Chapter Three

Law

1. The Instrumental Approach

If basic disagreement about the nature of justice, democracy, and the rule of law is of largely negative consequence for political theory, relevant mostly to critique, why does legal philosophy proceed on the assumption that convergence on a single account of the nature of law is so terribly important?

The first part of the answer concerns something law has in common with justice and the rest. These are all objects of inquiry that have great political significance. For Dworkin, they all have to do with something that is good, and that is the basis of their political significance. But the concepts of tyranny, authoritarianism, fascism, and so on also have great political significance. What's important is that decisions about what the law holds, or what democracy is, or what is justice, all carry immediate weight, pro or con, in political argument. Political theorists or politicians will therefore prefer to have accounts of these thing that help persuade others to their overall point of view.[1] Thus most Western theorists of government today will reject an account of democracy that leaves their own theories beyond the pale.

When it comes to law, the range of politically significant issues tied up with the what can and what cannot be counted as a ground of law is great.[2] Depending on our views whether moral considerations are grounds of law, it could be argued that we the public will be more or less likely to believe that there is a prima facie duty to obey the

state's commands or believe that its rule is legitimate; will have greater or lesser respect for the state; or will be more or less concerned about the legitimacy of judges' appealing to moral considerations in the course of making decisions. There are also a range of possible effects on legal officials of various kinds. Perhaps we get better outcomes from conscientious judges if they are not positivists;[3] or perhaps it is the other way around.

If we are convinced that general convergence on a positivist or nonpositivist account of the grounds of law will produce one of more of these effects, and if we already have views about the desirability of those effects, that will give us a reason to wish for that convergence and reason to urge others to reform their understanding of what law is. At least until 1961, when *The Concept of Law* was published, Hart was clearly thinking along these lines:

> If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.[4]

So Hart was prepared to defend a positivist account of law on essentially instrumental grounds. It is common to reject this approach by saying that it confuses what is with what we would like to be.[5] Those making this claim generally seem to believe that they are already in possession of a decisive argument for either the positivist or nonpositivist view. But we can leave that aside. For the instrumentalist can cheerfully claim, as Frederick Schauer does, that even if there were convergence on a univocal concept of law, it could still be appropriate to argue that we would be better-off embracing a different one.[6] Hart and Schauer are not confused: The instrumental argument is not about what the content of the concept of law really is but rather about what it would be

best for it to be. In Carnap's terms, they offer an explicative definition of "law"—one which preserves much of the meaning the word has in ordinary use, but extends or refines it for the sake of certain ends.[7]

It is easier to understand this kind of approach, however, if we see it as urging us to redirect our attention from the law, that thing we have been disagreeing about, to something else. For Hart and Schauer, the thing we should be thinking about is what we might call positivistic law.[8] The idea seems to be this. Consider all the contexts in which it has been thought important to know what the law is. In all those contexts, it would be much better if we all agreed that what mattered was positivistic law, not some other thing, such as, in particular, nonpositivistic law.

There is, I believe, a plausible nonspeculative case to be made that exclusive positivism tends to promote a healthy critical attitude to the state.[9] But the argument that positivism or nonpositivism will lead to better judicial decisions needs to consider a wide variety of possible situations, turning on the many possible permutations of the variables of the goodness or badness of existing law and of each branch of government. And there are the other possible effects to consider. Even if there were agreement on the appropriate ends for the instrumental argument, it is evident that it is going to be impossible to make the practical case that shifting attention to either positivist or nonpositivist law will be the means to the best outcome, all things considered, in all circumstances.

It is in any case not plausible to think that desired ends will be the same in all circumstances. A critical attitude to the state seems obviously desirable in stable and more or less homogenous polities such as Britain for the last few hundred years, but it is

hard to deny that in particular times and places, a quietist attitude to the state may be for the best. One option is of course to accept that the instrumental argument for the best substitute for law is inevitably parochial. I have heard it suggested that justice was well served in the civil rights era in the United States by a quietist attitude to the (national) state. Should we wish that what we should be discussing differs between, say, Canada and the United States, so that Canadian judges applying Article 7 of the Charter must always in part make (positivistic) law while American judges applying the equal protection clause never make (nonpositivistic) law? Whatever may be the importance of either a quietist or a critical attitude in any given circumstance, this seems like a bad result (which of course would also never come about).

Suppose the instrumental argument worked on its own terms: one or another substitute for law would do best, all things considered, in promoting certain political ends in all circumstances. More fundamental problems remain. The instrumental argument has no purpose if there is no serious prospect that convergence on the preferred new object of inquiry and concern will actually happen. But there would never be convergence because we won't all agree about the values any particular instrumental argument depends on. It makes no difference that there may be a correct answer to the question of which are the true or most important political ends; being correct doesn't mean that others will agree with you.

2. *Why Disagreement About Law Matters*

Though the instrumental approach to the dispute over the nature of law has no promise, both its initial appeal and its failure highlight the importance of the perceived political implications of different ways of understanding the relation between law and morality in any explanation of why this has seemed worth fighting over. For my own case, certainly, it is distrust of quietism and what seem overly romantic views about law that explains my instinctive attraction to positivism.[10] Even those who insist that there is a correct understanding of the relation between law and morality and see no sense in looking for a substitute for law which stands in some desirable relation to morality can agree that one reason this particular philosophical project is important is that its conclusions may have politically significant consequences.[11]

The clear political stakes tied up with the nature of law are not in themselves sufficient to explain legal philosophers' fixation on this question, however. Different accounts of democracy, justice, and the rule of law have political implications too. But few believe that it is a central task of political and legal philosophy definitively to determine the contents of these ideals. Even though we all might wish for accounts of democracy and the rest that best suit our overall political commitments, what most of us feel instead is the need to be on the look out for ideological fudging. Why then the continued quest for the truth about the nature of law in particular? The main puzzle still remains.

