion. Dworkin agrees with Hart that in hard cases judges will appeal to moral principles to resolve disputes. Unlike Hart, however, he argues that such norms are not extralegal standards, but are instead binding legal standards. His evidence for the claim that they are binding legal standards is, moreover, that judges so regard them. They are part of the law though they are not rules in Hart’s sense, nor is their status as law a matter of their being identified as law by a rule of recognition. They are part of the law because they express a dimension of justice or fairness suitable to law. If Dworkin is right, *contra* Hart: (1) law is not simply a matter of rules (law includes moral principles); (2) moral principles are law though they are not identified as such under a rule of recognition; (3) moral principles are law *in virtue* of their expressing a dimension of morality, thus violating the separability thesis; and (4) instead of exercising discretion, judges appeal to binding legal standards that are not rules. All four tenets of Hart’s positivism must be abandoned.

Though many positivists have taken up the task of responding to Dworkin’s objections, the centerpiece of many of these has been the idea that (“inclusive”) positivism can allow moral principles to be legally binding standards provided their being law depends on their satisfying a condition in the rule of recognition (cf. Hart, 1994; Sartorius, 1971). The idea is that moral principles can figure in the law as binding standards only if they are identified as such under a rule of recognition. In that case, it is not their morality as such that makes them law; rather, it is the *fact* that they meet the demands set forth in the rule of recognition. Allowing moral principles to be legally binding in this way saves both the separability thesis and the rule of recognition. The separability thesis is saved because what makes even moral principles binding law is that they are recognized as such under a rule of recognition, not their truth. The rule of recognition is saved just because the legality of all norms – including moral principles – depends on establishing that they satisfy the demands set forth in the rule of recognition.

Some positivists, notably Raz (1979) and his followers (for example, Marmor, 1992), take a different tack: they claim there are far better explanations for why judges might argue *as if* moral principles are legally binding than that they really are legally binding. Politically, for example, it behooves unelected judges to act as though they are “constrained” by law rather than owning up to their exercise of discretion.

If a positivist incorporates into law moral principles that are not rules, the positivist must abandon the model of rules. This is not a problem, however, since no positivist – not even Hart – advances this model. Hart’s point has always been that law is a rule-governed (that is, a normative) practice, where rule-governed is always intended to be broadly construed so as to include customary practices and other norms (cf. Hart, 1994). Dworkin’s objection is based on a narrow and uncharitable reading of Hart. Positivists are prepared to accept that a variety of different kinds of norms can count as law. What they insist on is that the legality of those norms be established by a rule of recognition.

What about the positivist’s apparent commitment to judicial discretion? By allowing moral principles to count as law the number of binding legal standards increases. This suggests that the number of occasions on which a judge will face a case without the benefit of guiding or controlling legal standards will decrease significantly. That means that the extent of judicial discretion resulting from the paucity of available legal standards will diminish. At some point, it may be reduced to an insignificant fraction of the total number of cases litigated. Increasing the absolute number of binding legal standards affects only this argument for discretion, however. More standards suggest more cases involving the penumbra of general terms. Indeed, moral principles are especially contestable in just this way. Concepts like “justice” and “fairness” are likely to be even vaguer and more contestable than terms like “bald” and “vehicle.” So increasing the set of binding legal standards by incorporating controversial moral principles into law may actually increase the extent of discretion, owing to problems of vagueness and controversy. In short, Dworkin’s objections do not appear decisive against a sympathetic reformulation of Hart’s positivism.

### Incorporationism and Legality

Even if moral principles can sometimes be binding on officials, inclusive positivism or incorporationism claims that this fact about moral principles can be explained by the rule of recognition. The legality of moral norms is not a function of their morality, but their validity under a rule of recognition; the rule of recognition in a particular community asserts, in effect, that certain norms are law provided they meet the demands of justice, or that they cannot be law unless they do so, and so on. Incorporationism depends on a rule of recognition incorporating morality into law. Dworkin denies that legal positivists can be incorporationists in this sense, and offers four different objections to a positivist’s attempt to incorporate morality into law through the rule of recognition. (Note that some of these objections would also be accepted by positivists who are not incorporationists; cf. Raz, 1985.)

First, a rule of recognition that includes reference to moral principles will violate the separability thesis. Second, positivism is committed to the idea that what makes

something law depends on its history or the form and manner of its enactment: legality, for a positivist, cannot depend on the substantive value of a norm or the truth of a moral principle. Incorporationism violates this requirement. Third, positivism is committed to the rule of recognition serving an epistemic function: that is, by consulting it, individuals can determine for themselves what the law is and what it requires of them. Incorporationism allows morality into law in a way that makes it impossible for the rule of recognition to serve its epistemic function. Fourth, positivism is committed to the rule of recognition being a social rule. Incorporationism renders the rule of recognition incapable of being a social rule. How might the incorporationist respond to these objections?

Coleman (1982) has argued that the core of the separability thesis is given by what he calls negative positivism: the claim that there is no *necessary* connection between law and morality. This does not preclude a rule of recognition from incorporating morality into law. It only precludes positivism from claiming that law must necessarily incorporate morality into law – everywhere, in all possible legal systems.

Is positivism committed to pedigree, historical, or noncontentful criteria of legality? In fact, incorporationism does not entail the absence of a pedigree or noncontentful criterion of legality. A rule of recognition might hold, for example, that a principle is part of the law to the extent it is appealed to in preambles to legislation, judicial opinions and the like. Under such a rule, it is the fact that a moral principle is cited that contributes to its legality, not the fact that the principle is true or expresses a dimension of justice, or the like. (Some incorporationists go further and argue that moral principles can count as law in virtue of their truth, though this position is quite controversial among positivists; cf. Coleman, 1995.)

Does incorporationism undermine positivism's commitment to the idea that the rule of recognition serves an epistemic function? The worry is this: a rule of recognition should allow individuals to determine which norms are binding laws; the rule of recognition is, after all, a rule of *recognition*. Hart himself introduces it by discussing the role it plays in reducing uncertainty about the law of a community. Unfortunately, a rule that makes morality a criterion of legality fails to reduce uncertainty, because moral principles are inherently controversial.

We can distinguish, however, between two different epistemic functions the rule of recognition might be asked to serve: validation and identification. The rule of recognition is the standard in virtue of which *officials*, especially judges, validate the legality of norms. Legal positivism is committed to the rule of recognition's serving a validation function. Nothing in incorporationism threatens the rule of recognition's ability to serve that function. That a rule of recognition may be controversial in its instantiations, however, does not entail that judges disagree about what the rule is. They disagree, perhaps, only about what it requires. In that case, they do not disagree about what the validation standard is, only about what it validates.

Finally, Dworkin claims that a rule of recognition that incorporates morality into law cannot be a social rule. A social rule requires a pattern of convergent behavior. A rule of recognition that incorporates morality will generate disagreement because officials will disagree about its requirements or instantiations. So the element of convergent practice will be missing. As just noted, however, disagreement about a rule's instantiations is compatible with agreement about what the rule is. Officials can agree

that the rule of recognition requires incorporating some moral principles into law, while disagreeing among one another about what those principles are. Nevertheless, their behavior converges in the requisite way.

Incorporationism responds to Dworkin's earlier objections to positivism. Its plausibility depends on understanding the rule of recognition in a way that permits it to incorporate moral principles into law. Dworkin offers four arguments to the effect that such a rule of recognition would be incompatible with positivism's most fundamental commitments. Arguably, however, Dworkin either misunderstands positivism's commitments or underestimates the resources available to the incorporationist to meet the objections. Interestingly, positivists like Raz share many of Dworkin's worries. These worries become most apparent when we consider whether incorporationism can provide a plausible positivist conception of law's authority.

### Raz's Theory of Authority

Recall that we distinguished between the authority of the rule of recognition and the authority of rules subordinate to it. The authority of the rule of recognition, it was suggested, depends on the convergent behavior of relevant officials. What matters, in this view, is that officials converge, not what norm their behavior converges on; they might even converge on the kind of rule of recognition incorporationism favors. Thus, nothing in the account of the authority of the rule of recognition is incompatible with the incorporationist's conception of legality. The question remains whether incorporationism is compatible with the best available positivist conception of the authority of rules subordinate to the rule of recognition. In considering the authority of rules subordinate to the rule of recognition, we have already ruled out Austin's account in terms of sanctions and Hart's account of authority in terms of the internal point of view. What alternatives remain?

The most influential positivist account of legal authority is due to Joseph Raz (1979, 1985). Yet Raz believes that his account of authority is incompatible with incorporationism. So can incorporationism be reconciled with the Razian account of authority?

We can begin by outlining the central features and key insights of Raz's view. Each of us asks ourselves, on various occasions: what ought I to do? What we ought to do depends on the reasons that apply to us – reasons that would ground or justify one or another course of conduct. We can suppose that there are good moral reasons and good prudential reasons, and that the balance of reasons will, typically, settle for us what we ought to do. Of course, we may be unclear from time to time about the proper weight to assign to various reasons and there will be conflicts that may, from time to time, seem unresolvable by reason alone. Setting these problems aside for now, we may suppose that the set of reasons that apply to us settles the issue of what we ought to do even if we are not always altogether clear about the answer that reason supplies.

We can refer to the answer reason supplies as the requirements of "right reason." To say that the law is a practical authority is to say that it provides an independent and different reason for acting that figures in the decisions of agents as to what they ought to do. Our concern is with the relationship between the reasons that law supplies and

those that already apply: the demands of right reason. There are three possibilities: (1) the reasons law supplies might be generally unrelated to the demands of right reason, thus giving us more reasons to think about; (2) they might, in general, conflict with the demands of right reason; or (3) they might generally coincide with those demands.

The Austinian view is that law provides distinct and altogether different reasons for acting than those that already apply (in the absence of law). Avoiding legal sanction gives us something else to think about when we are contemplating what we ought to do. Hart, however, convincingly argues that sanctions do not adequately explain the claim that law makes to being a practical authority, a claim whose truth or falsity would not hang on whether particular legal directives were backed by threats.

That leaves us with options (2) and (3). The reasons law provides can either generally coincide with those of right reason or stand in conflict with them. If the reasons law provides conflict with the demands of right reason, then it would not be rational for individuals to act on the basis of law's reasons. Law leads agents away from right reason, and, therefore, away from what they ought to do. Legal authority appears to require that law's reasons generally coincide with the demands of reason. If law's reasons, however, merely reiterate or reaffirm the demands of right reason, law's reason is otiose. Law's reason merely confirms what we ought to do; it does not provide us with a reason for acting different (in any way other than logically) from the reasons we already have. It appears that either the law is irrational or otiose; either interpretation fails to provide a basis for a plausible claim to authority. How, then, can law be a practical authority when the reasons it supplies coincide with those of right reason?

One's directives are authoritative only if individuals acting on the basis of them are likely to comply more fully with the reasons they already have for acting. Somewhat more precisely, in order for law to be a practical authority, it must be the case that for each agent for whom law is an authority, that agent would more fully or satisfactorily comply with the demands of right reason that apply to him by acting on the basis of the reasons law supplies than he would do otherwise. Raz calls this the normal justification thesis (1985, p. 299). Thus, the authority of law depends on its efficacy in this sense.

How can one do better by complying with the demands of right reason by following legal directives than one would do by following the demands of reason directly? There are two possibilities. Even when we have access to the relevant reasons and can assess adequately their weight in the balance of reasons, we may be unable to coordinate our behavior with others in ways that are necessary to bring about what we all have good and sufficient reasons for doing. Suppose we will all benefit from the provision of certain services – for example, police, schools, health care, and so on. Each of us has prudential or self-interested reasons for creating the institutions that provide these benefits, but none of us is capable either of creating the institutions individually or of organizing the large-scale collective efforts that would otherwise be necessary. Thus, we are much more likely to succeed in creating these institutions if we follow legal directives that tax us for the purposes of funding and establishing these institutions than we would be by acting on the basis of the reasons we have. In this kind of case, law's claim to authority is connected to its coordination function. (Notice that coordination arguments can be



extended beyond the standard case of providing public goods. Suppose each of us had a reason for acting that required us to ensure that no one in the relevant political community of which we were members fell below a certain minimum level of income. We would be much more likely to succeed in meeting the demands of right reason by putting in place some sort of welfare state than we would by trying to meet the demands of reason individually. Our individual efforts, however well motivated, would be overcome by various epistemic and free-rider problems that only a legally created welfare state can overcome.)

Now consider an argument for legal authority that is not based on law's coordination function. Suppose that right reason requires that all of us be act-utilitarians. Very few of us are actually in a particularly good position to determine which course of conduct is required of us all the time. We do not have access, for example, to most people's benefit and damage schedules. At least with respect to some of the larger scale projects to which we might be required to contribute, we would probably do better as utilitarians if we followed the judgments of democratically elected public officials. Their legislative decisions are reached after gathering information that we are not in a position to secure. In such cases, law's authority would derive from its special epistemic role.

In short: there are times when each of us would do better following the law than we would acting directly on the basis of right reason. Typically, these are cases involving problems of coordination or uncertainty. The claim to legal authority is based on the thought that the reasons law provides replace the reasons that otherwise apply to us because acting on the former will enable us more fully to comply with the demands of the latter than we will by acting on the basis of them directly. To the extent to which it is generally true that one will do better acting on the basis of law's reason than by acting on the basis of the reasons law provides, it is rational for us to accept law as an authority over us. There will always be areas, of course, in which we have a special expertise, and cases in which the law makes clear mistakes. Its authority will therefore be incomplete at best.

## Incorporationism and Authority

Raz believes that his account of authority presupposes the "sources thesis": the thesis that a norm is law only if it has a social source (for example, being duly enacted by the legislature). Incorporationism, however, allows that sometimes the legal validity of a norm could depend on its moral truth rather than on its having a social source. Thus, the sources thesis appears to be incompatible with incorporationism.

Does authority require the sources thesis? And are the underlying motivations for the sources thesis really incompatible with incorporationism? Before answering these questions, it is worth noting the relationships among incorporationists, Dworkin and Raz.

Dworkin and Raz both believe that legal positivism cannot allow incorporationism. Dworkin draws this conclusion from considering various deep commitments of positivism, for example, the separability thesis, the social thesis and the rule of recognition's epistemic function. In contrast, Raz draws the same conclusion from considerations

drawn from a positivist account of legal authority. Incorporationists and Dworkin believe that modern legal democracies incorporate moral principles into law without regard to their social source, and in that way both disagree with Raz. Incorporationists claim that this is accomplished through the rule of recognition; Dworkin argues that this is achieved through the practice of adjudication.

The burden for the Razian is to explain the role of moral principles in law without resorting to incorporationism; the burden for the incorporationist is to provide a theory of authority that is positivistic in spirit and compatible with incorporationism. And that is why Raz represents a more formidable challenge to the incorporationist than Dworkin does. (Notice, in this regard, that Hart (1994) decided – wrongly it seems – to spend most of his time responding to Dworkin rather than to Raz.)

According to the sources thesis, legality depends on a norm's social source, not its substantive content or underlying justification. What in the theory of authority appears to require this constraint? What would be problematic for the Razian theory of authority if the legality of a moral norm depended in some way on aspects of its moral merits? The idea is this: suppose that determining whether or not a norm constitutes part of a community's law meant engaging in substantive moral argument of the sort incorporationism appears to envision and allow. In determining whether a norm was valid law, one would be forced to uncover the underlying justificatory (moral) reasons that already apply to individuals. In determining, for example, whether a norm against murder was valid law one would be looking to see what justifies the prohibition against murder and thus why one has a reason not to murder. Doing that, however, would be incompatible with treating law as an authority. To treat law as an authority is to forego assessing the underlying or justificatory reasons. Authority presupposes foregoing precisely the sort of inquiry incorporationism appears to invite.

Suppose, however, that the rule of recognition has a clause to the effect that no norm can count as part of the community's law if it violates due process or equal protection, or even more generally, fairness. In this sense, the validity of the law depends on aspects of its morality. Determining whether or not a norm counts as law would require us to explore aspects of its moral value, in particular, its fairness. But that inquiry does not lead us to uncover the moral reasons that would justify the prohibition in the first place – the reasons that would already explain to us why we ought to act in a particular way or forebear from acting in certain ways.

An example might be helpful. The legislature passes a prohibition against certain forms of intentional killings. We all know the kinds of reasons that would justify such a prohibition. Suppose the rule of recognition says that a legislative enactment can be valid law only if it meets the demands of fairness. If a court is asked to determine the validity of the legislative enactment, it will inquire into a range of matters. The court will no doubt be looking to questions about the form and manner of enactment. Once it moves beyond those matters, it might take up the question of whether the law meets the requirements of fairness, a moral requirement of legal validity. At no time, however, in inquiring into the validity of the enactment must the court look to the underlying moral reasons for having a prohibition against certain forms of intentional killings. At least, without further argument, it does not follow from the fact that a rule of recognition makes reference to substantive moral considerations as a condition of legal validity that inquiries into legal validity will lead to the underlying

justificatory reasons of legislation in a way that is incompatible with the concept of authority.

A related argument against incorporationism would go something like this: if the law is to be an authority, the rule of recognition must serve an identification and not merely a validation function. The kind of rule of recognition that incorporationism allows is incompatible with its serving this kind of identification function.

The rule of recognition must serve an identification function for the following reason: law is an authority only if individuals acting on the basis of it will do better in complying with the demands of right reason than they would do otherwise. For individuals to act on the basis of law's directives, however, they have to be aware of what the law requires of them. That means that the rule of recognition must make the law accessible to them – it must fulfill the *epistemic* function of *identifying* what the law is.

Moreover, even if the rule of recognition served an identification function, it would not follow that the considerations brought to bear on the question of identification would coincide entirely with those that are relevant to justification. The moral reasons that bear on identifying the rule as law need not coincide with those that figure in its justification, that is, those that establish the way in which it is connected to the demands of right reason.

This is an argument for the sources thesis. After all, the considerations of morality that justify the prohibition against certain intentional killings and those that specify the content of fairness, due process, and equal protection may be controversial. This means that if moral principles are essential to the practice by which ordinary citizens come to recognize which of the community's norms count as binding law, then the rule of recognition (as conceived by the incorporationist) will not discharge its epistemic function.

Incorporationists have two possible lines of response. Hart (1994) concedes the centrality of the rule of recognition's epistemic function, and concedes that incorporating morality into law makes law more uncertain. But, Hart contends,

the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition ... A margin of uncertainty should be tolerated, and indeed welcomed in the case of many legal rules, so that an informed judicial decision can be made when the composition of an unforeseen case is known and the issues at stake in its decision can be identified and rationally settled. (Hart, 1994, pp. 251–2)

Thus, the positivist might argue that Raz is mistaken to think that the authority of law requires that there be no margin of uncertainty that results from incorporating morality into law.

Other incorporationists question whether incorporating morality into law really renders law uncertain (as Hart seems to suppose; cf. Coleman, 1995). Recall the distinction between validation and identification. The rule that officials must use to determine legal validity need not be the same rule that ordinary citizens employ in order to identify the law that applies to them. Indeed, ordinary citizens tend to either know what the law is (especially the criminal law) or to find out what the law is from lawyers. In both cases, the law provides authoritative guidance without citizens being able to formulate themselves the relevant rule of recognition!

The argument for authority we are considering now depends on ordinary citizens being in a position to identify and act upon the law that applies to them. That requires that citizens have access to a reliable indicator of what the law in their community is. That indicator may or may not be the rule of recognition; empirically, it seems it probably is not. If the rule that citizens typically turn to in order to determine the law that applies to them is not the rule of recognition, then it does not matter what kinds of constraints the rule of recognition imposes. All that is required of the rule of identification is that it be a reliable indicator of what turns out to be valid law. (It still remains, however, a significant problem for the incorporationist to explain how it is that a rule of identification can be a reliable indicator of what the law is if it is different from the rule of validation.)

It might turn out (as an empirical and not a conceptual matter) that the only kinds of rules that ordinary citizens can appeal to in determining the law that applies to them are ones that satisfy the sources thesis: that is, ones in which the law is identified by its source. In that case, we could view the sources thesis only as a *constraint on the theory of authority, not on the theory of validity*. What makes something law, in other words, need not depend on its social source. Incorporationism, then, would be compatible with validity and thus with any plausible conception of legality. All law, however, also claims authority. In order for that claim to be true, most, if not all, legal norms must be identifiable as such in light of their social sources. Only then can individuals appeal to them in ways that might prove fruitful from the point of view of their interest in complying with the reasons that apply to them. So understood, the sources thesis would be a condition of legitimate authority and not a constraint on the standards of legal validity.

This would impose a constraint on the rule of recognition were it necessarily an identification rule, that is, were it the case that ordinary citizens had to appeal to it in order to identify the law that applies to them. In fact, all that positivists really require is that there exist some practice that enables ordinary citizens reliably to determine the law. *That* practice need not coincide with the rule of recognition (cf. Coleman, 1995). The sources thesis, then, would impose a constraint on the rule of identification and not the rule of validation. For there to be law, there must be a validation rule – one that is as broad as incorporationism allows. For law to be authoritative, however, there must be an identification rule – one that may not be so broad. There is a problem for incorporationism only if those two rules must be the same rule.

The same general strategy of argument connects the two elements of the account of legal authority developed so far. The authority of the rule of recognition depends ultimately on considerations of coordination and knowledge. The same is true with respect to the authority of rules subordinate to the rule of recognition. With respect to the rule of recognition, officials have reason to comply with what others do as a rule if they want to coordinate their behavior with what others do, or if they believe that the behavior of others reflects an understanding of what the appropriate standards of validity are. The link is between individual action and the convergent behavior of other officials.

That link is unavailable as a general explanation of the authority of rules subordinate to the rule of recognition. Here the link is between the reasons that already apply to agents and the agents' grounds for believing that the law's reasons provide a better

avenue for complying with them than they otherwise would have. The agent's confidence is a function of the law's expertise and its abilities to coordinate human action. So while the account given so far draws a distinction between the authority of the rule of recognition and the authority of rules subordinate to it, the same general account is at work in both.

## Conclusion

An adequate jurisprudence should include accounts of the concepts of legality and authority, as well as providing a theory of adjudication. As a rule, positivists have focussed primarily on issues pertaining to the concepts of legality and authority. Central to positivism's analysis of legality is the institutional nature of law; central to its analysis of authority is the idea of efficacy. Individual positivists, as the foregoing has made clear, differ significantly on how the details of legality and authority are best explained.

## Postscript

In this brief Postscript, I (Brian Leiter) want to mention some important developments in the literature on legal positivism since the original essay above (written in 1996), respond to some criticisms of the original essay, and also indicate some places where my own views have changed from those expressed in the jointly authored piece with Jules Coleman.

Legal positivism remains the dominant view among Anglophone legal philosophers, a fact which may explain the increasingly *ad hominem* nature of attacks on positivism by Dworkin and some of his former students, in which positivists are accused of being "boring" or having a "stagnant research program" or being motivated by a desire to carve off the topic for specialists (Dyzenhaus, 2000 and Dworkin, 2004 are embarrassing examples of the genre; for a short critical discussion, see Leiter, 2006, pp. 175–80). The leading contemporary natural law theorist, John Finnis, has now conceded that the positivist theories of Hart and Raz give a wholly adequate account of "what any competent lawyer...would say are (or are not) intrasystematically valid laws, imposing 'legal requirements'" (Finnis, 2000, p. 1611), which would seem a quite satisfactory vindication of Hart's project of elucidating the concept of law recognizable to the ordinary man familiar with a modern municipal legal system. Yet Finnis still thinks he has a dispute with the version of legal positivism articulated above. Finnis (2000) writes: "*Pace* Coleman and Leiter, the laws of South Africa, or some of them, were not binding, albeit widely regarded and treated and enforced as binding" (p. 1611). Yet nothing in our original essay, or any positivist theory, claims that the laws of South Africa under apartheid were *morally* binding, only that they were legally valid. And that latter point Finnis does not dispute. Perhaps it is a moral deficiency of Coleman and Leiter, and other positivists, that we do not always ask and answer the questions that interest Finnis, but it hardly shows positivism to be "incoherent"!

Finnis, to be sure, thinks the "incoherence" results from the fact that positivism sets itself an "explanatory task" that it cannot discharge. The difficulty is that the "explana-

tory task” in question – “whether, when, and why the authority and obligatoriness claimed and enforced by those who are acting as officials of a legal system, and by their directives, are indeed authoritative reasons for [officials’ or citizens’] own conscientious action” (2000, p. 1611) – is one Finnis sets for positivism, not one legal positivists set for themselves. Yet Finnis is right that in our 1996 essay, we were careless on that point – as Hart himself sometimes seems to be in the 1994 “Postscript” to *The Concept of Law* – by suggesting that the fact of convergent behavior of officials could generate a binding moral reason for officials to comply with the rule of recognition. In fact, Hart’s practice theory of rules, consistent with the ambitions of his descriptive general jurisprudence, only needs to claim that one of the characteristics of a legal system is that officials *believe themselves to have obligations* to apply the criteria of legal validity in the rule of recognition, not that they are right to so believe or that they actually have such duties. Since the 1996 essay, Green (1999) has offered a decisive refutation of the various attempts to explain the reason-giving force of the rule of recognition in terms of its solving coordination problems, and Dickson (2007) has even cast doubt on whether Hart himself was really committed to the idea that officials had reasons for accepting and following the rule of recognition because others followed it, despite some unclarity in the Postscript. More generally, lack of clarity about the idea of the “normativity of law” – of the idea that law gives reasons for action – has bred much mischief in legal theory, leading positivists to give complicated answers to questions they did not need to answer. Enoch (2010) shows that when we distinguish the different senses of law giving reasons (or claiming to give reasons), it turns out that there is no problem for any version of legal positivism, and that the difficulties arise from (falsely) thinking that anyone needs to defend the (implausible) idea that legal norms necessarily give moral reasons for acting.

Finnis also shares with another leading natural law theorist, Mark Murphy (2005, p. 18), the worry that our original essay was unfair to natural law theory in assuming it was committed to the idea that any legally valid norm must be morally valid, an assumption that Finnis, Murphy, and even Aquinas reject. I am happy to concede the point, but it then leaves mysterious what dispute these writers purport to have with legal positivism. It seems, too often, that when natural law theorists speak of positivism’s failure to capture truths about the “central” cases of law or about “nondefective” law, these words are just masking the fact that they are changing the topic: that they, in fact, have no competing account of the nature of law, but would prefer to examine the nature of *morally good* laws and legal systems, a project to which positivism offers no objection. At least if natural law theories affirmed what positivism denies – namely, that morality must necessarily be a criterion of legal validity in any legal system – a real dispute could be joined. (It is a virtue of Dworkin’s theory that it appears to join the issue.) Since recent work by leading legal positivists (see, e.g., Gardner, 2001; Green, 2008) has emphasized (as Hart himself did in Chapter IX of *The Concept of Law*) the many ways in which law and morality are connected, indeed, *necessarily* connected, it is perhaps worth emphasizing that the crux of the separability thesis, as we explicitly noted in the original essay, is about morality as a criterion of legal validity, and not any other kinds of relations between law and morals.

Two other post-1996 developments in the jurisprudential literature are worth noting. Work by Stephen Perry (e.g., Perry, 2001) has led to a revival of interest in the

challenge put to positivism originally by Finnis (1980, ch. 1), namely, whether a jurisprudential theory can, as Hart advocated, offer a purely *descriptive* account of the nature of law, or whether it is not necessary, as a matter of satisfactory theory construction, to first answer the question “What ought law be?” in order to individuate the subject matter for an inquiry into what law is. The “methodology debate” is reviewed in Oberdiek and Patterson (2007) and in the contribution to this volume by Andrew Halpin. Leiter (2007, pp. 164–81, 183–99) defends a kind of descriptive jurisprudence and offers detailed critiques of Finnis and Perry.

On a different front, Shapiro (1998) offered a new argument for exclusive legal positivism, one that did not turn on any strong assumption about the nature of authority or law’s claim to authority (cf. Raz, 2006, for an important recent statement and slight revision of his views). According to Shapiro, if we assume that all law purports to guide conduct (which it surely does), then it follows from the very idea of what it is to be “guided by a rule,” that a rule of recognition that incorporated moral criteria of legal validity could not, in fact, guide conduct.

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## American Legal Realism

BRIAN LEITER

“American legal realism” refers to an intellectual movement in the United States that coalesced around a group of law professors and lawyers in the 1920s and 1930s, including Karl Llewellyn, Jerome Frank, Felix Cohen, Herman Oliphant, Walter Wheeler Cook, Underhill Moore, Hessel Yntema, and Max Radin. These writers thought of themselves as taking a *realistic* look at how judges decide cases, at “what the courts ... do in fact,” as Oliver Wendell Holmes, Jr. (a major intellectual forebear) put it (Holmes, 1897, p. 461). What judges really do, according to the realists, is decide cases according to how the facts of the cases strike them, and not because legal rules require particular results; judges are largely “fact-responsive” rather than “rule-responsive” in reaching decisions.

How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of “law” (which generally permits more than one outcome to be justified) but of these various psychosocial factors, ranging from the political ideology to the institutional role to the personality of the judge. Thus, the legacy of realism in both the practice and teaching of law consists of phenomena like these: lawyers now recognize that judges are influenced by more than legal rules; judges and lawyers openly consider the policy or political implications of legal rules and decisions; law texts now routinely consider the economic, political, and historical context of judicial decisions. In this sense, it is often said that “we are all realists now.”

The realists are by now the subject of a substantial historical literature (see the bibliography to Fisher, Horwitz, & Reed, 1993, pp. 325–6). This article will concentrate, by contrast, on the largely neglected, but substantial, contributions of realism to a philosophical theory of law and adjudication, one at odds with the mainstream of the jurisprudential tradition. The realists, unfortunately, often expressed hostility to systematic theorizing and even denied the existence of a “realistic” school of thought; their own theoretical efforts were, at the same time, hindered by a lack of philosophical sophistication and control. These features of their work have led to a highly critical treatment of the realists in the work of later, more philosophically acute jurists (cf. Hart, 1961). Almost despite themselves, however, the realists succeeded in developing a powerful and coherent theoretical view of law and adjudication.

## Jurisprudential Methodology

Realists have a fundamentally different conception of methodology in jurisprudence, and it is this that puts them at odds with the mainstream of the tradition. Modern legal philosophy has, like most of twentieth-century Anglo-American philosophy, employed the method of *conceptual analysis*: hence the title of the seminal work of this genre (Hart, 1961). In its simplest form, the method of conceptual analysis calls for the explication of the meaning of concepts (“morality,” “knowledge,” “law”) that figure in various human practices; it is an essentially armchair inquiry. Such an approach does, however, aim to illuminate real social institutions, for “the suggestion that inquiries into the meanings of words merely throw light on words is false” (Hart, 1961, p. v); rather one seeks “a sharpened awareness of words to sharpen our perception of phenomena” (Hart, 1961, p. 14, quoting J. L. Austin). In analyzing the concepts, then, we illuminate the social phenomena they describe – for example, our moral, epistemic, or legal practices.

Among the features of the *concept* of law thought to require philosophical explication, two are generally taken to be central: (1) of all the various norms in a society, only some subsets are norms of “law” (“criteria of legality”); and (2) that a particular norm is a “legal” norm provides agents with special reasons for acting (“normativity of law”). An account of the criteria of legality demarcates the boundary (if any) between norms of law and all other norms in the society (especially norms of morality), and at the same time defines the scope of judicial obligation: judges must abide by and enforce the norms of *law*. An account of the normativity of law, by contrast, explains how or why law changes our reasons for action. It thus helps demarcate the boundary between group behavior that is merely habitual and that which is genuinely rule governed; in the latter case, but not the former, the norm describing the behavior provides a standard of conduct to which people can legitimately appeal in justifying conformity with or criticizing deviation from the norm. Only when we understand norms from this “internal” point of view – that is, as providing agents with these special reasons for action – can we begin to understand the norms that comprise “law” (Hart, 1961, pp. 54–5).

Realism has often been construed by its critics as a conceptual theory – what might be called “the predictive theory,” often attributed to Holmes (1897, pp. 458, 461; see also Frank, 1930, p. 46; Llewellyn, 1930, esp. pp. 3–4; Cohen, 1935, pp. 828–9, 839). According to the predictive theory, a norm is a norm of law just in case it constitutes an accurate prediction of what a court will do; the claim that it is the law that a particular exchange of promises constitutes a contract is, on the predictive theory, equivalent to a prediction that a court will enforce these promises when called upon to do so by one of the parties. If a court declines to find an enforceable contract in the case at hand, then, on the predictive theory, there is, as a matter of law, no contract. Thus, the final criterion of legality, for the predictive theory, is what courts do in the particular case, and an accurate statement of law is equivalent to an accurate prediction of what the court will do. Because the predictive theory understands by the concept “law” nothing more than a prediction of what courts will do, the only reason for action provided by the theory comes from the prudent concern of those subject to the “law”

to avoid or engage the power of the courts. The statement, "As a matter of law, Mr Jones, you are bound to do X by this contract," provides, on the predictive theory, only one reason for action for Mr. Jones: namely, his prudent desire to avoid sanction by the courts for failure to perform. The only normativity of law, then, is the type of normativity present for the person Holmes calls "the bad man" "who cares only for the material consequences which ... knowledge enables him to predict" (Holmes, 1897, p. 459).

The predictive theory, so construed, was famously attacked by H. L. A. Hart (1961, pp. 101–2, 132–44). According to Hart, to conceive of the normativity of law as the Holmesian "bad man" (and, as Hart thinks, John Austin's theory of law also does) is to reduce the normativity of law to that of mere prudence or self-interest: but this is inadequate to make sense of the idea of having an *obligation* (and not merely a self-interested reason) to do what the law requires (Hart, 1961, pp. 82–6). The predictive theory fails to appreciate the "internal" aspect of legal rules, their status as reasons for conduct for legal actors. Take, for example, a judge trying to decide what the "law" is on some point; according to the predictive theory, what she is really trying to do is predict what it is she will do, since the law on this point is equivalent to a prediction of what she will do!

The manifest absurdity of the realists' purported conceptual theory might have suggested that Hart had misinterpreted the realists; yet, on the whole, Hart's criticisms have been widely embraced. In fact, however, there is a better explanation for the absurdity: as a methodological matter, the realists were not engaged in conceptual analysis. Indeed, Holmes makes clear on the very first page of "The Path of the Law" that he is talking about the meaning of law *to lawyers*, who will "appear before judges, or ... advise people in such a way as to keep them out of court" (1897, p. 457), and not aiming for a generally applicable analysis of the concept of law. So, too, Frank cautions that he "is primarily concerned with 'law' as it affects the work of the practicing lawyer and the needs of the clients who retain him" (Frank, 1930, p. 47n). (Hart's criticisms may be more apt with respect to Cohen, 1935.) In fact, it will become clear as we consider the realist arguments for legal indeterminacy (below) that the realists are, in *conceptual* matters, tacit legal positivists with respect to the criteria of legality (see esp. Leiter, 2001).

If the realists are not engaged in conceptual analysis, what methodology are they employing? Interestingly, conceptual analysis has fallen out of favor in philosophy since the late 1960s, except in jurisprudence. This general development marks what might be called "the naturalistic turn" in philosophy, and it is here that we will find the key to realist methodology: for the realists are not bad legal philosophers, as Hart's analysis might suggest, but prescient ones, philosophical naturalists before their time.

Naturalists in philosophy all share the following methodological view: philosophical theorizing ought to be continuous with and dependent upon empirical inquiry in the natural and social sciences. It will not do to seek an account of phenomena through an armchair analysis of concepts; we must begin, instead, with the relevant empirical data about these phenomena provided by the various sciences, and construct our philosophical theory to accommodate them.

W. V. O. Quine ("Epistemology Naturalized" in Kornblith, 1994) provides one important contemporary paradigm of philosophical naturalism, what we may call

“Replacement Naturalism.” According to Quine, epistemology studies the relationship between evidence (in the form of sensory input) and our various theories about the world (the cognitive “output” as it were). Traditional (nonnaturalized) epistemology wants to find a normative, foundational relationship between evidence and theory: it aims to show which of our theories are really *justified* on the basis of indubitable evidence. Quine argues that the foundationalist program is impossible, in part because evidence always underdetermines the choice among theories, and thus does not *justify* only one of them. From the failure of the normative, foundational project, Quine draws the conclusion that the only fruitful study of the relation between evidence (sensory input) and theory (cognitive output) is a descriptive account of what input causes what output, of the sort provided by psychology. Thus, says Quine, “Epistemology ... simply falls into place as a chapter of psychology” (Kornblith, 1994, p. 25). The science of human cognition *replaces* armchair epistemology: we naturalize epistemology by turning over its central question – the relationship between theory and evidence – to the relevant empirical science.

The dominant strand of naturalism in legal realism is a type of replacement naturalism. Indeed, Quine’s famous slogan – “Epistemology ... simply falls into place as a chapter of psychology” – echoes Underhill Moore’s own jurisprudential credo 25 years earlier; his work he says “lies within the province of jurisprudence. It also lies within the field of behavioristic psychology. It places the province within the field” (Moore & Callahan, 1943, p. 1). Jurisprudence – or more precisely, the theory of adjudication – falls into place, for the realist, as a chapter of psychology (or social science generally); we abandon the normative ambition of telling judges how they *ought* to decide cases in order to undertake the *descriptive* study of the causal relations between input (facts and rules of law) and outputs (judicial decisions). This yields a fully naturalized *descriptive* theory of adjudication, rather than a conceptual theory of the criteria of legality or a conceptual theory of adjudication, as a byproduct of the former (cf. Hart, 1961).

Yet Moore, it may seem, does not speak for all realists, some of whom appear to retain the ambition of formulating a *normative* theory (as do many naturalistic epistemologists; cf. the essays by Alvin Goldman in Kornblith, 1994). All the realists endorse the following *descriptive* claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the underlying facts of the case, rather than legal rules and reasons (hereafter “the Core Claim”). The question, to which we return below, is whether this descriptive claim can be parlayed into a *normative* theory, the traditional ambition of jurisprudence (to tell judges how they *ought* to decide).

## Legal Indeterminacy

Why abandon the normative ambitions of traditional jurisprudence in favor of replacement naturalism? Here we need to understand the influential realist arguments about the indeterminacy of law.

The law on some point is *rationaly* indeterminate when the “class of legal reasons” (hereafter “the class”) is insufficient to justify a unique outcome on that point. The class encompasses those reasons that are proper justificatory grounds of judicial decision: for

example, that prior, analogous cases have held a similar way or that a relevant statute requires the outcome are legitimate reasons for a judicial decision. The law is *locally* indeterminate when it is indeterminate only in some select range of cases (for example, those cases that reach the stage of appellate review). The law is *globally* indeterminate when it is indeterminate in all cases. (Strictly speaking, we are concerned only with the *underdeterminacy* of law, not its indeterminacy: we are concerned that the class justifies more than one, but perhaps not simply any, outcome.)

The law is *causally* indeterminate if the class is insufficient to *cause* the judge to reach only one outcome in that case. More precisely, suppose that relevant “background conditions” obtain: judges are rational, honest and competent, and they do not make mistakes. The law is causally indeterminate just in case the class together with relevant background conditions is still insufficient to cause the judge to reach only one outcome in that case. One reason this might be true is, for example, because the law is rationally indeterminate on that point: if the class justifies more than one outcome, then even rational, honest and competent judges will not be caused by applicable legal reasons to reach the decision they reach; we must look elsewhere to find out what caused them to do what they did. (On this way of conceiving the varieties of indeterminacy, see Leiter, 1995.)

All realists defend the following two theses about indeterminacy: (1) the law is rationally indeterminate locally not globally; and (2) the law is causally indeterminate in the cases where it is rationally indeterminate. Some realists defend this additional thesis: (3) the law is causally indeterminate even where it is rationally determinate and the background conditions obtain.

### *Rational indeterminacy*

The class includes legitimate *sources* of law (such as statutes, prior court decisions) and legitimate ways of *interpreting* and reasoning from those sources (for example, interpreting statutes by the “plain meaning,” reasoning by analogy). Someone might think the law is indeterminate because there are too few sources of law (so that there are no *legal* reasons for decision on some points) or too many conflicting sources (so that the conflicting sources provide legal reasons for conflicting decisions). The realists, however, argue that rational indeterminacy results from there being too many conflicting but equally legitimate ways of interpreting and reasoning from the sources, thus yielding conflicting legal rules. Thus, for example, Llewellyn argues that it is equally legitimate for a court to treat precedent “strictly” or “loosely.” On the strict view,

a later court can reexamine the [earlier] case and can invoke the canon that no judge has power to decide what is not before him, can, through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires to be understood as thus restricted. In the extreme form this results in what is known as expressly “confining the case to its particular facts.” (Llewellyn, 1930, p. 72)

The strict view of precedent, says Llewellyn, “is applied to *unwelcome* precedents” (1930, p. 73), as a way of distinguishing them from the case at hand. But there is

another approach to precedent, the “loose view,” which “is like the other, recognized, legitimate, honorable” (1930, p. 74). On this view, the earlier court “has decided, and decided authoritatively, *any* points or all points on which it chose to rest a case” so that in “its extreme form this results in thinking and arguing exclusively from *language* that is found in past opinions, and in citing and working with that language wholly without reference to the facts of the case which called the language forth” (1930, p. 74). But if “each precedent has not one value [that is, stands for not just one rule], but two, and ... the two are wide apart, and ... whichever value a later court assigns to it, such assignment will be respectable, traditionally sound, dogmatically correct” (1930, p. 76), then precedent, as a source of law, cannot provide reasons for a unique outcome, because precedent can be interpreted to stand for more than one rule, and so justify more than one outcome.

As with precedent, Llewellyn argues that with respect to the interpretation of statutes, “there are ‘correct,’ unchallengeable rules of ‘how to read’ which lead in happily variant directions” (1950, p. 399). By mining the cases, Llewellyn shows that courts have endorsed contradictory “canons of construction” like “A statute cannot go beyond its text” but also “To effect its purpose a statute must be implemented beyond its text” (1950, p. 401; Llewellyn adduces 28 contradictory canons at 401–6; cf. Llewellyn, 1930, p. 90). But if a statute can properly be construed in contradictory ways to stand for different rules, then reasoning from the statute will not justify a unique outcome in the case at hand (cf. Radin, 1930).

Indeterminacy enters not just in the interpretation of statutes and precedents, but also in the wide latitude judges have in how to characterize the facts of a case. After all, rules – what we get by interpreting precedents and statutes – must be applied to facts; but the facts of a case do not come with their own descriptions, and must be characterized in terms of their legal import. Many realists argued here, as well, that judges could legitimately characterize the same facts in differing ways, and thus even with a definite rule, the judge could still be justified in reaching more than one decision depending on how he characterized the facts. (See Frank, 1930, pp. 108–10, 1931, p. 28; Llewellyn, 1930, p. 80.)

### *Local indeterminacy*

Most Realists, unlike the later writers of critical legal studies, defended only the view that the law was *locally* indeterminate, that is, that the class only failed to provide a justification for a unique outcome in some circumscribed class of cases. (Jerome Frank is the main exception: he seemed to think the indeterminacy that arose from the latitude with which facts could be characterized permeated the legal system.) Most, but not all, realists were concerned with appellate litigation, and with the opinions of appellate courts; all confined themselves to cases that were actually litigated before courts at some level. Thus, Llewellyn explicitly qualified his defense of the indeterminacy of law by saying that “*in any case doubtful enough to make litigation respectable* the available authoritative premises ... are at least two, and ... the two are mutually contradictory as applied to the case at hand” (1931, p. 1239, emphasis added).

Now the evidential base of cases actually litigated clearly could not support the inference that the law is *globally* indeterminate, for it would omit all those “easy” cases

in which a clear-cut legal rule dictates a result, and which, consequently, no one (typically, at least) bothers to litigate. In any event, it is far less controversial, and certainly familiar to all practicing lawyers, that the law is locally indeterminate, even if this fact conflicts both with the popular perception in the realists' own day as well as our own. Moreover, if the law is locally indeterminate *in some or most of the cases actually litigated* that still raises the troubling specter of judges deciding cases unconstrained by law. The realists, unlike many contemporary political and legal philosophers, were not concerned with this issue, and in some respects even endorsed the practice unguardedly (see Cohen, 1935).

### *Causal indeterminacy*

All the realists make the point that the law (as the putative cause of decision) is causally indeterminate where it is rationally indeterminate. Indeed, this follows immediately given two assumptions: first, that law exercises its causal influence through reasons; and second, assuming the background conditions obtain, that reasons cannot be the sole cause of a decision if they do not uniquely justify that decision. But if the law is rationally indeterminate on some point, then legal reasons justify more than one decision on that point: thus we must look to additional factors to find out why the judge decided as he did. As Radin remarked, "somewhere, somehow, a judge is impelled to make his selection" of an outcome (1930, p. 881). And as Holmes observed more than 30 years before: "You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it?" Holmes is quick with an answer: the basis for the decision is to be found in "a concealed, half-conscious battle on the [background] question of legislative policy" (1897, pp. 465–6, 467; cf. Llewellyn, 1931, p. 1252). Other realists, as we shall see shortly, looked to an array of psychological and sociological factors as the *real* causal determinants of decision.

Some realists made the point that the law was causally indeterminate with respect to how a court would rule on a particular dispute precisely because the background conditions often do not obtain (for example, Frank, 1931, p. 240). This raises very different sorts of questions about the legitimacy of the adjudicatory process, and to the extent it is true (and it often is), it is of considerable importance to lawyers and litigants.

But some realists held a further, more startling thesis: that the law is causally indeterminate even where it is rationally determinate *and* the background conditions obtain – precisely because reasons *per se* are causally inefficacious. This view is clearest in Moore, who took most seriously the naturalistic imperative to make jurisprudential theorizing continuous with empirical inquiry in the social sciences (see Moore, 1923; Moore & Hope, 1929; Moore & Callahan, 1943). For Moore, the relevant science was (usually) psychology, in particular Watsonian behaviorism, which viewed human beings, like rats and dogs, as complex stimulus-response machines.

For the behaviorist, the content of the mind is a black box, not to be invoked in explaining behavior. On this view, reasons are causally relevant only as certain types of (aural, visual) stimuli, but are *not* causally relevant in virtue of their rational content or meaning! ("[A] proposition of law," says Moore "is nothing more than a sensible object which may arouse a drive and cue a response" (Moore & Callahan, 1943, p. 3).)

So, for the behaviorist, the fact that reasons *justify* a decision is not a causally significant fact, because *justification* involves a relation between the rational content of different propositions, and such content is off-limits for the behaviorist. The law is causally indeterminate on this picture even when it is rationally determinate, because rational determinacy (that is, justification via rational contents) is causally irrelevant for the behaviorist. Thus, Moore can say that the “logical processes of the institution of law ... throw[ ] no light on any pertinent question as to what the institution has been, is or will be” (1923, p. 611) – that is, such rational processes make no causal difference. Similarly, Moore complains that to move “[f]rom necessary logical deduction to necessary behavior” is “an easy step” but a misstep, presumably because rational determinacy does not entail causal determinacy for the behaviorist (Moore & Hope, 1929, p. 704). And even Llewellyn (1931) observed that for Moore’s account of adjudication, “all reference to the actor’s own ideas is deprecated or excluded” (p. 1245). This final thesis about indeterminacy is not only the most unfamiliar but also the least important for purposes here.

Notice now that the realist argument for indeterminacy turns on a conception of what constitute *legitimate* members of the class, that is, what count as legitimate *legal* reasons. This, of course, is just to presuppose some view of the criteria of legality, and it is a deficiency of realist jurisprudence that it has no explicit theory on this score. Yet when Holmes chalks up judicial decision not to law but to a half-conscious judgment of policy, he is plainly presuming that such considerations of policy are not legitimate sources of law. And in demonstrating the indeterminacy of *law* by concentrating on indeterminacy in the interpretation of *statutes and precedents*, the realists seem to be supposing that these exhaust the authoritative sources of law, a thesis easiest to justify on positivist grounds. Indeed, Llewellyn even says at one point that judges take rules “in the main from authoritative sources (which in the case of the law are largely statutes and the decisions of the courts)” (1930, p. 13). The realists did not develop a conceptual analysis of “law,” but it appears they may actually need the positivist analysis! (Cf. Leiter 2001 for a more detailed treatment.)

Finally, we are now in a position to see the motivation for replacement naturalism in jurisprudence. Recall that Quine had argued for replacement naturalism as follows: the central concern of epistemology is the relationship between evidence (input) and theory (output); if a normative, foundational account of this relationship is unrealizable (because, for example, evidence underdetermines theory), then there is only one fruitful account of this relationship to be given: namely, the purely descriptive, causal account given by the science of human cognition.

But now we can see that the realists have made the very same argument about the theory of adjudication. Its central concern is the relation between facts, rules of law, and legal reasoning (that is, the class) – the “input” – and judicial decision – the “output.” If the law is always rationally indeterminate, then no normative, foundational account of this relationship is possible; there is no normative, foundational relationship between the class and a particular decision, because the class is able to justify more than one decision (that is, it *underdetermines* any particular decision). Given the failure of the traditional normative project, the realists propose seeking a fruitful *descriptive* account of what input causes what decisions, by subsuming the theory of adjudication within a scientific account of judicial behavior.



## Descriptive Theory of Adjudication

The realists, as philosophical naturalists, sought to make their theorizing about adjudication continuous with scientific inquiry. While all the realists were scientific in attitude and method, only Moore pursued the link with social–scientific inquiry systematically. Indeed, Llewellyn aptly described Moore’s position as “semi-behaviorist, via cultural anthropology” (1931, p. 1243 n. 50). Note, however, that the model of psychology, anthropology, and social science at work in Moore and in realism more generally is positivistic (in the scientific, not legal, sense), not hermeneutic: we seek to study human (or judicial) behavior as we study the rest of the natural world, relying on detached observation in order to formulate causal laws. The hallmark of the naturalistic impulse in realism is this attempt to “formulat[e] laws of judicial behavior” (Moore & Hope, 1929, p. 704) based on actual observation of what it is courts do in particular cases. As Cook put it: legal scholars must eschew *a priori* methods and “observe concrete phenomena first and ... form generalizations afterwards” (1924, p. 460).

The central proposition that issued from this inquiry is what we earlier called the Core Claim of realism: in deciding cases, judges respond primarily to the stimulus of the underlying facts of the case, rather than to legal rules and reasons. Observation of court decisions, in other words, shows that judges are deciding largely based on their response to the facts of the case – what they think would be “right” or “fair” on these facts – rather than because of legal rules and reasons. (Recall that because of the rational indeterminacy of law, judges can justify *post hoc* the decision that strikes them as “fair” on the facts.) The challenge for at least some realists was to correlate facts (“input”) with decisions (“output”), in order to “observ[e] and stat[e] the causal relation between past and future decisions” (Moore & Sussman, 1931, p. 560).

The Core Claim is stated neatly by Oliphant: judges “respond to the stimulus of the facts in the concrete case before them rather than to the stimulus of over-general and outward abstractions in opinions and treatises” (1928, p. 75). Similarly, Llewellyn cautions that, in looking at the pronouncements of appellate courts, one must understand “how far the proposition which seems so abstract has roots in what seems to be the due thing on the facts before the court” (1930, p. 33). Later Llewellyn would speak of “the fact-pressures of the case” (1931, p. 1243; cf. 1960, p. 122) and “the sense of the situation as seen by the court” as determining the outcome (1960, p. 397). Max Radin suggested that the decision of a judge was determined by “a type situation that has somehow been early called up in his mind” (1925, p. 362), where “type situations” were simply “the standard transactions with their regulatory incidents [which] are familiar ones to [the judge] because of his experience as a citizen and a lawyer” (1925, p. 358) (for example, “the situation of a person bargaining for actual wares, agreeing to pay a certain amount for them and carrying them off on a promise to pay at a future time, is a common situation” (1925, p. 357)).

Federal District Court Judge Joseph Hutcheson affirmed that “the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause” (1929, p. 285). Frank cited “a great American judge, Chancellor Kent” who confessed that, “He first made himself ‘master of the facts.’ Then (he wrote) ‘I saw where justice

lay, and the moral sense decided the court half the time; I then sat down to search the authorities ... but *I almost always found principles suited to my view of the case*" (1930, p. 104n). The same view of judging is presupposed in Llewellyn's advice to lawyers that, while they must provide the court "a technical ladder" justifying the result, what the lawyer must really do is "on the facts ... persuade the court your case is sound" (Llewellyn, 1930, p. 76). As Frank pointed out, the very same advice had been offered by a former president of the American Bar Association (Frank, 1930, pp. 102–3n). It is no small virtue of the realist' core claim that it constitutes what every practicing lawyer knows.

Notice that the Core Claim forms the crux of the realist' notorious "ruleskepticism" (Hart, 1961, pp. 132–44). The realists were skeptical not about the existence or conceptual coherence of rules, but about whether rules make any significant causal difference in judicial decision making. It is what judges think would be "right" or "fair" on the facts of the case – and not legal rules – that generally determines the course of decision according to the realist. (It is striking, too, that on this central issue Hart can do no better than assert what the realists deny: "*it is surely evident* that for the most part decisions ... are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would be generally acknowledged" (1961, p. 137, emphasis added). The *real* dispute between Hart and realism, then, is not conceptual, but empirical: it concerns how often rules do or do not matter (causally) in adjudication.)

While all realists accepted the core claim, they divided sharply, however, over the issue of what determines how judges respond to the facts. One wing of realism, represented by Frank and Hutcheson, held that what determines the judge's response to the facts of a particular case are idiosyncratic facts about the psychology or personality of the individual judge (the "idiosyncrasy wing"). Another wing of realism, represented especially by Llewellyn and Moore, held that judicial response to the facts was "socially" determined such that these responses fall into very particular patterns, making generalization and prediction possible (the "sociological wing"). Over time, there has been a gradual "Frankification" of realism, with the views of the idiosyncrasy wing coming to stand for realism itself; but, in fact, prominent realists had a very different view about the determinants of judicial decision.

### *The idiosyncrasy wing*

Judge Hutcheson's confession that he reached his decisions by getting a "hunch" about what would be right or fair on the facts of a given case (1929, p. 278) provided the foundation for the idiosyncrasy wing of realism. Frank specifically endorsed Hutcheson's view and declared: "the way in which the judge gets his hunches is the key to the judicial process" (1930, p. 104). While conceding that "rules and principles are one class of ... stimuli" producing decisions, Frank claimed that it is "the judge's innumerable unique traits, dispositions and habits" which are decisive, which "shap[e] his decisions not only in his determination of what he thinks fair or just with reference to a given set of facts, but in the very process by which he becomes convinced what those facts are" (1930, pp. 110–11). Political and economic biases, often thought to be

important in adjudication, in fact only “express themselves in connection with, and as modified by, these idiosyncratic biases” (1930, p. 106). Thus, concludes Frank, “the personality of the judge is the pivotal factor in law administration” (1930, p. 111; cf. 1931, p. 242). (Note, however, that no one in the idiosyncrasy wing actually adhered to the view, often wrongly attributed to realism, that “what the judge ate for breakfast” determines the decision.)

But if “the ultimately important influences in the decisions of any judge are the most obscure, and are the least easily discoverable” (1930, p. 114) precisely because they are these idiosyncratic facts about the psychology of the individual judge, then how will it be possible to formulate laws of judicial behavior? In fact, Frank repudiates this ambition of the behaviorists when he declares that, “The truth is that prediction of most specific decisions ... is, today at any rate, impossible” (1931, p. 246; cf. 1930, *passim*). The qualification (“today at any rate”) is important: for the problem is *not* that there are no determinants of decision (Frank does accept a type of Freudian psychic determinism) but rather that such determinants are epistemologically opaque: we have no reliable way of knowing what they are. But even Frank allowed that if judges became suitably self-aware – undergoing, say, psychoanalysis – then they could provide us with the information about their personalities that would make prediction possible (1930, p. 163).

Even if later images of realism seem to conform to the Frankian model, Frank himself was aware that his was a minority view, both among lawyers and among realists. Fond of armchair Freudian speculations, Frank charged that the continued demand for certainty (via predictability) in law was the product of an infantile longing for the protection of a father figure (1930, p. 34). More interestingly, he suggested that the reason he and Hutcheson had “far less belief in the possibility of diminishing the personal element in the judge than Oliphant or Llewellyn” was due to his and Hutcheson’s greater experience with trial courts, where, Frank suggested, the personal element was omnipresent (1931, p. 30, n. 31).

### *The sociological wing*

Writers in the sociological wing of realism did not deny the relevance of the fact that judges are human beings with individual personalities (see Llewellyn, 1930, pp. 80–1, 1931, pp. 1242–3); rather they insisted that the relevant facts about judges *qua* human beings were not primarily idiosyncratic ones. As Cohen aptly put it (in answer to Hutcheson and Frank): “Judges are human, but they are a peculiar breed of human, selected to a type and held to service under a potent system of government controls ... A truly realistic theory of judicial decision must conceive every decision as something more than an expression of individual personality, as ... even more importantly ... a product of social determinants” (1935, p. 843). If writers like Frank emphasized the psychological profile of the individual judge, writers like Llewellyn, Cohen, and Moore emphasized the “sociological” profile of the judge, one he had in common with many others. Judicial decision is still primarily explicable in terms of psychosocial facts about judges (that determine how they respond to the facts of particular cases), it is just that these psychosocial facts are held to be general and common, rather than idiosyncratic.

Unfortunately, the realists did not have a rich sociological theory of judicial personality. Their strongest argument was an inference to the best explanation: given that judicial decisions can be correlated with the underlying facts of the cases decided, it must be the case that there are “social” determinants of decision that force decisions of individual judges into these predictable patterns.

The realists tended to draw their best examples of this point from the commercial realm (rather, say, than constitutional law). Here they commonly advanced two sorts of claims: with respect to the underlying facts of the case (whether stated in the opinion or not), what judges do is either (1) enforce the norms of the prevailing commercial culture; or (2) do what is best socioeconomically under the circumstances.

Oliphant gives this example: looking at a series of conflicting court decisions on the validity of contractual promises not to compete, Oliphant observed that, in fact, the decisions tracked the underlying facts of the cases:

All the cases holding the promises invalid are found to be cases of employee’ promises not to compete with their employers after a term of employment. Contemporary guild [that is, labor union] regulations not noticed in the opinions made their holding eminently sound. All the cases holding the promises valid were cases of promises by those selling a business and promising not to compete with the purchasers. Contemporary economic reality made these holdings eminently sound. (1928, pp. 159–60)

Thus, in the former fact-scenarios, the courts enforced the prevailing norms (as expressed in guild regulations disfavoring such promises); in the latter cases, the courts came out differently because it was economically best under *those* factual circumstances to do so.

Llewellyn provides a similar illustration (1960, pp. 122–4). A series of New York cases applied the rule that a buyer who rejects the seller’s shipment by formally stating his objections thereby waives all other objections. Llewellyn notes that the rule seems to have been rather harshly applied in a series of cases where the buyers simply may not have known at the time of rejection of other defects or where the seller could not have cured anyway. A careful study of the facts of these cases revealed, however, that in each case where the rule seemed harshly applied what had really happened was that the market had gone sour, and the buyer was looking to escape the contract. The court in each case, being “sensitive to commerce or to decency” (1960, p. 124) applies the unrelated rule about rejection to frustrate the buyer’s attempt to escape the contract. Thus, the commercial norm – buyers ought to honor their commitments even under changed market conditions – is enforced by the courts through a *seemingly* harsh application of an unrelated rule concerning rejection. It is these “background facts, those of mercantile practice, those of the situation-type” (1960, p. 126) that determine the course of decision.

Moore tried to systematize this approach as what he called “the institutional method” (1929, 1931). Moore’s idea was this: identify the normal behavior for any “institution” (for example, commercial banking); then identify and demarcate deviations from this norm quantitatively, and try to identify the point at which deviation from the norm will *cause* a judicial decision that corrects the deviation from the norm (for example, how far must a bank depart from normal check-cashing practice before a court will

decide against the bank in a suit brought by the customer?). The goal is a predictive formula; deviation of degree X from “institutional behavior (that is, behavior which frequently, repeatedly, usually occurs)” (1929, p. 707) will cause courts to act. Thus, says, Moore: “the semblance of causal relation between future and past decisions is the result of the relation of both to a third variable, the relevant institutions in the locality of the court” (1931, p. 1219). Put differently: what judges respond to is the extent to which the facts show a deviation from the prevailing norm in the commercial culture.

The theory of the sociological wing of realism – that judges enforce the norms of commercial culture or try to do what is socioeconomically best on the facts of the case – should not be confused with the idea that judges decide based, for example, on how they feel about the particular parties or the lawyers. These “fireside equities” (Llewellyn, 1960, p. 121) may sometimes influence judges; but what really determines the course of decision is the “situation-type” – that is, the general pattern of behavior exemplified by the particular facts of the disputed transaction, and what would constitute normal or socioeconomically desirable behavior in the relevant commercial context. The point is decidedly not that judges usually decide because of idiosyncratic likes and dislikes with respect to the individuals before the court (cf. Radin, 1925, p. 357).

But why would judges, with some degree of predictable uniformity, enforce the norms of commercial culture as applied to the underlying facts of the case? Here the realists did little more than gesture at a suitable psychosocial explanation. “Professional judicial office,” Llewellyn suggested, was “the most important among all the lines of factor which make for reckonability” of decision (1960, p. 45); “the *office* waits and then moves with majestic power to shape the man” (1960, p. 46). Echoing, but modifying Frank, Llewellyn continued:

The place to begin is with the fact that the men of our appellate bench are human beings ... And one of the more obvious and obstinate facts about human beings is that they operate in and respond to traditions ... Tradition grips them, shapes them, limits them, guides them ... To a man of sociology or psychology ... this needs no argument. (1960, p. 53)

Radin suggested that “the standard transactions with their regulatory incidents are familiar ones to him [the judge] because of his experience as a citizen and a lawyer” (1925, p. 358). Cohen, by contrast, simply lamented that “at present no publication [exists] showing the political, economic, and professional background and activities of our judges” (1935, p. 846), presumably because such a publication would identify the relevant “social” determinants of decision.

Of course, by the time of *The Common Law Tradition*, Llewellyn had actually repudiated many of the naturalistic ambitions of early realism, remarking, for example – and with Moore obviously in mind – that the judge is not a “Pavlov’s dog” (1960, p. 204). The final collapse of naturalism in realist jurisprudence comes with Llewellyn’s introduction of “situation-sense,” a mysterious faculty that permits judges to detect the “natural law which is real, not imaginary ... [that is] indwelling in the very circumstances of life” (1960, p. 122, quoting Levin Goldschmidt). Plainly, though, the ambition of making theories of adjudication continuous with social scientific inquiry has

been abandoned in favor of rank mysticism when the explanation for the correlation of decisions with underlying facts is the operation of a nonnaturalistic faculty, “situation-sense”! (But for a different understanding of later Llewellyn, see Kronman, 1993, pp. 209–25.)

One final difficulty may seem to plague the realist’ descriptive theory. For surely it is obvious that some cases that come before courts are easy (the rules clearly dictate a certain outcome), that judges often appear to strive to conform to the demands of rules, and that judges often decide in ways that are consistent with rules being causes of decision. Call these phenomena “the rule truisms.” How can the Core Claim of realism be compatible with the rule truisms?

The key here is to remember that the central naturalistic commitment of realism is to explain judicial decision in terms of the psychosocial facts about judges that account for how they make decisions. But judges, as the sociological wing emphasizes, are a special breed of human being, and this too counts as a relevant psychosocial fact. “Judges,” says Cohen, “are craftsmen, with aesthetic ideals” (1935, p. 845) – surely a relevant fact about the psychological profile of the judge. And Llewellyn concedes that in trying to get a court to decide in your favor, “‘rules’ loom into importance. Great importance. For judges think that they must follow rules, and people highly approve of that thinking” (1930, p. 4). Judges, in short, are guided according to the realists by “a certain ideal of judicial craftman-ship” (Kronman, 1993, p. 214). Let us call this the idea of “the normative judiciary” – of how judges ought ideally to decide cases. To the extent that human beings *qua* judges have a conception of the normative judiciary, then to that extent *the psychological fact about them* explains why they are sometimes rule-responsive in the way the rule truisms suggest. Theoretical coherence, a virtue not much prized by the realists, is, nonetheless, preserved in the face of the rule truisms – by showing that even “rule-responsiveness,” however infrequent, is, nonetheless, explicable within a naturalistic account of judicial decision.

## The Attack on Formalism

Whatever their differences among themselves, the realists were united in their opposition to a very different descriptive theory of adjudication, often called “formalism” or “mechanical jurisprudence.” According to the formalist, “the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision” (Frank, 1930, p. 101). Judges, of course, write their opinions in this “formalistic” mode, but the realists want to insist precisely that, “the decision often may and often will prove to be inadequate if taken as a *description* of how the decision really came about and of what the vital factors were which caused it” (Llewellyn, 1930, p. 37; cf. Cohen: “The traditional language of argument and opinion neither explains nor justifies court decisions” (1935, p. 812)).

“Formalism” as an epithet has actually been widely applied. In a very strict sense, the formalist holds that decisions flow (or ought to flow) from certain axiomatic definitions. Thus, in the notorious (formalistic) opinion in *United States v. E. C. Knight Co.* (156 US 1 [1895]), the US Supreme Court held that the regulation of a sugar manufacturer (responsible for 90 percent of sugar production in the United States!) was not

within the power of Congress to regulate “interstate commerce,” since, *by definition*, interstate commerce did not include manufacturing, which takes place only within a state.

In a looser sense, formalism names any view in which authoritative legal sources together with the “methods” of legal reasoning are sufficient to provide a watertight justification for a unique outcome to any dispute. The deductive model of decision just described by Frank is the most familiar form.

The realists were intent to deny the descriptive adequacy of formalism on both counts. We shall return momentarily to the realist attitude toward formalism as a normative theory.

Formalism owed its intellectual underpinning to the work of Christopher Langdell, Dean of Harvard Law School in the late nineteenth century, who, along with certain followers (like Joseph Beale), was a figure for whom the realists reserved a special antipathy. Langdell aimed to make law “scientific” in a different sense than the realists. As one commentator explains:

To understand a given branch of legal doctrine in a scientific fashion, one must begin ... by first identifying the elementary principles on which that field of law is based (for example, in the case of contract law, the principles that the minds of the parties must meet for a contract to be formed and that each must give or promise to give something of value to the other in return). These elementary principles are to be discovered by surveying the case law in the area. Once they have been identified, it is then the task of scholars to work out, in an analytically rigorous manner, the subordinate principles entailed by them. When these subordinate principles have all been stated in propositional form and the relations of entailment among them clarified, they will ... together constitute a well-ordered system of rules that offers the best possible description of that particular branch of law – the best answer to the question of what the law in that area is ... [I]ndividual cases that cannot be fit within this system must be rejected as mistakes. (Kronman, 1993, p. 171; for an eloquent discussion of Langdell and realism, see generally pp. 170–99)

The realists, as we have seen, rejected this picture wholesale. In particular, they denied that the sort of categories adduced by the Langdellian scholar were really descriptive of the bases of decision. Notice, however, that the realists repudiate primarily the methodology, not the aspiration, of Langdell: they object to Langdell’s notion that decisions track abstract principles of law, rather than particular patterns of facts (cf. Llewellyn, 1931, p. 1240; Oliphant, 1928). The mistake of Langdell is in thinking we can learn the law, in the sense the lawyer needs to learn it (that is, in order to be able to predict what courts will do), by examining the opinions and the reasons given therein; rather, the realists *qua* naturalists discover that decisions track underlying fact patterns (“situation-types”), not published rationalizations (or the “axioms” to be adduced from them).

### Normative Theory of Adjudication

If the Core Claim is a true descriptive thesis about adjudication, what room does it leave for a *normative* theory of adjudication? The realists are not always clear on this issue, but the majority of them endorse a type of view we may call “quietism.”

Quietists hold that since the core claim reports some irremediable fact about judging, it makes no sense to give normative advice – except perhaps the advice that judges “ought” to do what it is that they will do anyway. So if judges, as a matter of course, enforce the norms of commercial culture or try to do what is socioeconomically best under the circumstances, then that is precisely what realists tell them they ought to do.

Thus, Holmes complains that “judges themselves have failed adequately to recognize their duty of [explicitly] weighing considerations of social advantage.” But having just noted that what is really going on in the opinion of judges anyway is “a concealed, half-conscious battle on the question of legislative policy,” it follows that this “duty” is in fact “inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious” (1897, p. 467). Thus, what Holmes really calls for is for judges to do explicitly (and perhaps more carefully) what they do unconsciously anyway. (Contrast the nonquietistic Cohen (1935, p. 810), who recommends that judges address themselves to questions of socioeconomic policy *instead* of the traditional doctrinal questions that they often address.)

In a similar vein, Radin suggested that the decisions judges make on the basis of the type-situations into which they put facts essentially track the sorts of decisions one would get by demanding explicitly that judges do the “economically or socially valuable thing” (1925, p. 360). Frank observed that with respect to what he dubbed “Cadi justice” – justice by personal predilection essentially – “[t]he true question ... is not whether we should ‘revert’ to [it], but whether (a) we have ever abandoned it and (b) we can ever pass beyond it” (1931, p. 27). Advocating a “‘reversion to Cadi justice’ ... is as meaningless as [advocating] a ‘reversion to mortality’ or a ‘return to breathing’” (1931, p. 31). This is because “the personal element is unavoidable in judicial decisions” (1931, p. 25).

The most important example of normative quietism in realism comes from Llewellyn’s work on Article 2 of the Uniform Commercial Code. For how can a realist, one might wonder, tackle the enterprise of designing rules for what ought to be done in commercial disputes? The answer should be obvious: tell judges that they ought to do what it is they will do anyway, that is, enforce the norms of commercial culture, of the prevailing mercantile practice. Thus, the Code imposes an obligation of “good faith” in all contractual dealings (Sec. 1-203) which means besides honesty, “the observance of reasonable commercial standards of fair dealing in the trade” (Sec. 2-103). But for a court, then, to enforce the rule requiring “good faith” is just for that course to enforce the relevant norms of commercial culture! The reliance of the Code throughout on norms of “good faith” and “reasonableness” is a constant invitation to the judge to do what he would, on the realist theory, do anyway: enforce the norms of the prevailing commercial practice.

A final worry might arise about this normative “program.” For the motivation for the quietism is the thought that since judges will decide in accordance with the core claim anyway, it would be futile or idle to tell them they “ought” to decide in some other way. But why think judges *must* be fact-responsive? One possibility is that the core claim of realism is supposed to report a brute psychological fact about human



judgment: indeed, Frank often presents it that way (1930, p. 100). A perhaps more plausible hypothesis is that the core claim is inevitably true of common-law judges, who, by role and tradition, are invited to examine and rework the law in ways that are responsive to the changing circumstances in which legal problems arise. Thus, it is not because of a “deep” wired-in fact about the human psyche that the core claim is true, but rather a contingent, but still obstinate, fact about adjudication in the common-law system. Indeed, we may detect a further, nonquietistic, normative element in realism: namely, to the extent, however small, that judges are *not* fact-responsive and fairness-driven in their decisions (to the extent, for example, that they are sometimes formalistic or Langdellian in their mode of decision), then to that extent they *ought* to decide as the core claim says most of them ordinarily do. This additional, more ambitious, normative demand does not, however, receive the sustained defense one would hope to find.

### Other Themes from Realism

Writers often associated with realism have been the source of other intellectual themes that have recently overshadowed the distinctive realist contributions in philosophy of law. Primary among these is the purported argument against the public/private distinction generally attributed to the economist Robert Hale and the philosopher Morris Cohen (both contemporaries of the realists) (see the selections in Fisher, Horwitz, & Reed, 1993; cf. Cohen, 1935, p. 816; Llewellyn, 1930, p. 10), and brought to prominence by the critical legal studies (CLS) movement in the 1970s and 1980s (see the introduction to chapter 4 in Fisher, Horwitz, & Reed, 1993, a volume that generally views realism through a CLS lens). The argument runs as follows: since it is governmental decisions that create and structure the so-called “private” sphere (that is, by creating and enforcing a regime of property rights), there should be no presumption of “nonintervention” in this “private” realm (for example, the marketplace) because it is, in essence, a public creature. There is, in short, no natural baseline against which government cannot pass without becoming “interventionist” and nonneutral, because the baseline itself is an artifact of government regulation.

This general argument has been widely influential (see, e.g., Sunstein, 1987, pp. 917–19); unfortunately, it is based on a *non sequitur*. From the fact that a “private” realm is a creature of government regulation it does not follow that government action in that realm is normatively indistinguishable from government action in the “public” realm: for the key issue is the normative justification for drawing the baseline itself, not simply the fact that one has been drawn by an exercise of public power. If the underlying normative reasons for the baseline are sound (that is, for demarcating a realm of “private” transactions), then *these reasons* provide an argument *against* intervention. Hale and many of his contemporary followers are, of course, correct that many proponents of the baseline (wrongly) regard its existence *per se* as a reason against government action (cf. Sunstein, 1987); but this is simply to repeat in reverse the *non sequitur* of those who think the regulability of the “private” sphere follows from recognizing that its very existence depends on public regulation.

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## Critical Legal Studies

GUYORA BINDER

Critical legal studies is a movement in legal scholarship associated with the Conference on Critical Legal Studies, an organization inaugurated by a small conference at the University of Wisconsin in 1977 (Schlegel, 1984). As an intellectual movement, critical legal studies combined the concerns of legal realism, critical Marxism, and structuralist or poststructuralist literary theory. Many of its members identified with the leftist politics of the student movements of the 1960s (Binder, 1987; Tushnet, 2005). The movement's most influential writings were published in the 1970s and 1980s.

By the early 1990s, the Conference had dissolved. Nevertheless, the critical legal studies movement has had continuing influence on the work of numerous legal scholars, particularly in the fields of legal and constitutional theory, legal history, labor and employment law, international law, local government law, and administrative law. It contributed to the emergence of other intellectual movements critiquing the role of law in maintaining hierarchies based on sex, race, and sexual orientation. It also influenced scholarship in interdisciplinary legal studies using the methods of the humanities and the interpretive social sciences.

### Critical Legal Studies as Analytic Jurisprudence: The Critique of Liberal Rights Theory

A few critical legal scholars displayed interest in the traditional concerns of analytic jurisprudence. These scholars followed in the footsteps of legal realists Wesley Hohfeld (1913), Walter Wheeler Cook (1918), Robert Hale (1943), and Morris Cohen (1927), criticizing liberal rights theory by stressing the economic and social interdependence of legal persons. They argued that such interdependence frustrated the classical liberal aspiration to secure a maximum sphere of equal liberty by defining rights. Like their legal realist forebears, critical legal scholars saw rights as:

[R]elations among persons regarding control of valued resources ... Legal rights are correlative; every legal entitlement in an individual implies a correlative vulnerability in someone else, and every entitlement is limited by the competing rights of others ... Property

rights are interpreted as delegations of sovereign power to individuals by the state; these rights should therefore be defined to accommodate the conflicting interests of social actors. (Singer, 1993, p. 20)

If property rights are understood to confer power, it similarly follows that contractual bargaining is never truly equal and all contractual consent is coerced through the exercise of superior bargaining power.

Because they identified entitlements with power over others, critical legal scholars argued that the liberal ideals of freedom to act without harming others, and freedom to transact with consenting others, are self-defeating. Accordingly, these ideals cannot be realized in a legal regime and efforts to realize them will yield doctrinal systems that are structured by recurrent, irresolvable debates. Doctrinal systems that are “liberal” in this sense may include precise-sounding rules, but the rules will generally confront, or even contain, counter-rules that contradict them. Accordingly, in such a system, the rules do not determine results and cannot explain whatever ability legal practitioners have to predict results (Balkin, 1986; Kennedy, 1991). Liberal rights theory, then, is not formally realizable. Judicial application of a liberal rights regime involves political discretion; it can never be the mere formality demanded by the liberal ideal of the rule of law. The meaning and validity of rights will always be subject to further political contestation.

This “indeterminacy thesis,” as it came to be called, was a claim about classical liberalism and its aspiration to secure liberty through a rule of law. The claim was that no determinate rule system can secure liberty. Put this way, the indeterminacy thesis turns out to be widely accepted among legal scholars of disparate views. For example, legal economist Ronald Coase’s influential analysis of social cost argues that transaction costs preclude any allotment of rights from internalizing all “external” costs and preventing mutual interference (Coase, 1960). If the critical legal studies indeterminacy thesis largely repeated the familiar and widely accepted legal realist critique of classical liberalism, why was it so controversial?

This controversy was partly the result of a misunderstanding. Observers mistakenly ascribed to critical legal scholars a categorical claim that all legal rules are necessarily indeterminate (Solum, 1987; Altman, 1990). Yet critical legal scholars sometimes invited such misunderstanding by gratuitously associated liberal rights theory with foundationalist metaphysics and philosophy of language (Peller, 1985; Tushnet, 1988). This created the impression that they thought the indeterminacy of liberal rights jurisprudence somehow followed necessarily from pragmatist, poststructuralist, or hermeneutic ideas about language. Eventually critical legal scholars scaled back these more dubious claims about the sources of indeterminacy (Tushnet, 2005).

Further confusion arose because critical legal scholars identified additional sources of indeterminacy in American legal doctrine beyond its embodiment of liberal rights theory. Thus critical legal scholars also argued that doctrinal standards requiring identification of the interests of legal actors or populations are indeterminate. This second claim took critical legal scholars beyond their legal realist predecessors; indeed it implied a critique of the instrumentalist approach to legal decision making embraced by many legal realists. This second “indeterminacy thesis” was the more original and interesting contribution of critical legal studies.

Taken together, critical legal scholars' indeterminacy critiques of liberal rights theory and of instrumental jurisprudence attributed indeterminacy to a good deal of American legal doctrine. The combined scope of their two indeterminacy theses contributed to the misapprehension that critical legal scholars were making general claims about the indeterminacy of language. Yet their two indeterminacy theses did not amount to a categorical claim that no rule or rule system can yield determinate results. Instead, the indeterminacy of rights and the indeterminacy of interests connected in a less abstract way. The indeterminacy of rights results from their correlative character and from the interdependence of economic actors. Because economic actors cannot exercise freedom without mutual interference, rights do not secure a sphere of individual autonomy beyond social scrutiny. Instead, rights are claims to social support for the pursuit of self-interest at others' expense. When legal systems recognize entitlements, they thereby endorse some conceptions of self-interest as worthy of social support. In this way, law may influence the very interests that an instrumental jurisprudence would have it serve.

### Critical Legal Studies as Social Theory

The indeterminacy critique of interests developed by critical legal scholars is best seen as a contribution to social and political theory rather than analytic jurisprudence. It is essentially a claim that society and politics are legally constructed. Thus it is an original and philosophically important claim about the relationship between law and society. Critical scholars did not see legal language as indeterminate *relative to* the social context to which it refers. Rather, they saw legal language as indeterminate *because of* the indeterminacy of the social context to which it refers (Kennedy, 1973). The indeterminacy of the social world frustrates instrumentalist efforts to explain or prescribe legal rules on the basis of their service to certain interests.

The remainder of this chapter will explicate this critique of instrumentalism by reviewing the work of several critical legal scholars. As we shall see, critical legal scholars have deployed this critique not only against existing legal institutions, but also against instrumentally driven proposals to reform or overthrow them.

#### *The critique of instrumentalism*

Legal realists tended to see legal doctrine as an empty shell, covertly determined by social context; they sought only, by means of policy analysis, to make that contextual determination overt and self-conscious. Critical scholars, like most modern legal scholars, internalized this realist conception of legal argument as policy analysis. They expanded the realist critical project to include the policy analysis realists advocated. Unlike the realists, critical legal scholars did not treat legal doctrine as a special or even a distinct case among forms of social knowledge, uniquely lacking in truth or determinacy. Instead, they treated it as a typical instance of the use of social science methods to promote policy ends, so that its indeterminacy simply exemplified the indeterminacy and value-laden quality of the social knowledge on which it is based.

Accordingly, much critical legal scholarship is properly understood as a critique of legal realism rather than a recapitulation of it. In “The Metaphysics of American Law,” Gary Peller made this rejection of realism explicit, while making clear that it by no means entailed a return to the formalism of liberal rights theory (Peller, 1985). Instead, he argued that realism perpetuated the basic flaw of formalism: its commitment to determinacy. Instead of seeing the social world as determined by law, realism insisted that legal decisions are and should be determined by their social context. Instead of subordinating facts to rules, Peller argued, legal realism subordinated rules to facts. Each involved the same structure and the same faith in the ability of experts to know and control the social world. Peller invoked poststructuralist literary theory in equating the legal analysis embraced by liberal formalists with the policy analysis embraced by legal realists; both are simply “discourses” or “disciplines” – practices of observation, classification, argument, and judgment that do not simply describe human beings, but also shape them. Accordingly, these concepts seemed to encompass both formal doctrinal analysis and instrumental policy analysis.

One of the key arenas in which this link was forged was in the critics’ transformation of legal history. This revision began with Morton Horwitz’s *The Transformation of American Law* (1977). This study of antebellum jurisprudence demonstrated that by the middle of the nineteenth century the jurisprudence of natural law had been replaced by the sort of instrumentalist jurisprudence that the realist scholars favored. By arguing that this instrumentalist regime served the interests of merchants and industrial elite, Horwitz challenged the assumptions of realists that this style of jurisprudence was necessarily more democratic than a jurisprudence of natural rights. Other critical scholars, most prominently Duncan Kennedy and Robert Gordon, extended the attack on realism implicit in Horwitz’s work by questioning some of the instrumentalist premises implicit in his method. Thus, Gordon questioned the possibility of explaining doctrinal change in terms of elite interests, when legal doctrine and legal thought are partly constitutive of those interests (Gordon, 1984). Kennedy severely complicated our notion of doctrinal change by presenting liberal legal doctrine as a contradictory framework embracing positivism and natural rights, instrumentalism and formalism. In this context, the selection of one or another pole by a legal decision maker deploys, but does not alter, the doctrinal framework (Kennedy, 1976, 1979). If doctrinal frameworks are this malleable, we may say that doctrine expresses or articulates conflicting interests, rather than serving them.

Other critical scholars stressed the malleability of the notion of interest itself as a barrier to doctrinal determinacy. Writing about decision criteria that call for the balancing or representing of interests, Al Katz argued that the concept of interest disguises but does not resolve the tension between “natural rights” and “popular sovereignty” in liberal jurisprudence. Moreover, the interests balanced or represented are products of the techniques by which they are measured or observed. Accordingly, the modern decision maker’s practices of balancing and representing may be characterized as Foucaultian “disciplines” that constrain the identities of individuals and groups in the process of recognizing their “interests” (Katz, 1979, 1987).

Several critical scholars used the indeterminacy of interests as a basis for attacking the policy analysis that dominates postrealist legal scholarship. Most such scholarship

explores three models of social choice: the adversary process, the electoral process, and the market. Critical scholarship interpreted these models as attempts to reconstruct the normative certainty on which classical liberalism rested without adopting its naive assumption that social actors can exercise freedom without infringing the freedom of others. Each model of social choice rests on an image of society as a competition among antagonists. Nevertheless, each model identifies normative truth as the fairly compiled aggregate of the subjective preferences or “interests” of these antagonists. Postwar legal process scholarship focused on two issues: which of these models should be employed for the resolution of a particular controversy, and how the decision-making process modeled by each can be made fairer. Critical legal scholars, by contrast, argued that no mere combination of the adversary process, the electoral process, and the market can automatically produce legitimate social choice. They rejected the notion that the interests of individuals and groups develop independently of the processes that aggregate them.

William Simon made this argument with respect to the adversary process. In *The Ideology of Advocacy*, he argued that lawyers cannot represent their clients without attributing to them “interests” that are recognized by the legal system as legitimate and realizable (Simon, 1978). In this way lawyers – poverty lawyers especially – could socialize and coopt their clients in the very process of zealous representation. They could learn to live with this because the “ideology of advocacy” reassured them that truth was the outcome of the adversary process. At the same time, this conception of truth allowed their opponents to abdicate moral responsibility for the impact of their arguments on the lives of the poor. The adversarial ethic allowed lawyers for both sides to act on the basis of “interests” manufactured by the legal system itself, rather than their own values.

Critical legal scholars similarly attacked economic analysis of law, on the grounds that it mistakenly treats individual economic preferences as independent of legal rules. Where legal economists urged that courts should allocate resources to those who value them more in order to escape transaction costs, Edwin Baker, Mark Kelman, and Duncan Kennedy have countered that the value each disputant places on a resource depends heavily on whether or not she already possesses it and may depend even more on what else she possesses. Thus, resources cannot be distributed on the basis of calculations of allocative efficiency because such calculations always depend on prior assumptions about the distribution of resources. Accordingly, these critical scholars argued, questions of allocative efficiency can never be separated from questions of distributive justice (Baker, 1975; Kelman, 1979; Kennedy, 1981).

Critical scholars also objected to scholarship invoking political science in an effort to reconcile adjudication with majoritarian decision making. By treating voter preferences as given, such scholarship is able to treat the problem of democratic decision making as a matter of aggregating those preferences, without exploring how they are arrived at. By contrast, Richard Parker argued that even a judicially supervised electoral process cannot represent the “interests” of the poor because poverty precludes people from formulating and pursuing their own political goals (Parker, 1981).

*The critique of instrumental reformism*

There is little point in improving the ability of the market, the electoral process, and the adversary system to represent interests if those interests are constituted in the very process of representation. Accordingly, the critical scholars' anti-instrumentalism is aimed not only against these institutions, but also against liberal reforms designed to improve them.

Such criticism of liberal reform movements followed one of two paths. One such path is exemplified by Alan Freeman's "Legitimizing Racial Discrimination through Antidiscrimination Law" (1978) and Karl Klare's "Judicial Deradicalization of the Wagner Act" (1978). These pieces criticized decisional law (antidiscrimination law after *Brown*) and legislation (the National Labor Relations Act) that are commonly thought to be major achievements of progressive politics. They criticized these products of progressive politics as ineffectual because, while they made minor adjustments to provide the appearance of protection for persons of color and working people, these legal changes, in practice, left the decision-making institution of the market intact. Many readers understood these articles to imply that it is the market that chiefly oppresses the poor, whose ranks include substantial numbers of workers and persons of color. Some readers went on to assume that such Marxist scholarship took the institution of a market as a given, and presumed that unless capitalism is overthrown, struggles for civil or labor rights are futile and misdirected.

Yet these pieces are more fairly read as celebrating the political struggles that brought about these liberal reforms. What they lamented was the exhaustion of such political movements as a result of their embodiment in institutions, specifically in adjustments to the ground rules for bargaining within a market. According to Klare and Freeman, these movements did not fail because they accepted the institution of the market; to the contrary, they challenged the institution of the market by embodying a form of association and decision-making inconsistent with it. These movements were contained by the market, however, when their struggles were embodied in legal institutions. The labor movement was the setting for collective participation in political decision making about the meaning and shape of work; labor law reduced it to a common economic interest. The civil rights movement was a forum for passion, participation, interracial understanding, solidarity, and sacrifice: civil rights law eventually reduced it to a right to governmental indifference. In short, these articles did not urge contempt for the labor and civil rights movements as irrelevant because they did not pursue world revolution against capitalism. They celebrated these movements as forms of association and decision making that were, in and of themselves, good and sufficient alternatives to instrumentalism.

This perspective was perhaps a little clearer in a second pattern of critique of liberal reformism. This pattern, exemplified by William Simon's "Legality, Bureaucracy and Class in the Welfare System" (1983) and Derrick Bell's "Serving Two Masters" (1976), directed critical attention at the strategic decisions made by liberal reformist lawyers on the basis of distorting assumptions about their client groups' "interests." In each case, the lawyers were criticized not so much for interfering with a situation better left alone but for allowing abstract conceptions of their clients' interests to blind them to their clients' potential to contribute to the process of social change.



Accordingly, Bell argued that integrationist lawyers failed to recognize one black community's desire for quality neighborhood schools over which they could exert some control and which could serve as vehicles of opportunity for black educators. The result was that these lawyers were so busy pursuing their clients' interests that they ignored their desires. They also failed to learn from their clients to the detriment of the lawyers' own political vision. Finally, they squandered an opportunity to mobilize an aroused community to define its own goals, not only in the litigation process, but also in the administration of its own schools.

William Simon revealed a related problem encountered by poverty lawyers endeavoring to render welfare bureaucracies more generous and less degrading by formalizing their decision-making procedures. It could hardly have surprised anyone that the result was to make the welfare bureaucracy more bureaucratic. But what lawyers had failed to consider was the impact of bureaucratization on welfare workers and on the future possibilities for welfare recipients to influence those workers. Removing the discretion of welfare workers degraded their work and destroyed opportunities for them to pursue civil vocations, even as it destroyed opportunities for arbitrariness, condescension, and discrimination. It dehumanized welfare recipients' contact with the welfare bureaucracy, which perpetuated the dehumanization of welfare recipients in a new, more impersonal form. It sometimes created new forms of personal degradation as well, substituting inflexible skepticism for invasive curiosity. While recipients "received" new rights to constrain agency behavior, they found that they could not avail themselves of these rights without the indulgence of other poverty professionals – lawyers. Thus poverty lawyers solved the problem of welfare worker abuse of welfare recipients by disempowering welfare workers instead of by empowering welfare recipients. As a result, they foreclosed the possibility that welfare recipients would have found in such a transformed relationship with welfare workers a political resource rather than a liability. By assuming that the interests of recipients and workers were opposed, poverty lawyers ignored the possibility that those interests could evolve and converge as a result of political activity. And by taking for granted that the recipients' interests could be pursued without the recipients' participation, poverty lawyers ignored the possibility that welfare recipients might have a noneconomic interest in political participation and control over their circumstances.

These four critical assessments of legal strategies for liberal reform suggested serious misgivings about the desirability of social reforms planned, directed, and institutionalized by experts. Thus, the problem they identified in the civil rights movement, the welfare reform movement, and the labor movement was not their failure to attack capitalism. The problem with these reform movements was that they made too many assumptions about the problem to be solved and involved too few people in the decision-making process. In short, they were not sufficiently democratic. Critical legal scholars' attack on instrumentalism was inspired by their commitment to participatory democracy.

Nevertheless, critical legal studies drew criticism from the left, and especially from minority scholars, for slighting the value of rights as a rhetoric for mobilizing subordinated groups to sustain commitment to a struggle in the face of personal hardship and political defeat (Crenshaw, 1995). Even if, as Freeman argued, antidiscrimination rights became weapons white males could use to defeat affirmative action, they

remained important symbols of solidarity for communities of color. Critical legal scholars would eventually draw on Foucaultian governance theory and feminist theory to defend their rights critique against this multiculturalist response. A 2002 volume entitled *Left Legalism/Left Critique* collected a number of essays arguing that efforts to indicate rights against subordination often promote confining identities as paradigmatic victims, and render some dimensions of oppression invisible (Brown & Halley, 2002).

While some critical legal scholars continue to critique rights oriented reformism, others have developed proposals aimed at democratizing the administrative state. Industrial organization theorist Charles Sabel has joined with William Simon, Michael Dorf, and other legal scholars to promote a more participatory model of regulation and social service delivery they call “democratic experimentalism” (Dorf & Sabel, 1998; Sabel & Simon, 2004). Drawing on Dewey’s pragmatic critique of the hierarchy of ends over means as both undemocratic and unscientific, this system aims to recruit the empirical judgment of those who directly deliver and suffer policy in a continuous process of reform. Combining decentralization with monitoring, information-sharing and flexible standard setting, democratic experimentalism aims to foster competition in developing best practices, while providing institutional mechanisms and practical incentives for those affected by policy to participate in its development and assessment. Whether this sort of “new governance” reform strategy is reconcilable with the suspicions inspired by Foucaultian governance theory remains to be seen.

### *The critique of revolutionary instrumentalism*

Writing in the closing decades of the cold war, critical legal scholars expressed the misgivings about ambitiously radical programs for social change as well as liberal reformist programs. If planned and conducted by experts based on fixed assumptions about the “interests” of the oppressed, revolutionary programs were at least as undemocratic and misguided as the movements for liberal reform.

In “The Process of Change and the Liberty Theory of the First Amendment” Ed Baker identified instrumentalism as the separation of means and ends (Baker, 1981). Arguing that the distinction is artificial and cannot be maintained, he attacked the notion that the end of progressive social change justified violent or coercive means. Baker’s chief purpose was to argue that even the radical change to a collectivist or communal requires strict protection of individual freedom of opinion.

Critical legal scholar Roberto Unger argued that the Marxist theory of revolution was undermined by reliance on the same kind of instrumental reasoning that informs mainstream policy analysis. Marx identified revolution as the change from one mode of production to another. But how did Marx define the concept of capitalism, the paradigm for all modes of production? At least three factors were crucial for the identification of a “capitalist” economy: (1) a predominance of “free labor,” understood as the condition which a laborer owns all of her own labor and none of the means of production; (2) commodity production for private accumulation of wealth; and (3) sufficient accumulation of wealth to enable industrialization. But Unger pointed out that there is no necessary connection between commodity production and the development of a labor market, or between a labor market and industrialization, or between industriali-

zation and private accumulation. Any criterion for recognizing capitalist societies based on these criteria will be both under- and overinclusive (Unger, 1987).

The crucial assumption underlying Marx's conception of capitalism was that "free labor" is economically necessary to industrialization. This assumption is undermined by the irreparable ambiguity of the concepts of free labor and economic necessity. Each of these concepts is analytically related to the concept of desire, a variant of the concept of interest. To say that the "free laborer" has property in her labor is to say that her labor can only be utilized with her consent. To say that a "free labor" market makes possible industrialization by utilizing labor more efficiently is to say that it better fulfills desires. Because Marx's theory of revolution is a variant of economic determinism, it shares the tendency of liberal economics to treat individual desire as an independent variable. A market is a means of aggregating desires. If one claims that the introduction of a free labor market better fulfills desires, one wrongly assumes that desires are independent of the means by which they are aggregated into social choice.

The instability of desire over time renders the concept of free labor indeterminate. Are specifically enforceable contracts for personal service expressions of "free labor" or involuntary servitude? In respecting the laborer's freedom at the time of contracting, we must sacrifice her freedom at the time she wishes to leave service, thereby designating her former self custodian of her later self's interests. In recognizing the laborer's freedom at the time of leaving service, we reduce her freedom at the time of contracting, effectively designating her later self custodian of her former self's interests. The instability of desire precludes us from simply respecting the preferences of the laborer. Because we cannot noncontroversially identify individual preferences, we can give no determinate meaning to the concept of free labor that underlies Marx's concept of capitalism.

The instability of desire also undermines the determinacy of concepts like economic efficiency that aggregate individual desires. Thus even if Marx could define free labor, he would have difficulty demonstrating that free labor was economically necessary to industrialization. And this claim is crucial to Marx's conception of capitalism as both a system and a necessary stage in the development of the "productive forces."

Marx would have denied that his conception of economic necessity was based on any notion of desire. For Marx, economic life consisted in production rather than consumption, and the value of products was a function of labor rather than consumer demand. Thus "economic necessity" would have meant "necessary to production," not "necessary to the satisfaction of consumer demand." "Free labor" then, was "necessary" in the sense of necessary to the development of industrial production.

Yet the "necessity" of "free labor" to industrialization depends on culturally contingent "consumer" preferences. In characterizing bondage as a "fetter" on the development of the productive forces, Marx meant that it inhibited production by misallocating labor: bound laborers have no incentive to seek more productive tasks. And less production means less social surplus to invest in the development of industry.

But unless we specify the "consumer" preferences of laborers and employers for different labor relations, we cannot conclude that a market in free labor will allocate work more efficiently than a market in bound labor. This follows from Coase's claim that, absent transaction costs, allocative efficiency does not depend on the distribution

of entitlements (Coase, 1960). From the standpoint of efficiency, the choice of remedy for personal service contracts is as irrelevant as the choice of remedy for any contract.

The choice between free and bound labor is simply a choice between a damage remedy and a specific performance remedy for contracts for personal service. It follows that the distribution to employers of a property right in their laborer's services does not necessarily prevent the efficient allocation of those resources. A worker learning of a more productive position can buy her employer out, leaving both better off. Similarly, an employer discovering a more productive use for an employee can lease her services to another employer, or to the employee herself.

We can only conclude that bondage allocated labor inefficiently by viewing labor as a consumer good rather than a factor of production. Many masters refused to manumit their slaves at market price, or to permit them to hire their time. Few masters invested in the education and skilling of their slaves, or permitted their slaves to so invest. Many masters felt that it demeaned their authority to bargain with their slaves. And masters correctly feared that slaves allowed to wander in search of productive employment would run away. But this means that the slave system failed to allocate labor efficiently because neither the master nor the slave regarded the slave merely as a factor of production, to be valued according to the income she might yield. Masters owned slaves partly for the consumption value of the attendant honor, just as slaves were often willing, though not always able, to pay more than their own market value to consume the honor of self-ownership. Thus Marx's concern with the efficient allocation of labor for production cannot be separated from the question of its efficient allocation for consumption.

We have seen that critical legal scholars argued that the concept of efficiency is thoroughly indeterminate when applied to the allocation of resources for consumption. Because we often incorporate our possessions into our sense of self, how much we value a good often depends on whether we already have it. This point applies to property in labor. Employers whose identities are already invested in master status are more likely to pay a premium for slave labor; penniless slaves could offer little for their freedom, while we would be surprised to learn of freed slaves selling themselves back into slavery at any monetary price. Thus the efficient allocation of the entitlement to dispose of labor depends in part on how the law distributes it.

The contingency of allocative efficiency on legal and cultural norms means that legal and cultural changes can make an efficient allocation inefficient and vice versa. Critical legal historian Robert Steinfeld showed that indentured servitude ceased to be a profitable way to employ labor when workers would no longer stand for it, and courts became less willing to enforce it (Steinfeld, 1991). Rather than economic rationality ending bound labor, the cultural rejection of bound labor made it economically inefficient.

What made bondage a "fetter" on the productive forces was the fact that the productive forces included laborers who saw it as demeaning. What bound "free" wage labor to the service of industrialization and accumulation to form "capitalism" was culture. This means that capitalism can never be separated from the "superstructure" it is supposed to explain. It also means that there is no necessary connection among any of the defining elements of a mode of production, and no necessary incompatibility between

what are supposed to be elements of different modes of production. The indeterminacy of interests renders the Marxist conception of revolution incoherent.

Of course few calls for Marxist revolution have been audible since the end of the cold war. Nevertheless, the indeterminacy critique of “capitalism” warranted skepticism that the collapse of communism signaled a global consensus on liberal institutions or presaged an “end of history” (Binder, 1993).

## Conclusion

The indeterminacy of interests, as developed by critical legal studies, undermines the instrumental conception of society that has informed much policy analysis across the political spectrum. Although the indeterminacy critique of liberal rights theory generated more attention and controversy, the indeterminacy critique of instrumentalism was critical legal studies’ more original and significant philosophical claim.

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## Postrealism and Legal Process

NEIL DUXBURY

During the past two decades, the intricacies of American legal realism seem to have been relentlessly explored. Finding an American law professor who does not have his or her peculiar “take” on the subject would be something of a minor miracle. Depending on whose commentaries one reads, legal realism may be seen to represent a variety of turning points in American legal thought. Accordingly, realism marked the birth of social scientific legal study (Schlegel, 1979, 1980); it demonstrated the essentially political nature of the legal process (Horwitz, 1992); it even – in the eyes of certain of its detractors – constituted a jurisprudence of nihilism and tyranny (for an account of this critique, see Purcell, 1969; Duxbury, 1992). This essay will not assess these or any other interpretations of realist jurisprudence. Rather, its purpose is to analyze the ways in which certain postrealist jurisprudential tendencies have either built upon or departed from basic realist insights.

### Modern Legal Theory and the Impact of Realism

In the United States, interest in realist jurisprudence was revived significantly with the emergence of critical legal studies in the late 1970s. While there are certain fundamental differences between the realist and critical traditions in American jurisprudence, legal realism never embodied a commitment to grand-scale social and legal transformation, which has been espoused by at least one major proponent of critical legal studies (Unger, 1987a, 1987b, 1987c). However, realists and critical legal theorists alike acknowledge the inevitability of indeterminacy in law. Whereas legal realists recognized and generally lamented the existence of legal indeterminacy, representatives of critical legal studies have endeavored to demonstrate the peculiar consequences of indeterminacy. According to critical legal theorists, it is owing to the existence of indeterminacy that law is an ineluctably political practice. Unlike their realist forebears, proponents of critical legal studies have shown a greater eagerness to uncover the political implications of indeterminacy in law.

Law and economics – particularly as developed at the University of Chicago – is commonly regarded as methodologically and ideologically very different from critical legal studies. Yet certain commentators on law and economics have tended to treat it just as critical legal studies has been treated: that is, as an outgrowth of the realist

jurisprudential tradition. “In the law schools,” Edmund Kitch has claimed, “law and economics evolved out of the agenda of legal realism. Legal realism taught that legal scholars should study the law as it works in practice by making use of the social sciences, and economics was one of the social sciences to which academic lawyers turned” (Kitch, 1983, p. 184). Whereas Kitch treats law and economics as a continuation of the realist legal tradition, Arthur Allen Leff regarded it as “an attempt to get over, or at least to get by, the complexity thrust upon us by the Realists” (Leff, 1974, p. 459). My own view is that the law and economics tradition ought to be regarded neither as an attempt to develop nor to undermine the lessons of realist jurisprudence. A proper understanding of the development and the jurisprudential impact of law and economics requires that the tradition be understood primarily in relation to developments in economic as opposed to legal theory (see Duxbury, 1995, ch. 5).

Although one of the most incisive and sympathetic studies of realist jurisprudence is the product of a British legal scholar (Twining, 1985), it is worth noting that legal philosophers in the United Kingdom have tended to be indifferent, if not hostile, to the realist tradition. British critical legal theorists, for example, appear to have been little inspired by realist jurisprudence. While British legal theory has hardly failed to flourish owing to the general disinclination of its representatives to consider realism as a subject deserving of sustained attention, it is worth speculating on the reason for this disinclination. My own suspicion is that the reason British legal theorists tend not to treat realism seriously may be traced to H. L. A. Hart’s assessment of the subject in his classic positivist text, *The Concept of Law* (1961). In that book, Hart criticizes realist rule-skeptics – and Jerome Frank in particular – for focussing only on the duty-imposing function of rules in the process of judicial decision making and ignoring those secondary rules that confer judicial and legislative power. According to Hart, it is crucial to appreciate – and legal realists appeared not to appreciate – that there must exist specific power-conferring rules that facilitate the appointment of legal officials. Realists tended to consider rules as if they were nothing more than manipulable tools to be used arbitrarily in the process of adjudicating disputes. They said little if anything about the fact that there must exist a definite body of rules that confer on certain people the capacity to adjudicate disputes in the first place. Those legal philosophers – and this includes the majority of British legal philosophers – who have been educated primarily in the positivist jurisprudential tradition appear generally to accept Hart’s criticism of realist legal thought.

Not surprisingly, it is to the United States that one must look in order to understand how jurisprudence has developed directly in response to the lessons of realism. During the latter half of this century, there have emerged, I believe, two distinct traditions of “postrealism” in the United States. The first of these traditions might conveniently (if somewhat vaguely) be labeled *policy science*. The second, and more significant, of these traditions is commonly termed *legal process*. I shall consider each of these traditions in turn.

## Policy Science

Policy science, as a form of jurisprudence, was the joint creation of the political scientist, Harold D. Lasswell, and the Yale law professor, Myres S. McDougal. In the late 1930s,



Lasswell and McDougal began teaching a course together at the Yale Law School in which they explored the possibility of expanding upon the lessons of legal realism. Their particular concern was to develop the law school curriculum in such a way as to facilitate the promotion of democratic values. Whereas legal realists tended not to explore the political implications of their arguments (indeed, this is precisely why realism suffered from so much political misinterpretation), Lasswell and McDougal endeavored to outline an explicitly pro-democratic approach to the development of legal policy. The framework for this approach is set out in their oft-cited article, "Legal Education and Public Policy," first published in 1943. According to one commentator, this article marks "the clear beginning of the postrealist period" in American legal scholarship (Stevens, 1971, p. 530).

One of the objectives behind Lasswell and McDougal's article is to highlight what they considered to be the shortcomings of realist jurisprudence. They focus especially on the inability of most realists successfully to utilize social scientific methods for the purpose of legal study. "Heroic, but random, efforts to integrate 'law' and 'the other social sciences,'" they observe, "fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes* ... The relevance of 'non-legal' materials to effective 'law' teaching is recognized but efficient techniques for the investigation, collection and presentation of such materials are not devised" (Lasswell & McDougal, 1943, p. 263). Whereas so-called realists had been concerned merely with integrating law and the broader social sciences, Lasswell and McDougal were more concerned with demonstrating how such integration could be made to serve a specific purpose.

But what purpose? Lasswell and McDougal's answer to this question is very specific. The purpose of integration is to demonstrate to legal decision makers, present and future, that the social sciences constitute an invaluable source of normative guidance. Legal realists, they argued, made the mistake of assuming the possibility of a value-free social science. In fact, they insisted, far from providing some sort of value-free framework, the social sciences constitute a collection of conceptual tools to which legal decision makers of the future will be able to resort in order to make legal values explicit. Enlightened by the social sciences, in other words, lawyers of the future will come to acknowledge that they are dealing not only with law but also with policy (hence the term "policy science").

For Lasswell and McDougal, the study of law along scientific lines would require of law students not that they embrace any old values, but that they affirm explicitly the values to which they ought already to be committed, that is, the individualistic values of American liberal democracy. Realist jurisprudence – indeed, American jurisprudence in general – had remained conspicuously inarticulate on the matter of how to relate "legal structures, doctrines, and procedures ... clearly and consistently to the major problems of a society struggling to achieve democratic values" (Lasswell & McDougal, 1943, p. 205). The spread of despotism throughout Europe offered a sharp reminder that the acceptance of democracy can never be taken for granted; and it was recognition of precisely this fact that led Lasswell and McDougal to develop their argument that the fundamental goal of postrealist jurisprudence ought to be "the better promotion of democratic values" (Lasswell & McDougal, 1943, p. 264). They outline their argument thus:

We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity. (Lasswell & McDougal, 1943, p. 206)

Thus, in Lasswell and McDougal's view, the primary reason for developing an interdisciplinary approach to legal education is to use the social sciences as a medium through which to immerse the law student in those values which are deemed to represent the values of democracy.

But how is this immersion to be achieved? That is, how is the law student to be exposed to these values? And still more importantly, what are these values? It is to Lasswell and McDougal's credit that they do not sidestep these questions. However, their effort to answer them reveals the basic problems inherent in their perspective.

The pivotal value to which law students ought to be exposed, they assert, "is the dignity and worth of the individual," for it is only through respect for this value that students may come to recognize that "a democratic society is a commonwealth of mutual deference – a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture or class" (Lasswell & McDougal, 1943, p. 212). Apart from this basic respect for the distinctness of the individual, law students will also be encouraged to recognize other "general values in which they participate as members of a free society" (Lasswell & McDougal, 1943, p. 246). These values are the shared values of "power, respect, knowledge, income, and safety (including health)" (Lasswell & McDougal, 1943, p. 217). In later writings, Lasswell and McDougal gradually modified and expanded this list: "knowledge" was replaced by the separate categories of "enlightenment" and "skill"; "income" was broadened to "wealth"; "safety" to "well-being"; and "morality" – later changed to "rectitude" – was added to their list. These values, for Lasswell and McDougal, constitute the basic values of human dignity. The primary purpose of post-realist jurisprudence, they claimed, was to demonstrate to students that their recognition of these values as self-evident is of fundamental importance for the maintenance and furtherance of a properly democratic order.

How, then, was policy science supposed to work? That is, how might Lasswell and McDougal's basic values of human dignity ever come to feature centrally in the law school curriculum? Their answer to this question seems to be that one can do little more than proselytize: law professors must be encouraged to reorient their teaching along policy science lines. New courses must be devised, and old ones revised, along policy science lines. All curricular revision ought to be guided by one simple criterion: whether or not current doctrines and practices in particular areas of law serve to promote or to retard the basic values of human dignity (Lasswell & McDougal, 1943, pp. 248–62). The fundamental obstacle facing the policy science proposal, however, was that it bore little resemblance to anything that either students or teachers actually wanted from legal education. Lasswell and McDougal wrote in highfalutin terms about the need for

radical pedagogic change in the American law schools. But no one was prepared to seize the initiative with them. Indeed, at most law schools less prestigious than Yale, resources simply did not exist which would have permitted the seizing of such an initiative, even if anyone should have wished to do so. Another Yale law professor hailed their 1943 article as “a forgotten classic” in the history of modern American legal scholarship (Kronman, 1993, p. 202). To my mind, however, the article is more eccentric than classic. It offers a highly idiosyncratic vision of legal education perfected. If policy science had not hailed from Yale, it is doubtful that it would have generated even marginal academic interest.

Perhaps the greatest shortcoming of all concerning policy science as a form of jurisprudence is that it did not improve significantly upon the lessons of legal realism. I would argue, indeed, that Lasswell and McDougal offered little more than a version of realist jurisprudence for good times. Like their realist forebears, they recognized that law is a political phenomenon. But their argument seemed to be that so long as an educational framework was established which would ensure that future lawyers subscribed to the right kind of politics, the use of law to promote political objectives ought not to be discouraged. That law might be used to serve both good and bad political ends seemed not to concern Lasswell and McDougal. For them, the integrity of a law school curriculum redesigned to promote the basic values of human dignity would be enough of a safeguard to ensure that the legal profession did not stray into murky political waters. If law students were provided with a good political education, then they would eventually develop into good legal policymakers. The matter, in Lasswell and McDougal’s eyes, really was as simple as that.

## Legal Process

As compared with Lasswell and McDougal, many American law professors in the post-World War II era were remarkably less sanguine about the prospects for the development of law as a political tool. The tradition of American jurisprudence known as “legal process” epitomizes the sense of disquiet which various law professors of this period expressed regarding the politicization of law. While it would be inappropriate strictly to characterize legal process as a postrealist tradition – the development of process jurisprudence in the United States parallels if not predates the advent of realism (see Duxbury, 1993, pp. 607–22) – it seems not inaccurate to claim that it was only as legal realism began to wane that the process tradition came to acquire a distinctive identity. Legal process, in short, came alive in response to the challenges of realist legal thought.

What is meant when we speak of “legal process” as a form of jurisprudence? It seems to me that “process,” in this context, can be seen to denote two things. First, there is the legal process itself. The process tradition in American jurisprudence presents a very distinctive account of the elements which make up the legal process. Secondly, “process” denotes a specific process of legal reasoning which most process theorists believe ought to dominate constitutional adjudication (or indeed, some would argue, adjudication in general). Let us take these different dimensions of process in turn.

*Who Should Do What?*

One of the issues at the heart of the process tradition in American jurisprudence is that of institutional competence: viz., within the legal process, which institution should be deemed competent to do what? From the mid-1930s onwards, various law professors – virtually all of them associated in one way or another with the Harvard Law School – turned their attention to this question. In the 1930s, Felix Frankfurter and Henry Hart had written a series of articles in which they warned against the dangers of blurring the distinction between adjudication and legislation. If this distinction does become blurred – and it appeared, during the New Deal era, that this is precisely what was happening – then the integrity of the Supreme Court can no longer be guaranteed:

A Court the scope of whose activities lies as close to the more sensitive areas of politics as does that of the Supreme Court must constantly be on the alert against undue suction into the avoidable polemic of politics. Especially at a time when the appeal from legislation to adjudication is more frequent and its results more far-reaching, laxity in assuming jurisdiction adds gratuitous friction to the difficulties of government... Inevitably, fulfilment of the Supreme Court's traditional function in passing judgment upon legislation, especially that of Congress, occasions the reaffirmation of old procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running. (Frankfurter & Hart, 1935, pp. 90–1)

The message which Frankfurter and Hart were endeavoring to promote was simple: adjudication is a peculiar type of institutional activity that ought not to embrace policymaking; and if the integrity of the adjudicative process is to be preserved, judicial self-restraint must dominate the activity of the courts. Within the legal process tradition, nobody took more care in developing the idea that adjudication is somehow a “special” form of juristic activity than did Lon Fuller. For Fuller, “adjudication is a form of social ordering institutionally committed to ‘rational’ decision” (Fuller, 1978, p. 380). This thesis is elaborated by Fuller in this article, “The forms and limits of adjudication.” (Although published in 1978, shortly after his death, this article was circulated in draft form by Fuller among members of the Legal Philosophy Discussion Group at Harvard Law School as early as 1957.) Fuller argues in this article that “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor” (Fuller, 1978, p. 364). As a legal activity – as opposed, say, to the refereeing of a sport or the judging of a competition – adjudication demands, indeed, that decisions be “reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments” (Fuller, 1978, p. 369). Given that adjudication requires that an affected party be able to participate in the process of reaching a decision, that person, “if his participation is to be meaningful,” must “assert some principle or principles by which his arguments are sound and his proofs relevant” (Fuller, 1978, p. 369). Only by resorting to principles might disputing parties convincingly assert their rights within the adjudicative process. Indeed, for Fuller, principles and adjudication go hand-in-hand. He attempts to illustrate this point by constructing a particular scenario:

We may see this process ... in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim "a right" to the raise. He may argue the fairness of the principles of equal treatment and call attention to the fact that Joe, who is not better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right. (Fuller, 1978, p. 369)

Within the literature of the legal process tradition, this passage is, in my opinion, fairly crucial. Fuller manages here to draw together three distinct process themes: that adjudication is a special form of legal-institutional activity; that the court is a forum of principle; and that principles serve to protect rights. These themes – especially the second and third themes – would, in due course, come to be associated primarily with the legal philosophy of Ronald Dworkin. Before the advent of Dworkin, however, these three themes were developed very gradually by a variety of writers within the legal process tradition. The history of this development is by no means neat, and in an article of this nature it is possible only to sketch what is in fact a fairly complex intellectual history. Any summary of this history would be thoroughly deficient, however, if account were not taken of Henry Hart and Albert Sacks's unpublished manuscript, "The Legal Process" (1958).

At the core of "The Legal Process" rests the observation that law is a purposive process. The basic purpose of legal institutions, according to Hart and Sacks, is to maximize the total satisfactions of valid human desires. "Almost every, if not every, institutional system gives at least lip service to the goal of maximizing valid satisfactions for its members generally" (Hart & Sacks, 1958, p. 115). For Hart and Sacks, this observation may be taken for granted. What is far less obvious, however, is the matter of how the legal process might best pursue the goal of maximization. Successful pursuit of this goal, according to Hart and Sacks, demands an efficient legal system; and one can only have an efficient legal system if most issues of social ordering are left to private individuals and groups, if the law is allowed to intervene in the process of private ordering only when it is required, and if – once the law is permitted to intervene – there exists no confusion as to which legal institution ought to do the intervening. An efficient legal process, in other words, is one that intervenes in the process of private ordering only when necessary and that demonstrates a general awareness of which legal institution is competent to do what. Accordingly, a proper distribution of institutional responsibility between, say, the courts and the legislature demands the recognition that each must refrain from trying to perform functions for which it is not competent.

While Hart and Sacks examine the institutional competence of both legislatures and courts (and other law-applying bodies, for that matter), it is their reflections on the courts in particular which feature most significantly within the history of the legal process tradition. Integral to adjudication, they argue, is "the power of reasoned elaboration" (Hart & Sacks, 1958, p. 161). In other words, courts are expected to reach decisions on the basis of rationally defensible principles. It is not enough that a court should reach welcome or popular decisions; it is more important that those decisions

be principled – that they be sound. But were the American courts of the 1950s and 1960s fulfilling this expectation? Were they adjudicating in a principled fashion? The decisions of the Supreme Court under the Chief Justiceship of Earl Warren indicated that the requirement of soundness was not being taken seriously. Given that many of these decisions were meeting with a good deal of popular support, the question arose as to why this requirement ought to be treated seriously. That is, if a judicial decision seems like a good decision, why should it matter that it is not backed up explicitly by principle? This question Hart and Sacks failed to confront. Refinement of the process tradition in American jurisprudence demanded that someone else speak where Hart and Sacks had fallen silent.

### *The Affirmation of Principle*

The question which Hart and Sacks failed to confront – the question of why principles matter – was tackled head-on by Herbert Wechsler in his classic article, “Toward Neutral Principles of Constitutional Law” (1959). In that article, Wechsler argues that during the first half of this century, and especially during the New Deal era, the Supreme Court paid little attention to principles. Indeed, in decisions such as *Lochner v. New York* (198 US 45 (1905)) and other famous early twentieth-century liberty of contract cases, the Court had demonstrated a commitment to judicial activism by reading policy preferences into the Fourteenth Amendment of the U.S. Constitution. Activist constitutional adjudication, Wechsler observed, was equally prevalent in the Supreme Court during the 1950s. Between the early decades of this century and the 1950s, however, something had changed. The early twentieth-century liberty of contract cases are generally considered to represent the unwelcome face of judicial activism. By reading an economic preference – a preference for *laissez faire* and Social Darwinism rather than for economic interventionism – into the Constitution, the Supreme Court of the *Lochner* era was demonstrating just why political adjudication may be considered undesirable. But by the 1950s, political adjudication appeared to be serving good rather than bad ends. For Wechsler, the segregation decisions – and *Brown v. Board of Education* (347 US 483 (1954)) in particular – demonstrated this point. Those decisions, he believed, had “the best chance of making an enduring contribution to the quality of our society of any ... in recent years” (Wechsler, 1959, p. 27). Yet he also believed that those decisions were, in a peculiar way, unsatisfactory. They were unsatisfactory because they were not sufficiently principled.

In elaborating this point, Wechsler focused specifically on the case of *Brown v. Board of Education*, in which the Supreme Court held that racial segregation in American public schools denies black children equal protection of the laws as guaranteed by section 1 of the Fourteenth Amendment. The Supreme Court had reached its decision in *Brown*, he observed, “on the ground that segregated schools are ‘inherently unequal,’” having “deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development” (Wechsler, 1959, p. 32). Yet there existed no evidence to support this argument. Indeed, Wechsler suggested, the reality may be that integrated schools are racially hostile schools in which blacks suffer by being made to feel inferior. It may even be the case that, where

segregation does exist, blacks enjoy a “sense of security” in their own schools (Wechsler, 1959, p. 33). In offering this argument, Wechsler was not attempting to justify racial segregation. Rather, he was attempting to demonstrate that the Supreme Court needed to do rather more than it had done in order to justify integration. But what should the Court have done? According to Wechsler, the Court ought to have demonstrated that the constitutional invalidation of state-enforced segregation was founded on a principle that would favor the interests of neither blacks nor whites – a principle such as that the state ought not to impede freedom of association.

Even Wechsler himself seemed not entirely convinced that freedom of association was the principle at stake in *Brown*. But then, the hesitancy of his conclusion is not especially important. What is far more important, for the purpose of understanding the legal process tradition as a strand of postrealist legal thought, is an estimation of why Wechsler felt that resort to principles is crucial in the context of constitutional adjudication. His argument is perhaps most easily grasped if one contrasts the *Lochner*-type liberty of contract decisions with the segregation decisions. In the former set of decisions, the Supreme Court was adjudicating in an activist fashion, using the 14th Amendment to validate a preference for *laissez faire* over economic interventionism. In the latter set of decisions, the Supreme Court was again engaging in judicial activism, this time using the Fourteenth Amendment to validate a preference for racial integration over segregation. Both sets of decisions were political: the first set was welcomed, the second set castigated. For Wechsler, these two sets of decisions illustrate that where a politically appointed judiciary reaches decisions on the basis of policy preference, one must expect judicial preferences to change with the political climate. Where political change occurs, in other words, the political objectives behind judicial activism are likely also to change. The consequence of this is that while the decisions of an activist Supreme Court may be welcomed when the politics of the Court are considered to be favorable, its decisions are equally likely to cause outcry when the political perspective of the Court appears to change for the worse. Judicial activism thus turns out to be a constitutional jurisprudence for good times. For Wechsler, however, a jurisprudence for good times is an unsound basis for constitutional adjudication: it would be hypocrisy, after all, if one were to applaud activism when the courts are engaging in good politics and then to cry foul once the courts begin to pursue political objectives with which one disagrees. To put the point very simply, if one wishes to welcome the political adjudication which produced *Brown*, one must also accept the political adjudication which produced *Lochner*.

Hence, for Wechsler, the importance of principles. If guided by general neutral principles, constitutional adjudication is likely to exhibit a greater degree of consistency, and in consequence command a greater degree of respect, than if it were guided by considerations of policy. This faith in principle marks off the legal process tradition from the realist tradition in American jurisprudence. So-called realists recognized the problem of judicial indeterminacy; but they had little idea as to how such indeterminacy might be controlled or eradicated. Within the process tradition, we find a solution to this problem: indeterminacy can be controlled through the constraining force of principle. It almost goes without saying that there exist plenty of objections to this solution. Perhaps the main objection is that the solution overlooks the fact that principles themselves may be indeterminate – they may appear sometimes to conflict (for

example, where a claim to privacy is pitted against the right to freedom of speech) – and that, in cases of such indeterminacy, there exists no principled way of determining which principle should prevail. Despite this objection and others, however, process writers after Wechsler – writers such as Alexander Bickel, John Hart Ely, and Ronald Dworkin – have continued to refine the legal process perspective (see, for example, Bickel, 1961; Ely, 1980; Dworkin, 1986). As with the criticisms of this perspective, consideration of these refinements lies beyond the scope of this essay. Rather than consider the various twists and turns of the legal process tradition, my aim here has been to demonstrate how process jurisprudence constituted a response – a highly problematic response, but, nevertheless, a response – to a problem which legal realism did little more than acknowledge and which policy science basically glossed over: the problem, that is, of how to monitor and control the impact of politics on law.

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## Feminist Jurisprudence

PATRICIA SMITH

Since the 1980s, a substantial amount of challenging and creative legal scholarship has come to be known as feminist jurisprudence (see Smith, 1993). The character of this scholarship is quite diverse. Just as it has been noted that there is not one feminism, but many, so there is not one feminist legal theory, but many. The question is: what is feminist jurisprudence and what makes it worth attending to? What (if anything) do all these divergent views have in common that binds them together and distinguishes them from all other theories? (What makes them all feminist?) Second, what do they tell us about law? (What makes them jurisprudence?) Third, what is important about this form of legal analysis? Supposing that there is a distinctively feminist jurisprudence, why is law in need of it? These questions are derived from the major objections leveled against feminist jurisprudence, namely: (a) it is not “proper” jurisprudence; (b) it is not distinctively feminist; and (c) it is not philosophically interesting. These objections challenge the very existence or legitimacy of feminist jurisprudence as a philosophical discipline. So it is worth considering each question (or objection) separately.

