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Legal Philosophy for Lawyers in the Age of a Political Supreme Court

Patrick J. Borchers

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LEGAL PHILOSOPHY FOR LAWYERS IN THE AGE OF A POLITICAL SUPREME COURT

PATRICK J. BORCHERS*

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Legal Philosophy has long been concerned with the question of what brands a norm as legal, as opposed to a non-legal norm of justice or morality. This central question has occupied the attention of philosophers and lawyers for centuries. Roughly speaking, the Naturalist school contends that legal norms are inextricably intertwined with norms of morality and justice (and in its strongest form contends that law-like pronouncements that are immoral or unjust are not fully laws), while the Positivist school argues that a social construct (often called the Rule of Recognition) brands selected norms as legal, and thus legal norms may be just norms, but need not be. This article contends that Positivism has won the argument, though with the important caveat that a community's Rule of Recognition might condition the legality of norms on their morality or justness. While legal philosophy has of late been seen by some as

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walled off from legal doctrine, this article contends that modern debates about the legality of unenumerated constitutional rights are debates about the United States' Rule of Recognition. Thus, legal philosophy may have much to say about contemporary legal issues. This article argues that rather than the conventional framing of the central question as the relationship between law and morals, reframing it as between law and justice would improve the subject's comprehensibility and impact. The Supreme Court conservative majority's focus on "originalism" is less a theory of interpretation than a strategy to selectively narrow the United States' Rule of Recognition, particularly in constitutional cases. The Supreme Court is a substantially political institution, carrying out its work under the guise of interpretation, while in fact furthering a politically conservative agenda. Recognizing this, though unlikely to alter immediately the Court's course, could make a difference in the way that lawyers frame their arguments and how the Court's decisions are evaluated.

INTRODUCTION

Like many lawyers (I suspect), I remember the first moments of my formal legal education. My classmates and I were mailed a copy of Professor Lon Fuller's fable of *The Case of the Speluncean Explorers*¹ and instructed to read it for our first class in Introduction to Law, a one-credit course occupying the week before second-and-third year students arrived back to impart their "wisdom" on us newbies. Fuller was a famous law professor of the mid-twentieth century who wrote prolifically on legal philosophy and other subjects—notably contract and commercial law.²

For those unfamiliar with *The Case of the Speluncean Explorers*, in the fictional jurisdiction of Newgarth a landslide traps five cave explorers.³ Considerable efforts are made to rescue the explorers—and ten rescuers are killed in the process—but progress is slow and it becomes clear the explorers can't survive until rescue without nutrition.⁴ Realizing that the only hope of survival is to kill one of the five and cannibalize him, the explorers draw lots and the loser is killed

1. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 616 (1949) [hereinafter Fuller, *Explorers*].

2. See, e.g., Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (exemplifying Fuller's wrings on legal philosophy).

3. See Fuller, *Explorers*, *supra* note 1.

4. *Id.* at 617.

and eaten.⁵ The other four are rescued, nursed back to health, and put on trial for murder.⁶

Newgarth's murder statute provides: "Whoever shall willfully take the life of another shall be punished by death."⁷ Fuller tells us that the statute has been applied literally, save a common-law exception for self-defense.⁸ A jury finds the facts to be undisputed and the trial judge sentences the four to be hung—the mandatory form of capital punishment.⁹

An appeal is taken to the Supreme Court of Newgarth, with each of five justices writing separate opinions, all intended to represent different schools of jurisprudence.¹⁰ Two vote to affirm the convictions; two vote to reverse; one is in equipoise and recuses himself.¹¹ Because the Supreme Court is divided equally, the conviction is affirmed and the court's judgment is that the surviving explorers are to be hung forthwith.¹²

Our professor's first question, cleverly phrased, was "should the four men have been hung?" He asked students to raise their hands if they thought the answer was "yes." To my surprise, about ninety percent of the hands shot up. Then the remaining ten percent of us who thought the answer was "no" raised our hands. This was from a group in which at least eighty percent were on the left half of the political spectrum and a majority probably opposed capital punishment under any circumstances. I can still see the classmate sitting to my left (we later became friends) voting "yes" with her arm unbent, and I later learned that she was among the most politically liberal members of our class and vehemently opposed to the death

5. There are some complications. The explorer who suggested the lottery then had second thoughts and proposed waiting a week, but the other four did not agree. Lots were drawn for him—fairly we are told—and he lost. *Id.* at 618.

6. *Id.*

7. *Id.* at 619.

8. *Id.* at 624.

9. *Id.* at 619.

10. I use the terms "jurisprudence" and "philosophy of law" interchangeably. There are senses of the word jurisprudence that are broader than philosophy of law. The equation of the two terms is a relatively modern invention, but for our purposes here they are synonyms. See Frederick Schauer, *(Re)Taking Hart: A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, 119 HARV. L. REV. 852, 857 (2006) [hereinafter Schauer, *Noble*].

11. See Fuller, *Explorers*, *supra* note 1, at 644–45.

12. Fuller, *Explorers*, *supra* note 1, at 645. Although Fuller disclaimed any relationship to a real case, the facts are similar to some notorious lifeboat cannibalism cases. See *id.*; see, e.g., *R v. Dudley* [1884] QBD 273 at X (Eng.).

penalty. The professor made a remark about how we must be a bloodthirsty bunch.

Why did so many approve of the hangings? I think they had a sense that in judicial application of the law, the morality (or, as I argue, the term justice is a better fit) of the outcome is irrelevant, and on a plain reading of the statute the four surviving explorers were guilty. My classmates largely took “should” to mean the most technically required outcome—we were in law school after all. This is a view of the law often associated with Legal Positivism, though as I explain it is a caricature of it. But if the legal profession has an official philosophy, it’s Positivism and I place myself somewhere in that camp.

I had half-formed thoughts as to why I would have voted to reverse. None of Fuller’s opinions persuaded me, though my view was closest to the second rationale of the mythical Justice Foster, who argued the self-defense exception applied as hanging the survivors served no deterrent interest.¹³ My theory was that the explorers who killed the unfortunate loser of the lottery didn’t act willfully. As I saw it, they were in the position of having a bad person with a gun pointed at the explorers and saying, “you have the following choice—you can kill your friend and the remaining four of you will live, or you can refuse and all five of you will be shot dead.” In that horrible circumstance their wills were overcome.

I also didn’t take “should” to confine me to a completely legalistic frame of mind. It was an utterly perverse result. Herculean efforts were made, and the lives of ten rescuers were sacrificed, all to free the survivors, nurse them back to health, and then hang them. What sense does that make? On a dispassionately utilitarian calculus, it would have been far better to have not tried to rescue them, or at best penetrate the landslide enough to give the trapped explorers suicide pills to avoid an agonizingly slow death.

A good deal of modern legal philosophy has drifted far from the accessibility of *The Case of the Speluncean Explorers*. This is not a bad thing in and of itself; the field has developed vastly since Fuller’s writings. But much of the writing on, for instance, the role of metaphysics and metaethics in defining sources of law, increasingly intricate models of the interplay (if any) between legal and moral norms, and so on, is too dense for all but a small number of legal

13. See Fuller, *Explorers*, *supra* note 1, at 625 (discussing the proposition that a self-defense argument negates the statute’s deterrence interest, as future groups in similar situations will not put their lives in the hands of the criminal code).

philosophers.¹⁴ This scholarship may produce improvements in our concept of law and legal obligations, privileges and rights that will influence a broader swath of the legal academy and then ultimately practicing lawyers, judges, and other legal officials—but not right away.

I worry that these highly technical debates strand even most academic lawyers—to say nothing of judges and practicing lawyers who have less time for abstract conceptualization—on an island believing legal philosophy is of no practical relevance, even in subjects like constitutional law in which jurisprudence lies in the not-very-distant background. Some argue that the movement of jurisprudence from the realm of doctrinal legal theory to a standalone philosophical topic has made the subject less relevant.¹⁵ However, I will argue, the contemporary philosophical camps converge in important ways that could and should frame how legal arguments are advanced and cases are decided—and ultimately how opinions are evaluated and criticized, particularly those of today’s Supreme Court.

I proceed in three parts. Part I gives an overview of the development of Anglophone legal philosophy. As I see it, the subject divides into two major periods—the period before the emergence of British legal philosopher H.L.A. Hart and the period after. Hart rose to prominence with his brilliant book, *The Concept of Law*, published in its first edition in 1961.¹⁶ Before Hart, what I call the “strong” natural tradition (principally that of Aquinas but continuing at least through Blackstone), and the pushback against it, dominated Anglophone jurisprudence. Chief among those pushing back was British legal philosopher John Austin—and his utilitarian mentors, most notably Jeremy Bentham—who in the early nineteenth century set the stage for the modern Positivist school of law, though its philosophical roots were in Hume and Hobbes.¹⁷ An American offshoot called the Legal Realist school came to prominence in the

14. See generally Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2 (2011) [hereinafter Coleman, *Architecture*] (discussing the current taxonomy of theories and proposing a new structure).

15. See NICOLA LACEY, H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 259–60 (2004) [hereinafter LACEY, NOBLE DREAM].

16. Hart’s posthumous response to some critics appeared in the 1994 second edition. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (responding to critics of anglophone legal philosophy).

17. See *infra* notes 88–91 and accompanying text.

1930s, particularly on the Harvard, Yale, and Columbia law faculties.¹⁸

Hart set the agenda from roughly 1960 to today. Hart took Austin's groping at a Legal Positivist theory—roughly that law is a human (not divine) creation and not defined by its “merit or demerit”—and refined it to avoid some of Austin's methodological and definitional difficulties.¹⁹ Hart produced a theory more closely aligned with how lawyers (and likely non-lawyers) think of the law by positing a social rule he called “The Rule of Recognition” that determines which norms are legal and which are not. Hart's memorable 1958 exchange with Fuller across the pages of the *Harvard Law Review*²⁰ pushed Hart and Fuller to refine their arguments and helped vault Hart to prominence on this side of the Atlantic.

American lawyer and legal philosopher Ronald Dworkin then became the most dogged, eloquent, well-known, and sometimes unfair Anglophone critic of Positivism; he launched his attack and began to develop his competing theory in a 1967 essay.²¹ The canonical statement of Dworkin's theory is his 1996 book *Law's Empire*.²² Roughly speaking, Dworkin is to Fuller as Hart is to Austin. Dworkin took Fuller's aversion to Positivism's divorce of legal and moral norms—allowing for only their “antiseptic ‘intersection’”²³—and wove it into an elaborate theory of adjudication he called integrity.²⁴ Much of legal philosophy is now nominally centered on the Hart-Dworkin

18. See Gail J. Hupper, *The Rise of an Academic Doctorate in Law: Origins Through World War II*, 49 AM. J. LEGAL HIST. 1, 5 (2007).

19. H.L.A. HART, *THE CONCEPT OF LAW* 18–25 (2d ed. 1994) [hereinafter HART, CONCEPT].

20. See generally Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Fidelity*] (discussing and refining “The Rule of Recognition” alongside Hart); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart, *Separation*] (discussing and refining “The Rule of Recognition” alongside Fuller).

21. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *Model of Rules*] (attacking Positivism and producing a competing theory).

22. RONALD DWORIN, *LAW'S EMPIRE* (1986) [hereinafter DWORIN, EMPIRE]. At the end of his life, Dworkin published another book ostensibly covering a wider range of moral and ethical obligations, and purportedly subsuming his theory of law within them. See *infra* notes 363–65 and accompanying text. In my view, *Law's Empire* is central to Dworkin's philosophy of law.

23. Fuller, *Fidelity*, *supra* note 20, at 630.

24. DWORIN, EMPIRE, *supra* note 22, at 94.

debate,²⁵ though this misleadingly omits the work of post-Hart Positivists; some argue Positivism is the clear winner and it's time to move on.²⁶ As I see it, three camps of significance remain: hard or Exclusive Positivists of whom Joseph Raz is the best known proponent, soft or Inclusive Positivists of whom Jules Coleman (and Hart who embraced him) is a leading proponent, and the anti-Positivists,²⁷ of whom Dworkin is a leading proponent, though more purely Naturalist John Finnis deserves mention too. This may not do the Legal Realists justice,²⁸ though I contend their theory is a branch of Positivism.

Part II argues that framing the issue as the relationship between legal and moral norms has not helped the comprehensibility of the subject. Many of the moral theories advanced are thin,²⁹ with notable counterexamples.³⁰ Many jurists lean heavily on examples of actions that are morally outrageous on any measure. For example, Fuller and Hart discussed extensively a 1950s West German case involving a wife who turned her husband in to Nazi authorities for making private statements critical of Hitler because she wanted to be rid of him as she "had turned to other men" while he was away fighting.³¹ He was sentenced to death, but apparently sent to the front

25. Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 22 (Arthur Ripstein ed. 2007) [hereinafter Shapiro, *Perplexed*].

26. Shapiro, *Perplexed*, *supra* note 25, at 49; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Debate in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003) [hereinafter Leiter, *Beyond*]; Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1162 (2015) [hereinafter Hershovitz, *End*] (referring to the Hart-Dworkin debate, "[w]e should move on because we can.").

27. This term is not completely fair because Dworkin and his disciples are not just against Positivism, they are for a concept of law that recognizes a much closer connection between legal and moral norms than are usually ascribed to Positivists. However, to call this camp "natural lawyers" runs the risk of confusing them with the "strong" natural law theorists who saw natural law as a divine creation. One commentator describes Dworkin as attempting to establish a middle ground between positivism and natural law. See Robert J. Yanal, *Hart, Dworkin, Judges, and New Law*, 68 THE MONIST 388, 388 (1985).

28. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) [hereinafter Singer, *Realism Now*].

29. See Fuller, *Fidelity*, *supra* note 20, at 636.

30. See, e.g., KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 3 (Tony Honore & Joseph Raz eds., 1989).

31. See Fuller, *Fidelity*, *supra* note 20, at 653.

instead,³² which probably amounted to the same thing. No controversial system of ethics is required to condemn her actions.

But much of morality is not and never has been the province of the law, and much of law is morally neutral (such as whether a defendant should have twenty-one or thirty days to answer a civil complaint). In my view, it would be more productive to discuss law and its relationship to a theory of justice. True enough, many legal philosophers refer to justice—or “political morality,”³³ which I take to be a synonym—but the overlap between subjects with which justice and law are concerned is greater.

Without endorsing all aspects of it, I discuss American political philosopher John Rawls’s theory of justice.³⁴ Many competitors exist, notably Robert Nozick’s argument for a “night watchman’s state,”³⁵ and those who advance offshoots of Rawls’s theories.³⁶ However, Rawls’s theory matches—at least as a first approximation—my notion of what a just society should be and is admirably clear, making for a reasonable starting point. Moreover, Rawls’s general commitment to equality and liberty folds easily into the Constitution, particularly after the Civil War Amendments.

So, one might fairly ask, what does this have to do with the Supreme Court? A good number of legal philosophers are fond of applying their theories to concise statements of positive law, such as Fuller’s murder statute or Hart’s hypothetical ordinance prohibiting vehicles in the park. But there are, to borrow Dworkin’s term, hard cases,³⁷ and those before the U.S. Supreme Court attract the attention of lawyers and the general public alike.

32. *Id.*

33. *See, e.g.,* DWORKIN, *EMPIRE*, *supra* note 22, at 3. At times Dworkin also used morality as the obverse of justice, with morality metaphorically “heads” and justice “tails.” *See* Ronald Dworkin, *Hart’s Posthumous Reply*, 130 *HARV. L. REV.* 2096, 2111 (2017) [hereinafter Dworkin, *Posthumous Reply*].

34. *See* JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *JUSTICE*].

35. *See* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 39 (1974).

36. For a succinct introduction to Rawlsian political philosophy, *see* Brooke Ackerly, *John Rawls: An Introduction*, 4 *PERSPS. ON POL.* 75 (2006). The literature critiquing Rawls’s theories is voluminous. *See, e.g.,* James Gledhill, *Rawls and Realism*, 38 *SOC. THEORY & PRAC.* 55 (2012); Charles W. Mills, *Retrieving Rawls for Racial Justice?: A Critique of Tommie Shelby*, 1 *CRITICAL PHIL. RACE* 1 (2013); Nicholas Tampio, *Rawls and the Kantian Ethos*, 39 *U. CHI. PRESS* 79 (2007); Robert P. Wolff, *A Refutation of Rawls’ Theorem on Justice*, 63 *J. PHIL.* 179 (1966).

37. *See* Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975) [hereinafter Dworkin, *Hard Cases*].

In Part III, I hope to answer the question of why we should care about legal philosophy. Despite protestations of individual Justices to the contrary,³⁸ today's U.S. Supreme Court is substantially a political institution. True, a good number of Supreme Court decisions are unanimous³⁹ or the Justices divide in ways that defy the common perception of liberal and conservative.⁴⁰ However, empirical analysis shows the Justices are much more likely—in cases in which the Court splits—to vote with other Justices appointed by Presidents of the same political party.⁴¹ The Supreme Court, since the turn of the twenty-first century, has decided cases that effectively declared the winner of the 2000 presidential election,⁴² legalized same-sex marriage,⁴³ considerably restricted the power of federal administrative agencies,⁴⁴ ruled on gerrymandering of congressional

38. See, e.g., *Supreme Court's Casablanca Defense*, DAILY MESSENGER (Canandaigua, New York), Oct. 1, 2021, at A6 (describing claims of Justices Thomas, Breyer, and Barrett that the Supreme Court is apolitical as “hokum” and noting that public confidence in the Supreme Court has declined 28 points in recent years).

39. See, e.g., *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1710 (2022).

40. See, e.g., *Thompson v. Clark*, 142 S. Ct. 1332, 1334 (2022).

41. See *Stat Pack for the Supreme Court's 2020–21 Term*, SCOTUSBLOG (July 2, 2021), <https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07-02.2021.pdf>. For example, in the 2020-21 term, Democratic-appointed Justice Sotomayor agreed with fellow Democratic-appointed Justices Breyer and Kagan in 88% and 93% of the Court's judgments, respectively, but only agreed with Republican-appointed Justice Thomas in 55% of the Court's judgments. *Id.* Justice Thomas agreed in judgment with his fellow Republican appointed Justices in approximately 75% to 88% of the cases, while his agreement with Democratic-appointed Justices ranged between 55% and 67% of the cases. *Id.* Scotusblog also identified ten “polarized” cases in the 2020-21 term on contentious topics such as immigration policy, the exclusion of non-citizens from the census, and the constitutionality of sentencing juveniles to life without the possibility of parole. *Id.* All ten of those cases were decided with each of the Republican-appointed Justices in the majority and each of the Democratic-appointed Justices dissenting. *Id.* The only minor exception was that in one case Republican-appointed Justice Barrett was recused, so that the decision was five to three instead of six to three. *Id.*

42. See *Bush v. Gore*, 121 S. Ct. 525, 527 (2000).

43. See *Obergefell v. Hodges*, 135 S. Ct. 681, 2584, 2608 (2015).

44. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022) (ruling that the EPA's Clean Power Plan was void under the “major questions doctrine”); *Rapanos v. U.S.*, 126 S. Ct. 2208, 2235 (2006) (plurality opinion) (denying enforcement of the permit requirement for developing wetlands and limiting “waters of the United States” to continuously present bodies of water).

districts,⁴⁵ declared unconstitutional the most effective enforcement tool of the Voting Rights Act,⁴⁶ ruled that there is no constitutional right to an abortion,⁴⁷ and de facto resolved dozens of other hot button social and political issues.

Politics and the Supreme Court have long been acquainted; an obvious example is President Franklin D. Roosevelt's so-called Court-packing plan resulting from his frustration with rulings blocking his economic recovery agenda.⁴⁸ But we are at a relative high point in terms of the politicization of the Court. The Republican leadership of the Senate engaged in protracted (and successful) efforts to alter the ideological orientation of the Court by ensuring a six-to-three supermajority of Republican-appointed Justices.⁴⁹ The make-up of the Supreme Court, and federal courts generally, has been a significant campaign issue in the last several presidential elections.

My point is not to decry the political consequences of Supreme Court decisions or bemoan that politics enter into Supreme Court appointments. The former is an inevitable consequence of *Marbury v. Madison*⁵⁰ and the latter a matter of constitutional design, in which the President and the Senate decide who sits on the Supreme Court. One could take the tack of newspaper editorials, cable news commentary, and social media posts to celebrate or criticize opinions solely on the results.

But the Court is political in a different way from how it is commonly perceived. Competing theories of interpretation (particularly of the Constitution) are debates about legal philosophy. The strategy of politically conservative Justices (and the organizations that support their nominations) in the last few decades of relying on so-called "originalism" to deny or minimize constitutional rights and reach politically conservative results is in truth an effort to narrow the United States' Rule of Recognition. But originalism can't deliver on its promise of a universal, politically neutral way of construing the Constitution. This has implications both for how

45. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

46. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2630–31 (2013).

47. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2285 (2022).

