What Makes Law

AN INTRODUCTION TO THE PHILOSOPHY OF LAW

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Adjudication and the Grounds of Law

The main traditional dispute about the nature of law, and the one that is the main focus of this book, is a dispute about what morality has to do with figuring out the content of the law in force in any particular place.

On the one hand we have matters of fact, such as the meaning of what is written in some document that is issued by some legal institution such as a legislature. On the other hand we have moral considerations, in the broad sense that includes not just individual right and wrong but also normative political theory (about, say, social justice or the proper limits of state power). Everyone thinks that matters of fact are relevant to determining the content of current law. The main dispute about the nature of law is a dispute about whether moral considerations are also relevant. This is a dispute about what Dworkin (1986, 4) called the grounds of law – of what makes legal propositions true.

This dispute is obviously distinct from the question of whether moral judgment does or should influence those who make law. We can take for granted that it should and to some extent does. The question is whether moral considerations are relevant to figuring out what the law already is.

What may not be so obvious is that the issue of the grounds of law is also distinct from that of whether judges should appeal to moral considerations when adjudicating disputes. Explaining this contrast is perhaps the best way to bring the traditional debate about the grounds of law into focus.

Any government official whose role it is to determine the legal rights and duties of others requires a theory of legal decision making. In the case of judges, we call this a theory of adjudication. Officials from other branches of government also make decisions about the legal rights and duties of others, which will be important in later chapters, but judges provide the central case and the natural place to start.

A judge's theory of adjudication may be sketchy and perhaps only implicitly believed, but she must have one. Decisions about people's legal situations obviously cannot be made without having views about which considerations it is appropriate to take into account. It is not essential, by contrast, that judges have a theory of the grounds of law – a theory that would tell them whether and when moral considerations are relevant to the question of what the law (already) is.

A record of the reasoning behind a judicial decision may cite many factors that were thought to be relevant, such as the contents of constitutions, statutes, prior judicial opinions, the prevailing custom in a particular industry or place, the opinions of legal scholars, and considerations of social welfare, justice, and fairness. A judicial opinion (in common-law jurisdictions, at any rate) explains how and why a decision was reached, and therefore tells us a lot about the judge's theory of adjudication, but it will not necessarily reveal her views about which of the factors on which the decision was based were part of already existing law.

If judges were called on always to announce the state of the prior law as they found it, they would need to reveal their views, for example, about whether considerations of fairness are part of the law or rather fall into the category of considerations not part of law that are nonetheless legitimately taken into account in adjudication. Such categorization requires a theory about which kinds of factors are, in principle, relevant to figuring out the content of the law; it requires a theory of the grounds of law. It is typically not necessary for judges to engage in such categorization, and so it is typically not necessary for judges to have a theory of the grounds of law.

This holds true even when common-law courts explicitly "overrule" or "decline to follow" a precedent. Such a statement leaves open whether the discredited precedent was, in the view of the court, formerly part of the law, which is now changed, or instead a mistake that was never part of the law properly understood. Both views are found in traditional common-law thinking, but judges working within the common law need not take a stand.

Some judges and some legal theorists believe that all normative considerations that judges are authorized to take into account when deciding a case are necessarily part of the existing law. We can call this the adjudicatory or adjudicative (Perry 1987) view of law. The implication of the adjudicatory view is that there is no interesting gap between determining what the law is and marshaling the considerations relevant to resolving a particular dispute before a court.[1] If the adjudicatory view of law is correct, then it is misleading to say that it is not necessary for judges to have a theory of the grounds of law. But the adjudicatory view of law may or may not be correct, and it is not necessary for judges to have a view about whether it is.

The majority and the dissent in the nineteenth-century New York case *Riggs v. Palmer*[2] disagreed about statutory interpretation. Francis Palmer's will, formally valid under the relevant statutes in New York State, left his estate to the person who murdered him. The majority argued for the relevance of the fact that the legislature, had it ever considered such a case, would never have intended to allow a murdering heir to inherit. It also argued that statutes should be interpreted in light of "fundamental

[1] There will still be a gap, on any plausible view: mathematics and logic can help determine the outcome of a legal dispute, but no one believes that they are part of the law in force. The terms of a contract will in part determine the outcome of a contract dispute. It seems natural not to regard those terms as part of existing law, but some may prefer to talk that way – to treat the contract as private legislation between the parties. But this is not an interesting disagreement. What matters is whether the normative considerations of fairness, justice, and the rest are, if legitimately appealed to in adjudication, therefore part of the law in force.

[2] 115 N.Y. 506 (1889).

maxims of the common law." The dissenting judges argued for a straightforward application of the literal meaning of the words of the relevant statutes. Dworkin characterizes this dispute as one "about what the law was, about what the real statute the legislators enacted really said" (1986, 20). But while the judges clearly disagreed about proper adjudication, we simply do not know whether they all embraced the theory of the grounds of law according to which all normative factors legitimately taken into account in adjudication are at the same time relevant to determining the content of the existing law. They did not say. They did not take a stand on the nature of law because it was not necessary.

It is sometimes claimed that all, or almost all, judges hold the adjudicatory view of law. If this were true, it would provide some support for it. But the evidence does not support the claim. In the United States, prominent and scholarly judges who have addressed the issue – from Oliver Wendell Holmes Jr. to Learned Hand to Richard Posner – have thought it obvious that judges must, on occasion and under constraint, "legislate."[3] Benjamin Cardozo (1921) elaborated a theory for such legislative adjudication – using what he called the "method of sociology," a judge should fill gaps in the existing law with recourse to community morality. Most judges, however, neither announce their theory of law in their opinions nor write books or articles about the judicial process, so it is hard to know what theory of law they hold.

It is true that in recent times it has become typical for judges and aspiring judges in the United States publicly to disavow "legislating from the bench." But many of these same judges would equally adamantly deny that applying the law ever requires them to have recourse to "their own" moral or political views. As it would precisely be inclusion of moral judgment within the bounds of law that would give existing law the resources

[3] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917, Holmes, J., dissenting). Hand (1952) takes a similar view, as does Posner (2008, 81–92).

to generate an answer to all questions before a court, this makes it a little mysterious just what theory of law these judges hold.[4]

Of course there is this truth in what most judges say: whatever else is controversial in the theory of adjudication, judges ought to apply the law. Is the upshot that even if applying the law is not all that judges must do, they nevertheless will need a theory of law – that this is in fact the primary thing that they do need (Dworkin 2006, 18–21)?

It is true that one way to develop a theory of adjudication is to start with a theory of the grounds of law and only later turn to the issues of when judges may depart from prior law (if the theory of the grounds of law makes that ever seem necessary) and of how decisions should be made when valid law does not settle the issue (if the theory of the grounds of law makes that a possibility). But it is also possible to start from the immediate practical question of how to decide a

[4] It is a commonplace of jurisprudence – that no theorist or judge could really disagree with – that a literal reading of legal sources will not in itself yield answers to all legal questions. Though some legal systems or areas of law are more or less determinate than others, there will always be cases where a reasonable reading of the materials could go either way. There may or may not be a method of adjudication, such as "originalism" or Cardozo's method of sociology, that could allow a judge to supplement the guidance of legal sources without reference to her own moral or political judgment. (That seems dubious, but it is not our topic here.) But even if one were available in principle, there is no consensus (in most jurisdictions) that any such method is mandated by existing legal sources, read plain. It is quite appropriate, then, that Justice Antonin Scalia of the U.S. Supreme Court defends originalism on political grounds (Scalia 1998), just as Cardozo before him defended the method of sociology. Both hold that judges should appeal to other material when they need more guidance than the legal sources can give them; both hold that this other material should be something other than a judge's own moral convictions, something more objective. But neither holds that his preferred method of adjudication is mandated by existing law. To be a good judge, even on these approaches, you need to reach the right moral conclusion about how to make decisions on your own; no legal authority is directing you in this matter. In the face of its evident absurdity, the pervasive contemporary disavowal of the need for moral reasoning on the part of judges, at least in the United States, is something of a political pathology that is itself worthy of investigation. For an extended discussion, see Kennedy (1998). The current point, however, is simply that in this political environment we would be unwise to treat what judges say about the nature of law at face value.

case.[5] And if we start from that end, there is no need, within the theory of adjudication, to mark the boundary between law and not law.

There have been exceptional cases where courts have declared that a decision about the content of prior law was necessary to resolve a legal dispute. Shortly after the reunification of Germany, two former East German border guards were convicted of homicide for the shooting of a person attempting to climb the Berlin Wall. The guards appealed, in part on the ground that the shooting was in accordance with the law of the former German Democratic Republic: the killing was therefore justified by law in force at the time, and so the homicide convictions must be seen as retroactive criminalization that violated the constitution of the now unified Federal Republic of Germany. The appellate court, the Criminal Division of the German Federal Court of Justice, agreed that the convictions would have been unconstitutional if the killings had been in accordance with valid East German law. But there was no retroactivity, the court held, because the legislation of the German Democratic Republic that regulated the policing of the border was, in virtue of its grossly unjust content (authorizing guards to shoot at people fleeing over the border), no law at all.[6]

In this case the court made a statement about the grounds of law. It was moved to do so presumably because it seemed that there was no other way it could uphold the convictions in the face of the potentially justifying legislation. In support of its declaration that grossly unjust law was not law at all, it cited a 1946 article by Gustav Radbruch (2006) published in a German law journal. There was, however, a less adventurous route to the same outcome. Reviewing a similar set of convictions, the German Constitutional Court, while not impugning the constitutionality of the approach of the Federal Court of Justice, showed how the

[5] Here is how Posner sees it: "A judge does not reach a point in a difficult case at which he says, 'The law has run out and now I must do some legislating.' He knows that he has to decide and that whatever he does decide will (within the broadest of limits) be law; for the judge as occasional legislator is still a judge" (2008, 85).

[6] BGHSt 39, 1 (1992).

convictions could be upheld without taking a stand on the grounds of law.[7] The Constitutional Court upheld homicide convictions stemming from shootings at the wall on the basis of a creative interpretation of the constitutional ban on retroactivity. Article 103(2) of the German Constitution holds that "An act may be punished only if it was defined by a law as a criminal offense before the act was committed."[8] This, the court held, did not apply to a situation where an otherwise criminal act was justified by a grossly unjust law. The court justified this interpretation with an argument about the point of having a ban on retroactive punishment in a democratic society. Approaching the issue in this way, the court avoided having to pronounce on the validity of the legislation governing the activities of the border guards at the time of the shooting and so avoided having to take a stand on whether morality was relevant to the determination of the content of the law.