What makes “feminist jurisprudence” jurisprudence? Since jurisprudence is the analysis of fundamental legal relations, concepts, and principles, and the feminist legal theory that identifies itself as jurisprudence is, in fact, engaged in such analysis, the real question is why there should be any objection to classifying it as jurisprudence? It is claimed that feminist jurisprudence is a contradiction in terms. Jurisprudence, it is argued, is supposed to be the neutral analysis of universal legal principles, so given that feminism is self-interested, it produces a self-interested jurisprudence, which is a contradiction in terms. But this argument is misguided in both of its central premises: (1) it assumes that feminism is somehow unfairly self-interested, which is false; and (2) it assumes that jurisprudence is neutral (meaning nonmoral or apolitical), which is also false.

The feminist answer to (1) is that feminist jurisprudence is no more self-interested than supposedly universal jurisprudence, which, in fact, is patriarchy masquerading as the objective analysis of neutral legal principles and concepts. In fact, much feminist jurisprudence is dedicated to proving that traditional jurisprudence and law are not neutral or universal, but biased in favor of the dominant culture, at the expense of all others (see Smith, 1993; Estrich, 2001; MacKinnon, 2006). So this objection to the

legitimacy of feminist jurisprudence relies on denying or ignoring the central claim of feminists about the nature of jurisprudence and law. Thus, it embodies a fundamental misconception about the object of feminist jurisprudence, which is not intended to reconstruct legal institutions so as to favor women. It is intended to reconstruct legal institutions so as not to disfavor women. That is, it is intended to eliminate bias against women. So, while feminism is self-interested, it is self-interested in the sense that self-defense is self-interested, which is to be interested in promoting justice, not privilege. Therefore, the assumption that feminism is illegitimately self-interested is false.

As to point (2), that jurisprudence is neutral, this objection relies on a particular interpretation of what counts as jurisprudence. The idea of jurisprudence in common usage today can be divided into a broad and a narrow sense. Broadly speaking, jurisprudential theories are political theories which have legal ramifications. For example, liberal, Marxist, and socialist political theories spawn jurisprudential views (that is, legal theories) that follow from and reflect their implications. When people talk about liberal jurisprudence or socialist jurisprudence, that is what they are talking about. Clearly, this broad sense of jurisprudence does not entail neutrality in its theories. Quite the contrary.

Much (although not all) feminist jurisprudence is associated with one or more of these political theories. For example, liberal feminists since Mary Wollstonecraft have always argued that liberal values should be applied equally to women as in Baer (2004). Socialist feminists argue that socialist principles should be used to alleviate the oppression of sexism as in Jaggar (1983). Feminist theories often point to the omission of women or the presence of gender discrimination within the general political theories with which they are associated. And feminist jurisprudence can be combined with any number of other political views, such as pragmatism (Williams, 2001), postmodern critical theory (Cornell, 2007), purely radical (MacKinnon, 1989, 2006), critical race theory (Crenshaw et al., 1996), post-Colonial feminism (Mirza, 2006), or critical legal studies (Minow, 1991; Rhode, 1997). There is no single feminist jurisprudence, no single political view associated with feminism, except feminism itself, which is also a political view (the view that advocates freedom and justice for women). So, all feminist theory is political. Its form varies depending on the other theories with which it is combined. Yet, all these views fit within the broad sense of jurisprudence that informs all feminist work.

There is also a narrow, technical sense of jurisprudence, however, which is sometimes equated with all jurisprudence. Thus, the legitimacy of the broad sense is sometimes questioned, and that is the ground for denying that feminist jurisprudence is “really” jurisprudence. It does not fit the narrow sense of jurisprudence. But the narrow sense of jurisprudence – at least in the form that denies the legitimacy of feminist jurisprudence – is itself open to question.

The narrow sense of jurisprudence has traditionally been concerned with the question: what is law? Addressing this question, philosophers have focussed on the concept of law as such, on legal concepts and relations, and legal functions, particularly legal reasoning. Historically, three major theories were advanced to deal with these issues.

The oldest, natural law, commonly defined law as a precept of reason promulgated for the common good by those in authority to do so. Natural law holds, among other

things, that there is a necessary connection between law and morality, such that an immoral law is invalid or not binding.

The second view, legal positivism, which became predominant in the nineteenth century, objected to the natural law view as confusing what law is with what law ought to be, and attempted to construct a value-neutral definition of its own. Positivists today generally define law as a system of rules promulgated by authorized procedures, recognized as binding by officials and obeyed by the bulk of the population.

The third theory, legal realism, a twentieth-century development, objected to the natural law approach as too obscure and metaphysical, and to the positivist approach as too rigid and abstract. Arguing that law is fundamentally and inescapably political, the realists defined law roughly as a method of dispute settlement by appeal to the authority of an office, especially a court; or to put it more succinctly, they claimed that law is what judges say it is. Proponents of these well-known theories continue to debate the fundamental nature of law and the appropriate function of jurisprudence to this day.

Given this history we can see that traditional jurisprudence was not always divided, but has long been divided into two major subcategories: normative and descriptive jurisprudence. This division was instituted by John Austin, the nineteenth-century positivist who dedicated his famous lectures to “determining the province of jurisprudence, properly so called.” According to Austin, the proper domain of jurisprudence was the descriptive analysis of the positive law, its basic concepts and relations. Normative analysis of law, he thought, was the proper domain of legislation, not jurisprudence, and the two should not be confused, just as law and morality should not be confused.

The powerful influence of this view can be seen in the official definition of jurisprudence found today in *Black's Law Dictionary*:

that science of law which has for its function to ascertain the principles on which legal rules are based, so as not only to classify those rules in their proper order ... but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation.

Notice that this definition conveniently settles the long and continuing controversy between positivists and natural law theorists, by making positivism the only true jurisprudence. Unfortunately, philosophical questions are not often answered so easily, and presumably those who find natural law insightful will not have their questions answered by *Black's Law Dictionary*. Nevertheless, the dictionary entry does show the power of positivist influence in American legal thought, as well as the problematic nature of the approach taken by Austin to define natural law out of existence. And it is precisely this view which provides the grounding for the objection that feminism, not being neutral, is contradictory to jurisprudence.

According to *Black's Law Dictionary*, natural law theory is not jurisprudence (and legal realism is not jurisprudence either), so perhaps feminists should not be disturbed if their theory is not considered to be jurisprudence for the same reasons. But the impor-

tant point is that *Black's Law Dictionary*, in its attempt to be neutral, is blind to its own bias against all theories but one, which it assumes by adopting a positivist definition of what qualifies as jurisprudence: hardly a neutral definition.

What this demonstrates is that given the nature of law as *arguably* political, jurisprudence cannot be made neutral in any way and certainly not by stipulative definition, because arguing and examining the political implications of law – or lack of them – is a central issue of jurisprudence. So jurisprudence is not and cannot be neutral, and that shows that both the assumptions that underlie the objection to the legitimacy of feminism as jurisprudence are false. So feminist jurisprudence is indeed jurisprudence or else natural law is not. This is not to say that they cannot both be wrong. Positivists can claim that natural law is wrong, but not that it is not jurisprudence. Similarly, feminist detractors.

The more difficult question is what makes feminist jurisprudence feminist? The great diversity within feminism has led some critics (and even some feminists) to argue that there is no common feminist perspective. There is no feature that distinguishes feminist jurisprudence from all other legal philosophy. All feminism is actually reducible, or so it is argued, to those theories that inform its many facets. Liberal feminism is reducible to liberalism; postmodern feminism is reducible to postmodernism, and so on. Thus, it is claimed, feminism provides no new idea, or distinctive theory. It is simply the application of old theories to the particular problem of women's oppression.

Furthermore, it is claimed, there is no point of view of all women. Feminism, if it can be identified as one view, is the view of a few women who are seeking to impose it on everyone else. The fact is that the majority of the women of the world either disagree with the views of feminists, or else never thought about the issues feminists raise. So it is highly problematic for feminists to represent themselves as speaking for all women. These are serious charges.

It is true without question that women are as diverse as human beings can be. Women can be rich, poor, weak, strong, dominating, passive, upper class, lower class, rational, irrational – the list could go on indefinitely. Women are members of every race, religion, nationality, class, or ethnic group. So what is the supposed perspective of all women that is the putative foundation of feminism? What do all women have in common?

What do I have in common with the homeless women I walk past in Grand Central Station, or the invisible ones that I do not see in my hometown? What do college professors have in common with prostitutes, or drug addicts, society women, or corporate executives, cashiers, or the lonely invalids who inhabit the nursing homes? How can anyone presume to speak for all of them? The women of South Africa, Bangladesh, former Yugoslavia, China, the Brazilian rainforests, and the Australian outback are all women. Can they possibly all have something in common?

When I think of the problem in these terms it reminds me of when I was trying to figure out exactly what it is that makes human beings human. It turns out that there is no set of necessary and sufficient conditions that delineates the classification and distinguishes it from all others. There is no property common to all and only human beings. And I think that is true about women as well.

Nevertheless, it is not reasonable to conclude that therefore there is no such thing as a human being or a woman. Isolating necessary and sufficient conditions is not the

best approach to solving all problems or answering all questions. So, it is still possible that there is something we share that makes us all human, even if we cannot say exactly what it is with logical precision. Similarly, there can be something common to all women that feminism addresses, despite our profound differences. Even if we are unable to specify it precisely, we can indicate generally what this is.

So what is it? What do all women have in common regardless of race, class, religion, station, nationality, ethnicity, or background? All women live in a patriarchal world. All women function within an environment that is patriarchal. It is unavoidable, like the air. We eat, sleep, and breathe it (as do men). But all women hold a certain position within that world (despite the qualification of our other differences) because it is precisely the function of patriarchy to specify that position and preserve it. Thus, all women operate within a worldview that constitutes a certain picture of reality – a picture that is profoundly and systematically gendered, even if that picture is beginning, just beginning, to crack and dissolve. That is the insight of radical feminists, that gender itself is a social construction based on and reflecting sexism: that is, male dominance and female subordination, male autonomy and female restriction, and male glorification and female devaluation, all supposedly justified as a result of natural needs and differences, or the protection of women, or simply as a value-neutral description of the world (see MacKinnon, 1989, 2006). This theory is not reducible to any other.

Of course, this description of patriarchy as sexism is an oversimplification. One of the problems all feminists face is that any description of patriarchy will inevitably be an oversimplification because patriarchy is an entire worldview. It is enormously complex. By comparison, if you asked ten people for a description of, say, the United States (or any complex entity), you would get ten different descriptions. They could all be true. They would all be incomplete. No one of them could be the best description for all purposes. And they could all disagree with one another and still be accurate because they would differ in focus, purpose, characterization, and so forth. But patriarchy is much more complex than any single nation or culture. It is an entire worldview, with a million implications and effects, which has structured reality since the prehistory of human existence without any serious objection, challenge, or change until the second half of the twentieth century. This is a profoundly effective worldview, as Catherine MacKinnon put it, the most perfect ideology ever invented. It structures virtually everything that exists in its own image of reality. There is almost nothing that it does not touch. A comprehensive description of something like that is utterly impossible. So it is hardly surprising that different feminists provide different descriptions of it and different approaches to it. In fact, it would be surprising if that were not the case.

It does not follow, however, that because patriarchy is a complex worldview that cannot be described comprehensively, that there is no such thing as patriarchy or that women are not subject to it. Patriarchy is the systematic subordination of women to men, and that is the experience that all women share. The point of view of all women is the point of view of those who are subordinated on the basis of their sex regardless of what else may be different about them. Even if some individual personal relationships deviate from this norm, systematic social organization still conforms to it everywhere. And even if particular women are in positions of power because of wealth, class, or

accomplishment, they are not real exceptions to the point because they still function in a sexist world overall.

So the one experience common to all women is living in the subordinated half of a patriarchal world, and the one feature common to all feminism is the rejection of that worldview. The focus and result of this rejection may vary a great deal. Feminists may disagree with one another about what constitutes a rejection of sexist domination, or about which approach is likely to improve the condition of women, or is most susceptible to abuse or misinterpretation. They may disagree about which element gets to the essence of the problem, or even whether there is an essence to this problem. Nevertheless, all feminist theories are intended to liberate women from sexist domination in one form or another.

Sexist domination comes in many forms. It is found in social attitudes about rape, wife battering, sexual harassment, employment practices, educational expectations, workplace design, advertising, entertainment, and family responsibilities, to name just a few. Most of these social attitudes are reflected in law. They are part of the million effects and implications of patriarchy. And all these effects and implications are the legitimate domain of feminist theory. Thus, the diversity of feminist theories is in part a reflection of the pervasiveness of patriarchy and the great variation of its effects.

The diversity is also due to other perspectives on which feminists diverge. That is, feminists adopt many different approaches to addressing patriarchy. For example, some have focussed on the global failure of law to adequately address violence against women in the form of rape, incest, and domestic violence (see, e.g., Schneider, 2000; Estrich, 2001; Manderson, 2003; Hussein, 2007). Others are analyzing the disadvantage caused by hierarchical economic structures, and particularly the division between the family and the market (see, e.g., Olsen, 1983; Williams, 2001; Fineman, 2004; McClain, 2006). Yet others are challenging the value structures associated with traditional male and female roles, insinuated in law and supposedly justified by religion (e.g., Peach, 2002; Reed, & Pollitt, 2002; Mirza, 2006). Still others are examining the intersection of gender with other factors of identity and discrimination, such as race, ethnicity, class, disability, or age (see Crenshaw, 1989; Crenshaw et al., 1996; Roberts, 2002; Nussbaum, 2006). All these approaches are partial and all are needed. Each addresses some aspect of the pervasiveness of patriarchy.

Yet it does not follow that feminist theories share no common, distinctive feature. To see what makes feminist theories distinctive, we should compare them not with each other, but with antifeminist or nonfeminist views. These differences make clear that what is common to all feminist theories is also what is distinctive about them.

Consider the debate between Catherine MacKinnon and Phyllis Schlafly over the ERA as an example of the feminist antifeminist dispute (see MacKinnon, 1989). What was that debate about? It was, at bottom, a disagreement over whether the traditional roles of men and women should be changed or preserved. How these traditions are described depends on the point of view. The feminist describes the effects of these traditional roles and institutions as sexist domination. The antifeminist describes them as the preservation of family values. The feminist is arguing that patriarchy should be changed and the antifeminist that it should be preserved. Both agree that this issue is crucially important.

The nonfeminist theory on the other hand either argues that patriarchy is not important or simply does not address it. But a feminist generally thinks the implications and effects of patriarchy are relevant to many more subjects than the nonfeminist recognizes. In fact, a significant part of the feminist project is to educate the nonfeminist, so to speak, to make clear the significance of patriarchal influences where they commonly go unrecognized. For example, a central project of feminists is to make clear that certain institutional structures – such as equal protection law founded on male norms as the standards of comparison (see Allen, 2005 or Fineman and Dougherty, 2005), concepts such as force and consent in rape law (Estrich, 2001), or policies such as noninterference with family violence as respect for privacy or family (Schneider, 2000; Hussein, 2007), or judicial review based on the intent of the framers (Minow, 1991) are biased or value laden, when they are assumed to be neutral.

Overall, then, the antifeminist supports patriarchy. The nonfeminist overlooks or ignores patriarchy. And the feminist opposes patriarchy. The one feature that defines or identifies a theory as feminist, then, is that it takes the changing of patriarchy as its central focus. That is precisely what makes feminist jurisprudence feminist, despite all its variations.

So feminist jurisprudence is jurisprudence because it is the analysis of fundamental legal relations, concepts, and principles. It is feminist because it examines and opposes patriarchy. But why is that project central to jurisprudence as a whole, rather than a specialized topic for a small subgroup? The formulation of the question betrays its answer. The feminist claims that patriarchy unfairly structures virtually all social arrangements, and is dedicated to reforming that structure. Anyone who denies the broad significance of that sort of project is like the feudal lord who denied that the industrial revolution was relevant to him because his fief was in the country. If you think the claim is narrow, it is because you do not believe it, or perhaps do not understand it because it is undertaken incrementally and peacefully.

Yet, for the unbeliever, instrumental arguments can also be given. First, law, given its nature, tends to preserve the status quo. Law is a system of order intended to provide stability. That is its value; but that also makes it poorly suited to deal with change, especially broad based, systemic social change. Second, law naturally embodies the values, attitudes, expectations, and presumptions of the dominant culture (which it generally represents as universal values and/or neutral descriptions of facts of nature). This feature makes law badly suited to deal with diversity in a truly open and equitable manner. Yet in a world of fast paced social change, pressing pluralism and global diversity these limits are serious.

If law is supposed to promote the general welfare, it must be able to accommodate social change and cultural diversity better than its current structure and tradition allow. The dominant culture – those who hold power, make law and public policy, and influence institutional development – have no stake in solving these problems, and their training, background, and position militate against their being able to recognize such problems as central, to see them, let alone deal with them.

If law stands for justice, it must be justice for all. But the fact is that law has been notoriously bad at providing justice for those outside the dominant culture. Blacks, Native Americans, and Chinese (to mention three of the most infamous examples) as well as all women did not get the same standard of justice that the founding fathers set



up for themselves and those who were much like them, even as they called it “justice for all.” Nor is this deficiency yet corrected. Our blind spots are still significant. Feminist analysis is one of the best corrective lenses available today because it speaks from the position of the outsider. This enables it to be more creative, less tied to the tradition, less blinded by its own prominence.

Feminists have enormous motivation to find ways to accommodate change and diversity in law, because the feminist program is part of the new development that will otherwise be left out, and because women are among the legal outsiders who are vying for recognition. In fact, some feminist work has provided unusually insightful observations about whether norms are neutral or biased, and about how legal mechanisms might be revised and developed to increase its flexibility and responsiveness. Feminists are very good gadflies.

For these reasons, feminist jurisprudence is clearly of general interest. It is the only legal philosophy that currently confronts patriarchy as a central issue. Contrary to the objection that this is not philosophically interesting, it provides a vantage point for truly creative and insightful analysis of the most basic structures of law and society. We have hardly begun to explore its implications.

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## Law and Economics

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Law and economics, as it has been succinctly defined by Judge Richard Posner, one of its most prolific and influential exponents, entails “the application of the theories and empirical methods of economics to the central institutions of the legal system” (1975, p. 759). Although a first generation of efficiency-oriented scholars had long applied economic analysis to some fields of law, such as antitrust and commercial law, the second generation of law and economics to which Posner is referring applies economic principles to virtually every legal problem, even in less obvious fields such as criminal and family law. Posner summarizes the success and influence of law and economics this way:

Economic analysis of law has grown rapidly, has become the largest, most pervasive interdisciplinary field of legal studies in the history of American law, has palpably influenced the practice of law and judicial decisions, has launched lucrative consulting spin-offs, has spawned courses and textbooks in economic analysis of law, has influenced legislation (economic analysts of law played an important role in the deregulation movement), has made it de rigueur for law schools of the first and second ranks to have one or more economists on their faculty, has seeded a number of its practitioners in university administration and the federal judiciary, and has now crossed the Atlantic and begun making rapid gains in Europe.” (1995, p. 275, citations omitted)

Similarly, Professor Thomas Ulen calls law and economics “one of the most successful innovations in the legal academy in the last century” – one that “suffuse[s] ... a modern legal education” (1997, p. 434).

Although economic analysis is now found throughout the law-school curriculum, nowhere has its application been more fruitful or influential than in tort law (see Chapter 3). In 1992, George Priest wrote:

[T]here are few articles within the last ten years and no articles of importance within the last five years written about modern tort law that have not addressed ... this new approach to the law ... This trend is highly likely to continue for the future. ... [T]here is no future lawyer, no future academic, no future judge that can believe that one can adequately understand modern tort law without taking seriously the economic analysis of its effects. (p. 704)

For the most part, Priest's assessment has been confirmed: One cannot have a sophisticated understanding of tort law or tort theory without first having some familiarity with basic law and economics. The theoretical-doctrinal relationship is actually somewhat reciprocal. Indeed, to understand modern economic analysis requires an appreciation of the impact that tort law has had on its development.

To see why, it is necessary first to consider two general modes of analysis within law and economics: the *positive* mode, which is descriptive or predictive; and the *normative* mode, which is prescriptive or judgmental. Legal economists have asked two types of positive questions. First, all legal economists ask: What are a policy's behavioral effects, and would that policy lead to the efficient – that is, the cost minimizing – outcome? Second, some legal economists also ask: what would the law look like if efficiency were its sole purpose, and does the law, in fact, look like that? This second type of question is asked by scholars – positivists – testing the hypothesis that judge-made law is currently structured as if efficiency were its sole purpose (for example, Landes & Posner, 1987; Easterbrook & Fischel, 1991). Asserting and testing that positive hypothesis was once the central project of law and economics and was largely responsible for the rapid rise of what we are calling second-generation law and economics. The positive hypothesis would eventually lose most, though certainly not all, of its adherents. Still, it was the positivists' impressive initial successes that seemed to convince many scholars and judges to take efficiency seriously as a legal goal. It was in part because of the positivists' striking empirical support for the claim that “the logic of the law is really economics” (Posner, 1975, p. 764, emphasis added), that scholars and some jurists leapt to the normative view that the logic of the law *ought* to be economics (Michelman, 1978, pp. 1038–9). And, thus, the following two *normative* questions of law and economics surfaced: First, should efficiency be the goal of law? And, second, if so, how should the law be reformed to best serve that goal? The former question provoked comment from the likes of Guido Calabresi, Jules Coleman, Ronald Dworkin, and Richard Posner in one of the more famous and subtle legal debates of the twentieth century (see generally, *Journal of Legal Studies*, volume 9; *Hofstra Law Review*, volume 8). Now, however, the vast majority of law and economics scholarship assumes without hesitation that the goal of law should be efficiency (Hylton, 2005, p. 92). Today's legal economists most commonly inquire into the effects of different policies (the first positive issue) and recommend reforms in light of those effects (the second normative issue). To understand how we got to this point, it is helpful to examine more closely the positive hypothesis.

In one of the earliest and most significant contributions to the positivist project, Richard Posner (1972) reviewed 1,500 American appellate court decisions to test his “theory of negligence” (p. 29). The sample appeared to confirm his hypothesis that “the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – level of accidents and safety” (1972, p. 33). No matter that the courts did not speak in terms of efficiency, for

the true grounds of legal decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions. ... Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds. It is an advantage of

economic analysis as a tool of legal study rather than a drawback that it does not analyze cases in the conceptual modes employed in the opinions themselves. (Posner, 1972, p. 18)

Despite this explanation, even Posner seemed to sense the strain in his argument that a single goal – efficiency – explained all of negligence law and yet no court, in a sample of 1,500 opinions, once mentioned efficiency. Fortunately for the hypothesis, the strain was relieved by the economistic rhetoric contained in “Judge Learned Hand’s famous formulation of the negligence standard [in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)] – one of the few attempts to give content to the deceptively simple concept of ordinary care” (1972, p. 32).

Although the case fell outside of Posner’s data set, he characterized it as an “attempt to make explicit the standard that the courts had long applied” (p. 32). To a considerable degree, therefore, the early success of the positivist project can be attributed to the suggestive language in *Carroll Towing*. To better understand the issue that Judge Hand was addressing, consider the context as legal economists commonly describe it. The defendant, *Carroll Towing Co.*, was readjusting a line of barges moored in New York Harbor. One of the barges, the *Anna C.*, broke loose and crashed into a tanker. The tanker’s propeller damaged the hull of the *Anna C.*, and she sank. The plaintiff, the owner of the *Anna C.*, sued *Carroll Towing Co.* for the damages. The question before the appellate court was whether the tug owner, who had been deemed negligent at trial, could avoid paying the damages to the owner of the *Anna C.* The defendant argued that the barge owner was partially to blame for the accident because he failed to keep a bargee on board. Judge Hand agreed, reasoning that a defendant should be deemed negligent, and a plaintiff contributorily negligent, whenever the cost to the party of preventing an accident is less than the *expected cost* of the accident. According to his pithy algebraic formulation, a party’s duty is a function of three variables: the probability of an accident’s occurring, ( $P$ ); the gravity of the resulting loss or injury if an accident occurs, ( $L$ ); and the burden of precautions adequate to avert the accident, ( $B$ ). Applying the formula, Hand found that the barge owner was contributorily negligent because the cost of leaving a bargee on the barge, ( $B$ ), was less than the probability of a loss, ( $P$ ), times the gravity of the loss, ( $L$ ). According to Posner, Hand’s reasoning made explicit the otherwise implicit “economic meaning of negligence” (1972, p. 32).

As Posner highlighted, the “Hand Formula” appears consistent with the efficiency goal of minimizing the total cost of accidents, including the cost of preventing accidents. If  $B < PL$ , then an additional or *marginal* investment in accident prevention ( $B$ ) will have positive net returns in terms of a marginal reduction in expected accident costs ( $PL$ ). Efficiency requires that such investments be made. By holding a party liable for whom  $B < PL$ , tort law will encourage efficient investments in accident prevention. Put in the language of legal economists, tort law will induce parties to “internalize their externalities.” (*Externalities* are the costs that an actor’s actions impose on others but that the actor excludes from his or her decision-making calculus. Much of tort law should, according to legal economists, be understood as an attempt to force individuals to take into account – to *internalize* – the costs that their actions impose on others.) If, however,  $B > PL$ , an investment in accident prevention will yield negative net returns. Put

differently, society is better off, in economic terms, by incurring lower accident costs instead of higher accident-prevention costs.

## An Economic Model of *Carroll Towing*

### *Starting Assumptions*

To identify more clearly whether and under what circumstances the Hand Formula is efficient, we turn now to a simple model using the facts in *Carroll Towing*. As with all law and economics models, ours is premised upon a series of assumptions, many of which are indisputably unrealistic. So that readers unfamiliar with economic analysis might suspend incredulity, it is worth noting at the outset the purpose of this type of model. Economists hope that through a set of simplifying abstractions, useful insights can be gleaned about otherwise intractably complex problems – insights that maintain some validity even in the messy real world. By first examining the *Carroll Towing* case through the lens of an abstract model and then evaluating the effects of relaxing many of the model's underlying assumptions, we hope to illustrate both the nature of economic reasoning and its potential benefits and costs. In addition, we offer a rudimentary introduction to a key analytical methodology widely used by legal economists: game theory.

Our model's initial assumptions (many of which we relax below) are as follows:

- 1 Legal economists Robert Cooter and Thomas Ulen have written that “[o]ne of the central assumptions in economic theory is that decision-makers are rationally self-interested,” meaning that they “have stable, well-ordered preferences, which implies ... that ... [they] can calculate the costs and benefits of the alternatives available to them and that they choose to follow the alternative that offers the greatest net benefit” (pp. 350–1). Our first assumption is that the barge owner and tug owner are in that sense *rational*.
- 2 All costs and benefits can be measured in terms of a single metric: dollars.
- 3 The barge owner and tug owner have *complete, but imperfect, information* (that is, they know their own and the other players' strategy options; they know the payoffs – that is, the costs and benefits outlined in Table 19.1; and they each know that the other party is equally well informed; but neither knows beforehand how much care the other will take).
- 4 *Transaction costs* (more specifically, the *ex ante* [pre-accident] costs to the barge and tug owners of allocating liability or setting care levels by contract) are prohibitively high.
- 5 *Agency costs* (including costs of hiring and monitoring an agent, as well as the residual costs of agency disloyalty or shirking) between the barge owner and his employees and the tug owner and her employees are zero.
- 6 The parties' *activity levels*, the frequency and duration of their actions, are irrelevant in that they do not affect the total cost of accidents. Only the level of care the parties take when they act is relevant.
- 7 The liability standards are all costless to administer.

**Table 19.1.** Carroll Towing hypothetical.

<i>Tug Owner's Care</i>	<i>Expected Benefit to Tug Owner (\$)</i>	<i>Expected Cost to Barge Owner (\$)</i>	<i>Net Gain (\$)</i>
Tow rapidly	150	125 (on)*	25 (on)*
		145 (off)	5 (off)
Tow moderately	100	50 (on)*	50 (on)*
		70 (off)	30 (off)
Tow slowly	50	20 (on)*	30 (on)*
		40 (off)	10 (off)

\*Because, by assumption, the barge owner would have to pay \$1 to keep a bargee on board, the expected cost (or net gain) would be \$1 more (or less) than the amount indicated.

Source: Adapted from Polinsky, 2003, p. 48.

- 8 Both parties are risk neutral. *Risk-neutral* individuals care only about the expected value of an option. The *expected value* of a risky option is the absolute magnitude of the risk, if it occurs, multiplied by the probability that it will occur. *Risk-averse* individuals, in contrast, care not only about the expected value, but also about the absolute magnitude of the risk. For example, suppose an individual is offered a 50 percent chance of winning \$1,000 or a guarantee of winning \$500. Both offers have the same expected value, \$500. If the offeree is risk neutral, therefore, he or she will be indifferent between the two choices. If risk averse, he or she will prefer the \$500 with certainty.
- 9 There are no spillover effects or third-party externalities. Tug owners and barge owners are the only parties affected by the interaction and by the choice of legal rules governing it.
- 10 Both parties know the applicable legal rules.
- 11 Courts accurately measure the costs and benefits of each party's behavior – they too know the numbers in Table 19.1 – and perfectly apply the liability standard.

### *The Basic Model*

Consider now the specific terms of our example, as described in Table 19.1, which builds on an example developed by Professor Polinsky in his popular introduction to the field (2003, p. 48). As column 1 indicates, the tug owner can take different levels of care by moving the boat line at one of three speeds. Column 2 describes the benefits to the tug owner of moving the barges at each speed. Towing at higher speeds enables the tug owner to maximize the amount of work she can complete in any day. Towing the barges more slowly forces the tug owner to forego additional revenue. Economists refer to this type of foregone benefit as an *opportunity cost* and generally treat it like any other cost. Column 3 shows that both of the parties can affect the expected accident costs to the barge. As indicated in the parentheses in columns 3 and 4, we have assumed for simplicity's sake that the barge owner can take either of two levels of care:

he can either keep a bargee on the barge or allow the bargee to get off. Although not reflected in the table, we also assume that the cost of keeping a bargee on board is positive, but trivially small (\$1). Column 4 shows the total expected benefits less the total expected costs – the net social gain – of the parties' activities at different levels of care.

The efficient result – that is, the outcome that minimizes the costs of accidents and thus maximizes net social gain – requires that both parties take care. The tug owner must tow at moderate speed, and the barge owner must keep a bargee on board. While column 4 readily reveals the efficient result, to fully appreciate *why* that is the efficient result, it is useful to employ the sort of marginal analysis that is fundamental to economic reasoning. Rapid towing generates the greatest expected benefit to the tug owner (\$150). From a social perspective, however, towing moderately is preferable because the marginal cost to the tug owner of towing moderately ( $B$ ) is only \$50 of opportunity costs (\$150 – \$100), while the marginal benefit of that investment in terms of the reduction in expected accident costs ( $PL$ ) is \$75 (depending on the barge owner's care level, \$125 – \$50 or \$145 – \$70). Because the cost of prevention is less than the expected accident costs ( $B < PL$ ), efficiency mandates that the tug owner does not tow rapidly. Note that efficiency also requires that the tug owner does not tow slowly because the marginal cost of doing so is \$50, while the marginal benefit is only \$30 ( $B > PL$ ). Thus, the efficiency criterion requires the tug owner to tug moderately. Similarly, the barge owner should keep a bargee on board because the marginal cost of doing so is, by assumption, always less than the marginal benefit ( $\$1 < \$20$ ). Having identified the efficient outcome, we turn now to the task of defining a set of possible liability standards and examining which of those standards, if any, would lead to that efficient outcome.

In light of its central role in legitimating the positivist hypothesis, if there is one case that should confirm that hypothesis, it is *Carroll Towing*. Ironically, however, legal economists have largely neglected to examine whether the Hand Formula, as applied in *Carroll Towing*, actually was efficient. Instead, they have separated the Hand Formula from the very case in which it was announced and have presumed that, because of its apparently beneficial efficiency consequences in the abstract, the Hand Formula leads to efficiency in specific factual settings. Given that the positivist hypothesis – that the common law is in fact efficient – requires more support than simply theoretical speculation, we will treat this as an opportunity to retest the hypothesis by placing the Hand Formula back in its original context.

To decide whether the standard applied in *United States v. Carroll Towing* was efficient, one must first ask, compared to what? Rules 1–6, as depicted in Figure 19.1, represent six possible tort liability standards. The question being answered in each of the two-by-twos is whether the parties took efficient levels of care. The named party in any given box –  $P$  (plaintiff) or  $D$  (defendant) – is the one who will bear liability in light of the indicated conduct. As specified in Figure 19.1, the efficient outcome – under any of the rules – is that both parties take care. The shading within each two-by-two indicates the likely result (which we will explain below) given the incentives created by the particular liability standard. Thus, from each two-by-two one can see: the behavioral result (that is, who will bear liability, and who will take efficient care) and whether that result is efficient. Each matrix – or each liability rule – is named, somewhat didactically,



		Plaintiff - Barge Owner's Care				Plaintiff - Barge Owner's Care				Plaintiff - Barge Owner's Care	
		Yes	No			Yes	No			Yes	No
Defendant- Tug Owner's Care	Yes	P	P	Defendant- Tug Owner's Care	Yes	P	P	Defendant- Tug Owner's Care	Yes	P	P
	No	P	P		No	D	P		No	D	D

		Plaintiff - Barge Owner's Care				Plaintiff - Barge Owner's Care				Plaintiff - Barge Owner's Care	
		Yes	No			Yes	No			Yes	No
Defendant- Tug Owner's Care	Yes	D	D	Defendant- Tug Owner's Care	Yes	D	P	Defendant- Tug Owner's Care	Yes	D	P
	No	D	D		No	D	D		No	D	P

**Figure 19.1.** Liability standards.

according to the number of times that a court might be required to apply the Hand Formula.

It is helpful to recognize that the two rows in Figure 19.1 are mirror images of each other, with the standards becoming increasingly pro-plaintiff moving in numerical order from rule 1 to rule 6. Under a “no-Hands” rule (commonly referred to as a *no liability* rule), the plaintiff pays costs of all accidents, while under a “reverse no-Hands” rule (*strict liability*), the defendant pays all accident costs. Under rule 3, a “one-Handed” standard (*negligence*), the defendant is liable whenever she fails to take efficient care, but otherwise the plaintiff is liable. Rule 4 represents a “reverse one-Handed” standard (strict liability with a defense of *contributory negligence*), in which just the reverse is true: The plaintiff is liable when he fails to take efficient care, but otherwise the defendant is liable. Under the “two-Handed” standard of rule 2, the defendant is liable if and only if the plaintiff takes efficient care but the defendant does not. (This standard, which was long the basic standard in tort law, and a version of which governed the case in *Carroll Towing*, is typically referred to as “negligence with a defense of contributory negligence.”) The opposite is depicted in rule 5, in which the plaintiff is liable if and only if the defendant takes care but the plaintiff does not. (This “reverse two-Handed” rule has no common name and, to our knowledge, has never been adopted by courts.)

### *Introduction to Game Theory*

So that is the basic setup. There remains the task of assessing what the tug owner and barge owner will do under the various rules and standards that we have laid out. As Professors Cooter and Ulen put it, any economic analysis must take this second

major step of showing that an *equilibrium* – that is, “a pattern of interaction that persists unless disturbed by outside forces” – emerges “in the interaction among maximizing actors” (2003, p. 16). To ascertain that equilibrium, economists commonly apply game theory.

*Game theory*, often described as the “science of strategic thinking,” is a branch of economics concerned with modeling and predicting strategic behavior. *Strategic behavior* arises when two or more individuals interact and each individual’s decision turns on what that individual expects the others to do. Game theoretic models have been used to help predict or make sense of everything from chess to childrearing, from evolutionary dynamics to corporate takeovers, and from advertising to arms control. Another indicator of the success of game theory is the fact that, since 1990, seven Nobel Prizes have been awarded to game theorists (including one to John Nash, whose contributions to the field – including the “Nash Equilibrium” concept – is the stuff of a well-known book and movie). The influence of game theory is evident in legal scholarship as well. Indeed a Westlaw search reveals that, since 1990, law-review articles employing the phrase “Nash Equilibrium” have escalated from roughly zero to six hundred.

In this chapter, we will review two of the most common types of games: normal form games and extensive form games. We will start with a *normal form* rendition of the *Carroll Towing* tug and barge interaction. A normal form game is generally depicted in a matrix indicating the players (in this case, tug owner and barge owner), the strategies (take due care – “Yes” – or fail to take due care – “No”), and the payoffs. For simplicity, we have given each player just two strategies (so the tug owner faces only the options of tugging rapidly or moderately). As game-theoretic conventions require, the payoffs are listed in the interior of the matrix as row player (the defendant or tug owner) first, and column player (the plaintiff or barge owner) second.

Key to understanding the legal-economic perspective is recognizing that changes in the liability standard represent, at bottom, changes in the payoff structures, which, in turn, lead to different behaviors and different equilibria. Consider the payoffs in Table 19.2, depicting payoffs and outcome under rule 1 (no liability).

Referring back to Table 19.1 to review the applicable costs and benefits, one can calculate that the tug owner would enjoy \$100 of benefits if he were to tug moderately (taking due care) and \$150 of benefits if he were to tug rapidly (failing to take due care). Under the “no liability” rule, the tug owner is not liable, so those benefits will not be offset by liability payments to the barge owner. Meanwhile, if the barge owner does not take care, the barge owner will have to pay the costs to the barge (listed in column 3 of Table 19.1) plus the costs of care (\$1). Thus, if the tug owner does not

**Table 19.2.** No-liability (rule 1) payoffs.

<i>Defendant – Tug Owner’s Care</i>	<i>Plaintiff – Barge Owner’s Care</i>	
	<i>Yes</i>	<i>No</i>
<i>Yes</i>	\$100, –\$51	\$100, –\$70
<i>No</i>	\$150, –\$126	\$150, –\$145

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take care (tugs rapidly), the barge owner would pay \$126 ( $\$125 + \$1$ ). If the tug owner does take care (tugs moderately), the barge owner would pay \$51 ( $\$50 + \$1$ ). If the barge owner does *not* take care the barge owner will have to pay the costs to the barge, which would be \$145 if the tug owner does not take care and \$70 if the tug owner does take care.

In that way, it is fairly straightforward to translate the interaction between the tug owner and barge owner into the payoffs of a normal form game for each of the six rules, as we have done in Figure 19.2.

### *Results of the Basic Model*

With the payoffs thus calculated, it may be helpful to make some general observations about all of the payoff matrices before solving any one of them. First, the shading indicates the equilibrium outcome (below we will explain how we solved for that outcome). Thus, from each matrix, it is simple to see how much care each party will take, how much each party will gain or lose in equilibrium, and whether that outcome is efficient. Second, the net payoffs for each quadrant are the same for all six of the games. For each and every rule, the “Yes/Yes,” corner always sums to a difference of \$49, the “Yes/No” quadrant nets out \$30, the “No/Yes” corner yields \$24, and, finally, the “No/No” corner always nets just \$5. Those net payoffs illustrate why the “Yes/Yes” option is the most efficient – the combined payoffs for the parties are greatest there. While the net payoffs are the same in each quadrant across the six rules, the allocations or distributions of the underlying costs and benefits vary.

We turn now to the key question regarding the behavioral implications of the different payoff structures in each of the different games. More specifically, we want to find out if the payoffs will lead the tug owner and the barge owner to take efficient care (the “Yes/Yes” quadrant).

As long as the accident context is *bilateral* – that is, as long as *both* parties need to take effective accident prevention measures in order for the efficient outcome to be reached – we can immediately eliminate rules 1 and 6. Consider first the no-Hands rule (#1). The tug owner’s incentives are quite clear, because she will always be better off not taking due care (better off, that is, tugging rapidly), no matter what the barge owner does ( $\$150 > \$100$ ). In intuitive terms, the tug owner will never be held liable for her negligence and, hence, will externalize the costs that her negligence will impose on the barge owner. In game-theoretic terms, the tug owner’s strategy is said to be *strictly dominant* – it is the best choice for the tug owner for every possible choice that the barge owner might make. The barge owner also has a strictly dominant strategy – although to him, the incentives are to take care. The barge owner will always save \$19, regardless of what the tug owner does, by making sure that a bargee is on board. In sum, under a no-Hands rule, only the plaintiff will take efficient care.

The opposite will occur under a reverse no-Hands rule (#6). For the tug owner, the “Yes” (or take-care) strategy strictly dominates the “No” (or do-not-take-care) strategy. Meanwhile, for the barge owner, the “No” option strictly dominates the “Yes” option. In slightly less technical terms, only the tug owner will take care, because the tug owner will be liable for all the costs, but barge owner can externalize the \$20 of costs associated with not maintaining a bargee on the barge.

1) No-Hands rule (no liability)

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$100, -\$51	\$100, -\$70
	No	\$150, -\$126	\$150, -\$145

2) Two-Hands rule (negligence/contributory negligence)

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$100, -\$51	\$100, -\$70
	No	\$25, -\$1	\$150, -\$145

3) One-Hand rule (negligence)

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$100, -\$51	\$100, -\$70
	No	\$25, -\$1	\$5, \$0

6) Reverse no-Hands rule (strict liability)

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$50, -\$1	\$30, \$0
	No	\$25, -\$1	\$5, \$0

5) Reverse two-Hands rule

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$50, -\$1	\$100, -\$70
	No	\$25, -\$1	\$5, \$0

4) Reverse one-Hand rule (strict liability/contributory negligence)

		Plaintiff - Barge Owner's Care	
		Yes	No
Defendant-Tug Owner's Care	Yes	\$50, -\$1	\$100, -\$70
	No	\$25, -\$1	\$150, -\$145

Figure 19.2. Payoffs.

Both no-Handed rules, therefore, clearly fail the efficiency criterion under the circumstances. However, in *unilateral* accident contexts, where only one party can make cost-justified investments in accident-cost reduction, even rules 1 and 6 can lead to efficient investments in accident reduction. Suppose, for example, that only the tug owner could take cost-justified steps to prevent the accident. Under rule 6, or absolute defendant liability, the tug owner will be liable regardless of its care level. Thus, rule 6 forces the tug owner to internalize fully the costs to the barge. While this result would occur in the unilateral accident context, most of the debate over appropriate tort liability standards centers around bilateral accidents, so we will focus the balance of our analysis on that context. As will become clear, under our initial assumptions, any of the rules with the exception of 1 and 6 will lead to an efficient result (Landes & Posner, 1987, ch. 3; Shavell, 1987, pp. 26–46).

Under rule 2, a judge or jury will apply the Hand Formula first to the defendant. If the defendant is not negligent, the plaintiff will bear the costs. If the defendant fails the Hand test, then the court applies the same test to the plaintiff. If the plaintiff is contributorily negligent, he will be liable. The defendant will thus be liable only if she, but not the plaintiff, fails the Hand test. This rule will cause both parties to take efficient care. To see why, consider the distribution of payoffs for rule 2. Looking at the game from just the defendant's perspective, it is not apparent which strategy is superior. She might be better off taking care or not taking care, depending on what the plaintiff does. If the barge takes care, then the tug owner will be better off doing the same ( $\$100 > \$25$ ); if the barge owner does not take care, then the tug owner will be better off not taking care ( $\$150 > \$100$ ). Put differently, neither strategy available to the defendant strictly dominates the other. So, we need a new way of predicting a player's behavior.

Game theorists often employ a second *solution concept* known as *iterated dominance*, which holds that any player assumes that other players will take strictly dominant (or avoid strictly dominated) strategies and acts on that assumption. With that solution concept, solving the game is simple even though only one of the two players has a strictly dominant strategy. Specifically, the barge owner has a strictly dominant strategy to take care because doing so will save either \$19, where the tug owner takes care, or \$144, where the tug owner does not take care. The tug owner will assume that the barge owner will, in light of those payoffs, take care, and under that assumption will rationally take care herself by tugging moderately ( $\$100 > \$25$ ).

The bottom row is simply the reverse of the top row, so the reasoning for rule 5 is the reverse of that for rule 2. Specifically, the tug owner will have a strictly dominant strategy to take care, and the barge owner will have an iterated dominant strategy to take care. Both parties will therefore behave efficiently under this standard as well.

Under rule 3, the court will apply the Hand Formula only to the defendant. If she fails, she is liable for all accidents, regardless of the plaintiff's care level. That rule gives the tug owner a strictly dominant strategy to take care. The most she could benefit under this rule is \$25 (or  $\$150 - \$125$ ) if she does not take care. If she passes the Hand test, she is liable for nothing, and enjoys \$100 of benefit. Weighing these options, the rational defendant will take care. That provides the plaintiff an iterated dominant strategy to take care. He knows that he will be liable for all accident costs. The plaintiff, faced with \$51 in expected costs if he does take care, and \$70 in expected costs if he does not take care, will ensure that the bargee remains aboard.

Rule 4 is the mirror image of rule 3: the barge owner has a strictly dominant strategy to take care, and the tug owner has an iterated dominant strategy to take care. Rule 3, therefore, will also lead to the efficient result.

As this analysis of the various liability rules demonstrates, the standard employed by Judge Hand – rule 2, or negligence with a defense of contributory negligence – appears to satisfy the efficiency criterion. Thus far, however, our analysis provides only weak support for the positivist hypothesis, because it fails to yield a unique prediction – that is, it is indeterminate as between rules 2–5 (Elster, 1993, p. 181). So the question we turn to next is: if some of the model’s assumptions are relaxed, will it yield a more determinate result that more clearly supports, or threatens, the positivist hypothesis?

## Relaxing the Model’s Initial Assumptions

### *How to Assess Assumptions*

The law and economics literature does not, as far as we can tell, include any discussion of how to evaluate assumptions – a surprising omission given that every economic conclusion ultimately turns on the economist’s starting assumptions. As loosely captured in Table 19.3 below, there are at least two questions that should be asked when evaluating assumptions. First, is the assumption *plausible*? Some assumptions are uncontroversially accurate, while others are either more controversial or plainly implausible. Second, how *relevant* or result-implicating is the assumption? That is, do the results of, or conclusions from, the model rest on the assumption – making it extremely relevant – or does relaxing the assumption have no real effect on the model’s results – making it irrelevant? Or is the assumption’s relevance indeterminate in the sense that there is currently too little empirical data available to allow a reasonably confident prediction as to the assumption’s effect?

If an assumption is implausible, it can have one of three implications for the positivist hypothesis. If it is also irrelevant, then the assumption will have no effect on the validity of the model. If the assumption is implausible and its effect is indeterminate, it will present some threat to the model’s validity – it may not disprove law’s efficiency, but it certainly should undermine the positivists’ confidence when declaring the law efficient. Finally, if an assumption is implausible and very significant to a model’s predictions – that is, the model’s success rests in some substantial part on the assumption – then the assumption presents a serious threat to the model’s conclusion.

**Table 19.3.** Evaluating a model’s assumptions.

	<i>Plausible</i>	<i>Questionable or Indeterminate</i>	<i>Implausible</i>
Irrelevant	No threat	No threat	No threat
Indeterminate	No threat	Mild threat	Moderate threat
Relevant	No threat	Moderate threat	Major threat

We turn now to examining some of the model's assumptions according to those criteria. We will ask whether the assumptions are plausible and whether relaxing any assumptions influences our conclusion regarding which liability rule would have been the most efficient to apply in *United States v. Carroll Towing*.

### *Transaction costs*

We began by assuming that transaction costs were too high for the tug owner and the barge owner to assign the risk of damage between themselves by contract. Changing that assumption – supposing instead that the expected gains to contracting exceed the transaction costs – indicates that the initial supposition may be quite relevant to the model's outcome. To illustrate why that is so, we first must review two of the most important insights of law and economics.

Legal economists commonly begin their analyses with the assumption that transaction costs are trivial. The importance of that assumption was first made clear by Nobel Prize winner Ronald Coase (1960) in his famous article “The Problem of Social Cost.” Oversimplifying a bit, the so-called Coase Theorem posited that where no obstacles to bargaining exist between the parties involved, resources will be allocated efficiently regardless of who initially receives the rights to the resources and regardless of how the state protects those rights, provided contracts are enforced by the state. As economists sometimes put the point, where parties can contract with each other without cost, all accident costs will be internalized.

An example may clarify why in settings where transactions are costless, a court's choice of liability standards has no efficiency implications. Recall that the tug owner would earn an additional \$50 and the barge would suffer an additional \$75 in damages if the tug owner tows rapidly rather than moderately. If the law gives the barge owner the right to enjoin the tug owner from tugging rapidly, the tug owner would be willing to pay up to \$50 to do so, but the barge owner would accept nothing less than \$75 to permit it. Thus, the tug owner would be forced to tow moderately, as is efficient. If, on the other hand, the law gives the tug owner the right to tug rapidly without paying damages for harms caused, the tug owner would accept any amount greater than \$50, and the barge owner would pay up to \$75 for the tug owner to slow to a moderate speed. The barge owner would contract with the tug owner to slow down. When contracting costs are low, the efficient outcome obtains regardless of who is buying and who is selling.

In fact, legal economists posit that the likelihood of an efficient result in this context is even higher than it would be if a court applied the Hand Formula to determine liability. When parties contract together, each of them is making his or her own subjective valuations – his or her own willingness to pay or willingness to accept for a given asset, right, or privilege. The measurement of value is a fundamental issue in economics. A *subjective* valuation system is favored by most legal economists, because it allows each party to judge the effects of an outcome according to her or his own preferences. Where contractual negotiation is possible, legal economists therefore generally prefer contract-based, subjective allocations of costs to tort-based objective allocations.

However, transaction costs are almost never zero and are often rather high. These transaction costs might, for instance, include information costs (the parties must locate

each other, learn the legal rules, evaluate the probability of different accidents and the possible accident costs) and “strategic behavior” (for example, one or both of the parties may try to hold out, refusing to bargain in the hopes that the other party will compromise his position). In circumstances where individuals cannot (or will not) contract to allocate the costs of accidents, the legal system may have to intervene and impose liability standards as a proxy for contractual allocation.

Here, a second important insight of legal economics becomes relevant. Guido Calabresi and Douglas Melamed (1972) observed in a classic article, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” that once the legal system has defined and assigned an entitlement – a legal right – it still must decide what form of protection to provide the entitlement. When *property rule* protection is provided, the entitlement can change hands only by contract – that is, only if its holder agrees to sell. Hence, the transfer of entitlements protected by property rules depends on a holder’s subjective valuations. When the entitlement is protected by a *liability rule*, a nonholder can take the entitlement as long as he or she is willing to pay *ex post* a state-determined price. The transfer of entitlements under liability rules depends therefore on objectively determined values.

The choice between property-rule and liability-rule protection, then, turns on trade-offs between two variables: first, the level of the contracting costs relative to the potential gains to contracting; and second, the extent to which a subjective means of valuation is superior or inferior to an objective means. In the *Carroll Towing* context, the case for liability rule protection is somewhat indeterminate. On one hand, contracting costs on a crowded day in New York Harbor may well have been prohibitively high, and the value of the loss – a barge and its cargo – can be measured fairly accurately using an objective measure. From that perspective, some form liability-rule protection seems efficient. On the other hand, the commercial entities involved may well have already been in a contractual relationship – one in which they might readily have specified how risks and damages were to be allocated. Were that true, the most efficient approach may have been for Judge Hand to treat the case as a contract case and assign the liability in a way that would encourage efficient contracting in the future (see generally Ayres & Gertner, 1999). In sum, the assumption that transaction costs were high is of indeterminate plausibility and relevance and thus poses a mild threat to the positivist hypothesis.

### *Agency costs*

Our model assumes that the barge owner and his agents (and the tug owner and her agents) can collectively be treated as a single individual. Legal economists who have studied the question of how to encourage efficient behavior on the part of firms have shown that our assumption can be implausible and relevant. Although space constraints preclude us from summarizing any details, legal economists have identified several significant agency costs that exist between a firm and the firm’s agents and that influence which liability rule would be efficient (Arlen & Kraakman, 1997). The zero-agency-cost assumption therefore poses some threat to our model’s conclusion that Learned Hand’s decision in *Carroll Towing* was efficient.



### *Activity levels*

We have thus far assumed that accident costs are a function of only one type of investment: care-level investments. However, it is possible – in fact, likely – that the parties' activity levels will also affect the costs of accidents. For instance, the tug owner's activity may have posed a risk to the barge not just as a result of how carefully she moved the barges, but also as a result of how often and how far she moved them. Thus, a liability rule can have two principal *deterrence effects*: first, as we have already indicated, the *care-level effect* is the change in the costs of accidents resulting from a change in the amount of care taken by a party; and second, the *activity-level effect* is the change in the total costs of accidents resulting from a change in the duration or frequency of a party's activity.

The efficient level of activity is that level beyond which the net marginal gains of an additional unit of activity (assuming efficient care) are no longer positive. To deter all accidents that could be cost-justifiably prevented, judges and juries would need to compare the benefits a party obtains from greater participation in the activity to the resulting increase in expected accident costs. Unfortunately, courts tend to ignore activity-level considerations, and most scholars believe that, as a practical matter, courts are *unable* to conduct the necessary activity-level calculus, because of the amount of information that they would need (Shavell, 1980, p. 25).

The addition of activity-level considerations to the *Carroll Towing* analysis could very well change its conclusions. Judge Hand appears to assume that the benefits to the tug owner of moving the barges will remain constant for every job she completes. However, the *law of diminishing marginal returns* suggests that the tug owner's net gains will eventually decline with each additional trip. For instance, the value to the tug owner of a second trip (and if not the second, then the third or fourth or the fifth) is likely to be less than the value of the first. But, because courts do not, or cannot, consider whether the marginal benefits of an additional unit of activity would justify the costs, the negligence rule may cause the tug owner to tug too often, albeit moderately.

Consequently, any rule in which the plaintiff bears the costs when both plaintiff and defendant have taken care (rules 1–3) will lead the defendant to engage in too high a level of activity. And, for analogous reasons, the plaintiff will engage in an inefficiently high level of activity if the defendant is liable when both parties have taken care (rules 4–6). There is no liability standard that can force both defendants and plaintiffs (again, assuming that they are not in a contractual relationship) to optimize their activity levels. The problem of nonoptimal activity levels is therefore theoretically insuperable. And absent some empirical basis for believing that one party's activity levels are more significant in creating accident costs other things equal, or that one party's activity levels are relatively inexpensive to reduce, there is no good way to choose among liability standards on activity-level grounds. The assumption that activity levels should be ignored is thus of indeterminate plausibility and indeterminate relevance. The resultant uncertainty raises doubts about any claim that one or another rule is the most efficient rule, but, by itself, does not allow one to conclude that a particular rule is inefficient.

*Administrative costs*

We began with the clearly implausible assumption that administrative costs – that is, the various costs of implementing a particular tort regime – were zero. No one denies that the administrative costs of the current regime are high. Numerous studies have found that administrative costs eat up at least as much money on average as injured plaintiffs receive in compensation (Shavell, 1987, pp. 262–4; Shavell, 2004, pp. 57–8). And while critics of the present tort system commonly point to that fact, no one has been able to show how it should affect the choice among liability standards. Because of the dearth of empirical evidence, it is not clear that the administrative costs of our current system exceed its benefits; that another liability standard would yield lower administrative costs without a more-than-offsetting increase in accident costs; or, finally, that there are not other means of lowering administrative costs independent of the liability standard (Shavell, 1987, pp. 262–5; Croley & Hanson, 1991, pp. 14–17).

The mere observation that the costs of administering the current tort regime are significant does not aid in the choice among liability standards. That those costs are so substantial, however, does again suggest that any confidence one might have in the common law's efficiency should be tempered by how little is known about variables that likely matter a great deal.

*Risk neutrality*

Contrary to our starting assumption, many individuals are concerned not only with expected losses but also with the absolute size of those losses – that is, many individuals are risk averse. Thus, the Hand Formula's implicit assumption – that negligence should turn on the expected value of costs and benefits without regard to the absolute magnitude of those costs and benefits – is implausible in a world of human decision making. To avoid the problem that risk aversion creates, legal economists typically assume that individuals have insurance, which, by transforming a potential loss of some absolute amount into premiums equal to the expected value of the loss, allows the insured to behave *as if* they are risk neutral (Posner, 1992, p. 12). But while it is true that most individuals have some insurance, it seems unlikely that many have enough insurance to behave as the Hand Formula posits.

Insofar as the full-insurance assumption is empirically untrue, the possibility that one party is more averse to risk or faces greater insurance costs, may have significant implications for the choice among liability standards. Because the efficiency goal of minimizing the total costs of accidents is concerned in part with the costs of insuring against those accidents that cannot be cost-justifiably prevented, it matters who is liable for those accidents. In circumstances where plaintiffs typically have greater insurance costs, other things equal, courts should choose one of the liability standards on the bottom row. When insurance costs are higher for defendants, the opposite reasoning dictates that courts choose one of rules 1–3. Absent evidence regarding the relative preferences of plaintiff and defendant for tort-provided insurance, efficiency concerns do not dictate the choice of one liability standard over the others.

### *Legal knowledge*

Where the law is unknown by the potential plaintiffs and defendants, it cannot have its desired deterrence effect (Kaplow, 1994, pp. 365–6). The assumption that parties know the legal rules is therefore clearly relevant to the positivist hypothesis. It may also be a somewhat implausible assumption, in light of evidence

that people often ignore or otherwise fail to respond to law, and, when they do try to be law-abiding, that they misconstrue legal signals. ... The reality that cognitive limitations impair the learning of law makes legal instrumentalism much more difficult. An analyst must become involved in the messy matter of the extent to which actors will respond to formal legal signals. (Ellickson, 1989, p. 40)

The extent of legal knowledge held by parties to a dispute will vary tremendously depending on the context of the suit and the identities of the parties involved (Latin, 1985, 1994). Therefore, the introduction of questions about legal knowledge complicates the model and, to some extent, undermines the grounds for believing that the common law is efficient.

### *Applying the Hand Formula*

It is essential to the positivist hypothesis that courts not only apply the Hand Formula, but that they do so with “reasonable care,” measuring the relevant marginal benefits and costs of each party’s options and actions. While this assumption is clearly relevant to the model’s success, several scholars have shown that it is quite implausible (Gilles, 2003, pp. 28–30; see generally Wright, 2003; Feldman & Kim, 2005).

Above, we summarized the conventional view that courts and juries have too little information to competently apply the Hand Formula with respect to a party’s *activity levels*. And we have also already summarized the information-cost advantages of property-rule protection over liability-rule protection. Both of those basic insights of law and economics are consistent with the more general critique that courts or juries either cannot or, in practice, do not conduct an effective cost-benefit analysis. Positivists such as Posner do not entirely deny this judicial shortcoming – indeed, they have employed it as a means of explaining certain areas of the law. However, a more general formulation of that shortcoming poses a real threat to the positivists. Some investments in accident prevention – such as, but by no means limited to, activity-level investments – may well have significant positive returns, but are not considered by courts applying the Hand Formula. Moreover, for those investments that courts and juries do consider, there is little reason to be confident that the relative costs and benefits are (or, indeed, can be) accurately measured (Croley & Hanson, 1991, pp. 67–75).

In *Carroll Towing*, Judge Hand reasoned that the cost of maintaining a barge on the barge (*B*) must have been low because the bargee had offered a fabricated story as an excuse for his absence, and that *PL* must have been high because of the wartime bustle of New York Harbor. The balancing of *B* against *PL* seems rather rough, though understandably so in light of how little information judges and juries typically have (Gilles, 2003, pp. 28–30). Hand himself recognized this difficulty, writing in another case, *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949), that

[t]he difficulties ... in applying the rule ... arise from the necessity of applying a quantitative test to an incommensurable subject-matter. ... [A]ll such attempts are illusory, and, if serviceable at all, are so only to center attention upon which one of the factors may be determined in any given situation.

Even Richard Posner – qua Seventh Circuit judge – has conceded the difficulty of accurately applying the Hand Formula. In *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987), he noted that, “[f]or many years to come juries may be forced to make rough judgments on reasonableness, intuiting rather than measuring the factors in the Hand Formula.”

The failure of courts or juries to apply the Hand Formula in most cases and, even if they do apply it, the measurement difficulties and information deficiencies they face seem to pose a significant threat to the positivist hypothesis.

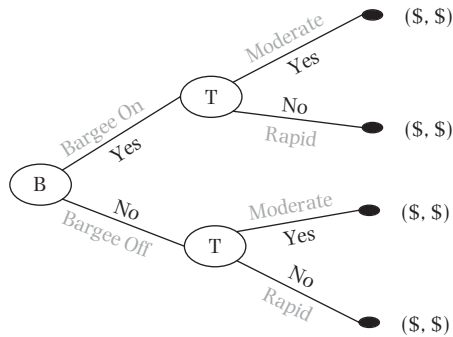
### *Simultaneity or observability of parties' caretaking investments*

The efficiency justification of the standard applied in *Carroll Towing* may also be significantly undermined if we relax the assumption that the parties have complete but imperfect information. That assumption, recall, is equivalent to assuming that each party behaves independently or simultaneously, without regard to the behavior of the other. To glimpse why this assumption may matter, think of the game of Rock-Paper-Scissors. Played simultaneously, neither player has an advantage over the other; played sequentially, however, the second player to “shoot” is a sure winner.

Contrary to our initial assumption, it seems plausible to assume that the tug owner could observe ahead of time whether the plaintiff had taken efficient care – that is, the tug owner likely knew whether the barge had a bargee aboard. On the other hand, the barge owner likely could not observe the tug owner’s level of care. In other words, it is as if the two parties were playing Rock-Paper-Scissors, and the tug owner watched as the barge owner moved first. That would not pose a problem were the barge owner to take care, but sometimes the barge owner will not ensure that a bargee is on board even under a negligence regime. Indeed, that may well have been the case in *United States v. Carroll Towing*.

To better demonstrate how sequential care might matter, we introduce a second general way that game theorists specify games. Like the normal form game, an *extensive form game* models the players, strategies, and payoffs of an interaction. Additionally, the extensive form game also models the sequence in which the players move and the information they have when selecting their move. Consequently, the extensive form game makes it possible to model interactions that occur dynamically between parties (Ayres, 1990, pp. 1298–304).

Figure 19.3 provides a generic extensive form depiction of the interaction between the parties in *Carroll Towing*. The barge owner first decides whether to place a bargee on board his barge (see the *decision node* marked “B”). Then the tug owner decides whether to tug rapidly or moderately (see the decision nodes marked “T”). We are assuming that the tug owner makes her decision with both complete and *perfect information*, meaning that she knows, among other things, which option the barge owner



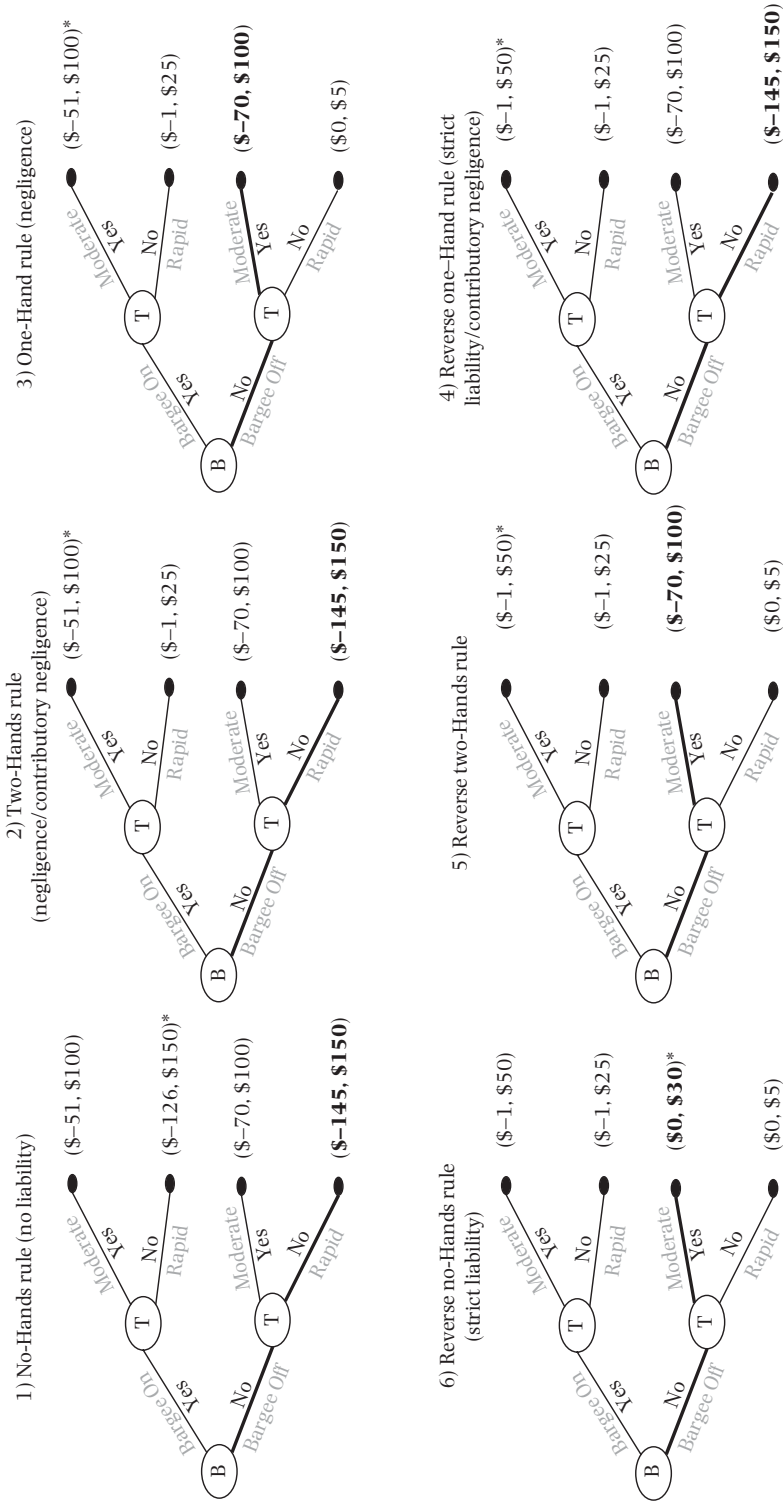
**Figure 19.3.** Basic extensive form game.

selected. The payoffs for each of the possible combination of choices are listed in parentheses at the *terminal nodes*. (Note that the payoffs are, consistent with game-theoretic conventions, listed in the order in which decisions are made – that is, the barge owner’s payoff is listed first and the tug owner’s is listed second.)

Figure 19.4 includes a decision tree for all six of the liability rules. We filled in the payoffs by translating from the analogous Yes/No options depicted in the normal form games above (see Figure 19.2). Again, we are assuming here that the barge owner, for whatever reason, takes the “Bargee Off” option. Our task in this section is to determine what the tug owner will do under the various liability rules assuming that the barge owner does not take efficient care. Ideally the tug owner would take care and tug at moderate speeds in that circumstance. As a review of the game trees reveals, however, that is not the result under several liability standards.

Under rule 2, the standard applied by Judge Hand, if the tug owner sees that the barge owner *has taken care*, then she will have an incentive to take care by tugging moderately; otherwise she would be liable for an amount greater than the costs of taking care and her net payoffs would be reduced from \$100 to \$25. If, however, the tug owner sees that there is no bargee on board, she will opt to tug rapidly. The intuition behind those numbers is that, under rule 2, the tug owner can take inefficiently low levels of care with impunity (as if she were acting in a no liability – rule 1 – regime), because she knows that the barge owner will be deemed contributorily negligent and therefore held liable. When the plaintiff fails to take efficient precautions, efficiency still requires that the defendant take care. That is, to maximize net gains (at \$30), we still want the defendant to tow at a moderate speed. If the defendant tows rapidly, her own gains will be high, but net social gains will be only \$5, which is the worst of all possible worlds. Thus, relaxing the assumption that the parties act simultaneously or independently, the defendant who observes that the plaintiff has not taken care would have no tort-provided incentive to take the efficient level of care under the standard applied by Judge Hand.

Under these assumptions, rule 2 would not have been the most efficient of the alternatives. The assumption that the tug owner was unaware of the barge owner’s care level, in other words, seems to have been highly relevant. It also seems implausible,



**Figure 19.4.** Extensive form games for six liability rules (assuming barge owner does not take care). Bold line represents equilibrium path in sequential-care game, when barge owner moves first and does not take care. Rules 1, 2, and 4 lead to inefficient care on the tug owner's part. The asterisk denotes the result in simultaneous care game depicted in Figure 19.2 (which, unlike here, assumed that the care levels were simultaneous and barge owner selected the option that maximized his payoff).

given the strong likelihood that the tug owner would have been able to observe whether the barge owner had a barge on board.

The question remains whether any other rules would be more efficient than the two-Handed rule applied in *Carroll Towing*? Only rules 3, 5, and 6 provide the tug owner the needed incentive to take care. That is true because only those rules give the defendant a strictly dominant strategy to tug at moderate speeds.

### Efficiency as a Norm

If, as we believe the previous section indicates, the liability standard that Judge Hand famously applied in *Carroll Towing* was not the most efficient, is there any reason to be confident that the other judges have been successfully promoting efficiency in tort cases – or at least that they have done so with enough consistency to validate the claim that the common law *tends toward* efficiency? We are dubious. If even when courts strive for efficiency they fail, then there is little reason to be confident that courts avowedly motivated by noneconomic considerations will reach decisions that satisfy the efficiency criterion. Furthermore, courts and juries demonstrate little or no interest in acquiring the sort of information that even a rudimentary efficiency analysis would require; they are instead occupied with the very sorts of questions that ordinary people focus on when attributing causation or assigning responsibility or blame (Feigenson, 2000).

Although the preceding analysis raises doubts about the positivist side of law and economics, it also offers a sample of the positivists' early striking successes and of several key insights that law and economics has brought to legal analysis. Though positivists now speak less often and less boldly than they once did, law and economics continues to thrive, largely because of the work of a large number of normativists, who accept efficiency as the relevant goal of law and employ the tools of law and economics to identify how the law can best serve that goal.

The true benefits of law and economics, according to the normativists, exist in identifying and making clear to lawmakers and judges the reforms that are – or are not – necessary for efficiency's sake. In pursuit of those benefits, legal economists have authored countless articles and books analyzing the efficiency of particular tort doctrines or decisions. And yet, while there are several excellent books introducing and summarizing the key law-and-economics insights for tort law (for example, Landes & Posner, 1987; Shavell, 1987; Polinsky, 2003, pp. 43–78; Posner, 2007, pp. 167–213), legal economists have offered very little in the way of direct instruction to courts interested in resolving cases with efficiency as a goal.

In this section, we build on lessons learned through our exploration of *Carroll Towing* to develop a tentative and partial catalogue of questions that an efficiency-minded court might ask when faced with a tort claim. (For reasons highlighted in the next section, we are doubtful that any “how to” manual will yield significant benefits. Our efforts, however, should at least be heuristically useful as a means of reviewing some of the previous section's insights.)

Imagine an efficiency-minded judge today confronted with a tort dispute. The judge must determine first where to set the legal entitlement and next what type of legal

protection to accord that entitlement. If the transaction costs between the parties are low – and especially if the court’s objective measure of damages is likely to deviate substantially from the subjective valuations of the parties – then the court should allocate the entitlement to the party who values it most and should encourage the parties to contract to mutually beneficial arrangements by protecting the entitlement with a property rule (Posner, 1986, pp. 49–50).

If, however, transaction costs are prohibitively high, such that liability rule protection is warranted, then the court must inquire into which of the liability standards would be most efficient. Initially, a court seeking efficiency might focus solely on the parties’ care levels, inquiring whether one or both of the parties could make a care-level investment that would reduce the total cost of the accident. This question has two parts, one of which has been discussed at length by legal economists, and the other of which has been largely ignored. The former is the question of *preventability* – that is, whether either party *could* make an adjustment in care level to prevent the accident. If both parties’ care levels are relevant, the accident is bilateral; if only one party can affect the cost of an accident by adjusting his or her care level, the context is unilateral; and where neither party can adjust his or her care level to reduce the costs of an accident, the context might be called “nonlateral.”

The latter question – the question of *deterribility* – asks whether tort liability will in fact have any beneficial effect on a party’s conduct. There are two general types of reasons why a party may be undeterrable. First, a party may externalize *ex ante* even the threat of tort liability. For instance, a party may not foresee or may underestimate the risk, a party may not know the law, or a party’s insurance may substantially eliminate the impact of tort law (Hanson & Logue, 1990). Second, tort liability may be wholly or largely redundant in that a party may be given adequate incentives to take care from sources other than tort law (Shavell, 2007). A number of sources, such as administrative regulation and market forces – including well-functioning insurance markets – could provide those incentives. Similarly, the nature of damages for a given risk may provide one party relatively strong incentives to avoid the accident regardless of how tort law might later assign liability (Landes & Posner, 1987, p. 65; Croley & Hanson, 1995, p. 1913). When tort law is a redundant or an ineffective means of deterrence for one or another party, its use may not be justifiable as a tool for preventing future accidents.

Imposing tort liability on a party will lead to efficient care-level investments only when the accident is preventable by that party (that is,  $B < PL$ ) and that party is deterable. When either of those necessary conditions is not satisfied, liability will have no beneficial effect on a party’s care levels. Therefore, if a judge is faced with a nonlateral accident context, he or she will have to choose liability standards using criteria other than deterrence or prevention. If the accident context is unilateral, the appropriate no-Handed rule – either no liability or absolute liability, depending on which party’s behavior is relevant – will likely be most efficient. Finally, if the accident context is bilateral, the efficiency-minded judge should choose from among liability standards 2 through 5.

Having narrowed the field to four, the judge might next ask whether one of the parties could have observed the other’s care level before deciding whether to take care.



Where the defendant can observe the plaintiff's care level, the court should choose a standard that holds the defendant liable when both parties were negligent (rules 3 or 5). Where, on the other hand, the plaintiff could observe the defendant, the court should adopt rules 2 or 4. Of course, where care is unobservable or the parties acted simultaneously, none of the four rules can be eliminated on efficiency grounds, so some other criterion will have to determine the choice.

The judge confronting the evidence in a tort dispute may, of course, reach the conclusion that neither the plaintiff nor the defendant could have prevented the accident cost-justifiably. In that context, the choice of a liability standard is going to necessitate a judgment about which party should pay the costs of nonnegligent accidents. Rules 2 and 3 will leave those costs with the plaintiff, while rules 4 and 5 will shift them to the defendant. As should be clear from our discussion above, two possible conclusions suggest themselves from a court's finding that neither the plaintiff nor the defendant could have prevented the accident cost-justifiably. First, the court could be wrong. That is possible for at least two reasons, both stemming from information deficiencies: (1) courts cannot take a party's potential *activity-level* investments into account; and/or (2) courts cannot take all of a party's potential *care-level* investments into account. Consequently, if there are many potential but unverifiable cost-justified activity-level and/or care-level investments that a party could make, then that party should be held liable even in the absence of proven negligence. Again here, courts should be sensitive to deterrability, and not just preventability, of accidents.

The second possible conclusion that one might draw from a court's findings of non-negligence is that the court is correct. When an accident occurs in the absence of any negligent behavior, efficiency demands that courts allocate the costs of accidents to the party best able to bear those costs. Courts, in other words, should pick the row that best satisfies the insurance goal – that is, the row that allocates the risk of unprevented accidents to the party who can bear them at least cost. If the plaintiff has the greater aversion to risk, the court should apply one of the rules that will rest liability with the defendant. If the defendant is more risk averse, the plaintiff should be responsible for the costs of nonnegligent accidents.

A final issue for the efficiency-minded court may be possible administrative-cost considerations. In the nonlateral accident context, if none of the other criteria proves more helpful than the care-level criterion, the judge might opt for a no liability standard since it will likely be least costly to administer. In the bilateral accident context, courts are unlikely to know the costs of any given rule, but it seems plausible that rules 3 and 4, where the Hand Formula is applied only once, will be less costly to administer.

While this catalog is by no means exhaustive, it highlights some of the questions that legal economists would have judges ask to channel the law toward efficient results. The reader may, however, have noticed a tension in this list. Though it is possible that each of these efficiency considerations will point toward the same liability standard in a particular accident context, it seems far more likely that different efficiency considerations will have conflicting implications for the choice among liability standards. A judge, or a legal economist, must then confront the task of somehow choosing among competing efficiency concerns.

## Some Limitations of Law and Economics

Much of law and economics scholarship has been strikingly un-self-critical. In light of the undeniably robust influence of efficiency theory, we feel a special obligation to summarize a few of the more common criticisms.

The fault line along which most of the critiques of law and economics rest can be exposed by re-examining the catalog of efficiency considerations provided in the previous section. While it is possible to list an array of factors a judge might take into account, any such inventory will not – and, in our view, cannot – answer a set of questions having to do with how a court might measure each consideration or balance one against another. For instance, how does a court counterbalance care-level deterrence considerations against activity-level deterrence considerations? Or, assuming that all deterrence considerations point in the same direction, how does a court counterbalance insurance and deterrence considerations where they are conflicting? What about administrative costs? Does any rule stricter than no liability (rule 1) create benefits exceeding administrative costs? And how might a court trade off the deterrence benefits against the information and administrative costs resulting from a more highly tailored application of the Hand Formula? Although those sorts of questions might be answerable at the level of theory, they are virtually unanswerable in practice. The problem facing the legal economist is that, for efficiency to maintain any normative punch, all the significant efficiency effects of a rule (or its alternatives) must be taken into account. But the economist, just like the judge, is highly constrained by information costs and is, therefore, often unable accurately (or uncontroversially) to weigh countervailing efficiency considerations.

A legal economist trying to find a way out of this dilemma might take one of two routes – the first empirical, the second theoretical. First, the normativist can do the empirical research necessary to weigh properly the various efficiency considerations. That option has rarely, if ever, been taken since the costs of such research seem likely to outweigh the benefits. Instead, scholars typically attempt a cheap version of this approach by eyeballing the various efficiency considerations and offering their own view, together with a smattering of contestable empirical support, of how the countervailing efficiency considerations stack up. The normative force of conclusions emerging from this form of analysis is strengthened inasmuch as more of the efficiency effects are considered, but weakened inasmuch as the analysis underlying the conclusion is less scientific. Second, the normativist can narrow the focus of the model until something unequivocal can be said about the model's simplified and stylized world. Efficiency analyses lose their normative force, however, inasmuch as they ignore potentially significant efficiency considerations. Thus, this approach sacrifices normative force by excluding potentially significant efficiency effects in return for the added normative force that comes from the claim to scientific rigor.

The normative punch of any law and economics conclusion is, thus, weakened by one or the other of those criticisms. As Amartya Sen (1985) has observed,

the demands of tractability can conflict with those of veracity, and we can have a hard choice between simplicity and relevance. We want a canonical form that is uncomplicated enough to be easily usable in theoretical and empirical analysis. But we also want an

assumption structure that is not fundamentally at odds with the real world, nor one that makes simplicity take the form of naivety. (p. 341)

It is perhaps unsurprising that the most common and potent criticisms of law and economics are either that its models are indefensibly unrealistic or that the analysis is insufficiently scientific.

One such criticism has gained so much traction that it has fundamentally altered the way a third generation of legal economists now approach legal questions. Specifically, over the last decade, economists and legal economists have increasingly drawn from a branch of psychology known by various names, including *economic behavioralism*. Economic behavioralists have demonstrated the lack of realism of the rational actor model long at the core of law and economics. Those scholars have identified a variety of systematic and predictable biases in people's decision making (Hanson & Kysar, 1999). By making "more realistic assumptions about human behavior," economic behavioralists "wish to retain the power of the economist's approach to social science while offering a better description of the behavior of the agents in society and the economy" (Jolls, Sunstein, & Thaler, 1998, p. 1487). Predictably, a common critique of this more realistic account of the human being is that it sacrifices both "simplicity and parsimony" in economic modeling (Jolls, Sunstein, & Thaler, 1998, p. 1487) and fails to provide "a model of human behavior suitable for making normative decisions about optimal legal regimes" (Arlen, 1998, p. 1788).

More recently, legal scholars delving deeper into the mind sciences have challenged not just the "rational" part of the rational-actor model, but also the "actor" part. A sizeable and still burgeoning body of research indicates that the common-sense presumption that a person's behavior is the product of her stable preferences (combined with whatever information she might have) is based on an illusion. In fact, largely invisible forces within us (such as knowledge structures and implicit associations) and nonsalient forces outside of us wield far more influence on our behavior than we appreciate. Scholars taking this approach – sometimes called *situationists* or *behavioral realists* – warn that any legal conclusions based on unrealistic understanding of human behavior may be useless or even harmful (Hanson & Yosifon, 2004; Hart, 2005; Kang & Banaji, 2006). Once again, law and economics faces a tension between, borrowing Amartya Sen's terms, simplicity and relevance.

Finally, another common criticism of law and economics is that it overlooks or, worse, displaces questions of distribution or equity. When analyzing the efficiency of one or another area of the law, legal economists tend to take as given the current distribution of wealth and treat distributional consequences as irrelevant (Cooter & Ulen, 2003, pp. 7–10; Polinsky, 2003, pp. 7–11, 147–56). For instance, looking back at the payoffs for each of the six different rules (see Figure 19.2), it is evident that as one moves from rule 1 to rule 6, the distributional consequences (regarding how much each party receives or pays) in equilibrium grow increasingly favorable to the barge owner. Legal economists tend to ignore that effect, even when the efficiency effects of different rules are comparable. As critics have pointed out, many people are less concerned with the total amount of social wealth (or utility) than with its distribution. Economists respond in part by observing that distributional questions taken by themselves fall outside the reach of economic science and in part by arguing that other institutions are better

equipped than, say, tort law to serve distributional ends. Unfortunately, assuming that is true, those institutions do not appear to adjust in response to the distributional consequences of legal rules. Yet again, reality and simplicity are at odds.

## Conclusion

As the above-mentioned criticisms suggest, law and economics is not without costs. The tradeoff between the need for realism and the need for science is a genuine one, and it is one that future legal economists will have to continue to confront. However, recognizing some weaknesses in law and economics does not justify ignoring it. Whatever its costs, law and economics also has some benefits. After all, while the claim that efficiency should serve as *the* goal of the law might not find much support, many people – perhaps most people – still believe that efficiency should be a goal of the legal system. And, where a model's relevant assumptions are plausible, law and economics can contribute in important ways to our understanding of laws' effects, of how those laws might be altered to better serve the goal of efficiency, or, alternatively, of what the efficiency costs of pursuing different policy goals (such as equity) might be.

Finally, law and economics, like it or not, continues to have a major effect on laws and policy. Proponents, skeptics, and critics alike must understand at least the fundamentals of the field if they want to have a meaningful voice in, or even to comprehend, many policy debates. We hope this chapter has helped to provide such an understanding.

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## Legal Formalism

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Rumor has it that legal formalism is dead. This rumor is false. Formalism reflects the law's most abiding aspiration: to be an immanently intelligible normative practice (Weinrib, 1988, 1995, pp. 1–55). The rumor will become true only with the passing of the aspiration.

This essay on formalism presents a voice from the empty sepulcher. The conception of formalism that I offer differs from the caricature current in contemporary legal scholarship, where formalism – usually identified as postulating the mechanical application of determinate rules – serves principally as a “loosely employed term of abuse” (Simpson, 1990, p. 835). The crucial issue, of course, is not the proper reference for formalism as a word but the most plausible conception of formalism as an idea. My own version claims fidelity to law's normative dimension, to juristic thinking, and to a philosophical tradition stretching back to classical antiquity.

### The Project of Formalism

Formalism is a theory of legal justification. As a theory of *justification*, formalism considers law to be not merely a collection of posited norms or an exercise of official power, but a social arrangement responsive to moral argument. As a theory of *legal* justification, formalism focuses on the phenomena most expressive of the juridical aspect of our social lives: on legally significant interactions between parties and on the role of courts in resolving the consequent controversies. Thus, formalism's project is to elucidate the forms of moral argument appropriate to adjudication among interacting parties.

The basic unit of formalist analysis is the legal relationship. Law connects one person to another through the ensemble of concepts, principles, and processes that come into play when a legal claim is asserted. If, for instance, the claim is for breach of a contract, the legal relationship between the parties is defined by the doctrines and concepts of contract law and by its accompanying procedures of adjudication. Or if the claim concerns a nonconsensual harm, the legal relationship of the injurer and victim is composed of the norms, concepts, and institutions of tort law.

Formalism's interest is in the internal structure of such relationships. The relationship's components – its various doctrines, concepts, principles, and processes – are the

parts of a totality. The formalist wants to understand how these parts relate to one another and to the totality that they together form. Is a legal relationship an aggregate of autonomous elements, so that these parts are connected to one another only through their contingent juxtaposition within the same legal relationship, like so many grains in a heap of sand? Or are the parts the interdependent constituents of an internally coherent whole?

Law's justificatory aspect provides the standpoint from which to address these questions. Underlying any element in legal relationships is some consideration that supposedly justifies it. The formalist concern with the structure of a juridical relationship is, therefore, a concern with the connection between justificatory considerations. Do the considerations that justify the various parts of a relationship play their justificatory role in isolation from one another? Or do they interlock into a single justification that coherently pervades the entire relationship?

The term "formalism" suggests a contrast between the formal and the substantive. That contrast lies at the core of the formalist methodology. The formalist approaches legal relationships by first discerning their necessary conditions, their internal principles of organization, and their presuppositions. These formal aspects then guide substantive determination.

To understand law as a justificatory enterprise, the formalist elucidates three features of justification: (1) its nature; (2) its structure(s); and (3) its ground. By the nature of justification, I mean the minimal conditions that any consideration must observe if it is to be justificatory. By the structure of justification, I mean the most abstract and comprehensive patterning of justificatory coherence. By the ground, I mean the presuppositions about agency that ultimately account for the normative character of any justification.

Let me turn to each of these features. The following discussion indicates how the consideration of formal aspects precedes the drawing of substantive conclusions. Throughout, I use tort law to illustrate. The illustration itself reflects the formalist insistence that private law is a distinctive mode of legal ordering and not merely a disguised form of public law. The formalist affirms, in other words, the categorical difference between justice between the parties, on the one hand, and justice in the pursuit of collective goals, on the other.

## The Nature of Justification

A common criticism of tort law (for example, Franklin, 1967) goes as follows. In combining the goals of deterrence and compensation, tort law sets up a lottery for both litigants. From the plaintiff's standpoint, tort law recognizes a moral claim to compensation in the aftermath of injury. Yet instead of treating alike the sufferers of like injury, tort law makes the victim's compensation depend on the fortuity of a tortious act. Similarly, from the defendant's standpoint, tort law is a mechanism for deterring carelessness. Yet tort law makes the occasion and scope of deterrence depend on the fortuity of the injury's occurrence and extent. The result of linking the compensation of victims to the deterrence of actors is that both compensation and deterrence work capriciously. The legal consequences for the litigants are normatively arbitrary.



Those who offer this criticism urge the abolition of tort law. They argue that because tort law cannot intelligibly combine deterrence and compensation, the law should replace tort law's treatment of personal injury with arrangements that aim at deterrence and compensation separately. The criticism assumes that deterrence and compensation are valid goals and then adjudges tort law incoherent in their light.

In the formalist view, the criticism is correct (though, as we shall see shortly, the dismissal of tort law does not follow from it). Goals, such as compensation and deterrence, that focus on each litigant independently cannot provide the moral underpinning for the relationship between plaintiff and defendant. In the context of tort law, such goals do not observe the minimal condition any consideration must observe if it is truly to function as a justification.

At stake is the nature of justification. A justification justifies: it has normative authority over the material to which it applies. The point of adducing a justification is to allow that authority to govern whatever falls within its scope. A consideration that functions as a justification must be permitted, as it were, to expand into the space it naturally fills. Consequently, a justification sets its own limit. For an extrinsic factor to cut the justification short is normatively arbitrary.

This is the arbitrariness to which the critics of tort law point. The goals of compensation and deterrence are independent of one another. Compensation addresses the needs of the injured party, and is indifferent to deterrence. Similarly, deterrence looks to the conduct of the injurer and is indifferent to compensation. Consequently, when juxtaposed within the tort relationship, compensation and deterrence are mutually truncating. What limits compensation is not the boundary to which its justificatory authority entitles it, but the competing presence of deterrence in the same legal relationship. Thus, tort law compensates victims only when damages serve the purpose of deterrence. In the same way, tort law artificially restricts deterrence, by tying deterrence to what is needed not to deter wrongdoers but to compensate victims. In this mixing of justifications, neither of them occupies the entire area to which it applies. Accordingly, neither in fact functions as a justification. Understood as composite of compensation and deterrence, tort law ceases to be a justificatory enterprise.

The formalist sees in the abolitionist critique of tort law an indication of what would answer the critique. In effect, the abolitionists point to the tension between the bipolarity of the tort relationship and the normative reach of the standard tort goals. Because each goal addresses the situation of only one of the parties, neither justifies the relationship as a whole. When combined they embrace both parties, but because the goals are mutually independent, the moral force of one artificially limits the moral force of the other. In principle, the solution is to elaborate a justification that is bipolar in the same way that the tort relationship is.

The abolitionist position presupposes that justification takes the form of goals such as compensation or deterrence. Abolitionists reason that since tort law cannot coherently satisfy such goals, it should be replaced. Ignored is the possibility that the justification applicable to tort law is as relational as tort law itself. The abolitionists assume that justifications refer to goals. The formalist assumes only that justifications justify.

Formalism asserts that formal considerations are prior to substantive ones. Accordingly, formalism's initial concern is not with a justification's substantive merit,

but with the minimal condition for its functioning *as* a justification – namely, that it fills its own conceptual space. Purported justifications that do not respect that condition are not so much villains as imposters: they are not doing something wrong, but they are pretending to be what they are not.

It is worth noting at this stage what the formalist does *not* maintain. The formalist neither disputes the desirability of achieving compensation and deterrence nor asserts the superiority of tort law to other mechanisms for handling injury. The claim, rather, is that the goals of compensation and deterrence do not serve a justificatory function in the tort context. Whether they serve such a function in a different context is another matter.

## The Structures of Justification

As this brief discussion of tort law indicates, justifications do not act as justifications unless legal relationships are coherent. Justificatory considerations provide moral reasons for relating one person to another through a set of legal concepts and consequences. Incoherence in the relationship reflects the presence of mutually independent justificatory considerations. Coherence, on the other hand, is the interlocking into a single integrated justification of all the justificatory considerations that pertain to a legal relationship. A relationship is coherent when a single justification animates it, so that the justification's moral force is congruent with the relationship's boundaries. Coherence thus denotes unity.

At this point, the question arises: what are the different ways in which legal relationships can express a single justificatory idea? Or, to put it another way, what are the different structures of legal justification?

The classic treatment of justificatory structure is Aristotle's discussion of justice (Aristotle, 1962, V, 1130a, 14–1132b, 20; discussed in Weinrib, 1995, pp. 56–83). Aristotle outlines two contrasting forms of justice, corrective justice and distributive justice, which are the patterns of justificatory coherence for external relationships. Corrective justice focuses on whether one party has done and the other has suffered a transactional injustice. Distributive justice deals with the distribution of whatever is divisible among the participants in a political community. For Aristotle, justice in both these forms relates one person to another according to a conception of equality or fairness (the Greek *to ison* connotes both). Injustice arises in the absence of equality, when one person has too much or too little relative to another.

The two forms differ, however, in the way they construe equality. Distributive justice divides a benefit or burden in accordance with some criterion that compares the participants' merit relative to one another. Distributive justice therefore embodies a proportional equality, in which all participants in the distribution receive their shares according to their respective merits under the criterion in question.

Corrective justice, in contrast, features the maintenance and restoration of the notional equality that consists in the interacting parties' having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party.

Aristotle likens the parties' initial positions to two equal lines. The injustice upsets that equality by adding to one line a segment detached from the other. The correction removes that segment from the lengthened line and returns it to the shortened one. The result is a restoration of the original equality of the two lines.

As its name indicates, corrective justice has a rectificatory function. By correcting the injustice that the defendant has inflicted on the plaintiff, corrective justice asserts a connection between the remedy and the wrong. From the perspective of corrective justice, a court does not treat the situation being adjudicated as a morally neutral given and then ask what is the best course for the future, all things considered. Rather, because the court aims to correct the injustice done by one party to the other, the remedy responds to the injustice and endeavors, so far as possible, to undo it.

Aristotle's account makes it clear that this rectification operates correlatively on both parties. A remedy directed to only one of the parties does not conform to corrective justice. For the court merely to take away the defendant's wrongful gain does not suffice, because then the plaintiff is still left suffering a wrongful loss. Nor does it suffice for the court merely to replenish the plaintiff's loss, for then the defendant will be left holding his or her wrongful gain. The remedy consists in simultaneously removing the defendant's excess and making good the plaintiff's deficiency. Justice is thereby achieved for both parties through a single operation in which plaintiff recovers precisely what the defendant is made to surrender.

From these two features of the corrective justice remedy – that it responds to the injustice and is correlatively structured – a third follows. A correlatively structured remedy responds to and undoes an injustice only if that injustice is itself correlatively structured. In bringing an action against the defendant the plaintiff is asserting that they are connected as doer and sufferer of the same injustice. What the defendant has done and what the plaintiff has suffered are not independent items. Rather, they are the active and passive poles of the same injustice, so that what the defendant has done counts as an injustice only because of what the defendant has suffered, and vice versa. The law then rectifies this injustice by reversing its active and passive poles, so that the doer of injustice becomes the sufferer of the law's remedy. Only because the injustice is the same from both sides does the remedy treat the parties as correlatively situated. Thus throughout the transaction, from the occurrence of the injustice to its rectification, each party's position is normatively significant only through the position of the other, which is the mirror image of it.

The idea that correlativity informs the injustice, as well as its rectification, points to the kind of justifications that are appropriate for determinations of liability. To think of something as an injustice is not to refer to a brute event but to make a normative ascription. The correlativity of the injustice is, therefore, the correlativity of the normative considerations that underlie that ascription. Because the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses. Thus, in specifying the nature of the injustice, the only normative factors to be considered significant are those that apply equally to both parties. A factor that applies to only one of the parties – for example, deterring defendants or compensating plaintiffs – is an inapposite justification for liability because it is inconsistent with the correlative nature of the liability. Accordingly corrective justice not only rectifies injustice in transactions; by structuring

the justificatory considerations relevant to transactions, it is also regulative of the notion of injustice that is applicable to them.

Thus, correlativity is the structural idea that underlies the most obvious and general feature of liability, that the liability of the defendant is always a liability to the plaintiff. Liability consists in a legal relationship between two parties, each of whose position is intelligible only in the light of the other's. In holding the defendant liable to the plaintiff, the court is making not two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same from the defendant), but a single judgment that embraces both parties in their interrelationship. The defendant cannot be thought of as liable without reference to a plaintiff in whose favor such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's correlative obligation. The court's finding of liability is the response to an injustice that, accordingly, has the same correlative shape as liability itself.

Justifications for holding someone liable that exhibit the parties as the doer and sufferer of the same injustice render the law both coherent and fair. Legal reasoning composed of such justifications treats the parties' relationship as a normative unity that embraces them both rather than as a hodgepodge of factors separately relevant only to one or the other of them. A justification for liability that conforms to corrective justice necessarily fills the entire space of the legal relationship to which it applies. With this justificatory coherence comes fairness as between the parties. A justification that fails to match the correlative structure of the parties' relationship necessarily favors one of the parties at the expense of the other, thereby failing to be fair from the standpoint of both. In contrast, by insisting that the normative considerations applicable to liability reflect the parties' correlative situation, corrective justice construes private law as setting terms for the parties' interaction that take account of their mutual relationship and are therefore fair to both of them.

Aristotle's original account contrasts the correlativity of corrective justice with the categorically different structure of distributive justice. Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions. Distributive justice, in contrast, assigns shares in a benefit or burden by comparing the parties to the distribution in terms of a distributive criterion. Instead of linking one party to another as doer and sufferer, distributive justice links all parties to the benefit or burden they all share and to the criterion that governs the distribution. For corrective justice, unity consists in a justification's correlative embrace of both parties to the legal relationship. For distributive justice, unity consists in having the distributive criterion fit both the distribution's subject matter and its participants without either over- or underinclusion. Each form of justice has a different organizing principle: correlativity (for corrective justice) and comparison according to a distributive criterion (for distributive justice). The categorical distinction between correlativity and comparison is certified by the difference between the numbers of parties that each admits. Corrective justice links two parties and no more, because a relationship of correlativity is necessarily bipolar. Distributive justice admits any number of parties, because in principle no limit exists for the number of persons who can be compared and among whom something can be divided.

Because corrective justice and distributive justice are categorically different, no external relationship can coherently partake of both. Aristotle's contrast of corrective

and distributive justice does not determine whether the law should treat an incident correctively or distributively. But if the positive law is to be coherent, any given relationship cannot rest on a *combination* of corrective and distributive justifications. When a corrective justification is mixed with a distributive one, each necessarily undermines the justificatory force of the other, and the relationship cannot manifest either unifying structure.

Tort law illustrates the drastic implications of this line of thinking. All the goals – deterrence, compensation, punishment, loss-spreading, wealth-maximization, cheapest cost avoidance – routinely adduced or proposed for tort law are inadequate because they interrupt the direct relationship of doer and sufferer. Such goals, accordingly, are incompatible with the coherence of the private law relationship. If tort law is to be a truly justificatory enterprise, we can disqualify them even without evaluating their substantive desirability.

### The Ground of Justification

Implicit in legal justification is a conception of normativeness. What is that conception? The standard assumption of legal scholarship is that normativeness is rooted in the substantive desirability of certain goals. Tort theorists who emphasize deterrence, for instance, point to the desirability of reducing the number and severity of injuries. Similarly, the compensation rationale rests on the desirability of alleviating hardship in the aftermath of injury. The goals that validate legal regulation may, of course, be multiple and complex. At bottom, however, they represent aspects of human well-being that law is supposed to promote.

The correlative structure of justification in private law precludes the formalist from sharing this conception of normativeness. Aspects of human well-being are not intrinsically correlative. In our tort example, for instance, the goals ascribed to tort law do not link the doer and the sufferer of harm: nothing about compensation as a justificatory consideration ties it to the action of a particular injurer; and nothing about deterrence ties it to the suffering of a particular plaintiff. Corrective justice therefore cannot presuppose aspects of well-being as the sources of its own normativeness.

As sophisticated systems of private law show, the overarching justificatory categories expressive of correlativity are those of the plaintiff's right and the defendant's corresponding duty not to interfere with that right. Unlike aspects of well-being, a right is an intrinsically relational idea that immediately signifies the existence of a duty correlative to it. These rights themselves cannot, of course, be understood as bundles of well-being, for that would merely reintroduce noncorrelative considerations. What, then, grounds these rights? Because it understands law through the abstractions immanent to juristic thinking, formalism addresses this question by looking for what is pervasively present in particular rights and duties.

What is present is the parties' capacity for purposiveness, which assumes legal significance when externalized. On the duty side, this is evident in the trite doctrine of tort law that the defendant cannot be liable in the absence of an "act," defined as an external manifestation of the volition. Mere physical movement is irrelevant to liability; there must be the outward expression of an inwardly determined purpose. However, although

tort law insists that the wrong originate in an exercise of purposiveness, it does not condition liability on the failure to act for a particular purpose, however meritorious. As the nonfeasance doctrine attests, tort law makes obligatory no particular purposes, not even purposes that would preserve another's most fundamental interests. Thus the indispensable presupposition of the defendant having breached a duty is the sheer purposiveness of the defendant's action, rather than a conception of some set of particular purposes that should have guided the defendant's conduct.

The same picture appears in connection with rights. The acquisition or transfer of a right involves the exercise, in a legally cognizable manner, of the acquirer's or the transferor's purposiveness toward the subject matter of the right. As in the case of acts that violate rights, an external manifestation of the volition is necessary if the law is to ascribe consequences to what one has done. Moreover, the legal basis for the thing's being used in the exercise of the owner's purposive capacity is what acquisition creates (and transfer terminates). Accordingly, the law regards a right as the power to treat something as subject to one's will as a consequence of an antecedent connection that one's will has established with the thing in question. Yet the law regards as irrelevant the specific purpose that motivates the acquisition, transfer, or use. Nor does it require that the right, once acquired, be used for any particular (and arguably laudable) purposes, such as to increase the utility of all or to maximize wealth or to produce an equality of resources. Of course, the acquisition, transfer, and use of one's entitlements is fuelled by one's particular needs, interests, and desires, but the law pays these no heed when determining the entitlements' validity. The law responds merely to the external indicia of an exercise of purposiveness, rather than to a schedule of required or desirable purposes.

Purposiveness without regard to particular purposes is the presupposition that underlies liability. This presupposition is what the natural right tradition called "personality." Personality in this context is not a psychological but a normative idea: it refers not to the pattern of an individual's behavioral characteristics, but to a presupposition about imputability and entitlement that is implicit in the rights and duties of private law. Just as the ancient Roman legal texts use "person" when discussing the indicia of one's legal standing, so personality refers to the capacity for purposive agency that forms the basis for the capacity for rights and duties in private law. By virtue of the presupposition of personality, parties count as ends in themselves, so that the law cannot construe their interaction in a way that treats any of them as a means. Personality encapsulates the normative standpoint of self-determining freedom from which private law has to view the parties if it is to regard them as having its rights and being subject to its duties.

The rights and duties in a coherent liability regime specify the manifestations of personality in the parties' legal relationship. Because personality signifies the capacity for purposiveness without regard to particular purposes, no obligation exists to exercise this capacity toward any particular end. Any duties that reflect personality are therefore the negative correlates of rights. These rights arise insofar as the capacity for purposive agency is not merely an inward attribute but achieves external existence in social interactions through its exercise by or embodiment in an agent. Among these rights are the right to the integrity of one's body's as the organ of purposive activity, the right to property in things appropriately connected to an external manifestation of

the proprietor's volition, and the right to contractual performance in accordance with the mutually consensual exercises of the parties' purposiveness. The existence of these rights gives rise to correlative duties of noninterference. These rights and duties are actualized through a set of judicial institutions that endows them with a determinate shape, makes public the mode of reasoning that accords with what is presupposed in them, and undoes the consequences of conduct inconsistent with them.

For rights conceived in this way, well-being has only a derivative rather than a basic significance. Of course, having a right contributes to a person's well-being by protecting some interest from wrongful interference. And it is also true, of course, that private law responds to the infringing a right by measuring diminutions of the right-holder's welfare under the legally recognized heads of damages. That, however, does not mean that rights are synonymous with aspects of welfare or that their normative significance is to be understood in terms of it. In the law's contemplation, the increase in well-being through having a right and the decrease through the infringement of a right are the consequences rather than the grounds of the right. That is why (as in cases of negligently caused economic loss) a decrease in well-being that does not violate the plaintiff's rights is not actionable, and conversely (as in cases of nominal damages) a violation of a right that does not decrease the plaintiff's well-being is. Well-being serves only the secondary function of concretizing rights and making them quantifiable in particular cases. The reason that rights matter for private law lies not in their constituting the marks of well-being but in their being the juridical manifestations of the person's self-determining freedom.

Corrective justice presupposes this conception of personality. As Aristotle himself observed, corrective justice is a normative structure that abstracts from considerations of virtue or circumstance, so that all that matters is the correlativity of doing and suffering as such (1962, V, 1132a, 2–7). Personality underlies the sheer correlativity of doing and suffering by bringing out what is presupposed in the correlative rights and duties of the doer and sufferer of injustice. This means that the person's particular purposes – even such morally plausible purposes as the promotion of welfare or of the good – are irrelevant to corrective justice. All that matters is that, whatever their particular purposes, persons should not exercise their free purposiveness in a way that is inconsistent with the free purposiveness of other persons. As operative within corrective justice, therefore, practical reason abstracts from the particularity of this or that purpose to the very idea of purposiveness itself.

Distributive justice also presupposes the fundamental value of personality. By distributing things to persons in accordance with some criterion, distributive justice postulates a distinction between things and persons. Implicit in distributive justice is the Kantian idea that a thing (the subject matter of the distribution) can be a means to any end for which it is useful, whereas the nature of a person (the participant in the distribution) is to be an end and never only a means to an end. Similarly, the equal application of the criterion of distribution to all who fall under its justificatory force reflects their equal moral status as ends in themselves by certifying that they are not available for use according to the distributor's pleasure. The challenge for public law as the actualization of distributive justice is to work out how the state can pursue its aims in a way that respects the status as persons of those who fall within its jurisdiction. The positive law of well-ordered legal systems does this in a variety of ways: by

incorporating respect for personality into the techniques for construing statutes, by elaborating notions of natural justice or fairness for administrative procedures, or by enshrining specifications of personality into constitutional arrangements.

## The Immanent Intelligibility of Law

I mentioned at the outset that formalism represents the law's aspiration to be an immanently intelligible normative practice. Immanence bespeaks a standpoint that is internal to law. How does formalism illuminate this immanence?

First, the components for the formalist analysis are not elements of an external ideal but merely the internal presuppositions of law as a justificatory enterprise. Formalism starts with the notion of legal justification and works backward to the preconditions of that notion and then backward to the preconditions of those preconditions, and so on. My discussion of the nature, structures, and ground of justification has summarily retraced this process of regression: implicit in justification is the coherent application of a justification to what it justifies; implicit in coherence is the unitary structure of what coheres; implicit in these structures is the notion of personality. Nowhere does the analysis assume an external standpoint.

Second, formalism tries to make sense of juristic thinking and discourse in their own terms. Formalism is attentive to the striving of sophisticated legal systems to their own justificatory coherence – to what Lord Mansfield (*in Omychund v. Barker* (1744) 26 Eng. Rep. 15, at 23) called the law's attempt to work itself pure. Consequently, formalism takes seriously the concepts, principles and institutions through which the law expresses that coherence. The formalist treats the law's concepts as signposts of an internal intelligibility and tries to understand them as they are understood by the jurists who think and talk about them. The formalist, accordingly, regards law as understandable from within, not as an alien language that requires translation into the terminology of another discipline such as economics. Whereas the practitioner of economic analysis, for instance, might construe the plaintiff's cause of action in private law as a mechanism for bribing someone to vindicate the collective interest in deterring the defendant's economically inefficient behavior, the formalist interprets it simply as what it purports to be: the assertion of right by the plaintiff in response to a wrong suffered at the hands of the defendant.

Third, formalism highlights coherence, which is itself an internal notion. Coherence implies the presence of a unified structure that integrates its component parts. In such a structure the whole is greater than the sum of its parts, and the parts are interconnected through the whole that they together form. One understands the coherence of something by attending to the self-contained circle of mutual reference and support among its components. Justificatory coherence points not outward to a transcendent ideal but inward to a harmonious interrelationship among the constituents of the structure of justification.

Although the formalist approach is internal to law, it is evaluative and not merely descriptive. The point of formalism is to discern standards of evaluation that are internal to the phenomenon being evaluated. Implicit in the conceptual and institutional apparatus of law, as well as in the activity of its jurists, is the claim to be a justificatory



enterprise. Formalism asks what law would look like if it were true to this claim. Formalism thus has a critical standpoint, but one that emerges from law's own aspirations.

## Conclusion

Over the last generation, legal scholarship has both lengthened its reach and shortened its ambition. The lengthening of reach is evident in the appeal beyond law to other disciplines and modes of thinking: economics, literature, history, and so on. The shortening of ambition is evident in the assumption – shared by economic analysts, legal pragmatists, and critical legal studies scholars and their intellectual successors – that law is not systematically intelligible in its own terms. The lengthening and the shortening are parts of the same phenomenon: the richness of interdisciplinary work reflects the supposed poverty of the law's own resources.

In contrast, formalism retrieves the classical understanding of law as “an immanent moral rationality” (Unger, 1983, p. 57). This conception of law begins with Aristotle's sketch of the justificatory structures for legal relationships; it is elaborated in Aquinas's treatise on right; and it continues through the accounts of normativeness found in the great natural right philosophies of Kant and Hegel. By attending to the distinctive morality that marks coherent legal relationships, the version of formalism I have been presenting asserts the autonomy of law both as a field of learning and as a justificatory enterprise. Formalism thus claims to be the theory implicit in the law as it elaborates itself from within.

Decades ago, in a fascinating but unjustly neglected article, Michael Oakeshott (1938) observed the chaos of what was then passing for jurisprudential explanation. After tracing the competing claims of historical, economic, and other jurisprudences, he pointed out that a truly philosophical jurisprudence could not simply accept the conclusions of special disciplines but must instead start with what we, in some sense, already know about law, and work back through the presuppositions of this knowledge to a clearer and fuller knowledge. This, he said, was the procedure followed by all great philosophers, including the great figures of natural law and natural right. Jurisprudence, Oakeshott concluded, must regain a sense of this tradition of inquiry. Unfortunately, the passage of time has not appreciably diminished the pertinence of his observations.

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## German Legal Philosophy and Theory in the Nineteenth and Twentieth Centuries

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Considering the mainstream of early nineteenth-century legal thought in retrospect, there appears to have been a preoccupation with two major questions, both reflections of the idealistic temper of German philosophy. The first concerns the enigma of how the legitimate general will, representing the conditions of justice, can be realized on the level of individual actions. Assuming the perspective of the individual agent, it had to be explained why the realization of a genuinely free individual will implies the recognition of a generally acceptable and effective regime of coercion. The answer to this question lay in the acceptance of the state's predominance over civil society. The latter was seen as an unstable aggregation of social atoms, each with its own needs and unruly desires; their drives had to be contained and were at the same time protected through the enforcement of general laws. Given this resolution, a second question arose: what medium could lend the general will an adequate form of expression and implementation? While most philosophers were convinced that all legal constraints on individual action had to issue from the impartial and mechanical application of neutral and general legal rules, influential legal scholars pointed out that the mediation of general will and individual action presupposes the intervention of a conceptual apparatus, specifically designed to reveal the systematic significance of statutory provisions. It will be seen that the inherent difficulties in answering the first question reached to and affected the attempts to answer the second.

### Nineteenth-Century Idealism

Certain writings of Immanuel Kant bear on our theme. Although they were published at the end of the eighteenth century, their impact on the later tradition calls for a brief sketch of the basic ideas.

Introducing the first of the questions, adumbrated above, Kant begins with a reconstruction of the necessary conditions for the legal appropriateness of individual action. Assuming a setting in which persons, equal and free, can select and pursue their goals as they wish, Kant applies the universal principle of moral judgment – that is, the categorical imperative – to determine the formal constraints on performing an act that one has freely chosen (*Willkür*). Hence, the general principle of law is inferred

from a moral point of view: an act is legally correct if it respects everyone's freedom of action according to a general rule of law. If this condition is met, people have rights (notably, the right to property) and obligations. Since infringements upon the freedom of others are incompatible with the general rule of freedom, Kant regards coercion (in the abstract) as an appropriate means of reinforcement. Thus, coercion is defined in terms of a double negative, as the "hindrance of a hindrance of freedom." Given the inherent uncertainty of the hypothetical state of nature, the powers of legislation and law enforcement must be exercised by the state, whose acts are subordinated to the ideal of republicanism. Along with the separation of those powers, this ideal requires that the legislature pass only those laws that could plausibly stem from the consent of "a people with mature reason." Although Kant is convinced that a government fulfilling the requirements of republicanism could only be sustained by an enlightened monarch, the ideal includes a morally charged principle of political autonomy: ideally, the members of such a republic would only be subject to those morally acceptable rules to which they had collectively given their approval. Thus, Kant's republicanism is an echo of the related notion, familiar from his moral philosophy, that all moral legislation must presuppose an ideal "kingdom of ends," in which reasonable beings would be associated by means of a systematic and coherent set of "communal laws."

The links Kant established between the morally acceptable form of legislation, "true" political autonomy and individual rights, were transformed by the philosophers of German Idealism into the idea that the legal system is a reflection of the organic unity of the citizens. As a result, the state was seen either as an indispensable institution for engendering the moral attitudes necessary for a kingdom of ends or as the highest expression of the communal morality (*Sittlichkeit*), whose institutional structure transcends the limited perspective of individual moral judgments. The former is clearly expressed in the legal philosophy of Johann Gottlieb Fichte; the latter can be found in Georg Wilhelm Friedrich Hegel's *Philosophy of Right*.

Although Fichte was deeply inspired by Kant's critical philosophy, his theory of legal relationships took a different course. Starting with the *a priori* evident principle of spontaneous subjectivity (that is, the exercise of free activity unconditioned by external circumstances or natural drives), Fichte is concerned with a reconstruction of the necessary conditions for the individual awareness (*Selbstbewußtsein*) of such unconditional freedom. His deductions reflect a double strategy: first, a progression from unconditional subjectivity to the conditions of self-awareness on the level of the individual self, and second, a regression to the circumstances under which those conditions would be met in the historical world.

Following the first strategy, Fichte argues that self-awareness consists of the identity of unconditional spontaneity and its reflection on itself. Since all reflection necessarily implies a distinction, the individual self can become aware of its subjective spontaneity only if it separates the latter from every kind of restricted activity (such as perception or volition aroused by certain objects of desire). It follows that spontaneous subjectivity can become aware of its free activity on the level of the individual self only in a sphere of volition that is, by its very definition, neither determined by natural causes nor limited to specific acts of choice. Self-reflection, able to grasp that sphere, is prompted when the individual self is summoned to free self-determination by another individual

self. Since the other self, in order to consistently deliver the respective summons (*Aufforderung*), must restrict its own activity, individuals can become aware of their freedom only if they mutually restrict their spheres of action. Thus, for Fichte the concept of law follows from the purely theoretical construction of conditions that allow the spontaneity of reason to enter into the individual experience of conduct. Far from being grounded in a moral principle or in the mutual restriction of self-interested behavior, legal relationships represent the conditions under which individuals partake of unconditional freedom.

Once the conditions for unconditional freedom have been deduced, the second step for Fichte is to identify the circumstances sufficient to motivate human beings to subordinate their freedom of action, provided that others are willing to do the same, to a system of rules. In this context, Fichte devises a set of governmental institutions whose operation is strictly mechanical. The basic structure of legal and political institutions is deduced from a series of hypothetical contracts; the most important among them is the "contract of unification" (*Vereinigungsvertrag*), which transforms the social perspective of the individual self into that of a member of the organic unity of the state. The latter has to guarantee each individual's sphere of activity, which implies a broad conception of rights, including rights to property and to work. In addition, Fichte stresses the state's responsibility to police mutual cooperation for the sake of the well-being and moral perfection of the citizens, in some respects a foreshadowing of socialist ideas. And his legal philosophy has its utopian moments, too. Particularly in his later writings, Fichte regards legal sanctions as having merely transitional significance, relevant only until humankind has been transformed into an "imprint of reason" (*Abdruck der Vernunft*). It comes as no surprise that Fichte's theory of the state has totalitarian connotations as well.

Whereas Fichte's philosophical argumentation departs from (alleged) self-evident premises, Hegel's philosophy is devoted to the discovery of the contradictory yet organic interplay of "moments" that represent a deeper transindividual totality. Although for Hegel, too, the law stands for conditions for the creation of freedom, those conditions are reconstructed from the perspective of what he calls the "objective spirit" (*objektiver Geist*), which encompasses all ethically relevant social perspectives, actions, and institutions.

According to Hegel, freedom consists of the unification of two conflicting moments: "generality," understood as absolute independence and indeterminacy on the one hand, and "particularity," understood as conditioned determinacy in decisions, on the other. Specific forms of freedom partake of these moments in shifting constellations and therefore represent separate instances of the totality. Thus, to work out a statement of the rational basis of law and morality is to provide a coherent account of the internal composition and external juxtaposition of the forms of freedom. This methodological perspective explains the dynamic aspect of Hegel's dialectical analysis. The objective spirit is viewed as unfolding itself internally, this through the differentiation of forms, and representing its totality in each distinction. Since the synthesis of moments includes their simultaneous attraction and repulsion, the forms necessarily transcend their own limits. As their moments are obliterated, elevated and preserved (this is the triple meaning of "sublation," that is, *Aufhebung*) in the transition to a later form, the reality of freedom is ultimately conceived as the increasingly mediated totality of relationships

between forms of freedom. This methodological approach is clearly reflected in the structure of Hegel's *Philosophy of Right*.

In the sphere of private legal relationships, freedom is first understood in terms of independent individual ownership. The decision to make a thing one's own stands for the unification of mutually accepted freedom of choice (indeterminacy) and distinctive acts of appropriation and exchange (determinacy). The unsubstantiated or, as it were, "abstract" character of such a synthesis of general and individual will is brought to the fore, when the respect for property is denied through acts of injustice. The resulting need to determine the objectively valid content of the general will is then addressed within the sphere of morality. Even though the particular will, in moral judgment, seemingly abides by a general principle (such as the categorical imperative), that which is to count as a correct application of the principle must ultimately be determined by individuals themselves. Hence, there are no shared criteria for determining whether moral judgments are carried out correctly and without deception or fraud. Thus, a stable reconciliation of individual and general will requires that the domain of individual moral judgment be transcended, that one move from it into the sphere of communal morality (*Sittlichkeit*). On this level, the generality of the particular will, understood as independence from individual desires and arbitrary choices, is rendered stable through the belief that existing habits and institutions actually promote the well-being and socially acceptable self-assertion of individuals.

*Sittlichkeit* has different manifestations in different contexts. Whereas the individual will, within the family, is eventually subordinated to the integrity of the communal bond, the market relationships of civil society are dominated by an individualistic spirit. Even in this sphere, however, the common bond is knit unintentionally – on the one hand, through the fact of mutual economic dependencies (the pursuit of individual happiness increases the well-being of society as a whole), and, on the other, through professional and political groups to which members of civil society contribute on a voluntary basis. (So it is that they start to understand themselves as parts of a trans-individual whole.) However, the internal instability of a class-divided civil society must be remedied through the intervention of the state, whose acts acknowledge individual well-being as a right. Institutionally, the state is depicted as an organism whose three branches of government (monarchical, legislative, administrative) represent the unity of general and particular will in three different forms. As is well known, Marx and other left-wing Hegelians pointed to the fact that such an organic unity had not yet been attained in practice.

### From Idealism to Nineteenth-Century Constructivism: The Case of the Historical School

Despite their apparent rejection of Hegel's glorification of the state, the major proponents of the historical school (Savigny, Puchta, Jhering, Gerber) shared his conviction that legal institutions originate in the spirit of the people (*Volksgeist*), which lends to the universal principles of freedom and equality distinctively national contours. In particular, Carl Friedrich von Savigny highlights both the evolutionary development and the "organic" coherence of legal institutions. In his early writings, legal history is

framed within a three-stage model of legal culture. After the age of customary law and legislation, the development culminates in a period in which legal institutions, though still originating in the spirit of the people, find adequate representation in doctrinal categories. It follows that jurists must be regarded as the representatives of the legal consciousness of the people. Since the people's general will, at the very epitome of legal evolution, is most adequately represented within the categories of the science of law, it could never be captured by the authoritative issuance of a set of legal rules. Accordingly, members of the historical school were strictly opposed to codification.

This opposition is intriguing for another reason, too. It stems from the recognition that statutory language is inherently indeterminate, from the rejection, then, of the enlightenment philosophers' notion that legal certainty could somehow be assured by means of the mechanical application of rules. Since no canon of interpretation offers a safeguard against indeterminacy, the representatives of the historical school consider the idea that legal doctrine essentially amounts to the application of rules as, in a word, wrong-headed. In their opinion, rules are but surface manifestations of a latent legal content, which is to be drawn out, made manifest, by means of a construction of the systematic meaning of legal institutions and rights. According to Georg Friedrich Puchta and Rudolph von Jhering, such a construction requires that one employ the inherited legal vocabulary in the conceptual dissection of the legal materials (statutes, cases) and, through and as a result of such an analysis, that one supplement and refine the evolving hierarchical system of legal concepts. Once the legal materials have been transmuted into manifestations of an "underlying" conceptual structure, the vocabulary enables the legal analyst to link the meaning of legal concepts to concrete events. In this respect, it represents the grammar according to which people express their general will on the level of detailed legal relationships. Furthermore, the legal vocabulary can also be used in a productive way, for it allows the extension of constructed principles to unprecedented cases.

## From the Turn of the Century to World War II: Disintegration and Reconstruction

The constructivist method of the historical school was extremely influential for the subsequent development of German legal thought, not just in the field of civil law, but also in the area of constitutional and administrative law (Gerber, Laband, Jellinek). Nonetheless, it fell victim to relentless attacks by the so-called "free law movement" (Stampe, Ehrlich, Kantorowicz, Fuchs, Isay) at the turn of the century.

The idea underlying the movement's critique is fairly simple. The deductions of conceptual jurisprudence, which developed in the sequel of the historical school, exceed by far what could be claimed to follow from the language of the German civil code, enacted in 1900. Since those provisions are the only relevant source of authority, and since the constructivist method amounts to nothing more than a reminder of an opaque metaphysics, the results of this method are a sham. Accordingly, once one has abstracted from the doctrinal metamorphosis of the code, it can then be seen, as Ulrich Kantorowicz writes, that the code contains more gaps than regulations. In order to fill such gaps and to ensure the realization of social justice in processes of adjudication that is free from

constraints (*freie Rechtsfindung*), one must appeal to the common sense of the people (*Kantorowicz*) or the living law of the community (*Ehrlich*). Since such a dramatic shift in orientation would have to be manifest in the legal curriculum, too, Ernst Fuchs proposes the establishment of “clinical programs.” Others, such as Eugen Ehrlich, seek to replace the established style of legal analysis by a more sociological approach.

The challenge posed by the free law movement triggered two different historically significant responses: The “jurisprudence of interests” and the rise of what might be called “radical proceduralism.”

The jurisprudence of interests attempts to restore the constructivist’s idea of a latent legal content, but by reversing directions and proceedings in an empirical way. While constructivists held that elusive means-ends-relationships are only of marginal significance to the construction of the conceptual structure, scholars such as Philipp Heck and Heinrich Stoll adopt the idea (already expressed in Jhering’s later work) that means-ends-relationships provide the rational basis of legal institutions, and contend that the true meaning of the statute can be elicited through research on the political and social circumstances of their enactment. However, the constructivist’s favorite tools, legal concepts, are only useful as a means of organizing the legal materials into a conceptually neat “external system.” The real task of the interpreter is to provide a reconstruction of the reconciliation of conflicting social interests that underlie the statutory regulations and, if possible, to go on to reconstruct from these efforts at reconciliation, the “internal system” of legislative evaluations of interests (*Interessenbewertungen*). Such a system would be true to the historical facts and, at the same time, would enable the judge to draw conclusions that transcend the sphere of statutory language. Still, the jurisprudence of interests is unworkable if the existing polity turns out to be riddled with contradictions and conflicts.

A very different response to the free law movement was chosen by proponents of what might be termed “radical proceduralism.” Its emergence can be traced back to the writings of Oskar Bülow, and its most marked expression appears in the works of James Goldschmidt, Julius Binder, and Adolf J. Merkl. These writers point out that the law governs its own application. Since all lawsuits terminate in the stage of final decision, controversies about the proper method of statutory construction are eventually resolved through procedural inappellability (*Rechtskraft*). Therefore, Goldschmidt holds that until a final decision has been reached, legal claims exist, during a lawsuit, only relative to the situation defined by procedural stages (*Rechtsslagen*). Binder goes further. Any doctrine of law, he holds, that disregards the domain of procedure is completely pointless, for there simply is no law apart from procedure. Accordingly, the plaintiff and the defendant have rights only if they are able to prevail in a lawsuit. In a less radical way, Merkl tried to accommodate the free law movement’s indeterminacy thesis in his “dynamic” model of the legal system. It became one of the building blocks of Hans Kelsen’s pure theory of law.