48. See William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 U.S. REV. 347, 352.

49. See J. Stephen Clark, *President-Shopping for a New Scalia: The Illegitimacy of "McConnell Majorities" in Supreme Court Decision-Making*, 80 ALB. L. REV. 743, 794 (2017).

50. *Marbury v. Madison*, 5 U.S. 137, 180 (1803) (holding a law requiring delivery of a judicial commission unconstitutional and establishing Supreme Court authority to declare unconstitutional laws as void).

lawyers frame their arguments, and for legal philosophers whom I believe could have important things to say here, rather than simply ceding the field to political philosophy—to say nothing of cable news and social media. Legal philosophy, I contend, is relevant in promoting the arguing, deciding, and the outcome of today's cases in a principled fashion.

Let's get on with seeing whether this is so.

I. A SUMMARY OF ANGLOPHONE LEGAL PHILOSOPHY

To legal philosophers who have devoted their academic careers to debating nuances of contemporary jurisprudence, this summary is surely unsatisfactorily general and can be rightly accused of glossing over debates about complex theories that are the stuff of current writing. For example, I won't attempt to settle intramural disputes between modern Positivists as to what theses make a theory Positivist, and whether various canons of analytic jurisprudence are consistent with each other. Nor will I attempt to interject myself into the nuances of anti-Positivist writings and the extent to which they are consistent with various tenets of Positivism.

There's risk in proceeding at a high level of generality. One of the titans of modern Positivism, Professor Joseph Raz, pointed out that when discussing differing schools of thought, as opposed to considering the views of one particular scholar, it's easy to create straw persons.⁵¹ I try to avoid this pitfall by not knocking down any comprehensive theory—whether composed of straw or not—but rather to note what I see as some convergences of practical import.

I aim to write not just for contemporary writers engaged in nuanced debates. I hope to say something of use to practicing lawyers (including legal officials such as judges) who do not specialize in legal philosophy. I am not the first to attempt to address the audience of lawyers and judges in general; it was and is the project of the Legal Realists and their intellectual descendants, and the most prominent anti-Positivist of our time, Ronald Dworkin.

A. Before Hart

1. The Strong Natural Law School

51. See Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1, 1 (1998).

Study of the natural law school canonically begins with the 13th century writings of Saint Thomas Aquinas.⁵² On Aquinas's account, "law is nothing else than an ordinance of reason . . . made by him who has the care of the community, and promulgated."⁵³ Aquinas took "reason" to mean practical reason as illuminated by "the Philosopher," Aristotle.⁵⁴ A view frequently attributed to Aquinas is that some variant of "an unjust law is no law at all."⁵⁵ One might think too mean an unjust law can be safely ignored, but this would impute to Aquinas an absurd naivete, as we are all aware of thoroughly unjust enactments—the Fugitive Slave Law is a popular example—carrying with them noxious practical consequences.⁵⁶

Aquinas believed in a divine natural law directed by practical reason aimed at the common good. But he was not so foolish as to think a direct appeal to natural law, without human explication, could govern a community.⁵⁷ Aquinas recognized that a ruler "who has care of the community" must promulgate municipal law.⁵⁸ For an ordinance to be true law that binds the conscience of a citizen, it must conform to the natural law.⁵⁹ Aquinas also recognized legal systems could be diverse in the ways in which they conformed to natural law, depending on the needs and constitution of the community.⁶⁰

52. See SUSAN DIMOCK, *THE PHILOSOPHY OF LAW 1* (Feinberg & Coleman eds. 6th ed. 2000) [hereinafter DIMOCK, *NATURAL LAW*].

53. See *id.* (quoting Aquinas, *Summa Theologica*, Question 90, Article 4).

54. *Id.* at 1–2. ("[P]ractical reason,' which provides practical directions concerning how one ought to act, rather than to 'speculative reason', which provides us with propositional knowledge of the way things are."); see also *id.* at 21 (noting that Aquinas followed Aristotle's philosophy).

55. See, e.g., Coleman, *Architecture*, *supra* note 14, at 11; Sean B. Cunningham, *In Defense of Law: The Common-Sense Jurisprudence of Aquinas*, 1 LIBERTY U. L. REV. 73, 97 (2006); Mark C. Murphy, *Natural Law*, in BLACKWELL GUIDE TO PHIL. L. & LEGAL THEORY 15, 19 (Martin P. Golding & William A. Edmundson eds. 2005) [hereinafter Murphy, *Natural Law*] (noting that Aquinas never uses this exact formulation).

56. See, e.g., Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1346 (1997).

57. See DIMOCK, *NATURAL LAW*, *supra* note 52, at 13 (noting that human law makes determinate natural law). See generally Jeremy Waldron, *What is Natural Law Like?*, N.Y.U. SCH. L. PUB. L. AND LEGAL THEORY RSCH. PAPER SERIES 1, 1 (2012) (arguing that natural law prescriptions are not spelled out in sufficient detail to govern a community coming out of a state of nature).

58. See DIMOCK, *NATURAL LAW*, *supra* note 52, at 1.

59. *Id.* at 16; Murphy, *Natural Law*, *supra* note 55, at 16.

60. See DIMOCK, *NATURAL LAW*, *supra* note 52, at 13–14.

Law-like pronouncements not conforming to natural reason are not fully law, but might generate prudential reasons—though not moral obligations—to obey them.⁶¹ Suppose a despotic king promulgates an ordinance requiring all citizens to attend parades in his honor and enthusiastically wave national flags as he passes, and failure to do so results in a sanction. This ordinance would not be Aquinian law because it does not conform to natural law. It's not promulgated for the common good of the community; its sole goal is to feed the king's ego.⁶² However, this does not mean the community can ignore it without consequence. A community member of moral rectitude would likely attend the parade and with false enthusiasm wave her flag to avoid the sanction, unless there were to be a mass refusal of flag waving in an effort to spark a rebellion to overthrow the despot.

However, Aquinas's is a stronger version of natural law than most in current circulation. Recall the Nazi informing wife case discussed in the introduction and to which we will return later. Assuming Hart and Fuller had the case right on the details—and they didn't,⁶³ but no matter—Aquinas's account easily decides the case. The Nazi edicts regarding penalties for disparaging the Third Reich were not Aquinian law. Those edicts no more created a moral obligation to obey than does a robber who points his gun at you and demands your wallet.⁶⁴ To be sure, you (staring at the barrel of a gun) have a prudential reason to comply, assuming you prefer your life to your wallet. But the informing wife had no moral or prudential reason to inform on her husband and the Nazi edicts did not impose any duty to do so,⁶⁵ and—even if they did—how would the authorities find out except from her? Her motivation was that she had come to prefer her paramours to her husband. Thus, the West German court was right on Aquinas's account to find her guilty under a longstanding German

61. *Id.* at 24; Murphy, *Natural Law*, *supra* note 55, at 19–20 (discussing the “officials’ say-so” objection to natural law theory).

62 *Id.* at 3 (“the sovereign . . . must aim not merely at his own good, but the good of all . . . in making the law.”). Murphy formulates what he calls the Strong Reading of Aquinas that “a rule that is not a standard for rational conduct is no law at all.” See Murphy, *Natural Law*, *supra* note 55, at 19. Under this formulation, the king's parade edict would not be fully law.

63. See David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000, 1032–34 (2008) [hereinafter Dyzenhaus, *Grudge Informer*] (translating the judgment of the West German Court into English).

64. See, e.g., Hart, *Separation*, *supra* note 20, at 617–18.

65. Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1007.

statute making it a crime to illegally deprive someone of his or her liberty.

The enormously influential eighteenth-century commentator on English law, Sir William Blackstone, counts among natural law thinkers. One modern commentator asserts that Blackstone's "*Commentaries on the Laws of England* is arguably the single most influential work of jurisprudence in American history."⁶⁶ Much of the attention goes to Blackstone's dictum that common law judges find, but do not make, the law.⁶⁷ Judges, on his account, are "not delegated to pronounce a new law, but to maintain and expound the old one."⁶⁸ Whether or not it is fair to associate this methodology with natural law, Blackstone was Aquinas's kindred spirit in claiming the primacy of natural law.⁶⁹ Blackstone asserted:

This law of nature, being co-eval with mankind and dictated by God himself is of course superior in obligation to any other. It is binding all over the globe, in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original.⁷⁰

However, Blackstone's assertion that judges merely find the law made him a convenient target for the early Positivists,⁷¹ whom we will consider below.

These theoretical underpinnings were transmitted to the United States with the reception of English common law.⁷² United States courts saw themselves as exploring and applying the common law in

66. See William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J. L. & RELIGION 255, 255 (2006).

67. *Id.* at 256.

68. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, vol 1, at 69 (reprinted University of Chicago Press, 1979).

69. See Stephen A. Siegel, *The Aristotelian Basis of English Law: 1450-1800*, 56 N.Y.U. L. REV. 18, 56 (1981); see also HART, CONCEPT, *supra* note 19, at 14-15 (discussing the theory of "finding" the law).

70. BLACKSTONE, *supra* note 68, at 41.

71. See 2 JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 655 (1832) [hereinafter AUSTIN, PROVINCE] (suggesting the notion that common law judges find the law is a "childish fiction").

72. See, e.g., Ernest G. Mayo, *Rhode Island's Reception of the Common Law*, 31 SUFFOLK U. L. REV. 609, 609 (1998).

a project that came to be known as the general common law. On the best reading of Section 34 of the First Judiciary Act, it called on federal courts to apply the general common law in subjects where it governed, such as commercial transactions.⁷³ A consequence was that courts—both federal and state—could disagree as to the best reading of the common law because they were both digging to find an eternal truth, but had a partially obstructed view.

A famous example is the U.S. Supreme Court's "stop, look, and listen" rule regarding contributory negligence crossing railroad tracks.⁷⁴ Some state courts followed it and others did not.⁷⁵ Although modern U.S. courts speak of, for instance, "the common law of negligence,"⁷⁶ the notion of the shared project of discovering a unified body of the common law fell to the rise of Positivist jurisprudence, and its intellectual cousin Legal Realism. I believe the most significant marker on this road is the Supreme Court's 1938 decision in *Erie Railroad v. Tompkins*.⁷⁷ But whenever the erosion began, in the United States the strong natural law underpinnings of legal philosophy have washed away so it no longer makes sense to speak of modern common law as common law in Blackstone's sense.

2. The Pre-Hart Positivists

When discussing Legal Positivism, I define it at its highest level of generality—what Frederick Schauer calls "conceptual

73. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 140–41 (Wyth Holt & H. H. LaRue eds., 1990).

74. See *Delaware, L & W. R. Co. v. Converse*, 11 S. Ct. 569, 572 (1891).

75. See Note, *Aftermath of the Supreme Court's Stop, Look, and Listen Rule*, 43 HARV. L. REV. 926, 931 (1930).

76. See, e.g., *Wermerskirchen v. Canadian Nat'l R.R.*, 955 N.W.2d 822, 840 (Iowa 2021).

77. *Erie R.R. Co. v. Tompkins*, 58 S. Ct. 817, 819–23 (1938); see Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 110–17 (1993). Dworkin agrees with me on this point. Citing *Erie*, Dworkin wrote: "In 1938, at the zenith of positivism's practical importance, the Supreme Court embraced it to help justify one of the most consequential decisions in its history." Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1677 (2002) [hereinafter Dworkin, *Thirty Years*]. However, not everyone concurs. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 673–75 (1998).

positivism.”⁷⁸ As Schauer points out, conceptual Positivism is the current project of Positivists, and “conceptual positivism focuses on a series of conceptual claims about the relationship between the domains of law and of morality.”⁷⁹ So understood, Legal Positivism is the claim that—*contra* natural law theory—morality is not a *necessary* condition of the legality of norms across all legal systems.⁸⁰ As discussed below, this is the claim of the Inclusive Positivists, which is weaker than the Exclusive Positivists’ claim that morality is not a condition of legality, full stop. In other words, Inclusive Positivists admit some legal systems could condition the legality of norms on their justness (or morality). Exclusive Positivists contend the justness (morality) of a norm is always independent of its legality, though of course legal norms might also be just norms, but never has anything to do with whether they are legal norms.⁸¹

Professor Schauer and others distinguish conceptual from normative Positivism. While conceptual Positivism asserts the lack of a necessary relationship between legal norms and norms of justice or morality is a matter of fact, normative Positivism asserts conceptual Positivism is a desirable intellectual stance because it promotes reform of unjust laws.⁸² Schauer then describes a third type, which he calls “decisional positivism.”⁸³ This type of Positivism—if it ought to be called Positivism at all—has attracted the pejorative labels of formalism⁸⁴ and mechanical jurisprudence.⁸⁵ Conceptual

78. See Fredrick Schauer, *Positivism Before Hart*, VA. PUB. L. & LEGAL THEORY RES. PAPER SERIES NO. 2010-01 1, 8 [hereinafter Schauer, *Before Hart*].

79. *Id.*

80. *Id.*

81. *See id.* at 9. *See generally* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979) (providing arguments, examples, and a conglomeration of essays on the assertion that the morality of a norm is always independent of the legality of the norm).

82. *See* Schauer, *Before Hart*, *supra* note 78, at 10–11.

83. *Id.* at 12–13.

84. *Id.* at 12. However, formalism can be much more sophisticated than the strawman versions of it deployed by the Realists. *See* Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175, 222 (2021).

85. *See* Schauer, *Before Hart*, *supra* note 78, at 7. It is doubtful that any serious scholar deployed “mechanical jurisprudence” in the sense of arguing that legal rules always supply the major premise of any legal problem and that coming to the correct legal result is merely a matter of supplying the minor premise gleaned from the facts of the case. As Dean Miller writes: “The formalist, in pejorative caricature, is said to be in the grip of one or several . . . foolish or overwrought views . . . [f]or example, the

Positivists generally disclaim any strong theory of adjudication or how statutes should be drafted.⁸⁶ Some conceptual Positivists—notably Bentham and Austin—were committed to a program of codification and limiting judicial discretion, but by no means are all conceptual Positivists so inclined.⁸⁷

The great proto-Positivist was English philosopher Thomas Hobbes. Hobbes, writing in the 17th century, asserted that a law is the command of the sovereign, given to the sovereign's subjects, promulgated publicly so that the subjects know what they can and can't do.⁸⁸ In this respect, Hobbes's definition was not far from Aquinas's. But in his masterwork *The Leviathan* Hobbes departed from Aquinas. Hobbes argued that law was made law not from wisdom, but by authority, and as to subjects of the sovereign law reigned it displaced individual reason and judgment.⁸⁹ Positivists also take as irrefutable David Hume's dictum that an "ought" cannot

belief that judges ought to enforce but never to make law, that laws are generally applicable by means of deductive logic, and/or that legal rules must always be enforced strictly whatever the substantive injustice that might result." See Miller, *supra* note 84, at 182. Moreover, even judges claiming to follow a purely textualist methodology are generally doing no such thing—they are also deploying background assumptions about social context and morality that have nothing to do with the text. See Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 7–8 (2022) (examining the Supreme Court's competing interpretations of the word "sex" as used in Title VII of the Civil Rights Act of 1964).

86. See, e.g., BRIAN H. BIX, *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 31 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter BIX, POSITIVISM] ("By its terms, legal positivism does not have consequences for how particular disputes are decided[.]"); John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199, 217–22 (2001) [hereinafter Gardner, *Myths*].

87. Schauer, *Before Hart*, *supra* note 78, at 13. In fact, they bristle at it because in some quarters, "Positivism" came to stand for purely syllogistic reasoning, which is quite alien to how courts operate in the English-speaking world. *Id.* at 26. Schauer does not argue that a commitment to conceptual Positivism necessarily entails normative or decisional Positivism. *Id.* But he contends that most of the modern figures in Positivism are at least arguably normative Positivists and that Bentham and (more tepidly) Austin were committed to decisional Positivism. *Id.* He simply argues that those other forms of Positivism (particularly normative) have good claims to the term. *Id.*

88. See BIX, POSITIVISM, *supra* note 86, at 29; GERALD J. POSTEMA, *LEGAL POSITIVISM: EARLY FOUNDATIONS*, reprinted in *ROUTLEDGE COMPANION TO PHIL. L.* 32, 35 (Andrei Marmor ed., 2011) [hereinafter POSTEMA, EARLY FOUNDATIONS].

89. See POSTEMA, EARLY FOUNDATIONS, *supra* note 88, at 36.

be derived from an “is.”⁹⁰ Positivists contend adherence to Hume’s injunction requires law and morality or justice to occupy intersecting but distinct spheres.⁹¹

Development of Legal Positivism became the project of the English utilitarian reformers of the late 18th and early 19th centuries, most recognizably the philosopher and lawyer Jeremy Bentham. Bentham asserted that talk of “natural rights” was “nonsense on stilts.”⁹² Bentham developed what one commentator described as “the most comprehensive, systematic, and sophisticated theory of law in the positivist tradition.”⁹³ However, much of his work on jurisprudence was not published and a good deal not discovered until the last few decades.⁹⁴

Bentham’s acolyte John Austin then articulated what became the influential early model of Positivism. Austin offered what has become “a classic positivistic definition of law in *The Province of Jurisprudence Determined*, first published in 1832.”⁹⁵ He argued law is a general command of the sovereign by “political superiors to political inferiors.”⁹⁶ Austin took this as a self-evident truth and thus law could be separated from other phenomena often confused with it, most obviously norms of morality or justice.⁹⁷ This led to the separation thesis⁹⁸—separation of law and morals—that Hart later argued is the core commitment of Legal Positivism.⁹⁹ Austin’s formulation was that “the existence of law is one thing; its merit or demerit is another.”¹⁰⁰

Austin’s dictum is still quoted nearly two centuries later because it rings true to modern lawyers, and non-lawyers too. Just about every practicing lawyer has had to explain to a client that the applicable legal rule is a lousy one, but it’s the law nonetheless. Likely every judge has had to rule in a way that ached her heart, but a legal rule constrained her. Plenty of actions—a near-adult teenager lying

90. DAVID HUME, A TREATISE OF HUMAN NATURE 469 (L.A. Selby-Bigge ed., 1739).

91. Hershovitz, *End, supra* note 26, at 1168.

92. See Jeremy Bentham, *Anarchical Fallacies*, in 2 COLLECTED PAPERS (1843), reprinted in HUMAN RIGHTS 28, 32 (A.I. Melden ed., 1970).

93. POSTEMA, EARLY FOUNDATIONS, *supra* note 88, at 11.

94. *Id.*

95. *Id.* at 18.

96. *Id.*

97. *Id.* at 18–19.

98. *Id.* at 20.

99. HART, CONCEPT, *supra* note 19, at 185–86.

100. POSTEMA, EARLY FOUNDATIONS, *supra* note 88, at 20.

to his parents about his plans for the evening, adultery, and so on—are immoral by almost any reckoning, but are not now (and in some cases never have been) within the scope of legal prohibitions.

The term “Legal Positivism” did not connote a distinctive theory of jurisprudence until the early 1900s¹⁰¹ and was not popularized until 1940 when, ironically, a leading figure in the anti-Positivist camp, Lon Fuller, deployed it in his writings.¹⁰² But what became known as the separation thesis, and the related proposition that what counts as law is determined by social facts—not facts related to justice (or morality)—gave legal philosophy a domain of its own. This has had the beneficial consequence of greatly developing legal philosophy, but at the cost of walling it off from moral and political philosophy.¹⁰³

Legal Positivism did not hibernate after Austin only to be awakened by Hart. One active philosopher was T.E. Holland, who writing in the Austinian tradition in the early 20th century, tweaked Austin’s conception of the role of custom and law. Austin argued that custom (primarily here customs of commerce between merchants) only became law when courts (necessarily an organ of the sovereign) recognized them as law.¹⁰⁴ Holland, however, argued (more plausibly) that courts took customs and made them rules of law wholesale, not simply case by case.¹⁰⁵ From the standpoint of practicing lawyers, this was an important advance. Commerce, in particular, requires honoring the expectation interests of the parties—that their agreements will be enforced according to predictable rules of commercial custom—to promote relatively frictionless trade of goods and services.¹⁰⁶

The most prominent judicial adherent of Positivism of this time was Supreme Court Justice Oliver Wendell Holmes, Jr. By virtue of his judicial office, he saw law as a matter of what norms courts will enforce. This led him to the oft-denigrated assertion that law is just “prophecies of what the courts will do.”¹⁰⁷ This is a controversial

101. See Schauer, *Before Hart*, *supra* note 78, at 6.

102. See generally LON L. FULLER, *LAW IN QUEST OF ITSELF* (1940).

103. LACEY, *NOBLE DREAM*, *supra* note 15, at 259–60.

104. See POSTEMA, *EARLY FOUNDATIONS*, *supra* note 88, at 22.

105. *Id.* at 22–23.

106. The famous Realist Karl Llewellyn was instrumental in drafting the original Uniform Commercial Code and, like Holland, sought to codify the law merchant—actual practice between merchants—rather than drawing on the broad formalisms of the common law or earlier codifications. See Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 469–70 (1987).