The German Constitutional Court in this case certainly engaged in moral reasoning along the way to reaching its decision. Suppose we think that this was entirely appropriate. That would indicate nothing about our view on whether moral considerations are relevant to determining the content of the law. One excellent way to characterize what legal philosophers have been disagreeing about is precisely this question: When a conscientious judge appropriately appeals to moral considerations to reach a decision, has he in so doing gone beyond the mere application of existing law and in part also made new law? One side says yes, its opponents no. The dispute about the grounds of law is not about what judges should do, but you could say it is about the correct description of what they do.[9]

Once this becomes clear, however, many start to wonder why anyone ever thought this dispute mattered. If judges can do without a theory of

[7] BVerfGE 95, 96.

[8] Official translation available at: https://www.btg-bestellservice.de/pdf/80201000.pdf.

[9] "Much of legal theory can be seen as an attempt better to understand what a court takes from the law and what it gives to it, where the application of the law stops and judicial discretion begins, what the boundary is between the law the court finds and the law it creates" (Raz 1986, 1117).

the grounds of law and that theory affects merely how we can describe what judges do, why would anyone bother with it?

The Law in Force

The reason is that anyone who is attempting to answer a question about the content of law must as an initial matter have a view about the grounds of law.

Had a German law professor been asked, prior to the trials of the former border guards, whether the intentional killings at the wall were criminal homicides when they happened, she would not have been able to avoid taking a stand on the grounds of law. If they were not criminal homicides, the justifying East German law (which we can assume was grossly unjust) was valid, and Radbruch's account of the grounds of law is rejected. Suppose that this is the view of our professor. We might next ask her what she thinks about the Constitutional Court's argument that the convictions should stand even if the killings were not crimes at the time. The professor may dodge the question by saying that it was a good decision, that she "agrees" with it. That is multiply ambiguous. She may mean, first, that the court correctly applied German constitutional law as it was prior to its decision. Or she may mean that the court, acting within its legal authority and thus in accordance with law, reinterpreted and thus changed, at least for this case, German constitutional law in a manner she thought wise. Last, she may mean that, even though the court exceeded its legal authority in acting as it did, this was, in the circumstances, the morally right thing to do – taking into account, she might say, the importance of some kind of public accountability for the crimes of the former East German regime. After all, she might add, even though judges are, as a matter of morality, duty bound to act in accordance with law, that duty is not absolute, and sometimes other factors may outweigh it.

To keep things reasonably simple, we can leave aside the issue of whether, and if so when, it is morally appropriate for a judge to make decisions that are not in accordance with law. If we ask our professor

to choose between the first and second ways of understanding what she said, we will force her, once again, to take on the issue of the grounds of law. We know that she holds the justifying East German legislation valid. If she believes that the convictions were nonetheless constitutional under the law as it was before the court made its decision, she must believe that the argument of political morality the Constitutional Court engaged in to justify its decision falls within the domain of law. If the professor believes that the convictions were not valid under prior German constitutional law, but that the decision was nonetheless in accordance with law and a good decision, then she believes that while the argument of political morality did not fall within the boundary of law, it was nonetheless a legitimate set of considerations for a judge acting according to law to take into account, and that the court's reasoning was sound.

Consider a very different kind of example. Whether the exclusion of same-sex couples from the institution of marriage in New York was in violation of the state constitution in, say, 1995 depends on the grounds of law. Some people believe that the content of the law is determined entirely by legal sources: statutes, constitutions, judicial opinions, and so on, all interpreted in a fashion that never requires the independent moral judgment of the interpreter. If we take this view, we will probably conclude that the existing legal sources did not determinately settle the legality of same-sex marriage in New York in 1995, and so the matter remained open until the Court of Appeals settled it, in the negative, in the 2006 case of *Hernandez v. Robles*.[10] Subsequently, the Marriage Equality Act of 2011 changed the law. Others believe that the content of the law is determined by the best, the morally best, interpretation of the existing legal materials. If we take this view and also believe that equal protection, properly interpreted, implies equal participation, regardless of sex or sexual orientation, in important social institutions such as marriage, we will have little difficulty in reaching the conclusion that the exclusion of same-sex couples from the institution of marriage in New York violated

[10] 7 N.Y.3d 338, 855 N.E.2d 1 (2006).

the equal protection clause of the New York State Constitution in 1995. We could also conclude that the holding to the contrary in *Hernandez* was a mistake and that the legislation of 2011 recognizing same-sex marriage was strictly speaking unnecessary.

On the one view there was no answer to the legal question before *Hernandez*; after that decision, there was for five years the clear answer that same-sex marriage was not legally available in New York until the New York State Legislature changed the law. On the other view, it has for a long time been contrary to law to exclude same sex-couples from the institution of marriage in New York. Different views of the grounds of law, different conclusions about what the law is. And it does seem to matter, to New York residents at any rate, what the law about marriage in New York is.

Each of us needs to take a stance on the dispute about the grounds of law if we want to be able to offer answers to legal questions. Far from nothing turning on it, it looks as though, as far as the law is concerned, everything turns on it. Of course, if it did not matter what the law is, then the dispute about the grounds of law would not matter. This "eliminativist" attitude to the law, radical though it is, must be taken seriously; I discuss it in Chapter 6.

Law and Morality: A Brief History

Some insist that moral considerations are relevant to figuring out what the law is and others that this is never so; each camp believes that the other misunderstands the nature of law in a fundamental way. But that neither camp is obviously mistaken has been recognized at least since Aristotle.

In the *Rhetoric*, Aristotle distinguishes between the "written law," which is specific to a particular place, and the unwritten "common law," which is the same everywhere and expresses what is just by nature (1373b). He then advises those arguing a lawsuit before an Athenian jury to take advantage of the fact that the law governing the dispute could be

thought to be grounded either entirely in the written law, or alternatively in the written law as corrected by the common law. Where the written law is against you, you should argue from the common law, pointing out that the written law does not always "perform the function of law." Where the written law is on your side, you should remind the jury that its job is not to try to be "wiser than the laws" (1375a–1375b). The advice is to lean on one or another way of understanding what kind of thing Athenian law is, depending on which understanding better suits your case.

In language that has been familiar in the West since St. Thomas Aquinas's *Treatise on Law*,[11] we could put Aristotle's point this way. Take for granted the fundamental distinction between the *natural law*, which is a distinctive way of understanding what modern philosophers would call universal morality, and *positive* or *human law*, which is the law that is in force in a particular place. The question then arises of whether the human law in a particular place is determined solely by its written or customary legal sources or whether it is at least in part also determined by the natural law. Aristotle sees that both possible answers to this question about the nature of (human) law can be made to seem plausible.

Aquinas perhaps agreed; he did not take a clear stand on whether the natural law is partly determinative of what the human law is, or instead just an external basis for determining what it ought to be. At the start of the *Treatise on Law*, Aquinas writes that all law (human law included) must concern itself with "the happiness of the community." Later, when writing specifically about the human law, he notes that a law is unjust if (among other reasons) it is contrary to the benefit of the community, or imposes unequal burdens, or exceeds the lawmaker's power, and then comments: "These are acts of violence rather than laws, for as Augustine said, 'A law that is unjust is considered no law at all'" (qu. 96). Such remarks suggest the position that conformity with the natural law is always a criterion of validity for the positive law. But other passages suggest the contrary view. The passage just quoted continues: "Therefore laws of this kind do not

[11] *Summa Theologiae*, Qu. 90–7 in Aquinas 1988.

bind in conscience except to avoid scandal or disorder." That suggests that unjust human law still is human law, it is just that the reasons for obeying are not the same as those we have for obeying human law that is in accord with the natural law. This interpretation seems compatible with the statement that if a human law "disagrees in some respect from the natural law, it is no longer a law but a corruption of law." So it is plausible to read Aquinas as allowing unjust human law the status of human law, but refraining from granting it the status of law in the fullest sense of the word, which implies its conformity to the natural law and therefore human reason (Finnis 1996, 2003; I follow Finnis's interpretation).

The important point is that Aquinas seems relatively unconcerned with issues of the validity and interpretation of the human law. Rather, he was concerned with the question of what the human law ought to be and with the nature of the obligation to obey just or unjust rules promulgated by the state, whether they are properly called law or not.

Not until the modern period did legal theorists and philosophers with legal expertise start to offer views on the question of whether morality could or could not be relevant to the determination of what the (positive) law is. Hobbes explicitly states the "command theory" version of legal positivism: law is the command from one person to another who is obliged to obey.[12] But this is not yet positivism in the classical form it took on with Jeremy Bentham in the late eighteenth century, because Hobbes did not believe that the content of the law is one thing, justice or morality another; he believed that there was no such thing as justice without law and so could hardly have allowed that considerations of justice are relevant to the determination of what the law is. Hobbes did hold that the sovereign was subject to the natural law, and that positive law should be interpreted in light of the laws of nature, but as the natural law consists for Hobbes in precepts of rational self-interest, the issue of the relation between positive law and morality is still not joined (see Dyzenhaus 2012 for a contrary interpretation).

[12] *Leviathan*, ch. XXVI.

Positivism proper starts with Bentham. More than that, we can say that philosophical discussion of the nature of human law – philosophical discussion of whether, given what kind of thing law is, morality can be a ground of law – starts with Bentham too. It seems that none of the early modern philosophers in the natural law tradition – Suárez, Grotius, Pufendorf, Locke – were any more concerned than Aquinas to take a stand on this question.[13] And neither Hume nor Kant was terribly interested either.[14] Bentham's opponents were not philosophers but theorists of the common law – especially William Blackstone, who was the target of Bentham's first published work, *A Fragment on Government*, in 1776 (see Lieberman 1989; Postema 1986).

Blackstone did appear to take a clear stand on the role of morality in determining the content of the common law. When writing about precedent, and a judge's duty to make decisions based on the existing law rather than his own private judgment, Blackstone commented:

> Yet this rule admits of exceptions, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law*; that is, that it is not the established custom of

[13] Like Aquinas, Suárez makes remarks that could be interpreted as taking a stand: "The human lawmaker … does not have the power to bind through unjust laws, and, therefore, were he to command unjust things, such prescriptions would not be law, because they have neither the force nor the validity necessary to bind." "For a law to be genuine law, it must … be just and reasonable, because an unjust law is not law." Both passages are from *De legibus*, and are cited in Garzón Valdés 1998, 267. Garzón Valdés reads these passages as implying a view that there is no such thing as an unjust human law. They can be read that way, though Suárez in other respects, such as his embrace of the command theory of law (Postema 2012), suggests a reading like Finnis's reading of Aquinas that I embrace in the text. It seems that, as for Aquinas, the important upshot of a "law" being unjust for Suárez is that it does not "bind."

[14] Waldron (1996) plausibly argues that Kant was a legal positivist, but this has to be extracted from the text by way of implication.