According to Merkl, every “legal act” (a term referring to acts of parliament, administrative, and judicial decisions) performs at the same time a (constrained) law-applying and an (unconstrained) lawmaking function. From the perspective of the conditions governing them, legal acts can be arranged hierarchically (such as constitution → legislative acts of parliament → judicial decision). Within the hierarchical structure each act is conditional upon the provisions of the conditioning act, inasmuch as the



latter sets the limits for the former. According to both Merkl and Kelsen, the science of law (*Rechtswissenschaft*), drawing on the language of legal acts, can identify the constraints set by the conditioning act and single out those acts that violate the constraints. It cannot (and must not), however, purport to offer any additional guidance to the decision maker, for the choice among alternatives within the constraints established by the conditioning act is left to the decision maker's discretion.

In radicalizing the dynamic model of the pure theory of law, Kelsen's disciple Fritz Sander contends that authorized legal officials alone can make legally valid statements that a decision maker has exceeded his or her discretion. Sander believes that Merkl's hierarchical perspective on the legal system, though reflecting the official's feeling of constraint, is unable to describe purportedly objective limits to the lawmaking process. Constraints mean nothing more than what the officials say they mean. It follows that, in the process of its own reproduction, the legal system paradoxically owes its hierarchical structure to a prior inversion of that structure. Related ideas will be expressed later in the century, albeit in a muted form, in the legal hermeneutics of Joseph Esser and in Niklas Luhmann's sociological theory of law.

Kelsen's pure theory of law is undoubtedly one of the most noteworthy species of legal positivism. Along with perspicuous statements about the identity of the law and the state, and claims about the ideological nature of legal subjectivity, the theory is perhaps still most famous for its rigorous separation of law and morality. While Kelsen regards all natural law theory as based on unwarranted premises, he does not subscribe to the traditional versions of legal positivism either (as found, for example, in the writings of Bierling and Bergbohm). In strictly separating "is" and "ought," Kelsen accuses traditional positivists of reducing the validity of legal norms to a matter of mere social fact (recognition, the power of the state, or whatever). Steering an arduous course between the pitfalls of natural law theory on the one hand and traditional legal positivism on the other, Kelsen tries to establish that the validity of any legal system is dependent on a "basic norm." This hypothetical rule demands that validity be ascribed to those legal regimes that are, by and large, effective. At the most sophisticated stage in the development of his theory, Kelsen conceived the basic norm as a "transcendental condition" for the description of the legal system.

The reference to "transcendental conditions" reflects the influence of neo-Kantianism, the most prominent philosophical school at the turn of the century, on legal theory. Interestingly, most neo-Kantian legal philosophers do not resort to Kant's *Rechtslehre* (which they regarded as evidence of Kant's increasing senility), but to his theory of knowledge. While Rudolf Stammler outlines a purely formal theory of natural law (*richtiges Recht*) and Hermann Cohen – the leading figure in the Marburg school – conceives of his "ethics" in terms of a theory of legal science, the members of the influential Heidelberg School (above all: Windelband, Rickert, and Lask) are concerned with a reconstruction of the internal logic of the cultural sciences (*Kulturwissenschaften*). Their basic idea is that just as statements in the natural sciences are related to the value of truth, the validity of statements in the domain of the cultural sciences is dependent on a link to cultural values. Accordingly, all propositions of law turn on the "legal value" or "legal idea" (*Rechtswert* or *Rechtsidee*). Since, following Kant, the conditions of possibility of experience are at the same time the conditions of the possibility of the objects of experience, the "legal value" performs a constitutive function for the

identification of valid legal materials. Formulating formal conditions of experience within a distinctive cultural sphere, neo-Kantian theory failed, however, to place any substantive constraints on the law. Although Gustav Radbruch, the most prominent legal philosopher in this context, singles out justice, purpose, and legal certainty as the necessary elements of the idea of law, these elements are all understood as formal characteristics of the law; its content is left to the political process.

### The Period from 1933 to 1945: “*Völkische*” Jurisprudence

Turning to Nazi jurisprudence, it must be noted that the Nazi jurist’s extraordinary productivity in the field turned on a double strategy, practical in nature. Whereas new regulations and, of course, the commands of the Führer had to be respected, the received body of statutes was seen as lending itself to extensive reinterpretation. From the enormous bulk of materials in which Nazi jurisprudence attempted to justify the second strategy, two examples are deserving of our attention.

In an influential essay written in 1934, Carl Schmitt offers a demarcation of the new millennium’s style of legal reasoning by pitting *konkretes Ordnungsdenken* (“thinking in a concrete institutional order”) against “normativism” on the one hand, and “decisionism” on the other. The former, with its hard and fast commitment to general rules, is seen as compensating for a lost sense of order. The latter, Schmitt holds, is based on the assumption that society has to be constantly rescued, by powerful sovereign rulers, from its tendency to lapse into disorder, marked by a normative vacuousness. By comparison, “thinking in a concrete institutional order” presupposes the existence and stability of institutions whose meaning and function cannot be reduced to the language of legal rules. In an institutional order, the “normal situation” is prior to the rule governing its preservation. Hence, legal officials can reconstruct an already given statutory language and apply even seemingly vague “concrete legal concepts” (such as “brave soldier” or “dutiful public official”) because of their familiarity with the (new) “normal situation.”

A similar attempt to provide the Nazi’s position on legal interpretation with a theoretical foundation was made by scholars coming from a neo-Hegelian background. Adapting earlier proto-fascist readings of Hegel to the officially favored style of *völkisches Rechtsdenken*, both Binder and Larenz emphasize that the existing legal materials have to be regarded as manifestations of the *völkisch* spirit of the law. Like Schmitt, Larenz holds that *völkisches Rechtsdenken* favors “concrete-general” (that is, vague) legal concepts. Their application provides the medium through which the political will of the *Volk* expresses itself in legal relationships.

### The Period from 1945 to the Present: From Natural Law to Postmodernism

The immediate aftermath of World War II gave rise to a brief renaissance of natural law theory. Here the most famous contribution is Radbruch’s, which differs from his

earlier position in a single respect: as a component of the idea of law, the value of justice is not completely devoid of substantive constraints.

In assessing the validity of legal rules, according to Radbruch, law-applying officials have to balance the claims of legal certainty with those of justice. Legal certainty requires that personal political commitments be suppressed in the process of adjudication; under normal conditions the legislative decision will then prevail. Still, legal certainty is outweighed by considerations of justice if the elementary requirements of the latter are violated by a statute in an intolerable way. The examples provided by Radbruch clearly reflect the Nazi regime: laws contradicting substantive or procedural due process and laws based on a racist bias are evidently unjust and therefore void. It might be added that Radbruch's idea has been repeatedly used by the German Federal Constitutional Court for the retroactive invalidation of administrative decisions that were based on Nazi legislation.

Despite the resurgence of natural law theory, it seems that, on the whole, the Nazi past has had a stifling effect on the further development of German legal thought. Critical attitudes toward traditional legal analysis, re-established in the postwar period, have been challenged as undermining the rule of law. It comes, then, as no surprise that most critical approaches have been relegated to a separate compartment of legal studies, the sociology of law. Nonetheless, mainstream legal theory has changed a good deal in Germany; the field has paid increasing attention to the hermeneutical aspects of interpretation (Esser, Kaufmann, Müller) and has developed the jurisprudence of interest into the jurisprudence of values (Larenz, Canaris). According to the latter, the legal system is not simply the outcome of contingent power struggles, but reflects internal coherence within a hierarchy of principles and subprinciples through which its different levels are connected. Adjudication should reconstruct the complex scheme of principles and appeal to it in contexts where "balancing" is called for. German jurisprudence, therefore, had been prepared for Dworkin's ideas when, in the late 1970s, the reception took place in the writings of Robert Alexy. Earlier, the same author had first introduced Jürgen Habermas's theory of rational discourse to jurisprudential readership, transforming it into a theory of legal argumentation.

Legal philosophers today – obviously inspired by Rawls's example – have taken up contractarian theories of justice (Höffe). Others are engaged in an elaboration of the best interpretation of the eighteenth- and nineteenth-century tradition, and this is replete with rich detail. Still others are studying applied ethics (in particular, in the fields of abortion, euthanasia, and animal rights). Habermas alone, in recent years, has offered a more comprehensive account of the philosophy of law.

For Habermas, the law is an indispensable means of disseminating social solidarity in different spheres of social action. Through a reconstruction of the institutional design of modern constitutional democracies, he attempts to show how the private and public autonomy of citizens mutually presuppose each other. In this context, Habermas pays special attention to the relationship between the state and civil society: though functionally more or less independent, the political processes of the state serve as receptors for the major impulses for social change from the "communicative power" released in the public sphere of civil society. The entire legal system is, therefore, depicted as highly dynamic, being constantly nourished by the institutionalized "tension of facticity and

validity." It follows that the historically established system of rights is always open to revision.

Instances of "postmodernist" approaches to law and society are currently being formulated under the guise (or should one say "banner"?) of social systems theory. Given postmodern conditions of "fragmentation," Karl-Heinz Ladeur, for example, holds legal decision making should not even attempt to follow a consistent pattern. On the contrary, the conflicting demands of the different subsystems of modern society can only be accommodated in situational acts of balancing. In a similar vein, Gunther Teubner and Helmut Willke, departing from problems of regulatory efficiency, recommend that the legal structure of the modern welfare state should undergo significant transformations. The state should refrain from regulatory intervention and, rather, facilitate the cooperative self-reflection of social systems on locally or functionally specified levels. By comparison, the catalyst for virtually everything in German social systems theory, Niklas Luhmann, claims that the subsystems of modern society necessarily coexist in a state of mutual indifference to each other. Hence, for its reproduction, the legal system depends on exclusive recourse to specific legal communications, whose binary code ("legal/illegal") marks them off from the languages of economy, politics, art, and so on. In order to reveal to itself its own identity, the legal system has to produce descriptions of its own operations. Since the system cannot step outside its own mode of operation, self-description involves a paradox: the line between inside and outside is drawn from the inside. What makes Luhmann's analysis appealing is his idea that most operations of the legal system are devoted to obscure ("invisibilize") paradoxes such as the one alluded to here. And in studying of paradoxes, obfuscations and modes of deparadoxication, Luhmann promotes the Germanic cause of legal deconstruction: a legal system is necessary, not despite the fact that it obscures the undecidability and contradiction of its own operation, but precisely because it does.

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# Marxist Theory of Law

ALAN HUNT

## The Object of Marxist Theory of Law

Marxist theory of law asks: what part, if any, does law play in the reproduction of the structural inequalities which characterize capitalist societies? It is thus a project that does not occupy the same field as orthodox jurisprudence; its agenda is necessarily different. Thus Marxist theory of law cannot simply replace elements within liberal legalism in order to produce an alternative theory and it does not address the same questions that motivate liberal jurisprudence. It has mainly played an oppositional role. Its most frequent manifestations have been directed toward providing a critique of liberal legal thought. The critique is “oppositional” in the sense that it has been directed at controverting the conventional wisdom of liberal legalism.

Marxist theory of law exhibits a number of general themes that have been reworked into new and variant combinations. In summary form, the major themes that are present in Marx’s own writing and in subsequent Marxist approaches to law are:

- 1 Law is inescapably political, or law is one form of politics.
- 2 Law and state are closely connected; law exhibits a relative autonomy from the state.
- 3 Law gives effect to, mirrors, or is otherwise expressive of the prevailing economic relations.
- 4 Law is always potentially coercive and manifests the state’s monopoly of the means of coercion.
- 5 The content and procedures of law manifest, directly or indirectly, the interests of the dominant class(es).
- 6 Law is ideological; it both exemplifies and provides legitimation to the embedded values of the dominant class(es).

These six themes are present in Marxist writings on law in a variety of different forms and, in particular, with very different degrees of sophistication and complexity. This point can be illustrated by taking theme 5, concerning the connection between law and class interests. In a simple version, this finds expression in the claim that law gives effect to the interests of the capitalist class, and that law is thus an instrument through which

the capitalist class imposes its will. This theme is also present in more sophisticated forms, which stress that the content of law can be read as an expression of the complex dynamic of class struggle. As such, it comes to include legal recognition of the interests of subordinated classes secured through struggle.

These themes raise issues excluded or ignored in orthodox jurisprudence; for example, the focus on the connection between law and politics or between law and class interests either adds to or redirects the concerns of jurisprudence. Other themes have more wide-ranging implications for legal theory. For example, the insistence on the ideological nature of law involves an entirely different way of looking at the texts, discourses, and practices of law. Such a point of departure disallows a positivist acceptance of legal rules as the taken-for-granted primary reality of law.

### Outline of a Marxist Theory of Law

What follows is an outline of a Marxist theory of law that concentrates on achieving an integrated theoretical structure from the main themes present in the diverse versions of Marxist theory of law. It is *not* an attempt to offer a précis of Marx's own writings on law. It is important to stress that Marx did not produce anything that could be called a "theory of law." Law was never a sustained object of Marx's attention, although he did have much to say about law that remains interesting and relevant (Cain & Hunt, 1979; Vincent, 1993).

The selection of a starting point is the most important step in the development of any theory. Space does not permit a full defense of the starting point selected. The claim is that Marxism is a rigorously sociological theory in that its general focus of attention is on social relations. Law is a specific form of social relation. It is certainly not a "thing," nor is it reducible to a set of institutions. In one of many similar passages Marx stated his relational approach in the following terms:

Society does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand ... To be a slave, to be a citizen are social characteristics, relations between human beings A & B. Human being A, as such, is not a slave. He is a slave in and through society. (Marx, 1973, p. 265)

The relational approach to law posits that legal relations are first and foremost a variety or type of social relation that are identified by a specific set of characteristics that separates them from other types of social relations. Legal relations take the form of relations between "legal subjects." The legal subject does not coincide with the natural person; thus until relatively recently women were either not legal subjects or were constrained within a specific legal status that imposed duties whilst granting few rights. It should be noted in passing that there is an important connection between "legal subject" and "citizen," which is neither homologous nor opposed.

The simplest instance of the legal subject is that of the adult person recognized by a court as the bearer of rights and thus able to initiate litigation. Many social institutions are endowed with legal subjectivity or "legal personality," for example, the corporation is accorded the status of a legal subject. It is also important to emphasize the wide

variety of legal statuses into which people and groups are interpellated: defendants, witnesses, trustees, beneficiaries, agents, owners, and a host of other legal statuses are summoned into being. Legal interpellation may itself be constitutive of a social relation as is the case with the formation of a corporation where law is performative (a legal act actually changing the position of the parties). In other circumstances, the legal interpellation does not create a social relation but rather it affects the terms, conditions, and limits under which that relationship is lived out and struggled around.

A legal relation always generates a potential “mode of regulation”; it is “potential” in the sense that many legal relations may be wholly or largely passive in that the legal dimension of the relation may play no part at all in the way the concrete social relations is lived out. Law provides a wide variety of different modes of regulation of social relations. In many instances, this is directly apparent in the conventional classification of types of law; thus criminal law employs different agents (for example, police) and imposes different sanctions (for example, imprisonment) from those techniques associated with private law (for example, litigation, damages). The concept of a mode of regulation serves to focus attention on law as an ongoing set of practices that contribute to the reproduction and transformation of social relations.

The major ingredient of a legal mode of regulation is the form that flows from the attribution of rights to interpellated legal subjects. The discourse of rights needs to be understood as consisting of a bundle of rights/duties distributed between legal subjects located within social relations. Both rights and duties embrace a variety of different types of attributions whose significance is that they not only provide a relatively unified legal discourse that can handle a range of different social relations, but that also overlaps with wider normative and moral discourses. This interface of legal and moral rights provides for both the authoritative determinations of rights/duties in litigation, a meta-discourse that provides legitimation and also a terrain, a contestation, and change in which new or variant claim rights are articulated and asserted.

The significance of the rights-grounded discourse is that it provides an integrated field within which all forms of social relations can be made subject to a common discursive apparatus. This is not to suggest that rights discourse is or can be fully coherent or free from internal tensions or contradictions. One of the major contributions of the “critical legal studies” school has been to highlight the internal incoherence and contradictions within the discourse of rights (Hutchinson, 1989). It is important to note that rights-discourse figures in other forms of dispute handling outside litigation such as negotiation and public debate.

Law and legal process have the potential to change the relative positions of legal subjects within social relations; in this basic sense, law is a distributive mechanism. Again it is necessary to stress “potential” since it does not follow that change in legal capacity necessarily affects positions within social relations. This is particularly obvious where law “fails” – for example, in not achieving an adequate mechanism to enforce child support payments by deserting fathers. The general process of legal distribution is that interests and claims are transcribed into rights discourses, and in that process the capacities of legal subjects are confirmed or varied. Law is a major distributive mechanism by varying the relative positions and capacities of the participants in social relations. Thus one important dimension of legal regulation is that it regulates the boundaries or spheres of competence of other modes of regulation. This process



frequently manifests itself in the never-ending process in which legal discourse invokes and redraws the boundary between the public and the private.

It is important to emphasize the quest for consistency in legal doctrine. Engels formulated the issue clearly in his letter to Conrad Schmidt:

In a modern state, law must not only correspond to the general economic conditions and be its expression, but must also be an *internally coherent* expression which does not, owing to internal conflicts, contradict itself. (Cain & Hunt, 1979, p. 57; Marx & Engels, 1975, p. 399)

Two important points follow. First, it explains why law is rarely if ever the direct instrumental expression of the interests of a dominant class. Second, it is the persistent quest for coherence, rather than its realization that is significant. Indeed a necessary tension between competing versions of legal boundaries, such as that between public and private, ensures the flexibility and responsiveness of law to changing contexts and pressures.

Marxism's central concerns are: (1) to explain the relations of subordination or domination that characterize particular historical epochs; (2) to account for the persistence and reproduction of these relations; and (3) to identify the conditions for ending these relations and realizing emancipated social relations. The method and content of a Marxist theory of law will necessarily be concerned to explore the role of law in these three areas.

### Alternative Marxist Approaches to Law

The characteristics of this relational theory can be illustrated by contrasting it with two other variants that have been influential in the history of Marxist work on law. The first draws on Marx's imagery of base and superstructure that distinguishes between "the economic structure of society," which forms the base or "real foundation," "on which rises a legal and political superstructure and to which correspond definite forms of social consciousness" (Marx, 1971, p. 21). Law is assigned to the "superstructure" which "reflects" the "base" or "economic structure." Thus it is the economic structure that determines or has causal priority in determining the character and content of the law (and all other features of the superstructure).

The base–superstructure thesis is problematic in a number of respects. The notion of base–superstructure is a metaphor; it seeks to advance our understanding of social relations by importing an analogy which involves imagery derived from thinking about society as if it were a building or a construction project. The base–superstructure metaphor runs the risk of committing Marxism to an "economic determinism" – the objection to which is that it proposes a causal law (analogous to classical scientific laws) that asserts the causal priority of the economic base over all other dimensions of social life (Williams, 1977, pp. 83–9). There is a "weaker" version of the idea of determination in which "determination" is conceived as a mechanism whereby "limits" are set within which variation may be the result of causal forces other than the economic structure. Thus the economic base is pictured as prescribing the boundaries or as setting objective

limits for the different elements of the superstructure. This sense of determination is theoretically more attractive because it does not foreclose or predetermine the causal relationship that exists between the different facets of social life.

Marx and Engels both occasionally came close to this softer version of “determination”. Perhaps its best known formulation is provided by Engels’s letter to Bloch (September 21, 1890):

According to the materialist conception of history, the *ultimately* determining factor in history is the production and reproduction of real life. Neither Marx nor I have ever asserted more than this ... The economic situation is the basis, but the various elements of the superstructure – political forms of the class struggle and its results, such as constitutions ... juridical forms, and especially the reflections of all these real struggles in the brains of the participants, political, legal, philosophical theories ... also exercise their influence upon the course of the historical struggles and in many cases determine their *form* in particular. There is an interaction of all these elements in which, amid all the endless host of accidents ... the economic movement is finally bound to assert itself. (Marx & Engels, 1975, pp. 394–5)

This version of the determination thesis is usually referred to as the “theory of relative autonomy.” Its central idea is that law and other elements of the superstructure can have causal effects in that they “react back” upon the economic base which, however, still retains causal priority, but now only “ultimately.” Marx and Engels also used phrases such as “in the last instance” and “in the final analysis” to express this long-run sense of the determination by the economic.

Many Marxist writers on law have been attracted to this “softer” version of determinism. Its merit is that it retains some sense of the causal weight or importance of the economic order while at the same time it provides an invitation to explore the intriguing specificity of law.

Despite the undoubted attractions of “soft determinism” plus “relative autonomy,” it cannot provide a satisfactory starting point for Marxist theory of law. In its simplest form, the objection is that it says both too much and too little. It says too much in that instead of providing a theoretical starting point, it rather imposes a conclusion for each and every piece of investigation – namely, that the economic is determinant. But it says too little because it offers no account of the mechanisms whereby this ultimate or long-run causality is produced.

A quite different starting point for a Marxist theory of law was employed by the early Soviet jurist, Evgeny Pashukanis, who, in the 1920s, produced what still remains the most comprehensive Marxist theorization of law (Pashukanis, 1978; Beirne & Sharlet, 1980). Pashukanis set out to model his theory on the framework that Marx had employed in Volume I of *Capital* which opens with a rigorous discussion of the concept “commodity” (Marx, 1970, ch. 1); he sought to elucidate “the deep interconnection between the legal form and the commodity form” and for this reason his theory is often referred to as the “commodity form” theory (Pashukanis, 1978, p. 63). His key proposition was that “the legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities” (1978, p. 85). In its simplest form, Pashukanis viewed the contract as the legal expression of this primary relationship of capitalism, namely the commodity exchange. “Commodity

exchange” and “legal contract” exist in a homologous relation; they are mutually dependent.

The most succinct evaluation of Pashukanis is that while he correctly identified law as a social relation, he blocked that insight by reducing law to a single and inappropriate relation, the commodity relation. The root source of both his success and his failure was the rather simplistic reading of Marx, in general, and of *Capital*, in particular, on which he relied. He treated Marx’s opening discussion of the commodity as if Marx was propounding an economic history of capitalism that traced its development from the general growth of “simple commodity production.” For Marx, the famous chapter on commodities was a means of approaching what he regarded as the most basic relationships constitutive of capitalism, namely, capitalist relations of production; for this reason, the standard Marxist criticism of Pashukanis is that he reverses Marx’s priority of production relations over commodity relations. Thus in grounding his analysis of legal relations upon the homology with commodity relations, Pashukanis skewed his whole subsequent analysis.

That Pashukanis took this wrong turn can be readily explained. The most important feature of his work, both theoretically and politically, is his contention that law is irredeemably bourgeois; that is law is especially and distinctively associated with the existence of capitalism. Hence for Pashukanis there could be no postcapitalist law; thus the idea of “socialist law” was both unnecessary and contradictory. The alternative Marxist view is that socialism would involve the development of new sets of relationships, and these in turn would necessitate new forms of legal relations. For example, socialism would be likely to accord increased importance to a range of semiautonomous bodies, which would operate with large measure of self-regulation whilst drawing its resources from public sources; such bodies would require new legal property forms. To recover the general relational orientation proposed by Pashukanis, it is necessary to free Marxist theory of law from the narrow focus on commodity relations.

### Ideology as Law and Law as Ideology

Law is ideological in a double sense; law is ideologically constructed and is itself a significant (and possibly major) bearer of ideology. This can be expressed in two theses:

- 1 Law is created within an existing ideological field in which the norms and values associated with social relations are continuously asserted, debated, and generally struggled over.
- 2 The law itself is a major bearer of ideological messages which, because of the general legitimacy accorded to law, serve to reinforce and legitimate the ideology which it carries.

Ideology is not falsity or false consciousness, nor is it a direct expression or “reflection” of economic interests. Rather ideology is a contested grid or competing frame of reference through which people think and act. The dominant ideology is the prevailing influence that forms the “common sense” of the period and thus appears natural, normal, and right. The key project of every dominant ideology is to cement together

the social formation under the leadership of the dominant class; it is this process that Gramsci called hegemony (Gramsci, 1971).

The content of legal rules provides a major instance of the condensation of ideology. Law has two important attributes as an ideological process. First, it offers a deep authoritative legitimation through the complex interaction whereby it both manifests a generalized legitimacy, separated from the substantive content of its constituent rules and, on the other hand, confers legitimacy. Modern democratic law involves a change in the form of legitimacy itself; it involves a movement towards impersonal, formal legitimation of social relations in which "law" becomes increasingly equated with "reason." Increasingly the legitimation of social order appeals to law simply because it is law, and, as such, provides the grounds for the obligations of obedience by citizens. Law also comes to be seen as the embodiment of the bond between citizen and nation, the people-nation, as law both constitutes and expresses the state's sovereignty.

The foregoing discussion of legal ideology makes no claim to completeness; it does, however, serve to put in place two major themes: first the doubly ideological character of law; and second the need for attention to the historical dynamic whereby the role and significance of legal ideology has expanded with modern democratic law (Poulantzas, 1978, pp. 76–93; Sumner, 1979, chs. 7 and 8; Collins, 1982, ch. 3; Hunt, 1985, 1991).

## Law and State

The relational approach highlights the importance of the law-state connection. It seeks to find a way of furthering our grasp of a connection which is on the one hand close, but within which a significant degree of autonomy and separation of law from the state is manifest. Orthodox jurisprudence tends to be preoccupied with the issue of the identification and legitimation of the boundaries of legal control of individual conduct.

The state is an institutional complex whose dynamic emerges from the tensions within and between state institutions (Poulantzas, 1973; Jessop, 1990). Coexisting and competing projects are pursued by different state agencies. Whilst some are directed towards the cohesion of the state, such as those pursued in the course of the political projects of governments, it is equally common for agencies to operate in such a way as to create spheres of autonomy. The bureaucratic imperatives within state institutions frequently favor such functional separation. The legal system has a distinctive project of state unity whose ideological source stems from the theory of sovereignty. The unity of the state is always a project, but it is one which is never realized.

The most difficult feature of the law–state relationship to give an account of is the manner in which the state is both within and outside the law. It is not just a matter of pointing to the persistent reality of state illegality, but even more importantly of the large sphere of state action that is not unlawful but that is not subject to legal regulation. The really important issue is the way in which law marks out its own self-limitations. The ideological core of the modern state lies in the varieties of the idea of a state based on law (*Rechtsstaat*) epitomized by the constitutional doctrine of the rule of law. The considerable variation in the degree of judicial review of state action that exists between modern capitalist states should be noted.

It is within the law–state relationship that the important but difficult question of the relationship between coercion and consent needs to be posed. Marxists have historically stressed the repressive character of law; they have done so in order to redress the blindness of most liberal jurisprudence that has systematically played down the role of coercion and repression in the modern state. But in reacting against the omissions of liberal theory, some Marxists have come perilously close to simply reversing liberalism’s error by equating law with repression. The really difficult problem is to grasp the way in which repression is present in the course of the “normal” operation of modern legal systems.

One possible explanation along these lines posits a fallback thesis: normally law operates more or less consensually, but in exceptional moments the repressive face of law is revealed. Such an account emphasizes the role of special powers and emergency legislation as providing the means for the legal integration of repression. This focus on legal exceptionalism is important, but potentially misleading. It draws attention to the capacity of the state to suspend the operation of democratic process. But it draws too stark a distinction between normal and exceptional conditions. A more adequate view draws attention to the fact that a wide range of legal procedures are coercive and where they are deployed systematically set up patterns of repression. For example, the role of courts as debt enforcement agencies, able to order repossession or grant seizure powers, runs counter to the liberal image of civil law as a mechanism for resolving disputes.

### Economic Relations and the Law

A core question for Marxist theory of law is: what part does law play in the production and reproduction of capitalist economic relations? A number of key legal relations form part of the conditions of existence for capitalist economic relations without which they could not function. Law provides and guarantees a *regime of property*. The expansion of the forms of capital and their complex routes of circulation require such a regime that protects multiple interests, falling short of absolute ownership.

Legal relations have distinctive effects. The most important of these is the extent to which legal relations actually constitute economic relations. The most significant example is the formation of the modern corporation with limited liability; these are legal creations in the important sense that it is precisely the ability to confer a legal status which limits the liability of participants that makes the relationship not only distinctive but a viable vehicle for the cooperation of capital drawn from a range of sources (Hunt, 1988). Similarly, the modern contract must embrace contract planning for a range of potential variables. The same consideration affects the expansion of issues embraced in collective agreements between labor and capital, which necessitates a level of detailed specification that cannot be sustained within traditional notions of custom and practice.

It is important to stress the complex interaction that exists between legal and economic relations. Some of these features can be briefly indicated. Legal doctrines and processes must make provision for the interrelations of capital, through commercial

law, insurance, banking, and other financial services. One traditional way of identifying these activities is to speak of the conflict-resolution role of law. But it may be wise to avoid this formulation since it focuses too narrowly on litigation and the courts. It is probably more helpful to think of these mechanisms as background conditions that constitute the framework within which economic relations are conducted.

Law also provides the central conceptual apparatus of property rights, contract, and corporate personality, which play the double role of both constituting a coherent framework for legal doctrine and, at the same time, provide significant components of the ideological discourses of the economy. Conceptions of rights, duties, responsibility, contract, property, and so on, are persistent elements in public discourses. The interpenetration of legal and nonlegal features of these discourses play a significant part in explaining the impact of legal conceptions on popular consciousness.

### Legal Relations and Class Relations

Another important question for Marxist theory of law is: what contribution, if any, does law make to the reproduction of class relations? This requires attention to the impact of law upon the pattern of social inequality and subordination. Two general theses can be advanced:

- 1 The aggregate effects of law in modern democratic societies work to the systematic disadvantage of the least advantaged social classes.
- 2 The content, procedures, and practice of law constitute an *arena of struggle* within which the relative positions and advantages of social classes is changed over time.

The important point to be stressed is that these two theses are neither incompatible nor contradictory; they are *both* true at one and the same time. The first thesis that law disadvantages the disadvantaged operates at all levels of legal processes. It will be assumed that these unequal consequences are either self-evident or so well evidenced in empirical studies as not to require support here. Substantive inequalities disadvantaging the working class (and other subordinate categories) are embedded in the content of legal rules. The procedures of law, the discretion of legal agents, the remedies and sanctions of law, and other dimensions manifest unequal social effects. In order to produce a complete analysis of law's capacity to participate in and to reinforce the reproduction of social inequality, it is necessary to trace the detailed interaction between the different processes involved.

The second thesis about law as an arena of struggle requires some means of registering and establishing the connection between economic interests and the categories of legal doctrine. Here attention needs to be directed toward the manner in which social interests are translated into rights-claims and the degree of "fit" between those claims and the prevailing form of law expressed in existing legal rights. Analysis of this type generates hypotheses such as claims capable of translation into a discourse of individual rights and those interests congruent with existing rights categories are more likely to succeed than claims not matching these characteristics.

## Conclusions

This essay has outlined a general framework for a Marxist theory of law. There are inevitably issues that have been omitted. Most significantly almost nothing has been mentioned about what Marx himself said about law, or about the history of Marxist writing and debate on law. Another omission concerns the relationship between Marxist theory of law and orthodox jurisprudence. The agendas of Marxist theory and jurisprudence overlap but do not converge. Marxism gives prominence to issues omitted or marginalized within jurisprudence, such as the repressive role of law and the fundamentally political character of law. In these respects, Marxism can provide a much needed supplement to jurisprudence by its stress on the rootedness or connectedness of law with social, cultural, and economic relations. It provides a powerful source of resistance to the prevalent tendency within orthodox jurisprudence to treat law as disconnected, even autonomous. Marxism further refutes the timeless or ahistorical quality of much liberal jurisprudence. Marxism insists that the role and place of law are always a consequence of a concrete and historically specific dynamic of the interaction of institutions and practices.

If Marxism supplements jurisprudence, it should not simply seek to negate or displace orthodox jurisprudence. The pervasive jurisprudential issues, such as the grounds for the obligations of citizens to obey law, the means of determining the proper limits of state action and the conditions under which it is permissible to restrain the conduct of citizens are also important questions for Marxism. The renewal of socialism requires not the withering away of law, but the realization of a legal order that enhances and guarantees the conditions of political and economic democracy, that facilitates democratic participations and restrains bureaucratic and state power. The implication is that a Marxist approach to law will be concerned, on the one hand, with characteristically jurisprudential issues but will also be concerned about the potential contributions of legal strategies to achieving effective political strategies for the social movements that reflect the Marxist political and ethical commitment to the poor and the oppressed.

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## Deconstruction

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Deconstruction has a broader, more popular, and a narrower, more technical, sense. The latter refers to a series of techniques for reading texts developed by Jacques Derrida, Paul de Man, and others; these techniques, in turn, are connected to a set of philosophical claims about language and meaning. However, as a result of the popularity of these techniques and theories, the verb “deconstruct” is now often used more broadly as a synonym for criticizing or demonstrating the incoherence of a position.

Deconstruction made its first inroads in the United States through departments of literary criticism, which sought new strategies for interpreting literary texts. As a result, deconstruction became associated and sometimes confused with other trends, including reader response theory, which argues that a text’s meaning is produced through the reader’s process of encountering it.

In Europe, on the other hand, deconstruction was understood as a response to structuralism; it is therefore sometimes referred to as a “poststructuralist” approach. Structuralism argued that individual thought was shaped by linguistic structures. It therefore denied or at least severely de-emphasized the relative autonomy of subjects in determining cultural meanings; indeed, it seemed virtually to dissolve the subject into the larger forces of culture. Deconstruction attacked the assumption that these structures of meaning were stable, universal, or ahistorical. However, it did not challenge structuralism’s views about the cultural construction of human subjects. Social theories that attempt to reduce human thought and action to cultural structures are sometimes called “antihumanist.” Ironically, then, deconstruction suffered the curious fate of being an antihumanist theory that nevertheless was often understood in the United States as making the radically subjectivist claim that texts mean whatever a person wants them to mean. The misunderstandings that deconstruction has engendered are partly due to the obscurity of expression that often distinguishes the work of its adherents.

Despite Derrida’s insistence that deconstruction is not a method but an activity of reading, deconstruction has tended to employ discernible techniques. Many deconstructive arguments revolve around the analysis of conceptual oppositions. A famous example is the opposition between writing and speech (Derrida, 1976). The deconstructor looks for the ways in which one term in the opposition has been “privileged” over the other in a particular text, argument, historical tradition, or social practice. One

term may be privileged because it is considered the general, normal, central case, while the other is considered special, exceptional, peripheral, or derivative. Something may also be privileged because it is considered more true, more valuable, more important, or more universal than its opposite. Moreover, because things can have more than one opposite, many different types of privilegings can occur simultaneously.

One can deconstruct a privileging in several different ways. For example, one can explore how the reasons for privileging *A* over *B* also apply to *B*, or how the reasons for *B*'s subordinate status apply to *A* in unexpected ways. One may also consider how *A* depends upon *B*, or is actually a special case of *B*. The goal of these exercises is to achieve a new understanding of the relationship between *A* and *B*, which, to be sure, is always subject to further deconstruction.

Legal distinctions are often disguised forms of conceptual oppositions, because they treat things within a legal category differently from those outside the category. One can use deconstructive arguments to attack categorical distinctions in law by showing that the justifications for the distinction undermine themselves, that categorical boundaries are unclear, or that these boundaries shift radically as they are placed in new contexts of judgment (Schlag, 1988).

Perhaps the most important use of deconstruction in legal scholarship has been as a method of ideological critique. Deconstruction is useful here because ideologies often operate by privileging certain features of social life while suppressing or de-emphasizing others. Deconstructive analyses look for what is de-emphasized, overlooked, or suppressed, in a particular way of thinking or in a particular set of legal doctrines. Sometimes they explore how suppressed or marginalized principles return in new guises. For example, where a field of law is thought to be organized around a dominant principle, the deconstructor looks for exceptional or marginal counter-principles that have an unacknowledged significance, and which, if taken seriously, might displace the dominant principle (Frug, 1984; Dalton, 1985; Peller, 1985; Unger, 1986; Balkin, 1987).

Sometimes deconstructive analyses closely study the figural and rhetorical features of texts to see how they interact with or comment upon the arguments made in the text. The deconstructor looks for unexpected relationships between different parts of a text, or loose threads that at first glance appear peripheral yet often turn out to undermine or confuse the argument. A deconstructor may consider the multiple meanings of key words in a text, etymological relationships between words, and even puns to show how the text speaks with different (and often conflicting) voices (Balkin, 1989, 1990b). Behind these techniques are more general probing and questioning of familiar oppositions between philosophy (reason) and rhetoric, or between the literal and the figural. Although we often see the figural and rhetorical elements of a text as merely supplementary and peripheral to the underlying logic of its argument, closer analysis often reveals that metaphor, figure, and rhetoric play an important role in legal and political reasoning. Often the figural and metaphorical elements of legal texts powerfully support or undermine the reasoning of these texts.

Deconstruction does not show that all texts are meaningless, but rather that they are overflowing with multiple and often conflicting meanings. Similarly, deconstruction does not claim that concepts have no boundaries, but that their boundaries can be parsed in many different ways as they are inserted into new contexts of judgment.

Although people use deconstructive analyses to show that particular distinctions and arguments lack normative coherence, deconstruction does not show that all legal distinctions are incoherent. Deconstructive arguments do not necessarily destroy conceptual oppositions or conceptual distinctions. Rather, they tend to show that conceptual oppositions can be reinterpreted as a form of nested opposition (Balkin, 1990a). A nested opposition is an opposition in which the two terms bear a relationship of conceptual dependence or similarity as well as conceptual difference or distinction. Deconstructive analysis attempts to explore how this similarity or this difference is suppressed or overlooked. Hence deconstructive analysis often emphasizes the importance of context in judgment, and the many changes in meaning that accompany changes in contexts of judgment.

Deconstruction's emphasis on the proliferation of meanings is related to the deconstructive concept of iterability. Iterability is the capacity of signs (and texts) to be repeated in new situations and grafted onto new contexts. Derrida's aphorism "iterability alters" (Derrida, 1977) means that the insertion of texts into new contexts continually produces new meanings that are both partly different from and partly similar to previous understandings. (Thus, there is a nested opposition between them.) The term "play" is sometimes used to describe the resulting instability in meaning produced by iterability.

Although deconstructive arguments show that conceptual oppositions are not fully stable, they do not and cannot show that all such oppositions can be jettisoned or abolished, for the principle of nested opposition suggests that a suppressed conceptual opposition will usually reappear in a new guise. Moreover, although all conceptual oppositions are potentially deconstructible in theory, not all are equally incoherent or unhelpful in practice. Rather, deconstructive analysis studies how the use of conceptual oppositions in legal thought has ideological effects: how their instability or fuzziness is disguised or suppressed so that they lend unwarranted plausibility to legal arguments and doctrines. Because all legal distinctions are potentially deconstructible, the question when a particular conceptual opposition or legal distinction is just or appropriate turns on pragmatic considerations. Hence, deconstructive arguments and techniques often overlap with and may even be in the service of other approaches, such as pragmatism, feminism, or critical race theory (See Article 18, *FEMINIST JURISPRUDENCE AND THE NATURE OF LAW*; Article 27, *LEGAL PRAGMATISM*.)

Deconstruction began to have influence in the legal academy with the rise of critical legal studies (CLS) and feminism. (See Article 16, *CRITICAL LEGAL STUDIES*.) However, deconstructive scholarship eventually became part of an emerging category of post-modern jurisprudence separate from critical legal studies (Balkin, 1989; Schlag, 1991b; Cornell, 1992). (See Article 25, *POSTMODERNISM*.) Deconstructive arguments in feminism have been more clearly understood as a development and critique of earlier feminist themes; they are best studied in the context of feminist jurisprudence. This difference may have something to do with the continuing vitality of feminism and the waning influence of critical legal studies at the end of the 1980s.

Critical legal scholars were originally attracted to deconstruction for three reasons. First, because deconstruction claimed that meanings were inherently unstable, it seemed to buttress the thesis that legal decision making was indeterminate. This, in turn, appeared to support the familiar CLS emphasis on the political character of legal

decision making (Frug, 1984; Dalton, 1985). Second, because deconstruction discovered instability and indeterminacy everywhere, it seemed to support the notion that social structures were contingent and social meanings malleable and fluid. This supported CLS claims that legal ideology rested on claims of the “false necessity” of social and legal structures that seemed reasonable in theory but were oppressive in practice (Peller, 1985). Third, because deconstruction seemed to show that all texts undermined their own logic and had multiple meanings that conflicted with each other, deconstruction could be used for the purpose of “trashing” – that is, showing that particular legal doctrines or legal arguments were fundamentally incoherent.

Nevertheless, CLS’s appropriation of deconstruction along these lines was problematic. First, the CLS argument seemed to assume an autonomous subject who was manipulating indeterminate language; this was in tension with deconstruction’s anti-humanist assumptions (Schlag, 1990a). If meaning is beyond the control of the subject, and the subject is socially constructed, it is hard to argue that legal reasoning is a disguise for political reasoning (Balkin, 1991). Second, if the conceptual oppositions of liberal legalism were deconstructible, so too would be the concepts that critical legal studies scholars would offer to replace those of liberal legalism. If deconstruction could be used to show the incoherence of liberal thought, it could equally be used to show the incoherence of any alternative to liberal thought. Third, the contingency and instability are separate concepts, and neither is identical with mutability. Even if legal concepts had multiple and unstable meanings, it did not follow that legal and social structures were easily manipulated and changed.

Similar problems arose in the attempt by British critical legal theorists (Goodrich, 1987, 1990; Douzinas, Warrington, & McVeigh, 1991) to use deconstruction to show how rhetorical figures created ideological support for injustice. Ironically, rhetoric becomes viewed with a certain degree of suspicion in this body of work, because rhetoric and figure grant legal writing and legal theory far more legitimacy than they deserve. The problem is that this critique does not seem to distinguish the present legal system and its doctrines from alternatives equally dependent on rhetoric and figural language.

A more promising line of attack for CLS rejected the claim that legal doctrine was unstable and easily malleable. It asserted that political and legal ideologies operated as a form of constraint on individuals. These ideologies constructed a way of thinking about society that prevented individuals from considering other alternative orderings of social and legal structures, and thus limited their thought (Gordon, 1982, 1987; Balkin, 1991). From this standpoint, the determinacy of legal doctrine was quite real, but was produced by the social construction of the subject. CLS’s use of deconstruction was also more successful when it concentrated on showing how the justifications for specific legal doctrines and legal distinctions undermined themselves, or how the ideologies underlying legal doctrines marginalized or suppressed important features of human life (Unger, 1986).

Like critical legal scholars, feminists also found deconstruction useful as a method of ideological critique, directed in this case at patriarchal thought and institutions. Feminists could use deconstructive arguments to expose and critique the suppression and marginalization of things associated with women and femininity. Moreover, the iterability and instability of social meanings seemed to undermine any potentially

pessimistic suggestions in radical feminism that patriarchy was an unconquerable monolith, or that patriarchy's control of social construction had been so successful that women's very desires and identities were nothing more than the products of male power and privilege. Because social meanings are iterable, they are fluid and unstable, and always present possibilities of interpretive variance and play. Thus, the deconstructive theory of meaning seemed to suggest potential avenues of resistance to patriarchy, and seemed to allow, if not guarantee, the possibility of feminist critique.

Unfortunately, deconstruction tends to destabilize not only patriarchy, but also femininity and feminine identity. Deconstructive arguments that "women's perspectives," "women's interests," or "femininity" have been suppressed or marginalized in existing culture beg two important questions: the first is whether there can be such relatively stable and determinate entities; the second is whether they do not already form nested oppositions with what they are claimed to oppose. Thus, feminists employing deconstructive critiques have been faced with two important, yet potentially conflicting, goals: to identify and honor the feminine that has been suppressed or marginalized, and to recognize the instability and contested nature of the identity so honored (Cornell, 1991). (See Article 25, POSTMODERNISM.)

In 1987, a major academic scandal erupted when Paul De Man's wartime journalism for a pro-Nazi newspaper was discovered. The revelations raised anew the question of deconstruction's relationship to ethics and politics. In literary circles, deconstruction had often been accused of political quietism, because no clear moral or political consequences could be drawn from an interpretive theory that asserted that all meanings were unstable and seemed to deny the certainty of all truths. Some critics even accused De Man of turning to obscurantism to assuage his guilty conscience over collaboration. These accusations particularly affected his close friend Derrida, a Jew, who was a teenager during World War II. Whether directly or indirectly as a result of the De Man affair, Jacques Derrida began to explore the question of the normative uses of deconstruction. In subsequent work (Derrida, 1990), he asserted that deconstruction had always been concerned with normative questions, and cryptically insisted that "deconstruction is justice."

The connections between deconstruction and social justice were hardly questioned in earlier critical legal studies and feminist scholarship because it was simply assumed that deconstruction was an impressive analytical weapon that could be used to criticize politically regressive positions and "trash" liberal legal thought. Nevertheless, it was not difficult to see that deconstructive arguments could as easily be used by the political right as by the political left, and that they could serve many different political positions (Balkin, 1987, 1990b). By the 1990s, several legal scholars began to examine the relationship between deconstruction and social justice more carefully.

Drucilla Cornell (1992) has addressed these questions through a combination of deconstructive and feminist legal theory. Basing her work on a synthesis of Derrida and Emmanuel Levinas, Cornell argues that deconstruction necessarily presupposes an ethical relationship to others; deconstruction requires us not only to recognize others as others but also to be open to them and their perspectives. Thus, deconstruction contains an ethical imperative both to question our own beliefs and to understand the situation and views of others. Cornell's redefinition of deconstruction as a "philosophy of the limit" attempts to make sense of Derrida's claim that deconstruction is justice by

arguing that justice is an unpassable difficulty or paradox for any legal system rather than a transcendental ideal.

My own work (Balkin, 1994) argues that Derrida's attempted equation of deconstruction and justice is unsatisfactory. In order for deconstruction to be used for purposes of social and political critique, it has to presume a transcendental value of justice – an inchoate and indeterminate longing for justice that is never fully articulated or satisfied in human law, culture, or convention. Deconstruction is useful as a critical tool because it exposes the gap or inadequation between the transcendental value of justice and its concrete instantiations in human culture.

Pierre Schlag offers a marked contrast to these approaches; he emphasizes deconstruction's antihumanism. Schlag criticizes CLS's use of deconstruction as an intellectual tool employed to promote a normative agenda (Schlag, 1990a, 1991b) because it assumes that CLS scholars choose how deconstruction can be wielded. In fact, deconstruction is not a tool but a predicament: legal doctrines are already deconstructed without any human choice or intervention. Moreover, Schlag argues that all normative legal theory – legal theory that purports to offer normative prescriptions about how society should be organized and regulated – is intellectually bankrupt. The rhetorical style of normative legal scholarship assumes that people are in control of what and how they think about normative problems, and that people offer normative directives to others who are persuaded by their cogency and coherence, and who carry them out because of the normative justifications given. Poststructuralism has already shown that this picture of human agency and human reason is inadequate; the goal of legal scholarship should henceforth be to study the stylistics of legal rhetoric and how they have contributed to the perpetuation of the fantasy of rational autonomy (Schlag, 1990b, 1991a).

At first glance, Schlag's attack on normative legal scholarship seems puzzling and even self-defeating, because Schlag appears to be employing the rhetorical form of normative prescription in his own writing. Moreover, if legal scholars are socially constructed to articulate their scholarship in normative rhetoric, why does their obedience to this social construction pose any difficulty? Schlag's position would have critical bite only if he assumed that there is something wrong about this way of thinking from which legal scholars should and could be liberated. In fact, Schlag's point seems to be more sociological and predictive than critical. He thinks that social forces are causing the enterprise of normative legal discourse to disintegrate before our eyes; hence he predicts that legal scholarship will be increasingly unable to engage in normative legal dogmatics without an increasing sense of dislocation (Schlag, 1990b, 1991a).

As the examples in this essay suggest, deconstruction has proven to be a surprisingly adaptable concept serving many different purposes and supporting many different types of legal scholarship. It first appeared in the American legal academy as an esoteric weapon of critical legal scholars. By the 1990s, it had been instrumental in the rise of postmodern jurisprudence and some critiques of critical legal studies. Along the way, it has fostered debates about ideological and social construction, the connections between poststructuralism and justice, the role of rhetoric in legal thought, the nature of feminine identity, and the health and direction of normative legal scholarship. The deconstructive dictum that "iterability alters" seems to apply particularly to deconstruction itself, for the meaning and importance of deconstruction in legal theory has

continually changed as it has been employed in different contexts and situations. As a result, its future and its future applications in the legal academy remain – as a deconstructionist might say – indeterminate.

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## Law and Society

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Law and society is a potentially boundless subject. There are no widely agreed upon definitions of “law” or “society.” When then these terms are conjoined, the opacity of reference is magnified. The very phrase law *and* society, moreover, strikes some scholars as inapt because law is a thoroughly social phenomenon embedded within society, not something that stands apart in a relationship *with* society.

In the United States, “law and society” is the label for an academic movement or field with roots that trace back to sociological jurisprudence and legal realism of the early twentieth century (Friedman, 1986). Major contributions have come from legal sociology, legal anthropology, legal history, and secondarily from political science, psychology, and behavioral economics, leavened with input from social theory, political theory, and legal theory. What unites the field across these disciplines are a shared commitment to the social scientific (or empirical) study of law, an intellectual home provided by the Law and Society Association, and a network of like-minded scholars (many with liberal political views). In negative terms, scholars in the field eschew a primary or exclusive focus on legal doctrine.

The expansive scope of the field can be seen in the range of topics covered in “law and society” books: social order, social control, social organization, social and legal evolution or change, dispute resolution, social norms, regulation, law in action, ideology, inequality, power, punishment, legal consciousness, legal culture, structuring of communities, legal profession, critical theory, law and economic relations, and legal sociology (see, e.g., Schur, 1968; Friedman, 1977; Hunt, 1993; Cotterrell, 1994; Abel, 1995; Sutton, 2001; Barkan, 2009; Vago, 2009). Law and society covers just about everything about law – except for legal doctrine in isolation – and law is implicated in just about everything in society, producing a field without boundaries or settled content.

### A Mirror of Society that Functions to Maintain Social Order

A full review of the law and society literature is impossible in an essay of this length. Instead, to convey a broad sense of the basic themes within the field, I will explore the implications of a widely held notion: law is a mirror of society that functions to maintain social order (Tamanaha, 2001).



Two distinct propositions are contained within this notion. The first proposition is the mirror thesis: “Law reflects the intellectual, social, economic, and political climate of its time. Law is inseparable from the interests, goals, and understandings that deeply shape or comprise social and economic life. It also reflects the particular ideas, ideals, and ideologies that are part of a distinct ‘legal culture’ – those attributes of behavior and attitude that make the law of one society different from that of another” (Vago, 2009, p. 3). Baron de Montesquieu’s *The Spirit of Laws*, written in the mid-eighteenth century, provides the seminal articulation of the mirror thesis. He argued that law is, and should be, tailored to the particular customs, manners, religion, commerce, and political system, to “the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives” (Montesquieu, 1991, p. 7). Another famous version of the mirror thesis was set forth in Henry Maine’s *Ancient Law* (1861). Maine (1986, p. 164) argued that ancient society revolved around families, aggregated into clans and tribes. Primacy was accorded to the community; law was based upon the status of person within the group. In modern society, in contrast, individuals have primacy and arrange their own affairs; law is based upon contract. “Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up on the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals” Maine (1986, p. 164). As society shifts from the primacy of the family or community to the primacy of the individual, the law shifts from status to contract. Legal evolution is an integral aspect of social evolution, each mirroring the other.

The second proposition identifies the function of law: “The paramount function of law is to regulate and constrain the behavior of individuals in their relationships with one another” (Vago, 2009, p. 10). This proposition, uttered innumerable times by philosophers, jurists, and social scientists, has ancient roots. Aristotle (1988, p. 162) declared that “For law is order.” The celebrated judge Benjamin Cardozo (1924, p. 140) held that “[l]aw is the expression of the principle of order to which men must conform in their conduct and relations as members of society.” Iredell Jenkins (1980, p. 10) wrote that “the best of all evidence of the close association of these ideas is found in the fact that the expression *law and order* has virtually ceased to be a phrase for us and has become a single word.”

These two propositions are integrally connected. The very fact that law mirrors society, it is often said, is what makes law *effective* and *legitimate* in functioning to maintain social order. Because law reflects and bolsters prevailing social norms, the bulk of behavior conforms to these norms without the need for legal sanction, allowing law to conserve resources and maintain efficacy. Every time law steps in to enforce the norms of social order, it vindicates and helps define the norms adhered to by the populace. The citizenry view the norms enforced by law as their own products, reflecting their way of life, manifesting their consent. Law, in turn, claims that citizens owe it obedience because it is doing their work, preserving their norms, constituting their way of life, keeping their order, allowing them to pursue their projects and enjoy life in safety and security.

One of the most influential arguments that law is a reflection of society that functions to maintain social order was presented by Emile Durkheim. Durkheim (1973, p. 67)

labeled primitive societies “mechanical” because they are characterized by a “collective consciousness” – common beliefs and practices that infuse all aspects of social life. Law in this setting is repressive because disruptions of social order are threats to the group as a whole. Modern societies, in contrast, are characterized by a division of labor in which people engage in specialized activities each with their own sets of beliefs, practices, and values. Shared values, while still present, have receded in scope and focus on the relations between individuals (pp. 69–85). Law is oriented toward restitution to repair disruptions in these relations. Modern societies are “organic” in that each part provides an essential function for the whole. Law integrates organic modern society by providing new binds that replace the normative ordering that was lost through the diminishment of the collective consciousness.

A more elaborate argument along the same lines has recently been propounded by the preeminent contemporary philosopher Jurgen Habermas (1996, pp. 66–81). “Today legal norms are what is left from a crumbled cement of society,” Habermas claims (1999, p. 937), “if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces.” In this view, law is more than just a reflection of social relations: it undergirds social relations, it coordinates social behavior, it integrates different components of society, and, ultimately, it is what keeps modern society hanging together and humming along.

### Law as Social Ordering

The notion that law is a mirror of society that functions to maintain social order is easily transposed into the notion that *what maintains social order is law*. Bronislaw Malinowski’s *Crime and Custom in Savage Society*, an early twentieth century classic of anthropology, took this approach. Law among the Trobriand of Melanesia, Malinowski (1926, p. 14) argued, was not to be found in “central authority, codes, courts, and constables,” but rather in social relations. As he put it, “The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are arranged into chains of mutual services, a give and take extending over long periods of time and covering wide aspects of interests and activity” (p. 76).

In the same period, the pioneering legal sociologist Eugen Ehrlich (1975, p. 24), working in the hinterlands of the Austro-Hungarian Empire, laid out the same basic thesis: “It is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of courts or other tribunals.... the law is an ordering.” Ehrlich argued that the normative ordering of the many associations (family, clubs, businesses, the state, etc.) that course through society provide the foundation for social order. “A social association is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them” (p. 39). “Living law” was the label Ehrlich famously gave to the norms actually observed in social life, norms produced by multiple, coexisting sources. “The living law is the law which dominates life itself even though it has not been posited in legal propositions” (p. 497). Ehrlich

recognized that state legal institutions (legislatures and courts) are important sources of law, but insisted that they are not the only sources.

Malinowski and Ehrlich opened up an illuminating perspective on law and society. But their view of law suffers from a flaw that makes it unacceptable to critics. Legal anthropologist Sally Falk Moore (1978, p. 220) observed that “the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships.” Similarly, legal theorist Felix Cohen (1960, p. 187) remarked that “under Ehrlich’s terminology, law itself merges with religion, ethical custom, morality, decorum, tact, fashion, and etiquette.” If law is what maintains social order, as Malinowski and Ehrlich suggested, then law swallows up all forms of normative order.

Several important lessons about law and society emerge out of this analysis. A variety of sources contribute to the normative ordering of society, many of which do not comfortably fit the label “law.” Furthermore, what is typically understood to constitute “law” – codes, courts, constables, and sanctions – is not necessarily the most influential source of social order. A great deal of social intercourse is arranged, coordinated, and maintained in a variety of ways that do not involve legal institutions: through habit, customs, practices, moral norms, institutionalized roles, cognitive frameworks (internalized ways of seeing the world), structural constraints (limited choice of ends and limited available means), reciprocity, incentives, self-esteem, desire for the praise of others, self-interest, altruism, and more.

In addition, contrary to the import of the mirror thesis, the official law – the law declared by courts or set forth in legal codes – is not necessarily a mirror of the society it purportedly governs. Official Austrian law did not match prevailing social norms in the region Ehrlich studied. This disconnection between the law and social life is not unusual. A mismatch often exists, for example, when legal institutions or norms are transplanted from one system to another (through imposition or voluntary borrowing), or when an overarching political authority enacts a uniform law that governs diverse populations, or when the norms of one group receive official sanction to the exclusion of the norms followed by other groups in the society. These conditions prevail today in the many nations that contain populations with different ethnic groups, languages, cultures, or religions. It exists in the immigrant communities that pocket large Western cities, as well as in the blighted areas of urban megalopolises around the world controlled by gangs or community organizations, where legal officials have little presence or power. The social ordering capacity of official state law in situations like this can be negligible.

## The Institutional Form of Law

Many theorists and social scientists who study law assert that the defining feature of law is its institutionalized form (MacCormick, 2007). In primitive society, under this view, social order was maintained through an undifferentiated primordial soup of habits, customs, and moral norms – law as such did not exist. Authority was exercised by fathers, chiefs, warrior leaders, or councils, holding their positions by tradition,

charisma, or raw power, rendering ad hoc decisions to deal with disruptions. Law arises when institutions develop to declare, enforce, and apply norms. The emergence of law in its institutionalized form marks a fundamental stage of social differentiation (Parsons, 1966, pp. 25–6).

Max Weber (1954, p. 5), an acclaimed giant in sociology, articulated an often quoted institutional account of law:

An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose.

Moral norms and customs differ from law “by the absence of a *staff* holding itself ready to use coercion” (p. 5). Weber, who was trained in law and initially taught law, produced this account by stripping away the trappings of state law to reveal its institutionalized core. The legal system is the “staff of people” standing ready to avenge violations of norms – encompassing criminal actions in response to social disorder or crimes against persons and property, as well as civil actions between individuals in response to disputes that arise out of social interaction.

When law is defined as an institution that enforces norms, it makes sense to speak of law *and* society because the institutional form of law can be isolated upon and examined in connection with its surrounding social context. “Law” encompasses the full gamut of actors whose conduct revolves around and gives rise to legal institutions, including police and other members of the coercive apparatus (parole officers, jailers, and so on), along with the groups that manage legal norms and processes: lawmakers (executives, legislators, administrative agencies), courts, lawyers, and law professors.

This perspective on law generates a host of questions, including: Who declares legal norms and how are these norms selected for recognition (securing the backing of the coercive legal apparatus)? Do legal actors really enforce stated legal norms? How do coexisting legal institutions relate to one another (in coordination, in conflict)? What impact does law have on individuals and groups within society? Who invokes the legal apparatus and why? Whose interests are served by the actions of legal institutions? How do people in society react to the actions of legal institutions (compliance, avoidance, indifference)? What do people know about law? How do they view the law (what is their opinion of police, lawyers, or courts)? Do they seek legal assistance or do they resort to other mechanisms to deal with problems? Some of these questions focus on actors *within* legal institutions. Other questions focus on how the actions of legal institutions relate to the social environments in which law operates.

A great deal of law and society research revolves around these questions. A long-standing theme in the field is the gap between officially declared norms (the “positive law”) and what legal officials actually do. Two mundane illustrations will suffice: every large city in the United States contains areas in which prostitutes openly ply their illegal trade, and unlicensed street merchants are tolerated on the sidewalks of many cities. Police and prosecutors frequently do not bother to enforce legal prohibitions of this sort except for ritual sweeps or to put on a political show (after which things go back to normal). The law in the books is not the same as the law in action (Pound, 1910; Stone, 1966). Various reasons explain these gaps: obsolete laws are often ignored by legal

officials; legal norms may be declared mainly for symbolic purposes with little expectation of enforcement; legal official may dislike certain legal norms and undermine them; it may be futile or costly to attempt to enforce laws that go against prevailing social views or practices; the applicable law in given cases may lead to unjust or socially detrimental results, which legal officials circumvent; legal officials may espouse an idealized set of legal norms for the purposes of external legitimacy.

A related theme is the gap between official legal norms and the norms followed in social life. This is not about the occasional violations that all normative systems experience; it is about systematic nonconformity, such that the law is little more than words on paper. Common sources of these gaps were identified in the earlier discussion of Ehrlich. Two additional sources of such gaps are obsolete laws that no longer match prevailing social norms and laws enacted in a conscious effort to change prevailing social norms. This gap brings home the lesson that the normative center of gravity rests with ongoing social behavior more so than with norms declared or enforced by official legal institutions.

Another theme focuses on situations in which people forgo resort to legal institutions. Merchants in long-term business relations, communities where reputation is important, networks of people with interlinking ties (including families and friends), long-term neighbors, and more generally people in relationships that place a premium on the consensual resolution of disputes, may prefer to resolve matters without the participation of legal institutions (Macaulay, 1963; Ellickson, 1989). Legal processes are costly and can entail lengthy delays, lawyers seize control of the situation away from the parties (potentially exacerbating the dispute), the applicable legal norms might not match the norms preferred by the actors, the legal system can produce winners and losers rather a reconciliation, and resort to the law can be perceived as a breach of trust for calling upon an outsider to interfere in an internal problem.

Focusing attention on the actual behavior of legal institutions exposes practices that are inconsistent with the image presented by the law. Consider a few well-known examples from the United States. Law is presented as a neutral system that applies the law equally to all, but studies have shown that wealthy repeat litigants can enjoy a higher rate of success in legal actions than occasional litigants without resources or legal experience (Galanter, 1975). The high cost of legal services erects a barrier against access to law for many middle-to-low income citizens. Wealthy criminal defendants can retain a team of lawyers to fight for their interests, while poor criminal defendants get overburdened public defenders who barely speak to clients and do little preparation. African-Americans in various ways are treated worse than whites in the criminal justice system – from being stopped or searched by police at a disproportionately high rate to receiving harsher punishment. “For example, when a black person is convicted of killing a white person in America, the risk of capital punishment far exceeds every other racial combination” (Vago, 2009, p. 23).

The actual operation of legal institutions does not comport with standard assumptions in other ways as well. An overwhelming proportion of criminal cases are handled through plea bargaining; although putative adversaries, prosecutors and defense attorneys routinely cooperate to efficiently process an assembly-line mass of people through the system. Judges are typically portrayed as presiding over criminal and civil

trials, applying the law and resolving disputes. But this too is mostly a mirage. A recent study by Marc Galanter (2006, pp. 6–12) revealed that a remarkably small fraction of cases are actually terminated through a trial: at the federal level, only 1.7 percent of civil cases and 4.3 percent of criminal cases (with similarly small numbers in state cases). The vast majority of criminal and civil cases are resolved through bargaining; judges spend much of their time in a bureaucratic rather than judicial mode, managing cases, encouraging (or pressuring) parties to settle, and rubber-stamping resolutions brought to them ready-made.

The general image of the legal system as functioning to enforce norms misses important aspects of the underlying reality. Actors throughout the system routinely exercise discretion in ways not captured by the image of norm enforcement: police let violators off with a warning, prosecutors shape charges or choose not to bring them, judges are influenced by equitable or other considerations that bear against the application of the rules. The very notion of a “legal system,” moreover, obscures internal tensions among or between various legal actors. Legal authorities may be fragmented, uncoordinated, or have potentially conflicting mandates (for example: labor regulators protect illegal aliens in the workplace and tax authorities want these workers to pay income taxes, so both agencies assist them in various ways, while immigration authorities want to capture and deport them). Police, prosecutors, lawyers, and judges have their own separate roles and practices that sometimes clash. Police arguably would be more effective in maintaining social order if they were allowed to summarily arrest and punish perceived violators, for example, but their actions are restricted by legal rules – rules which courts enforce *against* the police.

### The Semiautonomy of Legal Knowledge and Processes

Another major contribution from Weber is his argument (1954, pp. 61–4) that law in modern society is a highly specialized body of knowledge and processes – what he called formal rational legality – uniquely suited for capitalism, and which creates a distance between the operations of law and lay understandings. Decision makers in substantively irrational systems, he argued, make outcome-oriented ad-hoc decisions based on a variety of nonlegal sources and considerations, often accessible to others within the community. Decisions in formal rational legal systems, in contrast, are based upon the logical application of a comprehensive body of legal rules to the case at hand. Rule-based decisions facilitate capitalism by enhancing certainty and predictability, securing property and guaranteeing commercial transactions.

Legal professionals control the development of legal knowledge – specialized legal language with technical meaning – rationalize legal rules and concepts, and prepare new legal regimes. Lengthy and expensive legal education is required to gain access to this body of knowledge and sets of legal practices – the totality of which amounts to a professional “legal culture” (Nelken, 2004). The monopolization of legal knowledge provides legal professionals the means and opportunity to restrict access to legal services in ways that serve their own economic interests. Law is the primary apparatus of coercive power in public and private contexts, and lawyers are fee-extracting gatekeepers.

Legal language, rationalization, and fidelity to legal practices and procedures, cloak the law in mystery for outsiders, and produce results that can be at odds with social understandings:

To a large extent such conflicts [between lay expectations and legal outcomes] rather are the inevitable consequence of the incompatibility that exists between the intrinsic necessities of logically consistent formal legal thinking and the fact that the legally relevant agreements and activities of private actors are aimed at economic results and oriented toward economically determined expectations. ... But a “lawyers” law has never been and never will be brought into conformity with lay expectations unless it totally renounces that formal characteristic which is immanent to it. (Weber, 1954, pp. 307–8)

Legal professionals form a culture that spans different societies and systems, moreover, sharing knowledge, transferring styles and legal regimes from one body of law to another (Watson, 1983), occasionally creating transnational bodies of law.

A variety of factors keep the law closely tethered to society, notwithstanding the specialization of legal knowledge and processes. Lawyers, judges, and legislators are informed by and share in prevailing social views, which their legal products reflect; law deals with cultural, political, and economic problems thrown up by society. Many jurists have noted that judges (subconsciously and consciously) are influenced by, and seek to achieve, the community welfare or sense of justice (Cardozo, 1921). Popular views influence law through the force of public opinion on legal actors, the electoral accountability of legislators and judges, and the direct participation of grand jurors or juries within the system. A jurist observed, over a century ago, that to understand legal results one must go beyond legal doctrine to study “the social and political environment of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue” (Tiedeman, 1896, p. 20). The creation of law, as well as its enforcement and application, are driven and fed by contesting social forces seeking legal recognition or support (Jhering, 1915). Although law has its own internal imperatives, it is never wholly detached from society: legal officials, litigants, norms, and problems brought to law, all have manifold and deep social connections.

Furthermore, theorists in the United States have noted that the law in the last few decades has evolved away from the formally rational system described by Weber to become more responsive to social purposes and goals (Unger, 1976; Nonet & Selznick, 1978). Open-ended standards like reasonableness and fairness are now ubiquitous; judges openly make policy decisions and are called upon to maximize social wealth or efficiency (Posner, 2008). Decisions of this sort are not strictly rule bound and are not limited to specifically legal norms. Judges consider social consequences and strive to advance social interests – orientations that keep law in closer sync with prevailing social forces.

Another ongoing change in the United States has the potential to indirectly influence legal knowledge and processes in ways that produce a more fulsome reflection of the broader society. Prior to the 1960s, law schools and the practice of law were largely the preserve of white males. Now law schools are evenly divided between male and female students, with significant numbers of minority students, and the complexion of the legal profession has changed as a result (although barriers to professional

advancement of these groups still exist). Critical feminist theory and critical race theory scrutinize legal knowledge and processes in ways that were previously ignored, bringing to light inequities or bents in the law. Real questions remain, however, about whether or to what extent legal knowledge and processes will be influenced by the influx of these new perspectives into the legal profession; or whether the indoctrinating, conforming effect of legal education and the practice of law will wash away most of this influence.

To understand law and society, one must appreciate that social influences have a constitutive effect on law; law has a constitutive effect on society; but large and small spaces, gaps, and disjunctions are omnipresent.

## Legal Pluralism

Law and society scholars increasingly are paying attention to the phenomenon of legal pluralism: a multiplicity of legal orders that exists in every social arena (Merry, 1988). There are village, town, and municipal laws of various types; there are state, district, and regional laws of various types; there are national, transnational, and international laws of various types. An array of courts or tribunals supports these bodies of law, often lacking explicit coordination with one another. There are soft forms of law with binding effects, like codes of conduct, model practices, standard contractual terms for business transactions and employment, and uniform workplace rules. In addition to these familiar bodies of laws and rules, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing (security in gated communities, universities, malls, public entertainment, and corporate headquarters) and private courts (arbitration), to privately run prisons, to the new *lex mercatoria*, a thriving body of transnational commercial law created through private law making by lawyers and parties.

The coexistence of multiple legal orders is an old phenomenon (Tamanaha, 2008). The Medieval period was marked by a rich tapestry of legal pluralism, which was reduced in the early modern consolidation of state power. The output of lawmaking bodies exploded at the dawn of the twentieth century and continued apace since, reaching ever deeper into social, economic, and political life – penetrating contexts that official law did not previously address. In the late twentieth century, the state devolved to other bodies limited aspects of its hard earned monopoly legal power: acceding some legal authority to international and transnational bodies (the European Union, the World Trade Organization, the International Criminal Court, etc.) or granting greater autonomy to internal subregions; and allowing or encouraging private bodies, like private security or arbitrators, to take over some of its traditional legal activities. At the same time, the global spread and penetration of capitalism (finance, production, and markets) and the massive global movement of people in pursuit of work (from rural areas to mega-cities, from one nation to another) have multiplied legal pluralism at two levels. The transplantation of economic-related legal norms from advanced capitalist systems to developing societies has brought legal conflict and change to the latter; while migrants to cities and emigrant communities often reestablish and live according to



their own legal regimes (particularly religious norms and institutions) in their new locales.

What makes this pluralism noteworthy is not merely that it involves multiple uncoordinated, coexisting, or overlapping bodies of law and normative regulation, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations. This potential conflict can generate uncertainty or jeopardy for individuals and groups in society, who cannot be sure in advance which legal regime will control their situation. For example, polygamy is accepted in the Muslim religion and men have high complete authority over divorce; serious questions about the applicable law have arisen in the United Kingdom over the rights of a second wife or of a Muslim woman in a divorce. This state of conflict also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims, pitting the norms and resources of one legal regime against another. Legal authorities are confronted with serious challenges in these situations, for it means they must deal with rivals – rivals that can be more powerful in selected areas or ways.

### Law and Society in the Twenty-First Century – Law as an Instrument

The contemporary field of law and society has been enriched, as well as pulled in different directions, by three roughly distinguishable coexisting orientations. A dominant objective of one group of contributing scholars, especially legal sociologists, has been to advance a science of society. For these scholars, law deserves a key place in the analysis owing to its pivotal role in society, but their perspective on law is thoroughly shaped by the objectives and demands of social science (see Black, 1976). A second group, with roots in sociological jurisprudence, labors to produce knowledge about how legal institutions actually operate (past and present). Some of these scholars are motivated by an intrinsic interest in gathering knowledge on the subject; others hope this knowledge will help to design better legal regimes to more efficiently achieve social goals. Social scientific research methods are enlisted in the service of these aims. A third group of scholars, working in a leftist critical vein, are dedicated to exposing the ways in which law systematically furthers the interests of powerful groups in society to the disadvantage of others.

Various tensions exist between these orientations (Tamanaha, 1997). Members of the first group reject the research orientation of the second group as too narrow for a science of society, and reject as unscientific the critical scholars' explicitly political agenda. The second group has scant interest in the scientific concerns of the first group. The critical third group has charged scientism (of the first group) and studies of legal efficacy (of the second group) with serving to facilitate legal oppression. Members of all three groups share concerns about social justice, but they have markedly different commitments to science, research, and law.

These tensions have not proven disruptive to the development of knowledge in the field. This essay has drawn insights about law and society from each. However, I will

close with a few observations about how the social scientific roots of the field erect a framework that is too constraining to accommodate the full range and implications of legal activity within society today.

The classic works in sociology were written from the mid-nineteenth century through the early twentieth century, when the dominant concern of social theorists was to come to grips with the emergence of industrialized, urbanized, market-based mass society – a society that was alarming in its sheer size, complexity, and poverty (side-by-side with pockets of luxury), visited by frequent bouts of economic crisis and political upheaval, overflowing with teeming, unruly, unkempt masses posing a constant threat of disorder. Their quest was to understand society, social order in particular; a favorite technique at the time was to contrast modern society with its (imagined) predecessors. This orientation produced two dominant themes: the evolution of law and society, and the role law plays in social organization. Notice that the question posed in this inquiry is what keeps *society* together – with law filling a crucial role in this explanation. Succeeding generations of theorists continued to operate within the same framework, taking it in different directions. Theorists working in a Marxist vein focused on (class) conflict within society to combat the previous emphasis of social theorists on consensus, or they pointed out the dysfunctions of law. But this oppositional work still largely operated within the confines of the traditional framework.

The problem is that a great deal of what law does, or is used to do, cannot be captured in these terms. Consider that the law brings to life and shapes the nature and existence of the most important actors in modern society: corporations. Corporations are legal creations. Similarly, the infrastructure of government is constructed by law, and law serves as a primary mode of government communication and action. Law, to offer one multisided example, is the mechanism used by government to create money (legal tender), to issue money (through the Federal Reserve), to acquire money (taxes), to borrow money (bond issues), and to spend money (appropriations). None of this essential legal work is captured by the notion that law is a mirror of society that functions to maintain social order because these legal activities are not immediately about maintaining order, but about creating things and doing things. This activity has little to do with enforcing customs and morality, or resolving disputes, the traditional foci of law and society. An essential aspect that has never fit comfortably with the law and society framework is the rule of law – legal constraints on government and law (Tamanaha, 2004). Attention to social order looks downward at social behavior rather than reflexively at the impact of law on law itself. The social ordering framework, furthermore, cannot easily accommodate the ways in which the law is used by individuals and groups as a weapon to fight other individuals and groups, or to fight the government, or to advance particularistic objectives or achieve goals. The law in these situations is not resolving disputes but rather is a crucial part of the disputing terrain, with combatants fighting to control and enlist the law in their battles.

Three particular developments (noted by Weber) have combined to create a social manifestation of law that exceeds former understandings: the development of standing bureaucratic legal institutions with ample material resources; the ready capacity and unconstrained willingness to declare new laws; and the view that law is an instrument. This potent combination has transformed the types and scope of legal activities. Law in contemporary society is an instrument, a tool or mechanism for doing things, an

empty vessel that can be filled in any way desired to serve any end desired (Tamanaha, 2006). Legal institutions in modern societies are resources of power which individuals, groups, corporate actors, and government actors utilize in a multitude of ways to advance a multitude of objectives.

Law operates in ways that maintain social order, to be sure, and this important function merits the substantial attention it garners within the field. Social ordering is not the only use or function of law, however, and perhaps it is not even the predominant activity of contemporary law. Characterizing law in terms of this function makes sense in connection with simple societies with rudimentary forms of law and legal institutions. But today law is a consummately flexible, multifunctional, multipurpose, multiuse way of doing things. To understand the full range and complexity of law in contemporary society, the long dominant social ordering perspective must make room for a focus on the extraordinary variety of applications of this tool.

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## Postmodernism

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Postmodernism is a topic that attracts attention. In fact, it probably attracts too much attention or, one might say, attention of the wrong sort. The discussion of postmodernism has fallen into the hands of those who use it as a vehicle for the propagation of specious ideas, principally about the relationship of language to the world and mind to culture. Often identified with recent French philosophy, in particular deconstruction (see Article 23, deconstruction), postmodernism has by and large failed to enjoy the sort of careful attention an analytic treatment provides.

And what is the relevance of postmodernism to legal and political theory? This entry is devoted to this question. Before I discuss postmodernism and legal theory, I shall advance an analytic account of postmodernism. This account will, I hope, lay the foundation for a discussion of specific philosophical questions in legal theory, questions which are of interest in philosophy generally, and legal theory in more particular ways. Following that discussion, I will discuss the concept of the Postmodern State, specifically as that notion is used in the context of the theory of the evolving State and its implications for security and trade.

### Modernism

In discussing postmodernism, it is helpful to observe two dichotomies: modern/postmodern and modernity/postmodernity. The modern/postmodern (modernism/postmodernism) dichotomy identifies philosophical positions (discussed below). By contrast, postmodernity is an epoch, one in which the defining features of modernity are no longer part of the terrain of human existence. Postmodernity is exemplified in culture by the presence of “pastiche” – the juxtaposition of unrelated elements in various cultural forms. One sees this point most easily in contemporary discussions of architecture. Whether or not we are in postmodernity is, of course, very much open to question. From the point of view of legal theory, this entry is concerned with the first of these dichotomies – that between modernism and postmodernism.

Modernism is the form of thought identified with the spirit of the Enlightenment. Enamored of the power of science and its attendant control over nature, philosophy in the modern age replaced the medieval emphasis on custom, ritual, authority, and

cosmology with a self-conscious preoccupation with legitimacy, progress, civility, rationality, and human emancipation.

Modernism is exemplified by three axes that, taken together, provide a three-dimensional perspective (Murphy & McClendon, 1989, p. 191):

- 1 *Epistemological foundationalism*. This is the view that knowledge can only be justified to the extent it rests on indubitable foundations;
- 2 *Theory of language*. Language has one of two functions – it represents ideas or states of affairs, or it expresses the attitudes of the speaker;
- 3 *Individual and community*. “Society” is best understood as an aggregation of “social atoms.”

These three components of the modernist picture should not be understood simply as parts of a whole. Each represents not an idea or element in a picture but an axis that, when taken with the others, enables one to see a broad range of thinkers as all-of-a-piece.

As the label suggests, epistemological foundationalism is an epistemological axis, with foundationalism at one end and skepticism at the other. The representative rationalist foundationalist is Renè Descartes. In essence, Descartes saw the problem of knowledge as a problem about certainty. Separating belief from illusion required a method. For this, Descartes invented the “method of doubt.” The process of validating belief required that the belief be submitted to an inner (mental) tribunal for interrogation. Ideas that survived this process of questioning earned the label “clear and distinct.” The emphasis on method and validation led, not surprisingly, to the valorization of mathematics, science, and geometry, for it was in these areas that Descartes found that which was most certain: axiom, system, and deduction.

The other foundationalist approach to knowledge is empiricism, which replaces the rationalist emphasis on the formal relations between and among ideas with an appeal to our ordinary, commonsense understanding of experience. When we see an object, we have a retinal impression of a thing which exists in space and time or, to put it more colloquially, we have an experience of another body. Providing an explanation of such an experience (for example, how it is possible, what is involved in “having” the experience) without resort to anything “in” the mind is the gravamen of empiricism. Empiricism is foundationalist in that, for the empiricist, the basis of all knowledge of the world is sense impressions.

Skepticism is not necessarily tied to either the rationalist or the empiricist account of knowledge. In other words, it is a mistake to see the skeptic as one who denies the rationalist or the empiricist account of knowledge. The skeptic does not deny that what is described (on either account) as knowledge is in fact knowledge. The skeptic denies that we ever have knowledge. For example, David Hume believed that, although we had to assume its existence, we could not prove the existence of the external world. All we have to base our knowledge of causation on is a constant conjunction of sense impressions. Sense impressions – raw input from the outside world – are the only available “ground” of knowledge. In sum, knowledge on the modernist view is foundational (rationalism or empiricism): for modernists, the only question is whether the

foundations are themselves adequate and whether the “logic of construction” from foundations is itself adequate.

The two poles of the language axis stand for the two functions of language: language refers to objects in the world, or is expressive of the attitudes, preferences, or emotions of the speaker. One end of the pole, that of representationalism, is closely linked with epistemological foundationalism. If language is a medium for referring to objects in the world, then knowledge of what something is can be gleaned from the object’s representation in language. The point of studying language is to study the ways in which words refer to things.

In their philosophical heyday, modernist philosophers advanced theories of language that saw words as place holders or stand-ins for things. In the twentieth century, the work of Ludwig Wittgenstein before 1929 stands as the paradigmatic expression of the program of “logical atomism,” which emphasizes the reduction of the elements of sentences to their constituent parts in the world.

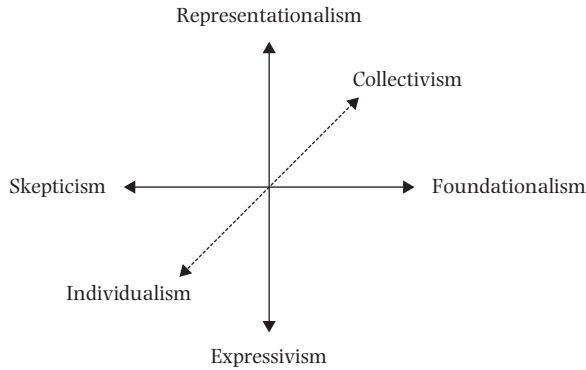
If language is not a means of referring, then what else can it do? If one accepts the claim that language does refer to things in the world – the representationalist view – then what is one to do with ethical discourse? Logical positivists recommended that ethics, together with the whole of “continental philosophy,” be dismissed as “bad poetry.” The only alternative was to develop an account of language as a mode of personal expression. Thus, according to logical positivists, moral judgments are not “true,” do not “represent” the world; rather, they are expressions of preference, attitude, or feeling.

Now to the third modernist axis. To the individualist, society is composed simply of “social atoms,” each endowed with needs and desires the existence and identity of which are known (internally) to each. Political economy is best understood from the perspective of individual motivation. All talk of public values, group norms, or “structures” of all manner are eschewed. Methodological individualism is the explanatory model for understanding.

The collectivist (for example, Marxism: see Article 22, marxist theory of law) counters that far more foundational than the individual is the class to which that person belongs. Class is one of many constitutive social facts which shape the individual – make her what she is. At its most radical expression, the individual is not in control of her fate, she is produced by forces beyond her control. At the individual level, agents are capable of making free and rational decisions with respect to their own preferences only to the extent they are able to become aware of and break free from the structures that shape their choices. Taken together, these three axes give us the picture of modern thought shown in figure 25.1.

## Postmodern Thought

Postmodern thought is any form of reflection that departs significantly from one or more of the three axes of modernist thought. Because different disciplines concentrate on one axis to the exclusion of others, departures from modernist premises are best viewed on a discipline-by-discipline basis. For example, modernist political theory is a



**Figure 25.1.** Three axes of modern thought. *Source:* Murphy & McClendon, 1989, p. 196.

struggle between individualists at one end (for example, Hobbesians) and collectivists on the other (for example, Marxists or structuralists). The specific struggle is over the fundamental ontological unit: the individual or the group. The postmodernist departure is to reject those two categories in favor of “practices” as the basic unit of social analysis (Schatzki, 1996).

Before turning to law, let us consider how philosophy in the mid-twentieth century took a postmodern turn. The turn occurred in a place few would have thought to locate it – that of analytic philosophy. The work of the philosopher and logician Willard Van Orman Quine represents what in time will be seen as a radical break with previous thought.

In Quine’s view, the modernist conception of knowledge as a process of building from the simple to the complex, and the concomitant notion that truth is a matter of resonance between word (concept) and world, could not be maintained. (In scientific practice, Quine thought, the conduct of research belied this conception of knowledge.) Quine substituted holism for foundationalism. On a holist account, the truth of any one statement or proposition is a function not of its relationship to the world but of the degree to which it “hangs together” with everything else taken to be true. Quine stated his view this way:

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profound laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Reevaluation of some statements entails reevaluation of others, because of their logical interconnections – the logical laws being in turn simply certain further statements of the system, certain further elements of the field. Having reevaluated one statement we must reevaluate some others, which may be statements logically connected with the first or may be the statements of logical connections themselves. But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to reevaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly, through considerations of equilibrium affecting the field as a whole.



If this view is right, it is misleading to speak of the empirical content of an individual statement – especially if it is a statement at all remote from the experiential periphery of the field. Furthermore it becomes folly to seek a boundary between synthetic statements, which hold contingently on experience, and analytic statements, which hold come what may. Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system. (Quine, 1980, pp. 42–3)

Quine's picture of knowledge of the external world changed the way people thought about the construction of knowledge. The breakthrough was to see knowledge not as a matter of foundations – building up from bedrock – but a function of one's being able to move about within a holistic web (be it a web of theory or intersubjective practice). It is in the move from simplicity, reductionism, and foundations to holism, network, and totality that Quine's epistemology is rightly described as "postmodern." Quine's embrace of holism, together with his pragmatism on questions of truth, invite comparison with the second of the three aspects of modernism which are displaced in postmodernity, that of the referential theory of language.

Language has been a central concern of philosophy in this century. In a postmodern approach to language, the modernist picture of sentence-truth-world is replaced with an account of understanding that emphasizes practice, warranted assertability, and pragmatism. The principal contemporary exponent of the pragmatist approach to truth is Richard Rorty. He summarizes his position this way:

For the pragmatist, the notion of "truth" as something "objective" is just a confusion between (I) Most of the world is as it is whatever we think about it (that is, our beliefs have only limited causal efficacy) and (II) There is something out there in addition to the world called "the truth about the world" (what James sarcastically called "this tertium quid intermediate between the facts per se, on the one hand, and all knowledge of them, actual or potential, on the other"). The Pragmatist wholeheartedly assents to (I) – not as an article of metaphysical faith but simply as a belief we have never had any reason to doubt – and cannot make sense of (II). When the realist tries to explain (II) with (III) The truth about the world consists in a relation of "correspondence" between certain sentences (many of which, no doubt, have yet to be formulated) and the world itself the pragmatist can only fall back on saying, once again, that many centuries of attempts to explain what "correspondence" is have failed. (Rorty, 1982, p. xxvii)

So what can we glean from these passages from Quine and Rorty? The basic point is that the modernist distinction between two realms of discourse, the factual and the expressive, cannot be maintained. If that distinction cannot be maintained, then with what are we left? Rorty's suggestion is to follow the later Wittgenstein, specifically the Wittgenstein of *Philosophical Investigations*. The task of philosophy is the perspicuous elucidation of our linguistic practices. What are the implications of this postmodern critique for law?

## Law and Postmodernism

The investigation of truth in law turns out to be the effort to describe what lawyers do with language. The modernist, referential approach preoccupies itself with the ways in

which legal language represents, depicts, and captures the world. Those who deny such a referring relation have left themselves little in the way of alternatives to relativism or crass conventionalism. We need not embrace these two unpalatable alternatives. But if jurisprudence is to be an account of what lawyers do, what is to be said of truth? Let us now turn to that question.

What postmodernism achieves is a shift from a concept of language as representation to language as practice (meaning as use). It is a move from picturing to competence, with competence being a manifested ability with and facility in a language. Of course, our immediate concern is with the special language of law.

Law is an activity driven by assertion. As Dworkin puts it so well, propositions of law – “statements and claims people make about what the law allows or prohibits or entitles them to have” (Dworkin, 1986, p. 4) – can be quite general or quite specific. Propositions of law may range from “The Fourteenth Amendment prohibits the denial of equal protection” to “Jones has violated the motor vehicle code by exceeding the speed limit.” How in the law do we go from assertion to truth? To answer this question, we need to know something about the nature of legal argument.

Claims in law are assertive in nature. The claim “Ordinance S is unconstitutional” purports to assert a truth. To ask what it is about S which prompts one to assert its unconstitutionality is to ask for the ground of the claim “S is unconstitutional.” Suppose S states the following requirement: “Any assembly of 12 persons or more requires a parade permit.” This fact is the ground for the claim that S is unconstitutional. The ground is advanced in support of the claim.

But, one might ask, what connects the ground to the claim? This is to ask how the ground is relevant to the claim. What is sought is the warrant. In the case of S, the warrant is the First Amendment to the United States Constitution. The First Amendment, which provides for the right to peaceable assembly, is the warrant that provides the connection between the ground and the claim.

Of course, the text of the First Amendment is not self-executing. There is more to the move from ground to claim than resort to a warrant. In addition to invoking a warrant, the warrant must be used in the right way. This is where the forms of argument come into play. The forms of argument are culturally endorsed modes for the use of warrants. The forms of argument are the backings for warrants.

Philip Bobbitt’s account of argument in constitutional law provides the best example of the role of argument in law. In brief, Bobbitt argues that the practice of constitutional interpretation is a matter of using six forms of argument (he refers to them as “modalities”) to show the truth of propositions of constitutional law. The following six modalities are the forms of argument in constitutional law:

- historical (relying on the intentions of the framers and ratifiers of the Constitution);
- textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary “man on the street”);
- structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up);
- doctrinal (applying rules generated by precedent);
- ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and

prudential (seeking to balance the costs and benefits of a particular rule)  
(Bobbitt, 1992, pp. 12–13)

Justification – the activity of showing the truth of a legal proposition – is a matter of employing the modalities. To be legitimate, a constitutional argument must remain within the modalities. The modalities themselves, either alone or in combination, can never be legitimate, for they are the means by which legitimacy is maintained (through their use in argument). The modalities are the constitutional grammar of justification.

Use of forms of argument to show the truth of legal propositions does not exhaust the argumentative activities of lawyers. What counts as a form of argument may itself be called into question. Additionally, lawyers debate the criteria by which they judge what is to count as an appropriate form of argument. Let us consider some examples.

Judge Richard Posner has challenged conventional beliefs about the status of facts of legislative history. Judge Posner has argued that the canons of statutory interpretation are an improper guide to the meaning of statutes because they are based on false assumptions regarding the nature of the legislative process. The basic assumption Posner calls into question is an imputation of omniscience to Congress:

Most of the canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process. The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted – though many are – and not that the legislators failed to agree on just what they wanted the statute to accomplish in the statute – though often they do fail – but that a statute necessarily is drafted in advance of, and with imperfect application for the problems that will be encountered in, its application. (Posner, 1985, p. 811)

As an example of a canon founded on the assumption of legislative omniscience, consider that of “*expressio unius est exclusio alterius*” (the expression of one thing is the exclusion of another). Posner’s point – one that is well taken – is that the canon would only make sense “if all omissions in legislative drafting were deliberate” (Posner, 1985, p. 813). As an example, Posner raises the Supreme Court’s decision in *Touche Ross & Co. v. Redington*, 442 US 560 (1979), where the Court used the canon as the basis “for refusing to create private remedies for certain statutory violations” (Posner, 1985, p. 813). Posner objects:

Whether the result in the private-action cases is right or wrong, the use of *expressio unius* is not helpful. If a statute fails to include effective remedies because the opponents were strong enough to prevent their inclusion, the courts should honor the legislative compromise. But if the omission was an oversight, or if Congress thought that the courts would provide appropriate remedies for statutory violations as a matter of course, the judges should create the remedies necessary to carry out the legislature’s objectives. (Posner, 1985, p. 813)

By calling into question certain of the assumptions of the historical form of argument, Posner turns what is normally backing (historical argument) into something which itself requires backing.

What Posner calls into question are certain of the beliefs and assumptions of the historical form of argument. Posner is not rejecting legal argument per se, nor is he putting in question any other aspect of legal reasoning. His is a quite specific and localized complaint. In fact, much of the strength of his criticism is drawn from the fact that he is able to make his points about unrealistic historical assumptions without upsetting any other part of the system of beliefs.

We must take matters one step further to complete our account of the typology of argument in law. Consider a direct challenge to the efficacy of a form of argument. Let us stay with historical argument. Together with textual and doctrinal argument, historical argument is among the most common of the forms of argument. In American jurisprudence, lawyers often ask what motivated a legislature to draft the law as they did. The focus is often on a problem, issue, or set of historical circumstances to which the legislature or Congress was responding when the legislation in question was drafted. In short, appeal to history as a guide to purpose and intent is a cardinal move in the lawyer's argumentative framework.

In *United Steelworkers of America v. Weber*, 443 US 193 (1979), the Supreme Court of the United States considered the legality of a private affirmative action plan for skilled workers. The case generated majority, concurring, and dissenting opinions. A central focus of each opinion was the legislative history of Title VII. There was much debate among the justices as to the meaning of various aspects of the record. The form of argument each employed was historical argument.

I want to consider William Eskridge's challenge to the conventional understanding of the historical form of argument at issue in *Weber*. In "Dynamic Statutory Interpretation," Eskridge describes two perspectives that are usually brought to bear in the interpretation of statutes:

- (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective);
- (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective). (Eskridge, 1987, p. 1483)

To these two perspectives, which we recognize as the textual and historical forms of argument, Eskridge adds a third, the "evolutive perspective," which he describes as:

the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time. (Eskridge, 1987, p. 1483)

In an effort to make his argument against the background of conventional understanding of legal argument, Eskridge notes that "[w]hen the statutory text clearly answers the interpretive question ... it normally will be the most important consideration" (Eskridge, 1987, p. 1483). Of course, the ordinary meaning of the text is not

always dispositive, as was the case in Weber. When text is not dispositive, the door opens for dynamic statutory interpretation.

Why is Weber a good candidate for dynamic statutory interpretation? Eskridge regards the question in Weber as one particularly amenable to dynamic analysis because

it recognizes not only that the very nature of the problem had changed since 1964, but also that the legal and societal context of Title VII had changed. In 1964, the legal culture – legislators, judges, administrators, and commentators – focused on how to root out discrimination inspired by racial animus. People thought that rooting out actual prejudice would create a color-blind society. The intellectual focus changed over the next fifteen years, as the legal community came to realize that discrimination could be just as invidious even when it could not be established that prejudice was at its root. The concept of the continuing effects of historical patterns of discrimination suggested that current institutions might perpetuate discrimination even though no one in those institutions remained personally prejudiced. This insight was not a historical concern of the 1964 Act, but it evolved into a current concern and was recognized in subsequent statutes, judicial decisions, and commentary. (Eskridge, 1987, p. 1493)

While Eskridge labels his argument “evolutive,” the argument is clearly historical in nature. The point of the argument is to put in question the conventional limits on historical argument, which preclude asking anything about history other than from the then-present perspective. Eskridge puts the historical form of argument in question by making the case for the legal significance of failed legislative aspirations. Where the text of a statute is unclear, as he argues it was in Weber, and history demonstrates a clear historical aspiration on the part of Congress, subsequent history (both social and legal) should play a justificatory role in cases like Weber.

### The Postmodern State

Since the middle of the seventeenth century, the “State” has evolved through a number of iterations (Van Creveld, 1999; Bobbitt, 2002; Cooper, 2003). In the era of Napoleon, the State took the form of a “state nation” (Bobbitt, 2002). This form of the State drew its legitimacy from its forging of a nation out of disparate peoples and territories. This process has both strategic and trade dimensions: it results in the establishment of a state founded on discrete boundaries, a solid identity associated with the nation, an industrial and commercial base owned and operated by the nation, and the ultimate transformation of the State as a force that unleashes the power of the nation to solidify itself to one that dedicates itself to the welfare of the nation.

The modern nation state draws its legitimacy from two promises: security for the homeland and an increase in “welfare” for the nation. Welfare is to be understood not simply as subvention from the state to the nation but includes development of legal regimes that improve the lives of citizens. The modern administrative state is the product of the nation state and a reflection of its commitment to bettering the lives of citizens through law.

The State evolves as challenges to its legitimacy alter its statecraft. In the realm of strategy, democracy triumphed after a century long struggle against fascism and

communism (Bobbitt, 2002). The “epochal war” of the twentieth century ended in 1989 with the fall of the Berlin Wall. Now the nation state must meet and conquer the twin strategic threats of global networked terrorism and the commodification of weapons of mass destruction. In meeting these challenges, the State must legitimate itself through a new approach to strategy, one that requires not only new forms of defense but new ideas of “war” and “law” (Bobbitt, 2002, 2008).

In terms of welfare, the State will evolve from a regime of entitlements to one of incentives. States will continue to decrease their traditional forms of direct subvention, replacing and supplementing them with the provision of economic opportunities for the nation. Relations between states will be to the same effect. In developing states, direct aid will be supplanted by incentive-driven packages that bring together states, multinational corporations, and nongovernmental organizations on an ad hoc basis to address problems of underdevelopment as well as cross-border threats to health and welfare. These changes will be reflected in a new form of the state, the Postmodern State (Patterson & Afilalo, 2008).

## Conclusion

In this entry, I have tried to provide an analytic account of postmodernism and show its implications for legal theory and political theory (the Postmodern State). Postmodernism represents a new way of understanding the development of analytic philosophy in the twentieth century. When we see modernism all-of-a-piece, composed of the three axes that comprise it, we cannot help but see analytic philosophy since mid-century as representing a significant departure from the concerns of modernism. This is not to deny that many philosophers carry on the modernist tradition. Nor is it to deny that many would dispute the characterization of philosophy just given. Rather, it is to argue for the proposition that postmodernism represents a compelling new way to approach the questions that animate analytic philosophy.

For legal theory, this means that its concerns may rightly be informed by general philosophical discussion. Philosophy of law or jurisprudence in the twentieth century has been largely uninformed by questions in metaphysics and epistemology, preferring to dispute the borders between legal discourse and ethical discourse. Little progress has been made in this latter endeavor. Postmodernism presents the opportunity to consider these other issues from the legal point of view.

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## Kantian Legal Philosophy

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Kantian legal philosophy is difficult to situate in terms of the categories of contemporary jurisprudence. It focuses on things that are widely thought to be irrelevant to an analysis of the concept of law: its explicit incorporation of moral concepts, its focus on coercion, and its attention to doctrinal detail all seem to be changing the subject rather than illuminating it. Also, it does not address the standard questions of normative jurisprudence. Normative jurisprudence is typically said to focus on questions about what the law should be, apart from what it is. If the aim of normative theory is to say what the law should be, the Kantian engagement with legal doctrine appears to be beside the point. In this chapter, I will show that each of these features of Kantian legal philosophy grows out of Kant's distinctive view about the relation between morality and law.

Most European languages other than English have two words for law: *lex* and *ius*, *gesetz* and *Recht*, *loi* and *droit*. In each case, the first member of the pair is a purely institutional concept; the second is also institutional, but morally loaded. Contemporary debates about the relation between law and morality take the first member of these pairs as their topic. Positivists argue that law, understood as *lex*, could only guide conduct if people could figure out what it told them to do without needing to get to its merits (Hart, 1962, Raz, 1970). Modern antipositivists try to show that merits matter, by showing that the first member of each of these pairs of concepts presupposes the second, either by arguing that an immoral law is not really a law at all (Murphy, 2006) or else by demonstrating that identifying what the law requires in any particular case requires moral argument (Dworkin, 1986).

If forced to choose sides in this debate, the Kantian would have to side with the contemporary positivist: the key to the concept of *lex* is that it is laid down. At the same time, the Kantian approach accepts a version of the natural lawyer's view of the priority of *ius* over *lex*, but understands it in a different way: *ius* can only fully be *ius* if it is made *lex*. The Kantian concedes that a rule that was laid down in the right way would still be law (*lex*), even if it even it failed to be just (*ius*). The relation between law and morality goes in the opposite direction: justice between persons can only be realized through positive law. Rather than saying that you have not understood law unless you understand the place of morality in it, the Kantian says that you have not understood morality unless you understand the law's place in it, because only law can make a fundamental



part of morality possible. So the Kantian does not deny the modern positivist's claim that whether a particular norm is a valid member of a given legal system depends exclusively on facts about the acts and practices of officials, and not on its merits (Gardner, 2005). Instead, the Kantian gives an explanation of the moral significance of *lex*: people can only interact on terms of justice if both those terms and the authoritative bodies empowered to apply and interpret them are in place. In Kant's preferred idiom, right, understood normatively, is only binding if it is "laid down as right" (Kant, 1797, p. 450), that is specified institutionally through positive law. The Kantian approach thus offers a normative account of significance of the contemporary positivist account of legal validity.

Kant's acceptance of the contemporary positivist view that law (*lex*) must be identified by its sources is coupled with a rejection of a different view about law that has historically been associated with leading positivists, but is not only distinct from the core thesis of contemporary positivism, but more significantly, is not a thesis about law, understood as *lex*, at all. If anything, it is a view about *ius*, roughly that it is normatively derivative. On the view the Kantian rejects, law (*lex*) is a tool for achieving moral purposes that are entirely independent of it. A particularly forceful version of this position is put forward by Bentham, whose emphatic introduction of the contrast between a natural law position, as represented by someone like William Blackstone, and his own legal positivism, turned entirely on a novel thesis about the nature of *morality*, according to which its fundamental principle contains neither rules nor anything like them. As a utilitarian, Bentham believed that the *criterion* of right action is whether it *in fact* brings about the optimal balance of pleasure over pain. That is a purely factual question about causal relations in the world, which has (in principle) a fully determinate answer in every case, even if ordinary fallible human beings will often have difficulty discovering what utility demands. Such limitations require that the principle for *deciding* which action to perform operate indirectly, through the adoption of rules likely to bring it about in the long run. Rules are thus seen as morally derivative. They are instruments for achieving something that can be described without any reference to them. If rules have no intrinsic moral role, but only a contingent and instrumental one, then legal rules also have no intrinsic significance either. They are just tools for the effective guidance and coordination of behavior, and should be evaluated exclusively on the basis of their ability to do so; that they are rules can carry no moral weight because only consequences can. This instrumental attitude towards law survives in contemporary legal theory, even among those who reject utilitarianism. Joseph Raz (2003) writes, "I doubt that there are important tasks that are unique to the law, in the sense that they cannot at all be achieved any other way." It also animates the familiar picture of normative jurisprudence as engaged in an enquiry about what the law ought to be that is best carried out without considering what the law is.

In putting forward his novel view of rules, Bentham did not disagree with the traditional natural law view that law (*lex*) are the rules that are laid down by officials; instead, he disagreed about why this had to be done. The natural law tradition is too rich to admit of easy summary, but one of its key suppositions was that interpersonal morality itself is fundamentally and noncontingently made up of rules – do not injure other people, do not take what belongs to another person, honor your contracts, coordinate your behaviour with that of others, and so on – and only contingently about

results. The medieval and early modern natural lawyers, such as Aquinas and Grotius, sought to ground their approach in views about distinctive human goods and flourishing (Finnis, 1998), but that grounding was itself ordered by rules of conduct rather than consequences. At the same time, the natural lawyers recognized that the interpersonal rules at the heart of morality were partially indeterminate, and needed to be given specific content through positive law. The line-drawing and casuistry that is a familiar feature of every legal system is, for the traditional natural lawyer, just the working out of those moral concepts in particular cases. It is not an attempt to approximate a wholly different conceptual order. Where Bentham or Austin would say that morality only contingently and instrumentally requires institutions for making, applying, and enforcing law, because of the limits of human knowledge, the natural lawyers thought that these things were noncontingently required. So the natural lawyers thought that the positivity of positive law was to be understood in terms of a moral requirement: the moral rules are insufficiently determinate and need to be spelled out in a single way for everyone in order for everyone to be able to do what morality requires, consistent with everyone else doing the same (Stone, 2007).

Kant offers a distinctive reworking of themes from the natural law tradition; he eliminates reference to Aristotelian ideas about flourishing and the good in favor of the concept of right. Only the concept of freedom can underwrite either authoritative directives or the power to enforce them, so that the only parts of morality that can be given effect through positive law are those regulating the external freedom of persons. Other parts of morality – both virtue and the selection of worthwhile ends – cannot be achieved through law. Virtue is not concerned with what a person does, but with why he or she does it; an outwardly virtuous deed is not genuinely virtuous if adopted in response to either outside authority or legal sanction. The outer aspects of interpersonal interaction, by contrast, can be rightful regardless of the incentive to compliance, because right is concerned only with the *interaction* of free persons. Kant articulates the structure of rightful interaction as the rational structure of a system of equal freedom, in which each person is independent as against all the others. Whether one person's deed affects another's capacity for freedom does not depend on *why* the first so acted; it only depends on what he or she did. The freedom of each person as against others can only be achieved through law.

The Kantian claim that only law *can* create a system of equal freedom is put forward as an *a priori* moral claim, rather than an empirical one parallel to either what Hume called the “circumstances of justice” (Hart, 1962, pp. 189–95; Hume, [1740] 1975, p. 488), those features of the human situation that made governance through general rules both morally beneficial and humanly possible, or what Locke conceived of (though did not call) the circumstances of law (Locke, [1688] 1960), the epistemic and moral limitations that made social institutions preferable to individual judgment. Kant's negative view of human character and inclinations is extreme; he writes that “nothing straight will ever be made from the warped wood of humanity” (Kant, 1991). But he also insists that a fully rightful condition, in which free persons live together under positive law, is morally required no matter “how good and right-loving” people might be (Kant [1797] 1996, p. 456).

Because Kant conceives moral concepts as rational rather than empirical concepts, the starting point for thinking about them must be the most abstract and purely rational

one, in abstraction from any specific hypotheses about human limitations or circumstances. Applied to the specific case of the moral concept of right, analysis of the pure case of interaction among finite rational beings will show that justice between persons is only possible through positive law, including institutions for making, applying, and enforcing it. The rational structure of those institutions then provides the normative basis for empowering officials to take account of human limitations in circumstances in filling out the specific details of public law.

Given the contingent historical and empirical nature of legal systems, an account of the pure rational structure of justice may seem like an unpromising starting point for understanding anything that actually exists. Kant introduces it as a model of the pure case of the rule of law. By beginning with the successful case and treating it as analytically basic, Kant follows the natural law tradition in jurisprudence and, indeed, the more general Aristotelian tradition in understanding complexity. In the *Critique of Pure Reason*, Kant uses the same analytical strategy to approach the concept of a living thing (Kant [1781] 1998, p. 397). If, as Kant argues, the natural physical world must be understood exclusively in terms of physical causality governed by exceptionless laws, the concept of a living thing generates a philosophical puzzle, because it appears to be an instance of a fundamentally different type of order. Although there are true generalizations about animals and about falling objects, the type of generality is different. Generalizations about the physical world are incomplete if they admit of exceptions. Ordinary thought about living things makes generalizations that do not appear to be compromised by the many exceptions to them. A three-legged horse is not a counterexample to the claim that horses have four legs. Nor is any claim about the normal life cycle of a mosquito undermined by the fact that the overwhelming majority of mosquitoes do not make it past the larval stage. Nor would it be undermined by the discovery of a sizable number of adult mosquitoes that were unable to reproduce. Rather than hoping to replace the concept of a living thing with something more empirical, Kant argues that the concept of a complete life cycle is a rational idea that we impose on things encountered in nature, even if none of them is fully adequate to the idea. In jurisprudence, a parallel role is played by the concept of a fully rightful condition, understood as a system of equal freedom. It organizes our thinking about legal systems encountered in experience, and also provides the perspective from which particular cases can be regarded as defective. Just as we presuppose the concept of an ideal horse when we judge the three-legged horse defective, so, too, we presuppose the concept of an ideal system of equal freedom in judging the respects in which actual legal systems defective. In both cases, the judgment is from a standpoint presupposed by the application of an abstract concept to a particular object (Kant [1797] 1996, p. 491, 505).

The rational idea of a rightful condition is not, however, put forward merely as an interpretation of what is imminent in the concept of statutory *lex*, in the way that some have sought to show that every communicative act presupposes a pure concept of uncoerced speech, in the hope of establishing that anyone who uses speech or law in any other way is somehow engaged in some form of performative self-contradiction (Habermas, 1981). Even if a successful argument could establish such a conclusion, either in the case of speech or of law, it would highlight the wrong kind of defect. The problem with using law (*lex*) unjustly is that it is unjust, not that it is failing to be

law-like, just as the problem with using speech deceptively is not that the speaker contradicts him or herself, but rather that the speaker deceives somebody *else*.

To see the general shape of Kant's argument about the relation between moral concepts and institutions, consider the right to a fair trial. Its normative basis resides in the fact that it is an instance of the more general moral right that a free person has to be beyond reproach, to only be held accountable for your own deeds, and to be presumed to have done no wrong unless others can show that you have done wrong (Kant [1797] 1996, p. 394). At the same time, the right to a fair trial can only be enjoyed in the state, because it is a right that institutions and procedures be set up to give effect to it, consistent with the right of others to also be entitled to fair trials. Kant's startling thesis is that *all* rights fit into this category. Persons are entitled to their rights, simply in virtue of their humanity, and their innate right of humanity forms the basis of any additional rights that they might acquire through their deeds. The rights of a plurality of persons must be made consistent, not because they are bound to conflict, but rather because they are rights, and so must be part of a systematic set of restrictions on conduct. That consistency is only possible in a rightful condition that guarantees everyone his or her rights.

The starting point for generating this idea of legality is what Kant calls "external freedom." A purposive being is one that can set and pursue its own purposes. Kant follows Aristotle in supposing that to make something your purpose, you must do more than wish for it; instead, you must actively take up means that you believe are capable of achieving it. You might be wrong about the suitability of your means, and you might fail to achieve your purpose even though the means are normally adequate to it, but you have not set yourself a purpose at all unless presumptively adequate means are at your disposal. Kant integrates this conception of purposiveness into a normative principle: each person is entitled to be his or her own master, to be the one who determines what purposes he or she will pursue. Since each person is his or her own master, none is master (or servant) of another, so each person's right must be conceived as a part of a system of rights: one person's right to freedom ends where another's begins. Your right to external freedom is thus your entitlement to use your means for setting your purposes consistent with the ability of others to do the same.

So understood, the right to external freedom can only be understood relationally. You are free if *you* rather than any other person are the one who determines what purposes you will pursue. Your basic entitlement is simply to use your own means to set and pursue your own purposes, limited only by the entitlement of others to do the same. Because the entitlement is relational, it also generates a relational conception of wrongdoing: one person wrongs another by interfering with the other's ability to use his or her own means as he or she sees fit. Although each person's *factual* capacity to set and pursue purposes is at least as vulnerable to natural factors as it is to the deeds of others, the only thing that can violate a person's entitlement to set and pursue purposes independently of the choice of another is the act of another person.

Kant's ambition of constructing concepts relevant to law out of more basic concepts concerning action and freedom might be thought of as a sign of a commitment to an unfashionable "foundationalist" approach to justification. Whether or not Kant's own texts are committed to such a notion of justification, the broader Kantian project does not depend on one. It is perfectly consistent with Kant's argument to insist that the

ultimate defensibility of his starting point depends in part on his ability to generate the relevant legal concepts from it. If that project is unsuccessful, so much the worse for the starting point; if the project is successful, then the relevant legal concepts have been shown to be instances of the broader practical ideas that Kant puts forward. If the legal concepts also make sense of the broad structural features of legal systems, such as the distinction between private and public law, as well as traditional legal divisions within each – property and contract in private law, a separation of powers and limited government in public law – then both the starting point and the characterization of the relevant legal phenomena form a mutually supporting whole. In principle, then, the Kantian approach can be carried out in either direction, working outward (“synthetically”) from the idea of external freedom, or inward (“analytically”) from the familiar legal phenomena. Each strategy promises rewards; the latter has the advantage of making sense of existing practices; the former, by starting instead with basic concepts of freedom, provides a different sort of philosophical reward, because it provides the background against which questions about legal power and authority gain much of their philosophical interest. The Kantian idea of equal freedom is, at bottom, just the idea that each person is entitled to be his or her own master, where this self-mastery is understood relationally and contrastively. Self-mastery does not require that you be in control of all aspects of your life nor even that you have a worthwhile set of alternatives open to you, but only that *you*, rather than any other person, determine which purposes you will pursue. The idea of each person being his or her own master not only stands in sharp contrast to ideas of slavery and serfdom; it also animates familiar questions of legal philosophy. States claim to be entitled to tell people what to do and to force them to do as they are told. Both of these supposed entitlements stand in apparent tension with each person’s right to be his or her own master. If you are your own master, how could others be entitled to tell you what to do, or to force you to do anything? By starting with each person’s right to be his or her own master, the Kantian account holds out the promise of showing how and when such claims could be legitimate.

From this austere starting point in the concept of external freedom, understood relationally, Kantian legal philosophy can then generate a distinctive conception of interaction between private persons. External freedom protects each person’s purposiveness, rather than any particular purpose of any particular person. The only way that each person’s freedom could be reconciled with that of the others is if the formality of that purposiveness is preserved, so that each person has an entitlement to the means he or she has for setting and pursuing purposes, rather than to success at any particular purpose. Each person is entitled to use his or her own means as he or she sees fit, but no person is permitted to use or interfere with means belonging to another. This conception of interference does not depend on the intentions of those who interfere; I wrong you if I injure you carelessly, or if I use your property while laboring under an innocent but mistaken belief that it is my own. Thus the Kantian account stands apart from those aspects of the natural law tradition that contend that moral rules have their basis in the inappropriateness of aiming at things that are bad (Finnis, 1996). The formality of purposiveness makes what Kant calls the “matter” of choice – the end for the sake of which a person performs an action – irrelevant to right (Kant [1797] 1996, p. 387).

The concept of reciprocal limits on freedom presupposes a contrast between interfering with, or using, means that belong to another person, and using the your own means in a way that changes the context in which others use their means (Ripstein, 2009, ch. 2). That conceptual contrast turns out to be just the familiar legal contrast between each person having his or her own person and property, and not having any claim to the person or property of others, unless that other person has undertaken an affirmative obligation through contract. So others may not touch or injure your person, or use or damage your property without your consent, because if they do, they interfere with your means, and so with your purposiveness. Other than your person or property, things that you depend on do not give rise to any such rights, and so, for example, if you have a contract with another person, and a third person injures your contracting partner in a way that prevents performance, you have no direct cause of action against that third person. Your only claim under a contract is to the performance of a person with whom you made an agreement.

By starting with a conception of freedom as independence from the choice of another, the Kantian approach thus provides a systematic exposition of the sense in which interpersonal morality is made up of rules. Your obligations of right are obligations to use your means – your person and property – in ways that are consistent with every other person’s entitlement to be his or her own master by using their means as they see fit. But that is just to say that obligations of right cannot be thought except in terms of rules restricting the conduct of persons in light of the entitlements of others. So a system of equal freedom is not something that rules are supposed to cause, in the way that Bentham proposed they be set up to produce a maximally beneficial outcome, or even in the way in which Aquinas argued that public rules would produce a common good. A system of equal freedom cannot be described except in terms of reciprocal restrictions on conduct. The legal rules *are* the system of equal freedom.

The same focus on freedom as independence generates a striking perspective on law’s coercive character. The idea that law is coercive has fallen from favor in legal philosophy, under the weight of H. L. A. Hart’s criticisms of Bentham and Austin’s account of legal rules in terms of orders backed by threats (Hart, 1962, pp. 22ff.). Hart argued that the concept of a rule is conceptually prior to that of a threat for its violation. So the concept of a rule cannot be reduced to the concept of a command backed by a sanction in the way Bentham and Austin had hoped. The Kantian account of coercion is fundamentally different. Kant has no interest in reducing or replacing the concept of a rule, because, as we have seen, he regards rules as normatively basic. Instead, coercion must be understood in terms of rules of equal freedom. Any interference with a person’s ability to set and pursue his or her purposes is coercive. The simplest and most familiar example of coercion is not threatening to punish someone if they do not follow an instruction, but, instead, compelling someone to do something. If a creditor compels a debtor to pay off the debt, by seizing the debtor’s assets, the creditor coerces the debtor. The seizure of the assets is coercive even if the creditor issued no threats in advance. Again, the kidnapper coerces his victim, quite apart from any threats that might be made to the victim’s family members or business associates. In each of these examples, the use of force – the interference with something the other person has (whether rightfully or not) – is the primary instance of coercion, because it is a hindrance of that person’s ability to use what he or she has to set and pursue his or her purposes. If

coercion is understood in this way, then a system of equal freedom from the choice of another is *also* a system of restrictions on coercion. Any violation of the limits on how another person is entitled to use what he or she happens is coercion, that is, an interference with that person's ability to set and pursue his or her own purposes. So a system of equal freedom sets out limits on the use of force, and the upholding of a system of equal freedom is just the upholding of everyone's entitlements against force. Upholding particular entitlements – entitling a creditor to seize the debtor's assets in settlement of a debt – is consistent with a system of equal freedom, because it does nothing more than give the creditor what he was entitled to have. The entitlement to a remedy in case of a violation of private right is just the reassertion of the private right itself. If I have contracted to meet you at noon, and am delayed, I still need to meet you at 12:01, because my failure to arrive at the appointed time does not release me from my obligation. If I owe you \$100 and fail to pay, my failure to pay does not make the debt disappear. Instead, the debt survives in your continuing entitlement to claim it from me. If I take your coat without your permission, I must return it, because my taking it does not make it stop being your coat. In each of these examples, I have deprived you of something to which you had a right. In each case, your right survives my violation of it, even though it has failed to constrain my behavior in the particular instance. The same right that restricted my purposiveness by placing me under an obligation to do (or refrain from doing) something entitles you to restrict my purposiveness by compelling me to give you back whatever you had a right to. In many cases, the prospects that I will be compelled to compensate you if I wrong you, or disgorge my gains if I use what is yours will *also* provide me with an incentive to comply with my obligations. When a legal system holds out the prospect of enforcement of private rights, it does nothing more than shape conduct by announcing that a system of equal freedom will be upheld (Ripstein, 2009, ch. 3).

A system of equal freedom is constituted by the basic rules of private law. The generality of those rules is not a sort of compromise in light of imperfect information. It is the fundamental structure of justice between persons. Where Bentham, for example, thinks of morality itself as containing nothing like rules, Kant conceives of interpersonal morality as made up entirely of rules. Although both Kant and Bentham would say that all law (*lex*) is positive law, they conceive of the need for positivity in fundamentally different ways. Bentham sees it as a tool for achieving something that is much more precise than it, Kant as the specification of something much more abstract than it.

This difference generates the Kantian approach to normative jurisprudence and doctrinal analysis. It is only if familiar legal concepts are thought to be somehow suspect – in the way, for example, that Bentham deems them *automatically* suspect because ordered by rules, of which he is inherently suspicious – that there is any reason to suppose that the moral *justification* of legal rules must be stated in terms that are fundamentally different from the law's own vocabulary. This legacy of Bentham infects much contemporary legal scholarship, as it seeks to recommend particular rules on the basis of their efficiency effects (Posner, 1972) or expressive meaning (Anderson & Pildes, 2000); the same Benthamite legacy generates debates between retributive and deterrence theories of punishment, both of which suppose that the rationale for punishment must lie in its tendency to produce a moral outcome that has nothing to do with

punishment, as such, whether the reduction in crime or the matching of suffering to wickedness.

For the Kantian, the only possible vindication of particular legal doctrines depends on showing the ways in which they are elements of a system of equal freedom. The familiar legal focus on wrongdoing rather than harm is one instance of this. It is often remarked with some puzzlement that the law is indifferent to certain types of harm, such as those brought about by economic competition, but willing to hold someone accountable for an action that is harmless or even beneficial. If you touch another person, or use that person's property, without permission, you commit a trespass and so do wrong, even if you do no harm. Your horse might be healthier as a result of the exercise it gets when I ride it without your permission, or your health may be improved by an unauthorized surgical procedure I perform while you are asleep. For the Kantian, these examples illustrate the basic normative point that as your own master, you alone are entitled to decide how you will be touched or how your property will be used, even if those uses benefit you. For the exact same reason, no other person can require you to use what is yours, or refrain from using it, in a way that is most advantageous to them, even if they suffer a disadvantage as a result. You can open a business competing with mine, or build a hotel that casts a shadow over my beach, because I am not entitled to tell you how to use your abilities or property. The only harms that I can complain of are the ones that are also wrongs, that is the ones that interfere with my ability to use what is mine, not the ones that simply failed to provide me with a favorable context.

The Kantian conception of a system of equal freedom is highly abstract, both at the level of primary rights and their correlative duties and at the level of remedial rights of enforcement. It shows that a system of equal freedom requires people to refrain from using or interfering with the person or property of others without their consent, to keep their contracts, and that also one who hinders the freedom of another may be compelled to give the other back whatever he or she had a right to. If I injure you or damage your property, I can be compelled to make up your losses; if I use your property, I can be compelled to disgorge my gains; and if I breach my contract with you, I can be compelled to perform or to do the equivalent of performance. Thus the broad structure of legal doctrine in private law can be articulated as a system of rational limits on freedom, without any empirical premises about need, vulnerability, or harm. Which actual conflicts arise between separate persons as they pursue their separate purposes will depend on the particular purposes people have, as well as specific features of their vulnerability to the effects of actions by others. Such factors speak only to when the formal apparatus of private right will be engaged, and not to its structure.

The same abstraction that makes it possible to articulate the concept of private right *a priori* has a further implication that they are not fully determinate in their application to empirical particulars. The structure of Kantian rights explains why there are many cases in private law in which the pursuing party simply fails to state a right of action. The person who tries to sue on a contract to which she is not a party, or for damage to property in which he has no proprietary or possessory interest, is claiming a right to something that could not be part of a system of equal freedom. It also explains why legal concepts have the further feature that, as concepts of a system of equal freedom, they need to structure every interaction in terms consistent with the freedom



of both parties. Such familiar doctrinal landmarks include each person's duty to exercise "reasonable care" to all others, and the principle that the terms of a contract are based on what a reasonable person would take them to be. The rational structure of a system of equal freedom requires objective standards to ensure that neither party be entitled to determine the terms of interaction with the other unilaterally (Weinrib, 1995, ch. 5). The required objectivity opens up space for good faith disagreement about their application in any particular case. You and I may know that we have a contract, but disagree about its application to a particular contingency that we had not explicitly considered together. Unfortunately, the concept of reasonableness seems to be just as abstract and indeterminate as the terms of our agreement; even if we eliminate unreasonable or disingenuous claims about how the terms of our contract apply to this unanticipated situation, there may well be more than one reasonable answer. So the idea of a reasonable interpretation is just as indeterminate as our contract is.

Critics of legal "formalism" – beginning with Oliver Wendell Holmes and the legal realist movement, through the law and economics and critical legal studies movements – have often taken the indeterminate application of traditional legal concepts as a sign that they are merely conclusory packaging for arguments that somehow must have some other basis. But where the realists saw that as a problem, the Kantian sees it as a reflection of the rational structure of those concepts. Rational concepts do not apply themselves to particulars; their rationality consists in part in the abstract relation between them, which can be articulated without reference to particularity. Normative concepts themselves do not carry with them determining rules for the classification of particulars. Instead, they require the sort of judgment and line-drawing that is characteristic of legal systems. As a general matter, any abstract concept will require some judgment in its application to particulars. Once more, rather than seeing this as a problem, Kant sees this as fundamental to a legal order.