107. See Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

assertion, but Holmes's audience was mainly practicing lawyers.¹⁰⁸ A good deal of legal advice takes this form. Lawyers frequently assess (if not precisely numerically) their chances of prevailing for purposes of determining the settlement value of a case and communicate it to clients that way. A lawyer's assessment is to be taken more seriously than a conversation between two friends, one of whom predicts how the Supreme Court will rule on a hot button social issue, and happens to be right. No serious thinker would claim the foresighted friend or the lawyer made the law. Much farther up the ladder is a clear statute that has not yet been the subject of a reported judicial opinion. Most (and I assume Holmes) would take the statute as more than a prediction.

But obscured by Holmes's prediction thesis was his commitment to the Positivistic view that law must have a sovereign-backed source and legal and moral norms are separate. Hart, in his famous 1957 Holmes lecture (published in 1958) at Harvard Law School, which became the source of the Hart-Fuller debate, paid tribute to Holmes and his commitment to the separation thesis.¹⁰⁹ As a Supreme Court Justice, Holmes took aim at the notion that there was a general common law that courts, particularly federal courts, participated in finding and explicating. Holmes began dissenting from cases in which the Supreme Court was articulating common law rules in disputes between citizens of different states. As Holmes famously wrote: "The common law is not a brooding omnipresence in the sky, but the *articulate voice of some sovereign . . .*"¹¹⁰ Holmes would not live to see his view vindicated, but in 1938 the Supreme Court declared the general common law (at least in federal courts) an untenable fiction and, in cases that arrive in federal court because they are disputes between citizens of different states, state law must govern.¹¹¹ A few years later, Justice Frankfurter credited Holmes's brooding-omnipresence metaphor with prompting a revolution in the Court's conception of law.¹¹² For those who think legal philosophy has little practical import, one need gaze no farther than Holmes's relentless pressing of the Positivistic view against the received

108. Holmes's essay, *The Path of the Law*, was a speech delivered to a bar association. *See id.*

109. Hart, *Separation*, *supra* note 20, at 593–94.

110. *See* *Southern Pac. Co. v. Jensen*, 37 S. Ct. 524, 531 (1917) (Holmes, J., dissenting) (emphasis added).

111. *Erie R.R. Co. v. Tompkins*, 58 S. Ct. 817, 822 (1938); *see* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1332 (creating federal jurisdiction in cases "between . . . Citizens of different States . . .").

112. *See* *Guaranty Trust Co. v. York*, 65 S. Ct. 1464, 1466 (1945).

Blackstonian tradition of common law to see that jurisprudence's effect on the practice and administration of law are real.

3. The American Legal Realists

A caricature of Legal Realists is that they posit how a judge decides a case depends on what she had for breakfast.¹¹³ The Realists never held this outrageous view. As a homegrown school of legal philosophy, the Realists had a significant effect on how U.S. lawyers view the law and the lawyering process. For a bunch with little formal philosophical training,¹¹⁴ they left a significant mark on legal philosophy, particularly in the United States.

The Realists didn't dispute that there are easy cases. Assume a tort statute of limitations is three years from injury and that there's no complication, such as whether to start the clock later because of a latent injury. A plaintiff who files the case three years and six months after the injury cannot proceed. No number of clever arguments about why the limitation period should be longer can carry the day.

The Realists, however, argued that many more results are indeterminate than usually thought. They combatted so-called "mechanical jurisprudence."¹¹⁵ Attempting to explain how cases are *really* decided, the Realists argued that judges respond to the facts of the case and what they see as a fair outcome, with legal rules providing post hoc rationalizations. They argued law is indeterminate, in that (in many cases, at least) the available legal arguments do not mandate a unique result; they also maintained law is indeterminate in that judges are often not candid about why they decide cases as they do.¹¹⁶ But the Realists' indeterminacy theory is not as broad as often assumed—their focus is appellate cases.¹¹⁷

The Realists have a point (to which we will return), particularly when it comes to difficult U.S. Supreme Court cases with obvious political implications. For example, in *Bush v. Gore*, in which the

113. See, e.g., Dan Priel, *Law is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020).

114. See Michael Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915, 1919 (2005) [hereinafter Green, *Legal Realism*].

115. See Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter Leiter, *American Realism*].

116. *Id.* "The Realists argued . . . that careful empirical consideration of how courts *really* decide cases that they decide not primarily because of law, but based . . . on their sense of what would be 'fair' on the facts of case." *Id.* at 52.

117. *Id.* at 51–52.

Court's declaring unconstitutional Florida's 2000 recount of presidential ballots effectively made Republican George W. Bush president, the five Justices who sided with Bush were Republican-appointed and the Democratic-appointed Justices, plus liberal Republicans Justices Stevens and Souter, sided with Democrat Al Gore.¹¹⁸ None of the opinions mention this partisan divide, but it's impossible to ignore. Showing that law is not completely doctrine-bound, algorithms studying which side is asked the most questions during Supreme Court oral arguments have proved highly successful in predicting the outcome of cases.¹¹⁹

There's a realpolitik to contentious social issues, such as whether there's a constitutional right to same-sex marriage in which even the most casual observer in 2015 could predict how eight of the nine Justices would vote, with the only mystery being Justice Kennedy. Or consider the four-year span from 1972¹²⁰ to 1976¹²¹ when the Supreme Court de facto abolished as unconstitutional the death penalty. In 1972, public support for the death penalty was at a low ebb with a Gallup poll showing 50% support, but by 1976 (when the Court effectively reinstated it) support climbed to 66%.¹²²

While the Realists landed some punches, it goes too far to claim that "[t]o some extent we are all Realists now."¹²³ Realism makes threadbare claims as to how judges *should* decide cases. Suppose through observation of a judge we know red headed lawyers lose when appearing before him. If a case comes before him and one party is represented by a red headed lawyer, we can predict this party will lose. This is a Realistic assessment of this judge, though he surely would not write an opinion expressing bias against red headed

118. *Bush v. Gore*, 121 S. Ct. 525 (2000).

119. See Johnson et al., *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Arguments in the U.S. Supreme Court?*, 29 WASH. U. J. L. & POL'Y 241, 261 (2009).

120. See *Furman v. Georgia*, 92 S. Ct. 2726, 2727 (1972) (holding that the imposition and carrying out of the death penalty constituted cruel and unusual punishment, violating the Eighth and Fourteenth Amendments).

121. See *Gregg v. Georgia*, 96 S. Ct. 2909, 2941 (1976) (holding that the purpose of *Furman* was to prevent juries from "wantonly and freakishly" imposing the death penalty; however, the death penalty is not itself unconstitutional).

122. See *In Depth: Topics A to Z: Death Penalty*, GALLUP (Apr. 9, 2023, 8:20 PM), <https://news.gallup.com/poll/1606/death-penalty.aspx>.

123. Singer, *Realism*, *supra* note 28, at 467. This is particularly true of what Leiter calls the "Idiosyncratic Wing" of the Realists who put heavy emphasis on the personality of the judge as a factor. See Leiter, *American Realism*, *supra* note 115, at 3.

lawyers. No serious thinker would shrug her shoulders and say “that’s the way it is in front of this judge”—she’d be rightly critical of the judge. There must be a sorting mechanism that puts basic fairness to the parties on one side of the line and the hair color of the lawyer on the other.

Hart devastatingly critiqued what he called “rule sceptics,” particularly on this conceptual ground.¹²⁴ Hart—correctly in my view—derided the contention “that talk of rules is a myth, cloaking the truth that law simply consists of the decisions of courts and the prediction of them”¹²⁵ Hart took more seriously the Realist account that judges relied on extralegal considerations, but he thought it a wild exaggeration that legal rules determined outcomes in few cases.¹²⁶

Realism is a judicially-centric variant of Positivism.¹²⁷ In Austinian terms, courts are the sovereign and their opinions are the commands. While some decisions are outrageously unjust¹²⁸ that doesn’t make them any less law on the Realist account. Realism,

124. HART, *CONCEPT*, *supra* note 19, at 124–54.

125. *Id.* at 136.

126. Green, *Legal Realism*, *supra* note 114, at 1918.

127. *See, e.g.*, Dworkin, *Model of Rules I*, *supra* note 21, at 17 (the Realist model “differs mainly in emphasis from the theory first made popular by the nineteenth century philosopher John Austin”); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278, 279 (2001) (Realism is based on the same fundamental assumptions as Positivism); Liam Murphy, *Better to See Law This Way*, 83 *N.Y.U. L. REV.* 1088, 1091 (2008) (Realism assumes the same grounds of law as Positivism). Even those sympathetic to Realism acknowledge that Realism and Hartian Positivism began from the same fundamental premise that law is determined by social facts. *See* Green, *Legal Realism*, *supra* note 114, at 1921. Realism “often fails to identify constitutions, statutes, and the like as law, even though these are items that clearly fall under our concept of law.” Green, *Legal Realism*, *supra* note 114, at 1927. The so-called pragmatists deserve some mention too: famous judge and law-and-economics proponent Richard Posner adopted a theory of pragmatism that he attributed to Holmes. *See generally* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1993) (Posner, on a multitude of occasions, cites to Holmes and his theories on pragmatism while making his own argument and portraying his own views). Although I agree with Posner about the need to hook up legal philosophy with real-world legal problems, I reject his contention that current philosophical debates don’t bear on current legal problems.

128. *See, e.g.*, *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (holding that an enslaved person who resided in free territories of the United States was still property of his putative owner and thus not entitled to his freedom).

however, has never disappeared and the Realists left a prominent mark on American law and legal education.¹²⁹

Despite Realism's lack of philosophical rigor, its success in capturing the imagination of American lawyers and judges is instructive. Today, many lawyers and judges who could not name H.L.A. Hart or Ronald Dworkin as influential jurisprudents could give a basic explanation of Legal Realism. The Realists' attention to the policy preferences and political affiliation of judges as an often-unspoken factor in high profile and difficult cases gave them credibility with practicing lawyers. As I argue below, a dash (but not the whole jar) of Realism is worth adding to the recipe of a lawyer's advocacy, and advocates and courts ought not be shy about appeals to fairness and justice, nor should they be irrelevant in critiquing Supreme Court and other important opinions. Attention to these elements of the judicial process—telling Dorothy to look really closely at the man behind the curtain, so to speak—is the greatest debt we owe the Realists.

B. Hart and Beyond

A vast literature has developed around Hartian Positivism, variants of it, the thrusts at Positivism (particularly those of Dworkin), and the parries by post-Hart Positivists and Hart himself—leading to the Hart-Dworkin debate. To the charge that my discussion fails to capture the full nuance of this complex array of theses, arguments, and counter-arguments, I plead guilty.

I offer this in mitigation. While I believe lawyers, judges, and other legal officials have much to gain by understanding the basic contours of modern jurisprudence, their preferred philosophical flavor is less important. As discussed below, Positivism offers the best (really the only plausible) account of law as a day-to-day phenomenon experienced by lawyers and non-lawyers.¹³⁰ Particularly in hard cases, whether one subscribes to Exclusive or Inclusive Positivism, or one of the major camps of anti-Positivism, appeals to norms of justice should help decide cases. And by hard cases I mean those in which

129. As Leiter points out, modern law school casebooks do not consist entirely of cases. The casebooks now include other materials. The principal purpose of the other materials—bits of law review articles, comparisons to foreign legal sources, and so on—is to explore the policy aspects relevant to law. See Leiter, *American Realism*, *supra* note 115, at 60.

130. See Brian Leiter, *Why Legal Positivism (Again)?* 1–4 (U. CHI. L. SCH. PUB. L. & LEGAL THEORY WORKING PAPER NO. 442, 2013) [hereinafter Leiter, *Why Positivism?*].

the law has run out, or nearly so, in that there are no binding precedents in the neighborhood—or a precedent is perceived as ripe for overruling—and no relatively clear regulatory, statutory, or constitutional provisions to guide the lawyer or judge faced with such a case.

1. The Hart-Fuller Debate

Back-to-back 1958 articles by H.L.A. Hart and Lon Fuller in the *Harvard Law Review* mark, in my view, the beginning of time for modern legal philosophy. Some of the back story is illuminating. Fuller was a Harvard Law School icon who wrote prolifically and accessibly on jurisprudence. Hart of Oxford was a visitor to Harvard the 1956–1957 academic year.¹³¹

Hart gave the prestigious Holmes lecture in April of 1957 and Fuller was visibly agitated, pacing in the back of the room and leaving during the question-and-answer session.¹³² Fuller associated Positivism with various evils, the worst of which was its purported link with the weak resistance German lawyers put up to Nazi destruction of German legal institutions (Hart's lecture came only twelve years after Nazi Germany's surrender).¹³³ Fuller also was concerned with the amorality his students showed regarding legal and commercial dealings, for which he blamed Positivism.¹³⁴ Fuller also associated Positivism with an overly literalist interpretation of statutes.¹³⁵ Fuller accused British courts of failing to take into account trade customs in commercial cases (a specialty of Fuller's), forcing more disputes into arbitration where arbitrators did (and do) take into account trade usage.¹³⁶

Fuller demanded the right to reply to the published version of Hart's address, and the two articles appear back-to-back.¹³⁷ Fuller, though one of the most famous American law professors of his time, is

131. See *Foreword: Fifty Years Later*, 83 N.Y.U. L. REV. 993, 995 (2008).

132. *Id.* at 994–95.

133. *Id.* at 993. See generally BIX, POSITIVISM, *supra* note 86, at 31 (associating positivism with the weak resistance of the German judiciary and bar to the rise of the Nazis “is, at best . . . a misunderstanding . . . about legal positivism”).

134. LACEY, NOBLE DREAM, *supra* note 15, at 184.

135. Fuller, *Fidelity*, *supra* note 20, at 638.

136. *Id.* at 637–38.

137. See *Foreword: Fifty Years Later*, *supra* note 131, at 995.

not taken seriously by most legal philosophers today,¹³⁸ though there have been efforts to rehabilitate his standing in the philosophical community.¹³⁹ Despite giving Hart credit for a more refined and powerful version of Positivism than Austin's,¹⁴⁰ the visceral hatred of the evils Fuller associated with Positivism lies just beneath the surface of his reply.

The articles are mostly clear and thoughtful. Employing a religious simile, for Dworkinians, Fuller is John the Baptist to Dworkin as Messiah. Though I judge Hart the winner in the exchange, Fuller scored enough points to influence Hart's better-developed theories in *The Concept of Law*.

Even more than sixty years on, the clash between the two is of relevance, though it lies in the background of the seemingly interminable Hart-Dworkin debate. The *New York University Law Review* held a symposium in 2008 on the fiftieth anniversary of the Hart-Fuller debate. It included many leading scholars, though absent was Dworkin, then on the NYU law faculty. I make no attempt to address comprehensively the secondary literature on the Hart-Fuller debate, rich and varied as it is. Instead, I set forth some of its basic themes to help explain the current development of the major jurisprudential camps.

a. The principal theses

Hart's principal thesis is easily discerned; one can infer it from the title: *Positivism and the Separation of Law and Morals*.¹⁴¹ At the core of his article is a defense of Bentham's and Austin's insistence of the need to "distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be."¹⁴² Put simply, there are bad and good laws—but they're still laws. Hart then offered a normative defense of

138. See, e.g., Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. LEGAL STUD. 663, 673 (2011) (noting Fuller "has been a target of philosophical derision ever since for its odd mischaracterizations of the claims of legal positivists, including Hart. Fuller thought, simply put, that the blame for the moral depravity of Nazi judges could be laid at the door of their 'positivism,' i.e., their view that they were bound to apply the legally valid norms of their immoral system.") [hereinafter Leiter, *Demarcation*].

139. See, e.g., KRISTEN RUNDLE, *FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER* (2013) (presenting Fuller's philosophies in a positive light).

140. Fuller, *Fidelity*, *supra* note 20, at 630.

141. Hart, *Separation*, *supra* note 20, at 593.

142. *Id.* at 594.

the Bentham/Austin thesis, which is that by not confusing whether a law is just or moral with whether it is a law makes reforming bad laws more achievable.¹⁴³ He posited two equally noxious directions in which confusion between law and morals might spread. One is an anarchist who feels free to ignore laws with which he disagrees, and the other is a reactionary who uncritically assumes that because a law is a law it must be just.¹⁴⁴

Hart also identified two other theses of Austin and the utilitarian Positivists. One was that there is value to what he called the “analytical study” of legal concepts.¹⁴⁵ By this he meant study of legal terminology in its sociological and historical context. This Hart endorsed and related it to his approval of the separation (between law and morals) thesis. The other was the problematic command theory of law articulated by Austin, and others.¹⁴⁶ Hart saw the three theses as independent of each other, and—although he endorsed the first two—he devastatingly criticized the third.

Hart’s criticism of Austin’s command theory of law is straightforward. Austin conceived of laws as commands, by someone in power, to a group that habitually obeys. But, as Hart pointed out, the same could be said for a group used to being terrorized by a gunman—equating government to “the gunman writ large.”¹⁴⁷ Hart offered a distinction between laws that look like commands (for example, criminal statutes) and other legal rules, such as those for creating a valid will.¹⁴⁸ No plausible definition of a command could accommodate these latter sorts of rules. Here we glimpse Hart’s most enduring contribution, which was to posit a secondary rule—quite unlike a command—that allows us to distinguish legal rules from a gunman’s demands. Referring to legal systems with legislatures, Hart argued “nothing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures.”¹⁴⁹ Hart said, in other words, that we know something is law because it springs from a generally accepted (i.e., social) rule that brands it as law. From this acorn would grow Hart’s oak of “The Rule of Recognition.”¹⁵⁰ But vital to the recognition rule is its general social acceptance, not its moral content.

143. *Id.* at 596.

144. *Id.* at 598.

145. *Id.* at 601.

146. *Id.*

147. *Id.* at 603.

148. *Id.* at 604.

149. *Id.* at 603.

150. HART, CONCEPT, *supra* note 19, at 100.

Before going further into Hart's essay, Fuller's central themes require examination. Though others have made this observation, Fuller's curious title *Positivism and Fidelity to Law: A Reply to Professor Hart*¹⁵¹ is a hint that this is not a conventional debate. As far as I can tell, Hart didn't say anything about fidelity to law. Fuller attributed (probably correctly) to Hart both conceptual and normative Positivism, i.e., that separation of law and morals is a matter of fact and it's a desirable intellectual stance because it allows for clear-eyed criticism of bad laws.¹⁵² Fuller then argued that Hart thought failing to maintain a Positivist outlook created the risk that "we may lose a 'precious moral ideal,' that of fidelity to law."¹⁵³ Fuller's quotation marks around "precious moral ideal" are curious because they imply Hart used that phrase, but he didn't. The closest expression I can find in Hart's essay is his assertion that failing to punish the informing Nazi wife would "sacrific[e] a very precious principle of morality endorsed by most legal systems."¹⁵⁴ But, of course, there's nothing about being a Positivist that estops one to criticize a legal regime; indeed, it's encouraged. Moreover, I can't find the word "fidelity" in Hart's essay.

Fuller, however, used "fidelity" a lot. One of the major virtues of Hart's essay, Fuller wrote, was "[i]t is now explicitly acknowledged on both sides that one of the chief issues is how we can best define and serve the ideal of fidelity to law."¹⁵⁵ It's a bit as if Hart and Fuller met in the faculty lounge to discuss football, but Hart wanted to talk about a championship soccer match while Fuller wanted to talk about the NFL title game.¹⁵⁶ If pressed on the fidelity issue, I hypothesize Hart would have said to Fuller:

"Hopefully you live in a community in which law seldom or never requires you to do something immoral or prevents you from doing something morally required. If, however, your conscience pulls you one way and the law another [recall our citizen required to

151. Fuller, *Fidelity*, *supra* note 20, at 630.

152. *Id.* at 630–31; see also Nicola Lacey, *Philosophy, Political History, and Morality: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1068 (2008) ("Hart's argument is implicitly concerned not merely with the elaboration of a descriptive, positivist account of law but also with the moral recommendations of such an approach.") [hereinafter Lacey, *Philosophy*].

153. Fuller, *Fidelity*, *supra* note 20, at 630–31.

154. Hart, *Separation*, *supra* note 20, at 620.

155. Fuller, *Fidelity*, *supra* note 20, at 632.

156. The Super Bowl wasn't played until after the 1966 season.

wave a flag at the king's parade] you have options. You can hold your nose and comply with the law to avoid the sanction, you can civilly disobey, or you can try to get the law changed [the latter not inconsistent with either of the first two].”