Law matters not just for the evaluation of the state but also for the day-to-day operations of its main institutions and for people's understanding of their day-to-day interactions with it. Whatever else it does, law governs the categorization of rules and standards into those which are presented by the state to its subjects as obligations (in

some sense) and those which are not. This is the main reason why the law has such everyday importance for all of us. And it is the reason, I believe, why philosophers persist in trying to get the nature of law right, while they are for the most part happy to let the rest alone.

Dworkin is often criticized by his positivist opponents for running together the issue of the nature of law with that of how we figure out what the law is in a particular place.[12] But he is right to do so because we cannot as a general matter decide how questions of legal validity should be answered in a particular legal system without first settling whether moral considerations can be grounds of law. Of course positivists and nonpositivists share a lot of beliefs about law. And so all parties will be able to agree about the legal validity of properly enacted speed limit rules, etc. Disputes over the nature of law won't be relevant if what is before us is properly enacted legislation that is both obviously constitutionally innocent and susceptible to a plain reading. Nor will they generally affect our thinking about firmly entrenched private law precedent that takes the form of formally realizable rules.[13] But once we get beyond this kind of thing, variations in commitment on the boundary between law and morality will lead to variations in judgments of legal validity. If the law declares that contracts entered into under duress are voidable and there is no binding precedent that fits the facts of some case where duress is alleged, and also no established interpretive method (such as Cardozo's method of sociology)[14] that enables us to settle the legal question without engaging in moral reflection about the best way to understand or improve the doctrine of duress, then a judge trying to decide whether the contract is enforceable against the party claiming duress will have to engage in moral reflection. Even if she concludes that the right way

to make a decision is to appeal to community morality, or to a criterion of efficiency, or to toss a coin, she will need to engage in moral deliberation in order to reach that conclusion. Since finding an answer required moral reflection some will say that valid law did not settle the matter prior to the decision. But others will disagree. Though a judge making a decision need not take a stand on the nature of law, that is required for anyone venturing an opinion on what the law was before the decision was made.[15]

This is why there a strong inclination in most of us to think that one of the competing views about the nature of law must be right. Unlike what seems perfectly fine for democracy, say, it would strike most people as on the face of it unsatisfactory or regrettable to have say that there are simply different views about law and that on one understanding of what law is the contract wasn't ever legally enforceable while on another there was no answer to question of whether it was enforceable until the judge made her decision.

3. *Analysis of the Concept of Law*

As I have said, I believe that the traditional disagreement about the nature of law is a basic disagreement: there is no substantive argument available that will allow us to proceed with our debate in a productive way.

Since traditionally the question of the nature of law has been understood as a question about the content of the concept of law, we first need to see whether some version of conceptual analysis might provide the means for progress.[16]

Nicos Stavropoulos favors a version of the causal-historical approach according to which the reference of "law" is fixed by what legal experts tell us about the nature of paradigm cases of law.[17] He offers a sophisticated and detailed argument against objections to extending the causal-historical model to legal concepts, but his view in the end must still be grounded in intuitive reactions to cases. It is hard to see that this grounding will be forthcoming. Supposing that the relevant experts are lawyers and legal theorists, we know that, unlike the chemists who tell us about the nature of gold, they don't all agree about the nature of law.[18] But leaving that aside, suppose that while most people (not knowing what the experts think) believe that the death penalty is provided for by valid law in Texas, the consensus among the legal experts is that the Constitutional materials, on the appropriate moral reading, show that the Texan death penalty statutes are not valid law.[19] What seems pretty clear is that while some might react by thinking that they were wrong to include those statutes in the category of law, many, including many sophisticated philosophers of language, will react with incredulity. A response like John Austin's may come to many minds:

> 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, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.[20]

It is true that what will happen to me doesn't determine the question of legal validity. But what we are trying to figure out is precisely what the conceptual ground rules for the theory of validity are, and for that we need some grounding for Stavropoulos's account in the intuitive reactions of people generally to sample cases. We are talking about what determines the correct usage of "law" and the only authority we can appeal to for this question are the views of sophisticated users of the word.

A more traditional criterialist approach is much more plausible for the case of law than the causal-historical view.[21] If the concept of law is determinate, the way to express that will be with a list of (perhaps defeasible) criteria for its correct application generally accepted in the relevant population. The trouble, of course, is that there will be no convergence on examples relevant to the key questions of whether grossly unjust law can be law or whether what the law is can be determined in part by moral considerations.[22] Could there be a valid law of racial slavery? No, say some. Yes, say others. Raz's ingenious solution is to determine the criteria by investigating the relations between the concept of law and other concepts, in particular that of authority.[23] In general this seems like an extremely promising approach.

Raz's argument starts with a question: "Do you agree that law claims authority?" "Yes," we are all supposed to answer. "But then you see," the argument goes on, "that that means that it would be very odd to think that moral considerations in part determine the content of law, since if we have to figure out the moral issues on our own, the law couldn't serve as an authority, since an authority is precisely something that can tell you what you ought to do." The argument obviously depends upon Raz's "normative-explanatory" account of the concept of authority being accepted. And so there are, it

seems to me, two lines of resistance for the nonpositivist. He could say that he disagrees with Raz about what authority is, or say that, *if* Raz is right and that's what authority is, he no longer thinks law always claims it; he was only willing to agree that law claims authority because he had in mind some weaker idea of authority that didn't lead to positivism at all. The intuition that Raz's argument builds on, "law always claims authority," isn't obviously going to remain intact when people's everyday and no doubt conflicting senses of what authority is are replaced by Raz's own normative-explanatory account.[24]