> the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. (*Commentaries*, 1: 69–70)

This sounds like the view that an unjust law is an impossibility; if it is unjust, it cannot be law. In the past century or so, many people have used the label "natural law" for that view. But it is doubtful whether anyone ever held such a view. We have seen that Aquinas most probably did not, and the thought that Blackstone did is contradicted by several passages where he rather clearly acknowledges the possibility of unjust law (see Finnis 1967). It is more plausible to read Blackstone as advancing the more subtle and plausible claim that determination of the common law involves the application of reason, understood to include moral judgment, and that on occasion this will justify treating certain (though not all) past decisions as mistakes, and so not part of the body of decisions that are "evidence of what is common law."[15] On this reading, Blackstone's non-positivism was something rather close to Dworkin's theory of law, according to which the content of the law is determined via an interpretation, guided by moral judgment, of existing legal materials.[16]

Bentham confronted this idea of law with a definition of law as the command of a sovereign supported by the threat of a sanction (Bentham 1970; see Postema 1986, chap. 9; 2011). This account of law received its most widely read presentation in John Austin's *The Province of Jurisprudence Determined*, first published in 1832. By the time the fifth edition of this book was published in 1885, debate among philosophers

[15] "So that *the law* and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however we may take it as a general rule, 'that the decisions of the courts of justice are the evidence of what is common law'" (1: 71). For discussion, see Lieberman 1989, Part I.

[16] On the affinity between traditional common-law theory and Dworkin's views, see Perry 1987.

and lawyers about the relation between law and morality was widespread throughout Europe, with positivism in the ascendance, at least in England. Bentham's insistence on the distinction between what the law is and what it ought to be could be described, as early as 1877, and by no less careful and fair-minded a writer than Henry Sidgwick, as "to us so obvious a truism that it seems pedantic to state it expressly" (2000, 207). In Germany, by contrast, the merits of positivism – usually in the guise of "statutory positivism" – remained a matter of contentious debate in the nineteenth century and would become politically explosive during the Weimar period (see Dyzenhaus 1997; Paulson 2006).

In any event, not until the twentieth century were significant philosophical contributions to the debate about the nature of law made, particularly through the work of Hans Kelsen, H. L. A. Hart, Ronald Dworkin, and Joseph Raz.

Two Pictures

The most fundamental divide within the debate over the grounds of law is between those who believe that the foundations of the law in a particular place are exclusively matters of fact and those who believe, to the contrary, that the content of the law is also partly a moral matter. Different views within each camp differ on the way factual or moral considerations determine the content of law. These differences, though very important, are downstream of that more fundamental disagreement. The core idea of positivism, then, is that it is in the very nature of law, wherever it is found, that the final determinants of its content are facts, not norms (Coleman 2001a, 75). The opposing view has lacked an appropriate name, which is perhaps why "natural law" has misleadingly been used. "Legal moralism" would also be misleading, as it already has a place in a different debate about the legitimacy of the legal enforcement of morality for its own sake. Dworkin's label "law as integrity" would not do because we are looking for a name for the broader class of views of which Dworkin's is not the only example (though it is by far the most fully developed and

the most important). This leaves "nonpositivism." It may seem too broad a label, since to deny that the law is determined just by social facts is not, strictly, to say that it is in part determined by moral considerations in particular. But when we limit ourselves to plausible views, there is no third class of considerations that might be relevant to the content of law: it is either social facts alone or social facts along with moral considerations, especially those of political morality, so it is clear enough what "nonpositivism" means.

In the next two chapters, I try to motivate each of these pictures of what law is, and discuss some of the main internal issues within each camp.

3 Legal Positivism

A Normative System Grounded in Facts

To bring out what motivates positivism, it is best to think of it first in its purest and most plausible version, according to which moral reasoning is never required or appropriate in figuring out what the law is, even if legal sources can be interpreted as calling for it.[1] Legal argument on this view is never, in any part, about what ought to be, never involves thinking about right and wrong, fairness or justice. Of course the language lawyers use overlaps with that used in moral discussion – in both domains we talk of rights, duties, obligations, wrongs, and so forth. But that is no embarrassment to the positivist, who can accept that the law typically and ideally reflects someone or some collective's moral conclusions about what the law should be. Moreover, a statute or constitution or a history of decisions might give a great deal of guidance about what the specifically legal meaning some moral term, such as "justice," may have acquired. What is important is that while the content of the law may have been, and ideally would have been, arrived at after moral deliberation, and while the law may use words also used in moral argument, moral deliberation is not required to identify law's content after it has been made.

The law is what is posited, or put forward by a person or people. We may all hope that what gets posited is good, that it matches closely with

[1] This has come to be known as "hard" or "exclusive" positivism; I discuss the "soft" or "inclusive" alternative later in this chapter.

what the law ought, morally speaking, to be. But, insists the positivist, it would be simply mad to look at what *has* been put forward as law by people and see there, instead, what *ought* to have been put forward. Suppose someone were to argue that slavery is illegal in a particular place in part because it is a violation of people's moral rights. The positivist sees such an argument as like defending the claim that sexual promiscuity causes disease by saying that promiscuity deserves to be punished.

Sometimes positivism has been confused with the peculiar view that it is a matter of moral indifference what the content of the law is. In fact, the origins of positivism lie in Bentham's enthusiasm for the reform of law in line with what he took to be the correct account of what it ought to be. One of his concerns was that if people believed it was in the nature of law to be good, this would deter them from subjecting the law to moral critique and then reform (Postema 1986, 304–5). Bentham also believed that the sole basis for sound critique was the principle of utility; but positivism as a theory of law takes no stand on the appropriate moral theory for evaluation of the law.

Positivism is also compatible with the idea there might be something meritorious about law as such. Perhaps there is no law without a legal system, and perhaps anything that qualifies as a legal system has *some* merit. Perhaps too, there are reasons for thinking that, even though law as such does not necessarily provide reasons for action, it often does (a position I myself defend in Chapter 7). The positivist picture of law does not offer any kind of fully general claim about the lack of necessary connections between morality and law (see Gardner 2001 for a clear statement of this point). The claim it makes about the nature of law is very focused: law is a social phenomenon in the specific sense that its content is always fixed by social facts, and so, in reasoning toward a view about the content of current law, it is never appropriate to take into account considerations of what would be better, of what ought to be.

If our thoughts about what it would be morally better for the law to be cannot at all guide our thinking about what it is, what does guide

us? The answer is legal sources: statutes, constitutions, judicial opinions, and so on, all interpreted in a fashion that never requires the independent moral judgment of the interpreter (a classic statement is Raz 1994, 194–221). These are the social facts that ground propositions of law. So a positivist account of law must explain how we are to identify which texts or practices count as legal sources, as well as an account of how they may be interpreted in a morally neutral way. Positivist theory has traditionally been more concerned with the first of these.

The positivist rejects such claims as that materials count as legal sources if it is appropriate, from the point of view of political morality, to treat them as such. A positivist may grant that the best possible justification for coercing people according to certain rules is that the rules were arrived at through a democratic process, but insists that this is not at all relevant to the question of whether legislation is a source of law. If legislation is a legal source, we must be able to identify it as such without entering into questions of justification.

Typically, a particular text counts as part of the legal order in a particular place because another, higher-level legal source tells us so. Thus the validity of administrative orders may be established by appeal to legislation, and the validity of legislation by appeal to a written constitution. As Bentham was perhaps the first to insist, legal sources are generally not identified as valid one by one, but rather form a system (Bentham 2010; see Postema 2012 for discussion). But of course the system is not self-validating; if a highest-level legal norm exists that explains the validity of all lower-level norms, the question of the validity of that highest-level norm still arises. Put otherwise, we might be able to identify or dream up a number of systems of rules, with their own internal structure and organizing highest norms. The question we would need to answer is which of those systems is in force as the legal system of a particular place. The challenge for the positivist, then, is to tell us what matter of fact establishes that a particular system of legal norms is in force.

For Bentham and Austin, the solution lay in a certain account of sovereignty. Law, "strictly and properly so-called" as Austin liked to put

it, was the command of a sovereign, backed up with a threatened sanction. This position is positivist because commands can be identified as events that happen in the world, and the sovereign, the person or collective whose commands count as law, is also identified purely descriptively. The sovereign is not such because of some right to rule, but because of the existence of a habit of obedience. Therefore, to find out the content of the law it is necessary to figure out whose commands are habitually obeyed and then figure out what he has commanded.

Hart's detailed criticism of the command theory has been very influential (though for some reasonable doubts, see Schauer 2010a). Part of the critique pointed out that many legal rules are only very awkwardly understood as commands. The rules of contract law, for example, are better understood as facilitative than imperative. Also, the idea that all legal rules are backed with sanctions cannot be made to fit much of what is commonly regarded as law. (For example, Austin had to concede that, according to his view, a statute repealing another statute was not strictly a law.)

Hart's alternative account is that the validity of legal rules is determined by other legal rules in a hierarchical structure that ends with a set of ultimate criteria of legal validity, identified as such by a rule called the rule of recognition. But this special rule is not really a rule *of* the system of legal sources; rather it is a rule definitive of the system, grounding it from outside. To avoid the question, "But how do we know that the rule of recognition is valid?" Hart holds that it is neither valid nor invalid, it just is. By which he means, it is the rule of recognition that is *in effect*. It is the rule of recognition that the participants in the practice of making, but especially applying, the law in a particular place actually *accept* – they treat it as appropriately governing their activities within the legal practice. The situation is analogous to the "rule" that tells us that the rules of chess are the rules of chess. How do we know that *these* are the rules of the game, rather than *those*? No rule of the game of chess can answer that question. We can only answer, well, these are the rules that are generally accepted to be the rules of chess.

It seems evident to most commentators that Hart's account of law is superior to Austin's. Given that there is so much disagreement about the nature of law, this area of agreement might seem puzzling. We cannot say that it seems evident to everyone that Hart has more accurately described the nature of law, because it does not seem so to nonpositivists – from their point of view, both accounts are utterly hopeless. The best way to characterize the relationship between the command theory and Hart's account is that they are competing efforts to provide detail for the basic picture of law as social fact. If that basic picture is taken for granted, Hart's account is better to the extent that it fits better with our ordinary contemporary ways of talking and thinking about the law. The great achievement of *The Concept of Law* is to tell a story about how the law is determined purely by social facts that appears entirely natural, even commonsensical, to the reader who is already attracted by that basic picture.