Here Hart endorsed Austin's view.¹⁵⁷

Perhaps Fuller really meant to speak of fidelity to morality. Some of what bothered Fuller about Positivism was that allowing only what he termed an “antiseptic intersection”¹⁵⁸ of law and morality might lull one into tucking her moral compass away and simply following the law without reflection (that's what Fuller thought happened in Nazi Germany).¹⁵⁹ Hart, however, argued that a virtue of Positivism is it allows for pointed criticism of bad laws.¹⁶⁰ Fuller was on the horns of a dilemma. He realized he couldn't take the Thomistic route without the attendant difficulty of finding Holmes's brooding omnipresence.¹⁶¹ But Fuller wasn't going to adopt the Positivist view he thought legitimized wicked legal regimes.¹⁶² Instead he tried for a

157. Hart, *Separation*, *supra* note 20, at 599–600. Others ascribe this view to Hart. See Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1011; Lacey, *Philosophy*, *supra* note 152, at 1069 (“But there is also a utilitarian strand to Hart's position, an implication that, in terms of resistance to tyranny, things will turn out better if citizens understand that there are always two separate questions to be confronted: First, is this a valid rule of law? Second, should it be obeyed?”).

158. Fuller, *Fidelity*, *supra* note 20, at 630–31.

159. More accurately, it was Radbruch's claim, endorsed by Fuller. See Lacey, *Philosophy*, *supra* note 152, at 1069–70. For a fascinating discussion of whether lawyers with good intentions should participate in an evil regime, see David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613, 616 (2021). Luban discusses in detail the biographies of two German lawyers who worked as functionaries in the Nazi government and attempted to mitigate persecution of Jewish Germans, as well as attempting to convince German officers to adhere to international law norms of not killing prisoners and civilians. *Id.* at 623–36. It is debatable the degree to which each succeeded and it presents the question of whether participating at all in such a monstrous government creates the risk of normalizing the appearance of its operations. *Id.* at 654–57.

160. Hart, *Separation*, *supra* note 20, at 598; Lacey, *Philosophy*, *supra* note 152, at 1069.

161. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

162. Fuller, *Fidelity*, *supra* note 20, at 644–48; see also Miller, *supra* note 84, at 198 (describing Fuller's list as including “generality, public promulgation, prospectivity, clarity, non-contradictoriness, conformability, stability, and congruence”).

middle ground of finding the “inner morality” of law, with virtues of coherence, clarity, internal consistency, promulgation to its subjects, and the like.¹⁶³ Fuller linked this virtue of coherence in the law with the general virtue of a legal system. He wrote: “Professor Hart seems to assume that evil aims may have as much coherence and inner logic as good ones.”¹⁶⁴ Fuller admitted he was not “competent to undertake an excursus in that direction” and that he had to “rest on the assertion of a belief . . . that coherence and goodness have more affinity than coherence and evil.”¹⁶⁵

This is the sometimes-overlooked lynchpin of his disagreement with Hart. Law, on Fuller’s account, has an inner morality that flies the flag of coherence; coherent legal systems are more likely to be just, right, and good, and Hart—by not recognizing this—has not given us a rationale for fidelity to law. Every one of these propositions is debatable, but the central one—the affinity between coherence and good—is unproven, at least by Fuller, and rests on his intuition. Perhaps others share Fuller’s intuition, but I do not. Obviously, it’s better to have legal systems in which citizens can more easily ascertain their legal rights and duties, but I agree with Hart that this is efficacy, not morality.¹⁶⁶ Take, for instance, China’s now-abandoned “one child” policy that allowed couples only one child. This directive was promulgated, eminently clear, efficiently enforced, and one of the worst human rights catastrophes in modern times. Couples, desperate for a male child, engaged in mass infanticide of newborn girls.¹⁶⁷

On the other hand, suppose a government issues a directive—with funding—to establish “adequate daycare options” so parents can continue to work, if they so choose, while raising young children. This might be administratively challenging in terms of allocating the funding and discerning what constitutes adequate. But between this directive and the one-child policy, I have no trouble concluding that the adequate-daycare directive is far more just, though less coherent.

Fuller got traction as he went along. He criticized what would become Hart’s Rule of Recognition because its social acceptance

163. Fuller, *Fidelity*, *supra* note 20, at 650; *see also* Lacey, *Philosophy*, *supra* note 152, at 1070; Miller, *supra* note 84, at 197.

164. Fuller, *Fidelity*, *supra* note 20, at 636.

165. *Id.* at 637.

166. Hart, *Separation*, *supra* note 20, at 621.

167. *See* Michael Weisskopf, *China’s Birth Control Policy Drives Some to Kill Baby Girls*, THE WASH. POST (Jan. 8, 1985), <https://www.washingtonpost.com/archive/politics/1985/01/08/chinas-birth-control-policy-drives-some-to-kill-baby-girls/77bf59d0-b0c0-4261-a1e5-51ea6a3b8939/>.

depended on it being “right and necessary.”¹⁶⁸ Hart, because he was not responding to Fuller, didn’t have much to say about how a Rule of Recognition (though he did not call it that in 1958) comes into being. However, even if such secondary rules are more likely to be accepted if they are good rules doesn’t mean they *must* contain any content of justice or morality. Hart’s thesis wasn’t that law *never* has any moral content, just that it doesn’t *need* moral content. North Korea, for example, has a simple Rule of Recognition—whatever the Supreme Leader says is law is law. That’s not a rule with any intrinsic merit, but through brutal repression it has become a socially accepted rule in North Korea.

b. Of parks and vehicles

Here I briefly discuss perhaps the most famous English-language legal hypothetical,¹⁶⁹ because this ground is thoroughly tilled. Suppose, Hart wrote, “[a] legal rule forbids you to take a vehicle into the public park.”¹⁷⁰ Hart noted that this rule obviously excludes automobiles from the park, but what about roller skates, bicycles, and airplanes?¹⁷¹ It was here that he introduced a distinction between the core of a rule (about which there was no doubt as to its application) and its penumbra (in which application is debatable).¹⁷² Hart pointed out that questions such as whether a bicycle is a vehicle cannot be made by logical deduction, which he used to rebut the charge that Positivism leads inevitably to mechanical jurisprudence.¹⁷³ Hart also offered up the no-vehicles hypothetical to rebut the charge often attributed to the Realists that there are no easy cases.¹⁷⁴ But Hart was equally anxious to defend against the related charge that in penumbral cases a court must decide the case based on what the law ought to be, leading to a necessary connection between law and

168. Fuller, *Fidelity*, *supra* note 20, at 639.

169. See Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008) [hereinafter Schauer, *Critical*].

170. Hart, *Separation*, *supra* note 20, at 607.

171. *Id.*

172. *Id.*

173. See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615–16 (1908). See generally Bix, *Positivism*, *supra* note 86, at 31 (the accusation that positivism promotes a “wooden perspective on judicial decision making . . . is a bad mischaracterization”).

174. Hart, *Separation*, *supra* note 20, at 607; see also Schauer, *Critical*, *supra* note 169, at 1109.

morality in primary legal rules.¹⁷⁵ Hart offered a guide to these penumbral cases that was neither mechanical nor necessarily moral. Hart opined that in these cases judges must look to “the aims, the social policies and purposes” of the rule.¹⁷⁶

Here Fuller was on his surest footing replying to Hart. Fuller charged Hart with having interpretation of legal rules rest upon a pointer theory of language.¹⁷⁷ Fuller also insisted that Positivism is beset by a “fear [of] purposive interpretation of law and legal institutions”¹⁷⁸ This charge is a head-scratcher, as nothing about the central theses of Hartian Positivism—law as conceptually separate from morality and originating from a social rule—entail a vapid theory of adjudication. But Fuller, and then later Dworkin,¹⁷⁹ saw this as an opening through which they could penetrate the walls and sack Positivism’s castle.

Admittedly, Hart left himself open to attack by hypothesizing a rule that turned on a single word, “vehicle.” Fuller offered an effective counterexample—what about a veteran’s group that wants to erect in the park a memorial that includes a truck used in World War II and still able to function?¹⁸⁰ Would this count as a vehicle? Fuller also served up his own hypothetical of an ordinance forbidding sleeping in a train station. What is one to make of a weary traveler who nods off for a moment as opposed to a homeless person¹⁸¹ bedded down for the night but not yet asleep?¹⁸² (I am reminded of Anatole France’s sarcastic quip that “[t]he law, in its majestic equality, forbids rich and poor alike to sleep under bridges”¹⁸³).

Here Fuller scored debating points. But it’s unfair to assert Hart meant that legal interpretation comes down to the meaning of a single word; this was a simple hypothetical. Hart used the no-vehicles hypothetical to fend off attacks on Positivism from two directions. One was from the Realists who were often taken to contend that there were no easy cases of a rule’s application, though as I argued above

175. Hart, *Separation*, *supra* note 20, at 608.

176. *Id.* at 612.

177. Fuller, *Fidelity*, *supra* note 20, at 668.

178. *Id.* at 669.

179. *See infra* notes 256–91 and accompanying text.

180. Fuller, *Fidelity*, *supra* note 20, at 663; *see also* Schauer, *Critical*, *supra* note 169, at 1116–17.

181. Fuller actually used the word “tramp,” but as Schauer points out, this was 1958. Schauer, *Critical*, *supra* note 169, at 1117.

182. *See* Fuller, *Fidelity*, *supra* note 20, at 664.

183. ANATOLE FRANCE, *THE RED LILY* 119 (Calmann-Levy trans., 14th ed. 2007).

this is a caricature.¹⁸⁴ In the other direction, from critics of Positivism—including Fuller¹⁸⁵—who contended that Positivism’s commitment to the view that (at the very least primary) rules of law were not dependent on their merit led inexorably to formalistic or syllogistic reasoning by judges.

c. Of informers

This soil too is well-tilled.¹⁸⁶ Hart addressed, at the end of his essay, the problem faced by the West German courts after the end of World War II of persons who did evil under the cover of Nazi laws, and then were charged with crimes after the war’s end.¹⁸⁷ In particular, Hart and Fuller addressed the case described above of a wife who reported her husband for making anti-Hitler statements to be rid of him as she had taken on other lovers.¹⁸⁸ Hart addressed the writings of a German law professor Gustav Radbruch who had been a pre-Nazi Positivist but blamed Positivism—especially the slogan “law as law”—for aiding Nazi destruction of German legal institutions.¹⁸⁹ Radbruch had converted to a Thomistic natural law view that held the Nazi enactments were not law.¹⁹⁰

The West German court held the woman guilty of illegally depriving her husband of liberty under an 1871 German statute then still in effect.¹⁹¹ Both Hart and Fuller understood the West German court’s reasoning to turn on the rationale that the Nazi enactment, which allowed her to denounce her husband, was too odious to count as law, and thus the decision was a victory for natural law over Positivism.¹⁹²

Hart and Fuller misunderstood the case. Credit for pointing this out goes to German philosopher H.O. Pappé.¹⁹³ Working from a careful translation to English of the Judgment of the Bamberg Provincial High Court,¹⁹⁴ I can report that the court’s opinion is a muddle. The statute under which the wife was charged was Section

184. See *supra* notes 113–23 and accompanying text.

185. See Schauer, *Critical*, *supra* note 169, at 1114–15.

186. See, e.g., Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1004.

187. See Hart, *Separation*, *supra* note 20, at 618.

188. See *supra* notes 31–32 and accompanying text.

189. See Hart, *Separation*, *supra* note 20, at 617.

190. *Id.* at 616.

191. *Id.* at 619.

192. *Id.*

193. See Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1007.

194. *Id.* at 1032–34.

239 of the Penal Code.¹⁹⁵ The statute under which the husband was convicted and sentenced to death (but sent to the front instead) was known as the “Treachery Act,”¹⁹⁶ enacted by the Nazi government in two forms, one in 1934 and one in 1938.¹⁹⁷ The post-war trial court acquitted the wife because she acted lawfully under the Treachery Act; the prosecution appealed¹⁹⁸ and the Bamberg court found her guilty.¹⁹⁹ The appellate court announced in the first paragraph that the wife was guilty as an “indirect perpetrator.”²⁰⁰ This was problematic, as German law held one could not be an indirect perpetrator using lawful means.²⁰¹ The sentence that animates the view that the case is a Thomistic victory is the first of the second paragraph: “Despite the fact that an act is done in accordance with the authority of a positive law, it is unlawful in terms of § 239 Penal Code when it grossly offends the sense of fairness and justice of all decent people.”²⁰²

This sentence could be read to support a strong natural law view, but the “gross offense” language refers to the wife’s evil report, not the Treachery Act. The court then sidestepped the rationale the trial court found convincing, which was that the wife had used lawful means, rather than, for example, hiring a hitman to kill the husband. But the court evaded this difficulty with a sentence that is difficult to parse (though complexities of translation may play a role):

[O]ne can commit a criminal offense by indirect perpetration even when the proscribed result is directly caused by an instrument to whom a particular justification is available, provided this particular justification, on the one hand, carries sufficient legal weight to deprive the act of its continuing unlawfulness from the point of view of the instrument’s particular position, but, on the other hand, cannot confer legality upon the result caused by the justified instrument.²⁰³

Apparently, the court held that there is a class of actions that “carry sufficient legal weight” so the instrument—here the Court Martial—acted lawfully but those actions don’t have enough weight

195. *Id.* at 1032.

196. *Id.*

197. *See* David Dyzenhaus, *The Grudge Informer Case Revisited*, 83 N.Y.U. L. REV. 1000, 1032 (2008).

198. Apparently, Germany does not have a Double Jeopardy bar against appeals from a judgment of acquittal.

199. *See* Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1033.

200. *Id.*

201. *Id.* at 1033.

202. *Id.* at 1034.

203. *Id.* at 1033.

to excuse the perpetrator—here the wife. How one decides the action has just enough legality to excuse the instrument, but not enough to excuse the indirect perpetrator, is a mystery, but the wife's actions were in this class. If one squints to see a strong natural law thesis, it probably lies in this sentence, in which the court erased the Treachery Act from the wife's point of view. But more plausibly the opinion is grist for the Legal Realist mill; the court decided to convict her and then bent positive law axioms to justify the result.

Operating on the (mistaken) assumption that the German court's rationale was that the Treachery Act was too evil to be law, Hart thought this was hysteria and opined there were two unattractive options.²⁰⁴ One was to let the wife go free despite her outrageous conduct; the other to enact "a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way."²⁰⁵ This, in Hart's view, had the virtue of candor. But candid or not, the German court's judgment (and others like it) were—for practical purposes—equivalent to retroactive legislation.²⁰⁶

Fuller devoted thirteen pages to the informing-wife case and defending Radbruch.²⁰⁷ Although some judge Fuller the winner here,²⁰⁸ I am confused by his presentation. Fuller correctly pointed out that declaring every Nazi enactment void *ab initio* would have created intolerable uncertainty.²⁰⁹ Hart thought the Nazi enactments were law because they were enacted in conformity with the twisted social norms of the Nazi regime. Fuller then wrote: "One cannot help raising at this point the question whether the issue as presented by Professor Hart himself is truly that of fidelity to law."²¹⁰ Hart's position is austere but clear—legal norms give prudential reasons to act or not, but don't necessarily have independent moral force.²¹¹ Fuller attempted to frame the debate around an issue not of apparent concern to Hart.

204. See Hart, *Separation*, *supra* note 20, at 619.

205. *Id.*

206. See Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1020–22–21.

207. Fuller, *Fidelity*, *supra* note 20, at 648–61.

208. Dyzenhaus, *Grudge Informer*, *supra* note 63, at 1020 ("Fuller, in my view, clearly had the better of the exchange with Hart, because Hart seems unable to appreciate the moral and legal complexity of situations in which judges are faced with unjust laws.").

209. See Fuller, *Fidelity*, *supra* note 20, at 648–49.

210. *Id.* at 649.

211. Hershovitz, *End*, *supra* note 25, at 1168–69 ((noting Hart "thought that the legal concept of obligation was normative but not moral").

Fuller undertook a defense of the German court's informing-wife decision—as he and Hart understood it—based on his inner-morality-of-law theory. However, the German court didn't deploy Fuller's theory.²¹² Fuller then engaged in an extended discussion of the ways in which Nazi law violated his conception of the inner morality of law, including secret and unfairly retroactive laws, though they did not figure in the actual decision.²¹³

Fuller imagined a collateral attack on the judgment of the Court Martial, which admittedly took a ludicrously broad view of what constituted a public denunciation under the Treachery Act, given that the conversation was entirely private.²¹⁴ Fuller then (correctly in my view) ascribed to Hart the view that the dilemma was whether to allow the wife a defense on the evil Nazi laws and let her go free, or punishing her through a frankly retroactive criminal statute—the latter oddly what Hart, Fuller and Radbruch all thought the best solution.²¹⁵ Unfortunately, this portion of Fuller's reply leaves little more than a sense of his visceral loathing of Positivism and his association of it with the Nazi regime.

2. Hart and The Concept of Law

The Hart-Fuller debate set the stage for almost everything that follows.²¹⁶ Hart's book *The Concept of Law*—which has been central to analytical jurisprudence for the last sixty years—was an extension and refinement of the themes of his Harvard lecture. Dworkin expanded Fuller's less philosophically disciplined anti-Positivism. But the battle line was drawn: either a secondary social rule brands some norms as legal, or legal norms are inherently norms of justice or morality. It's impossible to summarize a work as critical as *The Concept of Law* in a few paragraphs, but Hart's Harvard lecture eases the task of making its themes tolerably clear.

a. Primary and secondary rules

212. Fuller, *Fidelity*, *supra* note 20, at 650.

213. *Id.* at 650—54.

214. *Id.* at 654.

215. *Id.* at 655, 661.

216. See Schauer, *Noble*, *supra* note 10, at 856 (noting Hart's debate with Fuller resulted in further developed themes in Hart's later work, principally *The Concept of Law*).

Hart began by again refuting Austin's command theory of law.²¹⁷ As he had in his Harvard lecture, Hart argued that the command theory reduced law to nothing more than the demands of "the gunman situation writ large."²¹⁸ He also distinguished law from merely convergent behavior as a matter of custom or widespread practice.²¹⁹

Without taking these fundamental tenets of his theory in precisely the order Hart presented them, Hart expanded on his 1958 explanation of a basic social rule. Hart noted that while some legal rules resemble commands, others (such as court jurisdictional rules) look nothing like commands.²²⁰ Here, Hart sharpened his criticism of the command theory to articulate the distinction between primary and secondary rules.²²¹ Secondary rules are parasitic of primary rules because secondary rules need not exist but for the primary norms.²²² Secondary rules can be such as those necessary for valid wills or enforceable contracts, but crucially secondary rules define what constitutes law.²²³

Here, Hart introduced the best-recognized aspect of his theory, which is the Rule of Recognition.²²⁴ The Rule of Recognition is an array of norms born of a convergence of social practice.²²⁵ In a simple system, the Rule of Recognition might be "whatever the Queen promulgates as an ordinance over her royal seal is law." In complex legal systems such as the United States, the Rule of Recognition is set forth by the federal and state constitutions, as well as various other authority-enabling pronouncements.²²⁶

The Rule of Recognition was not so named in Hart's Harvard lecture, but its embryo is there. As commentators have noted, calling it a rule is misleading, because it's an array of norms and

217. HART, CONCEPT, *supra* note 19, at 7.

218. *Id.* at 6.

219. *Id.* at 10.

220. *Id.* at 29.

221. *Id.* at 36.

222. See Matthew H. Kramer, *The Legal Positivism of H.L.A. Hart*, U. CAMBRIDGE LEGAL STUD. RSCH. PAPER SERIES, March 2019, at 1, 10–11 (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347611 [hereinafter Kramer, *Legal Positivism*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347611] (discussing HART, CONCEPT, *supra* note 19, at 81).

223. See HART, CONCEPT, *supra* note 19, at 36.

224. *Id.* at 100.

225. *Id.*; see also Hershovitz, *End*, *supra* note 25, at 1168 (noting the Rule of Recognition is "a social rule – that is, a rule whose existence and content are fixed by a social practice.").

226. See, e.g., 5 U.S.C. § 553.

standards.²²⁷ Although the Rule of Recognition is multi-splendored in any complex community, Hart spoke of it as a single rule because of its hierarchical structure;²²⁸ in the United States, for example, the federal constitution sits atop the other norms. This gave Hart's theory the pyramidal architecture Dworkin would later say he admired.²²⁹

b. The internal and external viewpoints

Hart also introduced different viewpoints of a legal system. The internal point of view is that of someone who participates in a legal system.²³⁰ The attitude of someone in a legal system is that of someone with a "critical reflective attitude" toward duty-imposing norms, ranging from speed limits to prohibitions on murder.²³¹ That attitude recognizes the duties that those norms place on a participant, and the appropriateness of censure for violating them.²³²

A participant need not think all the rules are just.²³³ For instance, a street on which I regularly drive was adjacent to a large construction project. As the project began, the speed limit was lowered from 45 m.p.h. to 35 m.p.h., which in my non-expert opinion was a reasonable safety precaution. The project is finished, but the temporary sign announcing the 35-m.p.h. speed limit is still there. I grumble every time I have to slow down, as the street can now handle safely traffic in the 45 m.p.h. range. Despite my assessment of a safe speed, I know that if I drive at 48 m.p.h., my chance of getting a speeding ticket is substantial. Not wanting a ticket, I come close to obeying the speed limit, because I have the internal view of the law.