Dworkin's alternative method is also promising because it starts precisely from the fact of intuitive disagreement about particular cases. In its most recent presentation, it is clear that it also approaches the concept of law via another concept.[25] Whereas Raz claims that law necessarily claims authority, Dworkin claims that where there is law, there the value of the rule of law, or legality, is satisfied:

> Claims of law are claims about which standards of the right sort have in fact been established in the right way. A conception of legality is therefore a general account of how to decide which particular claims of law are true.[26]

For this claim about the connection between the concepts of law and of the rule of law to be acceptable, it would have to be the case that sophisticated people generally would intuitively rebel at the idea that there can be valid law where the rule of law is violated. It seems obvious that there is no reason to think that this would be the typical reaction: many theorists have explicitly claimed that the rule of law and law are not coextensive.[27]

But perhaps this conceptual claim is inessential for Dworkin's argument.[28] His fundamental idea is that to figure out the content of all the politically important disputed

concepts, including law, we have to figure out what is good about the value that the concept picks out. We get the concept of democracy right by figuring about what's good about democracy. We offer an interpretation of the concept of democracy that tries to present the value the concept is concerned with in its best light. Similarly, though "law" doesn't just refer to a value, that's part of what it does. And so for law we must offer an interpretation that presents what we take to be good about law in the most compelling way: we present the value associated with law as the best or most choiceworthy value it could be, while still being the value associated with law. Again, we could object that, for some people, there is no value associated with law as such. Certainly this is the way Hart thought about it.[29] But even leaving that aside, Dworkin's method for figuring about the true content of political concepts of any kind is, in my view, unsupported.

We are, to repeat, making claims about the (deep structure of the) content of the concept of law. By what authority can we claim that the right way to understand the concept of law, the right way to employ it, is in the way that makes what is valuable about law as choiceworthy as it could be? The only authority there could be is that, in reacting to particular cases, we find ourselves being intuitively drawn to this view. Either that, or we all already agree on the more abstract proposition that the concept of law is an interpretive concept in Dworkin's sense. Dworkin agrees with this account: "Interpretive concepts also require that people share a practice: the must converge in actually treating the concept as interpretive."[30] The trouble is that there is no convergence in treating the concept of law as interpretive in Dworkin's sense.

As with the values discussed in the previous chapter, conceiving of the debate about the nature of law as a debate about conceptual content does not provide a path to

substantive argument between the two sides. Dworkin is saying to his opponent that the way to move forward is to discuss what is most valuable about law and legal practice, so let's talk about that. The positivist reply will be that she will do nothing of the sort; in fact that is the last thing she is inclined to do, since it is the importance of a cool, detached, morally neutral stance towards law that motivates her positivism in the first place.

As I've said, positivists and nonpositivists share many beliefs about law. What they don't share is a set of beliefs that would make substantive argument about whether morality can be among the grounds of law possible. The two positions are not just different, they are directly contradictory on the very question at issue.

As discussed in chapter one, positivism and nonpositivism can be conceived as two different fundamental understandings of the kind of thing law is. Positivists see law as a complex normative system that is grounded entirely in matters of fact. Law isn't just what any particular person in power does. There are right and wrong answers to many if not most legal questions, and you have to be an expert on the system's rules and principles and their proper interpretation to know what the law about any particular issue is. But this entire system is none the less grounded in social fact, in the attitudes and beliefs of those with de facto authority within the system. The content of the law is always finally determined by facts, by what is, and not by moral considerations, or what ought to be. As a result, it will always remain an open question whether legal rights and duties are real, that is moral, rights and duties, and whether the system as a whole deserves our allegiance, all things considered.

Nonpositivism, by contrast, insists that law in its nature is something good, or at least can be seen as striving towards being something good. For most people of this inclination, the evident truth that law is something good, or at least potentially so, is tied up with the further evident truth that the law is genuinely binding on us—it is, as Dworkin has all along insisted, a domain of *real* rights and obligations. Anyone who insists that law is ultimately grounded solely in social fact must be blind to these essentially moral aspects of law; once you understand what kind of thing law is, it is obvious that morality must play some role in determining what the law is. From this point of view it may turn out that the Nazis and the Taliban have no law, but who cares about that? If there is something interesting going on in this whole domain, something worth reflecting on, especially something worth reflecting on philosophically, it must be because there is something valuable or at least potentially valuable about law, or at any rate something immediately morally relevant about the content of law, and the philosophical task is to figure out more exactly what that is.[31]

So it's not that the two camps each think that the other side is missing something. Each side thinks that the other is fundamentally and hopelessly mistaken about what law is. No amount of fancy footwork, in my view, is going to bring these two camps to a place where they can actually argue through their disagreement.

4. *Eliminativism*

A possible response is that we should just stop talking about what the law is altogether. This is a more radical, though more plausible, proposal than that we should replace talk

about law with talk about, say, positivistic law. The suggestion is that in place of inquiry into the content of the law in force, we need nothing at all.[32]

Of course, there is no chance that we will stop discussing what the law around here is, so the proposal really amounts to the claim that that discussion plays no important role in legal practice and social life generally—it is otiose, a wheel spinning on its own. We can get on perfectly well by discussing a range of other questions, in particular the following.

Within legal practice, judges and other legal officials need a theory of legal decision-making, which is a political theory setting out what textual materials and other considerations it is appropriate to take into account and in what way. But, as we saw in chapter one, such an account can be expressed without reference to the law in force prior to the decision.

Legal practice also requires a theory of legal counsel, of how lawyers should advise clients. This is where Holmes's "bad man" theory of law can seem plausible: Lawyers should advise clients on the assumption that all they care about is how the legal system will affect their interests and so offer predictions about it is most likely to do to them.[33] Whether or not the "bad man" description is necessary, the idea that lawyers do and should advise clients based on predictions about what will happen, as opposed to considered judgments about the content of current law, is not novel.