There is superficially a great contrast here with the work of Hans Kelsen.[2] Kelsen's commitment to a "presupposed" valid *Grundnorm* ("basic norm") as the final step on the ladder of validity strikes many people, at least in the English-speaking world, as philosophically extravagant and obtuse. But actually the difference between Hart's and Kelsen's accounts is not nearly as great as it may seem, and for a rather banal reason: Though both wrote that they were giving accounts of legal "validity" ("*Geltung*"), they meant different things by the word (Raz 1979, 150). For Hart, the ultimate criteria of validity as set out in a rule of recognition simply identify those rules that are "in force," or are part of the law, in a particular place. This leaves open, as an issue requiring separate discussion, what reason, if any, a person might have to obey those rules. In his rejection of Austin's account of law, Hart pointed out that for many people legal rules play a significant deliberative role; they are not simply

[2] Kelsen's views changed over time. My account, which is heavily influenced by Raz 1979, is based mainly on Kelsen 1967, but seems compatible with earlier and later publications. For discussion of the development of Kelsen's views, see Paulson 1998.

obeyed out of habit, but are treated as providing reasons for action. He also introduced the idea of "internal" legal statements – those that, in making claims about the law that is in force, express the utterer's acceptance of the legal norms as reason giving. For example, the statement, "it is my legal duty to pay my taxes," is, for Hart, an internal legal statement in this sense. But all of this is compatible with the possibility that valid legal rules provide no one with any genuine reason for action at all; in particular, neither the fact that a rule is legally valid nor people's willingness to make internal statements about that rule implies anything about its moral force. Hart did believe that he had to provide an account of the discourse of "legal obligation," but that account too leaves quite open the issue of whether I have a real reason to do what I have a legal obligation to do. Law, in this sense, is just like the system of rules we call etiquette, or indeed any rule-governed game; we can make sense of proper and improper moves we can make from within the game, without taking any kind of stand about why that is a game we should play. This aspect of Hart's view is discussed further in Chapter 7.

Kelsen used the term "validity" differently. For Kelsen, legal norms purport to impose oughts, and insofar as they are valid, they do impose oughts. There is some controversy about whether Kelsen thought that legal oughts were in some sense a different kind of beast than moral oughts, but such a distinction would only matter for current purposes if he also thought that legal oughts were somehow less binding than moral oughts, which he clearly did not. And so the reason Kelsen had to insist that the foundation of a legal system was a presupposed basic *norm* rather than some matter of fact, was that, as he saw it, validity implies ought and you can't get an ought from an is. As Kelsen (1928, 393–4) puts it, "This, indeed, is the problem of the positivity of law: The law appears as 'ought' and 'is' at the same time, while logically these two categories are mutually exclusive."

Nonetheless, facts are the foundation of the grounds of law for Kelsen as well. The content of law for Kelsen is determined by the rules of the constitution that is effective, and a constitution is effective if the norms

created in accordance with it are by and large applied and obeyed. It is just that those norms are only legally *valid* in Kelsen's sense if there is a further norm, the basic norm, which states that people ought to obey the effective constitution. Without that grounding ought statement, there would only be matters of fact, no oughts. That would do for a sociological account of law, but not for a "juristic" one (Kelsen 1967, 218).

So we see that both Hart and Kelsen offer accounts of how to determine which legal norms are in force without at the same time taking a stand on whether they impose genuine obligations. Hart calls this an account of legal validity, while Kelsen insists that it is not yet that. There is no need to quibble over these words. I generally use "validity" in Hart's normatively neutral sense because it seems to comport with current English usage. The issue of what kind of obligation valid legal rules can impose is discussed in Chapter 7, and that is the right place to discuss Kelsen's doctrine of the basic norm (see also Marmor 2010).

The question we are addressing now is how to determine the content of the law that is in force. And though Hart's account of the law that is in force is in some ways an advance on Kelsen's, it is fundamentally the same view. For Hart, the content of the law is determined by the ultimate criteria of legal validity. The ultimate criteria of legal validity are set out in the rule of recognition, which is in effect if it is actually followed by people in the business of identifying law. The content of law for Kelsen is determined by the rules of the constitution that is effective. The "constitution," in this usage, means the collection of rules regulating the creation of legal norms that apply to people, and is in that sense roughly equivalent to Hart's rule of recognition, which sets out ultimate criteria of legal validity (Kelsen 2006, 124; 1967, 222). A constitution is effective if the norms created in accordance with it are by and large applied and obeyed. On both accounts, then, law has the content it does because of certain facts about the practice of people, especially legal officials.[3]

[3] Hart believes that unless officials take an "internal attitude" to the rule of recognition, a legal system will not persist. But this internal attitude is still a matter of fact. Whether

It might seem that on these accounts of how to determine the law in force we have not just given up on Kelsen's thought that to say a legal norm is valid is to say that it is genuinely binding; we have also given up on any plausible understanding of the law as a set of norms at all. For whether or not it imposes genuine obligations, it must be possible, if law is to be understood as a set of norms, for there to be divergence between what the law requires and what happens in legal practice; that seems hard to square with the idea that the content of the law is determined by matters of fact. But the positivist model of how to determine the content of law – not just the model of Hart and Kelsen, but also that of Bentham and Austin – is compatible with this minimal sense in which law is a set of norms. It does not reject the idea that there is a truth of the matter about what the law is in particular places and that legal officials can be mistaken about this. On the command model, a judge could go wrong in misunderstanding the content of the sovereign's command. In Hart and Kelsen's version, a decision might be mistaken when a particular legal official decides contrary to the constitutional norms that are generally applied, or simply fails to reason correctly within the normative system the ultimate criteria of validity set up.

To sum up: the positivist picture of law is distinctive in finding the grounds of the law, the ultimate sources of its content, in matters of fact. Reducing the accounts of Hart and Kelsen to what is relevant to an account of the grounds of law (as opposed to an account of the role law plays in the deliberations of most legal officials, or an account of what kind of obligation, if any, law imposes), we extract a plausible way to fill out this picture: the social facts that provide the grounds for the content of law are practices that most legal officials actually engage in most of the time. In saying that it is plausible, I mean that for those of us who find the picture of law as social fact appealing in the first place, this account introduces no awkwardness; it is compatible with us (including those of

officials can in fact treat the rule of recognition as providing reasons for action is discussed further in the next section.

us who live in constitutional democracies) continuing to say most of the things we are in the habit of saying about the law.

Positivist Puzzles

If we take Hart's formulations as our positivist model, there are some ambiguities to unravel and revisions to be made. Hart (1994, 110) writes: "The rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact." It is this formulation that is closest to Kelsen's account of the efficacy of a constitution.

Hart also tells us that the officials of a legal system must *accept* the rule of recognition. On the notion of acceptance introduced to illustrate the idea of the internal point of view, those who accept a rule treat it as providing a general reason for action that also applies to others and justifies criticism, of themselves and the others, for noncompliance. Just why they treat the rule in this way is, as we have seen, entirely open. It could be because they believe that prudence counsels it, or morality demands it, or because, like most other people, they just do, without having thought much about it.

The rule of recognition, Hart tells us,

> if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single system.

The unity and continuity of the legal system, he goes on, "depends on the acceptance, at this crucial point, of common standards of legal validity" (116).

But if "acceptance" here means what it usually does – treating the rule as a reason for action – this is puzzling, since "common standards of legal validity" cannot provide, all on their own, a reason for action.

In Hart's model of law as the union of primary and secondary rules, the former are "duty-imposing" and the latter "power-conferring."[4] There is a sense in which both kinds of rule can guide action. Hart's secondary rules of adjudication and change specify how legal disputes are to be authoritatively resolved and how law is changed in the system. These rules tell people what official role they need to attain and what they need to do if they are, in accordance with law, to resolve a particular dispute according to law or to change the law. Similarly, the rule of recognition tells someone wishing to declare the content of law how to do that. But these rules guide action hypothetically – "if you want to do that, this is the way to do it" – just like a recipe or the rules of a game. None of them provides categorical reasons – "do this!" – for action. Hart's rule of adjudication should not be confused with a theory of adjudication as discussed in the previous chapter, that directs those with the official role of deciding legal disputes how that should be done; it is rather a rule that tells us who has the authority to decide disputes and according to what formal processes (97). The rule of change similarly tells us which kinds of acts of which people or assemblies will be effective in making law, not that anyone should make law.

Our interest is in the rule of recognition. People can of course accept that they should comply with or apply the law, and if they do they will need to know the content of the rule of recognition. But in accepting a norm – treating it as a reason for action – that I should comply with or apply law as identified by the rule of recognition, I am not accepting the "common standards of legal validity." I cannot treat a rule that simply specifies the ultimate criteria of legal validity as itself a reason for

[4] Some power-conferring rules, such as rules of contract law, are not secondary rules according to another way of marking the distinction that Hart sometimes employs – according to which secondary rules are rules about other rules. The infelicities of Hart's distinction have been much discussed, but I won't explore them here.

action. I treat the norm "feed your children nutritious food" as a reason for action, but I cannot treat principles of good nutrition themselves as reasons for action.[5]

The whole thing makes much more sense if we regard the rule of recognition as no practical rule at all, but rather a simple statement of ultimate criteria that one may hold correct or not. From this perspective, we can read Hart's use of the word "acceptance" when discussing the rule of recognition as meaning something other than it usually does for him. We can say that the officials must accept that these are the actual ultimate criteria of validity for this legal system in the sense that they must believe that they are, or be disposed to treat them as such. It *would* be a problem if no one actually thought that the criteria of validity they appealed to in any particular instance were the real ultimate criteria of validity, applicable alike to all cases concerning all people. It is plausible to say that for a legal system to continue and have unity the officials of the system, those who have de facto power and administer it in the name of law, must converge in what they regard the ultimate criteria of validity within the system to be. If each official believed that the criteria applied "for their part only" we would, as Hart writes, "be in the presence of a *lusus naturae* worth thinking about only because it sharpens our awareness of what is often too obvious to be noticed" (116). So the matter of external fact that determines whether a rule of recognition "exists" is, we

[5] Raz (1979, 92–3) interprets Hart as holding that the rule of recognition is not just a statement of common standards of legal validity, but a duty-imposing rule, imposing duties on law-applying officials. See also Coleman 2001a, 84–6. I argued in the previous chapter that judges can in principle fully discharge their official obligations without developing a view about the content of the law already in force; so in principle, positivist judges do not need to know what the rule of recognition is. But supposing that judges have a legal duty to figure out what the law is, the interpretation makes sense. But now do legal officials, as a matter of "logic," need to accept, in the "treat as reason-giving" sense, that they must either comply with or apply law, either as subjects of officials? It doesn't seem that the existence of a legal system depends on this, though certainly its health and efficiency would. What matters is that legal officials do comply with or apply the law, not why. If case-by-case self-interest were sufficient to ensure compliance by officials, that would be enough. See further Chapters 7 and 8.

should say, convergence in belief or attitude among legal officials about the ultimate criteria of validity.