An external observer stands outside the legal system and observes the behavior of persons within the system.²³⁴ From what Hart called an "extreme external" stance, all the observer notices is a confluence

227. Kramer, *Legal Positivism*, *supra* note 221, at 12. Nor is it a rule whose scope is free from debate. By analogy, English speakers might have minor differences in the way they pronounce some words or conjugate some verbs; however, they are still able to understand each other—just as participants in a legal system might disagree about features of the Rule of Recognition at its edges without thinking that the others are lawless rebels. *Id.* at 12–13.

228. See HART, CONCEPT, *supra* note 19, at 101.

229. Dworkin, *Model of Rules I*, *supra* note 21, at 44.

230. See HART, CONCEPT, *supra* note 19, at 89.

231. Kramer, *Legal Positivism*, *supra* note 221, at 7.

232. See HART, CONCEPT, *supra* note 19, at 89.

233. See Kramer, *Legal Positivism*, *supra* note 221, at 7.

234. See HART, CONCEPT, *supra* note 19, at 89.

of behavior, without attempting to ascertain motivations for it.²³⁵ From a “moderate external perspective,” the observer attempts not only to chart the behavior, but also probes the reasons the participants have for engaging in it.²³⁶ But the internal view is the key to Hart’s theory. Legal officials – from those who enforce parking violations to Presidents and Supreme Court Justices – must participate internally in the legal system, otherwise they would not share the Rule of Recognition’s boundedness.²³⁷

c. Separateness

Those having a passing familiarity with legal philosophy state that Positivism claims norms of morality or justice have no necessary connection with legality, while under natural law theory they do.²³⁸ However this beguilingly simple formulation is problematic.²³⁹ Hart observed that there are various relationships between legal norms and norms of justice or morality.²⁴⁰ Hart, however, was clear that for primary norms their justness could not condition their legality. He wrote that he took “Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality . . .”²⁴¹ In contrast, anti-Positivists contend that norms of justice or morality are so inherently interwoven with legality that speaking of them separately is incoherent.²⁴²

I recognize that to full-time legal philosophers my summary of Hart’s theory is absurdly truncated. However, Hart’s Positivism has spun off variants, and in the words of a leading Positivist it is impossible to imagine a near-term future of jurisprudential debates in which Hart’s masterful work *The Concept of Law* is not at the center.²⁴³

235. *Id.*

236. Kramer, *Legal Positivism*, *supra* note 221, at 9.

237. *Id.* at 10.

238. Coleman, *Architecture*, *supra* note 14, at 5.

239. *See* Kramer, *Legal Positivism*, *supra* note 221, at 20.

240. *See* HART, CONCEPT, *supra* note 19, at 184.

241. *Id.* at 185–86.

242. *See, e.g.,* John Finnis, *Propter Honoris Resptum: On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1611 (2000) [hereinafter Finnis, *Incoherence*].

243. *See* Leiter, *Beyond*, *supra* note 26, at 18.

One of the beauties of Hart's Positivism is it doesn't claim too much.²⁴⁴ As I see it, his theory makes two central claims.²⁴⁵ One is that every advanced legal system has a social rule that picks out some norms (whether rules, principles, standards, or whatnot) and brands them as legal.²⁴⁶ This master rule is a social rule because it arises through convergence of social practice, independent of its merit on any scale of justice.²⁴⁷ This master rule is a secondary rule because it's parasitic on primary norms – such as speed limits and laws criminalizing arson – because without primary norms a secondary rule isn't needed.²⁴⁸

The second is that the master rules brands primary norms as legal or not. Primary norms are often just, but they need not be.²⁴⁹ As Hart put it, we must “firmly and with a maximum of clarity” distinguish law as it is from law as it ought to be.²⁵⁰ This bedrock of his theory is unshakable. It also accords with how lawyers view the law, even if they do not articulate it precisely so.²⁵¹

244. Leiter, *Why Positivism?*, *supra* note 130, at 24 (positivism explains law “without controversial or incredible metaphysical assumptions”). A Canadian philosopher makes a similar point. See Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 U. TORONTO L.J. 367, 368 (2001) (“I suggest that Hart's theory of the concept of law is properly understood as serving a special philosophical purpose and is not merely the piece of ‘general jurisprudence’ that it is often thought to be.”).

245. Positivist John Gardner reduced it to one proposition: “In any legal system, whether a given norm is legally valid, and hence forms part of the law of that legal system, depends on its sources, not its merits.” Gardner, *Myths*, *supra* note 86, at 201. Gardner modifies this somewhat for Inclusive Positivism to allow for the possibility of some legal norms being valid due to their merits – he gives the example of reasonableness – but requires that these merit-based tests refer to other legally valid norms. *Id.*

246. Leiter, *Why Positivism?*, *supra* note 245, at 2.

247. *Id.*

248. *See Id.*

249. *Id.*

250. Hart, *Separation*, *supra* note 20, at 594.

251. If I were asked what the law in Nebraska is on an issue of federal law, here is how I (and I assume just about every other lawyer) would proceed. I'd look at several sources. I'd review federal statutes and, if in an administratively regulated area, federal regulations. If asked to explain why I considered those laws I'd say that they were duly enacted by Congress or, in the case of regulations, adopted by the agency in accordance with the Administrative Procedure Act. I'd also look to cases, particularly United States Supreme Court and Eighth Circuit decisions. Assuming the cases of relevance I found had not been overruled, I would call those law too. Again, if asked,

C. Hart and Dworkin

As to Hart and Dworkin, it's hard to capture a so-called debate covering three decades between the main participants, shifting grounds several times, and continuing past the death of both. They had radically different agendas. Hart, being English, grew up in a legal system which fathered that of Dworkin's America, but has important differences – notably the lack of final constitutional review by a high court. When Dworkin debuted in a 1967 essay in *The University of Chicago Law Review* – now referred to as *The Model of Rules I*²⁵² – in the United States the Warren Court was nearing its end, but had radically transformed domestic law. Its effort to desegregate public life in the United States was its most famous venture,²⁵³ but it protected unpopular speech (from antiwar protests in public schools,²⁵⁴ to vulgar speech,²⁵⁵ to controversial political

I'd say they were decisions made by Article III judges duly appointed and confirmed to their offices to decide cases and controversies. See U.S. CONST. art. III. I might also look at treatises, law review articles, decisions of courts of other jurisdictions, and other secondary sources. These I would not call law, but they might lead me to law. Moreover, if I could not find any law on point, the secondary sources might help me formulate an argument as to why (here in Hart's penumbra) the legal rule should be one way or the other. If my argument were made to a court and accepted by a sufficiently high court, my posited rule would become law. While most lawyers would not use the term "Rule of Recognition" to describe how they picked out what is law and what's not, this is how they'd proceed. Moreover, if a lawyer encountered a rule that she thought unjust or otherwise flawed, she'd accept it as law, and recognize that the hope of changing it would be a statute stating a better rule or (assuming the rule came from a court decision) a decision from a higher court rejecting the rule and putting in its place a better one.

252. Dworkin, *Model of Rules I*, *supra* note 21. For a summary of the direct interchanges between Hart and Dworkin for the first two decades after Dworkin's 1967 essay, see Michael Bayles, *Hart vs. Dworkin*, 10 L. & PHIL. 349, 349 (1991).

253. See, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) (holding that intentionally segregated schools are unconstitutional).

254. See, e.g., *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that wearing black armbands in a public school to protest Vietnam War is constitutionally protected speech).

255. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that wearing a jacket in a courthouse with the words "Fuck the Draft" on it is constitutionally protected speech).

speech²⁵⁶), and remade criminal procedure law more protective of defendants.²⁵⁷

Even as Republican-appointed Warren Burger became Chief Justice, and Republican presidents would select most of the ensuing Supreme Court Justices, the next decades did not see a counter-revolution; some of the Court's most controversial rulings would come from the early Burger Court, and Republican-appointed Justices penned them.²⁵⁸ Dworkin's agenda from his 1967 salvo to the publication of his first major book ten years later – *Taking Rights Seriously* (in which *The Model of Rules I* is the second chapter)²⁵⁹ – was to provide a philosophical basis for the Warren Court's (and early Burger Court's) expansion of individual rights, and then to provide a philosophical ground for not rolling them back. In furtherance of this agenda, Dworkin sought to give the Left a principled ground to resist the Right's charge that the Supreme Court was “legislating from the bench.”²⁶⁰

Hart's spare theory did not serve Dworkin's purpose.²⁶¹ Moreover, Hart's core/penumbra account of adjudication²⁶² ran smack into the legislating-from-the-bench charge Dworkin sought to deflect. Many newly pronounced rights that Dworkin sought to guard – to be advised of one's right to remain silent when in police custody,²⁶³ to engage in

256. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that actual malice by the defendant must be proved before a public figure can recover for defamation).

257. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 498 (1966) (holding that the right to post-arrest warnings is constitutionally required); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (establishing a right to counsel paid for by the state for indigent criminal defendants).

258. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (establishing the constitutional right to abortion in the first two trimesters), *overruled by* *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 79 (2022). *Roe* was written by Nixon appointee Justice Harry Blackmun.

259. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14–45 (Harvard University Press 1977).

260. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 16–17, 49 (Simon & Schuster 1990) (discussing how, in the author's view, judges subvert democracy by “legislating . . . from the bench”).

261. Gardner, *Myths*, *supra* note 86, at 210 (“Legal positivism is not a whole theory of law's nature, after all. It is a thesis about legal validity.”); Leiter, *Why Positivism?*, *supra* note 130, at 12 (arguing that positivism is “ontologically austere”).

262. Hart, *Separation*, *supra* note 20, at 607.

263. See *Miranda v. Arizona*, 384 U.S. 436, 498 (1966).

controversial political speech largely free of defamation liability,²⁶⁴ to terminate a pregnancy in the first two trimesters²⁶⁵ – rested on moral judgments that had not figured in earlier decisions. To rebut the charge that these were naked exercises of political power from nine unelected Supreme Court Justices, Dworkin needed a theory that drank from the well of justice.²⁶⁶

Dworkin, like Fuller, sought to erect his philosophy on a base of a theory of adjudication. Dworkin built a complicated theory of adjudication that depended upon the powers of a superhuman judge Hercules who could take account of all the various precedents and then devise a result that best fit with the political morality of the legal system.²⁶⁷ This led Dworkin to his controversial right-answer thesis, which claimed that even in hard cases a singularly correct result best fits with the norms of legality and political morality of the system.²⁶⁸

Late in his career, Dworkin did more applying his theory than explaining it. He devoted an entire book to defending abortion and euthanasia.²⁶⁹ He frequently commented on Supreme Court decisions and was a prolific contributor to the *New York Times Review of Books*.²⁷⁰ He gave speeches across the country (one of which I attended) on the right to healthcare, which were endorsements of President Clinton's proposal for universal coverage.²⁷¹

For Positivists, he was infuriating.²⁷² Dworkin was a brilliant, gifted writer with a genius for drawing readers into facially plausible

264. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

265. See *Roe v. Wade*, 410 U.S. 113, 164–65 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 79 (2022).

266. RONALD DWORKIN, *LAW'S EMPIRE* 3 (The Belknap Press of Harvard University Press 1986).

267. Hershovitz, *End*, *supra* note 26, at 1171 (“Roughly, Dworkin argued that the content of the law is a function of the principles that best fit and justify past political decisions about the state’s use of force.”).

268. See Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 5–6 (1978) [hereinafter Dworkin, *No Right Answer*].

269. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 10, 26–28 (Vintage Books 1994) (1993).

270. Leiter, *Beyond*, *supra* note 26, at 17 n.3.

271. Philosophy Overdose, *Politics, Death, and Nature - Robert Dworkin* (1995), YOUTUBE (Apr. 19, 2023) https://www.youtube.com/watch?v=5GDWVFJLpQE&ab_channel=PhilosophyOverdose.

272. See, e.g., Gardner, *Myths*, *supra* note 86, at 203 n.6 (arguing that Dworkin “intentionally elides” the distinction between propositions about legality and sources of law in *Law's Empire*); Leiter, *Beyond*, *supra* note 26, at 20 n.10; Leiter, *Demarcation*,

representations of opposing viewpoints (frequently Legal Positivism) that included clever distortions allowing Dworkin to discuss Supreme Court cases. Hart, in his posthumous addendum to *The Concept of Law*, over a dozen times pointed out where he thought Dworkin had misrepresented Hart's views.²⁷³ Dworkin was a moving target. Once an objection he raised was blunted – mostly by Positivists defending Hart – he would raise a new objection as if his earlier objection had been sustained.

1. The Model of Rules I

Dworkin's critique of Positivism in *The Model of Rules I* is not now especially pertinent, but shows how slippery the Hart-Dworkin debate is. Early on, Dworkin identified three theses as defining Positivism. The first, the "Pedigree Thesis," was meant to capture Hart's Rule of Recognition. Dworkin said that under this thesis law is a "special set of rules" to justify the use of public power and they are so identified by "their *pedigree* or the manner in which they were adopted or developed."²⁷⁴ This formulation only approximates Hart's Rule of Recognition. As Scott Shapiro pointed out, it's both too strong and too weak.²⁷⁵ Hart's Rule of Recognition does not foreclose content-based tests for a legal norm, but says legal norms do not *necessarily* lose their legal character if they lack a minimum amount of justice. Dworkin's formulation also does not capture that the Rule of Recognition is a matter of social fact, though he shortly thereafter referred to it as a social rule.²⁷⁶

The next two theses are not distinctly Positivistic.²⁷⁷ The second was the Discretion Thesis.²⁷⁸ Dworkin attributed to Positivists the

supra note 138, at 676 (arguing that Dworkin engaged in "wild fabrication[s] of the positivist position").

273. See Leiter, *Beyond*, *supra* note 26, at 20 ("It is now well-known . . . that [in *The Model of Rules I*] Dworkin misrepresented Hart's views on all but [the Discretion Thesis]."). Dworkin replied, but like Hart's, his reply was not published until after his passing. See Dworkin, *Posthumous Reply*, *supra* note 33, at 2096–97. Dworkin's reply, in my view, did not break any new ground. Essentially, he argued that law and justice/morality cannot be separated. He contended that the question of what law "is" can never be completely separated from judgments about law's justness. See, e.g., *id.* at 2122.

274. See Dworkin, *Model of Rules I*, *supra* note 21, at 17.

275. Shapiro, *Perplexed*, *supra* note 25.

276. Dworkin, *Model of Rules I*, *supra* note 21, at 21.

277. Shapiro, *Perplexed*, *supra* note 25, at 8.

278. *Id.*

view that if a case is not “clearly covered by [a legal] rule”²⁷⁹ the judge exercises discretion to “decide that case by what amounts to a fresh piece of legislation.”²⁸⁰ Dworkin presented as its corollary the Obligation Thesis. The Obligation Thesis is that one has a legal obligation only by virtue of a legal rule (which is trivial) but Dworkin went on to say that “when the judge decides an issue by exercising his discretion [in Hart’s penumbra] he is not enforcing a legal obligation as to that issue.”²⁸¹

Dworkin slyly imputed to Hart, and Positivists generally, two untenable – or at least highly controversial – positions. Hart believed judges have discretion in the penumbra, but he didn’t see them as unfettered as a legislator. Hart spoke of deciding penumbral cases according to the purposes of the rule.²⁸² Taking the no-vehicles hypothetical, a judge could not one day decide that a bicycle is a vehicle, but the next decide an electrically powered toy car capable of going 40 m.p.h. is *not* a vehicle, without being subject to severe criticism and likely reversal from a higher court, or an amendment of the ordinance.²⁸³ One needs no special powers of induction to conclude that excluding bicycles represents a maximal effort to keep the park peaceful and safe, but allowing dangerously fast toy motorcars flouts that aim. Nor is the last part of the Obligation thesis – i.e., judges deciding cases in the penumbra are acting lawlessly – a necessary consequence of the Discretion Thesis. Lawyers litigate close cases that do not break their client’s way, but few would say the judge acted

279. Dworkin, *Model of Rules I*, *supra* note 21, at 17.

280. Dworkin, *Model of Rules I*, *supra* note 21, at 31.

281. *Id.* at 18.

282. Hart, *Separation*, *supra* note 20, at 612.

283. Leiter, *Beyond*, *supra* note 26, at 21 (Hart’s sense of discretion includes “standards that narrow the range of possible decisions”). Hart did refer to court decisions in the penumbra as “creative or legislative activity.” See HART, CONCEPT, *supra* note 19, at 135. However, he immediately clarified that this was akin to a delegation to an administrative agency. *Id.* at 135. While administrative agencies can reach a range of conclusions within their delegated authority, the range is not unlimited and inconsistent and unexplained results are set aside as arbitrary and capricious. See, e.g., *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, slip op. at 29 (June 18, 2020) (agency did not give a reasoned explanation for termination of Deferred Action on Childhood Arrivals (“DACA”) and thus it is arbitrary and illegal); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983) (agency decision to repeal seat belt and airbag requirements on newly manufactured automobiles is arbitrary and capricious); *Citizens v. Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (decision to route an Interstate highway through a community park set aside because not adequately reasoned).

lawlessly. Instead, the more common view is that it became a legal obligation because the judge said so, even if the legal obligation was unknown before the judgment.

Dworkin's real target wasn't these theses. Instead, he asserted Positivism is a system for validating rules, by which he meant "all or nothing" rules like the no-vehicles ordinance.²⁸⁴ Instead, Dworkin asserted, in hard cases non-binary principles and standards do the heavy lifting. In his most famous discussion of a case and a principle he turned to the then-nearly-century-old decision in *Riggs v. Palmer*.²⁸⁵ In that case, a grandson who was a beneficiary of his grandfather's estate, tired of waiting for his inheritance, murdered his grandfather. Under the statute read literally, the grandson was entitled to his share of the estate, but invoking the principle that "no man may profit from his own wrong"²⁸⁶ the New York Court of Appeals left the grandson empty-handed.²⁸⁷

Dworkin thought the failure of Hart's theory to take account of these non-rule principles was fatal. Principles are not all-or-nothing propositions but have a dimension of weight or importance.²⁸⁸ Dworkin argued principles could not be validated under the Rule of Recognition, but rather by "a sense of appropriateness developed in the profession and the public over time."²⁸⁹

Dworkin was confident the existence of legal principles falsified the Discretion Thesis, but also the Pedigree Thesis. He asserted, *ipse dixit*, that "[n]o tests of pedigree, relating principles to acts of legislation, can . . . be made to serve without abandoning that tenet altogether."²⁹⁰ But why could not a Rule of Recognition (or some other validating social rule) make room for new legal principles? Moreover, Dworkin's notion of community acceptance – apparently giving special weight to acceptance among the legal profession – strongly resembles Hart's notion of social rules.

No wonder Positivists find Dworkin maddening. He began with a slightly warped restatement of their position so he could discuss adjudication in hard cases. Dworkin wrote as if he discovered the distinction between rules and principles. Although Hart defaulted to the word "rule," he also used phrases like "principles, rules, and

284. Leiter, *Beyond*, *supra* note 26, at 22.

285. *Riggs v. Palmer*, 22 N.E. 188, 192–93 (N.Y. 1889).

286. Dworkin, *Model of Rules I*, *supra* note 21, at 25.

287. *Id.* at 23–24.

288. *Id.* at 27.

289. *Id.* at 41.

290. *Id.* at 44; *see also* Bix, *Positivism*, *supra* note 86, at 36 (discussing Dworkin's assertion that the Rule of Recognition cannot accommodate principles).

standards.”²⁹¹ Nor was the idea of competing weights – which Dworkin argued falsified the Pedigree Thesis – alien to Hart. Hart’s account resembles the reasoning of *Riggs* that Dworkin canonized. Speaking of decisions in his penumbra, Hart wrote:

The open texture of the law means that there are, indeed, areas of conduct where much must be left to developed by courts or other officials striking a balance in light of circumstances between competing interests which vary in weight from case to case.²⁹²

This is essentially the *Riggs* rationale Dworkin celebrated. The court faced competing interests. The New York Court of Appeals encountered a clear-on-its-face statute and weighed it against the stomach-churning result of the grandson winning. Dworkin offered no account as to why the Rule of Recognition cannot validate principles. Behind Dworkin’s caricature of Positivism is the unstated assumption that law is a closed system into which new rules and principles cannot enter, except by formal routes such as legislation or constitutional amendments. But Hart allowed that judges could introduce new principles, or apply them in novel ways, and by acceptance make them part of the legal system.