Finally, considering legal practice in the broadest political sense, we need a theory of what legal systems should strive for if they are to achieve the distinctive virtues, distinct from justice and legitimacy, this kind of governance structure can achieve.[34] Construed broadly, this theory would encompass not just the separation of powers and the

procedural concerns associated with traditional ideas of the rule of law, but also such questions as whether it is better in general for legislatures and judges to produce texts and pronouncements made up so far as possible of formally realizable rules.[35]

We can say and do a lot with these accounts of legal decision-making, legal counsel, and the distinctive possible virtues of the legal governance structure. What we cannot do is discuss what the law now is: Any such question must be paraphrased into a question about what a legal official ought to decide or what the state is likely to do to people or should do to them. So one consequence of an eliminativist attitude to law is that there can be no meaningful discussion of the legal domain where there are neither law-applying nor enforcement institutions. For example, the nineteenth-century debate in international law circles between positivists and natural lawyers took place before the development of generally recognized supra-national law-applying bodies and so would have to be understood as really a debate about some combination of what national legal officials should do, what is likely to happen, and perhaps the moral obligations of states.[36] Another consequence is that we have to think of the identification of legal officials such as judges as a political but not a legal matter. There is no such thing as valid law to tell us who are the legal officials who get to employ a theory of legal decision making; we must identify them by looking for political consensus about which office holders have authority to resolve disputes in the name of the state (or international community).

But we need not pursue any further the prospects for more or less clever rephrasings of familiar discourse about law. Even if coherent paraphrases were available for every familiar kind of claim about the law, it would not be plausible to think that

nothing important had been lost in the translation. It is not, in other words, plausible to think that all talk about the law that is in force is idle.

Law professors, at least in the United States, are surprisingly comfortable with the idea that there is no such thing as "the law," that there are rather just legal materials and good and bad legal decisions. Perhaps this is an effect of legal realism, perhaps of attempts by political scientists to model judicial behavior purely in terms of "policy preferences," but I believe that it is also, and more fundamentally, an effect of teaching American appellate decisions. Comparatively speaking, American legal sources on their own provide strikingly little determinate guidance. Of particular importance is the lack of convergence on legal standards of interpretation and stare decisis, especially in the horizontal dimension.[37] My anecdotal sense is that law professors in other countries, even other common law countries, are far less inclined towards the kind of knowing skepticism about the law that is prevalent in American law schools.

Even in the United States, however, the eliminativist option is surely not agreeable to judges and other officials. It seems that almost all judges believe that their duty is to figure out what the law is, and apply it. Though not all judges believe that this exhausts their responsibility (Cardozo, for example, did not), most believe that this is their first obligation. It is possible for judges to follow instead a theory of adjudication that does not address the issue of where the law ends and other considerations begin, but we can guess that this way of conceiving of what they are doing would strike most as both artificial and wrong. One reason for that, perhaps, is that the theory of adjudication is always going to be controversial. In the absence of convergence within this particular branch of political theory, judges can insist that nonetheless they are all constrained by

the law. In light of the lack of convergence on an account of the law, and given that in any case judges must inevitably sometimes appeal to considerations of political morality in order to reach a decision, this claim of course rings somewhat hollow. But not entirely so. To suggest that judges abandon entirely the idea of being constrained by the law and instead only follow the theory of legal decision-making they judge best is to suggest a radical reworking of the understanding of the role of legal officials—both the understanding of the officials themselves and of the rest of us.

As I have already suggested, it is in the end the understanding of the rest of us that most fully undermines the eliminativist option. Though we ordinary citizens could negotiate our relationship with the state reasonably effectively if we only asked ourselves what the state is likely to do or what conscientious judges ought to do, and while the former may be the main question people who seek the advice of lawyers want answered, it is nonetheless the case that many of us are in the habit of acting on beliefs about what the law is. For some this might be because they are concerned about not violating what they believe is a (prima facie) moral duty to obey the law. For others, it is just part of their self-understanding of how they relate to their state and through it to others. Many people who are skeptical or have no view about a moral obligation to obey the law nevertheless "accept" the law in Hart's sense: for some reason or other, they treat valid law as giving them reasons for action.[38] It is hard to take seriously the idea that we should just stop thinking and deliberating in this way. For the criminal law, in particular, it seems ridiculous to propose that, properly understood, there are no crimes, just good or bad decisions in criminal cases, and better and worse predictions about our interactions with the criminal justice system.

But could not acceptance of the law by citizens be understood instead in terms of a theory of good legal decision-making? Is anything lost if we say that what people really treat as reason-giving are good legal decisions, what those with authority to resolve disputes ought to decide? What is lost is a distinction between what the law is and what a legal official ought to do that is entirely familiar to all of us and compatible with every contending account of the nature of law. For the positivist, of course, it is important to be able to say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or invalidate was until now has been valid legislation. But even for Dworkin, whose theory of law implies that if a judge ought to overrule a precedent then that precedent was already not a valid source of law (but rather a "mistake"), there is an important distinction between how a judge ought to reason when she ought to give force to the law, and how she ought to reason in those circumstances which justify not giving force to the law—a kind of justified official disobedience.[39] Now perhaps this familiar thought could be explained as follows: we distinguish between a judge's moral obligations in her professional capacity and her moral obligations all things considered.[40] Cases of justified official disobedience are cases where the moral reasons a judge has to follow the theory of legal decision-making that defines her professional role are outweighed by other reasons. This maneuver won't work for the positivist, who will continue to insist on the distinction between what the law is and the factors relevant to what a judge should do in her professional role. Some may be inclined to dismiss this, however, as merely a theoretical obsession carried over from the project of describing the nature of law.[1] I remain convinced, however, that the questions

[1] In his most recent writings on law Dworkin has abandoned his long standing insistence that he has been offering a theory of law, as distinct from a theory of adjudication: "Legal rights are political rights that are

about the content of the law in force are both substantive and important. No matter how sophisticated the eliminativist account becomes, the claim that there is no reason for us to care about the content of law remains, to me, implausible on its face.