The application of private right to particular cases not only requires that lines be drawn. It also requires that the lines be drawn by officials rather than by the parties themselves. This, again, is an implication of each person's right to be his or her own master. The official is charged with bringing rational concepts of right to bear on particulars; the job of a judge is to bring the relevant legal requirements to bear on the particular case. Because the requirements are themselves partially indeterminate, part of the judge's task is to exercise judgment. It is hardly surprising that in doing so, judges typically look to the familiar and ordinary expectations and understandings. Their incorporation of these factors does not show that the legal concepts give them no guidance, or that the reasonable is really just another name for the ordinary. Instead, they show that ordinary life is filled with examples of making abstract normative concepts more determinate.

The application of legal rules to particular cases is a central example of an exercise of authority. The judge's decision makes the rule apply to the case at hand. The decision of the highest court is authoritative because it is charged with exercising its judgment in applying the law. A court's authority is justified by the way that it gives effect to the relevant concepts in a particular case, because concepts of equal freedom can only be applied consistently with their own structure by an impartial court. So each person's right to be his or her own master can only be reconciled with everyone else's correlative right through a system in which judges exercise authority in deciding cases. Kant's

argument is not based on any premises about imperfect information or partiality. It depends exclusively on the need to make rational concepts apply to particulars in a way that is consistent with the normative point of those rational concepts. The only way that any particular application of concepts governing interpersonal interaction can be consistent with the freedom of everyone is if there is a single, public interpretation, provided by a public authority authorized to speak on behalf of everyone. Thus the Kantian must reject Ronald Dworkin's idea of "Protestant interpretation," according to which each citizen must decide for him or herself what the best interpretation of the law is. In its most extreme formulation, Dworkin contends that a private citizen is legally entitled to disregard a court's finding if she believes it to be unsound. Dworkin's example concerns civil disobedience (Dworkin, 1977, p. 216) but the analysis, if sound, would appear carry over to private disputes. From a Kantian perspective, such an approach is inconsistent with the possibility of rightful relations between persons. In the absence of a legal system, the fundamental problem for rights is that every person's right to be his or her own master entitles him or her to do "what seems good and right to it," and nobody ever needs to defer to the judgment of an authority. The solution to the problem is to empower an authority capable of deciding. The ideal authority decides with perfect impartiality; however, a defective authority – rendering decisions that one (or both) of the parties to a private dispute considers defective – is still entitled to decide, because having an authority is the only way in which each person's right to be his or her own master can be rendered consistent with that of the others. Dworkin urges that every case of *lex* must be construed as *ius*, and that a citizen who disagrees with an official finding should follow his or her own judgment about *ius*, rather than what an official lays down as *lex*. Kant argues that *ius* is only possible through *lex*.

The conceptual requirement for legal institutions to give effect to justice is not limited to courts resolving private disputes. More generally, the only way that a plurality of free persons can enjoy their respective rights systematically and conclusively is in a legal system that secures them. A fundamental aspect of securing everyone's rights is the laying down of law so as to make those rights systematic, determinate, and enforceable in a way that is consistent with their status as rights.

Institutions must be created and officials empowered to make, apply, and enforce law with respect to private parties and to make further public law, in order to sustain the preconditions of the operation of those institutions, and still further public law governing the ways in which laws are made. So in addition to regulating interactions between persons, law must also govern provision for those in need, the creation of properly public goods, and the state's powers of taxation to support such activities. And in addition to all of those activities, the state must have procedures through which officials are selected and laws are made. At every stage of the analysis, the underlying normative concepts of equal freedom restrict the contours of the answers. Because they are normative, they shape those contours by specifying an ideal version of a state as a system of equal freedom under laws, through what Kant calls "Republican government" in which the people, through their representatives, give laws to themselves, and executive and judicial functions are sharply separated from legislation. The Republican system of government is an ideal type, against which actual governments are to be judged. It provides an internal criterion for thinking about the relationship between legality and the legitimate use of force. Any use of force that cannot be articulated in

Republican terms is not simply a defective instance of law. It is a defective instance of the use of force, understood from the standpoint of human freedom. As such, it is contrary to each person's entitlement to be his or her own master.

The Kantian account does not have very much to say about how exactly the state is to go about any of these public functions. It says only that institutions must be created and officials empowered within those institutions to determine how best to achieve public purposes, without saying anything about the relative merits of income, property, and consumption taxes, or the appropriate rate to which these should be set. These are questions that a state needs to answer in order to sustain itself as a rightful condition, but the concept of a rightful condition says little about what the answer should be (Ripstein, 2009, chs. 7–10).

This refusal to provide detailed criteria, or even measures, of success invites another version of the realist charge that such concepts are indeterminate, open-ended, or merely cumbersome ways of stating what are really goals of social policy. The Kantian response in this instance is the same as in the case of private law: the relevant normative concepts require institutions and procedures to give effect to them. There is such a thing as an institution or procedure that fails to give effect to ideas of equal freedom, but a wide range of institutional arrangements do give effect to them. Within those arrangements, there is a wide range of possible policy choices. Such questions are inevitably and properly left to the political process.

The assumption that an adequate normative theory of law must provide detailed guidance to officials presupposes the instrumentalist conception of law that the Kantian rejects, for it supposes that the normative concepts relevant to lawmaking can be identified and articulated without any reference to legal concepts or institutions. Economic analysis of law is explicit in its commitment to this view; in some sense it is a program for the replacement of traditional legal concepts with economic ones. The first generation of economic analysis sought to advance that program by providing a reductive interpretation of legal doctrine. When explanatory and interpretive difficulties arose, a later generation turned to avowedly normative projects of replacing any legal concepts that were resistant to reduction (Ripstein, 2004).

The Kantian denies that the relevant normative principles apply to particulars without any reference to institutions or officials acting within them. This was already clear in private law. Each person is entitled that every other person use reasonable care in pursuing his or her own purposes, so as to avoid interfering with the freedom of others. How much care is reasonable in a given case can only be decided, consistent with the freedom of all, if it is decided by an official. That does not mean that the official could say absolutely anything and still be making a reasonable judgment. It means only that within the range consistent with the freedom of everyone, there must be a single answer provided for everyone. A parallel structure applies in public right, the fundamental requirement of which is that everyone enter a condition in which everyone's rights can be secured. That condition is an institutional one in which particular people are charged with doing particular jobs, with making, applying, and enforcing law, all in light of law that has already been made. In each case, institutions are capable of providing a public standpoint in a way that private persons are not. An official is someone who fills an office defined by rules, which, in turn, generate a distinction between acting within, and outside, an official capacity. So long as officials act within

their official capacity, they act publicly rather than for their own private purposes. This idea of acting within an official role is put forward as the ideal case of official action. There is no guarantee that officials will always do what is required of them; it is just that if they do not, their acts, understood as official acts, are defective ones. Again, no claim is advanced that no injustice could be authorized by someone acting within an official role. The Kantian claim is only that institutions are (conceptually) necessary for justice, not that they are sufficient. The ideal case of a fully rightful condition is the standpoint from which the deficiencies of actual legal institutions can be identified and articulated.

Legal institutions are thus required to provide public answers to first-order disputes about private interaction, second-order disputes about adjudication, and tertiary disputes about the laws under which the first two types of disputes are resolved. Without each of the three levels of law, there can be no systematic entitlement to equal freedom enjoyed by all, and the requirement of equal freedom constrains the ways in which the second and third levels can operate as systems of equal freedom, but it does not dictate to them how precisely they should operate.

The Kantian conception of the ideal state is articulated entirely in terms of institutions, officials, and rules. At each level, the rules are not justified by what they are likely to cause, but rather by what they are: a system of equal freedom.

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## Legal Pragmatism

RICHARD WARNER

Many legal scholars insist that they are pragmatists and that their pragmatic perspective crucially informs their vision of the law (see, for example, Lipkin, 1993). Are they right? Does pragmatism offer some important insight into the law, an insight that escapes other perspectives?

### What Is Pragmatism?

The first step is to say what pragmatism is. As a philosophical position, pragmatism makes characteristic claims about justification and truth. We begin with justification and then turn to truth. The approach to justification is nonfoundational. This is what many legal scholars find so appealing in pragmatism; legal pragmatism's most constant refrain is that justification lacks a foundation (West, 1991, p. 121).

But what exactly is nonfoundationalist about justification? The answer begins by noting the obvious: namely, we accept and employ various *norms of justification* in deciding what to assert and how to act, and in evaluating the assertions and actions of others (we may, of course, employ such norms unreflectively and unconsciously). Such norms delineate what counts as a justification (and sometimes when one justification is better than another). *Cohen v. California* illustrates what we mean by a "norm of justification." Cohen was arrested for wearing a jacket on which the words "Fuck the draft" were clearly visible. The Court held that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." This is a norm of justification: it tells us what counts as justifying an invasion of privacy.

Intellectual history is, in part, the history of the rejection of old norms for new ones, so the question inevitably arises, "What makes the prevailing norms the right ones? How do we know that the assertions and actions they apparently justify *really* are justified?" Pragmatism provides a way to answer this question: we can turn our norms of justification on themselves. Of course, we cannot evaluate all our norms at once; some have to serve as the standard against which to assess the others. The important point is that such assessment is always *internal* to the norms in question. We assess how well

our norms work by using those very norms. There is no external standard of evaluation: *our norms of justification neither have nor need a ground outside themselves*. This is the distinctive pragmatic claim about justification.

An essential point: the norms I mean are the norms we *actually* use day in and day out. These are the norms that neither have nor need a ground outside themselves. The focus on actually-in-use norms is a *Rortyan* version of pragmatism (Rorty, 1982, p. xxv). Not all pragmatists endorse this version. Some – notably C. S. Peirce – allow evaluation of actual norms in light of a standard that we do *not* use, an *ideal* norm that we do not have but could in principle construct (Burks, 1958, pp. 16–17). Peircean pragmatism makes sense against the background of Peirce’s views about rational inquiry. Peirce envisions different inquirers beginning their investigations with different and conflicting views, and he contends that, if all inquirers follow correct methods of rational inquiry, their views will – in the infinite long run – converge on a single theory. According to Peirce, this theory will contain what we are ideally justified in believing. How could it not? It is the unique result of the correct application of rational methods of inquiry over the infinite long run; everything reason ultimately validates is in the theory, and everything reason ultimately rejects is not.

Now let us turn then to the pragmatist account of truth. We begin with what, according to pragmatists, truth is *not*. It is *not* a matter of “corresponding to the facts.” This may – and should – seem puzzling; after all, it surely *seem* that, for example, the statement “The cat is on the mat” is true when it corresponds to the fact that the cat is on the mat. Pragmatists, nonetheless, reject the correspondence picture of truth as a profound misconception; Rorty, for example, does so emphatically (Rorty, 1991, p. 23). So how do pragmatists explain truth? Peirce provides the best starting point. Peirce envisions different inquirers beginning their investigations with different and conflicting views, and he contends that, if all inquirers follow correct methods of rational inquiry, their views will – in the infinite long run – converge on a single theory. According to Peirce, this theory will contain what we are ideally justified in believing. Peirce holds that what is ultimately justified in this way is true; this is how Peirce *defines* truth. What it means for a statement to be true simply is for it to be included in the final theory. This Peircean approach illustrates the general pragmatist strategy: Truth is not a matter of correspondence; rather, what is true is what ends up justified in the long run.

Now let us turn to *Rortyan* pragmatism. How do Rortyan pragmatists define truth? How do they implement the underlying pragmatist idea that truth is not a matter of corresponding to the facts, but a matter of justification? Rortyan pragmatism focuses on actually-in-use norms and does not recognize a Peircean ideal norm that emerges at the final infinite limit of rational inquiry, so Rortyan pragmatists cannot define truth, as Peirce does, by appeal to such an ideal norm; rather, the obvious strategy is to equate being true with being adequately justified under *current, actually-in-use* norms of justification. Indeed, what other answer could there be as long as we reject evaluation of actually-in-use norms in terms of ideal, *not-actually-in-use*, norms (Rorty, 1989, p. 52)?

This completes our sketch of the pragmatist approach – or, better, of the *two* pragmatist approaches – to justification and truth. The sketch leaves us with the question, which pragmatism is the one legal pragmatists endorse? Legal pragmatists are – or are

best interpreted as – Rortyan pragmatists. The views of legal pragmatists are generally inconsistent with Peircean pragmatism. Most legal pragmatists would deny the existence of methods of rational inquiry whose consistent application would ensure that initially disagreeing inquirers ultimately converge on a single theory. Legal pragmatists emphasize diversity; they call attention to the divergent viewpoints and methods of different cultures, social classes, races, and genders (Minow & Spelman, 1991, p. 251). Divergence, not convergence, is the recurrent theme. But to deny that rational inquiry converges on a single theory is to tear the heart out of Peircean pragmatism, for such convergence is what *defines* the ultimately justified theory. Legal pragmatists cannot, therefore, consistently be Peircean pragmatists.

### Foundationalist versus Nonfoundationalist Views of the Law

How does such abstract theorizing about justification and truth matter to the law? To see what is at stake, it is helpful to contrast the pragmatist/nonfoundationalist position with a nonpragmatist foundationalist one. The positions of Catherine Wells and Richard Wright provide just such a contrast; Wells is a pragmatist/nonfoundationalist while Wright endorses foundationalism and explicitly rejects pragmatism and nonfoundationalism. *A caveat:* for us, Wells and Wright serve as exemplars of particular positions; and, to make them into clear examples, we will both simplify and supplement their positions. Our “Wells” and “Wright” are not precise portraits of the real Wells and Wright; the resemblance is close, however.

We begin with Wright. To understand Wright’s rejection of pragmatism in favor of foundationalism, we must understand his objection to what he calls “pluralistic ... normative theory.” Pluralistic theories recognize no ultimate single norm “to resolve conflicts among competing sub-norms” (Wright, 1995, p. 160). Wright contends that such theories make the choice between the competing sub-norms “arbitrary” – in the sense that we cannot have a reason to choose one norm over another. On Wright’s view, to have such a reason is to have a norm that decides between the sub-norms. The reason would have to identify some features of one sub-norm that make it superior to the competing sub-norm, and this means the reason is the conflict-resolving norm – the norm being that sub-norms with such-and-such features are superior to norms with so-and-so features.

Wright holds that *any* rationally acceptable normative theory *must* contain an ultimate single norm. Rortyan pragmatists disagree. Our actually-in-use norms develop and change over time; and one cannot say in advance of this development what the norms *must* look like; one cannot say whether there will be one ultimate norm or not. To insist that normative theories without an ultimate norm are irrational is to assess actually-in-use norms by a standard of rationality external to those norms. This is enough to make Wright count as a foundationalist. But he goes further. He identifies the ultimate foundational norm. It is “the foundational norm of equal individual freedom.” Wright explains: “Freedom ... is an ... attribute of each rational being. The possession of free will or freedom is what gives each rational being moral worth – an absolute moral worth that is equal for all rational beings” (Wright, 1995, p. 162). One must use one’s freedom in a way consistent with a like freedom for others; otherwise,



one claims that one's freedom is more important than the freedom of others, which is false, for "freedom is what gives each rational being moral worth – an absolute moral worth that is equal for all rational beings" (Wright, 1995, p. 162).

Turning from individuals to the state, Wright contends that the state has the right to coerce citizens to use their freedom in ways consistent with a like freedom for others. This right has limits, of course; suppose you take more than your share of the dessert and thereby use your freedom in a way inconsistent with a like use by others. Most of us – and Wright is among them – would not think the state has a right to coerce you to take only your fair share of dessert. State power does not – and should not – extend into every aspect of our lives. Let us put this issue aside and focus, as Wright does, on torts – an area in which the state clearly may, in appropriate circumstances, coerce behavior. Wright contends that the foundational norm of equal individual freedom explains how courts actually handle negligence cases. He considers cases in which "the defendant put the plaintiff at risk to benefit the defendant or some third party, and the plaintiff was not seeking to directly benefit from the defendant's risk-creating activity." Wright argues that "the actual test of negligence in such cases is ... the defendant's creation of a significant, foreseeable and unaccepted risk to the person or property of others. A risk is significant ... if it is a level of risk to which an ordinary person would be unwilling to be exposed without his consent" (Wright, 1995, p. 261). To impose such a risk is to use one's freedom in a way *not* consistent with a like freedom for others, and the state has a right to use its power both to deter such behavior and to compel compensation for the injuries it may cause.

The point to emphasize is that the state's position here is appropriately premised on the foundational principle of equal freedom. For Wright, this means citizens have an *obligation* to obey. This way of putting the point suggests – misleadingly – that Wright thinks that citizens have an obligation to obey the law when and only when the law can be appropriately derived from the norm of equal freedom. Wright's (the real Wright's) views are considerably more complex, but we can put the (intricate and interesting) details aside. The broad outline we have given is sufficient for a contrast with Wells. It is the point about obligation that turns out to be essential to the contrast.

Wells emphatically rejects foundationalism. Wells is a Rortyan pragmatist who advocates what Wright calls a "pluralist normative theory." She denies that any rationally acceptable normative theory must contain an ultimate single norm; rather,

theory and practice evolve together with a context of human purpose and activity; the practice informs the theory while the theory, in turn, informs the practice. Thus the hallmark of a pragmatic method is its continual reevaluation of practices in the light of norms that govern them and of the norms in light of the practices they generate. (Wells, 1992, p. 331)

There can be no ultimate norm since any norm is subject to evaluation in light of others. Wells finds empirical confirmation of these claims in the actual practice of adjudication. She contends that legal decision-makers in fact work with *multiple* norms, no one of which is "ultimate." Legal decision makers "locate the controversy within a web (*or several different webs*) of relevant normative analysis" (Wells, 1992, p. 332), and "it is only by locating an issue within these *various theories* that a judge

can understand the full extent of the controversy.” Furthermore, the normative rules we find in theories – no matter how detailed – cannot capture the full basis of a judge’s decision; decision making is also a matter of non-rule-guided intuitive understanding. The reason is that

the rules utilized by legal reasoning contain many vague terms and unstated exceptions, and for this reason, application of a rule is not merely a matter of determining whether certain formal conditions apply. Application also requires that we have an intuitive grasp of the rule – an ability to determine which of many logically possible exceptions are in the “spirit” of the rule and also relevant to the case at hand. (Wells, 1992, p. 330)

This emphatically nonfoundationalist and pluralist picture is a far cry from Wright. The contrast between Wright and Wells emerges clearly if we compare old laws enforcing slavery with current laws prohibiting sexual harassment. Wright and Wells would – we may safely assume – agree that we should not obey laws enforcing slavery and should obey laws prohibiting sexual harassment. The question is, why? Wright has a ready explanation. Slavery so grossly violates the fundamental right of equal freedom that there is no obligation to obey laws enforcing slavery. We are, on the other hand, obligated to obey the laws imposing strictures on sexual harassment – provided they can be appropriately derived from the foundational right of equal freedom.

Wells must, of course, reject this foundationalist explanation. In the case of slavery, this may not seem too worrisome. After all, our actually-in-use norms now prohibit slavery, so does not this at least provide a basis for explaining why we – those of us who now abhor slavery – would not *now* be obligated to obey laws enforcing slavery? This is a weak reply, however. To see why, turn to sexual harassment. No one will deny that norms of justification prevalent in our culture until very recently justified behavior that we now think of as sexual harassment, and no one will deny that such norms are still widespread in our contemporary culture. Wells does not – let us assume, for now – want to say that those who accept such norms are not obligated to obey laws about sexual harassment. The point of sexual harassment laws is to compel a certain kind of behavior in the workplace – *whether or not* those subject to the laws accept norms of justification that justify behaving in the compelled fashion. Of course, the temptation here is to say that norms that do not justify slavery and sexual harassment are *the right* norms, and that norms that do justify these things are simply wrong. But, as a Rortyan pragmatist, Wells cannot say this. Where norms of justification conflict, Rortyan pragmatism’s antifoundationalism about justification denies a neutral perspective independent of either set of norms from which both sets can be evaluated. Confronted with conflict, all we can say is that the assertions and actions our norms validate are justified *relative to those norms*. Those on the other side can say the same thing with respect to *their* norms. We are forced to relativism about justification. There is no way to reject this relativist conclusion and remain a Rortyan pragmatist. (This does *not* mean that pragmatists must refrain from raising moral objections to, for example, slavery and sexual harassment; they can – they can insist that, *under the norms they accept*, slavery and sexual harassment should not be tolerated. The relativism of pragmatism need not be the sophomoric relativism of “anything goes.”)

So what explanation can Wells give of why we should not obey laws enforcing slavery but should obey laws prohibiting sexual harassment? Wells rejects the demand that she give an explanation here. Before we consider this response, it is helpful first to consider the response of pragmatists who do *not* reject our explanatory demand. Joseph Singer is an excellent example. He addresses the general issue of which our particular question about slavery and sexual harassment is an instance. The general question is simply: what are the proper limits of state power? An answer to this general question would provide the basis for determining in particular whether laws about slavery and sexual harassment fall inside or outside the proper purview of state power. Legal pragmatism's answer is *not* the traditional one that we find in classical liberal political philosophy. Legal pragmatists typically reject the classical answer, and we can understand their pragmatic alternative by first looking at the answer they reject.

### Pragmatism and Legitimacy

In classical liberal political theory, a government is legitimate when (and only when) its citizens – at least most of them – have a *prima facie* general obligation to obey it. Such an obligation exists only when the state can justify (most of) its actions on grounds that *every reasonable citizen* would accept. Wright's views illustrate the idea. Wright contends that *every rational person* must assent to the foundational principle of equal freedom, and he derives the obligation to obey the law from that principle.

Joseph Singer, as we noted earlier, attacks the classical liberal conception of legitimacy. Singer notes that the possibility of a rational consensus is the fundamental premise underlying liberal legitimacy, and he objects that the requisite consensus is not possible: "it is not possible to identify a 'common point of view' to answer normative questions that can be both based on shared values and sufficiently definite to generate answers in particular cases" (Singer, 1988, p. 536). Note that this is precisely what Wright thinks he *can* do; he intends, in his analysis of negligence in terms of equal freedom, to offer "a 'common point of view' [the foundational norm of equal freedom] ... based on shared values and sufficiently definite to generate answers in particular cases." It would be interesting to adjudicate this disagreement between Wright and Singer; however, another task is more pressing here. Legal pragmatists do not merely criticize the classical liberal conception of legitimacy; they also offer an alternative conception, a conception that does not assume that a rational consensus is possible. This positive conception is our concern. We want to know whether it provides an adequate pragmatic explanation of why, for example, one should not obey laws enforcing slavery, but should obey laws prohibiting sexual harassment.

We will focus on the positive conception as Joseph Singer develops it. Singer sets himself the task of articulating a conception of the proper use of state power without assuming that a rational consensus is possible. Singer argues we need "a language that allows us both to understand alternative social visions and to judge them" (Singer, 1988, p. 542). Singer insists that "[t]here is no single best way to [judge competing social visions]," and that "[o]ur goal should be to generate competing visions of social justice ... We must talk to each other about our competing visions of the good society" (Singer, 1988, p. 542). Singer thinks pragmatism helps us here. It helps us "affirma-

tively think about justice and to establish it in the world – to elaborate the democratic values embedded in our culture” (Singer, 1989, p. 1757). We can accomplish this by focusing “on the ways in which our categories of discourse, and modes of analysis reinforce illegitimate power relationships by embodying the perspectives and concerns of those who are powerful and suppressing members of oppressed groups” (Singer, 1989, p. 1769). As Singer says, “Truth and justice are both partly a matter of experimentation, of finding out what works and trying out different forms of life. *The process of discerning the truth* is not passive” (Singer, 1989, p. 1757).

The crucial idea is that if we were to actively engage in “conversation” (talking to others, experimentation, analysis) – *carefully observing the appropriate pragmatic strictures such as paying attention to power relationships* – we would ultimately be led to see the “truth,” to see what is and is not *really* justified. This idea yields a picture of the proper use of state power. In legitimate uses of state power, the agents of the state aim, as the basis for their action, at knowing what is really justified, and they carry out this aim by engaging in “conversation” *under the appropriate pragmatic constraints*. This is to participate in good faith in the “process of discerning the truth.” One might suggest – although Singer does not take matters this far – that we *should* obey legitimate uses of state power, but are under *no obligation* to obey illegitimate uses. This would provide a pragmatic resolution of the problem we raised for Wells: namely, why should we not obey laws enforcing slavery yet should obey laws prohibiting sexual harassment? That is, it resolves the problem provided we think that laws enforcing slavery did not arise out of the appropriately pragmatic conversation while laws banning sexual harassment did.

We need not investigate the merits of this suggestion, for – whatever its merits – *it is flatly inconsistent with Rortyan pragmatism*. Singer defines legitimacy in terms of a process that reveals the truth about what is and is not “really” justified. For a Rortyan pragmatist, our norms of justification neither have nor need any ground outside themselves: there is no “truth” to discern about what is and is not “really” justified. So we have not found an acceptable Rortyan-pragmatic solution to the question of the proper limits of state power. Of course, one possible response here is to abandon Rortyan pragmatism. But that would be to abandon the claim that Rortyan pragmatism provides some fundamental insight into the nature of the law.

### Rejecting the Demand

Singer, as we have interpreted him, tries to explain why, for example, one should not obey laws allowing slavery but should obey laws prohibiting sexual harassment. Wells, as we noted earlier, rejects this explanatory demand. Of course, she can – in *a sense* – explain why one should not obey laws allowing slavery but should obey laws prohibiting sexual harassment. She can point out that our actually-in-use norms prohibit both slavery and sexual harassment. However, “our” norms are not everyone’s norms. Some adhere to norms that allow – what we regard as unjustifiable – sexual harassment. The demand was to explain why they ought to obey laws prohibiting sexual harassment. And – again *in a sense* – Wells can explain this; she can point out – again – that, from the point of view of “our” norms, sexual harassment is unjustified. What she cannot

do is explain – from some neutral perspective – why those whose norms differ from ours should obey laws prohibiting sexual harassment. For Wells, there is no such neutral perspective. To recognize such a perspective is to overlook the basic pragmatist point: namely, our norms neither have nor need a ground outside themselves. To look for a “neutral perspective” from which to review norms and pass judgment on them is to look for such a nonexistent ground. The pragmatic approach rejects any such explanatory task.

Some will find Wells’s pragmatic nonfoundationalism decidedly unpalatable; they will insist that – surely – there *must* be a way to show that *everyone* is obligated to obey laws prohibiting sexual harassment. For example, Wright, as we have seen, contends that an obligation to obey the law derives from the foundational norm of equal freedom, a norm to which all rational persons must assent. Our goal is not to resolve this difference, but to use the difference to make the nature of legal pragmatism clear. The key difference between the Rortyan pragmatist Wells and Wright is that she completely rejects the idea that there is anything all rational persons *must* assent to; moreover, unlike Singer (as we have represented him), Wells does not try to replace the ideal of necessary rational assent with an alternative explanation of why people should obey the law. Instead, she insists that we abandon the – in her eyes, futile – search for such an explanation. Instead, we should focus on the practices of argument and justification that comprise our actually-in-use norms. These norms do in fact incorporate a variety of ways to deal with conflicting points of view, and the good-faith practice of argument and justification often leads – not necessarily, but *in fact* – to agreement. Legal pragmatism urges us to understand the law by focusing on the practices that comprise our actually-in-use norms, on the pattern of actual conflict and conflict-resolution that we find displayed in the judicial decision making. This is the perspective pragmatism offers us. But is it a perspective we should adopt? The key issue here is antifoundationalism. Are there norms any rational person *must* accept, as Wright – and many others – think? Or, are there no such norms, as Wells – and many others – think? The plausibility of legal pragmatism depends on the answer to this traditional philosophical question.

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## Part III

# Topics and Disciplines





## Law and Its Normativity

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It is commonplace to distinguish between the normative and the descriptive. Descriptions state facts: norms guide action, tell us what to do. It is equally commonplace to note that laws are norms. It may be a fact that the Canadian *Criminal Code* makes dishonest appropriation of another's property an offence. The clause of the *Code* that defines the offence, however, has the status of a norm – it tells us not to steal.

So much is clear, but not much else is, when we begin to theorize how it is that laws are norms. Many questions arise. In what does the normativity of law consist? Do laws guide action if and only if they *justifiably* guide action? What is it for a law to guide action justifiably? Can a law guide action in itself, or only through some connection to another body of norms? And if so, which body? These questions are at the core of the philosophical or jurisprudential problem of the normativity of law. I interpret this problem in the widest possible way – that is, without prejudice as to exactly what content the idea that law justifiably guides action, or justifiably imposes an obligation, may have. In particular, I am not assuming from the beginning that only moral content suffices to provide justification. The question of justifying content is left open for independent settlement.

There are a number of different families, broadly speaking, of theories of the normativity of law. Leslie Green writes:

At the level of concept formation ... legal theory must be value-relevant. Any concept of law can have no deeper ground than the complex set of interests and purposes to which legal and political theory responds. (Green, 1987, p. 15)

One much-contested issue is whether – on the assumption that law's link to its grounds in background political morality is what underwrites the normativity of law – that link then or is it not part of the concept of law itself? One main division of theories of legal normativity, therefore, is that into externalist and internalist accounts. By "externalist accounts," I mean theories that do not explain the normativity of law from resources within the law itself. Rather, they locate the normativity of law in its relation to some other, nonlegal, body of norms. Such theories view law as heteronomous, deriving whatever authority or action-guiding force law has from somewhere outside of itself. By "internalist accounts," I mean theories that do make use of connections to

other bodies of norms in order to explain the normativity of law, but that regard the connection of law to these other norms as *internal* to law. Law, on these accounts, is still in itself normatively autonomous.

In addition to these large families of theories of the normativity of law, there are also descriptivist theories of law. By “descriptivist accounts,” I mean theories that focus on the social role of law. That is, these accounts identify what they see as relevant features of the way that laws or legal systems function in social life, and ground the normativity of law in these features. They claim that the normativity of law consists exactly in the possession of these features. Some versions are overtly naturalist or reductionist accounts of the normativity of law: these merit separate discussion.

Legal theories are a motley, differing more or less widely along many vectors despite the commonality of their concern with law. Green (1987), for instance, divides legal functionalism from adjudicative moralism and legal institutionalism. Most of the same theories appear in his essay as appear in this one, but the taxonomical focus is different: Green’s focus is specifically how theories of law represent law’s *political* dimension. Danny Priel (2007, p. 195) divides theories of the normativity of law into the “moral normativity” approach and the “social normativity” approach. The former category includes both externalist and internalist (in my senses here) theories, the latter includes both reductionist and nonreductionist descriptivist (in my sense here) theories. The differences between externalist and internalist theories, and between reductionist and nonreductionist theories is not significant for Priel, who is mainly concerned to present an alternative to analytical jurisprudence’s emphasis on the necessary features of law.

This essay tries to look at the normativity of law as a problem in itself, and not as a route to shedding light on further philosophical problems about law. My primary goal here is to provide a schema or taxonomy of the variety of answers that legal theorists have tried to offer to the question of the normativity of law, in the hope that readers will be able to locate within the schema any given theory that interests them and begin from there to consider the relation between such a theory and its rivals. In the following sections, I will discuss in turn each of these four families of theories mentioned.

## Externalist Accounts

By “externalist accounts,” as said, I mean theories that do not explain the normativity of law from resources within the law itself. Rather, they locate the normativity of law in its relation to some other, nonlegal, body of norms, viewing law as heteronomous, as deriving whatever authority or action-guiding force law has from somewhere outside of itself. In contemporary legal theory, there are four important forms of externalist theory: exclusive legal positivism, moral realism, law and economics, Critical Legal Studies and similar movements.

### *Law and Morality*

Human beings are both individual persons and social creatures. Their individual projects, interests, and lives overlap and intertwine in complex ways. These relation-

ships need management if human life is to bring pleasure and satisfaction to those who live it. Both law and morality are normative systems designed for such management. Yet they are fundamentally different systems. Legal systems are institutionalized normative systems: moral norms are the norms of society as a whole, not of any institution within society. It is hardly surprising that a focus on the complex set of similarities and differences that exist between law and morality has been the preoccupation of a great deal of recent, and not-so-recent, philosophy of law.

Some things are clear, and can be inventoried without prejudicing jurisprudential issues. Law and morality clearly overlap: they contain norms identical in content. Laws often come to exist as a result of the moral beliefs of citizens, legislators, and judges. Legal systems may consciously pass laws (charters or bills of rights are the obvious examples) that seem to leave to morality the task of filling out their applicability in particular cases. Law may even be thought of as having as a primary function the enforcement of morality, though such a view is invariably controversial. As opposed to these commonalities, laws do and moral norms do not come into existence, become changed, or pass out of existence at specific points in time as the result of specific procedures. Laws must be public and the sanctions for their breach publicly determined, moral norms need not be either.

These are prephilosophical, if you like, facts about the relation between law and morality. The question arises, however, at the level of theory: are the substantive connections between law and morality part of the nature of law, or are they contingent as far as law is concerned? My interest in these huge questions here is only as they reveal themselves in concerns about the normativity of law. In this section, I address two very different forms of “externalism,” as I am calling it, about law and morality.

### *Exclusive legal positivism*

The terminology “exclusive legal positivism” is of relatively recent currency in legal philosophy. It appeared first around twenty years ago as the obvious foil to the terminology of “inclusive legal positivism” (see below) adopted by adherents to the latter view. Until the emergence of “inclusive legal positivism,” exclusive legal positivism arguably was simply legal positivism itself – the view that “the existence of law is one thing, its merits or demerits another.” On the other hand, one of the main contemporary defenders of exclusive legal positivism, Joseph Raz, wrote in 1979 that

a jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend *exclusively* on facts of human behaviour capable of being described in value-neutral terms and applied without resort to moral argument. (Raz, 1979, pp. 39–40, emphasis added)

It is a short step from there to “no, tests for the existence of law can include moral argument,” and then to “inclusive legal positivism” as the name for that family of views, and to “exclusive legal positivism” for the reassertion of “tests for the existence of law cannot include moral argument.” Apart from Raz, Scott Shapiro (2000, 2001, 2002), Andrei Marmor (2001, 2002, 2006), John Gardner (2001), and Green (2003) are prominent current defenders of exclusive legal positivism.

Exclusive legal positivism is often thought of as insisting on a separation of law and morality – law excludes, if you like, in some specified way or ways morality. Intuitively, that poses for exclusive legal positivism of explaining then how it is that laws are *norms*. The response is typically to explain that the normativity of laws comes from their status as valid laws, from their validity. However, it is then immediately said that, because the existence of law is one thing and its merit or demerit another, the normativity derived from validity is a strictly *legal* normativity, not a moral or other normativity. However, such a limitation on the normativity of law for many seems to leave that normativity unexplained. We know that valid laws have whatever normativity derives from their validity: we want to know, does law have “real” normativity – a form of normativity beyond that which is just a function of validity?

Any answer to this latter question from the point of view of exclusive legal positivism must take a certain form. That form is well exemplified by Raz’s “Normal Justification Thesis” for the authority of law. “Authority” here is used in a precise way: law is authoritative just in case law’s claims on our obedience are justified. Raz puts the matter this way:

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons that apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly. (Raz, 1986, p. 53)

Law is authoritative if we have reason to obey it. We have reason to obey it if by obeying we will conform better to reasons that already apply to us, reasons that independently of the provisions of the law say that we should act in this or that way. The law is authoritative, not because it is the law, but because it mediates successfully reasons for action that are independent of the law. The distinctive character of law as a social institution lies in the distinctiveness of its style of mediation, but exploration of that is a different topic outside the scope of this essay.

*Michael Moore and semantic realism*

A particularly strong form of externalism about the normativity of law is the metaphysical realism about law defended by Michael Moore (e.g., 1981, 1987, 1992). In Moore’s view, the meaning of propositions of law is given by the semantic relationship in which they stand (if they do) to propositions of morality. Morality may be an independent normative system from law, but morality provides the facts independent of law that give legal propositions their meaning. In the case of those legal propositions that are normative, therefore, morality underwrites that normativity.

Moore also believes that morality itself can be given a realist account. However, it is not necessary to determine whether he is correct about that. A person might believe that morality itself will not have genuine normativity – a normativity that in the appropriate circumstances can be duly passed on to law – unless real moral facts exist, unless there is a real independent moral order. Moore believes that. But others – for example, Derek Beyleveld, Roger Brownsword, and Ronald Dworkin – believe that the normativity of law is dependent on the normativity of morality, while believing also that morality

itself is construed in antirealist ways (see e.g., Beyleveld & Brownsword, 1986; Dworkin, 1986). Even that dependency can be differently construed, according to how much weight in the required adjustment of law to morality is given to the actual state of the law at a given point in time. Dworkin, for example, seems to give fit with existing settled law the same weight as fit with principle, while Beyleveld and Brownsword are less respectful.

### *Law and economics*

Law and economics, as an approach to the normativity of law, began in the early 1960s. Coase (1960) and Calabresi (1961) are generally cited as the beginnings of law and economics as a movement. It has since become a staple and stable, though not wholly uncontroversial, part of legal education and legal scholarship, not to mention adjudication itself. Criticisms can be found from many perspectives – Catholic (Sargent, 2005), Kantian (White, 2006), feminist (Fineman & Dougherty, 2005), socialist (Kelman, 1979, 1983), noncognitivist (Leff, 1974), and doubtless others as well. The scholarly literature and pedagogy is worldwide and highly professionalized: apparently Calabresi and Melamed (1972) is the single most cited paper in the field (Van den Bergh, 2008, p. 1). Richard Posner's pioneering textbook is now in its seventh edition (Posner, 2007). For a different perspective within the genre, see also Shavell (2004); for an introduction, see Polinsky (2003).

Within law and economics, the distinction is standardly made between descriptive or positive law and economics and normative law and economics. Descriptive or positive law and economics is an analytic approach to law that claims we best understand the content of given laws or bodies of law by seeing that they mimic or track, or have been developed so as to mimic or track, economic efficiency. Descriptive law and economics may also deploy the tools of economic analysis to show what the effects might or would be of the law adopting this or that norm. Normative law and economics, on the other hand, judges laws as good or bad laws, and so as worthy of being followed or not, in terms of whether the law is or is not economically efficient.

Given that one of the primary functions of law is the regulation of the distribution of resources in a society, and that economics is the science of the allocative management of resources, it would not be surprising that certain areas of law would, or even should, have a close connection with economic efficiency – not just areas of law such as securities law or competition law, but also broader and more traditional areas such as contract and tort. However, law and economics as a theory of the normativity of law becomes much more controversial when applied to areas such as criminal law, family law, constitutional law, human rights law, and the like. Descriptive law and economics also proffers to be the best explanation of how law influences behavior: the behavior of citizens in conforming to the law and the behavior of officials in creating and applying the law is best explained in terms of rational economic choice. In that way, law and economics attempts to explain the normativity of law in the sense of the way that law actually guides behavior (Kornhauser, 1999). Many think that the normativity of the rationally self-interested search for individual preference-satisfaction is not a possible basis for the normativity of *law*. Given my capacious interpretation of “normativity” here, the truth of this last claim must be left unexplored.

*Critical Legal Studies and “political” views of law*

As soon as social science became established as a genuine scientific (in some sense) discipline, it was not hard to discover that the realities of the way the creation, application, and enforcement of the law occurred in real time in the real world were not always congruent either with legal doctrine or with law’s official self-image as an impartial institution of justice. “Law in action” became markedly distinguishable from “law on the books.” However, legal realism in the first, say, two-thirds of the twentieth century was content to chart this divide, and to consider the consequences as having significance for practical legislative policy and law reform rather than for jurisprudence and legal theory themselves. That changed in the 1970s with the advent of Critical Legal Studies.

The Critical Legal Studies movement certainly was not slow to urge policy changes, but it also presented a challenge to orthodox legal doctrine and thought at the level of theory. The discrepancies between law’s self-image as impartial and the realities of its effects on the poor, the marginalized, and the dispossessed were not simply described but theorized, as being the results of the exercise of political power in the development and application of the law. Orthodox liberalism sees the political as separate from the legal, and sees the legal as in part designed to correct the injustices wrought by the political. Courts are seen as counterbalances to legislatures, as forums of principle, not of policy. This orthodoxy is challenged by the representation of law as nothing but politics in a different guise. The official image of the law as impartial represents the law as drawing its normative content from its embodiment of the values of liberal pluralism. According to Critical Legal Studies, on the other hand, the law derives its normative content from the political process itself. Law is as much about political power and the exercise of political power as is the political process itself. Law is politics “all the way down.”

Two different forms of such a politicization of law at the level of theory may be distinguished. The first relies largely on empirical and on conceptual arguments only to the extent that they are expository of doctrine. Feminist legal theory (Levit & Verchick, 2006), Critical Race Theory (Delgado & Stefancic, 2001), including work done by aboriginal legal theorists (Henderson, 2006; Turner, 2006), and much class-based critical criminology (e.g., Henry & Lanier, 2001) have this character. The law is argued simply to display in its doctrines and in its applications gender, race, or class bias – to serve the interests of the powerful and the rich, rather than the poor and the marginalized. The assertion that “law is political” is a factual or historical assertion – law is in its creation and evolution the plaything of the politically powerful.

There is, on the other hand, in much writing by Critical Legal scholars a quite different form of argument: a transcendent argument, one might almost call it. The argument takes the form of urging that the conceptual structure of the law itself is such as to make it fatally indeterminate or unstable – “fatally” in the sense of wholly inimical to and subversive of law’s purposes and goals. For example, Duncan Kennedy has argued that private law is structured around two fundamental polarities – individualism and altruism, rule and standard. These polarities are irreconcilable: they have no middle ground. So the actual enterprise of private law cannot but be a series of judgments made ultimately on political, not doctrinal, grounds (Kennedy, 1976). Mark

Kelman argued that the time frame within which the criminal law collects behavior together so as to constitute an “act” that will be the *actus reus* element of criminal guilt is infinitely malleable, and so again criminal conviction cannot but be a series of judgments made ultimately on political, not doctrinal, grounds (Kelman, 1981). Martti Koskenniemi dismissed the pretensions to legality of international law by arguing that international law is internally incoherent. International law must distance itself from both natural law and sheer States’ will. To achieve the former, international law seeks concreteness: to achieve the latter international law seeks normativity. But this argumentative structure destroys itself. It is impossible to prove a rule, principle, or doctrine is both concrete and normative simultaneously. An argument about concreteness is an argument about closeness of rule to State practice. But the closer to State practice a rule is, the less normative and more political it seems. The search for normativity aims to create a distance from States’ practice: the search for concreteness aims to close a distance to States’ practice (Koskenniemi, 1990).

There is a common core to all these three arguments and others like them. The law presents itself as normatively autonomous, as having a normativity of its own. But that independent normativity requires as a precondition that the law has a stable normative meaning. Law though cannot have a stable normative meaning. Law is indeterminate and self-contradictory. The normative meaning that law undoubtedly does have must therefore come from outside of law, from political morality, from the political process.

## Internalist Accounts

### *Classical natural law*

Moore regularly describes the view that he holds as a “natural law” view. The notion of “natural law theory” can be understood in a capacious way to refer to any theory of law that regards law as having some form of essential connection to morality. In this wide sense, theories such as Moore’s, Beyleveld and Brownsword’s, Lon Fuller’s (see below), and even Robert Alexy’s or Dworkin’s (see below) would count as “natural law theories.” This capacious understanding of “natural law theory” is not illuminating. There are too many differences between theories so grouped for an allegation of a commonality to be helpful. In particular, as the taxonomy adopted here implies, there is an important difference between theories that see law’s connection to morality as internal to, or as external to, law. In this essay, the term “natural law theory” is used in a more restrictive way, one that gives full weight to the descriptor “natural.”

Historically, natural law theory is associated primarily with Thomas Aquinas. The influence of Aristotle on Aquinas is a commonplace. It is not always acknowledged, however, how this influence yields an account of the “natural” in “natural law theory.” Aristotle had a fundamental belief in the unity of nature, in the idea that one set of concepts explicated all of nature. The differences between different aspects of nature are but differences between modes of instantiation of these fundamental concepts. The study of human nature was no exception – not merely with respect to human beings seen as bodies, but also human beings seen as ensouled, and specifically as having

rational souls. Nature he saw as teleological, as always directed to ends that constituted the natural good. Humanity, therefore – rational human nature – contained as an inherent principle practical reason and the capacity to seek the goal of living well. This inherent practical reason is the *natural* law. The content of the natural law is the substantive account of ways of living that bring humanity to its natural good.

In this broad sense, the natural law is much broader than *law* understood as a specific human institution. Natural law theory as a specific kind of theory of *law* is a theory of how this human institution stands in relation to natural law broadly conceived. As John Finnis has repeatedly emphasized (1980, 26ff; 2008):

Natural law theorists ... did not conceive their theories in opposition to, or even as distinct from, legal positivism ... The term “positive law” was put into wide philosophical circulation first by Aquinas, and natural law theories like his share, or at least make no effort to deny, many or virtually all “positivist” theses – except of course the bare thesis that natural law theories are mistaken. (Finnis, 2008, intro: see also Aquinas 1988, 56 [*Summa Theologica* Q 95 A 2])

Positive law is a human artifact, its existence and content matters of social fact. However, positive law as a human artifact has a function and a purpose: to be “an ordinance of reason for the common good” (Aquinas, 1988, 17, Q 90 A 4). Natural law theory is an example of what Green calls “normative functionalism,” a type of theory that “presents a teleological view of law as an institution whose distinctive province it is to aim at certain valuable ends” (Green, 1987, p. 5). That is the essential nature of law. Any given instance of human law may fail to do that, but to the extent of that failure there is a poor example of law, as a cheetah who cannot run well or an odorless rose is a poor example of a cheetah or a rose. Positive law succeeds in being truly law by being a *determinatio*, a proper realization or instantiation of the natural law (Aquinas, 1988, 59 ff., Q 95 A 2; Finnis, 1980, 284ff).

### *Weinrib's Legal Formalism*

Classical natural law in its Aquinean form, and in modern expositions such as Finnis', also has a theological level: the natural law itself is only properly understood by being seen as related to divine law. This theological dimension, though, is separable, though this latter claim of separability would have to be defended in a different context. This separability gives rise to the idea of “secular natural law theory,” natural law theory that eschews references to a higher or divine order of reality. Even “secular” natural law theory, though, must have a genuine commitment to *natural* law: a theory does not become a “secular natural law theory” merely by being metaphysically parsimonious. The idea of “natural law” here comprehends at least a commitment to objective value as a function of how things naturally are. We find different examples of such a commitment in different theories of the normativity of law.

My first example is the legal formalism of Ernest Weinrib's theory of private law (Weinrib, 1995): all references in the text are to this work. Weinrib is only interested in applying his formalism to private law (contract and tort), but as we shall see, his



formalist approach is of wider application, and could be used as a theory of the normativity of law in general, not merely of the normativity of private law.

Weinrib identifies first, using the term in a manner similar to my understanding of it here, what he calls externalist or functionalist approaches to law (1995, 4ff). Externalism finds the distinctive character of law in some goal or purpose or function that law serves. Externalism thus cannot capture the intrinsic nature of a domain of law, for example, private law. Externalism collapses the legal into the political, but it is possible to separate the legal from the political. The striking and salient thing about private law is the direct connection between a particular plaintiff and a particular defendant (10ff): *this* person sues *that* person in contract or on tort. That relational structure must be the focus of any analysis of private law. Private law is a justificatory enterprise that articulates normative connections between controversies and their resolutions. It is not just that this person sues that person: this (or that) person has rights or duties under private law such that the outcome of the suit is *properly* a finding for the plaintiff or for the defendant. This propriety is built into private law. Private law values and tends towards its own coherence, as an aspiration.

This approach is “formalist,” in the following sense. Weinrib endorses Roberto Unger’s account of formalism, although he rejects Unger’s reasons for repudiating formalism (Unger, 1983, p. 563–76: on the need to be very careful how the term “formalism” is understood given theorists’ tendencies to use it as a term of abuse, see Stone, 2002). Formalism, for Unger, is a method of legal justification that consists in an apolitical mode of rationality. The distinctive rationality of law is immanent in the legal material on which it operates. Doctrine is developed by working out the implications of law from a viewpoint internal to law. Formalism presupposes that authoritative legal materials display, though always imperfectly, an intelligible moral order.

Formalism, then, focuses on the “immanent moral rationality” of law. For Weinrib, the moral content of this immanent rationality is supplied by Aristotle’s notion of corrective justice and Kant’s notion of right. Formalism goes to the relevance of understanding the private law relationship through its structure; corrective justice is the specification of its structure; and Kantian right supplies the moral standpoint immanent in its structure. The three qualities – the rationality, the immanence, and the normativeness that characterize law – are integrated: law has each because and only because it has the others. “Form” understood classically as the essence of a thing, a means of classification of things, and as a principle of the unity of things: form, that is, is “character, kind and unity” (p. 28). These three aspects of formal intelligibility are all applicable to juridical relationships. The coherence of legal doctrine is linked to the possession of form (p. 35). Weinrib gives examples from tort law. To analyze tort law, as externalist theories do, in terms of deterrence and compensation omits the essential feature of tort litigation that it involves a juridical relationship between two specific parties, *that* plaintiff and *that* defendant. For that defendant to be deterred, the harm to that plaintiff has merely contingent relevance: for that plaintiff to receive compensation for the harm payment by that defendant has contingent relevance. Weinrib quotes with astonishment (p. 47) Posner’s comment that: “that damages are paid to the *plaintiff* is, from the economic standpoint, a detail” (Posner, 1977, p. 143, Posner’s emphasis), and the economists’ disparagement of causation (47n31). Even the shift to a

noninstrumental morality makes no difference insofar as such a morality is appealed to as external standard for legal justification (p. 49). Weinrib cites George Fletcher's work on excusing conditions in tort (Fletcher, 1972), and criticizes the emphasis on excuses (53ff). Excuses deal with the defendant in isolation from the plaintiff. Why should the probability that most people in the defendant's position would have committed the same wrong lead to the cancellation of a particular plaintiff's right to compensation? Even if the excusing condition moves *us* to compassion, on what grounds does our compassion operate at the *plaintiff's* expense (p. 54, Weinrib's emphasis)? The examples are important because illustrative. We want private law adjudication to be justified in each particular case, to have substantive normativity. Weinrib's formalism understands tort litigation, for example, as essentially structured by a relationship between a particular plaintiff and a particular defendant, with that plaintiff and that defendant having rights and duties derived from Aristotelian corrective justice and Kantian right. This immanent moral rationality explains, and so justifies, in a way that externalists accounts do not, just exactly why in the fact situation in question the law is right to award, or not to award as the case may be, damages to that plaintiff for that harm done to that plaintiff by that defendant.

As hinted above, the nature of legal form – form as expressing character, kind and unity; form as expressing the rationality, the immanence and the normativeness that characterize law – is explicated by Weinrib simply as regards private law. But the analysis is capable of wider application. I submit that the work of Antony Duff in explicating the moral foundations of criminal law is validly seen as “formalist” in this sense. In analyzing criminal trials and punishments, for example, Duff presents the criminal trial as a structure involving the defendant and society as a whole through the law in a relationship structured by society's valid claims on its citizens that they conform to the law and its right to call them to account when they do not. The defendant in turn has rights to be treated by society through the law as a rational being when society calls him or her to account and punishes him or her for a failure to discharge duties of conformity (Duff, 1986). The immanent moral rationality is that of society as a liberal political community, a concept subtending both the right on the part of a defendant to be treated as a member of that community and the right on the part of the community to expect conformity to its laws (Duff, 2001). The detail and structure of the criminal law's specific mechanisms for calling members of the community to account – the doctrines and procedures of the criminal law – must equally exhibit this same immanent moral rationality (Duff, 2007). The normativity of any actual criminal law, for Duff, is a function of its expressing the immanent moral rationality (though he does not at all use such language) of the normative structure outlined.

### *Fuller and the inner morality of law*

Weinrib's account of the normativity of law, while having in common with the classical natural law tradition roots in Aristotle, is secular. Lon Fuller's idea of the “inner morality of law,” or the “morality that makes law possible” (Fuller, 1964, ch. II), takes us further from classical natural law. It is less clear whether Fuller's view still qualifies as a “natural law theory.” Fuller himself identified his view with natural law theory (Summers, 1984, p. 62), but as Robert Summers points out (*ibid.*) that is hardly

decisive. The thrust of Fuller's idea is to articulate an ideal of legality that displays the essential rationality of law as "the enterprise of subjecting human conduct to the governance of rules" (Fuller, 1964, p. 106). This rationality, however, is essentially *procedural*: law must meet certain formal criteria if it is to be able to do what law does, to achieve the benefits that the governance of men by laws is designed to bring. Just so far, Fuller's view is not that different from Raz' well-known account of the virtue of the Rule of Law (Raz, 1979, ch. 11), an account that is far from being a natural law account. Summers rests his own claim that Fuller merits classification as a natural law theorist on the fact that Fuller regards it as an objective truth about human affairs that law must be designed in terms of his "inner morality" if it is to be rational. But that is an insufficient ground: Raz also would hold a view of a similar form.

Fuller comes closer to natural law theory in his claim that a failure to observe his conditions is a failure to "make law" at all, a claim that Raz would not accept. Finniss (2008, 1.3, 1.5) accepts Fuller as a natural law theorist, as he emphasizes what he sees as rich moral underpinnings to Fuller's view. Law's "inner morality" is the key to law as good social ordering, and the goodness of good social ordering lies in its fostering of liberty. Summers likewise quotes Fuller thus: "to give social effect to individual choice, some formal arrangements, some form of social order, is necessary" (Summers, 1984, p. 74). However, to what extent Fuller's methodology is simply instrumentalist, and so alien to natural law theory, is not a matter than can be settled without more exegesis than can be carried out here. It is, though, worth briefly noting an important contrast between Fuller and Summers' own version of formalism (Summers, 2004, part II; Summers, 2006; see also Bix, 2007). For Summers, form is "the purposive systematic arrangement of the unit as a whole – its 'organizational essence,' and is to be defined in terms of its constituent features, and their inter-relations" (Summers, 2006, p. 5). He applies this general picture to a number of specific functional legal units. The form of these units makes them apt for certain ends or purposes. Summers' theory is thus "externalist" in my sense here – the normativity of any such form comes from its factual aptness to realize ends whose value derives from elsewhere than the form-end relation itself. Summers' theory is genuinely instrumentalist, therefore. Arguably, law and legal procedure have intrinsic ordering properties, and so intrinsic values, of their own. Weinrib's view of course is not in the least bit externalist or instrumentalist.

### *The "legal principles" approach*

One topic much discussed in recent legal theory has been the existence and role in the law of so-called legal principles. I emphasize the qualifier "so-called" for this reason. The term has been typically used by theorists as though it has a well-understood prephilosophical or ordinary-language meaning, such that the term can then be introduced into and advance technical jurisprudential disputes. This is a mistake: whether and how there are jurisprudentially significant standards in the law called "legal principles" is one form that the debate between legal positivism and its opponents can take (Shiner, 1992, chs. 1.6, 2.5, and 7). Nonetheless, with this caveat in mind, we can profitably enquire how the concept of a "legal principle" has been held by its sponsors to explain the normativity of law. The notion of "legal principle" in this technical sense is prominent in the work of Dworkin and Robert Alexy. We will consider them in turn.

*Dworkin*

I have argued at length elsewhere (Shiner, 1992, chs. 7.4, 8.2–4, 12.3) that there are substantial philosophical differences between the original principles-based critique of legal positivism in the first fifteen or so years of Dworkin's writings (see Dworkin, 1978, 1985) and the later theory of law as integrity in Dworkin (1986). I will allude to those differences here.

Dworkin originally introduced “legal principle” as the name for a kind of standard in the law whose nature and existence could not be accounted for by legal positivism, and which therefore stood as a refutation of positivism (Dworkin, 1978, chs. 2–4). The argument is straightforward. Standards such as “No one shall profit from their own wrong” or “The courts will not permit themselves to be instruments of inequity” have three salient features: they do not have a social source, they are not “pedigreed”; they are requirements of justice or fairness or some other dimension of morality (Dworkin, 1978, p. 22); they are binding on judges, judges have a legal obligation to deploy them in adjudication. Legal positivism leaves no room for legal standards with these three features. Dworkin then extends the idea of legal principles into a full-scale theory of law crystallized in the image of the ideal judge Hercules, who is the supreme exponent of the role of legal principles in adjudication. Hercules has the capacity to work out an entire justificatory scheme for first-order legal decisions in advance, in a “seamless web” (Dworkin, 1978, pp. 115–17). The web includes both the propositions of first-order law and the background justificatory legal principles. There is no better metaphor for what I am calling “internalism” about the normativity of law.

The internalism of the later theory of law as integrity is different. According to this theory, the enterprise of law is an essentially interpretive enterprise. It is possible to distinguish (1) a preinterpretive stage of simply identifying commonsensically legal materials; (2) an interpretive stage, crucial to adjudication, of settling on a general justification for the main elements of the identified practice (Dworkin, 1986, pp. 65–6); (3) a postinterpretive stage of reforming the practice in the light of the interpretive judgments. The interpretive stage holds the attention of legal theory. There are two dimensions that constrain the judge at the interpretive stage – the dimension of fit with existing institutional history, and the dimension of justification (Dworkin, 1986, p. 230ff). In the latter, the judge must seek to develop a theory, drawing on principles of political morality, which would make institutional history the best it could be. A judge's convictions about fit provide a “rough threshold requirement” (Dworkin, 1986, p. 255), but the requirement is not an absolute constraint. In the end, the judge must come to “an overall judgment that trades off an interpretation's success on one type of standard against its failure on another” (Dworkin, 1986, p. 239). Neither dimension has lexical priority over the other. Hercules reappears as “an imaginary judge of super-human intellectual power and patience who accepts law as integrity” (*ibid.*), and who may be assumed to display his powers in finding a coherent integration of the two dimensions of interpretation as they apply to any given instant case.

Exclusive legal positivism might be thought of as the theory which champions fit with institutional history. Anti-positivism might be thought of as the theory which champions justification in terms of principles of political morality. Dworkin's earlier theory is “anti-positivist” in this sense. The theory of law as integrity does not sponsor

either of the two dimensions exclusively. Rather, it represents the goal of adjudication as the proper balance of the two different elements, as the reconciliation of the claims of institutional history and the claims of moral principle. The notion of law as an interpretive enterprise is meant to highlight the fact that a legal decision even, and perhaps especially, in a hard case is not simply an assertion of a pre-existing order. Nor is it a declaration of how things shall in the future be unconstrained by how they have been in the past. Rather it is an interpretation of the past in the light of the ideals embedded in the past.

It can be seriously questioned whether the theory of law as integrity is a meaningful, stable theory (see Réaume, 1989; Shiner, 1992, ch. 12.3; Crowe, 2007). The thesis of law as integrity wants us to believe that the second interpretive dimension, the requirement of coherence with legal principle, sufficiently frees the judge from the restrictions imposed by coherence with settled law to make coherence overall a proper model for legal interpretation. The impression is illusory. Law as integrity still faces a troublesome dilemma. Either coherence with settled law is a genuine requirement, in which case the content of the law becomes determined relativistically. Or coherence with settled law is not a genuine requirement, in which case the judge is being licensed to “play fast and loose” with settled law, and is thus no longer a judge (see Mackie, 1977–78). The theory of law as integrity oscillates infinitely between what I have called externalism and internalism with respect to the normativity of law.

### *Alexy*

A somewhat different account of legal principles has been recently presented by Robert Alexy. He characterizes legal principles as *Optimierungsgebote*, “optimization commands”:

*Principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules. (Alexy, 2002, pp. 47–8, Alexy’s emphasis, footnotes omitted)

There are obvious resonances here with Dworkin’s notion of interpretation that “strives to make an object the best it can be” (Dworkin, 1986, 52ff): we cannot say “echoes,” because the original German version of Alexy’s book appeared in the same year as *Law’s Empire* (Alexy, 1986). Alexy’s idea of principles and the underlying motivation for the theory, however, are different from Dworkin’s. Alexy clearly sees the existing state of the law as exercising a more powerful constraint on the process of optimization than does Dworkin. Existing principles and rules *determine* the scope of the legally possible for Alexy, whereas for Dworkin they simply represent the dimension of fit that is of equal status with the dimension of justification. It is clear also from Alexy’s book as a whole that his main concern is with conflicts of constitutional rights. Like Dworkin, he tries to theorize from within the head of a judge on a constitutional court, but Alexy’s “Hercules,” as it were, does not see the task before him as does Dworkin’s Hercules. Alexy’s judge “Hercules” sees the legal reality of a complex, interlocking network of constitutional values that cannot all be satisfied at once and may even seem

to be incommensurable. Alexy's "Hercules" has his feet placed and his eyes focused on the ground and not in the clouds – a practical, not an ideal judge. Alexy's "Hercules" views the task of balancing the various conflicting considerations he is required to accommodate as exactly defining his task, not as a kind of second-best situation he ideally would be without.

Alexy's doctrine of principles, therefore, while clearly aimed at including in the law normative standards that extend beyond simply what positive law empirically contains, secures that inclusion to a lesser degree than the theory of law as integrity, let alone the theory of legal principles as requirements of justice or fairness or some other dimension of morality.

### *Inclusive legal positivism*

The story so far of internalism about the normativity of law has been one of a steadily reducing scope for the internal connection that gives law its normativity. The natural law and the importance for positive law of being a *determinatio* of the natural law are pervasive across the law. Fuller's "inner morality of the law," however, focuses on the formalities and procedures of law, rather than its substantive content. Both theory of law as integrity and the theory of legal principles as optimization requirements define institutional history as a side constraint on justificatory principle in determining the normativity of law, although to different degrees. There is still, though, one common assumption to all these views: law would not be law, not have legal normativity, without the connection to natural law, or to the inner morality, or to legal principle. In the case of the final version of internalism to be considered, the thinnest version, even this assumption is given up.

Inclusive legal positivism is the view – not that unpedigreed moral standards must be determinants of legal normativity, or that legal normativity has nothing to do with external moral standards, but the view that moral standards may indeed be the root of legal normativity by becoming part of the law according to the law's own formal standards of legal validity. The term "may" is crucial: it is possible for this to be so, although it is not necessary. Law would still be law even if there were no such properly embedded moral justificatory norms. Such a view is "positivist" in that still what counts as the law is determined by a social source. But it is an "inclusive" positivism because moral standards or principles can become "included" in the law by the appropriate source-based criterion for validity. The set of justificatory standards for law may include moral standards as well as strictly legal standards. Inclusive legal positivism has attracted more debate than any other issue in legal theory of the last twenty or so years. Our interest in it here is very narrow – in the view simply as a distinctive account of legal normativity.

Inclusive legal positivism is associated primarily with the work of Wilfrid Waluchow, Jules Coleman, and Matthew Kramer. H. L. A. Hart also seemed to embrace the view in the essay published as the Postscript to the second edition of *The Concept of Law* (Hart, 1994, p. 247). Coleman arguably introduced the idea of inclusive legal positivism in print in his 1982 essay "Negative and Positive Positivism" (reprinted in Coleman, 1988). However, the first systematic presentation was by Waluchow (1994). Waluchow focused on so-called "charter societies," societies like Canada or the United States who

authorize strong judicial review of legislation for compatibility with the principles embedded in a charter or bill of rights. Such documents typically contain references to general notions like freedom, equality, liberty, “cruel and unusual,” due process, and so forth. On Waluchow’s view, these are clearly moral concepts: courts when applying them to decide cases are using moral arguments to determine legal status. For example, if the Supreme Court of Canada by way of interpreting the constitutional guarantee of equality rules that gays and lesbians may legally marry, then the normative force of that ruling as applied to some particular case comes not from the legal validity of the constitutional guarantee alone, nor from a moral principle of equality external to the law, but from a moral principle of equality that is itself part of the law.

Waluchow’s view draws much from the intuition that clauses of charters or bills of rights are distinctive legal documents. Their function precisely is to guarantee to citizens “pre-legal” or fundamental rights and freedoms. So the thought that, when in a clause of such a document a term like “equality” or “liberty” appears, the clause contains embedded moral principles is intuitively appealing. Coleman (2001 and elsewhere) and Kramer (2004 and elsewhere) yield some of this advantage. They take it, as Dworkin takes it, to be just obvious that the law is full of moral concepts and principles, and they devote their energies largely to criticizing the arguments of those who would deny this to be possible, or who would deny the need for such normatively powerful principles to have a social source.

The debate between exclusive and inclusive legal positivism, and between different versions of inclusive legal positivism, however vivid and vital to its participants, has nonetheless been recently dismissed as merely an internal debate over which is the most plausible form of legal positivism, whether descriptively or as the best grounds for rejecting anti-positivism. Dworkin (2002, p. 1679) and James Allan (2003, p. 209) describe the debate as “scholastic,” David Dyzenhaus (2000) as “stagnant,” and Priel (2005) as one to which we should say “Farewell,” while both Finnis (1999–2000, p. 1603) and Jeremy Waldron (2002, p. 381) characterize it as a mere “squabble.” I prefer to think in terms of a “maturing” of the debate about positivism’s views on the nature of law, in a sense of “mature” akin to that used by economists when they talk about a “mature” market for a product. A market for a product is “mature” when that market has reached a state of equilibrium marked by the absence of significant growth or innovation. No further development is technologically feasible or possible. Sales to existing customers have been maximized, and further sales can only be to customers newly entering the market altogether and existing customers who change the range of options they wish to possess. Advertising deploying claims of novelty is essentially misleading, as distinctions are being made without differences. If this analogy is appropriate, then some skepticism is justified as to whether the energy being expended in analytical legal theory about the status of determinations by morality of legality is likely to pay off in terms of tangible results and insights.

### Descriptivist Accounts

By “descriptivist accounts,” I mean theories that give naturalist or reductionist accounts of the normativity of law: that is, they identify what they see as relevant features of the

way that laws or legal systems actually function in real life, in actual practice, and then explicate the normativity of law in terms of these features. They claim that the normativity of law consists exactly in the possession of these features. There is, of course, a sense in which such descriptivist approaches do yield easily an account of a form of normativity. The issue is how interesting a form of normativity this is. Borrowing Hart's well-known terminology (Hart, 1963, 20ff), we can distinguish the "positive normativity" of law from its "critical normativity." The former would be the normativity that the norm-subjects of the law believe the law to have, and the latter would be the normativity that law actually has viewed from some independent normative perspective. Every theory of the normativity of law so far considered offers an account of the *critical* normativity of law. Descriptivist theories of the normativity of law, by contrast, must limit themselves to law's positive normativity. Whether an explication of the positive normativity of law is really an explication of "the normativity of law" I leave as an exercise for the reader, though I shall myself express views on the matter.

There is a long tradition of different descriptivist accounts of the normativity of law, all associated unsurprisingly with exclusive legal positivism. As I indicated briefly above, the exclusive legal positivist seems left with the task of explaining what can be meant by a strictly legal form of normativity that derives from nothing but legal validity. Great ingenuity has been expended in trying thus to construct the normative from what is not normative. However, it is doubtful that the attempts are successful.

*Austin: laws as commands backed by threats*

The founding father of descriptivist accounts of the normativity of law – at least in the eyes of legal theory of the last sixty years – is John Austin. For Austin, laws are commands of the sovereign: the normativity of law is in some way connected with this fact about laws. Unless the command emanates from one to whom others are in a habit of obedience and who is himself (herself/themselves) not in a habit of obedience to any human superior, the command will not be that special kind of command which constitutes a law (Austin, 1954, pp. 192–5). It is easy to overlook how subtle is Austin's taxonomy here. Commands are distinguished from other forms of imperative: those commands of the sovereign which are laws are distinguished both from those commands of others which are not laws and those commands of the sovereign that are not laws: positive law is distinguished from other kinds of law (Austin, 1954, Lecture I, pp. 18–23). The norm's force as a reason is derived from the fact that the command is backed by a threat or sanction – the norm-subject will be visited with evil if he or she does not comply with the command. "Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it" (Austin, 1954, Lecture I, p. 14, Austin's emphasis). However, the habits of obedience Austin refers to are facts, and the normative force of these facts is a matter of further facts, the likelihood or not of being "visited with evil." This normative force is "positive," not "critical." Austin is bowdlerizing language when he calls this normative force being "bound or obliged," or imposing a "duty."



*Hart and the internal point of view*

At the foundation of twentieth-century legal theory stands of course Hart's extensive repudiation of Austin's Command Theory as an adequate account of the concept of law (Hart, 1994, chs. 2–4). Famously, Hart urges that, to understand law, we must think in terms of rules and rule-following behavior, rather than commands and obedience in the light of threats. Hart urges *inter alia* that Austin has omitted the crucial element of the internal point of view to law. I have argued at length elsewhere that Hart's own internal point of view is itself riven with difficulties and confusions (Shiner, 1992, chs. 2.4–5, 6). Be that as it may, Hart's central thought is that the existence of a legal system as a system of rules depends on the existence (where and how is a matter of controversy) of the internal point of view – a point of view that accepts the law as genuinely creating obligations to obey and not simply as threatening to visit noncompliance with evil.

The internal point of view so construed seems to approximate closer to creating a genuine normativity for law than the simple idea of commands backed by threats. In one crucial respect, though, this appearance is an illusion. Still, the emphasis is on “positive normativity,” not “critical normativity.” That is, we are still explaining the existence of law and legal system in terms of beliefs about what is normatively forceful, not in terms of what actually is normatively forceful. As is well known, Hart tantalizingly in the Preface to *The Concept of Law* refers to his project as one in “descriptive sociology” (Hart, 1994, p. v).

*Conventionalist theories of law*

Hart argued that “the root cause of failure [of Austin's Command Theory] is that the elements out of which the theory was constructed, viz., the ideas of orders, obedience, habits and threats, do not include, and cannot by their combination yield, the idea of a rule” (Hart, 1994, p. 80). Similarly, Hart's positivist successors – albeit standing on his shoulders, the better to see – have argued that the elements out of which his theory was constructed, viz., the ideas of the internal point of view and a “critical reflective attitude,” the distinction between primary and secondary rules, and the conception of rules as social practices, do not include – and cannot by their combination yield – the essential characteristic of law as an interactive and coordinative practice. Without due weight to this characteristic, it is assumed, there is no explanation of law as a *normative* system.

*“True” conventionalist theories*

The first class of theories to attempt to remedy this deficiency are true conventionalist theories of law: that is, theories that use the term “convention” in an intentionally technical sense. The term “conventionalist theories of law” can be interpreted broadly or narrowly. In the broadest sense, the conventionalist thesis is simply the thesis that law rests on social practice (cf. Postema, 2008, p. 45), in that sense that all legal

theories I know of are conventionalist. A less broad (but still broad) sense embraces theories, almost always positivist theories, that build on the status of law as a social fact and on interpretations of what the term “social” might be held to imply in order to generate an account of the normativity of law. In the narrower sense, conventionalist theories of law are those theories that interpret legal systems as rooted in *conventions* in the sense highlighted by David Lewis (1969). Conventions so understood are patterns of mutual response that generate norms of behavior: they solve coordination problems seen as a kind of problem of strategic interaction.

The seemingly crucial feature about conventions so understood is that just in existing they have *normative* significance. That is, when a convention is in place, the social fact of the convention existing properly enters into an individual’s reasoning about preference rankings in a new way. The convention is not merely a fact about social behavior that produces for the individual preference-ranker a very weighty prudential reason for action – as if it were merely a sign of a great evil with which one would be visited if one not comply with the convention. Rather, the convention introduces a reason for acting in a certain way simply because that way conforms to the convention.

#### *Narrow conventionalist theories*

The potential application of Lewisian conventionalism to law is as follows. Law as an institution has the structure of a convention, so that the normativity of individual laws derives from their status as coordination norms of a certain kind, conventional coordination norms. Laws are taken to be coordination-norms that have emerged conventionally in the manner outlined, and have been given saliency by virtue of their acquiring positivistically understood validity via a rule of recognition. Having achieved saliency, they then achieve normativity.

There are many different versions of a conventionalist theory of law in this sense; the differences will not be charted here: Govert den Hartogh (2002), Eerik Lagerspetz (1995), and Gerald Postema (1982) all have presented versions of such a theory. Debate revolves around the degree to which and the ways in which a Lewisian analysis of conventions can be properly expanded beyond solutions to coordination problems strictly conceived – for example, to other “games” of strategic interaction besides coordination games (den Hartogh), or to coordination as the expression of democracy (Postema).

All the same, there are strong reasons for saying that Lewisian conventions are a poor model for the law, for a legal system (Green, 1988, ch. 4; Green, 1999; Marmor, 2001). While it may be true that legal systems do at times perform a coordinating function, and that viewed from the outside that is a reason for valuing them, still legal systems perform many other functions than coordinating, and it seems difficult to explain even their coordinating function without reference to more than sets of behavioral preferences. For reasons like these, Marmor introduces the notion of “constitutive conventions” (Marmor, 2001, chs. 1–2). A constitutive convention is a set of socially constructed standards such that the existence of the enterprise those standards control is inconceivable without the normative force of those standards. Marmor offers the rules of chess or bridge as obvious examples of such conventions, but he also extends

the idea to the norms of such wider cultural practices as the art world, and in the end the law.

One need not decide whether in such an extension the concept of “convention” still has weight. Suppose that it has, and that the idea of “convention” can be expanded beyond merely solutions to coordination problems strictly conceived. There is a deeper problem faced even by an account like Marmor’s. Conformity to a convention, by virtue of the kind of thing a convention is, necessarily has, but only has, the rationality of conformity to preference, and thus necessarily has, but necessarily only has, whatever normative force attaches to conformity to preference. “Preference,” however, is here a very “thin,” even formal, term. It has little more content than that of a subjective ordinal ranking of states of affairs revealed in conduct. It does not have the “thickness,” the substantiality, required for the genuine normativity of law. Suppose that I rank very highly my preference for not being visited with evil, and thus comply with the coercive commands of a wicked dictator. I have acted in accord with the minimal demand of rationality that one conforms to one’s highest-ranked preferences. But I have not thereby shown that this system of coercive commands is a legal system, nor have I thereby shown that the system is genuinely normative. The normativity of a system of revealed preferences is no more than a set of reasons for actions which people *believe themselves to have*. We still have not moved beyond “positive normativity.”

#### *Legal systems as systems of shared understandings*

A further group of contemporary theorists have rejected the “thinness” of the normativity of conventions. Conventions cannot account for the systematic unity of law. The officials and citizens, but especially the officials, of a legal system are not engaged in just any old practice, but specifically in a socially organized practice in which each participant acknowledges and accepts and factors into their reasoning the role and contributions of others – not simply in order to forward their own personal rational interests, but by way of acknowledging that mutuality as essential to the practice being the practice that it is. These theorists, speaking generally, argue that legal systems must be seen as systems of “*shared understandings*.”

The earliest person to put forward this emphasis was Tony Honoré in the early 1970s (in essays reprinted in Honoré, 1987, chs. 2–3). Laws, he argued, are always laws of groups. Groups have a unity that mere aggregates do not, and that unity is founded on shared understandings. However, despite rejecting Lewisian conventions for much the reasons given above (Honoré, 1987, pp. 65–6), Honoré’s focus is on efficacy: the “bindingness” of law is its ability to secure obedience, and shared understandings are promoted as essential to the explanation of that ability. Postema in later work (Postema, 1986, 1987, 1989a, 1989b) develops what he calls “constructive conventionalism,” which starts out from the acknowledgment that any conventionalist account of the law must include reference to mutual interaction, and not a mere convergence of views. However, he goes on from there in a somewhat different direction from the theorists I am about to discuss, and I will return to “constructive conventionalism” below.

Michael Byers displays a similar faith in the explanatory power of shared understandings in relation to a well-known theoretical problem about international law

(Byers, 1999). Much of international law has a strictly customary character: there are no authoritative lawmaking organs of international law with compulsory jurisdiction. How then should one theorize the normative force of customary international law as law? Does customary international law have genuine normative force, or is it, as the rule-skeptics and realists argue (see, e.g., Koskenniemi, 1990; Mearsheimer, 1994–95), just another site for the exercise of political power? International law's own official answer is that a norm becomes a norm of customary international law by satisfying two conditions, the State Practice condition and the *opinio juris* condition (ICJ, *North Sea Continental Shelf Cases*, ICJ Reports [1969], 44). That is, there must be a settled practice of behavior, and a settled practice of regarding that behavior as normative. The question is, though: why should these two conditions yield law? Byers's answer (1999, pp. 139–52) is that the conditions amount to a shared understanding of legal relevance. This shared understanding of what “produces lawness” produces lawness. It is doubtful whether Byers's thesis will satisfy the skeptics (see, e.g., Koskenniemi, 1990, discussed above). It is hard not to answer: No, it does not; it just produces a shared understanding.

Michael Bratman, as part of an attempt to theorize collective activity, has introduced the notions of a Joint Intentional Activity (JIA) and a Shared Cooperative Activity (SCA) (Bratman, 1998, chs. 5–8). A JIA has the properties of Mutual Responsiveness and Commitment to the Joint Activity. A SCA has in addition to those two the property of Commitment to Mutual Support. JIAs emphasize cooperation and coordination in a context of commitment to a collective outcome. The third condition thickens the cooperativeness. The details are concisely laid out by Scott Shapiro (2002, pp. 394–401).

The potential for Bratman's account to apply to law is clearly considerable, and has been followed up in different ways by Coleman (2001, pp. 96–100) and Shapiro (2002). Coleman argues that law should be viewed as a SCA, rather than a JIA – that is, as including the third feature of commitment to mutual support – chiefly on the grounds that the account thereby “helps to make intelligible the rule of recognition as a duty-imposing rule” (Coleman, 2001, p. 98). He posits SCAs as having “a distinctive, though by no means unique, normative structure” (ibid.). While it may be true, however, that at the level of empirical adequacy the extra elements introduced by thinking of law as an SCA over and above those embodied in law as social rule, there is no more adequate account of the normativity of law. What is explained better by the SCA story than the “social rule” story is why officials and citizens should in fact feel themselves bound to obey the law, or to regard the law as normative for them. What is not explained is why law is normative.

Shapiro takes Bratman's analysis one stage further, and so takes an account like Coleman's one stage further as well. Shapiro rightly points out that the Bratman/Coleman account is flat or “horizontal”: all participants in the collective activity are assumed to be on the same level. But, he argues (2002, 405ff), that is not always so. Some collective activities have a “vertical” dimension too. Along with the jointness or sharedness of the collective activity, there may be authority relations between the participants, and the cooperativeness must include these authority relations. For example, a captain has authority over her crew. For the sailing of the vessel to be a successful enterprise, there must not only be “horizontal” relations of cooperation

between all, but also “vertical” relations of the crew respecting the captain’s authority. Thus we get the concepts of a JIAA, a JIA with Authority added in, and a SCAA, a SCA with authority added in. These concepts, rather than their “flat” equivalents, are the ones we need to properly model law. Law turns out, on Shapiro’s account (2002, 426ff), to be a JIAA and to claim to be a SCAA. Shapiro claims, plausibly, that there are familiar features of the way legal systems operate such as the principles of *res judicata* and *stare decisis*, and amending provisions of constitutions, that cannot be explained except in terms of the inclusion of authority relations in the model. Again, though, the same point may be made. The inclusion of authority relations seems to make it more plausible to assert that really the normativity of law is being explained. But that is not so: what we have is a better explanation of a sense of normativity, not of normativity itself.

A very detailed version of this line of argument against Coleman and Shapiro can be found in Rodriguez-Blanco (2009). The “shared understandings” approach, especially in its Bratmanian form, has also been recently criticized by Matthew Noah Smith (Smith, 2006) on the grounds that it presupposes a higher and more complex kind of interacting commitment by the participants than plausibly can be found in any actual functioning legal system. I urge here a different objection. All the theories mentioned in this section present themselves as versions of legal positivism, and rightly so. If these theories are to remain true to the positivist project of representing law as a social fact, they cannot but be theories about beliefs concerning the normativity of law. Only beliefs about the normativity of law can be social facts. The actual possession by law of normativity cannot be merely a social fact. Coleman, for example, writes that “What we need is an account of how social rules ... can nevertheless be bona fide reasons” (Coleman, 2001, p. 86). As Green remarks, “the word ‘nevertheless’ suggests a puzzle, although it does not tell us what it is” (Green, 2005, p. 568). He continues, “Perhaps it is the thought that there is a gap between a rule and a reason that needs to be bridged by something that *makes* that rule a reason” (his emphasis). Green then goes on to list the above theories as attempts to bridge the gap, as indeed they are. Social rules, however, and conventions as sets of behaviors do need to be *made into* reasons. Coleman’s “nevertheless” suggests that *prima facie* rules by themselves are not reasons: argument needs to be made. That argument must be a normative argument that begins beyond the fact of the behaviors.

### *Enriched Conventionalism*

Still it might be thought that the line of argument I have followed in this section is too mean-spirited and dogmatic. In the remainder of this section, I want to consider two further approaches to the normativity of law, and thereby give further the support to the account given here.

First, some have defended what might be called Enriched Conventionalism: that is, the approach to law is still at heart conventionalist in the broad sense used here, but the theory tries even harder to include an account of the genuine normativity of law. I regard Postema’s “constructive conventionalism” as an “enriched” conventionalism of this type. He presents constructive conventionalism as a middle ground between “strict conventionalism” that emphasizes simply coordination and natural law theory

that really is not interested in coordination as such, but only conformity to the natural law. If the strict conventionalist's requirement of strategic interaction is correct, then natural law theory fails to meet the requirement; it cannot explain the "enriched convergence" on the right reasons when that occurs. However, if natural law theory is correct in saying that not just any reason for acceptance will do, then strict conventionalism is inadequate; it does not enquire into the reasons for accepting the convention provided that the convention is in place. We need a theory which does justice to the valid points in strict conventionalism and natural law theory which avoids the deficiencies in each. "Constructive conventionalism" is the answer:

On this view, officials recognize, and are committed by their actions and arguments to recognize, that their joint acceptance of the criteria of validity must be linked to more general moral-political concerns ... But they also realize that *an essential part* of the case to be made for the criteria rests on the fact that they jointly accept the criteria, or *could come to accept them* after reflection and participation in a forum in which reasoned and principled arguments are exchanged amongst equals. (Postema, 1987, p. 104, Postema's emphasis)

We meet here a new constraint on what will be an adequate conventionalist account of law – that the shared activity must have as its communal goal a link to "more general moral-political concerns." This is a normatively enriched or "thicker" idea than simply a commitment to a rule of recognition, or to the success of a cooperative enterprise. Yet all the same, the view faces a dilemma. Either (1) the requirement of reference to more general moral-political concerns is construed as a reference to a set of beliefs in the society about what matters to it. In that case, for the purposes of our theoretical goals here, the theory is subject still to the same objections as brought against Hart, that we do not have an account of the normativity of law: we have a theory that is as strictly positivistic as strict conventionalism or any of the putatively unsatisfactory theories supposedly replaced. This option is clearly available, since one could imagine traditions in which a practice of public debate existed with respect to a set of ideals that are in their content quite reprehensible. Or (2) we take seriously the idea of foregrounding convergence on the *right* ideas, and thus do not count as a moral-political concern of the relevant kind one that is reprehensible in its content – in which case we have left far behind any positivistic theory of law, though we have quite satisfactorily explained the normativity of law.

A more ambitious attempt yet to combine conventionalism with genuine normativity can be found in Finnis's writings. Following the Aquinean characterization of law as "an ordinance of reason for the common good," Finnis proposes that law be seen as a convention for the common good. That is, he narrows down Postema's broad "general moral-political concerns" to a specific set of moral-political concerns, those that define the common good (Finnis, 1980, chs. 9–10). The difficulty is this (I state briefly an argument made at greater length elsewhere: Shiner, 1992, pp. 243–50, which is an argument itself indebted to Green, 1983). The idea of coordination makes no sense unless there are things to be coordinated. Liberal individualism offers a ready source of such things – the various and varying values, ideals, choices, life plans, and so forth one finds in a liberal, pluralistic society. We need then to make a distinction between a "weakly individualistic" and a "strongly individualistic" conception of the common

good. A conception of the common good is *weakly individualistic* if, though not making individual good entirely subservient to the common good, it nonetheless deploys a conception of the content of the common good to delimit the legitimate diversity of individual life plans. A conception of the common good is *strongly individualistic* if it defines the common good, whether aggregatively or not, in terms of individual subjectively perceived benefit and flourishing. Finnis's theory is in the above sense weakly individualistic, in that the "positive" common good of some society is only in reality a common good just in case it promotes the choices of those whose life plans are devoted to the basic forms of human good – life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and "religion."

Now the instability of Finnis's position is becoming evident. He wants to define a role for positive law as a set of conventions providing solutions to coordination problems, against a background of legitimate diversity of individual interests based on individual choice of life plans. The tactic seems nonetheless to fit well with Finnis's basic natural-law approach, despite its individualism, because one can preserve the basic structure of formal rationality (or so it seems) while introducing out of deference to natural law the concept of the common good. If we are to take seriously, however, the notion of the "common good" as an indispensable part of any adequate theory of law, then the common good must bear on the matter in its own right. The common good must have independent normative force; its normative force cannot be simply identified with whatever intrinsic normative force is possessed by law understood in strictly conventionalist terms. The theory of law as a convention for the common good achieves a genuine account of the normativity of law, but at the cost of marginalizing the individualism that is at the centre of the attractiveness of conventionalist theories of law. Dimitrios Kyritsis (2008) has defended what he calls a "natural-law" version of conventionalism; he instances Dworkin as "a characteristic example" (p. 145) of his kind of natural law theory, rather than a more traditional theorist like Finnis. However, Kyritsis's strategy is overtly to begin with the established values of background political morality and show that such values can be interpreted to imply something close to a conventionalist theory of law. Thus he is engaged in a very different project than the conventionalist theories discussed in this section, so different that it is not clear how much value there would be to calling it "conventionalist," any more than in the case of Finnis's "convention for the common good" theory. Much the same would be true of Rodriguez-Blanco's (2009) notion of normativity through a shared cognitive capacity to discern reasons, though she only hints at the notion in this paper.

### Naturalized Jurisprudence

There is, though, on the face of it a way out of the difficulties posed here for descriptivist theories of legal normativity, in terms of the "naturalized jurisprudence" recently promoted by Brian Leiter (2007). As one reviewer has pointed out, Leiter himself does not discuss the normativity of law (Spaak, 2008, p. 352), but the applicability of the naturalizing approach is clear. I shall explain.

Naturalizing as a method in philosophy is generally acknowledged to have been initiated by W.V. Quine in his essay "Epistemology Naturalized" (Quine, 1969, ch. 3).

The idea behind naturalizing (crudely) is that analytic philosophy is mistaken in its conception of a division of labor between itself as conceptual and science as empirical. Rather, the border between philosophy and science is infinitely permeable. Philosophy serves the role of theory constructor for science. The results of philosophical enquiry are forever vulnerable to the results of science, and the results of science forever vulnerable to the philosophical revision of theory. Philosophy and science constitute together one seamless “web of belief,” in Quine’s famous metaphor, out of which our world is constructed. This naturalizing method has been the foundation for major shifts in philosophical research programs in epistemology, philosophy of language, and philosophy of mind in particular. In all these three areas, philosophy and cognitive science merge together: the analytic question of the concepts of knowledge, language, and mind becomes the scientific question of the nature of the brain, and vice versa.

What would it be, however, to “naturalize jurisprudence”? Leiter does not spend much time on spelling this out in his own right, since his main point is that naturalizing has been going on a long time in legal philosophy without anybody realizing it – namely, in the work of the American Realists: Llewellyn, Pound, Frank, Holmes, and the like. Their programmatic separation of “law on the books” and “law in action,” and sponsorship of the latter, is presented by Leiter as a naturalizing of jurisprudence comparable in its methodology to the work of Quine in epistemology and philosophy of language, for example. Personally, I am not so sure about this. American Realism seems to me to involve a pre-Quinean picture of social science, more analogous to scientific positivism (I have addressed the matter briefly in Shiner, 2009). Law on the books is not reduced to law in action, but rather is presented as being pointless without it. To a point, Leiter does not disagree: he expresses his view in terms of saying that realism presupposes positivism. More controversially, he says it presupposes hard or exclusive legal positivism, as opposed to soft or inclusive legal positivism. However, as Priel has argued (Priel, 2008), that is a difficult thesis to maintain. The contemporary distinction between exclusive and inclusive legal positivism is purely theoretical: it operates at a considerable remove from actual legal practice. The realists focused on actual legal practice: it is hard to see that the exclusive/inclusive distinction is relevant to their concerns. More plausibly, one could say that the realists were committed to what Priel happily calls a “folk theory of law” (on the analogy of “folk psychology”) that acknowledges law as a social institution. It is a mistake, though (see Shiner, 1992, pp. 5–9) to call, as Priel does (2008, p. 338), such a folk theory “positivism.” Positivism in the sense familiar to legal theory is a real legal theory, not a “folk” one: a “folk” theory is a form of pre-theoretical discourse. One could, I suppose, speak of “folk positivism,” but that would in my view be more confusing than helpful. It would beg precisely the question at issue – whether law’s platitudinous status as a social institution is best represented theoretically by some form of legal positivism.

This interpretive issue about Realism cannot be further explored here. However, there is a much more obvious place to search for naturalizing methodologies in contemporary jurisprudence, and that is in the theoretical approach to the normativity of law I have been calling “descriptivist.” My criticisms of descriptivism as an approach to the normativity of law depend on drawing a clear distinction between the actual normative force of a law, say, and what is believed to be the normative force of a law. But, if jurisprudence is naturalized, this distinction disappears. There is nothing to the



normative status of a law beyond what is believed to be its normative status. The normative status of laws is constituted out of the web of our beliefs about normative values and structures. There is nothing outside our web of normative beliefs to serve as a standard against which the actual content of our normative beliefs can be compared. There is of course the issue of what theory at some high level of generality best captures the way that our normative beliefs about law interconnect to make them beliefs about law. Are they best represented in terms of Shared Cooperative Activities, or Joint Intentional Action with Authority, or Lewisian convention, or... as theoretical models? The normativity of law itself, though, is nothing more than a matter of the best model for the web of our law-related normative beliefs.

It is to be noted that, by this standard, Postema's "constructive conventionalism" and Finniss's "convention for the common good" theory clearly topple over from descriptivism into internalism. Neither theory is plausibly represented as such a naturalization of the normativity of law. Nor do I mean to suggest that Hart and his successors saw or see themselves as naturalizing jurisprudence. They see themselves as positivists. My point is that their approach strikingly lends itself to being interpreted naturalizingly.

The status of naturalizing as a method in philosophy itself raises far more issues than can be decided here. I experience the debate about naturalizing as a clash of fundamentally different perspectives on philosophy, on life and on the world – not the passing difference of *gestalten* ("It's a duck. No, it's a rabbit. No, it's a duck ..."), but rather a difference of what Wittgenstein called "*Einstellung*," or "basic stance": "My *Einstellung* towards him is an *Einstellung* towards a soul. I am not of the *opinion* that he has a soul" (Wittgenstein, 1958, II.iv, p. 178e). As Peter Winch showed in his 1981 essay "Eine *Einstellung* zur Seele" (reprinted in Winch, 1987), the resonances of the standard Anscombe translation for *Einstellung* of "attitude" are misleadingly superficial. An *Einstellung* is a mental stance far more fundamental to one's being than that. So I will persist in my criticisms of descriptivist accounts of the normativity of law. But I do not expect to convince the naturalizers.

## Conclusion

In this essay, I have presented four different approaches to the normativity of law: externalism, internalism, descriptivism, and naturalism (if that is the right word). It is not to be supposed that there will be a final resolution of these debates about the normativity of law, or even a final convergence on one theory believed to be the best. Rather, the issue of the normativity of law is one that calls up, expresses, and is the site for familiar fundamental oppositions in jurisprudence – between positivism, anti-positivism, and realism. Rather, the lesson for jurisprudence and legal philosophy is to see the distinctive nature of law as consisting in the fact that law is the site of these endless debates (Shiner, 1992, *passim*). Laws and legal systems exist as social institutions, as institutions within society – that is a truism, although we must be careful not to take too seriously the spatiality of "within." Law cannot exist as law without taking society seriously, without being permeable to society's norms. Law also cannot exist as law without being an identifiably unique institution within society, and thus needing

to insulate its norms from society's norms. Law as an enterprise is rooted in the values of certainty and flexibility. Flexibility is associated with openness to the influence of nonlegal norms, certainty with closedness to the influence of nonlegal norms. As the legal system navigates its way between the poles of certainty and flexibility, theories of the normativity of law can be expected to reify openness and closedness, to represent law as internally related to or as externally related to alternate societal normative systems. The positions discussed here, even though associated with the historically situated specific views of specific people, are nonetheless no more and no less than abstracted and frozen moments in the dynamic and endless activity of legal theory.

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## Law and Literature

THOMAS MORAWETZ

The label “law and literature” is relatively hermetic with regard to the nature of the intellectual and academic enterprise to which it refers. Other conjunctions, marrying law to other disciplines, are rich with implications about content. “Law and sociology” or “law and economics” implies an agenda that studies how lawyers use sociology or economics *or* how law can be seen as a sociological/economic phenomenon. “Law and epistemology” or “law and ethics” are labels that foreshadow an inquiry into the kinds of knowledge or the ethical concerns to which law gives rise. However disparate they are in other ways, each of these *other* conjunctions pairs law with an enterprise that can appropriately be called a “discipline,” a structured enterprise self-conscious about its own methodology.

By contrast, literature is a “discipline” in something of a quixotic sense. While law, as well as the social sciences, is concerned with persons collectively and with making generalizations about individuals, literature is preoccupied with individuality in special ways: its subject is more often than not the individual and it exercises its power through communication from one individual to another, one author and one reader at a time.

To think of literature as a discipline is to try to define its essence. But this task is perilous because the essence of a literary work often lies in its idiosyncrasy. Moreover, the purpose and spirit of literature are arguably deeply anarchic. Thus, from the time of Plato on, literature has been seen as a threat not only to political order but to “disciplined” and generalized thinking of all kinds.

If the concept of literature itself is elusive and Protean, what can one make of the marriage, or at least the engagement, of law and literature? I shall describe four ways in which law-and-literature can constitute an activity and a discipline. Then I shall look more deeply into those activities that occupy the energies of most scholars and teachers of law-and-literature and that are at the same time symptomatic of interdisciplinary thought about law.

### The Varieties of Law and Literature

There are various kinds of fruitful interactions between law and literature. Each can form the basis of a provocative academic course and a worthwhile research agenda.

Each way of interacting has its practitioners and proponents. A particular way of conceiving and investigating the relationship of law and literature may play a central role in reflecting and advancing a cultural agenda. In the last section of this article, I shall consider why fictional as well as nonfictional narratives have recently assumed an important role in jurisprudence and how literary strategies are being used to discuss the possibilities and limits of legal understanding. Before doing so, we must distinguish different ways of thinking about law-and-literature.

### *Law in literature*

The first expectation of almost any law student and of most lawyers is that law-and-literature concerns the depiction of legal issues and predicaments, lawyers, and legal institutions in literature. That expectation is sensible and often correct. Most courses of law-and-literature refer to a more or less familiar canon of literary works. An unabated, if thin, stream of academic articles and books explicates those same works.

The terrain of law in literature has its regions. One domain consists of literary accounts of legal proceedings, usually trials, which lead readers to reflect on the meaning and achievement of justice. *The Apology* (the trial of Socrates), *The Merchant of Venice*, *The Brothers Karamazov*, *Inherit the Wind*, *The Ox-Bow Incident*, *Judgment at Nuremberg*, and *The Caine Mutiny* are the high end of a scale that includes untold numbers of genre novels, plays, and films.

An overlapping domain concerns the lives and character of lawyers. Lawyers may be depicted as heroes or antiheroes, fools or villains. Often literature explores the circumstances of becoming and being a lawyer, the psychological and moral demands and costs. Every profession, one imagines, forms and deforms human character in distinctive ways. Works of fiction offer opportunities to consider both the shared characteristics of life in the law and the special social and economic constraints of law practice in different times and circumstances.

Yet another way of understanding law in literature stresses symbolic uses of law. Law is often freighted with such obvious symbolism that it is difficult to distinguish the characteristics of law *in itself* from the uses of law as a metaphor. Thus, law represents the various ways in which persons give order and structure to lives lived in society. Law can stand for various institutions that use coercion, and it can also stand for the ways in which persons work together in institutions to realize their shared goals and values. In representing both kinds of institutions, law stands for a whole greater than the individuals that make up its parts. Law symbolizes order and rule-governance as opposed to arbitrariness and chaos, but it also symbolizes the artificiality of manmade order as against the preexisting order of nature or of God. Authors as different as Dickens (*Bleak House*), Kafka (parables), and Samuel Butler (*Erewhon*) appeal to law as a surrogate for the many institutions by which persons seek – for better or worse – to give life coherence.

Law in literature may also serve more limited didactic agendas, yielding insight for example into the treatment of minorities and women by law, into the resolution of conflicts between classes and cultures, and into the significance or absurdities of law's rituals and language.

*Law as literature*

Some of the most interesting ways of addressing law and literature do not take literature simply as a vehicle for telling stories, as a transparent medium for looking at situations, characters, and institutions. Rather, this second set of ways of practicing law-and-literature involves self-consciousness about law and literature as a system of texts and as a vehicle for creating and conveying meaning.

In its simplest terms, to look at law as literature means to inquire into the use of literary devices and strategies in legal texts. It is also to look at the rhetorical and stylistic methods that are distinctively legal rather than literary. Such self-conscious reflection has been part of the activity of both literature and law severally throughout their existence.

Traditionally, such inquiries into the use of rhetoric and style have been of limited scope and ambition. For example, critics in different periods have compared and analyzed the use of metaphor in legal texts and in literary ones. In doing so, they took for granted the existence of a stable lexicon of rhetorical devices and strategies embedded in a stable underlying view of how language functions – of how meaning is enshrined in texts and retrieved from them. In other words, they took for granted that one can look at rhetoric and style without looking at controversies about language and communication within epistemology and the philosophy of language. They presumed, among other things, that language is representational, that the denotative and figurative uses of language can be distinguished and classified, and that one can easily carry out the distinctive agendas of logic, syntax, and semantics.

Postmodern investigations of language have generally undermined these assumptions. Contemporary literary theorists, influenced by the critical and deconstructive work of such writers as Jacques Derrida and Paul deMan, treat the retrieval of meaning as problematic. Many legal theorists, in turn, have come to regard questions of hermeneutics as central to an understanding of the role of legal texts. Accordingly, literary and legal theorists have joined forces in considering whether meaning is implanted by authors or constructed by readers, how interpretive communities play their role in making communication through texts possible, and how one can determine the parameters of agreement and disagreement in text-based discourse. The work of such philosophers as Wittgenstein, Foucault, Habermas, and Gadamer has had a determinative influence on examinations of law and literature as vehicles of meaning.

The study of law as literature has become the study of legal hermeneutics, in particular the study of similarities and dissimilarities between law and literature with regard to the role of author, reader, and institutional context. While law-and-literature in the first sense (literature as a resource for moral lessons) maintains a strict intuitive distinction between primary works of literature and secondary works of criticism and commentary, law-and-literature in the second sense deconstructs that distinction by posing questions of meaning that are equally relevant to all texts.

*Law of literature*

Law-and-literature can also be reconceived as the law of literature. Because our constitutional framework privileges freedom of expression, American courts are often



asked to define the limits of free speech. Contemporary debates about the limits of literary and artistic expression change kaleidoscopically, assembling familiar issues in new patterns. In the last few decades, debates about obscenity as impermissible speech seem to turn upon the definability and usefulness of such terms as “prurient interest” as criteria of obscenity and upon the existence and relevance of local standards for what is obscene.

A notable feature of current controversies is the blurring, or perhaps the disappearance, of the traditional identification of the political right with a narrowing of free speech and of the political left with a broadening of it. In much contemporary discussion on the so-called “left,” liberalism, which advocates tolerating expression that some regard as offensive, stands opposed to critical theory, which tends to argue that toleration of offensive speech tacitly maintains hegemony by the powerful over the powerless. Accordingly, feminist and critical race theorists accuse liberals of perpetuating inequality by naively (or invidiously) protecting discriminatory and hate-driven kinds of expression. These critics sometimes borrow the language of deconstruction to argue that the celebrated neutrality of liberalism masks a covert agenda and that the favored literary canon can be understood as an ideological tool for discrimination.

### *Literature and legal reform*

Just as one can investigate the effects of legal constraints on literary expression, one can also examine the ways in which literature, especially popular literature, has influenced the course of law. In this activity, the interests and skills of the literary and the legal historian join forces.

From *Uncle Tom's Cabin* through the “muckraking” novels of Emile Zola and Upton Sinclair to the more recent writings of Toni Morrison and Nadine Gordimer, literature has often been politically inspired and has served the causes of political and legal reform. At the same time, the effects of literature on law have not always been benign. Arguably, popular literature sometimes dehumanizes criminals, reinforces racial and ethnic stereotypes, and depicts the exigencies of international relations (war, espionage) in unrealistic ways. Such writings tend to shape popular attitudes; these attitudes in turn can affect law with regard to the procedural rights of offenders, the welfare and other social claims of the underclass, and curbs on individual rights for the sake of national security.

Law-and-literature as the study of the socio-legal effects of literature is a small tributary in the current flood of research. There seem to be several reasons for this. Representational and didactic literature, unless elevated by the passage of time (Dickens, Zola), currently tends to be dismissed as popular culture, unworthy of the academic attention given to *serious* literature. Second, the broadcast media are seen, probably correctly, as having assumed a greater influence on social beliefs and values than contemporary literature. Finally, assessing the effects of any of the media, including literature, on popular views and measuring the impact of popular views on legal decisions and policies are notoriously difficult and controversial tasks.

These four ways of thinking about law-and-literature reflect respectively the treatment of literature as representation and narrative, literature as a vehicle for the investigation of epistemological and hermeneutical questions, constitutional law as it affects

literature, and literary/legal history. Practitioners of each approach often claim hegemony and treat these approaches as mutually exclusive. The first two approaches currently compete for dominance in academic research and law school pedagogy. I shall look more closely at these two approaches and, in the last section, I shall consider certain ways in which they complement each other in epitomizing contemporary attitudes about law.

## Law and Fiction

Notwithstanding the influence of both modernism and postmodernism, the overwhelming number of teachers and scholars look from law to literature with the didactic purpose of drawing moral lessons. In so doing, they use stories as they have always been used. They implicitly reject the lesson of modernism that literary artifacts are to be taken on their own terms as special artifacts and not merely as representations of reality and therefore as objects of secondary status. They also put aside the lesson of postmodernism that the meaning of a text is not stable but constructed by the reader.

Moral lessons can be elicited from literary representations of lawyers and legal situations in two opposing ways. Law can be seen as morally positive, as an instrument of justice, and lawyers can be seen as models of rectitude and fair treatment. On the other hand, one can take a critical and even dystopian view of law and consider its destructive and subversive effects on persons and society. One can see law as deforming the personalities of its practitioners and can see lawyers as agents of power and discrimination. Countless literary works lend themselves to these uses. Many are best seen as combining the two approaches, works in which good lawyers fight against bad institutions.

Nonetheless, the message of modernism must not be lost. The didactic use of literature begs two concerns: whether moral lessons best represent the significance of such literary works and whether those lessons are fairly drawn. Modernism raises these questions in negative form: a fictional depiction of a lawyer or a legal situation, shaped as it is by the choices and acts of an author, is simply not comparable to a *real* particular lawyer or legal situation. And therefore it is not created primarily to support generalizations about lawyers or legal situations.

It is easier to say what a particular literary work is *not* than to say what it *is*. As a result, any attempt to draw moral lessons from literature must be tentative. The author of a short story or novel may be as elusive when forced into the role of moral arbiter as a painter or a composer. Understanding the act of creation implies respect for the special status and character of the created object.

If modernist literary theory teaches that the characters and events of fiction are not reducible or assimilable to the characters and events of life but must be examined as artifacts on their own terms, postmodernism teaches one to question whether those terms are stable enough that one can regard any particular understanding of an artifact as more correct or appropriate than any other understanding. What gives the author's understanding of her work, if it is available, priority over the (possibly conflicting) understanding of a particular reader? What gives one reader's understanding priority over that of any other? What gives the interpretation offered by one subcommunity

in a multicultural environment priority over that of another subcommunity? Postmodernists argue that those who use literature didactically cannot simply ignore such questions.

In the face of this criticism, some contemporary theorists have attempted to derive a different kind of didactic use for literature in law, one that incorporates modernist and postmodernist scruples about literary stories. They draw lessons not from the content of literary stories but from the process of literary interpretation. Mindful of the dangers of using literary characters and situations as moral examples, they do not focus on particular works of literature but on the common denominator of all literature, its creative and interpretive dimensions. James Boyd White, for example, alerts his readers that “resort to the plain words [of a text] always requires *an act of creation, a making of something new*, yet the original text cannot be forgotten, for fidelity is always due it” (White, 1990, p. 246, emphasis added). The underlying idea for legal pedagogy is that law students and therefore lawyers (and judges and legal scholars) tend to forget that all language use is creative, that language use is in a sense constitutive not merely of a way of regarding reality but of reality itself. The author of a judicial opinion, no less than the author of a work of literature, shapes and manipulates the terms in which social reality over time comes to be constructed.

This way of using literature to draw lessons for law about creativity and responsibility, suggestive as it is, can be faulted as tendentious. For one thing, it is not clear why an account of the creative responsibilities of language users needs to focus on *literature* in preference to any other kind of language use. If it is said that literature involves creative readings that are more transparently creative than readings of other kinds of texts, this response is questionable. It is dubious because the creative input of *readers* is itself problematic; postmodernism poses it as a question, not as a given. It is paradoxical because such theorists’ underlying assumption is that *all* uses of language in general, and all readings in particular – literary, legal, scientific, historical, and so on – are *essentially* creative/constructive and therefore there is no basis for assigning one kind priority over others.

Yet another issue in treating literature didactically is that there is no clear relationship between appreciating one’s creative options (as a judge, as a legal representative, as a reader of any kind) in interpreting a text and with being morally constrained by the text. Self-consciously creative uses of language (for example, deviations from precedent) – by judges, lawyers, readers – are not necessarily biased toward morality and justice; they are arguably as compatible with injustice and moral irresponsibility as with their opposites. Even so, the underlying idea remains compelling: in interpreting law or literature, these actors make interpretive choices insofar as the implications of a text for a new situation are never wholly predetermined, and these choices are characteristically ones that expose the potential embrace of moral strictures.

## Hermeneutics

We have considered the lure of literature as a moral resource. Even when that approach raises problematic questions in literary theory, legal scholars, teachers, and practitioners look to literature for the indicia of justice and for guidance in leading exemplary

lives within the law. And even when they concede that literature is not life and that literary stories, unlike life, are constructed by the reader and writers, they persist in finding moral significance in the very process of constructive reading.

By contrast, the import of much recent scholarship in law-and-literature has little to do with literature and morality; instead this body of work compares the hermeneutic processes implicit in law and literature. This way of thinking about law and literature is the offspring of the union between constitutional theory and deconstructive literary criticism. Since the 1970s, constitutional theorists have waged a peculiarly quixotic campaign for legitimacy. Goaded by the accusation that constitutional interpretations merely translate political agendas into doctrine, some scholars and jurists have tried to justify one reading or another as the *correct* or *true* meaning of relevant constitutional language. For liberals, this technique has tended to devolve into appeals to an underlying moral consensus that favors one set of constitutional results; conservatives have tended to construe meaning as authorial intent.

In a seminal essay, H. L. A. Hart sees the search for a univocal meaning for legal – in particular, constitutional – texts as a response to the fear of political relativism. He says it embodies a “noble dream” and stands opposed to the “nightmare” of judicial arbitrariness and willfulness. This bipolar way of posing the epistemological alternatives, whereby texts either have a univocal (correct) reading or are meaningless (that is, arbitrary in meaning), seems to rest on a naive understanding of hermeneutics. As literary and philosophical critics have long recognized, the retrieval of meaning is a complicated enterprise. To understand how communication and argument are possible, how readers/speakers can understand one another, is to go beyond the polar possibilities of seeing the meaning of a text as univocal or wholly indeterminate.

Through the influence of literary hermeneutics, constitutional theory has evolved over the last twenty years from a search for constitutional determinateness to a wide-ranging comparison of how meaning is found in literary and legal texts. This brief evolution has had two stages. In the first stage, debate has tended to focus on the transaction between author and reader, and on the question of which of the two participants is responsible for meaning. In the second stage, the complexity of the process is more fully appreciated. On this view, to understand meaning is to understand the history of the text, the situation and expectations of the reader, and the constraints imposed by the institutions and community context within which interpretation occurs.

Because literary theory explores these factors and their roles, it serves as a model for legal hermeneutics. Just as it is possible to take seriously readings of literature that could hardly have been framed by their authors (a Marxist reading of Jane Austen or a Freudian reading of Shakespeare), it is similarly possible to read constitutional provisions – equal protection, freedom of expression – in ways their authors could not have anticipated. But to reject the idea that meaning is set unambiguously and clearly (by the author, by shared interpretive principles) is not to affirm that the process of finding meaning is unconstrained (the “nightmare” of judicial arbitrariness). The parameters of contemporary debate are real. Some accounts – of Austen, Shakespeare, the Constitution – cohere better than other conceivable accounts with the interests and self-understanding of persons here and now, and those possibilities constitute the spectrum available to contemporary interpreters.

Literature informs the study of legal epistemology in at least two ways. On the one hand, it is useful to compare the interpretive history of particular works of literature with the comparable history of particular legal texts. On the other hand, the hermeneutic observations of literary theorists are often generalizable to legal materials. But the differences between legal and literary texts and processes are as important for an understanding of hermeneutics as the congruences. Legal questions, unlike literary ones, require definitive and simple answers. Literary critics, severally or together, may permanently disagree about the use of symbolism in *Moby Dick* or the moral implications of *Billy Budd*; a panel of judges must arrive at a decision whether X's speech is protected by the First Amendment (even though individual judges may dissent from the holding). Thus, law is institutionalized in a way that literary study is not and does not need to be. The interpretive acts of legal actors have the aim of structuring social and economic relationships and settling conflicts; the acts of literary critics have no such aims or consequences. The resources and methods of legal research and argumentation are highly formalized; decision makers are expected to respect precedent and to be mindful of the formal hierarchy of courts. Literary research and criticism, even at its most formal and formularized, has no comparable constraints.

Law-and-literature as a hermeneutical investigation explores the implications of these similarities and differences. In the eyes of most scholars, this way of exploring the intersection of law and literature is a different enterprise from the didactic use of literary stories. In another sense, however, the two approaches complement each other as writers in legal theory explore the claim that both literature and law constitute converging social narratives.

### Law as Narrative

I have already alluded to the seismic fault that runs through much of contemporary jurisprudence, the opposition between liberalism and critical legal theory. Although the lines of demarcation between jurisprudence and law-and-literature remain fairly clear, the preoccupations of the two fields have come to influence and reinforce each other.

Some of the central assumptions of liberal jurisprudence grow out of the confrontation between legal positivism and legal naturalism. Rejecting the positivist identification of law with whatever rules of order are imposed by authority (regardless of the content of such rules), liberals borrow from naturalism the idea of continuity between law and a consensus about social values, in particular a consensus about the role of government in securing and protecting private freedom, mutual respect, and personal autonomy. Accordingly, liberals presuppose that law as an ideal must be capable of transcending particular political and moral agendas and that governments must strive to use law to maintain an arena in which diverse political and moral agendas compete. The existence of law and the work of legal actors are justified by appeal to this ideal.

Critical legal theory questions and rejects the fundamental premise of the liberal appropriation of legal naturalism, namely that law and legal institutions can and must

be justified as disinterested and politically neutral. There are particular and general versions of this critique. Particular critiques examine specific legal arguments, doctrines, and results to show how the appearance of fairness and neutrality is maintained only at the cost of blindness to many aspects of the legal situation. In other words, particular critiques identify legal winners and losers to show that for the most part some political goals triumphed over other – perhaps equally defensible – alternative goals. The generalized version of such critiques is that *every* legal issue is resolved politically and that those who claim that law generally embodies a moral consensus and/or value neutrality delude themselves.

Criticisms of this kind are especially familiar in the work of feminists and critical race theorists, whose arguments have the following structure. The justifications offered by liberals are said to be both partial and defective. They are partial because the liberals' narrative about the progress of law, about successes and failures, is only one of many possible narratives. It is characteristically the story told by the powerful rather than the disempowered. They are defective because they *claim* to be the only correct narrative, the only way in which the processes and progress of law should be understood.

In this way, critical theory borrows some themes familiar in law-and-literature. First of all, it echoes the didactic use of stories for moral purposes. One point of seeking out various potentially conflicting narratives is a moral point. The narratives – both autobiography and fiction – are not ends in themselves; they are used to cast doubt on the moral claims of the “winners” (that is, of liberals) to act in the interests of all, to be above self-interest and partisanship. The narratives often set out the moral claims of victims and portray law as a tool of victimization, characteristically of minorities, children, and women. Such an indictment may be made through the prism of an individual life, as in an autobiographical narrative, or less personally through the legal history of a community bound together by race or gender.

This didactic use of narrative in critical jurisprudence begs methodological questions. These “alternative” narratives seem to be put forward to replace and discredit the liberal story whereby law is above politics and benefits all, whereby the rule of law has and deserves respect, and whereby an evolving system of equal rights forwards the goal of individual autonomy. But it is arguable that the alternative narratives simply belong to a subgroup of possible perspectives on law with no claim to be more or less “correct” than the “winners’ narratives.”

Thus, it is unclear whether narratives, whether told by liberals or their critics, are to be seen as competing approximations of the truth or merely as stories told from differing perspectives. If one labels the problem of multiple perspectives “the *Rashomon* problem,” one finds the same ambiguity in both the story and movie of *Rashomon* itself: shall we sort out the competing perspectives to determine what *really* happened and not just to marvel at the perspectival aspects of experience? Note that many of the processes of law, in particular the rules of litigation, seem to presuppose that one way of regarding experience is true and that, for example, the job of juries is to make such factual judgments.

The proponents of critical narratives seem to make two tendentious claims: that we are indeed concerned with approximations of truth rather than mere stories or perspectives and that their narratives, the victims' narratives, are closer to truth than the

narratives of others. In making the first of these claims, they remain traditional lawyers insofar as they remain committed to an ontology whereby the characteristics of events are fixed and univocally true descriptions may, in principle, be given. In making the second of these claims, they undercut law by asserting that the constructive processes of law-as-neutral conceal and subvert the truth about events. Such processes as drafting legislation and conducting trials remain, it is said, ongoing ways of maintaining oppression and inequality – and of denying that that is so.

A number of writers who emphasize the importance of narratives in understanding law make no claims about finding truth and argue for an extreme perspectivism whereby legal situations are best understood in terms of multiple conflicting narratives. These theorists, drawing on the work of Richard Rorty and Stanley Fish, challenge the expectation that narratives are approximations of truth and claim that a pragmatic understanding of legal events requires contextualization of both the events themselves and the narratives or reports offered about them. It is impossible to do justice to such suggestions in this brief essay. However, one can hardly avoid the question of how to reconcile the kind of relativism entailed by this account with the commitment to a preferred (truthful?) narrative that seems to be required of legal actors engaged in legal decision making.

The significance of these developments in critical jurisprudence is that critical and pragmatic legal philosophers, perhaps echoing the culture at large, have come to see literature as a metaphor for law. Confusion about literature is transmuted into confusion about law. The distinction between fiction and reality is questioned and ultimately eroded.

Consider how this comes about. The confusion about literature, as indicated above, is reflected in three available, but incompatible, attitudes toward it. The traditional or naive attitude is to treat fictional stories and characters as one would treat real events and persons and draw moral lessons. The modernist attitude is to treat fictional stories and characters as special artifacts, created by an authorial intelligence, which must not be confused with reality, in part because of the selectivity and intentionality that went into their creation. The postmodernist attitude is to treat fictional stories and characters as shaped by the perspective of the reader as well as the author and as having no fixed or immutable characteristics. Thus, the postmodernist attitude threatens to dissolve the distinctions between author and reader (by treating readers as authors), between text and commentary (by treating commentaries as primary texts), and between reality/truth and fiction (by questioning the claims of descriptions of reality to be true).

These three attitudes may be applied to law and legal events in the following ways. The use and incompatibility of the first two attitudes have long been familiar in legal philosophy. Moralism in literature corresponds to moralism in law: traditional naturalism, seen by some as naive, maintains that law incorporates shared social values and is to be judged by its conformity to moral norms. The alternative attitude of legal positivists is that law is a distinctive artifact and reflects a special kind of intentionality. The critical challenge plays havoc with both of these attitudes by raising the possibility that the moral dimensions of law (and morality generally) may depend on the beholder (the reader), that the very nature of legal texts and legal institutions may depend on whether they are seen by winners or losers, and that therefore the very idea that law is the sort

of thing about which one can make objective claims rather than offer endless fictions may itself be an illusion.

In this way, our confusions about literature infect our attitudes to law as law is equated with legal stories and legal stories, in turn, are treated as a subcategory of literature. Whether these methodological questions for legal philosophy are cul-de-sacs or opportunities continues to be debated.

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## The Duty to Obey the Law

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Few issues in jurisprudence have received so much attention in recent years as whether citizens have a distinctive moral duty to obey the law. Yet the differences among the disputants might well seem slender to the unprofessional eye. No one holds that the duty is absolute: even its most passionate advocates allow that it is sometimes morally permissible to disobey the law, as when abolitionists aided runaway slaves before the American Civil War. But neither does anyone advocate open or frequent disobedience. Those who doubt the supposed duty yet hold that we very often have a strong moral reason to do what the law requires independently of its commands, for example, not to assault, cheat, or rob others. The doubters allow that we are obligated to obey whenever the law has established patterns of conduct that are dangerous to depart from, such as driving to the left in Great Britain. They believe that disobedience is permissible only when there is no independent moral reason to obey or when the weight of independent reasons favors disobedience; and they do not suppose that in reasonably just societies these conditions obtain often. Finally, those who are skeptical about the duty of obedience nonetheless prize the great social benefits that can only be achieved through government; and they believe that one which is reasonably just deserves its citizens' cooperation and support. It therefore seems probable that the putative duty's advocates and disbelievers alike would virtually always agree in their judgments about particular illegal conduct – or at least that any differences between them would not flow from their disagreement about the philosophical issue.

Despite the debate's apparent lack of practical significance, many philosophers and academic lawyers disagree hotly about whether there is a "prima facie" duty to obey the law. (Alan Buchanan, who thinks the issue is "irrelevant to the two main tasks for a theory of the morality of political power," is a rare exception. Buchanan, 2004, p. 240.) I shall later conclude that the continuing controversy is primarily metaethical rather than political, being fueled by disagreement about the very point of positing prima facie duties. Let us look first at some particular arguments.

### The Prima Facie Duty to Obey: A Brief History

Philosophical worries about the precise contours of the duty citizens owe to the state date back at least to Plato. But the particular claim that there is a prima facie duty to

obey the law was first voiced in 1930, by the great British classicist and ethical intuitionist, W. D. Ross.

Twentieth-century intuitionism is part of an older family of metaethical theories that ascribe to humanity a common moral faculty. (Older siblings include the moral sentiment theories of Hutcheson or Hume and the moral rationalisms of Aquinas or Richard Price.) Ross devised the distinction between prima facie duty and absolute duty in the hope of solving the problem bedeviling all such theories: viz., that of setting out the principles that explain the moral faculty's deliverances about particular kinds of morally relevant factual circumstances. Ross's intuitionistic contemporaries generally agreed that Sidgwick had shown the futility of any attempt to frame exceptionless general principles of rightness or wrongness – that every promising candidate will turn out either to be inconsistent with our firm intuitions about examples or else be a disguised tautology such as “Murder is wrong” or “Justice is giving every man his due.” But Ross thought it possible to frame absolute principles of what he called “prima facie” rightness or wrongness. His distinction is often explicated by the practice of promising. Everyone agrees that it is sometimes permissible to break them. But it is also plausible to suppose that promise-breaking is wrong “other things being equal” – by which is meant some such notion as “wrong unless justified by one's thereby fulfilling some moral consideration of equal or greater weight.” (See Thomson, 1990, ch. 12, for the best intuitionistic account of the moral constraint of promises.) Ross offered a list of our separate prima facie duties, comprising inter alia those of fidelity, gratitude, beneficence, and nonmaleficance. Somewhat as an afterthought, he suggested that there is a duty to obey the law:

Thus ... the duty of obeying the laws of one's country arises partly (as Socrates contends in the *Crito*) from the duty of gratitude for the benefits one has received from it; partly from the implicit promise to obey which seems to be involved in permanent residence in a country whose laws we know we are expected to obey, and still more clearly involved when we ourselves invoke the protection of its laws ... ; and partly (if we are fortunate in our country) from the fact that its laws are potent instruments for the general good. (Ross, 1930, p. 27f)

Ross did not repeat these arguments in his later, longer book, *The Foundations of Ethics* (1938). His suggestion found little attention until 1955, when it was taken up by H. L. A. Hart in his seminal article, “Are There Any Natural Rights.” Hart offered a fresh argument in support of the duty of obedience, based upon his formulation of what has come to be known as the principle of fair play:

when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. (Hart, 1955, p. 185)

John Rawls refined Hart's argument in a series of influential articles. By 1964, Ross's suggestion had become a philosophical commonplace, so much so that Rawls could confidently assert:

I shall assume, as requiring no argument, that there is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations. (Rawls, 1963, p. 3)

This consensus was broken in 1973, when an alternative position began to be developed by a number of philosophers, including the present author. (See inter alia: Smith, 1973; Sartorius, 1975; Raz, 1979; Simmons, 1979; Woozley, 1979; Greenawalt, 1987; Edmundson, 1998; Simmons & Wellman, 2005). I shall now sketch what I take to be a broad area of agreement among those who reject the duty of obedience (but the reader is cautioned that I cannot include many necessary qualifications and subtleties). First, most of us acknowledge the existence of legitimate authority; but, unlike many political theorists, we analyze the concept of authority without reference to a duty of obedience. For instance, I once offered an overly simple definition, which counts a government as possessing legitimate authority when it has a moral right (in the sense of “that which is morally permissible”) to coerce its citizens’ obedience (Smith, 1973, p. 676). Kent Greenawalt refined this definition by adding the condition that, if a government has legitimate authority, its citizens are virtually always obligated not to interfere with enforcement of its commands (Greenawalt, 1987, p. 55). William Edmundson added yet another condition, viz., that states with legitimate authority will claim that their commands give rise at least to prima facie obligations. But he too denies that legitimacy depends upon the truth of any such claim (Edmundson, 1998, p. 48).

Second, we doubters have in various ways criticized the sundry arguments that have been offered in support of the duty to obey the law. We do not launch frontal assaults upon them; rather we attempt to show that, when their underlying principles are properly understood, it is evident that the factual situation of most citizens fails to trigger their conditions of application. Thus, we do not deny that a genuine, voluntary consent to obey every law would found a general duty to obey; rather we follow Hume ([1777] 1948) in denying that most citizens of any nationality have performed acts which constitute such consent. Similarly, after analyzing the scope of the obligations of fair play, gratitude, rule, and act utilitarianism, we have concluded that these principles do not reach every situation in which the law requires us to act. (The most comprehensive criticism of these arguments is in Greenawalt, 1987.)