At Dworkin’s level of generality it is difficult to tell from where these principles come. Was the no-profit²⁹³ principle already a legal one when *Riggs* was decided? It’s not difficult to find legal support for a norm stated at a high level of generality. The New York Court of Appeals cited the U.S. Supreme Court case of *New York Mutual Life Insurance Co. v. Armstrong*,²⁹⁴ in which the Court refused to allow a murderer to take the proceeds of an insurance policy on the life of his victim – invoking a variant of the no-profit maxim.²⁹⁵ Despite the mystical status Dworkin gave the musty case of *Riggs*, the opinion is

291. HART, CONCEPT, *supra* note 19, at 168.

292. *Id.* at 135.

293. The principle as stated by *Riggs* is somewhat broader: “No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.” *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

294. *N.Y. Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (cited by *Riggs*, 22 N.E. at 190).

295. *Id.* at 600 (“It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken.”).

unremarkable.²⁹⁶ The New York Court of Appeals faced an unappetizing result if it applied the statute literally. In the time-honored tradition of common law courts, it found a way around it. *Riggs* perhaps can be explained by magical, Rule-of-Recognition – evading moral principles, but more plausibly it’s a case of weighing two competing interests – honoring the plain meaning of the statute versus avoiding a bad result – or on the Legal Realist account the New York court couldn’t stomach the grandson winning, and found a way for him to lose.²⁹⁷

2. Hard Cases, Right Answers, Hercules, and Integrity

Building on the distinction between rules and principles, Dworkin argued that in hard cases the law mandates a singularly correct answer.²⁹⁸ Fuller’s *bete noire* was a mere antiseptic intersection between legality and morality, and Dworkin’s was that if the law runs out judges decide cases based upon extralegal considerations. Dworkin sought to show that the law *never* runs out because principles of morality or justice enable a judge to find the right answer – making law an inherently a moral phenomenon, falsifying Positivism.²⁹⁹

Dworkin introduced a mythical judge Hercules possessing a superhuman ability to take account of all relevant legal, political, and moral considerations.³⁰⁰ Dworkin proposed a hypothetical in which Hercules is the judge facing a constitutional provision like the First Amendment’s Establishment Clause, and then decides the question of whether public busing for parochial school children is unconstitutional.³⁰¹ To resolve this case, Hercules must develop an entire theory of the Constitution “in the shape of the complex set of

296. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1233 (2009) [hereinafter Leiter, *Theoretical*] (arguing that *Riggs* opinions are “mundane”).

297. *Id.* at 1247 (discussing Realist explanation for *Riggs*).

298. Dworkin, *Hard Cases*, *supra* note 37, at 1101.

299. *Id.* at 1101–09 (describing how Hercules must take account of community morality and institutional fit).

300. *Id.* at 1083.

301. *Id.* at 1083. The Supreme Court recently ruled that a Maine program giving public tuition assistance to the parents of students attending private secondary schools could not exclude religious schools. *See Carson v. Makin*, 20-1088, slip op. at 18 (June 21, 2022). If Hercules had to take account of this case, it would make his job easy—busing parochial school students obviously would be constitutional.

principles and policies that justify that scheme of government. . . .”³⁰² This – dare we say Herculean – task requires him to alternately refer to political philosophy and institutional detail.³⁰³ Ultimately, Dworkin concluded that there is a right answer if we could summon Hercules’s powers.³⁰⁴

The right-answer thesis is wildly counterintuitive. Even considering the historical, institutional, precedential, moral, and political variables, to assert that a single right answer exists as to the constitutionality of abortion statutes or bans on same-sex marriage does violence to any lawyer’s instinct and experience.³⁰⁵ Hart’s penumbra (or the Realists’ account) matches better with practice. When the litigation strategy for recognition of same-sex marriage registered its first tentative victory in 1993 in a plurality opinion from the Hawaii Supreme Court,³⁰⁶ the subject was so far off the radar that Gallup had not even begun to poll it.³⁰⁷ When Gallup first polled the issue in 1996, support was a meager 27%.³⁰⁸ By 2015 when the Supreme Court decided *Obergefell v. Hodges*³⁰⁹ – finding an equal protection right to same-sex marriage – support had climbed to 60%, and has now risen to 70%.³¹⁰ Justice Roberts, in his *Obergefell* dissent (obviously referring to opinion polls), described the wind as freshening at the backs of proponents.³¹¹ The majority surely wasn’t simply reading the polls, but public opinion was clearly relevant to the outcome.

In the central book of Dworkin’s oeuvre, *Law’s Empire*, Hercules reappeared to engage in a refined version of Dworkin’s theory of adjudication called “integrity.”³¹² Dworkin again attacked Positivism, arguing it cannot account for theoretical disagreements.³¹³ Dworkin

302. Dworkin, *Hard Cases*, *supra* note 37, at 1085.

303. *Id.* at 1085.

304. See Dworkin, *No Right Answer*, *supra* note 263, at 1.

305. Leiter, *Beyond*, *supra* note 26, at 17.

306. See *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

307. Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, Gallup (June 8, 2021), <https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx>.

308. *Id.*

309. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

310. McCarthy, *supra* note 301.

311. *Obergefell*, 576 U.S. at 711 (Roberts, J., dissenting).

312. DWORKIN, *EMPIRE*, *supra* note 22, at 239; Leiter, *Why Positivism?*, *supra* note 130, at 16.

313. See DWORKIN, *EMPIRE*, *supra* note 22, at 11.

returned to *Riggs*, as well as *TVA v. Hill*,³¹⁴ in which a dam project was halted under the Endangered Species Act, because it threatened a recently discovered species of fish – the snail darter.³¹⁵ Both cases, as Dworkin presented them, involved a clash between a plain meaning versus an absurd result of statutory interpretation.³¹⁶ It's debatable whether that's a fair characterization, but we can demur; Dworkin argued Positivism cannot account for so-called "theoretical" disagreements such as whether to give a statute of purposive reading.³¹⁷

This is a spurious charge. In ordinary life, we have disagreements like this but process them. I recall a debate (really an argument) between my children as to whether, while in Orlando, we should spend more time at Disney World or Universal Studios. The older children favored Universal because it has "cooler rides." The younger children lobbied for Disney, because the rides are "just as cool," plus they wanted to meet the Disney characters. This prompted eye-rolling from the older children who cared not one whit about the Disney characters. So, we had a theoretical issue – should access to Disney characters count in the decision? – and a factual one – are the rides at Universal cooler than those at Disney? None of this was incomprehensible to the court of last resort, my wife.³¹⁸ Courts routinely deal with similar questions such as the best interests of the children in a divorce. Positivists had little trouble parrying this thrust from Dworkin.³¹⁹

D. Beyond Dworkin

I assert without much further argument that Positivism won the day. The difficulties Fuller and Dworkin saw with Positivism were not difficulties at all, or were explained by features of Positivism neither liked, but nonetheless fit with how law functions. Moreover, Positivism had withstood attacks because it doesn't make extravagant claims. In contrast, whether it was Fuller claiming that law requires coherence which has an affinity for good, or Dworkin maintaining that Hercules could puzzle out a unique right answer to the most difficult

314. DWORKIN, EMPIRE, *supra* note 22, at 15–23 (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889) and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

315. See *Tenn. Valley Auth.*, 437 U.S. at 158.

316. See DWORKIN, EMPIRE, *supra* note 22, at 15–23.

317. DWORKIN, EMPIRE, *supra* note 22, at 46.

318. She worked out some compromise, the details of which I have forgotten.

319. See, e.g., Leiter, *Beyond*, *supra* note 26, at 18.

of cases, they were left defending lonely strips of turf, while the Positivists were not.

Dworkin (and by extension Fuller) – though he lost the battle – didn’t completely lose the war.³²⁰ Dworkin’s insistence that courts, particularly the Supreme Court, invoke principles of justice without an obvious legal provenance seems correct, and Fuller’s attack on Positivism clearly inspired Dworkin. As to principles of justice or morality figuring in legal rights, the Anglo-American legal system has long had a component that seeks to do justice where cases fall between the gaps of the law or the law produces a manifestly unfair outcome – namely equity.³²¹ From our modern vantage point we don’t see equity as clearly as when it had separate courts.³²² But equity survived the merger into the courts of law and is with us still.³²³ Moreover, justice comes to the forefront in constitutional law. For example, in interpreting the Eighth Amendment’s prohibition on “cruel and unusual punishment” the U.S. Supreme Court has said that the

320. See *infra* note 447 and accompanying text.

321. Article III of the Constitution specifically gave the federal judicial power to federal courts in cases in “law and equity.” See U.S. CONST. art. III, § 2. For a comprehensive discussion of the history of equity and its role after the “merger,” see generally Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763 (2022). Rather than a cause of action, “[a] suitor in equity needed a grievance, a good story that would motivate the court.” *Id.* at 1764. Before the merger in the United States of law and equity into a single court, Chancellor Kent (who sat in Equity as one can deduce from his title (equity involved “an emphasis on the chancellor’s discretion, and the need for the plaintiff to motivate the chancellor to act,” see *id.* at 1772)) was seen as an exemplar of Legal Realism because he said that he first “mastered the facts” and then was able to find a principle to fit his notion of the just outcome. See Leiter, *American Realism*, *supra* note 115, at 53; see also Andrew Kull, *Equity’s Atrophy*, 97 NOTRE DAME L. REV. 1801, 1804 (2022) (“[w]hat has been largely forgotten . . . is equity’s residual power of intervention to correct *unjust legal outcomes*”) (emphasis added); Kull, *supra*, at 1809 (“most of equity’s judgments about fairness rest on ordinary intuition”). So-called “reception” statutes that received the common law in states were usually construed to receive equity as well, but even where they weren’t, pronouncements from tribunals sitting in equity were understood to at least be “evidence” of the law. See Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 603–04 (2002).

322. See Bray & Miller, *supra* note 315, at 1766–68 (discussing the historical fusion of law and equity).

323. See Bray & Miller, *supra* note 315, at 1795–98 (outlining the contemporary implications of the merger finding that equity remains a consideration throughout a cause of action).

prohibition on cruel and unusual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³²⁴

These are principles of justice. We no longer allow the imposition of the death penalty on persons who committed their crimes before they were eighteen³²⁵ or on persons with IQs below seventy³²⁶ because it is unjust, not because the Eighth Amendment was amended. In declaring the juvenile death penalty unconstitutional, the Supreme Court majority surveyed other nations and found very few allow the practice.³²⁷ The point of this survey must’ve been to assess its justice, not to look for norms internal to U.S. constitutional law. Any philosophical account of law must explain this reality. Dworkin’s primary project was to build a theory of adjudication around justice and thus describe law as inherently about justice and morality. Meanwhile, the Positivists split into two camps. One is hard or exclusive Positivists (“Exclusive Positivists”), the other soft or inclusive (“Inclusive Positivists”).

All modern Positivists agree that law is determined by social facts, and whether a norm is branded as a legal norm need not depend on its content or whether it has a minimum content of justice or morality.³²⁸ The Exclusive Positivists replace “need not” in the prior sentence with “does not.” In other words, Exclusive Positivists maintain that the social rule – Hart’s Rule of Recognition or something akin – must brand norms solely based on their sources, not content. Inclusive Positivists (to whose view I incline), agree a system could brand norms as legal based entirely on their sources, but also could have a social rule that brands some norms as legal based on their content. The practical difference is that when a court decides a hard case – such as the U.S. Supreme Court declaring the juvenile death penalty unconstitutional – Exclusive Positivists say that the law has run out and the Court reached for extralegal norms to decide

324. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

325. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

326. *See, e.g., Hall v. Florida*, 572 U.S. 701, 704 (2014).

327. *See Roper*, 543 U.S. at 575–78.

328. *See Bix, Positivism*, *supra* note 86, at 37 (Inclusive Positivism contends that “there is no *necessary* moral content to a rule . . . a particular legal system may . . . make moral criteria necessary or sufficient for validity. . . .”); Gardner, *Myths*, *supra* note 86, at 200 (“[I]n any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.”).

the case.³²⁹ Inclusive Positivists reach for norms of justice or morality if branded as legal norms by the Rule of Recognition. For example, Inclusive Positivists say the Eighth Amendment is part of a social rule that brands norms as legal if they reflect evolving standards of decency, which is a justice-based test.³³⁰

The best-known Exclusive Positivist is Joseph Raz, who was Hart's student at Oxford. Raz credited Hart as the "heir and torch-bearer . . . [of a] philosophy of law which is realistic and unromantic in outlook."³³¹ Raz set forth three theses describing respectively Exclusive Positivism, Inclusive Positivism, and Dworkinian anti-Positivism. The first he called "the Sources Thesis" which was that "[a]ll law is source based."³³² What he called "The Incorporation Thesis" is that "[a]ll law is either source based or entailed by source-based law."³³³ "The Coherence Thesis" is that "[t]he law consists of source-based law together with the morally soundest justification of source-based law."³³⁴ In Raz's view, law is law because it claims authority over those in the community.³³⁵ It is preemptive if it commands a subject to take or refrain from an action it replaces at least some of the other reasons a subject might have for so acting or not, such as my annoying 35 m.p.h. speed limit.³³⁶

Raz claimed his account best fits our understanding of the law. Legal institutions are called authorities and impose obligations on persons.³³⁷ This is consistent with the fundamental Positivist claim that law depends on social sources and not its merit.³³⁸ Raz, in a sympathetic reconstruction of Dworkin's view of law as coherence, rejects it. Because Dworkin requires judges to aspire to be Hercules, one cannot maintain that these yet-undiscovered legal norms claim authority over those in the community.³³⁹ Raz had more difficulty challenging Inclusive Positivism because it's closer to his view. He argued Inclusive Positivism requires viewing moral entailments of a source-based legal rule to be law, which he contends cannot square

329. See Gardner, *Myths*, *supra* note 86, at 219–20 (suggesting that lawmakers should look at the local norms of interpretation and draft laws accordingly).

330. See *Roper*, 543 U.S. at 561–68.

331. Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 295 (1985).

332. *Id.*

333. *Id.*

334. *Id.*

335. See *id.* at 300.

336. See *id.* at 299.

337. See *id.* at 300.

338. See *id.* at 305–06.

339. See *id.* at 305–10 (discussing the Coherence Thesis).

with his authority conception.³⁴⁰ Exclusive Positivism has many sophisticated defenders besides Raz, but my purpose here is merely to sketch its contrast with Inclusive Positivism.

The canonical statement of Inclusive Positivism is Jules Coleman's 1982 article,³⁴¹ whose views Hart later accepted.³⁴² Coleman began with three possible versions of the "separability thesis" advanced by Positivism, that is, the lack of some sorts of necessary relationships between law and morality.³⁴³ If one took the separability thesis to mean "that the law of a community is one thing and its morality another" this claim would be ambiguous.³⁴⁴ One interpretation would be that there's no overlap between legality and morality, a view quickly put to rest because killing an innocent victim is both illegal and immoral.³⁴⁵ Second, it could be merely an epistemic claim that one could learn the law of a community without learning its moral principles.³⁴⁶ The third, which Dworkin was anxious to impute to Positivists, is that the legality of a norm can never depend on its morality.³⁴⁷

This strong statement was essential to Dworkin's arguments in *The Model or Rules I*, but Coleman reduced the separability thesis to the more modest claim that legality and morality are conceptually distinct – neither has a constitutive relationship with the other.³⁴⁸ In its weakest form, which Coleman called "negative positivism," Positivism is merely committed to the proposition that there's at least one conceivable legal system whose Rule of Recognition doesn't make morality a condition of its legality.³⁴⁹ For instance, if law is what the Queen writes above her official seal, the morality or justice of what she writes is irrelevant to its legality. She might be a benevolent Queen whose pronouncements are all just and moral, or she might be the Evil Queen of *Snow White* – it doesn't matter.

Coleman's goal in denying that Positivism is committed to the view that morality can never be a condition of legality was to evade

340. See *id.* at 311–15 (discussing the Incorporation Thesis).

341. Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982) (hereinafter Coleman, *Negative*).

342. See HART, CONCEPT, *supra* note 19, at 250–54 (discussing "soft positivism" and mentioning Coleman, *supra* note 335, at 251, n.36).

343. Coleman, *Negative*, *supra* note 335, at 142.

344. *Id.*

345. See *id.*

346. See *id.*

347. See *id.*

348. See *id.* at 142–43.

349. *Id.* at 143.

Dworkin's attack in the *Model of Rules I*.³⁵⁰ Unlike some other Positivists, Coleman found Dworkin's rule/principle distinction persuasive and took him to say that principles are law by virtue of their truth or acceptance as appropriate to resolve the dispute.³⁵¹ Coleman called this version of positivism *negative* because it makes a small claim.³⁵²

Coleman then defended a form of *positive* Positivism, but with a master social rule that brands some principles legal based upon their content.³⁵³ Coleman's invention of Inclusive Positivism was a response to Dworkin's charge that – because judges appear to engage in moral reasoning at the edges of the Rule of Recognition – law must be an inherently moral phenomenon. This, according to Dworkin, shows that Rules of Recognition are inherently normative, because social rules cannot give rise to content disputes.³⁵⁴ Coleman carefully reconstructed Dworkin's arguments, but rejected them. Judicial reasoning from facts about morality and justice doesn't falsify the proposition that the Rule of Recognition is social; it shows a convention to rely on these principles in disputed cases.³⁵⁵ Thus, principles of justice becoming celebrated legal norms doesn't mean law isn't grounded on a social construct.³⁵⁶

Inclusive Positivism has an appeal, especially to American lawyers who read many cases in which justice crashes the party.³⁵⁷ To pick a fairly well-known case, consider *Tinker v. Des Moines Independent Community School District*.³⁵⁸ There, the Supreme Court held that public high-school students had a First Amendment right to wear black armbands at school to protest the Vietnam War. Early on, the Court wrote that “students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . .”³⁵⁹ The Court deduced this principle from an

350. *See id.* at 143–44.

351. *See id.* at 143.

352. *See id.*

353. *See id.* at 148–49.

354. *See id.* at 150–51 (discussing Dworkin's views).

355. *See id.* at 151.

356. For instance, as to the principle invented by the Supreme Court in the *Tinker* case discussed just below, a Lexis search of May 30, 2022, showed that this language had been quoted 471 times by U.S. courts.

357. *See* Bix, *Positivism*, *supra* note 86, at 37 (“[t]he strongest argument for inclusive legal positivism seems to be its fit with the way both legal officials and legal texts talk about the law”).

358. *Tinker v. Des Moines Independent Cmty. Sch. Dist.*, 93 U.S. 503 (1969).

359. *Id.* at 506

earlier case holding that states could not prohibit the teaching of a foreign language to young students, but that's a far cry from symbolic speech by near-adult students.³⁶⁰ To an Inclusive Positivist, this could be a legal principle because it is consistent with our constitutional design and the Constitution is part of the United States' Rule of Recognition. To an Exclusive Positivist, it's either a legal principle because it claims authority, or it's an extralegal principle to which the Court resorted because the law ran out. But either way, the Court wrote as if it were already a legal principle.

In the end we are left with three major camps: Exclusive Positivism, Inclusive Positivism, and anti-Positivism.³⁶¹

II. JUSTICE

Perhaps the preceding section was a long run for a short slide. But I hope not. The three main camps partially converge. As Leiter noted, if one wants to make an argument from morality – or justice, I'm getting to that, I promise – one can assume the anti-Positivist stance (especially Dworkin's) and argue moral principles are inextricably interwoven with law, one can take the Inclusive Positivist stance and argue a capacious Rule of Recognition brands as legal the relevant principles of justice, or one can take the Exclusive Positivist stance

360. *Id.* (citing *Meyers v. Nebraska*, 262 U.S. 390 (1923)).

361. Brilliant natural law theorist John Finnis deserves better than a footnote, but that's all I have to offer. While Dworkin garnered most of the attention in the anti-Positivist camp, Professor Finnis had held down the position of what is the most naturalist of the anti-Positivists. See Leiter, *Why Positivism?*, *supra* note 130, at 13 (Finnis is the "most sophisticated proponent" of natural law theories). Finnis agrees that Positivism describes law in a way that a "competent lawyer" would view it, though he thinks the same of natural lawyer. See Finnis, *Incoherence*, *supra* note 241, at 1611 (2000). Finnis is in search of deeper connections in so-called "central cases" of law and answering questions that Positivists were not asking, "such as whether there is a moral obligation to obey the law." Leiter, *Demarcation*, *supra* note 138, at 666 n.18. "Finnitian Natural Law, charitably understood, is just doing something different, trying to explain the features of morally ideal legal systems." See Leiter, *Why Positivism?*, *supra* note 130, at 14. Given that I am attempting to assess the state of play in legal philosophy from the standpoint of (in particular) lawyers, these questions are beyond my ken.

and argue for the application of extralegal principles.³⁶² So, from the standpoint of a practicing lawyer or a judge, who cares?³⁶³

I believe there are good reasons to care. But first allow me a presumptuous pronouncement. The Hart-Dworkin debate is over, and Hart (really the Positivists) won.³⁶⁴ As Leiter points out, human creations generate insoluble demarcation problems.³⁶⁵ He uses the example of a chair. We know what a chair is, but attempting to describe the properties that both define a chair and exclude anything else is maddening.³⁶⁶ Chairs can be sat on. But so too can a lot of other things, like couches and steps. Plus, chairs can be used for other things, like stacking papers in a messy office or changing light bulbs. Besides, some chairs are not for sitting on, like a museum piece last sat on 200 years ago. Chairs also vary in many respects. Some have arms, some have wheels, some have four legs and some don't, and so on. But any visitor to my office asked to point to the chair would point to the thing behind my desk.