Is this interpretation compatible with Hart's statement that the rule of recognition exists as a practice of the "law-identifying and law-enforcing agencies effective in a given territory"? (Hart 1984, 336; see also Raz 1979, 90–7; 1999, 132–48). Let us use Raz's useful label "law-applying institutions" to cover both kinds of institution and understand Hart's "legal officials" as the people who staff them. The question is: What exactly is the "practice" by these officials that is supposed to reveal the content of the rule of recognition? As we have seen in the previous chapter, looking at what courts and other legal decision makers actually do and say will reveal (if we assume that all these decision makers are conscientious) implicit theories of adjudication, but not necessarily beliefs about criteria of legal validity.

The same clearly goes for law-enforcing agencies. The conscientious police officer will, we hope, believe that law sets limits to what she can do in her official capacity; but no one would think that her beliefs about the law could be read off from what she does. Kelsen's (1967, 349) image of the law providing a frame only, leaving particular determinations to the law applier's discretion, is uncontroversial when applied to law enforcers.

Hart's view that the primary source of information about the grounds of law was the practice of legal officials is appealing because it suggests a close connection between de facto political power and the content of effective law. It also promises to allow us to say that law is grounded in very concrete social facts – facts about what people do and say. But it turns out that these two positivist desires cannot be satisfied together.

The only *practice* that would directly and reliably reveal beliefs about ultimate criteria of legal validity is that of legal experts, particularly legal academics, in preparing textbooks and other presentations of the state of current law. This would reduce positivism to the unhappy view that the ultimate criteria of legal validity are found in a rule that exists as a practice of law professors.

The better solution is simply to abandon the idea that the rule of recognition exists as a social practice in any straightforward sense. The rule of recognition, if it exists, is a set of common beliefs and or attitudes, perhaps implicit, about the ultimate grounds of law and/or dispositions about what to regard or treat as the ultimate criteria when figuring out what the law is.

When we now consider whose beliefs count, Hart's association of the foundations of law with legal officialdom is largely but not wholly vindicated. Most people who do not work with the law have only vague and uncertain beliefs about ultimate criteria of legal validity. Among officials, some have more comprehensive interaction with law than others, and it is natural to think that the more comprehensively a person is involved with the law, the more that person's beliefs count in fixing the grounds of law. So Hart's frequent emphasis on the courts is justified; but the beliefs of legal officials in, for example, law departments of the executive branch should be regarded as especially significant also.

However, though officials are clearly the central case, it would be more accurate to say that we are looking, more generally, for convergence in belief about the ultimate criteria among those who work with the law in their professional capacities. This expands the net beyond officials of the state to include practicing lawyers and academic legal experts. The intuition here is that even if all state officials started, for example, to declare that some formerly embraced constitutional principle was not a source of law, we would not immediately be inclined to say that the rule of recognition had changed if all lawyers and legal experts disagreed. At the limit, too, it is wholly possible for an entire population to have beliefs about the ultimate criteria of validity, and if its beliefs were sufficiently comprehensive and convergent, that would be relevant to the issue of what the law is should some officials start to head off in a different direction (Adler 2006; Tamanaha 2001, 166–7).

Now the appeal to convergence in belief about criteria of validity among those with a life in the law may seem hopelessly optimistic. Dworkin has always denied that any such convergence exists, even among

judges. One response from positivists has been to point out that there is an important difference between agreement on the proper standards for determining legal validity and agreement on the correct application of those standards in a particular case (Coleman 2001a, 116). This is certainly true; the positivist need not be embarrassed just by the fact that two people might apply the same legal rule to the same facts and arrive at different conclusions. This is as true for standards of legal validity as for primary legal rules that apply directly to people. Two people may agree entirely on a criterion for the legal enforceability of agreements (there must be a mutuality of interest in the exchange, say), but disagree about whether a particular agreement is enforceable; and there could be consensus that statutes that have not been enforced for a very long time are no longer valid but much disagreement about how long, in this context, is long enough.

This point can only take us so far, however. Even if all acknowledge the same text as setting out ultimate criteria of validity, disagreement about the proper method of interpretation of that text can undermine consensus about the grounds of law. One group might hold, for example, that a certain eighteenth-century text should be read with an eye to what would best advance some purpose (perhaps not stated in the text) in the contemporary world, while another might hold that it must be understood to mean what a literal-minded eighteenth-century reader would have thought it meant. When we say that there is agreement about the grounds of law, we must mean more than that all recognize certain canonical statements of criteria of validity to be correct. "Manifestly unreasonable legislation is invalid" for example, is clearly of no use as a criterion of validity unless we have some ideas about the relevant notion of reasonableness.

If there is to be a rule of recognition, there must be genuine consensus about the ultimate criteria of legal validity, not nominal consensus that consists in a general willingness to use the same form of words.[6] Of

[6] I believe this is the fundamental insight of "The Model of Rules I" (Dworkin 1978, 14–45).

course, a rule of recognition can have gaps – there may be no consensus on some questions of validity even if there is consensus on many. It is an open and complicated question how much agreement of the right kind there is in any particular place. But I will postpone further discussion of this issue until Chapter 6, where the problem of disagreement will be taken to the next level, the level of disagreement about the nature of law itself.

For now, there are other positivist puzzles to consider. On the positivist account, the foundations of law lie in people's beliefs and attitudes about the foundations of law. Many people have nonpositivist views about law; they may believe that the ultimate criteria are determined, in the end, by some argument having to do with the legitimacy of the state. For example, they may believe that a constitution sets out the ultimate criteria of legal validity just because the scheme of government it sets up constitutes a legitimate coercive political order. Our positivist does not have any difficulty with the fact that some beliefs about ultimate criteria are based on what (to the positivist) are mistaken views about law. All the positivist looks at is what the beliefs about the grounds of law are, not the justification someone might offer for those beliefs. What is interesting is that it is much harder to make sense of the beliefs of the positivists among us.

If we are positivists, we think that the grounds of law are what we think the grounds of law are. It can seem that there is nothing else for us to be thinking about, when we are thinking about the grounds of law, other than what we think.

We do have ideas about what legal norms are. At the least, we think legal norms are directives that present themselves as legitimate demands on our conduct. Those who create those norms, those whose institutional role it is to pronounce their application to particular cases, and those whose institutional role it is to enforce them, all present their institutional acts as justified. As discussed further in later chapters, this seems to be the truth in Raz's important idea that law claims authority. Something like these ideas must be in our minds as we distinguish legal norms from

norms of morality, conventional morality, etiquette, or the rules of a game.[7] But for the positivist, these ideas themselves do not give us any basis on which to identify the grounds of law. When it comes to that, all we have to go on is our beliefs about the grounds of law, and those beliefs are themselves not justified by any further set of considerations. The puzzle is that when it comes to the question of what the ultimate criteria are for determining the content of law, there is nothing substantive for each of us to be thinking *about*.

Some have suggested that the rule of recognition is best seen as the conventional solution to a coordination problem. A coordination problem is one where the substance of the solution is not what matters (whether we drive on the left or on the right), but the fact that we all agree on what it is. If this were a plausible way to think about law, it might make sense of the puzzle. If law is just a conventional solution to a coordination problem, it is not surprising that there is no substantive basis to anyone's view about the grounds of law, since it wouldn't matter what the grounds of law were, just so long as there were some.

But of course this isn't how we think about law (Dickson 2007; Green 1999). We think it matters a lot whether the king's command, or the court's opinion, or the acts of parliament are sources of law. This is what makes natural Dworkin's claim that beliefs about the grounds of law really are, in the end, grounded in political theory. On Dworkin's view, there is something for each of us to think about when we reflect on the foundations of law; we are to think about what might make the resulting government by law legitimate and potentially just. The positivist agrees that that's what we should think about when we are thinking about what the grounds of law should be, but denies its relevance when we are thinking about what they are.

The solution to the puzzle of what each positivist is supposed to think about, when asked what he believes are the ultimate criteria of validity, is

[7] In Chapter 8, I discuss further what we might have in mind when we are thinking about a norm as legal, rather than something else.

found in the history of law.[8] In an ongoing legal system, judges, law professors, and so on are not reduced to asking each other what they think at any particular time. One thing they all believe, for a variety of reasons, is that the ultimate criteria of legal validity do not typically change radically from moment to moment. And so there is something to anchor all our beliefs about the grounds of law now; it is what we know about what has been generally believed up until now. There is, in this respect, an important historicist aspect to positivism, whether it be based on the command theory (habits of obedience build up only over time) or the model of the system of norms.

But of course legal orders can undergo revolutionary change. When change happens, the relevant people can no longer look to history to ground their beliefs about criteria of legal validity, and so a different account is needed. The positivist account of radical constitutional change must be that relevant people somehow reach the position, at roughly the same time, that it would be better if *these* were the ultimate criteria of validity (those set out in the new constitution) rather than *those* (the constitutional rules that had been traditionally followed). People's reasons for thinking that these criteria would be better than those may or may not be grounded in moral beliefs; they may also be grounded in a convergence in people's sense of their own interests. But again, what matters is not why they believe this, but that they become disposed to identify law with reference to the new criteria.

The success of this kind of revolutionary legal reform depends on everyone connected with law going along with it. If from one day to the next, these people start treating different factors as determinative of legal validity, then the revolution has succeeded. When it comes to fundamental constitutional change, as Hart memorably put it, "all that succeeds is success" (1994, 153). It should be noted, however, that the expanded account of whose beliefs count for determining the existence of the rule of recognition offered earlier forces some changes to Hart's

[8] I am heavily influenced here and in what follows by Marmor 2009, 155–75.

account of fundamental constitutional change. On that account, if all the legal officials embrace a new rule of recognition, then the rule of recognition will have changed. But on the broader account I have argued is necessary, the legal officials would have to bring everyone else with a life in the law along with them. And this is intuitively right – a fact that supports the broader view. For if the officials embrace one set of criteria while all the nonofficial lawyers and legal experts reject it, we would be more inclined to talk in terms of an illegal coup d'état, as opposed to a successful legal change.

At the moment of revolution, when relevant people become disposed to identify law by reference to the new criteria, it would be misleading to say that there was a convergence of *belief* about ultimate legal criteria. Deciding to treat certain factors as the grounds of law is not the same as believing that they are the grounds of law. But this is not embarrassing for the positivist story. The situation is closely analogous to inventing rules for a new game, or drastically changing the rules for a game with an existing name. Andrei Marmor's (2009) notion of a constitutive convention is helpful here. We can say that, at the moment of revolution, the members of the relevant group are disposed to appeal to certain criteria to determine legal validity, contingent on their belief that others are similarly disposed. The reasons people have for being disposed to appeal to a particular set of criteria are not *just* that they believe others will – they have substantive reasons, good or bad, for hoping that others will. But, as positivists, they will not, at the revolutionary moment, appeal to those criteria unless they expect others to, because they believe that consensus on the relevant criteria is required before the new legal order can take effect. If all goes well for the revolutionaries, there will be a convergence and a new legal order will have been constituted. Once people believe that this has happened, then they can straightforwardly be said to have beliefs about the grounds of law. And from that moment onward, there is no need to think about the rule of recognition as a convention in any strong sense that implies that part of the reason people have for

thinking that such and such are the ultimate criteria is that everyone else does as well.