Third, as a positive argument against the supposed general obligation to obey the law, we have observed that contemporary law comprises a very comprehensive scheme of social regulation, most of which undoubtedly is very necessary to the public weal, but which also contains (as Lord Devlin put the point) “many fussy regulations whose breach it would be pedantic to call immoral” (1963, p. 27). Contemporary landlord-tenant law is rife with examples: for example, *Mass. Gen. Laws*, c. 186 § 15B requires landlords who accept security deposits to keep them in interest bearing escrow accounts in Massachusetts banks. A Massachusetts landlord who for reasons of convenience places a security deposit in a Vermont bank will pay triple damages if sued by his tenant. His practice is imprudent, but would anyone say that it is morally wrong?

Last, we doubters have pointed out that the supposed general obligation to obey the law must be redundant in every normative theory that has any plausibility whatsoever. That is because every such theory must contain proscriptions against assault, reckless

endangerment, fraud, breach of serious promises, and so forth, whose conjunction arguably specifies each important moral interest that we are bound to respect. Hence, regardless of whether a theory provides specifically for obedience to the law, it will imply trivially that there is a *prima facie* duty to obey whenever disobedience puts an important moral interest at risk. Moreover, we contend, when we do have an obligation of obedience, its weight is exhausted by the collective weight of the independent moral reasons that point in the same direction. Our argument is broadly speaking intuitionistic, being primarily based upon our considered moral judgments about particularly described examples. We point out that no one supposes that mere illegality gives rise to moral concern: no one condemns the prudent driver who slowly and safely runs through a lengthy stop light at an empty rural intersection at two in the morning. Neither does anyone suppose that illegality worsens what is independently wrong: no one would say that the practice of husbands raping their wives has recently been made more reprehensible by having belatedly been made illegal. (Here we echo Blackstone: "Neither do divine or natural duties ... receive any stronger sanction from being also declared to be duties by the law of the land" [1793, p. 54].) Hence, we conclude, the supposed general obligation of obedience plays no useful explanatory role in normative theory, and so there is no good reason to accept it.

Many philosophers have not been convinced by these arguments. Few believe that any of the classic arguments from rule or act utilitarianism, gratitude, consent, or fair play can be refurbished so as to yield a general *prima facie* duty of obedience (but see Klosko 1987, 2005; Walker, 1988). Instead, fresh arguments have been offered (Finnis, 1980; Honore, 1981; Mackie, 1981; Dworkin, 1986; Simmons & Wellman, 2005; Gilbert, 2006). What has not been noticed is that there is a metaethics supposed in many of these arguments that is vastly different from Ross's intuitionism – one so different as to raise doubt that they affix the same meaning as did he to "*prima facie* duty." Summed briefly, the difference is this: Most who favor the *prima facie* duty of obedience conceive of normative theory as catechistic and perhaps even as political. They believe that philosophers ought to aim at formulating a set of principles that the rest of humanity might accept and articulately employ in arriving at their considered moral judgments. However, Ross had no such ambition at all. He spoke primarily to other philosophers, and he did not expect to find catechumens there or in the public at large. Rather than preaching at humanity, he assumed that we all have a faculty that permits us to discern moral truth. He thought that the proper task of normative theory is to explain the principles that the moral faculty employs. These different metaethical visions yield different conclusions about whether there is a *prima facie* obligation to obey the law. Hence, what appears to be a dispute about politics is in reality a dispute about the proper end of normative theory. It is no wonder then that the disputants differ so slenderly over particular instances of illegal conduct.

### Implications of Catechistic Metaethics for the Duty of Obedience

Apart from their common project of framing moral principles for general adoption, catechistic philosophers are a diverse metaethical lot. They comprise the moral realist, John Finnis, an avowed defender of Thomistic natural law theory, who attempts to

delimit the obligations of humankind by speculating about which principles would best promote the common good were ordinary people to accept and to act upon them (Finnis, 1980, esp. pp. 303–8). The rule-utilitarian prescriptivist, Richard Hare, is also in their company (Hare, 1981). And they include the moral skeptic, John Mackie, whose argument for the obligation of obedience shall be our exemplar from the class (Mackie, 1981).

The first sentence of Mackie's book, *Ethics: Inventing Right and Wrong*, boldly proclaimed "There are no objective [moral] values" (1977, p. 15). But he nonetheless offered arguments in normative theory, whose point he thought is to invent a morality that will allow humanity to flourish peacefully were it generally accepted (Ibid., p. 193). It need not be created wholly new: all moralities contain restrictions upon the free use of violence, theft, promise-breaking, and so forth; and it is evidently necessary that the one to be recommended to society must have some such content if it is to promote human welfare. Still, we cannot suppose that existing moralities adequately serve the goal of human flourishing: for example, "some more traditional obligations traditionally attached to status, not created by contract, are dispensable; patriotism ... may have outlived its usefulness" (Ibid., p. 123). Mackie's conception of normative theory requires philosophers always to determine the consequences of general belief in a large variety of alternative moral principles, and to settle upon that set whose acceptance would best make us flourish.

What then about the duty of obedience? In an article devoted to the topic, Mackie began by announcing without a shred of argument or evidence that "the dominant conventional morality of our present society" recognizes its existence (1981, p. 144). However, he placed no weight upon this, focusing instead upon whether:

If we were quite literally inventing right or wrong – constructing a system of moral ideas – might we include in it, as a basic and underived element, an obligation to obey the law as such? (Mackie, 1981, p. 151)

He returned an affirmative answer:

The norm that lays down a prima facie obligation to obey the law as such is a further, though more extensive, reciprocal norm, like those that prescribe gratitude and loyalty to friends, collective action or forbearance, and honesty about property ... The general recognition of [this] obligation ... therefore shares with these other reciprocal norms a feature that makes it more viable than the norm of rational benevolence. (Mackie, 1981, pp. 153–4)

If we accept Mackie's methodological presuppositions, it is hard to demur from his conclusion, given the obvious practical empirical truth that general obedience to law is essential to human well being. The objections that I set out earlier against the obligation of obedience have no force against him. He is unfazed by the fact that the obligation cannot be derived from other moral principles, such as gratitude or fair play, because he contends that it follows directly from the goal of human flourishing. Neither does it tell against him that the duty plays no useful explanatory role in normative theory, because he does not allow that there is a moral reality for philosophers to explain. Nor will it impress him that the obligation fails to fit our intuitions about particular kinds

of cases, because he rejects the intuitionistic metaethics that lies behind this style of argument. Lastly, he will not care that the duty is redundant in any colorable normative theory, because he does not aim at explanatory economy. He may respond that redundancy can be a virtue in normative theory, because it is desirable that conduct tending to promote human flourishing be morally overdetermined. Since obedience to the law promotes this end, it is well that ordinary people accept more than one principle that will inspire them so to behave.

Greenawalt criticizes Mackie's argument by pointing out that the available evidence does not show that recognition of an obligation of obedience is necessary to sustain adequate compliance with the law (Greenawalt, 1987, pp. 179–85). But this too seems weak, for it is hard to see how any harm could result from a general recognition of the duty. Most philosophers agree that the law's commands generally track those of morality. And the duty of obedience is only one of a number of *prima facie* duties that Mackie urges upon us. When obedience to a law requires that we breach other weighty obligations, Mackie would counsel civil disobedience. On the other hand, there is probable good in its general acceptance: when (as will most often be so) the law's demands upon its citizens coincide with their independent moral duties, their recognition of a duty of obedience will reinforce their disposition to adhere to the right. Hence, it seems that we ought to place the obligation of obedience in our catechism of principles, even if we do not know that its recognition is essential to achieving the ameliorating aim of normative theory.

Apart from act utilitarians, who recognize but one moral principle, I believe that every philosopher who has explicitly set forth a catechistic metaethics has also endorsed a distinctive duty of obedience to law (see, e.g., Austin, 1954, pp. 14, 24, 42–3; Finnis, 1980, pp. 314–20, 345; Hare, 1998, pp. 8–20). It appears that they were right to do so. Let us now see how the duty fares from Ross' point of view.

### Implications of Commonalist Metaethics for the Duty of Obedience

It is often said that metaethics and normative ethics are wholly independent of one another. That commonplace captures one important truth: philosophers' moral sympathies do vary independently of their metaethics. But the claim of independence hides the more important truth that a philosopher's metaethics sets constraints upon the form of the principles her normative theory can recognize and upon the arguments that may be deployed in their support.

Since it is impossible to argue for all one's premises, every philosophical theory must rest in the end upon intuition – upon the theorist's unsupported bare beliefs, which she hopes her readers will share. But the role that intuition plays differs greatly among metaethical theories. Catechistic philosophers typically suppose that an acceptable normative theory must be one satisfactory to philosophy, and so presuppose that only philosophers' intuitions (perhaps restricted to those of “logic” or “language”) have authority for normative theory (cf., Hare, 1981, §§ 1.3, 1.6). Ross thought that philosophers' substantive moral intuitions are authoritative, but only because he supposed that everyone's are (Ross, 1938, p. 1f.). Like Judith Jarvis Thomson, our most gifted contemporary intuitionist, Ross was a metaethical rationalist: he believed that funda-

mental moral principles are necessary truths and that virtually all humanity has a faculty of reason by which it can recognize such truths in favorable circumstances. As did many great philosophers before him (e.g., Aristotle, Cicero, Aquinas, Hume, Adam Smith, Kant), Ross supposed that the moral faculty is fungible. Let us call this assumption “commonalism.” Let us also adopt this model of the common moral faculty: whether reason, sentiment, or something else again, it is a mentalistic “black box” into which nonmoral beliefs are fed as stimuli and from which moral conclusions issue. (A psychologically accurate model must posit reciprocal causal relations between nonmoral and moral belief. But since normative theory concerns the conditions of passage from premises of empirical fact to moral conclusions, the one-way model will suffice for our purposes.)

Since commonalists presume that the deliverances of the moral faculty are true and that everyone has one, they also suppose that the proper task of normative theory is to explore and explain “common sense” morality, but is emphatically not to change it. For example, Kant ([1785] 1964, pp. 71–3) held that ordinary folk can perfectly well discover their duties without aid of philosophers, and that philosophy’s only practical office is to explain the basis of ordinary practical reason in necessary truth, which may help those who understand this to be less tempted to follow specious arguments and inclinations contrary to duty. Hence, setting very different goals for normative theory, commonalism implies constraints upon its principles and arguments that are very different from those of catechistic metaethics.

First, commonalists suppose that the primary constraint upon normative theory is that it explains those of our own and others’ moral intuitions that are made in circumstances conducive to reliability. Roughly, these are: that we are not prey to false relevant nonmoral belief (e.g., about whether Sally hit John); and that we are not relevantly subject to influences likely to corrupt judgment (e.g., family feeling, racial prejudice). Commonalist methodology, which relies heavily upon our intuitions about hypothetical (often fantastical) examples, produces intuitions that are maximally reliable. That is because our personal interests are then disengaged and we are immunized from nonmoral error, since the facts upon which the moral faculty works are stipulated. However, we must note as a caveat that philosophers’ theories sometimes badly skew their intuitions. For example, Gilbert Harman believes that morality is merely a matter of group convention, which prompted him to the spectacularly counterintuitive claim that “it would be a misuse of language to say of hardened professional criminals that it is morally wrong of them to steal from others or that they ought morally not to kill people” (1977, p. 113).

Second, because commonalists assume that we have somehow all acquired an inchoate knowledge of a common morality, they do not suppose that normative principles are subject to learnability constraints or that they must be easily understood by the vulgar. (Those troubled about how anyone could recognize moral truth but not be able to understand a summation of its principles should reflect upon the familiar fact that few – if any – have a complete articulate understanding of the principles of English grammar but many have inchoately mastered them; cf., Smith, 1979). And indeed, the normative theories offered by leading commonalists, such as Hume and Kant, or more lately Ross and Thomson, are exceedingly abstract and fearsomely complex. In contrast, the principles of catechistic theories are constrained by what not-too-

terribly-well-educated people can be expected to apply. Catechistic principles must therefore be aphoristic, so that they can effectively be inscribed upon and kept before the minds even of the dull (cf., Hare, 1981, § 2.4). (Arguments in support of catechistic principles may of course be as complicated as one pleases, since they are addressed primarily to philosophers.)

Third, unlike catechists, commonalists should never argue for moral principles by appealing to the supposed favorable consequences of ordinary persons accepting and acting upon them. That is because they seek to understand our common morality, not to supplant it. Commonalists should instead attempt to discern what principles we would all settle upon in ideal conditions of judgment: that is, if we knew all relevant nonmoral facts (but philosophers should be diffident about whether their training gives them competence to speak authoritatively upon matters of empirical fact), and if we were reasoning consistently, were uninfluenced by invidious bias, and had adequate time for reflection and consultation with others engaged in the same difficult task.

Commonalists will note that the appeal to our moral intuitions shows that the existence and weight of a moral reason to obey the law is always a function of some independent moral reason arguing in that direction. That same appeal shows that we sometimes have no moral reason whatever to do what the law requires, as when one outstays the parking meter by five minutes at a time when there is ample available parking. Fidelity to the constraint that a normative theory adequately explains our intuitions requires that commonalists exclude a duty to obey the law from their lists of independent moral duties.

## Conclusion

It appears that whether a normative theorist ought to recognize a distinctive duty of obedience depends upon her metaethics: catechists should (except act utilitarians), commonalists should not. Hence, the question can receive no decisive answer except in the context of a full-blown metaethical theory. It is a mistake to suppose, as I once did, that it may be addressed discretely (Smith, 1973).

Nonetheless, since I believe that some version of commonalism is true and that catechistic theories are wrongheaded, I hold to my earlier doubts about the duty of obedience. I cannot here defend commonalism (but see, Smith, forthcoming). Still, I can offer these summary criticisms of catechistic theories as a promissory note to be paid elsewhere: First, although many philosophers have thought that their professional office is to correct society's erroneous moral beliefs, virtually everyone else has ignored their schooling. It is evident upon brief reflection that anyone who sets herself this goal dooms herself to frustration. Philosophy is difficult reading, and few have either time or inclination to wade through it. Most nonphilosophers who do – virtually all of them academics in other disciplines – doubt that a philosophical education confers any special store of wisdom. But if nonphilosophers will not defer or even listen to us, what is the point of our trying to correct their opinions?

Second, despite the interest and subtlety of various catechists' arguments, there is scant intrinsic plausibility to the supposition that ordinary people require philosophers' aid to discover what they ought individually and collectively to do. When voiced by



philosophers, it seems suspiciously self-aggrandizing. But its primary implausibility lies in its making normative ethics into something wholly anomalous. The historically dominant conception of analytical philosophy is that its task is explanatory, not hortatory or prescriptive. Its “philosophy of” branches generally (e.g., language, law, science, mathematics, etc.) do not undertake to tell speakers, judges, scientists, mathematicians, and so forth, how they ought to behave in these roles. Rather philosophers attempt to formulate explanatory theories about what speakers and others, actually do and how they do it, and about the nature of the various entities with which they work (e.g., meanings, laws, scientific theories, numbers, etc.). No one supposes that native speakers of English need study philosophy of language to speak it correctly, that mathematical or scientific proofs would be improved were mathematicians and scientists all proficient in the “philosophies of” their respective disciplines, or that constitutional decisions would be more just were Supreme Court Justices required to be schooled in analytical jurisprudence. Why would normative ethics break this pattern? In default of a convincing answer to this question, we should reject all catechistic metaethics out of hand – and with them the supposed distinctive duty of obedience to law.

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## Legal Enforcement of Morality

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In modern Western political and legal thought, the subject of legal enforcement of morality is narrower than the literal coverage of those terms. That is because much legal enforcement of morality is uncontroversial and rarely discussed. Disagreement arises over using the law to enforce aspects of morality that do not involve protecting others from fairly direct harms. More precisely, people raise questions about legal requirements: (1) to perform acts that benefit others; (2) to refrain from acts that cause indirect harms to others; (3) to refrain from acts that cause harm to oneself; (4) to refrain from acts that offend others; and (5) to refrain from acts that others believe are immoral. Answers to some of these questions *may* be affected by whether the relevant moral judgments are essentially religious. Subsidiary questions concern the status of taxes adopted to discourage behavior the government should not forbid outright and the status of prohibitions on others profiting from such behavior. Since a single argument for restricting behavior rarely stands alone, a conclusion on any of these general issues will not usually yield a decisive answer to whether any particular action should be left free; but a conclusion can significantly affect the overall power of the totality of appropriate arguments. For example, if someone concludes that the claimed immorality of homosexual behavior is not an appropriate basis to forbid it, this will substantially affect the overall strength of reasons in favor of prohibition.

A final subtlety concerns two perspectives from which the subject of the legal enforcement of morality can be considered. One is a matter of legislative philosophy: "Should the legislature enforce morality by law?" The second perspective is that of a court in a constitutional regime: "Should enforcement of morality count as a legitimate basis for legislation that is challenged as invalid?" One *might* think that certain reasons should really not be relied upon by legislatures but should be accepted by courts as adequate if they are relied upon. More complicated relations between these kinds of reasons might exist. A reason might be acceptable for most legislation, but not, say, for legislation that infringes on liberty of expression. Or, a reason might be acceptable as a matter of general philosophy of government, but not in a constitutional regime that includes separation of church and state.

I explain these major questions in turn, but I first address the obvious point that legal enforcement of morality is usually appropriate.

## Legal Enforcement of Moral Norms against Causing Harm

Any comprehensive morality includes restraints against harming other people. Murder, assault, theft, and fraud are immoral. In any society sufficiently developed to have a law distinguishable from its social morality, the law will forbid murder, assault, theft, and some forms of fraud. As H. L. A. Hart pointed out (Hart, 1961, pp. 188–95), law and social morality will constrain much of the same behavior. That does not mean, of course, that every aspect of morality that concerns preventing harm to others will be enforced by the law. Law is a crude instrument, requiring findings of uncertain facts, with rules backed by a limited arsenal of coercive sanctions. Most lies and many other immoral acts that hurt others are left unregulated by law. Nevertheless, no one doubts that, in principle, protecting others from harm is an appropriate task for legal rules. Exactly what protection should be extended is a matter of prudential judgment or some kind of balancing of morally relevant factors. These plain truths may obscure some complexities that matter when one asks if legal rules should prohibit acts on *other* grounds.

The idea of harm to someone else needs to be clarified and developed. If every unpleasant feeling or negative thought counted as a harm, an act might be prohibited because it made some people envious or disturbed them. With such an expansive notion of harm, enforcement of all aspects of morality could be swallowed up as prevention of harm to others. (However, the weight of reasons in favor of a legal rule would still be influenced if one had to focus on such harm.) Questions whether legal rules appropriately prevent harm to oneself or appropriately enforce morality *as such* would then have much less practical significance. In his nuanced and exhaustive treatment of the subject, Joel Feinberg suggests that, *for a principle of preventing harms to others*, the “harms” that count are “setbacks to interests” that are in some way wrong (Feinberg, 1984, pp. 31–104). Thus, if an actress is chosen for an important role, that does not harm a competitor who is envious and who loses the opportunity to earn \$1,000,000. Exactly what counts as relevant harms to others is a problem that emerges as of central importance when we move on to bases for legal regulation that are contested.

One significant point is that the prevention of harm to others includes prevention of harm that is most directly inflicted on people as a collective. Thus, the “harm principle” generates no difficulty for a law against spying on the government. What harms count as collective harms, however, is an issue to which we will need to return.

There are two related problems about harm to others that affect much of the rest of the essay. Their explication here will clarify what follows. (1) Could decisions about legal regulation be made without any moral judgment whatsoever? (2) If moral judgment is necessary in deciding what counts as relevant harm, does it follow that general enforcement of morality is appropriate? In answer to the first question, a distinction between wrongful and nonwrongful harms does involve moral judgment, such as, that suffering envy at the deserved success of others is not a relevant harm. Could this sort of judgment be avoided? We could *imagine* legal regulation being based on some assessment of negative consequences that takes account only of overall individual preferences, happiness, or ability to pay, relying on no (other) moral judgments. (“No other” is the precise characterization here because deciding that only preferences, happiness,

or ability to pay should count is itself a moral judgment.) If someone conceived the grounds for legal regulation as so limited, would they seem *more* limited than the grounds for moral judgment? That depends. An “average happiness utilitarian” thinks all moral judgments should be based on actual and prospective happiness. It would be misleading to put that position as one in which legal regulation is determined without moral judgment; because one would use the same kinds of assessments to make correct moral judgments as to determine appropriate legal restrictions. Suppose, by contrast, someone thought that sound morality includes many bases for judgment, and that these are irrelevant for legal regulation. That position might be cast as one in which legal regulation could be determined without moral judgment. But it is hard to understand how that position could be defended. Why should moral distinctions that govern the evaluation of acts cease to be of direct relevance for evaluating legal rules? We are left, I believe, with the conclusion that, on any defensible understanding, principles guiding legal regulation must include moral judgments.

If moral judgment infuses determinations of harm, does it follow that legal rules appropriately enforce morality in general? No. It may be that for reasons of moral and political philosophy, harm to others (determined partly by moral judgment) should be an appropriate basis for legal regulation, whereas moral evils that do not involve harm to others should be left free of legal regulation. I now turn to some doubts about whether the law should enforce morality.

### Legal Requirements to Perform Acts That Benefit Others

This topic can be introduced most sharply by asking whether people should have any legal duty to rescue others. In most states of the United States and in many other countries, people do not have such a duty. A person in the park who is walking by a shallow pool in which a baby is drowning, fully aware that he can save the baby easily with no more harm to himself than wet feet, can keep on walking without criminal or civil (tort) consequence. On occasion, this legal principle has been defended on the ground that the law should not enforce morality. Whatever other grounds may exist for the legal principle, this claim is either confused or unpersuasive.

It helps initially to narrow the genuine basis of contention. People often suppose that omissions to act have a different moral status from actions. If *A* breaks *B*'s arm, *A* has done something worse morally than if *A* fails to prevent *C* or a falling limb from breaking *B*'s arm. An extreme utilitarian might deny the moral significance of any distinction between action and omission, but I shall assume it in what follows. Everyone agrees that preventing easily avoidable serious harms is morally preferable to letting them occur, and most would probably acknowledge that the stronger language of moral duty is apt for the rescue situation I have posed, that is, that the passerby has a “moral duty” to rescue the baby.

If we turn to the law, we can quickly see that no universal line is drawn between action and omission. When people have a special responsibility to care for others, they cannot stand by and let them suffer avoidable injury. A parent or hired nurse who, with full awareness, let the baby drown would be guilty of murder or manslaughter. People perform a wide range of roles that include responsibilities to care for others. Further,

people have general duties to act for the benefit of the public. They have a legal duty to testify, even if they would rather not; they must pay taxes, and submit to jury service. Anyone who is not an anarchist is likely to acknowledge that governments properly impose on people some positive duties to act. Thus, few doubt that the law imposes on some people some requirements to act to avoid harm and to contribute to the common welfare.

Any principled controversy appears to be over whether strangers should be legally required to assist other individuals in need. Some of the arguments against such liability are that determining the state of mind of someone who could rescue but did not is usually very difficult, that people in a position to rescue (say on a beach, or at home with their telephones as a rape happens outside) frequently believe someone else may do the job, that a free-floating duty to help others in need is too vague, and that such a duty imposes inappropriately on the autonomy of citizens to pursue their own projects. From a consequentialist perspective, these problems are matters of degree. A legal duty to prevent death or severe injury to another when one is fortuitously in the position to do so at no risk and slight cost to oneself would be a very slight imposition on one's pursuit of one's own projects. (The idea of one being fortuitously in the position to help is included so that those with special skills, mainly doctors, are not on constant call to assist strangers in need.) If the duty were limited to persons who find themselves in situations where others are not equally able to help, the complexity concerning many available potential rescuers would be avoided. If determining the state of mind of someone who fails to assist is deemed too difficult, a failure to rescue could be treated as criminal or civil negligence. Someone may reasonably conclude that a legal duty would cover so few circumstances it would not be worth imposing, that it might even detract from nobler motivations to help; but there could be no principled objection to the basic idea of such a duty.

Does a deontological perspective (based on moral rights and justice) yield a different conclusion? I have assumed that a moral duty to rescue exists. (If one assumed that rescue were only a question of what is morally preferable, not of moral duty, one still might believe that a *legal* duty was appropriate, since in some domains the law requires more than is required by independent moral duty.) Given that the law properly imposes legal duties to rescue on those with special responsibilities and also imposes general legal duties to satisfy public responsibilities, no basis exists for some absolute principle against requiring stranger rescue. People, in advance, imagining that they might be in the position of needing rescue or being able to make a rescue easily would choose to have such a legal duty (at least, if they did not think they could rely for rescues on the moral sense of others). Such a duty is a reasonable responsibility of citizens. *Perhaps*, on balance, imposing the duty is unwise, but it involves no breach of any defensible principle that law should not enforce morality.

### Requirements to Refrain from Acts that Cause Indirect Harm to Others

Before we examine claims that self-protection, offense, and perceptions of immorality are themselves inappropriate bases for regulation, we need to look at indirect harms to

others. Many acts that do not cause direct harm may hurt people indirectly. In *On Liberty*, the most famous work on the legal enforcement of morality (and on enforcement of morality by public opinion), John Stuart Mill wrote, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Mill, 1975, p. 15). Mill acknowledges that when people harm themselves, this affects others through their sympathy and interests, but only when “a person is led to violate a distinct and assignable obligation to any other person or persons [is] the case taken out of the self-regarding class” (Mill, 1975, pp. 99–100). As an example, Mill says, “no person ought to be punished simply for being drunk; but a soldier or policeman should be punished for being drunk on duty” (Mill, 1975, p. 100).

May indirect harms to others, contrary to Mill, properly be a basis for legal restriction? I shall consider three kinds of instances: (1) when an action will certainly cause harm to others; (2) when a likely future consequence of action is harm to others; (3) when an action is likely to make one a burden on society. If parents with young children commit suicide, they are unable to provide further material and emotional support for them. That is certain. Criminalizing suicide may be pointless, but is the harm to young children a proper basis for preventing such parents from committing suicide, when that is possible? Whatever conceptual division between direct and indirect effects makes sense, a consequence that is certain to follow from an action is one on which society may base regulation.

Likely, but not certain, future consequences pose a more complex problem. Suppose evidence strongly indicates that if use of a particular psychedelic drug were legal, most people who began to use it would eventually become addicted and would at that stage (because of cost and physical effects of the drug) be unable to perform family obligations; further, once people used this drug extensively, their desire to consume it would be much more intense than when they had never or seldom used it. Would this typical harm “down the road” be a proper basis for forbidding *all* use of the drug or all use by parents of young children? If a high percentage of parent-users would eventually neglect their children and no one could estimate in advance who these were, forbidding all use, at least by parents of young children, would make practical sense. From a consequential perspective, it might be warranted. Any claimed consequential basis for an absolute principle against prohibitions based on such indirect effects would have to contend that governments cannot be trusted to limit legal restraint to extreme situations in which expected future harm is so serious and pervasive, and restraint at the initial stage is so much more effective.

If one focused on some nonconsequential right to liberty, one *might* believe that people who are capable of controlling themselves should not be restricted because other people, even a high percentage of users, lack such control and will end up doing harm. Were the percentage of nonaddicted users very slight, the cost in human misery of recognizing this claimed right would be very high; and the idea of any absolute right of this sort is unattractive. Nonetheless, the basic idea of some such claim to liberty does suggest a counter to any analysis of the problem that is simply consequentialist. The appeal of the claim to liberty seems most powerful when the high-risk activity is thought to reflect some commendable striving of the human spirit, as with extremely dangerous mountain climbing expeditions.

What of actions that are said to bear an unacceptable risk that one will become a burden on society? This is one justification offered for making automobile drivers wear seat belts and motorcyclists and bicyclists wear helmets. From a consequential point of view, the value of liberty and the pleasure of riding unconstrained might somehow be weighed against likely cost. The cost appraisal would need to be reasonably comprehensive; if cigarette smoking leads to public medical expenses, does it also save public money because smokers tend to live less time after retirement? Someone who places a great intrinsic value on liberty may claim that the public burden argument is, in principle, an insufficient basis for restriction. If society wants to protect itself, it can demand that people who engage in dangerous activities buy insurance to cover possible expenses of injury. Since that lesser restriction is available, ease of administration, on this view, cannot warrant across-the-board-prohibition.

In summary, *some* arguments for restriction based on likely indirect effects run into claims of autonomy that will seem more or less powerful depending on one's overall approach to moral and political philosophy.

### Requirements to Refrain from Actions That Hurt Oneself

Is harm to the actor an appropriate reason for legal prohibition? For this question, it is widely assumed that adults voluntarily engaging in behavior together, such as sexual acts, are not distinguishable, in principle, from individuals acting by themselves. If morality bears on how we treat ourselves and the law should not interfere to prevent harms to ourselves, this respect would be one in which the law should not enforce morality. Mill put the principle in favor of nonrestriction boldly. A person's "own good, either physical or moral, is not a sufficient warrant" for society exercising power over him (Mill, 1975, p. 15). In the part of conduct "which merely concerns himself, his independence is, of right, absolute" (Mill, 1975, p. 15). Were this principle of Mill's followed (and were indirect effects on others not regarded as an adequate basis to regulate), there would probably be no seat belt and helmet laws, no laws generally restricting voluntary sexual activities among adults, no laws against most presently proscribed drugs, no rules forbidding swimming at unguarded beaches, no legal restraint of suicide, and much less extensive regulation of food, medical drugs, and related matters.

Mill speaks of an absolute right, but his claimed basis for the right is consequential. He argues that given differences among individuals, what is good for most people often is not good for everyone, and that, in any event, people grow by learning through experience. Experiments in living are vital for the progress of the human race. The majority cannot be trusted to restrict wisely. When one thinks of most sexual activities, these arguments are powerful. But what of an activity like cigarette smoking? Few adults (in the United States at least) are pleased to be smokers, but most smokers find it very difficult to stop. Given the nearly universal desire for decent health, can we not confidently say that cigarette smoking is harmful to smokers (or at least unwisely reckless)? Unless one's distrust of the majority is extreme, one cannot come up with a principle as absolute as Mill's on consequentialist grounds.

Such an absolute principle is more comfortably defended on the basis that adults should have autonomy to decide how to live their lives, making even foolish choices so



long as they do not harm others. The value of autonomy seems most directly opposed to restriction that is designed to protect the actor himself.

In considering the defensibility of a powerful principle against legal “paternalism” that protects people from themselves, it helps to consider voluntary choice, paternalism that serves the reflective values of the actor, and paternalism that imposes values that the actor rejects. Restriction of people for their own good is easiest to justify when voluntary choice is absent. If voluntary choice is present, restriction on behalf of values the actor accepts involves less severe restriction on autonomy than restriction on behalf of values that the actor rejects.

The problem of seat belts provides an apt introduction to these points. For most people, using seat belts in automobiles is a minor restriction; very few people are indifferent to loss of life or grave physical injury, and use of seat belts prevents those in many automobile accidents. Yet a great many people choose not to use seat belts. One might analyze these facts in the following way. The chance of a bad accident on any one occasion of driving is very slight. Some people are not fully aware of the value of seat belts in accidents; others find it hard to act rationally in the face of a very slight risk of injury, and they are disposed not to imagine that they will actually be in a serious accident. For complex psychological reasons, they do not act rationally in light of risks involved. A requirement that people wear seat belts might be viewed as forcing them to do what is prudent and reasonable given their own values. One might even argue that choice in ignorance or under conditions when rational assessment is difficult is not *really* voluntary. I shall not explore the problem of voluntariness further, but the more robust one conceives the conditions of voluntariness to be, the more one will accept state restrictions as countering undesirable choices that are not sufficiently voluntary.

The most serious breach of someone’s autonomy involves coercion against one’s own rational, reflective judgment. Practicing homosexuals believe that their lifestyle is best for them, yet until fairly recently they were forbidden in many jurisdictions from engaging in homosexual practices. If they are told they must refrain because such a life is really psychologically unhealthy and abstinence is preferable, their own deep sense of how to live is disregarded. (I pass over the complicated status of coercion that successfully alters the subject’s judgment about what is worthwhile.) This justification for restriction is more an insult to their status as autonomous persons than any serious justification cast in terms of harm to others.

Exactly how much paternalism a person will countenance, on reflection, depends on how strongly that person rates the value of autonomy and distrusts the judgments of the government about what is in people’s self-interest. Perhaps no one has given as much careful study to these problems as Joel Feinberg; writing from a straightforwardly liberal perspective, he, like Mill, endorses an absolute principle that someone’s own physical, psychological, or economic good should not be a basis for criminal prohibitions against voluntary behavior (Feinberg, 1986a, pp. 1–49). That position is substantially more libertarian than the practices of modern societies and what most people in them would endorse.

Some secondary questions about legal regulation involve civil law consequences when criminal prohibitions would be inappropriate, rules against third persons (such as pimps) profiting from consensual acts between others, and taxation designed to discourage behavior. Much could be said on each of these subjects, but I will limit

**Table 31.1.** Example.

<i>Tax Rate Per Pack (\$)</i>	<i>Sales (millions)</i>	<i>Revenue (\$ millions)</i>
(A) 0	20	0
(B) 1.00	15	15
(C) 1.50	8	12

myself to brief comment on the third. Mill decisively concludes that although raising money disproportionately on unhealthy activities is all right (liquor sales can be taxed at a higher rate than milk sales), it is unacceptable to tax in order to discourage behavior that in principle should be left free of criminal restriction (Mill, 1975, pp. 123–4). Put aside the fact that cigarette smoking harms nonsmokers and assume the values in table 31.1 for the amount of sales under various levels of cigarette taxes.

The only reason for preferring tax *C* to tax *B* would be to discourage smoking; that choice would be barred by Mill's conclusion. That conclusion, however, is not warranted on consequentialist grounds. People who have a very strong desire to smoke will continue to do so if tax *C* is in place and the "experiment in living" of smoking will not be squelched. A *payable* tax has a quite different effect on choice than a successful prohibition. (Of course, an enforced tax of \$300 per pack will be a more severe restriction than an unenforced prohibition.) If a set amount of tax is unfair to poor smokers, that problem could be met by calibrating the amount of tax to a smoker's wealth. Thus, the consequentialist reasons against outright prohibition apply with much less force to a discouraging tax that is not too high. Matters are more complex if one focuses on a smoker's intrinsic right to autonomy. One might think autonomy is breached if the state tries to manipulate behavior for the smoker's own welfare. In that event, tax *C* is not distinguishable, in principle, from a prohibition. On the other hand, the choice to smoke is still available, and the price of cigarettes is no greater than if ordinary natural (disastrous storms) or economic factors drove the price of cigarettes up. In its actual import on effective choice, the tax still differs from a successful prohibition. My claim here is that no easy step takes us from belief that the law of crimes should leave behavior free to a conclusion that taxation to discourage the behavior would be inapt.

### Requirements to Refrain from Acts That Offend Others

Some acts that do not cause harm in a more restricted sense offend others who observe them or who know they take place. Often people regard the offending behavior as immoral in some sense. Is offense an appropriate basis for legal restraint or is this an aspect of morality that the law should not enforce?

Analysis is fairly simple for activities that offend unwilling witnesses (e.g., sexual intercourse in public) and that may be carried on in private. The immorality here is not in the basic activity, but in failing to respect the cultural sense of what may decently be done in public, before involuntary witnesses. (A "public" performance before *willing*

*consumers* is a different matter.) Of course, the law should not enforce the sensitivities of the most timid, and many things that social conventions treat as offensive (e.g., belching loudly in a restaurant) do not rise to the level of legal regulation; but almost everyone agrees that, in principle, criminal restrictions appropriately protect people against instances of public offensiveness. This broad conclusion is qualified in certain respects by countervailing rights. Suppose what *offends* the majority are religious symbols worn openly by a minority or forms of speech (say, flag burning) by dissidents. Rights of free exercise of religion and free speech may preclude using offense as a basis to restrict religion and speech. In the United States, courts treat such laws as unconstitutional infringements on liberty.

Some acts cause offense to others who are not witnesses. Homosexual acts are striking instances; some people are disturbed to know they are occurring. Mutilation of the bodies of those who have died and cannibalism are more perplexing examples. Isolating the issue of whether offense should be a basis for restriction is not easy. Conceptually we can imagine people being offended by private acts they do not regard as immoral, but that is unusual. Typically this kind of offense accompanies belief that behavior is wrongful. In practice, asking whether a broad opinion that behavior is deeply wrongful is a justification for prohibiting the behavior is not too different from asking whether deep offense is such a justification. But the elements are, or can be, distinguishable bases for legal enforcement, and this section focuses on the offense people feel.

For the element of offense, some near absolute, or absolute, principles are plausible, which I offer without a sustained defense. First, if those offended *do not have any moral objection*, behavior should be allowed; people's liberty to live their own lives as they choose should not be restricted because some others feel mere disturbance at what they do. Second, offense at religious practices that cause no secular harm cannot be a basis for restriction in a country that recognizes religious liberty. Third, offense at nonreligious practices (such as homosexual acts or eating pork) because the practices violate some people's religious beliefs should not be a basis for restriction in a country that values religious freedom and does not maintain a close connection between some religion and the government. (*Perhaps* in a country that is overwhelmingly Jewish or Muslim, prohibitions on pork eating would be acceptable.)

We are left with the possibility of a restriction that is based on deep offense connected to belief in wrongfulness that is not perceived as primarily a matter of religious belief. If other appropriate bases for restriction are present, deep offense may count in the balance; but could it ever be the primary basis for restricting liberty? I am very doubtful, but that doubt involves a particular view about mutilation of bodies, desecration of graves, and so on, which are sometimes presented as the strongest candidates for appropriate restriction based on offense. When those we love die, our deepest emotions do not fully divorce the body from the person we love. Abuse of the body would feel like abuse of the person. More broadly, abuse of the bodies of strangers feels like abuse of people. According to our emotions, if not our reason, mutilation is a harm to the person who lived in the body; it is also a harm to those who identify strongly with the person, and it may threaten our concern over what will happen to our own bodies. I think it is misleading to characterize as "offense" the deep sense that this behavior causes harm. Protection of human remains is proper, but it should be understood as a special example of accepting (nonrational?) sentiments of what constitutes harm to others.

## Requirements to Refrain from Acts Others Believe Are Immoral

Can legal restriction be justified because acts are regarded as immoral, apart from harm (to others and self) and offense they may cause?

Sometimes this seems to be *the issue* about legal enforcement of morality, but conceptual clarity is not easy. Part of the difficulty is that claims that such enforcement of morality is improper dissolve into rather different kinds of arguments. Part of the difficulty is doubt that any acts really are regarded as immoral, apart from some perception of harm. On the latter point, beliefs about homosexual acts provide a helpful illustration. Almost everyone who thinks these acts are morally wrong also believes they are psychologically unhealthy for those who practice them. But someone who believes the Bible reveals that God has condemned cities whose inhabitants practice sodomy may implicitly rate the evil of the acts as much greater than the particular harm (in this life, at least) to practicing individuals. One *could* conceivably think certain individuals are condemned to a completely miserable life no matter what they do and still object to their committing immoral acts. Such a complete divorce of morality from harm may be unusual, but since moral perspectives (especially religious ones) have different dimensions, the *magnitude* of moral wrong may seem greater than any harm. Thus, it does matter whether a basic sense of moral wrongness may underlie restriction.

A claim that the law should enforce morality *as such* might assert a rationale that: (1) objective immorality should be punished; (2) that a community properly punishes what it regards as immoral, without more; (3) that a community may preserve its moral structures, without more; (4) that people have a legitimate interest in preserving structures of life familiar to them; and (5) that liberty in self-regarding matters may weaken a community and dissolve bonds of other-regarding morality, to the detriment of people in general.

The last claim is plainly consequentialist. The notion is that people who perceive the law as accepting acts that they regard as abhorrent will fail to identify with other citizens, and will over time lessen their respect for the rights and interests of others. Although various passages may be interpreted differently, this seems to be the drift of Patrick Devlin's argument that legal enforcement of (private) morality is, in principle, appropriate (Devlin, 1965). It may be answered, as did H. L. A. Hart (1961), that communities could observe other regarding morality well, while respecting wide variations in private life, just as communities now respect wide variations in religious belief and practice. Neither position is illogical; the real issue is factual, and the answer could vary among communities. Given normal fears of change and the actual capacity of social communities to survive change (e.g., among religious beliefs), one should regard claims of social disintegration with great skepticism, but they cannot be ruled out, in principle, as conceivable justifications behind social restrictions.

Within societies based on particular views about religious truth, punishment of objective immorality may seem perfectly appropriate, but probably that *alone* is not a sufficient justification in a liberal democracy. If one takes the position advocated by certain liberal theorists that the state should be neutral among conceptions of the good life, it will follow that the state has no business punishing objective immorality; but

even if one thinks the state should not be neutral, coercion of adults in respect to behavior apart from its damaging consequences may not seem appropriate. This tentative conclusion is tested by examples like sex with animals and staged bear fights. Human sex with animals, bestiality, is almost universally criminal, and the main reason is not animal protection. One may perhaps find sufficient justification in its unhealthiness for the human participants, and perhaps the morally grounded offense felt by others. But these probably do not capture all the bases for prohibition; a sense of fundamental immorality also contributes. Similarly with bear fighting, worries that it would make human observers more cruel and aggressive may be only part of the story. These examples show that even in liberal democracies, a sense of objective immorality affects feelings about legislation. Whether acting on those feelings is fully consistent with liberal principles is debatable.

Those who are skeptical about the existence of objective morality or about the role of any government's enforcing such a morality may retreat to the idea that any community may enforce its *own* morality, independent of harm and offense. But apart from negative consequences of nonenforcement, why should existing morality be frozen in amber, if members of the community do not assume that it is objectively required? (I pass over the complex intermediate possibility of an observer who does not think a particular morality is objectively required, but who is asking himself if a community is justified in enforcing moral norms that the community thinks are objectively required?)

Claims about moral structures and structures of life seek to provide an answer to why the community may enforce its morality. Both claims come down to the idea that members of a community have some interest in preserving forms of life familiar to them. If the argument is not to reduce either to a bald contention that a community can enforce its morality or to an assertion that offense justifies restraint, the claim must be based on the value of continuity and psychological security in people's lives. This is a kind of consequentialist basis, although one whose power would need to be very strong if it is to override the liberty of people to choose their own ways of life. As I have already suggested in respect to offense, such a justification probably should not prevail in a liberal society to sustain a morality that is directly dependent on a religious perspective.

The relation between political philosophy and constitutional requisites was sharply at issue in *Bowers v. Hardwick* 478 US 186 (1986), an American Supreme Court case reviewing the constitutionality of a ban on sodomy as it applied to homosexuals. A majority of five justices said that a public view that such actions were immoral was a sufficient basis for a prohibition, as far as the Constitution was concerned. The dissenters did not express disagreement with this conclusion in all applications, but said that this basis was inadequate when the fundamental interest of sexual intimacy was involved. Although judges are influenced by their sense of sound political and moral philosophy, any individual judge might conclude that a legislature is allowed by the Constitution to rely upon bases for prohibition that would be eschewed under the best understanding of appropriate grounds to infringe individual liberty. In *Lawrence v. Texas* 539 US 558 (2003), the Court overruled *Bowers*, a majority determining that private sexual intimacy was a fundamental right warranting constitutional protection.

If this essay has a central point, it is the need to avoid reductionist simplicities when questions are put whether, and when, the law should enforce morality.

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## Indeterminacy

LAWRENCE B. SOLUM

Does the law determine the outcome of particular legal disputes? The simple, common-sense answer to this question might be, "Yes, the laws (the statutes, cases, and so forth) fix the way that judges decide cases." A more sophisticated answer might go, "Yes and no, the laws have a big influence, but other things (politics, preferences, and so on) may also come into play." A very cynical answer to the question could be, "No, the laws have nothing to do with how cases come out. They are just window dressing that skillful lawyers and judges can manipulate to justify any decision they please." This final answer to the question is a version of the claim that law is indeterminate.

The indeterminacy debate is about the claim that the law does not constrain judicial decisions. Put differently, the claim is that all cases are hard cases and that there are no easy cases. This claim has been associated with two schools of legal theory, the critical legal studies movement and legal realism, although many scholars associated with the contemporary critical legal studies movement do not believe that a radical critique of law should involve claims about legal indeterminacy. The strongest version of the claim is the notion that any result in any legal dispute can be justified as the legally correct outcome, but the thesis can be modified or weakened in various ways.

The indeterminacy debate has been called "the key issue in legal scholarship today," (D'Amato, 1990, p. 148), but the debate has also been referred to as "ultimately vacuous" (Patterson, 1993, p. 278). These wildly inconsistent evaluations underscore the one thing that is clear about the indeterminacy debate. The participants in this controversy do not agree as to what it is they are arguing about. As one observer put it, "Perhaps no phrase has been more misunderstood by legal scholars than the 'indeterminacy thesis' developed by the Conference of Critical Legal Studies" (Cornell, 1993, p. 1196). Care about what is meant by indeterminacy is especially important because advocates of the thesis charge that the thesis is badly misunderstood by its critics (Gordon, 1984, p. 125; Yablon, 1987, p. 634; Binder, 1988, p. 892; Singer, 1988, p. 624; Feinman, 1990, p. 1312; Millon, 1992, p. 35).

### What Does the Indeterminacy Thesis Mean?

Call the claim that the laws (broadly defined to include cases, regulations, statutes, constitutional provisions, and other legal materials) do not determine legal outcomes

*the indeterminacy thesis.* Because there are many different versions of the indeterminacy thesis, our approach will be to identify clearly the distinct versions of the indeterminacy thesis and then to consider each version of the thesis on its own merits. As a preliminary step, we will consider the point of the indeterminacy thesis by examining its relationship to radical critiques of liberal legal theory.

### *The role of indeterminacy in radical critiques of law*

Contemporary versions of the indeterminacy thesis are part of a radical critique of liberal legal theory. The overall thrust of the critique might be summarized by the slogan, “Law is politics.” The contrasting liberal claim is expressed by the ideal of the rule of law. This ideal requires that disputes be settled by general rules that are announced in advance and applied by courts that follow fair procedures; the ideal of the rule of law forbids arbitrary decision and requires that like cases be treated alike (Rawls, 1971, pp. 235–43). The rule of law is a complex notion, but if the indeterminacy thesis is true, then legal justice will fall short of the ideal of the rule of law in at least three ways: (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very idea of legal regularity is empty if law is radically indeterminate.

As we examine a variety of formulations of the indeterminacy thesis, the relation of that thesis to radical critiques of the rule of law must be kept in mind, both as a guide to understanding what is meant by the thesis and as a measure of the adequacy of particular versions of the thesis for critical purposes.

### *Indeterminacy versus underdeterminacy*

The next step in clarifying the indeterminacy debate is to distinguish between “indeterminacy” and “underdeterminacy” of law. Thus far, we have accepted the implicit assumption that indeterminacy and determinacy are exhaustive categories – that is, that the decision of a case is either determined by the law or it is indeterminate. This assumption is not correct. A legal dispute may be constrained by the law, but not determined by it.

Roughly, a case is underdetermined by the law if the outcome (including the formal mandate and the content of the opinion) can vary within limits that are defined by the legal materials. This approximation can be made more precise by considering the relationship between two sets of outcomes of a given case. The first set consists of all possible results – all the imaginable variations in the mandate (affirmance, reversal, remand, etc.) and in the reasoning of the opinion. The second set consists of the outcomes that can be squared with the law – the set of legally acceptable outcomes. The distinctions between indeterminacy, underdeterminacy and determinacy of the law with respect to a given case may be marked with the following definitions:

- The law is *determinate* with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member.



- The law is *underdeterminate* with respect to a given case if and only if the set of legally acceptable outcomes is a nonidentical subset of the set of all possible results.
- The law is *indeterminate* with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results.

The notion of a “hard case” can now be explicated with reference to the idea of underdeterminacy. A case is a “hard case” if the outcome is underdetermined by the law in a manner such that the judge must choose among legally acceptable outcomes in a way that changes who will be perceived as the “winner” and who the “loser.” The point is that the outcomes of a case need not be completely indeterminate in order for it to be a hard case; a case in which the results are underdetermined by the law will be “hard” if the legally acceptable variation makes the difference between loss or victory for the litigants. The distinction between indeterminacy and underdeterminacy is rarely observed in the indeterminacy debate, but it is, nonetheless, important to assessing the debate. Claims that the law is radically indeterminate are implausible, but more modest claims about underdeterminacy may both be defensible and play a role in a radical critique of liberal legal theory.

### Is the Law Radically Indeterminate?

The following discussion summarizes several moves made in the indeterminacy debate, with the aim of identifying different versions of the indeterminacy thesis. Exposition begins with the strongest or most radical version of the thesis. An objection to this version is considered, followed by a variety of defenses and modifications of the thesis.

#### *The strong thesis of radical indeterminacy*

Our investigation of the indeterminacy debate begins with the formulation of the strongest (the most ambitious) claim about the indeterminacy of law. As a preliminary formulation, we might say that *the strong indeterminacy thesis* is the claim that in every possible case, any possible outcome is legally correct. In other words, the strong indeterminacy thesis is the claim that the law is radically indeterminate.

Our preliminary and somewhat informal statement of the strong indeterminacy thesis can be made more precise by analyzing its constituent elements. A case is a legal event, in which a court or other legal body processes a legal unit (identified by pleadings or other legal events) that includes a set of facts about events and actions. The final outcome of a case is the end product of the processing of facts and law by the court. Typically, in common-law courts, the final outcome of a case includes three elements: (1) the decision (a verdict for one or more parties); (2) the order (a criminal sentence or civil relief); and (3) the opinion (a formal statement of the reasons for a decision). Reformulated in accord with this analysis, the strong thesis makes the following claim:

- *The strong indeterminacy thesis.* In any set of facts about actions and events that could be processed as a legal case, any possible outcome – consisting of a decision, order, and opinion – will be legally correct.

To falsify the strong indeterminacy thesis one needs to establish that there is at least one possible case in which at least one possible outcome is legally incorrect. This refutation would disprove the strong indeterminacy thesis only in the sense stipulated here; it would not establish that the law is always, usually, or even frequently determinate.

*The argument from easy cases*

One way to establish that there is at least one possible case in which at least one outcome is legally incorrect has been called “the argument from easy cases” (Schauer, 1985, p. 399). In its simplest form, the argument from easy cases points to a hypothetical case in which at least one outcome is legally incorrect. The following discussion attempts to formulate one such easy case.

Consider the following case, consisting of facts, a legal rule, and a legal event. First, postulate the following set of events and actions: I (the author) visited Point Magu State Beach in Ventura County, California, between the hours of 12:30 p.m. and 4:00 p.m. on Sunday, February 14, 1993. Second, consider the following legal rule: Section 2 of the Sherman Antitrust Act states, “Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony” (26 Stat. 209 [1890]). Third, consider the following claim about a possible case: my visit to the beach on the date and time specified would not constitute a violation of Section 2 of the Sherman Act. In order fully to convince you of this, I would need to tell you more about what went on at the beach on that day. The details will include my looking at the ocean, speaking with friends about politics, reading a book, and so forth. Children flew kites; a friend grilled chicken and hot dogs. You might want to know whether I discussed any business dealings at the beach: I did not. But no matter how many questions you asked, no matter how hard you tried, you would not be able to make out a legally valid case that the Sherman Act was violated. If a prosecution was filed against me based only on the events specified, a verdict of guilty would be legally incorrect. This is not to deny that it is possible that things would go wrong in some way. Perjury might be committed; the judge assigned to the case might be deranged. Our system of justice is hardly foolproof, but that does not entail the further conclusion that any result is legally correct.

The upshot of my example of an easy case is this: there is at least one possible case in which at least one possible outcome is legally incorrect. Therefore, the strong indeterminacy thesis (as I have defined it) is false. Notice my argument is not that the outcome of an antitrust prosecution based on the facts I describe is predictable. Rather, my claim is that one possible outcome, that is, conviction, would be legally incorrect. If the law is correctly applied and the witnesses testify truthfully, the prosecution should fail.

At this point, one might object that there is an illicit move in my argument. I have set up a hypothetical case in which I am prosecuted for violating Section 2 of the Sherman Act based on an actual trip to the beach. Is this legitimate? Could such a legal event really be called a case? Anthony D’Amato has raised similar concerns with respect to another alleged easy case:

If a homeowner eats ice cream in the privacy of her home, it will not give rise to any legal action. But there is no dispute here! No one is claiming that the homeowner has injured anyone else by eating ice cream, and hence there is no occasion to cite a legal rule that she may have violated ...

Nonetheless, given temporary license to be gruesome, the [advocate of the indeterminacy thesis] can supply such a case: the homeowner's child is starving (and indeed starves to death) while the homeowner eats ice cream. In this case, the homeowner's action (or inaction) gives rise to a criminal case; the state will (or at least should) bring charges of criminal manslaughter. (D'Amato, 1989, p. 256)

D'Amato makes two points in his attempt to refute this example of the argument from easy cases. First, the ice-cream example is not a case, because no legal event has occurred. Second, one can add facts to the hypothetical situation so that the legal outcome would be changed.

The first charge is a fair one, although one can alter the example to add a legal event, such as the charge of manslaughter that D'Amato himself adds in the second paragraph of the quoted passage. The trip-to-the-beach example introduced above does provide such a legal event – a Sherman Act prosecution.

D'Amato might respond that the addition of the hypothetical prosecution is not sufficient to transform a simple trip to the beach into a case. Just as no prosecutor would have any reason to prosecute the innocent homeowner (the one who did not have a starving baby) for manslaughter, no one in the Antitrust Division of the Justice Department would see my expedition to Point Magu as a case under the Sherman Act. In normal circumstances, this is absolutely right. Our perception of the beach trip or the ice-cream case is filtered by our understanding of what constitutes a legally redressable wrong, and we do not see such a wrong in these easy cases.

The next question is, "What shall we make of the fact the law shapes our perception of what constitutes a case?" This fact does not show that the law is radically indeterminate. Rather, the phenomenon that D'Amato identifies is powerful evidence that the strong indeterminacy thesis, as I have defined it, is untrue. The fact that the law shapes our perception of what counts as a case is very persuasive evidence for the proposition that the law does in some way determine outcomes. At this level, the agent by which the law works to determine outcomes is not a judge; rather, it is the person responsible for deciding whether to initiate a legal proceeding. In a potential criminal case, this agent may be the prosecuting attorney. In potential small claims court actions, the agent who determines whether a case will be filed is an aggrieved citizen. The outcome that is determined is not a verdict or judgment; rather it is the decision whether to institute a formal legal proceeding. Notice, however, that the filtering, which takes place at the institution stage, limits the range of possible outcomes at the judgment stage.

The second point – that the hypothetical can be changed so as to change the legally correct outcome – is not responsive to the argument from easy cases. Let us stipulate for the sake of argument that it is always possible to add facts to an easy case such that the addition of the new facts will change the legally correct outcome of the case. This does not demonstrate that there are no easy cases. Quite the contrary, the fact that the advocate of the strong indeterminacy thesis needed to add facts to the easy case in order to change the legally correct outcome shows that, as originally stated, the easy case

was not indeterminate. If the strong indeterminacy thesis were true, then a reasonable legal argument should be available on the facts as originally stated in the hypothetical. The additional facts should not be necessary. That facts must be added to transform an easy case into a hard one demonstrates that the law does constrain the set of legally correct outcomes.

*Rule skeptic defenses of radical indeterminacy*

The argument from easy cases suggests that from the point of view of lawyers and judges the law is not radically indeterminate. Thus, the defender of radical indeterminacy needs to show that this point of view, a commonsense perspective internal to the practice of law, is in some way mistaken. One such defense draws on philosophical skepticism about rules that is associated with Saul Kripke's interpretation of certain remarks by Ludwig Wittgenstein (Kripke, 1982). Our purposes do not require a summary of the voluminous debate over rule skepticism and the proper interpretation of Wittgenstein. In the context of the indeterminacy debate in legal theory, rule skepticism is the contention that because rules (including legal rules) cannot, by themselves, determine their own application, there is no such thing as following a rule.

Legal rule skepticism is inspired by Kripke's interpretation of Wittgenstein's discussion of teaching a mathematical series, for example the series of numbers generated by the rule add two (+2). Imagine that the pupil has learned to generate the series and completes the sequence. "0, 2, 4, 6, 8 ..." by writing "10, 12, 14, 16." Wittgenstein writes,

Now we get the pupil to continue a series (say +2) beyond 1000 – and he writes 1000, 1004, 1008, 1012.

We say to him: "Look what you've done!" – He doesn't understand. We say, "You were meant to add two: look how you began the series!" He answers: "Yes, isn't it right. I thought that was how I was meant to do it." – Or suppose he pointed to the series and said: "But I went on in the same way." – It would now be no use to say: "But can't you see ...?" – and repeat the old examples and explanations. – In such a case we might say perhaps: It comes natural to this person to understand our order with our explanations as we should understand the order: "Add 2 up to 1000, 4 up to 2000, 6 up to 3000 and so on." (Wittgenstein, 1958, pp. 74–5)

Wittgenstein's example can easily be transposed into the context of a simple legal rule. We are teaching someone the meaning of the provision of the motor vehicle code, which makes it an offense to not to stop at a red light. We illustrate the rule by stopping at red and going at green at First Street, Second Street, and Third Street. We turn the car over to the pupil, who successfully stops during the red at Fourth Street, Fifth Street, and Sixth Street. We drive along a bit further, and then ask the student to continue following the rule. But at Tenth Street, the student begins to go on red and stop on green. We say, "No, you had it before. Stop on red, go on green." But the student replies, "Right, that is what I am doing."

There is nothing magical about the verbal formulation of the motor vehicle code that prevents this sort of interpretation of the red light rule. There is no logical incon-

sistency internal to an interpretation of "It shall be an offense to drive through a red light at an intersection," that says that "driving through" means *going* until one gets to Tenth Street but means *stopping* after that. Put another way, we might say that the red light rule does contain the complete set of all its applications.

This sort of possibility illustrated by the red light rule can be conjured up with respect to the application of any legal rule in any particular case: that was not murder because the victim was wearing a red sweater on a Tuesday in June before 7:00 a.m., that was not speeding because I was on my way to my dentist, and so on. Returning now to the indeterminacy debate in legal theory, the question is whether general rule skepticism provides support for a strong version of the indeterminacy thesis.

Initially, it should be noted that the attractiveness of rule skepticism as a foundation for the indeterminacy thesis may be undercut by its wider consequences. Pushed to the limit, general rule skepticism seems to imply that there are no rules for the application of language to any situation. But the proposition that any sentence can mean anything would seem to be equivalent to the proposition that no sentence means anything or that human communication is impossible. The conclusions generated by general rule skepticism are wildly implausible.

Moreover, it is not clear that Wittgenstein's examples really lead to general rule skepticism. We can concede that the verbal formulation of a rule does not determine its own application without conceding that the rule is indeterminate. Rules are embedded in a social context. The meaning of the red light rule is the subject of a wide social agreement, and someone who adopts a deviant interpretation, like "go on red after Tenth Street," will get a ticket and lose in court. Moreover, our agreement on the meaning of many legal rules is rooted in our shared forms of life and our biological nature as humans. Rule skeptics who practiced what they preach and went through red lights at random would cause accidents and hurt themselves and others. This is not to say that there could not be a human society in which the red light rule meant stop from First through Ninth Streets and go after Tenth, but in our society the red light does not mean that. In sum, the rule skeptic defense of radical indeterminacy fails.

### *Deconstructionist defenses of radical indeterminacy*

A different sort of defense of the indeterminacy thesis invokes the deconstructionist techniques associated with Jacques Derrida. The deconstructionist version of the indeterminacy thesis makes the ambitious claim that the indeterminacy of legal rules is the function of deep contradictions within liberal society, or of the failure of liberal society to reconcile or mediate a deep contradiction within the individual. The contradiction is phrased as being between "self" and "other" or between "individualism" and "altruism." Indeterminacy results from contradictions in the underlying principles or policies that are used to justify legal decisions (Feinman, 1983, p. 847; Peller, 1984, pp. 3–4).

In order to make out this deconstructionist defense of the indeterminacy thesis, one would have to demonstrate that the contradiction between self and other runs through the policies and principles underlying all aspects of law. Critical scholars have attempted

to show that contract law contains some principles that permit selfish behavior and others that encourage altruism among the parties to a contract, but it seems unlikely that this program could be carried out for the law as a whole.

More fundamentally, the existence of tensions between legal principles that promote altruism and those that protect selfish behavior does not demonstrate that the law is radically indeterminate. Many particular legal doctrines have nothing to do with such tensions. Even in the cases in which these tensions exist, there may be legal rules that reflect a compromise or balancing of conflicting values. Tension at the level of justification does not imply indeterminacy at the level of application. In order to demonstrate that the law is radically indeterminate on the basis of such contradictions, the deconstructionist would need to convince us any outcome in any case can be defended on the basis of existing legal principles that rely on one side of the contradiction between self and other.

### *Epiphenomenalist defenses of radical indeterminacy*

The epiphenomenalist defense grants the existence of easy cases, but denies that it is the law that explains the results. The core idea is that outcomes are predictable, but that the predictability stems from extralegal factors. Legal doctrines, statutes, case law, and so forth are all mere epiphenomena – entities without any real causal role in determining the results of legal proceedings. If the law does not determine results, what does? In line with the role of the indeterminacy thesis in radical critique, the answer is likely to be politics, class bias, or ideology. A Marxist version of the epiphenomenalist defense might identify the material base as the real cause of the outcome of legal proceedings. For the epiphenomenalist, apparently easy cases are not easy because the law determines the outcome; rather, we can predict the outcome of such easy cases because we know that these outcomes are favored by the politics, biases, and ideologies of the legal establishment (Singer, 1988).

It is important to note that the epiphenomenalist defense requires that the link from the real, underlying causal factors to the results in particular cases does not go through the law. If the causal chain went through the intentional actions of judges who decided cases on the basis of doctrine, then the indeterminacy thesis would be false: law *would* determine results, although the law would itself be determined by nonlegal factors.

The question then becomes precisely how the causal linkage does work, if the law is not part of the chain. The usual explanation is that judges decide the case on the basis of their political or ideological preferences first and then dress up the result with legal arguments. This may sometimes happen, but in other cases, judges believe that their decisions are constrained by the rules: judges frequently report that they felt the law required them to decide a case in a way that was contrary to their own wishes. Another possibility is that judges themselves are unaware of subconscious ideological influences on their decision making, but until the proponents of the indeterminacy thesis offer a fully developed account of the subconscious basis of judicial decisions, there is no good reason to believe that all judges who believe their decisions are constrained by law are deluded in this way.

Another approach to the basic point of the epiphenomenalist defense draws on the distinction drawn by Jules Coleman and Brian Leiter between the indeterminacy of

reasons and indeterminacy of causes (Coleman & Leiter, 1993, pp. 559–60). Contemporary versions of the indeterminacy thesis tend to focus on the indeterminacy of reasons. Liberal defenders of the rule of law must admit that sometimes judges go astray and are causally influenced by their passions or corruption or political pressure. Given this admission, liberals cannot claim that the law is the only causal factor determining legal outcomes. Rather, the claim is that the law does not determinately justify a uniquely correct outcome in particular cases. This focus on indeterminacy of reason was not always the focus of indeterminacy claims. Leiter and Coleman argue that the legal realists were more concerned about causal indeterminacy than about indeterminacy of reasons (Coleman & Leiter, 1993, pp. 581–2).

Causal indeterminacy implies that something other than the law determines the results in particular cases. As Coleman and Leiter note, lawyers frequently can predict outcomes:

Presumably they do it with some degree of informal psychological, political, and cultural knowledge constituting a “folk” social scientific theory of adjudication. The success of this folk theory, which is, after all, all largely coextensive with the talents of lawyers (i.e., their ability to advise clients what to do, when to go to trial, when to settle, etc.), may constitute success enough for the purposes of predictability and authority, regardless of the prospects of social scientific theories. Even liberalism’s harshest critics do not appear to deny the possibility of “folk” theories of judicial behavior. Thus, Critics and Feminists correlate judicial decisions with wealth, gender, race, cultural mores, and ideologies. Indeed, doing so is essential to part of their program, which is to establish the ideological bases of adjudication. (Coleman & Leiter, 1993, p. 584)

As Coleman and Leiter point out, “If individuals can predict what the law will require of them, then, in principle, they are on notice and have the opportunity to conform their behavior to the law’s demands. Notice requires predictability, not determinacy” (Coleman & Leiter, 1993, p. 584).

It is true that some degree of predictability of legal outcomes is required by the rule of law, but it is not the case that predictability is all that is required. First, predictability does not address the problem of rule by arbitrary decision. An arbitrary judge may still be predictable if lawyers or litigants can accurately foretell what her whims will be. Second, the ability of lawyers to predict outcomes in particular cases does not satisfy the rule-of-law requirement that the rules be public. Lawyers and other specialists may be able to predict how particular judges will decide, while the public is unable to discern the true standards of conduct from the published law, for example, the constitutions, statutes, rules, and decisions. Particular judges may be predictable, but because of random assignments, one may not be able to predict which judge will hear a particular dispute. Third, predictability does not entail that like cases will be treated alike, because outcomes may be predicted on the basis of legally irrelevant factors, such as the political orientation of judges. Treating like cases alike requires more than predictability; it requires that the basis for prediction be the legally relevant features of the cases in question. These considerations suggest that causal indeterminacy, that is, the epiphenomenalist defense, if true, would undermine liberal claims that the existing legal order substantially satisfies the ideal of the rule of law.

## Is a Modest Version of the Indeterminacy Thesis Defensible?

If the strong indeterminacy thesis cannot be supported, is there a more modest claim about indeterminacy that is defensible and has critical bite?

### *Underdeterminacy of actually litigated cases*

One modest version of the indeterminacy thesis might be the following: in most (or almost all) of the cases that are actually litigated, the outcome is underdetermined by the law. This claim about indeterminacy is not refuted by the argument from hypothetical easy cases. Confirmation of the actually litigated underdeterminacy thesis would require empirical investigation, but there are some good reasons to believe that cases which actually proceed to filing, trial, or appeal will frequently be underdetermined by the law. Litigants will rarely have an incentive to settle easy cases. For example, in a civil dispute where the law gives a determinate answer to the question of who will win and what the amount of their judgment will be, the parties to litigation will usually prefer to settle, rather than incur the expenses of litigation. Uncertainty about the law is one of the factors that selects which cases will be filed, go to trial, and be appealed. This point should not be exaggerated, however: litigation may proceed for any number of reasons, including an irrational overconfidence in a hopeless case, uncertainty about facts in a case in which the law is clear, and so forth.

Even if we were to concede that there is substantial legal underdeterminacy in every litigated case, there remains an important question about the critical force of this version of the thesis: If potential litigants choose not to settle in part on the basis of underdeterminacy, does the actually litigated underdeterminacy thesis have any critical bite? In particular, will the requirements of the rule of law be met? Notice that underdeterminacy of litigated cases does not entail a violation of the requirement that the laws be public; the vast majority of potential disputes may be resolved by recourse to publicly available laws, even if there are hard cases in which litigation is required to resolve legal uncertainty.

On the other hand, it might be argued that underdeterminacy in actually litigated cases would entail that judges will make arbitrary decisions, because their decisions will not be determined by the law. In this connection, we should note the important distinction made by Ken Kress between metaphysical and epistemic indeterminacy. Is it the indeterminacy of the law itself or of our knowledge about the law that is at issue in debates about indeterminacy? Ken Kress calls the claim that the law itself is indeterminate “metaphysical indeterminacy” and the claim that it is our knowledge of the law that is indeterminate “epistemic indeterminacy” (Kress, 1990, pp. 138–9). As Kress explains the distinction:

Metaphysical indeterminacy speaks to whether *there is* law; epistemic indeterminacy, to whether the law *can be known*. We might say that the question of abortion in a particular jurisdiction is metaphysically (or ontologically) determinate (at some particular time) if there is a right answer to the question whether a woman has a right to an abortion in that jurisdiction. It might nevertheless be epistemically indeterminate whether women have that right, because the right answer is not demonstrable, or because there is no method



for determining the right answer, or because there is great controversy among lawyers or other persons about what that right answer is. (Kress, 1990, pp. 138–9)

We can now reconsider the thesis that the results of actually litigated cases are underdetermined by the law in light of Kress's distinction. Put in Kress's terminology, we might say that litigants make settlement decisions in part on the basis of epistemic indeterminacy, and therefore many of the actually litigated cases are likely to involve epistemic indeterminacy. But does epistemic indeterminacy mean that judicial decisions are arbitrary? Not necessarily. If judges engage in a good faith effort to determine the correct legal result, then we might say that they have not made an arbitrary decision, even though their decision cannot be demonstrated to be uniquely correct (Dworkin, 1986).

### *Important cases*

Some critical scholars have advanced the claim that it is the important cases that are indeterminate (Kairys, 1982, pp. 13–17); a similar claim is that all interesting cases, including all Supreme Court cases, are indeterminate (Tushnet, 1983, p. 819). Put more precisely, the claim might be that the important issues in important cases are underdetermined by the law. If true, this claim might preserve almost all of the critical force of the strong indeterminacy thesis. Yes, there are easy cases, but those cases are unimportant.

One difficulty with the important case version of the indeterminacy thesis is its potential circularity. Our concept of what counts as an important case may have indeterminacy as a component. Part of what makes a case important is that the result is not certain or predictable; if we all knew how the case would come out, we would not be interested. Likewise, the Supreme Court may select cases in part on the basis of their legal indeterminacy.

Another possibility is to limit the indeterminacy thesis to the important cases in a particular legal culture in a particular period. The critical legal studies movement has been, in part, a critique of liberal legal theory and practice in the United States, emphasizing the period from the end of World War II to date. Thus, the indeterminacy thesis might be limited to the important decisions of the Warren, Burger, and Rehnquist courts. The thesis would be that these key decisions (e.g., *Roe v. Wade*, the Supreme Court's abortion decision) were not determined by the text of the Constitution, the original intent of the framers, or the Court's prior decisions, but were, instead, determined by the political preferences of the Justices. In this version, the indeterminacy thesis may well be true. Moreover, this version of the indeterminacy thesis might well play a role in a critique of contemporary liberal legal theory and practices. After all, legal justification of the important Warren Court decisions has been a major item on the agenda of liberal legal theorists (Dworkin, 1986).

With respect to all of the versions of the important case indeterminacy thesis, it is important to recall the distinction between metaphysical and epistemic indeterminacy. The arguments for the indeterminacy of important cases are usually arguments about uncertainty and unpredictability. Yet, there are plausible theories of law that maintain that there can be a legally correct result even if there is disagreement about what that

result might be. Some of the critical force of the important case version of the indeterminacy thesis comes from an equation of epistemic indeterminacy with arbitrary decision making, but as Ronald Dworkin has made clear, judicial decisions can be principled even if there is disagreement over the question whether they are correct (Dworkin, 1986).

### *Modal indeterminacy*

Another way to weaken the indeterminacy thesis is to weaken its modal status. Rather than claiming the law is indeterminate, one could claim that the law *might* be indeterminate. For example, Robert Gordon contended that the point of the indeterminacy thesis was, not that the outcome of particular cases is unpredictable, but rather, is that legal regularity is not a “necessary consequence of the adoption of a given regime of rules. The rule system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of the political winds, switch to those opposing conventions at any time” (Gordon, 1984, p. 125).

The critical bite of a modally weakened indeterminacy thesis hangs on the meaning given to “necessity,” and this, in turn, depends on the kinds of possibilities that are allowed to demonstrate that case results need follow from particular legal rules. If one allows logical possibilities, that is, all those possibilities that do not involve a logical contradiction, then it follows that no law is necessarily determinate. For example, Gary Peller argued, “It is possible that the age thirty-five *signified* to the Framers a certain level of maturity rather than some intrinsically significant number of years” (Peller, 1985, p. 1174). It is possible, logically and physically, that the term “thirty-five” meant “mature” to the founders, but it did not, as a matter of historical fact, actually mean that. Therefore, it is logically and physically possible that the Supreme Court could hold that a mature 22-year-old can legally become President of the United States on the ground that for the framers “thirty-five” meant “mature.” Despite this logical and physical possibility, the Supreme Court will never actually make such a decision on that ground. Indeterminacy may also be a logical possibility, but this sort of possible indeterminacy utterly lacks critical bite.

Gordon’s statement of a modally weakened version of the indeterminacy thesis suggests a sense of possibility that might have critical bite. If a shift in the political winds could change the outcome of any case, then there might be an important sense in which we could say, “law is politics.” But if the modally weakened indeterminacy thesis is formulated to include only realistic political possibilities, then there will still be easy cases, the outcomes of which will not shift with the political winds. There is no political movement that would make beach parties violations of the Sherman Act. Indeed, there are many actually litigated cases, from traffic violations to ordinary torts, with outcomes that would not be affected by any shift in the political winds. The modally weakened thesis might be further restricted; for example, it might be argued that there is a subset of politically important cases which might come out differently if there were a shift in the political winds. This sort of move was discussed above in connection with the important case version of the indeterminacy thesis.

## Conclusion

What conclusions should be drawn from the debate over the indeterminacy thesis? Initially, it is clear that radical critiques of liberal legal theory are strengthened to the extent that they forgo reliance on claims of radical indeterminacy. In this regard, it should be noted that some of the most interesting critical work has been done in response to the arguments made against the indeterminacy thesis. David Millon has argued that the admission that the determinacy of law depends on social context and convention highlights the problem that the legal subculture may rely on tacit assumptions that are not shared by the public as a whole, and this divergence may be problematic in a democratic society in which the law ought to be publicly available and responsive to majority will (Millon, 1992, p. 66). Duncan Kennedy's work on a critical phenomenology of judging has reformulated many of the critical points developed in association with the indeterminacy thesis but avoids implausible claims about the radical indeterminacy of law (Kennedy, 1986).

Moreover, the indeterminacy debate has sharpened our understanding of how the law does determine outcomes. The liberal defense against the indeterminacy thesis has produced distinctions between indeterminacy and underdeterminacy, between epistemic and metaphysical indeterminacy, and between indeterminacy of causes and reasons, that have clarified the claims of liberal legal theory. In addition, the indeterminacy debate has made it clear that almost no one defends a strong formalist claim that the law determines every aspect of the outcome of every case. The demise of strong formalism in turn has implications for liberal theorizing regarding the rule of law in a world in which it is acknowledged that the law underdetermines at least some part of the outcome of most (or even almost all) of the actually litigated cases. If the claim that the law is radically indeterminate turns out to be silly, it is also the case that the strong formalist claim that the outcomes of cases are completely determined by the law is just as implausible.

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## Precedent

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The doctrine of precedent, or *stare decisis*, requires courts to follow earlier judicial decisions on matters of law. Precedent is one of several doctrines of repose – that is, doctrines for settling issues with finality. The doctrine of *res judicata* dictates that courts not allow relitigation of particular lawsuits after they have been decided. It applies only to the particular parties to a lawsuit and only with respect to the factual issues that were raised or should have been raised in that lawsuit. The doctrine of collateral estoppel prevents the relitigation in a second lawsuit of particular factual issues that were decided in the first lawsuit, even if the second lawsuit is distinct from the first, and in certain circumstances even if the parties are different. The doctrine of precedent, on the other hand, makes a court's determinations of law in one lawsuit binding on all other courts of equal or inferior rank within the first court's jurisdiction, even if the lawsuits and the parties in the subsequent cases are completely distinct from the lawsuit and the parties in the precedent case.

The constraint imposed on courts by the doctrine of precedent can be analyzed both in terms of the *scope* of the constraint and in terms of the *strength* of the constraint. The scope of precedential constraint refers to the number of possible cases that the precedent case controls. Put differently, questions of scope ask how broad or narrow are the legal issues that the precedent case has settled. The strength of precedential constraint refers to types of reasons a court must have to justify refusing to be bound by a precedent. Questions of scope are far more complex and have been dealt with far more extensively than questions of strength (Goldstein, 1987; Perry, 1987; Schauer, 1987; Monaghan, 1988). Accordingly, I shall spend the bulk of this essay discussing questions of scope, turning to questions of strength only briefly toward the conclusion.

### The Scope of Precedential Constraint

#### *Common-law cases*

Suppose we have a case that does not involve the interpretation of a constitutional provision or a statute, and there is no prior case that is, even arguably, a precedent for this case, whatever that means. In other words, we have what is called a common-law

case of first impression. (I shall deal with precedent in constitutional and statutory cases in the next section.)

Further suppose that in this case of first impression, the facts are *A*, *B*, and *C*. The court – the “precedent court” – decides in favor of plaintiff, announcing in its opinion that in all cases with fact *A*, plaintiff shall prevail.

A subsequent case arises with facts *A* and *B* but not *C*. The court in the later case – the “constrained court” – believes that defendant should prevail. It has no quarrel with the precedent court’s decision in favor of the plaintiff in the precedent case; however, it does not believe that in all cases with *A*, plaintiff should prevail. In particular, it believes the absence of *C* should be decisive for the defendant. Does the doctrine of precedent mandate a decision for plaintiff in the constrained case, or is the constrained court free to decide for defendant?

The issue of the scope of precedential constraint is frequently framed in terms of the distinction between distinguishing a precedent case and overruling it. Thus, if one takes as significant the full panoply of facts in the precedent case, the precedent case is distinguishable from the constrained case and does not control it. That is so because fact *C* was present in the precedent case but not the constrained case, and the constrained court believes the absence of fact *C* is a material difference. On this view, the precedent court has settled only the legal issue of what to do when *A* and *C* are both present. On the other hand, if one takes the announced rule in the precedent case to be its significant aspect for future cases, the constraint of precedent appears much greater. The precedent court has settled what to do in all cases where *A* is present, a larger set of cases than those with both *A* and *C*.

In cases such as I have hypothesized, in which the precedent court reaches the correct result but announces a rule that produces incorrect results in future cases – where correct and incorrect refer to the point of view of the constrained courts – it may appear that a version of the doctrine of precedent that permits the constrained courts to reach the correct decisions – by distinguishing the precedent case or, the same thing, refining the rule announced in that case – is superior to any version of precedent that requires the constrained courts to reach incorrect results. On such a version of the doctrine of precedent, what is constraining is the precedent court’s decision in light of the facts before it, not the general rule it announced. The latter, framed in specific circumstances, is likely to produce regrettable outcomes in circumstances covered by the precedent court’s rule but not envisioned with the clarity that only the facts actually before the court possess. Therefore, the constrained court should be able to distinguish the precedent case by pointing to factual dissimilarities that militate in favor of a different outcome.

The problems with this approach to the scope of precedential constraint emerge more clearly in cases where the constrained court believes the precedent case is wrongly decided on its facts, and not just the source of an overbroad rule. Suppose again, for example, that the precedent case had facts *A*, *B*, and *C*, and the decision was for plaintiff. And suppose again that the constrained case has facts *A* and *B*, and that the constrained court believes defendant should prevail. In addition, however, the constrained court believes defendant should have prevailed in the precedent case because it believes that whenever fact *B* exists, defendant should win.

If the precedent court is only bound to decide its case as the precedent court decided its case when the facts are the same, then the constrained court always will be able to do what it thinks best regardless how the precedent case was decided, for there will always be some factual differences between the precedent case and the constrained case. Because there are always factual distinctions between cases, the view that precedent cases only constrain subsequent courts presented with the same facts is a view that denies any precedential constraint whatsoever.

If precedents are to constrain, they must do so even in cases that are factually dissimilar in some respects. Three different models, or types of models, exist in the literature for explaining or justifying precedential constraint.

### *The natural model of precedential constraint*

According to this model, past decisions naturally generate reasons for deciding present cases the same way. These reasons can be boiled down to two: equality and reliance (Moore, 1987). Equality dictates that present litigants should be treated the way past litigants have been. And because not upsetting expectations is a value that courts should take into account, reliance by actors on the way precedent courts have decided cases is also a reason for deciding subsequent cases in a similar manner (Perry, 1987, pp. 248–50).

The natural model is so called because the model does not depend on the existence of any posited doctrine of precedent. Rather, according to the natural model, precedents naturally generate reasons in favor of similar decisions, and precedents constrain only insofar as the weight of equality and reliance require constrained courts to decide differently from how they would have decided in the absence of the precedents. According to the natural model, precedent cases are just facts about the world that, like other facts, influence what is correct in the present.

The natural model can be criticized on two grounds. First, it is doubtful that equality is ever a *moral* reason for departing from decisions that would otherwise be morally correct (Alexander, 1989, pp. 9–13). To take a dramatic example, past genocide does not generate an equality reason – not even a weak one – for continuing genocide in the present. Nor do any less dramatic past injustices have the effect of making what would otherwise be a present unjust act no longer unjust. Moreover, the constrained court has access to only those facts about the precedent case that the precedent court thought pertinent, not all the facts that might bear on an equality claim.

Second, although protecting justified reliance is an important value, giving full effect to that value will probably require a stronger doctrine of precedential constraint than the natural model provides (Alexander, 1989, p. 16). That is so because actors, though they know that their reliance will be taken into account, will be uncertain how much weight will be given to their reliance by the constrained courts, or whether those courts will deem their reliance to have been justified. Such actors will therefore be quite uncertain regarding how the constrained courts will decide. The disvalue caused by such uncertainty and unpredictability militates in favor of a stronger precedential constraint.

Finally, it should be noted that there are no such things as distinguishing a precedent case or overriding a precedent case if one is operating under the natural model of precedential constraint. Because the constrained court is always supposed to reach what it believes to be the correct decision in the case before it, and is supposed to treat past judicial decisions no differently from how it treats any other facts about the world, there is nothing in a past decision to distinguish or overrule.

*The rule model of precedential constraints*

According to this model, precedent courts in deciding cases promulgate rules of law (Hardisty, 1979, pp. 53–5). It is these rules that constrain subsequent courts. And it is these rules on which actors may justifiably rely, and which further predictability and stability.

There are several versions of the rule model of precedent that differ according to how the rule of the precedent case is to be defined (Alexander, 1989, pp. 18–19). The rule of the precedent case might refer to some canonical formulation of a rule that appears in the opinion of the precedent case (Wasserstrom, 1961, p. 36). Thus, in the hypothetical with which I began, the constrained court must hold for the plaintiff, even though it would hold for defendant in the absence of the precedent case, because the rule of the precedent case – “if A, then hold for plaintiff” – dictates that result. Or, particularly when no canonical rule formulation appears in the opinion, the rule might refer to some premise held by the precedent court which is inferable from the court’s decision and opinion (Stone, 1985, pp. 124–9). Obviously, such a premise cannot be too abstract – as it would be if, for example, it were “do justice” – or it will fail to provide any meaningful constraint on the constrained court and hence fail to promote the reliance values of predictability and stability. Moreover, to be consistent with the rule model, such a premise would have to be expressible in canonical form and have to be a premise that the precedent court wanted to control future cases. Finally, when the rule of the precedent case conflicts with the actual result reached in the case – and it is logically possible that a court that announces a canonical rule will fail to apply it correctly in the very same case – different views regarding what should be considered *the* rule of the case produce different versions of the rule model.

The rule model of precedential constraint is subject to three basic criticisms. First, as I have just pointed out, identifying the rule of the precedent case can be controversial. Even if one adopts the version of the model in which the rule is some actual canonical formulation in the court’s opinion, not every case will have such a formulation. If identifying the precedent rule is difficult and controversial, however, the reliance values that the rule model of precedential constraint was supposed to promote are undermined.

Second, some might object to the rule model of precedential constraint because the model explicitly recognizes and endorses judicial legislation (Alexander, 1989, pp. 27–8). If one’s view of the proper role of courts excludes their legislating, even interstitially, then the rule model of precedential constraint would be objectionable and only the natural model would be acceptable.

The first two criticisms of the rule model of precedential constraint are normative. The third criticism is positive, namely, that the rule model fails to account for the prac-



tice of *distinguishing* precedents (Alexander, 1989, pp. 19–25). Distinguishing a precedent case, which is directed at the scope of the constraint it imposes, is supposed to be different from *overruling* a precedent case, which is directed at the strength of its constraint. Yet the only questions of scope that a constrained court asks under the rule model are “What is the rule of the precedent case?” and “Does the constrained case fall within the terms of the rule?” There is no further question of scope that might provide a toehold for distinguishing the precedent case. For example, “distinguishing” the precedent case by narrowing its rule amounts to amending the rule, which in turn is the same as overruling the rule in part. (“Broadening” the rule is never an issue because a rule that is too narrow to cover the constrained case does not constrain it in any way.) Therefore, the rule model cannot account for what is at least supposed to be an aspect of the doctrine of precedent.

### *The result model of precedential constraint*

A third model of precedential constraint is the result model (Hardisty, 1979, pp. 53–5). According to this model, the result reached in the precedent case, rather than any rule explicitly or implicitly endorsed by the precedent court, is what binds the constrained court. Unlike the natural model, however, the result model gives the result in the precedential case more constraining scope than it “naturally” carries.

What does it mean to say the constrained court is bound by the result in the precedent case? (I shall refer to the precedent case in the singular, although the result model, by eliminating the focus on rules, makes all decided cases precedents for the constrained court; the result model is thus holistic in approach.) There will always be factual differences between any two cases, so that if the precedent court’s opinion is ignored, no decision by the constrained court will logically contradict the decision of the precedent court.

The result model of precedential constraint can be formulated in two ways that are ultimately equivalent in meaning (Alexander, 1989, pp. 29–34). First, the model can be said to require the constrained court to decide in favor of the analogous party to the party who won the precedent case if the arguments in favor of that party in the constrained case are equal to or stronger than the arguments in favor of the analogous party in the precedent case, even if without the precedent, those parties should lose. This can be called the “*a fortiori* case” formulation of the result model (cf. Horty, 2004; Lamond, 2005).

Second, the model might be said to require the constrained court to decide analogously to the precedent court if in a world in which the precedent court’s decision were correct, the analogous decision by the constrained court would be correct.

The equivalence of the two formulations of the result model of precedent can be seen by noting the difficulties of the “*a fortiori* case” formulation. That formulation assumes a metric by which the strength of reasons for a result can be weighed and compared. To make matters simple, let us assume the proper metric is a utilitarian one. In the precedent case, facts A, B, and C were on the plaintiff’s side and facts X, Y, and Z were on the defendant’s side. A, B, and C outweighed X, Y, and Z on the utilitarian metric (say, by ten utiles), but the precedent court decided (wrongly) in favor of defendant.

In the constrained case, the facts are again *A*, *B*, and *C* for plaintiff. The facts for defendant are *W* (instead of *X*), *Y*, and *Z*, plus *N*, the natural weight of the precedent case (say, its reliance value). *A*, *B*, and *C* still outweigh *W*, *Y*, *Z*, and *N* on the utilitarian metric, but they do so by less than they did in the precedent case (say, by five utiles). Therefore, the constrained case is a stronger (*a fortiori*) case for defendant.

The problem with this approach is that the precedential constraint it establishes is either devastatingly far reaching or else completely indeterminate (Alexander, 1989, pp. 35–7). In every case where a decision for a party would produce a loss of fewer utiles than in the precedent case, such a decision will be an *a fortiori* case under the result model of precedential constraint no matter how unrelated the two cases appear to be. Moreover, all correctly decided cases will also constrain all other cases, but in the opposite direction. Finally, if an incorrect decision is, nonetheless, an *a fortiori* case relative to the incorrectly decided precedent, then a correct decision would also be an *a fortiori* case.

For example, criminal cases upholding a privilege against self-incrimination where the threat against defendants for remaining silent is loss of employment appear to make administrative cases involving threats of criminal prosecution for failures to file incriminating reports *a fortiori* cases in favor of defendants. Yet the decisions in the latter cases were decided against those invoking the privilege. Thus, they make the criminal cases *a fortiori* cases in favor of the state.

The upshot of these examples is that we cannot use a correct metric of weight for determining what is an *a fortiori* case relative to a precedent case that was incorrectly decided (by that same metric). Either the incorrectly decided precedent case is like a misshaped piece of a jigsaw puzzle that cannot be pieced together with correctly decided precedents, or, alternatively, correct decisions will always dominate incorrect decisions on the *a fortiori* analysis, producing no precedential constraint.

The result model of precedential constraint therefore must abandon all reliance on correct principles or metrics and invoke those principles or metrics that, though actually incorrect, would justify the precedent result in a world in which those principles or metrics were correct (Alexander, 1989, pp. 37–42). In other words, on the result model of precedential constraint, precedents have what Ronald Dworkin refers to as “gravitational force” in that they generate governing principles that, although not correct principles (because they are generated by incorrect decisions), would be correct in a world in which the incorrect precedents were correct (Dworkin, 1977, pp. 110–15). (On the rule model, precedents have what Dworkin calls “enactment force.”)

The result model of precedential constraint thus construed has two principal difficulties. First, there is the same access to the facts of the precedent case problem that I adverted to in the discussion of the natural model. (The result model asks questions that advert to the particular facts of the precedent and constrained cases; however, if the precedent court favors an abstract rule – such as, “if fact *A*, decide for plaintiff” – the constrained courts may know no more about the precedent case than that fact *A* was present.)

The more serious problem the result model faces, however, is that the counterfactual question it poses – “What decision would be correct in a world in which the incorrect precedent decision were correct?” – is quite probably either incoherent or else coherent but cannot account for constraint. (It would be the latter if the answer to the question

was that the constrained court should follow principles that produce correct results in all cases except the past incorrect ones.) In other words, viewed one way, the result model asks a question that cannot be answered: “What would be right in a world in which certain decisions that are wrong in our world were correct?” (Compare that question to this question: “What would 3 plus 3 equal in a world in which 2 plus 2 equals 5?”) Or the model asks a question that is answerable, but in a way that negates precedential constraint: “In such a world, everything that is right in our world is right, except for the decisions in the precedent cases as particulars, which fortunately are in the past.” Moreover, there will always be some fact present in the later case that supports a different result from that in the precedent case – that is, that supports the correct result – and that was not present or at least reported to be present in the precedent case (Alexander & Sherwin, 2008, pp. 85–6). The result model either cannot be followed or cannot constrain.

### *Other false starts in explaining the scope of precedential constraint*

#### *Analogy*

Sometimes the scope of precedential constraint is explained by reference to analogical reasoning. The precedent case constrains to the extent the constrained case is more closely analogous to the precedent case than to any other case.

The difficulty with constraint by analogy is that every case is analogous to every other case in some ways and disanalogous in other ways. Picking the dimension by which cases are compared requires reference to some norm beyond the facts of the case. Once we have identified that norm, however, reasoning by analogy does no work, for the norm itself identifies what the constrained court must do (Alexander & Sherwin, 2001, pp. 128–31; Alexander & Sherwin, 2008, pp. 64–76).

#### *Constraint by the precedent court’s reasoning*

Sometimes it is said that the constrained court is bound, not by the precedent court’s rule, but by its “reasoning” (Summers, 1978, pp. 730–5; Monaghan, 1988, pp. 764–5). Now, such a statement might just refer to a version of the rule model that rejects the canonical rule formulated in the court’s opinion in favor of a more abstract premise from which the precedent court reasoned to the stated rule. (The premise cannot be so abstract that it fails to constrain, as it would be if it were “do justice,” for example.)

On the other hand, if being bound by the precedent court’s reasoning refers not to some rule-like premise, but to the precedent court’s process of inference, then it runs into the same problem the result model ran into (and can be viewed as one way of describing the result model): in cases decided incorrectly, the precedent court’s inferences were mistaken. And determining what one should do in a world in which fallacious reasoning is (sometimes) nonfallacious is probably impossible.

#### *The skeptical view*

Legal realists were skeptical regarding whether precedents could ever constrain because they noted that there were always factual distinctions between precedent cases and

constrained ones (Stone, 1985, pp. 124–9). (“In the precedent case, the defendant’s horse was white, and the plaintiff’s name was Joe.”) Therefore, a constrained court that wished to reach a different result from that reached in the precedent case could always point to some distinguishing factual difference between the cases.

The realist’s skeptical critique, however, does not apply to the three models of precedential constraint described above. It does not apply to the natural model because that model does not locate constraint in a doctrine of precedent. Rather, it merely directs the constrained court to decide as that court believes is correct, taking into account all material facts, including past decisions and the reliance they generated.

Nor does the skeptical criticism apply to the rule or result models. It does not apply to the rule model because the only factual differences that can be taken into account under that model are those factual differences that are material according to the precedent court’s rule. And according to the result model, factual differences are significant only if they dictate different outcomes under the principles that the precedent cases reflect.

### *Conclusion*

The natural model of precedential constraint in reality does not represent any sort of legal doctrine of precedent, although it instructs courts to take account of changes in the world effected by prior judicial decisions that fully exhausts its force. The result model of precedential constraint is undesirable because it requires the constrained court to answer an unanswerable question: “What would be a correct decision in a world in which the precedent court’s incorrect decision was correct?”

Some version of the rule model of precedential constraint appears to be necessary if there is to be a coherent doctrine of precedent. Such a version would require settling what is to count as the rule of the precedent case and accepting the legislative role of the precedent court.

### *Postscript: the relation between the natural and rule models of precedential constraint*

If, according to the natural model, one of the values that following precedent is supposed to promote is reliance; and if, according to the rule model, reliance is best promoted by requiring constrained courts to follow the rules announced in precedent cases; then one could conclude that the natural model itself requires adoption of and thus subsumes the rule model (Alexander, 1989, pp. 48–51). That view of the relationship between the two models may be correct, but it illustrates the tension inherent in all normative decision making between getting the particular case right and following rules. That tension, which almost amounts to a practical paradox, exists because the best rule to promulgate in a precedent case may be one that produces incorrect results in some particular cases. In these cases, the constrained courts must choose between deciding the particular case correctly and deciding it according to the rule, which it also believes to be correct as promulgated, that is, with no exception provided for the case at hand.

*In cases governed by canonical texts (statutory and constitutional cases)*

Many believe that constraint by precedent is problematic in cases of statutory or constitutional interpretation as opposed to common law decision making (Brilmayer, 1988; Lawson, 1994). After all, if the constrained court believes the precedent court misinterpreted the statutory or constitutional provision at issue, would it not defeat the purpose of lawmaking through statutes and constitutions for the constrained to follow the precedent rather than what is in its view the correct interpretation of the statutory or constitutional provision?

The answer is that although precedential constraint in statutory and constitutional cases *would* be problematic in a pure statutory/constitutional regime, our statutory/constitutional regime is an impure one, and for good reason. We have statutes and constitutions rather than merely a general injunction to “do justice” because we believe that statutes and constitutions, being more determinate than the injunction to “do justice,” will actually produce more justice long-term than the general injunction, even though in some cases statutes and constitutions will depart from what justice requires (Alexander & Sherwin, 2001, pp. 11–36). The very reason we have statutes and constitutions rather than merely the general injunction – that is, to “settle” what justice requires – also can be invoked (though not conclusively) in favor of other institutions for settling matters, including settling the meaning of the statutory and constitutional provisions themselves. Thus, we have the institution of judicial review in cases arising under the Constitution, so that the Supreme Court’s interpretation of the Constitution is treated as authoritative – as if it were the Constitution – even if it is mistaken (Alexander, 1989, p. 57; Schauer, 1994). And from treating a judicial decision in a statutory or constitutional case as final *for that case* even if mistaken, it is but a short step to treating the interpretation the court announces as final *for all other cases*. In other words, the argument for a doctrine of precedent in statutory and constitutional cases is the same kind of indirect consequentialist argument that supports judicial finality generally and that ultimately supports the authority of statutes and constitutions themselves (Monaghan, 1988; Alexander, 1989, pp. 57–8; Schauer, 1994).

The model of precedential constraint in statutory and constitutional cases must necessarily be the rule model. What the precedent court does in statutory and constitutional cases is translate the canonical formulation at issue into the court’s own alternative formulation, which then, by virtue of the doctrine of precedent, becomes canonical for subsequent courts.

## The Strength of Precedential Constraint

In the previous section, I analyzed the *scope* of precedential constraint: what does following precedent require the constrained court to do that is different from what it would do in the absence of the precedent case? In this section, I shall discuss the *strength* of precedential constraint: when – for what reasons – may the constrained court disregard precedential constraint? (This question does not arise under the natural model,

given that the natural model never requires the constrained court to reach a result it regards as incorrect.)

In dealing with the strength of precedential constraint, one must distinguish cases of *vertical* constraint from cases of *horizontal* constraint (Alexander, 1989, pp. 51–2, 60–1). (There is a third class of cases in which the precedent court has no authority to constrain the court in question, though the latter might be *influenced* by the precedent court's decision.)

Cases of vertical constraint are cases in which the constrained court has a status inferior to the precedent court within a particular hierarchy of courts. For example, a decision by the Supreme Court of Iowa acts as a vertical constraint in later cases before the lower courts of Iowa. In vertical constraint cases, the constraint is usually regarded as absolute. That is, once it is clear that the case falls within the scope of the precedent, there are no reasons that would justify the constrained court's departing from what the precedent requires.

Cases of horizontal constraint are cases in which the precedent court is the same court as the constrained court. For example, a decision by the Supreme Court of Iowa acts as a horizontal constraint on later cases in the Supreme Court of Iowa.

It is in horizontal constraint cases that the strength of precedential constraint is controversial. No one today argues that the strength should be absolute (that horizontal precedents should never be overruled). To overrule a precedent, it is, of course, necessary that the constrained court find that the precedent court erred. Otherwise, it would have no good reason to overrule the precedent. On the other hand, if error by the precedent court were sufficient for overruling, precedents could never constrain.

Therefore, in order for a constrained court to overrule a horizontal precedent, the precedent must be more than wrong: it must be both wrong and also mischievous to a certain degree of gravity. What that degree of gravity is, will determine the strength of precedential constraint. That strength will vary from jurisdiction to jurisdiction and from court to court. It may also vary in the same court depending upon whether the case is common law, statutory, or constitutional (Alexander, 1989, p. 59).

Finally, the strength of precedential constraint, to the extent it is less than absolute, is incapable of being captured by a determinate, canonical rule (Alexander & Sherwin, 2001, pp. 51–6). On the other hand, although the strength of precedential constraint can be a function of the weight of the reasons required for overruling, the doctrine of precedent itself is not a legal norm that has the dimension of weight. In other words, although the doctrine of precedent can operate as a rule requiring constrained courts to follow precedent unless moral or political reasons of a certain weight dictate otherwise, the doctrine of precedent does not have weight in its own right. This point is part of a broader and controversial argument against viewing any *legal* norms as having the dimension of weight (Alexander & Kress, 1995).

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## Punishment and Responsibility

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The notions of punishment and responsibility display a tight conceptual connection. Punishment reveals the point of holding someone responsible for a wrongful act; and responsibility enables us to make sense of punishment.

Both punishment and responsibility are recognized “for” something. The object of the “for” bears certain logical characteristics. Punishment consists in unpleasant consequences imposed for something that has happened in the past. It makes no sense to punish someone now for something that may or may not happen in the future. Also, punishment is typically imposed for a human action. At times in the past, governments ventured to punish animals, but that happened presumably because officials attributed to them responsibility for their actions.

### What Is Punishment?

The answer to the question “What is punishment?” is philosophical or conceptual. We have a strong intuition that it is not apt to call shooting a dog with rabies an instance of punishment. It is a preventive measure designed to protect the health of human beings. This intuition leads us to perceive the implicit rule for saying that shooting a dog with rabies is nonpunitive in nature. We can infer that punishment is always imposed “for” some past event and not for the sake of protecting people from an ongoing danger.

There are many human institutions that resemble our preventive actions toward animals. Civil commitment of the mentally ill is the primary example, but others, such as disbarment, impeachment, and deportation typically qualify as nonpunitive in nature. All these actions by the government adversely affect the interests of individuals, and the latter three, like punishment, are imposed for breaches of legal obligations. That their purpose is primarily to separate the individual from an office (disbarment, impeachment) or civil status (deportation), however, implies that they are not punitive in nature. Or at least the courts have so held.

Courts are not interested, abstractly, in the question whether a governmental action is punishment. The question typically arises in efforts to decide whether a governmental action against an individual constitutes a “criminal prosecution” as that



term is used in the Sixth Amendment; if it is, then the affected individual may invoke certain procedural rights, such as the right to a jury trial and the right to confront adverse witnesses. The controlling test whether proceedings are criminal in nature is whether, if the defendant is found liable, the sanction applied will be tantamount to punishment.

If a purpose to remove someone from an office renders a governmental action nonpunitive, then what kind of purpose is required to make the action punitive? One might say that, unlike measures that separate individuals from offices, punishment must offer the offending individual an opportunity to reintegrate himself in the society that holds him responsible for a wrongful act. This might be true of punishment inflicted within the family: the child suffers the penalty for his or her “offense” and then returns to the good graces of the judging parents. In this sense, the punishment erases the offense.

Some theorists think that this is the way punishment works in our time. Yet there are certain obvious objections to the claim that punishment enables offenders to pay their “debts” and resume their role in society. First, it fails to account for the death penalty, which has, in fact, been the oldest form of punishment and the most common in the course of history. Further, if we look at modern recidivist statutes, particularly the popularity of statutes that impose life imprisonment for the third violent felony (“three strikes and you’re out”), we have trouble finding much regard for the principle that punishment erases the offense. If punishment truly erased the offense, it would not be a factor that justified an increased penalty for a second or third offense.

We are left, then, with the question: is there a positive feature of punishment that distinguishes it from sanctions, such as disbarment and deportation, which are regarded as nonpunitive in nature? One is tempted to say that punishment must inflict pain for its own sake – and not for the purpose of removing the offender from an office or other position of privilege. But speaking of punishment “for its own sake” seems to take a position on the long dispute about whether the purpose of punishment should be retribution or deterrence.

The best approach to the concept of punishment might be to avoid verbal definitions and simply point to certain paradigmatic instances of punishment – the death penalty, flogging, caning, and imprisonment (at least since the early nineteenth century). We can assume that these are punishment, if anything is. Beyond these core cases, there is endless dispute. Treble damages in antitrust actions are punitive in nature, but no one contends that the Sixth Amendment, with its abundant procedural protections, should apply to the levying of treble damages.

In addition, punishment is an expression of authority, and in this respect it differs from vengeance. The classic agents of punishment are parents, the state, and God. A private killing may be vengeance, a simple act of tit for tat, but it is not punishment in the narrow sense.

## Purposes of Punishment

Assuming we know what punishment is, we should turn to the longstanding dispute about the purposes of punishment. The general division is between those who favor

arguments that from the standpoint of the trial are retrospective and those who favor arguments that are prospective. Retribution is said to be retrospective: it looks only to the crime not to the beneficial consequences of punishment; on this axis of time, utilitarianism is prospective; it looks to the beneficial consequences of punishment rather than to imperatives implicit in the facts. Yet there are other variations on the axis of retrospective and prospective or consequential theories. Let us distinguish among them:

- 1 *Purely retrospective.* The only arguments permissible are those based on events in the past, in particular the details of the crime. This argument that the punishment must fit the crime, regardless of the consequence, represents a paradigm of retributive thinking.
- 2 *Factually consequential.* The argument that punishment is justified by deterrence, both special (the criminal himself) and general (the rest of society), represents a factual prediction. If neither the criminal nor the rest of society is deterred, then the prediction is false. Whether punishment is justified on these grounds, therefore, requires careful observation of what happens in the aftermath of punishing. The problem, particularly in tests of the death penalty's efficacy, is distinguishing between those things that would have happened anyway from the consequences attributable to the act of punishment.
- 3 *Conceptually consequential.* Some of the consequences by which punishment is justified are conceptually linked to the act of punishing; the desirable consequences follow logically from the act of punishing. Nineteenth-century philosopher G. W. Hegel reasoned that punishment vindicates the right or the legal order over the wrong represented by the crime (Hegel, 1952). This act of vindication is conceptually connected to the punishment in the sense that if you believe it occurs, there are no facts that could disprove its occurrence.
- 4 *Utilitarianism.* This collection of theories conditions the ethical quality of an act on its factual consequences. The benefits to the society, as a whole, of punishing must outweigh its costs – to the offender, to his family, and indirectly to the rest of society. Schools of utilitarianism differ in the way they purport to measure these benefits and costs. Hedonistic utilitarianism regards happiness – pleasure and pain – as the common denominator in both. Economists believe that dollar signs can be attached to these consequences and thus toted up and compared.

These, then, are four positions of the spectrum from retrospective to prospective conceptions about the purpose of punishment. Taking one of these positions should not be confused with making an argument in favor of one of them. The arguments for prospective, instrumental theories are more easily made than arguments for retrospective theories. Most people gravitate toward the view that harming people by punishment should have a purpose; it should accomplish some good to offset the harm inflicted.

The argument for retributive theories relies often on an appeal to authority. The Bible is a favorite source. Immanuel Kant is another. Authority, of course, is not an argument. If we take a close look at Kant's arguments for retribution, we may find most of them suggestive, but wanting. Of the many arguments he deploys, at least three will

be rehearsed here. Kant was so strongly opposed to utilitarian theories of punishment that he wrote:

The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism [utilitarianism] in order to discover something that releases the criminal from punishment. (Kant, 1991)

This famous passage expresses Kant's perception that utilitarianism – or cost–benefit analysis – leads invariably to breaches in the principle of equality. Some people will be exempt from punishment if their exemption serves a useful social purpose. Kant believed that there should be no exceptions either for those who serve the state on purpose, say, by submitting to medical experiments (Kant, 1991), or whose punishment does not, in fact, serve the society's welfare. The term “categorical imperative” that Kant casually invokes in this passage is not used in its ordinary sense. It means no more, it seems, than a commitment to general and universal laws, equally applied.

In his second argument in favor of nonutilitarian punishment, equally applied, Kant stresses the equality or equivalence of the crime and the punishment. Drawing on the teachings of the biblical principle of the *lex talionis*, he insists that the scales of justice as well as the concept of law require this equivalence. No other standard would, he claims, be sufficiently precise to meet the desiderata of “strict justice” under law (Kant, 1991).

The third argument elicits Kant's understanding of “retribution” as captured in the German term *vergeltung*. The categorical imperative requires people to act on their maxims (subjective plans) only if they can be universalized and made to apply (*gelten*) as a universal law. The same it seems should be true of criminals in a negative version of the categorical imperative that Kant, trading on the association with *gelten*, calls *vergelten*. The justification of punishment, as it emerges in this argument, requires that the criminal's maxim be universalized and applied to him. If he kills, his killing should be universalized and applied to him. If he steals, his stealing should be regarded as a universal law, which would imply that all property would be subject to theft. If property is undermined, then the criminal should be treated as not having any resources as his own. If he has no resources, Kant concludes (playfully, it would seem) that he should be put into prison (Kant, 1991).

Though this argument blurs the distinction between the poorhouse and the prison, it should be recalled at the time of Kant's writing in 1795 that imprisonment had yet to become the common mode of punishment. Kant struggles to find a rationale for putting people behind bars rather than executing, exiling, or castrating them. The latter forms of punishment he regards as fitting, respectively, for murder and treason (Kant, 1991), sex with animals (Kant, 1991, p. 1142 [333]) and rape (Kant, 1991). The general theme in Kant's writing on punishment is that the crime should be turned back on the criminal. Sometimes this can be done by universalizing his maxim and making him suffer the consequences or by making the punishment “fit” the crime as castration fits rape. The notion of fitting punishment may bear some resemblance to the idea developed by Michel Foucault in *Discipline and Punish*, that punishment was originally thought to expiate the crime by re-enacting the horror on the body of the victim.

## An Alternative Theory of Punishment

The most intriguing of Kant's arguments for justice in punishment leads the way to an alternative view of what punishment is about. Kant imagines that a society is about to disband, but it has a problem: there are still murderers, condemned to die, languishing in prison. What should they do about them? Kant insists that the murderers should be executed "so that each has done to him what his deeds deserve and blood guilt does not cling to the people" (1991, p. 142). Executing them seems to be pointless because no good could possibly follow. This is precisely Kant's point.

The notion of a society's disbanding should be treated as a thought experiment, very much like the idea of a society's coming together in a social contract. Neither of these events ever occurred in history, but they are useful constructs for testing our intuitions about the conditions of a just social order. Further, the biblical reference to blood guilt is highly suggestive. It brings to bear an ancient rationale of punishment that lies some place between the theories I have labeled conceptually and factually consequential. The view in biblical culture, apparently, was that a manslayer acquired control over the victim's blood; the slayer had to be executed in order to release the blood, permitting it to return to God as in the case of a natural death (Daube, 1949). The failure to execute the murder meant that the rest of society, charged with this function, became responsible for preventing the release of the victim's blood.

These ideas lend themselves to a modern interpretation. The idea of gaining control over another person's blood suggests that criminal violence is typically a form of dominance. In fact, it is. Criminal conduct establishes the dominance of the criminal over the victim and, in the case of homicide, the victim's loved ones or next of kin. This is obvious in some crimes, such as rape, mugging, and burglary, where victims characteristically fear a repeat attack by the criminal. It is also true in blackmail, where the offender induces services or money in return for silence and is in a position to return at any time and demand additional payments (Fletcher, 1993). Instilling fear and this form of subservience is a mode of gaining dominance. Punishment counteracts domination by reducing the criminal to the position of the victim. When the criminal suffers as the victim suffered, equality between the two is re-established.

Thus the institution of punishment provides an opportunity to counteract the criminal's dominance over the victim. The failure to use the institution, the passively standing by when there is an opportunity to punish justly, provides the foundation for shared responsibility. This is the sense in which the "blood guilt ... cling[s] to the people" when they refuse to punish those who deserve it. The practice of punishing crime provides an opportunity for the victim's co-citizens to express solidarity and to counteract the state of inequality induced by the crime. If they willfully refuse to invoke the traditional response to crime, they disassociate themselves from the victim. Abandoned, left alone, the victim readily feels betrayed by the system.

A primary function of punishment, then, is to express solidarity with the victim. It is a way of saying to the victim and his or her family: "You are not alone. We stand with you, against the criminal" (Fletcher, 1995).

The connection between punishment and solidarity has become apparent in the last few decades in the numerous countries that have overcome dictatorial regimes and

have begun the transition to democracy. The first notable example was Argentina, which in the mid-1980s began a program of prosecuting the generals who were responsible for the mass disappearances in the period of the military junta. The victim's families themselves – led by *las Madres* – insisted on prosecution as a means of vindicating their dignity as citizens. Since the shift of government from Presidents Alfonsín to Menem, the leaders of the junta have been pardoned (Malamud-Goti, 1991). Those connected to the victims must endure the sight of those responsible for their suffering now leading the good life as free citizens.

The transition to democracy in Eastern Europe has led to repeated demands to punish the leaders of the Communist governments that were responsible for evil deeds ranging from encouraging Soviet intervention in Budapest in 1956 and Prague in 1968 to shooting escaping East German citizens in the 1980s. Technical problems, such as the statute of limitations, prevent many of these prosecutions. Yet the Germans have been insistent about prosecuting border guards for killings at the border, and the Hungarians seem resolute about prosecuting former Communists who committed the most egregious crimes, particularly those that can be classified as “war crimes.”

## Responsibility

Punishment makes little sense unless those who are punished are indeed responsible for the wrongs that trigger a punitive response. The first stage of legal analysis is always to determine whether an untoward event has occurred for which someone ought to be held responsible. For purposes of criminal punishment, this negative state of affairs must constitute the violation of a statute promulgated in advance and which gives fair warning to citizens of the possibility of incurring responsibility for violating the statute. Once this negative state of a statutory violation is established, we can turn to the question whether a particular individual is responsible for having brought it about. If he or she is responsible, then in the normal case, the legal system will impose punishment for the action.

There are many synonyms used to describe this second stage of the inquiry about responsibility. The question might be put as whether the actor is “accountable” or “answerable” for the legal violation, or whether the violation is “attributable” or “imputable” to the actor. All of these terms converge on the single meaning whether it is fair to hold the actor responsible for the violation.

### *Unlawful action*

We may refer to the first stage of legal violation as determining whether an “unlawful act” has occurred. The question is not so simple as whether an action violates a statutory rule. First, the violation must bear the characteristics of a human action. Only human actions can generate criminal responsibility. That one's body is the instrument of harm hardly suffices. If *B* forces *A*'s hand down on a valuable vase, thus breaking it, *A*'s hand is the immediate cause of the injury, but *A* is not personally responsible for the damage orchestrated by *B*. This is an easy case for exclusion from the field of

responsibility. As soon as it looks like *A* is acting in some fashion, however, the attribution of responsibility becomes more difficult.

Criminal law seems to be the arena where the requirement of human action is most often posed. The defendant throws his child out the window, and the claim is made that because of a brain tumor operating on him, he was really acting. Or the defendant kills somebody when he is sleepwalking, and the argument is heard: no responsibility because there is no human action. The criminal law has even coined the general term “automatism” to pinpoint the question whether there is any action or agency in the bodily movements leading to the victim’s harm. Yet no one quite knows what this component of “action” or “agency” is beyond the simple fact of bodily movements. It is not too helpful to require that the action be dictated by the will, for how do we know whether the will is operative without first classifying the bodily movements as human action? The way we approach this problem in practice is to assume that unless some known factor negating agency is present – brain tumors, sleepwalking, hypnosis, epilepsy – then we assume that the nominal appearance of agency signifies agency.

For action to be unlawful, it must not only be an instance of acting instead of being acted upon. It must also be unlawful in the sense of constituting the violation of a statutory norm and being unjustified. An action is not unlawful if it is justified on grounds of consent, lesser evils, or legitimate defensive force, for example, for protection of self, others, or property. These topics of justification require treatment in their own right. The important feature of these defensive claims is that they do not deny personal responsibility. On the contrary, when someone argues that his action is justified, he means to say that what he did was right and proper and that he has every reason to take responsibility for the action. The problem of responsibility is reserved, therefore, for the analysis of excusing conditions.

### *Responsibility and excuses*

Since Aristotle, the discussion of excuses has focused on the question of involuntary action. The assumption is that someone who brings about an unlawful state of affairs is not responsible for his action if it was involuntary. An action might be involuntary for one of two reasons, either it is subject to coercion or it is carried out in ignorance of the relevant facts. Coercion, in turn, might be either external or internal. The standard cases of external coercion are duress and personal necessity. The proverbial mode of duress is the gun pointed at the head of the victim. She gets an offer that she cannot refuse. Either she opens the safe or she dies. The clearest case of coerced action, therefore, is but a short step from physical coercion, from the case of actually forcing the hand of another. Yet she can always say no and be shot. Her “will” is engaged by the act of submission to the gunman. Because she is acting rather than just being acted upon, we need an argument why we should excuse her. There are two primary starting points for generating an explanation of excuses such as duress. One is a version of causal analysis. The roots of her action lie not in her character, in her nature as a person; rather, they derive from the threats of the gunman. Although her will is nominally expressed in opening the safe, that action says nothing, or very little, about her as a person. She does not express the personality or character of a thief in permitting

the gunman to take the money. She is not complicitous in the crime. The true cause of the action is not her personality, her traits of character, but the gun pointed at her head. The argument of character, therefore, extends the causal analysis as a way of denying the responsibility of those who act under insuperable pressure.

The alternative way of thinking about excuses is to stress the involuntariness of submitting to the dictates of a gun-toting bank robber. If the action is involuntary, it is treated as the equivalent of no action at all. And in the absence of action, voluntary action, there is no basis for imposing responsibility. Yet it is not so clear what one means by "involuntary" action. The judgment of involuntariness invariably entails a comparison of the threat and the action that the allegedly coerced party must undertake in response to the threat. As the threat becomes less severe and the action becomes more harmful, the judgment of involuntariness loses its grounding. Sooner or later, we reach the point at which we conclude that the actor should have resisted the threat. If she must kill in order to avoid damage to her car, she hardly acts involuntarily. The threat of property damage is one she should resist, particularly if the only way of avoiding the threat is to kill an innocent person.

The boundary between voluntary and involuntary behavior lies some place between the extreme paradigms, the first requiring opening of the safe in order to avoid being killed, and the second, exacting the death of an innocent person in order to avoid property damage. The way the line is drawn depends on our sense of what we can fairly expect of each other under circumstances of pressure. Different cultures will draw this line at different places. Some cultures are indulgent toward those who must act under severe pressure; others are more exacting and refuse, for example, to excuse the killing of an innocent person, no matter how severe the threat of harm to the coerced party. The point to remember about excuses is that the question is always focused on the actor having done something wrong. Excusing is a matter of recognizing that people cannot always do the right thing. Yet a severe and puritanical culture might well demand that individuals sacrifice themselves rather than identify themselves with evil.

Apart from duress, English and American courts have been loath to recognize excuses based on external coercion. As threats made by persons excuse wrongdoing, it should also be the case that coercion generated by natural circumstances would have the same impact on criminal responsibility. In the famous case of *Dudley and Stephens*, 14 QBD 285 (1885), the Queen's Bench rejected this analogy and held the circumstance of starvation on the high seas would not excuse homicide and cannibalism. Perhaps duress is more easily recognized than the personal necessity present in *Dudley and Stephens*. In the former case, there is always someone responsible for the crime, namely the threatening party; in the latter case, recognizing the excuse would imply that no one could be held accountable for the wrongful act. Yet the availability of an alternative party to hold liable should not bear, in principle, on whether those who acted under the pressure of starvation should be treated as responsible and subject to punishment.

The internal analog to external pressure is mental illness. It is common to think of mental illness as a kind of compulsion that interferes with the actor's freedom in the same way that external coercion undermines the possibility of voluntary action. Yet we need not necessarily think of insanity as a weight that bears down on the actor's freedom of choice. An alternative approach treats mental illness and

insanity as conditions that go to the foundation of the actor's capacity for rational thought.

According to Aristotle, actions can be involuntary either if they are the product of coercion or if they are carried out in ignorance. The actor cannot be said to choose his action unless he knows what he is doing. The problem with the theory of ignorance and mistake is that no one ever knows everything about the circumstances and the consequences of action. What did Bernhard Goetz know when he pulled his gun and began to shoot at the four black youths on the subway? He knew the elementary facts of his situation, but he was ignorant about the important features of his situation. There was no way for him to know what would have happened had he not drawn his hidden revolver. Yet we would have to say that Goetz acted voluntarily despite his ignorance of factors that mattered to his fate.

The knowledge that people have about their actions is always a matter of degree. No one ever knows everything about the circumstances and consequences of action. Thus there is no conceptually clear standard for deciding when ignorance and mistake should negate the voluntariness of the action. As in the analysis of coercion, we arrive finally at the point at which the judgment of involuntariness merges with moral criteria of fairness. The problem always is what we can fairly expect of each other in resisting pressure and in paying attention to signals implicit in the circumstances under which we act. When we do meet the common standard we set for each other, we are at fault, we are personally to blame, and we cannot properly invoke an excuse for the wrongs we have committed.

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## Loyalty

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### Loyalty and Partiality

The ethic of loyalty provides a vehicle for understanding partial as opposed to impartial morality. The standard liberal moral theories – Kantianism and utilitarianism – are impartial in nature: friends are worthy of no more attention than strangers. By definition, loyalty is partial: it extends to those who are close and not to those who are distant or foreign.

The core cases are loyalty to people we know – friends, lovers, and family members. But by extension, we feel the pull of loyalty toward groups, many of whose members we do not know personally. Loyalties are tendered to corporate bodies, such as universities, companies, professions, and political parties. At higher levels of abstractions, loyalties extend to peoples, nations, and states. We also speak of loyalty to principles and to schools of thought. And those who are religious can understand their faith as an expression of loyalty to the true God.

In all these contexts, loyalty has the same basic meaning. For every loyal friend or lover, there is always a third party who could, in the fashion of the classic triangle, tempt the loyal away from the object of his or her loyalty. In a matrix of loyalty, then, there are three parties. Let us call them: *A*, *B*, and *C*. *A* can be loyal to *B*, only if there is or could be a third party *C* who stands as a potential competitor to *B*, the focal point of loyalty. The competitor is always lurking in the wings, rejected for the time being, but always tempting, always seductive. If the competitor appears and beckons, the loyal will refuse to follow.

Loyalty to principle means, therefore, that one will not be tempted by competitive principles. Loyalty to God means that one will not be tempted by false gods.

There is some dispute about whether acts of personal loyalty are always negative – abstaining from sexual infidelity, disclosing secrets, and other acts of intimacy with third parties. Some would maintain that the lover who did no more than abstain from adultery was hardly loyal and faithful. Some positive acts also seem necessary, acts of devotion that reflect the importance of the other in one's sense of priorities. It seems that simply by losing interest one could be an unfilial child, faithless friend, or disloyal lover; being loyal in this fuller sense requires devotion as well as abstaining from betrayal.

In the case of loyalty to nations, the potential tempter is the enemy to whom, in the language of the Constitution, one would “adhere” and commit treason by giving it “aid and comfort.” Some people might think that positive acts of patriotism are required to be loyal to the nation, as acts of devotion are required in personal relationships. All can agree that the minimum foundation of loyalty is captured in the definition of treason. One need not “adhere” emotionally to one’s own nation, so long as one does not go over to the other side.

Let us refer to my account as the triadic theory of loyalty. It stands opposed to dyadic theories that treat the subject who tenders loyalty and the object who receives it as sufficient to account for the phenomenon. So far as there is an existing literature on loyalty, it is dominated by an implicit acceptance of dyadic theories. A good example is the definition offered by Josiah Royce, who treats loyalty as a species of voluntary commitment, a “willing and thoroughgoing devotion to a cause.” The commitment of *A*, the subject, to *B*, the cause, purports to be sufficient to account for loyalty. Dyadic theories make the mistake of overemphasizing the element of devotion in loyalty. Loyalty becomes like love; loyalty to the nation, like patriotism. The advantage of the triadic theory is that it underscores a minimal dimension of loyalty as no more than abstaining from adultery, betrayal, and treason.

It is important to distinguish between feelings of loyalty and duties of loyalty. Neither implies the other. One can feel sentimental loyalty to an institution without being under a duty to do so, and one can be under a duty of loyalty to parents or children without tendering positive feelings toward them. Loyalty becomes interesting as a moral concept only so far as it expresses a duty of loyalty.

### Loyalty: Unilateral and Reciprocal

Expressed as a moral duty, loyalty carries feudal overtones. Loyalty is, typically, expressed from those lower to those higher in the feudal hierarchy. The serf had a duty of fealty to his lord. But the lord was under no reciprocal duty to any particular serf. His duty was to provide protection and security to those who were loyal to him. The same structure carries forward in the modern conception of the state’s duties to its citizens. The state tenders protection to citizens in return for their loyalty, and the loyalty of the nation indeed facilitates defense against external enemies. The notion of loyalty of the state to its citizens lacks a conceptual grip, but it does seem possible to speak of the King’s or the government’s duty of loyalty (or disloyalty) to some weak and dependent segment of the body politic, such as the poor.

The most dramatic example of unilateral loyalty is God’s insistence of submission and loyalty from the Jewish people. The Prophets accuse the Jews of persistently “whoring after other gods.” Worshipping false gods is an act of adultery, of betrayal. But God is under no reciprocal duty of loyalty to the Jews. The theology is clear on this point. God may choose subject peoples others than the Jews, but the Jews may not have other gods. The most that subject peoples may hope for is protection against enemies and destruction, and on this point the Holocaust has generated a crisis of faith among many.