Certainly international law in the contemporary world is hard to understand on the eliminativist model. Much of what is generally regarded as valid international law is not subject to adjudication in courts of permanent compulsory jurisdiction. Even states that have consented to the compulsory jurisdiction of the International Court of Justice may revoke that consent, as the United States did in 1985. If all that matters is what conscientious courts would decide, this structure is hard to understand. I suppose we could say that states are bound to what the correct decision of a relevant court would be, even if they do not or need not, going forward, recognize decisions of the actual relevant court as binding on them. But this is starting to seem very peculiar. Or I suppose we could say that, since that seems so peculiar, states that do not consent to the jurisdiction of the relevant court are not subject to the same obligations that consenting states are; international obligations can be turned off and on at will. That's even worse. Far more natural is to think that there is something called international law, binding on all states, but that it is a feature of the international legal system that for large areas of the law states need not defer to any adjudicative body's decision under that law as binding on them.

Of course, at this point, the eliminativist may remind us that the very existence of international law has long been controversial and that it is a desperate measure to defend

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properly enforced, directly on a citizen's demand, by an adjudicative body. The distinction between theories of law and adjudication is erased . . . ." Hedgehogs. Should we count Dworkin among the eliminativists, leaving concern about the content of the law in force a special and theoretically driven worry of (former) positivists only? I doubt it (we'll find out), just because the call to drop discussion of what the law is, as opposed to those political rights and obligations that we have that are properly enforced by courts, is such a radical refocusing of the self-understanding participants in legal practice have had. (If the claim is rather that the law is just that set of rights and obligations properly enforced by courts, the change in view, while still, significant, is not so dramatic.)

the role of law in social life by turning to the international stage. I don't agree with that, but we can leave it aside for now.[41]

In the end, there is of course no knock down argument against elimination of the law as an object of concern. All we can do is continue to try to raise reasons why the content of the law matters. Let me end with just one more. As I've said, I believe that the idea that there are no crimes, just good and bad decisions in criminal cases, is especially hard to swallow. Consider the situation in Singapore with respect to Section 377A of the Penal Code, which criminalizes sex between consenting adult males. This provision is not currently enforced. In other words, police and prosecutors are not dragging sexually active gay men off to court. Were they to do so, the right decision by a conscientious court, in the overall context of Singapore law would be to convict.[42] But a political decision has been made not to present this issue to the courts. In that context it is hard to understand acceptance (or rejection) of law in terms of an attitude to decisions a court ought to make. Does that mean that gay men in Singapore have nothing to complain about until the government changes its mind and starts sending people off to court again?[43]

5. *Substantive Argument about the Content of the Law*

So we face a problem. We cannot give up on the idea that some statements about what the law is can be true, but our basic disagreement about the grounds of law makes it hard to see how this is possible. Of course, I haven't proved that basic disagreement about law is permanent; there's no claim that our basic judgments can't be revised. It is also of

course possible that an argument I have not considered shows that what seems to be a basic disagreement is not one at all. The most promising general strategy would be to continue to search for agreement about the relation between law and something else where reflection of the nature of that something else might provide reason to embrace either positivism or nonpositivism about law. Though I have said that the versions of this approach offered by Raz (law and authority) and Dworkin (law and legality) are unsuccessful, I certainly haven't shown that no version of this approach will succeed. The difference between the two camps is, however, so deep, that it does seem reasonable to conclude that we are stuck with a basic disagreement which, unlike those about the nature of democracy, justice, and the rule of law, matters a lot.

It is clear that the different role assigned to moral considerations in our two accounts of the grounds of law means that sometimes substantive argument between the two sides about some legal proposition will not be possible. Consider whether the exclusion of same-sex couples from the institution of marriage in New York was in violation of the State Constitution in, say, 1995. On the positivist account the content of the law is determined entirely by legal sources: statutes, constitutions, judicial opinions, and so on, all interpreted in a fashion that never requires the independent moral judgment of the interpreter. If we take this view, we will probably conclude that the existing legal sources did not determinately settle the legality of same-sex marriage in New York in 1995, and so the matter remained open until the Court of Appeals settled it, in the negative, in the 2006 case of *Hernandez v. Robles*. Our nonpositivist, by contrast, believes that the content of the law is determined by the best, the morally best, interpretation of the existing legal materials. If he also believes that equal protection,

properly interpreted, implies equal participation, regardless of sex or sexual orientation, in important social institutions such as marriage, he will have no difficulty in reaching the conclusion that the exclusion of same-sex couples from the institution of marriage in New York violated the State Constitution in 1995. He will also conclude that the holding to the contrary in *Hernandez* was a mistake.

On the positivist view there was no answer to the legal question before *Hernandez* and, after that decision, there was the clear answer that same-sex marriage was not legally available in New York. On the nonpositivist view, it has for a long time been contrary to law to exclude same sex-couples from the institution of marriage in New York and it remains so today. Here we have run up against basic disagreement about the content of law. This doesn't mean that we have to conclude that there is no answer to the legal question, just that the disagreement is basic; the two sides have nothing more to say to each other.

Consider also a case from private law—the question of damages for breach of a promise for which there was no bargained-for consideration, but for which the promisor is nonetheless liable under the doctrine of promissory estoppel. There is no clear consensus in the American case law about whether reliance or expectation damages are appropriate in such cases, and there is quite a bit to think about, from the moral point of view, if we want to know which kind of damages ought to be available. (Does the doctrine of promissory estoppel reflect a proposition of corrective justice that reasonable detrimental reliance ought to be compensated, or is it just an instrumentally justified expansion of the grounds for enforcement of promises?) Here too we have to conclude

that basic disagreement about the nature of law leads to basic disagreement about this particular legal proposition.