The situation here is exactly analogous to the emergence of a new norm of customary international law. A rule of customary international law exists when there is a general practice of states attended by an "opinio juris" – the belief that the practice is a case of following the law. There is an apparent paradox, or circle, in this criterion; it appears that belief that the practice is legally required has to precede its being legally required – which, unless law is to be founded on irrational or false beliefs, seems impossible. It would be irrational to come to believe, for no reason at all, that a practice until now not legally required is legally required. The solution is the same as that just sketched for change in the rule of recognition.

First, there is no problem with rules of long standing. Everyone relevant may believe that such and such is a customary rule of law just because that's what has generally been believed for a long time. There is nothing irrational or puzzling about that (Tasioulas 2007, 322). As with the rule of recognition, the problem comes with changes in customary international law. It would be rational to come to believe that a practice is legally required on the basis of a reasonable but false belief that there is a general belief that it is legally required, but it would be troubling if this were the only way a new customary norm could get off the ground. But there is a non-troubling possibility, which we might call the orthodox route to a practice becoming legally required. States may converge in the belief that it would be good if a certain practice had the status of law, and so be disposed to treat it as law so long as enough others do. Once the initial leap is made, and enough others are treating the practice as law, the belief of any one state that the practice is law need not be contingent on everyone else's attitudes or dispositions anymore and the validity of the rule will just depend on the fact that most states believe it is law.[9]

[9] I return to customary international law in Chapter 8. The literature on the so-called chronological paradox is voluminous; I find Lefkowitz 2008 especially helpful.

Inclusive and Exclusive

The fact that fixes the grounds of law on the positivist account I have outlined is a convergence of beliefs or dispositions among those with a life in the law. But now there is an apparent problem linking this view with the main feature of the picture of law as fact as I have outlined it – the idea that it is never necessary to appeal to moral considerations to determine what the law is. For of course many people do believe that moral considerations are relevant to the determination of legal validity.

On the one hand there is the firm conviction, best expressed in the works of Raz, that law is found in a morally neutral interpretation of valid legal materials. On the other hand, there is the basic positivist position that the validity of legal materials is determined by contingencies of the beliefs or practices of legal officials and relevant others. The problem is that, at the top of the ladder of positivist validity, beliefs about the ultimate criteria of legal validity might not be consistent with the idea that morality is never relevant to determining the content of law.

Positivism splits at this point. If you focus on the motivation for being a positivist in the first place – the desire to be able to insist that the content of the law is one thing, its moral merit another – the exclusivist position is irresistible. In Raz's (1994) terminology, the exclusivist view is that the grounds of law are all socially identified *sources* that can be interpreted without recourse to moral judgment. If we take this view about the nature of law, moral standards simply cannot be part of law. So moral language in legal materials will be read not as part of law but as directing a decision maker to make a judgment, outside the bounds of law, on the moral merits. If legal officials and the rest believe that, to the contrary, those moral-sounding requirements in the materials really are cases where morality is incorporated into law, that belief must simply be ignored. A belief that some unwritten overarching moral standard of validity is among the ultimate criteria must likewise be ignored. On the exclusive positivist account, we determine the grounds of law by

appeal to a purification of a consensus among relevant people about the grounds of law.

There is nothing objectionable about this way of proceeding. The main positivist idea that law is grounded in fact is not itself justified by asserting that everyone believes this. Rather, philosophical argument is required to get us to that point. The exclusive position is that law is grounded in social sources, read straight, and that the beliefs of those with lives in the law about what the social sources are settles the matter.

The inclusive position is that law is grounded in social sources along with moral considerations that those with a life in the law agree are relevant. In other words, the content of the rule of recognition itself will determine whether grossly unjust rules or standards can be valid, whether a "moral reading" of sources is always appropriate, or whether "moral language" in sources incorporates just those aspects of morality into law.[10]

On each view, certain beliefs of legal participants become relevant once a certain account of the grounds of law is accepted (that law is grounded in facts about beliefs and attitudes of those with a life in the law). On each view, certain beliefs about the grounds of law held by legal participants must simply be ignored – for example, that there can be no law that contravenes God's will. But the views differ on whether beliefs that certain moral considerations are among the rounds of law must be ignored. How to choose between these views?

Both versions of positivism are perfectly coherent. The exclusive view seems overwhelmingly more appealing to someone with an initial picture of law as fact; but then the inclusive view sits more comfortably when we are discussing some aspects of legal practice. I will not here address the

[10] I leave aside a view that holds that where "moral language" is found in a source, there morality is incorporated into law by that very fact, irrespective of the content of the rule of recognition. The problem with this view, as Raz (2004) has discussed, is that some argument is required, from within the positivist outlook, for assuming that the moral considerations a judge is, the externalist agrees, thereby directed to consider when making a decision, are themselves part of law.

internecine arguments between these two positions, since, as I argue in Chapter 6, we lack compelling argument at the more basic level: we lack compelling argument for preferring either version of positivism to any version of nonpositivism.[11]

I will, however, make one remark, without further comment, about the internal debate: the inclusive position seems reactive, driven by the need to reply to various objections to positivism. The exclusive position, by contrast, is motivated by a strong sense of law's validity being entirely distinct from its goodness. If no one had this initial conviction about the nature of law, I doubt that the very idea of positivism would ever have emerged. The nonpositivist position is driven by the opposite conviction that law occupies the same general space as the good and the required; that's just the kind of thing law is. It seems to me that no primitive pretheoretical motivation for the inclusive positivist position exists. It stakes out a middle ground that makes positivism seem less jarring when considering, in particular, constitutional adjudication grounded on bills of rights (Waluchow 1994). But this middle ground seems unstable, since once we have become comfortable with the idea that the content of law is sometimes fixed by the truth about what is good and right, it isn't so clear why we have reason to resist the nonpositivist view that considerations of the good and the right are always relevant to the content of law. In other words, in the positivist conviction that law is a matter of fact, not morality, it is the second, negative part of that thought that seems to me dominant.

[11] Inclusive legal positive is defended in Coleman 2001a and Waluchow 1994; Himma 2002 is a helpful shorter discussion.

4 Nonpositivism

Good Things about Law

Most people who take any kind of interest in the debate about the nature of law seem to have very strong views, right from the start. Either positivism or nonpositivism is obviously right and the other obviously wrong. What seems obviously wrong about positivism to many is that it misses the fact that law in its nature is something good, or can be seen as striving toward being something good – or at the very least, is something that can't be very bad. For most people of this inclination, the evident truth that law is something good, or at least potentially so, is tied up with the further evident truth that the law is genuinely binding on us, or is usually so, or is in some sense *meant* to be so (Greenberg 2011) – it is, as Dworkin all along insisted, a domain of *real* rights and obligations. To see law as ultimately grounded in social fact is to miss these essential moral qualities of law. From this point of view, it may turn out that the Nazis and the Taliban have no law, but who cares about that? If something interesting is going on in this whole domain, something worth reflecting on, especially something worth reflecting on philosophically, it must be because there is something valuable or at least potentially valuable about law, or at any rate something immediately morally relevant about law, and part of the philosophical task is to figure out what that is (see, for example, Perry 2001, Soper 1984).

To be clear about the contrast here, we have to remember that positivists of course agree that there is something potentially valuable about law.

Good law is good. They may even agree that, wherever there is law, there you are likely, or even certain, to find something that is in one way good – an effective legal system will greatly increase the range of social possibilities, and we may say that this, in itself, is in one way good. They also are likely to say that, depending on the law's content, there are often moral obligations to obey (some of) it. As we will see in Chapter 7, it is consistent with positivism to believe that especially certain kinds of law (those that apply to states) are very likely to generate reasons for action. The disagreement is that the nonpositivist insists that the inherent moral significance of law must be kept in mind when thinking about what kind of thing law is, and, in turn, must structure any theory of how to determine legal content in any particular place. The positivist, by contrast, believes that we can account for law's nature while bracketing any moral significance it may have. I argue in Chapters 6 and 7 that the fact that law can have moral significance should be the reason that anyone engages in the exercise of providing a theory of the grounds of law in the first place. But for the positivist, that theory itself is not shaped by any view about law's value.

That we are describing something of inherent moral significance is a common assumption of nonpositivism, but this broad idea could be explicated in many different ways. Since the late 1960s, nonpositivism has rightly come to be associated with Dworkin's legal theory. This theory is both deep and complex, and it contains many strong commitments that it is worthwhile to identify individually, so that we can better see the range of nonpositivist options.

Morality in the Grounds of Law: The Moral Reading and the Moral Filter

What I take to be definitional of all nonpositivist views is that moral considerations are always among the grounds of law. Morality can figure in determining law's content in two main ways. In the first, it is always playing a role as a guide to interpretation, resolving indeterminacy and perhaps also correcting particular mistakes in the law to show the law as a whole

in its morally best light. This view has its roots in common-law legal theory and was developed into a comprehensive theory of legal interpretation by Dworkin. The term "interpretivism" is sometimes (Dworkin 2011, 401; Stavropoulos, 2003) used as a label for Dworkin's view, but since any theory of law acknowledges that legal materials require interpretation, I prefer a more revealing label that Dworkin (1996) also used – "the moral reading." As one common formulation of this approach has it, the law is what follows from the principles that best justify past legal practice.

A different kind of nonpositivism takes a blunter approach. As is well known to English-speaking legal theorists thanks to discussion in Hart's (1958) article "Positivism and the Separation of Law and Morals," Gustav Radbruch came to the conclusion that a positivist view of law was partly to blame for the degree of obedience to Nazi law the German population displayed during the Third Reich. In response, Radbruch developed the idea that it was contrary to the nature of law that it could, in its content, be seriously unjust. Thus much of what was presented as law by the Nazi regime was not law at all. As noted in Chapter 2, at least one German court embraced the so-called Radbruch formula in another reconstruction era – the reunification of Germany after the fall of the Berlin Wall in the late twentieth century.

The view that nothing can be law that is very unjust is essentially (some form of) positivism, with a moral filter laid on top. The thought here is that, even though law isn't always perfect, we rebel at the thought of what might be called perversions of law. An institutionalized system of rules and standards that avowedly is aimed at genocide cannot, on this view, fall within the domain of law. The most prominent defender of the moral filter view at the turn of the twenty-first century is Robert Alexy; his argument for the moral filter is discussed briefly in Chapter 6.