The modern ideal of loyalty in friendship and marriage rejects the feudal model in favor of the liberal principle of reciprocity. In friendship, loyalty is tendered in exchange for loyalty. Modern marriage more closely resembles the model of friendship than an anachronistic feudal conception based on the exchange of the wife's loyalty for the husband's protection.

More and more, in contemporary institutions, when we speak of loyalty we expect reciprocal loyalty. A good example is the relationship between employers and employees. Factory owners seek to induce employee loyalty to the firm. They will use the language of the "family" and the "community" to describe the workforce. In turn, however, employees expect owners to remain loyal in the face of declining profits. So far as there is a moral duty of the owners to keep a factory of declining profits in the city where it is located, the duty is expressed as one of loyalty.

### Contract and History

In the modern legal culture, duties of loyalty are frequently grounded in contract. Charles Fried writes of his loyalty, as Solicitor-General, to the President who appointed him. Lawyers and physicians are under conventionally defined duties of loyalty to their clients and patients. Fiduciary duties of corporate managers can be understood as duties of loyalty, namely, to place the interests of the corporation ahead of competing interests. Contract is a source of duties of loyalty, but not the only source.

Duties to family, friends, lovers, and nations are based not on contract but on a shared history. Sometimes this duty of loyalty derives from past care and nurturing that enables a child to grow into adulthood. In many traditional cultures, the reverence for teachers takes this form. The Japanese term *sensei* or the Hebrew term *mori* are appellations that express gratitude and submission, without an expectation of reciprocal loyalty.

Recognizing duties of loyalty based on a shared history affirms identity. The soldier willing to fight for his country declares where he stands in the world of fractured nationalities. Sometimes the decision to fight derives primarily from a family identity. Robert E. Lee was, in fact, loyal to the Union and he was opposed to slavery, but he chose out of loyalty to his "kith and kin" to fight for the Confederacy. Those who organize fighting forces know that the intense personal loyalties that soldiers feel to their units often outweigh the abstract calls of patriotism.

History lays the foundation both for loyalty as an expression of identity and sets limitations on possible loyalties. However much Alexis de Tocqueville admired America, he could not suddenly declare his loyalty to that nation. Six thousand French regulars fought under General Rochambeau in the American Revolution, but this was not an act of loyalty to the emergent American republic. A Virginia farmer can put aside his plow and take up arms as an act of loyalty, but a Parisian who comes to fight in the same cause does not make the same statement about where he stands. Even if he believes firmly in his heart that the Americans should win (and not as his government, that, for political reasons, the English should lose), he fights as an outsider. The soundness of his cause influences how hard he fights, but his fighting neither expresses nor confirms his historical roots.

No one can decide, as a matter of taste, to be loyal to someone with whom the requisite historical bond is lacking. Fond as I am of French culture and cuisine, I cannot decide tomorrow that I shall be loyal to the French nation. My connection to the French remains that of a fond observer. I may continue to appreciate French culture as an outsider, but on the fringes of the culture, looking in, I am not in a position to be either loyal or disloyal to the French people.

The exact relationship between historical experience and duties of loyalty, however, remains controverted. People do change locations, jobs, and cultures and sink new roots. It is not clear how much time is required for fresh soil to resonate in new found loyalties. As Aristotle says, friends must have “eaten salt” together. But how much salt and the quality of the salt seem to be a matter of individualized taste and judgment.

### Individualism and Communitarianism

Understanding loyalty as historically grounded provides a window on the contemporary debate between liberal individualists and communitarians. Liberal individualists reject the principle that history is destiny, that our pasts can dictate duties for the present. For the individualist, loyalty smacks of feudalism, of a time when one’s station in life determined one’s duties. If history means anything, they would say, it means that we have evolved from the duties of status to duties based on contract and voluntary choice.

Of course, liberal individualists recognize that some duties arise regardless of choice. The moral theories of the eighteenth-century philosophers, Jeremy Bentham and Immanuel Kant, ground their theories of obligations in the common traits shared by all humans. Bentham claims that our common denominator is our capacity for pleasure and pain and infers that everyone has an obligation to act in a way that takes account of the pleasures and pains of everyone else. The Kantians claim that all human beings are connected by their capacity to reason and to know the moral law implies that they bear, therefore, a common humanity. Their commonality generates a duty to respect the humanity in themselves and in others as an end in itself.

The version of the Kantian theory developed by John Rawls presupposes the capacity of the purely rational self to decide upon principles of justice that should govern society. Rawls attributes to the rational self the aim of maximizing certain basic goods such as liberty, wealth, and self-esteem. His achievement is to have generated principles of justice on the bare bones assumption that rational beings, who do not know their position in society, would seek to maximize the basic goods that everyone desires.

The communitarian critique of Rawls, particularly as developed by Michael Sandel (Sandel, 1982), argues the implausibility of a rational “unencumbered self” choosing the basic goods that motivate Rawls’s principles of justice. The self must be situated in a particular society, Sandel argues, in order to explain why we have the commitments and loyalties we have. Sandel begins with an intuitive sense of our commitments and argues backwards to a self that must be “encumbered” by its historical roots.

An alternative line of reasoning begins with the rootedness of the self in a historical situation and asks what follows from our invariably localized circumstances. One argument is that our historical situations entail obligations to those who have played a

“significant” part in the shaping of our personalities. The claim is that the “historical self” generates duties of loyalty toward the families, groups, and nations that enter into our self-definition. These duties may be understood as an expression of self-esteem and self-acceptance. To love myself, I must respect and cherish those aspects of myself that are bound up with others. Thus, by the mere fact of my biography, I incur obligations toward others, which I group under the general heading of loyalty.

We do not choose our historical selves in any direct and immediate sense. We are born into a particular culture, acquire a mother tongue, receive exposure to certain political and religious ideas, learn a national history – all without significant choices on our part. The responsibility for our initial sense of historical self is left to our parents, those who run our schools and the media, and the religious leaders who have an impact on us. Of course, some choice is left to us as adults to leave our native cultures and attempt to assimilate as immigrants or converts in a new world. Whether the assimilation succeeds depends, in large part, on the will and talents of the individual and the receptivity of the immigrant culture. It is obviously easier to assimilate as an immigrant to the United States than to most other national cultures. The possibility of engaging in this structural change, engendering a whole new set of loyalties, represents the limited control that we have over our historical selves.

In some areas, of course, we reach our critical decisions as adults and we can alter our commitments to friends, marital partners, religion, and profession in midlife. The range of our freedom in making these structural changes depends, as well, on the receptivity of the culture in which we seek to act. As compared with Western countries, it is relatively difficult to restructure one’s religious commitments in Iran or one’s professional loyalties in Japan.

### Loyalty in the Legal Culture

The law, particularly Anglo-American law, is loath to recognize duties that derive exclusively from birth or personal history. The notable exception is the crime of treason, which is applicable only to citizens or permanent residents of the United States. Foreigners cannot commit treason against the United States. Choice or consent – some voluntary act – seems to be essential to the Anglo-American view of legal duty. Parents have duties toward their children, for they choose to bring them into the world. But children have no legal duties to their parents, not even to support them if they are incapable of earning their own livelihood. The argument is that children do not choose their parents, and therefore there is no moral basis for a duty to care for them. Yet other legal systems do recognize the duty of children to provide for elderly, impoverished parents. The new Russian Constitution, for example, carries forward the communitarian spirit of their culture by explicitly recognizing this filial duty (Russian Constitution, art. 38(3)).

True, Anglo-American law recognizes duties of loyalty when the duty rests on choice and contract. Fiduciary duty is a matter of loyalty; it is an obligation to put first the interests of the company or the individual toward whom one must act as a fiduciary. Lawyers are under duties of loyalty toward their clients. They must treat their interests as paramount and protect the secrets of the relationship. These examples of contractual

loyalty differ fundamentally from, say, the duty of children to support their parents. The latter is a duty rooted not in choice and consent, but in birth and blood.

Loyalty based on the historical self may not generate duties in a liberal culture, as is now dominant in Western jurisprudence. But there is another way that the state may recognize loyalty as a relevant value in the legal culture. The state chooses to stay its hand – not to intervene – in relationships based on loyalty. A good example of this deferential attitude is exempting people in certain relationships from the duty to testify against each other. A wife may choose not to testify against a husband, and vice versa (Fletcher, 1993). Many writers advocate extending this exemption to other relationships within the family and some, even to relationships between friends (Levinson, 1984). The law permits, therefore, persons who are close to each other to choose to remain silent rather than testify and harm someone dear to them. The processes of justice suffer, of course, for the courts must thereby forego valuable evidence, but the relationships thereby protected prosper.

Another example of the proper deference to the value of loyalty is the nearly universal attitude toward inheritance. Even though strict egalitarians object to transmitting wealth from one generation to another, the practice survives everywhere. Even the Communist regimes dared not eliminate it. Leaving property to another at death is a way of expressing a bond with the recipient. Writing wills permits people to express their loyalties to some and not to others. The possibility of transmitting wealth across generations is important because it permits personal loyalties to flourish (Fletcher, 1993, pp. 87–9).

It is important to note that neither of these institutions rests explicitly on the value of loyalty. My claim is that the recognition of loyalty as a moral value is implicit in the legal practice. The mode of interpretation used resembles the arguments of economists who contend that the pursuit of efficiency is implicit in the legal practices they observe.

Two other examples of deference to loyal relationships are worth noting. Some people support surrogacy contracts on the basis of the liberal principle of contractual autonomy. The courts declare these contracts to bear children for a fee void as a violation of “public policy” (Farnsworth, 1990). A good account of this limit on contractual autonomy is that no one should be able to contract to commit an act of disloyalty to a child.

Similarly, the legal accommodation accorded to acts of religious faith represents a form of official deference to loyalty of believers to their God. The First Amendment provides special protection for the “free exercise of religion,” which the courts long interpreted to mean that the faithful could claim an exemption from laws applicable to others. The Supreme Court reversed itself on this question and held in 1990 that neutral, nondiscriminatory laws must apply to everyone, regardless of their claims of religious conscience. Congress intervened with a statute that reinstated the special exemption accorded to those who claimed that for religious reasons they could not, for example, work on the Sabbath, send their children to public school, take off their head covering indoors, or pledge allegiance to the flag. The best interpretation of this policy of deference is that the state recognizes the value of pre-existing loyalty to instruction perceived as coming from God. The state will not force people into the crisis of betraying one set of loyalties in order to remain obedient to secular law.

Though loyalty is an important value in many contexts, it cannot trump all conflicting considerations. Members of the Mafia may be guilty of criminal conspiracy even if their way of life rests heavily on an ethic of personal loyalty. Yet the value of loyalty often captures one important side of many disputes.

## Loyalty and Its Critics

Opponents of loyalty as a moral imperative stress the dangers of partiality. In an article generally sympathetic toward loyalty and patriotism, Alasdair MacIntyre writes: "Patriotism turns out to be a permanent source of moral danger. And this claim, I take it, cannot in fact be successfully rebutted" (MacIntyre, 1984). He obviously has in mind the slippery slope toward fascism, of blind, unthinking adherence to "my country right or wrong." (This famous phrase comes from Stephen Decatur's toast in 1816: "Our country! In her intercourse with foreign nations may she always be in the right; but our country, right or wrong.") Blind adherence to any object of loyalty – whether friend, lover, or nation – converts loyalty into idolatry. There is a moral danger in thinking that any concrete person or entity could become the ultimate source of right and wrong, but the moral danger is no greater in the case of patriotism than it is in friendship, erotic or filial love, or political commitment.

Loyalty and patriotism are often subject to attack because of the risk of excessive attachments. One philosopher claims that "patriotism is like racism" (Gomberg, 1990). These charges of guilt by association serve to remind us of the importance of setting limits to loyalty. Yet defining these limits poses considerable theoretical difficulty.

One technique for setting limits on particular loyalties derives from the inevitable conflict between higher and lower loyalties. The higher, more abstract values of God and country seem to have a greater moral claim on us than our more immediate attachments to family and friends. But this structure of values often gets turned around, as illustrated by General Robert E. Lee's choosing, despite his political convictions, to stand by his kith and kin in the Confederacy.

Another possible technique for setting limits is to invoke the idea of a "true" version of the person or group that gains our loyalty. In his attempt to assassinate Hitler, Colonel von Stauffenberg arguably acted in the name of the true Germany. A mother's continuing to nurture a son turned violent criminal expresses a commitment to the good man behind the corrupt surface.

In some contexts, loyalties are out of place. We expect judges and juries to decide impartially, regardless of their loyalties to people on one side of the dispute or the other. This is also true of those who judge contests based on merit. Yet there are situations, such as employment decisions, where loyalties seem in constant tension with commitments to merit. Democratic voting is also an area where everyone might be better off if everyone acted solely on the basis of their perception of merit, but where loyalties to political parties, gender, and ethnic groups invariably shape the pattern of voting.

Alas, there is no definitive theory to account for the relative sway of loyalties, on the one hand, and impartial morality, on the other. Impartial morality and loyalty remain independently binding; neither reduces to the other. Loyalty cannot be seen as a version

of impartial morality any more than impartial morality can be understood as deriving from loyalty. Contrasted at the level of pure theory, the differences between the ethic of loyalty and impartial morality are manifold. The former is grounded in our relationships with others; the latter is universal in its appeal. The ethic of loyalty brings to bear an historical self; impartial morality derives from the universality of reason or of human psychology. The former is pitched to humans as they are; the latter, to the spiritual aspirations of humans as they might be. Systems that are so radically different cannot be brought together on any single common denominator.

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## Coherence

KEN KRESS

An idea or theory is coherent if it hangs or fits together, if its parts are mutually supportive, if it is intelligible, if it flows from or expresses a single unified viewpoint. An idea or theory is incoherent if it is unintelligible, inconsistent, ad hoc, fragmented, disjointed, or contains thoughts that are unrelated to and do not support one another. Historical, strict, rationalist, idealist coherence theories flow from a single principle. Modern *normative* coherence theories tend to be pluralistic.

After roughly characterizing seven properties that might enhance coherence, or be thought necessary or sufficient for it, this essay will set coherence theories of law in context by briefly describing coherence theories of truth, justified belief, ethics, and justice. Coherence of theories of *law* is then analyzed by asking: (1) what besides constitutions, statutes and precedents are in the base of legal sources; and (2) how that base is to be coherently reconstructed into valid law. Areas of agreement and disagreement among coherence theories are described. Representative coherence and (noncoherence) theories of law are examined in light of the above analysis.

Attention is next focused on the concept of coherence itself. Three candidates for necessary requirements for coherence – consistency, comprehensiveness, the right answer thesis – are acknowledged to enhance coherence despite not being, at least generally, required for it. Seven techniques for enhancing coherence by eliminating or resolving conflicts among principles and counter-principles are described. The core concepts of coherence, monism, and unity are then examined. A taxonomy of monisms and unities is developed, which employs the seven techniques to characterize degrees of coherence in normative theories. Finally, the essay turns to the issue of the normative value of coherence and rejects Dworkin's claim that a coherent legal system is morally more legitimate than its less coherent counterparts.

As a first approximation, whether a theory is coherent, and if so, to what degree, may be analyzed under seven properties. Each property may be argued to be necessary for, or sufficient for, coherence. Alternatively, it may be claimed that the more of that property a theory manifests, the more coherent that theory is.

- 1 *Consistency*. A theory is consistent if its principles and propositions are logically consistent. In moral or legal theory, logical consistency is a weak constraint. A

- stronger constraint would find a theory consistent only if its underlying principles are consistently applied in creating rules and deciding concrete cases.
- 2 *Comprehensiveness.* A theory is comprehensive if it provides answers (including the answer, “the theory cannot resolve this issue”) to all questions within the scope of the theory.
  - 3 *Completeness.* A theory is complete if it provides single right answers to all questions within its scope, with no gaps, no unresolvable issues. Each proposition of a complete theory is either true or false, with no indeterminate or other truth values.
  - 4 *Monism.* A theory is monistic if it flows from a single principle. It is nearly monistic if it flows from a handful of principles with a unified spirit.
  - 5 *Unity (internal relations).* A theory displays unity when its principles imply, justify, or mutually support one another.
  - 6 *Articulateness.* A theory is articulate if its methods for deciding issues, integrating and unifying its principles, and resolving conflicts among competing principles are expressed in language and are not merely “intuitive” techniques.
  - 7 *Justified.* A theory is “justified” if it resolves conflicts with reasons. A pluralistic, normative theory is justified if its articulated meta-principles and means for resolving conflicts among principles are normatively intelligible.

Some would urge that utilitarianism is coherent because it is monistic and flows from a single normative principle: maximize happiness. Similarly, Sir Robert Filmer’s Divine Right of Kings justifies a king’s authority based on ancestry. Classical Newtonian mechanics manifests coherence because it is founded in three axioms of motion expressing a unified theory. Thermodynamics is similarly founded in a handful of principles expressing a single spirit.

Suggesting examples of seriously held incoherent theories is a dangerous occupation. Its proponents are likely to accuse one of bias and of failing to appreciate the simplifying and unifying aspects of the theory. A science in crisis, as described by Kuhn, would be incoherent insofar as it requires ad hoc principles to explain anomalies. The Ptolemaic, geocentric view of the universe is arguably incoherent because it employs ad hoc, unmotivated epicycles to describe planetary motion. The Copernican heliocentric theory is more coherent because it requires fewer, more motivated, and unified principles. Newtonian mechanics just prior to the discovery of relativity theory may be another example of a science in crisis, requiring ad hoc adjustments to explain anomalies. In normative theory, nihilistic and intuitionist perspectives are less coherent than those of their more articulated, justified, and optimistic opponents.

For example, Rawls criticizes intuitionists’ failure to provide articulated, ethically justified meta-principles, which weigh principles off against counter-principles because it ends rational discourse about normative matters prematurely: “An intuitionist conception of justice is, one might say, but half a conception” (Rawls, 1971, p. 41).

Coherence theories of law and morals may be understood as an outgrowth of coherence theories of truth and justified belief, which have a longer ancestry. The coherence theory of truth can be crudely characterized as the view that a proposition is true if and only if it fits with other believed propositions. This theory sharply contrasts with the correspondence theory, which holds that a proposition is true if and only if it corresponds to the facts, where the facts are conceived as external to us, and independent of

our beliefs about them (unless the proposition itself is about our beliefs). Correspondence theories of truth evoke the image of true propositions mirroring reality. The correspondence theory of truth is frequently associated with realism, the metaphysical claim that there exists an external world independent of our beliefs or social conventions. The denial of realism, antirealism, which maintains that reality is dependent upon beliefs and conventions, entails the coherence theory of truth and may be entailed by it.

In modern theories of knowledge, coherence theories contrast with foundationalist theories. Foundationalist theories assert that certain basic beliefs – such as those reporting immediate sense impressions – are justified despite not being supported by (or inferred from) any other beliefs. Foundationalism maintains that justified beliefs consist of basic beliefs and justified inferences from basic beliefs. By contrast, coherence theories of justified beliefs maintain that a belief is justified if and only if it fits with other believed propositions. Foundationalist theories of justified belief conjure the picture of linear justification from basic beliefs; by contrast, coherence theories of truth and justified belief suggest a spider's web, a double geodesic dome, a link necklace, or a unified field. Perhaps the most illuminating metaphor for coherence is a puzzle with identically shaped pieces, say, one-inch squares, which must be arranged into a meaningful, coherent picture.

The most famous coherence methodology in modern normative theory is the technique of reflective equilibrium developed by Rawls to resolve issues about ethics and justice. Rawls's early method in "Outline of a Decision Procedure for Ethics" (1957) requires that we determine the considered judgments about concrete normative issues that would be made by individuals with average intelligence in idealized circumstances which promote integrity, impartiality, and insight. One then induces principles much like a scientist would – only the data to be explained are the morally competent actors' considered judgments, not scientific observations.

In *A Theory of Justice* (1971), Rawls substantially extends the method. Considered convictions no longer have epistemic priority over principles. We compare our considered concrete convictions – now about justice – to the abstract principles of justice chosen by rational individuals in circumstances designed to eliminate bias and self-interest to determine whether the principles and convictions fit together. There is an appropriate fit if someone following the principles would reach the convictions or, in the alternative, if the convictions could be viewed as a normatively attractive extension of the principles. If not, the method of reflective equilibrium engages in real work. Insofar as there are discrepancies between the principles and convictions, one or the other (or both) must be revised. The antifoundational aspect of the method consists in giving neither principles nor convictions *a priori* preference in the process of revision. We go back and forth revising first one and then the other until the principles imply the convictions, thereby rendering our convictions coherent and justified (Rawls, 1971, pp. 20–1).

What motivates coherence theories, especially normative coherence theories? Coherence seems desirable – or necessary – in a theory because what is coherent is intelligible and forms a rational, understandable unity rather than a patchwork quilt. Second, it appears that truth, morality, justice (and perhaps justified belief) must be coherent. In law, coherence accounts appear preferable to those legal positivist

perspectives which link law to the intentions of their authoritative authors because it frees law from the dead hand of the past, promoting responsiveness to contemporaneous concerns (Raz, 1992, p. 292).

Each of these motivations for coherence is problematic. First, intelligibility does not guarantee truth, justification, or legal validity (but see Weinrib, 1988, 1995). Moreover, “coherence” as employed here is a technical philosophical term continuous with, but not identical to, its ordinary meaning (Raz, 1992, pp. 276–7). Second, as positivists and critical legal scholars urge, law may well be a patchwork quilt, the handiwork of political forces and actors proceeding at cross purposes with inconsistent ideologies. Third, while pure morality and justice must be coherent, given human fallibility, it is controversial whether practical day-to-day theories of morality, justice, and law should be coherent (Sayre-McCord, 1985, pp. 181–7). Moreover, while pure morality and justice must be coherent, surely positive law need not be. On the other hand, positive law requires techniques to eliminate strict inconsistencies. Why not limit incoherence by the same or similar methods?

Irrespective of the plausibility of other coherence theories, several considerations suggest that coherence theories of *law* have a special claim on us. The idea that law is a seamless web, that it is holistic, that precedents have a gravitational force throughout the law, that argument by analogy has an especial significance in law, and the principle that all are equal under the law, provide strong *prima facie* support for a coherence theory of law.

## Coherence Theories of Law

Despite the apparent claim of some that a coherence theory of law is a coherence theory of truth for law (Kress, 1984, pp. 369–71; Raz, 1992, p. 283 and *passim*), a coherence theory of law is logically compatible with a correspondence theory of truth (Fumerton, 1994, pp. 90–1) or a deflationist theory of truth (Coleman, 1995, pp. 54–61). Theories of truth and theories of valid law are logically distinct, for all we know. For example, correspondence theories must be able to account for truths involving coherence, including claims that coherence is a (or the) determinant of legal validity. Consider the proposition that comparative negligence is valid law because it coheres better with general negligence principles than any alternative (including contributory negligence). That proposition will be true according to the correspondence theory just in case that proposition corresponds to the facts. The relevant factual questions are: first, does comparative negligence cohere better with negligence principles than contributory negligence or other alternatives and, second, assuming it does cohere better, does that mean it is valid law? If both questions are answered affirmatively, the correspondence theory will declare the proposition “comparative negligence is valid law” true by virtue of *correspondence with “facts”* about the *coherence* of comparative negligence and general negligence, and about coherence as the criterion for legal validity. No persuasive argument has yet tied theories of law in any interesting way to general theories of truth.

Characterizing theories of law and adjudication clarifies differences among versions of coherence and noncoherence theories of law. With the exception of pure coherence

natural law theories that assert that law is morality and justice, and that morality and justice are constituted by coherence, all coherence theories of law contain at least one noncoherentist aspect, and some contain more than one. This noncoherentist aspect consists in what Raz calls “a base” which is to be made coherent by some reconstructive method (Raz, 1992, p. 284). Almost all agree that bases include constitutions, statutes, and precedents. Controversy arises over: (1) the best characterization of constitutions, statutes and precedents; (2a) what else the base of a possible legal system could include, (2b) what else the base of some particular legal system does include; and (3) what method of coherent reconstruction (a) could in possible legal systems, or (b) does in some actual jurisdiction, produce valid law as output, that is, in what the coherence relation consists. Analyzing differences between coherence theories in these three ways is often useful, but the classification will not bear intense scrutiny. The categories are not entirely distinct. For example, natural law coherence theorists may be conceived as adding morality to the base, or as employing a method of reconstruction combining moral and coherence considerations.

Disagreements will arise, for example, about the best characterization of enactments and precedents: Does the base contain only present institutional acts or also past institutional acts? If so, how far back? Is there a principle of desuetude for statutes? Does the base include hypothetical acts which courts, but not legislatures, are prepared to make? Are hypothetical acts better accounted for under the method of reconstruction? Are precedents the words in reporters? The outcomes of cases given the actual facts? The outcomes given the facts as described by the court, plus the *ratio decidendi* and justifying principle provided by the court? Are dissenting opinions part of precedents?

Controversy exists over what, besides enactments and precedents, is in the base. Does it include conventional or critical morality? If the base includes conventional morality, is it constituted by judge’s, the legal profession’s, or society’s moral views? If the base includes conventional or critical morality, yet there is no foolproof method for determining what morality requires, what methods may courts legitimately employ to discover moral principles?

As developed in greater detail below, theories differ over whether reconstruction aims at coherence alone, or also at moral and political values. If other values are included, how are they combined with coherence? The best combination of coherence and morality? The morally best reasonably coherent theory? The most coherent, reasonably moral theory? *The most important differences are over what coherence itself means.* Is a theory coherent if its principles imply the base of legal sources? Justify the sources? If the principles and sources form a unified theory? If the base is derivable from a single principle (monism)? If the theory provides an answer to all possible legal questions (comprehensiveness and right answer thesis)?

Nonlegal coherence theories also require bases. In moral theory and the theory of justice, employment of an individual or society’s moral beliefs as a base to be coherently reconstructed by reflective equilibrium, as in Rawls, appears ineffective. Unless it is reconstructed according to a justified coherence theory of truth, the reconstructed set appears as likely to reflect biases and socialization as moral truth.

Employment of a base of beliefs in coherence theories of truth and justified belief may illegitimately sneak in a realist or foundationalist element. By contrast, employment of

a base of legal sources is innocuous. It serves to secure a coherence theory, or any legal theory, to authoritative sources of law (Raz, 1992, p. 291 and n. 29). Only extreme natural law perspectives might question the legitimacy of a base in law.

Raz's parsimonious positivist sources thesis (1979, ch. 3; 1985) maintains that law consists of source-based law only: constitutions, statutes, and precedents. Since legal authorities may generate an incoherent mishmash of legal sources, the sources thesis is not a coherence theory.

A positivist pure coherence theory maintains that, in addition to the base, law includes those principles and policies which cohere with – by implying – the base. Finally, anything that follows from the principles, policies, and the base is law (cf. Sartorius, 1975, p. 192). This theory parallels Rawls's early theory of reflective equilibrium (1957, described above) with the base of enactments and precedents playing the role which considered convictions play for Rawls. Like considered convictions in Rawls's early work, enactments, precedents, and other sources of law have priority over abstract principles (and policies) – the principles are chosen to fit (by implying) the sources of law. The coherence in this theory is a version of unity. The underlying principles and policies imply the base and are in that way internally related to it.

Quine's underdetermination thesis implies that many sets of principles and policies will imply the base. This suggests that where coherence is understood as the principles implying the base many sets of principles will be equally coherent because they each imply the base. Yet the theory supplies no method for choosing among those multiple sets of principles and policies. To minimize indeterminacy, coherence theories might be motivated to employ noncoherentist elements such as morality as a tie breaker between equally coherent theories. That is, morality could be a second element in a lexical ordering (defined below).

Other coherence theories may define law as the best combination of coherentist and other considerations. Coherence is one element among many. For example, law consists of the best combination of unity, comprehensiveness (coherentist elements) and morality (a noncoherentist element). Where coherence is one factor among many, however, theories of law may be incommensurate and indeterminate. One theory is more unified and comprehensive, another is morally preferable. Unless there is a metric which balances these values against one another, neither theory is better than the other. Nor are they equally good. In mathematical jargon, this coherence theory is only partially ordered. Dworkin chooses a yet more complex relation between coherentist and noncoherentist aspects: law is the morally most appealing of all those sets of principles and policies which explain or imply the legal base.

Burton's positivist theory (1985, 1995) takes a more expansive view of the sources of law, including within it dissenting opinions, legal scholarship, and conventional moral beliefs within the legal profession, in addition to constitutions, statutes and precedents. Law, for Burton, is the most coherent reconstruction of the legal community's beliefs and dispositions about what would lead to order and justice.

Eisenberg's positivist theory of the common law (1988) is worth exploring at greater length than can be provided here. His discussions of overruling (pp. 104–45) and of what constitutes legally acceptable evidence that a proposition has social support (pp. 16–19, 29–32, 40–2) are especially valuable contributions, and deserve more attention than they have received. Eisenberg begins with a base of sources similar to

Burton's, although he looks beyond the legal profession to society at large to determine conventional moral norms and policies.

Eisenberg argues that conflicts among moral norms may be resolved by reflective equilibrium, on the basis of which norm fits better with policies, or determining which norm fits better with doctrinal propositions. The theory provides for two more important roles for coherence as a regulative ideal. First, the social propositions should imply the valid doctrinal rules. Second, the body of valid legal rules should be consistent in the sense that the principles, policies, and the like, which imply those doctrinal rules, must be consistently applied. Although in ideal theory doctrinal propositions would reflect social propositions perfectly, and be as close to being implied by them as is possible in normative practices, in the real world, this will not be so. Eisenberg adds an overarching noncoherentist element: doctrinal propositions will and should lag behind changes in social propositions in consequence of rule of law and other conservative principles that ground a principle of doctrinal stability, thereby slowing the evolution of doctrinal propositions toward conventional morality and policy.

The most famous and influential coherence theory of law and adjudication, Dworkin's natural law theory, is discussed below. A pure natural law theory holding that law is critical morality, political theory, or justice is coherentist to the degree – if any – that its theory of morality, political theory, or justice is coherentist, and not otherwise.

## What Coherence Is

Beyond providing a base, coherence theories must explain how to modify the base to produce law as output. Put differently, a coherence theory must specify in more detail what it means for legal norms to cohere or fit together. Coherence theorists agree that some – but not extensive – modification of the base is permitted.

To understand coherence in law, techniques thought to promote coherence, or properties or states thought to be aspects of, explanations of, or to be necessary or sufficient for coherence, will be examined. The discussion will focus on justificatory coherence within normative theory, particularly ethics and law, although concepts more appropriate to the theory of knowledge will be discussed in passing. The primary aim throughout is to serve as background for the later taxonomy of coherence in normative theory, although much of what is said here applies more generally.

First, three possible necessary requirements for coherence – consistency, comprehensiveness, and the right answer thesis – will be described and claimed to generally enhance coherence. Still, comprehensiveness and the right answer thesis will be found not to be necessary for coherence, while consistency is necessary in ideal theory but not in practice.

Second, seven techniques aimed at reducing or resolving conflicts among principles of theories, such as pre-emption and reflective equilibrium (described above) will be examined. Characterized thinly as bare or mechanical methods for resolving conflicts, the techniques appear relevant only to consistency, comprehensiveness, and the right answer thesis dimensions of coherence. The appearance is misleading because the conflict-resolution techniques can be articulated and justified. For example, in the

United States, federal law expressly or implicitly intended to cover a field pre-empts state law because: (1) the ultimate authority, the US Constitution, so provides; (2a) Congressional power to create uniform national law is essential or helpful to sound policy and moral ends, and (2b) state authority to develop law in the absence of Congressional pre-emption is also desirable. So articulated and justified, federal pre-emption of state law may be part of a coherent unity of doctrine exemplifying a unified spirit in which abstract principles of federalism imply (and are thereby internally related to) principles of pre-emption, which in turn imply pre-emption rules and outcomes in concrete cases.

Finally, the core concepts of coherence – monism and unity (internal relations) – will be examined.

*Consistency at a time* is necessary *in theory* for normative coherence, but is not sufficient for it. By normative coherence is meant a coherence theory in a normative area where the coherence requirements do substantial justificatory work. *Consistency over time* is not necessary for a coherence theory such as Dworkin's, which permits – indeed requires – change over time. Insofar as common-law adjudication is one of the features to be explained by coherence, the theory should not demand consistency or coherence among the principles of the theory at different times, but only a coherent path of movement over time (Kress, 1984). Finally, although consistency at a time is necessary in theory, or metaphysically, for coherence, it is not necessarily required in practice. Although we aim for consistency in the long run, modest skepticism may recommend that we do better day-to-day if we retain some inconsistencies until we are able to resolve them satisfactorily, rather than force consistency via ad hoc solutions. Given the difficulty of developing consistent, coherent, and complete theories, and the value of experimentation, especially in a federal system, consistency (and coherence) are arguably less desirable and necessary *in practice* than as a regulative ideal (Sayre-McCord, 1985, pp. 181–7), despite Rawls and Dworkin's insistence that coherent explanations articulating underlying principles are required of governmental actors to minimize the prospects for bias, self-interest, and deceit, and thereby to help legitimize the use of force and coercion (e.g., Dworkin 1978, pp. 162–3; but contrast, Dworkin, 1986, pp. 217–19).

Some claim that coherence requires that a theory must be *comprehensive* and cover the entirety of the relevant field, supplying an answer to each question within its scope, including, where appropriate, the answer “indeterminate.” For example, a theory might hold abortion legal or moral in the first trimester, and illegal and immoral in the final trimester, but indeterminate in the middle trimester because at that stage of gestation it is indeterminate whether the fetus has a right to life. This perspective is unduly restrictive. Comprehensiveness improves coherence, but is not required for all conceptions of it.

More controversial yet is a third possible requirement of coherence, the *completeness* requirement. Called by some the “right answer thesis” and by others the “bivalence thesis,” it maintains that each proposition within the scope of the theory is either true or false, with no gaps, no unanswerable questions, and no indeterminate truth values. A normative theory may be substantially coherent, even while leaving some vague, borderline, or other cases unanswered. The right answer thesis is not necessary for



coherence. Nonetheless, it cannot be denied that in certain circumstances, right answers will enhance coherence, while gaps will undermine it.

Shifting focus to methods for eliminating or resolving conflicts and deciding concrete cases, one coherentist method is *reflective equilibrium*, discussed above. A second coherentist technique weighs and balances norms against one another. *General equilibrium* – a third route to coherence – succeeds when things fit together even when individual elements are warring; an overall theory may make sense although its principles conflict (Hobbes, 1962, pp. 105, 110, 164, 229; Sartorius, 1975; Dworkin, 1986, p. 183).

A fourth coherentist method is *lexical ordering*. In a lexical ordering, the first principle must be completely satisfied before the second principle is considered; the second must be completely satisfied before the third is considered; and so on. In this way, Rawls asserts, a lexical ordering avoids weighing and balancing and gives earlier principles “absolute weight, so to speak, with respect to later ones” (1971, pp. 42–3, 60ff). Rawls ranks the principle of equal liberty before the difference principle distributing social and economic resources (1971, p. 61).

A fifth coherentist method is *scope*. By restricting some principles to mutually exclusive areas, concrete conflicts cannot arise. Each standard is limited to its own sphere of influence. For example, a jurisdiction might provide that the principle of equal opportunity governs official employment, while private employment is regulated by freedom of contract. Similarly, antidiscrimination principles might regulate government and public enterprises while freedom of association regulates private activities like private clubs.

*Pre-emption*, a sixth coherentist method, assists in avoiding conflict among standards. If occasionally, or always, when two principles conflict, one pre-empts the other over all or some portion of their range, potential inconsistency and incoherence will be avoided. In the United States, federal statutes intended to cover a field pre-empt state law on the same subject, thus (in principle) avoiding conflicts.

In their arguments that law is indeterminate, incoherent, and contradictory, critical legal scholars cite the lack of explicit meta-principles to adjudicate among competing principles and counter-principles (Kennedy, 1976, pp. 1723–4). A seventh possible way for a theory to achieve coherence is to encompass explicit *meta-principles* that resolve conflicts among principles.

The two most important aspects of coherence have been saved for last: *monism* and *internal relations*. The “single fountain” or monistic theory aims to avoid or resolve all conflicts by confining the theory to one fundamental principle from which all subprinciples follow. Utilitarianism is a well-known example of a single fountain theory.

In fact, monism does not guarantee the absence of concrete conflict. First, conjoining multiple principles into a “complex fundamental principle” will permit the conjoined principles to conflict as in any pluralistic theory, and there is no easy way to discriminate between true monistic theories and pluralistic theories in monistic dress. Even true monistic theories may yield conflicting directives under certain factual circumstances: “obey your parents” is the fundamental principle, but mother and father give inconsistent commands. Moreover, even when a monistic theory avoids conflicts, it might fail to provide right answers as a result of vagueness or a failure to be applicable under the circumstances.

Along with monism, the most important consideration in assessing coherence is the internal architecture within the theory – that is, the internal relations among the principles (and norms, rules, policies) of the theory. In its strictest version, internal relations (unity) require that each principle entail and be entailed by every other principle. Such strict versions of internal relations are implausible for most normative theory. Less strict versions of internal relations require that each principle entail or be entailed by some other principle or principles of the theory. Even less strict versions hold that each principle must justify or be justified by some other principle, explain or be explained by another principle, make probable or be made probable by another principle, or be evidence for or be supported by some other principle. These even less strict versions of internal relations may be called one-one versions, to distinguish them from the one-many or one-all versions. For example, one-all versions of internal relations require that each principle be related by some inferential, justificatory, or evidentiary relation not to a single other principle, but to all the rest as a whole. That is, the other principles, taken as a whole, entail, justify or support the principle in question.

Strong internal relations promote coherence by limiting the risk of multiple subject matter incoherence. An example of multiple subject matter incoherence is the following three sentences. Sally is smart. Two is the smallest prime number. Inflation is not a function of the money supply. These three sentences lack coherence because they are about too many different subject matters and are not mutually supportive.

Another version of internal relations is narrative: I came. I saw. I conquered (Balkin, 1993, p. 114).

Strong versions of internal relations have been out of style for half a century. Weaker forms have survived – for instance, in Dworkin’s requirement that the individual coherent principles underlying legal doctrine fit coherently with each other.

Internal relations as described above in either one–one or one–many versions do not guarantee coherence. Thus, it is possible that several subsystems of principles exist, where each member of each subsystem is related by the relevant inferential or justificatory relation to other members of that *same* subsystem, yet the different subsystems have at most weak or no relation to one another. In this way, internal architecture that relates principles one to one, or unidirectionally many to one, does not necessarily prevent multiple subject matter incoherence. Prevention of multiple subject matter incoherence is more likely if the justificatory–inferential relations among principles are reciprocal, holistic, and pervasive. The degree to which this obtains is one measure of the degree of coherence within a theory (Bonjour, 1985, pp. 97–8).

## The Characterization of Normative Coherence Theories

From here on, the discussion is limited to coherence in moral, legal, and political theory, and would not necessarily apply to coherence theories of knowledge or truth. The remarks that follow are not intended to be a complete and final definition of coherence in normative theory. Coherence is much too difficult a concept for that. There is a range of conceptions of coherence, not just one. What is offered here is a first approximation of a taxonomy of conceptions of coherence.

Referring to reflective equilibrium and concluding the discussion is inadequate to account for coherence in normative theories. The analytical tools described thus far provide the means for a richer, deeper, and more comprehensive analysis.

Moreover, characterizing varying conceptions, and how they differ, will advance efforts to assess their normative virtues. Distinguishing the subconcepts of coherence permits identifying those that are part of a particular conception of coherence, singly or in combination. Such identifications aid evaluation of whether a particular conception is morally legitimate, desirable, or partakes in any other normative virtue by determining whether the subconcepts it has induce those virtues.

As noted above, comprehensiveness and right answers enhance coherence but are not necessary for all forms of it. Consistency at a time is a theoretical but not a practical requirement for coherence. The core of coherence is monism and internal relations.

Three versions of monism shall be discussed. No claim is intended that other categorizations are unworthy of investigation. First, strict monism requires that the entire theory “flow from” one master principle so that each subprinciple is implicit in the master principle. “Flow from” means entailment, near entailment, or similar logical and theoretical relations. Moreover, the subprinciples must flow from the master principle together and in harmony so that they are an integrated whole. Weinrib’s formalist view that private law, especially tort law, is justified and made intelligible by the principle of corrective justice is a strict monism. Corrective justice holds that those wrongfully causing harm must compensate their victims. Weinrib (1988, 1995; see Article 20, legal formalism) claims that the principle of corrective justice explains, integrates, and harmonizes tort law’s bipolar procedure, breach, causation, and damages requirements (Kress, 1993, pp. 648–9, 659–61).

Second, there is moderate monism, wherein methods of reflective equilibrium, weighing and balancing, general equilibrium, lexical ordering, scope, pre-emption, meta-principles, and the like resolve competition and conflict among principles and counter-principles, thus achieving substantial or complete coherence and consistency. Moreover, some master principle or norm explains for each of the following subprinciples that are employed in the theory:

- 1 why reflective equilibrium eliminates some data and principles, keeps the rest, and adds others;
- 2 why principles and counter-principles are balanced as they are, why each has the weight (in context) it does (and what justifies the particular weighing mechanism employed);
- 3 why general equilibrium reaches stasis and makes the theory intelligible;
- 4 why the lexical ordering is ordered as it is;
- 5 why the various norms are limited in scope as they are;
- 6 why those norms which pre-empt others do so;
- 7 why the particular meta-principles employed for resolving conflict are appropriate; and so on.

In short, the master principle provides a *normatively intelligible explanation and articulation* of arithmetical and abstract methods and meta-principles for resolving conflict among principles. Such a master principle, in combination with the resolution device,

serves as the monistic principle, and as a functional substitute for *strict* monism. Yet it is not strict monism, because it allows for disharmony among subprinciples and for subprinciples that do not flow from the master principle. In near monism, a small number of principles irreducible to each other perform the function of the master principle.

By subtracting some articulateness and justifiedness, the second version of monism is transmuted into a third where resolution of concrete cases is accomplished via reflective equilibrium, weighing and balancing, general equilibrium, lexical ordering, scope, pre-emption, meta-principles, and the like, but without recourse to any articulated master principle. Nevertheless, the principles, norms, and conflict resolution devices must reflect a single, unified normative vision. This conception of monism is supported by pragmatist impulses and by atheoretical interpretations of Wittgenstein. Whether these are forms of monism is debatable. If, however, the resolution devices are interpreted as creating functional monism (plausible, perhaps, if they resolve almost all issues) and the normative vision is clear, version three may be monistic.

Ironically, the first two versions of monism are foundationalist in the respect of being built upon a master principle (except for near monism). Modern coherence theorists might reject this foundationalist imputation, claiming that the master principle is induced by the scientific method of hypothetico-deduction, that is, by determining which master principle (best?) implies the lower norms, as in Rawls's early version of reflective equilibrium, described above. A better perspective simply rejects the alleged opposition between coherence and foundationalism in *law*. Although foundationalism contrasts with coherence theories of justified belief (although even here sophisticated versions of either incorporate aspects of the other), the contrast is not universal: coherence theories of truth are generally compared to realist, correspondence theories, not foundationalist perspectives.

The concept of unity is close to monism in spirit, but it is distinguishable in form, focusing more on internal architecture among the principles of the theory. One way to look at unity is through the version of internal architecture employed. That perspective is more appropriate to theories of justified belief and will not be discussed here. Instead, a taxonomy halfway between that and the classification provided for monism will be explored.

First, unity might be provided by a single master principle that entails all the principles, and thereby relates each to the others in a normatively intelligible fashion. In weaker forms of this first version of unity, the single master principle justifies, explains, makes probable, is evidence for, or otherwise supports all the rest of the principles.

Second, the principles might be united by some form of reflective equilibrium, weighing and balancing, general equilibrium, lexical ordering, scope, pre-emption, meta-principles, or the like that is entailed (or, in weaker versions, justified, explained, made probable, or otherwise supported) by an articulated master principle.

Third, unity might be achieved by one or more of the techniques of reflective equilibrium, weighing and balancing, general equilibrium, lexical ordering, scope, pre-emption, meta-principles, or the like, without any articulated supporting master principle. In its strongest form, this unity would be a matter of entailment between the principles, each to every other. In a weaker version, each would entail or be entailed

by some other. Yet weaker versions would replace entailment with justification, or probabilistic and similar less-strict evidentiary relations. Finally, some minimal unity may be achievable by the above techniques without any evidentiary relations being created (or existing?) among the principles of the theory. The third version of unity may be understood as the second version with less articulateness.

Strong versions of monism entail some version of unity or internal relations. Theories exemplifying weak forms of version three for both monism and unity are, at best, weakly coherent.

Consistency (in theory but not practice) and at least one of monism or unity are clearly necessary for ideal coherence. It is less certain whether both monism and unity are necessary for coherence. But it is clear that, with consistency, they are sufficient for it. There is no single central concept of coherence, but instead many different conceptions of it. Stronger forms of monism and unity give rise to stronger versions of coherence.

### The Normative Value of Coherence

An important question about coherence that will only be discussed briefly here is whether a legal system exemplifying coherence or a coherent legal (or normative) theory is more morally legitimate, desirable, or respectful of individual rights than one which is not. Naturally, the answer will differ for different conceptions of coherence. Dworkin's claim that legal systems manifesting the version of coherence he dubs "integrity" better legitimizes law than less coherent legal systems will be evaluated, although the arguments employed are intended to apply broadly to other coherence theories.

Dworkin's early writings maintained that a legal proposition is true if it follows from that (coherent) scheme of principles that best justifies and explains the precedents, statutes, and constitution. His conception of coherence was a version of Rawls's mature method of reflective equilibrium in *A Theory of Justice*, emphasizing the requirement that the underlying principles must be consistently applied in justifying surface rules and reaching concrete judicial decisions.

Dworkin's mature theory differs slightly in a way that, as noted earlier, admits a second noncoherentist element besides the base and obscures its connection to a pure coherence theory (Kress, 1985, p. 378, n. 53). In Dworkin's later writings, a proposition is law if it follows from the morally most appealing set of principles that meet or exceed a (vague) threshold of fit with legal institutional facts (constitutions, statutes, precedents; Dworkin, 1978, pp. 340–1, 360). In yet later writings, he allows that the threshold is not an absolute floor: one may drop beneath the threshold for urgent or exceptional moral gains (Dworkin, 1986). Raz argues – somewhat disingenuously – that Dworkin may not be a coherence theorist because in *Law's Empire* the moral elements – justice, fairness, and due process – do all the work, leaving coherence (fit) idle (Raz, 1992, pp. 315–21, esp. 317).

Dworkin supported coherence in his early work with four main abstract arguments. The first three were arguments for his rights thesis that judges do and should decide cases on the basis of principle, not policy. The rights thesis imposes a constraint of

coherence on judges since Dworkin defined principles as requiring an equality – consistency in application – much stricter than that required of actions justified on policy grounds.

The rights thesis was defended by Dworkin on three main abstract grounds. First, Dworkin argues that the democratic principle that elected and politically accountable officials, and not judges, should make law has far more force against judicial decisions generated by policy than it has against those generated by principle. The second abstract political argument for the rights thesis is that it is unfair for the judge to create a new duty based upon policy and apply it retroactively because “then the losing party would be punished, not because he violated some duty he had, but rather a new duty created after the event” (Dworkin, 1978, p. 84; but see Kress, 1984). Third, Dworkin argues that the best explanation of the requirement of precedent that like cases be treated alike is that adjudication is restricted to arguments of principle because principle requires more consistency from case to case than policy does. In addition to the support provided for coherence by the argument for the rights thesis, Dworkin argues directly that the doctrine of political responsibility requires consistent, articulated rationales for government actions.

One objection to coherence theories of law, including Dworkin’s, is that they are path-dependent (Kress, 1989, pp. 5–53, esp. 20–6, 50–3) and lead to morally troubling retroactive application of law. Dworkin’s theory of legal reasoning is built on the proposition that litigants are entitled to the enforcement of pre-existing legal rights. One way in which Dworkin’s early work expressed this major claim was by presupposing that litigants have a right to have decisions determined by settled law. In Dworkin’s theory, settled law together with moral theory determines litigants’ rights and litigants’ rights determine the proper outcome. Thus, decisions are a function of, among other things, settled law.

Retroactivity is a consequence of legal rights being a function of settled law and upon the temporal gap between events being litigated and their eventual adjudication. Judicial decisions change the settled law. Often, if not always, the settled law will be changed between the occurrence of events being litigated and their eventual adjudication. In consequence, a litigant’s rights will sometimes also be changed. If changes in the settled law change the dispositive legal right, the litigant who would have prevailed given the legal rights existing at the time of the occurrence will lose because she no longer has the right at the time of the adjudication. The opposite is true of the opposing litigant. This is retroactive application of law (Kress, 1985, 1989; Alexander & Kress, 1995, pp. 296–301).

Hurley (1990), following a suggestion of Dworkin’s, objects that legal rights do not change in coherence theories when judges decide cases correctly, but only when judges make mistakes. This is a problematic conception of precedent. What could justify a doctrine of precedent that provides a reason to follow (and a right to equal treatment of) mistaken and unjust decisions, but no reason to follow correct, just ones (Alexander & Kress, 1995, p. 300)?

Raz (1985, 1992) claims that coherence theories are unable to satisfactorily account for the authority of law, and the proper role of legal sources within the law. Although Raz views the criticism as a structural, evaluative but not moral criticism, it could also be read as a moral critique (cf. Perry, 1995). Raz claims that, in general, legal

authorities are legitimate to the extent that they aid individuals in doing the right thing, that is, in acting in accord with the reasons that apply to them (normal justification thesis). This requires that legal authorities promulgate norms on the basis of the reasons and circumstances which apply to individuals (dependence thesis). Where legal authorities are better than individuals at figuring out what the applicable reasons require of individuals, individuals following the authoritative acts of legal authorities will act correctly more frequently than if they follow their own lights. But this means that once an alleged legal authority has been shown to be legitimate (generally by the normal justification thesis), then its authority is respected only if individuals to whom its decisions apply act on the basis of the authority's reasons and standards, and not on the basis of the reasons which applied to the individuals prior to the authority's utterance: authoritative utterances pre-empt dependent reasons (pre-emption thesis).

But coherence theories, including Dworkin's, are inconsistent with this conception of the authority of law. First, the most coherent account of the legal sources may be entirely original, thereby severing all connections with the reasons and norms uttered by legal authorities. Dworkin's conception cannot account for the mediating role of authority.

Moreover, it denies the pre-emption thesis. On Dworkin's theory, citizens deciding how to act must determine the morally best reconstruction of the authoritative sources of law. But this means that the identification of law depends upon the very considerations which applied to the individual before the authoritative act and which law is supposed to settle. In summary, "Coherence accounts take the base [of legal sources] because it is too absurd to disregard it; then they strive to ignore it and to explain the law in a way which transcends the inherent limitations of the workings of human institutions, and by transcending them they misunderstand them" (Raz, 1992, p. 297).

An urgent question about the moral value of coherence is whether it promotes the moral legitimacy of legal systems exemplifying it. By coherence, which he now calls "integrity," Dworkin means at least:

- 1(a) the principles underlying official government acts must be individually coherent and intelligible;
- 1(b) the individual principles must be consistently applied, with applicable principles receiving similar weight in relevantly similar situations;
- 2(a) the principles, as a whole, must be consistently applied, with like situations being treated alike;
- 2(b) the principles as a whole must fit together into a single and comprehensive vision of justice.

Moreover, the justification for each of (1)–(2) is the same: "consistency in principle ... requires that the various standards governing the state's use of coercion against its citizens be consistent in the sense that they express a single and comprehensive vision of justice" (Dworkin, 1986, pp. 88, 116–17, 134, 166; Alexander & Kress, 1995, p. 311). The justification for coherence generally and of the specific conception of it embodied in (1)–(2) is importantly connected to the nearly universally accepted internal point of view that law is a matter of practical reason, intended to provide guides to

conduct for its subjects, and grounds for criticism of violations of its commands. While an external observer might be able to understand a foreign legal system as a patchwork quilt of conflicting norms resulting from the respective fortunes of opposed ideologies, someone adopting an extreme internal point of view cannot do so. She regards legal norms as valid and as guides to her behavior and judgment. Yet she cannot accept the norms as her own unless she can regard the norms as “valid and justified, and [she] cannot regard them as justified unless they form a coherent body” (Dworkin, 1986, p. 189; Raz, 1992, p. 293).

Dworkin gives several arguments explaining how the form of coherence exemplified in the theory he calls “law as integrity” legitimizes law as integrity. The argument that he develops at greatest length, and on which he relies most heavily, is the argument from community. To understand this argument, we must recall that for Dworkin, integrity involves discerning principles that underlie and justify governmental acts (such as legislation and judicial decisions) and following those principles in making future governmental decisions (such as decisions in hard cases at law). Dworkin claims that “[A] political society that accepts integrity as a political virtue becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force” (1986, p. 188).

Dworkin’s argument for this proposition is difficult to decipher; what follows is a reconstruction. Dworkin begins with the claim that the major traditional grounds for political legitimacy and political obligation (consent, tacit consent, fair play, duty to uphold just institutions) do not succeed in bestowing legitimate authority on governments to coerce and use force; nor do they generate moral obligations on citizens to obey the law. An interpretive reconstruction of the argument from fair play, however, is sufficient. Dworkin’s new interpretive version of the argument from fair play reconstructs political obligation as a form of associative obligation – that is, the obligations arising within groups or communities such as families, law faculties, and clubs. For Dworkin, a bare political community, such as the United States, is a true community giving rise to true associative obligations only if the obligations arising from the community have four characteristics, of which two are relevant here:

- 1 each must be thought of as flowing from an underlying and pervasive concern for the other members; and
- 2 each must be predicated not only on concern for the other members, but on equal and reciprocal concern.

Of particular concern here is the first requirement that particular obligations must be thought of as flowing from a deep, underlying, and pervasive concern for other members of the community, because Dworkin argues that a community that accepts integrity as political ideal is better able to meet this requirement than a community that does not. This first requirement tracks Dworkin’s early criticism of legal positivism that besides rules the law includes those principles that underlie and justify the rules (1978, pp. 14–45).

Dworkin claims that citizens’ political obligations clearly include those obligations laid down in explicit rules of law. To satisfy the first requirement, however, citizens’ obligations cannot be thought of as exhausted by the explicit rules. Citizens must think



of themselves as having whatever obligations and rights can be shown to flow from the values of equal concern that underlie the explicit rules.

Citizens can infer such inexplicit obligations and rights from the values underlying the explicit only if the explicit rules are coherent. If the explicit rules are incoherent, the only principles and values that can be said to be underlying them will be similarly incoherent, or even contradictory. This incoherent or contradictory foundation would frustrate citizens' attempts to successfully infer, and engage in dialogue about, what their inexplicit obligations and rights are. If individual principles are incoherent or unintelligible, citizens will not be able to apply them. If the individual principles are not consistently applied, but receive different weights in similar situations, their weight in novel but similar situations will be indeterminate. If the principles as a whole are not consistently applied but principles and counter-principles with the same pattern of relative weights sometimes are decided in favor of the principles and sometimes in favor of the counter-principles, new situations with the identical pattern of opposing norms will be unpredictable and indeterminate. If the principles do not fit together into a single and comprehensive vision of justice, then they contain all, or part, of contradictory visions that cannot be reconciled, or they are incomplete or incoherent. Once again dialogue and decision making will be hindered or prevented altogether. Thus, the political system can be legitimate only if its explicit rules and the underlying principles are coherent.

There are many ready avenues of attack of this reconstruction of Dworkin's text. For example, the duty to uphold just institutions, in addition to the argument from fair play, may legitimize government. But let us ignore these issues.

For Dworkin, an act's manifesting integrity does not insure its justice and legitimize it. The relationship is more complicated than that. Rather, a governmental act justified by justice, charity, efficiency, or other grounds, is permitted and legitimate only if that act can be shown to flow from, or cohere with, other actions taken in the name of the community in the past (Dworkin, 1986, p. 93; Alexander & Kress, 1995, pp. 312–14). But this constraint of coherence is unattractive if it prevents a government that has so far limited itself to promoting the welfare of its citizens from broadening its horizons to doing justice, or offering its services as an international mediator, or engaging in charity, unless it can engage in intellectual contortions demonstrating that these new roles cohere with prior governmental acts.

More importantly, it is not true that when a new initiative or incoherent act is taken, this disrupts the ability of citizens to engage in dialogue about or judges to make inferences about what the law now is, thereby undermining law's legitimacy. For example, suppose that until now a jurisdiction has operated on a color blind antidiscrimination principle. Proponents of affirmative action now convince the legislature to vote, or a court to hold, that affirmative action for some historically discriminated against group is required. The defender of integrity will allege that the law has now become incoherent in a way that diminishes the ability of citizens and officials to coherently work out the law's implications. But the defender of affirmative action may respond that the new affirmative action law brings along with its own set of underlying principles, on the basis of which dialogue and inference about the law's commands should proceed. There is no loss in the ability to engage in dialogue; rather, the principles justifying affirmative action have now replaced the principles of color blindness in making authoritative

determinations. The Dworkinian conception of coherence does not legitimate law better than following the demands of morality and justice. (For a fuller development of the argument, see Alexander & Kress, 1995, pp. 308–26.)

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## The Welfare State

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What are the proper functions of the state? One answer is the facilitation of decisions made by autonomous individuals, coupled with prevention of the use of force or fraud by insufficiently socialized individuals and provision of a “common defense” against foreign enemies. This answer underlies the classical-liberal, nineteenth-century theory of the “night-watchman state,” limited to enforcing private contracts, providing protection against those who violated basic legal norms, and defending the society from hostile incursions. Contemporary theorists of the minimal state would presumably include within the state’s proper ambit the provision of certain “public goods,” a special set of goods – the usual examples are national defense or the building of dams to prevent flooding – whose enjoyment cannot be limited only to those specific individuals who wish to purchase them. Instead, precisely because there is no effective way to prevent nonpurchasers from enjoying what they did not pay for, they become “free riders.” As a consequence, most economists would argue, there is underinvestment in the goods in question because of the reluctance of investors to subsidize the free riders. The answer to this problem is to force potential free riders to pay their “fair share” through compulsory taxation. For most economists, though, the category of true “public goods” is relatively restricted, and the state’s domain can remain quite limited. Moreover, the taxation and subsequent spending on public goods is in no way redistributive, since by definition the potential “free riders” are compensated for their taxes by the supply of what is stipulated to be a valuable good.

Such views about the minimal role of the state are historically linked with the intellectual development of free-market economics and the economic rise of capitalism. As Gilbert (1983, pp. 4–5) has written, “Capitalism encourages competition and risk-taking behavior,” with victory going to those who are the beneficiaries of both their talents and the sheer luck of market vagaries. In turn, however, “misfortune and failure can lead to harsh consequences,” for “[t]here are few market mechanisms to mitigate the consequences of accident, illness, ageing, and vicissitudes of industrial society.”

As a matter of empirical fact, *no* state has ever adopted a completely minimalist role, however strong its advocacy by such proponents of *laissez-faire* as Herbert Spencer. Whatever the power of that vision, reflected today in the thought of economists like Milton Friedman or the philosopher Robert Nozick (not to mention political leaders like

former Prime Minister Margaret Thatcher in Britain and Speaker of the United States House of Representatives Newt Gingrich), it has obviously not occupied the field unchallenged. Indeed, almost all Western states, especially in the twentieth century, have adopted some version of a “welfare” rather than a “night-watchman” state.

One must recognize, though, that even most devotees of the “welfare state” have only limited notions of the citizen’s “welfare” that is a proper concern of the state. Should the state be concerned with the religious salvation of its members? A tenet of the political liberalism identified with John Locke and his later American followers like Thomas Jefferson was that getting right with God was the responsibility of each individual, with the state having no role to play. Few contemporary adherents of a “welfare state” have been critical of this absolutely central aspect of political liberalism, even though proponents of a more traditional tutelary state might well argue that *nothing* could provide greater welfare to the citizenry than the state’s firm guidance of the recalcitrant in the paths of eternal life or, at least, the avoidance of sin. Similarly, an Aristotelian might argue that the state should be concerned with the *virtue* of its members and act consciously so as to mold in them a sufficiently virtuous character. Although contemporary debates about the role of the state in, say, regulating pornography or sexual conduct or inculcating in the young the precepts of virtuous living are usually not couched as debates about the reach of the “welfare state,” they could well merit that description under a broad conception of that term.

Most critics of the minimal state, however, especially those persons identified with the political left, have accepted the liberal notion of state neutrality in regard to basic questions about what counts as a life well lived. Critics have therefore focused on other questions, especially those involving the *distributive justice* of the allocation of economic resources found within a given society and the state’s role, if any, in rectifying ostensible maldistributions.

Although any inquiry into the demands of “distributive justice” necessarily has many dimensions, two in particular have tended to frame much of the debate, especially since the publication of John Rawls’s extremely influential *A Theory of Justice* (1971). One involves the *equality* of distribution and implicitly criticizes, or at least asks for justification, of any deviation from equal distribution of resources. Another, quite different, approach accepts with relative equanimity inequality of resources; it asks, however, if even those with the least resources are assured some set of basic goods, such as food, clothing, or shelter, and a reasonable opportunity to try to achieve their own conceptions of the good life.

A pure egalitarian might be upset that the millionaire has a yacht while the ordinary citizen has, at most, a motorboat, or that only the millionaire would be able to achieve a vision of life that included a great deal of foreign travel. Someone focusing more on the satisfaction of “minimum needs” or “minimum just wants,” however, might find that unproblematic, though concerned about those who lack all access to *any* kind of transportation or those who seem unable to realize even the most modest of their visions of a good life. In fact, most theorists of the welfare state are in the second camp, emphasizing the dire economic straits of those who lose out in the unfettered competition of the liberal market and end up with so few resources that they cannot afford to pay the market price for even “basic” needs. Or, what is much the same thing, these theorists have rejected the justice of a state that allows forcing persons who need

such resources to have to accept the most onerous of labor conditions, including child labor, 70-hour work weeks, subjection to constant risk of dangerous accidents, and the like, as an alternative to starvation or other similar privation. These critics therefore resist the vision of a minimalist state that is indifferent to the fate of the poorest among it.

Although some critics of the minimal state rejected capitalism itself and embraced some variety of socialism, more moderate – and certainly, in the United States, more numerous – critics accepted the basic desirability of capitalism and free markets as ways of generating incentives and efficiently allocating scarce resources; at the same time, though, they wanted to limit the costs of failure in such a society. They therefore endorsed the provision of a “safety net” that assures even those at the bottom of the class structure with a tolerable set of resources.

Historian Asa Briggs (1961, p. 228) describes the welfare state as one “in which organized power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions”: (1) guaranteeing members of the social order “a minimum income irrespective of the market value of their property”; (2) in effect, insuring everyone against the particular kinds of insecurities linked with “social contingencies” such as sickness, old age, and unemployment; and (3) “ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services.” All of these present difficult problems of definition, not to mention that some generate considerably more controversy than do others.

The first two categories, for example, can easily coexist with the acceptance of considerable inequality of resources and the linked ability of those with more property to purchase better goods and services than those with less. The last category, though, seems to be considerably more egalitarian in its thrust insofar as it would require that even those with minimal or no resources receive “the best” of at least some set of social services; this entails that even the millionaire, for all of his freedom to purchase yachts while the rest of us are limited to motorboats (or worst), would be unable to use his market power to purchase better supplies of at least some goods. Michael Walzer (1983) is perhaps the best known political theorist to have sketched out such a position. Markets, according to Walzer, are completely appropriate structures to allocate some goods, but are, concomitantly, almost completely inappropriate in regard to others. Should, for example, a millionaire be allowed greater access to lifesaving treatment than a pauper, even if we gladly allow greater access to exotic vacation spots? Walzer believes not, even as he accepts the justice of the latter.

What might explain the adoption of a “welfare state”? One answer is ruthlessly pragmatic, emphasizing the “buying off” of those at the bottom end of the income ladder lest they become sufficiently discontented to engage in crime or even rebellion (see, e.g., Posner, 1986, p. 439). At a more theoretical level – given that one response to the pragmatic argument is simply to adopt more severe mechanisms of punishment – one’s support of a welfare case seems to depend in significant measure on one’s propensity to attribute responsibility to individuals for their fate. If everyone’s bundle of resources, at the end of the day, is a function of his or her own uncoerced and informed decisions, then it is hard indeed to figure out why those who choose to behave in foreseeably counterproductive ways, as by refusing to learn certain job skills, should be

entitled to state-mandated redistribution of resources from their more successful fellow citizens. The parable of the ant and the grasshopper comes quickly to mind. Particularly charitable persons might, of course, choose to contribute for the relief of those who are downtrodden by virtue of their own bad decisions, but this is obviously different from state compulsion.

To the extent, however, that the distribution of resources is less attributable to personal choices – that is, even persons with excellent character diligently doing “the best they can” seem unable to prosper at all, because their carefully honed job skills become irrelevant owing to market vicissitudes – then it seems at best heartless and at worst manifestly unjust to turn away from their plight and leave them to the vagaries of private charity (especially if private charity does not, in fact, suffice to alleviate the plight of all with “just claims” to aid). Surely the easiest way to make this point is by reference to young children; no one argues that 3-year-olds are responsible for their own conditions of privation. There might, obviously, be great contention about exactly what ought to be done. On the one hand, one might support direct income grants to the parents to purchase goods for the child; on the other, if one attributes responsibility for the inadequate conditions to the parents themselves, one might want more active intervention in the parental setting or even support placing the child in a state-run institution. All alternatives, though, concede that the state cannot properly remain indifferent to the welfare of the child. Similar analyses might be offered in regard to others deemed “childlike” by the society, including, for example, the severely mentally retarded.

Far more controversial, obviously, are “normally functioning” adults. Are *they* properly viewed as responsible for their own circumstances in life or, on the contrary, as more hapless (and sometimes helpless) victims of fate? There can be little doubt that the rise of the welfare state was linked with the adoption of more general theories of society that found agency more in impersonal structures and less in the particular individuals living within them. If economists, generally speaking, with their predilection for images of “rational actors” making best use of their bundle of resources in order to maximize their individual (and incommensurable) utilities, provide the ideological underpinning for the free-market and minimal state, then sociologists, generally speaking, with their own images of “the individual” as simply a product of surrounding socioeconomic structures, provide similar underpinning for the interventionist state and its attempts to check the consequences of leaving these social structures unregulated.

Indeed, a number of important thinkers associated with American legal realism – and very much influenced by sociological critiques of liberal individualism – wittingly criticized the very image of “unregulated” or “natural” structures. They emphasized, for example, that the very notions of private property were the product of distinctive social formations that enjoyed the coercive power of the state to enforce certain conceptions of property. Other conceptions would have resulted in distinctively different patterns of allocation. The millionaire, being the beneficiary of state regulatory largesse rather than the possessor of truly “private” property – the realist critique savaged the general distinction between public and private – could not really complain if the state changed its mind and decided to redirect its largesse elsewhere, even at the cost of reducing the millionaire’s set of legal entitlements.

Although the most dramatic instances of the modern welfare state often involve direct transfer of income from taxpaying “haves” to “have-nots,” it is important to realize that earlier instantiations of the welfare state were more likely to be limited to self-conscious *regulation* of the market place in the interest of those who would otherwise remain unacceptably deprived of necessary resources. Examples of such regulation include minimum-wage and maximum-hours laws, safety regulations, protection of labor unions, and the like. Economists could argue cogently that almost all such regulation, if carefully analyzed, involved income transfers, even if they did not take the direct form of receipt of checks or goods from the state. Instead, for example, increases in minimum wages would generally be passed along to the purchasers in the form of increased prices for goods and services, though some of the increase was paid for in diminished profits by the employers. Indeed, some costs were even borne by those marginal workers who lost their jobs entirely because of the inability of the employer to continue employing them at the higher rate. Economists, especially, delighted in pointing out that this last group was scarcely helped by minimum wage laws and that their dire circumstances might even be worse than before. The fact, though, that such redistributions were not reflected in governmental tax bills or spending budgets offered a certain kind of political insulation absent once the welfare state had to be financed through taxation and acknowledged government expenditures in regard to direct governmental expenditures.

In the American context, almost all jurisprudential questions mutate into debates about the meaning of the US Constitution, and this is certainly true in regard to the welfare state. The first question that was raised, historically, was whether the Constitution even allowed a welfare state, with its provision of what Gilbert has described as “a sort of communal safety net for the casualties of a market economy.” The US Supreme Court, in a remarkable decision (*Coppage v. Kansas*, 236 US 1 [1915]), suggested that the Constitution was basically inhospitable to any attempts to redistribute resources. “[W]herever the right of private property exists,” said Justice Pitney for the majority, “there must and will be inequalities of fortune ... [I]t is self-evident that unless all things are held in common, some persons must have more property than others.” Pitney referred to “the nature of things” as making it “impossible to uphold ... the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise” of the ability to work one’s will on the world that having more property than others brings one. *Coppage* did not involve direct redistribution of income. Direct redistribution was present, though, in an act of the Ohio legislature offering modest sums to “worthy blind” persons. The Ohio Supreme Court (*Lucas County v. State of Ohio*, 75 Ohio St. 131 [1906]) did not hesitate to strike it down:

If a bounty may be conferred upon individuals of one class, then it may be upon individuals of another class, and if upon two, then upon all. And if upon those who have physical infirmities, then why not upon other classes who for various reasons may be unable to support themselves? And if these things may be done, why may not all property be distributed by the state?

This quasi-syllogistic, “slippery slope,” style of reasoning was obviously thought to be unanswerable. The prospect of the state’s redistributing “all property” from haves

to politically favored groups of have-nots was sufficiently frightening to counsel precluding even the most modest redistributions.

To be precise, decisions suggested that redistributive regulation, taxation, and spending would be tolerable if and only if politically unaccountable courts were themselves persuaded that the legislation was truly in the public interest and not simply a “naked preference” for the political friends of the legislative majorities. Though courts in fact sometimes upheld measures, they often did not. Legislative decision making took place in the shadow of potential judicial invalidation.

The New Deal revolution of 1937 brought this era to an end, and the state was given immense discretion in regard to decisions to regulate, tax, or spend. Judicial oversight of the “public purposes” underlying these decisions was reduced to what courts themselves described as “minimal” scrutiny leaving legislatures basically free to redistribute as they wished. By the late 1960s, scholarly debate had shifted from whether the welfare state was permitted to whether it might even be *required*. Thus Harvard law professor Frank Michelman, acknowledging Rawls’s influence on his own thought, suggested in a widely noted, aptly named, article, “On Protecting the Poor through the Fourteenth Amendment” (1969), that the Constitution was best read as guaranteeing provision by the state to all citizens of some set of “minimum just wants” should they not be able to attain these goods through their own efforts.

Although the Supreme Court then dominated by a liberal majority led by Justice William Brennan seemed open to views like Michelman’s, any such hopes – or fears – were dashed in the early 1970s. Four new justices appointed by Richard Nixon joined other moderates already on the Court in rejecting Brennan’s expansive views and adopting instead a considerably more cautious notion of constitutional meaning. By 1990, it was crystal clear that the Supreme Court did not read the Constitution as requiring the state to alleviate any particular suffering, however dreadful, that it could not be viewed as causing. This obviously raises important problems summarized as the “act – omission” problem: Are overt acts causing some harm X truly distinguishable from an omission to act in a situation where the omission will foreseeably tolerate the occurrence of X? Few questions are thornier philosophically, and the answers to few philosophical questions are so fraught with implications for one’s very notion of the reach of the state. In any event, the Supreme Court has adopted a quite restrictive notion of causation and, therefore, a quite latitudinarian approach to state indifference to those without resources.

Even if the Court rejected arguments that a redistributive welfare state was constitutionally required, this did not in any way mean that the growth of the welfare state came to an end. A host of new programs continued to be passed by Congress and state legislatures. The point, though, was that passage of these programs involved the exercise of relatively unfettered political choice rather than submission to constitutional duty. Even in the 1990s and its atmosphere of worldwide political ferment in regard to issues surrounding the welfare state, few persons seriously suggest eliminating it entirely. Important constitutional-jurisprudential questions therefore remain, even if one concedes that the state, as a theoretical matter, need not have embarked on those programs it has, in fact, chosen to initiate.

As already suggested, especially important is the precise definition of what is meant by the welfare state. Politically, the term tends to be applied only to redistributions from



haves to have-nots, even though it is clear that many other redistributions, including many from have-nots to haves, also take place in any complex society. If one defines “welfare,” for example, as the provision to selected persons of certain important goods below their market price, then a perfect example of the welfare state would be a state law or medical school whose tuitions recapture from students only a modest fraction of the true cost of the goods and services provided them. Similarly, massive redistributions from New Jerseyites and Texans to Californians or Iowans who are the victims of earthquakes or floods can easily be viewed as examples of the modern welfare state in its “insurance” function, and often no effort is made to ensure that benefits go only to those who are without other funds (including the ability to have purchased private insurance against the readily predictable calamities of nature). Such expenditures, often directed at middle- or even upper-class constituencies, rarely draw the attention directed at those expenditures involving the poor. The same is true of what some theorists call “corporate welfare,” the use of tax funds in effect to subsidize business enterprise.

What are some other key issues? One involves a classic question of “the rule of law”: to what extent should welfare entitlements be clearly set out, as against being subject to a variety of discretionary decisions by administrators within welfare bureaucracies? To the extent that administrators need conform only with relatively vague “standards,” rather than clear rules, the recipients of welfare benefits may become dependent not only on the grants themselves, a much discussed topic in the 1980s and 1990s, but also on the bureaucrats whose acquiescence is necessary to receive a grant. Hayek (1944) condemned this aspect of the welfare state as “the road to serfdom.”

Linked with this debate about “rules” versus “standards” is one about how closely bureaucratic decision makers should be monitored by courts. This issue was debated in the United States in the 1970s particularly in regard to the right of welfare recipients to receive hearings *before* their welfare benefits were cut or terminated for alleged infraction of one or another rule linked with these benefits. Generally speaking, courts have ended up accepting as constitutionally sufficient legitimacy of *post*termination hearings, even though this entails that at least some individuals will be wrongfully deprived for some period of time – until the hearing can be held and the wrongful termination invalidated – of what, by definition, are necessities of life, because of bureaucratic error. The alternative, though, is tolerating other individuals wrongfully continuing to receive benefits that they are not by law entitled to. Especially if one assumes a relatively fixed overall budget for any given welfare program, there may be direct trade-offs between what is spent on achieving maximally fair procedures and how much is in fact distributed to the beneficiaries of the program. Would, for example, recipients rather receive \$100 and a posttermination hearing or \$95 and the possibility of a pretermination hearing? It is doubtful that either jurisprudential or constitutional reflection suggests a determinate answer to the question that would make it improper to allow the legislature to do whatever it thinks best.

Knotty issues surround what in the United States take the form of “equal protection” challenges to particular coverage of any given program. Consider, for example, a health benefits program. The first question likely to arise is who should (or, as a constitutional matter, *must*) be covered. Certainly the most common classification is that of income. Is it fair to limit coverage only to persons with less than \$X income, given the obvious

arbitrariness involved in saying that  $\$X + \$1$  is substantially different from  $\$X$  alone? This may take on even greater poignancy once one realizes that even  $\$X + \$n$  may fall well short of a “subsistence” income. Other classifications likely to be imposed involve residence or citizenship. Can the state legitimately limit its succor only to those who are part of its own social or political community? Both in the United States and Europe, part of the great debate about the future of the welfare state involves determining whether the state must be as generous to resident aliens, guest workers, and political refugees as to its own citizens.

Even if everyone agreed *who* should be covered, intense controversies would still remain about the *scope* of coverage. A committed egalitarian would presumably give the poor whatever medical care is available to the millionaire. Others might be less generous, limiting coverage to the most common, or most dangerous, illnesses, or pay for treatment only up to a certain amount. Might expensive heart transplants be limited only to those persons with sufficient resources to purchase them on the open market (or, more to the point, purchase insurance plans that would cover transplants)? Medical care presents only the most (melo)dramatic examples of the problems of classification attached to any redistributive welfare program.

A final question of great import concerns the *conditions* that can be placed by the state on the receipt of welfare benefits. Can, for example, health benefits be made contingent on recipients' willingness to stop smoking or grants to parents made contingent on their willingness to engage in certain disciplinary practices *vis-à-vis* their children? All other citizens would remain free to smoke or treat their children as they wish (subject to general laws against child abuse). No topic of theory or legal practice is more tangled than that of “unconstitutional conditions,” which attempts to set out the limits of the state's putting strings on those whom it benefits.

Almost all political systems in economically advanced countries throughout the world are embroiled in controversy about the maintenance of their own versions of the welfare state. To escape these controversies entirely requires either that the invisible hand of market capitalism, including the role of private charity, works to assure that everyone in the society, in fact, procures enough to meet basic needs or that society becomes so completely indifferent to the fate of losers that it accepts without question the presence of dying or starving persons in the streets for whom the state takes no responsibility at all. Otherwise, we must continue to wrestle about how to combine the advantages of a capitalist economy with due concern for those whom capitalism leaves without basic resources.

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## Legal Scholarship

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### The Contours of Legal Scholarship

Most academic disciplines suffer from some uncertainty about their boundaries, but legal scholarship, like several others, experiences basic problems with its core identity. The difficulty arises from the diffuse nature of both its topic and its methodology. The legal system is deeply intertwined with the history, politics, and sociology of any given era, while its theoretical analysis merges with more general issues of philosophy. Thus, scholars working in other disciplines will often deal with the law at length, and those aspiring to comprehensive treatments of society or moral systems are compelled to do so. Of course, both the social sciences and the humanities also overlap among themselves, but most are distinguished by fairly well-defined methodologies. Legal scholarship, in contrast, continually debates its methodology, with different groups of scholars advancing such divergent claims that there often seems to be no common ground. There is thus a serious question whether legal scholarship constitutes a discipline at all, or whether it is simply the body of work produced by university professors who teach in programs that prepare their students for careers in law.

In fact, legal scholarship possesses a distinctive intellectual agenda, defined by a combination of subject matter and methodology. It can be characterized as an internal, as opposed to an external, view of law. Historians, political scientists, and sociologists treat the law as one component of a social institution, to be studied for the ideas it embodies and the effects it produces. Legal scholars approach law as a set of significant normative statements that are intended to comprise a meaningful system. As such, its provisions should be described in detail and evaluated according to their moral or social value. This is a question of purpose, not of methodology, and does not imply anything about the use of other disciplines; it simply means that any methodologies or disciplines that are deployed will be devoted to an inquiry into the internal structure and meaning of the legal system. Similarly, it is a question of focus, not commitment or belief; several recent movements in legal scholarship, most notably critical legal studies, deconstruction and postmodernism challenge the meaningfulness of the legal system. But they remain within the field because this challenge is their central theme, and is leveled at other legal scholars who maintain the opposite position. As a contrasting example, judicial opinion studies, now coming back into vogue as a result of positive political

theory, begin from the premise that the legal system has no inherent meaning, that it is a set of beliefs or strategies without any internal relation. Consequently, these studies are generally recognized as political science about law, not legal scholarship.

Since legal scholars, as opposed to historians of law, tend to write about their own legal system, they often adopt an internal perspective without arguing for their choice or even indicating conscious awareness of it. This might suggest that their approach embodies nothing more than intellectual naivety. But as Alfred Schutz (1962, pp. 3–66) and others have suggested, an internal perspective allows the observer to actively participate in the social system – or more precisely, in the social practice being studied. It thus provides a separate mode of understanding that cannot be duplicated by external observation. The social scientist who views institutions from outside obtains insights into their causes and effects, but only inadequately understands the meaning that the institution possesses for its members. Because such meanings are components of a comprehensive lifeworld, as complex as that of an observer's, they cannot be fully understood unless the observer participates on the same terms as the members (Dworkin, 1986, pp. 13–15; Post, 1992).

To define the ambit of legal scholarship in this fashion places several significant subdisciplines, such as legal history, legal sociology, and legal anthropology outside its bounds. Epistemologically, this is probably the correct result, since these subdisciplines tend to derive their methodology from the nonlegal component of the diad. A more sociological approach would regard these subdisciplines as occupying an intermediate position, since that is the way that legal historians or legal sociologists and anthropologists regard themselves and are regarded by their colleagues. There is little clarification to be gained by choosing between these alternatives. The important point is that the internal perspective on law identifies the central subject matter of legal scholarship, the area of inquiry that comprises its unique preserve. Interdisciplinary efforts can then be located in a variety of ways without affecting the basic understanding of the field.

With this understanding of the field's contours, it is now possible to describe its content. For convenience, legal scholarship can be divided into descriptive, prescriptive, and jurisprudential modes. This division may seem overly dependent on Hume's distinction between "is" and "ought," which has come under attack from modern philosophers (Quine, 1953; Habermas, 1981). But it remains a working principle for organizing research and analysis in a variety of fields, and can serve as a means of organizing the body of scholarship involved, without making any strong assertions about qualitative differences among these categories of convenience.

### Descriptive Scholarship

Descriptive scholarship in law, most commonly associated with the treatise, involves an internal account of the legal rules that govern a particular subject matter. The individual subjects are defined by the legal system itself, being used on a daily basis of judges, attorneys, legislators, administrators, and other active participants. They include common-law subjects such as contract as well as more specialized, legislatively created ones such as environmental law. Within each subject, the description may be

either comprehensive or particularized. Comprehensive treatments are book-length, almost by necessity, and are generally characterized as treatises. More particularized treatments can be book-length as well, given the ever-increasing complexity of the legal system, and while they might more logically be called monographs, the term treatise applies to them as well. In addition, there are many descriptions of specific doctrines, or subareas, that are presented in article-length treatments.

The internal quality of these descriptions is displayed most notably in their doctrinal focus. They present the field as a coherent body of rules whose interrelationships are sufficiently precise to resolve a range of pragmatic issues. The treatise writer's task is to organize the rules in a systematic structure, identify the areas where one rule seems to contradict the other, and to define the boundaries between them. The reader of a treatise, whether from inside or outside the society whose law is described, will learn how that society carries out activities and resolves disputes in a specific area.

Most of the descriptive work in legal scholarship is not purely descriptive, but contains at least a sprinkling of prescriptive or normative statements. Such statements can be based on the author's particular views, but the most common ones reflect a general preference for the coherence of law. The treatise or article writer, having identified an area where the meaning of a rule is unclear, or where two rules conflict, will recommend that the uncertainty be resolved. The proposed resolution will generally be one that renders the law more coherent, either by resolving an internal uncertainty or by making an outmoded or idiosyncratic legal rule conform to the principles that inform the field as a whole. Wide-ranging legal reform efforts, including the codification of commercial law and the American Law Institute's Restatements of the Law, have been spawned by this approach.

Quite often, the treatise writer's preference for coherence reflects a genuine political or normative position. But this preference also appears to be generated by the methodology of descriptive scholarship; since an internal description only makes sense if the system of rules possesses coherence, a scholar working in this mode will naturally tend to favor changes in the law that increase that coherence. To say that these scholars are trying to ensure the continued vitality of their own enterprise ascribes to them both an overly cynical instrumentalism about the purpose of a legal treatise and an unrealistic naivety about its potential influence on legal actors. More likely, because the treatise writer's enterprise is premised on the law's coherence, the recommendation that this coherence be increased does not strike the author as a normative position at all, but simply an application of the law's inherent logic.

Descriptive work was once the dominant form of ordinary legal scholarship, and the comprehensive treatise was regarded as the apogee of scholarly attainment. Its appeal derived from the prevailing theories of law, originally natural law and later legal formalism. If the law was an embodiment of necessary moral principles or of socially embedded formal ones, then an accurate, well-organized description would not only provide the information necessary for ordinary transactions, but also elucidate those underlying principles (Simpson, 1981). There is nothing naive about this approach; in fact, it remains the methodology of physical science, where description is our means of perceiving what we call the laws of nature.

In legal scholarship, however, descriptive work declined during the twentieth century because a new approach to law developed. Since the legal realist movement,

most scholars have been convinced that law is a social instrumentality, a collection of strategies and compromises that have developed over time in response to changing circumstances. It possesses meaning, and generally forms a system, but it is a system whose components are derived from social policy, not from either a universal moral order or the collective wisdom of the ages. This policy-oriented approach suggests that the level of coherence in any given area of law is too low to support the treatise writer's instinctive commitment to that norm. More importantly, it means that description can no longer unlock the legal system's animating principles; it merely provides necessary information to those who act within that system.

Despite its decline, however, descriptive work remains an important element in legal scholarship. Prevailing views about the contours and structure of entire legal subjects, as well as insights into the analysis of specific legal issues, are regularly derived from scholarship of this nature. Comparative law is frequently descriptive, since it derives much of its value from the accurate presentation of contrasting legal rules. At its best, descriptive work can illuminate the structure of an entire subject or clarify a previously disorganized subject with genuinely transformative effect.

### Prescriptive Scholarship

The second major form of ordinary legal scholarship is prescription; its purpose is not to describe existing law, but to frame recommendations for the law's improvement. In order to be comprehensible, such scholarship must be explicit about the features that descriptive scholarship usually leaves unspecified – the intended audience and the normative basis of the recommendation. Since legal scholarship in general is characterized by its internal approach to law, prescriptive legal scholarship is addressed to those who generally adopt such a perspective, that is, those who think and act within the legal system. One obvious audience, albeit somewhat circular in its effect, consists of other legal scholars; prescriptions for this audience would typically involve criticisms of existing scholarship or recommendations for future work. A second audience is the judiciary. Judges are expected to follow legal doctrine, they view themselves to be doing so, and generally couch their decisions in doctrinal terms. Consequently, prescriptions addressed to judges generally focus on doctrinal law: how to follow or distinguish precedents, how to interpret statutes, how to incorporate social policy considerations. The classic format is to present the decision in a recent case and then offer a critique that is structured as a prescription for reaching a better decision or writing a better opinion to support the decision that was reached. This technique is often extended to entire lines of decisions, while the recommended basis for decision ranges widely across different disciplines and non-doctrinal arguments. But the essence of this scholarship continues to be a recommendation to a judicial decision maker.

Legislators and administrators are still another audience to whom prescriptive scholarship can be addressed. Some administrators function like judges, in the sense that they interpret a preexisting source of law – most typically a statute, but sometimes a regulation or judicial decision. Scholarship addressed to them tends to resemble scholarship addressed to the judiciary, although the broader discretion that such administrators are afforded tends to emphasize social policy at the expense of doctrine.

Other administrators, and all legislators, are primarily lawmakers. When addressing them, the scholar critiques an existing law or proposes a new one. Since legislation is not expected to conform to prior law, the prescriptions are generally not based on doctrinal arguments but on considerations of social policy or public morality. Scholarship of this sort is most distinctive when it concludes with proposed statutory language, but much other scholarship falls within this category. At its boundaries, of course, it merges into scholarship addressed to law interpreters as inevitably as the underlying legal actions overlap.

Finally, internal prescriptions about law can be addressed to practicing attorneys, that is, attorneys representing clients. This body of scholarship, generally known as professional responsibility or legal ethics, concerns the lawyer's obligation to restrain himself or herself from engaging in certain behaviors despite the fact that those behaviors are legally permissible. The question, of course, has institutional ramifications, involving bar associations, court rules and eligibility for public appointments, but the central concern is to prescribe ethical, or nonlegal modes of conduct. Other prescriptions that can be addressed to lawyers are generally regarded as "skills" issues. Prescriptive discussions of substantive law that are directed toward practicing attorneys – ranging from "contract drafting in the European community" to "defending the drunk driver" – fall within this category. There is a great deal written in this mode, but it is rarely regarded as true legal scholarship.

Prescription not only implies an audience, but also depends upon an identifiable normative position. While description can rely upon the ambient and unspoken norms of the prevailing legal or academic culture, one cannot frame recommendations for legal actors without a sense of the purpose that the recommendation is intended to achieve. In some cases, legal scholars base their prescriptions on the same desire for legal coherence that contributes a prescriptive element to otherwise descriptive treatises; the argument is that the judge should have decided a case differently because the alternative decision would be more consistent with existing law. More often, however, the scholar argues that a different decision would be more consonant with social policy. There has been a notable dispersion of the normative systems that animate prescriptive scholarship in recent years. Divergent political views, which, except for Marxism, were relatively rare, have now become quite prevalent in the academy. Much contemporary scholarship – including critical legal studies, feminist legal theory, deconstruction, postmodernism, and critical race theory – now derives from normative positions lying well outside of mainstream politics. The result, not surprisingly, has been an increasing self-awareness among scholars of their normative commitments, and an explicit debate about the character and consequences of various positions.

One of the most striking developments in modern legal scholarship is the predominance of the prescriptive, policy-oriented voice. The modal law review article is now distinctly prescriptive, and the prescriptive monograph has replaced the treatise at the acme of the academic hierarchy. This development is a natural consequence of our changing theories about law. Law is now viewed largely as an instrument of social policy, rather than as a system of inherently and logically connected rules. From this perspective, voluminous descriptions, leavened with some scattered recommendations based upon an unexamined norm, are far less nourishing than they originally seemed. Instead, legal scholars have become engaged in the social policy debate, recom-



mending changes in the law to produce the social results they deem desirable (Cotterrell, 1992).

Given this new, social policy orientation, however, it is equally striking that legal scholarship continues to be centered on judicial decision makers, just as it was when the descriptive voice predominated. The shift to policy-oriented scholarship has not been accompanied by a shift in audience to the leading policymakers of the modern state, namely the legislative and the executive. Even the new methodologies of law and economics or critical legal studies have tended to focus on the efficiency and incoherence, respectively, of judicial decisions. One reason for this may be traditionalism; addressing judges preserves the continuity of current legal scholarship with the scholarship of the common-law era, when judges were the dominant legal decision makers. A deeper reason is that prescriptions advanced by academics seem to make sense only when addressed to a rational decision maker, that is, a decision maker who will listen to reasoned argument. Our age-old belief is that judges are decision makers of that sort; the notion that legislators and administrators are similarly rational would seem risible in any era.

Several consequences have flowed from prescriptive scholarship's continued tendency to address itself to the judiciary. The first is that a great deal of legal scholarship continues to analyze legal issues in the same terms that judges do, deploying the same sorts of legal arguments and invoking social policy considerations to the same extent. This phenomenon, which may be called the unity of discourse between scholars and judges (Rubin, 1988), has the virtue of preserving a relatively consistent legal culture. Its disadvantage is that the analysis of statutes, regulations, and administrative implementation mechanisms has been underemphasized. In addition, the unity of discourse between scholars and judges precludes extensive incorporation of social science into legal scholarship and limits interdisciplinary efforts to the modicum of social science research that the judicial process is capable of absorbing (Friedman, 1986).

While prescriptive scholarship suffers from some serious limitations, one must recognize that it is neither as idiosyncratic nor as artificial as a naive distinction between description and prescription might suggest. To begin with, there is a substantial amount of descriptive material in most full-length prescriptive articles and in almost all prescriptive monographs. In order to critique a legal action or propose a new one, it is generally necessary to describe the existing state of the law. Thus, judges, administrators, scholars, and students regularly consult prescriptive books and articles in the same way that they consult legal treatises. Moreover, given that the legal system is a dynamic institution, prescriptive analysis will often be more informative than pure description; it is tomorrow's persuasive argument that both lawyers and decision makers may want to know. To be sure, the author of a particular piece may possess idiosyncratic norms that preclude the adoption of his position, but in the process of advancing that position he is likely to canvass other arguments based on more generally accepted norms.

Prescriptive and descriptive modes of scholarship have merged still more because of the dramatic rise of empirical legal scholarship in recent years. Legal scholars have long recognized that their increased emphasis on social policy, rather than on the internal coherence of doctrine, implies that legal rules should be assessed according to their real world effects. But the legal realists who first introduced this perspective into American

legal scholarship lacked the skills and institutional support that were required to translate it into a sustained scholarly agenda (Schlegel, 1995). The situation has now changed due to the increased number of legal scholars who have entered the field with advanced academic training. This trend began in law and economics, as the insights that could be achieved by autodidacts yielded to more sophisticated analyses that generally required doctoral training in the field. At present, nearly half the entry-level faculty members being hired by elite law schools have, in addition to their law degree, doctoral degrees in social science fields such as economics, political science, sociology, and anthropology, or in the equally empirical field of history. To be sure, the trend is not only driven by the substance of law's scholarly agenda, but also by the institutional competition among law schools for relative status that increasingly depends on the sheer quantity of scholarship that their faculties produce. An entry-level faculty member who has written a dissertation is clearly a safer bet, as a potential scholar, than the more traditional entry-level candidate who has written a student note and clerked for a federal judge. Nonetheless, the result is the same; the extent to which law is intertwined with history, politics, and sociology means that aspiring professors who opt to obtain a second academic degree are likely to choose one of these essentially empirical fields, and then be well positioned to produce empirical scholarship.

The notable increase in empirical legal scholarship could conceivably produce a revived descriptive discourse in legal scholarship, but this does not appear to be the direction in which the field is moving. Rather, legal scholars seem to be deploying their amplified empirical capabilities within the prescriptive framework of the field. That is, empirically trained legal scholars are using their ability to measure and assess the real world effects of law to articulate prescriptive arguments directed to judges, legislators, and administrators. The result is that their work remains within the internalized ambit of legal scholarship, but uses the same methodologies and techniques that previously characterized the external perspective that social scientists without legal training adopted toward the legal system. If there is any change in the prescriptive character of this newly developing empirical legal scholarship, it is that this scholarship tends to be addressed more often to legislators and administrators, rather than judges. This is not surprising, since legislators and administrators are explicitly concerned with social policy, that is, with law's real world effects, while judges focus more often on consideration of fairness or on preexisting rights. The contrast should not be overdrawn, however; judges in the Anglo-American legal system have always acted as policy makers, and this role has become more explicit as law in general is redefined in social policy terms (Feeley & Rubin, 1998).

There is, however, still a further overlap between description and prescription in legal scholarship. Since this scholarship is addressed to a particular type of decision maker, there is a tendency to assume that its purpose is to persuade, and that the failure to do so – which is the usual result – indicates the futility of the entire enterprise. But, as stated above, the internal perspective of legal scholarship allows the scholar to achieve a mode of understanding that is only possible through participation, and prescriptive scholarship is part of that participatory process. Its premise is that engagement in the field's normative debates reveals the meaning of the subject matter. External descriptions, and even internal descriptions that stand apart from the normative debate,

cannot duplicate the understanding that prescriptive scholarship achieves by addressing recommendations to legal decision makers. This amphibious quality of prescriptive scholarship, as both a recommendation and an elucidation, may seem paradoxical, but the law itself is a normative construct and thus presents a particularly strong case for the idea that normative engagement can serve as a mode of understanding. In the final analysis, therefore, legal scholarship's prescriptive voice becomes a vehicle for a higher level of description.

The link between normative discourse and understanding helps to explain the status of skill-oriented writing in the academy. This writing is as prescriptive as any other – it tells practicing lawyers how to act effectively – but since it is narrowly strategic, the general view is that it does not contribute to our understanding of law's position in society, or of society in general. It is understanding, not direct influence on legal actors, that constitutes the primary purpose of prescriptive scholarship.

## Jurisprudence

Jurisprudence is generally recognized as a separate category of legal scholarship, but the nature of its separate identity is far from clear. It is sometimes described as the philosophy of law, which might be useful if we only knew the precise meaning of the term "philosophy." Jurisprudence is also described as the theory of law, but since everyone aspires to be theoretical these days, relying on this definition quickly leads to the notion that there is a jurisprudence of contracts, a jurisprudence of consideration, and finally a jurisprudence of the preexisting duty rule, at which point one has made complete hash of the word.

While there is undoubtedly something "philosophical" about jurisprudence, it is distinguished from philosophy by being part of legal scholarship. This means that jurisprudence, like legal scholarship in general, adopts an internal approach to the legal system. It discusses the general structure or the underlying morality of the legal system from the perspective of that system and aspires to capture the meaning that the legal system possesses for its participants. Thus, Hume is a philosopher, not a jurist, because he is concerned with the nature of society and the state; law appears in Hume's work as one component of these larger structures and is viewed from the perspective of the state in general. Kelsen, in contrast, is a jurist. While his approach is consistent with Hume's, he focuses on the legal system itself and he derives his insights from the examination of that system rather than a general analysis of the state.

If jurisprudence is distinguished from philosophy by its internal approach to law, it is distinguished from ordinary descriptive and prescriptive legal scholarship by its meta-descriptive character. The somewhat formidable prefix in this term is simply intended to indicate that jurisprudential writing rises above or cuts across the ordinary categories into which law is divided by the active participants in the field. Practicing lawyers, judges, legislators, and administrators make use of standard categories such as contract, torts, and crimes; a work of ordinary legal scholarship defines its scope of concern by reference to these same categories. The fact that a work compares the rules that prevail in several categories, or analyzes the inevitable overlaps between them, would

not alter this characterization. Thus an article suggesting that tort concepts should be used to measure damages in contract cases, or that the boundary between contracts and corporations is being effaced by modern business practices, does not thereby become a work of jurisprudence. This term, as it is commonly used, refers to discussions of the law that do not depend upon these standard categorizations to define their ambit or their mission.

Some jurisprudential writing is immediately recognizable by its generality. H. L. A. Hart's *Concept of Law* (1961), for example, discusses the legal system in its totality, rarely making reference to the categories of law that are used for everyday purposes by the participants in the system. But Hart and Honoré's *Causation in the Law* (1985) is also recognized as a work of jurisprudence, although it is quite specific and makes constant reference to standard categories. It would be difficult to describe this book as more "general" than a criminal law treatise. While Hart and Honoré also discuss tort and contract, they ignore many topics – such as sentencing, the exclusionary rule, and the indictment process – that would be included in the treatise. What renders *Causation in the Law* a work of jurisprudence is that it cuts across the standard categories, defining its own frame of reference rather than operating within existing ones.

The widely held belief that the interdisciplinary character of a work renders it jurisprudential (Stone, 1964, p. 16) no longer seems to reflect common usage, if indeed it ever did. With the decline of the formalist faith in law as an autonomous discipline possessing its own internal logic, and the increasing social policy orientation of both law and legal scholarship, much ordinary legal scholarship is heavily interdisciplinary. It is common these days, on opening any law journal, to find a corporate law article that employs economic analysis, an administrative law article that relies on political science or a civil rights article that invokes sociological research. Thus, a more accurate statement would be that the interdisciplinary character of a work is a separate, independent variable from its jurisprudential character. Of course, many works that are recognized as jurisprudence are also highly interdisciplinary, and there remain numerous works of ordinary scholarship that do not venture beyond legal doctrine. But the other combinations exist as well. The corporations article that employs economic analysis is still regarded as ordinary scholarship, not jurisprudence; conversely, Fuller's *Morality of Law* (1969) contains relatively few references to nonlegal philosophy for a work of its generality, but its jurisprudential character is clear.

There are, however, several fields that lie athwart the boundary between ordinary scholarship and jurisprudence. The most notable is probably constitutional law. This is a category used by practicing lawyers and other legal actors, but even relatively specific issues in the field tend to implicate basic questions about the nature of the individual or the state, and general discussions have a distinctly jurisprudential cast. Is Alexander Bickel's *The Least Dangerous Branch* (1962) a work of constitutional law, jurisprudence, or both? Linguistic clarity may favor the former choice, but, in truth, the value of categorization is quickly exhausted at this point. Indeed, extensive overlap between ordinary scholarship and jurisprudence is hardly surprising, since there are no organizational or sociological structures to police the boundary between the two. Both types of scholars are found on precisely the same faculties, with precisely the same training; in fact, they are often precisely the same people since many academics who begin their careers as specialists aspire to end them as jurists.

Jurisprudence, like ordinary legal scholarship, can be either descriptive or prescriptive. The *Concept of Law* describes existing legal systems, while Finnis's *Natural Law and Natural Rights* (1980) or Roberto Unger's *False Necessity* (1987) offer recommendations for reordering the legal system. The distinction between the two approaches is less apparent in jurisprudence than it is in ordinary scholarship, since it does not appear to divide the field into works that are stylistically distinct. One reason may be that the distinction is itself a major issue in jurisprudential literature. Thus, descriptive works regularly argue against the meaningfulness of jurisprudential prescription, although not against the social policy prescriptions of ordinary scholarship. Prescriptive jurisprudence, on the other hand, often criticizes descriptive work for its positivistic focus.

While this debate tends to efface the categorization among jurisprudential works, it emphasizes the distinction between jurisprudence and philosophy. Because jurisprudence is legal scholarship, with an internal approach to law, its practitioners are concerned with the character of law itself – whether it is inherently normative or merely a means of implementing externally established choices. This debate is not particularly relevant to nonlegal philosophers, who would be prepared to consider either characterization and then judge the result by whatever conceptual or ethical system they employ.

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## Further Reading

Useful symposia on legal scholarship may be found in:

*Journal of Legal Education* 1983, 33:403

*Michigan Law Review* 1991, 89:707

*Texas Law Review* 1991, 69:1595

*Stanford Law Review* 1993, 45:1525

*University of Colorado Law Review* 1992, 63:521

*Vanderbilt Law Review* 2006, 59:1811

*Yale Law Review* 1981, 90:955

## Authority of Law

VINCENT A. WELLMAN

In political philosophy and philosophy of law, the idea of authority presents a set of issues regarding the justification of government and the corresponding obligations of citizens, especially the obligation of citizens to obey the law. Law, it is said, claims authority (Raz, 1979, p. v; Green, 1988, p. 1). This characterization builds on two observations about the nature and function of law. First, legal systems issue directives which aim to shape the behavior of their subjects. Second, while legal systems employ sanctions to secure compliance with their directives, they do more than just wield power. As they seek to control their subjects' behavior, they claim that their control is justified or in some other way legitimate. Law assumes that its directives are binding and that, as Raz (1979, p. v) has phrased it, its subjects owe obedience and even allegiance to the system which governs them.

### Why Authority?

The idea of authority finds application in a wide variety of contexts, but the most pressing reasons for thinking about law's authority have arisen out of debates about the existence of a general obligation to obey the law.

Traditional arguments for a general obligation to obey the law have clustered into two families. One family maintains that we have such an obligation because we have, in some meaningful sense, promised to obey our community's laws. Some versions of this argument emphasize a social contract between the citizen and the state, and others use some notion of an implied agreement. Whatever the particulars, these arguments share a common feature: the moral obligation to obey the law is an application of a more general moral obligation to fulfill our promises. The other family derives an obligation to obey from the receipt of benefits from one's state or community. On some versions, the purported benefits are the security and comfort we enjoy because our lives are governed by the lawmaking and law-enforcing apparatus of the state. Other versions emphasize the advantages of being part of a community – life among other persons makes it possible to be sociable and involved, rather than isolated atomistic individuals. For this family of arguments, the fact that we have received and retained the benefits of our government or society generates an obligation to obey the law: either

we are obligated to repay the society or the state for the benefits we have received or we are obligated to bear our share of the burdens of sustaining community life.

Both promise-based and benefit-based arguments can be seen to depend on some instantiation of the following inference:

If *X* performs an action *A* in circumstances *C1*, *C2*, *C3*, ... , *Cn* then *X* has an obligation to obey the law.

Promise-based arguments depend on *X*'s promising to obey the law, where the promise is expressly or impliedly made in circumstances that obligate us to fulfill our promises. If those circumstances obtain, then *X* is obligated to obey the law. Benefit-based arguments, on the other hand, depend on *X*'s voluntarily receiving benefits in those circumstances which give rise to an obligation either of restitution or else of burden-sharing.

However, this inference schema underscores the now-commonly recognized inadequacies of both families of argument. These arguments are advanced to show that there is a general moral obligation to obey the law, and they could fulfill that ambition only if every person has performed the appropriate act in the required circumstances. This is implausible. Not everyone has, in fact, promised to obey the law, and some of those who have promised to obey have done so in circumstances of, say, duress that would defeat the obligation. It may be possible to loosen the specification of the required action or the required circumstances, so that those conditions are true of more agents. Thus, some might contend that citizens impliedly promise to obey their government's laws when they continue to reside within its jurisdiction; continued residence is thus treated as tantamount to promising to obey the applicable laws. But, the more the specifications are relaxed, the less compelling it is that acting in that fashion gives rise to a genuine obligation to obey the law. Suppose the citizens continue to reside in their community, but on a daily basis explicitly disaffirm any commitment to obey their government's laws. That they disaffirm such a commitment undermines the claim that they impliedly promised, and hence undermines any promise-based obligation to obey. A set of comparable problems infect any argument that depends on the receipt of benefits as the foundation for the claim that citizens are obligated to obey their legal system. In some cases, citizens are unwilling subjects of their legal systems and accordingly "receive" the purported benefits only because the legal system's rule has been imposed on them; but benefits that have been imposed rather than requested cannot engender any general obligation to obey. In other cases, the legal system functions only sporadically, or the populace is not generally law-abiding; as a result, any benefit that is generated by legal protection or the law abiding behavior of others is insufficient to engender a broad-based obligation to obey all the laws.

The authority of law might seem to finesse this problem of generality. In asking about law's authority, we ask about the attributes of the state or its legal system, rather than the characteristics of the governed, and one attribute of authority is often held to be a correlative obligation to obey. "Part of what 'authority' means is that those subject to it are obligated to obey" (Pitkin, 1966, p. 40). As expressed by Raz, whose arguments about authority have shaped much of the debate in this area, "legitimate authority implies an obligation to obey the law." (Raz, 1981, p. 117) Sometimes this



idea is expressed instead in terms of the language of rights: “Authority is the right to command, and correlatively, the right to be obeyed” (Wolff, 1970, p. 4). Or, “authority is a regular right to be obeyed in a domain of decisions” (Anscombe, 1978, p. 3). Whatever the formulation, the purported conclusion is tantalizing: if authority implies an obligation to obey, then a general obligation of fidelity to law can be established by demonstrating law’s authority, without reference to the particular circumstances of each agent.

## The Forms and Limits of Authority

The foundation of Raz’s approach to authority has been an analysis that roots the idea in a larger framework of practical reasoning. We can distinguish different kinds of authority. Those who are expert in a field are said to be authorities about issues within their area of expertise. This is often described as *theoretical* authority, or authority about what to believe. Theoretical authority may be distinguished from *practical* authority, authority about what to do. In some contexts, both forms of authority are at work. Parents are standardly acknowledged to have authority over their children, and military commanders are held to have authority over their subordinates. The authority in such hierarchical relationships may be both theoretical and also practical. A parent will both instruct her children about the nature of the world and also lay down directives for their behavior.

Law’s authority can take both forms. Some laws are grounded on claimed expertise: the criminalization of certain substances, for example, is sometimes defended on grounds of the dangers posed by their use. Sometimes the authority of law is derived instead from the need for social coordination and the accompanying need that some questions be decided, and some norms established, without regard to the merit of competing alternatives. Without commonly observed norms of automobile driving, for example, traffic of any density would be impossible, and so traffic laws must be promulgated and enforced. In this context, it is less important which particular rules are chosen than that some rules be laid down and enforced. The example of traffic laws shows that law’s authority is clearly not just theoretical. Instead, most recent discussions have focused on law’s practical authority, (e.g., Raz, 1986; Greenawalt, 1987; Green, 1988) and that focus raises questions about the justification of practical authority, and law’s claims to such justification.

Authority may be differentiated along other lines as well. There are those who hold themselves out as authorities, though we may doubt their warrant. A self-promoting diet guru may claim expertise, but from that bald claim of authority it does not follow that the claimant should be so recognized. Similarly, one country may conquer another and set itself up to rule its new subjects, but the mere claim of authority to govern, even when backed by sufficient force, may not yield genuine authority. And, there are those who exercise *de facto* authority, playing a salient role in the lives of others because their influence and control is accepted as authoritative. But, we may reject *de facto* authorities because, notwithstanding their claims, they are illegitimate, and the idea of *legitimate* authority – as opposed to mere claims of authority – raises interesting and subtle questions about law.

Practical authority (whether *de facto* or legitimate) can exercise a measure of influence over the activities of others. Systems of law lay down rules governing the others' behavior and back those rules with some force or sanction, and legal authority therefore clearly involves some notions of power. But authority is more than power. A kidnapper may exercise control over my child, but does not have authority over her. Uncontrolled gangs may dominate a town or even a country, but may nevertheless lack authority over the affected citizens. The idea of authority implies in addition some normative characteristics. Even legal positivists like H. L. A. Hart regard law as the source of duties on the part of those governed by each particular legal system (Hart, 1961, *passim*).

What is it about authority that goes beyond mere power to ground normative claims about what we should do? Consider first the case of theoretical authority. To say that Farnsworth is an authority on contract law is to credit Farnsworth with superior knowledge or understanding of his field. Further, Farnsworth's authority implies certain conclusions about what we should believe. Claims of theoretical authority sustain inferences along the following lines.

*X* is an authority with regards to *D*, some domain of inquiry.  
*X* says that *p* is true, and *p* is within *D*.  
 Therefore, you should believe *p*.

At bottom, what is claimed about a theoretical authority is that her utterances are reliable within her area of expertise. If *X* really is an authority, what she says about her area is significantly more likely to be true. Therefore, your beliefs about *D* will more likely be true if you believe as does *X*. Thus, the issue presented by this inference is epistemic, and the justification for *X*'s authority is derived from the likely truth of her claims.

Practical authority can be understood along similar lines. Consider the following inference, adapted from Raz (1986, p. 29).

*X* has authority.  
*X* has decreed that you are to do some act *A*.  
 Therefore, you ought to do *A*.

This inference offers *X*'s authoritative utterance as a reason for acting as the authority decrees. What justification can be offered for following *X*'s dictates? One justification, paralleling the claim for theoretical authority, would cite the authority's wisdom. Your actions, on this claim, will more likely be satisfactory if you act as *X* decrees.

A set of deep philosophical problems lurks behind this conception of practical authority. What kind of reason is the authoritative utterance, and how does it figure in our practical reasoning? We ordinarily decide what to do after weighing the balance of reasons that are operative for us. Accordingly, if others seek to influence our reasoning, they will usually advance reasons which are relevant to our deliberations: they may point to facts about the world which will show us that our ends can be better served by some different plan of action, or they may seek to show us that our ends are different from what we had thought them to be. Law's claims of authority have two important

characteristics which diverge from this standard picture of practical reasoning. First, the authoritative utterances are advanced as *content-independent* reasons (Hart, 1982, ch. 10). Second, those authoritative utterances are advanced as *pre-emptive* (Raz, 1986, pp. 42, 57–62) or *exclusionary* (Green, 1988, pp. 36–40) reasons. Raz explains content-independence in this way:

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently “extraneous” fact that someone in authority has said so, and within certain limits his saying so would be a reason for any number of actions, including (in typical cases) for contradictory ones. A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason. (Raz, 1986, p. 35)

There are other types of content-independent reasons for acting: threats, for example, and promises (Green, 1988, pp. 40–1; Raz, 1986, pp. 35–7). If I agreed to meet with a student at a particular time, the fact that I have promised operates as a reason for me to act in that way, independent of my desire (or unwillingness) to meet with that student. These kinds of speech-acts create reasons for the parties because of some facet of their interaction, not because the speaker has advanced reasons which connect directly with the action at issue. Authority operates along similar lines. No facts are adduced for our practical deliberations, except that the authority has decreed that we are to act in some way, and none of our ends are invoked, except that we should obey the authority.

### The Paradoxes of Authority

Law’s claims of authority also differ from other reasons by virtue of their claim to preclude some of the agent’s other reasons. A legal norm is advanced as exclusionary: demanding our obedience, without regard to whatever reasons we may have for acting to the contrary. Indeed, law is standardly understood to serve us, at least in part, by virtue of the fact that it replaces the self-interested calculations of individuals with other norms of behavior, thereby allowing us to live together in society. Therefore, law’s decrees, if they are to function as authoritative, must, in some way, supplant the individual citizen’s deliberation about how to act.

Some have described this facet of practical authority as involving a “surrender of judgment” whereby the agent takes the authority’s “will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own” (Hart, 1982, p. 253). This metaphor is fraught with peril, and sometimes authority has been rejected as altogether illegitimate because its claim to replace the will or reason of its subjects is held incompatible with the autonomy or the reason of the individual (Wolff, 1970, *passim*). This contention has been framed in terms of “paradoxes of authority” (Raz, 1979, pp. 3–5). If you act as the authority directs because its directives converge on the result of your independent deliberations, then you are not really *obeying* the authority; conversely, if you are truly obedient, then you act as the authority decrees, even though it diverges from your own independent deliberations.

One response to this line of reasoning would be to conclude that law lacks genuine authority and can be said at most to have *de facto* authority. After all, we may properly evaluate the particular rules which are made law. Laws segregating people according to racial or sexual characteristics cannot be accepted with the same easy lack of concern as can the laws which tell us to drive on the right, or the left side of the road. A more satisfying response has been advanced by Raz (1986) and also by Green (1988), involving the nature of practical reasoning. These responses are substantially the same, but Green's discussion, relying on Raz's (1975, pp. 37ff.) distinction between *first-* and *second-order* reasons, is the more straightforward.

Practical reasoning involves ordinary reasons for acting – beliefs, desires, needs and interests – and in simple deliberations we balance these factors against other factors of the same sort. Call these factors first-order reasons for acting. In addition to these sorts of reasons, we also respond to other, second-order reasons, which are weighed for and against our acting on various first-order reasons. Consider, for example, a professor and a student who are sexually attracted to one another. Notwithstanding the attraction, the professor may decide to avoid involvement with the student because he regards faculty-student relationships as inappropriate. The professor's attraction to the student would be, on this distinction, a first-order reason for acting, but his actions would result instead from his second-order reasons about the propriety of acting, in those circumstances, on such first-order reasons. "The conflict between [a] second-order and the first-order reason is not resolved because the former outweighs the latter ... Rather, [the second-order reason] excludes action taken on the first-order balance of reasons alone and is thus an *exclusionary* reason. Such reasons exclude those they defeat by kind, not weight" (Green, 1988, p. 38, footnote omitted, emphasis in the original).

Practical authority, in general, and legal authority, more particularly, can be understood as offering second-order, exclusionary reasons for acting in a specified way. Suppose the professor's college has promulgated a rule against student-faculty liaisons, or suppose that the professor's dean has recognized the smoldering passions and has directed him to avoid involvement. Those directives, if authoritative, would function by excluding certain considerations – his sexual attraction to the student, or perhaps his belief that the student too desires an affair – from the professor's practical deliberations. So, too, for the law. Its directives, if authoritative, would function by excluding certain first-order reasons from the deliberations of those subject to the legal system; the citizens would act because the law directs it, even though their own individual interests might lead them to break the law.

This answer defuses the "paradoxes" of authority: Second-order exclusionary reasons can be seen as a standard part of practical reasoning, and appeal to them is thus a part of a process of reasoned evaluation of what to do. (Such reasoning is particularly common to the deliberations within legal theory about the virtues of precedent and decisions by rule.) Moreover, while exclusionary reasons preclude appeal in a particular deliberation to first-order reasons, it is still cogent to question the satisfactoriness of such second-order reasons. In this connection, Shapiro (2002) has argued that the first-order/second-order dichotomy is too simple and needs substantial amplification. One might, for example, challenge the coherence of one second-order reason with other such reasons, or argue that decisions according to such exclusionary reasons too

often result in decisions that are ill advised. But, the use of second-order reasons is in general compatible with both reason and autonomy.

## The Justification of Authority

Raz's picture of practical reasoning highlights the problem of authority's justification. Authoritative utterances are understood, on this picture, as reasons which exclude other of the agent's reasons for acting: accepting some person or institution as authoritative means that we accept their reasons as excluding some of our own first-order reasons. Why should we regard the putative authority's decrees as authoritative? What could justify the claim of authority, understood along these lines?

Raz (1986) argues for the following picture of the justification of authority, which he calls *the normal justification thesis*:

the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly. (Raz, 1986, p. 53)

This thesis parallels the justification for theoretical authority that was offered earlier. Accepting a theoretical authority's pronouncements will more likely lead you to true belief than if you tried to reason it out on your own, and following a practical authority's directives will more likely lead you to do what it is that you really want to do than if you try to reason it out for yourself. Coleman and Leiter (1996 at 255) summarize the point in this way:

To the extent to which it is generally true that one will do better acting on the basis of law's reason than acting on the basis of the reasons law provides, it is rational for us to accept law as an authority over us.

But analyzing the limits to the scope of an authority's justification leads quickly to doubts that law lacks the authority that it claims for itself. Law claims a wide range of authority. It demands that its subjects obey *all* its directives, not just those which are likely to be wise. Law's claim of authority will therefore outrun any reasonably persuasive claim of its justification. Only just governments, with well-reasoned legal systems, could claim that obeying the norms of law will more likely lead its citizens to act in ways that will fulfill their practical deliberations than they would achieve by reasoning for themselves about how to act. And, even if the government is just and the legal system well reasoned, it is implausible that the system's decrees will, in fact, satisfy the criteria of normal justification for *each* citizen in *every* arena that is regulated by law. This line of reasoning, in sum, undermines law's claims of authority.

The parallel with theoretical authority is again instructive. A Nobel-winning scientist might be authoritative about transistors, for example, but not about the efficacy of certain vitamins in fighting the common cold. As a result, we can accept the scientist's

pronouncements in some areas, but not others: “There will always be areas, of course, in which we have a special expertise, and cases in which the law makes clear mistakes. Its authority will therefore be incomplete at best” (Coleman & Leiter, 1996 at 255). More generally, any practical authority’s claim of justification must be limited, as is any theoretical authority’s claim of reliability, to distinct domains over which the claim could be supported.

## Authority and the Obligation to Obey the Law

Raz asserts that legitimate political authority implies an obligation to obey (Raz, 1981, p. 117) What is it about authority that might warrant such a blanket implication of an obligation to obey?

Recall the claim that “authority is a regular right to rule” (Anscombe, 1978). This implication has been challenged by Ladenson (1980, pp. 139–41). A government, he argues, has only a “justification right” to issue certain kinds of directives and to use force to secure compliance with them. But a justification right is not a claim right, where the latter, but not the former, would imply a corresponding obligation to obey. The state’s justification right carries no such implication; instead, the justification right provides only a rebuttal to the challenge that it acts wrongly when it attempts to govern. Raz counters that there is more to authority than merely the justified use of power, and that the “exercise of coercive or any other form of power is no exercise of authority unless it includes an appeal for compliance by the person(s) subject to the authority” (Raz, 1986, p. 27). Law, as Raz describes it, claims authority and hence claims that its exercise of coercive power deserves obedience. If *X* is a legitimate authority, then *X*’s authoritative decrees pre-empt other reasons for acting; as a result, law’s decrees, if legitimate, would require the citizen’s obedience because other reasons for acting to the contrary have been excluded.

But this conclusion can hold only within the scope of the authority’s proper domain. Further reflection on the idea of authority shows that the simple implication of a duty to obey ignores some important subtleties. The idea of legitimate political authority, Greenawalt (1987 pp. 50–1) contends, is associated with at least seven components:

- 1 Those with political authority are justified in issuing certain kinds of directives to those they govern.
- 2 They are justified in using force to induce compliance with these directives.
- 3 Other persons in the society are not warranted in issuing the kinds of directives appropriate for political authority, and they also lack the right to employ coercive force on behalf of their wishes.
- 4 The governed should pay attention to the directives of the persons with authority.
- 5 The governed should not interfere with the exercise of force by those with authority.
- 6 The governed should cooperate with enforcement efforts.
- 7 The governed should obey the directives of those with authority.

By itself, the idea of political authority implies only the first few of these characteristics: the justification of those with authority to act in certain ways (numbers 1 and 2), and perhaps a corresponding lack of justification on the part of others to act in similar or competing ways (number 3). Other claims, especially those about a citizen's duty to cooperate or to obey (numbers 6 and 7), can be derived only with the addition of further premises, most plausibly those about "the importance of government and the requirements of effective government and ... the implication of those premises for individual duties" (Greenawalt, 1987, p. 56).

The claims of Greenawalt and Ladenson can be generalized beyond the question of an obligation to obey authority. Ascribing authority to a state implies its justification to act in certain ways, and the legal system has *de facto* authority insofar as those subject to it accept its claims of justification. But that leaves open the question, What justification really obtains for the legal system's claims of authority? Greenawalt's argument implies that different justification must be provided for different aspects of the legal system's claims of authority.

The justification for the state or the legal system acting as political authority, by issuing directives and seeking to enforce them, will plausibly take the familiar Hobbesian form. Some such directives are necessary lest social life degenerate into chaos, and some enforcement of the directives will be necessary, so long as the subjects are likely to act on the strength of their own desires.

The justification for taking the legal system's decrees as exclusionary reasons will therefore derive from the value of precluding the members of a community from deciding what to do entirely on the strength of their own first-order deliberations. Understood in this way, the justification reveals an important exception. Suppose a country conquers its neighbor, and proceeds to install its own legal system in the place of the previously existing and legitimate regime. Does the Hobbesian argument compel the conclusion that the usurper has genuine authority? After all, it might be observed, the usurper is now fulfilling the role of political authority by issuing, and enforcing, directives that seek to preclude the members of the now-conquered society from deciding through their own individual deliberations, how to act. The short resolution of this difficulty is to recall the source of the Hobbesian justification for the state: without the state, life would be disastrous. But that justification does not hold for the usurper, for, without the usurpation the previous regime would still be in power and its directives would suffice to govern. (Although the usurper's legal system would lack authority as a whole, some of its directives may legitimately claim authority to the extent that they duplicate the prior regime's directives on the same issues.)

In sum, law's decrees are authoritative to the extent that their status as exclusionary reasons can be justified. By itself, this justification does not imply a general obligation to obey those directives; in particular, the citizenry is free, on this argument, to disobey in ways and to an extent that does not challenge the efficacy of the regime. A second point follows as well. Law's authority is sometimes held to be exclusive (Greenawalt, 1987, p. 56, number 3 above) or monopolistic (Ladenson, 1980, p. 138). However, it can be seen that the justification for the authority of a legal system does not preclude a comparable justification for other authority within the same society, nor does it preclude the use of force by other authority to enforce compliance with its directive. Law's authority, in other words, does not by itself require law's monopoly. This idea should

be obvious enough to those familiar with the history, in various legal systems, of joint secular and religious authority and jurisdiction. Both secular and ecclesiastical courts can promulgate and enforce norms, and each can have legitimate authority. By extension, other institutions in a given society can also exercise political authority as well. Each authority will be less effective to the extent that the limits of each authority's proper sphere are not clearly drawn, or where there is some conflict between the different attempts to govern. But, the idea of authority does not inherently require that the power to make or enforce directives be reserved exclusively to a single set of political authorities.

## Legal Authority

In legal practice, "authority" has another application. A "legal authority" can be a statute or judicial decision – the result of a determinate act of an official (or designated body of officials) who are empowered in the legal system to render decisions for a class of controversies. When the official (or body of officials) is so empowered, the result of her decision will shape or constrain other officials in their decision processes. So, a statute can set the law for certain behavior of the citizens and accordingly will shape the decisions of judges or administrators who must make decisions about the citizens' rights and responsibilities. Similarly, a binding precedent can channel or direct later case law decisions by the same or other courts.