We might think that we will always run into basic disagreement at least in the United States and other countries where individual rights are constitutionally enshrined.[44] Some people believe that the equal protection clause of the 14th Amendment to the U.S. Constitution enacts, as part of U.S. law, a moral principle of equal treatment: "government must treat everyone as of equal status and with equal concern."[45] Others believe that the equal protection clause authorizes the Supreme Court to decide, outside the boundary of law, whether legislation or common law doctrine violates its view of what morality requires in the domain of equal protection. As decisions are made, and to the extent that the principle of stare decisis is taken seriously, a body of equal protection law builds up. But certainly, the positivist will say that right after Reconstruction there was very little in the way of a law of equal protection.[46]

As there is no agreement on the right way to understand the Equal Protection Clause, and as all law must satisfy that clause, do we not face the result that all legal argument will run into basic disagreement? Take a piece of legislation that is not unconstitutional on a nonmoral reading of the Constitution and Supreme Court precedent. Assume also that on the best moral reading of equal protection, the legislation violates this right. A positivist holds the legislation valid, a nonpositivist holds it invalid. And there is no substantive argument available that might resolve the disagreement because it depends not on competing interpretations of the legal materials but different views about whether moral considerations are among the grounds of law.

It is crucial to see, however, that basic disagreement about the grounds of law is often of no practical significance. No one thinks that 10 years imprisonment for murder is unconstitutional in the United States, or that the law against murder violates the law of equal protection, or that only marriage between persons of the same sex is permissible under New York law. Though some insist that these conclusions depend in part on moral reasoning and others deny it, agreement on the truth of these propositions doesn't depend upon agreement about why they are true. And of course there is in any case partial agreement about why they are true. Positivists and nonpositivists agree a great deal about the grounds of law. It is not just that they may end up with the same conclusions about particular legal issues. They agree also about a good many of the factors that are relevant to reaching such conclusions. All sides agree that legal sources such as validly enacted statutes, judicial decisions, and constitutional provisions are among the grounds of law.

Of course there are disagreements about how to interpret such legal sources and what weight to give them. But again, in a significant range of cases, those favoring moral readings of sources, and a moralized approach to the doctrine of stare decisis, can end up in the same place as positivists who offer a straight-forward nonmoral interpretation. Nonpositivists agree that legislation imposing a sentence of 10 years for murder is constitutional because there is no plausible moral case that this amounts to cruel and unusual punishment; and the criminalization of murder does not violate the equal protection clause because there is no plausible moral case that it fails "to treat everyone as of equal status and with equal concern." Sometimes the moral factors that nonpositivist accounts of law locate within the boundary of law are inert, even if they are always in principle playing a role.

Suppose that a plaintiff in an American contract case argues that his letter containing an offer of a world cruise for $15,000, "deemed accepted if we don't hear from you within 10 days," created a binding contract once the ten days had expired, though the offeree had done and said nothing. The rule that there is no contract in a case like this is well established in unambiguous precedent, and the moral case in favor of the plaintiff's point of view is extremely weak. If we follow Dworkin and try to interpret contract law as a whole to show it in its morally best light, there is simply no case for concluding that the offeree is legally bound.

It is in general true that the less determinate the legal materials and the less agreement there is on issues of interpretation and the weight of precedent, the more the moral factors recognized by nonpositivist accounts of law will have a role to play, and thus the more basic disagreement we will find. Since indeterminacy in the sources and standards for interpretation and the weight of precedent makes for less law on the positivist view, it is tempting to think that basic disagreement occurs if and only if we venture into the territory where the positivist believes that there is no right answer to the question of what the law is. If so, that would seem to be some kind of vindication of the positivist approach. Sadly, it's not so. In the first example from contracts determinacy in the legal materials coincided with low moral stakes. But take the issue of damages for breach of a contract for which there is bargained-for consideration. Here the rule that expectation damages is the default remedy is as well established in clear precedent as anything in private law. But from the moral point of view, there is actually a lot to think about. Contracts theorists argue endlessly about whether the default remedy should instead by reliance damages, specific performance, or something else. If we take a moral

reading of contract law as a whole, it could be plausible to conclude that contract law provides for, say, the more general availability of the remedy of specific performance, despite the fact that this would force us to conclude that many prior conclusions by judges about contract law were mistaken.

Still, on any plausible nonpositivist view, determinate guidance from extant legal sources does considerably constrain the enquiry into what the law is, so even when the moral issue is a live one, determinacy in the source law will affect the degree with which we will run into basic disagreement.

It is important to note that what I am saying does not collapse into the view that the law is what everyone agrees is the law. There can be considerable disagreement about the content of the law even where everyone agrees about all the relevant factors to take into account. Was Judge Easterbrook right to say that section 2-207 of the Uniform Commercial Code did not apply to a case where there was only one contractual form?[47] There's a substantive debate to be had, since, in the context of this statute, we all agree that the ordinary meaning of the statutory text, read as a whole and along with interpretive precedent, provides the answer to this question. And there is much to disagree about in the interpretation of the Internal Revenue Code, but no one thinks that the best moral reading of that statute sees it as enacting some theory of distributive justice. On any plausible moral reading, when it comes to tax, the issue is to get the statute right, but that's no easy matter. Much of the common law of contracts is technical in this sense too. Does the law of a particular state accept the view of the Restatement (Second) of Contracts that: "An offer is binding as an option contract if it … "is in writing and signed by the offeror, [and] recites a purported consideration for the making

of the offer"?[48] Either the law includes this formal device or it does not. Even if it would be good to have it, morally speaking, that can't mean that it is already there if there is no trace of it in prior case law. But whether the prior case law contains enough of a trace of it to conclude that it is a legally effective way of making offers irrevocable can be a matter for substantive debate.