Legality, Legitimacy, and Justice

Both the moral reading and the moral filter need to be further specified, as perhaps not just any moral consideration is relevant to the interpretation

of law. One might hold, for example, that what is good about law is that it regulates social life in a way that respects the autonomy of its members and treats them all as equals before the law.

That some version of the ideal of the rule of law shapes our understanding of the nature of law was the view of Lon Fuller (1969). Fuller's main line of argument is that unless the entire legal system satisfies certain formal criteria, none of the rules or standards within it can count as law. This view is discussed further in Chapter 8, where we will evaluate, in the context of a discussion of international law, various views about the necessary features of legal systems. But Fuller also thought that considerations of the rule of law, or legality, should shape legal interpretation (Rundle 2012, 168–74). Without trying to do justice to the complexity of Fuller's actual position, his writings do suggest this view about how to figure out what the law is: when interpreting legal materials, one must do so with an eye to making them consistent with the ideal of the rule of law. This is in fact how Dworkin describes his moral reading, but his account of the rule of law is expansive enough to encompass all moral considerations necessary to reach a conclusion about the proper resolution of a particular dispute (see, for example, Dworkin 2006, 170).

For there to be a distinctive view here, rule-of-law values must be thought to make up a subset of potentially morally relevant factors – a distinctly *legal* morality as Fuller conceived it. This would exclude, for example, the liberal theory of social justice that is among the resources of Dworkin's moral reading. The richest defense of such a view can be found in the work of David Dyzenhaus (2000, 2007). On such a restricted moral reading, it would seem that preexisting law would not always be sufficiently determinate to resolve a particular dispute. Reading legal materials in light of classical rule-of-law values such as publicity, prospectivity, and equality before the law would clearly reduce indeterminacy as compared to a positivist nonmoral reading, but it is hard to see that this limited set of moral considerations would be sufficient to allow us to say that existing law provides an answer to all legal disputes. Dworkin's more expansive understanding of the values encompassed by the rule of law

seems necessary for him to make good on his well-known claim that the law always already provides a "right answer."[1]

As discussed in the next chapter, the content of the ideal of the rule of law is just as contested as the nature of law. It is therefore not helpful to sort nonpositivist views according to whether they hold that the grounds of law include the values of the rule of law or more than that. The point is simply that within both the moral filter and moral reading approaches, a range of options exists about what kinds of moral considerations are appropriately appealed to in legal interpretation. It seems on the face of things that just as exclusive positivism best expresses the initial foundational belief that law is about what is and not about what ought to be or what is good, a maximalist nonpositivist view such as Dworkin's best expresses the initial foundational belief that law is a domain of value. On the other hand, as Dyzenhaus (2000, 2007) explains, there are advantages to the restricted moral reading, in that the moral considerations held to be among the grounds of law emerge from the very idea of legal governance, rather than a contestable moral and political theory. I will not here attempt an internal evaluation of these options for nonpositivists.

It does seem, however, that the moral reading is straightforwardly more plausible than the moral filter, since once we believe that the content of law is partly determined by moral considerations, it seems unmotivated to recognize a discontinuity, such that morality is involved only when the law would otherwise be very bad. After all, the moral reading, as a reading of legal materials, preserves the institutional positivity of law; it does not go all the way to the position that legal norms just are morally ideal norms.

[1] Jeremy Waldron's (2008) argument that the grounds of law include rule-of-law values characterizes those values as ones of procedure and form. There are, however, signs that Waldron is ready to embrace an account of legality as expansive as Dworkin's. He writes that when judges disagree about how to resolve hard cases – when there is no disagreement about the terms of any relevant statute or precedent – judges are disagreeing about what the law (already) is, by way of disagreeing about the content of the ideal of the rule of law (48–54). This suggests that any moral factor relevant to figuring out how to resolve the dispute is a rule-of-law value.

Justification and Obligation

Among those who approach the theory of law from the nonpositivist foundational stance, some, such as Dworkin, assert the strong claim that legal rights and duties are always real, that is moral, rights and duties. The topic of the normativity of law is discussed in Chapter 7. For now, the important point is that if we hold as a fixed point that legal rights and duties are moral rights and duties, the moral reasoning in legal interpretation may take on a distinctive structure. Whether it will do so will depend on our moral theory of the duty to obey the law, however. Thus if we believe that legal rights and duties are real rights and duties just because we believe that all subjects have, in a relevant sense, consented or promised to obey, legal interpretation will not be affected. If, however, we hold, with Dworkin, that legal rights and duties are moral rights and duties because the law can generate associative obligations through its creation of a community of principle, then we will interpret law, if possible, in such a way that it does create a community of principle. I say more about Dworkin's theory of associative obligations in Chapter 7.

A weaker view is that law must be such as would justify its coercive enforcement, whether or not it provides subjects with genuine obligation. Thus in a recent article Philip Soper (2007) defends a moral filter view, according to which official directives that are so unjust that nothing could justify their coercive enforcement cannot count as law. This defense of "classical natural law" turns on the claim that law in its nature is not just that which the state presents as legitimate directives that can legitimately be enforced, but is that which can, in fact, be legitimately enforced. A state can justifiably enforce unjust law, but not grossly unjust directives. If the state does enforce grossly unjust directives, we are dealing with "acts of violence, rather than laws" – as Aquinas put it.

At the other end of the spectrum, it would be possible for a nonpositivist to believe, along with positivists, that the question of whether legal rights and duties are real moral rights and duties is always open – that

the search for the content of law, though it is always informed by moral considerations, is not guided by the aim of finding real rights and duties.

Adjudication and Right Answers

As noted in Chapter 2, Dworkin's legal theory includes the further strong commitment that all normative considerations appropriately taken into account in adjudication are ipso facto among the grounds of law. This commitment is also not essential to nonpositivism as I have defined it. This is already plain from the discussion of the possible view that (only) formal rule-of-law values are among the grounds of law. On such a view, though moral considerations are always among the grounds of law, not all moral considerations appropriately taken into account in adjudication are within law's boundary. To take another example, suppose that the moral considerations always within the grounds of law relate only to matters of fundamental individual rights; considerations of social or economic justice, or of general welfare, by contrast, are excluded. Taking considerations of individual right into account in legal interpretation may still leave gaps, or indeterminacy in the law. A judge who resolves that indeterminacy by appeal to some theory of social justice or social welfare may be acting appropriately given her institutional role, on this possible view, but she would be in part making law, not just applying it.

It is tempting to connect the adjudicatory view with the "right answer thesis" – a yet further strong feature of Dworkin's theory. This is because it is natural to believe that there is always a right or best outcome to a legal dispute, even if we believe that the law itself is not sufficiently determinate to guarantee that. The adjudicatory view thus seems to go naturally together with the right answer thesis. But of course everything depends on the content of the theory of adjudication, on whether it has the resources to generate a unique best resolution to all disputes. Adjudication is plausibly thought always to yield a best answer if we assume that proper adjudication will help itself to unrestricted moral

argument, even if that is not part of the determination of the content of law. For moral theory most obviously has the resources necessary to yield a single best result. That is not essential, however, since other theories of adjudication could also have adequate resources. If there were such a thing as "community morality," Cardozo's method of sociology would do the trick as well. As would some theory that holds, for example, that in cases of indeterminacy the defendant always wins. But the important point is that we should not assume that all theories of adjudication have the resources to guarantee a single best result.

The Moral Reading: Nonpositivist Puzzles

Dworkin's commitments to the right answer thesis, to the adjudicatory view of law, to the existence of a prima facie duty to obey the law, and to an unrestricted but appropriately structured (given those commitments) account of the moral considerations to be taken into account in legal interpretation – all these commitments hang together to form a coherent and well-motivated view. But it is important to emphasize that none of these commitments is essential to nonpositivism as I have defined it. In chapters that follow, I use "nonpositivism" in the minimal sense of a commitment to either the moral reading or the moral filter account of legal interpretation – and since it seems the better view, I will normally have in mind the moral reading.

Though it has roots in common-law legal reasoning (Perry 1987), the moral reading receives its best elaboration in Dworkin's discussion of legal interpretation in *Law's Empire*. We are to suppose a three-stage process. In the preinterpretive stage, we start with central cases, cases that everyone agrees are instances of valid law. This first stage involves no moral reasoning; preinterpretive law is a matter of brute fact. In the interpretive stage, moral considerations are brought to bear to find the general principles that best justify the past legal practice that produced those legal materials; legal rights and duties are those that flow from the best set of general principles that can be said to fit or explain past legal

practice. In the postinterpretive stage, we may, on reflection, conclude that some of the legal materials identified in the preinterpretive stage are not legal materials at all; from the point of view of our interpretation, they are so far in tension with the best interpretation that they must be banished from law as mistakes. (Recall Blackstone: "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.")

One important question is how far a good interpretation can go in declaring preinterpretive material to be mistakes. This is usually posed in terms of Dworkin's terminology of "fit" and "justification." The interpretive stage aims to justify past legal practice, but for it to do that, it must after all fit past legal practice; we would not be interpreting our law at all if we simply discarded all prior materials as mistaken. But how much fit is required? And to what extent can judgments of a required degree of fit be separated from the judgments of justification? These are important and fascinating questions, but a full discussion would take us too far afield here.[2] Let us simply assume that some plausible account of the twin tasks of fit and justification can be given that retains the dimension of fit as a genuinely independent criterion.

A somewhat different puzzle does need to be discussed here. It concerns the preinterpretive stage, the initial identification of legal materials that interpretation must (to some degree) fit. For this stage, the moral reading appears to require what we could call a provisional rule of recognition (Raz 1986). Provisional only because what is initially treated as a data point may of course later be expelled as a mistake. But the entire process depends on our ability to find considerable initial agreement about clear cases of valid law, which reveals at least some implicit convergence on criteria of validity. What's striking here is that

[2] See the extended debate between Dworkin (1985, 146–77; 1986, 65–8, 225–75) and Stanley Fish (1989, 87–119, 356–71).

nonpositivist legal interpretation takes as its object a matter of brute social fact; what we are interpreting is just what people agree, for whatever reason, is part of law. One way to criticize the view, understood in this way, would be to say that the moral reading takes legal materials that could have any content at all and pretties them up (Stavropoulos 2014 forthcoming). Why should we make the best of something that, so far as we know, initially has nothing going for it at all? The conviction that law is a location of value and a source of practical reasons seems to require more than that we make something morally indifferent look good. It would seem to require that we have some reason to think that there is value, or at least potential value, in the materials that interpretation must fit.

Now the situation is not as stark as this objection suggests. Procedurally valid statutory enactments are, in the moral reading, not *just* part of the brute facts to be fit; neither need the legal priority such sources have over judge-made law in common-law systems be treated as brute fact. For the practice of allowing representative institutions the final say over legal rights and duties (within limits) can itself be justified by democratic theory.