The language of legal practice reveals that this application of the idea of authority shares important features with the concept of political authority that was examined earlier. Legal authorities of this kind are standardly said to "bind" or "control" the later resolution of some legal dispute. That is, a legal authority can be deemed to pre-empt other decision-making; legal rules in particular are assumed to operate as second-order reasons for decision making and are expected to preclude individualized consideration of the special circumstances that might distinguish a specific case or dispute.

Although the authority of a statute or precedent appears closely related to the practical authority of a legal system, few writers in political philosophy have ventured to apply the analytical framework of practical authority to these issues in legal practice. Raz's essay on the authority of a constitution (Raz, 1998) is a salient exception.

Consider the issues presented by the kind of constitution that Raz calls "originating" – constitutions that are adopted in the course of founding a country or a legal system (Raz, 1998, p. 158). In American law, one common theory of constitutional reasoning starts with the actions of the "founding fathers" and derives a view about the proper interpretation and application of the American Constitution from their understandings. The justification for that interpretational stance is usually based on an assumption that the Constitution's authority is that of its creators. Raz challenges that central assumption and, as a result, that interpretational stance.

At the core of Raz's argument is this question: can the authority of the Constitution's creators extend indefinitely into the future, such that the Constitution's authority can derive solely from their authority? Assume that the originating constitution's creators had legitimate political authority to create a constitution. Assume further that the



Constitution's legitimate authority continues into the future, decades or even centuries after the Constitution's adoption and well beyond the life spans of its creators. The argument in question concludes that the Constitution's later authority must be the same as its authority when first enacted, because its authority at all time derives from the authority of the creators. But Raz's analysis of political authority, when applied to those creators, undermines any expectation of timelessly enduring personal authority. While we honor the insight and sophistication of the founding fathers, it is implausible that their wisdom could extend indefinitely, without reservation. And, to acknowledge these reservations is to acknowledge the inherent limitations on the founders' authority and hence that the Constitution's authority must be established in some different way. Instead, we continue to accept the Constitution because of the role that it has come to play in our political and legal structure: after a period of time, constitutions "are valid just because they are there, enshrined in the practices of their countries" (Raz, 1998, p. 170).

This conclusion is disquieting, at least at first inspection. For, it appears to hold that the Constitution is unmoored, and our efforts to interpret it can have no foundation in its authority. But consider other forms of legal authority: Raz's analysis extends easily to the authority of statutes and precedents as well. The authority of a precedent is not limited to the authority of the deciding court. To the contrary, a precedent can have weight in a different jurisdiction and its authority can be respected well beyond the circumstances of the particular decision. In those respects, the precedent's authority can go well beyond the authority of the court that made the decision. Conversely, later legal developments can limit the precedent's authority, even while the deciding court's authority is undiminished. Similarly, the authority of a statute is not limited by the intentions of the enacting body. Courts can for example make use of the "equity" of a statute to decide cases to which the statute does not directly apply. In decisions of that kind, the statute comes to play a role well beyond its literal terms and beyond the authority of the enacting body. These aspects of our legal practice confirm that, in a wide variety of circumstances, we are prepared to accept that the power of a legal authority can change over time and across different circumstances. Why, then, should we be discomfited by the idea that a constitution's authority is not limited to the authority of its creators?

## Conclusion

The results reached here are essentially negative. Law claims authority, but such claims must be viewed with substantial skepticism. At most, law's authority can be understood as a justification for the legal system to act in certain characteristic ways, by issuing directives and seeking to enforce them. But a legal system's claim on the obedience or allegiance of its subjects stands ever in need of justification, depending on the character and reach of its directives and the nature of its enforcement. A similar line of thinking allows us to examine the power and effect of legal authorities, with a similar reminder that we need a refined and sophisticated understanding of how they operate in our legal system.

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## Analogical Reasoning

JEFFERSON WHITE

### Analogy and the Principle of Justice

Traditional understanding takes similarity recognition to be a central factor in legal reasoning and legal judgment: "The finding of similarity and difference is the key step in the legal process" (Levi, 1949, p. 2). Part of the reason for this is a requirement imposed by the principle of justice itself: "The rule of law ... implies the precept that similar cases be treated similarly. Men could not regulate their actions ... if this precept were not followed" (Rawls, 1971, p. 53).

The likeness in question for lawyers and judges is likeness with respect to applicability of a legal rule or principle exemplified in a precedent. A precedent derives its legal status from the fact that it was decided on the basis of legal rules and standards, and it is these to which courts appeal for justification of their decisions. Adjudication is thus a matter of applying prescribed legal rules and standards, but as everyone knows, such application can be problematic. One of the primary difficulties was stated long ago by Plato:

Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time ... The variety of man's activities and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times. (Plato, 1961, p. 1063)

This understanding is reflected in a standard fixture of Anglo-American jurisprudence, namely, the doctrine of dictum.

Where case law is considered, and there is no statute, [a judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means that the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important ... It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision ... Thus it cannot be said that the legal process is the application of known rules to diverse facts. (Levi, 1949, pp. 2-3)

The reason is that: (1) known rules are applied by judges on a case-by-case basis; and (2) the *meaning* of rules is given only in legal precedents.

If reasoning that satisfies the principle of formal justice must pass a similarity test relative to legal precedents, then it is not merely the case that reasoning from analogy is *sometimes* involved in legal judgment. It must *always* be involved, whether explicitly or by implication, because: (1) justice requires that like cases be treated alike; and (2) no two cases are identical. Both this supposition of general rule limitation and the principle of formal justice contribute to the central role accorded analogical reasoning in traditional jurisprudence.

## The Logical Form of Analogical Inference

The form of legal reasoning from analogy can be stated schematically as follows: (1) cases *a, b, c ...* and the case at bar share the properties *p, q, r ...*; (2) cases *a, b, c* share the property of having been decided in favor of *X*; therefore, (3) the case at bar (or some issue in the case at bar) should be decided in favor of *X*. The general form of an inference of this type is discussed in elementary logic texts under the rubric “induction by analogy,” a variety of inductive reasoning pervasive in everyday thought. In most instances of induction by analogy, the conclusion drawn is a prediction of some sort – for example, the conclusion that a future event will resemble past events in some way. Thus if (1) Mary, Joe, Tom, and Sue have all enjoyed many meals at Pat’s, their favorite restaurant; and (2) Mary, Joe, and Tom have enjoyed the new entry in Pat’s menu, they might reasonably infer that Sue will enjoy the new entry if she orders it tonight.

Conclusions drawn by inference from analogy in law are, for the most part, neither causal nor predictive in this way. In legal argument from analogy, the similarities referred to in the premises support a normative, not a causal, inference – that is, an inference about correct legal outcome. This difference between induction by analogy in everyday reasoning and in law is a difference worth noting, and we shall explore some of its significance in what follows, but the difference should not obscure the fact that analogical reasoning, as a distinctive type of inductive inference, is pervasive both in legal and extralegal processes of thought.

## Limitations of Analogical Reasoning

While pervasive in law, the effects of analogical reasoning on legal decision making are limited. At least two reasons for this deserve comment. The first has to do with the nature of similarity judgments upon which analogical reasoning is based. Nelson Goodman has observed (1972, p. 444) that any assertion that “*A* is similar to *B*” is essentially incomplete. Just as we need to supplement the assertion that something “is to the left of” by specifying what it is to the left of, so, in order to be clear about a similarity claim, we must individuate the properties to which the similarity claim refers. But here we encounter a problem. Any two objects are alike in an infinite number of respects. This chair and this computer are alike, for example, in weighing less than a

hundred pounds, in being located in a university office, in being employed in an example, and so on indefinitely. Absent some restriction on what counts as a *relevant* property, the required individuation is impossible. The problem is that while relevance and importance of similarities must be restricted *in some way*, there is no *single correct way* to make the necessary restriction. Individuation of similarities, in other words, depends upon an *intrinsically relative* judgment. Goodman notes (p. 445), for example, that a passenger at an airport check-in station may recognize three pieces of luggage, *A*, *B*, and *C* as similar – say, in design, color, and ownership. To a pilot observing the same pieces, only *A* and *C* may be recognized as similar – with respect to weight, for example, they may be too heavy for safety’s sake. Accurate understanding of similarity judgment must include recognition of the fact that which pieces of luggage are more alike than others depends on who makes the judgment and why.

The implications for law are obvious. Just as persons at a baggage-train often fail for good reason to agree in their judgments of similarity because of different interests and/or points of view, so lawyers and judges fail for good reason to agree in their judgments of similarity among cases. The trial stage of a legal proceeding is designed to explore *alternative* theories of a case and the schemes of analogy connected with them.

This presents a problem for legal theory – namely, how to think about *choice* between plausible, but inconsistent, precedents. One temptation is to suggest that one line of precedents is more similar to the undecided case (*X*) because it shares more similarities with *X* than another. But this is no solution to the problem of choice.

If there are just three things in the universe, then any two of them belong together in exactly two classes and have exactly two properties in common: the property of belonging to the class consisting of the two things, and the property of belonging to the class consisting of all three things. If the universe is larger, the number of shared properties will be larger but will still be the same for every two elements ... If the universe is infinite, all these figures become infinite and equal. (Goodman, 1972, p. 443)

Counting similarities is no solution to the problem of choice, because in order to count we must know what and what not to count. There is no normatively independent way of counting similarities and thus no value-neutral way of deciding which of two conflicting lines of precedent is the correct line to employ in justifying decision in a case.

A second limitation of analogical reasoning adds support for the idea that normative theory must be the centerpiece of any adequate account of legal reasoning, including reasoning from analogy. In deciding a case at bar, one normally argues from similarity among precedents to a conclusion about only some *part or parts* of a case, that is, about specific, identifiable legal issues within a case. Before a final decision is made, the similarities which bear upon various specific issues within a case must be *collectively* assessed in order for a determination of overall fit between precedent cases and the case at hand to be made. While this type of reasoning may incorporate *conclusions* drawn by analogy, the reasoning process at work does not have the structure described above as the basic form of analogical inference. This is evident when we recognize: (1) that inference from analogy may count toward a defendant on one issue and toward a plaintiff in another; and (2) that analogies may differ in strength of their support for a conclusion from one

issue to another. Such variations in analogical support must somehow be summed over in a court's decision for one party rather than another. The "summing over" process involves, among other things, assignment of "weight" or "significance" to established analogies. Analogies, in other words, must be evaluated, and in the process they inevitably become embedded in a wider web of legal reasoning that must include nonanalogical, normative elements.

## Challenges to Traditional Theory

Recognition of the evaluative element in analogical reasoning has led most contemporary legal theorists to deny traditional claims about the centrality of analogy per se in the process of legal reasoning. The fact that analogical reasoning in law is not simply the problem of identifying similarities between cases, but the problem of identifying, or individuating, legally *significant* similarities is a starting point for most discussions of the subject. Evaluation of significance and relevance requires appeal to legal rules and principles, and contemporary accounts of legal reasoning focus primary attention on normative theory – that is, on the nature of legal norms and standards and on the way in which these are established.

The role accorded precedents and examples within normative legal theory varies widely. Some authors minimize their importance:

In a normative context, justificatory reasoning can proceed only from standards, and "reasoning by example," as such, is virtually impossible. Reason cannot be used to justify a normative conclusion on the basis of an example without first drawing a maxim or rule from the example, or, what is the same thing, without first concluding the example "stands for" a maxim or rule. (Eisenberg, 1988, p. 86)

Most, however, understand reasoning from precedent and example as a significant, but preliminary or condition-setting, phase of legal interpretation.

An example is Ronald Dworkin. His approach to normative theory is to construe the legal community as directed toward philosophical ideals, whether explicitly expressed or only implicit in legal judgment. He compares a judge deciding what the law is on some issue with members of some associative community – for example, a family, a friendship, or a fraternal order – deciding what the associative relationship requires in a situation which is unprecedented, that is, where rules have not been established that prescribe exactly what one should do. The member of an associative community to which he compares a judge most closely is a writer of chain novels (1986, p. 28). He imagines that such a writer is given a novel, part (or parts) of which have been written by others. The challenge is to continue the novel by making out of what one is given the best possible continuation of the novel. In doing this Dworkin says that the writer operates under two constraints. First, there is the *dimension of fit*. How one continues the story must be consistent with the bulk of the material supplied by the other authors. Second, there is an *aesthetic constraint*. How the writer proceeds depends on how he or she can make the work in progress best, all things considered.

As applied to law, the “dimension of fit” incorporates traditional concern with precedent. Any justifiable interpretation of a case “must not expose more than a low threshold number of decisions, particularly recent decisions, as mistakes” (Dworkin, 1978, p. 340). Choice between interpretations, each of which can pass a “threshold of fit” test, depends on another dimension of interpretation – moral theory. This corresponds to what he called the “aesthetic constraint” which operates in the work of a chain novelist. For Dworkin, which interpretation of a given case best advances legal practice involves inevitable appeal to political morality because every legal decision asserts the rights of one party over another. In doing so it provides sanction for use of society’s collective force against someone’s rights. Such a decision must be justified in some way, and for Dworkin the only means of providing such justification is appeal to some principle such as fairness, justice, or due process.

General theories of law ... for all their abstraction, are constructive interpretations: they try to show legal practice as a whole in its best light ... So no firm line divides jurisprudence from adjudication or any other aspect of legal practice ... Any judge’s opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision in law. (Dworkin, 1986, p. 90)

Dworkin’s notion that normative theory in law is inherently philosophical presents its own set of problems, of course. Some object to his claim (1986, pp. 248–50) that a judge employs his or her own convictions not because they are personal convictions, but because they are believed to be convictions the best morality would require. Melvin Eisenberg, for example, regards the distinction between “personal” and “philosophical” justification as of no theoretical significance since “Almost everyone thinks his own moral convictions are the convictions that the best morality would require, and thinks the method by which he arrives at his convictions is the best method of arriving at moral convictions” (Eisenberg, 1988, p. 194).

Others find practical problems with any philosophical understanding of normative theory. Steven Burton, for example, acknowledges that adjudication raises many “difficult, if not unanswerable, philosophical questions,” but in his view, these are “of little value to practicing lawyers and judges” (1985, p. 110). His alternative to an explicitly philosophical account of normative theory in law adapts some ideas of Lon Fuller (1946), who claimed that the key to legal interpretation is discovery of the purposes of law as applied to an undecided case. In his view, legal rules and standards are expressions of social aims and goals. Understanding these requires legal-specific, not philosophical, analysis, and the normative theory that should control the outcome of an undecided case will be the product of inquiry into the point and purpose of applicable legal rules and standards. Only such inquiry can produce knowledge of what the law should be trying to accomplish in the case.

A number of problems arise in connection with this conception of adjudication. It is often very difficult, for example, to give a clear answer to the question, “What is the point or purpose of a legal rule?” We have seen that agreement about the meaning of legal rules is far from extensive within the legal community – at least as applied to “hard” cases. Agreement in belief about the purposive underpinning of legal rules is

even less extensive, and this raises a critical question for Fuller's general approach to normative theory in law: "What if we can't determine the normative theory, that is, the social point or purpose, underlying a legal rule?" What is the legal effect of this circumstance on application of the rule? Do (or should) doubts about purposive theory weaken a legal rule or standard?

Mention of such questions is important here only to indicate that particular difficulties attach to a "socially purposive" conception of normative theory just as they do to a "philosophical" conception such as we find in Dworkin. It is important to recognize, however, that both these conceptions operate with roughly the same understanding of the limitations of analogical reasoning in law, namely, whether or not a factual similarity between an undecided case and a precedent case is legally significant depends on generalized, or at least generalizable, normative interpretation. For Dworkin, the norms are supplied by a judge's theory of political morality; for Fuller, they are supplied by a theory of the social point or purpose of relevant legal rules.

### Analogical Reasoning and Normative Legal Theory

From even a cursory comparison with traditional theory, it seems clear that recent accounts of legal reasoning are surely correct in their recognition of the limitation of similarity judgment and analogy in determining legal outcomes. Insofar as Edward Levi's well-known book on the subject fails to take these into account, it is incomplete. It is not clear, however, how much recent accounts contribute to a precise understanding of legal reasoning. So far as the analysis of the nature of analogical claims is concerned, progress is evident, as we have seen. But once this is acknowledged, signs of progress are difficult to make out. Richard Posner observes about the normative theoretical approach to adjudication, "When you think of all those ... theories jostling one another ... you see the range of choice that the approach legitimizes and, as a result, the instability of ... doctrine that it portends" (1992, p. 445). One is reminded here of Plato's comment, cited earlier: "the variety of man's activities and the unsettlement of human experience make it impossible for any art to issue unqualified rules holding good for all questions at all times." Substitute "normative theory" for "rules" in Plato's remark and you have a fair assessment of recent normative accounts of legal reasoning.

Normative theory aside, it is hard to ignore a stubborn fact: among practicing lawyers the idea persists "that general [legal] terms without examples are largely empty of meaning" (Gardner, 1987, p. 37). Even a normative theorist of legal reasoning like Posner seems grudgingly to accept some role for analogy in legal thought, though he is not sure how to describe it. He claims that analogical *reasoning*, as distinct from similarity judgment, does not amount to much (Posner, 1990, pp. 86–98). But he admits that "cases accepted within a theory provide testing instances for its further application" (Posner, 1992, p. 436). This lends support to the more or less standard "staging ground" view of precedent and analogy in legal reasoning and decision making, the view we find in Dworkin's "threshold of fit" criterion for the theory of an undecided case.



The underlying problems evident in discussions of similarity judgment and analogical reasoning in law stem from the fact that at present we do not understand how these processes work – whether in law or in other kinds of knowledge acquisition. In particular, we do not understand how similarity recognition interacts with normative legal judgment in case-by-case adjudication. Until more progress is made in scientific and philosophical understanding of these cognitive functions and their interaction it is likely that some purely conditional or stagesetting conception, like Dworkin’s “threshold” metaphor, will control accounts of analogical reasoning in law. Absent a more exact conception of how, apart from mere counting, similarity recognition enters into the formation of normative legal judgment, analogy-making and reasoning from analogy are certain to play second fiddle to generalized normative theory of some sort, so far as our understanding of legal reasoning is concerned. This is for good reason, but doubt may linger about whether the second-fiddle view is entirely correct. Reasons for such doubt are explained at the beginning of this article.

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## Risk

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Risk has always accompanied life. Danger and peril are not new. The risk of premature death from disease, for example, has been a part of human life from the beginning. Still, modern life is distinctively risky. It is so both because risk *permeates* modern societies and because these ubiquitous risks are, in the main, *morally cognizable*. Considering these claims in turn, it can scarcely be denied that the number, variety, scope, and salience of risks that anyone living in a contemporary industrialized or industrializing society faces on a daily basis dwarf those faced by our geographically dispersed and agrarian forebears. Just consider the risks attending prosaic aspects of modern life like mass transit, the widespread use of chemicals, or the vast scale of construction projects. Given the risks that have become a part of daily life, or at least given our increasing awareness of them, it should come as no surprise that ours has been characterized as a “risk society” – one focused on containing the risks that modernization itself creates.<sup>1</sup> More important than the sociological fact that societies have actually turned their attention to addressing risk, however, is the normative fact implied by the sociological one – namely, that the risks that we now face are morally cognizable. They are so because they are our creation, or are at least, as with risks posed directly by nature, subject to our control to some extent. Many of the risks with which we live are therefore our responsibility: we may be called to account for and must justify the risks.

To understand how modern legal systems, and especially their regimes of tort law and administrative regulation, ought to cope with the risks confronting their societies, the nature and moral significance of risk must be understood. In the first instance, without a grasp of what risk is it would be impossible to enshrine standards of risk imposition or regulation in the law. But an understanding of the nature of risk is not enough, for that alone would not warrant the creation of legal standards. Before such standards can be called for, then, risk must be shown to have moral significance – risk must matter morally. If this can be shown, it will surely be important in its own right, but also instrumentally. For it is likely that the substantive content of any moral standards governing the imposition and regulation of risk will be responsive to why risking matters morally, and thus that the content of the analogous legal standards ought to be shaped by the moral significance of risk. This should not be controversial: it would be very surprising after all if our standards of free expression, for example, did not answer to why it is that free expression matters. It is the aim of this discussion,

then, to explore the fundamental questions of the nature and moral significance of risk.

## The Nature of Risk

In legal contexts, risk is typically understood probabilistically, as the probability that a bad event (e.g., harm) will occur.<sup>2</sup> In order to understand risk, then, one must understand probability, and on a common taxonomy, the various accounts of probability can be sorted into objective and epistemic camps, each of which has constituent interpretations.<sup>3</sup> Objective interpretations consider probability to be a feature of the world that is independent in a relevant sense of human belief or knowledge, with the relative frequency account being a prime example: there is a fact of the matter about the risk, for example, that any American male faces of dying in a car accident over the course of a given year and one determines that risk by recourse to statistics about the reference class of American males. Epistemic interpretations of probability, on the other hand, consider probability to be a measure of belief, rational belief, belief about relative frequencies, or belief in the face of uncertainty.

As a first pass at the distinction between objective and epistemic accounts of probability, consider Donald Gillies's discussion of a coin-flipping example owed to the early nineteenth century mathematician P. S. LaPlace.<sup>4</sup> If one knows that a coin is biased but does not know which face it is biased towards, and then attempts to assess the probability that the coin will land heads when it is flipped, one might offer two very different answers. One might judge that the probability of heads is fifty percent, because without knowledge of the direction of the bias, there is no basis to expect one outcome over the other. Alternatively, one might determine that whatever the probability of heads is, it is definitely *not* fifty percent, because all that is known of the probability is that it is a value between zero and one, but not .5 – the coin is biased, after all, and thus it is either *more* or *less* likely to land heads than tails. The first assessment is based upon an epistemic conception of probability, while the second is based upon an objective conception. The difference in approaches is stark because, according to the epistemic account, the probability at issue in the hypothetical is exactly one-half, while according to the objective account, it is anything except one-half. Despite this divergence, however, it does not follow that one assessment is mistaken; the objective and epistemic accounts are simply different ways of assessing probability, and each likely has its place.<sup>5</sup>

What is most important in the present context, however, is what the two families of probability theory have in common: neither admits of a single measure of risk. Consider the epistemic accounts first. They refer essentially to a person's degree of belief or level of certainty that some event will occur. On a thoroughly subjectivist variant of an epistemic account, the probability that an event will occur is nothing more than some person's level of certainty, understood numerically, that the event will occur. When one claims that there is a 0.75 risk that it will rain tomorrow, then, one means nothing more than that one is 0.75 certain that it will rain tomorrow. And this should make plain that, according to the account, risk assessments may vary across persons, such that there is no *one* probability that some event, like it raining tomorrow, will occur.<sup>6</sup>

Rather, the probability depends on whom you ask, for each person may well have a different degree of belief about, for example, whether it will rain tomorrow. To be sure, the account claims not that there is *no* determinate probability, but rather that there are (or can be) *many* determinate probabilities.

Despite their name, this is true also of objective interpretations of probability, a fact that can be illustrated by further explicating the relative frequency variant of the view. The frequentist conception proceeds by defining a set and then discerning the probability that some person or event within that set has some salient property. In other words, it proceeds by first designating some reference class that includes the object of risk assessment, either a person or an event, and then determining what proportion of the reference class, or of the people or events in the reference class, has the salient property. For instance, the probability that Dean (the object of the risk assessment) will die in a car accident (the salient property) is derived on this view by stipulating a reference class, say "American males" (assuming Dean is American), and then determining what proportion of American males die in car accidents. The proportion of the set with the salient property – here, dying in a car accident – just is the probability that something will have the salient property. So, in sum, if one is seeking Dean's risk of being killed in a car accident, one starts with a reference class like "American males" and then determines what proportion of American males die in car accidents. The account is frequentist insofar as its proportionalism can be recast in the language of frequency, such that in the example at hand, the proportion of American males who die in car accidents marks the frequency with which any particular American male will die that way.

But what makes it a *relative* frequency account is what is key here. For on this view, risk assessments depend on or are relative to some reference class. That is, the reference class that one begins with influences the determination of risk, in that any risk assessment will be necessarily true only with respect to a given reference class. To see this, return to Dean's risk of dying in a car accident. Perhaps the proportion of American males who die in a car accident is .001, or one in a thousand. If true, this is an objective fact about the world: it is true, regardless of what anyone may believe, that the proportion of American males who die in car accidents is .001. In this respect, the frequentist conception of risk is objective. But the frequentist account's objectivity should be taken with a grain of salt, for its objectivity is relative. After all, there is no reason why, if it is Dean's risk of dying in a car accident that is sought, one might choose an "American males licensed to drive" reference class or even an eccentric reference class that fits Dean like "Indiana-born actors." There is no reason to expect that the risk that American males face of dying in a car accident is the same as that faced by Indiana-born actors. There will be a truth of the matter about the risk that Dean runs, but it will be relative to each possible reference class and so the objective risk may well be different for each.

One well-known but ultimately doomed attempt to circumvent this difficulty is worth briefly noting because it has a great deal of initial intuitive appeal. A. J. Ayer believed that better, more accurate statistics about probability could be generated by recourse to "the narrowest class in which the property occurs with an extrapolable frequency."<sup>7</sup> Ayer's thought was that a narrower reference class is like a truer description of the object about which or whom a probability of some kind is being sought, and accordingly, that narrower reference classes will yield more accurate probability judg-

ments because it will exclude irrelevant statistical data. So Dean's probability of dying in a car accident could be better gauged by appealing to the reference class of "American males licensed to drive cars" over one of "American males" because the former reference class has more qualifications than the latter.

Ayer's attempt to generate more accurate risk assessments foundered, however, in part because of two related problems. First, wider reference classes can capture causally relevant factors that are *excluded* from narrower ones. This is apparent even in the choice of reference classes just offered: victims of automobile crashes are not always licensed to drive. Second, narrowing the reference class may also accord *disproportionate weight* to causally irrelevant factors. For example, what would it illuminate to learn that Dean *qua* Indiana-born actor stands a .00098 chance of dying in a car accident? Nothing at all, because the relationship between one's state of birth and vocation, on the one hand, and risk of death in a car crash, on the other, is simply too contingent. But by narrowing the class in that way, those obviously causally irrelevant features of Dean would play a larger role in determining the probability sought. Of course, not all *intuitively* causally irrelevant features of the object of assessment are *in fact* causally irrelevant. Certain seemingly irrelevant descriptions of a person may actually illuminate facts about probabilities, as when it was discovered that drinking large amounts of alcohol increases the probability of developing esophageal cancer. The point here is simply that the usefulness or "accuracy" of a probability assessment does not correspond to how narrow the generative reference class is. Ayer's proposed solution to the reference class problem was thus at once too thin and too rich.

An objectivist account of risk will be as indeterminate in the relevant sense as an epistemic account of risk, for under an objective account of probability, risk assessments are generated by reference classes that can be infinitely redrawn, just as under an epistemic account risk assessments are hostage to people's diverse estimations of risk. Whichever account is relied upon to characterize risk, any given risk will be indeterminate. This is an important fact because it, more than anything, poses the greatest challenge to any legal response to risk, or indeed, to any purported moral standards of risk imposition or regulation. For it would seem to render impossible the task of formulating a particular and determinate threshold of risk marking the boundary between permissibly and impermissibly risky conduct.

But it would be premature to enjoin our legal systems to face that challenge at this stage. So far, only the conceptual niceties of risk have been canvassed. No argument has substantiated the moral significance of risk. And the claim that risk matters morally – that the description of some conduct or policy as "risky" has any normative bite – is hardly self-evident. Even if one has a dim intuition that risky conduct *qua* risky conduct calls for justification, moreover, that intuition's basis is not obvious. Thus, the moral significance of risk needs to be substantiated. For only if risk has moral significance should we expect the law to address it.

### The Moral Significance of Risk

If risk is morally significant, it means that risky conduct, personal or institutional, is open to moral assessment or requires justification in virtue of being risky. It does not

follow from this that the justification called for cannot be provided. Nor is there any prejudice (or approval) implied by deeming an aspect of some conduct morally significant. All that follows from ascribing moral significance to risk is that risky conduct is in principle morally assessable.

Now, if some conduct were harmful, the conduct would clearly be morally significant. For harming plainly requires justification. Sometimes harming is justified, sometimes not, but it is always morally significant, calling for justification. The question driving the present inquiry is whether the same can be said of risking. This is a difficult question. On the one hand, it seems hard to deny Arthur Ripstein's claim that "[p]arties engaging in potentially risky activities must show reasonable care for those who might be injured by those activities, not simply for the persons who turn out to be so injured."<sup>8</sup> Duties keyed to risk would entail that risk is morally significant. On the other hand, it is just not obvious that the fact that some action imposes risk is itself a morally relevant feature, characteristic, or property of that action. Even if we grant that *all* conduct is in principle morally assessable,<sup>9</sup> furthermore, it does not follow that risky conduct is morally assessable in virtue of the fact that it is risky. Any action can be variously described; the question here is whether describing conduct as risky bears moral significance. Put more directly, can risking in and of itself be wrong?

For clarity's sake, it is important to focus this question on the right object of moral assessment, for one might variously assess a person's character, a person's reasoning, or a person's actions. In asking whether risking can be wrong, it is principally risky *actions* that are at issue, not the character or the reasoning of those whose actions (or omissions) are risky. And one cannot get at the permissibility of actions by assessing either the character of the actor or the individual's reasoning. This is not the place to substantiate this particular claim,<sup>10</sup> but considering a couple of brief examples will go some way toward doing so. One who engages in risky conduct, say driving a gasoline truck, in order to earn a living while at the same time fostering a slim hope that one will wreak havoc clearly suffers from a character defect. That defect, though, does not bear on the permissibility either of the reason for driving the gasoline truck, namely to earn a living, or on the risky action itself, namely driving the gasoline truck. It bears only on the driver's character. Likewise, one who drives a gasoline truck in order to wreak havoc fails to act on a morally defensible reason, but here too that defect does not bear on the permissibility of the risky action itself of driving a gasoline truck. It is a commonplace, after all, that one can do the right (or permissible) thing for the wrong reason. The hypothetical gasoline truck driver in these examples is open to moral criticism regardless of the permissibility of driving the truck – alternately, his character and his reasoning are morally defective. This is true even if the risky action of driving the gasoline truck is not even morally significant. The central question is whether risky *action* is morally significant.

Now, perhaps the most straightforward and intuitive account of the moral significance of actions that impose risk maintains that that moral significance is owed to the fact that such actions portend harm. This commonsense view holds that risk impositions are morally significant because of their likelihood of, or potential for, causing material harm to the person upon whom the risk is imposed. There can be no doubt that the potential that risky actions have for causing material harm to people matters morally. The problem with this view, given the aims of the present inquiry, is that it is

not at all clear that the moral significance isolated by such an account can actually be ascribed to risky action *qua* risky action. In this way, it is not clear that such an account can be successful, for it appears to be the wrong *kind* of account. While some risks materialize causing material harm, others remain inchoate. There is a live issue whether risks that remain inchoate are morally significant, but the commonsense account just sketched cannot get at it.

For this reason, too, it makes sense to rule out accounts of the moral significance of risk that revolve around the fear that can be induced in people who are subject to risk. Although instilling fear in others is obviously morally significant, there is no necessary connection between risk and fear, and so this, too, is the wrong kind of account. It is possible to instill fear in another without imposing the risk that the fear is based upon, as when one points a toy gun at someone who does not know that the gun is a toy. And it is possible to subject someone to risk without inducing any fear, as when one secretly slips cocaine into another's jar of flour. A sound account of the moral significance of risk impositions, then, will capture the moral significance even of risks that remain inchoate and whose imposition is secret – what we can call “pure risks.”

This stricture might call into doubt the possibility of providing such an account. If so-called pure risks are the proper object of inquiry here, then one reason why risky action might *not* be thought to be morally significant is that there seems to be no material change in the lives of those who are put at risk (at least not in virtue of their being put at risk). James Griffin captures the import of this fact when he rhetorically asks, “How could murder acquire moral status independently of the havoc it wreaks in human lives?”<sup>11</sup> Broadening Griffin's claim, it is hard to make sense of the moral significance of killing apart from its material impact on the life of the person killed, her friends and family. Generalizing the claim, it is hard to understand how any action can be morally significant if it has no material impact on anyone's life.

Could pure risk impositions have such an impact? Interestingly, some recent tort cases have suggested as much by recognizing liability for certain pure risk impositions.<sup>12</sup> They have held that risk impositions constitute compensable injuries, or harms. To see the link between this case law and the question whether risks have a material impact on anyone's life, consider Stephen Perry's now canonical discussion of this line of cases.<sup>13</sup> Perry discusses the English case of *Hotson v. East Berkshire Area Health Authority*,<sup>14</sup> where the plaintiff suffered an injury that initially went undiagnosed by the defendant hospital and that later developed into a much worse condition. It was determined that there was a 0.75 risk that the injury would have deteriorated anyway, even if the defendant had diagnosed it properly at the outset, and that when the injury was properly diagnosed five days later the deterioration was inevitable, such that the risk had risen to 1. As the injury would more likely than not – specifically, 0.75 likely – have deteriorated quite apart from the defendant's carelessness, one might have thought that the defendant was in the clear. But the plaintiff pressed, arguing that the *increased risk* of deterioration – from 0.75 to 1 – due to the defendant's carelessness was *itself* a compensable injury: the chance of avoiding the harmful deterioration “was an asset possessed by the plaintiff when he arrived at the authority's hospital. ... It was this asset which [counsel] submits the plaintiff lost in consequence of the negligent failure of the authority to diagnose his injury properly.”<sup>15</sup> A trial judge and the English Court

of Appeal accepted the plaintiff's argument, but Perry argues that the House of Lords was correct in ultimately rejecting it.

As discussed in Part I above, to impose a risk is to impose a probability of harm, and Perry plausibly interprets the *Hotson* plaintiff's argument as being based upon a relative frequency conception of probability. So to say that there was a 0.75 risk of suffering the deteriorated injury at issue in *Hotson* is to say that if 100 people had suffered the same initial injury, seventy-five of them would have gone on to suffer the deterioration anyway while twenty-five of them would not have. Recall from the above discussion that the risk assessment here is relative to the reference class that is chosen as the baseline – in this case, other people with the same initial injury. What is crucial, though, is that some risk assessments will be more or less accurate. It is this fact that ultimately undermines the claim that risk impositions themselves have a harmful material impact on anyone's life.

Yet this move of Perry's, even at its bare introduction, might provoke the worry that he is simply following Ayer down the blind alley of appealing to the narrowest reference class about which we have statistics. Perry avoids duplicating Ayer's error, however, because he helps himself to a philosopher's conceit. While Ayer sought but failed to find a method for actually determining more accurate frequentist probability assessments, Perry's argument requires accepting merely that certain reference classes, perhaps unknown to us, just do generate more accurate risk assessments. Thus Perry argues, returning to *Hotson*, that if you *assume knowledge* both of the characteristics that determine whether any given individual of the 100 would have suffered the deterioration anyway and of which particular persons have the causally determinative characteristics, it is possible to partition the 100-person reference class into one group of seventy-five who would have suffered the deterioration anyway and one group of twenty-five who would not have, corresponding to the two probabilities. We know that the *Hotson* plaintiff must be in one of these two groups, and knowing his characteristics, moreover, it would be possible to know which one.

The claim of that a risk is a form of compensable harm, according to Perry, must be "capable of surviving such a partitioning of the reference class," because the partitioning leaves in place the original risk statistics, and assumes only that enough is known to distinguish those who would have suffered the deterioration regardless of misdiagnosis from those who would not have.<sup>16</sup> The claim that risk constitutes material harm, though, "must surely be independent of possession of knowledge of this kind,"<sup>17</sup> but as is obvious, it is not. For with enough information, it becomes clear that the defendant hospital has simply caused some people but not others harm on account of the misdiagnosis – risk, and with it any viable claim that risk is itself a material harm, disappears.

This conclusion has, however, been resisted by Claire Finkelstein.<sup>18</sup> Just as we should prefer to have a lottery ticket and the chance at a benefit that accompanies it, she argues, we should prefer *not* to be exposed to risk on account of its accompanying chance of harm. The fact, in short, that risk is dispreferable entails that risk is harm. The basis of Finkelstein's resistance to Perry's conclusion is her conception of harm: it is a preference- or rational preference-based conception. On this view, that which one prefers (or should prefer) is beneficial; that which one (rationally) disprefers is harmful. This kind of tack raises questions about the nature of harm that fall too far afield from



the main line of the present inquiry to pursue at length here. But the basis of her argument in a preferentialist account of harm casts doubt on her defense of risk as harm. If hers is an *actual preference* account of harm, then there is little that recommends it: our preferences are often misguided and indeed we often prefer, through ignorance or whatnot, what is in fact bad for us. But if the preferences that matter are *rational preferences*, which is more plausible, a new problem arises. Rational preferences are typically spelled out as fully informed preferences – the preferences that matter are the ones that one would have if one knew all the facts about what one might prefer – but from an omniscient perspective, risk just disappears. Risk is an “epistemic construct”<sup>19</sup> in that we think and reason in terms of risk only because of our bounded knowledge. A rational preference conception of harm assumes away those boundaries, but in doing so, it also assumes away risk.

An argument strikingly similar to Finkelstein’s is, moreover, actually anticipated and rejected by Judith Jarvis Thomson in a discussion of the possibility of a right against risk impositions. Thomson considers the following two propositions: “if it would be bad for X to get a thing Z, and if Y makes it probable that X will get Z, then Y causes X to be at a *disadvantage*” and “causing a person to be at a disadvantage is itself causing the person a harm.”<sup>20</sup> She rejects the case for a right against risk impositions so founded because, she maintains, “we cannot really say that causing a person to be at a disadvantage is itself causing the person a harm.”<sup>21</sup> On her view, the fact “[t]hat people prefer a minor harm to a risk of a major harm does not make the risk of the major harm itself be a harm.”<sup>22</sup> We are right to disprefer that which is disadvantageous, to be sure, but it does not follow from that that disadvantages – that which we disprefer – are themselves harms. Accordingly, Finkelstein’s argument that risks are harms does not succeed.

On the force of both Perry’s argument that risks are not themselves harms and the problems that beset Finkelstein’s argument that they are harms, we are left with the initial puzzle of the moral significance of risking, for Griffin’s point still stands. It is hard to make sense of the moral significance of any conduct, risky actions included, unless you can connect that conduct to some impact that it has on another. Assuming that no better argument can be offered to explain what *material* impact (pure) risking has on those subject to it, what is needed is an approach to the moral significance of risking that widens the parameters on how risk could affect life in a morally relevant way. I believe that one can accomplish this by widening both what one means by life and what can count as affecting that wider conception of life and arguing for an autonomy-based account of the moral significance of risk.

When Griffin rhetorically asks how murder could acquire its moral status apart from its terrible impact on life, he has in mind a straightforward understanding of what life consists in, what we might call “biological life,” as well as a straightforward conception of what the relevant impact on life consists in, which I have been referring to throughout as a “material” impact or harm. So murder is wrong (and so necessarily morally significant) at least in part because of the way it materially affects our biological life. But one’s interests can outstrip one’s biological life and more matters morally than matters materially.

Consider these facts in turn. The wider conception of life that accounts for the capaciousness of one’s interests we can call “normative life.” It is these two different conceptions of life, biological and normative, that Thomas Nagel eloquently trades on in

maintaining “[a] man’s life includes much that does not take place within the boundaries of his body and his mind, and what happens to him can include much that does not take place within the boundaries of his life.”<sup>23</sup> It is worth noting that if one is unaware that one is being subject to risk, as is true of pure risk cases, risk will also not affect one’s subjective experience, or what we might call one’s “experiential life,” which is a subset of one’s biological life just as biological life is a subset of normative life. Thus, in the course of defending the possibility of posthumous harms, Joel Feinberg contends, “[b]ecause the objects of a person’s interests are usually wanted or aimed-at events that occur outside his immediate experience and at some future time, the area of a person’s good or harm is necessarily wider than his subjective experience and longer than his biological life.”<sup>24</sup> I would only amend Feinberg’s statement to broaden the scope of his claim, so that it recognized that the area of one’s harm is also wider, and not just longer, than one’s biological life.

Relating this to the present discussion, we can say that just because being subject to risk cannot in and of itself affect one’s experiential or biological life, it does not follow that it cannot still affect one’s normative life. The question now is whether risk actually does or can affect anyone’s normative life. Any impact, whether from risk or anything else, must impact normative life. If it does not, there is no sense in which risk impacts a person’s life and thus no sense in which risk is morally significant. By widening what kinds of effects on life we recognize beyond material effects, however, we can recognize how risk impositions relevantly affect the normative life of people even if not materially and thus how they are in fact morally significant.

Imposing a risk is like laying a trap. There is a clear sense in which merely laying a trap does not materially affect anyone and in which risk therefore does not impinge on anyone’s material interests; rather, ensnaring a person in one does. Perry’s argument that risk is not itself a form of harm is largely based on this fact: when enough is known about where causal chains lead, he argues, we realize that there is only *bona fide* material harm or its absence.<sup>25</sup> Harm, on Perry’s view, is epistemically robust enough that judgments of harm do not depend upon what one knows at any given point, but only upon what in fact is the case. When we wait and see which risks ripen into the harms that they risk and which remain inchoate, according to Perry, we can thus discriminate between harms and harmless risks – the concept of a risk that is itself a harm loses its traction.

The power of Perry’s argument notwithstanding, there remains an important sense in which even laying a trap can impinge on a person’s interests because it can diminish the individual’s autonomy. There are many conceptions of autonomy, but according to one surely relevant conception articulated by Joseph Raz, autonomy requires a range of acceptable options from which to plot one’s life.<sup>26</sup> In the extreme, if enough traps are laid, one ends up with very few safe passages, and in the absence of an adequate range of acceptable options, one’s autonomy is completely undermined. But one need not invoke the extreme case to make the point. We should accept that focusing only on what materially affects a person overlooks a morally relevant feature of anyone’s situation – namely, what options the person has or had. So narrow a focus, in other words, overlooks the significance of autonomy.

One can learn only so much about someone’s autonomy by inspecting how the person actually acts or what materially happens to them. Perhaps one can infer some-

thing relevant about what choices someone had based on what they have done or the course of their life – what appears to be a poor choice may have been the best of many bad options – but it is at best a weak inference. Fully understanding the autonomy with which someone has acted requires understanding the options that were available to the actor, as autonomy depends upon the availability of acceptable options.

That autonomous activity presupposes acceptable options entails that the foreclosure of acceptable options diminishes autonomy. Certain risks represent just such foreclosures, and accordingly, risks can diminish autonomy. Even if one exercises the very options that one would have exercised absent the risk, which as it happens are safe, one's autonomy is diminished in virtue of the risk, for that risk narrows one's safe options. In this way, choosing a safe or otherwise acceptable option does not shield the autonomy of one's choice. Making one's way through a minefield without incident (aware of the danger or not) would certainly make one's choice of paths fortunate, but if there were no other safe and thus choice-worthy paths, it would not make one's choice autonomous. And it is this fact that shows why material impacts are not the only kind of impacts on normative life that matter morally: in the example above, one's life is not at all materially affected by the risk posed by the landmines, and yet it is clear that one's life is affected by them in a morally relevant way. They diminish one's autonomy.

Material harm is morally significant because it adversely affects what materially happens to one. It should come as no surprise that this fact figures in the foundations of accounts of the permissibility and impermissibility of harming. Thus the right against the imposition of harm provides normative protection against being put in a materially worse position than one would have been in but for the harmful behavior.<sup>27</sup> Risk, on the other hand, is not morally significant on account of its material effect. It is morally significant, instead, on account of its effect on autonomy, and any such effect simply does not necessarily have any material profile. Accordingly, a right against risk imposition would pay no attention to the counterfactual inquiry into what material position one *would* have been in, as the right against harming does, it would instead turn on the modal question of what positions one *could* have been in.<sup>28</sup>

This, it would appear, is what the moral significance of risky action must consist in. Only if risk is understood to impact on life in the ways discussed above, involving a modal form of impact that diminishes autonomy and a normative conception of life wherein one's interests are wider than one's material interests, can risking itself be morally significant. If this account fails, then the moral significance of risky action would be fugitive. Those who engage in risky conduct could of course still be open to criticism for their shortcomings of character or defective reasoning. And risky conduct could still bear any moral significance due to its potential for material harm. But this would not satisfy the intuition that risky action *qua* risky action is morally significant, and that intuition is difficult to shake. Following Judith Jarvis Thomson, who remarks that “[w]e do not think that the permissibility of acting under uncertainty is to be settled only later, when uncertainty has yielded to certainty,”<sup>29</sup> it is difficult to accept that the moral significance of risking is settled only later, after or indeed only if some risk has either materialized into harm or dissipated with no material effect.<sup>30</sup>

## Notes

- 1 For the term “risk society” and discussion of it, see Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992). See also Anthony Giddens, “Risk and Responsibility,” *Modern Law Review* 62(1), pp. 1–10 (1999).
- 2 Sometimes “risk” is understood to mean not merely the probability that a bad event will occur, but also the product of the probability and the badness of the bad event that may or may not occur. Thus, on the first interpretation, if two events of differing severity are equally likely to occur, they pose the same risk, whereas on the second interpretation, they pose different risks.
- 3 Donald Gillies refers to this high-order taxonomy, which encompasses the various constituent interpretations of probability, in *Philosophical Theories of Probability* (New York: Routledge, 2000), p. 2. This overarching taxonomy reflects Rudolph Carnap’s distinction between objective and subjective conceptions of probabilities in “The Two Concepts of Probabilities,” *Philosophy and Phenomenological Research* 5 (1945). The overarching objective/epistemic distinction is also adopted in Stephen Perry’s pathbreaking discussion of risk and tort law; see Stephen Perry, “Risk, Harm, and Responsibility,” in David G. Owen (ed.) *Philosophical Foundations of Tort Law* (New York: Oxford University Press, 1995), pp. 322–9. For a sophisticated and comprehensive overview of these matters tailored to a legal audience, see Matthew D. Adler, “Risk, Death and Harm: The Normative Foundations of Risk Regulation” *University of Minnesota Law Review* 87, 1293 (2003).
- 4 Gillies, *ibid.*, pp. 21–2. See also P. S. LaPlace, *A Philosophical Essay on Probabilities* (New York: Dover Publications, 1995)(1814), p. 56. I also discuss this example in John Oberdiek, “Towards a Right Against Risking,” *Law and Philosophy* 28 (2009).
- 5 This is a point noticed by early twentieth century philosopher and mathematician Frank Ramsey: “Probability is of fundamental importance not only in logic but also in statistical and physical science, and we cannot be sure beforehand that the most useful interpretation of it in logic will be appropriate in physics also. Indeed, the general difference of opinions between statisticians who for the most part adopt the frequency theory of probability and logicians who mostly reject it renders it likely that the two schools are really discussing different things. ...” Frank Ramsey, “Truth and Probability,” in *The Foundations of Mathematics and Other Logical Essays* (London: Routledge and Kegan Paul, 1931), p. 157.
- 6 As Gillies puts it, “[a]ccording to the subjective theory, different individuals (Ms A, Mr B, and Master C say), although all perfectly reasonable and having the same evidence *e*, may yet have different degrees of belief in *h*. Probability is thus defined as the degree of belief of a particular individual, so that we should really not speak of *the* probability, but rather of Ms A’s probability, Mr B’s probability or Master C’s probability” (Gillies, *supra* note 3, p. 53).
- 7 A. J. Ayer, “Two Notes on Probability,” in *The Concept of a Person and Other Essays* (London: Macmillan, 1963), p. 202. Gillies calls this the “principle of the narrowest reference class.” Gillies, *supra* note 30, p. 121. For more on this strategy, see Hans Reichenbach, *The Theory of Probability* (Berkeley and Los Angeles: University of California Press, 1949).
- 8 Arthur Ripstein, *Equality, Responsibility, and the Law* (New York: Cambridge University Press, 1999), p. 52.
- 9 This is the import of Samuel Scheffler’s claim, which I accept, that morality is “pervasive.” See Samuel Scheffler, *Human Morality* (New York: Oxford University Press, 1992), p. 25.
- 10 See Judith Jarvis Thomson, “Physician-Assisted Suicide: Two Moral Arguments,” 109 *Ethics* 497 (1999); T. M. Scanlon, “Intention and Permissibility I,” 74 *Proceedings of the Aristotelian Society* 301 (2000); T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning,*

- Blame* (Cambridge, MA: Harvard University Press, 2008); and John Oberdiek, "Culpability and the Definition of Deontological Constraints" *Law and Philosophy* 27, 105 (2008).
- 11 James Griffin, *Value Judgement: Improving Our Ethical Beliefs* (New York: Oxford University Press, 1996), p. 110.
  - 12 See *Falcon v. Memorial Hospital*, 462 N.W. 2d 44 (S.C. Mich. 1990) and *Alberts v. Schultz*, 975 P. 2d 1279 (S.C. N.M. 1999). From now on, I shall drop the qualification of "pure" risk and "pure" risk impositions, considering that qualification to be implied.
  - 13 Perry, "Risk, Harm, and Responsibility," *supra* note 3, pp. 321–46. My discussion here mirrors my account of Perry's position in John Oberdiek, "Philosophical Issues in Tort Law," 3 *Philosophy Compass* (2008).
  - 14 [1987] 2 W.L.R. 287, *rev'd* [1987] A.C. 750.
  - 15 Quoted in Perry, *supra* note 3, pp. 331–2.
  - 16 Perry, *supra* note 3, p. 334.
  - 17 *Ibid.*
  - 18 Claire Finkelstein, "Is Risk a Harm?" 151 *University of Pennsylvania Law Review* 963 (2003).
  - 19 Heidi M. Hurd, "What in the World Is Wrong?" 5 *Journal of Contemporary Legal Issues* 157 (1994), p. 200.
  - 20 Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 244.
  - 21 *Ibid.*
  - 22 *Ibid.*
  - 23 Thomas Nagel, "Death," in *Mortal Questions* (Cambridge: Cambridge University Press, 1979), p. 6.
  - 24 Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), p. 86.
  - 25 See Perry, *supra* note 3. For the record, Perry introduces a caveat to his analysis in "Harm, History, and Counterfactuals," 40 *San Diego Law Review* 1283 (2003), pp. 1305-9. This portion of my discussion draws on Oberdiek, "Towards a Right Against Risking," *supra* note 4.
  - 26 Joseph Raz maintains, "autonomy is exercised through choice, and choice requires a variety of options to choose from." Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 398.
  - 27 See Seana Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm," 5 *Legal Theory* 117 (1999). For further discussion, see Perry, "Harm, History, and Counterfactuals," *supra* note 25.
  - 28 It is worth pointing out that I am not backing into a position on free will, for my focus is on deliberative and not metaphysical options or possible positions. For discussion of "deliberatively significant" options, see Michael McKenna, "The Relationship Between Autonomous and Morally Responsible Agency," in James Stacey Taylor (ed.), *Personal Autonomy* (New York: Cambridge University Press, 2005), pp. 212–14. See also Hilary Bok, *Freedom and Responsibility* (Princeton: Princeton University Press, 1998).
  - 29 Judith Jarvis Thomson, "Imposing Risks," in *Rights, Restitution, and Risk* (Cambridge, MA: Harvard University Press, 1986), p. 185.
  - 30 Thanks to Dennis Patterson for inviting me to contribute this entry and for being so supportive during its writing. Thanks also to Arthur Laby, Tom Odom, Greg Lastowka, and Marc Edelman for comments on the penultimate draft. Thanks, too, to Hans Oberdiek for his helpful written comments. Finally, a special thanks to Gerardo Vildostegui for his comments, oral and written, on two separate drafts of this piece.

## Regulatory Theory

MATTHEW D. ADLER

“Regulatory theory” is hardly a well-developed area of philosophical scholarship – by contrast with tort theory, contract theory, property theory, and criminal law theory, to give some examples of substantive legal domains that have attracted much attention from legal philosophers. A partial explanation for this under-development may be that providing an illuminating conceptual analysis of “regulation” is quite difficult. Further, the nonconsequentialist normative views that have been the core of tort, contract, property, and criminal law theory, and to which legal philosophers are generally sympathetic, may not prove very fruitful in thinking about rate-making for natural monopolies, the licensing of pharmaceuticals, or anti-pollution laws – paradigmatic examples of regulation.

However, outside philosophy, a substantial body of theoretical work concerning regulation has developed – despite the lack of a clear definition of “regulation.” This work has been undertaken by economists and law-and-economists, and includes such topics as “market failure” rationales for regulation, the Coase theorem, the optimality of redistribution through the tax system rather than regulation, and the choice between alternative regulatory modalities, such as “command control” regulation versus tradeable permits. Debates about cost-benefit analysis and Kaldor-Hicks efficiency also should be mentioned, since these debates concern the criteria that regulatory bodies should use to evaluate possible regulations.

This chapter surveys a variety of matters concerning the justification for regulation and (if justified) its appropriate design. It draws upon the economic scholarship just described, but also attempts to connect the discussion to normative ethics and, more generally, to identify questions of philosophical interest. The chapter is a plausible blueprint for an as-yet-undeveloped jurisprudential field of “regulatory theory,” rather than a survey of existing philosophical work.

The focus of the chapter is normative – more precisely, *morally* normative, focusing on the moral justification for regulation and on morally optimal legal responses.

A large literature in economics and political science, under the rubric of “positive political theory,” seeks to describe and explain how governmental actors (including regulators) behave. Normative theorizing about regulation surely cannot ignore this literature. For example, whether externalities of some sort morally justify the creation of a regulatory body depends on the extent to which the body would be “captured” by

industry and therefore fail to address the externality. Still, the attempt here is to delineate the range of issues that scholars concerned to determine when regulation is morally justified should address – which is different from delineating the range of issues that a scholar interested in *explaining* regulation should address.

## What Is Regulation?

Defining “regulation” proves to be very difficult. Stephen Breyer states frankly at the beginning of his very influential book on *Regulation and Its Reform* that “no serious effort is made [in the book] to define ‘regulation’” (Breyer, 1982, p. 7). Anthony Ogus commences *Regulation: Legal Form and Economic Theory* by conceding that “regulation” is “not a term of art, and unfortunately it has acquired a bewildering variety of meanings” (Ogus, 1994, p. 1).

Intuitively, the following are instances of regulation: directives limiting air pollution issued by an environmental protection agency; the licensure of pharmaceuticals by a food-and-drug agency; the setting of permissible rates for a firm that has a natural monopoly on the provision of some sort of good or service. Intuitively, the following are *not* instances of regulation: tort law; criminal law; contract law; public education; national defense; the income tax. (For surveys of different types of regulation, see Breyer, 1982; Ogus, 1994; Baldwin & Cave, 1999.)

We might try to define regulation as public rather than private law. Regulation occurs, we might say, when a public body issues directives and enforces them, rather than private parties seeking relief from courts – as with tort, contract, and property law. Yet criminal law consists of statutory prohibitions issued by a legislature and enforced by prosecutors. To be sure, the legal norms prohibiting crimes are typically issued by legislatures, not administrative agencies. But much of what is taken to be regulation is also issued by legislatures. For example, federal antipollution laws in the United States are a mix of regulations enacted by the Environmental Protection Agency, and statutory provisions – often highly detailed – enacted by the Congress.

Nor is it particularly successful to define regulation as “ex ante” control of private behavior – by contrast to the “ex post” imposition of damages for wrongful conduct by tort law. Regulatory directives can be just as open-ended as the “reasonable man” standard of tort law. This definition is also problematic in suggesting that regulation necessarily takes the form of duty-imposing norms. The directives issued by regulatory bodies can, in fact, create a wide range of Hohfeldian positions: duties, to be sure, but also liberties, powers, and so forth.<sup>1</sup> Consider governmental licensure of professional services or pharmaceuticals, which takes the form of a background prohibition on the performance of certain conduct, coupled with legal directives (licenses) granted to actors on a case-by-case basis and permitting them to engage in the conduct.

Finally, identifying regulation as law animated, or justified, by a certain kind of value or goal is problematic – because the whole thrust of the law-and-economics movement is that the very same goals (namely, Pareto-efficiency, or Kaldor-Hicks efficiency, or the maximization of a social welfare function) are as relevant to tort, contract, property and criminal law as they are to regulation. In particular, to define regulation as that

body of law that should be evaluated with reference to consequentialist considerations, as distinct from those bodies of law that should be evaluated with reference to nonconsequentialist considerations, presupposes a kind of hybrid moral view – for example, a morality which instructs actors to maximize overall well-being within deontological constraints. Consequentialists, including law-and-economists, will not find this to be a useful definition, since they deny that morality includes deontological constraints or other nonconsequentialist elements.

This chapter will define regulation as nontax, noncriminal, public law: legal directives (of some sort) that are issued by governmental bodies; that are enforced by governmental bodies, rather than by private litigants; that are principally enforced through sanctions or incentives other than criminal penalties; and that are not taxes (more specifically, not taxes principally designed to raise revenue, such as the income tax). A legal directive can be general or addressed to a particular person, as in the case of a license or rate-making order. It can confer any kind of Hohfeldian position. Note that this definition excludes spending programs, insofar as they involve government's market purchases of goods and services – hiring teachers, for example – rather than the issuance of directives of any sort.

The definition is jury-rigged, meant to capture most of the cases commonly counted as regulation, and exclude most that are not. A better definition, like any good piece of conceptual analysis, would do that reasonably well, but would also illuminate the similarities between those items that fall within it.

## How Should We Morally Evaluate Regulation? Welfarism; the Pareto Principle; Kaldor-Hicks Efficiency versus Social Welfare Functions

What are the appropriate moral criteria for evaluating regulation? Normative scholarship by economists has, almost invariably, been *consequentialist* and *welfarist*. What it means to be consequentialist has been thoroughly explored by philosophers. Roughly, a consequentialist conception of morality evaluates actions (including governmental actions, such as the issuance of regulatory directives) with reference to an agent-neutral ranking of outcomes. Welfarism is the species of consequentialism that sees well-being as the sole intrinsically morally relevant feature of outcomes. More precisely, if each person's well-being in outcome  $x$  is the same as her well-being in outcome  $y$ , then  $x$  and  $y$  are equally morally good outcomes. This is just what economists call the Pareto *indifference* principle. It is also just the same as saying that moral goodness supervenes on well-being: no difference in the moral ranking of outcomes without a well-being difference.

Welfare consequentialism, of course, is a controversial moral position. More specifically, traditional economic wisdom about regulation has been strongly criticized, and some of the criticism seems to involve a foundational criticism of welfare consequentialism – as illustrated by the heated debates about regulatory cost-benefit analysis, a technique favored by many economists but vigorously opposed by numerous



legal scholars (Ackerman & Heinzerling, 2004; Adler & Posner, 2006). One strain here is civic republican. It has been suggested that cost-benefit analysis is problematic because it displaces citizen deliberation. Another strain is deontological. It has been suggested that cost-benefit analysis would license environmental, health and safety regulation that violates individuals' moral rights not to be put at risk of death or physical harm.

However, the perspective adopted in this chapter will be welfarist – not merely because of the author's own sympathies, but because plausible and reasonably comprehensive nonwelfarist normative accounts of regulation have not yet been developed with any rigor. By “comprehensive,” I mean an account that enables us to evaluate the full range of regulatory interventions. A critical issue which deontologists have not yet satisfactorily resolved is to specify the deontological constraints governing risk-imposition – without which a deontological account of environmental, health and safety regulation (let alone regulation more generally) is a nonstarter. Civic republican views, by their nature, help us to evaluate the procedures for regulatory choice, but not the substance of regulation – since that is supposed to be a matter for citizen deliberation. But, we can then wonder, what moral criteria should citizens themselves bring to bear in evaluating regulations? And the only plausible, reasonably comprehensive, and rigorously developed answer to *that* question is welfarist.

Welfarists, necessarily, accept the Pareto indifference principle – but they also, almost without exception, accept the principle of Pareto-superiority. That principle says: If each individual is at least as well off in outcome  $x$  as she is in outcome  $y$ , and at least one individual is better off in  $x$ , then  $x$  is a better outcome than  $y$ .<sup>2</sup>

A key issue in welfarist theory has been developing criteria to rank “Pareto-noncomparable” outcomes. Outcomes  $x$  and  $y$  are Pareto-noncomparable if  $x$  is not equally good as  $y$  by virtue of Pareto-indifference, but neither is  $x$  Pareto superior to  $y$ , nor is  $y$  Pareto superior to  $x$ . Economists tend to assume that any morally attractive ranking of outcomes will be *complete*: all outcomes, including all pairs of Pareto-noncomparable outcomes, will be ranked as better, worse, or equally good. This assumption is problematic (as the literature on incommensurability shows),<sup>3</sup> but surely it is true that there are *some* pairs of Pareto-noncomparable outcomes,  $x$  and  $y$ , such that  $x$  is better than  $y$ . Imagine that in  $x$  one person gets a slight headache which she avoids in  $y$ , but in  $y$  millions die painful deaths which they avoid in  $x$  (Adler & Posner, 2006, pp. 24–61, 158–66).

Efforts to rank Pareto-noncomparable outcomes have proceeded in two directions. Many applied economists believe that outcomes should be ranked using the criterion of “Kaldor-Hicks” efficiency or “potential Pareto superiority.” Outcome  $x$  is Kaldor-Hicks efficient relative to  $y$  if there is a hypothetical costless lump-sum transfer of resources, from those individuals who are better off in  $x$  than  $y$ , to those individuals who are worse off in  $x$  than  $y$ , which would make everyone at least as well off as in  $x$  as in  $y$  and at least one strictly better off. But it is deeply problematic to think that a Kaldor-Hicks efficient outcome is, as such, a morally better outcome. The Kaldor-Hicks criterion turns out to be vulnerable to “reversals” and intransitivities, hence not a good candidate for the betterness relation over outcomes (which is asymmetric and

transitive).<sup>4</sup> Yet more fundamentally, it conflates potential with actual betterness. Let us call  $x'$  some outcome produced from  $x$  by combining  $x$  with a costless lump-sum transfer that makes everyone at least as well-off in  $x'$  as in  $y$ , and some strictly better off. Then  $x'$  is Pareto superior to  $y$ , hence better than  $y$ . But why does this show that  $x$  – which is a different outcome than  $x'$ , and which is Pareto-noncomparable with  $y$  – is morally better than  $y$  (Boadway & Bruce, 1984, 96–102; Ng, 2004, pp. 47–64; Adler & Posner, 2006, pp. 9–24)?

A more attractive route to ranking Pareto-noncomparable outcomes involves “social welfare functions” (SWFs). (For a review of the SWF construct, with citations to the literature, see Adler, 2007, 2008, 2010; Adler & Sanchirico, 2006) This approach finds much favor in theoretical economics, and is used to some extent by applied economists too. The SWF framework use a utility function  $u(\cdot)$  to map a given outcome,  $x$ , onto a list or “vector” of utilities – representing the well-being of each individual in the population in that outcome. An SWF  $s(u(\cdot))$  then maps this vector onto a single number – such that  $s(u(x)) > s(u(y))$  if and only if  $x$  is a better outcome than  $y$ . SWFs are invariably structured to rank a Pareto-superior outcome as better, and also to rank  $x$  as better, worse, or equal to  $y$  even though  $x$  and  $y$  are Pareto-noncomparable outcomes; but many questions can still be asked about their appropriate structure. In particular, one can ask whether the most attractive SWF is the utilitarian SWF (which simply adds up utilities), or whether the best SWF is “equality regarding” – and, if so, what precisely that means. Contemporary debates in moral philosophy about the nature of equality – between prioritarians, “sufficientists,” and those who believe that equality concerns comparative fairness – have much relevance for the structuring of SWFs (Clayton & Williams, 2000; Crisp, 2003).

The SWF approach, unlike the Kaldor-Hicks approach, presupposes the possibility of interpersonal welfare comparisons. Again, the  $u(\cdot)$  function produces a list or “vector” of utility numbers for each outcome, one for each individual. It therefore produces an individual utility number for each individual in each outcome. These individual utility numbers represent, not merely whether a given individual is better off in one outcome than another, but also whether a given individual in some outcome is better off than a different individual in some outcome.

Economists who employ SWFs also adopt what might be called the “simple preference-satisfaction” account of well-being: Individual  $i$  is better off in outcome  $x$  than outcome  $y$  if and only if  $i$  prefers  $x$  to  $y$ . However, the SWF approach to welfarism is perfectly compatible with alternative accounts of well-being. A rich philosophical literature investigates the nature of well-being, with three distinct families of positions having substantial support: preference-satisfaction views; mental-state views; and objective-good views (Adler & Posner, 2006, pp. 28–39). The preference-satisfaction family consists of views which say that  $x$  is better for individual  $i$  than  $y$  if and only if  $i$  has the right sort of preference for  $x$  over  $y$ . The simple preference-satisfaction view is one variant of this first family of views, but not the only such variant.<sup>5</sup> Mental-state views of well-being say that  $x$  is better for  $i$  than  $y$  if and only if  $i$ 's mental states in  $x$  are better in some stipulated way. Objective-good views say that  $x$  is better for  $i$  than  $y$  if and only if  $i$  realizes a better bundle of objective goods in  $x$ . All three families might allow for well-being to be interpersonally comparable and measurable by utilities that are, in turn, the input for an SWF.

## The Two Fundamental Theorems of Welfare Economics and the Market Failure Framework

Most normative scholarship about regulation uses a “market failure” framework: regulation is justified only if certain failures of a free market occur, with externalities, public goods, monopolies, and imperfect information seen as the paradigmatic failures (Breyer, 1982; Ogus, 1994; Mas-Colell, Whinston, & Green, 1995, pp. 307–510; Baldwin & Cave, 1999; Salanie, 2000). Why a perfectly functioning market should be seen to vitiate the case for regulation, and what exactly “market failures” consist in, can be understood with reference to the two “fundamental theorems” of welfare economics (Mas-Colell, Whinston, & Green, 1995, pp. 545–77).

The setting for the two fundamental theorems is an idealized economy. Each individual’s well-being consists in the satisfaction of her preferences. Each individual is fully informed and fully rational, in the sense that she acts to maximize her preference-satisfaction. There are a variety of consumption goods. In each outcome or final “state” of the economy, an individual consumes one or another bundle of the goods, and her ranking of the outcomes depends solely on which bundle she consumes. The idealized economy also contains firms, each of which possesses some production technology, allowing it to transform combinations of goods or other productive factors into bundles of goods.

The economy starts with an initial total stock of goods and productive factors. An outcome – consisting of an allocation of a bundle of consumption goods to each individual – is “feasible” if the total stock of consumption goods in the outcome can be produced from the initial stock of goods and productive factors via some combination of the technological processes of the different firms. If an outcome  $x$  is feasible, and there is no feasible outcome  $y$  which is Pareto-superior to  $x$ , then – and only then – do we say that  $x$  lies on the “Pareto frontier” for the economy. In other words, the Pareto frontier consists of all feasible outcomes that are not Pareto-inferior to any feasible outcome.

In this set-up, a “free market equilibrium” consists of the following. Each individual is allocated some initial endowment, meaning some share of the initial stock of goods and productive factors, plus some ownership share in each firm. Given a set of possible prices for the goods and factors, it is assumed that each individual sells factors to the firms and sells and purchases consumption goods so as to maximize her preference satisfaction within her budget constraint (her budget being defined by her initial endowment and the prices), and each firm maximizes its profits. Individuals and firms act as “price takers”: Each individual believes that the amount she buys or sells will not change the price of a good or factor, and ditto for each firm. A set of possible prices is “market clearing,” an equilibrium, if the supply for each consumption good or factor at those prices equals the demand for that good or factor at those prices.

The first fundamental theorem shows that, given this idealized setup, together with very minimal assumptions about the structure of individual preferences and the production technology of the firms, every free market equilibrium produces an outcome that lies on the Pareto frontier. The second fundamental theorem shows that, given this setup plus somewhat stronger assumptions about the structure of individual

preferences and the production technology of the firms, *every* outcome on the Pareto frontier corresponds to some free market equilibrium. For every such outcome  $x$ , there is *some* set of initial endowments<sup>6</sup> for the individuals, plus a set of market-clearing prices, that produces a free market equilibrium whereby individuals consume exactly the bundles comprising  $x$ .

It bears noting how these theorems relate to the SWF framework which – I have argued – represents the most attractive variant of welfarism. Any plausible SWF – be it the utilitarian SWF or an equality-regarding SWF – respects Pareto-superiority. Therefore, the outcome ranked as the best feasible outcome by the SWF will lie on the Pareto frontier. The SWE, like free market equilibria, leads us to the Pareto frontier.

The SWF will *never* say that some off-frontier outcome is the best feasible outcome. To be sure, the SWF will also choose among outcomes lying on the frontier. But this is where the second fundamental theorem comes into play. The second fundamental theorem says that, whichever outcome on the frontier the SWF may choose as best, that outcome can be reached as a free market equilibrium.

In short, given the premises of the two fundamental theorems, government can always produce the morally best outcome through a free market.

The premises of the fundamental theorems are, of course, counterfactual. Still, the theorems represent a useful idealization. By identifying different ways in which the premises of the fundamental theorems can fail to hold, we identify distinct grounds that might justify government in taking actions other than maintaining the conditions for market exchange, that is, protecting endowments of goods and factors and enforcing contracts. This is exactly what the “market failure” framework does. As we shall now see, the paradigmatic “failures” – externalities, public goods, monopolies, imperfect information – are just distinct ways in which the premises of the two fundamental theorems may fail.

## Externalities

How should we analyze the concept of “externality”? The question is ripe for philosophical attention, given the importance of the concept to theorizing about regulation, and the variety of conflicting usages and definitions of “externality” in the existing literature. (For definitions of “externalities” and discussion of how they undermine the fundamental theorems, see Boadway & Bruce, 1984, pp. 110–17; Mas-Colell, Whinston, & Green, 1995, pp. 350–9; Ng, 2004, pp. 144–63; Salanie, 2000, pp. 89–105; Varian, 2006, pp. 626–48). Without purporting to survey that literature systematically, or to provide a nice conceptual analysis myself, let me suggest that two, quite different phenomena are often referred to as “externalities.”

One such phenomenon concerns the logical or conceptual structure of individual well-being. Imagine that John’s well-being depends, in part, on whether he is happy; and that Jim’s well-being depends, in part, on whether John is happy. Then there is a kind of externality, here. By making himself happier, John enhances not only his own well-being, but Jim’s.

To formalize a bit, let us say that the well-being of each individual  $i$  generates a ranking of the set of possible outcomes (for each pair of outcomes  $x$  and  $y$ ,  $x$  is better, worse, or equal for  $i$ ’s well-being to  $y$ ). From this ranking we can generate a set of

*i*-relevant propositions<sup>7</sup>, where each such *i*-relevant proposition consists of outcomes that are equally good for *i*, and outcomes belonging to distinct *i*-relevant propositions are not equally good for *i*. Then each individual's well-being is *logically independent* of every other individual's well-being just in case: for every *i* and *j*, the combination of every *i*-relevant proposition and every *j*-relevant proposition is logically possible.

In the Jim-John case, well-being is *not* logically independent in this sense. By contrast, imagine a case in which each individual's well-being supervenes on his mental states. Because, for any two individuals *i* and *j*, any specification of *i*'s mental state is logically compossible with any specification of *j*'s mental state, individual well-being is now independent.

One of the assumptions of the two fundamental theorems is that individual well-being is logically independent. Well-being consists in preference-satisfaction, and the degree of each individual's preference-satisfaction depends solely on which bundle of goods he consumes. Given different types of goods *a, b ... g*, any specification of *i*'s consumption of the goods is logically compossible with any specification of *j*'s consumption of the goods. To be sure, these joint specifications might not be *technologically* compossible in a particular economy, given the limited initial stock of goods and productive factors and the firms' production technologies. Scarcity and technical limits may make it physically infeasible to realize some joint specification of *i*'s consumption and *j*'s consumption. However, there is no conceptual or logical sense in which *i*'s satisfaction of his preferences frustrates or enhances *j*'s satisfaction of his preferences. (For examples of how the logical interdependence of individual well-being can undermine the fundamental welfare theorems, see Boadway & Bruce, 1984, pp. 112–17; Mas-Colell, Whinston, & Green, 1995, pp. 352–9.)

So much for the *first* sense of “externality”: logical interdependence of the sources of well-being. But “externalities” in a second and distinct sense can arise even where the sources of well-being are independent. Imagine, once more, that each individual's well-being supervenes on his mental states. However, in pursuing his well-being or other goals, Fred has a causal impact on George's mental states, affecting George's well-being. More precisely, this causal impact is not mediated by the market system. If Fred makes George happy by selling George a widget, then Fred has caused an impact on George's mind via the market system. Economists would not call this an “externality” – or at least not the kind that amounts to a market failure. Rather, an “externality” possibly justifying regulation occurs if Fred physically collides with George and hurts him, or makes noises that annoy George.

Generalizing, an externality in the second sense occurs when: some individual's or firm's activities have a causal impact (not mediated by the market) on some individual's well-being, or on some individual's or firm's stock of productive factors, or on some production process.

It is very plausible that the best theory of well-being allows for logical interdependence between the sources of individuals' well-being, and therefore gives rise to externalities in the first sense.<sup>8</sup> However, the externalities that motivate existing regulatory schemes<sup>9</sup> are typically externalities of the second sort. Consider environmental law: the standard example of an externality-targeting scheme. The externalities, here, are the physical effects of pollution: death, illness, property damage. A concern for such impacts is quite consistent with a theory of well-being where individual well-being is

logically independent (e.g., the theory which says that well-being supervenes on mental states).

Why do externalities in the second sense amount to market failures? Let us return to the two fundamental theorems. Imagine a very simple case. There are three consumption goods, apples, bacon, and cheese, and two individuals, Nate and Owen. This is a pure exchange economy: there is an initial stock of apples, bacon, and cheese, with no possibility of producing more. Nate has an initial share of the three goods, as does Owen. Each cares only about his consumption of the three goods (so well-being is logically independent). The endowments of apples and bacon are perfectly protected by the state – for simplicity, in the strongest kind of way, by a force field. It is physically impossible for Nate to get at Owen’s apples or bacon except by Owen’s consent, and vice versa. However, the endowments of cheese are not protected by the state.

Owen is much stronger than Nate and will physically seize and consume Nate’s cheese (nor has any way of committing not to do so). A market system is set up, whereby each individual can buy or sell his apples and bacon. Each individual does so, maximizing his preferences, and acting as a price-taker, on the assumption that Owen will consume all the cheese. Note that in this case, Owen’s consumption of cheese involves an externality in the second sense: By consuming the cheese, Owen causes Nate not to consume cheese, and has this impact on Nate’s well-being outside the market system – not by virtue of Nate’s decision to buy or sell cheese to Owen. And it is clear that a system of market-clearing prices for apples and bacon will not, necessarily, produce an outcome on the Pareto frontier. Why? By hypothesis, the market equilibrium for apples and bacon will leave Owen with all the cheese. But (depending on the structure of the individuals’ preferences) it could well be the case that it would be mutually beneficial for Owen to give some of his cheese to Nate in return for more apples and/or bacon than the market equilibrium leaves Owen.<sup>10</sup>

## Public Goods and Monopoly Power

In the setup for the fundamental theorems, the sources of well-being are not merely independent, but they are also *rivalrous*. If some individual consumes a particular, token, consumption good, it is impossible for any other individual to consume that particular, token, good. Note that rivalrousness in this sense is *not* the same as the logical interdependence of well-being. Individuals care about which *types* and quantities of goods they consume, not which *good-tokens* they consume; and so any consumption bundle for any individual is logically compossible with any consumption bundle for any other individual. Note also that rivalrousness is not the same as externalities, although both have to do with the causal structure of the world. If Jim buys a particular, token, good from John, and consumes it, then Jim has affected John’s well-being – by preventing John from consuming the token – but he has done so via the market system, with John’s agreement.

Sorting out these distinctions, and generalizing to the case of nonconsumption goods, is an obvious task for philosophical analysis.

Public goods are nonrivalrous. The classic example is national defense. My “consumption” of a unit of national defense does not prevent your consuming that unit. If

the air force sets up a missile defense system, reducing our risk of nuclear attack by some amount, then we jointly benefit from that reduction.

Nonrivalrous goods undermine the fundamental welfare theorems, which can be seen intuitively as follows: in paying a firm for the production of a unit of some nonrivalrous good, rather than some other good, I consider only the extent to which that unit advances my preferences. But (given nonrivalry) its production would benefit others as well (see Mas-Colell, Whinston, & Green, 1995, pp. 359–64; Salanie, 2000, pp. 67–88; Ng, 2004, pp. 164–86; Varian, 2006, pp. 670–93.)

Standard discussions see public goods as paradigmatic market failures, but do not emphasize regulation as the optimal response. Rather, scholars tend to think of state spending programs (defense, education, parks) as the normal mechanism by which the state provides public goods. However, there is often a public-good aspect to environmental, health, and safety regulation, in the following sense. Often, such regulation prohibits particular acts which (if left unregulated) would cause harm to multiple individuals. Consider the release of a toxin into a workplace, or water pollution, or the failure to build a safe building, airplane, or industrial plant. In such cases, the individual benefits from the nonperformance of the act are nonrivalrous. All the individuals who would have been harmed by the act jointly benefit when it is not performed. This means that an agreement between any one individual and the actor may not yield the optimal result: in considering how much reduction to bargain for,<sup>11</sup> the individual would simply consider his own benefit, not the collective benefit, while the actor simply would consider his cost of reduction.

Monopolies are yet another failure of the fundamental theorems. More generally, the failure here occurs when firms or individuals do not act as price-takers but determine how much to buy and sell with a view to influencing the price and, thereby, their profits or preference-satisfaction (Mas-Colell, Whinston, & Green, 1995, pp. 383–435).

Monopoly power is addressed, in part, through antitrust law. Given the definition of regulation offered earlier, antitrust law can be regulatory or nonregulatory – depending on whether legal enforcement is initiated by private actors or the states. In the United States, the federal government does have a role in enforcing the antitrust laws, but private individuals or firms can also sue a firm for a violation of the antitrust laws, and frequently do. (For a full discussion of antimonopoly regulation, see Viscusi, Harrington, & Vernon, 2005.)

So-called “natural monopoly” has, historically, been an important rationale for regulation. A “natural monopoly” occurs when production technology is such that it is cheaper to satisfy the demand for a good or service by concentrating production in a single firm; and where (relatedly) a system of competitive pricing, with multiple firms and marginal-cost pricing, would be unstable because the price for the good would be too low to cover the firms’ costs. A clear example of a natural monopoly is the supply of electricity, water, and cable television to households. It is considerably cheaper to have a single network of electric wires, water pipes, or television cables providing these services to a given neighborhood, rather than multiple networks for multiple firms.

The standard regulatory response to natural monopoly is to permit the existence of a firm with monopoly power (and even to mandate one, by barring entry from other firms) but to regulate the monopolist’s prices and terms of service. Such regulation is

commonly known as “economic regulation.” A significant trend, at least in the United States, has been to reduce the scope of “economic regulation” – both because of change in production technologies, and because of the realization that certain markets covered by “economic regulation” were not in fact natural monopolies. Airlines, interstate trucking, and railroads are important examples of previously regulated markets that are now deregulated (Viscusi, Harrington, & Vernon, 2005, pp. 362–8).

## The Coase Theorem

Ronald Coase’s hugely influential article, “The Problem of Social Cost” (1960), revolves around examples such as the following. (For a review of the literature on the Coase Theorem, see Medema & Zerbe, 2000.) A railroad’s train emits sparks, causing \$1000 in crop damage to fields along the tracks. Installing a spark-preventer would cost the railroad \$750. The farmers can bargain with each other and the railroad, and can bring suit to enforce whatever legal entitlements they may have, at zero cost. If the railroad is liable for the crop damage, then it will install the preventer – since the costs of doing so are \$750, while the costs of paying damages to the farmers for burned crops are \$1000. Conversely, if the railroad is *not* legally liable for the crop damage, then the farmers and railroad will bargain to an agreement – whereby the railroad agrees to install the spark-preventer, in return for a payment from the farmers equaling some amount between \$750 and \$1000. In either event – regardless of whether the farmers are legally entitled to undamaged crops – the “efficient” outcome, namely installing the spark preventer, will result.

What exactly do these sorts of examples show? Coase never provided a formal statement or proof of his “theorem,” and there are a variety of possible formulations of his insight. The “Coase Theorem” might be expressed as a proposition concerning Kaldor-Hicks efficiency. However, since Kaldor-Hicks efficiency is itself a dubious criterion for morally ranking outcomes, the Coase Theorem thus formulated would not be of moral significance. A better formulation is in terms of Pareto optimality. A given total stock of productive technologies and physical resources, existing in some society, defines a “feasible” set of outcomes: all outcomes that could be produced from those resources, using those technologies, if the physical resources and the outputs of productive processes could be costlessly reallocated between different holders, firms or individuals.<sup>12</sup> The Pareto frontier (again) consists of those, and only those, feasible outcomes that are not Pareto inferior to any feasible outcome.

The Coase Theorem can be understood as saying the following: If legal entitlements to the resources and technologies are clearly defined; and if individuals can costlessly enforce those entitlements and bargain to exchange them; and if individuals are perfectly informed and rationally maximize their preferences; and if the simple preference-satisfaction account of well-being holds true; then no outcome lying off the Pareto frontier will occur. If  $x$  lies off the Pareto frontier, then (by definition) there are some outcomes  $y_1, y_2, \dots$ , such that: at least one individual is better off in  $y_i$  than in  $x$ ; no individual is worse off in  $y_i$  than in  $x$ ; and  $y_i$  can be produced from  $x$  *without expanding society’s stock of physical resources or technological possibilities*, simply by shifting resources or outputs among individuals. Therefore, absent transaction costs, perfectly informed



and preference-maximizing individuals would bargain their way away from  $x$  to some  $y_i$ .

The Coase Theorem is often discussed with reference to externalities, but it equally applies to public goods and monopolies. Imagine that, given a stock of physical resources, and an allocation of individual endowments to the resources, and a set of technological possibilities, a market-clearing set of competitive prices would produce some outcome  $x$  lying off the Pareto-frontier – in virtue of externalities or public goods. Then the logic of the Coase Theorem shows that, absent transaction costs, individuals would bargain away from  $x$  toward some outcome on the frontier. Similarly, absent transaction costs, monopoly power would never produce an outcome off the frontier.<sup>13</sup>

The Coase Theorem is a vital supplement to the two fundamental theorems, which helps to sharpen our sense of the nonideal conditions that justify regulation. The two fundamental theorems show that, given certain idealized assumptions, regulation is unnecessary to implement a SWF, since any point on the Pareto frontier can be reached via competitive markets plus some set of individual endowments. The Coase Theorem shows that, even if some of the idealized assumptions of the fundamental theorems fail – namely no externalities, public goods, or monopolies – a different kind of idealization, that is, zero transaction costs, will still ensure that outcomes lie on the frontier.

Of course, in reality, nonzero transaction costs may well frustrate the beneficial exchange of legal entitlements. There may be large numbers of parties involved, or the parties may engage in strategic behavior – to give two paradigmatic examples of “transaction costs.” And, with nonzero transaction costs, the optimal state response to externalities, public goods, or monopolies – whether in light of a utilitarian SWF or some equality-regarding SWF – may be some sort of regulatory intervention. Still, like the fundamental theorems themselves, the Coase Theorem is very important in facilitating normative deliberation about regulation. It both draws our attention to the level of transaction costs as part of the normative rationale for regulation; and invites us to consider whether the optimal response to market failures might be a clearer definition of legal entitlements and/or measures to facilitate the exchange of such entitlements, rather than more traditional command-and-control regulation.<sup>14</sup>

## Information and Paternalism as Rationales for Regulation

Much contemporary regulation is targeted at potential harms to consumers or workers from market transactions – rather than at harms to third parties, at public goods, or at monopoly power. For lack of a better term, let us call this “first party” regulation. The licensure of pharmaceuticals and professional services; the regulation of foods, consumer products, and securities; and the regulation of workplaces are obvious examples of first-party regulation.

Is first-party regulation justifiable? To begin, let us keep in place the simple preference-satisfaction view of well-being traditionally held by economists. Even on this account of well-being, a system of competitive market prices may yield a suboptimal outcome if actors are imperfectly informed or imperfectly rational.

As already noted, the two fundamental welfare theorems presuppose (among their various idealizing premises) that all actors are fully informed and rational. Each

consumer and each firm knows everything about the various consumption goods, productive factors, and productive technologies; consumers maximize their preferences; firms maximize their profits. Analyzing the effect of competitive markets when the assumptions of full information and rationality are relaxed raises a host of difficult issues, including difficult issues regarding the implementation of an SWF under conditions of uncertainty (Adler & Sanchirico, 2006). But, however these issues are resolved, it is clear that a system of competitive prices can *sometimes* produce a morally problematic outcome given uninformed or irrational actors. For example, imagine that a stock of resources can be used to produce 1000 widgets, yielding 5 units of utility for each consumer; or 1000 gizmos, each of which may malfunction, yielding 0 utility for the consumer if it malfunctions and 10 units if it functions well. Would-be gizmo consumers believe that the chance of a gizmo malfunctioning is .1; the regulator believes that the chance of a gizmo malfunctioning is .9. Then a system of competitive prices may well lead to the resources being used to produce the gizmos; but the regulator employing a utilitarian SWF (to use the simplest example) would conclude that shutting down the gizmo market, and using the resources for widgets instead, increases overall well-being.

Note also that imperfect information and irrationality vitiates, not just the two fundamental theorems, but the Coase Theorem as well. For example, assume that sparks from the railroad will cause \$1000 in damage to the farmers' crops; that the railroad is not legally liable for the damage; that spark preventers cost \$750; and that the farmers believe the damage will only be \$300. Then the railroad will end up running its trains without the preventers – even though an outcome in which the railroad is paid \$800 to install the preventers would, in fact, be Pareto superior to this outcome.

Indeed, economic scholarship recognizes imperfect information as a kind of market failure potentially justifying regulation, distinct from externalities, public goods, or monopoly power (Mas-Colell, Whinston, & Green, 1995, pp. 436–510; Varian, 2006, pp. 694–715).

One important question here concerns the optimal regulatory response given poor information or irrationality. Should the good or service be barred outright, or licensed, or alternatively, should producers be required to provide consumers or workers with information, for example, by placing informational labels on goods? Actual regulatory regimes employ both sorts of strategies, and the appropriate choice between them obviously depends on the sort of information at issue, the cost of providing it, the cost of debiasing individuals, and so forth.

A different, more philosophical, issue is whether first-party regulation is justifiable even absent poor information or irrationality. Economists tend to say “no,” characterizing regulation of this sort as unwarranted paternalism. However, this response trades on a simple preference-satisfaction account of well-being. Once we shift to a different account of well-being – be it a modified preferentialist account, a mental-state account, or an objective good account – the possibility emerges that competitive markets and Coasean bargaining can fail to produce optimal outcomes quite apart from externalities, public goods, monopoly power, poor information, or irrationality.

Imagine that consumers, with full information and rationality, prefer gizmos to widgets; but widgets are actually welfare enhancing (e.g., because some kind of perfec-

tionist, objective-good account of well-being is correct, and widgets are, in fact, more perfect for humans than gizmos). Then if the resource cost of producing gizmos and widgets is the same, a system of markets will yield gizmos; but producing widgets is actually better.

The extent to which the divergence between well-being and preference-satisfaction in fact justifies regulation is a topic that scholars in the “happiness” literature have begun to explore (Frey & Stutzer, 2002; Kahneman & Sugden, 2005; Layard, 2005). Note that individual  $i$ , with the fullest of information and rationality, can prefer outcome  $x$  to  $y$ , even though  $i$ 's mental states would be such that he is happier in  $y$ .

## Regulatory Forms and Regulatory Choice Criteria

The discussion to this point has focused on the potential market-failure rationales for regulation: externalities, public goods, monopoly power, poor information and irrationality, the divergence between preference-satisfaction and well-being. However, the *modality* of regulation and *regulatory choice criteria* are also questions of normative interest, each of which has generated substantial scholarly literatures.

By *modality* of regulation, I mean different generic legal structures for responding to market failure (Breyer, 1982; Ogus, 1994; Freeman & Kolstad, 2007). One such structure consists of “command and control” regulation: namely, issuing legal directives prohibiting or requiring certain activities, described with a high degree of specificity and in terms of easily observable characteristics of activities. Another consists of “performance standards”: issuing less specific legal directives, framed in terms of the consequences of activities. Others consist of licensure, regulatory taxes, and “tradable permits.” To illustrate these differences using the example of pollution, imagine that factories of some sort produce a particular type of toxic air pollutant – a classic case of an externality. The legislature or environmental protection agency might respond to this externality by requiring the factories to implement certain specified technologies that remove toxins from emissions (command-and-control regulation); by requiring each factory to reduce the amount of the toxin in its emissions to a particular level, using whatever technologies it chooses (performance standards); by requiring each factory to have a license before emitting the toxin (licensure); by taxing each unit emitted, with the tax set at a level to reflect the external costs of the toxin (taxes); or by issuing a stock of permits, each allowing a certain amount of emission of the toxin, then allocating these permits to the factories and allowing the factories to exchange them, and requiring that no factory emit a toxin beyond the amount allowed by the permits it ends up holding (tradeable permits).

Yet a different type of regulatory modality, already noted in the discussion above of first-party regulation, is informational: firms may be allowed to sell products, conditional on their providing consumers various types of information; or, firms may be required to inform workers about the risks of certain workplace conditions.

The question of *regulatory choice criteria* is this. What are the optimal legal mechanisms for structuring the activities of regulatory bodies themselves? One such mechanism is statutory specificity: the legislature itself mandates some type of regulatory response to a market failure (be it command-and-control regulation, performance

standards, tradeable permits, etc.), and outlines this response in a fairly specific way in a statute, which an agency is then instructed to implement. Another mechanism is delegation-plus-cost-benefit-analysis: a regulatory agency is delegated broad legal discretion to combat some type of market failure, and is instructed to use cost-benefit analysis to decide how to do so. Another mechanism, seemingly attractive given an equality-regarding SWF, is to delegate legal discretion to agencies, but instruct them to employ some non-cost-benefit procedure that is sensitive to equality considerations.

Two important and philosophically interesting points are relevant to the question of regulatory choice criteria. The first point is that the optimal legal structure for controlling regulatory choices, in light of a given SWF, certainly need *not* be a legal instruction to regulatory agencies to employ that very SWF. For example, a legal regime in which regulators are legally instructed to maximize overall well-being might not, itself, be the overall welfare-maximizing regime – given that regulators may make mistakes about what welfare-maximization requires, that they may end up pursuing their own interests rather than welfare-maximization, or that they may be “captured” by regulated parties (Adler & Posner, 2006, pp. 62–123).

A second point is that it may be morally optimal to require regulators to employ Kaldor-Hicks efficiency or the closely related criterion of cost-benefit analysis<sup>15</sup> in choosing between regulatory options even though the appropriate moral criterion for ranking outcomes is some utilitarian or equality-regarding SWF, *not* Kaldor-Hicks efficiency. This point has been pressed by Louis Kaplow and Steven Shavell in their work on the optimality of channeling distributive considerations through the income tax system (Kaplow & Shavell, 1994). Imagine that policy 1 is preferred by an equality-regarding SWF to policy 2, but policy 2 is Kaldor-Hicks efficient. Then – Kaplow and Shavell argue – there is some change to the income tax system which, implemented together with policy 2, is Pareto-superior to policy 1. Policy 2 plus the change to the tax system is therefore better than policy 1, in light of the SWF – since the SWF respects the Pareto principle.

The upshot of the argument is that even the legal system designer who adopts an equality-regarding SWF, and cares about distribution, should issue a legal instruction requiring non-tax bodies to ignore distributive considerations, and should make such considerations the sole province of the tax system. A similar line of argument shows that even the utilitarian system designer, who cares about overall well-being rather than Kaldor-Hicks efficiency, should issue a legal instruction requiring non-tax bodies to use a Kaldor-Hicks or cost-benefit criterion in choosing among policies.

The Kaplow-Shavell argument, which relies on some technical assumptions about the structure of individuals’ preferences and the workings of the income tax system, cannot be reviewed in detail here. A substantial literature engages this argument and related work by other scholars (Sanchirico, 2001; Avraham, 2004; Johansson-Stenman, 2005). Whatever the ultimate cogency of the argument, it forces us to think clearly about the appropriate moral role of tax versus regulatory bodies in implementing a SWF and, more specifically, about whether it might be morally justified to require (some or all) regulatory bodies to choose their interventions with reference to Kaldor-Hicks efficiency, even though Kaldor-Hicks efficiency is not, itself, a basis for morally ranking outcomes.

## Notes

- 1 By “directive,” then, I simply mean some kind of legal utterance that changes individuals’ legal positions in some way.
- 2 An important point, relevant at various junctures later in the chapter, is that I define Pareto-indifference and -superiority in terms of well-being – which, on many accounts of well-being, is not the same as preference-satisfaction.
- 3 However, to simplify the presentation, in particular the discussion below of SWFs, the remainder of this chapter will assume that the moral ranking of outcomes is indeed complete, and that the ranking of outcomes for each individual’s well-being is complete as well. This is done for presentational reasons; the substantive claims made here generalize to the more plausible case of incompleteness (see Adler, 2010).
- 4 If outcome  $x$  is better than  $y$ , then  $y$  is not better than  $x$  (asymmetry); and if  $x$  is better than  $y$ , which is better than  $z$ , then  $x$  is better than  $z$  (transitivity).
- 5 A different variant might say that  $x$  is better for  $i$  than  $y$  if and only if  $i$  has a self-interested preference for  $x$  over  $y$  (Adler and Posner, 2006, pp. 28–39).
- 6 Strictly, an endowment here may be a wealth endowment, not necessarily a set of goods and factors and ownership shares (see Mas-Colell, Whinston, & Green, 1995, pp. 548–58).
- 7 A standard view in philosophy, which I am drawing on here, is that propositions are sets of possible worlds.
- 8 In other words, the best theory is not a mental state theory, but is either some objective good or some preference-based theory. While mental state theories make well-being logically independent, many variants of objective good and preference-based theories do not.
- 9 This is at least true in the United States, with which the author is most familiar.
- 10 This example shows, not merely how externalities undermine the first fundamental theorem, but how they undermine the second as well. Presumably there are *some* outcomes on the Pareto frontier that have Nate consuming some cheese. Because Own will seize whatever cheese Nate has, none of these will be reached in a free market equilibrium.
- 11 Either in the case where the actor is entitled to perform the harmful activity, or the case where the actor is subject to liability, but litigation is costly, and the individual is considering settlement offers.
- 12 The resources and production technologies should be understood to include individuals’ bodies and individuals’ abilities to exert causal effects on the world through activity. The Coase Theorem applies, *inter alia*, to the question of optimizing harmful and beneficial physical impacts on individuals, and to optimizing the choice of individual activity.
- 13 In the case of natural monopoly, for example, setting a single price for the good or service will yield too much or too little production. But the monopolist and consumers would bargain to produce the good or service up to the point where marginal costs and benefits are equal, perhaps by agreeing to differential prices for different units of the good, or perhaps by agreeing to have the monopolist set a single price at the level where marginal cost and benefit are equal, together with a lump-sum subsidy from the consumers to the monopolist sufficient to allow it to make a profit.
- 14 See the discussion, below, of tradeable permits.
- 15 Although often taken to be identical, cost-benefit analysis and Kaldor-Hicks efficiency can diverge. See Boadway and Bruce, 1984, pp. 263–71.

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## Methodology

ANDREW HALPIN

Overt discussion of methodology has become more widespread within legal theory in recent years. However, it is not yet apparent where this discussion is leading. The invocation of methodology may perform a number of quite different roles, which will be considered within this essay. (1) The methodology of jurisprudence (or legal theory), as one of the intellectual traditions caught up with exploring the human social condition, may be traced in order to demonstrate the inherent nature, characteristics, and limitations of such an intellectual inquiry. (2) The methodology of a particular legal theorist may be investigated to shed light on the nature, characteristics, and limitations of that particular theorist's approach. (3) The appropriate methodology for legal theory in general may be contested as a means of advancing the credentials of one theoretical approach over another for having the sounder methodology. (4) Advancing a methodology for legal theory in general may be used specifically to support a position in one of the key debates in jurisprudence, over the normative/descriptive divide. (5) Establishing a coherent methodology for a particular jurisprudential approach may be used to grant it credibility as a theory, rather than a disorganized collection of reflections on the subject of law. (6) Similarly, at a more general level, a methodology of jurisprudence may be sought to grant the discipline itself intellectual credibility, even scientific status. (7) And through identifying a methodology of jurisprudence, it is possible to suggest a comparison or even assimilation of the discipline of jurisprudence with other intellectual disciplines.

The enthusiasm for methodology within legal theory may in part be regarded as an excitement brought about by novelty. Within other disciplines that have engaged with methodology over a longer period of time, expectations that methodology might be the arbiter of good or bad theory have given way to a skepticism that regards methodological arguments as "political bids for ascendancy within a discipline" (Blackburn, 2005, p. 233). Even from such a skeptical perspective, there might still be valuable work to be done at a less ambitious level, in investigating how particular methodological positions relate to the development of legal theory, and in considering whether certain methodological approaches are more likely to yield fruitful results. Whether this latter inquiry is better regarded as yielding a discrete subject of the methodology of jurisprudence is a question that raises two issues that will be examined below. One issue concerns the question if there is anything more than loose analytical or metatheoretical

precepts at stake here. The other issue concerns the question if there is anything peculiarly legal about an appropriate methodological approach.

### The Emerging Interest in Methodology

Much of the impetus for the methodology debate in jurisprudence has come from Ronald Dworkin. His concern with methodology, although not explicitly invoked, is apparent in the earlier chapters of *Law's Empire* (Dworkin, 1986); it lurks not far beneath the surface of a subsequent article (Dworkin, 1997); surfaces at times in another (Dworkin, 2002); and is explicitly addressed in two more recent publications (Dworkin, 2004a; 2004b) – the four pieces being reproduced within Dworkin, 2006. However, Brian Leiter (2005) has correctly spread the credits more widely in attributing “the primary intellectual force” to John Finnis (1980, ch. 1) and “the primary stimulus” to Stephen Perry (1995) for the recent methodology debate.

Dworkin's contributions, as we shall see, illustrate roles (3) and (4) above, advancing a methodology that leaves his preferred theoretical perspective in the sounder position against his adversaries, as well as supporting Dworkin's side of the normative/descriptive divide. Finnis's concerns embrace role (1) in allying the methodology of jurisprudence with that of the wider social sciences; and he endorses Weber's insight on the theorist's necessarily reflective or evaluative concern for the human social condition, as it is approached even for the purpose of theoretical analysis through an internal preoccupation with its purpose or point. Finnis also, however, relates to roles (3) and (4), for he sets the character and limitation of the inquiry of jurisprudence by the property of possessing that practical right-mindedness, or sound judgment on aspects of human flourishing, which is regarded as the particular characteristic of a theory of natural law. Perry's initial motivation appears to fall under role (2), in exploring the methodology issue in the work of Herbert Hart, and through that to shed light on particular aspects of Hart's theory. Given the immense significance of Hart's work for twentieth-century jurisprudence, any serious study of Hart is likely to have wider ramifications, and hence discussion of Hart's position on methodology has fuelled discussion of broader concerns over the methodology of jurisprudence. There has also been more localized discussion on Hart's methodology (or the absence of a coherent methodology) and the implications for an assessment of his theory and its coherence – raising role (5), particularly in the setting of Hart's posthumously published “Postscript” (1994).

Further encouragement of a general methodology debate in jurisprudence has come from Julie Dickson's influential book (2001), and articles providing both surveys of and engagements with the developing debate from Leiter (2003), Dickson (2004), and Halpin (2006). Dickson enthusiastically champions methodology in general and promotes a Razian methodology in particular. Leiter's position, amplified in his subsequent book (2007), advocates a naturalistic methodology for a naturalized jurisprudence, exalting a scientific approach over the established analytical philosophy of mainstream jurisprudence. Leiter's work brings us within the scope of roles (6) and (7), pressing particular issues across a broader intellectual territory in a far more deliberate manner than Finnis's passing reference to the social sciences. Notable here is Leiter's treatment



of conceptual analysis, which we shall examine in detail below. In my 2006 article, I expressed caution over an elevated methodology, and skepticism over its use within mainstream jurisprudence; and in a subsequent essay (Halpin, 2009) raised doubts over whether any such defects can be repaired by Leiter's naturalist turn.

The works mentioned here provide a specimen and skeletal account of the emergence of the methodology debate in jurisprudence. Within the following sections, this will be fleshed out through consideration of specific topics and arguments within the debate, drawing in a fuller cast of contributors, before offering some concluding reflections on the roles and issues raised in the introductory section.

## Particular Arguments

### *Dworkin's choice of two methodologies*

Dworkin, in the works cited above, offers a basic choice between two types of methodology for jurisprudence: the one is external and descriptive, which he dubs Archimedean; the other is internal and normative, which is interpretivist. The interpretive character of Dworkin's methodology (and theory) is far from straightforward, but before investigating its complexity, it is worth presenting Dworkin's choice in other terms he frequently employs. The real choice, for Dworkin, is between doing theory that seeks to discover a descriptive criterion by which law can be identified (and more fully understood), and doing theory that seeks to build up a normative argument that can attain this objective.

It may appear at first sight that the internal, normative approach to methodology favored by Dworkin allies him with Finnis's methodological stance above. However, there is no hermeneutic social-science base, nor natural-law foundation to Dworkin's position, which relies instead (Dworkin, 1986) on the particular empirical observation that law is an argumentative practice, joined with the general optimistic or charitable outlook that human practices such as law (writing novels is another) have a coherently beneficial purpose or point, whose elucidation is the task of theory. The conjunction of these two premises shapes Dworkin's theory. The search for a descriptive criterion is inadequate, in Dworkin's eyes, to account for the arguments over law that fail to satisfy any uniform agreed criterion. On the other hand, the task, which he allocates to theory within his outlook on the nature of the legal enterprise, permits Dworkin to regard the theorist as developing the argument which will make sense of the practice of law in the best possible light.

It is important to note that it is the argumentative feature of law (Raban, 2003; Zipursky, 2005; Halpin, 2006), more than the normative feature, which is the basis for Dworkin's preferred methodology. It would be possible to merely describe a nonargumentative normative field of study (as Hart (1994) indicated, overlooking the point that Dworkin's subject matter was also argumentative). But although this is the basis for departing from a descriptive Archimedean approach, it is not sufficient to support the full extent of Dworkin's theoretical ambition. One might accept the need for an internal normative interpretive methodology in order to make sense of an argumentative normative subject matter. That is not to say that one would come out of the

interpretive process by resolving the argument in a manner which depicted that subject matter in the best possible light. In this respect, Dworkin's theoretical approach, which it should be stressed is not merely interpretive but, as Dworkin emphasises, *constructively* interpretive, is not enjoined by an interpretive methodology (Murphy, 2001; Halpin, 2006; MacCormick, 2007).

There is then a gap between the interpretive methodology that Dworkin argues for and his preferred theoretical stance which is constructively interpretive, and more narrowly than that, favors a particular point for the law of justifying state coercion. Similarly, it could be pointed out, for Finnis there is a gap between the hermeneutic social studies strain of interpretive methodology he endorses and the natural law theory he champions. In effect, both theorists take an interpretive methodology as appropriate based on their individual observations on the nature of law. For Dworkin, it is because he observes the argumentative nature of law; for Finnis, it is because he observes that law forms part of the human social condition. And both theorists promote their own theoretical viewpoint which is not entailed by that methodology, but comes about through their discernment of a purpose or point for the law: justifying state coercion; or, supporting the conditions for human flourishing. In this way, both Finnis and Dworkin add their own constructively interpretive purpose to an interpretive methodology.

The choice then is not simply between an external, descriptive, Archimedean methodology on the one hand, and an internal, normative, interpretive methodology on the other. For one thing, there is something going on in the theory building that is not captured by this choice – namely, the discernment of some purpose or point to the law. For another thing, the hard dichotomy between descriptive and normative is too simplistic; their relationship requires more subtle handling. Both Dworkin and Finnis rely to some extent on descriptive observation to found their theoretical approach. As Finnis himself has been the first to recognize, some sort of synthesis between the descriptive and normative is required in any adequate theory of law (Finnis, 1980, 1987).

### *Dickson's third way*

Dickson seeks to offer a path between purely descriptive and normative methodologies, through an initial study of Dworkin, Finnis, and Raz. She concludes that a Razian methodology that seeks to provide a theory of the practice of law by taking what the theorist regards as being the important, significant, or essential character of that practice is the most appropriate methodology for the legal theorist to adopt. Dickson labels this the "indirectly evaluative approach" because she considers that it requires the theorist to reflect on the practice of law and evaluate its character, rather than engaging in a direct evaluation of particular laws, as required by the normative methodology she identifies with Dworkin and Finnis.

Dickson's attempt to identify a third, indirectly evaluative approach, raises two key questions. In what sense is it "indirectly evaluative"? And, what is the distinct space it occupies between a purely descriptive and purely (directly) normative approach? Some illumination on the latter issue has emerged from an exchange between Leiter (2003) and Dickson (2004), though it has left Leiter (2007) unsure of Dickson's position. What has been clarified here is that the purely descriptive position, as seen by Dickson, is not

(as Leiter had thought) the position occupied by Hart. Rather, it turns out that Hart's position is for Dickson the prototype of the indirectly evaluative approach.

The real mystery then turns out to be what exactly occupies the purely descriptive position. It appears that Dickson has no contender for this role. Perhaps there is none. As Finnis (1980, p. 4) has remarked, "jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history." There is, nevertheless, some mystery still attaching to the precise standing of the indirectly evaluative approach. Leiter has suggested that the theorist's judgment of what is important in characterizing the practice of law could be equated with the exercise of "epistemic values," or what Dickson recognizes as "metatheoretical values." But these values for Leiter are nothing more than those precepts that guide the theorist in undertaking effective descriptive work, and hence can be regarded as falling within an amplified understanding of pure descriptivism.

Dickson persists in asserting that the indirectly evaluative approach consists of something more. She seeks to maintain a distinction between analyzing important features, which would be subject to epistemic or metatheoretical values, and *evaluating* important features in the process of pursuing an indirectly evaluative approach (Dickson, 2004, pp. 139–40). Yet when using her paradigm to illustrate this distinction, the judgment she cites from Hart (1987, p. 39) is a judgment that Hart himself described as based on "meta-theoretic values."

This returns us to the issue of how the phrase "indirectly evaluative" should be understood. The "indirect evaluation" is contrasted with direct evaluation. A direct evaluation endorses what the practice of law itself values as important, in evaluating particular laws. An indirect evaluation does not indirectly endorse an evaluation which the practice of law itself makes; nor does it endorse an evaluation which the practice of law makes indirectly. There is, in fact, no indirect process of that which is done directly in the other case. An indirect evaluation is supposed to express what is valued as important for the practice of law, but the basis for evaluating the feature as important bears no relation to any evaluation made by the practice itself. It would be simpler and more accurate to describe it as a *direct* evaluation of the practice from a particular theoretical position: it represents what that theoretical perspective sees of value in the practice.

If this does introduce something beyond epistemic or metatheoretical values, it only serves to reintroduce the theorist's discernment of some purpose or point to the law, in identifying what characteristic is regarded as giving the practice of law its value. That is an element of theory building noted at the end of the previous part, and cannot be regarded as heralding a new distinctive methodology.

## Particular Topics

### *Conceptual analysis*

Leiter's concern to advance a naturalistic methodology for jurisprudence buys into a Quinean naturalism which postulates a uniform approach to the acquisition of all understanding through a scientific-empirical study of the natural world. The

technicalities of Quine's attack on the analytic/synthetic distinction, sympathetically reviewed in Oberdiek and Patterson (2007), or the plausibility of naturalism (scientism), more cautiously considered in Halpin (2009), cannot be fully examined here. We may simply note for present purposes that Leiter's broader philosophical outlook leads to a view of conceptual analysis as being subordinated to scientific inquiry – social-scientific inquiry, in the case of law. This stands in sharp contrast to the traditional philosophical outlook in which conceptual analysis was an exalted philosophical activity enjoying a priority over scientific-empirical inquiry, an outlook adopted by mainstream analytical jurisprudence: “the philosophical methodology of analytic jurisprudence” (Coleman, 2001a, p. 213).

The place of conceptual analysis has previously received little attention within jurisprudence. Some efforts to encourage a discussion have been made by Brian Bix, to which others have responded (Bix, 1995 and Halpin, 1998; Bix, 2000 and Tamanaha, 2000). Bix (2003a, 2005, 2006, 2007) has also explored this subject through developing a commentary on the approach to conceptual analysis taken by Joseph Raz (notably, in Raz, 1996, 1998, 2005). The topics discussed have ranged across finding the basis for an analytical approach, the role of an interpretive community in establishing the boundaries of concepts, and the relationship between conceptual analysis and the metatheoretical or epistemic precepts mentioned in the previous part. Particularly in his more recent work, Bix has highlighted a problem that he sees illustrated in the approach of Raz to conceptual analysis, which relates directly to the position taken by Leiter.

Bix, generally speaking, adopts the mainstream jurisprudential outlook that conceptual analysis must be undertaken *prior* to empirical study. However, he notes that Raz's approach to conceptual analysis departs from the strict stance here in allowing that to some extent the basis for a concept of law is found within the prevailing thinking of a particular community. Yet, if this empirical contingency is let in to the formation of concepts, the analytical no longer holds priority over the empirical. Certainly, as Bix points out, conceptual analysis in jurisprudence cannot be regarded as sharing the same exalted position it traditionally occupied within philosophy.

Bix has attempted some tentative suggestions on how this departure can be reconciled with an appropriate role for conceptual analysis within jurisprudence, suggesting an Hegelian or Wittgensteinian perspective, but ultimately concedes more work needs to be done. For Leiter, there is no problem: the priority was always the wrong way round. Once the correction has been made, the only role for conceptual analysis is to serve in the process of helping to display our best current empirical-scientific understanding of law. This renders conceptual analysis virtually redundant as a principal theoretical activity, and the only ground that Leiter (2007) has conceded is to a diluted or “modest” form of conceptual analysis in the face of arguments from Farrell (2006) and Oberdiek and Patterson (2007). Leiter holds on to these authors' adoption of the Quinean insight against analyticity, and the priority of the empirical, in restricting conceptual analysis to the elucidation of concepts whose value is determined by empirical observation.

The core issue here is what is covered by the analysis in conceptual analysis. If conceptual analysis is modestly limited to the elucidation of existing concepts, then it

follows that some sort of empirical work needs to be done in identifying the existence of such concepts, whether they are found in the prevailing thinking of a particular community – folk intuitions, as Farrell following Jackson (1998) would have it; or, in existing theoretical work, which is the focus of Oberdiek and Patterson. Such elucidation may provide greater understanding of the concepts already in place, but, crucially for the Quinean, does not purport to identify what there is in the world as a preliminary to its investigation.

In my 2009 essay, I argued for a richer notion of conceptual analysis without falling back on the traditional philosophical primacy of conceptual analysis. This broadens the scope of analysis to cover the exposition of both raw subject matter and concepts, and insists on recognizing an exploratory role for conceptual analysis whereby a suggested explanation (descriptive or normative) can be advanced prior to further reflection and empirical testing. This notion of conceptual analysis provides a dynamic interaction with an experiential base of the particular subject matter under investigation, and is accordingly restricted neither by established empirical findings nor by settled philosophical categorization of the subject matter.

Alongside this core issue of what is the subject of the analysis, there is a connected and equally important issue concerning how the concept relates to its subject matter. In traditional philosophical terms, this is expressed as finding the essential or necessary features of a concept that will be used to determine what does or does not fall under it, establishing its boundaries. If these boundaries are fixed prior to empirical study, then it follows that they will severely limit the empirical investigation. If, on the other hand, we start with no boundaries, how do we know what to investigate? The apparent dilemma is created by a failure to recognize the different ways in which we use words and concepts to identify subject matter and to convey understanding of it, a distinction whose importance for legal theory I have stressed in the works cited, and elsewhere (Halpin, 2001). In particular, we may use a single term to commonly identify a subject matter over which we then develop different understandings, or concepts, without ever having reached a common agreement on the “essential properties” of the subject matter under investigation. (Consider cosmologists disagreeing over the concept of a black hole.)

We should also recognize the possibility of a single term being employed to signify different subject matters, which may call for quite different explanatory concepts; and, for the differentiation of subject matters to relate to the standpoint of the theorist. (Contrast the different concepts for snow expressed in Inuktitut and English.) Wittgenstein’s (1958, §76) stark refusal to set a boundary on the concept of a game is an extreme instance of recognizing the fluidity of language, but underlines the importance of an experiential base through which we determine what subject matters we wish to differentiate as significantly requiring understanding.

If conceptual analysis is not restricted to setting out the essential or necessary features of the subject matter under investigation, this has wider implications for the way we go about building our theories. The weaving together of what is essential to the subject matter and what is of importance to the theorist in seeking to understand that subject matter, suggested by Dickson’s depiction of the indirectly evaluative approach above (and reflecting a tendency found in Hart, Raz, and Coleman), must now be

unpicked more carefully. To suggest that a concept of law must convey the essential or necessary character of law that is found in all modern legal systems begs a number of questions.

### *Law and language*

The difficulties arising from the possible overlap between conceptual analysis and the definition of terms are compounded by law being intimately bound up with language. The interplay between these two close relationships has contributed a number of twists to the methodology debate in jurisprudence. At one stage, Dworkin appeared to be prepared to dismiss his opponents for adopting a semantic approach in the derogatory sense of playing with words: each proposed meaning of “law” described a different subject with no possibility of argument between them. However, his own approach to conceptualizing law can itself be recast as a semantic approach: deploying interpretive semantics rather than criterial semantics – we find out what the word “law” means (and what individual legal terms mean) through an interpretive process rather than through relying on an established criterion. Moreover, his infamous “semantic sting” fails to appreciate the crucial distinction between using words for identification and for conveying understanding (Halpin, 2006).

Others (Stavropoulos, 1996; Rodriguez-Blanco, 2001) have pointed out the link between Dworkin’s theoretical approach and a realist semantics: the meaning of words is discovered through a clearer grasp of the reality to which a word refers. One form of realist semantics, metaphysical realism, has been advanced by Michael Moore (2000), the metaphysical grounding for the realism clearly linked to Moore’s natural law persuasion. An alternative to a metaphysical grounding for realist semantics is to be found in the recognition of “natural kinds”, or in postulating some analagous grouping for legal realities. As well as Nicos Stavropoulos, David Brink (1988) has promoted this approach. And briefly, Dworkin himself (2004a) dallied with an analogous natural-kinds semantics before repudiating natural-kinds semantics outright (2006, ch. 8), in an attempt to revitalize the semantic sting. The notion that the method of acquiring greater understanding of the meaning of “tiger” by means of a study of tigers can be transplanted to discovering the meaning of legal terms has been fiercely criticized by Dennis Patterson in an exchange with Brink (Brink, 1989; Patterson, 1989a, 1989b), and more recently in a critique of Dworkin (Patterson, 2006a).

A general problem with transferring the methodology debate to an issue over semantics is that the solutions offered are at such a vague level of abstractness that they provide no further illumination on the initial problem. No metaphysical or natural-kind reality referred to by a legal term has ever been captured and caged to allow further study of it. Overabstractness is not, however, found only among the supporters of realist semantics. Both Raz’s and Hart’s criterialism have been defended (Raz, 1998; Rodriguez-Blanco, 2003) by making the criteria so abstract (or “thick”) that the argument over how the criterion applies remains unresolved. And Dworkin’s interpretive semantics, purified from an association with natural kinds, is more concerned with establishing the breadth and ambition of the debate than with bringing answers any closer. Taking abstractness a stage further still has been achieved by Coleman and Simchen (2003) in proposing a move beyond criterial semantics through a convoluted metasemantics

(Halpin, 2006) which postulates a quality for ordinary language meaning without having to demonstrate it in any individual case.

The suggestion that advances in jurisprudential methodology are to be imported from the philosophy of language has been doubted by a number of writers (Raz, 1998; Bix, 2003b; Green, 2003), and the counter-suggestion has been made that the learning might even travel in the opposite direction (Halpin, 2005). The point being that law unlike philosophy has an authoritative process for resolving argument over the uncertainty of its terms.

### *The normative/descriptive divide*

Not all legal arguments have, however, been resolved. It has been stressed in the previous section that it is the argumentative feature of law that underlies Dworkin's departure from a descriptivist methodology to place him on the normative side of the normative/descriptive divide. Before considering this more fully, it has to be recognized that the normative/descriptive divide is an aspect of the methodology debate that rages over a number of complex issues. The concern with finding a coherent methodology for Hart is in part due to the tension provoked by Hart's cryptic affiliations with both descriptive sociology and analytical philosophy, in a manner that did not effectively bridge the gap between them (Lacey, 2004; Twining, 2009). Viewed more narrowly as a work of analytical jurisprudence, there persists uncertainty over how to resolve the tension between descriptive and normative elements in Hart's approach (Perry, 1995 and 1998; other contributors to Coleman, 2001b; Dickson, 2001, 2004; Dworkin, 2002). And Hart's successors within legal positivism have produced different strains of that outlook considered elsewhere in this book, which are distinguished predominantly by their particular positions on the normative/descriptive divide.

The need for normative theory is generally recognized in a trivial sense in acknowledging that even descriptive analytical work should be guided by the metatheoretical precepts referred to above, requiring such virtues as simplicity, clarity, and concision. Inasmuch as these precepts are being used to evaluate a descriptive theory, they make the subsequent evaluation normative, not the initial theory building itself – unless one assumes the theorist while engaged in the theory building is also subject to a process of self-evaluation in accordance with these precepts. If we adopt this position, then it follows that there may be normative differences between theorists over which exercise of these values *during the process of theory building* produces the better analytical description, enjoys the greater explanatory power. (This fits the key passage of Hart (1987, p. 39) which Dickson relies on.) However, this does not produce a normative/descriptive divide, for the differences are all on the side of debating what makes the description more effective.

While considering common ground among theorists, it should also be noted that there is a wide consensus that law as a social phenomenon requires the theorist to develop a hermeneutic concept. This is accepted, to illustrate the breadth of the consensus, by Finnis, Dickson, and Leiter. But the consensus is shallow: the significance of recognizing the need for a hermeneutic concept is contested. Finnis relates it to an interpretive outlook, Dickson to the need for the theorist to make a judgment of what is important in the subject matter, and Leiter to the adoption of epistemic (metatheoreti-

cal) values. Leiter's position transfers us back to the previous paragraph, but the positions of Finnis and Dickson open up another possible front for the normative/descriptive divide, in that both regard the theorist as being involved through the hermeneutic endeavor with finding the point or purpose that gives the subject matter its significance and the theoretical account its edge.

Whether or not linked to a hermeneutic approach, it was noted in the previous section that the theorist's discernment of some purpose or point to the law is a common feature in different accounts of the methodology of jurisprudence. Is this the feature that determines the normative/descriptive divide? At a simple level, it might appear to be so. Finnis and Dworkin regard the point or purpose as being normative (promoting human flourishing, justifying state coercion), hence their theory is normative; Raz sees the point as nonnormative (avoiding moral controversy through a social test for prescribed conduct), hence his theory is descriptive. This suggestion gathers pace when it is observed that the post-Hartian strains of soft and hard positivism appear to assume positions along the normative/descriptive divide depending upon whether the social test (rule of recognition) they adopt permits or precludes recourse to normative values.

That this is too simple a level to account for the normative/descriptive divide is plain, however, when further interjections are made: (i) Hart's point mentioned above that even an activity that is primarily normative is susceptible to description; (ii) a theorist espousing a normative purpose for law may adopt a descriptive approach to its elucidation (Rodriguez-Blanco, 2006, on Moore); (iii) similarly, a theorist identifying a non-normative key feature for law may open up a normative issue within it that requires a normative response for its elaboration – the line taken by Perry on Hart's use of obligation within his analysis of the rule of recognition.

Yet these interjections are material only to the extent that the observation on the subject matter of the theory requires the same adjustment to the theory. So, as noted above, Hart's comment that normative subject matter can be described only follows through to establishing a descriptive theory if providing a descriptive account of the subject matter is all that the theory is called upon to do. Similarly, Perry's point is only significant if the theory covering legal obligation is required to normatively engage with the normative issue at hand. I have suggested that what compels Dworkin into normative theory is his picking up the theoretical burden to resolve (rather than merely describe) the argumentative condition of the law. If one were to generalize here, the suggestion would be that the existence of normative controversy *accompanied by* the acceptance of the challenge to engage with that controversy is what marks a theory as normative.

It would follow that the compulsion for normative theory would increase in so far as the subject matter itself was recognized as contested (argumentative) and/or there existed openings for contestable theoretical inquiries. The corollary would be that restricting the subject matter to nonargumentative material and limiting a theoretical inquiry to the exposition of an uncontested approach would be strategies to support descriptive theory. Whether or not the suggestion above is accepted as providing a clearer demarcation of positions in the normative/descriptive divide, it is telling that two of the hardest descriptivists adopt these strategies: Raz in precluding argumentative material from his subject matter by isolating his theory of law from his theory of



legal reasoning (Halpin, 2006); and Leiter in making his theoretical approach untested by assuming a uniform adherence to an established social scientific approach.

## A Concluding Overview

There are no grounds for concluding that a methodology that is appropriate to the theory of law can be developed to act as an arbiter of sound legal theory. The survey above has indicated that in too many ways the judgment of the theorist rather than the imperative of methodology will be a determining factor, in shaping what feature of the subject matter is regarded as worthy of theoretical inquiry, or in shaping the theoretical construct that is regarded as offering greatest illumination on the subject matter as the theorist perceives it. Even at the low level methodology of metatheoretical precepts there remains room for the theorist's judgment to influence the impact those precepts will have upon the construction of theory. And in recognizing technical semantic or philosophically sophisticated analytical approaches, the pervasive influence of the theorist's judgment is still to be found: in selecting a particular type of semantics; or in discerning an essential property and elaborating its quality in the tension between its recognition and the basis for its selection. Even where the apparent strictures of methodology are the strongest, in directing the theorist to one side or another of the normative/descriptive divide, we have seen that the particular position adopted here is influenced by the choice of the theorist over how to focus on the subject matter of the theory.

Nevertheless, to wholly dismiss methodology for being partisan or redundant, or both, would be mistaken. Even if methodology is regarded as a self-endorsement of the theorist's choice, even if it is seen as strictly otiose, the survey above has arguably exhibited a richer presentation of legal theory through addressing methodology. And perhaps it is simply the quality of openness by the theorist to conscious reflection on the working methods adopted, which produces the sense of something richer – a quality likely to give credibility to legal theory as an intellectual endeavor enjoying scientific status in the broad sense (MacCormick, 2007), even if not in the narrow sense preferred by Leiter. Leiter's position does also illustrate how through explicit attention to methodology wider intellectual influences can be introduced, whether acting to imperialize legal theory, or to liberate opportunities for it (Patterson, 2006b).