If we can't come up with a sure-fire test for identifying a chair, why expect to do better with law? We shouldn't abandon the concept of chairs or law. Positivism does as well as can be humanly expected of identifying some norms as legal. When I assert the Hart-Dworkin debate is over I'm not suggesting nothing more will be written about it – more ink will be spilled. But, for practicing lawyers, further deep soundings to detect new relationships between legal and other norms don't seem likely to yield anything of practical use.

As for my predicted fade-to-black of the Hart-Dworkin debate, the shifting agenda of the last few decades was set by Dworkin as he sent Positivists scurrying to counter his unpredictable moves.³⁶⁷ However, Dworkin has passed away, and it's unlikely a figure of his brilliance and stature can take up the fight anytime soon, nor is anyone likely

362. See Leiter, *Beyond*, *supra* note 26, at 27.

363. At least one famous judge, former Seventh Circuit Judge Richard Posner, doesn't care. See RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 3 (1996) (discussing that the conceptual theorization of "law" is of no value without a real-world payoff).

364. Other commentators have reached the same conclusion. See, e.g., Leiter, *Beyond*, *supra* note 26, at 18.

365. See Leiter, *Demarcation*, *supra* note 138, at 666.

366. See Leiter, *Demarcation*, *supra* note 138, at 666–68.

367. See Leiter, *Why Positivism?*, *supra* note 130, at 19 ("The trademark Dworkinian move in his decades-long battle with legal positivism was always to run together questions about what the law is (on which he and positivists had opposing views) with the question how courts should decide particular cases (where positivists could often agree with Dworkin).").

to endorse the quirkier aspects of his theories.³⁶⁸ Anti-Positivists are now rallying around a position that Dworkin argued for in his whimsically named last book, *Justice for Hedgehogs*,³⁶⁹ in which he staked out the position that legal norms are a subset of moral norms.³⁷⁰ But even if this line of argument gets traction, it's likely to

368. A possible candidate to pick up the torch, though perhaps carry it in a different direction, is David Dyzenhaus. Although not endorsing all aspects of Dworkin's theory, in an important new book, he argues that the true divide is between "dynamic" and "static" versions of law. To quote an authoritative review: "Dyzenhaus believes we should put to the side the question whether there is a necessary connection between law and morality and concentrate our efforts, instead, in developing a dynamic theory of law. The fundamental debate within jurisprudence is 'neither between legal positivism and natural law theory, nor between theories of law and theories of adjudication', but rather the divide 'between static theories of law, as espoused by Bentham, Austin, Hart and Raz, and dynamic theories, as espoused by Hobbes, Kelsen, Radbruch, Fuller and Dworkin.'" See Thomas Bustamante, *Interpretive Authority and the Kelsenian Quest for Legality*, JOTWELL, July 5, 2022, at 1 (reviewing DAVID DYZENHAUS, *THE LONG ARC OF LEGALITY: HOBBS, KELSEN, HART* (2022)), <https://juris.jotwell.com/interpretive-authority-and-the-kelsenian-quest-for-legality/> (quoting pages 22–23), <https://juris.jotwell.com/interpretive-authority-and-the-kelsenian-quest-for-legality/> (last visited April, 1, 2023). As I have argued above, however, I believe that Positivism, properly understood, is not static, but Dworkin so treated it for argumentative purposes. See *supra* notes 286–87 and accompanying text ("Behind Dworkin's caricature of Positivism is the unstated assumption that law is a closed system into which new rules and principles cannot enter, except by formal routes like legislation or constitutional amendments.").

369. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011).

370. See *id.* at 402. A fair-minded review of this book is Dan Herzog, *A Cute Prickly Critter with Presbyopia*, 110 MICH. L. REV. 953 (2012) (reviewing RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011)). "Presbyopia" is the medical term for the reduced ability to see close objects clearly as one ages, hence the large inventories of reading glasses at drug stores. See, *Presbyopia Definition & Meaning*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/presbyopia>, (last visited Mar. 2, 2023). Herzog believes some of Dworkin's arguments need reading glasses. Herzog mentions Dworkin's shift on the relationship between legal and moral norms. See Herzog, *supra*, at 962 ("Dworkin does acknowledge here an important architectonic shift in his own jurisprudence: he no longer believes that law and morality are independent systems of norms." See *id.* at 962. In places, Dworkin seemed remarkably Thomistic. He wrote: "The hideous Nazi edicts did not create even prima facie or arguable rights and duties. The purported Nazi government was fully illegitimate, and no other structuring principles of fairness argued for enforcement of those edicts. It is morally more accurate to deny that these edicts were law." DWORKIN, *supra* note 363,

replicate the approach described in Dworkin's famous *Hard Cases* essay.³⁷¹

In contrast, Positivism has many disciples and is, in the words of a leading contemporary Positivist, a "broad church."³⁷² One of the reasons I incline to Inclusive Positivism is it fits how cases are argued and opinions are written. Lawyers, particularly lawyers who advocate before trial and appellate courts on legal issues, have well-developed instincts as to which principles are legal ones – or those that can be so framed – just like we identify chairs, without exactly being able to say how we do it. Even if Exclusive Positivists are right that courts reach for extralegal principles to decide cases, that's not the way (at least in the United States) courts write their opinions and it's not the way to argue to courts.³⁷³ Courts may engage in self-delusion, but even in the hardest Supreme Court cases the Justices write their opinions as if they are based on the law, even if it entails huge extrapolations, as it did in *Tinker*.³⁷⁴

To give Dworkin his due, he wasn't shy about justice and engaging political philosophy.³⁷⁵ Moreover, Dworkin tried to influence Supreme Court cases and guide practicing lawyers. One of his complaints about analytic legal philosophy is that it's walled off from legal doctrine.³⁷⁶ This charge is overblown as some contemporary legal philosophers are engaging with legal doctrine and adjoining philosophical areas, but there's truth to Dworkin's complaint that much of the literature avoids the messy work of assessing the actual adjudication of cases.³⁷⁷ Trying to translate this now-nearly-seventy-year philosophical debate into something more easily put to use by lawyers and judges is worthwhile.

at 411. See generally Hasan Dindjer, *The New Legal Anti-Positivism*, 26 LEGAL THEORY 181 (2020) (other anti-positivists suggest that legal norms are moral norms).

371. See Dworkin, *Hard Cases*, *supra* note 37.

372. JULIE DICKSON, OURS IS A BROAD CHURCH: INDIRECTLY EVALUATIVE LEGAL PHILOSOPHY AS A FACET OF JURISPRUDENTIAL INQUIRY, 6 JURIS. 207, 229 (2015).

373. See Leiter, *Beyond*, *supra* note 26, at 27 (as to extralegal principles "the Hard Positivist must insist that we not be misled by judicial rhetoric in these cases: non-pedigreed principles are not legally binding, but it is all too obvious why judges should want to write their opinions as if they were.").

374. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

375. See Dworkin, *Thirty Years*, *supra* note 77, at 1678–79.

376. *Id.* at 1678–79 (hypothesizing that part of Positivism's hold is not as an attractive theory of law "but of legal philosophy as an independent, self-contained subject and profession.").

377. *Id.*

In a bitter review of Coleman's 2001 book setting forth the case for Inclusive Positivism,³⁷⁸ Dworkin contended Inclusive Positivism isn't Positivism at all, but "only an attempt to keep the name 'positivism' for a conception of law and legal practice that is entirely alien to positivism."³⁷⁹ Rather, Dworkin argued, Inclusive Positivism is *Hart's* conception of law, dressed in Positivist garb.³⁸⁰ He repeated his *Law's Empire* argument that the Rule of Recognition cannot accommodate moral principles because it loses its character as a social rule as theoretical disagreements emerge. As I argued above, this is a spurious charge.³⁸¹ Dworkin also argued his theory fits better with legal practice; but, fortunately for Positivists, Inclusive Positivism is not wedded to Dworkin's right-answer thesis, nor to the view cases are never decided on policy when courts obviously rule based on policy.³⁸² However, Dworkin was right that Inclusive Positivism moved his direction by accepting that courts employ principles of justice, and they treat them as part of the law, not as extralegal principles.

So why talk about justice instead of morality? The two are closely related, though – in one pithy description – "Justice is about living with other people, while morality is about living with yourself."³⁸³ I have no designs on contributing new theories of justice, a task taken on comprehensively no later than Plato's *Republic*. Framing the relationship as one between law and morality has a distinguished provenance, including Hart's Harvard lecture.³⁸⁴ In a chapter of *The Concept of Law* that doesn't get much attention, Hart addressed the justice/morality question and decided on morality, because he found justice too mushy.³⁸⁵

378. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001).

379. Dworkin, *Thirty Years*, *supra* note 77, at 1656.

380. *See id.* at 1658. Dworkin adhered to this – if I may so – preposterous position until his passing. *See* Dworkin, *Posthumous Reply*, *supra* note 33, at 2116.

381. *See supra* notes 312–13 and accompanying text.

382. *See* Dworkin, *Hard Cases*, *supra* note 37, at 1060; Dworkin, *Posthumous Reply*, *supra* note 33, at 2122–23. For refutations, *see, e.g.*, Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 993–96 (1977); Note, *Dworkin's "Rights Thesis"*, 74 MICH. L. REV. 1167, 1171 (1976).

383. *See* Isaac Morehouse, *Justice and Morality*, ISSAC MOREHOUSE, (June 21, 2013), <https://isaacmorehouse.com/2013/06/21/justice-and-morality/>.

384. *See* Hart, *Separation*, *supra* note 20.

385. *See* HART, *CONCEPT*, *supra* note 19, at 155–84; *see also id.* at 158 ("most of the criticisms of just or unjust could almost equally well be conveyed by the words 'fair' and 'unfair'").

But as the words are used today, understanding of legal philosophy would improve with justice-talk. Morality conjures up questions of sexual morality – is it moral to be in an openly polyamorous relationship? – that are no longer of much relevance in substantive law. True, variants of morality and justice are sometimes interchangeable. With regard to the informing Nazi wife, we could say her conduct was immoral or unjust. But the latter is awkward. However, we have no difficulty saying that the death sentence on the husband was unjust, while immoral clangs the ear.

In current usage, justice refers to how the community treats one of its members and morality refers to the conduct of a member of the community.³⁸⁶ For example, it's immoral (and illegal) to shoplift. But it would be unjust to let the shoplifter go free without any sanction and making restitution. To revisit Dworkin's favorite case of *Riggs*,³⁸⁷ the grandson's killing of his grandfather was immoral (and illegal) but allowing him to keep his part of the inheritance would have been unjust.

Speaking in terms of justice has advantages. Primary rules are communications from the community to a community member – the direction justice travels most easily. Justice has always been a central concern of political philosophy.³⁸⁸ Because the Supreme Court is a substantially political institution – particularly in polarizing cases – thinking about its judgments in terms of justice yields promising lines of inquiry. We have useful theories of justice at hand – I propose trying Rawls's on for size – while moral philosophy is impenetrable to most. Unless they were philosophy majors, most lawyers and judges don't have well developed views on Kantian versus Aristotelean ethics, if they know anything about them at all. Of course, most lawyers and judges probably don't have Plato's *Republic* and Rawls's *A Theory of Justice* on the nightstand either, but particularly the latter is easier to apply to legal norms.

Because justice travels in the same direction as primary legal norms, my contention is that most will see the fit between justice and law more easily. Let's consider Rawls. He began with a group in what he called "the original position."³⁸⁹ The original position is a state in which a person is a rational actor, but knows nothing of her own abilities.³⁹⁰ Rawls postulated that persons in the original position creating a just state would arrive at two principles. One he called "the

386. See Rawls, *Justice as Fairness*, *infra* note 384, at 231.

387. For a discussion, see *supra* notes 279–84 and accompanying text.

388. RAWLS, JUSTICE, *supra* note 34, at 3.

389. RAWLS, JUSTICE, *supra* note 34, at 18.

390. See *id.* at 18–19.

liberty principle,” which is that every person would have maximal liberty, consistent with other persons having the same.³⁹¹ So, for example, everyone would have liberty to engage in consensual sexual practices, but not liberty to sexually assault another.

The second is that offices and positions of influence would be open to all and disparities in wealth accepted only to the extent they benefit the least well off.³⁹² This he originally called the “equality principle,” but later he named the second half the “difference principle,” or as it’s sometimes known the “the maximin principle” – to maximize the wealth of the person with the least.³⁹³ If the two conflict, liberty trumps equality.³⁹⁴ Imagine ten persons faced with two possible allocations of wealth units. One gives twelve wealth units to nine community members and ten to the last one. The second gives fifteen wealth units to nine community members and eight to the last one. Rawls argued that the group would choose the first distribution over the second, even though the second has higher aggregate wealth.³⁹⁵ Generally, the difference principle is a commitment to equality to the extent practicable and consistent with liberty’s priority.

Neither is free from difficulty. As to the liberty principle, it allows behavior most would prefer to be illegal, such as dog-fighting contests, and doesn’t require actions most would prefer legally mandated, such as requiring airbags in newly manufactured cars. The difference principle is extremely risk averse, though Rawls defended it.³⁹⁶ For example, in a choice between nine people having a million wealth units with the last having nine units or all ten having ten wealth units, I’d vote for the former, but Rawls argued for the latter.

391. *Id.* at 60.

392. *See id.* at 61.

393. As Rawls originally formulated the equality principle, the group would agree to a distribution “reasonably calculated to be to everyone’s advantage.” *Id.* at 62. He later restated and arguably clarified this so that the least well off would have to get the largest jump forward. *See* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFFS. 223, 227 (1985). I attended a small colloquium with Rawls in 1984 as he was clarifying the equality principle. It was clear that in significant part his target was the “trickle down” economics of President Reagan. He said that even if the poor benefited some from Reagan’s policies—an assertion about which he was clearly skeptical—it wasn’t enough that they benefited some, they had to benefit the most, and the considerable cuts to the top marginal income tax rates clearly were benefiting the rich to a greater extent.

394. *See* RAWLS, JUSTICE, *supra* note 34, at 62–63.

395. *See id.*

396. *See* John Rawls, *Some Reasons for the Maximin Criterion*, 64 AM. ECON. REV. 141, 143–44 (1974).

But putting aside peripheral issues, the equality and liberty principles are attractive. Consider them as they played out in *Rucho v. Common Cause*.³⁹⁷ In *Rucho*, congressional districts were severely gerrymandered to the benefit of the state's dominant political party. Voters whose votes were rendered practically worthless by "packed districts" sued and won in the lower federal courts.³⁹⁸ A five-Justice majority of the Supreme Court dismissed the case on the grounds that it presented a nonjusticiable "political question" – even though the Court since *Baker v. Carr*³⁹⁹ has injected itself into election-district line-drawing. In the North Carolina map in *Rucho*, although Republicans consistently garnered about half the statewide congressional vote, the state legislature drew a map likely giving ten of North Carolina's thirteen seats in the House of Representatives to Republicans.⁴⁰⁰ Sophisticated computer analysis created three seats in which Democratic candidates had a huge advantage (where their voters were packed) and ten where the Republicans had a modest, but likely sufficient, advantage – though those districts were more competitive.⁴⁰¹

Despite the majority's hand wringing about the risks of the judiciary becoming involved in refereeing gerrymandering disputes, as Justice Kagan noted in dissent, the Court was only being asked to void egregious maps.⁴⁰² In states in which redistricting is delegated to a nonpartisan commission, districts are more geographically compact and vote more in proportion to the statewide vote, resulting in more electorally competitive districts.⁴⁰³

The Court's *Rucho* decision to let the maps stand was politically consequential. Nothing about the case was unmanageable, the touchstone for the political question doctrine.⁴⁰⁴ Evaluated by the liberty and equality principles, the result is wrong. As Justice Kagan noted in dissent, allowing such a skewed map to stand obviously violated basic notions of equality.⁴⁰⁵ The voters stuck in the three

397. 139 S. Ct. 2484 (2019).

398. *Id.* at 2491.

399. 369 U.S. 186 (1962).

400. *See Rucho*, 139 S. Ct. at 2492.

401. *See id.* at 2518 (Kagan, J., dissenting).

402. *See id.* at 2509 (Kagan, J., dissenting).

403. *See* Noah Litton, *The Road to Better Redistricting: Empirical Analysis and State-Based Reforms to Counter Partisan Gerrymandering*, 73 OHIO ST. L.J. 839, 861–863 (2012) (independent commissions produce less-partisan maps leading to more competitive districts).

404. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019).

405. *See id.* at 2514 (Kagan, J., dissenting).

heavily Democratic districts were relegated to casting “wasted” votes.⁴⁰⁶ This violates the liberty principle because many of the state’s voters had the chance to cast a meaningful vote taken away.

Rucho was a five-to-four decision with the Republican-appointed Justices in the majority and the Democratic-appointed Justices in dissent. State-level gerrymandering works to the advantage of Republicans. A significant reason is that eight states use independent redistricting commissions to draw congressional district lines: Arizona, California, Colorado, Hawaii, Idaho, Michigan, New Jersey, and Washington.⁴⁰⁷ President Biden carried all of those states in 2020, except for Idaho.⁴⁰⁸ Thus, the opportunity for gerrymandering in favor of Democratic congressional candidates is off the table in several high population states (including the biggest prize of all – California), but not for Republicans in high population states like Texas and Florida.

Despite *Rucho*’s party-line division, I doubt the majority Justices were staring at precinct maps with calculators figuring the best route for the Republicans to control the House of Representatives. But the case starkly illustrates the different value the Justices put on equality. The majority was content to let the political parties wrestle for supremacy at the state level,⁴⁰⁹ no matter how anti-egalitarian the outcome. As a matter of legal analysis, the majority opinion is unconvincing. The Court has found justiciable controversies over voter dilution because of state and federal districts with substantially unequal populations,⁴¹⁰ and suits to void redistricting to disenfranchise minority racial groups.⁴¹¹ In dissent, Justice Kagan skewered this reasoning: “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.”⁴¹²

But consider *Rucho* in terms of the Rule of Recognition. Justice Roberts, writing for the majority, pointed out that gerrymandering has a long history without being policed by any overarching equality requirement.⁴¹³ Roberts noted that the term gerrymander dated to

406. *Id.* at 2492.

407. *See Redistricting Commissions*, BALLOTPEdia, https://ballotpedia.org/Redistricting_commissions (last visited Apr. 1, 2023).

408. Michael Andre et. al., *Presidential Election Results: Biden Wins*, N.Y. TIMES, Nov. 3, 2020.

409. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019).

410. *See, e.g., Baker v. Carr*, 369 U.S. 186, 209 (1962).

411. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 642 (1993).

412. *Rucho v. Common Cause*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

413. *See id.* at 2494–96.

1812 when Massachusetts Governor Elbridge Gerry created a district map to protect his political party, and a scathing newspaper editorial decried it and pointed out that one of the districts looked like a salamander – hence “gerrymander.”⁴¹⁴ Roberts then used a combination of familiar strategies for a minimalist constitutional reading, including strict reliance on the text – noting it only gave state legislatures the power to set the time, place, and manner of congressional elections – and a species of originalism.⁴¹⁵

In contrast, Justice Kagan’s opinion for the four dissenters began with an ode to an equality principle. In the second paragraph of her dissent, she wrote:

The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.⁴¹⁶

Roberts and Kagan were debating the edge of the Rule of Recognition. Roberts, a political conservative, often flies the flag of “originalism,” which – as I argue below – is a strategy for recognizing fewer constitutional rights and reaching politically conservative results.⁴¹⁷ Roberts refused to see a broad *legal* principle of equality that would require the North Carolina legislature to start over. Kagan perceived the Constitution as, in part, a Rule of Recognition that brands as legal a broad equality norm.⁴¹⁸ As she saw it, the Court should rectify the North Carolina map because it was an affront to fundamental equality norms.

414. *Id.* at 2494.

415. *See id.* at 2495–97.

416. *Id.* at 2509–10 (Kagan, J., dissenting).

417. *See infra* notes 412–28 and accompanying text.

418. *See supra* notes 386–94 and accompanying text.

Supporters of *Rucho* likely contend it keeps the Court out of politics. But it's far too late in the day to make that argument convincingly. The Court has made rulings of enormous consequence in campaign finance,⁴¹⁹ enforcement of the Voting Rights Act,⁴²⁰ redistricting,⁴²¹ and state recount procedures.⁴²² If the Court had consistently deferred to the other branches, the hands-off argument might be defensible. But the Court has intervened selectively, sometimes supporting broad notions of equality and liberty and sometimes not.