But suppose no such story were available. Suppose that legislation is made by lawmakers who inherit their roles; they have neither any claim to be representative of the people nor any special moral and political expertise. We may even suppose further that, substantively, the content of this legislation has systematically favored the interests of the hereditary ruling class. The idea that, when interpreting the law of this jurisdiction, interpreters should try to show it in its best light may seem entirely unmotivated. This relates to the problem of "evil law" for nonpositivists. If nothing good can be said about some legal tradition in the first place, the moral reading, the attempt to show that tradition in its best light, seems inappropriate. The natural response for the nonpositivist here is simply to embrace the conclusion that only certain bodies of preinterpretive legal material can generate legal rights and duties. Any collection of legal materials that lacks any seed of value, either in the manner of its

making or its content, will simply be rejected as an appropriate site for legal interpretation. We could say that the moral reading must apply a moral filter to the preinterpretive legal materials, considered as a whole. I believe this is the most natural way to understand the moral reading (see Dworkin 1986, 101–13), and generally have this picture in mind in the chapters that follow.

In his latest writings, Dworkin (2006 34–5; 2011, 400–15) embraced quite a different approach.[3] Nicos Stavropoulos (2014 forthcoming) has introduced the terminology of "hybrid" and "nonhybrid" interpretivism that is helpful for making the contrast. The moral reading as I have so far laid it out corresponds to hybrid interpretivism. It treats legislative enactments or decisions of courts provisionally as sources of law just because everyone does (preinterpretive stage) – so long as they pass through the moral filter. At the interpretive and postinterpretive stages, such legal materials may be confirmed as part of the law, or not. On the reformulated view, it's a moral inquiry right from the start. The nonhybrid interpretivist approach treats legal materials as relevant to an investigation of what the law is *not* because everyone does, but because there is a good reason (if there is), grounded in political morality, to treat the past political decisions that produced those materials as sources of real rights and obligations. From this perspective, what we are looking for is not the content of some system of norms whose relation to morality is so far just that it has passed through a minimal moral filter; rather, when we look for the content of law, we are engaging in a moral inquiry at all times, seeking to determine what effect past political decisions of our political coercive order have on our moral rights and duties.

The first thing to notice about nonhybrid interpretivism is that it presupposes something that, as I have said, is not necessarily part of a nonpositivist view of the grounds of law, viz. that the outcomes of legal

[3] Stavropoulos (2014 forthcoming) and Greenberg 2011 hold that there has been no change; rather Dworkin has long been misunderstood. I disagree with that interpretation as, apparently, did Dworkin himself – see Dworkin 2011, 402.

interpretation are statements of real, moral, rights and duties and that this end point structures legal interpretation. Dworkin's reformulated view puts this position at the center of this theory of law. Legal interpretation just is a matter of figuring out what our moral rights and duties are, insofar as they flow from past political decisions.

So nonhybrid interpretivism is not a possible general account of the moral reading, since it depends on commitments that are not essential to the moral reading. But it is worth asking which view is preferable for those who accept that legal rights and duties are always real moral rights and duties. In one sense, nonhybrid interpretivism seems a clear improvement over Dworkin's original account of legal interpretation, since if we start with brute facts about what people think the law is, but insist that we end up with real rights and duties, it may seem obvious that the moral argument will always trump the brute facts. Though in the original account the dimension of fit is given moral significance through the value of integrity, or consistency in principle through time and across people, the morally salient kind of fit on that account is what has happened to people, rather than what people (even judges) have thought the law was (Dworkin 1986, 248, 284–5). This suggests that the reformulation was inevitable, as the original account left preinterpretive legal material with very little force in an interpretation driven by the final cause of determining real moral rights and duties.

On the other hand, if we drop any anchoring of the content of legal rights and duties in brute facts about people's views about the content of law, a new problem is immediately presented. Plausible moral arguments could be made that all kinds of past political (or social, for that matter) decisions and practices generate rights and obligations, but not all of them would ordinarily be identified as *legal*. Dworkin's solution to this problem is to say that legal rights and obligations are those that are appropriately adjudicated by courts (2011, 405–13). Given his commitment to the adjudicatory view of law, this is not a surprise, but it does come at enormous cost. Where actions of the executive or legislative branches of government are not appropriately reviewable by courts, they

are by definition not subject to law, either domestic or international.[4] On the face of it, this seems an extremely high price to pay, for reasons I will go into in Chapter 7. It also seems to be a dogmatic and unmotivated piece of taxonomy, and for that reason inconsistent with Dworkin's idea (discussed in Chapter 6) that law is an interpretive concept.

More important, taxonomy is usually uninteresting, as Dworkin himself reminds us (2006, 4–5). Dworkin is not troubled by the fact that where some presidential decision is not properly reviewable by a court we must say that no legal obligations constrain the decision, since we can of course acknowledge the *political* obligations that apply (2011, 412–13). But if this is just a matter of labeling, the very natural next step is to say that it doesn't really matter which of the obligations people have in virtue of past political decisions get the label "legal" and which do not. In other words, I believe that this latest version of Dworkin's theory leads inevitably to the eliminativist position I discuss in Chapter 6. There isn't any such thing as law as a distinct normative system. There are just actions by various kinds of institutions that have moral consequences for the members of that political community.[5]

In any event, when referring to Dworkin's version of the moral reading in the remainder of this book, I have in mind his original account of legal interpretation from *Law's Empire* with all of its three stages.

Mistakes and Scorer's Discretion

Though there is of course much more that would need to be said to give a full account of the moral reading, I will end with just one further apparent puzzle. On the moral reading, judges can make legal mistakes by way

[4] Dworkin does not deny international law the status of law on account of the lack of international courts of general and compulsory jurisdiction. As he makes plain in (2013), his position is that legal rights and duties are those appropriately adjudicated by courts actual or hypothetical.

[5] These remarks apply equally to the positions laid out in Greenberg (2011) and Stavropoulos (2014 forthcoming).

of making moral mistakes. Thus if the death penalty really is, morally speaking, cruel, the moral reading requires us to conclude that the entire legal apparatus of the death penalty in the United States is based on a legal mistake; that it is, in fact, unlawful. This can seem to be an absurd result, as positivists sometimes insist it is (Marmor 2011, 91–2). But in fact the advantage of positivism over the moral reading in this connection is at best a matter of degree.

Any theory of law must account for the possibility of judicial error, and the possibility that judicial error may generate systematic application of that legal error by other judges and law enforcement officials. The alternative is a view of law according to which what the highest court says is law, is law. Hart criticized such a view by comparing it to a game of scorer's discretion – the rules of the game reduce to the decisions the scorer makes as there is no independent standard against which to criticize the decisions as mistaken (1994, 142–7).

A decision of the highest court is authoritative for the enforcement branches and lower courts until overruled or changed by statute. But though the application of the decision by other officials is in accordance with law, it may still have been a legal mistake. If what the highest court declares to be law is not only appropriately followed by lower courts and enforcement officials, but definitive of the content of the law, then there is no law, but simply a grant of absolute discretion to highest courts.

Both Hart and Dworkin recognize the importance of the possibility of legal mistakes in any account of law as a genuine normative system that effectively constrains legal decision makers (Dworkin 1978, 121; Hart 1994, 141–7). Both also, within the terms of their theories, can explain how what was once a mistake may become a source of law in the common law through the operation of the doctrine of precedent. This is familiar enough in the United States, where nominees for the Supreme Court frequently tell the Senate Judiciary Committee that though the decision in *Roe v. Wade* was a mistake, they would not overturn it given its entrenchment and consequent significant precedential weight. Hart (1994, 144) also notes the possibility that if we find ourselves concluding

that most judicial decisions, most of the time, are mistaken, then the legal order – the complex set of rules that make up the content of the law in force on his account – would cease to be effective.

If there is to be a freestanding legal order that provides answers to legal questions, as opposed to an accepted practice of allowing judges to create legal rules without constraint, then any legal theory, positivist or nonpositivist, must accept into its account the legitimate enforcement of legally mistaken decisions. If there is an objection to nonpositivism here, it must be grounded on the assumption that if moral considerations are among the grounds of law, there is more scope for the institutionalization of judicial error than if they are not. But this assumption seems unwarranted, or at least in need of defense. The examples that make nonpositivism look silly – all those executions in Texas are contrary to law – naturally relate to legal issues with high moral stakes and prevailing moral disagreement. But there can be disagreement about the best way to understand a legal rule that does not turn on moral disagreement – as positivists in other contexts are eager to insist, in order to rebut the charge that on their view it must be true that everyone agrees what the content of the law is.

Thus take Lord Mansfield's argument, in a 1765 contract case, that

> the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing, as in covenants, specialities, bonds, etc., there was no objection to the want of consideration.[6]

This is an excellent argument against the idea that the doctrine of consideration called for a genuine quid pro quo. Sadly, Mansfield was reversed by the House of Lords in 1778,[7] and the requirement of an exchange remains part of the law in most of the common-law world.[8] The point here is that

[6] *Pillans and Rose v. Van Mierop & Hopkins* (1765) 3 Burr. 1663, 1670.

[7] *Rann v. Hughes* (1778) 4 Bro PC 27, 7 TR 350.

[8] Though outside the United States it has been largely undermined through judicial acceptance of the adequacy of a merely nominal exchange. *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87.

this issue has enormous significance for legal practice; whether Mansfield and his brethren who joined him were right or wrong, lower courts were bound to follow his decision until overruled. Suppose he was mistaken about the proper understanding of the doctrine of consideration but he was not overruled. The common-law world would have rightly enforced a legal error – until the passage of time converted the error into good law, through the doctrine of precedent. Nothing in this example requires that Mansfield employed a moral reading of the existing legal materials. I venture that it is hard to determine in the abstract whether the moral reading is more or less likely to lead to the conclusion that "a great deal … of what people take to be the law … in a given legal system is legally mistaken" (Marmor 2011, 91–2) than a positivist approach to legal interpretation. A lot would depend on the content of the legal materials that are being read, and also the kinds of moral considerations that a particular nonpositivist view holds should be taken into account. I see no reason to find here a general objection to the moral reading.

Progress?

The disagreements between and among positivists and nonpositivists are stark. One main question in this book is whether there is any plausible way to resolve them. But it is important to start with a different question: Why have philosophers over the past two hundred years or so thought that this disagreement mattered? Why have they not been happy to allow what Aristotle appeared to take for granted, that there simply are different ways of referring to the category of law, and that this is a verbal dispute of only rhetorical significance?

Explaining why that is not so is our first main task. It will be useful to start by discussing what might be at stake in disagreements about the content of some other politically and morally important concepts.