The use of methodology to identify legal theory with intellectual inquiry in general is also favored in my 2009 essay through advocating a broad portrayal of conceptual analysis. However, a crucial feature of that understanding of conceptual analysis is its link with a particular experiential base. While this does something to set apart a methodology specific to the theory of law, it also operates to deflate the status of methodology. The ultimate subordination of methodology to the subject matter of its theory is recognized in the view that the importance of methodology is limited to its ability to actually deliver significant findings on that subject matter (MacCormick, 2007); and it is underlined by the observation (Schauer, 2006) that greater insight may result from deeper familiarity with the law coupled with a lack of philosophical sophistication, than from possessing the relative measure of those attributes the other way around.

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## Overcriminalization

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### The Meaning of Overcriminalization

The terms *criminalization* and *overcriminalization* are ambiguous, and commentators have distinguished various meanings they may have (Whitman, 2003). Rather than survey the many possible candidates, I will specify what I take overcriminalization to be. Almost certainly, its most central meaning is that a particular jurisdiction subjects too wide a range of behavior to punitive sanctions. Is the United States at present (or any other legal system) guilty of overcriminalization as so construed? I will discuss five difficulties that arise in attempts to answer this question. Because of these difficulties, allegations of overcriminalization must remain somewhat speculative. Beyond anecdotal evidence – which is plentiful – claims that a jurisdiction overcriminalizes are inconclusive. Some commentators have expressed reasonable doubts that our legal system is guilty of overcriminalization (Brown, 2007).

*First*, what makes given laws criminal? This question is surprisingly difficult. The most plausible answer, I submit, is that the criminal law should be equated with that body of law that subjects offenders to state punishment. If a law does not authorize the imposition of punitive sanctions on persons who violate it, we should not categorize that law as part of the criminal law. If it allows state punishment, however, it *does* belong to the criminal law. Unfortunately, this answer only moves the controversy to a new place. Theorists disagree about what punishment is, and thus about whether given sanctions are modes of punishment. I believe that state punishment is best defined as the intentional imposition of hard treatment that is designed to stigmatize. Even if this definition is accepted, jurisdictions have ample incentives to label sanctions as nonpunitive in order to withhold the procedural protections that are required (typically by constitutional interpretation) when persons are accused of a criminal offense. Debate surrounds such measures as shaming sanctions, civil forfeiture, community notification for sex offenders, deportation, and a host of others. If a law provides that offenders may be fined rather than imprisoned, for example, many commentators do not conceptualize that law as criminal. Since these commentators regard fewer laws as belonging to the criminal law, they probably are less likely to conclude that the legal system in question is guilty of overcriminalization.

*Second*, no simple measure of the degree of criminalization exists. That is, no single metric can be used to determine whether one society criminalizes a wider range of conduct than another. How do we individuate instances of conduct to determine whether more or less of them have been proscribed? Suppose, for example, that one country prohibits many consensual sexual activities but permits persons to consume whatever substance they like, while a second country has the opposite set of laws. Which country has more criminalization? No “right answer” to this question can be given, and it is not even clear what additional information would help to resolve it. Without a device to quantify the degree of criminalization, the sheer number of criminal statutes is often taken to be a surrogate for it. But the volume of criminal statutes, although clearly relevant to allegations of overcriminalization, is a very imperfect measure of its true extent. It is doubtful that the number of distinct statutes in a jurisdiction maps on to the number of distinct crimes it contains. To illustrate the distinction between the number of crimes and the number of statutes, consider the most frequently enforced law in our federal code today: that pertaining to controlled substances. In fact, both the distribution of marijuana and the distribution of heroin violate the very same statute. Suppose, however, that a jurisdiction enacted separate laws to proscribe the distribution of each substance it bans. The number of statutes would multiply exponentially, although no more criminalization would result. I doubt that we should say the latter jurisdiction contained more *crimes*, or *criminalized* more than the former. My general point is that an increase in the number of statutes contained in a criminal code is but one of many imperfect measures of the trend toward greater criminalization. No single figure tells an accurate story about the size and scope of the criminal law.

*Third*, the claim that we overcriminalize – and subject too much conduct to punitive sanctions – is unintelligible without a baseline or reference point by which such claims can be assessed. In other words, some standard is needed to determine when our degree of criminalization is exactly right – not too much or too little. In my judgment, the most informative such baseline is *normative*. But since there is no consensus about the normative criteria that need to be satisfied before the state is justified in enacting a law that subjects persons to punitive sanctions, disagreement about whether and to what extent a state overcriminalizes is inevitable. Theorists who believe that these criteria are stringent are far more likely to conclude that our state is guilty of overcriminalization than those who think these criteria are relatively undemanding. I will return to this normative issue later.

*Fourth*, the allegation that a state is guilty of *overcriminalization* is compatible with the admission that that state sometimes is guilty of *undercriminalization* (Ashworth & Zedner, forthcoming). A state overcriminalizes when it subjects conduct to punishment that fails to satisfy the negative conditions in a normative theory of criminalization. Conversely, it undercriminalizes when it fails to subject conduct to punishment that satisfies the positive conditions in a normative theory of criminalization. Undoubtedly, some conduct should be punished that presently is immune from criminal sanctions. Many commentators believe, for example, that the United States desperately needs additional gun controls. In any event, I believe that examples of undercriminalization are less common than examples of overcriminalization, thus supporting the conclusion that our legal system as a whole is guilty of overcriminalization.

*Fifth*, judgments of whether a given legal system overcriminalizes should not be made solely by reference to the “law on the books.” A better indication of overcriminalization is “the law in action.” The latter refers to the way penal statutes are actually construed and enforced by police, prosecutors, and judges. Several states, for example, continue to retain old laws regulating sexual behavior, and others have enacted new laws prohibiting music piracy. Since few of these laws are enforced, however, they should not be cited as evidence of overcriminalization. The question of whether a state overcriminalizes depends largely on empirical data about the existing practices of criminal justice officials. Controversy about such data is bound to render allegations of overcriminalization controversial.

### Why Overcriminalization Is Worrisome

A state should regard overcriminalization as pernicious for several reasons, although I will focus on two broad concerns in particular. First, overcriminalization almost certainly results in too much punishment – punishment that is undeserved and unjustified. Second, overcriminalization threatens the rule of law. Like the phenomenon itself, each of the problems I believe to be caused by overcriminalization is difficult to substantiate.

First, a system that overcriminalizes is bound to overpunish. Although there is no necessary connection between overcriminalization and overpunishment, the correlation between them is strong. A state that subjects too much conduct to punitive sanctions inevitably punishes some individuals who should not have been punished at all. The resulting injustice is among the most serious a system of criminal law can commit. Everyone agrees that it is imperative not to punish the innocent – that is, persons who are not guilty of a criminal offense. It is only slightly less objectionable to punish persons who are innocent in the sense that they have engaged in conduct that should not have been criminalized in the first place.

In addition, even when persons are punished for conduct that merits punitive sanctions, overcriminalization is likely to produce punishments that are disproportionate to their desert. Despite notorious difficulties in application, nearly all commentators subscribe to a principle of proportionality, according to which the severity of the sentence should be a function of the seriousness of the offense. Overcriminalization contributes to violations of proportionality. No one can pretend to understand the workings of our criminal justice system without addressing the incidence of plea-bargaining. Among the main functions of overcriminalization is to enable prosecutors to induce defendants to plead guilty by *charge-stacking*. Defendants are routinely charged with multiple crimes – even though, from an intuitive perspective, they have committed but a single offense. Obviously, defendants face a far more severe potential sentence when multiple charges are brought against them. Prosecutors need to make credible threats that these punishments will be imposed if defendants stubbornly assert their innocence. In order for these threats to accomplish their objective and induce guilty pleas, the sentences defendants receive through plea bargains must be discounted – that is, made considerably more lenient than would be inflicted after a verdict of guilt in a trial (Barkow, 2003). Therefore, overcriminalization helps to

impose disproportionate sentences on persons who exercise their right to be tried and found guilty beyond a reasonable doubt.

The fact that the United States punishes too many people too severely is generally acknowledged and is easily demonstrated by a few statistics. Rates of incarceration provide the most familiar measure of the scale of state punishment. About 2.2 million persons were locked up in federal and state jails and prisons in 2006, a rate of 737 inmates per 100,000 residents. As a result, slightly more than 1 in every 100 adult residents is incarcerated. An estimated 1 in 20 children born in the United States is destined to serve time in a state or federal prison at some point in his life. Minorities are disproportionately represented behind bars: 12.6% of all black men ages 25 to 29 are in jails or prisons, compared with 1.7% of similarly aged whites. Although these rates of incarceration generally are used to measure the extent to which a society is punitive, a better indication may be the number of persons under the control and supervision of the criminal justice system – a figure that includes probation and parole. The number of individuals under the control and supervision of the criminal justice system grew rapidly in the last quarter of the twentieth century, and continues to grow in the first decade of the twenty-first. Approximately 4.2 million additional persons are currently on probation, and 784,000 are on parole in the United States. These individuals are subject to incarceration if they violate the terms under which they were placed on probation or paroled. Credibility is strained by supposing that overcriminalization is not a major factor in explaining these statistics.

Second, overcriminalization erodes the principle of legality itself, jeopardizing our status as a government of laws and not of men. This erosion of the rule of law takes place in many ways, both obvious and subtle. First, the sheer volume of criminal law makes it unreasonable to expect ordinary citizens to know what is proscribed. Even experts are aware of only a handful of the criminal laws to which we are subject. Since ignorance of the law is rarely an excuse, the criminal law is prone to ambush persons, punishing them for behavior they did not know to be prohibited. Second, the money and time diverted into enforcement depletes the resources available to tackle the social problems that create the incentives and occasions for offending. We squander opportunities to foster a social environment conducive to conformity with law. Third, as citizens encounter more and more petty and obscure criminal laws, their respect for the legal system probably declines, threatening the role of law in maintaining compliance and social order. Fourth, the criminal law is forced to borrow categories and decisions from other areas of law, such as property, contract, and administrative law, which are even more complex and difficult for ordinary people to grasp. Decisions to ban a given substance, for example, are made not by legislatures but by administrative agencies. Finally and perhaps most strikingly, the expansion of the criminal law means that ordinary folk who regard themselves as law-abiding are now committing crimes on an increasingly regular basis, and only official discretion (in arrest or prosecution) protects them from the ensuing trials, convictions, and punishments. When the criminal justice system overcriminalizes, no discernable principle distinguishes those persons who are punished from those who are not (Husak, 2003). The expansion in criminal law contributes greatly to the recent growth in the discretion of officials, many of whom are able to make use of increasingly vague and recondite criminal laws to



intimidate people they select for attention on some other basis, often because they are part of an unfashionable or unconventional minority. As a result of these several factors, William Stuntz bluntly concludes “criminal law is not, in any meaningful sense, law at all” (Stuntz, 2002). In sum, the consequences of this erosion of the rule of law are monumental.

I conclude that anyone concerned to reduce the size of the prison population and to enhance the rule of law has powerful reasons to be worried about overcriminalization and to support measures to ensure that their jurisdiction is not guilty of it.

### Political and Scholarly Causes of Overcriminalization

Why has the United States subjected so much conduct to punitive sanctions? No single answer will suffice, and I propose to distinguish two very different kinds of responses. The first is political; the second cites peculiar features of the way questions about criminalization are approached in scholarly disciplines. Both are important. If we hope to reverse the pernicious trend toward overcriminalization, we must try to understand the forces that have helped to create and sustain it. We need to know not only what the optimal amount of criminal law would be, but also how we are likely to achieve it. In other words, we need to identify the social conditions under which we are most likely to implement a good theory of criminalization. Scholars must play a role in this process.

Criminologists debate the empirical realities that have contributed to our current situation. Although no consensus has emerged, a hodgepodge of loosely related factors is worth mentioning. Commentators uniformly complain about the extent to which criminal justice in the United States has become *politicized*. The highly democratic character of criminal justice in the United States causes many of its best and worst features. Nowhere else, for example, do legislatures micromanage decisions about sentencing and parole, and few other Western industrialized countries elect their prosecutors or judges. The input of academic experts is rarely solicited, and is likely to be ignored on those unusual occasions when it is sought. We tend to be unilateralists about criminal justice; we neither know nor care about the successes and failures of other countries, and feel no need to explain or defend our policies to those who take a different approach. In addition, the extraordinary focus on capital punishment in the United States distracts attention from draconian practices that fall short of the death penalty. Perhaps most importantly, neither political party has been willing to allow the other to earn the reputation of being tougher on crime. Legislators hope to be perceived as “doing something” to combat unwanted behaviors. Tabloids and the popular media thrive on accounts of how offenders “get away” with crime by escaping through loopholes and technicalities. Policies are enacted most easily when they are unopposed, and no significant political organization wants to represent the “crime lobby” by protesting our eagerness to resort to criminalization and punishment.

Yet another explanation is the longstanding obsession with the judiciary and, in the United States, with the Constitution. What passes for a general theory of *law* in jurisprudence often is nothing more than a theory of how courts should decide hard cases. We tend to focus on those issues that can be debated before a judge. In a criminal proceeding in the United States, one can argue that the legislature has overstepped its

bounds only by citing some constitutional provision that has been breached. Remarkably few of these provisions, however, limit the substantive criminal law itself. Because of this fixation on the Constitution, relatively little thought is given to the issue of whether given kinds of conduct should or should not be criminalized.

Under current constitutional law, our theory of criminalization is remarkably permissive. Suppose a given law limits or restricts our liberties. If the constitutionality of this law were challenged, courts traditionally respond by identifying the liberty in question and categorizing it as *fundamental* or *nonfundamental*. The constitutionality of legislation that restricts a fundamental liberty is subjected to *strict scrutiny* and is evaluated by applying the onerous *compelling state interest* test. Under this test, the challenged law will be upheld only if it is necessary to achieve a compelling government purpose. The constitutionality of legislation that restricts a nonfundamental liberty, on the other hand, is evaluated by applying the much less demanding *rational basis* test. Under this test, the challenged law will be upheld only if it is substantially related to a legitimate government purpose. The legitimate government purpose need not be the *actual* aim of the legislation – only its *conceivable* objective. Since only those laws that lack a substantial relation to a conceivable legitimate purpose will fail this test, courts almost never hold a law to be unconstitutional when nonfundamental liberties are implicated. In the minds of many citizens, determinations that a statute is constitutional exhaust all inquiries into its legitimacy.

Most criminal laws limit nonfundamental liberties and thus are assessed by applying the rational basis test. As a result, courts show extraordinary deference to nearly all legislative decisions to criminalize conduct; the state needs only a conceivable legitimate purpose to enact the vast majority of criminal statutes on our books today. Persons who break these laws can be punished simply because the government has a rational basis to do so. Moreover, their punishments can be (and often are) unbelievably harsh. Outside the death penalty, courts almost never invoke a principle of proportionality to ensure that the severity of the punishment reflects the seriousness of the offense. Applications of the rational basis test produce a startling departure from the level of justification I believe should be demanded before allowing the state to resort to penal sanctions. A person can spend his remaining years in prison because he engaged in conduct the state had only a rational basis to proscribe. Outside the narrow range of fundamental liberties, it is only a slight exaggeration to say that the state can decide to criminalize almost anything. Indeed, it is hard to see why the Constitution would disable the state from punishing persons for contributing to obesity by eating high-calorie foods.

The most remarkable feature of this constitutional theory is its complete indifference to the contrast between criminal and noncriminal legislation. It is one thing for *non-criminal* regulations to be evaluated by the rational basis test. But it is quite another when *criminal* legislation is assessed by that same standard. The criminal law is *different* – critically dissimilar from other kinds of law. Despite the considerable difficulty of deciding which sanctions qualify as punitive, the criminal law is special in subjecting persons to state punishment. Rights are implicated by the hardship and censure inherent in punishment, and penal statutes are unjustified unless these rights are overridden. If I am correct thus far, a theory of criminalization should impose stringent constraints on the kinds of conduct that make persons eligible for punitive sanctions. Since the

rights implicated by punishment are valuable, no law is justified simply because it has a rational basis (Colb, 1994); a higher standard of justification should be applied throughout the criminal arena. The theory of criminalization accepted within constitutional law today is defective because it fails to afford the criminal law the significance it merits. Regardless of the standards that pertain to the justifiability of nonpenal sanctions, the right not to be subjected to hard treatment and censure should not be overridden simply because majorities have a rational basis to enact a criminal offense. Legislatures should impose constraints on the justifiability of penal statutes beyond those derived from the Constitution as it is presently construed.

The peculiar approach of academics to criminal law scholarship has also contributed to our present predicament. With a few noted exceptions (Kadish, 1967; Schonsheck, 1994), criminal law scholars have paid remarkably little attention to the topic of criminalization. Courses in criminal law taught throughout the United States tend not to cover this issue. In addition, criminal law scholarship has become overly specialized. Those commentators who are most knowledgeable about the substantive criminal law are not especially conversant with the latest developments in criminology or criminal justice. Applications of a theory of criminalization require a willingness to wrestle with empirical issues, and few legal theorists are proficient in the social sciences. Perhaps the best explanation for this lacuna is simpler: the topic of criminalization is just too hard and theorists may have resigned themselves to the sad reality of overcriminalization. We should not expect to return to a (real or imaginary) time when the criminal law conformed to the normative standards legal philosophers hold dear. Why bother to tackle a difficult project if the task cannot be accomplished and will have no impact in the real world even if it is achieved (Ashworth, 2000)?

Although each of these several factors may play a role, I believe we must understand how the discipline of criminal theory is conceptualized if we hope to appreciate why a theory to combat the problem of overcriminalization has not been produced. Due largely to the extraordinary influence of Glanville Williams, legal philosophers typically carve their subject matter into two halves: the *general* and the *special* parts of criminal law (Williams, 1953). The vast majority of scholars focus on issues in the general part: roughly, on those rules and doctrines that apply to a broad range of offenses rather than to particular crimes. With a few exceptions (Duff & Green, 2005), the quantity and quality of scholarship in the general part is far more impressive than comparable work in the special part. When the domain of criminal theory is divided between its general and special parts, controversies about the limits of penal liability seem destined to fall between the cracks. To which half of criminal theory should we assign this issue? Principles of criminalization cannot easily be located in the special part of criminal law – in that part that deals with specific crimes like burglary or arson. If these limitations are not included somewhere in the general part, they will have a hard time finding a home in criminal theory at all. It is scandalous to think that professors might teach and students might learn about both the general and special parts of criminal law without paying attention to the crucial issue of what conduct should or should not be subjected to punishment.

As a result of our political and academic culture, the resources to question dubious applications of the penal sanction are woefully undeveloped. Consider, for example, the long-standing “war on drugs.” In my judgment, statutes punishing the use and

possession of given substances are the best examples of overcriminalization (Husak, 1992). No one can doubt that these offenses have contributed to the erosion of the rule of law and are the main cause of the exponential rise in the size of the prison population. A few statistics tell the story. In 2006, approximately 1,750,000 persons were arrested for drug offenses in the United States. About 82% of these were arrested for simple possession. Over 410,000 drug offenders are in jails and prisons across the country – about the same number as the entire prison population in 1980. Nearly one of every five prisoners in America is behind bars for a nonviolent drug offense. This figure has climbed dramatically. In 1986, about 18 of every 100,000 American citizens were imprisoned for a drug offense; that ratio had jumped to 63 a decade later. Persons convicted of drug trafficking account for about 16% of all offenders serving a life sentence. I strongly doubt that these crimes could satisfy the criteria in a respectable theory of criminalization. If I am correct, such a theory has the potential to bring about major reforms in our treatment of drug offenders, with ramifications that would echo throughout the entire system of criminal justice.

### A Normative Theory of Criminalization

Many contemporary commentators *are* disturbed about the twin phenomena of too much crime and too much punishment but have defended a very different kind of solution than I tend to favor. Donald Dripps, for example, is motivated to search for “content-neutral” norms to limit the criminal sanction primarily because he is frustrated by efforts to apply principled constraints (Dripps, 1998). In particular, he expresses exasperation about the potential of the “harm principle” to impose meaningful curbs on the scope of criminal liability (Feinberg, 1984). Dripps endeavors to combat overcriminalization through reforms in criminal procedure. His most intriguing proposal is to require all penal laws to be passed by a “supermajority” of two-thirds of the legislature. I have no quarrel with such ideas. Dripps’s proposals might supplement my own; we need not be forced to choose between procedural and substantive solutions to the difficulties I have described. I readily admit that normative restrictions on the scope of the criminal law are not the only possible means to address the problem of overcriminalization. Still, all the procedural protections in the world – the presumption of innocence, the requirement of proof beyond a reasonable doubt, the privilege against self-incrimination and the like – cannot compensate for the injustice that occurs when bad laws are enacted. The principles I ultimately defend might be violated even if a bill could not become law without the unanimous support of legislators.

I believe that academics should endeavor to construct a theory of criminalization if the trend towards overcriminalization is to be reversed. Ideally, this theory should include both positive and negative principles. The positive principles should specify when criminal statutes are justified; the negative principles should specify when they are unjustified. If the primary concern is to combat the phenomenon of overcriminalization, the negative principles would naturally attract a larger focus. These negative principles are expressed in the form of *constraints* that limit the authority of the state to enact and enforce penal offenses. A theory that contains these constraints should be *minimalist* – a term borrowed from Andrew Ashworth (2006). The task of producing a

minimalist theory involves at least four related but distinct steps. First, constraints must be formulated. Second, they must be interpreted; that is, they must be given meaning or content. Third, they must be defended; arguments in favor of adopting them must be presented. Finally, these constraints must be applied to particular cases. These complex tasks are the work of a lifetime and clearly are well beyond the scope of this essay. I have made modest progress in achieving a few of them elsewhere (Husak, 2008).

I believe that positive law itself is committed to at least three overlapping constraints on the scope of the criminal law: what I call the *nontrivial harm or evil* constraint, the *wrongfulness* constraint, and the *desert* constraint. First, no statute is justified unless it is designed to prevent a nontrivial harm or evil. Moreover, criminal liability may not be imposed unless the defendant's conduct is wrongful. Finally, state punishment is justified only to the extent it is inflicted for conduct for which it is deserved. I claim that these three constraints are internal to positive law itself because much of criminal practice is unintelligible unless we suppose it is committed to them.

I offer only three brief observations about these constraints. First, so-called *mala prohibita* offenses are not exceptions to them. The trick is to show why the conduct proscribed by a justified *malum prohibitum* offense is wrongful, not to show why it may be proscribed notwithstanding its permissibility (Husak, 2003). Second, presumably all theorists believe punishments must be deserved. Although they differ enormously on the conditions under which punishments *are* deserved, none dispute *that* undeserved punishments are unjustified. The conditions under which punishments are deserved should help to identify a set of constraints that limit the content of the substantive criminal law. Third, it is clear that the foregoing constraints overlap significantly; most criminal laws that violate one will violate the other(s) as well. But the overlap between these principles should not be mistaken for an identity; we should not think, for example, that punishments are undeserved if and only if they are imposed for conduct that is permissible. The existence of excusing conditions provides one ground for distinguishing these constraints: punishments are undeserved even when imposed for wrongful conduct if the defendant is excused. In addition, the desert and wrongfulness constraints diverge because not all wrongdoing should make persons eligible for state punishment. *Private* wrongdoing, however identified, does not render persons deserving of state punishment. The task of distinguishing public from private wrongdoing is yet another major hurdle in formulating a theory of criminalization (Duff, 2007).

At least three additional constraints on criminalization derive from political theory. After all, criminal punishment is inflicted by the state. In light of the fact that a system of criminal justice is extraordinarily expensive, error-prone and subject to abuse, citizens must be given good reasons to create and invoke it. What could justify this exercise of state coercive power? I believe, first, that the state must have a substantial interest in whatever objective a penal statute is designed to achieve. Second, a justified law must directly advance that interest. Third, a statute must be no more extensive than necessary to achieve its purpose.

A few observations about these three conditions are as follows. First, the initial requirement that criminal legislation must aim toward a substantial state interest includes three analytically distinct parts: legislators must (1) identify a state interest,

(2) determine its legitimacy, and (3) decide whether that interest is substantial. Obviously, no one can pretend that this first condition is satisfied (or breached) unless he is able to identify the state interest a given statute is intended to serve, determine its legitimacy, and invoke some criteria to decide whether that interest is substantial. The *second* constraint requires a finding that the law directly advances that interest. This condition moves from the *what* to the *how* of legislation. To make this transition successfully, empirical evidence rather than unsupported speculation is needed to show that the legislative purpose will actually be served. Although this condition may seem trivial, it jeopardizes an enormous amount of criminal legislation, and it is hard to think of a single innovation that would have a more profound impact on the phenomenon of overcriminalization. At the present time, persons may be subjected to hard treatment and censure, despite the complete lack of evidence that the statute in question will attain its objective. In particular, the requirement of empirical support cannot be met by facile allegations that a statute will deter. Even without contesting the judgment that the state has a substantial interest in preventing whatever conduct has been proscribed, some reason must be given to believe that the statute in question will actually do so. In a great many cases, social scientists have demonstrated that the conditions under which statutes achieve marginal deterrence simply do not exist in reality (Robinson & Darley, 2004). Finally, the *third* and last constraint in this part of a minimalist theory of criminalization requires the state to show that an offense is no more extensive than necessary to achieve its objective. To apply this condition, legislators must be prepared to entertain and evaluate alternative means to attain their purpose. Applying this condition throughout the corpus of penal laws would open up an entirely new area of investigation. Deciding whether and under what circumstances various options (both criminal and noncriminal) would be less extensive than a given statute would again necessitate research that criminal theorists have seldom recognized the need to undertake.

I have taken only a small step toward sketching the constraints in a minimalist theory of criminalization. I am confident that the application of this theory would help to retard the pernicious tendency toward overcriminalization from which I believe the United States presently suffers.

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## Intention

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### The Conventional View of Intentions

Intentions are relevant to the meaning of actions. This relevance exists independent of whether one views intentions as metaphysical states or as part of language games. For some, intentions are a mental state that precedes and/or accompanies actions. Although there are reasons to reject a view that intentions are simply the product of beliefs and desires, it is relatively uncontroversial that intentions are linked to one's reasons for acting (Davidson, 1980, pp. 79, 83). Even to those who reject the metaphysical status of intentions, many still agree that the concept of intention has meaning. Intentional actions are those sorts of actions to which the question "Why?" applies (Anscombe, 1963, p. 9). Because we think that the reason why an actor does an action matters, intentions have normative significance.

Although every action is intentional under some description (Davidson, 1980, pp. 46–7), an actor properly rejects that her action is intentional under a description under which she is not aware of the relevant facts. Thus, an actor standing on her neighbor's garden hose might be asked why she is standing on her neighbor's hose (Anscombe, 1963, p. 11). Yet, her action may be intentional only insofar as she is standing outside. She may be unaware that she is standing on the hose, thus rendering that action unintentional. Or she may answer, "I thought it was my hose. I did not realize it was my neighbor's," thus rejecting her action was intentional under that (perhaps most) relevant description. In addition, even when the actor knows that a side effect will occur, most theorists reject that foreseen side effects fall within the scope of what is intended, and this distinction is consistent with both ordinary language and with the differing rationality rules for intentions and beliefs (Ferzan, 2008, pp. 1166–8).

### The Challenge of Inseparable Effects

Even if what is known is not intended, there is the problem of how to square this pre-supposition with the problem of inseparable effects or "closeness" (Foot, 1978, pp. 21–2; Hart, 1995, pp. 120–2). A range of imaginative hypotheticals illustrates the problem. Glanville Williams presents the surgeon who wishes to remove his patient's



heart completely, his only motivation being to experiment on the heart. The surgeon does not desire his patient's death, although he recognizes death as a certain result (Williams, 1953, p. 35). An intended killing? Robert Audi imagines the restaurant patron who intends to order lobster tails, knowing, but not caring, that they are the most expensive item on the menu (Audi, 1973, p. 396). Is it true, as Audi claims, that the patron does not intend to order the most expensive thing on the menu?

Although these hypotheticals may seem fanciful, the implications for criminal law are quite real. In transferred intent cases, some theorists argue that no *transferring* of intention is necessary because the defendant intended to kill a human being and that is what he did (Dressler, 2006, pp. 133–4; Moore, 1987, pp. 267–8). However, the victim's status *as a human being* is not motivationally significant to the actor, just as the lobster tails' expense may not be motivationally significant to the restaurant patron.

The same puzzle arises with hate crimes. Imagine an actor who kills a victim, whom he knows to be an African-American. By the logic above, when the actor intends to kill the victim, the actor thereby intends to kill an African-American man. Indeed, under the Model Penal Code, knowledge of attendant circumstance, such as the victim's race, suffices for purpose *vis-à-vis* that circumstance (Model Penal Code, § 2.02(2)(a)). However, we typically want the defendant to be motivated by the victim's race for his conduct to constitute a hate crime, yet this motivational inquiry is precisely the question that looking to the actor's intention is supposed to answer. But if we treat hate crimes just as we treat transferred intent cases, then we cannot draw this distinction.

When we vary the surgeon example, the same problem arises. Consider Fred who tries to decapitate Gary. Fred does this simply because he thinks it would be funny to have Gary's head on a stake. Were Gary (or his head) to miraculously live, Fred would not be disappointed. Now consider Helen who is being chased by her abusive husband, Ivan. She swings a machete, narrowly missing Ivan's head. Helen likewise contends that her intention was not to kill Ivan. (Bernhard Goetz's infamous acquittal may have been premised on such reasoning; Fletcher, 1990, p. 186.)

Query whether we are inclined to credit Helen's claim over Fred's. If so, notice that in doing so, we are altering the boundary of intentions. For Fred, we reject that he could understand his action as anything other than a killing. Conversely, for Helen, we may that she lacked the specific intent necessary for attempted murder.

In these cases, we may be inclined (at least sometimes) to say that the result is intended. But why? Whatever metaphysical status one attributes to intention, this disparity in treatment of seemingly equivalent cases is rather embarrassing. If one believes that to be intended, there must be an answer to the question "why," then *why* is that requirement sometimes disregarded? If one believes that an intention is a mental state, what describes the contours of this state, that some foreseen side effects are within its scope and others are not? Do we have a coherent account of intentions?

### Intentions and the Law: Type/Token Problems

A coherent account of intentions is of critical importance to law. For instance, the criminal law does not prohibit one actor from doing a specific act. Criminal codes prohibit *types* of conduct and *types* of mental states. It is a crime to intend to kill another.

Whenever a jury finds a defendant guilty, the jury must therefore find that the act the defendant did was one instance (i.e., a token) of the type prohibited by criminal law.

If a defendant only intends a very specific description of an act but the criminal law prohibits only broader general category, how is it that the criminal law can match what the defendant intended to what the law prohibited? There are two potential solutions. First, we can admit that there is some slippage between representational content and the criminal prohibition. Second, we can show how representational content includes the criminal prohibition.

Michael Moore (2007) recently took the first tack. Moore simply argues that the law is sloppy. He stipulates that putting an eye out is “maiming” under the law, and then imagines an actor who intends to put out his victim’s left eye. (The actor misses and hits the right eye, but we will get to that wrinkle in the next section.) Is the actor’s intention – to put out the left eye – an instance of the prohibited intention of maiming? Moore argues:

Since very few wrongdoers use representations exactly matching the act-type descriptions of moral norms, we have to get sloppy. ... And we do. I am confident that D’s intention-token will and should be taken to be an instance of the type of intention morality prohibits. D intended to disfigure V no matter which ... representation[] ... he had in his mind. (Moore, 2007, pp. 52–3)

Moore’s approach is a two-tiered approach (Perry, 1994, pp. 393–4). Such an approach recognizes that there is a difference between what goes on in the mind of the actor and the way in which the rest of the world describes the actor’s mental states. That is, although Oedipus would never say that he intended to marry his mother (because he did not know the woman he intended to marry was his mother), we might say that Oedipus intended to marry his mother, thus matching an external description of Oedipus’ intention with Oedipus’ own representational content.

The problem with the two-tiered approach should also be apparent from the illustration above. If it were a crime to intend to marry one’s mother, Oedipus would not be guilty of such a crime. Intentions are referentially opaque. We cannot substitute one description of an intentional object for another, even if the two descriptions are equivalent in the real world (Quine, 1980, pp. 139–59).

The problem is that the two-tiered approach does not impose any limits on when we may say the actor had an intention and when he did not. The criminal law is ultimately concerned with *representational content*.<sup>1</sup> If it were sufficient to simply match representational content to any other real world description, then Oedipus may be guilty for intending to marry his mother. In other words, sloppiness has the potential for grossly disproportionate punishments.

Now, I do not take Moore to be arguing for this sort of substitution. Rather, I think that even Moore takes as a given that the actor is aware of the fact that *a* is an instance of *b*. That is, the actor understands that she is engaging in act *a*; she understands that *a* is an instance of *b*, but she denies intending *b*. Here is where Moore thinks sloppiness is acceptable. But then, Moore still must answer why all instances of knowledge are not sufficient to satisfy prohibited intentions. That is, why is it not the case that providing an answering service for known prostitutes is sufficient for intending to further their

criminal enterprise (*California v. Lauria*, 59 Cal. Rptr. 628 [Cal. Ct. App. 1967])? Why not say that providing the name and address of a known drug dealer is intending to aid in the distribution of narcotics (*Washington v. Gladstone*, 474 P.2d 274 [Wash. 1980])? In both of these cases, why not say that when the defendant intends an act, and knows that it will aid, then by the “principle of sloppiness” the defendant may be said to aid?

In my view, we cannot simply admit sloppiness between the law and representational content because there is no principle by which we can determine when it is permissible to be sloppy and when it is not. Rather, we must take the second approach. We need *an account of representational content* that explains why the intent to take out the left eye is the intent to maim. This is the very same account we need to explain why Glanville Williams’ surgeon who intends to decapitate also intends to kill. If we wish to understand why jurors may apply broad legal rules to specific facts – as they do every day – then we must solve the problem of inseparable effects.

## Intentions and the Law II: Matching Intentions with Results

Our conception of intentions is also fundamental to a second categorization question: how can we tell whether the defendant did what she intended? Although there are times that a defendant may succeed in exactly the way she planned, our causal abilities are often imperfect. When these imperfections occur, we must determine whether the defendant may be held responsible for intentionally causing the harm.

Let us now introduce Michael Moore’s second complication. Assume that the defendant intended to put out the victim’s left eye, but missed and hit the right. Is the defendant an intentional maimer – because he caused the harm he intended? Or did he attempt to maim (and also accidentally cause harm to the right eye)? Once again, Moore thinks we can simply be sloppy:

So what did D intend? Did he represent the type of event he was trying to bring about as “putting out of V’s left eye,” as a “putting out of V’s right eye,” as a “putting out of an eye of V’s” (in the sense of any eye), as a “putting out of an eye of V’s (in the sense of one particular eye), as a harming of V,” a “disfiguring of V,” a “maiming V,” etc. My supposition: *any* of these representations will suffice to match what D did to what he intended to do, to make D an intentional maimer, even though it is unlikely in the extreme he had more than one or two of them as the representation under which he acted. If so, notice how much slop there is in fixing what it was that D intended to do. (Moore, 2007, p. 52)

However, the question of when to slip and how much to slip appears to be decidedly normative. For example, in the infamous tort case, *Mohr v. Williams*, 104 N.W. 12 (Minn. 1905), the plaintiff consented to an operation on her right ear, but the surgeon then performed an operation on the plaintiff’s left ear. The court held that the plaintiff did not consent to the operation on her left ear when she consented to her right. No slippage allowed.

We cannot therefore simply allow for slippage; rather, we must have an account of what justifies such slippage. Consider a game of friendly pool. Typically, the players will

allow any ball in any pocket no matter what the player intended. But, even amongst the friendliest of players, one must call correctly how and where the eight ball will land. In this game, there is a rationale: among friends, insisting on too much perfection and skill makes for tedious game of pool, but at the very end, to win, one must show some requisite degree of skill. If criminal law is like friendly pool, but consent is equivalent to sinking the eight ball, we need an account of why there is a difference, but Moore does not provide one.

But beyond the question of how one can justify any slippage, there is the question of how we understand intentions. Moore seems to lose sight of this. That is, let us return to the actor who aims for the left and hits the right, and let us embellish the story a bit.

In asking whether the actor did what she intended to do, we look to what motivates her. What if the defendant sought to put out the victim's left eye because that was the eye with which the victim winked at the defendant's boyfriend? Then, which eye is injured matters. It is *motivationally significant*. The defendant will feel that she failed if she does not injure the left eye. Thus, to say that the defendant did what she intended to do when she misses the left and hits right completely eviscerates our fundamental conception of intention – that what is intended is what is motivationally significant. We cannot endorse one view for representational content and a different view of intention for determining whether that representational content was achieved.

In summary, an understanding of intentions is critical to the criminal law. We must understand what the defendant intended; whether what the defendant intended was prohibited by the criminal statute; and when we can say that a defendant succeeded in doing what she intended. All of these questions presuppose a coherent account of intentions.

### Beyond Motivational Significance: A Full-Bodied View of Intentions and Representational Content

The answer to these questions lies within the mind of the actor. The representational theory of content, as simply a flat linguistic description, is misguided. Contents have meaning, and this entire meaning constitutes the object of the intention.

Before turning subjective, let us make clear why turning to an objective relationship between the object of an intention and its inseparable effect will not suffice. It cannot be that if *a* logically or causally follows from *b* that *a* intends *b*. As we know, if the actor does not know that *a* entails *b*, either logically or causally, then he does not intend it (Simester, 1996, pp. 457–8). Otherwise, intention would somehow have a strict liability or negligence component to it, wherein a defendant could be reasonably or unreasonably unaware of an implication and yet intend it nevertheless! Moreover, as noted earlier, intentions are not coextensive even with other known descriptions.

Michael Moore and A.P. Simester have proposed subjective theories that are much closer to the mark. Moore (before repudiating this arguably more correct view in 2007) argued that two nominally distinct intentions will be the *same intention* when the language used to describe their objects (1) has the same reference and extension, and (2) where that language means the same to the holder of the intention(s) in question (Moore, 1987, p. 260). Simester proposes that the relationship is part of the agent's

conceptualization of his act (Simester, 1996, p. 459). To Simester, inseparability may be because one is specific but the other is general – intending to decapitate is to intend to kill or intending to kill Brian is intending to kill a human being, or it may be in expectation – the actor simply cannot imagine a world in which *a* occurs but *b* does not – one cannot decapitate without killing (Simester, 1996, pp. 459–64). Simester and Moore thus take opposing views on the answers to both the decapitation and lobster tails puzzles. Moore contends that decapitating is not identical to killing, whereas Simester holds the one cannot rationally imagine decapitating without killing. Moore contends that if the actor can intend to order the most expensive thing on the menu by intending to order the lobster, whereas Simester claims that one may conceptualize one without the other.

To reconcile these approaches, we must turn to how we think, and how our thoughts are systematically connected. Consider the following hypothetical from Michael Luntley. Luntley (1999) imagines that in the middle of a crowded, rowdy meeting, he says, “That heckler should be ejected.” Luntley then supposes that the reader asks him a series of questions. Do you mean the man behind the guard? Do you mean the man with the red hair? Yet, instead of answering these questions, Luntley just shrugs, insisting that he only means the heckler should be ejected. The reader has “offered a series of thoughts to which you took the truth of my original claim to be sensitive, and I refuse point-blank to acknowledge any such sensitivity.” The result? “In the face of my attempt to hold my original claim insensitive to such further thoughts, it is tempting to wonder whether I could have really meant anything at all by my original claim” (Luntley, 1999, p. 236).

Notice Luntley’s point here. When he uses the phrase “the heckler,” it must be sensitive to the truth of other claims/descriptions about “the heckler.” Indeed, the heckler must be referring to someone. When Luntley uses the term “heckler,” it refers to a person about whom he is thinking. This person has a hair color, is sitting somewhere, etc. Thus, questions about these alternative descriptions should yield a yes or no answer. As Luntley explains:

The fundamental insight [that drives the whole conception of sense and reference] is that if you could factor out grasp of the sense of a singular term from grasp of the sense of whole sentences, you would have no account of the rational power of the sense of the singular term. Thinking of an object is normative. To think of an object is to have your cognitive attitude to it subject to normative rational evaluation. The normativity of thought consists in the way a thought is systematically connected to others..... The suppositions that I have considered are all ways of revealing the way in which thought about an object must be sensitive to a cluster of thoughts that, as it were, provide the triangulation that fixes thought on a particular. You cannot, for example, demonstratively think about an object without having some idea of how it stands above, behind and to the side of other things, for if you did not have some idea about that, you would have no idea of its space-occupancy at all. (Luntley, 1999, p. 236)

The key to understanding intentions is the following claim of Luntley’s: “To think of an object is to have your cognitive attitude to it subject to normative rational evaluation. The normativity of thought consists in the way a thought is systematically connected to others.” What this claim tells us is that an intention to *a* does not simply

amount to the words we use to describe *a* but to all the other descriptions that the actor attributes to *a*. After all, “heckler” is just a word. But, if we suppose that Luntley is not uttering a nonsensical sentence, then “heckler” must have content, and in having content, it must be able to be defined by the actor.

With Luntley’s teachings about the normativity of thought in mind, let us turn our attention to one of our inseparable effects problems – the lobster tails. Let us assume that I go to a restaurant and decide to order the lobster tails. My companion asks me, “What do you intend to order?” I reply, “The lobster tails.” This claim, as Luntley shows us, must be sensitive to other questions, which yield alternative descriptions of “the lobster tails.” Thus, my companion might ask me whether I mean “the most expensive item on the menu,” “the special,” “the meal I ordered last time that was so delicious,” “the lobster tails that come on the big red plate,” and my intended meal must be sensitive to whether these other claims are also true of the object that I intend to order.

Moreover, Luntley’s claim is not simply that I choose to order the most expensive thing on the menu when I choose to order the lobster. Rather, his claim is that “thought about an object must be sensitive to a cluster of thoughts.” For me to be rational, an intention, to, for example, eat “the lobster tails” must be sensitive to where the lobster tails are on the table – in front of me, on a plate, etc. – that is, “how it stands above, behind and to the side of other things.” So, when I think about the lobster tails, this thinking is sensitive to several different descriptions of the very same item, all of these descriptions inform my thinking about the item.

Thus, when we speak of “lobster tails,” these words are shorthand for an object. This object, with all of its descriptions, is represented by these simple words. What we intend to order is not two simple words but the object that those words represent.

Hence, it is our use of language that leads us astray. We think that we can reduce an intentional object to one description, and then question whether other descriptions also apply. This is the wrong question for it falsely presumes that intention is simply focused on one linguistically simple description of the intentional object. Therefore, Audi (1973) is incorrect in his assessments that to intend to order the lobster tails is not to intend to order the most expensive thing on the menu. The problem lies in oversimplifying the intention as one simply to order the lobster tails. Our discussions lead us awry as they favor one-dimensional linguistic intentional objects, failing to realize that our thought about objects is multimeaning and multidimensional.

My view ties together the insights of both Moore (1987) and Simester (1996). I concur with Moore that the question is about the object of the actor’s intention. Moore, however, adopts a single linguistic description as the intentional object and relies on external referents to distinguish between intentions. But external referents are irrelevant. If Alice goes to the restaurant and orders the lobster tails, hoping and believing that they are the most expensive thing on the menu, then Alice intends to order the most expensive thing on the menu. Indeed, even if the filet mignon is the most expensive item and lobster is relatively inexpensive, she still intends to order the most expensive thing. External realities are irrelevant. Thus, it does not matter whether intending to decapitate and intending to kill are ontologically the same action; the question is only synonymy (Ferzan, 2008, p. 1181). In contrast, I have argued that the object of intentions is determined solely by the meanings the actor ascribes to his intentional

object and that that intentional object is multidimensional – not a single linguistic description.

My approach is also quite similar to Simester's, though I part company with him in two significant respects. First, Simester correctly sees that intentional objects are linked by the way the actor himself understands his intention, but Simester oversimplifies the inquiry, thinking that the only way that objects can be linked is by specific to general or act and inevitable result. Simester thus fails to see that an actor might also link the general to the specific or the specific to the specific. That is, an intention to pick up "this pen" is also an intention to pick up "this blue pen" and an intention to pick up "this blue pen" is also an intention to pick up "my favorite pen." Second, although Simester locates the linkage between intentions within the actor's own conceptual framework, he fails to ground his approach. That is, one may agree that Simester's test is almost right, but wonder where the test comes from. I believe I have supplied the answer to this question. It is the normativity of thought that explains the inseparable effects phenomenon.

### Intentions and the Law III: Applying the Broader View of Intentions

Having resolved questions of representational content by recognizing how intentions extend beyond motivational significance, we must return to criminal law's categorization questions. In my view, it is this holistic understanding of intentional objects that explains how we can match what the defendant intended to what the criminal law prohibits and how we answer the normative question posed by proximate cause problems.

The holistic account of intentions explains why we so easily match what a defendant intended to what the criminal law prohibited. It is because the defendant understands the object of his intention at many different levels of description simultaneously. The defendant simultaneously intends a very specific description of the harm and the general description prohibited by the criminal law.

Consider a case of murder. It is murder to *intend* to kill a human being. So, when an actor intends to kill Sally, he is held to intend to kill a human being. That Sally is a human being need not be one of his reasons for acting. It need not be motivationally significant. But we now understand that the defendant understands Sally to be a human being when he intends to kill her. Sally's status as a human being is part of his representational content. Likewise, a car thief is motivated to steal under the description of "something I can get \$4200 for," not "someone else's car," or, more importantly, "property belonging to another." Nevertheless, the law correctly recognizes that all of these descriptions mean the same thing to the actor, and despite the fact that only one description is motivationally significant, all of these descriptions constitute the very same intention.

Our new understanding of representational content also helps us begin to address the second categorization question inherent in proximate causation analysis. This is the question of how we are to determine whether the defendant did what he intended to do. Should we follow *Mohr* and distinguish a left from a right ear? What if the defend-

ant intends to put out the left eye, but hits the right eye? What if the defendant intends to kill Alice (a human being) but misses and hits Betty (a human being)? Can we simply say that the defendant did what she intended – i.e., she killed a human being?

Now, we know that what an actor intends extends beyond what is motivationally significant. The intention is both to injure Alice and to injure a human being. The intention to put out the left eye, is also an intention to put out an eye, is also an intention to maim. At the level of meaning, the defendant has done what he intended to do.

## Beyond Intention?

There is, however, a nagging sense that in broadening our understanding of intentions, we have lost some of their normative import. That is, if intentions do not distinguish between what is motivationally significant and what is not, then why should the law rely on them at all?

This issue cannot be easily resolved. The multidimensionality on which we rely to match a defendant's intention to a criminal prohibition prevents us from narrowing our legal definition of intentions to motivational significance. If intentions are truly only what motivate us, then we cannot say that a defendant who intends to kill Sally satisfies a murder statute prohibiting intending to kill a human being. Now that we understand intentions, we may need to consider moving beyond them, as they do not, and cannot, track motivational significance alone.

## Note

- 1 Although my account will focus on representational theories of mind, it should be apparent that inseparable effects are equally problematic for logical behaviorists. My overall account is likely amenable to a Wittgensteinian reconstruction, though I will not attempt one here.

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## Coercion

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Coercion matters to the law for two main reasons. Coercion can affect people's legal liabilities: it can relieve those who are coerced from the normal legal consequences of their actions, and it can make those who coerce legally liable for what has occurred. In addition, coercion matters to the nature of law itself. The law employs both physical force and sanctions, and so pervasive are these features of legal systems that they are normally taken to be necessary or intrinsic features of law – part of the nature of law.

Making sense of these issues calls for a better understanding of the nature of coercion itself. Understanding coercion, however, is partly an exercise in developing an account of coercion from the complex mix of judgments we intuitively make about what is and what is not an instance of coercion. Although there are a large number of cases where our judgments converge, there is also considerable disagreement about other cases, as well as disagreement over the best analysis of the cases where we do agree. This exercise is not helped by the wide range of expressions that are used to describe coercion. For though we speak of being “coerced,” we also speak of being “forced” or “compelled” or “made” to do something, of “having no choice” and of acting “against our wills” (Wertheimer, 1987, ch. 10). The common thread that seems to run through the cases is of one party applying such pressure to another that the latter is forced to act as the first party wishes, rather than as they would choose themselves. The coerced party is forced to act against their will. So coercion is a form of social power *over* others by which they can be made to act even if they do not wish to do so.<sup>1</sup> As well as being a form of power, however, coercion is normally regarded as intrinsically problematic. There are many ways in which to induce people to act as one desires, e.g. by rewarding them, or by persuading them that it is in their own interests or accords with their sense of right and wrong. Some means of inducement, such as rewards, are not regarded as problematic in themselves. Instead, the dubiousness of a particular inducement lies in the character of the action being induced, or what is being offered in exchange. There are some things that should not be done, and some things that should not be done for certain (or any) rewards. To coerce someone, by contrast, seems problematic in and of itself. An analysis of coercion needs to shed light on this normative aspect of coercion.

Beyond the common threads lies a variety of disagreements over how best to understand the nature of coercion and account for its explanatory and normative relevance,

particularly for the law. In the following sections, I will look in turn at the theoretical disputes raised by the nature of coercion and at what light can be shed on the nature of the coerciveness of law.

## Coercion

Any analysis of coercion is complicated by the fact that there are different means of coercing another, and different roles that claims of coercion play in our normative thought. Both aspects call into question a common assumption that coercion has a unitary nature. They also call into question the idea that it is necessary to choose between “moralized” and “nonmoralized” accounts of coercion,<sup>2</sup> since the different roles that coercion plays may require elements from both approaches.

The two most significant means of coercing another are through the application of physical force, and through the creation of situation in which only one course of action is a viable option. For the sake of convenience these may be described as ‘physical compulsion’ and ‘rational compulsion’. Physical compulsion involves bringing sufficient physical pressure against someone’s body that they are unable to resist. When someone is forcibly arrested, or restrained, they are reduced to being an instrument of the other party’s will. They do not literally ‘act’, but their bodies are acted upon. By extension, when someone is incarcerated they are physically unable to leave the place of their confinement. In all of these situations the person subjected to the physical force is coerced – they are physically compelled to do as another party wishes.<sup>3</sup>

Coercion is more often discussed, however, in the context of rational compulsion. The paradigmatic method of creating rational compulsion is through the use of threats. The recipient of the threat is told to do as demanded or face some serious consequence, such as injury or harm to their interests. Unlike physical compulsion, threats do not deprive the recipient of the *ability* to refuse to comply: there is a choice, and the recipient *could* always choose to refuse the demand and suffer the consequences. It is simply that the recipient does not regard suffering the consequences as a reasonable or acceptable alternative to doing as demanded. While they do not wish to act as demanded, it is the only way of avoiding a worse fate. Rational compulsion is ‘rational’ in two senses of the word: the decision to comply with the demand is the outcome of a reasoned judgment that it is the lesser of two evils, and it is rational to prefer a lesser to a greater evil.<sup>4</sup>

Rational compulsion is not limited to the threat of physical compulsion: the threatened consequence can be anything that is significantly worse than doing as demanded. Hence, physical and rational compulsions are distinct modes of forcing someone to conform to another’s will. The existence of rational compulsion raises a number of complexities for the concept of coercion, which are most easily approached by focusing on the case of rational compulsion through threats: (a) When is a threat coercive? (b) When is a proposal a threat? (c) Can there be coercive offers? and (d) Is rational compulsion per se morally problematic? To simplify the following discussion, I will assume that the preferences and values of each party are common knowledge between them, and each party is sincere, so no one is acting under some misapprehension or error.

*When is a threat coercive?*

Not all threats are coercive – some just propose to bring about an unpleasant outcome such as revenge. To be coercive a threat must (1) propose to bring about some unpalatable consequence *Y* unless the recipient does *X*. Coercive threats, then, are conditional, with the nonoccurrence of the threatened consequence being conditional on the recipient's acting as demanded. In addition, (2) having *Y* occur must be distinctly more unacceptable to the recipient than doing *X*.<sup>5</sup> Threats must also (3) be credible, with the recipient believing there is a good chance they will be carried out, and (4) there must be no acceptable means *Z* of avoiding the choice between *X* and *Y*. Beyond this there are a number of possible candidates for further constraints, the most uncontroversial of which is (5) *Y* must be relatively serious rather than minor. This certainly accords with our linguistic usage, and there is a sense that someone cannot be “forced” to act by the threat of a consequence that is not very important.<sup>6</sup> Further proposed conditions include: (6a) a reasonable person, not just the recipient of the threat, must regard *Y* as unacceptable relative to doing *X* (Edmundson, 1998, p. 79); and/or (6b) doing *X* under the threat of *Y* must either be justifiable or excusable (Raz, 1986, p. 150)<sup>7</sup>; and/or (6c) *Y* must violate a right of the recipient's or at least wrong the recipient in some way (Haksar, 1976).

The plausibility of these further constraints derives in part from the fact that different types of claims can be made in terms of coercion (Edmundson, 1998, pp. 74–7; Lamond, 2000, pp. 47–51; Berman, 2002). Sometimes coercion provides the basis for a claim that doing *X*, which would otherwise have been blameworthy, was either justifiable or excusable. This is how coercion is standardly used in the criminal law doctrine of duress. At other times, coercion provides the basis for a claim that some otherwise permissible transaction or other change of normative position is void or voidable. This is reflected in the legal doctrines of duress in contract, property, and family law. Both of these duress claims look at coercion from the viewpoint of the party subjected to the threat. By contrast, we also refer to coercion simply as a particular means of inducing conduct by threatening the recipient with an unacceptable alternative. In this action-inducing sense of coercion, we look at it from the viewpoint of the person making the threat, and ask if the threat of *Y* is an acceptable means of inducing compliance, even when *X* is something the recipient is duty-bound to do.<sup>8</sup>

It is often assumed that there is a unitary analysis of coercion – that is, one that fulfils all of the above roles (Nozick, 1969; Raz, 1986; Edmundson, 1998, ch. 4). This makes sense in the case of physical compulsion, where the coerced is physically overwhelmed and unable to resist whatever is done with them. Barring special circumstances, someone whose hand is used to “stab” another person or “sign” a document cannot be held responsible for those outcomes, since they are simply the instrument for another's will and they do not really “act.” By contrast, rational compulsion allows these different roles to come apart. Duress as a criminal law defense, for example, may well require that a reasonable person would have acted as the defendant did (6a). But in asking whether a marriage was subject to duress, it may be enough that the party threatened did not consider that they had an acceptable alternative. In the case of crime, there is something to justify or excuse (6b), whereas in other cases the question is whether coercion is an acceptable means of securing even obligatory conduct.

Similarly, duress may only excuse a crime where the threat is to commit a fairly serious wrong (6c), whereas the threat to perform an otherwise permissible act might invalidate a contract, as in some cases of blackmail (such as the revelation of a secret there is no duty to keep).<sup>9</sup>

Arguably, there just are different concepts of coercion appropriate to the roles identified above. All cases of coercion share what can be called the *action-inducing* core of conditions (1)–(5) (i.e., the action being induced by the unavoidable and credible threat of a serious and unacceptable alternative), but further conditions have to be satisfied to make out different types of coercion claims.<sup>10</sup>

Take one further example. Many jurisdictions define sexual offenses in terms of lack of consent on the part of the victim. In these jurisdictions, an apparent consent may be invalid if it is induced by threats. Which threats should invalidate consent? The answer seems to depend on the particular interests and values that sexual offenses exist to protect, and may well differ from the answers given in the case of which threats would be sufficient to invalidate a contract. Again, conditions (1)–(5) need to be satisfied for the threat to be a candidate for coercion, but beyond that, which threats are coercive needs to be answered in a way that is sensitive to the specific context of sexual offenses. A threat to sack an employee whose work is unsatisfactory, for example, might be sufficient to invalidate consent for a sexual offense, but not to invalidate the creation of a new employment contract.<sup>11</sup>

If this is true, then it is a mistake to think that there is a single concept of coercion that can perform all of the roles that have been assigned to it in moral and political thinking. What is “coercive” depends upon the particular claim that is being made, and although all coercion claims share the basic conditions (1)–(5), the presence of those conditions may not be sufficient to establish that the recipient of the threat has been subject to duress, the conditions for which are issue-specific.<sup>12</sup>

### *When is a proposal a threat?*

There is a surprisingly large literature on the question of how to distinguish an offer from a threat, due to the widely held view that only threats can coerce. Intuitively the distinction between the two is clear enough. In the case of an offer, what is proposed (*Y*) in exchange for recipient’s action (*X*) is something that she welcomes, whereas in the case of a threat *Y* is unwelcome. But it is quite controversial how best to elucidate the distinction. There are two major lines of analysis: (i) in terms of whether *Y* makes the recipient better off or worse off against some “baseline” (Nozick, 1969; Wertheimer, 1987, ch. 12), and (ii) in terms of whether the recipient wants *Y* to occur or does not want *Y* to occur.<sup>13</sup>

The fundamental idea behind baseline analyses is to compare the future situation in which *Y* occurs to some other situation, e.g. what would otherwise have occurred at that future time ( $t_2$ ), and see whether the recipient would be worse off than in the baseline position. But the appropriate “baseline” for comparison is itself a major issue of dispute. Among the many possible baselines are: (a) what *would* otherwise have occurred at  $t_2$  (the statistical baseline); (b) what *should* have occurred at  $t_2$  (the moral baseline); and (c) what would have occurred at  $t_2$  omitting the occurrence of *Y* (the *talis qualis* baseline).<sup>14</sup> Each baseline has, on the face of it, some counterintuitive results.

The difficulty with (a) is that it suggests one cannot threaten to do something that one was planning to do in any case, yet the would-be assailant who decides at the last minute to “offer” their potential victim the choice between handing over his wallet or being beaten up still seems to be threatening the victim. Equally, in the case of (b), it seems wrong to suggest that I cannot threaten to punish a disobedient subordinate with a justifiable punishment. Similarly, in the case of (c) it would be strange to say that a child is not threatened with being punished by one parent if the other parent would otherwise have imposed a harsher punishment. Naturally, there is considerable scope for further refinements of the baselines test(s) to meet these difficulties, as well as room for arguing that the analysis need only generally fit our intuitive judgments, not slavishly follow them.

The alternative to the baseline approach is the preference approach that simply asks (in the case of threats) whether the recipient of the proposal wants *Y* not to occur, regardless of *why* they do not want it (Gunderson, 1979, pp. 252–5; Gorr, 1986, pp. 388–91; Lamond, 1996, pp. 225–7). This approach faces difficulties with proposed omissions. For example, many proposals are *bi-conditionals*, i.e. they have the form do *X* or the proposer will do *Y*: if the recipient does *X* then the proposer will not do *Y*, but if the recipient does not do *X* then the proposer will do *Y*. If someone refuses to sell me a unique item for less than \$1,000, and I want the item for \$200, are they threatening *not* to sell me the item? This seems wrong because they are merely proposing not to do something. It is only in special cases (*viz.* where I believe they have a duty to act or expected they would act) that omissions can be threatened.

Possibly the preference approach can be seen as a major variation on the baseline approach. On the preference approach a consequence can be unwelcome to the recipient if it satisfies *any* of the baselines (a)–(c), at least if the baselines are set in terms of what the *recipient* expected or believed should or would happen at  $t_2$ .<sup>15</sup> But it can also be unwelcome if (d) the recipient believes that the proposer’s doing *Y* will make the recipient worse off than she currently is (i.e., at  $t_1$ , the time of the making of the proposal). On this view, then, there are many different ways to make someone worse off, and threats reflect the full diversity of these ways.

### *Can there be coercive offers?*

It is often taken as axiomatic that only threats can coerce, hence the effort devoted to distinguishing threats from offers. Whether a proposal is an offer or a threat is of course a matter of its substance rather than its form. An “offer” from the mafia that is “too good to refuse” normally carries an implicit threat with it. But can proposals that are truly not threatening be coercive? Some theorists have argued that offers can indeed be coercive (Held, 1972; Frankfurt, 1973, p. 42; Lyons, 1975; Zimmerman, 1981; Feinberg, 1986, ch. 24; McGregor, 1988–9). This claim grows out of the fact that offers can be just as psychologically pressurizing as threats, e.g. where *Y* is something that the recipient desperately wants and the proposer will only confer it at the price of *X*. If my child is dying from a disease that can only be cured by a drug I cannot afford (and no one else is under a duty to provide), and someone offers to pay for the drug if I do something for them which I would ordinarily never do, then I may feel I have “no choice” but to do as requested, and may say that I was “forced” to accept the offer.

Generalizing a little, if I urgently need X, and your offer is the only possibility for obtaining it, then I may be forced to accept your offer and the offer may be coercive.

There is certainly something to the claim that offers can be coercive. One important difference with threats, however, is that although I may be forced to accept your offer, *you* do not force me to accept your offer, since (we assume) you are not responsible for my plight – you did not create it and you are under no duty to relieve it (or at least relieve it on easier terms).<sup>16</sup> What cases of coercive offers bring out is that we often use the term “coercive” more broadly than “coercion.” Coercion involves (i) the coercer deliberately creating the circumstances that force another to take an option, with the aim of making them take that option, and (ii) the other being forced to do so. But where *circumstances* force someone to take an option then the situation may be considered “coercive,” even though there is no one coercing another.

The fact that offers can be coercive in *this* sense, however, does not establish that they are morally problematic in the same way as coercion may be. Coercive offers may simply be cases of hard bargaining which, even if it is not generous, do not wrong the recipient of the offer. On the other hand, some coercive offers *are* wrongful because they are exploitative, i.e. they take (unjust) advantage of another’s plight. Exploitation can be a serious wrong, just like coercion, but because the conditions constituting exploitation are different to those for coercion, there are good reasons for keeping the two distinct (Feinberg, 1986, 242–62; Wertheimer, 1996).

### *Is rational compulsion morally problematic?*

Coercion is commonly thought to be morally problematic. Now coercion that amounts to duress clearly satisfies this conception. An act that forces someone to do something wrongful, or undermines the validity of an otherwise permissible normative change, is clearly unjustified. But the idea that coercion is morally problematic normally covers cases where someone is forced to do what they should do – it calls into question the use of *this* means of securing compliance. So action-inducing coercion is often thought to be *pro tanto* problematic: it may be justified all-things-considered, but it stands in need of justification. Can this view be sustained? There are many different views as to why coercion is intrinsically problematic, including: (1) because it restricts freedom; (2) because it violates autonomy; and (3) because threats are themselves wrongful.

- 1 Rational compulsion reduces the recipient’s freedom by reducing their options (Hayek, 1960; Nozick, 1969; Feinberg, 1986; McGregor, 1988–9). So if freedom is intrinsically valuable, any restriction of freedom comes at a moral cost. This makes sense of many cases where people are prevented from adopting certain options or forced to take one. The well-known difficulty with the account lies however in the idea that the freedom to take *any* option has value. The ability to wrong another, for example, does not seem to have any intrinsic value, and so there does not seem to be anything lost when someone is prevented from doing so.
- 2 One condition of personal autonomy, according to Raz’s influential account (1986, ch. 14), is independence, i.e. being free of the will of another. (This is distinct from any effect of coercion on the existence of an adequate range of valuable options.)

But if someone is forced not to take one option (particularly an immoral one) and is left with an adequate range of other options, it is unclear why their autonomy has been compromised – it seems no different to cases of the deliberate elimination of options, which is said not to violate independence.<sup>17</sup>

- 3 If threats are in themselves *pro tanto* wrongful, then using them to secure action also seems problematic. This is one of the attractions of adopting the *moral* base-line analysis of threats discussed above, i.e. a proposal is a threat when it involves making the recipient worse off than they (morally) *ought to be* at  $t_2$ . Making someone worse off than they ought to be is something that requires justification, and the proposal to do so similarly requires justification. The problem with the account is that it does not accord with the some very central cases of threatening, such as those to punish or sue wrongdoers. It also struggles to make sense of those cases of blackmail where what is threatened would be permissible to do, such as reveal some secret.<sup>18</sup> An alternative view holds that what is problematic about all threats is that they involve not simply the intention to do something unwelcome to the recipient, but to do it *because* the recipient finds it unwelcome (Lamond, 1996). This gives rise to the need for some good reason for treating another in this way, particular when it is being used to make them act as demanded.

It may be, of course, that it is simply not true that action-inducing coercion is always morally problematic. Some cases of coercion violate our freedom or autonomy, or involves a wrongful threat, but not all do. It is still possible to account for the standard assumption that coercion is morally problematic – since coercive threats so often call for justification, there is an *evidentiary* presumption against all such threats, but one that may be dispelled on closer inspection of a particular case. Coercion may be problematic, but simply as a generalization rather than a universal proposition.

## Law

What light do the preceding reflections cast on the relationship between law and coercion? If one thinks that the law must inevitably resort to physical force and sanctions, there are three general views that might be taken, depending upon one's view of coercion:

- 1 Law is not inherently coercive. Because conduct is only “coercive,” properly speaking, when what is proposed is wrongful, and since many laws prescribing physical force and sanctions *are* morally justified, the law is not intrinsically coercive (Edmundson, 1995, 1998, chs. 4–6). Of course, particular laws may force people to commit moral wrongs and illegitimately force them to enter into transactions, so people can be subject to duress by the law. But that depends upon the details of what is threatened and for what purpose, not on the nature of law itself.
- 2 Law is inherently coercive because to say it is coercive is simply to refer to the action-guiding way in which people are compelled to act through physical force or



the threat of unwelcome consequences. And because the types of consequences threatened often involve the infringement of individuals' rights (to noninterference with the person, or property holdings), it is a fair generalization to say that legal systems' use of coercion stands in need of justification.

- 3 Law is inherently coercive in the action-guiding way, and because such coercion is per se morally problematic legal systems use of coercion always needs to be justified (Lamond, 2001).

But is it true that law must resort to physical force and sanctions, and is it true that these are the features that make the law coercive?

### *How law is coercive*

Contemporary legal systems obviously force people to act – enforcement agencies frequently employ physical force to compel conduct, and people are often deterred from actions by the threat of some sanction. But it is a mistake to think that all legal uses of physical force are sanctions, or that sanctions invariably involve the use of physical force. Physical force can be used to quarantine the sick or take the mentally ill into care, neither of which amount to sanctions. Equally, sanctions which take the form of withdrawing some ability, e.g. the eligibility for public office, or forfeiting intangible property such as bank accounts or intellectual property, do not require physical force. In addition, the law can rationally compel without sanctioning, for example by applying prohibitively high taxes or burdensome regulations to force people not to take some option (see Oberdiek, 1976, pp. 88–9; Raz, 1980, pp. 79–80; Lamond, 2000, p. 43).

Law can also be “coercive” in the sense of having the *effect* of forcing people to act in certain ways – at least some people some of the time – even if it is not designed to do so. So a tax that is designed to raise the maximum revenue possible may have the effect of pricing many people out of the conduct taxed. And zoning regulations that are aimed at preserving the character of a neighborhood may have the effect of forcing some owners to sell. One possible significance of this distinction is that to justify a measure that has coercive effects is different to justifying a measure that has that aim (Lamond, 2000, pp. 53–5).

Of course the law of modern societies is characterized by the availability of physical force as the ultimate means to enforce many requirements. There are police to arrest people, prison officers to keep them in jail, the military to put down rioting and insurrection, as well as bailiffs to enforce court judgments and collect taxes. The effective regulation of the use of force is normally regarded as one of the central responsibilities of the modern state – whether the force is used by state or nonstate actors. This leads to the more challenging question of whether law itself is intrinsically coercive.

### *Coercion and the nature of law*

Historically a wide range of claims have been made about the relevance of coercion to law (see Lamond, 2001, pp. 42–3). Some theorists have argued, in essence, that law is simply a form of coercion (Austin, 1832); others that the use of coercion distinguishes law from other types of social regulation (Kelsen, 1967); others still that coercion is the

most important aspect of law. The weakest claim is simply that coercion is an intrinsic feature of law, i.e. that legal systems are necessarily coercive systems. I will concentrate on the last claim, since it is the most plausible.

There are three grounds on which law might be argued to be necessarily coercive: (1) efficacy; (2) normativity; and (3) authority. The most obvious argument for the coerciveness of law would seem to lie in the need to explain law's "efficacy." Clearly a legal system must actually be in force, i.e. it must be followed and applied, in order to exist. Does this show it must be coercive? Not exactly. What it shows is that law is a form of social power, because of its ability to motivate people to act in ways that they would otherwise not wish to do. But power is not synonymous with coercion: there are many forms of social power besides coercion, and coercion is not necessarily the most effective form.

Nonetheless, could a system of laws retain its social power if it was not coercively enforced? Outside of a very small and tight-knit community this seems sociologically implausible: there will always be situations in which people are tempted to disobey laws, and the lack of means to prevent such action or enforce remedial steps would undermine the allegiance of the law-abiding to such a system.

On the other hand, it can be argued that the fact (if it is a fact) that the law requires coercive support does not establish that the law itself must provide that support. Conceivably the law could rely on extralegal measures that were socially endorsed and generally followed. The law of course would have to *permit* such measures, i.e. it would have to be lawful to take such steps, and do so in a way that fell short of *authorizing* these measures. The nub of the debate between those who think this is a conceptual possibility and those who do not depends upon whether there could be such nonauthorizing permissions for such action (compare Lamond, 2001, and Yankah, 2008).

Putting efficacy to one side, does law's normativity need to be explained in terms of coercion? Laws are normally thought to create reasons for action for those to whom they apply, and some theorists have been attracted to the idea that those reasons derive solely from the sanctions attached to laws. Since Hart's critique of the command theory of law (1961), however, this has generally been abandoned as an unrealistic ambition. Sanctions do provide reasons for action, but legal duties seem to be understood as creating reasons for action in addition to those created by sanctions. Alternatively, it might be argued that a legal duty only exists when there is a sanction for its breach: properly speaking there are no legal duties without sanctions (Kelsen, 1967). But this is simply contradicted by the facts: it is not unusual for high legal officials to be under duties to which no sanctions are attached. Similarly, the common law doctrine of precedent puts courts under duties to follow the judgments of higher courts, but there is no legally prescribed sanction for failing to do so. A judge who regularly fails to follow the judgments of higher courts may be removed from office, but this is not the sanction laid down for violating the doctrine of precedent.

Finally, a link between law and coercion may be sought in the law's claim to authority. The link is not based on the idea that authority requires coercion: again, authority is a form of social power, but that power is often crucially based on the *acceptance* of the claim to authority, rather than simply on the possession of coercive force. Instead, there is a different way to link authority and coercion. Legal systems do not recognize any nonlegal limits on the scope of what matters they may regulate: any form of conduct

is potentially subject to regulation. But this means that the deployment of coercion must itself fall within the scope of the law's supposed authority. If this is right, then legal systems claim the authority to regulate when and by whom coercion is permissible, including the right to regulate the enforcement of its own directives. That is, law claims not simply the right to be obeyed, but the right to enforce obedience (Lamond, 2001; for a contrasting view of the connection between coercion and authority, see Ripstein, 2004).<sup>19</sup>

## Notes

- 1 For a discussion of coercion as a form of social power, see Anderson, 2008.
- 2 Examples of moralized accounts include Ryan, 1980; Wertheimer, 1987; Berman; 2002. Nonmoralized accounts include Zimmerman, 1981; Gorr, 1986.
- 3 Some theorists regard physical compulsion as distinct from coercion, which they restrict to rational compulsion (e.g., Nozick, 1969; McCloskey, 1980, pp. 336–7; Feinberg, 1986, pp. 189–95). Others regard it as a form of coercion (e.g., Bayles, 1972, p. 17; Gunderson, 1979, pp. 249–52; Gorr, 1986, pp. 386–7; Lamond, 1996, pp. 218–19).
- 4 The reasoned nature of the choice distinguishes rational compulsion from a third category of coercion, less relevant to the nature of law, which could be described as “psychological compulsion.” In this situation, the party subjected to some treatment is psychologically incapable of resisting – their fear, pain, or anxiety is such that regardless of their assessment of the situation they are unable to prevent themselves from complying with the other’s will (see Frankfurt, 1973; Lamond, 1996, pp. 218–19).
- 5 Indeed *Y* must be more unacceptable than doing *X* *under the threat of Y*, since there are often reasons to resist threats that go beyond the narrow question of the alternatives put forward.
- 6 Though it is disputed whether *Y* must be objectively serious, or simply serious *to the recipient* (McCloskey, 1980, p. 341). (For more expansive views of coercion embracing even minor threats, see Gorr, 1986, p. 401; Lamond, 1996, p. 223.)
- 7 Or alternatively (6b\*), the recipient of the threat must be entitled to yield to the proposal (Wertheimer, 1987, ch. 15).
- 8 For a discussion of the significance of the different viewpoints, see Anderson, 2008.
- 9 On this type of blackmail, see Lamond, 1996.
- 10 Indeed, Berman (2002, pp. 59–73) goes further and argues that there are just two overlapping concepts of coercion, rather than a common core.
- 11 A further important complication here is that the best *legal* rule for dealing with cases of this kind might not, for institutional reasons like proof and evidence, fully reflect the best *moral* position. See further Wertheimer, 2004.
- 12 From this perspective, for example, Wertheimer (1987) is primarily a study of coercion as duress.
- 13 Another significant approach focuses on whether the recipient wants to move from the preproposal to the proposal situation (see Zimmerman, 1981).
- 14 See the discussion in Feinberg, 1986, pp. 216–28; for further possible baselines, see Altman, 1996.
- 15 Indeed, Nozick (1969) ultimately adopts a form of “mixed” baseline approach using (a)–(c).
- 16 It is of course different if I have created the difficult situation you are faced with in order to make my proposal (Alexander, 1983).

- 17 For Raz's response, see Raz, 1986, pp. 377–8.
- 18 The same questions arise for the view that only threats to commit wrongful actions are coercive (Haksar, 1976; Berman, 2002).
- 19 See also Dan-Cohen (1994) for a discussion of the potential conflict between claims to authority and the use of coercion.

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## Unjust Enrichment

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The first section of the Restatement of Restitution (1937) states this principle: “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” In the last few decades, this principle has finally become as firmly established in the common law jurisdictions as it has long been among civil law systems. As a relatively new basis of liability, unjust enrichment (at least outside the United States) is now the most dynamic of all areas of private law. It gives rise to several theoretical challenges.

First, at the heart of unjust enrichment lies the mystery of what makes an enrichment unjust. For many years, the reference to injustice impeded the development of unjust enrichment by giving rise to the suspicion that, once recognized as a category of liability, it would direct judges away from traditional legal reasoning to the amorphous exercise of legal discretion on unspecified grounds that vary according to one’s personal sense of justice. How, then, can the unjustness of the enrichment be conceptualized in a juridically disciplined manner?

Second, how do the principle’s three elements – that the plaintiff has been “enriched,” that the enrichment has been “at the defendant’s expense,” and that the enrichment was “unjust” – fit together to form a coherent basis of liability? Historically, the prime impetus for the development of unjust enrichment has been to bring together various instances of restitutionary liability that the common law had assigned to separate compartments. But this drive for unity across different kinds of transactions would be pointless unless the principle provided unity within each transaction. Only by combining in a coherent set could the elements of liability impart the unity of an overarching principle to the various situations that contemporary scholars of restitution claim fall under it.

Third, unjust enrichment is unique among contemporary bases of liability in explicitly engaging some conception of justice. But what is that conception? The theoretical idea that reflects a concern with the inner unity of the principles of private law is corrective justice. Indeed, many restitution scholars acknowledge that the notion of unjust enrichment at another’s expense evinces the bipolar structure characteristic of corrective justice. But how precisely do the doctrines of unjust enrichment instantiate this particular theoretical idea?

This essay addresses these issues by treating unjust enrichment (as restitution scholars often do) as a restorable transfer of value. A transfer of value (I shall argue) involves the giving or doing of something for nothing. The requirement that the defendant's enrichment has to be at the plaintiff's expense situates the parties in correlative positions as transferor and transferee. Transfer thus marks out the two particular parties to the legal relationship by establishing between them the nexus of value given and received. Whether the transferee's retention of the value is unjust refers not to injustice at large but to the relationship between the parties' wills with respect to the gratuitousness of the transfer. Accordingly, in determining whether an enrichment was unjust, two issues regarding the justice of the transfer arise. The first is whether the transferor intended to give the value gratuitously. If the transferor had donative intent, justice in transfer is achieved. The transferred value cannot be recalled by claiming that the enrichment was unjust, because there is no injustice in the transferee's retention of what the transferor willingly gave. If, however, the transferor did not intend to give the value gratuitously, a second issue arises: did the transferee accept the value as nongratuitously given? An affirmative answer triggers the obligation to restore the value, because the transferee cannot retain for nothing a benefit was neither given nor accepted on a nongratuitous basis. Thus, the enquiry into whether the enrichment was unjust situates the parties correlatively as transferor and transferee of what was not gratuitously transferred.

### Transfer of Value

Value involves the treatment of qualitatively heterogeneous things as quantitatively comparable and equivalent. Anything useful has both a qualitative and a quantitative aspect. The qualitative aspect, the use that a person makes or might want to make of the thing, focuses on the particular qualities of the thing in question and on the role of those qualities in satisfying the particular wants and needs of the person using the thing. Thus the qualitative aspect connects the particularity of the thing to the particularity of the person using it. In contrast, the quantitative aspect abstracts from the specific usefulness of the thing to a general conception of usefulness in which things are quantitatively comparable with other things. This quantitative aspect is value. A judgment of value takes the form that such-and-such a quantity of one thing is equivalent to such-and-such a quantity of another thing. Value thereby relates different persons through the exchange of different things.

However, when dealing with transfers, one must distinguish between things that have value and value itself. The transfer to another of a thing (whether property or labor) that has value does not necessarily mean that there has also been a transfer of value. Take the example of exchange. When I exchange a certain quantity of shoes for a certain quantity of food (Aristotle's example in *Nicomachean Ethics* v, 1133a23), I no doubt have transferred something of value, the shoes, and received something of value in return, the food. But if the food is of equal value to the shoes, no value has been transferred. Exchange on such terms features the reciprocal transfer of things of value but not the transfer of value itself, since through the transaction the parties maintain the same quantity of value as before. To be sure, I would not engage in this

exchange unless the food I received was more useful or valuable to me than the shoes I surrendered. But the value that is expressed in and through the exchange abstracts from me as a particular person with a particular preference for this amount of food rather than that amount of shoes. What matters to value in exchange is not the value to me in isolation, but value as determined by the intrinsically relational process of exchange among those trading shoes and food.

Only to the extent that the transfer is gratuitous, that is, without involving the receipt of equivalent value, does the transfer of a thing of value involve a transfer of value as well. If I transfer shoes but receive in return nothing or food of less value, then I have transferred not only the shoes as things of value but value itself. In contrast to what happens in an exchange, the transaction does not preserve intact the amount of value that I have, because there is no equivalence of value in what was given and received. Through this gratuitous transfer the value of what is rightfully mine has been diminished and the value of what is rightfully the transferee's has been increased by the amount of value that has been transferred without reciprocation. In the language of unjust enrichment, the transferee has been enriched at my expense. This does not mean, of course, that the transferee is obligated to return the enrichment. That further consequence depends on whether the retention of that enrichment is unjust – that is, whether the transfer occurred under conditions that generate an obligation to restore the transferred value.

Being unreciprocated, the transferred value of the shoes thus has a double aspect. On the one hand, it is a component of the transferee's proprietary right in the shoes. As is the case with every owner, the transferee who becomes the owner of the shoes also thereby becomes entitled to their value. If the transferee sells the shoes, the transferee is entitled to keep the value realized through the sale. If the shoes are tortiously destroyed or converted, the transferee is entitled to receive from the wrongdoer their equivalent value as compensation. Because the transferee's right to the shoes (and the consequent entitlement to their value) is good against the whole world, I am not differently situated with respect to this value than is everyone else.

On the other hand, the value in the shoes is also a component of the normative relationship, unshared by anyone else, between me as transferor and the transferee. Even if the transfer of the shoes (and therefore of their value) is valid from a proprietary standpoint, the gratuitousness of the transfer of value raises a distinct issue of justice between us as parties to the transaction. Because the law assumes that persons generally act to further their own ends rather than others', it seeks to ensure that I truly intended the transfer to be gratuitous. And conversely because the law does not create obligations behind another's back, restitution of the transferred value has to be consonant with the free will of the transferee. Thus, aside from the passage of title in the shoes, the question arises whether the circumstances of the gratuitous transfer of the value in the shoes are such that the transferee is under an obligation to restore this value to me. These circumstances pertain to the relationship between the two of us as participants in the transfer of value rather than the relationship between the transferee, as the new owner of the shoes, and everyone else. Put more technically, although I have lost the *in rem* right to the shoes (and thus to their value), one can still ask whether the conditions of transfer were such that I now nonetheless have, as against the trans-



feree, an *in personam* right to their value. It is this aspect of the transferred value that engages the principle of unjust enrichment.

## The Transfer Elements of Liability

At the most general level, the idea of a transfer of value is reflected in two of the requirements for liability under the principle of unjust enrichment, that the defendant be enriched and that the enrichment be at the expense of the plaintiff. Understood as aspects of a transfer, these two requirements are not mutually independent elements but the integrated moments of a single bilateral phenomenon. Unjust enrichment deals not with maintaining the wealth of one party or another against an increase or decrease in the value of their respective resources, nor even with a matching increase and decrease in each party's wealth, but with a relationship between the parties that can ground the liability that one of them may have to the other. The idea of a transfer establishes the requisite relationship by pointing to an enrichment that has moved from the plaintiff to the defendant. Accordingly, the "enrichment" and "expense" mentioned in the principle of unjust enrichment are terms of mutual relation, each requiring the other in order to function as constituents of liability. They refer not to gains and losses *simpliciter*, that is, to one person being better off and another person being worse off than before, but to the connection of each to the other through the giving and receiving of value.

The notion of a transfer has a distinct set of juridical contours. A transfer involves the movement of a right directly from the transferor to the transferee. Thus, the subject matter of the transfer is something to which the transferor has a right at the inception of the transaction and to which the transferee has a right at its conclusion. This metamorphosis in the holding of the right takes place in and through the transaction, so that the movement of the right from transferor to transferee forms an integrated sequence that directly links the parties. The differing locations of the right first in one party and then in the other mark the termini of the transaction, which are linked through the continuity of the right's movement between them.

The elaboration of the principle of unjust enrichment involves recourse to all these characteristics of transfer. To begin with, the enrichment refers to something of value, either labor or property, that was within the right of the plaintiff prior to the value's transfer. Otherwise the plaintiff would have no standing to have the value returned. For example, no liability in unjust enrichment arises from the setting up of a competing business that drains customers away from one that was previously established. If both businesses draw on the same pool of patrons, the older business is now worse off through the diversion of its previous customers to the new one. Speaking loosely, one may even be tempted to say that the new business realized a gain at the expense of the older one. But no one thinks that this situation falls under the principle of unjust enrichment. The reason is that the old business had no exclusive right to the patronage of its former customers. It can therefore not claim the restoration of what, from the juridical standpoint, it never had.

Similarly, at the other end of the transaction, the value has to be brought home to the defendant by being incorporated into the totality of what the defendant is and has

as a matter of right. This can involve an enlargement of that totality, a sparing of an expense that would diminish it, or the receipt of a service.

Not every benefit realized from the action of another, however, involves a movement of value. For value to move, the enriching action must be directed toward something that is the defendant's. If the purpose and intended effect of the action refer only to the plaintiff and the plaintiff's property, the value remains with the plaintiff even though the defendant has been advantaged as a result. The absence of liability for incidental benefits illustrates this. In a typical case of incidental benefit, the plaintiff acts with reference to what is his or her own property or in the exercise of his or her own rights but in the process happens to confer a benefit on a neighbor. Classic examples are the cutting down of a wood that obscures a neighbor's prospect or building a wall that happens to shield a neighbor's house from windstorms. Because the work was done not on the defendant's property but on the plaintiff's property and for the plaintiff's own purposes, nothing has occurred that can be construed as a transfer of value from the plaintiff to the defendant. One can phrase this conclusion in the terms of the principle of unjust enrichment by saying that the defendant's enrichment has not come at the plaintiff's expense. What this means is that by virtue of the labor's having been expended on the plaintiff's property and for the plaintiff's purposes, the value of the labor has been retained by the plaintiff and has not passed to the defendant.

Understood in terms of a transfer of value, the principle of unjust enrichment involves a direct movement in which the benefit to the transferee's entitlements is realized through the corresponding diminution of the transferor's. It is this direct movement of value transferred from the plaintiff to the defendant that liability reverses by requiring the defendant to move the value back to the plaintiff. Directness in this context is juridical, not physical: the benefit to what is within the defendant's entitlement takes place through the detriment of what is within the plaintiff's. Thus a payment by the plaintiff that extinguishes a debt owed by the defendant to a third party or a receipt of money that extinguishes a right possessed by the plaintiff against a third party are instances of a transfer of value, because the defendant's enrichment occurs immediately through the plaintiff's corresponding deprivation. Accordingly, the connection between enrichment and deprivation is not a causal one satisfied by determining that the former would not have occurred but for the latter – and so including remotely antecedent stages of the enrichment's transmission – but a transactional one in which the transfer of value immediately constitutes the parties as transferor and transferee.

The existence of a transfer of value from the plaintiff to the defendant is not affected by the fact that the plaintiff has recouped the transferred value from others. Because such passing on of the plaintiff's loss is external to the parties' relationship as transferor and transferee, it cannot negate the occurrence of that transfer. To be sure, the defendant is not liable unless the enrichment has been "at the plaintiff's expense." However, within the principle of unjust enrichment, the plaintiff's expense and the defendant's enrichment are terms of mutual relation; neither hangs in the air as if detached from the other. The point of requiring the enrichment to be "at the plaintiff's expense" is not to refer to a baseline for deprivation set one-sidedly by the plaintiff's overall level of wealth prior to the interaction with the defendant, but rather to serve the relational function of identifying the plaintiff as the party who transferred the value that the defendant must now be retransfer.

A final observation about the transfer of value concerns the notion of “subjective devaluation” (Birks, 1989, p. 109). This term suggests that a benefit may not qualify as an enrichment if a defendant can plausibly assert that, despite the benefit’s objective value, he or she subjectively attaches no value to it. Once enrichment is understood as signaling a transfer of value, however, subjective devaluation cannot go to determining whether there has been an enrichment. In allowing qualitatively different things to be presented as quantitatively comparable, value abstracts from the particular use that a person might subjectively want to make of a thing given its particular qualities. Only because of its indifference to the subjectivity of the participants in the transfer can value be seen as defining the relationship between the two parties rather than as reflecting the specific wants of either one of them considered in isolation. If value is the subject matter of the principle of unjust enrichment, the value transferred has to have the same quantitative significance for both transferor and transferee. Accordingly, to see the possibility of subjectively devaluing the benefit as determining whether the benefit counts as an enrichment is inconsistent with the notion that unjust enrichment deals with transfers of value. At bottom, what subjective devaluation is about is not the nature of the enrichment, but the transferee’s freedom to make one’s own choices. This is of course an important consideration, for liability in unjust enrichment has to be consistent with the freedom of the interacting parties. But the importance of the parties’ freedom lies not in establishing whether a transfer took place, but in determining whether that transfer is subject to conditions that create an obligation to make restitution. In other words, the freedom of choice that is vindicated through the notion of the defendant’s subjective devaluation goes not to whether there was an enrichment but to whether the enrichment was unjust. It is to that issue that I now turn.

### Unjustness

Underlying the notion of unjustness in unjust enrichment is the idea that the parties each have an entitlement to what is one’s own until one freely parts with it (Drassinower, 1998). As the person entitled to the value at the inception of the transfer, the plaintiff makes a claim that rests initially on the failure freely to have parted with that value. However, the normative ground of this claim has equal validity for both parties. In the context of unjust enrichment, the value transferred now falls within the transferee’s entitlement; the obligation to retransfer it must, therefore, be consistent with the transferee’s will. Accordingly, the plaintiff’s entitlement to what is one’s own until freely parted with has to co-exist with the similar entitlement of the defendant. The plaintiff’s claim not to have freely parted with the transferred value cannot create an obligation that usurps an entitlement of the defendant’s with which the defendant also has not freely parted. Consequently, the principle of unjust enrichment postulates an ensemble of obligation-creating conditions that relate the unjustness of retaining what was gratuitously transferred to the free will of both the transferor and the transferee. These conditions thereby construct the liability to make restitution as a relationship of free will to free will between the parties to the transfer of value.

The condition applicable to the plaintiff is that the transfer of value was not intended by the plaintiff as a gift to, or did not fulfill the plaintiff’s legal obligation toward, the

defendant. This condition simply states with respect to gratuitous transfers the notion that justice in transfer requires that the transferor act either voluntarily or pursuant to an obligation. Because value given by the plaintiff as a gift to the defendant or in fulfillment of an obligation accords with justice in transfer, it is beyond recall by the principle of unjust enrichment. Thus, whether a legal system formulates the ground for unjustness under the principle of unjust enrichment positively in terms of a list of unjust factors (the traditional English approach) or negatively in terms of absence of juristic reason (the Canadian approach) or absence of basis (the civilian approach), the grounds applicable to the plaintiff are ultimately always negative, consisting in the transferor's failure to conform to either of the two modes for achieving justice in transfer.

In this context, the notion of donative intent is an extended one. It goes beyond subjective intent to include situations in which, whatever the transferor's subjective intent, the background legal categories justify the imputation of an intention to bestow a gift. In this extended sense, donative intent draws on the public meaning that the plaintiff's action has in the relationship between the parties. Imagine, for example, that the plaintiff makes an unrequested improvement to property that he knows belongs to another in the hope of being compensated for his labor. Subjectively, he may have no intention of giving a gift. But because his action takes place within a legal regime under which, as he knows or ought to know, only the owner has the right to determine whether to improve one's property, the improver can be taken to know that his action cannot obligate the owner to pay for the improvement. Accordingly, the law treats his action as the bestowal of a gift. The background legal category of property, which recognizes in the owner the exclusive power to improve the condition of what is owned, justifies the law's viewing the improvement as the expression of a donative intent. In this example, the imputation of donative intent is based not on what is subjectively within the plaintiff's mind, but on how the plaintiff's conduct is to be publicly understood and categorized in relation to the defendant's property. Conversely, however, if the improver mistakenly thinks that the property is his own or that that he is improving it at the owner's request, donative intent can no longer be imputed to him. Because the improver is unaware that his improvement was not authorized, he cannot be held to what is implied by the knowledge that the power to improve property is exclusively the owner's. For the improver who acts out of mistake or ignorance, an obligation-creating condition is in place.

When a gratuitous enrichment has been made without donative intent, the question then arises whether requiring the recipient to restore the enrichment is consonant with the recipient's freedom of choice. Put at its broadest, the obligation-creating condition on the defendant's side is that the defendant accepted the benefit as nongratuitously given. As with the plaintiff-oriented condition, this condition refers to the absence of donative intent in the transfer of value. It imbues this absence of donative intent on the plaintiff's part with a relational significance by connecting it to an imputed expression of the defendant's free will. If the defendant can be regarded as having accepted a benefit as nongratuitously given, then in fairness the benefit cannot be retained gratis; the defendant cannot keep as a gift what was neither given nor accepted as a gift. The nongratuitousness of the transfer – the consideration at the heart of unjust enrichment – thereby embraces and normatively links the parties.

Acceptance is thus a relational notion. It refers to what is to be imputed to the defendant in the light of the significance for the defendant of what the plaintiff has nongratuitously transferred. Although it is defendant-oriented, it does not treat the defendant in isolation from what the plaintiff did. Rather, as a member of the conceptual sequence that unites the transferor and transferee of value within an obligation-creating relationship, it is a structural feature of liability for unjust enrichment. Within that relationship the defendant's acceptance of the benefit as nongratuitous and the plaintiff's lack of donative intent are correlatives.

As with donative intent, the idea of acceptance draws on the public meaning the parties' interaction. What matters is not the defendant's inner psychological state, but the judgments and assumptions about the parties' interaction that can reasonably be made against the background of the legal structure in which they operate. In particular, the defendant who becomes aware of the receipt of something for nothing has no reason to assume that the benefit was given gratuitously. Private law is a legal regime through which parties pursue their self-chosen ends in accordance with their conceptions of their own interests. The law does not presume – and therefore those subject to the law are not entitled to presume – that someone has chosen to transfer value gratuitously, thereby surrendering the means for pursuing one's own ends. To be sure, a person may on occasion identify another's interest with one's own and therefore confer gratuitous benefits on the other. However, such donative intent must be established for each particular case, not assumed to be the general rule.

Accordingly, a defendant who is aware that another is bestowing an apparently gratuitous benefit and does not intervene to prevent it takes the risk that donative intent is absent. By allowing the enrichment to occur, the defendant is expressing her free will with respect to it. If it turns out that the plaintiff indeed had no donative intent (for example, if plaintiff was improving the defendant's land on the mistaken impression that it was his own), then the defendant's failure to prevent the benefit can be considered an acceptance of that benefit as nongratuitously given.

The limiting case for the imputation of acceptance emerges from Pollock C.B.'s graphic statement in *Taylor v. Laird* (1856), 156 E.R. 1203: "One cleans another's shoes; what can the other do but put them on? ... The benefit of the service could not be rejected without refusing the property itself." In this famous example, the benefit has been so completely entangled in the recipient's property, that the latter has had no opportunity to treat the cleaning of the shoes as an object of choice independent of his use of them. Acceptance of the benefit can therefore not be inferred from its nonrejection. In this context, entanglement means not merely that the transferred value has been absorbed in to the totality of the defendant's entitlements – this happens to all unjust enrichments – but that within that totality it cannot be separated from the other components, as here the cleanness of the shoes cannot be separated from the shoes themselves. The relevance of entanglement suggests that there are two kinds of situation in which one can impute an acceptance of the benefit as nongratuitously given. The first is when the benefit is not, or not yet, entangled in what the defendant is otherwise entitled to. The second is when, whether the benefit is entangled or not, the nature of the defendant's activities and projects are such that the benefit can nonetheless be regarded as accepted.

In the first kind of situation, the defendant knows or takes the risk that the benefit is nongratuitously given and yet requests it or foregoes the opportunity to refuse it. Examples of this kind of situation are: the plaintiff who performs a service for the defendant under an unenforceable contract, which serves as evidence both of the defendant's request for the service and of the plaintiff's nondonative intent in providing it; or the defendant who has been enriched by the plaintiff's labor in a quasi-spousal relationship although he knew or ought to have known that the benefit was given to him not as a personal gift but as an reflection of the full integration of their economic well-being; or the owner who "lies by" when he knows that another is expending money to improve the property on the mistaken supposition of his own title. The same holds if after receipt the defendant refuses to restore a nongratuitously given benefit that is easily returnable because it is not inextricably entangled into the defendant's entitlements. In such cases, the defendant's action or inaction in the face of the nongratuitous conferral can be equated to an acceptance of those benefits as given without donative intent.

In the second kind of situation for imputing acceptance, the law treats the defendant as having accepted the benefit because, given the nature of the defendant's activities and projects, the defendant has no reason not to accept it. Examples are the plaintiff who discharges an obligation owed by the defendant; or the defendant who holds property destined for a particular use or disposition that is forwarded by the benefit that the plaintiff nongratuitously conferred. In such instances, the issue is not whether the defendant as a rational maximizer is better off with the benefit in some global sense, but whether the benefit forwards the specific purposes implicit in the defendant's antecedent activities. If it does, then requiring restitution of the transferred value is, from the public standpoint of the parties' relationship, consistent with the defendant's free will. The defendant's retention of such a benefit after becoming aware of the lack of donative intent with which it was conferred constitutes an acceptance of it as nongratuitously given.

Mistaken payments – sometimes regarded as the core case of unjust enrichment – fall under both kinds of situations. Until it is spent, money is not entangled in the defendant's other entitlements. If it has been spent to purchase something separate from the defendant's other entitlements, the value remains disentangled; restitution can be made of the secondhand value of what was purchased. Moreover, money forwards any and every specific purpose that the defendant might have. On both counts, therefore, the recipient's acceptance can be imputed for money conferred nongratuitously.

Under the heading of "incontrovertible benefit," the second kind of situation is conventionally treated as establishing the enrichment rather than the unjustness of retaining it. In this respect, incontrovertible benefit is the counterpart of subjective devaluation. But as with subjective devaluation, the considerations for postulating an incontrovertible benefit go not to whether a transfer of value has taken place but to whether the defendant's retention of the transferred value is consonant with the parties' free will. The point of invoking incontrovertible benefit is to show that imposing an obligation to make restitution would not violate the defendant's freedom of choice. If this is the case, it should be situated where it structurally belongs: as an obligation-creating condition pertaining to value transferred without donative intent.

The same can be said about the defense of change of position when the defendant has spent the enrichment. This, too, is now conventionally explained in terms of enrichment, that the defendant has been “disenriched” (Birks, 2005, p. 208). The explanation is not without difficulty. The consumption of the value is the exchange of the transferred value for some good to which the consumer attaches a still greater value. At the general level, one may ask why such consumption negates the legal effect of the original transfer. Nor is the idea of disenrichment unambiguous. If I have spent the mistaken payment on a trip around the world, I am still enriched by what I did with the money – I now have the recollection of adventure and discovery, the slides and photographs, the seemingly inexhaustible store of conversational material – even though the money is no longer in my bank account. What has occurred is a transformation of the enrichment, not its disappearance.

The relevance of change of position is that it negates not the enrichment but an obligation-creating condition. The defendant’s acceptance of the mistaken payment as nongratuitously given presupposes that the defendant is aware of the plaintiff’s absence of donative intent. Notice to the defendant that the payment was mistakenly made triggers the obligation-creating condition, cutting off the possibility of the defendant’s spending the money in a way that would constitute a change of position. Consequently, as long as the defendant does not know of the mistake, she has no reason to treat the payment as something that is not rightfully hers and spend it accordingly. If the expenditure goes to something that remains separate from what she is otherwise entitled to, the plaintiff can recover the transferred value (or what remains of it). This is just an instance of the first kind of situation for imputing acceptance. If, however, the expenditure has consumed the value in such a way that nothing separately ascribable to it remains, then the enrichment has become entangled with the defendant’s other entitlements. Whether the defendant has spent the money on getting her old shoes cleaned or on replacing the old shoes with a new pair of clean shoes, her situation is no different from that person whose shoes are mistakenly cleaned by another. An obligation to restore such an enrichment would not be consistent with the defendant’s freedom of choice. Pollock C.B.’s observation, that the benefit could not be rejected without refusing the property itself, applies. In such a case notice of the mistake comes too late for acceptance to be imputed to the defendant. Thus, in sum, change of position through expenditure goes not to whether the defendant remains enriched but to whether the expenditure foreclosed the possibility of imputing to the defendant acceptance of the enrichment as nongratuitously given.

Compared to the conventional understanding of unjust enrichment, this description of the structure of unjust enrichment shifts considerations usually associated with enrichment (subjective devaluation, incontrovertible benefit, and change of position) to the obligation-creating conditions that make retention of the enrichment unjust. A consequence of the conventional placement is that the overloading of the “enrichment” slot within the principle of unjust enrichment involves the emptying of the “unjust” slot. It is then hardly surprising that the nature of the unjustness becomes a mystery. Once the “unjust” slot has been refilled in the way I have suggested, one can quickly identify the notion of justice to which the principle of unjust enrichment refers. The following final section offers a brief comment on this crucial issue.

## Correctively Unjust Enrichment

The normative structure just described treats the principle of unjust enrichment as an embodiment of corrective justice. Drawing on the fact that the liability of a particular defendant is always a liability to a particular plaintiff, corrective justice seeks to explicate the normative considerations that situate the parties in correlative positions and thereby match the relational structure of liability itself.

In the principle of unjust enrichment, this correlativity takes the form of the parties' being the transferor and transferee of value. The obligation-creating conditions that render this transfer unjust are also linked correlatively through the lack of donative intent that qualifies both the transferor's giving of the benefit and the terms on which the transferee is imputed to have accepted it. Consequently, the elements of the principle of unjust enrichment, when taken together, make up an integrated conceptual ensemble that arrays the parties as the active and passive poles of an injustice concerned with the nondonative movement of value from one to the other. Unjust enrichment is thus a unified and coherent principle that (as its proponents insist) can impart unity to the diverse situations in which it has historically evolved.

Corrective justice presupposes a conception of the person as having the self-determining capacity to act towards one's chosen purposes. From a juridical perspective, interaction with another involves the expression rather than the sacrifice of one's freedom or of the means to one's freedom. Put in Kantian terms, a person is assumed to assert one's worth as a human being in relation to others and not to allow oneself to be a mere means for others. The principle of unjust enrichment reflects this conception of the person with respect to both parties. On the plaintiff's side, a gratuitous transfer is defective unless it is made pursuant to an obligation or in execution of the plaintiff's intent to give a gift. On the defendant's side, the recipient of gratuitous benefit cannot assume that it was given with donative intent. Through the obligation-creating conditions, the principle of unjust enrichment incorporates these two implications of the conception of the person into a unified conception of what justice between the parties requires.

That the principle of unjust enrichment conforms to corrective justice should not surprise. Because it matches the structure of liability, corrective justice is the natural framework for considering what might be unjust about the enrichments that attract liability. Moreover, because it reflects the rationality immanent in the legal relationship between the parties, corrective justice is rooted in the private law and in its distinctive normative concerns. It is, therefore, resistant to the amorphous invocation of moral and political values that, so it was feared, the recognition of unjust enrichment as a distinct category of liability would let loose. Finally, because it highlights the nature of coherence in arguments about liability, corrective justice indicates what is required for the elements of unjust enrichment to form a conceptually integrated principle of private law. Corrective justice thus connects unjust enrichment both to the long history of enquiry into the law's rationality and to the coherence that must characterize any justified basis of liability.



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## The Ideal of the Rule of Law

ANDREI MARMOR

A remarkable consensus prevails in the literature about what the rule of law actually requires. It is widely agreed that the rule of law requires that laws be publicly promulgated, be reasonably clear and not self-contradictory, and have general and prospective application; that the application of laws be administered by impartial and independent courts which are reasonably accessible to all; that people ought to be given adequate opportunities to comply with the law; that laws are not changed too frequently; and other, similar principles.<sup>1</sup> From a philosophical perspective, however, the ideal of the rule of law is a complicated one, and discussions of it are often confusing. Of course, we share the view that the rule of law requires the kind of principles listed above. But on what grounds? And what is it that unites these ideas and brings them together under the umbrella that we call “the ideal of the rule of law”?

The fact that we tend to refer to the rule of law as *an ideal* suggests that the rule of law is a general normative principle, and one that can be attained, in practice, to various degrees; legal systems can meet the normative requirement of this ideal to a greater or lesser extent. Presumably, the better the law meets these standards, the better law is, at least in some respect.<sup>2</sup> However, as soon as we begin to think about the rule of law as an overall normative ideal, some dangers lurk in the background. One obvious danger is to confuse the ideal of the rule of law with an ideal of the rule of *good law*. Many commentators associate the rule of law with the kind of legal regime that respects, for example, personal freedom and human dignity. Others go even farther and maintain that a legal regime that violates human and civil rights is one that fails to comply with the rule of law. Undoubtedly, these are noble ideals but their connection to the rule of law is questionable. The ideal of the rule of law must capture something that is essential to legalism, *per se*; if there is something good about the rule of law, it has to be a kind of good that derives from certain features that law, as such, possesses. To assume that the rule of law instantiates values that derive from certain views about what would be a good legal regime, like law that respects freedom, dignity, and human rights, amounts to the circular thesis that it is good to be ruled by good law.<sup>3</sup> If the rule of law is to have some distinctive import, it must avoid this obvious circularity.

Nevertheless, there is a beginning of an insight here. The ideal of the rule of law is basically the moral-political ideal that it is *good to be ruled by law*. The general idea is

that whatever else is the case, including, crucially, whatever the content of the law is, it is always better to be governed by a system of laws than by some other system of governance or social control. But why is that? How can we say that a certain form of governance is better than its alternatives, regardless of its particular content, that is, without knowing what the actual governance prescribes. The answer that I will consider here consists of a twofold claim: first, that it is in the nature of regulation of human conduct by law that whatever purports to be law must meet certain conditions, conditions that enable it to be law. Second, that a form of governance that complies with those conditions achieves something good in itself, promotes certain values that we cherish.

If I am right that this is the main answer on offer, two problematic issues arise: first, if we maintain that the ideal of the rule of law is premised on the basic assumption that it is good to be governed by law, the obvious question arises: law as opposed to what? How else can a population be governed if not by law? Can there be any sustained form of *de facto* governance which would not be legal? Here the difficulty arises from some of the familiar theories about the nature of law. According to one tradition that emanates from Hobbes, and more specifically, from early nineteenth-century legal positivism, basically any form of governance that is *actually sustained* over a population is, *ipso facto*, legal. When we have a certain population that is governed by a political sovereign, we have law.<sup>4</sup> But now the idea that if we are to be governed, we should be governed by law, amounts to the tautology that if it is good to be governed it is good to be governed. According to the opposing view about the nature of law, however, generally associated with the natural law tradition, not every form of *de facto* governance is legal; only forms of governance that comply with certain minimal moral constraints are properly characterized as legal. Thus, on this account of the nature of law, the conception of legality is such that it already incorporates a moral component. Only minimally good law is law, as it were. If it is really the case that only forms of governance that comply with some moral constraints are legal, then the idea that it is good to be governed by law amounts to the claim that it is good (in some respect) if we are governed by law because only that which is good (in some respect) is really law. But on this conception, there would seem to be nothing special about the rule of law; what makes rule by law good, on this natural law conception, is that the *content* of law is necessarily good (at least to some extent). Furthermore, if this version of natural law turns out to be wrong, and some norms can be legally valid even if their content is evil, then there would seem to be nothing necessarily good about being governed by law.

We can generalize the problem here: it would seem that any attempt to explain what the rule of law ideal really is, must await a philosophical explication of the nature of law. In order to have a view about whether it is really good to be governed by law, one must first have a pretty good sense of what *law is* and what makes it a distinctive form of social control. It would seem that a theory about the rule of law is methodologically parasitic on a theory about the nature of law. If you want to claim that it is good to be governed by law, you must first tell us what law is, and what makes a form of governance legal to begin with.

Many commentators resist this methodological conclusion,<sup>5</sup> and to some extent, they are right. We do not need a fully articulated theory about the nature of law in

order to substantiate the normative ideal that it is good to be governed by law. What we need is only to understand that there are certain necessary features that any form of governance has to meet in order to be legal. The key idea here is that governance by law is regulation of human conduct by general norms. As long as we can agree that at least one distinctive feature of governance by law consists in this normative form of regulation, namely, that it is essential to law that it purports to regulate human conduct by general norms, we may have all that we need to ground the ideal of the rule of law. Why is that? Because it is in the nature of regulation of human conduct by general norms that such regulation has to meet certain functional conditions, and it is those functional conditions that constitute the various components of what we call the rule of law. In other words, once we understand what conditions law has to meet in order *to function as law*, we will be able to judge whether meeting those conditions is in any sense good or not.<sup>6</sup>

But here we meet the second main controversy about the rule of law ideal: if the conditions that constitute the rule of law are essentially functional, would it not follow that any value in complying with the conditions of the rule of law is only functional in nature? Some prominent legal philosophers have taken this line, and maintain that the values we associate with the rule of law are not moral values; they do not make the law good in any moral-political sense, but only functionally good.<sup>7</sup> Consider this familiar analogy: we can assume that the main function of a knife is to cut, and let us assume that in order to cut, a knife has to be sharp; the sharper the knife, the better it cuts. In this case, sharpness is a functional value. It is functionally valuable for knives to be sharp; sharpness is what enables knives to fulfill their putative function of cutting things. But this, of course, does not make sharpness valuable in any other sense; it certainly does not make sharpness somehow morally or normatively valuable. A sharp knife is a good knife, but good only in the sense that it makes the knife cut better. Similarly, it seems quite plausible to maintain that to the extent that there are certain features which are functionally necessary for law to guide human conduct, such features make the law good – that is, good in guiding human conduct. But this is a purely functional sense of good.

The problem with this functional conception of the rule of law is that it would seem to miss a great deal of what makes the rule of law worthy of our appreciation. It would leave unexplained the general association of the rule of law with a well-ordered society. More specifically, it would seem that a purely functional conception of the conditions of the rule of law would fail to support the first and most important component of the ideal of the rule of law, namely, the normative thesis that it is good to be governed by law.

What I am trying to suggest here is that there is an inherent problem in any attempt to articulate the ideal of the rule of law in a way that would be free of circularity. On the one hand, the ideal of the rule of law is meant to capture the normative judgment that it is good to be governed by law. But this idea, as we have seen, immediately calls into question: governed by law as opposed to what? Do we first need to have a theory about the nature of law in order to come to any conclusions about the question of whether governance by law is good in any sense? A negative answer to this question seems possible, if we focus on the functional aspects of governance by law: perhaps there are certain conditions that the law has to meet in order to be able to guide human

conduct; and then we could say that by meeting these conditions, the law achieves something good. However, as we noted, such a line of thought would naturally conclude with “good” in a purely functional sense. And then it becomes very doubtful that such a functional sense of “good” is capable of grounding the conclusion that it is generally good to be governed by law.

Is there a way out of this circularity? I believe that there is, and I do not think that we first need to have a fully articulated theory about the nature of law in order to show why it is good, morally speaking, to be governed by law. Suppose we agree that whatever else the law might be, it is basically a form of regulation of human conduct by general norms. Suppose we also agree with the functionalists that in order to be able to regulate human conduct by general norms, such regulation must meet certain conditions; it must take a certain shape, as it were, which is functionally necessary for guiding human conduct by norms. Now, suppose it also turns out that the features that law must have in order to function as law are such that they also tend to promote certain things that we value; suppose these conditions are such that, other things being equal, it is good to have them, because they manifest respect for human dignity, promote freedom, and so forth. If this is the case, then we would have shown that it is good to be governed by law. Let me try to present this in the form of a structured argument:

- 1 Whatever else the law is, at the very least, and necessarily so, law purports to guide human conduct by generally prescribed norms.
- 2 Generally prescribed norms can only guide human conduct if they meet certain conditions. Call these: the conditions of the rule of law. Thus, the conditions of the rule of law are functionally necessary for law to guide human conduct.
- 3 Therefore, wherever there is law (that is, some legal system in force), the conditions of the rule of law are actually met, at least to some minimal extent.
- 4 Any form of governance that meets the conditions of the rule of law necessarily promotes certain things that we morally value; that is, by actually complying with these conditions the law attains something morally good.
- 5 It follows that just by having law, we have attained something good; we have attained a form of governance that is good in some moral sense. Therefore, it is good to be governed by law.

I will assume here that premise 1 is basically correct and generally not controversial. Perhaps it requires one clarification: the idea that law aims to guide conduct by generally prescribed norms does not have to entail that just about every legal norm, as such, must have general application. Exceptions are possible and not very infrequent.<sup>8</sup> The claim is that governance by general norms is a characteristic and essential feature of law; for our present purposes, we do not need to specify what kind of norms are legally possible. Similarly, premise 2 is widely agreed by everyone who has written on this subject; in fact, as I have mentioned from at outset, there is a pretty wide consensus on what the conditions of the rule or law are. For example, it is widely recognized that norms can only guide conduct if they are made public, that is, promulgated to the population whose conduct the norm purports to guide; or that norms can only guide conduct if they are prospective (you cannot guide conduct retroactively); and prescribe

conduct that the relevant population can actually comply with (you would fail to guide conduct if it is actually impossible to comply with your guidance); or that norms can only guide conduct if people can understand what is the conduct that is required of them. And so on and so forth. Needless to say, the details are controversial. For example, although it seems pretty clear that one cannot actually guide conduct retroactively, it is not entirely clear that any violation of this condition is necessarily unjustified, or even that it is necessarily a violation of the conditions of rule of law. There may well be exceptional cases in which a retroactive law makes perfect sense. And such exceptions are possible with respect to all of the conditions of the rule of law. These exceptions, and countless borderline cases, are made possible by two considerations that apply here: The first consideration to bear in mind is that guiding conduct, though essential to what the law does, is not exhaustive of the functions of law. The law may need to achieve other objectives as well, besides guiding conduct. Second, even within the sphere of conduct guidance, the law's objectives may be in some internal conflict. The law may need to guide the conduct of different subsets of the population differently, or it may need to guide their conduct in certain ways that are not necessarily in harmony with some other objectives the law may need to achieve.<sup>9</sup> Thus, the fact that it is generally clear what the conditions of the rule of law are, does not entail that these conditions are simple, or that there is no room for controversy about their precise application. Complications notwithstanding, I will largely assume here that premise 2 is not particularly controversial.

I take it that if premises 1 and 2 are correct, then premise 3 follows as a matter of logic.<sup>10</sup> Premise 4 is, of course, the problematic one, and we will have to show that it is true. Finally, it is possible to cast some doubt on the legitimacy of the move from 4 to 5, and I will address that doubt as well.

According to the functionalist conception of the rule of law, the conditions of the rule of law are essentially functional in nature. If a legal norm purports to guide conduct, it must have certain features that enable it to fulfill this function. Now, what the functionalists claim is, that though there is a sense in which it is good if the law meets these conditions, this good is purely functional in nature. As we mentioned earlier, a sharp knife is a good knife, but only in the sense that it makes the knife cut better; it does not make the knife good in any other sense. In other respects, it may be bad that the knife is sharp (e.g., it makes it more dangerous or easier to use for malicious purposes). Similarly, the claim is that if the law meets the conditions of the rule of law, it is better law in the sense that it is better equipped to guide human conduct. But again, the good here is purely functional. Now, this, in itself, is quite right. However, it is arguable that the conditions of the rule of law, though essentially functional in nature, promote other goods that we value independently of, or in addition to, the functions they serve in enabling the law to guide human conduct. Let us explore this possibility.

Consider, for example, the requirement of promulgation. The need to make laws public and knowable to the population whose conduct the law purports to guide is, indeed, first and foremost functionally good; it enables the law to guide conduct. However, the publicity of law is good in many other respects as well. Making laws public renders them politically transparent and open for public scrutiny and criticism. It enables the law's subjects to form opinions about the content of the law, and about

those who enact the laws. Publicity of law is, generally speaking, an essential ingredient of political accountability. Therefore, whatever functional values promulgation of laws have, it also has moral-political value that is conducive to the maintenance of a well-ordered democratic regime.

To take another example, consider some of the requirements of the rule of law with respect to the application of law. It is widely acknowledged that in order to guide conduct, it is not sufficient for the law to make its prescriptions public, prospective, and so forth; successful application of the law to particular cases is also functionally essential. This is a very complicated condition of the rule of law: it requires the law to maintain a considerable amount of congruence between the rules it promulgates and their actual application to specific cases. And this general requirement entails a whole range of practices and institutions. Generally speaking, it requires that the various agencies dealing with the enforcement and application of the law to specific cases apply those rules that are promulgated by the law. In practice, given the conditions of the societies in which we live, this aspect of the rule of law may require such important things as an independent, impartial, and professional judiciary; unfettered access to litigation; generally reliable and noncorrupt enforcement agencies, and so forth. Now again, although the need for such institutions and practices is basically a functional one, the values they serve go well beyond their functional merit. A professional, independent judiciary, for example, is also very conducive to the flourishing of a well-ordered democratic regime, it serves to balance the power of other law making and law applying agencies, and generally, it contributes to a culture of public order and respect for the law that is essential to a well ordered political culture. Similar considerations apply to the existence of well functioning and noncorrupt enforcement agencies, like a police force, tax collecting agencies, and so forth. Without them, law cannot function properly. But their value goes much beyond this functional aspect. A corrupt police force, for example, is bad not only because it undermines the functioning of the legal system, as it does, but it is bad also because it creates a culture of corruption and dishonesty that makes life in society generally unpleasant. A reliable and honest police force enables the law to function well, but it also enables us to live in a fair and agreeable society, free of unnecessary anxieties and corruption.

The conclusion that there is something morally good about meeting the conditions of the rule of law needs to be qualified, and in two respects. First, it should be admitted that compliance with the conditions of the rule of law does not necessarily *guarantee* that the relevant legal regime is otherwise an agreeable one. Many evils can be committed by a legal regime that fully complies with the rule of law.<sup>11</sup> Second, I think that it is quite possible that there are legal regimes which are so profoundly evil that it may actually be morally better if they also fail to comply with the conditions of the rule of law. If the law is, overall, profoundly corrupt, it might be better, all things considered, if it also failed to guide conduct. So perhaps in some exceptional cases, violations of the rule of law would do more good than harm.<sup>12</sup> In any case, none of these qualifications undermine the essential point of premise 4. The good that is achieved by compliance with the rule of law conditions does not consist in the fact that it would guarantee, by itself, a good legal regime. There are many elements that make the law good and worthy of our appreciation. The fact that it meets the rule of law conditions is morally

good, in some respects, but it is not the only good, and often not even the most important one.

Even if we grant that premise 4 is true, and compliance with the conditions of the rule of law are not only functionally but also morally and politically valuable, it may still be argued that we have not quite established the conclusion in premise 5. In other words, even if it is the case that the rule of law virtues are partly moral in content, it is arguable that these values do not prove that there is necessarily some moral value in being governed by law, as such. In fact, Joseph Raz has made this argument a long time ago. The values we associate with the rule of law, he claimed, are only negative values: "The rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself" (Raz, 1979, p. 224).

Let us take a closer look at the two prongs of this argument. Many moral values consist in the avoidance of evil rather than the direct promotion of a good. Raz is right to claim that not every instance of avoiding evil justifies moral credit to the agent; as he rightly notes, the person who cannot poison another due to his ignorance or inability does not deserve credit for it. Moral agents normally deserve credit for avoiding evil when they would have had both the *opportunity* and the *temptation* to commit the wrong, and they have resisted it. But we should not confuse a theory of moral agency and ethical virtue with the question of what is a good. Suppose, for example, that we discover a world in which people, who are otherwise similar to us, cannot possibly kill each other. Thus they would not deserve any credit for the avoidance of murder. But we would still be able to say that it is a good world in that respect. The fact that those creatures cannot kill each other is good, in itself, even if it is not a personal accomplishment that they deserve credit for. Similarly, the fact that a properly functioning legal system cannot sanction certain forms of arbitrary force or violation of human freedom and dignity is simply good, even if it is true that the law does not deserve moral credit for it.

Furthermore, I doubt it that all the values which are promoted by compliance with the rule of law conditions are negative values in the sense Raz has in mind here. Many of them are, but not all. To the extent that there is something positively good about a culture of open, public deliberation about the common goals of society, and to the extent that compliance with some of the rule of law conditions is at least conducive to such a culture, there may well be something positively good, not just avoidance of evil, that is promoted by compliance with the rule of law.

Now consider the second prong of Raz's argument: The kinds of evil which the rule of law conditions avoid, Raz claims, are only those which could have been created by the law itself. No evil is avoided by, say, the publicity of law or its prospective aspect, unless there is law, first, which could violate these conditions (to some extent). In other words, the rule of law virtues only mitigate possible evils that the law could create to begin with. If there is no law, then there are no such evils that need to be avoided. Raz's analogy with the wrong of deceit is revealing: there is no way in which I can lie to you unless I communicate with you. It is only because I can talk to you and tell you a lie that my honesty, in the limited sense of avoiding deceit, is a virtue. Honesty, in this limited sense, Raz claims, "does not include the good of communication between people, for honesty is consistent with a refusal to communicate" (Raz, 1979, p. 224). But what



if I have a positive duty to tell you the truth? Surely, the unfaithful husband who cheated on his wife does not manifest honesty by simply keeping quiet about it. If there is a justified background expectation to communicate the truth, an avoidance of communication might be deceitful. Similarly, we can claim that if there are good reasons to have a form of governance in society, the lack of legal governance is a moral deficiency. We have law and legal systems because there are good reasons to have them. Thus, Raz is right to insist that if there is anything which makes the law good, it is not simply the fact that the conditions of the rule of law, by themselves, actually create certain goods. We must first assume that there is some good in having law to begin with. (Similarly, unless we assume that the institution of monogamous marriage is good, there might not be anything wrong with the silence of the deceitful husband.) In this respect, the argument we presented above is incomplete. But it can be completed by adding the necessary assumption (which, in fact, Raz has never denied): the necessary assumption is that we have good reasons to have law in the first place. If we add this background assumption, then it seems to me that the conclusion of the argument does follow.

It is, admittedly, a very limited conclusion, and for two main reasons. First, we must bear in mind that the conditions of the rule of law, though functionally necessary for law to be able to guide conduct, can be violated to a very considerable extent without rendering the legal regime inoperable. Many legal systems function with gross violations of the rule of law. Second, I think that there is something true about Raz's basic insight that most of the rule of law virtues are essentially negative values. There is a sense in which law itself is more like a necessary evil, not positively a good in itself. Imagine a world which does not require law and legal systems, a world in which there are no reasons to have law at all: presumably it would be a much better world than ours.<sup>13</sup>

## Notes

- 1 Most of these features of the rule of law were articulated by Lon Fuller (1964, ch. 2). Many others basically endorsed Fuller's list (e.g., Finnis, 1980, pp. 270–6; MacCormick, 1992; Raz, 1979, ch. 11).
- 2 This is actually not quite accurate. In my essay (Marmor, 2007, ch. 1), I have argued at some length that compliance with the rule of law can sometimes be excessive; it is not necessarily the case that the more, the better.
- 3 Hayek (1944, ch. 6), for example, was quite aware of this danger, but I doubt that he managed to avoid this circularity. Much of his praise for the rule of law derives from his conviction that the rule of law is good because it is conducive to freedom; and then he articulates the requirements of the rule of law as those which would make the legal regime conducive to freedom. This, I think, implicates his argument with the circularity I mentioned above.
- 4 This view is most famously associated with John Austin (1954).
- 5 Jeremy Waldron, for instance, in a recent article (yet unpublished) "The Concept and the Rule of Law," makes this methodological claim the main target of his critique.
- 6 This is basically the line of thought presented by Fuller (1964).
- 7 Most prominently, H. L. A. Hart (1983, pp. 349–50) and Joseph Raz (1979, p. 226).

- 8 I have elaborated on these exceptions and complications in my essay on the rule of law (see Marmor, 2007, ch 1).
- 9 For a very convincing argument showing how the law needs to convey a different message to different subsets of the population, see Meir Dan-Cohen (2002, p. 37).
- 10 Basically, the argument has this form:  $[(L \rightarrow P) \ \& \ (P \rightarrow Q)] \rightarrow (L \rightarrow Q)$ . Actually, it is a little more complicated since premise 3 introduced an existential quantifier, but the general structure is the same.
- 11 South African Apartheid, for example, was quite legalistic. The evils of the Apartheid regime can hardly be attributed to violations of the rule of law.
- 12 It is very difficult to generalize about this. Sometimes, even if the legal system is profoundly evil, the fact that it fails to comply with the rule of law might be an additional iniquity over and beyond the law's substantive injustice.
- 13 I am indebted to Scott Altman, Elizabeth Garrett, and Joseph Raz for helpful comments on a draft of this chapter.

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