7. *Does Basic Disagreement about Law Matter?*

We can continue to engage in substantive argument about law even though there is widespread basic disagreement about whether moral considerations are among the grounds of law. But there are a number of legal questions where substantive argument is not possible—in some places, such as the United States, there are a large number of such questions, many of them very important questions. Does this matter? In professional legal practice, perhaps not so much. Lawyers can still give predictive advice and judges can use their theory of legal decision-making without worrying about whether, in doing so, they are applying or making law. And for citizens too, the realization that in *some* cases people will have nothing to say in defense of their claims about the content of the law is perhaps not so troubling, so long as the issue remains a real one, capable of an answer, and so long as substantive argument about the content of law is not typically unavailable. It is one thing to say that, for some subset of legal propositions, no substantive case can be made for or against; quite another to say that this is the case for all or most legal propositions.

Nonetheless, the fact of basic disagreement about law does matter. It matters primarily to our political discourse about the way legal decisions should be made and the way legal institutions and legal materials should be designed. The generally dispiriting public discourse about judicial nominations in the United States provides a good example.[49] All sides claim that the nominees they favor will apply the law, not make it, and that the nominees that they do not favor will do the opposite. "Legislating from the bench" is right out. But then, judges appealing to their own judgments of political morality in the course of making a decision is also right out. As already noted, there is in the United States no determinate settled law governing adjudication in hard cases, or the force of horizontal stare decisis, so at the very least appellate judges must engage in moral reflection in order to decide how to go forward when the legal materials do not provide a simple answer. This inescapable point is almost always disavowed in the public sphere.[50] To the extent that politicians defend asking questions about the political views of judicial nominees, they usually suggest that this is needed in order the smoke out extremists who will make law, not apply it.[51] This game of cat and mouse rather obviously obscures what is really at stake.

If the question concerns the proper weight of precedent, or when a court should depart from the plain meaning of a statutory text, and the relevant legal norms about stare decisis and statutory interpretation do not settle the matter, it is obviously nonsensical to answer by saying that judges should apply the law. But this answer is equally empty if the question is what judges should do in hard cases, especially cases involving interpretation of broad statements of rights in constitutions, for basic disagreement

concerning the connection between law and morality maps precisely onto the different camps in that debate.

Of course we could always treat the proposition that judges ought always and only to apply the law, never make it, as a fixed point and think about what the nature of law must be given that this proposition is true. This would be one way to understand Dworkin's project. The trouble is, this is not a fixed point among us; there is basic disagreement about whether it is true. Even if there were convergence on this claim, however, people's sense that judges ought always to apply the law clearly depends on what they understand that to involve. It is plausible to think that when most people say, "No legislating from the bench!" what really concerns them is that a judge may be tempted to take her own judgment on relevant moral issues into account when making decisions. So an opponent of judges making use of moral judgment when making decisions, when told that this is necessary in order to apply the law, might respond, "Well, if that's what applying the law is, judges should not do it!" A better way to understand Dworkin's project is that it offers a theory of the rule of law and of adjudication that aims to show that appeal to moral judgment in legal decision-making is not undemocratic and is compatible with the rule of law—that, specifically, judges' use of moral considerations in their decision-making does not violate the general ban on retroactivity.[52] Similarly, the project of "normative positivists," who, unlike Dworkin, are troubled by legal decision-making that turns on moral considerations, is best understood as that of giving a theory for the design of legal materials and for legal-decision making that is compatible with a rather different understanding of democracy and the rule of law.[53]

When it comes to questions of institutional design and the theory of conscientious legal decision-making within any ongoing set of legal institutions, we would be better off avoiding discussion of what it is to apply the law altogether, because precisely where the design and adjudication questions run up against hard questions about legitimacy and the distinctive virtues of legal systems, basic disagreement about what the law is becomes relevant. Since the really important questions in legal philosophy are these questions about institutional design and adjudication, we should do what we can to make those issues tractable to substantive argument.

As Duncan Kennedy argues at length, the combination of the obvious fact that policy or ideological considerations are inevitably involved in legal decision-making in a legal system like that in the United States and the almost unanimous official and professional denial of this fact does great damage to our general understanding of the role of courts in government.[54] More than that, this denial can be described as ideological in that it "increases the appearance of naturalness, necessity, and relative justice of the status quo, whatever it may be, over what would prevail in a more transparent regime."[55] Widespread basic disagreement about the grounds of law helps to allow all sides to insist in good conscience that all they ask is that judges apply the law; this shores up the situation of denial. It does so by blocking direct political discussion of what legal decision-makers should do, in the system they work within and with the materials they have. Just as with the political values discussed in the previous chapter, basic disagreement about law does open up space for ideological sleights of hand and obfuscation. So though it isn't generally true that we can simply leave discussion of law aside and talk about something else, in some contexts that is the right thing to do.

[1] Cite Gallie

[2] For more on the issues discussed in this paragraph, see Murphy, "Concepts of Law" and "The Political Question of the Concept of Law."

[3] See David Dyzenhaus, *Hard Cases in Wicked Legal Systems* (1991).

[4] Hart, *The Concept of Law*, 209.

[5] See Julie Dickson, *Evaluation and Legal Theory* (2001); Waluchow, 86-98; Raz, *The Concept of a Legal System*, 2nd ed. (1980), 215-6.

[6] Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies* 25 (2005): 493-.

[7] Rudolf Carnap, *Meaning and Necessity* (1947), 7-8; Quine, "Two Dogmas of Empiricism," 24-7.

[8] This is an example of the subscript gambit. Chalmers.

[9] See Murphy, "Concepts of Law" and "The Political Question of the Concept of Law"; my current view about the instrumental approach is more fully set out in "Better to See Law This Way."