Reframing the discussion from a law-morality to a law-justice relationship allows legal philosophy to reclaim territory it rightfully owns. If one inclines to Inclusive Positivism, and the position that the Constitution – as part of the Rule of Recognition – should be understood more capaciously than the originalists would have it, a general norm of equality is a legal principle. If it brands more generalized norms as legal norms, we need a theory that gives these norms life, but cabins them. Not only do norms of equality and liberty find a home in a theory of justice, they also find a home in the Constitution, particularly after the Civil War Amendments.

III. THE SUBSTANTIALLY POLITICAL SUPREME COURT AND THE FALSE PROMISE OF ORIGINALISM

The Legal Realists are in the corner with an I-told-you-so smirk on their faces. It would be, in the words of Austin, a “childish fiction”⁴²³ to view the Supreme Court as anything other than a substantially political institution. As noted above, in the most contentious cases, Supreme Court voting breaks down along partisan lines,⁴²⁴ and particularly so in cases like *Rucho* with direct political implications.

Should we say to the Realists “you were right all along?” We could throw up our hands, adopt the view that it's a matter of personal preferences of each Justice, and write Brandeis briefs focusing entirely on the facts and social implications of the case.⁴²⁵ But perhaps instead we can say to the Realists “fair enough,” a dash of

419. See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

420. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).

421. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

422. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

423. AUSTIN, PROVINCE, *supra* note 71, at 634.

424. See *supra* notes 38–47 and accompanying text.

425. See Dworkin, *Model of Rules I*, *supra* note 21, at 15.

Realism is called for in these days in which advocates are well-advised to tailor their arguments to the court's political philosophy.

But Inclusive Positivism can do better than Realism, both as a philosophy of law and informing the rhetorical stance that advocates should take. One of the reasons to incline to Inclusive Positivism is it best matches how courts write their opinions and decide cases.⁴²⁶ Even in a political case like *Rucho*, the majority attempted to find a legal framework – the political question doctrine.⁴²⁷ The advocates for retaining the North Carolina map were well-advised to find a plausible legal doctrine to allow the Court to reach the result it did.

The most conservative and liberal Justices deploy different political philosophies and conceptions of justice, but they are also debating – though not in exactly these terms – the contours of the United States' Rule of Recognition. The fashionable method of constitutional interpretation among political conservatives is “originalism.”⁴²⁸ However, a multitude of theories fly that flag.⁴²⁹ Rather than being a single, coherent, and self-evidently-legitimate method of interpretation, on closer inspection originalist approaches disagree with each other, and allow judges and justices to make normative choices by choosing between strains.⁴³⁰ Within the originalism camp, theories of constitutional interpretation include the intent of the drafters of the Constitution,⁴³¹ the intent of those who attended state ratifying conventions,⁴³² the original meaning as understood by the drafters (or ratifiers, or both),⁴³³ and the public meaning of the words at the time of adoption.⁴³⁴ To quote one commentary: “Some originalists have focused on the understanding of the drafters; others on the understanding of the ratifiers; and still others on the understanding of the public.”⁴³⁵

426. See *supra* note 322 and accompanying text.

427. See *Rucho v. Common Cause*, 139 S. Ct. at 2487.

428. See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 240 (2009) (hereinafter Colby & Smith, *Living Originalism*).

429. See *id.* at 240–42.

430. See *id.* at 244 (“A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.”).

431. See *id.* at 248.

432. See *id.* at 249–50.

433. See *id.* at 249.

434. See *id.* at 251.

435. *Id.* at 251–52.

A consistent originalist theme is that it reaches politically conservative results. The prize is unenumerated rights. This was evident in *Dobbs v. Jackson Women's Health Organization*.⁴³⁶ In holding that there is no constitutional right to an abortion, the majority restricted “unenumerated rights” – any right not specifically mentioned in the Constitution – to those “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.”⁴³⁷ Although purporting not to call into question non-abortion decisions,⁴³⁸ the majority deployed a familiar number of originalist strategies – such as surveying the legality of abortion at the time of the ratification of the Fourteenth Amendment.⁴³⁹ But the central point is that originalism (regardless of variety) is a conservative political philosophy not easily defensible as a theory of legal interpretation. As one commentator observed, “defenses of originalism, with rare exceptions, leave its nature mushy and confused” and that it’s really “a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional positions in the current age.”⁴⁴⁰

As a comprehensive strategy to limit the Rule of Recognition, originalism (in whatever form) is illegitimate, or at best highly problematic. Despite its name, which implies it has ancient roots, originalism is a fairly recent invention, dating to 1971 when then-Supreme Court nominee Rehnquist promised to interpret the Constitution in accordance with the “original intent” of the Framers.⁴⁴¹ Early on, Rehnquist was an outlier on the Supreme

436. 142 S. Ct. 2228 (2022).

437. *Id.* at 2242 (internal citations and quotations omitted).

438. *See id.* at 2261 (citing, e.g., *Lawrence v. Texas*, holding that private, consensual sexual activities are constitutionally protected; *Obergefell v. Hodges*, holding that same-sex marriage is constitutionally protected; *Griswold v. Connecticut*, holding that married couples have a constitutional right to obtain contraception).

439. *See id.* at 2265–72.

440. Richard H. Falion, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL’Y 487, 487, 492 (1996). Interestingly, Dworkin – in his posthumous reply to Hart – discussed originalism. *See* Dworkin, *Posthumous Reply*, *supra* note 33, at 2115. Dworkin, however, cast it as an interpretive strategy, rather than as a dispute about the Rule of Recognition. *See id.* One of the reasons I adhere to Inclusive Positivism is that the debate about whether the Civil Rights Amendments should be frozen in their meaning – as they would’ve been understood in the latter half of the nineteenth century – is more than a dispute about the meaning of the words, it’s a debate about what ought to count as law. Dworkin casts it as the former and Positivism as the latter. I see the stakes as being more in line with the latter.

441. *See Living Originalism*, *supra* note 416, at 428.

Court, authoring the largest number of solo dissents in the history of the Court.⁴⁴² It's only in the last thirty years or so that it attracted enough support so that extensive opinions as to how Amendments to the Constitution would have been understood at the time of ratification have become commonplace.⁴⁴³ Before that, even politically conservative Supreme Courts justified outcomes with non-originalist arguments.⁴⁴⁴ Rules of Recognition earn their status as accepted social rules. But until recently, there was no hint that the Constitution was limited to rights as found within the four corners of the text or as envisioned at ratification of the relevant provision.

Much of the Constitution is not written to be applied in an originalist or literal fashion. An obvious case is the Eighth Amendment's prohibition on cruel and unusual punishment.⁴⁴⁵ What's usual in one age might be unusual in another. Moreover, the Constitution's broad commands, such as due process and equal protection,⁴⁴⁶ enshrine capacious principles, not immutable, specific commands.⁴⁴⁷ Imagine writing a business dress code. If one wrote "employees must wear appropriate professional dress" it would be silly to expect the rule to be interpreted in the same fashion twenty years hence; modes of dress change, as do notions of what groups must be treated equally or what it means to treat them equally, as the long-running debate over affirmative action shows. If one wrote "employees must wear long sleeved shirts or blouses" one would expect it to be followed, assuming it hadn't been amended.

442. See Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 124, n.63 (2009) (Rehnquist may hold the Court record for solo dissents with fifty-four).

443. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (acceptance of in-state service as conferring *in personam* jurisdiction at the time of the ratification of the Fourteenth Amendment in 1868 renders it constitutional without inquiry into the fairness of the rule).

444. See, e.g., *Lochner v. New York*, 198 U.S. 45, 46, 64 (1905) (declaring unconstitutional New York statute limiting an employee to sixty hours of work per week).

445. See U.S. CONST. amend. VIII.

446. See U.S. CONST. amend. V, XIV.

447. See Bix, Positivism, *supra* note 86, at 37 ("The more familiar example for inclusive legal positivism . . . is when constitution-based judicial review of legislation requires or authorizes the invalidation of legislation that runs afoul of moral standards codified in the constitution (e.g., regarding equality, due process, or humane punishment)").

Parts of the Constitution are in each vein. The President must be at least 35 years old.⁴⁴⁸ Thus, the Constitution doesn't allow a 34-year-old President. Elsewhere, however, the Constitution's language is broad, as in the Fourteenth Amendment, nor is it plausible to assume every word should be taken literally. For example, the Sixth Amendment prohibits a criminal defendant from being "twice in jeopardy of life or limb."⁴⁴⁹ Should we conclude that dismemberment is a constitutionally approved form of punishment?

The non-originalists do not all fly the same flag, and originalists accuse them of result orientation by endorsing a "Living Constitution" model.⁴⁵⁰ But this charge is overblown. In important cases, non-originalists endorse results that fit with Rawls's two central principles, broadly understood. Consider one of the biggest recent victories for non-originalists – *Obergefell v. Hodges*.⁴⁵¹ There the Supreme Court recognized an equal protection right to same-sex marriage. On any view of originalism, the case is wrong. In 1868, when the Fourteenth Amendment was ratified, few persons (perhaps none) contemplated a right to same-sex (or even interracial) marriage.⁴⁵² But on Rawls's liberty principle, the case is right.⁴⁵³ Extending the benefits of marriage to same-sex couples does not impinge the liberty of opposite-sex couples (nor do interracial marriages impinge on racially homogeneous marriages). Moreover, it fits with a broad conception of equality. In *Obergefell*, the four Justices appointed by Democratic Presidents, plus moderate Republican-appointed Justice Kennedy, formed the majority with the other Republican-appointed Justices dissenting.⁴⁵⁴ The *Obergefell* Court viewed the Constitution as a Rule of Recognition broad enough to recognize notions of liberty and equality beyond how they would have been seen in 1868, when the Fourteenth Amendment was ratified.

But consider one of the biggest defeats for non-originalists. In *Dobbs*, the Court upheld a Mississippi statute banning abortions after fifteen weeks of pregnancy.⁴⁵⁵ All six Republican-appointed Justices – employing the species of originalism that surveys state law at the time

448. See U.S. CONST. art. II, § 1, CL. 5.

449. U.S. CONST. amend. VI.

450. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 64 TEX. L. REV. 693, 694–97 (1976).

451. 576 U.S. 644 (2015).

452. See *Loving v. Virginia*, 388 U.S. 1, 9–10 (1967).

453. Rawls, *Justice as Fairness: Political not Metaphysical*, *supra* note 384, at 227.

454. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

455. 142 S. Ct. 2228 (2022).

of the ratification – voted in the majority and the three Democratic-appointed Justices dissented.⁴⁵⁶ Within the majority there were gradations. Five Justices voted to overrule – primarily on originalist grounds – earlier decisions that affirmed a constitutional right to an abortion in the relatively early stages of pregnancy, and thus left the matter to state legislatures.⁴⁵⁷ The majority, however, took pains to make clear that it did not wish to re-examine non-abortion cases, and Justice Kavanaugh concurred saying his vote depended on these assurances.⁴⁵⁸ Justice Thomas, however, concurred saying that he would be willing (indeed, pleased) to re-examine these cases.⁴⁵⁹ Chief Justice Roberts, however, only concurred in the judgment as he believed that Mississippi’s fifteen-week cutoff was reasonable and he would not have overruled earlier abortion cases.⁴⁶⁰ The dissenters not only would have retained the existing standard for evaluating state abortion law, they warned that the majority’s rationale would eventually undercut a wider swath of constitutional rights.⁴⁶¹

On a Positivist’s account, these hard cases are disagreements as to the scope of the Rule of Recognition. In *Obergefell*, the majority rejected originalism and treated the Constitution as branding as legal broad notions of liberty and equality. In *Dobbs*, broad notions of equality and liberty no longer enjoyed constitutional status; instead, only a limited array of enumerated rights is so enshrined.

Much of the Rule of Recognition is not in dispute, however. All Justices agree, for example, that a federal statute passed by Congress within its Article I powers and signed by the President is law, and some cases resolve questions of interpretation unanimously or nearly so. For example, in *Southwest Airlines v. Saxon*,⁴⁶² a ramp supervisor for the loading and unloading of baggage for a major airline – who also loaded and unloaded as needed⁴⁶³ – argued that she was exempt from Section 1 of the Federal Arbitration Act,⁴⁶⁴ because she was a transportation employee in interstate commerce. Justice Thomas, writing for a unanimous Court, employing a straightforward reading

456. *See id.* at 2239.

457. *See id.* at 2283–84.

458. *See id.* at 2309 (Kavanaugh, J., concurring).

459. *See id.* at 2302 (Thomas, J., concurring).

460. *See id.* at 2310–11 (Roberts, C.J., concurring in the judgment).

461. *See Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2319 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

462. 142 S. Ct. 1783 (2022).

463. *See id.* at 1789.

464. 9 U.S.C. § 1.

of the statute, agreed with her.⁴⁶⁵ The case resembled Hart's no-vehicles hypothetical. An automobile is a vehicle, and a worker who spends some of her day on the tarmac hoisting bags onto an airplane is a transportation worker. So, when I say the Court is substantially a political institution, I don't mean it's completely political.

But back to the contentious constitutional cases. Here Dworkin deserves one cheer. Whatever the quirks in his jurisprudence, Dworkin opined on high stakes cases and recognized political philosophy plays a large role.⁴⁶⁶ But his insistence on a single right answer, and the superhuman abilities required to find it, hobbled his theory both in application and its reception by other legal philosophers. Contentious constitutional disputes lie at the edges of the United States' Rule of Recognition. However, disputes about the scope of the Rule of Recognition do not falsify Positivism; Hart foresaw, and Positivists accept, them.⁴⁶⁷

Nevertheless, these disputes are critically important, even if they're a tiny fraction of cases.⁴⁶⁸ The originalist philosophy treats the Constitution as recognizing only rules or principles spelled out in the text or that would've been understood as within the scope of the text at ratification.⁴⁶⁹ Taken to its limits, this is a radically limiting view of the Constitution and the Rule of Recognition. An obvious example is *Brown v. Board of Education of Topeka*,⁴⁷⁰ which is wrong on any originalist view. Racially segregated schools (to say nothing of public parks, drinking fountains, beaches, swimming pools, and all manner of public amenities) were the rule when the Fourteenth Amendment was ratified, when *Brown* was decided, and well afterward in many states.⁴⁷¹ But as a matter of Rawlsian justice and

465. See *Southwest*, 142 S. Ct. at 1790.

466. See Dworkin's "Rights Thesis", *supra* note 375, at 1185.

467. See Hershovitz, *End*, *supra* note 26, at 1170 (citing HART, CONCEPT, *supra* note 19, at 150–54) ("Hart said that the rule of recognition is indeterminate as to any point on which legal officials fail to converge, with the consequence that the law is indeterminate on those questions too.").

468. See Leiter, *Why Positivism?*, *supra* note 130, at 11. (Leiter explains that "[p]ositivism . . . has an easy time explaining the most important fact about modern legal systems: namely, that despite their complexity, there exists massive agreement about what the law is in the vast, vast majority of legal questions that arise in ordinary life.").

469. See Colby & Smith, *Living Originalism*, *supra* note 416, at 240.

470. 347 U.S. 483 (1954).

471. See, e.g., Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119, 127 (2004). In an interesting new article, Professor Cox argues that a judge

the notion that our Rule of Recognition brands as legal a broad equality norm, *Brown* is clearly correct.

Originalism gained traction because it has a common name for its sub-theories and appeals to the instinct of some that interpretation of a text should be immutable. Non-originalism, I have argued, includes basic overarching principles (particularly after the ratification of the Civil War Amendments, including equality and liberty) as part of the Rule of Recognition and conforms to a well-developed theory of justice. The difference in outcomes is dramatic. *Brown* is wrong on originalism, but right on non-originalist equality. *Obergefell* is wrong on originalism, but right on non-originalist liberty. The list goes on.

Positivism, the conquering army, has won. So, to it go the spoils, but also the duty of governing the territory it has captured. For decades now, Positivists have engaged in fencing matches with anti-Positivists to decide, at the highest level of abstraction, whose account of law is the most philosophically pure. It was a battle worth fighting, but it has been won. Nothing practical can be achieved by visiting the sites of yesterday's victories.

If, as I think, Positivism is more than an abstraction but an accurate account of the concept of law, then it ought to be possible to discern – or at least meaningfully discuss – the contours of the U.S. Rule of Recognition. Some Positivists might object that this is a Dworkinian task.⁴⁷² But, unlike Dworkin, I do not believe that

can face what she calls “normative uncertainty” when a judge’s preferred jurisprudence leads to one result but rational considerations dictate another result. See Courtney M. Cox, *The Uncertain Judge*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 3) (on file with the author). She refers to *Brown* as something of a miracle because of the unanimity of the Court despite different schools of jurisprudence represented among the Court’s members. See *id.* (manuscript at 41). She describes this as a conundrum that floats above questions about particular schools of jurisprudence. See *id.* I confess to some skepticism as to whether this is a problem that logically precedes discussion of a particular school of jurisprudence. It seems that a committed originalist should either stick to her guns and conclude that *Brown* is wrong, adopt a revised version of originalism that allows for exceptions in cases like *Brown*, or adopt a different jurisprudence. In any event, even if one adopts Prof. Cox’s stance, this does not falsify the proposition that the U.S. has a rule of recognition that includes broad norms of equality that explain the result in *Brown*.

472. One way to understand Dworkin, which is plausible given his fixation on the Supreme Court, is that he was attempting to give voice to a particularly American sort of positivism. Leiter puts it this way: “Dworkin simply described the rule of recognition for those legal systems – perhaps the American – in which there is a conventional practice among judges of deciding questions of legal validity by reference

discerning contested boundaries of the Rule of Recognition falsifies the proposition that it's a social rule. Nor do I believe that it must generate uniquely correct answers to all legal problems. The Rule of Recognition is a social rule with some contested features at its margins. Although I don't deny that in some instances an historical inquiry into the nature of the rights conferred by a particular provision of the Constitution is useful,⁴⁷³ the multitude of theories being smuggled in under the moniker of originalism attempt to create a faux Rule of Recognition that dramatically narrows the Constitution. A hint that it's an attempt to create a faux Rule of Recognition is that despite its title of originalism, it's a recent and controversial invention – not the stuff of a settled social rule.

The time has come for defending a Rule of Recognition faithful to the social convergence that created it, not the politics of the moment. It's true that constitutional scholars and political philosophers are already on this turf. However, I believe legal philosophy can help to frame the discussion as an exercise in applied Positivism. It likely won't pay dividends with the current Court, but might pave the road to a principled reclaiming of constitutional ground when the Court's personnel changes.

CONCLUSION

Positivism has prevailed as the best theory of what constitutes law mainly by not claiming too much. Norms are branded as legal (or not) through a social construct, which Hart called the Rule of Recognition, although some Positivists see it slightly differently. However, they agree on what Raz called the sources theory – that law is law because of social facts (or facts entailed by social facts), not necessarily facts about justice or morality. This was a big achievement because it

to moral criteria. Rather than disputing Hart's legal positivism, Dworkin is, on this rendering, a case of applied positivism." Leiter, *Beyond, supra* note 26, 27. Posner has essentially the same diagnosis. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638, 1653 (1998) ("H.L.A. Hart and Ronald Dworkin, for example, have famously antagonistic jurisprudences. But the antagonism is largely an artifact of their insistence upon framing their respective theories in universalistic terms, when what each is really doing is offering a stylized description of the legal system of his own country.").

473. See generally Patrick J. Borchers, *Ford Motor Co. v. Montana Eighth Judicial District Court and "Corporate Tag Jurisdiction" in the Pennoyer Era*, 72 CASE W. RES. L. REV. 45 (2021) (surveying case law around the time of the ratification of the Fourteenth Amendment as to jurisdiction over foreign corporations to show lack of historical consensus).

cleared away clutter about the relationship of other kinds of norms to legal norms. So, two cheers for the Positivists – and I count myself among their number, though I claim no credit in this victory.

However, a messy world waits not far away from the narrow, but important, debate of what counts as law. The U.S. Supreme Court has always been a political institution to some degree, but the political implications of how it decides cases – and why it reaches the results it does – have never been greater. As I have argued, it has been a politically conservative project of roughly the last fifty years to create a faux Rule of Recognition which denies that important norms – long seen as constitutional – are, in fact, legal norms. The insights gathered in the decades-long debate about what counts as law can be deployed in a different direction now. The U.S. Supreme Court is central to American life. As I have argued, the heated battle going on over the status of unenumerated rights in the Constitution is enormously important. This can be seen through the lens of the Rule of Recognition, with the debate over the edges of the Rule – does the Constitution confer rights not specifically spelled out in the four corners of the document? Either the Constitution is minimally construed within its text and how it would have been understood at ratification, or it should be seen as importing less well-defined, but critically important, principles such as liberty and equality.

Legal philosophers can bring their analytical rigor to this critical discussion.