[10] See Murphy, "The Political Question."

[11] A good example of what I have in mind can be found in the first and second-last paragraphs of Joseph Raz, "Authority, Law, and Morality," in *Ethics in the Public Domain*, 194, 221.

[12] See, e.g., Raz, "Two Views," 23-5; Coleman, 180-1.

[13] I defend these claims at the end of this chapter.

[14] Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

[15] Dworkin writes: "Jurisprudence is the general part of adjudication, silent prologue to any decision at law" (Dworkin, *Law's Empire*, 90). If "jurisprudence" means the theory of the concept of law, I don't agree, since judges can conscientiously and legitimately make decisions without having a settled view about that. If "jurisprudence" is understood more broadly to include the question of political philosophy about how judges ought to decide cases, then it will be the prologue to many decisions. Since, however, that political question will, for some cases, have only one reasonable answer, I still wouldn't say that it is prologue to all decisions.

[16] For a different application of skepticism about conceptual analysis to the debate over the concept of law, see Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," American Journal of Jurisprudence 48 (2003): 43.

[17] Stavropoulos, .

[18] A point Coleman and Simchen make against this view. Coleman and Simchen, "Law," 22-7. But the view they favor is no more plausible. They put forward a version of the causal-historical approach according to which the reference of "law" is not determined by what the experts tell us about the nature of the paradigm cases. Rather, "to fall under the extension of 'law' is to bear the appropriate similarity relation to paradigmatic instances. But the determination that something or other bears this similarity relation to a paradigmatic instance of law is a task that the average speaker can be expected to be able to carry out." Id., 27-8. But insofar as there is supposed to be a determinate extension for "law", there needs to be just the one similarity relation. Just as the experts disagree about the nature of law, we ordinary folk disagree about what the relevant similarity relation is.

[19] For defense of the "moral reading" of the constitution, see Dworkin, *Freedom's Law*.

[20] John Austin, *The Province of Jurisprudence Determined* (1832), 158.

[21] See Raz, "Two Views"; "Can There be a Theory of Law?". Perhaps the purest traditionalist is Matthew Kramer, see his *In Defense of Legal Positivism*, 177-82.

[22] See Dworkin's discussion of "theoretical disagreement in law" in *Law's Empire*, 1-44.

[23] See Raz, "Authority, Law, and Morality."

[24] For further discussion, see Murphy, "Razian Concepts."

[25] See Dworkin, "The Character of Political Philosophy."

[26] Id. at 24-5

[27] See, e.g., Raz, "The Rule of Law and Its Virtue."

[28] When a version of the claim is made in *Law's Empire*, 91, Dworkin writes that his argument does not depend upon it.

[29] See the Postscript to *The Concept of Law*..

[30] Justice in Robes, 11.

[31] Soper, Dworkin, Perry, Shiffrin, Waldron

[32] Kornhauser

[33] See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457.

[34] Kornhauser

[35] This is one of the issues that "normative positivists" are most centrally concerned with. See Tom D. Campbell, *The Legal Theory of Ethical Positivism* (1996); Campbell, *Prescriptive Legal Positivism* (2004); Campbell, "Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law'," *Australian Journal of Legal Philosophy* 30 (2005): 20; Jeremy Waldron, "Normative (or Ethical) Positivism" in Coleman, ed., *Hart's Postscript*, 411; Jeremy Waldron, "Can There Be a Democratic Jurisprudence?" (unpublished ms. 2004). Methodologically, Campbell embraces the instrumentalist approach: we should stipulate the concept of law which, among other good effects, fits best with the model of law as a set of formally realizable rules (Prescriptive Conceptualism, 27). One possible interpretation of Waldron's articles has him embracing a version of Dworkin's interpretive method.

[36] Golove

[37] Dworkin, Model of Rules I; Leiter on realists

[38] See Hart, *The Concept of Law*, 203.

[39] See the discussion of the distinction between the grounds and the force of law in Dworkin, *Law's Empire*, 108-13.

[40] Thank Sager.

[41] International law is discussed further in chapter x.

[42] No constitutional right at stake. Cite.

[43] To be added: Anderson and Pildes on expressive aspects of law.

[44] The next several paragraphs are closely based on Murphy, "Concepts of Law."

[45] Dworkin, *Freedom's Law*, 10.

[46] The exclusive positivist position is beautifully and succinctly brought out in this passage of Joseph Raz (Raz, "Authority, Law, and Morality," 217):

> If the argument here advanced is sound, it follows that the function of courts to apply and enforce the law coexists with others. One is authoritatively to settle disputes, whether or not their solution is determined by law. Another additional function the courts have is to supervise the working of the law and revise it interstitially when the need arises. In some legal systems they are assigned additional roles which may be of great importance. For example, the courts may be made custodians of freedom of expression, a supervisory body in charge both of laying down standards for the protection of free expression and adjudicating disputes arising out of their application.

[47] ProCD

[48] §87(1)(a)

[49] This section was first written four years ago. Since then, things have gotten only worse. See Dworkin, "Justice Sotomayor: The Unjust Hearings"

[50] When Justice Scalia defends his version of originalism, he does so by making a political rather than a legal argument, without reflecting on the implication that, to reach the conclusion that they should not appeal to their own moral judgments when making decisions judges must engage in reflection on political morality; see Antonin Scalia, *A Matter of Interpretation* (1997).

[51] See, for example, Senator Charles Schumer's press conference of October 31, 2005, discussing the nomination of Justice Alito. Transcript available here: http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100707.html.

[52] Retroactivity has been a central concern of Dworkin's since the publication "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14-. That this is a good way to understand Dworkin is much clearer now—see Hedgehogs.

[53] Waldron

[54] Duncan Kennedy, *A Critique of Adjudication* (1997).

[55] Id., 2.